

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: **2595/2023**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

PIETER JOHANNES JOUBERT

1st Applicant

PETRUS JOHANNES JOUBERT N.O.

2nd Applicant

THARISA JOUBERT N.O.

3rd Applicant

**[In their capacity as Trustees of the
Fiesta Trust, IT No: 652/04]**

And

CLOSE TO HOME TRADING 546 CC

1st Respondent

MIDWICKET TRADING 556 CC

2nd Respondent

In re:

CLOSE TO HOME TRADING 546 CC

1st Plaintiff

MIDWICKET TRADING 556 CC

2nd Plaintiff

And

PIETER JOHANNES JOUBERT

1st Defendant

PETRUS JOHANNES JOUBERT N.O.

2nd Defendant

THARISA JOUBERT N.O.

3rd Defendant

CHRIESTIE WAGENAAR N.O.

**[In their capacity as Trustees for the time being
of the Fiesta Trust, IT No: 652/04]**

4th Defendant

JUDGMENT BY:

MOLITSOANE, J

HEARD ON:

7 SEPTEMBER 2023

DELIVERED ON:

21 DECEMBER 2023

[1] The Respondents in this interlocutory application instituted an action against the First Applicant, in his personal capacity, and the remaining Applicants in their capacity as Trustees for the time being of the Fiesta Trust No: 652/04.

[2] The First, Second, and Third Applicants as Defendants in the main action delivered a notice in terms of Uniform Rule 7(1) disputing and challenging the authority of Kramer Weihmann Inc. (KW Inc.) to act and represent the Respondents as Plaintiffs in the main action.

[3] The Respondents replied to the notice by filing a resolution as herein set out:

“RESOLUSIE DEUR DIE LEDE CLOSE TO HOME TRADING 546 CC H/A
OOBA REGIESTRASIE NO: 2010/080944/23 EN MIDWICKET TRADING
556 H/A CBC REGISTRASIE NO: 2008/149422/23 GENEEM TYDENS N
VERGADERING GEHOU TE BLOEMFONTEIN OP 14th May 2023.
RESOLUSIE:

Die aktiewe/meerderheid lede van die hierin bogemelde beslote korporasies bevestig en kom hiermee soos volg, ooreen:

1. N aksie teen Mnr Petrus Johannes Joubert (ID NO :7[...]) ingestel moet word;
2. Dat Mnr Jacques Nortje (ID NO :6[...]) lid van die gemelde beslote korporasies gemagtig word om alle instruksies uit te voer om gehoor te gee aan gemelde voornemende aksie ingestel te word en alle dokumente te onderteken welke nodig mag wees vir uitvoering van sy pligte namens die gemelde beslote korporasies.
3. Dat Kramer Weihmann Ingelyf aangestel word as die prokureurs om namens die gemelde beslote korporasies as prokureurs van record op te tree in enige aksie en /of aansoek procedure namens en teen gemelde beslote korporasies

[4] The Applicants were not satisfied with the response. They informed the Respondents by way of a letter of their dissatisfaction and pointed, according to them, that (1) neither of the Plaintiffs resolved to institute legal proceedings against the trustees of the Fiesta Trust;(2) neither of the Plaintiffs resolved to give KW Inc. the authority to represent and act on behalf of either of the Plaintiffs in legal proceedings against the Trustees of Fiesta Trust;(3) Neither of the Plaintiffs provided KW Inc. with power of attorney to represent and act on behalf of either of the Plaintiffs;(4) the nature of the authority given to KW Inc. as to the nature of the action to be instituted and the relief sought and the parties to be sued.

[5] It is submitted on behalf of the Applicants that the answering affidavit of Mr. Nortje on behalf of KW Inc. does not address the dispute and challenge of the authority of KW Inc. to represent and act on behalf of the Plaintiffs in the main action. The Applicants also submit that KW.Inc. has failed to provide an appropriately worded resolution to satisfy the court of its authority to act.

- [6] It is submitted on behalf of the Respondents. that the First Applicant is a former director of KW Inc. That he knows that all the remaining directors of KW Inc. have a members' interest in Close to Home and Midwicket. That all the remaining members had signed the resolution sought to be impugned in this case. It is further submitted that the Respondents were joined on the basis of 'notification' and that the action is aimed at the First Applicant and no relief is sought against the remaining Applicants. In so far as the Trust seems to be one of the Applicants, Mr Nortje on behalf of KW Inc. deny that these proceedings have been validly instituted.
- [7] It is trite law that unless the trust deed stipulates otherwise, trustees must act jointly. Further, unless the trust deed provides otherwise, the trustees may authorise someone else, including one of the trustees to act on their behalf.
- [8] As far as the Trust is concerned, the particulars of the claim in the main action suggest that it has three trustees, namely, the Second and Third Applicants in this interlocutory applicant and one Christie Wagenaar. The attack on the authority of KW Inc. to act is mounted by the Second and Third Applicant only. No authorization was filed giving authority to the Second and Third Applicants to act for the Trust. The Third Trustee does not seem to be involved in this application. This is evident from the Rule 7(1) notice where it is pertinently stated that the 'First, Second, and Third Defendants dispute and challenge the authority of KW Inc.'" to represent the Respondents.
- [9] The citation of the parties in this interlocutory application also excludes Christie Wagenaar. One would obviously doubt, as contended by Mr Nortje that this interlocutory application is validly instituted by the Trust in the absence of Christie Wagenaar. The fact that Christie Wagenaar is also represented by another firm of attorneys creates more doubt that he sanctioned this interlocutory application. The contention by the Applicants that the Respondents have failed to raise the challenge in the appropriate manner does not hold water. The fact is that the Trustees must act jointly otherwise the actions they take where one or more does not act is a nullity. Rule 7(1) is concerned with the mandate of attorneys to act, not of the mandate of a party to act for another party in a suit. In so far as the Trust is

concerned, this should be the end of their challenge to the authority of KW Inc. In the absence of satisfaction to this court that all three Trustees jointly act in these proceedings, I cannot find that the application is validly instituted by the Trust.

- [10] It cannot be contended that the resolution filed in response to Rule 7(1) is a model of perfection. It lacks particularity as to the nature of the action to be instituted as well as the relief sought. It is too broad. It can practically include anything. With this in mind, however, it must be borne in mind that Rule 7(1) lays no procedure to be followed by the party challenging the authority of an attorney. The parties are in agreement that the person whose authority is impugned must satisfy the court that he is so entitled to act and to represent another party. Where a notice has been delivered in terms of the Rule and a response furnished, the Rule also does not set out how the court should resolve the impasse where non-compliance is alleged. The court in *Eriksson v Hollard Insurance Limited and Others*¹ said the following:

“Rule 7(1) does not set out what evidential material should be placed before court by an attorney to satisfy the court that he or she has been mandated to represent clients, in this instance, the plaintiffs. It was argued on behalf of the plaintiffs that ‘*satisfies*’ does not imply a burden of proof. In my view, a court will reasonably determine whether it is satisfied with the material placed before it to rule whether a mandate has been shown. The court will act subjectively, but as a reasonable judge which brings into the equation an objective yardstick. One of the reasons for a challenge to the authority of an attorney is not to be faced with a situation where an unsuccessful plaintiff, faced with a cost order, denies the authority of the attorney who instituted the proceedings. In my view, a court will consider the documents filed as proof of authority and consider whether, on a balance of probabilities, the attorney was mandated or not.”

- [11] I agree with the sentiments expressed in Erikson, it is the court that must be satisfied, not a party, that the person acting has the necessary authority. In my view, the resolution filed authorises an action against the First Applicant.

¹ (2021/45339) [2023] ZAGP JHC39(24 January 2023) para 23.

Any doubt about the challenge of the authority of KW Inc. was laid to rest when all the close corporations members confirmed the authority in favour of KW Inc. This court is satisfied that KW Inc. is duly authorised to institute this action against the Applicants. I make this order:

ORDER

1. The application is dismissed;
2. The costs shall be costs in the cause.

P. E MOLITSOANE, J

On behalf of the Applicants:

Instructed by:

Adv. G.W AMM

Peyper Attorneys

BLOEMFONTEIN

On behalf of the Respondents:

Instructed by:

Adv. S Grobler

KW Inc.

BLOEMFONTEIN