



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

18/4/24.
DATE


SIGNATURE

Case No: 632/2022

In the matter between:

TRANSASIA 1 (PTY) LTD

Applicant

and

NHLANHLENI COMMUNITY PROPERTY TRUST

Respondent

IN RE

NHLANHLENI COMMUNITY PROPERTY TRUST

Applicant

and

MINISTER OF MINERAL RESOURCES & ENERGY

First Respondent

**DIRECTOR-GENERAL: DEPARTMENT OF MINERAL
RESOURCES**

Second Respondent

**REGIONAL MANAGER OF THE DEPARTMENT OF
MINERAL RESOURCES: KZN REGIONAL OFFICE**

Third Respondent

UMSOBOMVU COAL MINING (PTY) LTD

Fourth Respondent

TRANSASIA 1 (PTY) LTD

Fifth Respondent

11 MILES INVESTMENTS (PTY) LTD

Sixth Respondent

JUDGMENT

DM LEATHERN, AJ:

[1] This is an application wherein Transasia 1 (Pty) Ltd as applicant seeks an order in the following terms:-

“1. It is declared that:

1.1 the review application brought under the above case number was not duly authorised by the trustees of the applicant and is a nullity;

1.2 Kanyile MB Attorneys Inc does not have authority to represent the applicant.

2 Mr GJ Kunene and Kanyile MB Attorneys Inc are ordered to pay the costs of the review application jointly and severally *de bonis propriis*.”

[2] The applicant in this interlocutory application was the fifth respondent in an application launched by the present respondent, Nhlahleni Community Property Trust against the Minister of Mineral Resources & Energy & Others to review and set aside certain decisions relating to the granting of mineral rights over certain farms owned by it and ancillary relief, the detail whereof is not relevant to this decision.

[3] In the founding papers, the parties to this interlocutory application were referred to as “Transasia 1” and “The Community Trust” respectively and for ease of reading and to avoid confusion, I adopt the same nomenclature.

[4] The present application commenced with a notice in terms of Rule 7(1) wherein Transasia 1 stated that it “disputes the authority of Khanyile MB Attorneys Inc, Mr Brian Khanyile and SE Kanoyka Attorneys’ right (*sic*) to act on behalf of the applicant (“Nhlahleni Community Property Trust”).

[5] In such notice, certain documentation was requested including:

“1. copies of the necessary power of attorney appointing the above mentioned two persons as your practitioner’s) (*sic*) of record;

2. copies of any such resolutions authorising the granting of the abovementioned power of attorney and such authorisation authorising the signatory to the power of attorney to sign the power of attorney on behalf of the applicant;

3. copies of any such minutes of such meeting held by the applicant resolving as stated in 2 above and resolving in favour of the instituting of this application; and,

4. copies of all documents confirming compliance with the trust deed in duly appointing the abovementioned persons and the institution of this application.”

[6] In response to such notice, the Community Trust filed a notice to which was attached the power of attorney “the power of attorney in terms of Rule 7 of the Uniform Rules” and stated that the resolution of the Community Property Trust was annexed as annexure “FA1” to the founding affidavit and the letter of authority to the trustees and the trust deed as annexure “FA2” to the founding affidavit. The power of attorney annexed to the aforesaid notice signed by one Lucas Melusi Buthelezi purportedly in his capacity as the General-Secretary of the Nhlahleni Community Property Trust and “nominated constituted and appointed Mr Brian Kanyile in his capacity as the director of Kanyile MB Attorneys Inc be my attorney delegated with full power and authority to act for the Nhlahleni Community Property Trust in respect of the review application against the Minister of Mineral Resources, Transasia and Umsobomvu Coal”

[7] In reaction to the aforesaid notice, Transasia 1 served a notice purporting to be in terms of Rule 30 and / or Rule 30A of the Uniform Rules of Court stating that The Community Trust had failed to properly respond to the Fifth Respondent's notice in terms of Rule 7 and as such it constituted an irregular step or non- compliance with the Rules as contemplated in Rule 30 and / or Rule 30A in that the applicant had failed to provide copies of:-

[7.1] the necessary power of attorney appointing the abovementioned persons as the legal practitioners on record from current trustees of the applicant;

[7.2] resolutions authorising the granting of the abovementioned power of attorney and such authorisation authorising the signatory to the power of attorney to sign same on behalf of the applicant;

[7.3] minutes of any meetings held by the applicant resolving to grant the power of attorney and authorising the signatory referred to in sub-paragraph 2 above and resolving in favour of the institution of the application; and,

[7.4] all documents confirming compliance with the trust deed in duly appointing the abovementioned persons and the institution of the application.

[8] There was no reply to the notice in terms of Rule 30 / 30A.

[9] In the founding affidavit the point is made with reference to the trust deed of The Community Trust that clause 16.4 thereof provides that “the *quorum* necessary for the transaction of any business by the board of Trustees shall be (8) Trustees and it is stated that 4 Trustees would have to be authorised by 4 Trustees, conceding that the reference to the 8 Trustees is a typing error.

[10] It is further pointed out that the purported power of attorney is signed by Mr Lucas Melusi Buthelezi as General Secretary of the Community Trust and that the trust deed makes no provision for the appointment of such General Secretary thus Mr Buthelezi has no authority to act on behalf of the trust. On this basis it is submitted that Khanyile Attorney did not demonstrate that the community trust in fact authorised the review application.

[11] In opposition to this application an opposing affidavit by Godfrey Jabulani Kunene was filed wherein he stated that he was duly authorised to oppose the interlocutory application by Transasia 1 on behalf of The Community Trust and attached confirmatory affidavits filed by trustees of The Community Trust.

[12] The basis of opposition was summarised in paragraph 9.3 of the opposing affidavit that being:-

[12.1] the Rule 7(1) ought to be brought within 10 days of a party becoming aware of the person acting on behalf of another and *in casu* this did not take place;

[12.2] the review application was launched in January 2022 and the Rule 7(1) notice was only served on the 23rd of May 2022;

[12.3] the attorneys had in fact provided Transasia 1 with a power of attorney; and,

[12.4] the challenge to the Trustees' authority was merely a ploy to delay the prosecution of the review proceedings.

[13] Further defences were raised in the opposing affidavit namely:-

[13.1] that The Community Trust has a public interest standing under Section 38 of the Constitution to bring the review application;

[13.2] that Transasia 1 has failed to prove that the attorney lacked authority to bring the review application on behalf of the Community Property Trust;

[13.3] Transasia 1 failed to make out a case for a *de bonis* cost order;

[13.4] Transasia 1 failed to make out a case for declaratory relief.

[14] In dealing with the application, the respondent at times and in particular in regard to the public interest points made by it lost sight of the fact that this application deals simply with the authority of the attorney to launch the application and act therein and not with the *locus standi* which The Community Trust may have.

[15] In the answering affidavit The Community Trust relied furthermore for its authority on the following documents:-

[15.1] the resolution signed by the Trustees (annexure “FA1”);

[15.2] the deed of trust and letter of authority (annexure “FA2”);

[15.3] the minutes of the public meeting held with Transasia 1, the Regional Manager DMR, KZN and the Community Trust enlists of attendance (annexure “FA9”) and annexure FA13” which is dated the 15th of December 2015 time 14h30 and appears to be a minute of a meeting between the Community Trust, Umsobomvu and Transasia 1 and the DMR held at Sunshine Farm. The author of such minute does not appear therefrom but attached is an attendance list to what appears to be the written version of such minute.

[16] There were affidavits filed regarding the appointment by the Master of different Trustees during January 2022 by the Land Claims Court. It was however accepted that the matter would be argued on the basis of the initial affidavits filed, apparently accepting that once an application is authorised, it remains authorised. The attack on the authority related to the prior appointment of Trustees and their authorisation.

[17] I refer above to the history of this matter and emphasise that the last of the affidavits filed in regard to this dispute regarding authority was filed in November 2023, shortly before the matter was to be heard. Accordingly, there has been a flurry of affidavits and a delay in the determination of the true disputes between the parties for a substantial period of time. This was all commenced outside of the time periods prescribed by the Rules and the

first question that needs to be determined is whether the entire procedure should be condoned.

CONDONATION:

[18] Transasia 1 submits on the authority of *Lancaster 101 RF (Pty) Ltd v Steinhoff International Holdings NV*¹ that a litigant is entitled despite the 10 days limit contained in Rule 7(1) to challenge a party's authority at any stage before judgment. In that matter an action had been instituted in April 2019 and an application in September 2019 and the Rule 17 notices were only served in February 2021, almost two years later. It appears however from *inter alia* paragraphs 19 and 20 of the judgment that there was an application for condonation for the late delivery of the notice in terms of Rule 7. Accordingly, Steinhoff gave an explanation as to the delay in serving such notice.

[19] In the present application there is no application for condonation for failure to comply with the time periods prescribed in Rule 7. The well-known requirements for condonation are not even addressed in the founding affidavit in the present application. The Community Trust has in paragraph 9 of its answering affidavit and in particular paragraph 9.3 taken the point that Rule 7(1) requires that the notice should be filed within 10 days of a party becoming aware of the person acting on behalf of another. This challenge was dealt with in paragraph 2 of the replying affidavit where the deponent simply denies that the Rule 7 notice was irregular and states that it was

¹ [2021] 4 All SA 810 (WCC) paragraph [45] at 821

“given forthwith after it came to the Notice of Transasia 1’s legal representatives that the Review Application was not properly authorised”. The deponent goes further to state that as The Community Trust did not object that the Rule 7 notice was filed out of time it cannot now complain that the notice ought to have been given earlier and that Transasia 1 has shown good cause to challenge the authority of Kanyile MB Attorneys and Mr Godfrey Jabulani Kunene. Surprisingly this did not elicit an application for condonation, belated as this may have been.

[20] There is nothing on the papers to indicate how or when the legal representatives came to know of the alleged lack of authority. In attempting to ascertain whether there is any support for these bald allegations it must be noted that:-

[20.1] notice of intention to oppose was given on behalf of Transasia 1 by way of a notice dated the 9th of February 2022 the first set of attorneys were substituted by way of a notice dated the 23rd of March 2022;

[20.2] a notice in terms of Rule 47 calling for security for costs was issued on the 16th of May 2022 and this was followed by the notice in terms of Rule 7(1) on the 23rd of May 2022.

[21] Rule 7(1) requires that you challenge the authority of a person acting on behalf of another party within ten days after it has come to your notice that such person is so acting or with the leave of the Court on good cause shown at any time before judgment. There are good reasons for this.

The time period prescribed by the Rules calls upon the legal representatives or the parties themselves once they know that a particular person is acting to investigate the authority of that person and, should they have reason to suspect that the person is not properly authorised, follow the procedures set out in Rule 7. The Rule specifically calls upon the party to do so within 10 days of the party becoming aware of the identity of the person so acting, not when it should per chance decide or become aware that that person is not or may not be authorised. It should be embarked upon when deciding to defend an action or oppose an application.

[22] The Lancaster matter referred to by the applicant refers to a full bench decision of *Janse van Rensburg v Obiang*² where the full Court through Binns-Ward J held that a delay in challenging authority in terms of the sub-Rule is “inimical to the efficient administration of justice” and that such challenges to the authority of an attorney to represent a litigant “if they are to be raised at all, should be raised promptly at the earliest opportunity”. It is for this reason that a challenge must be made within the ten day period save where the party raising the challenge obtains the leave of the Court to do so outside of this time period on good cause shown.

[23] In any event, if it were to be submitted that condonation should be granted in the interest of justice without an application for condonation or a proper explanation this Court would not be disposed to do so where:-

[23.1] this application was instituted as far back as May 2022;

² (unreported), WCC case number A3380/2018 dated 10 May 2019 – a decision of the full Court

[23.2] the main application has to do with mining rights over property which belongs to The Community Trust; and,

[23.3] a determination of the true issues between the parties is being delayed by interlocutory skirmishes.

[24] Condonation is not simply there for the asking nor should a Court be quick to grant condonation under circumstances such as these. Non-compliance with the time periods prescribed in the Rules and the Rules themselves lead to inordinate delays, unnecessary litigation and interlocutory applications which clog the court rolls.

[25] Under the circumstances condonation is refused, the point raised on behalf of the Community Trust in regard to the failure to comply with the provisions of Rule 7 is upheld and the application falls to be dismissed. The general rule that costs should follow the event applies.

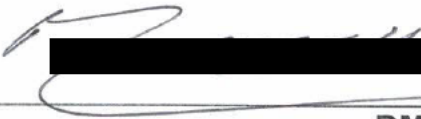
[26] In the answering affidavit, the respondent indicated that an order would be sought dismissing the application and instructing "Mineral Resources" to file the Rule 53 record within five days after dismissal of the application. Further cost orders relating to *inter alia* the Rule 47 application were also requested. These are not issues which were to be determined in the present application.

[27] In the heads of argument, the respondent requested the costs of two counsel. This was not specifically opposed. The applicant employed senior counsel. Under the circumstances the granting of the costs of two counsel is appropriate and, insofar as it is necessary, bearing in mind the

extent of the matter, the issues at stake and the importance thereof to the applicant in the main application it is appropriate that the costs of the leading counsel be determined on scale C.

[28] The following award is made:

1. The interlocutory application launched by Transasia 1 (Pty) Ltd against Nhlahleni Community Property Trust as respondent in terms of its notice of motion dated 23 August 2022 is dismissed.
2. The applicant in the interlocutory application is to pay the costs of such application, including the costs of two counsel, the lead counsel to be taxed on scale C.


[REDACTED]
DM LEATHERN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 18th of April 2024.