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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2019-21916

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

14 July 2025

In the matter between:

MEYERSDAL NATURE ESTATE HOMEOWNERS ASSOCIATION

Applicant

(Registration Number: 2005/00957/08)

And

FHUMULANI MAKHOMISANI N.O.

First Respondent

(ID No.: 7[...])

KHATHUTSHELO MAKHOMISANI N.O.

Second Respondent

(ID No.: 7[...])

[in their capacities as trustees of Makhoms Family Trust 126/2010]

JUDGMENT

NOKO J

Introduction

[1] This is an application for the confirmation of the *rule nisi* granted in terms of which Makoms Trust (IT 126/2010) (*“the Makoms Trust/ Trust”*)¹ represented by the first² and second respondents, was provisionally sequestrated. The applicant, Meyersdal Nature Estate Homeowners Association (“Estate”) obtained a *rule nisi* on 27 November 2019, which was extended on several occasions over a period of time and once lapsed, then re-instated on 22 August 2024, returnable on 3 February 2025, the date on which the application served before me. The second respondent opposes the application.

[2] The applicant further instituted an application seeking an order dispensing with service of the application personally on the respondents in terms of section 9(4A) (a)(iv) of the Insolvency Act³(*“the Act”*) as personal service could not be effected.

Background.

[3] Makoms Trust purchased a stand in the estate, *to wit*, Erf 749 Meyersdal Nature Estate Ext 14, held under Deed of Transfer T142993/2011 (*“property”*). The Trust failed to keep up with payments for the levies and penalties and was in arrears of R 77 000.00 in 2016. The applicant instituted proceedings against both respondents⁴ and obtained judgment of R 77 000.00. Makoms Trust failed to satisfy the judgment, and the applicant launched an application for sequestration

¹ Noting that Trust has no independent legal standing the word Trust in this judgment is used loosely instead of referring to specific trustees.

² As it would appear elsewhere in the judgment, the first respondent was not a trustee at the time when the judgment was granted.

³ 24 of 1936.

⁴ The applicant attached Letters of Authority dated 22 January 2010 which reflects both first and second Respondents as the Trustees.

of the Trust in terms of the Insolvency Act on 21 June 2019. The applicant avers despite settlement negotiations and promises to pay made by the second respondent no payments were effected. A provisional order was granted on 19 November 2019 calling upon the Trust to appear on the return day to show cause why the order should not be made final. The return date was on 4 February 2020 which was extended to 20 May 2020.

[4] The Trust had meanwhile paid an amount of R 413 838.30 on 20 January 2020, which was the total amount due to the applicant as at that date. The applicant's statement⁵ indicated a zero balance after that payment. Notwithstanding payment of the total balance, the Trust fell into arrears and was owing the amount of R 495 696.68, which included a penalty of R 5000.00 per month for failing to complete its building construction on the property within the prescribed time.

[5] The second respondent delivered his answering affidavit dated 24 October 2023, disputing liability on the basis that the amount underlying the judgment was settled, and further that the applicant is abusing the sequestration regulatory regime. The applicant, in turn, delivered the replying affidavit on 8 November 2023.

[6] The second respondent subsequently served notice in terms of Rule 6(5)(b)(iii) of the Uniform Rules of Court on 23 April 2024, setting out a point of law. The second respondent states in the notice that the application is bound be dismissed as the applicant cited and obtained judgment against the incorrect parties since the trustees as at date of the order included lyonda Maphuthi Makhomisani and Liebenberg Malan Consulting (Pty) Ltd represented by Linel Malan who were appointed on 16 November 2018 and not the first respondent. The Letters of Authority was attached to this effect.

⁵ CL014-15

[7] The applicant, in turn and with the object of remedying the above defect and having established from the Office of the Master of the High Court as per letters of Authority issued on 16 June 2023 that the only trustees were second respondent and Lyonda Maphuthi Makhomisanani served notice of substitution on 4 July 2024 in terms of rule 15(2) of the Uniform Rules of Court seeking to substitute Fhumulani Makhomisanani with Lyonda Maphuthi Makhomisanani.

Submissions by the parties.

Point of law.

[8] Counsel for the second respondent contended that the *rule nisi* should not be confirmed since the applicant cited a wrong party as a representative of the Trust. To this end, counsel contended that the application should be construed as a nullity.

[9] The applicant, on the other hand, contended that the second respondent was not co-operative and had failed even to provide the address of the first applicant. Further that, out of its efforts, it established from the office of the Master of the High Court that the Fhumulani Makhomisanani is no longer a trustee. Having established this fact, the applicant invoked the provisions of rule 15(2) and accordingly joined Lyonda Makhomisanani as a substitute for Fhumulani Makhomisanani. The said Lyonda Makhomisanani, counsel, argued, then substituted Fhumulani once the said notice was served on the latter.

Issues

[10] The issues for determination are whether the second respondent's point of law is sustained and if not, whether the applicant has made out a case to confirm the *rule nisi*.

Legal principles and analysis

[11] Rule 15 of the Uniform Rules of Court prescribes the process to be followed if a party seeks to substitute one party with the other. The applicant *in casu* sought to substitute Fhumulani with Lyanda through service of the Rule 15(2) notice. Rule 15(2) provides that:

“Whenever by reason of an event referred to in subrule (1) it becomes necessary or proper to introduce a further person as a party in such proceedings (whether in addition to or in substitution for the party to whom such proceedings relate) any party thereto may forthwith by notice to such further person, to every other party and to the registrar, add or substitute such further person as a party thereto, and subject to any order made under subrule (4) hereof, such proceedings shall thereupon continue in respect of the person thus added or substituted as if he had been a party from the commencement thereof and all steps validly taken before such addition or substitution shall continue of full force and effect: Provided that save with the leave of court granted on such terms (as to adjournment or otherwise) as it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed; and provided further, that the copy of the notice served on any person joined thereby as a party to the proceedings shall (unless such party is represented by an attorney who is already in possession thereof), be accompanied in application proceedings by copies of all notices, affidavits and material documents previously delivered, and trial matters by copies of all pleadings and the documents already filed of record, such notice, rather than a notice to the Registrar, shall be served by the Sheriff.” (underlining added).

[12] On a closer scrutiny of the applicant’s notice, it is beset by a few insurmountable hurdles. First, the return of service submitted as evidence to prove that Lyonda Makhomisanani was served instead refers to service on Fhumulani Makhomisanani, and not Lyonda Makhomisanani, who is identified as a

third party on the return of service. The said notice was not personally served and instead was affixed at the main gate of the chosen *domicilium citandi et executandi* of Fhumulani Makhomisanani. The sheriff remarked on the return that "... the property is half building premises vacant". (sic).⁶

[13] Secondly, substitution after the commencement of the hearing should be preceded by leave being obtained from the court. The applicant should have launched an application to court for an order to join Lyonda Makhomisanani. It is stated in Erasmus⁷ in the commentary under rule 15(2) of the Uniform Rules of Court that "... in view of the proviso to the subrule, application to court will be necessary where it is desired to substitute a party after judgment has been given." This was also confirmed by the SCA in *Cilliers*⁸ that the first proviso to Rule 15(2) requires a party to obtain leave of court where the proceedings had commencement. Further, that "... absent an application to court for the substitution ... the purported substitution is irregular ...".⁹ The application to confirm the *rule nisi* is not preceded by a court order substituting Fhumulani Makhomisanani with Lyonda Makhomisanani.

[14] It is noted in passing that the applicant also brought into question the authority of the first respondent to act on behalf of the Trust. This also extended to the attorneys who purported to act for the respondents who were served with notice in terms of Rule 7 by the applicant. The applicant referred to *Rossiter NO*¹⁰ where the court held that one Trustee would not have authority or standing to act on behalf of the Trust unless the Trust Deed authorises the same alternatively, if there is a resolution to that effect by other trustees.¹¹

⁶ See sheriff's return attached to Applicant's Notice of substitution in terms of Rule 15(2) at CL015-11.

⁷ HJ "*Superior Court Practice*" at B1-119

⁸ *Cilliers NO and Others v Ellis and Another* (200/2016) [2017] ZASCA 13 (17 March 2017).

⁹ *Id* at para 25. See also *The Public Protector of South Africa v The Chairperson of the Section 194(1) Committee and Others* (627/2023) [2024] ZASCA 131 (1 October 2024 at para 22.

¹⁰ *Rossiter NO v Nedbank Limited* (AR 94/2019) [2020] ZAKZPHC 7(14 February 2020).

¹¹ Such authority may also impact on the settlement negotiations which were entered into on behalf of the Trust.

Conclusion

[15] Having failed to comply with the regulatory framework foreshadowed above, ergo *cadit questio*. Furthermore, any other issues raised by the applicant pale into insignificance and the *rule nisi* is therefore bound to be discharged.

Costs

[16] The respondent contended that the costs awarded should be on Scale C, including costs reserved on the basis that the applicant who weaponised "...a provisional sequestration order obtained where the Trust has not been properly joined to these proceedings...". I am not persuaded that the applicant was unreasonable in bringing the application, and or that the *lis* is complex to warrant costs at a higher scale.

Order

[17] In the premises I make the following order

1. The *rule nisi* is discharged.
2. The applicant is ordered to pay the costs on scale B including costs of counsel.

M V NOKO

Judge of the High Court.

DISCLAIMER: This judgment was handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file on Case Lines. The date for hand-down is deemed to be 14 July 2025.

Dates:

Hearing: 4 February 2025.

Judgment: 14 July 2025

Appearances:

For the Applicant:

Snijders JP, instructed by Mills &
Groenewald Attorneys.

For the Second Respondent:

Ayayee AE, instructed by Bonisisle Majavu
Inc.