



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

|                              |        |
|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

Case number: 3367/2021

In the matter between:

**NEDBANK LTD**

Plaintiff

and

**RASEKOANE VINCENT MABULU N.O.**

1<sup>st</sup> Defendant

**NEO LAWRENCE MABULU N.O.**

2<sup>nd</sup> Defendant

**ANTHONY DE VILLIERS N.O.**

3<sup>rd</sup> Defendant

[cited herein in their capacities as the duly authorised trustees  
of the Mabulu Trust, IT544/2021]

**ANTHONY DE VILLIERS N.O.**

4<sup>th</sup> Defendant

[in his capacity as the executor of the deceased estate  
of RASEKOANE VINCENT MABULU]

**MAMPAI ANNAH MABULU**

5<sup>th</sup> Defendant

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**HEARD ON:** 3 FEBRUARY 2022

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**JUDGEMENT BY:** LITHEKO, AJ

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**DELIVERED ON:** 3 MARCH 2022

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- [1] This matter involves two applications. Firstly, there is an application by the second defendant to set aside the plaintiff's application for a default judgement on the basis that it is an irregular step, and, secondly, the adjudication of the disputed authority of Mathunjwa Incorporated attorneys (Mathunjwa Inc.) to act on behalf of the second defendant.
- [2] The plaintiff issued summons out of this court on 22<sup>nd</sup> July 2021, claim 1 being for a debt owing in respect of money lent and advanced and claim 2 alleged to be debt due in respect of money overdrawn from a current banking account in terms of an overdraft facility. The summons was duly served on the 28<sup>th</sup> July 2021 upon the fourth and fifth defendants and, on the 2<sup>nd</sup> August 2021 upon the first, second and third defendants. The first, second and third defendants are sued in their representative capacities as the Trustees of the Mabulu Trust, the fourth defendant in his representative capacity as the executor of the estate of the late Rasekoane Vincent Mabulu and the fifth defendant in her personal capacity. The fourth and fifth defendant did not enter appearance to defend and on the 28<sup>th</sup> September 2021 judgment was granted against them for payment of R867,028.52 together with interest and costs in respect of claim 1 and for payment of R186,856.02 plus costs in respect of claim 2.
- [3] On the 16<sup>th</sup> of August, 2021, Mathunjwa Inc. entered appearance to defend on instructions of the second defendant and, 11 days later, on the 31<sup>st</sup> August 2021, the plaintiff delivered a notice in terms of Uniform Rule 7(1) disputing their authority to act on behalf of the second defendant. On the 10<sup>th</sup> September 2021, the second defendant served and filed a power of attorney to which, on the 22<sup>nd</sup> September 2021, the plaintiff objected on grounds that it was given by the second defendant in his personal capacity and not in his representative capacity as Trustee of the Mabulu Trust. On the same date, i.e. the 22<sup>nd</sup> September 2021, the plaintiff served a notice of application for default judgment against first, second and third defendants.
- [4] I am called upon to decide the following issues:
- 4.1 whether the plaintiff's application for default judgment against second defendant is an irregular step, and,

4.2 whether Mathunjwa Inc. have authority to act on behalf of the second defendant.

[5] In order to deal properly with the issues raised by the applications before me, it is appropriate to refer to the Uniform Rules whereupon the applications are based.

[6] Uniform Rule 7(1) provides that:

“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 satisfied 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.”

[7] Uniform Rule 30 provides as follows:

“(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.”

[8] Rule 30A provides that:

“(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —

- (a) that such rule, notice, request, order or direction be complied with; or
- (b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.”

- [9] The basis whereupon the authority of Mathunjwa Inc. was disputed is, (a) that the second defendant gave the power of attorney in his personal and not representative capacity, despite having been sued in his representative capacity as a Trustee of the Mabulu Trust, and (b) that the Trust Deed provides that there shall be at least two (2) Trustees in office. The second defendant was, at the time the only Trustee. For these reasons, the plaintiff disregarded the second defendant’s appearance to defend and applied for a default judgement. This application for default judgement prompted the second defendant’s application in terms of Uniform Rule 30 and 30A seeking an order to set it aside as an irregular or improper step.
- [10] On the 31<sup>st</sup> January 2022, the second defendant served and filed a plea, notwithstanding the fact that the application in terms of Uniform Rule 30 and 30A had not been heard and was set down for hearing on the 3<sup>rd</sup> February 2022.
- [11] On the 3<sup>rd</sup> February 2022, Mr. Pela, who appeared on behalf of the second defendant, applied for a postponement which Mr. Benadè, on behalf of the plaintiff, opposed. I dismissed the application and ordered that the matter proceed, whereupon Ms. Masia of Masia Attorneys Incorporated, a correspondent of Mathunjwa Inc., took over on behalf of the second defendant.
- [12] Ms. Masia argued that although the Trust Deed stipulated that there shall be a minimum of two (2) trustees, and the second defendant was the only trustee at the time of the delivery of the appearance to defend and when the power of attorney was signed, he was authorised in terms of the Trust Deed to mandate Mathunjwa Inc. as the only prohibition in the Trust Deed related to distribution of income, capital or amendment of the Trust Deed. She submitted that plaintiff’s disregard of the second defendant’s appearance to defend constituted an infringement of his constitutional right “to have a dispute that can be resolved by

the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.”<sup>1</sup>

- [13] Mr. Benadè argued, correctly so, that a trustee, although he or she acts on the authority given by the Master of the High Court, any act that he or she performs must be so performed in terms of the provisions of the Trust Deed. In the event that a Trust Deed requires specified minimum number of trustees to hold office, when fewer numbers than the number specified are in office, that Trust suffers from an incapacity that precludes action on its behalf.<sup>2</sup> He contended that because from the time of the filing of the appearance to defend up to and including the date on which the Master of the High Court issued new Letters of Authority, i.e. the 10<sup>th</sup> December 2021, the Trust was incapacitated and consequently any action on its behalf was precluded.
- [14] Although Counsel for the second defendant and the plaintiff argued the merits of the applications at length, they eventually agreed that the issues that were raised in the applications were addressed in the second defendant’s plea. What was then left for adjudication was the issue of costs occasioned by the interlocutory applications that were enrolled for hearing on the 3<sup>rd</sup> February 2022. I have dealt briefly with the issues herein involved on the basis that they have a bearing on costs.
- [15] It is a trite principle of our law that a court considering an order of costs exercises a discretion,<sup>3</sup> which must be exercised judicially.<sup>4</sup>
- [18] Uniform Rule 7(1) requires a party<sup>5</sup> disputing the authority of another to do so within 10 days after becoming aware that such other party is so acting. After the expiry of a period of 10 days, such authority to act can be disputed at any time prior to judgment only with the leave of the court and upon good cause shown. A perusal of the pleadings has revealed that the plaintiff became aware of the fact

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<sup>1</sup> Section 34 of the Constitution, 1996.

<sup>2</sup> *Land and Agricultural Bank of South Africa v Parker and Others* 2005(2) SA 77(SCA) at paragraph 11.

<sup>3</sup> *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (2) SA 621 (CC) at paragraph 3.

<sup>4</sup> *Motaung v Mukubela and Another, NN.O; Motaung v Mothiba, NO* 1975 (1) SA 618 (O) at 631A.

<sup>5</sup> In terms of Uniform Rule 1, ‘party’ or any reference to a plaintiff or other litigant in terms, shall include his attorney with or without an advocate, as the context may require.

that Mathunjwa Inc. were acting on behalf of the second defendant on the 16<sup>th</sup> August 2021 and only disputed their authority to act on the 31<sup>st</sup> August 2021, eleven days later. In the circumstances, Mathunjwa Inc.'s authority could only be properly disputed with the leave of court and on good cause shown. As such leave was neither sought nor granted, the plaintiff's objection to the authority of Mathunjwa Inc. to act on behalf of the second defendant cannot be entertained.<sup>6</sup>

[19] It follows that the second defendant's application in terms of Uniform Rule 30, to set aside the plaintiff's request for default judgement as an irregular step, must, in the circumstances, succeed. Although I make no ruling in this regard, I am of the view that, the provisions of Uniform Rule 30A, which deals with general non-compliance with rules, did not find application in the second defendant's application.

[20] In conclusion, and in the light my finding above and the fact that Counsel were in agreement that the second defendant has purged his default by attaching relevant documents to the plea in proof of compliance with the terms of the Trust Deed, it seems equitable and competent to set aside the application for default judgement. There is no reason why the costs should not follow the cause.

[21] I therefore make the following order:

21.1 The plaintiff's application for default judgement is set aside as an improper step.

21.3 The plaintiff is ordered to pay the costs.

**M. S. LITHEKO, AJ**

For the Applicants:

Adv. H. J. Benadè

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<sup>6</sup> Janse van Rensburg v Obiang and Another (A338/2018, 22470/2015) [2019] ZAWCHC 53 (10 May 2019) at paragraph 17.

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For the Respondents:

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