

REPUBLIC OF SOUTH AFRICA



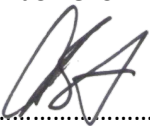
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-000305

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

20 February 2023

DATE


SIGNATURE

In the matter of:

**GENERAL INDUSTRIES WORKERS OF SOUTH
AFRICA (GIWUSA)**

**CHRISTIAN KHUMALO
TEDDY THOBAKGALE
JAPHTER MOKOENA**

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

and

**ABSA BANK LIMITED
NEDBANK LIMITED
MAMETLWE DAVID SEBEI
JOHN APPOLIS**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

(THE REGISTRAR OF LABOUR RELATIONS

Intervening Party)

REASONS FOR ORDER

BESTER AJ

[1] On 12 January 2023 I made an order in this matter in the following terms:

- (1) The matter is struck off from the roll for lack of urgency.
- (2) Costs are awarded in favour of the first, third and fourth respondents on the scale between attorney and client, payable by the second to fourth applicants, jointly and severally.

[2] Earlier in the proceedings, I ruled that Phale Attorneys had not satisfied me that they are authorised by the first applicant to have launched the application on its behalf. My reasons for the above are set out below.

[3] The applicants sought an order against the first respondent, Absa Bank, directing it to reopen bank accounts previously held with Absa Bank by the first applicant, the General Industries Workers Union of South Africa ("GIWUSA"). These accounts were closed by Absa Bank, and the funds in the accounts transferred to newly opened bank accounts held with Nedbank, the second respondent. The applicants also sought an order directing Nedbank to return the funds to the original bank accounts with Absa Bank.

[4] At the commencement of proceedings several issues stood in the way of hearing the matter on its merits: (i) Absa Bank delivered a notice in terms of Uniform Rule 7 challenging Phale Attorneys' authority to act on behalf of GIWUSA; (ii) the third and fourth respondents delivered an application for the

furnishing of security for costs in terms of Uniform Rule 47; (iii) the Registrar of Labour Relations applied to be admitted as an intervening party; and, of course, (iv) the applicants had to satisfy the Court that the matter ought to be finally enrolled in the urgent court.

The challenge to the attorney's authority

[5] Uniform Rule 7(1) provides that where the authority of anyone acting on behalf of a party is disputed, that person may no longer act unless he satisfied the Court that he is authorised to so act. It follows that the first issue to be determined, was whether Phale Attorneys Inc could satisfy the Court that it was authorised by GIWUSA to bring the application.

[6] A person may not institute legal proceedings without the authority of the person cited, and the object of rule 7 is to prevent any person cited in the process from thereafter repudiating it and denying his authority for the issue thereof.¹ The rule does not prescribe the method of establishing authority when challenged.² The person concerned must satisfy the court that he is authorised to so act,³ which he may do by adducing any acceptable form of proof.⁴

¹ *United Dominions Corp (SA) Limited v Greyllings Transport* 1957 (1) SA 609 (D) at 614 C – D; *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705 C – H/I.

² *Gainsford NNO v Hiab AB* 2000 (3) SA 635 (W) at 639 J – 640 A.

³ *Firststrand Bank Limited v Fillis* 2010 (6) SA 565 (ECP) at 569 A.

⁴ *Firststrand Bank* supra at 569 A – B; *Administrator, Transvaal v Mponyane* 1990 (4) SA 407 (W) at 409.

- [7] The rule further provides that the person whose authority is challenged may be granted a postponement in order to satisfy the Court of his authority. Inevitably, such postponement would have negated the level of urgency for which the applicants contended in this application, and Mr Motshabe, who was instructed by Phale Attorneys for the applicants, after some hesitation, decided not to seek a postponement for this purpose. He was thus constrained to argue that the authority of Phale Attorneys was established on the papers before the Court.
- [8] Mr Motshabe relied on two documents in support of the argument that Phale Attorneys' authority could be established from the application. The first was a document headed "*Special Power of Attorney*", on the face of which GIWUSA, represented by "*the General Secretary*" Teddy Thobakgale (the third applicant) appoints Phale Attorneys Inc to institute legal proceedings to reopen the Absa Bank accounts identified specifically in the document. The 'Special Power of Attorney' bears a signature merely identified as "*Deponent*", a person whose identity is not apparent from the document.
- [9] The second complimentary document was apparently on the letterhead of GIWUSA and headed "*Resolution*". On the face thereof it records that the National Executive Committee of GIWUSA resolved that Phale Attorneys Inc be appointed to pursue litigation pertaining to the closure of the Absa Bank accounts. It also recorded that it was resolved that Mr Christian Khumalo, as

President and General Secretary of GIWUSA, and Mr Thobakgale or his deputy Mr Japhter Mokoena, are mandated and authorised to liaise with Phale Attorneys and to sign whatever is necessary for purposes of the litigation. This document is signed by Mr Thobakgale. Mr Khumalo and Mr Mokoena are the second and fourth applicants respectively.

[10] The probative value of these documents needs to be considered in the context of the issues in dispute in this application. Two groups of people are vying for control of GIWUSA. It is this uncertainty of who constitute the legitimate governance structures of the Union that led Absa to close the bank accounts. The second to fourth applicants contend that they are the true representatives of the Union, and that the third and fourth respondents do not represent the Union and could not have opened the Nedbank accounts. The central issue in the application is who represents the Union. The applicants seek final relief. They are thus constrained by the *Plascon-Evans* rule.⁵

[11] The power of attorney relied upon by the applicants would establish Phale Attorneys' authority to act on behalf of GIWUSA, if the person granting that power of attorney had been authorised to do so by GIWUSA. Therein lies the rub. The resolution purporting to give that authority, was by a 'National

⁵ *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E – 635 C.

Executive Committee', the legitimacy of which is a central dispute of fact in the application.

- [12] Mr Motshabe conceded, correctly in my view, that this very issue is the subject of a dispute of fact that cannot be resolved on the papers. In my view it must follow that Phale Attorneys' authority to act for GIWUSA as first applicant cannot be established on these papers. In the result I was not satisfied that Phale Attorneys was authorised to act on behalf of GIWUSA and ruled accordingly. Obviously, this ruling had no bearing on their entitlement to proceed on behalf of the second to fourth applicants.

Security for costs

- [13] The next issue that could potentially scupper the applicants' attempt to have the matter heard, was the demand for security for costs. When I enquired from Mr Kubayi, appearing on behalf of the third and fourth respondents, as to the practicalities of following the procedures stipulated in Uniform Rule 47 in the face of an application that is sought to be moved urgently, the demand was withdrawn, and thus required no further attention.

The intervention application

- [14] As mentioned, the Registrar of Labour Relations applied to intervene in the application. The respondents did not oppose. The second to fourth applicants

(to whom I will hereinafter refer to as the applicants) initially indicated that they intended to oppose the application. To this end, Mr Motshabe intimated that they wish to deliver an answering affidavit in the intervention application and that the time required for the further exchange of affidavits would necessitate the postponement of the main application by one to two weeks. When confronted with the reality that such a delay does not easily align with the applicants' contention that the matter was sufficiently urgent to have been brought on seven days' notice to urgent court and set down on a Thursday, the applicants withdrew their opposition.

- [15] I concluded that the Registrar had a direct and substantial interest in the application and granted the intervention. As the application was unopposed, it is not necessary to belabour this matter with reasons. It suffices to mention the following. The application raises disputes regarding the control and management of GIWUSA, which is a registered labour union. The disputes in this application include disagreements on the legitimacy of amendments to GIWUSA's constitution, a matter in which the Registrar has a direct and substantial interest. In terms of section 109 of the Labour Relations Act, 66 of 1995, the Registrar is tasked with maintaining a register of trade unions and custody of their constitutions.

Grounds for urgency

- [16] The basic timeline of events is as follows:

- a) On 13 December 2022 Absa advised that the accounts had been closed.
- b) On 15 December 2022 the applicants learned of the closure of the bank accounts.
- c) On 19 December 2022 the applicants convened an urgent meeting, at which the resolution referred to above was adopted.
- d) On 20 December 2022 the applicants met with Phale Attorneys, who requested further information for purposes of preparing the application.
- e) On 28 December 2022 the requested information was provided.
- f) On 29 December 2022 the founding affidavit was deposed to.
- g) On 5 January 2023 the application was issued and served.
- h) On 10 January 2023 the first respondent as well as the third and fourth respondents delivered notices to oppose the application and their answering affidavits.
- i) On 12 January 2023 the matter was provisionally enrolled for hearing at 10:00.

- [17] The applicants are required to justify why they cannot be afforded substantial redress at a hearing in due course. This issue underpins the question of whether a matter is sufficiently urgent to be enrolled in urgent court.⁶
- [18] I expressed scepticism as to whether the applicants have standing to pursue the relief sought in the application on behalf of GIWUSA. However, that is ultimately a matter to be determined when the merits of the application are considered.
- [19] The main argument on urgency advanced by the applicants was that the application was for spoliation relief, and spoliation is inherently urgent. The applicants seek the reopening of bank accounts, and the return of funds thereto. That is, relief relating to a contract between a banker and its client. It is trite that the *mandament van spolie* is not available in such instances.⁷ An argument based on the purported inherent urgency of spoliation was thus not available to the applicants.
- [20] The applicants also contended that the matter is urgent because with the accounts closed, GIWUSA is unable to pay rental, telephone accounts, insurance policies for employees and other administrative costs. This, they contend, opens GIWUSA up to eviction and interest charges. This argument is

⁶ See for instance *In re Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ) in [7] to [9].

⁷ See for instance *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) at [8]; *FirstRand Limited t/a Rand Merchant Bank v Scholtz N.O.* 2008 (2) SA 503 (SCA) in [13].

undercut by the applicants' own evidence. They attach two rental statements, one of which reveals that the rental had not been paid for several months. In my view the alleged imminent prejudice is more convenient than real.

[21] The applicants also complain that employers cannot pay over members' dues to GIWUSA. This, they say, happens for the most part around the 15th of each month. It seems that this date is identified to justify the set down for Thursday the 12th. The several statements of the closed bank accounts attached to the founding affidavit reveals that monies have historically been received throughout the month. If any trend is discernible from the statements, it is that more monies tend to be received over the last and first weeks of the month. The suggestion that the 15th of the month has some significance, is not borne out by the evidence.

[22] The applicants have not complied with the practice directives applicable in this division, and offered no explanation for this failure. They have not explained why the matter was enrolled for a Thursday morning and why it could not have been enrolled for the Tuesday of the week, or another Tuesday.⁸

[23] Furthermore, I was not satisfied that the applicants acted appropriately in bringing this matter to court. They dictated that the matter is to be heard within seven calendar days from the time that it was issued and served. Yet,

⁸ *Luna Meubelvervaardigers v Makin* 1977 (4) SA 135 in (W) at 139 F – 140 B.

it took them eight calendar days to collect the information sought by their attorneys, and although it took their attorneys only a day to complete the affidavit, it then took another 7 days to issue and serve the application. No explanation is offered why the applicants deemed it appropriate to take their time but then insisted on such truncated timelines for the respondents. Even taking into account the public holidays over this period of the year, I am not satisfied that the applicants have shown that they have acted reasonably in pursuing the application, given the urgency that they contend for.

[24] In the result, I concluded that the matter was not sufficiently urgent to warrant enrolment on the urgent roll.



A Bester
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Heard:	12 January 2023
Order made:	12 January 2023
Reasons for order:	28 January 2023

Counsel for the Second, Third and Fourth Applicants:	Advocate NL Motshabe
Instructed by:	Phale Attorneys Inc.

Counsel for the First Respondent:	Advocate NJ Horn
Instructed by:	Tim du Toit & Co Inc.

Counsel for the Third and Fourth
Respondents:

Attorney NE Kubayi
Noveni Eddy Kubayi Attorneys

Counsel for the Intervening Party:
Instructed by:

Advocate VJ Chabane
The State Attorney, Johannesburg