

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

Case No: 17047/2009

In the matter between

Lampac CC t/a Packaging World

Applicant

and

John Henry Hawkey N.O.

First Respondent

John Dua Attorneys

Second Respondent

Cox Yeats

Third Respondent

JUDGMENT

Delivered on: 14 June 2011

STEYN J

[1] The applicant has lodged an application in terms of Rule 30 of the Uniform Rules of Court, seeking an order that will set aside all notices and pleadings served and filed by the third respondent on behalf of the first respondent as irregular.¹

¹ See Rule 30 that reads as follows:

“30 Irregular proceedings

- 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;

[2] When the matter was argued, Mr Wanless appeared on behalf of the applicant, Mr de Beer SC on behalf of the second respondent and Mr Suhr on behalf of the first and the third respondent.

[3] The first respondent is the duly appointed executor of the estate of the late Anthony John Swaby. The second respondent is an attorney practicing as a sole practitioner under the name of John Dua Attorneys. The third respondent is the law firm that is authorised to represent the first respondent in a pending action.² The applicant (plaintiff in the main action) issued a combined summons against the defendant whereby it sought enforcement of a suretyship purportedly issued by the deceased.

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- (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 day;*
 - (c) *the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) and 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.*

4) *Until a party has complied with any order of court made against him in terms of this Rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.*

5) *. . . ”*

2 Hereinafter referred to as the main action.

[4] This application has a long history and I consider it necessary to refer to the following background facts since it appears to have informed the applicant's decision to challenge the regularity of the proceedings.

[5] The executor of the deceased's estate who is the first respondent, held a consultation with a number of witnesses at his office, whereafter one of the members of the principal debtor, in the main action, took a copy of the summons and handed it to an attorney, who is the second respondent. Subsequent to the aforesaid the second respondent, delivered a notice of intention to defend the main action. The notice was filed on 19 January 2010. At the time when the notice was filed the second respondent was not authorised by the first respondent to either defend the first respondent or to take any action in connection with the instituted action.

[6] Against this background the applicant now seeks the following order:

"1. That all notices and pleadings served and filed by the

third respondent on behalf of the first respondent under case number 17407/2009 be and are hereby set aside as irregular proceedings in terms of Rule 30(1).

2. *That the first respondent, alternatively the respondent, alternatively the second respondent, alternatively the first, second and third respondents jointly and severally the one paying the other to be absolved, pay the costs of this application on the scale of attorney and own client."*

[7] The papers reveal that on 2 February 2010 the first respondent was represented by the third respondent. Third respondent was duly authorised and had the necessary mandate to act on behalf of the first respondent. The following letter was also sent by the second respondent to the applicant's attorneys:

"We refer to the above matter and confirm that we have withdrawn as Attorney of Record in the matter and that Mr. Hawkey will be instating himself as Attorney of Record if he has not already done so. In this regard, we filed an Appearance, ex abundante cautela, and will now leave the litigation to be dealt with by Mr Hawkey.

*Should you have any queries herein, kindly advise."*³
(My emphasis)

[8] The crisp issue to be decided by this Court is whether the applicant had suffered any prejudice either through second or third respondent's conduct when both law firms filed notices to defend the main action. To put it differently, did the applicant

3 See page 249 of the record.

have reasonable doubt regarding the authority of the third respondent to defend the first respondent in the main action, especially since the second respondent had withdrawn as attorney of record. Much of the applicant's argument depended on the failure of the second respondent to comply with Rule 16, which reads as follows:

"16 Representation of parties

- (1) If an attorney acts on behalf of any party in any proceedings, he shall notify all other parties of his name and address.*
- (2) (a) Any party represented by an attorney in any proceedings may at any time, subject to the provisions of Rule 40, terminate such attorney's authority to act for him, and thereafter act in person or appoint another attorney to act for him therein, whereupon he shall forthwith give notice to the registrar and to all other parties of the termination of his former attorney's authority and if he has appointed a further attorney so to act for him, of the latter's name and address.*
 - (b) If such party does not appoint a further attorney, such party shall in the notice of termination appoint an address within eight kilometres of the office of the registrar for the service on him of all documents in such proceedings.*
- (3) Upon receipt of a notice in terms of sub-Rule (1) or (2) the address of the attorney or of the party, as the*

case may be, shall become the address of such party for the service upon him of all documents in such proceedings, but any service duly effected elsewhere before receipt of such notice shall, notwithstanding such change, for all purposes be valid, unless the court orders otherwise.

- (4) (a) *Where an attorney acting in any proceedings for a party ceases so to act, he shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom he acted may be given by registered post.*
- (b) *After such notice, unless the party formerly represented within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in sub-Rule (2), it shall not be necessary to serve any documents upon such party unless the court otherwise orders: Provided that any of the other parties may before receipt of the notice of his new address for service of documents, serve any documents upon the party who was formerly represented.*
- (c) *The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.*
- (d) *The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b)."*

[9] Mr Wanless strongly argued that a distinction should be made

between representation and authority to act on behalf of a litigant and based on this distinction Rule 7 finds no application. He submitted Rule 16 should have found application whereby second respondent should have filed a notice to withdraw from the proceedings.

In my view an attorney acts on behalf of a litigant, once he has been duly instructed and authorised. The purported distinction between the aforementioned concepts as claimed by the applicants is without legal substance.

There is, however, another problem with a rigid application of Rule 16 in circumstances wherein the attorney was not duly appointed. The second respondent could never have acted on behalf of the first respondent since he was never instructed by first respondent and henceforth lacked the necessary capacity to represent the first respondent. If the second respondent had the necessary authority to act and issue any process, including issuing a notice to defend, then I would have expected Rule 16 to find application, more specifically Rule 16(4). This was never the case. Second respondent was never mandated by the first respondent and acted under a

mistaken belief that he should protect the interests of the first respondent.

[10] Could there have been any doubt post 2 February 2010 that the third respondent was duly authorised to act as the first respondent's attorney? If so, should such authority of either second or third respondent not have been challenged by applicant in using Rule 7(1) as a mechanism?

[11] Rule 7(1) of the Rules, provides as follows:

“(1) Subject to the provisions of sub-Rules (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.”

(My emphasis)

[12] I aligned myself with the view of Gorven J, that Rule 7 is the appropriate remedy to utilise when authority is challenged by a party. This much has also been stated by Flemming DJP in

*Eskom v Soweto City Council*⁴ at 705E-H:

⁴ 1992 (2) SA 703 (W); Also see *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) for a detailed review of the Rule and the relevant case law.

“The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney’s authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants especially certain financial institutions.”

- [13] The SCA in *Unlawful Occupier of the School Site v City of Johannesburg*⁵ highlighted the importance of the *Eskom* judgment, especially the fact that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of an applicant is provided for in Rule 7(1).

Brand JA succinctly stated it as follows:

“The ratio decidendi appears from the following dicta (at 705D-H):

5 (2005) All SA 108 (SCA).

'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney.

. . .

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring that application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1).'

And (at 706B-D):

*'If then applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.'*⁶

(My emphasis)

- [14] The applicant, however, failed to use the mechanism provided for in Rule 7(1), when it challenged the authority of the second and third respondent. Instead it persisted with an application

6 *Unlawful Occupier supra* at para 14.

to declare earlier proceedings as irregular.

[15] At best, any so called irregularity complained of could be regarded as technical in nature, especially when regard is had to the letter that was promptly filed by the second respondent.⁷ As stated earlier in this judgment I have serious doubt that Rule 16 could ever find application since second respondent never had any mandate to represent the first respondent.

[16] In *Trans-African Insurance Ltd v Maluleka*⁸ the court held:

“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

And

*Sandprops 1160 CC v Karlshavn Farm Partnership*⁹ where

Page J stated it as follows:

*“It is trite law that the Court has a discretion and is entitled in a proper case to overlook an irregularity in procedure that does not cause substantial prejudice to the party complaining of it.”*¹⁰

[17] Applicant has created a further conundrum by electing to

7 See *Scott and Another v Ninza* 1999 (4) SA 820 (ECD) at 826 et seq.

8 1956 (2) SA 273 (A).

9 1996 (3) SA 1026 (N).

10 See *Soundprops supra* 1033 A–B.

challenge the proceedings as irregular rather than challenging the authority of third or second respondent. Annexure “N”, which is the notice of irregular proceedings, reads as follows:

“WHEREAS John Dua Attorneys placed themselves on record by serving an Appearance to Defend on behalf of the Defendant on the Plaintiff’s Attorneys on the 19th January 2010, and remain on record in these proceedings.

AND WHEREAS Cox Yeats Attorneys served an Appearance to Defend thereafter a Plea, Claim in Reconvention and Request for Security on the Plaintiff’s Attorneys on the 29th of January 2010 purportedly on behalf of the Defendant whilst John Dua Attorneys remain on record as the Defendant’s attorneys.

AND WEREAS the Plaintiff has not taken a further step in these proceedings.

KINDLY TAKE NOTICE THAT, the Plaintiff affords the Defendant an opportunity of instructing Cox Yeats to withdraw all Notices, Pleadings and Applications irregularly served in this matter within 10 days, failing which the Plaintiff will make application to the above Honourable Court in terms of Rule 30(2)(c).”

(My emphasis)

The notice files and the prayers in the notice of motion do not correspond with each other. What was never sought by the applicant was to set aside the notice filed by second respondent or an order to direct the second respondent to withdraw properly.

I am not persuaded that applicant has made out a case for setting aside the notices, pleadings and counterclaim.

[18] One more aspect remains, the issue of costs. Mr de Beer has urged this court to show its displeasure with the application, given the specific circumstances, by dismissing the application with costs on attorney and client scale. Mr Suhr has supported the contention.

The principles for a punitive costs order have been comprehensively dealt with in *Waar v Louw*,¹¹ *Webb and Others v Botha*,¹² *SA Droëvrugtekoöperasie Bpk v SA Raisins (Edms) Bpk*¹³ and *Ketwa v Agricultural Bank of Transkei*.¹⁴

I have asked Mr Wanless to explain why the applicant persisted in this application, especially after the applicant had been in receipt of the second respondent's withdrawal and to indicate why a punitive costs order should not be granted. Mr Wanless simply relied on the provisions of Rule 16 and the non-compliance thereof and the impact of such failure on the applicant's case in the main action.

11 1977 (3) SA 297 (O).

12 1980 (3) SA 666 (N).

13 1999 (3) All SA 245 (NC).

14 2006 (4) All SA 262 (Tk).

In my view the applicant in advancing this argument overlooked the fact that there could be no confusion regarding the third respondent's authority to represent first respondent since second respondent admitted that he would no longer be part of the litigation. Prior to this application being lodged applicant was aware of the fact that second respondent filed a notice to defend without being authorised and that the firm was never instructed by the first respondent. This should have been the end to any *lis* between applicant and second respondent. Applicant, however, persisted in lodging this application, unjustifiably, in my view, and with unnecessary trouble and expense to the respondents concerned.

The application was entirely unnecessary and without legal basis. It warrants an appropriate punitive costs order to mark this court's disapproval.¹⁵

[19] In the result the following order is made.

19.1 The application is dismissed.

¹⁵ See *Moosa v Laloo* 1957 (4) SA 207 (D) at 225 and *Koetsier v SA Council of Town and Regional Planners* 1987 (4) SA 735 (W) at 744J-745A.

19.2 Applicant to pay the costs of the application, such costs
to be on the scale as between attorney and client.

Steyn,J

Date of Hearing: 18 March 2011

Date of Judgment: 14 June 2011

Counsel for the applicant: Adv Wanless

Instructed by: Atkinson, Turner & De Wet

Counsel for the first respondent: Adv Suhr

Instructed by: Morris Fuller Walden Williams

Counsel for the second respondent: Adv De Beer SC

Instructed by: John Dua Attorneys

Counsel for the third respondents: Adv Suhr

Instructed by: Cox Yeats