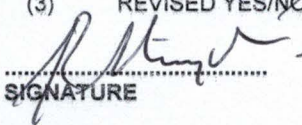


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2021/45339

|                                                                                   |                                     |
|-----------------------------------------------------------------------------------|-------------------------------------|
| (1)                                                                               | REPORTABLE: YES/NO                  |
| (2)                                                                               | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3)                                                                               | REVISED YES/NO                      |
|  |                                     |
| SIGNATURE                                                                         | 24/01/2023                          |
|                                                                                   | DATE                                |

In the matter between:

**DONALD GORDON ERIKSSON**

Applicant

and

**THE HOLLARD INSURANCE COMPANY LIMITED**

First Respondent

**SANTAM LIMITED**

Second Respondent

**BRYTE INSURANCE COMPANY LIMITED**

Third Respondent

**GUARDRISK INSURANCE COMPANY LIMITED**

Fourth Respondent

**OLD MUTUAL INSURE LIMITED**

Fifth Respondent

**NEW NATIONAL ASSURANCE COMPANY LIMITED**

Sixth Respondent

**EDWARD S CLASSEN AND KAKA ATTORNEYS**

Seventh Respondent

*IN RE:*

**THE HOLLARD INSURANCE COMPANY LIMITED**

First Plaintiff

|                                               |                   |
|-----------------------------------------------|-------------------|
| <b>SANTAM LIMITED</b>                         | Second Plaintiff  |
| <b>BRYTE INSURANCE COMPANY LIMITED</b>        | Third Plaintiff   |
| <b>GUARDRISK INSURANCE COMPANY LIMITED</b>    | Fourth Plaintiff  |
| <b>OLD MUTUAL INSURE LIMITED</b>              | Fifth Plaintiff   |
| <b>NEW NATIONAL ASSURANCE COMPANY LIMITED</b> | Sixth Plaintiff   |
| and                                           |                   |
| <b>CHARL JOHANNES PIETER CILLIERS</b>         | First Defendant   |
| <b>DIANNE MARGARET BURNS</b>                  | Second Defendant  |
| <b>GORDON KENNETH CUNLIFFE</b>                | Third Defendant   |
| <b>GRANT DAVIDS</b>                           | Fourth Defendant  |
| <b>FRANCIS DU TOIT</b>                        | Fifth Defendant   |
| <b>DONALD GORDON ERIKSSON</b>                 | Sixth Defendant   |
| <b>ANDREW ALEXANDER MAREN</b>                 | Seventh Defendant |
| <b>FRANS SAREL JACOBUS ELS</b>                | Eighth Defendant  |

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## JUDGMENT

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### STRYDOM J

- [1] This is a certified commercial matter in which the applicant has brought an interlocutory rule 7(1) application disputing the authority of the attorney acting for the plaintiffs.
- [2] The six plaintiffs instituted action against the eight defendants for damages allegedly suffered pursuant to the terms of section 424(1) of the 1973 Companies

Act. The eight defendants were directors of Insure Group Managers Limited ("IGML").

- [3] The sixth defendant is the applicant in this matter (hereinafter referred to as "the applicant"). The applicant filed a rule 7(1) notice on 4 December 2021, in terms of which he disputed the authority of Edward S Classen & Kaka Attorneys ("ECKA") to act on behalf of the plaintiffs in this action. Notice was further given that unless ECKA complies with the notice, it may no longer act in this matter unless it satisfies the court that it is authorised so to act. No basis or grounds for the challenge to authority was provided nor was any such grounds stated in correspondence leading up to the notice.
- [4] ECKA was placed on terms to reply to the notice but they responded by pointing out that the rule 7(1) notice was filed out of time. The lateness of the notice was initially disputed but later accepted by the applicant. The plaintiffs were asked to condone the lateness of the applicant's notice, but such request was refused.
- [5] Attached to a letter dated 25 January 2022, ECKA sent to the applicant's attorney, Brian Khan Inc ("BKI"), a mandate agreement, which, according to the letter, authorised ECKA to institute the action on behalf of the plaintiffs. ("the mandate agreement" or "mandate").
- [6] On 26 January 2022, BKI replied as follows:
- 'The document that you have tendered as constituting your mandate – and which you presumably expect me to be satisfied with – is a document prepared by you, signed in counter-part and raises a myriad of questions – more than it answers – and so we intend to take whatever steps are necessary to procure that the rule 7(1) notice is actually given effect to and that you will need to establish your authority to the satisfaction of the Court.'
- [7] ECKA, on 2 February 2022, formally responded to the rule 7(1) notice by presenting for filing, letters, resolutions and delegations of authority taken by the board of directors of each separate plaintiff. Seven documents were attached, including one on behalf of Guardrisk Insurance Company Limited and one on behalf of Guardrisk Life Limited. The latter is not a party to this action. This still
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left the applicant dissatisfied as to the authority of ECKA to act for the insurance companies as plaintiffs.

[8] This led to the current application, in which the applicant contends that ECKA has failed to demonstrate that it has the necessary authority to act on behalf of the plaintiffs, in both the action proceedings as well as these interlocutory proceedings, and that the documents provided by ECKA to date, ostensibly in support of its purported authority, raised more questions than it answered.

[9] It should be noted that the applicant also brought a joinder application in terms of which it seeks the joinder of ECKA as a seventh respondent to this rule 7 application. This application was not opposed but ECKA maintained that there was no need for its joinder.

[10] In this interlocutory application, the applicant has sought relief in the following terms:

- '1. joining the seventh respondent to the above action but only insofar as this application is concerned, alternatively to this application;
2. declaring that the Rule 7(1) notice has been validly delivered in accordance with the provisions of Rule 7(1) of the Uniform Rules of Court, alternatively that the late filing of the notice filed pursuant to the provisions of Rule 7(1) of the Uniform Rules of Court is condoned, further alternatively leave is granted to file the notice after the expiry of the 10 (ten) day period specified in Rule 7(1);
3. that the Notice of Bar filed on behalf of the Plaintiffs in the action on 25 January 2022 is set aside insofar as may be necessary;
4. that the institution of the action is declared a nullity, alternatively that all further proceedings be stayed until such time as Edward S Classen & Kaka Attorneys have satisfied the above Honourable Court that they have the authority to institute the proceedings on behalf of the first to sixth plaintiffs in the action;
5. that the respondents pay the costs of this application, jointly and severally, the one paying, the others to be absolved; and
6. further and/or alternative relief.'

[11] Rule 7(1) of the rules of this court provides as follows:

- '1. 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 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 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.'

[12] First issue for decision is what the effect of filing a rule 7 notice is, after the prescribed 10 day period, without leave of the court. In my view, this section should be interpreted to mean that a notice in terms of this rule, which is served out of time, will not prevent an attorney from acting for a party from date of the late filing of this notice. Such sanction will only become effective after a court has given the objector leave to dispute the authority of anyone acting on behalf of a party. If leave is granted by court in relation to a notice already filed the sanction will operate from date of leave, alternatively, if a notice has not been previously filed from date of filing the notice after leave was granted.

[13] The use of the word '*whereafter*' makes it clear that in this case, ECKA was entitled to act and still is entitled to act on behalf of the plaintiffs until the court grants the applicant leave, on good cause shown, to dispute the authority of ECKA.

[14] Subsequent to the filing of the rule 7 notice, the applicant, in an email dated 17 January 2022, requested a reply to its notice by not later than 2 February 2022. On 19 January 2022, ECKA responded to this email and stated that the notice was served out of time and that the applicant was not able to challenge the authority of ECKA to act. BKI was not aware of the lateness but after it was pointed out to be the case by ECKA, it accepted that the notice was late and asked for ECKA to condone the lateness. ECKA was not prepared to do so but without assuming any duty or obligation and subject to a reservation of rights, ECKA made available a mandate agreement signed on behalf of the plaintiffs and on behalf of ECKA. Correspondence followed about whether the mandate

authorized ECKA to act in this matter. BKI persisted that there was no mandate and stated that it will bring an application for an order that ECKA was not mandated by the plaintiffs to file the current action.

- [15] On 2 February 2022, ECKA addressed a formal process/response to the rule 7(1) notice. Attached to the response were documents referred to as authority documents. BKI was not satisfied that these documents authorized ECKA to act on behalf of the plaintiffs.
- [16] The situation which presented itself at that stage was that ECKA had not condoned the lateness of the rule 7(1) notice but now formally replied thereto by filing documents including resolutions. Previously, the mandate agreement was provided, which was not again referred to in the formal reply. The applicant then launched this application, inter alia, seeking condonation for the late filing of the rule 7(1) notice.
- [17] A consequence of the late filing of the rule 7(1) notice is however that it did not prevent ECKA from acting on behalf of the plaintiffs and all acts performed as at date of this judgment remain valid. Only after this court finds, if it is so inclined, that the authority of ECKA to act has not, to this court's satisfaction, been shown, then and thereafter would ECKA not be entitled to act further on behalf of the plaintiffs until such time that the court is satisfied with the authority of ECKA to act in the matter.
- [18] It was argued on behalf of the plaintiffs that the application is incompetent in fact and in law and should be dismissed. This submission is underpinned by a general analysis of rule 7(1). It was argued that a consequence of the lateness of a rule 7(1) notice is that the only order which the court could make in terms of this rule, in response to an application for condonation, is to grant the challenger the opportunity to issue the notice.
- [19] It was further argued that a specific feature and quirk of rule 7(1) is that it does not imply any interlocutory application to be made if it is properly applied. If due notice is given, the challenged attorney must approach the court and demonstrate his or her mandate to the court. The attorney is not a party to the principal proceedings and he or she does not approach the court as a party in

adversarial proceedings. Instead, so the argument went, the attorney approaches the court for the court to consider the attorney's mandate. This process is of an inquisitorial nature and not adversarial.

[20] I do not agree with this interpretation. Rule 7(1) does not lay down the entire procedure to be followed by the party challenging the authority of a person acting for a party. When a party decides to challenge the authority and serve a rule 7(1) notice, a process is initiated. If the notice was timeously given, then the person whose authority was challenged will no longer be able to act in the matter. The challenged attorney will have to satisfy the court that he or she has the authority to represent the clients. This will ordinarily be done by filing a signed mandate agreement and other authority documents. If, after the filing of the authority documents, the dispute is not resolved, then the court will have to make a determination. How the court will get involved to make a determination is not procedurally set out in the rule. In an action, which is not on trial yet, a judge would not even be aware of the challenge.

[21] The route to follow in resolving this disputed authority can differ, depending on the circumstances. If an attorney can no longer act, then that attorney can, by way of notice or otherwise, for instance orally during a trial, ask that the court makes its determination. In a case where the authority continues to be in place as a result of a late notice for instance, the objector can apply to court to make a determination. The court will, only at this stage, become involved. If the application is not opposed, a court will then consider the application on an unopposed basis and make an order, either that the court is satisfied with what was produced by the attorney to prove his or her authority to act for a party, or not. If opposed, then the court will have to make its ruling after a consideration of the opposed interlocutory application and after hearing the matter. The parties can argue the matter to persuade the court whether it should be satisfied that the attorney has shown that he or she has authority to act on behalf of clients. Consequently, depending on the process followed, the process can become adversarial.

[22] Further, I am not in agreement with the submission made on behalf of ECKA and the plaintiffs, that the only order which the court could make in terms of rule 7(1)

in response to an application for condonation, is to grant the challenger the opportunity to issue the notice. Such an approach would just lead to an escalation of costs. Where I do agree with the submissions on behalf of the plaintiffs is that the prayer to nullify the institution of the action, should the court find that ECKA has not been mandated, is not an outcome contemplated under rule 7(1).

- [23] Rule 7(1) does not set out what evidential material should be placed before court by an attorney to satisfy the court that he or she has been mandated to represent clients, in this instance, the plaintiffs. It was argued on behalf of the plaintiffs that 'satisfies' does not imply a burden of proof. In my view, a court will reasonably determine whether it is satisfied with the material placed before it to rule whether a mandate has been shown. The court will act subjectively, but as a reasonable judge which brings into the equation an objective yardstick. One of the reasons for a challenge to the authority of an attorney is not to be faced with a situation where an unsuccessful plaintiff, faced with a cost order, denies the authority of the attorney who instituted the proceedings. In my view, a court will consider the documents filed as proof of authority and consider whether, on a balance of probabilities, the attorney was mandated or not.
- [24] In a case where an attorney represents a corporate entity, a court would ordinarily require a signed mandate from an authorized representative of the entity in which document, an attorney is mandated to institute legal proceedings against a defendant. To establish the authority to provide a mandate, a court will require the resolution of the entity, which can either provide the representative with a general authority or a specific authority to appoint attorneys to institute proceedings against a defendant or defendants. An example of a specific authority would be where an entity has resolved to appoint a specific attorney to institute legal proceedings against a mentioned defendant. A party can challenge the mandate and/or the resolution. A court may, considering all facts and circumstances, be satisfied that authority has been shown even in a case of imperfect documentation being presented.
- [25] The rule 7(1) notice in this matter, on the face of it, followed the wording of the rule and did not provide any reasons or grounds for disputing the authority. Further, there was no distinction drawn between mandates and resolutions of

legal entities authorizing persons to provide mandates. In my view, it can now be accepted that a challenge to authority in terms of this rule will include a challenge to the authority of the person acting on behalf of a legal entity or trust. What the applicant challenged in this application are the mandates provided to ECKA as well as the purported company resolutions. I am in agreement with the finding in *ANC Umvoti Council Caucus and Others v Umvoti Municipality*<sup>1</sup> that the resolution type cases should also be dealt with in terms of rule 7(1) for the simple reason that a mandate given by unauthorized representatives should not stand scrutiny, unless there are other compelling reasons why the mandate satisfies a court that authority does exist. In this regard, a court will look at the evidence before it and consider probabilities holistically to come to its conclusion.

[26] It was argued that a prior dispute should have arisen between the respective parties concerning a mandate and a resolution, before rule 7(1) could be invoked. This argument, advanced by Mr Louw, appearing for the plaintiffs, is underpinned by the reference to '*be disputed*' in this rule. It was argued that the verb '*dispute*' connotes the need for an *a priori* position on the side of the applicant. On a plain reading of the rule, it is my view that the authority to act can be disputed without a prior dispute having arisen. When a party wants to dispute authority to act, the only requirement is to file the notice. The rule makes no mention whatsoever of a pre-existing dispute. If, at a later stage, during the consideration of the challenge, a court finds that the challenge was frivolous or mala fide, then an appropriate cost order can be made against a party or even against an attorney who was responsible for filing the notice. A further remedy, in a case where condonation is sought for filing the notice outside the 10 day period, would be not to grant such condonation.

[27] The rule does not require that the grounds for the notice be mentioned in the notice. In my view, it is nothing more than a challenge to the authority, which may even be based on a suspicion of some kind that the attorney does not have the necessary mandate to act or that the company never resolved that action must be taken against a party. Some of the grounds for disputing these issues may only become known to the challenger after proof is provided. This is the situation

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<sup>1</sup> 2010 (3) SA 31 (KZP) par 28.

in this matter and the court must now decide whether it is satisfied that the authority to act has been shown by the attorney. In coming to this conclusion, the court kept in mind that pre-1987, a mandate to act by an attorney had to be filed in every action. This would mean that regardless of a dispute, the mandate was required. Now it can be requested, in my view, without a prior dispute which presented itself. If this is not the situation, it can lead to an anomaly. If a party has no reason to dispute authority but continues to do so by filing a rule 7(1) notice, and subsequently, it turns out that the attorney is not in a position to satisfy the court that he or she has authority to act, can a challenged party then argue that the notice was not valid as no prior dispute manifested itself? It would lead to an absurdity.

- [28] The procedure envisaged in rule 7(1) is a quick one which, in normal cause, should be raised within 10 days after a party becomes aware of an attorney acting for a party. At such stage, no dispute might have arisen. There is no time for the exchange of correspondence. Similarly, proof of authority should be readily available to be produced. The rule does not refer to prior disputes but merely provides that authority for anyone acting '*may. . . be disputed*'. The rule does not provide that authority can only be disputed under certain circumstances.
- [29] On behalf of the applicant, it was argued that when the authority or agency of a person is challenged, it is not for the agent to simply proclaim that he or she is authorised to act, but for proof to be produced that the principal has so authorised the agent. I agree with this submission. Proverbially, you cannot pull yourself up by your own bootstraps.
- [30] ECKA provided a mandate agreement and further authority documents. The latter, in response to the rule 7(1) notice and the former as an attachment to a letter. The parties referred to these documents and the applicant launched an attack against all the documents. The court will consider all the documents holistically, together with other evidence, to determine whether it is satisfied that ECKA has the authority to act on behalf of the plaintiffs.
- [31] The first document the court will consider is the mandate agreement. On the face of, it is a bilateral agreement signed by parties to the agreement. On behalf of

applicant, it was described as a piece of paper which purports to be a mandate being provided, purportedly signed by or on behalf of the principal that provided the mandate. The question arises whether the signatories to this mandate were authorized to bind their principals. To ascertain this, so it was argued, a further requirement needed to be met, i.e. the resolutions authorising the persons who signed the mandates from which it could be deduced that these representatives were properly authorised by the principal. I agree with this submission, which was formulated in *Glofinco v Absa Bank Ltd t/a United Bank*<sup>2</sup> as follows:

'[13] A representation, it was emphasised in both the NBS cases, *supra*, must be rooted in the words or conduct of the principal himself and not merely in that of his agent (NBS Limited v Cape Produce Co (Pty) Ltd, *supra* at 411 H-I).'

[32] It was submitted that the documents and evidence placed before the court by ECKA amounted to no more than a '*mere assurance*' by ECKA itself that it has the authority to act. It was submitted that these documents should not satisfy this court that ECKA had authority to act in this matter. I am not in total agreement with this argument as the mandate is a bilateral agreement with signatures which purport to be signature of representative of the plaintiffs.

[33] The applicant averred that the mandate agreement was defective and remained as such and/or unexplained to date of the application for the following reasons:

- 33.1 It contains illegible signatures by unidentified signatories purportedly on behalf of the plaintiffs;
- 33.2 The signatories' position within the relevant plaintiffs' companies are not identified or reflected;
- 33.3 It does not confirm on what basis and pursuant to what enabling resolutions or other enabling documents the signatories were authorised to represent their principals;

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<sup>2</sup> 2002 (6) SA 470 (SCA) para 13.

- 33.4 There is no proof of confirmation that a number of important conditions precedent, which were required to be met to give the mandate agreement effect, had been fulfilled;
- 33.5 It refers to a company called IGML as the '*client*' of ECKA, and not any of the plaintiffs cited in the action proceedings. IGML was liquidated on 21 June 2021 and the liquidator of IGML is not a party to the action proceedings;
- 33.6 It refers to a report produced by the curator of IGML styled '*reportable irregularities dated 7 September 2020*', without attaching the report, which, according to the applicant, results in there being no rational connection between the report and the action proceedings having been instituted.

[34] On 2 February 2022, ECKA provided the applicant with authority documents. These authority documents comprised of various purported (as was referred to by the applicant) resolutions and ancillary documents, including Delegation of Authority (DoA) ostensibly given to a number of representatives of the plaintiffs.

[35] The true dispute between the parties is whether the mandate agreement, the authority documents and confirmatory affidavits filed on behalf of the plaintiffs, read together, are sufficient to establish ECKA's authority. The applicant disputed this.

[36] On behalf of the applicant, the defects in the authority documents which, according to the applicant, remained unremedied and/or unexplained to date of the application were summarised to be as follows:

- 36.1 A document purporting to be a DoA, when it is in fact merely a written confirmation that a DoA exists;
- 36.2 A document confirming the authority of an employee/representative who, ex facie the document, does not have authority to appoint attorneys of record, such as ECKA;

- 36.3 Documents that refer to, and/or depend entirely on the validity of other documents, which documents have not been provided;
- 36.4 The respondents' and/or ECKA's failure to provide necessary and valid board resolutions and/or minutes;
- 36.5 Undated documents or documents and/or resolutions dated after the institution of the action proceedings, without ratifying the actions taken by ECKA;
- 36.6 Unsigned documents and/or documents purporting to be resolutions;
- 36.7 Documents that have been signed by only a number of board members, without any explanation regarding the omission of the remaining board members' signatures;
- 36.8 Documents that authorise the institution of legal proceedings based on an entirely different cause of action than the cause of action relied upon by the plaintiffs in the action proceedings.

[37] In its argument that these documents should not satisfy the court that ECKA has the necessary authority to act on behalf of the plaintiffs, reliance was placed on the dicta of Satchwell J in the unreported matter of *PMG Mining (Pty) Ltd and Another v JD Chen and others*.<sup>3</sup> In this matter, it was found that the documents provided failed to constitute all the '*pieces of the jigsaw puzzle*' to establish the authority of the attorney. Part of this '*jigsaw puzzle*' would be to receive documents that satisfy a court that:

- 37.1 The '*housekeeping arrangements*' or '*internal compliance*' for the plaintiffs have been satisfied; and
- 37.2 Consequently, ECKA was duly authorised to institute action proceedings on behalf of the plaintiffs.

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<sup>3</sup> (Case No. 2016/19065X (GJ))

- [38] The court will now continue to consider the mandate provided to ECKA to institute proceedings against the applicant. In ECKA's endeavour to prove authority, it filed the mandate agreement and company resolutions. Apart from these documents filed, ECKA annexed to its answering affidavit, the supporting and confirmatory affidavits '*deposed to by duly authorized representatives of each of the insurance companies.*'
- [39] On perusal of the mandate agreement, it becomes clear that the *client* referred to in the mandate agreement is IGML, an entity which was liquidated after the mandate agreement was signed. The mandate was provided by the shareholder companies of IGML (the plaintiffs) to ECKA to take legal action on behalf of IGML against directors (including the applicant) and others arising from the conduct of the affairs and business of IGML prior to 14 September 2018. One of the conditions to the mandate before legal proceedings were instituted was to obtain authority from shareholders, the majority of which are the plaintiffs in the action and respondents in this application. The mandate agreement was purportedly signed by representatives of the shareholding companies mentioned in the mandate agreement.
- [40] The plaintiffs in the action against applicant are creditors of IGML who also happen to be the majority shareholders of the IGML. The claim against the applicant as former director of IGML, is to hold him liable for payment of the debt of IGML owing to the plaintiffs.
- [41] The mandate agreement does not provide authority to ECKA, provided by the plaintiffs in their capacity as creditors of IGML, to institute proceedings against applicant. It served a different purpose at a stage when IGML was still in business. At that stage, the aim was to institute a claim on behalf of IGML against its former directors. Once the moneys were obtained, the creditors could have been paid. Consequently, the mandate agreement does not provide authority to ECKA to institute action on behalf of the plaintiffs against the directors of IGML. The creditors could have instituted action against the directors either before or after liquidation but the mandate envisaged a claim by IGML in its capacity as the client of ECKA. Thus, the mandate agreement failed to provide proof of authority to institute the current proceedings. For purposes of this application this

fact adds to the factual matrix when the company resolutions and other evidence are considered. The mandate purportedly providing authority to ECKA to institute action on behalf of the creditor/shareholding companies. What it does show, on the face of the mandates, is that the current plaintiffs authorized ECKA to act on behalf of the same shareholders who became creditors of the defendants, including the sixth applicant, pursuant to the terms of section 424 of the 1973 Companies Act.

### **The authority documents**

#### **Hollard**

- [42] An undated letter signed by Ms Zinhle Mariani, in her stated capacity as Hollard Group General Counsel and in accordance with her mandate issued in terms of the Hollard Group Delegation of Authority, was provided by ECKA in which she approved the institution of legal proceedings against former directors and further appointed ECKA as attorneys to pursue such claims. A further letter, dated 25 May 2021, was provided, signed by the Group Company Secretary of Hollard in which it was confirmed that the Board of Hollard, from 6 December 2019, authorized Zinhle Mariani in respect of any legal proceedings to initiate and defend actions and applications. She could represent Hollard and sign documents and affidavits. She could delegate her authority.
- [43] The relevant resolutions were neither filed nor confirmed under oath. As far as Hollard is concerned, a confirmatory affidavit was deposed to by Ms Magasela, who described herself as the Head of Legal and Governance of the Hollard Group, reporting to the Group General Counsel, whom she identified as Ms Zinhle Mariani. She stated that Ms Mariani approved the institution of the action in accordance with the Hollard Group Delegation of Authority BK 18.5, which was confirmed under oath by Ms Magasela, provided authority to the Group General Secretary to institute litigation on behalf of Hollard. This confirmatory affidavit went beyond mere confirmation as to what was stated in the answering affidavit of Mr Classen. It was not explained why Ms Zinhle Mariani did not depose to a confirmatory affidavit herself, but Ms Magasela confirmed her authority.

- [44] The court must satisfy itself as to the authority of anyone acting on behalf of a party. In its consideration, a court will be entitled to consider the contents of confirmatory affidavits and not only the documents filed prior to the application.<sup>4</sup> As far as Hollard is concerned, the Head of Legal & Governance of the Hollard Group confirmed under oath that Ms Zinhle Mariani approved the institution of the action and the appointment of ECKA as attorneys to act on behalf of Hollard.
- [45] ECKA had to satisfy the court that the firm is authorized to represent Hollard. This, ECKA could do by adducing any acceptable form of proof and not necessarily by filing a written power of attorney.<sup>5</sup> Each case should be considered on its own merits and it is for the court to decide if enough had been placed before it to warrant the conclusion that it was the plaintiff that was litigating and not some unauthorized person on its behalf.<sup>6</sup>
- [46] The applicant has placed extensive reliance on the decision of Satchwell J in the unreported matter of *PMG Mining (Pty)*, *supra*. According to this decision, the applicant was entitled to receive documents that would satisfy the court that the 'housekeeping arrangements' or 'internal compliance' of the respondents had been satisfied. I am of the view that there is no need to file every resolution and minutes of meetings before a court will be satisfied as to authority of a person to act on behalf of a legal entity. The court will take a more holistic view and consider probabilities.
- [47] In *Unlawful Occupiers, School Site v City of Johannesburg*,<sup>7</sup> Brand JA stated as follows in relation to an alleged unauthorized application:

'After all, there is rarely any motivation for deliberately launching an unauthorized application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to supplementary affidavits followed by lengthy technical arguments on both

<sup>4</sup> See: *Johannesburg City Council v Elesander Investments (Pty) LTD and Others* 1979 (3) SA 1273 (T) at 1279D-H.

<sup>5</sup> See: *Elesander* above; *Administrator, Transvaal v Mponyane and Others* 1990 (4) SA 407 (W) at 409F-H; *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228E-J.

<sup>6</sup> See: *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) 347 (C) at 352A-B.

<sup>7</sup> 2005 (4) SA 199 (SCA). See headnote at 200.

sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? The question can, in my view, be answered only in the negative.'

- [48] In this case, the same question can be asked as to whether it is conceivable that the largest insurance companies in the country, who allege that the applicant is liable to them for an enormous amount of money, would not authorize their attorney, who was acting on their behalf prior to the liquidation of IGML, to act for them in pursuing a claim against the applicant? The court will consider the authority of ECKA in light of this fact. Moreover, the applicant had mentioned no apparent reason why he doubted the authority of ECKA. Clearly, it was a shot in the dark because after the documents were provided, the applicant, through its attorneys, BKI, maliciously scrutinized the documents for shortcomings in an attempt to convince the court that it should not be satisfied about the authority of ECKA and also not be satisfied that the mentioned officers of Hollard could bind it.
- [49] There are shortcomings in the documents, which render them less than perfect. For instance, the document at BK 18.3 is undated. This is of no consequence. The document headed *Delegation of Authority Mandate* refers to a DOA which was not attached. This document was separately provided and marked BK 18.5.
- [50] In my view, the document at BK 18.4 was prepared by the Group Company Secretary of the Hollard Group to reflect the authority of the Group General Counsel which is Ms Zinhle Mariani. Her position and authority was confirmed under oath by Ms Magasela.
- [51] The court is satisfied that ECKA was duly authorized to act on behalf of Hollard in its claim against applicant.

#### **SANTAM**

- [52] The document, BK 18.6, is a document of Sanlam Limited, headed: *GENERAL AUTHORITY BY CEO IN ACCORDANCE WITH DELEGATED POWERS BY*

*THE SANLAM BOARD.* The CEO of Santam authorized the action proceedings against, inter alia, the applicant, and also appointed ECKA. This document was signed by the CEO on 2 February 2022.

- [53] The document marked BK 18.7 is a delegation of authority and in terms of this document, the CEO was authorized to institute legal proceedings. Moreover, the Chief Financial Officer of Sanlam Ltd, Mr Henderik David Nel, confirmed under oath that the CEO, Ms Lize Lambrechts, executed the document appearing as BK 18.6.
- [54] The court is satisfied that Sanlam Limited authorized the litigation against the applicant and that ECKA was duly appointed to represent it.

#### **Bryte Insurance Company**

- [55] Considering what has been stated hereinabove about the improbability of unauthorized litigation in a matter of this magnitude, and the documents filed on behalf of Bryte, the court is satisfied that Bryte duly authorized the action against the applicant. The documents which were provided included a resolution of the board of directors at BK 18.8 and at BK 18.9 as well as the voting results concerning the institution of action against applicant and others. Four directors voted in favour of instituting action against applicant. The resolution at BK 18.8 makes it clear that ECKA was mandated to act on behalf of Bryte.
- [56] A confirmatory affidavit was filed deposed to by Mr Wynand Louw, the Head: Legal and Compliance of Bryte in which he specifically confirmed that the board of directors adopted the resolution, appearing as BK 18.88 and BK 18.9 which authorized the institution of the action on behalf of Bryte and that it appointed ECKA to appear on its behalf.
- [57] Considering all the evidence, the court is satisfied that the authority of ECKA has been established.

#### **Guardrisk Insurance Company Limited**

- [58] I agree with the submissions made on behalf of Guardrisk and ECKA that the latter was authorized to act on behalf of Guardrisk. According to BK 18.11 and

BK 18.13, a directors meeting was held on 27 May 2021 and it was resolved to institute such proceedings as would be necessary to protect Guardrisk's interest with regards to the IGML matter. On 27 January 2022, the board of directors passed a resolution to the effect that action proceedings be instituted against the directors of IGML, including the applicant and that ECKA be appointed as attorneys. Mr Botha, a director of Guardrisk, was authorized to present the company in any proceedings.

[59] A confirmatory affidavit was filed deposed to by Mr Lourens Johannes Botha, a director of Guardrisk, in which he, as a witness, specifically confirmed that Guardrisk's board of directors adopted the resolution, appearing as BK 18.10 and BK 18.11, which authorized the institution of the action and the mandate of ECKA.

[60] The court is satisfied that authority pursuant to the terms of rule 7(1) was established.

#### **Old Mutual**

[61] BK 18.14 is a resolution by the directors of the company to institute action against the directors of IGML, including applicant, and to appoint ECKA as attorneys and MR Pedra as a representative for Old Mutual.

[62] The court already found that a court can be satisfied about the authority to institute legal proceedings without all resolutions and delegations of authority being filed, especially in a case where no specific point had been raised regarding authority before a rule 7(1) challenge was filed. In the case of Old Mutual, sufficient proof of authority to satisfy this court was filed. The confirmatory affidavit of Mr David Pedra, the Executive: Outsourced Business Solutions Retail of Old Mutual, was filed wherein he confirmed that Old Mutual adopted a resolution, BK 18.14, authorizing the institution of the action on behalf of Old Mutual and the appointment of ECKA to act on behalf of Old Mutual against the applicant. It is highly unlikely and improbable that an attorney would go on a frolic of his own to institute an action without being mandated by corporate entities. Moreover, it is improbable that corporate entities, which aver that huge sums of

moneys due to them were unlawfully not paid over, would not pursue such claim as against the alleged wrongdoers.

### **New National Assurance Company Limited**

- [63] The court is satisfied that the extract of a resolution, BK 18.15, passed by the directors of the company on 28 August 2020, provided authority to institute an action against applicant and that ECKA be appointed as attorneys to pursue this claim. This resolution was passed before the institution of proceedings.
- [64] A confirmatory affidavit was deposed to by Mr Kalim Muhammad Rajab, the Managing Director of New National, in which he specifically confirmed that New National's board of directors adopted a resolution authorizing the institution of the action against applicant and the appointment of ECKA. The court is satisfied that the required authority has been established.
- [65] In conclusion, it is the view of the court that the plaintiff insurance companies have satisfied this court that they authorized the action against applicant and that ECKA has also satisfied the court that it was duly authorized to appear on behalf of the plaintiffs.

### **Condonation**

- [66] Despite the finding of the court on the merits of the rule 7(1) notice, the court will grant the applicant the required condonation for the late filing of the notice. The notice was only one day late and the delay was explained. Moreover, ECKA replied to the notice and the interest of justice required a consideration of the authority of the relevant parties to have instituted the action.

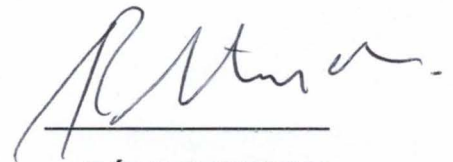
### **Costs**

- [67] It was argued that the entire challenge of authority was an abuse of process designed to frustrate the plaintiffs in the advancement of their action. The court already ruled that the rule 7(1) challenge to authority can be pursued without any

prior specific reason for believing that an attorney does not act with authority. Consequently, the route which was followed by the applicant and BKI cannot be labelled as an abuse of the process. Costs should however follow the result and the costs consequent upon the employment of two counsel, including one senior counsel, was warranted.

[68] The following order is made:

- 68.1 Condonation is granted to the applicant for the late filing of the Rule 7(1) notice.
- 68.2 The seventh respondent is joined in this application.
- 68.3 The applicant's application is dismissed with costs, including the costs of one senior and a junior counsel.
- 68.4 The court is satisfied that the authority of ECKA has been established and that the plaintiffs in the action against the applicant authorized the institution of the action.



**RÉAN STRYDOM  
JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION  
JOHANNESBURG**

Date of Hearing: 14 October 2022

Date of Judgment: 24 January 2023

#### **APPEARANCES**

On behalf of the Applicant:

Adv. A. Subel SC

Adv. E. Larney

On behalf of the 1<sup>st</sup> to 7<sup>th</sup> Respondents:

Adv. C, D. A Loxton

Adv. P. F. Louw SC

Adv. N. Ndlovu