Reportable: Circulate to Judges: Circulate to Magistrates: Circulate to Regional Magistrates	NO NO NO NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Case Number: 2481/2025

In the matter between:

NQOBILE LUTHO ZIBI	Applicant
And	
AMAHLUBI CHAIRMAN'S FOUNDATION	First Respondent
ABSA BANK LIMITED	Second Respondent

In re:

AMAHLUBI CHAIRMAN'S FOUNDATION	Applicant
And	
ABSA BANK LIMITED	First Respondent
NQOBILE LUTHO ZIBI	Second Respondent

Coram: Matlhape AJ

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand down is deemed to be **03 November 2026** at **15h00.**

Summary: *– Rule 7 Authority to institute proceedings on behalf a foundation–authority of a law firm to represent the foundation. Facts raise a genuine dispute of fact- matter referred for oral evidence.*

ORDER

1. The interlocutory application is referred for the hearing of oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court.
2. The evidence to be adduced at the hearing shall be that of such witnesses as either party may elect to call.
3. No party shall be entitled to call a witness unless:

    3.1 such party has served on the opposing party a statement setting out the evidence that the witness intends to give in chief. The applicant shall deliver such statement within 20 court days of the date of this order and the respondents shall deliver their respective statements within 20 court days of the date of receipt of the statement referred to herein above;

4. Notwithstanding the provisions of paragraph 3.1 above, either party shall be entitled to subpoena any person to give evidence at the hearing, irrespective of whether that person has consented to furnish a statement.
5. Within 15 court days of the date of this order, each party shall make discovery, under oath, of all documents relevant to the issues in dispute.
6. The discovery referred to in paragraph (5) herein above shall be effected in accordance with Uniform Rule 35 of the Uniform Rules of Court. The provisions of that Rule relating to the inspection and production of discovered documents shall apply accordingly.
7. The parties shall set the matter down for hearing in accordance with the Practice Directives of this Division.

JUDGMENT

Matlhape AJ

Introduction

[1] This is an interlocutory application brought in terms of Rule 7, read with Rule 6(11) of the Uniform Rules of Court. The applicant seeks to challenge the authority of Vulindlela Nkululeko Zibi ("Vulindlela") to institute proceedings on behalf of the first respondent, AmaHlubi Chairman's Foundation ("the Foundation"), as well as the authority of the firm of attorneys, Van Velden Duffy Inc, to represent the Foundation in the main application. The applicant contends further that neither Vulindlela nor the attorneys have demonstrated that they are duly authorised to institute and prosecute the main application on behalf of

the Foundation. The applicant consequently seeks declaratory relief, including an order declaring the main proceedings a nullity.

[2] The first respondent opposes the application. It contends that Vulindlela is the duly recognised Senior Traditional Leader of the AmaHlubi community and that his authority to act on behalf of the Foundation is supported by a resolution authorising the institution of the main application and the appointment of the legal representatives. The parties' competing submissions raise, inter alia, questions concerning the distinction between traditional leadership and authority to represent a juristic person, the requirements of Rule 7 as well as the effect of the Foundation's constitution.

[3] Having considered the parties' respective submissions, it is necessary to consider whether the matter should be referred for the hearing of oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court regarding the source of authority pertaining to the proceedings by the Foundation.

Background

[4] The present dispute arises against the background of a disagreement concerning succession and traditional leadership within the AmaHlubi community. Although the succession dispute is not directly before this Court for determination, it provides the context in which the present proceedings were instituted. According to the applicant, the Foundation was established in or about February 2013 following a proposal made by him and accepted by the AmaHlubi Traditional Council. Its purpose was to manage and protect the commercial interests of the AmaHlubi Traditional Community.

[5] The applicant submits that the Foundation is a juristic person governed by its constitution and that all matters relating to its affairs, including the institution of legal proceedings in its name, must be undertaken strictly in accordance with the provisions of that constitution. It is on this basis that he disputes that Vulindlela's recognition as Senior Traditional Leader automatically confers upon him the authority to institute legal proceedings on behalf of the Foundation. He maintains that such authority must be established by reference to the Foundation's governing instrument and the procedures prescribed therein.

[6] The first respondent on the other hand, relies on Vulindlela's recognition as the Senior Traditional Leader of the AmaHlubi community. It further contends that the decision to institute the main application was duly authorised by a resolution and that the attorneys representing the Foundation were properly mandated. The first respondent also relies on Proclamation Notice 159 of 2025, dated 3 July 2025, recognising Vulindlela as the traditional leader of the AmaHlubi community. It is submitted that the proclamation has not been reviewed or set aside and remains operative.

[7] In addition, the first respondent relies on a previous court order dated 18 September 2024, marked as annexure NZL5 in the papers. It contends that the previous proceedings are relevant to the present dispute and that the applicant is attempting to revisit issues that have already been dealt with. The applicant disputes that the proclamation and the previous court order resolve the question of the Foundation's authority to institute the main proceedings. His contention

is that the first respondent's traditional leadership status does not dispense with compliance with the Foundation's constitution.

[8] The parties have consequently advanced competing versions regarding the source of the authority relied upon by the first respondent, the role of the Foundation's constitution and the validity and effect of the resolution said to authorise the main proceedings.

The issues for determination

[9] The issues arising from the parties' submissions are:

[9.1] in the first instance, whether the applicant's challenge falls within the scope of Rule 7 and secondly, whether the authority to institute and prosecute the main application has been established.

[9.2] A further issue is whether the factual disputes concerning the Foundation's governance, the resolution relied upon and the authority of the persons involved can properly be resolved on the affidavits or whether oral evidence is necessary.

[10] It is important at the outset to distinguish between the authority of an attorney to act on behalf of a litigant, the authority to institute and prosecute proceedings on behalf of a juristic person and the authority of a person to depose to an affidavit. These are related but distinct questions and the applicable legal principles must be applied to each in its proper context.

The applicable legal principles

[11] Rule 7 of the Uniform Rules of Court provides a mechanism through which the authority of a person acting on behalf of a litigant may be challenged. Its purpose is to ensure that a person purporting to act for another has the requisite mandate. The Rule provides that:

Rule 7(1) provides as follows:

"7(1) Power of attorney

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 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 authorized to act, and to enable him to do so, the court may postpone the hearing of the action or application".

[12] In *Ganes and Another v Telecom Namibia Ltd*[1] the Supreme Court of Appeal distinguished between the authority of a deponent to depose to an affidavit and the authority required for the institution and prosecution of proceedings. The Court held that:

> *"The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the*

[1] 2004 (3) SA 615 (SCA), para 19

institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, 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"

[13] It follows that the applicant's challenge cannot succeed merely because Vulindlela's authority to depose to the founding affidavit is disputed. The relevant inquiry is whether the main proceedings were duly authorised and whether the attorneys purporting to represent the Foundation have the requisite mandate. To this end, the first respondent relies on *Botha v East of Eden Trading 764 CC and Another*[2] in support of the distinction between authority to depose to an affidavit and authority to institute and prosecute proceedings. The distinction is relevant, but it does not resolve the factual question of whether the

[2] (983/2015) [2016] ZANWHC 82 (15 December 2016)

Foundation's proceedings were authorised in accordance with its governing arrangements.

[14] In *FirstRand Bank Ltd v Fillis and Another*[3] the Court considered the position where an attorney's authority to act on behalf of a litigant is challenged. The relevant question is whether the attorney can demonstrate the requisite mandate. The precise form of proof required depends on the circumstances and the nature of the challenge.

[15] Accordingly, the mere fact that proceedings have been instituted in the name of the Foundation does not necessarily establish that the decision to litigate was validly taken. Equally, a challenge to authority does not without more, render the proceedings invalid. The question must be determined on the available evidence.

The Foundation's constitution and the resolution

[16] The applicant relies on *Pretoria City Council v Levinson*[4] for the principle that a juristic person acts through authorised agents and must take decisions in accordance with the requirements governing its affairs. Where a juristic person is governed by a written constitution, the provisions of that constitution are relevant in determining who may exercise its powers and how decisions, including decisions to institute litigation, are to be taken.

[17] The applicant contends that the Foundation's constitution regulates its affairs and that Vulindlela's traditional leadership status does not automatically confer

[3] 2010 (5) SA 565 (ECP),para 13
[4] 1962 (1) SA 325 (A)

authority to institute proceedings in its name. On the other hand, the first respondent contends that the authority of the traditional leader is central to the Foundation's governance and that the resolution relied upon establishes the requisite mandate. It further criticises the applicant for failing to place the Foundation's constitutional documents before the Court.

[18] The existence and contents of the constitution, the source of the authority to adopt the resolution, the circumstances in which the resolution was adopted and the scope of the mandate are therefore material to the determination of the dispute. The Court cannot determine the question simply by accepting the applicant's assertion that the constitution was not complied with. Nor can it conclude merely because Vulindlela is a recognised traditional leader, that he is necessarily authorised to institute proceedings on behalf of the Foundation.

[19] The relevant constitutional provisions and resolution must be considered together with the evidence concerning their adoption and operation. Where the parties' versions concerning these matters are materially divergent and cannot satisfactorily be reconciled on the papers, oral evidence may be necessary.

Whether a genuine dispute of fact exists

[20] The applicant submits that Vulindlela has failed to address the material allegations concerning the Foundation's constitution and the absence of proper authority. He contends that the answering affidavit contains bare denials and that the first respondent has failed to discharge the burden of demonstrating that the main proceedings were duly authorised. The first respondent disputes this characterisation. It relies on Vulindlela's recognised position as traditional

leader, the resolution allegedly authorising the proceedings and the previous court order. It further contends that the present application is an attempt to challenge the traditional leadership position indirectly and to delay the determination of the main application.

[21] The applicable approach to disputes of fact in motion proceedings was explained in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[5] Ordinarily, final relief on motion is determined on the applicant's admitted factual allegations together with the respondent's version, subject to the established exceptions where the respondent's allegations are not genuine or are so far-fetched or untenable that they may be rejected on the papers.

[22] In Wightman t/a JW Construction v Headfour (Pty) Ltd and Another[6] the Supreme Court of Appeal emphasised that a real, genuine and bona fide dispute of fact requires the party raising it to address the disputed facts seriously and unambiguously. The Court must consider the factual allegations within the broader context of the case and determine whether the dispute is genuine.

[23] Applying these principles, the question is not merely whether the parties disagree about the legal effect of Vulindlela's recognition as traditional leader. That question may be capable of resolution through the interpretation of the applicable law and the relevant documents. The difficulty lies in the factual circumstances surrounding the authority relied upon by the first respondent. The applicant disputes that Vulindlela was authorised to institute proceedings

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[5] 1984 (3) SA 623 (A)
[6] 2008 (3) SA 371 (SCA), para 12 & 13

in the Foundation's name. The first respondent relies on a resolution said to establish that authority. The applicant, however, maintains that the Foundation's constitution governs the exercise of its powers and that the necessary requirements have not been satisfied.

[24] The parties' competing positions raise questions concerning the adoption and effect of the resolution, the authority of the person or body responsible for adopting it and the relationship between that resolution and the Foundation's constitution. The existence of a resolution, if established, does not necessarily dispose of the dispute. Its validity, scope and legal effect may depend on the circumstances in which it was adopted and the powers conferred by the Foundation's governing instrument.

[25] Conversely, the applicant's assertion that the constitution was not complied with cannot be accepted as established merely because the first respondent relies on traditional leadership status. The Court must be satisfied that the factual and legal basis for the authority claimed has been properly established. On the evidence before me, the competing contentions concern facts that are potentially decisive of the authority to institute the main application. Those facts cannot be determined merely by adopting one party's characterisation of the Foundation's governance arrangements.

[26] I am therefore not satisfied that the issues concerning the source, existence and scope of the authority relied upon can properly be resolved on the affidavits alone. In particular, the circumstances in which the resolution was adopted, the authority of those responsible for adopting it and the scope of the mandate require further investigation. I do not, at this stage, make a finding that the

resolution is invalid or that Vulindlela lacks authority. Those are matters to be determined after the relevant factual disputes have been resolved.

Whether the matter should be referred for oral evidence

[27] Rule 6(5)(g) of the Uniform Rules of Court provides that :

"*Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.*"

[28] The rule affords the Court a discretion to determine the appropriate procedure where material disputes of fact arise. That discretion must be exercised judicially, with due regard to the nature of the dispute, its materiality, the evidence already available and the interests of justice.

[29] In *Greyling v George Randell High School*[7], the Court considered the application of Rule 6(5)(g) where material factual disputes could not be determined satisfactorily on the affidavits. The decision illustrates the importance of identifying the specific disputes requiring resolution before

[7] (PR11/22) [2023] ZALCPE 2; [2023] 5 BLLR 412 (LC); (2023) 44 ILJ 1254 (LC) (27 February 2023)

determining the appropriate procedural course. Similarly, in *Lefakane v Vuyo and Others*[8], the North West Division emphasised that the Court must determine whether the factual disputes are genuine, material and incapable of resolution without viva voce evidence.

[30] In the present matter, the authority to institute proceedings on behalf of the Foundation is central to the interlocutory application. It is not a peripheral issue. If the proceedings were not duly authorised, that finding may have significant consequences for the continuation of the main application. The dispute cannot, in my view, be resolved simply by finding that Vulindlela is a recognised traditional leader. Nor can it be resolved by accepting, without further examination, the applicant's contention that the Foundation's constitution was not complied with.

[31] Consequently, the appropriate course is to allow oral evidence on the factual issues necessary to determine whether the decision to institute the main application was validly taken and whether the persons involved were duly authorised to act on behalf of the Foundation. The referral will permit the parties to test the evidence concerning the resolution and the authority relied upon through examination and cross examination. This will assist the Court in determining the factual basis of the alleged mandate without prematurely deciding the merits of the interlocutory application.

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[8] (M653/2020) [2026] ZANWHC 7 (21 January 2026)

[32] I am accordingly satisfied that the interests of justice are best served by referring the specified issues for the hearing of oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court.

Costs

[33] The applicant seeks a punitive costs order on the basis that the main application was instituted without proper authority and that the first respondent has persisted in the proceedings despite the challenge. Whilst the first respondent seeks dismissal of the interlocutory application with costs on Scale B, contending that the application is an abuse of process intended to delay the main proceedings.

[34] At this stage, the Court has not determined whether the main proceedings were duly authorised. It would therefore be premature to make a final costs order based on a finding that either party acted improperly in relation to the disputed authority.

[35] The costs of the interlocutory application should accordingly be reserved for determination after the hearing of oral evidence, when the Court will be in a position to assess the outcome and the conduct of the parties in the context of the evidence presented.

Order

[36] In the circumstances, the following order is made:

1. The interlocutory application is referred for the hearing of oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court .

2. The evidence to be adduced at the hearing shall be that of such witnesses as either party may elect to call.
3. No party shall be entitled to call a witness unless:

    3.1 such party has served on the opposing party a statement setting out the evidence that the witness intends to give in chief. The applicant shall deliver such statement within 20 court days of the date of this order and the respondents shall deliver their respective statements within 20 court days of the date of receipt of the statement referred to herein above;

4. Notwithstanding the provisions of paragraph 3.1 above, either party shall be entitled to subpoena any person to give evidence at the hearing, irrespective of whether that person has consented to furnish a statement.
5. Within 15 court days of the date of this order, each party shall make discovery, under oath, of all documents relevant to the issues in dispute.
6. The discovery referred to in paragraph (5) herein above shall be effected in accordance with Uniform Rule 35 of the Uniform Rules of Court. The provisions of that Rule relating to the inspection and production of discovered documents shall apply accordingly.
7. The parties shall set the matter down for hearing in accordance with the Practice Directives of this Division.



B MATLHAPE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

Counsel for the Applicant: T Dyasi

Instructed by: Molefakgotla Attorneys

Counsel for the 1st Respondent: Adv GK Seleka

Adv KP Letswalo

Instructed by: Van Velden-Duffy Inc.

c/o Van Rooyen Tthapi Wessels Attorney