REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA**

**LIMPOPO DIVISION, POLOKWANE**

**CASE NO: 11014/2022**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

**In the matter between:**

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|---|---|
| **MABULANYANE NEMIA MAGOLEGO N.O** | **First Applicant** |
| **SELETANE PHILEMON MOKOBAKA N.O** | **Second Applicant** |
| **MADIETE EUNICE MOROTA N.O** | **Third Applicant** |
| **LETSEPE JOYCE SELOANE N.O** | **Fourth Applicant** |
| **MPHELA MAMASELE DINA N.O** | **Fifth Applicant** |
| **CHIDI JOHN MASHILO N.O** | **Sixth Applicant** |

**and**

| | |
|---|---|
| **MAGOLEGO KGOLA KLAAS** | **First Respondent** |
| **MASHILO MAKWESHE LUCAS** | **Second Respondent** |
| **MAGOLEGO MAPONYA EDWARD** | **Third Respondent** |
| **MAGOLEGO BOKGOBELO ELLIOT** | **Fourth Respondent** |

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|---|---|
| **MAGOLEGO MOSHIANE JULIA** | **Fifth Respondent** |
| **MAGOLEGO DONALD HLANUDI** | **Sixth Respondent** |
| **MAGOLEGO SERVICE MOTUBATSE** | **Seventh Respondent** |
| **MADUANE MOTLALECHEGO SHARDRACK** | **Eighth Respondent** |
| **MOROTA MATSHEHLE SHARDRACK** | **Ninth Respondent** |
| **MOROTA TEBADI HENDRICK** | **Tenth Respondent** |
| **MOROTA MABORE JOHANNA** | **Eleventh Respondent** |

*In re:*

***In the matter between:***

| | |
|---|---|
| **MAGOLEGO KGOLA KLAAS** | **First Applicant** |
| **MASHILO MAKWESHE LUCAS** | **Second Applicant** |
| **MAGOLEGO MAPONYA EDWARD** | **Third Applicant** |
| **MAGOLEGO BOKGOBELO ELLIOT** | **Fourth Applicant** |
| **MAGOLEGO MOSHIANE JULIA** | **Fifth Applicant** |
| **MAGOLEGO DONALD HLANUDI** | **Sixth Applicant** |
| **MAGOLEGO SERVICE MOTUBATSE** | **Seventh Applicant** |
| **MADUANE MOTLALECHEGO SHARDRACK** | **Eighth Applicant** |
| **MOROTA MATSHEHLE SHARDRACK** | **Ninth Applicant** |
| **MOROTA TEBADI HENDRICK** | **Tenth Applicant** |
| **MOROTA MABORE JOHANNA** | **Eleventh Applicant** |

and

| | |
|---|---|
| **MMIDI WILLIAM MAGOLEGO N.O** | **First Respondent** |
| **CHIDI JOHN MASHILO N.O** | **Second Respondent** |
| **SELETANE PHILEMON MOKOBAKA N.O** | **Third Respondent** |
| **LEHWELELE GEOFFREY MAGOLEGO N.O** | **Fourth Respondent** |
| **MADIETE EUNICE MOROTA N.O** | **Fifth Respondent** |

**LETSEPE JOYCE SELOANE N.O** **Sixth Respondent**

**MPHELA MAMASELE DINA N.O** **Seventh Respondent**

**HAMANE RALPH LEKGEU N.O** **Eighth Respondent**

**MABULANYANE NEMIA MAGOLEGO N.O** **Ninth Respondent**

**MASTER OF THE HIGH COURT** **Tenth Respondent**

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**JUDGEMENT**

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**GAISA AJ**

**INTRODUCTION**

[1] This is an application under Rule 30(1) of the Uniform Rules of Court to set aside two Rule 7(1) notices issued by the respondents (who are the applicants in the main application) on 13 February 2023. The applicants contend that the Rule 7(1) notices are irregular and should be set aside.

[2] The matter arises in the context of ongoing litigation involving the Ditamaga Trust. The main application concerns issues of accountability and proper governance of the trust. As trust beneficiaries, the respondents seek relief against the applicants in their capacity as trustees.

[3] Two separate but identical Rule 7(1) notices were issued - one relating to the main application and another to a Rule 47 application for security for costs. The notices dispute the authority of the applicants (as trustees) to act on behalf of the Ditamaga Trust and require the applicants' attorneys to satisfy the court of their authority to act.

[4] **<u>The Rule 7(1) Notices</u>**

4.1. The relevant portions of the Rule 7(1) notices state:

> *"Take notice that the applicants dispute the authority of the respondents to act on behalf of the Ditamaga Trust and requires that the said attorneys satisfy the court that they are authorised to act in accordance with the provisions of rule 7(1) read with rule 7(4)."*

4.2. The applicants raise three main grounds of irregularity:

4.3. The Ditamaga Trust is not cited as a party in the main application, so its authority cannot be disputed.

4.4. The notice improperly requires the attorneys, rather than the trustees themselves, to satisfy the court of their authority.

4.5. The notice was served late, outside the 10-day period prescribed by Rule 7(1).

## ANALYSIS

### [5] Citing of the Trust

5.1 The applicants argue that because the Ditamaga Trust is not formally cited as a party, its authority cannot be disputed via Rule 7(1). This argument is without merit.

5.2 It is trite that a trust does not have a separate legal personality and cannot sue or be sued in its own name. The proper parties to cite are the trustees in their official capacity. That is precisely what has been done here - the applicants are cited as trustees of the Ditamaga Trust.

5.3 The trust is effectively before the court by citing the trustees in their official capacity. There is no requirement to cite "The Ditamaga Trust" as a party separately. The trustees represent and act on behalf of the trust, and their authority to do so can be validly challenged under Rule 7(1).

5.4 Moreover, the Rule 7(1) notice does not purport to challenge the trust's authority but rather the trustees' authority to act on behalf of the trust. This is an entirely proper use of Rule 7(1).

5.5 I, therefore, find no irregularity on this ground.

[6] **Requiring Attorneys to Satisfy the Court**

6.1 The applicants next contend that it is irregular to require the attorneys, rather than the trustees themselves, to satisfy the court of their authority.

6.2 This argument misreads the Rule 7(1) notice. The notice disputes the trustees' authority to act for the trust, but then requires the attorneys to satisfy the court of their authority to act. This is consistent with Rule 7(1) read with Rule 7(4).

6.3 Rule 7(1) allows a party to dispute "*the authority of anyone acting on behalf of a party*". The trustees are acting on behalf of the trust. Their authority to do so is what is being disputed.

6.4 Rule 7(4) then provides that where authority is disputed, "the attorney or agent" whose authority is disputed shall satisfy the court of their authority to act. The attorneys are the agents acting on instructions from the trustees. It is, therefore, proper to require the attorneys to satisfy the court.

6.5 The respondents are ultimately seeking proof that the trustees properly resolved to oppose the main application and instruct attorneys in accordance with the trust deed. The attorneys would need to produce such proof to satisfy the court of their authority to act.

6.6 There is nothing irregular about framing the Rule 7(1) notice in this manner. It gives effect to both the letter and spirit of Rules 7(1) and 7(4).

6.7 Here is the principle: the courts should not countenance technical objections to less-than-perfect procedural steps where there is substantial compliance with the rules and no prejudice. This principle aligns with the overarching objective of the rules of court, which is to facilitate the resolution of the real issues in dispute.

6.8 In applying this principle to the present case, even if the wording of the notices, as the applicants would want this court to believe, was faulty, the substance of what is being sought - namely, proof of the trustees' authority to act following the trust deed - is apparent. Absent any demonstrable prejudice to the applicants, it would not serve the interests of justice to set aside these notices purely on such technical grounds.

6.9 The court notes that if the trustees have indeed acted in accordance with the trust deed, providing the requested documentation should be straightforward. Transparency in the administration of trusts is crucial, particularly where the interests of beneficiaries are concerned.

6.10 The court encourages open and forthright disclosure of relevant information to resolve disputes efficiently and maintain the integrity of trust administration.

## [7] **Lateness of the Notice**

7.1 The final ground of irregularity is that the Rule 7(1) notices were served late, outside the 10-day period prescribed by Rule 7(1).

7.2 Rule 7(1) requires the notice to be served within 10 days after it has come to the notice of a party that someone is acting on behalf of another party. The applicants argue that the respondents became aware on 26 January 2023 when the answering affidavit was served. The notices were only served on 13 February 2023, outside the 10-day period.

7.3 Even accepting the applicants' version of when the respondents became aware, the notices were at most 4 days late (excluding the intervening weekend). This is a relatively minor delay.

7.4 More importantly, Rule 7(1) expressly allows for late filing of the notice "*with the leave of the court on good cause shown at any time before judgment*". The court, therefore, has the discretion to condone late filing.

7.5 In considering whether to exercise this discretion, the following factors are relevant:

7.5.1 The delay was short;

7.5.2 There is no prejudice to the applicants;

7.5.3 The issue raised - whether the trustees properly resolved to oppose the main application - goes to the heart of the dispute and is of fundamental importance;

7.5.4 Refusing the notice would elevate form over substance and potentially allow the main application to proceed without clarity on a crucial issue of authority;

7.5.5 The respondents are beneficiaries of the trust seeking accountability, which is in the interests of justice;

7.5.6 There are no other bars to the respondents pursuing the Rule 7 challenge.

7.6 Weighing all these factors, I am satisfied that it is in the interests of justice to condone the short delay and allow the Rule 7(1) notices to stand. The applicants have not shown any prejudice from the brief delay. In contrast, there would be potential prejudice to the respondents and the administration of justice if the notices were set aside on this technical ground.

7.7 The applicant's argument is purely being over-technical and not constructive. Considering that no question of prejudice to the applicants has arisen, Schreiner JA reasoned in ***Trans-Africa Insurance Co. Ltd v Maluleka***[1] that, "…*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 decisions of cases on their real merits.*"

7.8 I therefore find that the late filing does not render the notices irregular, as the court's discretion to condone should be exercised in favour of the respondents.

[1] 1956 (2) SA 273 (AD)

## CONCLUSION ON IRREGULARITY

[8] For the reasons above, I find that none of the grounds advanced by the applicants establish that the Rule 7(1) notices are irregular or improper. The notices are valid and will stand.

[9] Even if I had found any technical irregularity, I would have exercised my discretion under Rule 30(3) to refuse to set the notices aside. The issues raised are important for the proper determination of the main application. Setting aside the notices would elevate form over substance and potentially allow the litigation to proceed without clarity on the fundamental question of the trustees' authority. That would not be in the interests of justice.

## OPENNESS AND TRANSPARENCY IN TRUST MATTERS

[10] Given that this matter involves a community trust, the court is mindful of the broader implications of this dispute. The Ditamaga Trust was established to benefit a community. The efficient and transparent administration of such trusts is crucial not only for the immediate beneficiaries but also for the wider community whose interests the trust is meant to serve.

[11] The court, therefore, encourages the parties to seek amicable resolution of their disputes where possible and to prioritise the efficient administration of the trust. While the court will adjudicate the legal issues before it, the parties are reminded of their broader responsibilities to the community.

[12] Trustees should be transparent in their dealings and mindful of their fiduciary duties. While beneficiaries are entitled to hold trustees accountable, they should exercise their rights in a manner that does not unduly hinder the trust's operations. The ultimate goal, which all parties should work towards, is to ensure that the trust fulfils its purpose of benefiting the community it was established to serve.

**<u>COSTS</u>**

[13] The applicants have been unsuccessful in this application. The general principle is that costs follow the result. However, the respondents have argued for punitive costs on an attorney and client scale against the opposing respondents (applicants in this Rule 30 application) personally.

[14] In considering this request, I have considered the following factors:

35.1 The respondents contend that there was no irregular step warranting the Rule 30 applications.

35.2 The respondents argue the opposing respondents could not demonstrate any prejudice resulting from the alleged irregularity.

35.3 There is a suggestion that the Rule 30 applications may have been a delaying tactic rather than a genuine procedural objection.

35.4 The respondents assert that, as trustees, the opposing respondents should have known that a resolution was needed to show they were acting according to the trust deed.

35.5 The respondents contend that ordering costs against the trustees in their official capacities would effectively result in the beneficiaries paying themselves, as trust assets would be used.

[15] The court has a wide discretion in awarding costs. While the general rule is that costs follow the result, the court may depart from this principle where the interests of justice require it.

[16] In considering whether to award punitive costs, the court must be satisfied that the conduct of the party against whom such an order is sought was vexatious, reckless, or amounted to an abuse of process.

[17] After carefully considering the submissions and the overall conduct of the litigation, I am not persuaded that the threshold for a punitive costs order has been met in this case.

[18] While the Rule 30 applications were ultimately unsuccessful, I do not find that they were brought in bad faith or for an improper purpose. The issues raised, particularly regarding the formulation of the Rule 7 notices, were not frivolous and may have required judicial determination.

[19] However, I am mindful of the concerns raised regarding using trust assets for litigation costs. In balancing the various interests at stake, including the need for accountability in trust administration and the rights of beneficiaries, I make the following order:

**<u>ORDER</u>**

[20] As a result, I make the following order:

20.1. The application in terms of Rule 30(1) to set aside the Rule 7(1) notices dated 13 February 2023 is dismissed.

20.2. The opposing respondents (the six applicants in the Rule 30 applications) are ordered to pay the costs of the Rule 30 applications on a party-to-party scale.

20.3. The opposing respondents are to pay these costs in their personal capacities, jointly and severally, with any one paying and the others absolved.

20.4. The opposing respondents are prohibited from using trust assets to satisfy this cost order.

[redacted]

**GAISA AJ**
**JUDGE OF THE HIGH COURT, POLOKWANE**
**LIMPOPO DIVISION**

**DATE HEARD: 2 May 2024**
**DATE DELIVERED: 26 July 2024**



**<u>APPEARANCES</u>**

**For the Applicants (Respondents in the main application): Adv. Mokwena**

**INSTRUCTED BY: Gilbert Motedi Attorneys Inc.**

c/o **Matotola Tseleng Attorneys**
5 Bekker Street, Polokwane

**For the Respondents (Applicants in the main application): Adv. Green**

**INSTRUCTED BY:** **DDKK Attorneys**
19 Watermelon Street Polokwane