REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 55831/2021

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

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N. REDMAN **30 March 2023**

In the matter between:

DIRECTRIX RISK SERVICES CC Applicant

and

BAREND JACOBUS BADENHORST First Respondent
GROUP RISK MANAGEMENT SERVICES (PTY) LIMITED Second Respondent
WILLIS SOUTH AFRICA (PTY) LIMITED Third Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be _____ 10h00 on _____ 2023.

JUDGMENT

REDMAN AJ:

[1] In this application the applicant seeks relief which is both novel and extraordinary.

[2] During 2019 the applicant instituted proceedings against the first respondent in this division under case no. 2019/41572 arising out of alleged breaches of a contract of employment (referred to as the "**Badenhorst matter**").

[3] By agreement between the parties it was directed that the Badenhorst matter be heard as a Commercial Court case in accordance with the Commercial Court Practice directives issued by this Court. Judge Mdalana-Mayisele was allocated to case manage the matter.

[4] In the Badenhorst matter discovery, witness statements and expert reports have been exchanged. According to the respondents, the Badenhorst matter is ripe for hearing and merely needs to be allocated a trial date.

[5] The applicant contends that during the discovery phase in the Badenhorst matter it was established that original material, the copyright of which vested with the applicant, had been copied and/or adapted by the first respondent and was in the possession of, and/or was used by, the respondents without the consent or permission of the applicant.

[6] During November 2021 the applicant issued a summons in the instant matter against the respondents seeking, *inter alia*, an interdict and claiming an amount of R11,460,038 as a reasonable royalty and damages in the amount of R11,460,038 ("**the Copyright matter**").

[7] On 14 December 2021, the following documents were delivered on behalf of the respondents –

7.1. A notice of intention to oppose, wherein Clyde & Co were appointed as the respondents' attorneys;

7.2. A notice of exception in terms of Rule 23(1);

7.3. A notice of irregular proceedings in terms of Rule 30(2)(b); and

7.4. A notice in terms of Rule 35(14).

[8] These notices were followed up by –

8.1. An application in terms of Rule 30(1) served on behalf of the respondents on 20 January 2022; and

8.2. A notice of exception to the summons served on 24 June 2022.

[9] In response to these notices, on 24 January 2022 the applicant served –

9.1. A notice in terms of Rule 7 challenging the authority of Clyde & Co to act on behalf of the respondents;

9.2. A notice of irregular proceedings in terms of Rule 30(1) [It was alleged that the respondents' Rule 30(2)(b) notice was irregular];

9.3. A reply to the respondents' Rule 35(14) discovery notice; and

9.4. A notice in terms of Rule 41A(1) indicating that the applicant did not intend to mediate the matter.

[10] On 7 March 2022, the respondents delivered replies to the Rule 7(1) notice ("**the Rule 7(1) replies**").

[11] On 18 March 2022, the applicant served a notice purportedly in terms of Rule 35(12)(a) seeking discovery of documents pertaining to the Rule 7(1) replies.

[12] The respondents raised the following objections to the Rule 35(12) notice:

12.1. the Rule 7(1) replies were neither pleadings nor affidavits, and accordingly Rule 35(12) was inapplicable; and

12.2. no specific documents were referred to in the Rule 7(1) replies.

[13] Dissatisfied with the responses, on 19 May 2022 the applicant launched this application. The relief sought by the applicant can broadly be divided into three themes, namely –

13.1. Relief under Rule 7 challenging the authority of the respondents' attorneys (Clyde & Co) to act in the matter;

13.2. Consolidation of the Badenhorst and Copyright matters and the removal of the Badenhorst matter from the Commercial Court;

13.3. Discovery in terms of Rule 35(12).

Authority of attorneys – Rule 7

[14] In its notice of motion the applicant seeks the following relief purportedly in terms of Rule 7(1):

"3. An order preventing the Second and Third Respondents ("the Company/ies Respondent/s or "Companies") appointed Attorney of Record from being instructed to act and institute legal proceedings on behalf of the Companies in terms of the provisions of Rule 7 which remains in dispute subsequent to their reply dated 7 March 2022;

4. An order that all legal process of the Companies Respondents Attorney be considered void ab initio from the date of their Notice of Intention to Defend;

5. An order that the Respondents be prevented from instructing Attorneys of Record, or any other Attorney from opposing this application on behalf of the Respondents until such time as the appropriate authority, Companies' resolutions and Power of Attorney duly authorised by a formal meeting held by the directors of the Company Respondents in accordance with the provisions of the Companies Act No 71 of 2008, are served on the Applicant's attorney;

6. An order that all notices filed by the Respondents in terms of Rule 23, 30 and 25 to date be declared a nullity failing proper authorisation in terms of Rule 7, with costs, alternatively with costs on attorney-and-client scale;

..."

[15] Rule 7 provides as follows:

7. Power of attorney

(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.

(2) The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing.

..."

[16] It is immediately apparent that the relief sought by the applicant does not accord with the provisions of Rule 7(1). The Rule precludes an attorney who has received a notice in terms of Rule 7 from acting in the matter until he/she satisfies the Court that he/she has been properly authorised. (*FirstRand Bank v Fillis 2010 (6) SA 565 (ECP) at 12A – 13C*).

[17] The Rule does not prescribe the manner in which the Court is to be satisfied. A resolution of a company may constitute sufficient proof of authority on the part of the attorneys. *Mall (Cape) (Pty) Ltd v Merino Koöperasie Bpk 1957 (2) SA 347 (C)*.

[18] In their Rule 7(1) replies, the second and third respondents attached written board resolutions together with signed powers of attorney authorising the respondents' attorneys to act in the proceedings on their behalf.

[19] The applicant was dissatisfied with the second and third respondents' Rule 7(1) replies. It contended that –

19.1. The second respondent's power of attorney was only signed by one person, namely Marco du Plessis.

19.2. The second respondent's board resolution was only signed by two of its directors, in circumstances where the CIPC records reflect that there were six directors.

19.3. The third respondent's power of attorney was only signed by one person, namely George Bishop.

19.4. The third respondent's board resolution was only signed by two of its directors in circumstances where the CIPC records reflect that there were five directors.

[20] Relying on the provisions of sections 73 and 74 of the Companies Act, 71 of 2008, the applicant contended that the power of attorney and board resolutions were insufficient to satisfy the Court that Clyde & Co was authorised to act on behalf of the second and third respondents. The applicant averred that there was no indication that the relevant board meetings had been properly convened or that the directors had received "formal notice" of the proposed resolutions. The applicant thus insisted that it was entitled to seek documentation relating to the board meetings to enable it to interrogate the validity of same.

[21] The respondents maintained that the resolutions were properly passed, and that the powers of attorney authorised Clyde & Co to act in the matter on behalf of the second and third respondents. *Ex abundante cautela*, the second and third respondents attached to their answering affidavit additional resolutions authorising Clyde & Co to act on their behalf.

[22] Notwithstanding, the applicant persisted with the application. In the heads of argument delivered on behalf of the applicant, it for the first time acknowledged that the additional resolutions remedied the position and vested Clyde & Co with the necessary authority to act on behalf of the second and third respondents.

[23] I am satisfied that the second and third respondents' initial responses to the Rule 7(1) notices constituted sufficient proof that Clyde & Co had been properly authorised to act on their behalf. The veracity of the initial powers of attorney and resolutions could not be, and were not, gainsaid by the applicant. The applicant's challenge to the authority of the attorneys was flimsy and unconvincing.

[24] Despite sufficient proof as to the authorisation of Clyde & Co having been provided, the applicant continued with the application and required the second and third respondents to incur further unnecessary time and expense to establish same. The challenge to the authority resulted in the filing of further superfluous resolutions and lengthy affidavits. It is inconceivable that Clyde & Co would have entered an appearance to defend the action on the part of the second and third respondents without having the requisite authority to do so. Any suggestion that the second and third respondents would not have opposed the action can also be rejected.

[25] Technical and dilatory attacks on the authority of attorneys should be discouraged. See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C and 705H-I and *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 207E-H.

[26] In the circumstances, I am satisfied that Clyde & Co had the necessary authority to act on behalf of all the respondent and the Rule 7(1) application falls to be dismissed.

Consolidation and removal

[27] The procedure for the consolidation of actions is addressed in Rule 11 of the Rules of Court. The overriding consideration is whether it appears to the Court to be convenient.

[28] In order to determine whether the consolidation of the Badenhorst and Copyright matters would be convenient, it would be necessary for the Court to have sight of the pleadings exchanged in those matters. Without the pleadings it is impossible for the Court to determine what issues have arisen in the two matters and whether there is any overlapping in the evidence or arguments which would be tendered.

[29] I am aware that the pleadings in the Badenhorst matter have closed, witness statements and expert notices have been exchanged and the matter is trial ready. I have, however, not been provided with the pleadings in that matter and have no insight into the disputes relating thereto.

[30] The applicant has elected not to attach copies of the pleadings in the Badenhorst matter to its application and it is thus impossible for me to determine whether the consolidation of the two actions would be convenient. Pleadings in the Copyright matter have not been finalised. There is an exception and various interlocutory matters pending. A consolidation would inevitably lead to a substantial delay in the Badenhorst matter.

[31] The Badenhorst matter is pending in the Commercial Court, whereas the applicant insists that the Copyright matter be heard in the normal course. This in and of itself indicates that the consolidation of the two matters would be inconvenient.

[32] The applicant has not made out a proper case for the consolidation of the two matters at this juncture and I am not persuaded that it would be convenient at this stage.

[33] In addition to the consolidation of the two matters, the applicant seeks an order that the Badenhorst matter be suspended and removed from the Commercial Court. The order sought in this regard is unprecedented.

[34] The primary reason tendered for seeking the removal of the matter from the Commercial Court is based on the contention that the Commercial Court directives make no provision for general discovery. The applicant complains that Chapter 5 of the Commercial Court Practice Directive only makes provision for targeted disclosure of documents. The applicant does not explain why its alleged complaints relating to discovery were not raised before Judge Mdlana-Mayisele who is case-managing the matter, nor does it indicate what documents it requires and why targeted discovery would not suffice.

[35] Matters heard in the Commercial Court are dealt with in line with broad principles of fairness, efficiency and cost effectiveness. There is no doubt that any issues relating to discovery or lack thereof could and should have been addressed in that forum. Not only did the applicant consent to the Commercial Court procedure but the matter was allocated to the Commercial Court by the Judge President or Deputy Judge President in accordance with paragraph 2 of Chapter 2 of the Commercial Court Practice Directives. The applicant's change of heart does not constitute a basis to review the decision to refer the matter to the Commercial Court, more so, having regard to the fact that the Badenhorst matter is ripe and ready to be heard.

[36] I accordingly find no merit in the application for suspension or removal of the Badenhorst matter from the Commercial Court.

Discovery: Rule 35(12)

[37] In the light of the applicant's acknowledgement that the Rule 7(1) notice has been complied with, there was no basis for it to seek any documentation relating to the second and third respondents' Rule 7(1) replies.

[38] The applicant's notice in terms of Rule 35(12) and application to compel discovery thereunder was in any event, ill-founded and fatally flawed. Rule 35(12) only entitles a party to inspect and make copies of documents or tape recordings referred to in an affidavit or pleadings. The applicant has attempted to utilise this Rule to embark on a fishing expedition and seek documents neither referred to nor relevant.

[39] The application in terms of Rule 35 is accordingly dismissed.

COSTS

[40] I am of the view that this is an appropriate matter for an award of costs on the attorney and client scale. The relief sought, both individually and cumulatively, was devoid of merit. There was no explanation for the applicant having sought relief purportedly in terms of the Rules of Court in circumstances where such relief was neither catered for nor envisaged by those Rules.

[41] Having been informed that Rule 35(12) was not available to it, the applicant nevertheless persisted in pursuing this relief. In addition, despite having been provided with resolutions and powers of attorney verifying that the respondents' attorneys were authorised to act, the applicant insisted on further evidence in this regard.

[42] In all the circumstances, I am of the view that the applicant's conduct in these proceedings warrants a punitive costs order and I am thus inclined to grant an order on the attorney and client scale.

[43] I am not persuaded that the applicant's attorneys and counsel were not acting on the instructions of the applicant and am thus not prepared to grant an order of costs *de bonis propriis* against the legal representatives.

[44] In the circumstances, the application is dismissed with costs on the scale as between attorney and client.

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N REDMAN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 21 November 2022
Judgment: 30 March 2023

Appearances:

For Applicant: Advocate Michael Kohn
Instructed by: J J Nel Attorneys

For Respondents: Advocates IP Green SC and L Choate
Instructed by: Clyde & Co