04/05/2018

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 36337/2017

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED. ✓
DATE 04/05/2018
SIGNATURE

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA	Applicant
ORGANISATION UNDOING TAX ABUSE	Intervening Party

and

DIRECTORATE FOR PRIOPRITY CRIMES INVESTIGATION	First Respondent
NATIONAL PROSECUTING AUTHORITY	Second Respondent

JUDGMENT

DAVIS, J

Introduction

[1] In this matter four interlocutory applications came before me in the Third Court on 30 April 2018. As the various interlocutory applications are being applied for by different parties, it will avoid confusion to refer to the parties as in the main application.

[2] The Applicant in the main application is the Passenger Rail Agency of South Africa (PRASA). The First Respondent in the main application is the Directorate for Priority Crimes Investigation (DPCI) and the Second Respondent is the National Prosecution Agency (the NPA). The Organization Undoing Tax Abuse (OUTA) is the intervening party. The NPA abides the decision of the court and did not participate in the interlocutory applications.

[3] The four interlocutory applications are the following:

3.1 The Rule 7 Proceedings launched by the DPCI;

3.2 The condonation application launched by the DPCI;

3.3 The counter-application by PRASA;

3.4 The intervention application by OUTA.

[4] <u>The procedural history</u>

The procedural history of the interlocutory applications are (briefly) the following:

4.1 On 29 May 2017 PRASA launched the main application;

4.2 On 5 June 2017 the DPCI lodged its notice of opposition;

4.3 On 21 June 2017 the State attorney on behalf of the DPCI requested an extension of time for the delivery of the DPCI's answering affidavit, which time would expire on 27 June 2017;

4.4 On 22 June 2017 PRASA's attorneys granted such extension to 14 July 2017;

4.5 On 12 July 2017 the DPCI lodged a Rule 7 notice, disputing the authority of the then Chairperson of PRASA and its Board of Control, Dr Molefe, to have launched the main application;

4.6 On 13 July 2017 PRASA's attorney claimed that the Rule 7 notice was out of time and therefore irregular, the 10 days period after service of the main application having expired on 12 June 2017. Simultaneously a power of attorney from PRASA's Group CEO and Group Executive: Legal, Risk and compliance (also referred to as "Head of Legal") was sent to the State Attorney.

4.7 Leaving further correspondence between the parties aside for the moment, a notice in terms of Rule 30 was delivered by PRASA on 26 July 2017 claiming the irregularity of the Rule 7 notice;

4.8 On 2 August 2017 PRASA's attorneys sent an affidavit deposed to by Dr Molefe on 26 July 2017, being prior to the expiry of his term of office on 31 July2017, to the State Attorney. This affidavit makes reference to a resolution taken by the PRASA Board of Control to institute, inter alia, the present proceedings. The resolution was taken at a special board meeting on 21 September 2015. This affidavit was subsequently served on the State Attorney

on 7 August 2017 together with confirmatory affidavits thereto by four other board members;

4.9 Despite the above and, intent on pursuing the disputed authority raised in its Rule 7 notice, the DPCI lodged a substantive (but conditional) application in terms of Rule 27 (3) of the Uniform Rules (referred to as the condonation application);

4.10 PRASA opposed the condonation application. In its opposition it again annexed the affidavit of Dr Molele and other board members and, reliant thereon and on the contents of the opposing affidavit by its "Head of Legal", claimed certain relief in a counter application, notably the setting aside of the DPCI's Rule 7 notice alternatively a declaratory order that the PRASA main application was duly authorised;

4.11 The DPCI did not answer or reply to the abovementioned PRASA affidavit and its counter-application.

4.12 In the meantime, OUTA has delivered an application for leave to intervene on 31 July 2017 which application was opposed by the DPCI on the basis that the PRASA main application was fatally defective due to lack of authority and that leave to intervene should not be granted in respect of a defective application. OUTA has delivered a replying affidavit to the DPCI's answering affidavit;

4.13 The papers in the main application are, as yet, incomplete in that the DPCI has not yet delivered its answering affidavit which ostensibly, on the correspondence, has been ready since the previously extended date for filing of 14 July 2017;

4.14 OUTA has indicated that its founding affidavit is ready for delivery immediately upon being granted leave to appeal.

[5] I consider it inimical to the interests of justice that, where matters of public interest are concerned, organs of state indulge in costly squabbles of interlocutory and somewhat technical nature rather than engage with the merits of the matter in an expeditious, responsible and transparent manner.

[6] Context

The context of the relief claimed in the main application, to my mind, adequately illustrates this point:

6.1 PRASA has in recent years sought to investigate numerous incidents of alleged corruption, other criminal conduct and irregularities relating to various tenders, including the two mentioned in the main application, namely the "Swifambo and Siyangena tenders". Fruitless, wasteful or irregular expenditure of between R 9 billion and R 14 billion are alleged in this regard.

6.2 Some of the irregular and unlawful activities were set out in a report by the Auditor General in the Draft Management Report of 31 March 2015 and others were highlighted in a report by the previous Public Protector entitled "Derailed".

6.3 The magnitude and severity of the "problems" uncovered were such that it overwhelmed PRASA's Board of Control. It therefore took the step of engaging forensic investigators lead by PRASA's attorneys Werksmans to assist in unearthing the relevant information. Werksmans were mandated to commence their investigations on 5 August 2015. The investigations bore

substantial fruit in respect of, inter alia, the two tenders referred to in paragraph 6.1 above which had been prioritized by PRASA.

6.4 On 21 September 2017 and at a special board meeting of the PRASA Board of Control a resolution was taken which had been detailed in the affidavit of Dr Molefe in paragraph 8 thereof as follows:

"8 *On that day, the Board resolved that:*

8.1 PRASA launch any application proceedings and institute any action proceedings that PRASA may be duly advised (by Werksmans) to launch or institute, and which proceedings are deemed to be the appropriate remedial actions to any findings that may arise from the investigation.

8.2 PRASA defend any application proceedings and action proceedings that may be launched or instituted by any third parties as a result of remedial steps taken by PRASA to deal with any findings by Werksmans during the course of the investigation.

8.3 That POPO SIMON MOLEFE be and is hereby authorised to take all steps and do all things necessary with regards to the proceedings referred to in paragraph 1 and 2 above including the signing of all documents and deposing to affidavits in regard thereto, and insofar as he has done so before the

adoption of these resolutions, such action/ s be and is / are hereby ratified.

8.4 That Werksman Attorneys of 155-5th Street, Sandown, Sandton be appointed as PRASA's attorneys in regard to the proceedings referred to in paragraphs 1 and 2 above".

6.5 The resolution followed on complaints filed with the South African Police Services (the SAPS) regarding the 37 complaints initially made to the Public Protector, including complaints of criminal conduct regarding the award of the two mentioned tenders and conduct surrounding their execution.

6.6 From an early stage, the SAPS referred the complaints to the DPCI for investigation as these complaints fell within its constitutional and statutory mandate. The founding affidavit is replete with complaints regarding the dilatory and alleged lackadaisical and unorganized fashion in which the investigation has been handled since.

6.7 The relief claimed in the main application is the following:

(a) Declarations that the DPCI has failed reasonably to conduct and / or continue to finality the PRASA / Siyangena and Swifambo investigations;

(b) A declaration that the DPCI has failed reasonably to conduct and co-ordinate the investigations co-operatively with the NPA to enable the effective utilization of asset protection

procedures provided for in the Prevention of Organised Crime Act 121 of 1998;

(c) An order directing the DPCI to take such steps as are necessary to finalise its investigations in respect of the related complaints by taking inter alia the steps set out in prayers 5.1 to 5.5 of the notice of motion;

(d) An order directing the DPCI to finalise its investigations within 30 days or such other time as may be determined by the Court or directing the Head of the DPCI to request the NPA to lead the investigations in terms of section 28(2) of the National Prosecution Authority Act 32 of 1998;

(e) Various relief aimed at preserving the confidentiality of certain evidence before the Court and to ensure that a financial analysis conducted in respect of the Swifambo matter be placed before the Court under an appropriate confidentiality regime;

(f) An order directing the DPCI to supply the NPA with the financial analysis.

6.8 It is in this context that the DPCI's attack in terms of Rule 7 must be considered.

[7] Uniform Rule 7

The relevant portions of Uniform Rule 7 provide as follows:

"Power of Attorney

... 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, where after 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)Every power of attorney filed by an attorney shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law; provided that were a power of attorney is signed on behalf of the party giving it, proof of authority to sign on behalf of such party shall be produced to the registrar who shall note that fact on the said power ..."

[8] Authority to Act

8.1 It is clear from the wording of the rule that it is primarily designed to ascertain whether the attorney acting for a party has the necessary mandate or power of attorney to represent the specific party or client.

8.2 Based on the wide wording of Rule 7(1), it is also often used to dispute the authority of anyone alleging that the proceedings have been authorised by a party, particularly in the instance of corporate or other legal entities.

8.3 The best evidence that proceedings have been authorised by a corporate entity is customarily the production of a resolution of the board of such an entity to this effect, introduced by an official of the entity. It is usual and desirable for such a resolution, if it exists, to be annexed and proven by the founding affidavits in motion

proceedings but such method of proof is not essential in every case. In each case, the court must decide whether sufficient evidence has been placed before it to warrant the conclusion that it is indeed the applicant that is litigating and not some unauthorized person purportedly acting on its behalf. Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C) quoted with approval in Poolquip Industries (Pty) Ltd v Griffin 1978 (4) 357 (WLD) with reference to a string of similar judgments at 386 F-H.

8.4 One should also be mindful of the fact that "*the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit*". Rather "*it is the institution of the proceedings and the prosecution thereof which must be authorised*". Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA). Once the proceedings have been authorised on behalf of a party, it is unnecessary that a witness should additionally be authorised. Eskom v Soweto City Council 1992 (2) SA 703 (W).

8.5 It is a question of fact whether the evidence tendered on the issue of authority is sufficient to establish whether it is in fact the applicant litigating.

8.6 "*The manner in which the authority is challenged is also relevant to the kind of evidence that would be required to satisfy a court as to the existence of authority*" : Tzaneen Local Transitional Council v Louw et Uxor 1996 (2) SA 860 (T) at 863B-C and Tattersall and Another v Nedcor Bank Ltd 1995 (3) SA 222 (A) at 228F – 229D.

[9] I am of the view that the issue of whether the present proceedings are in fact those of PRASA and whether they have been duly launched is of far greater importance than the issues of whether the Rule 7 notice was delivered in time and, if not, whether "good cause" has been established for the granting of condonation and, if not, whether the notice should be set aside as an irregular step or not. Determination of the issue of authority would also be dispositive of these other questions, including that of intervention of OUTA.

[10] The Rule 7 notice

10.1 The "manner" in which PRASA's authority was challenged has been formulated as follows in the DPCI's notice in terms of Rule 7:

> *"The deponent to the founding affidavit, Dr Popo Simon Molefe, does not allege that he has been authorised by the Board of PRASA, the applicant herein, to launch this application.*
>
> *The applicant is a juristic person, a state owned entity with legal personality established in terms of section 22(1) of the Legal Succession to the South African Transport Services Act No 9 of 1989 and it has a Board of Control in which authority to manage PRASA vests.*
>
> *As a result, the Board's resolution authorizing the launching of this application is a sine qua non for the launching of the application.*
>
> *The absence of the Board's resolution is fatal to this application.*
>
> *Wherefore the First Respondent hereby calls upon the applicant to produce a Board resolution which authorises the deponent to the*

founding affidavit to launch this application and to depose to an affidavit on behalf of the applicant ..."

10.2 The consequences to be achieved by this notice has been stated on behalf of the DPCI in heads of argument filed on its behalf to be that "*should this application (the Rule 7 attack) be granted, there will be no prejudice to PRASA as at this stage a new Board has been appointed and they can go back and rectify this irregularity and bring back the case and all their rights will remain intact*".

10.3 The aforesaid submission was premised on the fact, as stated by the State Attorney in his affidavit delivered in support of the DPCI's application for condonation, that "*... it was also raised by client in that consultation [of 10 July 2017] that it has learned through the media that the PRASA Board did not quorate (sic) at the time when Dr Molefe deposed to the founding affidavit and launching (sic) the application. Senior counsel undertook to consider the issue. It was on the strength of this revelation and failure by Dr Molefe to allege in the founding affidavit that he was duly authorised which strengthened the suspicion that indeed Dr Molefe did not have authority to institute the application. The Rule 7 notice was delivered on this basis*".

10.4 So far the grounds for disputing the authority of the PRASA proceedings and the manner in which it has been raised.

[11] Evaluation

11.1 To start off with, the attack on the alleged lack of authority to depose to an affidavit is unfounded and misplaced and has determinatively been dealt with by the Supreme Court of Appeal in

Gane's case mentioned in paragraph 8.4 above. No such authority to depose is necessary. Insofar as it may have been, it has in any event been granted by the Board.

11.2 The allegation that a Board of Control resolution is a sine qua non for the launching of legal proceedings is also factually incorrect. The PRASA Board of Control has, as it is empowered to do in terms of section 24 (5) of its enabling statute mentioned in the Rule 7 notice, delegated the authority to institute proceedings to an employee. In the affidavit delivered by PRASA in support of its counter-application and in opposition to the DPCI's condonation application, its Group Executive: Legal, Risk and Compliance (also known as Head of Legal) produced such a "delegations document" which clearly indicate that the power to institute legal proceedings and to appoint attorneys and counsel to act on behalf of PRASA has been delegated to the said deponent as the responsible person and that the accountability responsibility has been delegated to the Group CEO.

11.3 In response to the Rule 7 notice, PRASA's attorney have forwarded a power of attorney signed by the Head of Legal and the Group CEO of PRASA, reading as follows:

"... in our respective capacities as Acting Group Chief Executive Officer and Group Executive: Legal, Risk and Compliance of the Passenger Rail Agency of South Africa ("PRASA") and as the accountable and responsible person authorised to (a) institute legal proceedings on behalf of PRASA and (b) appoint attorneys and counsel to act on behalf of PRASA as prescribed in PRASA's

Delegation of Authority (a copy of which is attached) hereby certify that, in our aforesaid capacities, we have duly:

1. *Authorised the institution of the above proceedings and*

2. *Nominated, constituted and appointed Werksmans ... to act for PRASA, to launch and prosecute the proceedings ...*

To the extent necessary we hereby ratify, allow and confirm any and all actions already taken by virtue of this Power of Attorney".

11.4 As already indicated, all though this Power of Attorney was furnished to the state attorney on 14 July 2017, the DPCI was not satisfied with it and proceeded with its dispute of authority, alleging that the power of attorney was "fatally defective" as it was "inconceivable" that subordinate employees can authorise their employer to institute legal proceedings. No attack was however made on the delegation referred to above itself nor on its validity. A proper power of attorney to institute proceedings was therefore furnished by the duly delegated PRASA employee. It follows that this attack is without foundation.

11.5 In addition to the above, PRASA furnished the State Attorney with a copy of the Affidavit of Dr Molefe referred to in paragraph 6.4 above on 2 August 2017 and separately served and filed the affidavit together with the confirmation affidavits of four other Board members on 7 August 2017.

11.6 In the DPCI's application for condonation launched the next day, 8 August 2017, not a word was said about Dr Molefe's affidavit nor

about the resolution of 21 September 2015. Still not a word was said by the DPCI about this after the delivery of the affidavit opposing its condonation application and supporting PRASA's counter application, to which the affidavit of Dr Molefe and that of the other Board members were again attached. In addition, it was common cause during argument of the matter that at 21 September 2015 the PRASA Board of Control was quorate.

11.7 Counsel for the DPCI, although conceding that PRASA's Board retained the power to authorise the institution of legal proceedings itself despite the delegation of similar power to its Head of Legal, attacked the Board resolution relied on by Dr Molefe, not on the basis that it had not been properly minuted, but on the basis that it and the Power of Attorney referred to in paragraph 11.3 above are mutually exclusive and mutually destructive.

11.8 I cannot agree. Clearly the Board Resolution is blanket in nature, particularly viewed in the context in which it was taken as set out in paragraph 6 above. The exercise of the delegated power reflected in the Power of Attorney was additional and incidental thereto but relating to these specific proceedings. The two powers and the exercise thereof are clearly complimentary to and not destructive of each other.

11.9 In view of the uncontested evidence of Dr Molefe, not only has it been established to the satisfaction of the court that the present proceedings are indeed those of PRASA and have been duly authorised, but that the prosecution of the attack on this authority appears to be so without foundation that it was unreasonable.

11.10 Insofar as it may not yet be apparent, I find that the present proceedings have been duly authorised by PRASA.

11.11 In view of the above finding, I need not make any separate finding in respect of the condonation application or the Rule 30 proceedings except insofar as costs are concerned. It also follows that, once the issue of PRASA's authority is disposed of, there is no further bar or hurdle, insofar as there may have been, for the delivery of the DPCI's answering affidavit in the main application.

[12] OUTA's intervention

OUTA submitted, both in the affidavit filed in support of its intervention and in argument, that it was entitled to join in the main application as it seeks the same relief as PRASA and on the same facts and for substantially the same reasons. It further claimed to act in the public interest and that its joinder would be manifestly convenient and in the public interest. PRASA did not object to this proposed intervention and the only opposition proffered by the DPCI was that mentioned in paragraph 4.12 above. It conceded that, should the issue of authority be decided in PRASA's favour, as it now had, that it would not object to OUTA's joinder. With reliance on, inter alia, Shapiro v SA Recording Rights Association Ltd (Galeta intervening) 2008 (4) SA 145 (W), I am satisfied that OUTA has made out a sufficient case to warrant its intervention in the main application. It has also indicated that, should leave to intervene be granted, it is in a position to deliver its founding affidavit as co-applicant immediately and, as the grounds relied therein are substantially the same as those relied on by PRASA, lastmentioned of which the DPCI (and the NPA) had been aware of for almost a year, it should not present the respondents with any difficulty in delivering their answering affidavits thereto promptly.

[13] The hearing of the main application

I have been advised by the parties that the review application in respect of the review of one of the tenders forming the subject matter of the main application has been set down for hearing in the Third Court in this Division at the end of June 2018. PRASA would have preferred to have the main application heard simultaneously therewith but the permutations pertaining to this and the exchange of further papers subsequent to the filing of the answering affidavit by the DPCI will have to be taken up by the parties with the Deputy Judge President, with whom they had already had meetings in this regard. Suffice it to say that in the counter application an order for delivery of the answering affidavit in the main application by the DPCI within five days was claimed. There was no objection raised to this proposed time period.

[14] Costs

14.1 As indicated earlier in this judgment, it is to be deplored that organs of state engage in interlocutory skirmishes with each other whilst the main battle is raging around them and they, by their conduct delay any meaningful engagement therein.

14.2 The delay caused by the dispute of one organ of state of the authority by another organ of state for a mandamus to have criminal investigations expedited or concluded has exceeded nine months if calculated from the delivery of the Rule 7 notice and only slightly shorter if calculated from the day of the furnishing of the affidavit of Dr Molefe wherein the Board of Control resolution to initiate proceeding had been detailed. These delays could have been avoided and the manner in which the authority had been challenged was, as already indicated, inappropriate.

14.3 Not only did this delay prejudice progress in the finality if the investigation or at least the consideration of the public interest issues raised in the main application but huge additional costs were incurred.

14.4 The DPCI alleged that it would suffer prejudice if the main application is not dismissed due to a lack of authority but demonstrated no such prejudice. Surprisingly it further argued that "*the only possible prejudice (which is denied) [that PRASA would suffer] should the relief be granted, is the delay in the adjudication of the claim*". This, to my mind, constitute an irresponsible and wasteful type of litigation by an organ of State.

14.5 In addition, the prosecution of the challenge to PRASA's authority is in my view and in the circumstances of this matter and its context, unreasonable to the extent that it warrants a punitive costs order. The same applies to the opposition to OUTA's application for intervention.

14.6 Both PRASA and the DPCI had agreed or conceded that whatever costs order be made, the costs of three counsel would be warranted.

[15] Order

1. Paragraph 2 of the counter-application by PRASA is granted to the effect that:

   1.1 It is declared that the main application is duly authorised;

   1.2 The DPCI is directed to deliver its answering affidavit to the main application, if any, within five days from date of this order.

2. OUTA is granted leave to intervene in the main application as co-applicant and is directed to deliver its founding affidavit forthwith.
3. OUTA's costs of its application for intervention shall be costs in the main application.
4. The DPCI is ordered to pay OUTA's costs occasioned by the opposition to OUTA's application for intervention.
5. The DPCI is ordered to pay PRASA's costs of the interlocutory applications, including the costs of the condonation application and PRASA's counter application, on the scale as between attorney and client, including the costs of three counsel where employed.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 30 April 2018

Judgment delivered: 4 May 2018

APPEARANCES:

For the Applicant:	Adv. R HuttonSC (with Ms S Cowen and Ms N Kakaza)
Attorney for Applicant:	Werksmans Attorneys, Pretoria
For the Intervening party:	Adv Q G Leech SC (with Ms A Dipa)
Attorney for Applicant:	Alet Uys Attorneys, Pretoria
For the First Respondent:	Adv W Mokhari SC (with Mr MH Mhambi and Ms CT Lithole)
Attorney for Respondent:	State Attorney, Pretoria