

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 29142/2018

DOH: 06 March 2023

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

.....27 July 2023
SIGNATUREDATE

In the matter between:

JS VAN DE MERWE BOEDERY CC

Applicant

And	
WESHOEK BELEGGINGS (PTY) LTD	First Respondent
ARTHUR CHANNON ATTORNEYS	Second Respondent
ADV JOHAN GERHARD VAN DEN BERG	Third Respondent
<i>In re:</i>	
WESHOEK BELEGGINGS (PTY) LTD	Plaintiff

And	
J JS VAN DER MERWE BOEDERY CC	First Defendant
ZELDA KARELSEN	Second Defendant
BUZZ TRADING THIRTY ONE (PTY) LTD	Third Defendant
AMPY INVESTMENTS 43 CC	Fourth Defendant

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 27 JULY 2023

BAM J

A. Introduction

1. The main issue before this court is whether the second and third respondents had the authority to institute action proceedings¹, in the name of the first respondent, against JS van der Merwe Boerdery CC. The question arises from the first application which the applicant terms, 'dismissal application'. I adopt the same nomenclature but it needs to be said that the application is for a declaratory order that the respondents' responses to the applicant's Rule 7 notice are inadequate to satisfy the court that they had the requisite authority to act on behalf of Wes and institute the action against Boerdery. A further question which arises from the second application brought in terms of Rules

¹ Under case No. 29142/2018.

30 and 30A, is whether the steps taken by the respondents in filing their notice to amend and subsequently, an application to amend, against the backdrop of the applicant's Rule 7 notice, amounts to an irregular step. The applicants refer to the second application as the irregular step application. The respondents are opposing the first application. They state, *inter alia*, that the two orders issued by this court on 26 April 2016² and 15 February 2018 provide evidence of their authority. The respondents did not oppose the second application. However, they argue that the application was filed way outside the period provided for in the rules. They also state that by filing the irregular step application, the applicant itself took a further step with the knowledge of the claimed irregularity, which disqualifies it from approaching this court.

B. Parties

2. The applicant JS van der Merwe Boerdery CC (Boerdery) is a close corporation duly incorporated in terms of the Close Corporations Act³, with its registered office located in Zwartkloof Private Game Reserve, Mabula, Bela-Bela. The first respondent is Weshoek Beleggings (Pty) Ltd (Wes), a private company duly incorporated in terms of South African laws, with its registered address located at 58 Vrede Street, Fochville, Gauteng. The second respondent is an officer of this court. He practices under the name Arthur Channon Incorporated Attorneys, with his offices located at 693 Rubenstein Drive, Moreleta Park, Pretoria. The third respondent, Adv Johan Gerhard van

² This court order appears to have been granted on 26 April 2016 but bears the stamp of 27 October 2017. Since the court order of 15 February 2018 refers to the extension of the powers granted under the order of 26 April 2016, this judgment follows the same date when referring to the first order.

³ Act 69 of 1984.

den Berg (VdB), is also an officer of this court and a practising advocate, with his chambers located in Groenkloof Chambers, Florence Ribeiro Drive, Groenkloof, Pretoria.

C. Background

3. The two applications arise against the background of an action instituted on 24 April 2018, in the name of Wes, at the instance of the second and third respondents, against several defendants, including Boerdery. Wes had a single shareholder and director in the name of Ms Cornelia Aletta Weakley. In 2015, Ms Weakley suffered a series of strokes which rendered her cognitively impaired and mentally unsound. As a result, by way of an order issued by this court on 26 April 2016, Ms Weakley, to whom I shall henceforth refer as the patient, was declared *non compos mentis*. VdB was appointed curator *ad litem* to the patient. The particulars of claim in the underlying action refer to certain payment instructions executed by the patient at a time when she is alleged to have been mentally unsound. As a result, it is alleged, she could not have appreciated the nature and import of the transaction, rendering the payment instruction void or voidable. The plaintiff as a result seeks repayment of the monies paid to, amongst others, Boerdery.

4. On 24 July 2018, Boerdery, persuaded that neither the attorneys nor VdB were authorised to institute the action, caused a notice in terms of Rule 7 to be delivered to the attorneys. In their response, the attorneys attached a power of attorney signed by VdB appointing them, together with the two court orders referred to in the first paragraph of this judgement. I will soon turn to

the content of the two court orders. Loosely stated, the respondents' explanation was that based on the two court orders, VdB had the authority to appoint the attorneys since he had been appointed curator *ad litem* to the sole shareholder and director of Wes. To put it simple, the respondents contended that by virtue of being appointed curator to the patient, he automatically assumed the office of director.

5. By way of a letter dated 14 August 2018, Boerdery denied that the court orders provide authority to VdB to institute action against it. Boerdery further referred to the provisions of section 165 of the Companies Act, stating that although VdB had been appointed curator *ad litem* to the patient, such appointment did not entitle him to replace the sole director and or act as such where Wes is concerned. The only way VdB could validly replace the patient as director of Wes, submitted Boerdery, was through leave from this court authorising him to apply for such appointment. Boerdery further informed the attorneys that since VdB had not provided confirmation that the provisions of section 165 had been adhered to, the court orders, even if they authorised VdB to institute such action — which Boerdery denies — would be a nullity as the court was not empowered to make such orders. There was no response to Boerdery's letter. The application for dismissal of the action was launched on 19 October 2018.

6. On 7 November 2018, the attorneys delivered a letter to Boerdery stating that a Ms Brenda Weakley (Ms Brenda) the daughter to the patient, had been appointed director of Wes effective from 26 October 2018. The attorney's letter was followed by a notice to amend the plaintiff's particulars of claim in

the underlying action. Boerdery responded on the same day requesting details as to when and how Ms Brenda had been appointed given that the sole director had as early as October 2016 been declared *non compos mentis*. It also conveyed that it would consider the proposed amendment upon receipt of the requested documents. There was no response to Boerdery's letter of 7 November. Instead, the respondents followed up with what was termed an application for leave to amend the particulars of claim, without a supporting affidavit, to which the applicant responded with the application in terms of Rules 30 and 30A, the irregular step application.

Preliminary issues

7. At the start of the hearing, the parties recorded that they are no longer persisting with the issues they had raised pertaining to failure to observe the periods set out in the rules for exchanging pleadings. Condonation is accordingly granted to the parties for the late filing of the various affidavits. One matter however, remains to be dealt with by this court and that pertains to the filing of the duplicate affidavit. In the event the court refuses the duplicating affidavit the respondents have applied to strike out paragraphs 7 and 8 of the applicant's replying affidavit. It is accordingly necessary to first determine whether the duplicating affidavit should be considered.

8. The legal principles dealing with filing of additional affidavits after the applicant's reply are reasonably settled. They were expressed in *Hano Trading CC v J R 209 Investments (Pty) Ltd* as follows:

'...A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so...

This court stated in *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons* NO 1963 (4) SA 656 (A) at 660D-H, that:

'It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted....'⁴

9. I have considered the contents of the replying and the duplicating affidavits. It is clear to me that the parties, specifically the applicant, dealt with the case as a moving target. This is abundantly clear from the content of the replying affidavit. The question is whether it is in the interests of justice that the duplicating affidavit be allowed. Given the relevance of the details in the two affidavits, it is my considered view that justice will not be done if the duplicating affidavit is ignored. It is accordingly allowed.

D. Merits

10. The applicant says it is entitled to an order declaring that neither the second nor the third respondents had authority to institute action against it. In order to appreciate the applicant's submissions, one must consider the

⁴ (650/11) [2012] ZASCA 127; 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) (21 September 2012), paragraphs 11-12.

content of the two court orders for that is where the curator derives his powers. In the event the court orders do not empower the curator to institute the action, that should be the end of the argument based on the court orders, for the curator cannot empower another person to exercise a power he does not have. In summary the order of 26 April 2016 appoints VdB as curator *ad litem* to the patient. The following powers and authority, summarised, are provided for:

9.1 To institute legal action on behalf of Ooshoek and Wes in order to set aside certain contracts concluded with Z & M Family trust.

9.2 To institute legal action on behalf of the patient to have the power of attorney granted to a certain Stephanus van der Merwe set aside as well as take action to have the actions taken by van der Merwe declared null and void.

9.3 To institute legal action on behalf of the patient in order to claim repayment of the payments made by Attorneys Zelda ...to Van der Merwe, as a result of the fact that the patient not *compos mentis* when she gave instructions....

9.4 To institute legal action on behalf of the patient to have certain contracts in which the patient purchased certain immovable property in Bela Bela during 2015 set aside.

9.5 To bring proceedings to the final end and conclusion which will include negotiating settlement on behalf of the patient, which settlements shall be subject to the approval of a judge.

9.6 VdB is appointed as curator *ad litem* with powers and for the purpose as contemplated in Rule 57 (5).

The remainder of the terms of the order deal with VdB's responsibility to investigate the need to appoint a curator *bonis* to the patient and costs.

11. The second court order granted on 15 February 2018 extended the powers granted to VdB on 26 April 2016 to include the following:

10.1 To defend any legal action brought against the patient, Ooshoek and Wes whether arising from the patient's conduct as director of the two companies or otherwise.

10.2 To take all such steps as may be necessary, including instituting and defending any legal proceedings, obtaining advice and the like, in order to **protect the right, title and interest of the patient in the companies**, or in the immovable properties owned by the company.

The remainder of the terms of the order deals with costs.

12. The general tenor of the respondents' argument is that VdB was entitled in terms of the court order to instruct the attorneys and that the court order requires no interpretation in this regard. The first thing to note is that there are two court orders before this court on which the respondents rely for their authority. The first order, it may be easily accepted, does not empower VdB to institute the action against Boerdery. The second paragraph of the second order requires some attention. As a start, the plain meaning of the words empower the curator to institute proceedings to protect the right, title and interest of the patient in the two companies, Oos and Wes. One needs to be careful when interpreting the paragraph not to blur the separate and distinct personality of a company from the individual behind it⁵. Thus, a right or title the patient has in a company may, for example be, a right to receive a dividend; a right to vote; a right to payment of a loan account. These are just some of the examples that come to mind.

13. The second paragraph does not empower the curator to exercise powers reserved for directors of a company such as instituting legal proceedings. The paragraph did not catapult the curator *ad litem* into a director of either Wes or Oos. One must also bear in mind the provisions of Section 165 of the Companies Act when interpreting the paragraph. The section provides:

' Derivative actions

⁵ *Dadoo v Krugersdorp Municipal Council* 1920 AD 530.

(1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.

(2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person-

(a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;

(b) is a director or prescribed officer of the company or of a related company;

(c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or

(d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

14. Any contention that the second paragraph of the 15 February 2018 order authorises the curator to exercise powers such as instituting legal proceedings is struck by the provisions of Section 165 (1) and (2). The provisions are clear, for any person who is not a shareholder, a director or registered trade union representing employees or a representative of employees to institute legal proceedings to protect the interests of the company, they must first obtain leave from the court and the court must be satisfied that it is expedient to grant such power in order to protect a legal right of that person. The section in short does not admit of interpretation contended for by the respondents. It can thus be concluded that the two court orders do not empower VdB to institute action against Boerdery.

15. Before passing to the second basis of the respondents' authority, I should mention that the respondents rely heavily on the dicta of the court in *Eskom v*

Soweto Council. I deal with the dicta later in this judgment as espoused in later cases. What is important to note is that the case itself states clearly that the correct route to challenge the authority of any person acting on behalf of an artificial person is via Rule 7. It discourages basing challenges on what a deponent says about their authority in an affidavit. It is not authority to suggest that a record placed before court to substantiate the attorney's authority may not be interrogated by the court. The court must be satisfied that the record placed before it demonstrates such authority. That, as I shall show, is a matter of fact and law.

16. The second basis upon which the respondents claim to have authority to institute action against Boerdery relies on the appointment of Ms Brenda as director of Wes on 26 October 2018. The confirmation of appointment as director was accompanied by a resolution adopted by Wes' Board of Directors on 7 November 2018 authorising the attorneys to institute the main action on Wes' behalf and ratifying and condoning all legal steps and /or actions or proceedings, more specifically the action instituted under case number 29142/2018 in the Gauteng High Court, Pretoria.

17. Boerdery raised a number of legal and factual points, suggesting that the process and the actual appointment were flawed and unlawful. The first point deals with the identity of the person who called the meeting. According to Boerdery, the respondents had failed to name the person who allegedly called the meeting of Wes, or more accurately, in the name of Wes. That information, it is submitted, was critical as directors are ordinarily tasked with

convening company meetings. In this case Wes' sole director had ceased to be a director upon being declared *non compos mentis*. In that case, the patient could not have called the meeting. Similarly to the first point, the resolution taken at the meeting had to do with the appointment of Ms Brenda as director. The patient had according to the records attended the meeting. How she was able to appreciate the proceedings and offered her resignation and had Ms Brenda, (whom until the time of her alleged appointment was neither a shareholder nor director of Wes and could thus not call any meeting in the name of Wes) appointed as director, was not explained. The respondents further neglected to specify the nature and or type of meeting held on 26 October 2018. In this regard, it was necessary for the respondents to state whether the meeting was a shareholders' or directors' meeting. Nothing of the sort was mentioned, according to Boerdery.

18. The answer to the questions raised by Beoerdery may be found in the letter issued by Ms de Jäger of MDJ Accounting Services, of 2 December 2019. The letter suggests, despite the minutes which affirm that a meeting had been held in the name of Wes and the patient had attended, the signatures reflected in the paper work responsible for effecting the change in directors, of both Ms Brenda and the patient, were placed electronically as opposed to the patient physically signing. In this regard, Ms De Jäger averred:

'I then did the general meetings with regards to the change of the directors. The minutes is in a standard format that we have been submitting to CIPC for several years, I then used the signatures that was send (sic) and added them electronically to the minutes as the instruction was already received and confirmed by the appointment of curatorship from the Master.'

19. Ms De Jäger explains in her letter that she had been instructed by Ms Brenda and VdB to urgently attend to the change of directors.

20. A perusal of the respondents' duplicating affidavit falls short of addressing the questions raised by Boerdery against the appointment of Ms Brenda. The upshot of Ms De Jager's explanation as set out in her letter of 2 December 2019 is that: (i) There had not been a meeting, despite what the minutes say. (ii) The only director at the time, the patient, could not have called the meeting because there is no evidence that she had the mental capacity to call for one, attend and appreciate the proceedings. (iii) She also did not resign despite the paper work having been made to reflect that she had resigned. (iv) Overall, the signatures purporting to be those of the patient's in the paper work that saw Ms Brenda being appointed as director of Wes were not genuine. According to Ms De Jager, they were artificially imposed on the various documents on the instructions of Ms De Jager. That much is confirmed by the handwriting expert's report, to which neither of the respondents objected. The respondents did not proffer a single reply to these fatal flaws in the claimed appointment of Ms Brenda as director of Wes.

21. The entire resignation of the patient and the appointment of Ms Brenda as director of Wes is so fatally flawed that it is surprising that the respondents rely on it as authority for their launching of the action against Boerdery. If it is to be believed that there is a court order authorising Ms Brenda as curator bonis to the patient — the record suggests that Boerdery and its legal

representatives had never been furnished with a court order confirming the appointment of Ms Brenda as curator bonis — her conduct as mapped out in the process of appointing herself as director, including the steps taken by Ms De Jäger in effecting the change, must be frowned upon as it is plainly unlawful.

E. The law

22. Rule 7 provides:

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.

23. Rule 7 does not specify how an attorney may establish their authority upon being challenged. As was confirmed in *Unica Iron and Steel (Pty) Ltd and Another v The Minister of Trade and Industry and Another*:

‘...’In my view there is nothing in Rule 7 in its present form that requires the authorisation of an attorney to be embodied in a document styled a power of attorney. The provisions of Rule 7 specifically requiring powers of attorney in appeals fortifies the impression that otherwise an attorney's mandate can be proved otherwise than by the production of a written power of attorney. I also think that Rule 7 should be viewed against the background of its original form. Before its recent amendment it only required powers of attorney to be lodged in the case of actions and appeals...I have no doubt that the underlying intention of the recent amendment of Rule 7 was to make the Rule less cumbersome and formalistic.

I therefore conclude that proof of the authority of the respondents' attorney is not dependent on the production of a written power of attorney.⁶

24. The most relevant authority my research was able to yield is that of *Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV and Others*⁷ where the respondents, Steinhof, had challenged the authority of a director, one Mr J Naidoo — who was also the deponent to the applicant's affidavit — to institute legal proceedings on behalf of the applicant and by extension, that of the applicant's attorneys of record, via a Rule 7 notice. I should mention that at first Steinhof had instead of utilising a notice in terms of Rule 7, merely denied the authority of the deponent to the founding affidavit. When that general challenge did not yield the result they wanted, they then formally served Lancaster with a Rule 7 notice.

25. What is of relevance to the present case is the basis upon which the court found the response proffered by Lancaster was inadequate to satisfy it that the attorneys had the requisite authority to bring the proceedings. In this regard, Lancaster's response was a resolution purportedly taken by the directors during a board meeting. In a subsequent Rule 30A application, Steinhof challenged the resolution as being defective, for its failure to demonstrate compliance with the provisions of Section 75 (4) and (5) of the Companies Act⁸.

⁶ (Case no 1332/21) [2023] ZASCA 42 (31 March 2023), paragraph 4.

⁷ *Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV and Others* (16389/19; 6578/19) [2021] ZAWCHC 193; [2021] 4 All SA 810 (WCC) (29 September 2021).

⁸ Act 71 of 2008.

26. Section 75 and the two subsections deal extensively with disclosure of personal financial interest by directors, prior to the board considering a particular transaction or decision and the recusal of the director concerned from the meeting. The court found that Naidoo had not only failed to disclose his personal financial interest prior to the board taking the decision to institute legal action against Steinhof but that he had in fact participated in the proceedings and was part of the decision makers. In the result the court found that the resolution was defective. The court further went on to say:

'Directors act beyond their authority when they act in breach of their duty to perform with good faith and in the interests of the company. Naidoo is a director of Lancaster 101. He had a direct interest of a financial monetary or economic nature in the Relevant Decision that was significant in the determination whether to institute a claim against Steinhoff...'⁹

27. It is relevant to mention that the Lancaster group had also contended, like the respondents do in the present case, that Steinhof had to rely on a rule 7 Notice to challenge the authority of ENS, the attorneys representing the applicant, and not challenge the authority of a deponent relying on no '*more than a textual analysis of the words used by a deponent*'. This was because Steinhof had initially relied on a general denial of the authority of the deponent to Lancaster's founding affidavit, as I had earlier indicated. The italicised words, in inverted commas, were extracted directly from the ratio of the court in *Unlawful Occupiers of the School Site v City of Johannesburg*. This is what the court had to say:

'[14]... If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need

⁹ note 6 supra paragraph 96.

that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.... [16] However, as Flemming DJP has said, now that the new rule 7(1)-remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised....¹⁰

F. Discussion

28. Right from the start, Boerdery had raised its challenge to the authority of the second respondents by utilising the notice provided for in Rule 7. The first response was a power of attorney signed by VdB in favour of the Attorneys. In signing the power of attorney, VdB relied on the two court orders, which as I have concluded do not authorise him to institute proceedings against Boerdery. When Boerdery launched the dismissal application, the respondents turned their attention, in addition to the court orders, to a different source of authority, the purported appointment of Ms Brenda as director of Wes. I have analysed the appointment of Ms Brenda in detail and the failure by the respondents in their duplicating affidavit to confront the deficiencies complained of in the process of her appointment. Instead, the respondents chose to refer to the narrative provided by Ms de Jäger, claiming that Ms Brenda was indeed a director of Wes. Ms Brenda's appointment as director of Wes, as I have already found, including her authority to ratify the

¹⁰ 10 (036/2004) [2005] ZASCA 7; [2005] 2 All SA 108 (SCA); 2005 (4) SA 199 (SCA) (17 March 2005), paragraph 14

actions taken by the second and third respondents in launching the proceedings against Boerdery, is unlawful and invalid.

29. In their heads of argument, the respondents argue in general terms the principles espoused in the *Unlawful Occupiers* without specifically addressing the direct challenges raised by the applicant to each of their claimed sources of authority. They further add that the applicant misunderstands the import of Rule 7. For all the reasons set out in this judgment, I find that the respondents had no authority to launch the proceedings against Boerdery. I now turn to consider the irregular step application in terms of Rules 30 and 30 A application.

30. The application was launched on 14 February 2019. In terms of relief, Boerdery sought:

30.1 That the time period prescribed in Rule 30 (2) (b) be extended in terms of Rule 27, and that the late filing of the applicant's notice in terms of Rule 30 be condoned.

30.2 That the respondents' notice of intention to amend dated 7 November 2018 and the respondents' application for leave to amend its particulars of claim be set aside;

30.3 Costs to be paid by the respondents *de bonis propriis* on a scale as between attorney and client.

31. Boerdery referred to the application to the first application and requested that the contents of the founding affidavit in that application be read as if specifically incorporated into the irregular step application. The undisputed facts are the following: On 8 November 2018, whilst the challenge to their authority remained unresolved, the respondents caused a notice to amend

the particulars of claim to be served upon Boerdery. At the time, Boerdery had already written to the respondents seeking information pertaining to the appointment of Ms Brenda. It had also conveyed that it would consider the respondents' proposed amendment after the information had been furnished. The record shows that the respondents never replied to the letter of 7 November 2018.

32. On 20 November 2019, Boerdery caused a notice of objection to the amendment to be served upon the respondents. The respondents' Notice of Application for Leave to Amend was served on 27 November 2018. The application, as already indicated, was not supported by an affidavit. On 17 January 2019, Boerdery caused a notice in terms of Rules 30 and 30A to be served upon the respondents. The notice should have been served on 13 December 2018, following the alleged irregular step of 27 November.

33. It is not in dispute that the respondents had not opposed the irregular step application. Rule 30 provides for irregular proceedings and it states:

'(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

34. Rule 30A provides:

'30A Non-compliance with rules

(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.

35. Rule 7 is clear in its provisions and it states that once a party's authority has been challenged, it may not take further steps until it has satisfied the court that it has the requisite authority. The fact is this, the application to determine whether the respondents had proved to the satisfaction of this court that they had the authority to launch the action had not yet been adjudicated upon. Regardless of whether the respondents were fortified in their view that they had the authority, the filing of both the notice to amend and the subsequent application for leave to amend, in the face of the application to dismiss, constitute an irregular step. Both the notice to amend and the application to amend must thus be set aside.

Conclusion and discussion on costs

36. Now that I have found that the respondents lacked authority to institute the action against Boerdery and that their subsequent attempts to amend the pleadings constituted an irregular step, this court must determine the cost implications. It is not unusual that mistakes may happen when it comes to authority launch legal processes on behalf of an artificial person by an attorney as was seen in *Lancaster*. In the course of its reasoning, the court in *Lancaster* referred to the dicta in *South African Allied Workers Union v De Klerk NO* 1990 (3) SA 425, wherein Jansen J referred to an extract by Justice Watermeyer in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351 D-H, and stated:

‘ “I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before Court to show that the applicant has duly authorised the institution of notice of motion proceedings. (see for example *Royal Worcester Corset Co. v Kesler’s Stores*, 1927 C.P.D. 143; *Langeberg Ko-operasie Beperk v Folscher and Another*, 1950 (2) S.A. 618 (C)). Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolution in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorised by it. There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so... This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the

applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. ("own emphasis")'

37. The mistake that occurred in the appointment of the attorneys in the present case commenced with the reliance on the two court orders. From there on, more mistakes were committed in the process of Ms Brenda's appointment. The respondents' refrain that the applicant's applications for the determination of their authority to act and the irregular steps were simply designed to delay the final adjudication of the action is a mistake. In fact it must be inferred from the respondents' conduct that they recognised along the way that there may be merit to the challenge to their authority otherwise there would have been no need to procure the appointment of Ms Brenda as director of Wes, which as I have found was unlawful.

38. Instead of slowing down to assess their position, based on the criticisms levelled against their authority, the respondents simply escalated commitment and in the process unnecessarily increased costs for Boerdery in bringing the two applications. Notwithstanding my comments, I am not persuaded that this is a case warranting the type of costs sought by the applicant, those being costs *de bonis propriis*. But I am persuaded that Boerdery should not be left out of pocket by the unnecessary conduct of the respondents.

39. An argument was raised by the respondents pointing to the heading of the irregular step application, that the only respondent cited is Wes as

opposed to the application to dismiss, which cites all three respondents. It was then argued that costs should not be awarded against the second and third respondents in the irregular step application. I am not persuaded that such an argument is sufficient to excuse the second and third respondents from the costs of the irregular step application, despite the historic account which clearly illustrates that the parties got to the present position because of the two respondents' refusal to see what they ought to have seen from the beginning. So, the second and third respondents, along with the first respondent, must be held accountable for the costs of both applications. What exacerbates the respondents' conduct as officers of the court is their acceptance of or let me say acquiescence in Ms de Jäger and Ms Brenda in procuring the latter's appointment. On this basis, the respondents must pay Boerdery's costs on at the scale as between attorney and client.

F. Order

40. The following order is hereby issued:

1. Condonation is granted to the applicant and respondents for the late filing of their pleadings;
2. Leave is granted to the respondents for the filing of the duplicating affidavit;
3. The application to determine whether the respondents had authority to launch the action on behalf of Wes is upheld. It is accordingly declared that the respondents' responses to the Rule 7 notice are inadequate to satisfy this court that they had the requisite authority to launch the action on behalf of Wes against Boerdery.

4. The action proceedings are thus stayed until such time that the respondents have proven to the satisfaction of this court that they are authorised to act.
5. The irregular step application is upheld and the respondents' notices to amend and of application for leave to amend constitute an irregular step. The two notices are hereby set aside.
6. The respondents must pay the applicant's costs in the first and second applications on the scale as between attorney and client.

NN BAM
JUDGE OF THE HIGH COURT,
PRETORIA

Date of Hearing: 06 March 2023

Date of Judgement: 27 July 2023

Appearances:

Applicant's Counsel: Adv J.L Myburgh

Instructed by: Van Schalkwyk Attorneys
Monument Park, Pretoria

Respondents' counsel: Adv T.P Kruger SC

Instructed by: Arthur Channon Attorneys

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