

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

(1) REPORTABLE: YES/NO

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

(3) REVISED

DATE

SIGNATURE

Case no: 2021/22884

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

VERNON WILKEN N.O.

First Respondent

**(IN HIS CAPACITY AS A TRUSTEE
OF THE DEUTRA TRUST)**

**ANNA SUSANNA WILKEN N.O.
(IN HER CAPACITY AS A TRUSTEE
OF THE DEUTRA TRUST)**

Second Respondent

**VERNON WILKEN
(IN HIS CAPACITY AS SURETY FOR THE
DEUTRA TRUST
ID: [...])**

Third Respondent

**ANNA SUSANNA WILKEN
(IN HER CAPACITY AS SURETY FOR THE
DEUTRA TRUST
ID: [...])**

Fourth Respondent

JUDGMENT: RESPONDENTS' RULE 7(1) APPLICATION

FRIEDMAN AJ:

- 1 In this matter, the applicant (“Standard Bank”) sues the trustees of the Deutra Trust (“the trustees”) for payment of roughly R8.2 million, an order declaring certain property owned by the Deutra Trust to be executable, and costs on the attorney-own client scale (“the main application”).
- 2 The trustees have brought an interlocutory application in which they seek an order:
 - 2.1 Granting them leave to file a notice in terms of rule 7(1) of the Uniform Rules in the form reflected in an annexure to the founding affidavit.

2.2 Ordering that Buba Attorneys Inc, the attorneys acting for Standard Bank in these proceedings, may not continue to act until they have satisfied the court that they are “authorised so to act”.

2.3 Granting them costs in the event of opposition by Standard Bank.

3 Rule 7(1) of the Uniform Rules provides as follows:

“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.”

4 The reason why it was necessary for the trustees to bring this application is that they sought to challenge the authority of Buba Attorneys to represent Standard Bank after the expiry of the ten days envisaged by rule 7(1). They therefore are only permitted to dispute that Buba Attorneys is entitled to represent Standard Bank “with the leave of the court on good cause shown”.

The trustees’ case

5 In the founding affidavit in the rule 7(1) application, the trustees explain the basis on which they seek to invoke the provisions of rule 7. They say that:

5.1 In the founding affidavit in the main application, the deponent (“Ms Dikolomela-Mafa”) describes her position as being “Manager, Business Support, Rescue and Recoveries personnel at the Applicant”.

5.2 Ms Dikolomela-Mafa then relies on an annexure to the founding affidavit (labelled as KDM1) as evidence that she is authorised to depose to the founding affidavit. That annexure, however, describes the deponent's position as "Manager, Business Support and Recoveries, Business and Commercial Clients Credit, a division of The Standard Bank of South Africa Limited". This discrepancy leads the trustees to deny that the deponent to the founding affidavit was given authority to depose to it. In other words, the evidence on which the deponent relies to establish her authority (being KDM1) does not establish it.

5.3 Leaving aside the question of Ms Dikolomela-Mafa's authority, the trustees say that there is no resolution of Standard Bank authorising the launching of this litigation, and there is not even an allegation in the founding affidavit that such a resolution was taken. Since there is no evidence that a resolution was taken, "the issuing and prosecution of the application is unauthorised and constitutes a nullity". This carries the implication, according to the trustees, that "the attorneys who are at present on record for [Standard Bank] are not authorised to represent [Standard Bank]".

5.4 The trustees say that the "good cause" requirement is satisfied in this case because:

5.4.1 The absence of authority is "striking".

5.4.2 The absence of authority is a substantive matter which, if decided in the trustees' favour, will render the main application moot "since [Standard Bank's] attorneys will be precluded from acting for the

applicant until such attorneys satisfy the Court that they are authorised to act”.

5.4.3 There can be no prejudice to Standard Bank in having to establish the authority of Buba Attorneys to represent it, while there is manifest prejudice to the trustees in being precluded from challenging the authority of the firm of attorneys – ie, the risk of being held liable to pay R8.2 million in proceedings which were defective because of the lack of authority.

5.5 The trustees then explain why there was a delay between the time when they knew, or ought to have known, that there was an authority problem (ie, when the main application was served on them) and the launching of this interlocutory application. My understanding is that Standard Bank does not take issue with the delay – in other words, it accepts the entitlement of the trustees to pursue the relief in this application notwithstanding the delay. It is therefore not necessary for me to discuss the reasons given for the delay in any detail. I should record that, even if the question of delay had been disputed, I would have concluded that the delay was not unreasonable in the circumstances of this case.

Standard Bank’s answering affidavit

6 Standard Bank explains that, after the rule 7(1) application was served on it, it filed a notice in terms of rule 30. This arose from the fact that the affidavit of the trustees supporting this rule 7(1) application was, according to Standard Bank, not compliant with the Justice of the Peace and Commissioner of Oaths Act 19 of 1963. There

followed a period of time in which the parties exchanged correspondence on the future conduct of this matter. The correspondence related, in essence, to Standard Bank's suggestion that the rule 7 application and Standard Bank's application (yet to be launched) based on the alleged defect in the founding affidavit be heard together. The complaint on which Standard Bank's rule 30 notice is based is that the founding affidavit in this interlocutory application contains the allegation that the deponent is a male, but the commissioner of oaths records at the foot of the affidavit that the deponent is female. For this reason, says Standard Bank, it is "not clear, what gender the deponent identifies, inter alia, whether he is male or female [sic]". Standard Bank says that the trustees were given the opportunity to cure the defect (in the form of having received the rule 30 notice) but declined to do so.

- 7 Having explained the basis of its rule 30 notice, Standard Bank proceeds to explain why the authority point is, in its view, meritless. I return to discuss that, to the extent necessary, below. I should also note that Standard Bank's answering affidavit was filed out of time, and a request for condonation was made in its body. No formal condonation application was brought, a point taken by the trustees in their replying affidavit (which itself was accompanied by a condonation application because it was filed out of time).

The replying affidavit and condonation application

- 8 In the application for condonation for the late filing of the replying affidavit, the trustees deal briefly with the defect in the founding affidavit which Standard Bank had highlighted. They say that there was a typographical error in the affidavit, and agree that Standard Bank's complaint was well-taken. They said that they refrained from dealing with the issue in any detail because a separate condonation application in

respect of the defect in the founding affidavit was to be brought and the issue fully ventilated there.

- 9 That is a reference to a separate condonation application in which the trustees seek condonation for the late filing of the founding affidavit in respect of the rule 7(1) application and also the late filing of the third respondent's answering affidavit in the main application. As part of the founding affidavit in that application, an explanation is given for the typographical error contained in the original founding affidavit in this rule 7 application. A corrected affidavit, which makes clear that the deponent to the founding affidavit (Mr Wilkens, the first respondent in the main application) is a man (and confirmed by the commissioner of oaths this time), is annexed to this affidavit.

ANALYSIS

- 10 It may be seen from the discussion above that this matter is characterised both by arguments of the most technical character, as well as a series of procedural oddities. The Caselines folder is littered with rule 30 notices and skirmishes in relation to which my discussion above has not even scratched the surface. While parties are entitled to take whatever points they consider appropriate, it bears emphasis that the fundamental purpose of the rules, and our principles of civil procedure in general, is to ensure the convenient ventilation of disputes as fairly and quickly as possible. When parties take every technical point available to them, these principles are undermined. I make this point in passing – clearly, I have an obligation to consider and decide the issue raised by the trustees' rule 7(1) application and I do not mean to suggest that a challenge to authority is a mere technicality. My comment relates to the conduct of this litigation generally, rather than this rule 7(1) application in particular.

The validity of the rule 7(1) founding affidavit

11 Although Standard Bank filed a rule 30 notice in respect of the trustees' founding affidavit in the rule 7(1) application, it did not follow-up with a formal application to set aside the affidavit. The point is now characterised in argument by Standard Bank as an "*in limine* point". It does not seem to me to be permissible for a party to file a rule 30 notice complaining of an irregular step, fail to follow up with the application envisaged by rule 30(1) and then persist in taking the point on the purported basis that it is an *in limine* issue which may simply be argued.

12 In any event, it is not necessary to become bogged down in that issue because I, in any event, agree with the submission of *Mr Steyn* (who appeared for the trustees) that the whole purpose of rule 30 is to provide the other side with an opportunity to cure an irregularity. In contrast to what Standard Bank says now, the trustees did not simply plough through and insist that the initial founding affidavit was valid. On the contrary, they filed a corrected affidavit, coupled with a condonation application in which the typographical error was explained. Even if Standard Bank is entitled to raise the apparent defect in the founding affidavit in the manner in which it does, I would not be minded to uphold the point. To the extent necessary, I therefore take the opportunity to record here that the *in limine* argument is rejected.

Rule 7(1)

13 The noteworthy feature of rule 7(1) is that, within the 10-day period contemplated by the rule, a party wishing to challenge authority as envisaged by its terms has an unqualified right to do so. The need to show good cause arises only in cases where the challenge is sought to be made after the expiry of the ten days.

- 14 There is, of course, a great deal of case law on the meaning of the term “good cause” because it comes up in various contexts when courts are asked to condone non-compliance with some or other rule. There is not as much discussion of its particular meaning within the context of rule 7(1). It seems to me that the reference to “good cause” in rule 7(1) relates primarily to the question of lateness. In other words, there is an unqualified right to serve a rule 7(1) notice without any permission from a court being necessary, as long as it is done within the 10-day period. The circumstance which triggers the need for the Court to grant permission is the fact that the applicant falls outside of the ten-day period. It follows, in my view, that the enquiry into “good cause”, must primarily focus on the explanation of the lateness.
- 15 But, in any condonation application, it is well-accepted that, in addition to explaining the lateness, the party seeking condonation generally must also establish “reasonable prospects of success” or a “bona fide defence”, depending on the context. In other words, there is an overarching theme in our law, where there is non-compliance with the rules in some or other way, that the non-compliance may be condoned if a proper explanation is given for it. And part of this explanation involves satisfying the court that condonation, if granted, would not be an exercise in futility because the party seeking the indulgence has something of substance to say or add to the case.
- 16 The approach adopted by the trustees in their papers and argument broadly accords with this approach. They do not seek, as I understand their case (and, in particular, the relief as framed in the notice of motion), a final determination that the main application was not properly authorised. Rather, they have explained the delay in filing the rule 7 notice and then provided a basis on which the court may conclude that there is at least some reason to doubt that the main application was properly authorised.

17 As mentioned above, it is my understanding that Standard Bank does not take issue with the delay – in other words, it is common-cause that the delay should be condoned. And, as I have already said, even if that issue was not common cause, I would be minded to hold that the delay was not unreasonable in the circumstances of this case – and in particular, the other interlocutory matters which were being addressed in parallel shortly after the main application was instituted. So, it seems to me that, unless I can say, by looking at the papers as they stand, that there is simply no substance to the authority challenge (meaning, in this context, that there would be no good cause to permit the challenge to be mounted), I must allow the trustees to file their notice and raise the challenge. This flows, in my view, from the starting point which I raised earlier – ie, that in the ordinary course a litigant has an unqualified right to file a rule 7 notice.

18 In this context, the trustees have more than amply exceeded the threshold of showing good cause:

18.1 In the founding affidavit, the deponent does not allege that Standard Bank authorised the institution of the main application. Rather, she says that she is authorised to depose to the founding affidavit. So, the trustees are technically correct when they say that there is no positive averment that Standard Bank decided to institute the main application. Interestingly, Ms Dikolomela-Mafa herself makes the point in the answering affidavit in this rule 7(1) application that “a deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit and it is the institution of the proceedings and the prosecution thereof which must be authorised”. On

Standard Bank's own version, therefore, a material requirement to launch the main proceedings was not met.

18.2 But leaving that aside, the main issue is that the deponent to the founding affidavit relies on a document, which was annexed as KDM1 to the founding affidavit, described as a sub-delegation of authority. That document is signed by a Mr Keith Fuller, the Chief Risk Officer, Business and Commercial Clients of the Standard Bank. It purports to "certify" that Ms Dikolomela-Mafa has various powers to advance litigation such as the main application. It says that the fact that this authority is conferred on the deponent is "[c]ertified in terms of the resolution passed by the board of directors of The Standard Bank of South Africa Limited on the 7th March 2018 and the sub-delegation of authority by Lungisa Fuzile on the 12th April 2021". There is nothing in the papers which identifies, or explains the role of, Lungisa Fuzile.

18.3 There is no evidence of Mr Fuller's authority in the papers. It must be assumed that the resolution and sub-delegation of authority, dated 7 March 2018 and 12 April 2021 respectively, cast light on this issue. The problem is that they are not before court. So, if one reads the founding affidavit together with KDM1, one does not find the answer as to the basis on which Mr Fuller was empowered to authorise Ms Dikolomela-Mafa to take any steps in respect of this litigation. To put this problem slightly differently: Standard Bank is a juristic person. It may therefore only act through the agency of natural persons. What we are in essence dealing with here is whether Ms Dikolomela-Mafa and Mr Fuller are authorised agents of the Standard Bank with the authority to institute this litigation on behalf of the bank – and, in doing so, authorise Buba

Attorneys to represent the bank in the litigation. Because the resolution and delegation of authority are not before court, there is no independent way to verify this authority. There is not even a positive averment, let alone a confirmatory affidavit, as to the authority of Mr Fuller to confer authority on Ms Dikolomela-Mafa.

- 18.4 In an attempt to cure the defects mentioned above, Standard Bank filed a supplementary founding affidavit. It did so without seeking leave, and the trustees object to its admission on this basis. It does not, in any event, cure the doubts raised above because it refers to “the resolution supporting the Letter of authority and the sub-delegation of authority . . . dated 7 March 2018 and 12 April 2021” but provides no proof that they were taken; or, indeed, any information about their nature. The last point is key – the only way one could understand how these resolutions authorised Mr Fuller to perform the role that he did would be to consult their terms. This was obviously impossible, since they have not been placed before court in any of the affidavits filed by Standard Bank. So, even if I were to hold that the supplementary affidavit is admitted – and I make no finding in this regard – it does not take the matter any further.
- 19 In its heads of argument, Standard Bank advances essentially three arguments. First, it is argued that annexure KDM1 has “probative value” and authorises Ms Dikolomela-Mafa to institute litigation on behalf of Standard Bank and appoint attorneys to represent the bank in that litigation. Secondly, it is said that a resolution is not the only way to prove authority and it would be impractical to require a resolution to be passed in each and every debt recovery application instituted by Standard Bank. Thirdly, it is

argued that the challenge to Mr Fuller's authority was raised by the trustees for the first time in their heads of argument and that I should accordingly have no regard to it.

- 20 In my view, these arguments do not avail Standard Bank. The argument based on the scope of KDM1 is question-begging because the trustees' criticism of KDM1 is not that, on its terms, it does not authorise the institution of litigation. The criticism is that there is no independent evidence that the person responsible for generating KDM1 has authority to authorise Ms Dikolomela-Mafa to institute litigation and appoint attorneys to do so. This also demonstrates why the third argument must be rejected. Standard Bank relies on KDM1 as evidence of Ms Dikolomela-Mafa's authority (and consequently the authority of Buba Attorneys to represent Standard Bank, which would flow from the firm's valid appointment by Ms Dikolomela-Mafa). That is Standard Bank's evidence. The trustees are then entitled to advance legal argument to the effect that the evidence is insufficient to establish authority. That includes an argument that there is no evidence that the person who signed KDM1 was authorised to do so.
- 21 As far as the second argument is concerned: I agree with Standard Bank that it would be absurd to expect the board to pass a resolution every time the bank has to sue on a money debt. I can take judicial notice of the bank's size and can conclude that, if such a requirement were imposed, it would prevent the board from doing any other business. This is precisely why delegations of authority, and resolutions cast in general terms, are used by large organisations of this nature. All that the Bank had to do was to put up the resolution passed by the board of directors on 7 March 2018 and the sub-delegation of authority by Lungisa Fuzile on the 12 April 2021 (see paragraph above) and no doubt any questions about Mr Fuller's authority to authorise Ms Dikolomela-Mafa to institute litigation relating to claims of up to R40 million (which is what KDM1 says) would be

put to rest. And, if in putting up this evidence, the court were still to conclude that there was some defect in authority, the solution would not be to require the bank to issue a fresh resolution every time it wished to reclaim money owed to it. The solution would be to perfect the delegation of authority.

- 22 It may seem, in some senses, that the summary that I have given in paragraph above reflects a very technical approach to the question of authority. And it is true that many respondents faced with a formal letter of authority on a Standard Bank letterhead would take the view that the application must have been authorised and so there would be no sense in wasting time invoking rule 7. But the very purpose of rule 7 was to abolish the need for a power of attorney in all cases, and instead leave challenges to authority to the election of the parties. The implication of that is that, if a party exercises the election and wishes to use rule 7, it will be necessary for the authority to be properly established. This will sometimes involve what may seem like a pedantic exercise, to make sure that everything squares up. On the evidence before me at present, the authority has not been properly established, which suggests that the trustees have satisfied the “good cause” requirement envisaged by rule 7(1).

CONCLUSION

- 23 It follows from what I have said that the trustees should be granted the relief which they seek.
- 24 There is one complexity on the issue of costs. When this matter came before me, Standard Bank asked for the matter to stand down for a day. As I understood it, the idea was for this period of time to be used to pursue settlement discussions of some sort. When the matter came before me on the second day, counsel for the trustees argued that

Standard Bank should be ordered to pay the costs of two days because the stand-down was done at the request of Standard Bank, when the trustees were ready to proceed, and achieved nothing. There is merit in this submission, and I accordingly intend to address that in my order below.

ORDER

25 In the light of the above, the following order is made:

- 1. Leave is granted to the first to fourth respondents in the main application under case number 2021/22884 to serve a notice in terms of rule 7(1) in the form of annexure “FA1” to the founding affidavit of Vernon Wilken on the applicant and its attorney.**
- 2. Buba Attorneys Inc may not act for the applicant until such time as Buba Attorneys Inc has satisfied the court that it is authorised so to act.**
- 3. The applicant is to pay the costs of this interlocutory application, which costs shall include provision for a hearing of two days.**

**ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 1 February 2023.

APPEARANCES:

Attorney for the applicant: Buba Attorneys Inc

Counsel for the applicant: M Ramabulana-Mathiba

Attorney for the first to
fourth respondents: Goodes & Co Attorneys

Counsel for the first to fourth
respondents: JW Steyn

Date of hearing: 22 and 23 November 2022

Date of judgment: 1 February 2023