

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG**

CASE NUMBER: 13682/22

RML LIGHTING (PTY) LTD

APPLICANT

and

VANGIFLASH (PTY) LTD

RESPONDENT

JUDGMENT

ANNANDALE A.J:

[1] The applicant seeks to eject the respondent from commercial premises at 2[...] A[...] Avenue, Springfield Park. The applicant owns the premises from which the respondent runs the business it bought from the applicant some years ago. The parties concluded a written lease which the applicant cancelled after the respondent fell into arrears with its rental obligations in April 2021 and failed to remedy its breach. As the premises are commercial property, the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 does not apply.¹

[2] Beyond bald denials of non-payment of rental and receipt of the notice of cancellation, the respondent raises no challenge to the substantive merits of the

¹ *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) para 14.

eviction application, and at the hearing expressly abandoned other technical grounds of opposition raised in its answering affidavit.

[3] That, one might think, would be the end of the matter. But it is not. The respondent challenges the applicant's authority to institute the present proceedings and instruct its attorneys to act (the authority challenge). It asserts that the resolution authorising the institution of proceedings and mandating the applicant's attorneys is invalid because one of the applicant's two directors was improperly excluded from the directors' meeting at which the resolution was passed.

[4] The respondent relies on Uniform rule 7(1) which currently reads as follows:-

'Power of attorney Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[5] The respondent did not issue a notice in terms of rule 7(1). It raised the authority challenge in its answering affidavit and did so well outside the ten-day period envisaged by the rule. The applicant submits that this is fatal as challenges to authority must be pursued in terms of the rule and cannot be ventilated in the application. The respondent, on the other hand, contends that a notice under rule 7(1) is merely one of the ways an authority challenge can be mounted, and as the rule itself does not prescribe a procedure, nothing precludes the issue of authority being raised squarely in an answering affidavit with reference to the rule.

[6] The issue in this application is thus whether the authority challenge falls to be disregarded because of the manner in which it was raised. That issue arises in the following context.

The factual and legal context of the authority challenge

[7] The applicant has only two directors and shareholders, Mr Richard Longford and Ms Tracy Robinson. It is common cause that until at least 17 July 2022 Ms Robinson was also the sole shareholder and director of the respondent. On that date she resigned as director and appointed Mr Ahmed, until then the respondent's accountant, as its sole director, and sold her shares to him.

[8] The respondent's deponents, Mr Ahmed and Ms Robinson, did not explain the reason for the sale and change in directorship, adduce the agreements they concluded, or disclose the consideration, if any, paid by Mr Ahmed for the shares.

[9] A printout from the Companies and Intellectual Property Commission (CIPC) reveals that there are 1 000 issued shares in the respondent. Under cover of an email dated 25 July 2022, Ms Robinson transmitted to Mr Longford a share certificate which reflects Mr Ahmed as the holder of 120 of those shares.

[10] The date of Ms Robinson's resignation and the share sale is significant because it occurred less than a week after she received notice of a directors' meeting to be held on 26 July 2022 to consider, and if deemed fit, pass an ordinary resolution (the proposed resolution) in the following terms:-

- '1. Hadar Inc. and its Attorneys are authorised to do or cause to be done whatsoever shall be requisite as fully and effectively, for all intents and purposes, to recover all debts owed by Vangiflash to the Company; and to eject Vangiflash from the premises; and

2. Ratify all steps/actions already taken by Hadar Inc. and its Attorneys to recover all amounts owed by Vangiflash, which includes but is not limited to, the action instituted out of the Durban High Court under case number D5381/2022.'

[11] The notice of the meeting raised Ms Robinson's conflict in respect of the subject matter to be discussed. It recorded that as the sole director of the respondent she had unduly enriched that company at the applicant's expense by failing to take action against the respondent or assisting her co-director to take any action against the respondent for its failure to pay amounts owing to the applicant in respect not only of arrear rental, but also the payment of the purchase price of the applicant's business, which had been sold to the respondent as a going concern in 2013.

[12] The notice of the meeting was sent under cover of a letter which drew Ms Robinson's attention to section 75 of the Companies Act, 71 of 2008 (the Act) which requires directors to disclose any personal financial interest in any matter to be discussed at a directors' meeting before the matter is considered and then recuse themselves from the meeting.

[13] Section 75(5) of the Act is central to the authority challenge. It reads in relevant part as follows:-

'If a director of a companyhas a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person² has a personal financial interest in the matter, the director-

² Section 75(1)(b) defines 'related person' as including a second company of which the director is also a director.

- (a) must disclose the interest and its general nature before the matter is considered at the meeting;
- (b) must disclose to the meeting any material information relating to the matter, and known to the director;
- (c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;
- (d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);
- (e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c);
- (f) while absent from the meeting in terms of this subsection-
 - (i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and
 - (ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted.'

(footnote added)

[14] Ms Robinson attended the meeting which was held on a virtual platform on 26 July 2022. The minutes record that she refused to recuse herself. She contended that her resignation and the sale of her shares in the respondent removed the conflict so

she was entitled to be present throughout the meeting and to vote on the proposed resolution.

[15] Mr Longford and two attorneys from Hadar Inc (who had performed work for the applicant in the past and were present at the meeting) took issue with Ms Robinson's stance both because the share certificate she had provided read with the CIPC records revealed that she had not disposed of all her shares, and because a CIPC printout procured on the day of the meeting still reflected Ms Robinson as the sole director of the respondent. She was therefore required to leave the meeting and precluded from voting on the proposed resolutions.

[16] Before she left however, she was asked to state how she would have voted if she had been allowed to do so. She indicated that she would have voted against the proposed resolution. When asked the reasons for her stance, Ms Robinson's response was that Mr Longford essentially wanted to close the respondent down, and if he did so he would have no prospect of recovering any money. Her verbatim response as recorded in the minutes is: 'so then you are going to close us down' (emphasis in the original).

[17] Mr Longford states that after Ms Robinson exited the meeting he voted in favour of the proposed resolution and signed it. The effect of section 75(5)(f) of the Act is that a simple majority of those eligible to vote is sufficient to pass an ordinary resolution. As the applicant has only two directors and Ms Robinson was not to be regarded as being present at the meeting for the purpose of determining whether a resolution had sufficient support to be adopted, the requisite simple majority required for the passage of a valid resolution would have been achieved by Mr Longford's vote alone, if Ms Robinson had been correctly excluded.

[18] There is something of a disjunct between the minutes and the signed resolution. The minutes record that 'Mr Longford voted in favour of passing the resolution to try and recover the money on behalf of the Company.' The respondent submits that this

means that only the resolution relating to the pending debt recovery was passed, not the resolution relating to the respondent's eviction.

[19] In my view, nothing turns on these differences. The minutes must be read in context. The notice of the meeting referred to a proposed resolution in the singular, although it had two parts. The minutes reveal that the proposed resolution was read out in full before it was discussed and put to the vote. The resolution which was signed by Mr Longford on the same day as the meeting is identical to the proposed resolution and deals with both the existing recovery and the proposed ejectment proceedings. In addition, loss of occupation of the premises from which the respondent's business is run is consistent with Ms Robinson's fears that the resolutions would close the respondent down.

[20] A signed copy of the resolution so passed was sent to the respondent's attorneys in August 2022, a month before a letter of demand and a subsequent notice cancelling the lease were sent to the respondent. The present proceedings were instituted in October 2022. In its answering affidavit deposed to on 13 January 2023, the respondent indicated that Ms Robinson intended instituting proceedings to set the resolution aside and that the court would be furnished with a copy of those application papers when they became available. No explanation was proffered for why those proceedings had not yet been brought. I was informed by both counsel that Ms Robinson instituted proceedings to set aside the resolution out of the Durban High Court in the first half of July 2023, some two weeks prior to this matter being heard as an opposed motion.

[21] At the commencement of the hearing, Mr Temlett, who appeared for the respondent, applied from the bar for a postponement of this application pending the finalisation of the proceedings relating to the resolution. Mr Temlett was commendably frank about the difficulties posed by moving the application in this fashion. Without a substantive application counsel was unable to deal with matters such as: why the application was not launched immediately the resolution came to Ms Robinson's

attention, or at the very least at the same time the answering affidavit was filed, why it was launched in a different seat of the High Court than that in which the eviction proceedings were pending, on what basis it was brought, its prospects of success and the timeframes within it which it was likely to be finalised. Quite correctly, Mr Temlett did not attempt to address these matters by testifying from the bar. I refused the application, as it was not properly motivated, and could not be, given the form in which it was brought.

The authority challenge

[22] The founding affidavit in the eviction application dealt only with the conclusion of the lease, the respondent's breaches, and the applicant's compliance with the contractual notice provisions. The authority challenge was mounted in answer and therefore dealt with by the applicant only in the reply. The respondent did not deliver an additional affidavit to deal with the matter raised in reply, although it could have sought leave to do so.³

[23] There is there is thus no evidence to controvert the printout from CIPC that there are 1 000 issued shares in the respondent. Ms Robinson's version is that she sold 120 of those shares to Mr Ahmed. On the face of it therefore, accepting her resignation and share sale as alleged, Ms Robinson still has an interest in the respondent and was correctly excluded from the meeting, and the authority challenge is therefore without merit.

[24] I do not however make a finding in this regard, as binding authority in this division precludes me from considering the authority challenge in the form in which it has been brought. In *ANC Umvoti Council Caucus and others v Umvoti Municipality* 2010 (3) SA 31 (KZP) (*ANC Umvoti*), a full court of this division held that challenges to

³ *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38J - 39A.

authority had to be raised and dealt with under the rule and not by way of the application papers.⁴

[25] Counsel for the respondent sought to distinguish *ANC Umvoti* on three bases. First, that the rationale in *ANC Umvoti* did not apply to substantive challenges to authority which could not be cured by the production of a power of attorney. Here, the challenge to the validity of the resolution authorising proceedings and mandating the applicant's attorneys would affect the validity of any power of attorney produced on the strength of that resolution. Second, in *ANC Umvoti* authority had not been challenged in terms of rule 7. Third, in cases where rule 7 is invoked, the rule does not prescribe the procedure by which authority must be challenged, and it is appropriate for a substantive challenge to authority to be raised in an answering affidavit and dealt with on the papers.

[26] Whilst there may be much which could be said for the pragmatism of the approach suggested by counsel for the respondent, the legal validity of his submissions needs to be considered in the light of the purpose and history of rule 7 and the judgment of *ANC Umvoti* as a whole.

[27] Rule 7 assumed its current form following an amendment in 1987. Prior to its amendment rule 7(1) read as follows:

'Before summons is issued in any action at the instance of the plaintiff's attorney, the attorney shall file with the registrar a power of attorney to sue. Such power of attorney shall state generally the nature of the particular action authorised to be instituted, the nature of the relief to be claimed therein and the names of the party to be sued.'

⁴ Para 22.

[28] The original object of rule 7 was to have the mandate of a party's attorney established beyond question.⁵ This served to 'prevent a person whose name is being used throughout the process from afterwards repudiating the process altogether and saying he had given no authority, and to prevent persons bringing an action in the name of a person who never authorized it'.⁶

[29] Before its amendment, the rule applied only to actions, as in motion proceedings there is an affidavit signed by the applicant or someone on their behalf whose authority appears from the papers.⁷

[30] Given these origins, Jansen J in *Allied Workers' Union and Others v De Klerk NO and Others* 1990 (3) SA 425 (*De Klerk*) held that the type of authority contemplated by rule 7 is the type of power given by a client to their attorney authorising them to institute or defend legal proceedings on the client's behalf, and does not contemplate the general authority by one person to another to represent them in legal proceedings which must be established by evidence.⁸

[31] The approach of the court in *De Klerk* drew on the longstanding line of authority in cases such as *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) (*Merino Ko-operasie*) which held that where the applicant in motion proceedings was an artificial person, evidence was required in the founding affidavit that 'the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance'.⁹

[32] The amendment of rule 7 did away with the need to file a power of attorney in all actions, but it expanded the reach of the rule to motion proceedings. The amended rule employs broader language than its predecessor, as it no longer refers only to attorneys but to 'the authority of anyone acting on behalf of a party'.

⁵ *Hills and Others v Taxing Master and Another* 1975 (1) SA 856 (D) at p. 859 A -B.

⁶ *Estate Matthews v Ells*, 1955 (4) SA 457 (C) at p. 459.

⁷ *Unlawful Occupiers of the School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 15.

⁸ At p 436F to 437B.

⁹ At p 351 H – 352 A.

[33] *De Klerk* held that despite these changes, the ambit of the rule remains the same because :-

‘it could not have been contemplated by the lawgiver that a refutation by a respondent as to the existence of general authority to act could be met by the filing of an unsworn piece of paper. Rule 7(1) is, in essence, merely a means of achieving production of the ordinary power of attorney in order to establish the authority of an attorney to act for his client. It may be called for simply by notice and without an evidentiary challenge to such authority.¹⁰

[34] The full court in *ANC Umvoti* however took a contrary view. It attributed significance to the change in language brought about by the amendment,¹¹ and held that the amended rule was intended to apply to all types of challenges to authority.¹² In consequence, it held that ‘whether or not the litigation has been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence lead in the application. If clarity is required, it should be obtained by means of rule 7(1)’.¹³

[35] It is therefore clear that the *dicta* in *ANC Umvoti* apply whether the challenge to authority is, as here, substantive, or whether it is in the nature of a technical challenge which can be met merely by production of a power of attorney. The nature of the challenge is therefore not a basis upon which *ANC Umvoti* can be avoided.

[36] I am alive to the fact that reading rule 7 as having such breadth of application may be seen to somewhat undermine the rationale of the rule in amended form which

¹⁰ At p 436 I – 437 A.

¹¹ Para 22.

¹² Para 22.

¹³ Paras 26 – 27.

is to avoid a 'costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised'.¹⁴ The full court in *ANC Umvoti* drew on that rationale in finding that if clarity on authorisation was required it should be obtained by means of rule 7(1), since it was a procedure that freed an applicant from having to produce proof of what may not be in issue, and saved 'an inordinate waste of time and expense involved in attaching resolutions, delegations and substitutions to applications'.¹⁵

[37] Where the challenge to authority is in the nature of a technical objection, it can usually be easily addressed by the production of a power of attorney or a company resolution. Where however, as here, the challenge is substantive, it will need to be motivated and met on affidavit, because it cannot, by its nature, be refuted 'merely by the filing of an unsworn piece of paper'.¹⁶ The requirement that even such challenges be pursued outside of the application in respect of which they are raised will almost inevitably lead to two sets of opposed proceedings,¹⁷ with the application relating to authority needing to be finalised before the main application could proceed, with all the implications for costs and delay that entails. Be that as it may, there is no means of reading down the breadth of the clear language of *ANC Umvoti* in this regard.

[38] The respondent highlights that the challengers in *ANC Umvoti* did not invoke rule 7 by name or by issuing a notice in terms of the rule, whereas, in the present case, the respondent specifically relied on rule 7 and laid an evidential basis for the authority challenge in its answering affidavit. Counsel submitted that this serves to make *ANC Umvoti* distinguishable.

[39] It is so that rule 7 was not relied on in *ANC Umvoti*, but attempting to distinguish it on that basis would be to put form above substance and ignore the gravamen of the judgment.

¹⁴ *Unlawful Occupiers* note 7 above, para 16.

¹⁵ Para 27.

¹⁶ *De Klerk* at p 436 I – J.

¹⁷ *Dollar Rent a car and another v Moolla* NO 2023 JDR 2712 (GJ) paras 4, 5 and 16.

[40] In *ANC Umvoti*, the appellants asserted that they had an election whether to employ rule 7. They had not done so¹⁸ and sought instead to challenge the authority of the respondent to institute proceedings in the court below on the *Merino Ko-operasie* and *De Klerk* lines of authority discussed in paragraphs [30] and [31] above.¹⁹

[41] The substantive authority challenge in *De Klerk* was raised in the answering affidavit. Jansen J rejected the argument that this was impermissible as rule 7 had to be employed and upheld the challenge on the evidence. *ANC Umvoti* held that the legal position articulated in *Merino Ko-Operasie* had changed with the amendment of the rule and doubted the correctness of *De Klerk*.²⁰ This was the basis on which the full court held that authority need not be proved on the papers and that 'whether or not the litigation has been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence lead in the application.'²¹

[42] That finding of the full court also puts paid to the last basis upon which the respondent seeks to sustain its authority challenge despite the form in which it has been mounted, which is that the rule itself does not prescribe a procedure by which such challenges must be made.²² The respondent's reliance on statements in *Erasmus Superior Court Practice*,²³ that authority challenges can be dealt with in an answering affidavit are misplaced in the light of the unequivocal findings of *ANC Umvoti* that this is impermissible. The case from this division to which the authors refer and which could serve as authority for that proposition²⁴ predates the amendment of the rule and was therefore implicitly overruled by *ANC Umvoti*.

¹⁸ Para 29.

¹⁹ Para 11.

²⁰ Paras 28 and 22.

²¹ Paras 22 and 27.

²² *Gainsford and others NNO v Hiab AB* 2000 (3) SA 635 (WLD) p 639 J to 640 A.

²³ At p D1-94 – D1-95.

²⁴ *Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd* 2007 (4) SA 546 (D) at 553I–554D.

[43] It follows that the manner in which the respondent has chosen to raise its authority challenge is fatal. The respondent was legally represented even prior to the institution of the eviction proceedings. Its attorneys no doubt knew what the correct procedure was but elected not to follow it. The respondent therefore has only itself to blame.

Relief

[44] It also follows that the applicant is entitled to the eviction order which it seeks as the court has no equitable discretion to refuse an ejectment order if an applicant has established the grounds therefor.²⁵ It is however necessary for me to determine an appropriate date by which the respondent must vacate the premises.

[45] Counsel for the applicant stresses that the premises are commercial, the applicant has been deprived of the right to deal with its property for an extended period and the respondent has been aware for some considerable time that it was required to vacate. He submitted that the applicant should have arranged its affairs accordingly and moved for an eviction order effective immediately.

[46] The respondent has been aware for more than a year that its eviction was being sought. Whilst it might not initially have arranged its affairs in anticipation of an order being made in the applicant's favour by virtue of the various defences it raised, the lease terminated by the effluxion of time at the end of July 2023. The respondent must therefore have been aware for at least the past two months that it remained in occupation when there was no legal basis for it to do so, even if its defences to the present eviction proceedings were upheld. It should therefore have been seeking alternative premises. I am however mindful of the fact that the respondent is running its business from the premises and that leases usually run from the first of the month. I therefore find that it would be appropriate to grant the eviction order effective at the

²⁵ *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) at p 539 D -F.

end of the month in which this judgment is handed down, which is some two weeks hence.

[47] There remains the question of costs. The applicant seeks costs on an attorney and client scale. The lease agreement does not provide for costs on that scale as a matter of contractual right. The applicant however submits that costs on a punitive scale are warranted by virtue of the manner in which the respondent has opposed and delayed the eviction proceedings.

[48] The respondent did not proffer a substantive defence to the eviction. Its answering affidavit raised a bald denial of the allegations that it was in arrears and it adduced no proof of payment. Similarly, it denied receipt of the notice to remedy its breach and the cancellation letter in the face of the applicant attaching email notification and a sheriff's return to the founding affidavit. Apart from the authority challenge, the balance of its opposition comprised technical defences, all of which were correctly abandoned. The only ground in which the respondent persisted was the authority challenge, which required proceedings to vitiate the resolution. Despite such challenge being averted to in the respondent's answering affidavit in January 2023, it was not brought until seven months later, on the eve of the hearing of the opposed motion in the eviction proceedings and nearly a year after the respondent's attorneys had received a copy of the resolution.

[49] All of this conduct speaks to the respondent seeking to delay its eviction and the finalisation of the present proceedings on specious grounds. In those circumstances, I find it is appropriate to grant costs against the respondent on the scale as between attorney and client.

[50] I consequently make the following order:-

1. The respondent and all persons in occupation by, through or under it are ordered to vacate the premises at 2[...] A[...] Avenue, Springfield Park, Durban (the Premises) by 31 October 2023.
2. Should the respondent and all persons occupying the premises by, through or under it not vacate the premises by 31 October 2023, the Sheriff, or his lawful deputy, is authorised to evict such persons from the premises.
3. The Respondent is ordered to pay the costs of this application on the scale as between attorney and client.

ANNANDALE A.J.

JUDGMENT RESERVED:

28 JULY 2023

JUDGMENT HANDED DOWN:

19 OCTOBER 2023

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