

REPUBLIC OF SOUTH AFRICA



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

Case Number: 025607/2023

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED
- (4) Date: 02 SEPTEMBER 2025

SIGNATURE: _____

In the matter between:

METAL INDUSTRIES PROVIDENT FUND

Applicant

and

**JOHFREE CC T/A POWER INDUSTRIES ENGINEERING
(in Liquidation)**

First Respondent

JUDGMENT

NOBANDA AJ

Introduction

[1] The applicant is a Provident Fund, a pension fund in terms of section 4 of the Pension Funds Act 22 of 2008 (the Act), established in terms of the Metal Engineering Industries Bargaining Council (MEIBC), a bargaining council as defined by the Labour Relations Act 66 of 1995 (the LRA). The applicant has appointed the Metal Industries Benefit Funds Administrator (MIBFA) as its section 13B of the Act administrator.

[2] The applicant seeks an order against the second respondent in the following terms:

“1 *Directing the Second Respondent to provide the Applicant with the documents set out below within 30 calendar days of the date of the Court Order:*

1.1 *Outstanding provident fund contribution schedules, in respect of provident fund contributions for its employees*

which is payable to the Applicant, as contemplated in Section 13A(2) of the Act and Section 3.2 of the FSCA Conduct Standard 1 of 2022 for the periods of: October 2011 to December 2012 and January 2020 to November 2022;

- 2 Within one calendar month of the Applicant having determined the outstanding provident fund contributions, payable by the Respondents based on the schedules, provided by the Respondents in terms of paragraph 1 above, directing the Respondents to pay:*

2.1 all outstanding provident fund contributions, together with prescribed interest thereon, to the Applicant.

- 3 Directing the Second Respondent to pay over the monies owing to the Applicant, as determined based on contribution schedules already submitted by the Respondents but not paid over, which amount has accrued to **R84 407.47 (Eight (sic) Four Thousand, Four Hundred and Seven Rand and Forty Seven Cents)**, which remains due, owing and payable to the Applicant.*

- 4 Directing the Second Respondent Payment (sic) of the amount outstanding, as determined based on estimated Late Payment interest, which amount has accrued to **R94 055.93 (Ninety Four Thousand, Fifty Five Rand and Ninety Three Cents)** which remains due, owing and payable to the Applicant.*

5 *Alternatively to paragraph 1, 2, 3 and 4 above, granting the Applicant leave to approach this Court on the same papers, as supplemented, to seek the relief set out in 1, 2, 3 and 4 above once the amounts payable by the Respondents have been quantified based on the returns, schedules and forms provided by the Respondents as per prayer 1, 2, 3 and 4 above.*

6 *Ordering the Second Respondent to pay the costs of this application at a scale as between Attorney and Own Client...”*

[3] No order is sought against the first respondent.

Background facts

[4] The first respondent is a close corporation and a participatory employer in the applicant. As such, it was obliged to comply with the applicant's registered rules as well as the provisions of section 13A read with regulation 33 of the Act. The first respondent is in voluntary liquidation. The second respondent was the sole member of the first respondent.

[5] The applicant avers that the first respondent failed to comply with the applicant's rules in making contributions and submitting contributions for its employees to the applicant as envisaged in section 13A of the Act for the periods October 2011 to December 2012 and January 2020 to November 2022.

[6] The first respondent was finally liquidated in 2022. Section 13A(8)(b) of the Act holds every member of a close corporation who controls or is regularly involved in the

management of the close cooperation's overall financial affairs personally liable for any debts arising from the non-compliance of the close corporation with section 13A read with regulation 33 of the Act, hence the claim against the second respondent.

[7] The second respondent raises several various points *in limine*, to wit:

- [7.1] Lack of authority;
- [7.2] Non joinder/Mis-joinder;
- [7.3] Jurisdiction; and
- [7.4] Prescription.

[8] I shall first deal with the issue of lack of authority as this will determine how to proceed with the application further.

Lack of authority

[9] The second respondent is challenging the deponent to the applicant's founding affidavit, one Mr. Naidoo's (Naidoo) authority to depose to this application on behalf of the applicant but to Engineering Industries Pension Fund's (EIPF) application. Moreover, the second respondent denies that the facts deposed to by Naidoo fall within his personal knowledge as stated since the applicant avers that MIBFA is its section 13B administrators. As such, since in terms of *inter alia*, the provisions of section 13B(5)(b), (c) and (d) of the Act, the administrator is required to administer the fund in a responsible manner, keep proper records and employ adequate trained staff to fulfill its obligations and supervise them, the records pertaining to contributions received or outstanding are therefore in the possession of the administrator and not the fund where Naidoo is located.

[10] In its replying affidavit, the applicant admits that the attached resolution, annexure 'LN1' in the founding affidavit was not for the applicant but EIPF's. The applicant explains that it was an oversight on its part and annexes what it purports to be the correct resolution as annexure 'RA1'.

[11] During argument, Counsel for the second respondent, Mr. Janse van Rensburg contended that the resolution 'RA1' is still not authorising Naidoo to institute this application on behalf of the applicant but another person, one O'Girf. In response, the applicant's Counsel Mr. Hewitt argued that it was not open for the second respondent to raise this objection on affidavit but was required to do so in terms of rule 7(1) of the Uniform Rules. Mr. Hewitt relies on the Supreme Court of Appeal decision in ***Unlawful Occupiers, School Site v City of Johannesburg***¹ (*School site*) where Brand JA, after commenting on Flemming DJP's *dicta* in ***Eskom***² that the remedy of the respondent who wishes to challenge the authority of the person allegedly acting on behalf of the purported applicant is provided in rule 7(1) of the uniform rules, concluded that since that remedy is now available, a party wishing to challenge that authority should not do as it was previously done, that is, directed at the adequacy of the averments in the applicant's papers by way an affidavit but utilise the provisions of rule 7(1).

Applicable law/legislation

[12] Rule 7(1) provides:

"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 the party may, within 10 days after it has come to the notice of a party that

¹ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at [14] – [16]

² *Eskom v Soweto City Council* 1992 (2) SA 703 (W)

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.”

[13] Prior to the amendment of rule 7, rule 7(1) merely stated that ‘a *power of attorney to act need not be filed.*’ The authors *Herbstein & Van Winsen*³ submit that the intention of the amendment was merely to change the rule from one requiring an attorney to file a power of attorney every time a summons is issued to one not requiring this and substituting a procedure for challenging the authority of an attorney to act. The application of the rule now includes both actions and applications. It is this replacement of the word ‘attorney’ to ‘anyone’ that has caused much controversy and confusion in our courts.

[14] It all began with the *dicta* by Flemming DJP in *Eskom (supra)* where the applicant was challenging the authority of the deponent to the respondent’s (a juristic person) interlocutory application. Flemming DJP held *inter alia* that:

“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, indication necessarily is that of the applicant. There is no need that any other person, whether he be a witness or

³ Herbstein & Van Winsen: *Civil Practice of the Superior Courts of South Africa* vol 1 6ed

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...

If the applicant had qualms about whether the “interlocutory application” is authorised by the respondent, that authority had to be challenged on the level of whether [the attorney] had 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.”⁴

[15] This last part of Flemming DJP’s *dicta* was referred to with approval by the Supreme Court of Appeal in **Ganes**⁵ where Streicher JA commented thus “... Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided.”

[16] Flemming DJP’s *dicta* was reiterated by the Supreme Court of Appeal in *School Site (supra)*⁶ where Brand JA stated the following:

“[14]...The import of the judgment in Eskom is that the remedy of a respondent who wishes to challenge the authority of the person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court.

...

[16]... as Flemming DJP has said, now that the new rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt

⁴ At 705-706C

⁵ *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624J-625A

⁶ At [14]

the procedure followed by the appellants in this matter, i.e by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority.”

[17] Relying on this *dictum* by Brand JA, Gorven J, writing for the full court in *Umvoti*⁷ concluded that the only way to challenge the authority of the deponent purporting to represent a juristic person in the institution and/or defending the legal proceedings is by using rule 7(1) and not by affidavits. To that end, Gorven J held as follow:

“I am therefore of the view that the position has changed, since Watermeyer J set out the approach in the Merino Ko-operasie Bkp case. The position now is that, absent a specific challenge by way of rule 7(1), “the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant” is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used.”

[18] With the greatest of respect, I disagree with *Umvoti* in this regard in that it treats the different types of authorities as if they are the one and the same thing. As explained by the learned authors *Herbstein & Van Weinsen (supra)*⁸ there are three different types of authority namely:

[18.1] The authority of an attorney/legal practitioner to institute an action on behalf of a client;

⁷ ANC Umvoti Council Caucus and Others v Umvoti Municipality 2010 (3) SA 31 (KZP) at [28]

⁸ At p6-7

[18.2] the authority of the person or persons who instruct the legal practitioner to institute or defend proceedings on behalf of a juristic person; and

[18.3] The authority of a deponent to an affidavit to present evidence.

[19] The authority of the person or persons who instruct the legal practitioner to institute or defend proceedings on behalf of a juristic person is different from the authority of a deponent to an affidavit to present evidence on behalf of a juristic person even though in some instances, these authorities may overlap. The latter cannot exercise the authority of the former while the former can exercise the authority of the latter, which is usually the case with juristic persons. It is the former that is the most essential when dealing with juristic persons. As explained by Streicher JA in *Ganes (supra)*, it is not necessary to authorise a person to depose to an affidavit in motion proceedings. It is the institution of the proceedings and the prosecution thereof which must be authorised.⁹

[20] Juristic persons are governed by different laws from the laws that govern a natural person. A juristic or 'artificial' or 'fictitious' person cannot be a party to litigation in the absence of an authorising resolution. The courts require proper evidence of the existence of this authority in whatever form it takes.¹⁰ It is a basic principle of our law that a juristic or artificial or fictitious entity like the applicant cannot institute or defend any legal proceedings without human assistance and it obviously cannot physically appear in court. As such, it must be represented by a natural person.¹¹

[21] Hence, where a company or juristic person commences process by way of motion proceedings, it should appear that the person bringing the application on behalf of the juristic person is duly authorised by the juristic person to do so. As clarified by Krigler JA in *Louw (supra)*: 'Two questions arise: firstly, who has authority to bring or

⁹ At [19]

¹⁰ LAWSA 4(1) par 38; *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 352

¹¹ *Louw v WP Ko-operasie Bpk* 1991 (3) SA 593 (A) at 603

defend proceedings and, secondly, who may appear in court on the company's behalf'. As pointed out by the authors *Herbstein and Van Wiensen (supra)* these two aspects of authority are separate issues and must be dealt with separately.¹² Watermeyer J in *Mall (Cape) (supra)*, explains this distinction as follows:

*'There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example Lurie Brothers Ltd v Arcache, 1927 NPD 139, and the other cases mentioned in Herbstein & Van Winsen, Civil Practice of the Superior Court in South Africa at pp. 37, 38). This seems to me to be a salutary rule and one which should also apply to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purported to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution, but I do not consider that the form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant [juristic person] which is litigating and not some unauthorised person on its behalf.'¹³ (**emphasis provided**)*

[22] Although *Mall (Cape)* was decided long before the amendment to rule 7, its principles continue to apply. Authors *Herbstein & Van Winsen (supra)* indicate that these principles were followed and applied in motion proceedings for almost 50 years

¹² At p6-2

¹³ At 352

until *School Site* as indicated above.¹⁴ Prior to *School Site*, this *dicta*, amongst others, was referred to with approval, even after the amendment, by the erstwhile Appellate Division in ***Tattersall***.¹⁵ It bears to mention that *School Site* never mentioned or referred to either one of these cases. By implication, it means the principles enunciated in *Mall (Cape)* referred to with approval in *Tattersall* are still applicable.¹⁶

[23] In the light thereof, it seems to me that there are two schools of thought in one of our highest Courts, the Supreme Court of Appeal. The one thought distinguishes between the different types of authorities where a juristic entity is involved¹⁷ while the other regards the authority to the legal practitioner as sufficient, the deponent purporting to have been authorised to institute the proceedings on behalf of the juristic person not requiring additional authority.¹⁸ Inevitably, the school of thought determines the procedure to be adopted when there is a dispute about the authority of a person purporting to be authorised to institute or defend the proceedings on behalf of a juristic person. The former is neither restrictive nor prescriptive particularly since rule 7(1) does not provide any specific procedure for its implementation. As such, it recognises that the challenge can be raised in a variety of ways, that is, *inter alia*, by way of a special plea, notice or by affidavit, depending on the circumstances¹⁹ while the latter appears to restrict it to rule 7(1).²⁰

[24] In the light thereof, it seems to me that the court has a discretion on whether or not to entertain the challenge to the authority of a person purporting to be authorised to institute or defend the proceedings on behalf of the juristic entity raised in the affidavit or insist on rule 7(1) process thereby refusing to entertain the challenge raised

¹⁴ At p6-3

¹⁵ *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (SCA) at 228F-229A

¹⁶ *Minister of Water and Sanitation v Clarkson Power (Pty) Ltd and Another* 2024 (5) SA 280 (WCC) at [49]-[50]

¹⁷ *Tattersall* (supra) approving *Mall (Cape)* (supra) at 351G-352A

¹⁸ *Ganes* (supra); *School Site* (supra) approving *Eskom* (supra)

¹⁹ *Herbstein & Van Winsen* (supra) at p6-3; *Tattersall* (supra); *HR Computek (Pty) Ltd v Dr WAA Gouws (Johannesburg) (Pty) Ltd and Others* 2023 (6) SA 268 (GJ); *Clarkson* (supra) at [40]-[43] and the further cases referred to at [47]

²⁰ *Eskom*; *Ganes*; *School Site*; *Umvoti*

in the affidavit.²¹ Curiously, on the cases referred to herein, *Umvoti* appears to be the only one that refused to entertain the challenge to authority raised in the affidavit. In *Ganes*, which *Umvoti* also relied upon, the Court dealt with the challenge raised in the affidavit and made a finding. Only after the finding did Streicher JA comment about the rule 7(1) procedure, seemingly, as an afterthought.²²

[25] As indicated, the authority of the deponent to institute this application on behalf of the applicant was challenged by the second respondent. It appeared *ex facie* the resolution (NL1) that the authorisation was for the institution of the legal proceedings on behalf of EIPF and not the applicant. In trying to rectify this problem, Naidoo in the replying affidavit avers as follows:

'I am duly authorised by the Applicant to depose to this affidavit on its behalf. The institution of this application is also authorised as has been stated and set out in the founding affidavit. The resolution of the Applicant which authorises the institution of these proceedings and the deposition to this affidavit has been annexed hereto as Annexure "LN1" (I assume he meant annexure "RA1" as that is the annexure to the replying affidavit and "LN1" was the annexure to the resolution in the founding affidavit).

It did not go unnoticed that what is prominently absent in Naidoo's replying affidavit is that Naidoo proffers no explanation or response to the second respondent's averments that Naidoo bears no personal knowledge of the facts he purports to be deposing to. The second respondent's challenge to Naidoo's authority was not merely a bare denial but elaborates on the reason for the challenge.²³

²¹ See *Umvoti* (supra) at [29]

²² At 624J-625A; See also *Herbstein & Van Winsen* (supra) at p6-11

²³ Cf *Eskom; Ganes; School Site*

[26] Be that it may, resolution 'RA1' which, although proves the applicant's authorisation for the institution of the legal proceedings, nevertheless authorises O'Grif and not Naidoo to institute these proceedings on its behalf. The very document that Naidoo alleges authorises him to institute these proceedings on behalf of the applicant states the contrary.

[27] Accordingly, Mr. Hewitt's contention that it is not open for the second respondent to challenge Naidoo's lack of authority by raising it in the answering affidavit but should have done so through the provisions of rule 7(1) as held in the *School Site (supra)* is, in my view, opportunistic to say the least. Equally, the applicant could have also utilised the rules to object to what it seemingly considers 'irregular'. Instead, the applicant continued engaging the second respondent's challenge in what it now seemingly considers 'irregular'. The applicant made an election and cannot now attempt to invoke the provisions of rule 7(1) as a defense.

[28] In any event, as alluded to above, the court has a discretion on whether or not to entertain a challenge raised in the affidavit. In addition, in my view, Brand JA's comments could not have meant that a court should disregard the challenge especially where it ostensibly appears from the documents filed of record that the person purporting to be so authorised was in fact not authorised, only because the challenging party did not utilise the provisions of rule 7(1)²⁴. As indicated by Joubert JA in *Clarkson (supra)*, rules are not an end in themselves²⁵ and cognisance also to be had on what our Courts have repeatedly stated, that rules are made for the court and not the court for the rules.

[29] In ***HR Computek (supra)***,²⁶ where it did not appear *ex facie* the resolution that the deponent and accordingly the attorney was authorised by the applicant company

²⁴ Cf *Umvoti (supra)*

²⁵ At [40]

²⁶ Cf *Umvoti (supra)*

to oppose the proceedings on its behalf, Coppin J did not ignore the applicant's challenge to the first respondent's authority merely because it was not raised in terms of rule 7(1) but decided the matter on the papers as they stood.²⁷ Similarly, in the most recent case of *Clarkson (supra)*, where it similarly appeared *ex facie* the documents that the deponent was not properly authorised to institute the proceedings on behalf of the applicant, the Court dealt with the matter on the papers as they stood. As indicated by the Court in *Mall (Cape) (supra)*,²⁸ each case must be considered on its own merits and the courts must decide whether enough has been placed before it to warrant the conclusion that it is the applicant company which is litigating and not some unauthorised person on its behalf.

[30] Apparent lack of authority on the documents filed of record goes to the root of the application or opposition of the proceedings themselves. By necessary implication, it means the juristic person did not initiate those legal proceedings. It is a fundamental principle of our law that an order is generally taken to be binding only on the parties to the litigation. This principle is oftentimes emphasised in cases of mis-joinder or non-joinder of parties where the courts persistently emphasise that a party who has a direct and substantial interest in the litigation has to be joined not only because he or she or it may be prejudicially affected by the judgment of the court but also so that the court order may be effective.²⁹ Therefore, if there is ostensible lack of authority by the person who alleges to have been authorised to institute or defend the proceedings on that party's behalf, what effect would a court order for or against that party have.

[31] *In casu*, as indicated, it appears *ex facie* the resolution that the applicant did not authorise Naidoo to institute and represent it in these proceedings. For all intents and purposes, Naidoo could have appointed the attorneys as well, purporting to represent the applicant.³⁰ By necessary implication, in my view, the applicant did not institute these proceedings. It also seems to me that even if the second respondent

²⁷ cf *Umvoti Mall (Cape)*.

²⁸ At p352

²⁹ *Watson NO v Ngonyama* 2021 (5) SA 559 (SCA) at [55]

³⁰ *HK Computek (supra)*

had proceeded by way of rule 7(1), it still would not have assisted the applicant as the attempt to rectify what the applicant alleged was a *bona fide* error in attaching a wrong resolution, the applicant was still not able to attach a valid resolution as indicated. As such, the application ought to be dismissed.

[32] In the light thereof, it is not necessary for me to deal with the further *in limine* points raised by the second defendant.

Costs

[33] Mr. Janse van Rensburg argued on behalf of the second respondent that it was not necessary for the applicant to bring this application before court as the Act makes provision for the applicant to bring this type of complaint to be adjudicated upon by the Pension Funds Adjudicator. Accordingly, that the applicant should have referred this matter to the office of the Pension Funds Adjudicator to be adjudicated upon in order to alleviate the costs the applicant is complaining about that they will have to be borne by the members.

[34] I agree with Mr. Janse van Rensburg. Although it was the applicant's right to institute these proceedings in a court of law and forgo lodging the complaint with the Pension Funds Adjudicator's Office, the applicant also has to bear the consequences of its election.

[35] In the result, I make the following order:

1. The application is dismissed.

2. The applicant to pay the second respondent's party and party costs including the costs of Counsel at Scale B.



PL NOBANDA AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 29 May 2025

Date of judgment: 02 September 2025

Appearances:

For the Applicant: Adv D Hewitt instructed by Soonder Inc c/o Wiese & Wiese

For the Respondent: Adv E Janse van Rensburg instructed by SJ Van Den Berg Attorneys