



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

Case No: 21/4131

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DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
23 January 2024
DATE SIGNATURE

IN THE MATTER BETWEEN:

BERNHARD MADER

POHL VAN NIEKERK N.O

DIEDELOF JACOBUS FOURIE N.O.

FIRST APPLICANT

SECOND APPLICANT

AND

FLOXIFOR PTY LTD

RESPONDENT

JUDGMENT

SIWENDU J

[1] There are several interlocutory applications (the applications) for adjudication before the Court. The applications were enrolled for hearing as a

special motion following a case management directive and order by Senyatsi J on 16 March 2023.

[2] Berhard Mader Pohl Van Niekerk NO and Diedelof Jacobus Fourie NO are the first and second applicants (the applicants). They act in their capacity as the trustees of the Madernette Trust (IT 12581/997). The respondent is Floxifor (Pty) Ltd (Floxifor), a company engaged in mining. Floxifor had leased certain property from the Madernette Trust (the Trust) to conduct its mining activities. The parties will be referred to as they appear in the liquidation application.

[3] The background to the interlocutory applications can be summarised briefly. On 1 February 2021, the applicants brought an application for the final, alternatively, provisional liquidation of the respondent, Floxifor (Pty) Ltd (Floxifor) on the grounds that it was deemed unable to pay its debts in terms of section 344 (f) of the Companies Act 61 of 1973 (the old Act). They alleged that Floxifor defaulted on its obligation to pay rent on the property leased from the Trust. Floxifor opposed the liquidation application.

[4] It is a trite principle in our law that a Trust is not a legal person. Trust assets vest in the body of trustees, whose power to act and represent the Trust derives from the Trust Deed. At the time of the institution of the liquidation proceedings, the applicants were the two remaining trustees of the Trust. One of the trustees, Mrs Cornelia van Niekerk who was married to the first applicant, passed away on 10 October 2019. On 20 May 2020, the trustees made a written request to the Master of the High Court to appoint Cornea Liebenberg and Sandre van Niekerk as new trustees.

[5] When the application for liquidation was initiated, in February 2021, the remaining trustees had not yet received formal Letters of Authority appointing the two additional trustees from the Master. Requisite letters were issued by the Master in March 2021 after the initiation and service of the liquidation

application. In their founding affidavit, the applicants stated that the only requirement of the Trust Deed of the Trust in clauses 4.2 and 4.3 is that there shall at least be always two trustees. In the meantime, and until the vacancy has been filled, the remaining trustees were authorised to exercise all powers of the trustees.

[6] It was common cause between the parties that clauses 4.2 and 4.3 of the Trust Deed envisages that two trustees may validly act on behalf of the trust. The relevant parts of the clauses read:

‘4.2 Daar moet te alle tye minstens 2 (twee) trustee (s) in amp wees.

4.3

Tot tyd on wyl die vakatures aangevul is, is die oorblywende trustee of trustees gemagtig om alle magte van trustees uit te oefen vir die behoud van trustbates.’

[7] On 13 December 2021, following the exchange of the permissible number of affidavits, the applicants delivered a supplementary affidavit, placing further facts regarding Floxifor’s indebtedness.

[8] Progress in finally determining the liquidation application has stalled and is embroiled in a series of interlocutory disputes. Both parties filed several notices, some of which were accompanied by substantive applications in terms of the Uniform Rules of Court. I deal with them seriatim below to give context to the disputed issues.

Notices and Applications

[9] The first set of notices were delivered by Floxifor to challenge the authority of the applicants to institute the liquidation application and the authority of the Trust legal representative, Japie Van Zyl Attorneys. Floxifor delivered a Rule 7 (1) notice dated 26 January 2022 objecting to their authority to act in the matter. The applicants’ attitude was that the notice is irregular. They filed an application in terms of Rule 30 objecting to the Rule 7(1) notice.

[10] The second set of notices relate to the supplementary affidavit filed by the applicants on 13 December 2021, alluded to above. Floxifor challenged the delivery of the supplementary affidavit in terms of Rule 30. In response the applicants filed an application in terms of Rule 6(5)(e) seeking the Courts' leave to permit the filing of the applicant's supplementary/affidavit.

[11] The third set of notices concerned the substitution of Cornelia van Niekerk and the second applicant, Diedelof Jacobus Fourie NO (Mr Fourie). The applicants filed a Rule 15(2) notice accompanied by a substantive application for the substitution and joinder of the new trustees, Cornelia Liebenberg, and Sandre van Niekerk as second and third applicants in the liquidation application. Floxifor opposed the substitution and joinder of the new trustees in a substantive application delivered in terms of Rule 15(4).

[12] The fourth notice is in respect of a point of law raised by Floxifor in terms of Rule 6(5)(d)(iii) filed on 28 April 2023. It attacks the liquidation application on the grounds that it is nullity *ab initio* and cannot be ratified *ex post facto*. At first blush, it seemed that the issues raised were intertwined with those in the Rule 7(1) since Floxifor relied on the same facts to advance its point of law.

[13] It became necessary to first distil those issues to clarify what is rightly before the court for determination. The central theme concerns the disputed authority of the trustees and its legal representative to act on behalf of the Trust. Floxifor once again relied on the same contentions made in the Rule 7(1) notice to oppose the substitution and joinder of the new trustees. On the other hand, the Rule 6(5)(d)(iii) notice challenges the validity of the liquidation application.

Rule 7(1) notice

[14] The Rule does not prescribe a procedure to bring about a challenge of the authority of a party *per se*. It states however that:

‘7(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.’

[15] In its answering affidavit to the liquidation application, Floxifor first agreed that the Trust is properly before the Court. Notwithstanding, it filed the Rule 7(1) notice to challenge the authority of the Trust and its legal representatives approximately ten months after delivering the answering affidavit. The Rule 7(1) notice was without a supporting affidavit.

[16] The applicants objected to the Rule 7 (1) notice in terms of Rule 30. They contended the challenge to the authority of the Trust and its legal representatives to act was not raised within the period prescribed by the Rule.

[17] To have recourse to Rule 7(1), Floxifor was required to file its notice within the period prescribed in the Rule. Given that it did so out of time, Floxifor required an indulgence from the Court. Although as said, the Rule does not prescribe the procedure for bringing about such a challenge, it follows in the present case that such an indulgence can only be considered where there is an explanation of: (a) when the lack of authority came to its notice and (b) why the notice was delivered out time.

[18] Floxifor has not filed an affidavit setting out the facts required above, nor has it sought condonation from the Court for its delay. An affidavit to this effect was necessary, and absent this, the objection to the Rule 7(1) notice by the applicants must succeed. Accordingly, the Rule 7(1) notice falls to be set aside.

Rule 6(5) application

[19] The applicants sought condonation and the leave of the Court to permit the further supplementary affidavit. Floxiflor filed a notice to oppose this application but did not file an answering affidavit.

[20] The general principle is that in motion proceedings, only three sets of affidavits are allowed. However, this is not a rigid rule, and the Court has a discretion in relation to a case before it to permit the filing of further affidavits.¹

[21] The supplementary affidavit seeks to bring further facts on the merits of the liquidation. Since the affidavit engages the merits of the liquidation application, that discretion can only be properly exercised by the Court hearing the merits of the liquidation application. It would be inappropriate for this court to hamstring the court seized with determining the merits.

[22] Accordingly, a determination of the admission of the supplementary affidavit is deferred to the Court hearing the liquidation application.

Rule 15(2) Substitution and Opposition Rule 15(4)

[23] This application is for the substitution and joinder of the new trustees who were appointed by the Master on 19 March 2021. It is opposed by Floxiflor. It is common cause that after the death of Cornelia van Niekerk there were two remaining trustees. In the founding affidavit, the applicants stated that:

“A written request was directed to the Master of the High Court on 20 May 2020 for the appointment of new trustees in her place, but the formal Letters of Authority has not yet been received.”[Emphasis added]

[24] Additionally, the applicants informed the Court that the second applicant, Mr Fourie had resigned. Another trustee was appointed to fill that vacancy and to replace him. They stated further that the body of newly appointed Trustees

¹ *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons* 1963 (4) SA 656 (A) at 660D

have confirmed and ratified the appointment of Japie Van Zyl Attorneys as well as the authority of Mr Van Niekerk depose to affidavits on behalf of the Trust.

[25] Floxifor's opposition to the substitution is premised on the points raised in the Rule 7(1) notice wherein it challenges the applicants' authority to act. It claims the absence of authority renders all the steps taken by the Trust in the proceedings including the bringing of the substitution application defective. The submission is that the substitution application is a ruse to overcome the lack of authority by the Trustees. Floxifor stated that:

"53 Again and by of the Rule 7 Notice, the First Applicant, the Second Applicant (even if he was aware of the Main Application) and Japie van Zyl Attorneys they are not entitled to act until they have satisfied this Honourable Court that they are authorised to act on behalf of the Trust."

54 The only inference that can be drawn by the First Applicant and Japie Van Zyl Attorneys failure to produce their authority is that they have instituted the proceedings without the necessary authority."

[26] The argument by Floxifor is that only the first applicant was authorised to act as a trustee at the time of the launch of the liquidation application. The letters of authority which enabled the Trust to comply with clause 4.3 of the Trust Deed were only issued by the Master in March 2021, after the launch of the liquidation application. It contends that although Mr Fourie was cited as a party in the liquidation application, the Trust did not meet the threshold in clause 4.3 because Mr Fourie was no longer a trustee at the time of its institution. He was no longer a trustee for the purpose of the substitution application. The applicants did not file a confirmatory affidavit confirming that Mr Fourie was a party to the application.

[27] In amplification, Floxifor submitted further that the Master would have only been able appoint a third trustee upon the resignation of Mr Fourie. The original letters of authority would have been returned in terms of the Trust

Property Control Act 57 of 1988 (the Act). The argument by Floxifor hinges on the assumption that it is “likely that” the second applicant had resigned at the time when trustees approached the Master to appoint to new trustee. Floxifor submitted that the court should draw an inference to this effect. It contended that the applicants did not dispute that the second applicant resigned before the main application was instituted.

[28] Floxifor drew support from the decision in *Lupacchini v Minister of Safety and Security*² where Nugent JA held that:

“The section makes it clear that a trustee may not act in that capacity at all without the requisite authorisation. If we were to find that acts performed in conflict with that section are valid it seems to me that we would be giving legal sanction to the very situation that the legislature wish to prevent”.

[29] As the applicants correctly contend, Floxifor’s argument must be viewed against the case made out in its opposing affidavit. Although it intimated that it would deal with its allegation that Mr Fourie had resigned, it failed to do so or provide a basis from which such an inference could be drawn.

[30] The applicants cited *Cameron, De Waal and Wunsch Honore*³ and contend that the Act is silent on exactly when a resignation of a Trustee takes effect. The authors refer to the decision of the court in *Soekoe NO v Le Roux*⁴ which held that a resignation of a Trustee only takes effect when the Master appoints a replacement of his or her successor. The authors also point to the decision in *Meijer NO v Firstrand Bank Ltd*⁵, which suggests an alternative approach to *Soekoe* on grounds that *Soekoe* could lead to 'hardship'. It is proposed that a resignation in terms of section 21 of the Act⁶ ‘should take effect

² [2011] 2 All SA 138 (SCA); 2010 6 SA 457 (SCA)

³ South African Law of Trusts

⁴ [2007] ZAFSHC 155 (29 November 2007) para [50].

⁵ [2012] ZAWCHC 23 (4 April 2012) para [11].

⁶ 21. Resignation by trustee. — Whether or not the trust instrument provides for the trustee’s resignation, the trustee may resign by notice in writing to the Master and the ascertained beneficiaries who have legal capacity, or to the tutors or curators of the beneficiaries of the trust under tutorship or curatorship.

not only upon it being shown that the written notice was sent to the Master and the ascertained beneficiaries, but upon acknowledgement by the Master of the receipt thereof'.

[31] Bearing in mind that the issues Floxifor complains of fall in the realm of the internal affairs of the Trust, there are simply no facts before the Court to show when the resignation was communicated to the Master and the beneficiaries, and when Mr Fourie's written authority to act as a Trustee was returned to the Master. Importantly, because of what follows, I find that it is not necessary to determine this issue in the substitution application.

[32] Reverting to the subject of the application, Rule 15 and its purpose - states in the relevant parts that:

“15 (2) Whenever by reason of an event referred to in subrule (1) it becomes necessary or proper to introduce a further person as a party in such proceedings (whether in addition to or in substitution for the party to whom such proceedings relate) any party thereto may forthwith by notice to such further person, to every other party and to the registrar, add or substitute such further person as a party thereto, and subject to any order made under subrule (4) hereof, such proceedings shall thereupon continue in respect of the person thus added or substituted as if he had been a party from the commencement thereof and all steps validly taken before such addition or substitution shall continue of full force and effect....”

.....

15 (4) The court may upon a notice of application delivered by any party within 20 days of service of notice in terms of subrule (2) and (3), set aside or vary any addition or substitution of a party thus affected or may dismiss such application or confirm such addition or substitution, on such terms, if any, as to the delivery of any affidavits or pleadings, or as to postponement or adjournment, or as to costs or otherwise, as to it may seem meet.”

[33] *Erasmus*⁷ points out that the Court has an inherent power to substitute a party. The purpose of the Rule is “to simplify the procedure where a party to proceedings has undergone a change in status.” Dealing with the approach to

⁷ Superior Court Practice Uniform Rules of Court, 2015, D1-159

substitution, the Court in *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another*⁸ stated that:

“The court still has that power to grant a substitution of parties on substantive application where rule 15 does not apply.... The settled approach to matters of this kind follows the considerations in applications for amendments of pleadings. Broadly stated, it means that, in the absence of any prejudice to the other side, these applications are usually granted...

The risk of prejudice will usually be less in the case where the correct party has been incorrectly named and the amendment is sought to correct the misnomer, than in the case where it is sought to substitute a different party. But the criterion remains the same: will the substitution cause prejudice to the other side, which cannot be remedied by an order for costs or some other suitable order, such as a postponement.”

[35] Subject to prejudice to the other party, the court will adopt a benevolent approach to the substitution. In *Lupacchini NO*⁹, a decision referred to by Floxifor, the Court makes it clear that a Trust is not a legal person, but “a legal relationship of a special kind...in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose.”

[36] It is indeed so that the Trust “vests in the trustees and must be administered by them — and it is only through the trustees, specified as in the trust instrument, that the trust can act.”¹⁰ The substitution sought here is consequent upon the appointment of the new trustees in terms of the Trust Deed. Floxifor’s argument disregards the obligations set out in the Trust Deed to assume further Trustees to fill existing vacancies. The argument also overlooks that in the event of a failure in the composition of the Trust, the Master would in law be empowered and obliged to appoint additional trustees in terms of Section

⁸ 2011 (1) SA 35 (SCA) at para 14

⁹ Fn 2 above

¹⁰ *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) ([2004] 4 All SA 261) para 10

7 of the Act.¹¹ They would need to be substituted in all the proceedings before the Court.

[37] In my view, Floxifor mischaracterises the right to substitute and join the newly appointed Trustees and conflates it with its dispute about the absence of authority to institute the liquidation application. First, on the strength of the decision in *Tecmed*, the substitution does not result in a change in the status of the Trust. Secondly, any dispute Floxifor may have about the authority or validity of the actions of the Trustees to institute the liquidation application against it is severable from the right to substitute and join the newly appointed Trustees.

[38] When relative prejudice is weighed, the effect of a refusal of the substitution is far reaching. Its effect would be to grind to a halt any decision about the future conduct of the litigation leading to an untenable result. On the other hand, Floxifor has reserved questions of law, challenging the validity of the actions of the erstwhile trustees. Those questions remain regardless of the identity of the Trustees or who occupies the position of Trustee. It will not be prejudiced by the substitution.

[39] Floxifor cannot invoke Rule 15(4) as a proxy to challenge the authority of the Trustees in a manner that prevents the Trust from acting at all. It cannot rely on this Rule to overcome the difficulties raised in respect of its Rule 7(1) notice. I find that the opposition to the substitution is misplaced. Substitution of the trustees is granted, and the new trustees are joined as second and third respondents.

¹¹ Section 7 of the Trust Property Control Act 57 of 1988 provides that:

‘(1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee.

(2) When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit.’

Rule 6(5)(d)(iii)

[40] Floxifor expanded its complaint to challenge the capacity of the Trust to bring the main application as well as the substitution application predicated on the same facts above. I pause to mention that the argument about the capacity of the Trust overlaps with the newly raised point of law in Rule 6(5)(d)(iii).

[41] In challenging the capacity of the Trust to bring the liquidation application, it contended that the purported actions were *null and void ab initio*. It sought to persuade the Court to determine the Rule 6(5)(d)(iii). The argument was that all the interlocutory applications are intertwined.

[42] Although both parties were invited to address the Court on the contested issues, to discern the ambit of the interlocutory applications, the question of law was filed belatedly. It was not amongst the interlocutory matters certified for determination by Senyatsi J. Counsel for the applicants rightly objected to the adjudication of the newly raised point of law.

[43] Floxifor raised the questions after the case management meeting and the order authorising the interlocutory hearing. Importantly, as I have sought to demonstrate in the substitution application, in their essence, the questions in the Rule 6(5)(d)(iii) are discrete. They could be dispositive of the entire liquidation application if Floxifor succeeds. Those questions are best left to the Court dealing with the merits of the liquidation application.

[44] In the result, the following order is made:

- a. The objection to the Rule 7(1) notice succeeds, and the Rule 7(1) notice is set aside.
- b. The determination of the admission of the supplementary affidavit is deferred to the Court hearing the liquidation application.

c. Cornea Liebenberg and Sandre van Niekerk are substituted as new trustees and are joined as second and third respondents to the liquidation application.

d. The points of law in the Rule 6(5)(d)(iii) are deferred to the Court hearing the liquidation application.

e. Floxifor is ordered to pay all the costs occasioned by the Rule 7(1) notice, the Rule 30 application in opposition thereto, the Rule 15 application, and the opposition to the substitution.

SIWENDU J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment is handed down electronically by circulation to the Applicants and the Respondents' Legal Representatives by e-mail, publication on Case Lines and release to SAFLII. The date of the handing down is deemed to be 23rd of January 2024

Date of Hearing: 25 October 2023

Date of Delivery: 23 January 2024

Appearances:

For the Applicants: Adv M. Heystek SC

Instructed by: Japie Van Zyl Attorneys
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For the Respondent: Adv Daniel Sive

Instructed by: Barter McKellar Inc

