HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 60899/2021

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.
DATE: 19th of March 2024

SIGNATURE

In the matter between:

NEO HARRISON MASITHELA N.O.	First Applicant
MMAPHEFO ELIZABETH MABE N.O.	Second Applicant
TEBOHO VICTOR MONGOATO N.O.	Third Applicant
BUTANA BADI MAAKE N.O.	Fourth Applicant
MMADINEO MARY MNISI N.O.	Fifth Applicant
ANDREW WILLIE BARTLETT N.O.	Sixth Applicant
THE WINTER CEREAL TRUST (IT 11410/97)	Seventh Applicant

and

THE MASTER OF THE HIGH COURT, PRETORIA	First Respondent
JOHANNES FRANCOIS DE VILLIERS N.O.	Second Respondent
GEOFF ROY PENNY N.O.	Third Respondent
MARIANA PURNELL N.O.	Fourth Respondent
BOIKANYO MOKGADLI N.O.	Fifth Respondent
ANDRIES PRETORIUS THERON N.O.	Sixth Respondent

J U D G M E N T

The judgment and order are published and distributed electronically.

VERMEULEN AJ

Introduction

[1] For the ease of reference I will refer to the parties as they are cited within the main application referred to below. The First Respondent is the Master of The High Court of this division who does not oppose the main application. I will refer to the Second to Sixth Respondents as "*the Respondents"* and to the First Respondent as *"the Master"*

[2] On or about the 1st of December 2021 the Applicants launched under the above case number an urgent application against the Respondents, which application was was set down for the 15th of December 2021 (*the main application*).

[3] In essence the relief requested relates to the Winter Cereal Trust (*the Trust*), the Seventh Applicant.

[4] For reasons that are not relevant to this judgment, the main application has not yet been finalised.

[5] In the interim the Respondents have launched two interlocutory applications which applications now comes before me as opposed applications.

[6] The first application is an application in terms of Rule 30A(2). This application relates to a challenge in terms of Rule 7(1) of the Uniform Rules of Court of the authority of the Applicants' attorneys to act on behalf of the Applicants in the main application (the *Rule 30A(2) application*).

[7] The second application is an application in terms of Rule 15(4) wherein the Respondents request that a Notice of Substitution which was served by the Applicants to substitute some of the Applicants be set aside (the *Rule 15(4) application*).

[8] In both applications that served before me, the Respondents were represented by Adv. Strydom SC and the Applicants were represented by Adv. Shakoane SC together with Adv. Mabena.

[9] I wish to thank both sets of counsel for the quality of their Heads of Argument and the submissions made in court.

RELEVANT BACKGROUND:

[10] As aforementioned the main application was launched on the 1st of December 2021 as an urgent application that was set down for the 15th of December 2021.[1]

[11] On the 3rd of December 2021 the Second-, Fourth and Fifth Respondents filed a Notice of Intention to Oppose the main application.[2]

[12] The Respondents proceeded and on the 3rd of December 2021 also filed a Notice in terms of Rule 7 wherein they challenged the authority of Messrs Bokwa Law Incorporated. to act as attorneys on behalf of the Applicants and required that proof be furnished by way of a Power of Attorney for the proper authority of the said attorneys to act for the Applicants.[3]

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[1] *See: Notice of Motion uploaded on CaseLines, p. 001 - 1*

[2] *See: Notice of Intention to Oppose on CaseLines, p. 003 – 1*

[3] *See: Notice in terms of Rule 7 on CaseLines, p. 004 – 1*

[13] Three days later, on the 6th of December 2021 the Third and Sixth Respondents also filed a Notice of Intention to Oppose, being represented by the same set of attorneys as the other three Respondents.[4]

[14] The Respondents proceeded and on or about the 7th of December 2021 filed their Answering Affidavit together with a counter-application.[5]

[15] A Replying Affidavit was filed by the Applicants on or about the 14th of December 2021.[6]

[16] The urgent application came before my brother Fourie J on the 15th of December 2021. Fourie J held that the matter be removed from the roll because the matter was not properly set down (not ripe for hearing) and ordered the Applicants to pay the wasted costs occasioned by the removal, jointly and severally.[7] (*Fourie J order*)

[17] The main application was again set down for hearing for 26 May 2022.[8]

[18] During the hearing of the present applications I was informed by both sets of counsel that both parties were at that hearing ready to proceed with argument in respect of the main and counter-application. Both applications came before my brother Molefe J. It appears that on the 26th of May 2022 my brother Molefe J. made an order wherein he inter alia held as follows:

> "*Having read the papers filed of record and having heard counsel for the Second to Sixth Respondents, the following order is made:*
>
> 1. *That the Applicants be ordered to make available within seven days to Respondents as their co-trustees the following documentation and information:…*
> 2. *…*
> 3. *…*
> 4. *That the costs of the appearance of the 26th of May 2022 be reserved".*[9]

[4] *See: Notice of Intention to Oppose on CaseLines, p. 005 – 1*

[5] *See: Answering Affidavit on CaseLines, p. 006 – 1 and counter-application on CaseLines, p. 007 – 1*

[6] *See: CaseLines, p. 012 – 1*

[7] *See: A copy of the order of Fourie J. is uploaded on CaseLines, Annexure 025-14 and annexed as Annexure FA1 to the Rule 30A(2) application*

[8] *See: The final notice of set down for the 26th of May 2022 has been uploaded onto CaseLines, p. 019-1*

[9] *See: a copy of the order of Molefe J. has been uploaded onto CaseLines, p. 025 – 15. A copy has also been annexed as Annexure FA2 to the Rule 30A(2) application*

(*Molefe J order*)

[19] On or about the 11th of August 2022 the Respondents served and filed a second notice in terms of Rule 7 of the Uniform Rules of Court wherein they again challenged the authority of Messrs Bokwa Law Incorporated. to act as attorneys on behalf of the Applicants alternatively acting on behalf of the Winter Cereal Trust and required proof to be furnished by way of power of attorney for the proper authority to act and to file same within 10 days of receipt hereof. [10]

[20] It is the second Rule 7 notice that gave rise to the Rule 30A(2) application presently before me.

[21] In response to the Rule 7 challenge, the Applicants filed two documents, a document called a "Special Power of Attorney"[11], and a document under a letterhead of the "Winter Cereal Trust" (the Seventh Applicant)(*the Trust*), wherein the acting Administrator of the Trust, a certain RT Nonyane advised the Applicants' attorneys, that in accordance with a Directive from the Chairperson and Vice-Chairperson of the Trust, Bokwa Law Incorporated. is mandated to legally assist the Trust in opposing the Respondents who are currently impeding the proper administration of the Trust.[12]

[22] The Respondents were not satisfied with the responses filed by the Applicants and proceeded with the present application in terms of Rule 30A(2).[13]

[23] The Applicants opposes the Rule 30A(2) application and filed an Opposing Affidavit.[14] The Respondents also filed a Replying Affidavit.[15]

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[10] *A copy of the Rule 7 notice is uploaded onto CaseLines, p. 021 – 1*

[11] *See: Special Power of Attorney uploaded onto CaseLines, p. 022 – 3 to 022 - 4*

[12] *See: Letter dated 30th of November 2021 uploaded onto CaseLines, p. 022 – 5*

[13] *See: Rule 30A(2) application on CaseLines, p. 025 – 1 to 025 - 51*

[14] *See: Opposing Affidavit on CaseLines, p. 028 – 1 to 028 -17*

[15] *See: Replying Affidavit on CaseLines, p. 029 – 3 to 029 - 37*

[24] The Applicants further proceeded and on the 28th of July 2023 served a Notice in terms of Rule 15(1)(a) and 15(2), 15(3), 15(4) read with Rule 28(1) on the Respondents where notice was given to substitute some of the Applicants with new parties. [16]

[25] The Respondents were not satisfied with the substitution procedure adopted by the Applicants and launched an application in terms of Rule 15(4) to set the notice of substitution aside.[17]

[26] The Applicants are opposing the application to set the substitution aside and filed an Answering Affidavit.[18]

[27] The Respondents also filed a Replying Affidavit in this application.[19]

[28] These two opposed interlocutory applications now comes before this Court for adjudication. No other application serves before this Court. It is reiterated that this court is not seized to adjudicate on the main application.

[29] I will deal with the two applications separately and I will commence with the rule 30A(2) application. I was requested to grant an amendment in that the Heading of the papers only refers to Five Applicant trustees whilst it is common cause that the Applicant trustees are six. It appears that this is a bona fide mistake and the amendment is granted, also in relation to the relief sought against the Applicant trustees in the two applications where applicable

RULE 30A(2) APPLICATION:

Late Filing:

[30] The Rule 30A(2) application originates from a challenge of authority in respect of Rule 7.

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[16] *See: A copy of the notice of substitution on CaseLines, p. 038 - 18*

[17] *See: Application in terms of Rule 15(4) uploaded onto CaseLines, p. 038 – 1 to 038 - 30*

[18] *See: Answering Affidavit on CaseLines, p. 038 – 31 to 038 - 64*

[19] *See: Replying Affidavit on CaseLines, p. 038 – 86 to 038 - 134*

[31] Rule 7(1) of the Uniform Rules of Court reads as follows:

> "*Subject to the provisions of sub-rules (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 with the court on good shown at any time before judgement, 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*".

[32] Before I proceed in dealing with the merits of the challenge of authority it is common cause between the parties that the Rule 30A(2) is pursuant to the second Rule 7 notice which was only filed by the Respondents on the 11th of August 2022.

[33] This notice was not filed within 10 days after the lack of authority complaint of came to the Respondents' notice as contemplated within the provisions of Rule 7(1).

[34] There was no substantive application for condonation before me from the Respondents who requested the leave of the Court to challenge the Applicants' lack of authority in terms of Rule 7 as contemplated within the provisions of Rule 7(1).

[35] In ***Kaap-Vaal Trust (Pty) Ltd v Speedy Brick & Sand CC*** [20] the Court had to adjudicate upon a similar application in terms of Rule 30A pursuant to a Rule 7 challenge. In that matter the facts were briefly as follows:

[i] The respondent served a notice in terms of Rule 7 on the attorneys of the applicant wherein it disputed the authority of the applicant's attorneys to act on its behalf;

[ii] The applicant's attorneys did not comply with the rule 7 challenge at all;

[iii] In the premises the respondents proceeded to serve a rule 30A application on the applicant's attorneys wherein they sought an order to compel the applicant's attorneys to comply;

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[20] *(23143/2020)[2021] ZAGPPHC668 (18 October 2021)*

[iv] Pursuant to such an application the applicant's attorneys indeed attempted to comply with the rule 7 challenge and filed a power of attorney together with a resolution of their clients;

[v] Notwithstanding their attempt to comply with rule 7 challenge, the respondent's attorneys were not satisfied and launched the rule 30A application;

[vi] At the hearing of the rule 30A application, the applicant took a point *in limine* that the respondent's rule 7 challenge was filed out of the prescribed 10 day period provided for in rule 7 and that there was no application for condonation before the court for non-compliance of the rule or to request leave of the court to challenge on good cause shown;

[vii] In response to this point *in limine* the court ***inter alia*** held as follows:

> "*The 10-day time period within which the authority of another can be challenge, is not merely superfluous. This time period is set, so as to bring certainty to the litigants that no challenge will be mounted against their authority, and where this challenge is mounted outside of the 10-day period on notice, this challenge can only be mounted with leave of the court and on good cause shown. The rule thus gives direction and permission that the challenge can still be mounted outside of this 10-day period, but only with leave of the court and on good cause shown. In the present instance, no leave was also sought by the applicant*."[21]

[36] The court also referred to the provisions of Rule 27 that makes provision for condonation for non-compliance with the rules of court and the fact that there was no application for condonation that served before the court.[22]

[37] Premised on the above the application in terms of Rule 30A was dismissed with costs.

[38] Although there are similarities between the **Kaap Vaal Trust** matter and the Rule 30A(2) application before me there is, however, clear differences that can distinguish that matter from the facts that served before the court in the present matter.

[39] In this respect:

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[21] *See: par 10 of judgment*

[22] *Paragraph 21 of judgement.*

[39.1] The Rule 7 challenge that was served upon the Applicants' attorneys in August 2022 was not the first challenge of the Applicants' attorneys' authority. As I indicated above, two days after the main application was launched, the three Respondents who opposed the main application at that time, also challenged the Applicants' authority to act on behalf of the Applicants.[23] Although those Respondents did not proceed with an Rule 30A application to compel performance with the Rule 7 challenge at that time, the Respondents did raise this in their answering affidavit;

[39.2] In paragraph 4 of the Answering Affidavit that was filed in opposition to the main application, the Respondents raised the lack of *locus standi* of the Applicants. In paragraph 4.6 of the Answering Affidavit the Respondents specifically refer to the Rule 7 notice and states the following:

> "*A notice in terms of rule 7(1) requiring the applicants to present a resolution showing authority to litigate on behalf of the trust was served on the applicants' attorney. At the time of drawing this affidavit no response was received. A copy of this notice is annexed as annexure "X3".*"[24]

[39.3] I am well aware that the challenge to lack of authority and a challenge to *locus standi* are two separate legal principles. Notwithstanding, it will be evident from the content below that exactly the same legal principles are applicable to the two challenges in the present matter.[25]

[39.4] Where the Applicants dealt with these allegations in their reply in the main application, they adopted the attitude that:

[i] they possess the necessary *locus standi*; and

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[23] *See: first Rule 7 notice, CaseLines, p. 001 – 1*

[24] *See: par. 4.6 of Answering Affidavit, CaseLines, p. 006 – 14; See: Rule 7(1) notice annexed as annexure "X3" on CaseLines, p. 006 – 64*

[25] *See: par. 4 of Answering Affidavit commencing on CaseLines, p. 006 – 13*

[ii] that insofar as the respondents have resorted to a notice in terms of rule 7, they will make available as part of their replying affidavit, a mandate of the attorneys of record for that purpose.[26]

[39.5] I have diligently perused the Replying Affidavit and could nowhere find any mandate as alleged.

[39.6] In addition, pursuant to the second Rule 7 notice, no objection was raised by the Applicants that the said challenge in terms of Rule 7 was out of time. On the contrary on the 29th of August 2022 the Applicants merely proceeded to file the special power of attorney accompanied by what is called a "Mandate for legal representation"[27] in an attempt to comply with the challenge.

[39.7] When the Respondents launched the present Rule 30A(2) application, no objection was taken by the Applicants that the Rule 7 challenge was out of time. In the Answering Affidavit filed on behalf of the Applicants in opposition to the Rule 30A(2) application no point , whether ***in limine*** or at all, was taken in respect of the late challenge in terms of Rule 7.

[39.8] Where the Applicants deal with the content of paragraph 3.14 of the Founding Affidavit in the Rule 30A(2) application, where the Respondents specifically refer to the second Rule 7 notice that gave rise to the present application, the Applicants dealt with the substantive law and the Applicants persisted with justifying their authority. The Applicants make no mention, of any objection to the late filing of the Rule 7(1) notice.[28]

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[26] *See: par. 27.3 of replying affidavit, CaseLines, p. 012 – 13*

[27] *See: special power of attorney, CaseLines, p. 022 – 1 and mandate for legal representation on CaseLines, p. 022 - 2*

[28] *See: par. 16.1 of Answering Affidavit, CaseLines, p. 028 – 11*

[39.9] Throughout it has been the contention of the Applicants that they have duly complied with the Respondents' challenges in terms of Rule 7(1) and Rule 30A(1).

[39.10] Even in the Heads of Argument filed on behalf of the Applicants, Senior Counsel acting on behalf of the Applicants again submitted due compliance with the challenges.[29] Nowhere in the Heads of Argument filed on behalf of the Applicants was any objection taken to the late filing of the Rule 7 notice.

[39.11] The first time that this was raised was at the hearing of the Rule 30A(2) application when senior counsel appearing on behalf of the Applicants, in passing, made mention that the Rule 7 challenge was filed at a very late stage. No specific challenge was made to argue that as a consequence of the late challenge the Rule 7 Notice was defective or void. Counsel for the Applicants submitted that this was just another indication by the Respondents of their delaying tactics to avoid that the main application being heard.

[40] I am of the satisfied that the present matter is to be distinguished from the *Kaap-Vaal Trust* case above. It is evident that the first Rule 7 challenge was served in time and I cannot find any compliance by the Applicants with that notice. It is further evident that the basis for the challenge of authority throughout remained exactly the same. Further no objection was taken to the late filing by the Applicants.

[41] Lateness is not the only consideration to consider whether leave should be granted to the Respondents to proceed with their Rule 7 challenge. I believe the Applicants' lack of authority, which I will discuss below, is so flagrant and that given the implications and importance of the matter it is in the interest of justice that this aspect be adjudicated upon by the court.

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[29] *See: par 3 of Heads of Argument, CaseLines, p. 034 - 7*

[42] I agree with the remarks of Kusevitsky J. in ***Lancaster 101 (RF) (Pty) Ltd v Steinhoff International Holding N.V & two others*** [30]where the Court dealing with a similar situation stated as follows:[31]

> *"[45] Given the above, it is clear that a litigant is entitled, despite the 10-day limit contained in Rule 7(1), to challenge a party's authority at any stage before judgment. Furthermore, if due regard is had to the dictum in Ferris supra, then I am of the view that it is in the interest of justice that condonation be granted, given the implications and importance of the matter."*

[43] Dealing with the remarks of Constitutional Justice Moseneke in ***Ferris and Another v FirstRand Bank Ltd***[32] where he stated on p. 43 G as follows:

> "*[10] In Bertie Van Zyl this Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors."*[33]

[44] In ***Bertie van Zyl (Pty) Ltd & Another v Minister for Safety and Security & Others***[34] in paragraph 14 the Constitutional Court held as follows:

> *"[14] However, in determining whether condonation may be granted, lateness is not the only consideration. The test for condonation is whether it is in the interests of justice to grant condonation. In this case, the interpretation of section 28 is already before us for confirmation. The questions relating to section 20(1)(a) raise similar interpretative questions. Furthermore, the lateness of the applications does not appear to have caused substantial prejudice to the respondents, who do not oppose the condonation application. The respondents are already familiar with the issues articulated in the court a quo. More importantly, for purposes of legal certainty it is opportune to resolve the question of the proper construction of section 20(1)(a) with a view to settling the dispute between the parties. For these reasons, condonation is granted in the interests of justice*."

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[30] *case no. 16389/19 and 6578/19*
[31] *See: par. 45 of judgment*
[32] *2014 (3) SA 39 CC*
[33] *See: par. 10 of judgment*
[34] *2010 (2) SA 181 CC in par. 14*

[45] Lastly, Rule 7 does not lay down a procedure to be followed by the party challenging the authority of a person acting for a party. It can even be done at the hearing. *Erasmus, Superior Court Practice* in his discussion of Rule 7[35] states the following:

> "*It would seem that the challenge, which may be brought at any time before judgment, may be raised in a variety of ways:*
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> *(a) in appropriate circumstances, by notice, with or without supporting evidence;*
>
> *(b) in defendant's plea or special plea;*
>
> *(c) in an answering affidavit;*
>
> *(d) orally at the trial."*[36]

[46] Insofar as may be necessary I grant leave to the Respondents to proceed with the Rule 7 challenge in the present matter.

Merits:

[47] Erasmus (*supra*) in its discussion of Rule 7 [37] described the purpose of Rule 7 as follows:

> "*The purpose of a power of attorney is to establish the mandate of the attorney concerned and to prevent the person whose name been used throughout the process from afterwards repudiating the process all together and same he had given no authority, and to prevent persons bringing an action in the name of the person who never authorised it*." [38]

[48] In ***Eskom v Soweto City Council*** [39] the Honourable Deputy Judge President Flemming discussed the ambit of Rule 7(1) and *inter alia* held as follows:

> "*The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His*

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[35] *p. RS18, 2022, D1-96B*

[36] *See: Lancaster 101 (RF) (Pty) Ltd v Steinhoff International Holding NV (supra), par. 22; See: South African Allied Workers Union v De Klerk 1990 (3) SA 425 (E) at 437*

[37] *on p. RS21-23-D1-93*

[38] *Estate: Matthews v Els 1955 (4) SA 457 (C) at 459; United Dominions Corporation SA Ltd v Greyling's Transport 1957 (1) SA 609 (D) at 614; Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705 E - F*

[39] *1992 (2) SA 703 (W)*

signature to the process, or when that does eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney (compare Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 752 D – F and the authorities there quoted).

The developed view, adopted in court rule 7(1) is that the risk is adequately managed on a different level. 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 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.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority see: rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegation and substitution still attached to applications by some litigant, especially certain financial institutions". [40]

[49] The dictum by Flemming DJP was approved by the Supreme Court of Appeal in ***Unlawful Occupiers, School Site v City of Johannesburg*** [41].

[50] The *authorisation to institute* action or motion proceedings should not be confused with *locus standi in iudicio*. Authorisation concerns the question whether a party is properly before the court in legal proceedings. *Locus standi* materially concerns the direct interest of a party in relief sought in legal proceedings. In dealing with a Rule 7(1) challenge, such a challenge is directed to the *"authority of anyone acting on behalf of a party"*. It does not relate to any party's *locus standi in iudicio*.

[51] Rule 7 does not , however, limit the challenge to the authority of attorneys to act only. The wording of Rule 7(1) also contemplate a challenge to a general authority by one person to another to represent him in action or motion proceedings. This is clear from both the ***Eskom*** and ***Unlawful Occupiers*** decisions referred to above.

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[40] *See: judgment at p. 705 D – H*

[41] *2005 (4) SA 199 (SCA)*

[52] From the content of the relevant Rule 7 notice in the present matter it is evident that the Respondents have merely challenged the authority of the attorneys of the Applicants, Messrs Bokwa Law Incorporated, to act on behalf of the Applicants. The Rule 7 challenge is not directed to challenge the authority of the First- to Sixth Applicants acting on behalf of the Trust. I am, however satisfied that the same legal principles and findings against the authority of the Applicants' attorneys will also apply to the authority of the First to Sixth Applicants to act on behalf of the Trust in the main application.

[53] I quote the contents of the relevant Rule 7 notice as follows:[42]

> "*Kindly take note that the Second to Sixth Respondents in this matter hereby lodge a dispute as to the authority of Messrs Bokwa Incorporated to act as Attorneys on behalf of the Applicants cited above alternatively for the Winter Cereal Trust IT and requires that proof be furnished by way of a Power of Attorney, for the proper authority to act and to file same within 10 days of receipt hereo*f".

[54] As aforementioned in response to this challenge the Applicants filed two documents.

[55] The first document filed is under the heading "Special Power of Attorney" [43] that reads as follows:

> *"I, the undersigned, ROSINA THATO NONYANE do hereby appoint BOKWA INCORPORATED of 944 JUSTICE MOHAMED STREET (previously 210 Charles Street), BROOKLYN, PRETORIA, GAUTENG with powers of substitution to be our true and lawful attorneys and agent in the name of the Winter Cereal Trust (WCT) to do any or all of the following acts:*
>
> *1. To accept service of any legal process;*
> *2. To appear and represent …*
> *3. To defend any action or proceedings …*
> *4. ….*
> *5. ….*
> *6. ….*
>
> *This power of attorney shall become effective immediately.*
>
> *This power of attorney may be revoked by me upon the completion of Case no. 60899/2021 or otherwise at any time.*

[42] *See: rule 7 notice on CaseLines, p. 021 – 1*
[43] See: special of attorney, CaseLines, p. 022 – 3

Dated …
Mrs R T Nonyane
Acting Administrator: Winter Cereal Trust".

[56] The second document was a letter on the letterhead of the "*Winter Cereal Trust*" dated the 30th of November 2021 directed to Mr IRO Bokwa of Bokwa Law Incorporated. Again for the sake of clarity I quote a portion of the content of that letter herein as follows:

> "***THE WINTER CEREAL TRUST MANDATE FOR LEGAL REPRESENTATION BY BOKWA LAW INCORPORATED***
> *In line of the directive that I have received from the Chairperson and Vice-Chairperson of the Winter Cereal Trust, Bokwa Law Incorporated is hereby mandated to legally assist the trust in opposing the Trustees who are currently impeding the proper administration of the Trust.*"

[57] From the content of both documents it is unambiguous that in both documents the Power of Attorney is provided to Bokwa Law Incorporated by the Trust.

[58] This accords with the content of the opposing affidavit filed in opposition to the Rule 30A(2) application which states that the true applicant before the court is the Trust. I refer ***inter alia*** to the following two passages in the opposing affidavit:

> *"10.1 The suggestion and/or insinuation herein that the relief sought in the Main Application is necessarily individually sought by me and the Second to Fifth Applicants is denied. The relief sought in the Main Application is sought by the Sixth Applicant duly represented by me as chairman and the Second to Fifth Applicants as members of the board of trustees of the Sixth Applicant ….*
> *14.1 Save to … Indeed it is because of such impugned and delinquent conduct of the Second to Sixth Respondents that the Sixth Applicant, represented by me as chairman and the Second to Fifth Applicants had to approach the court for appropriate relief as prayed for in the notice of motion in the main application."*[44]

[59] It can therefore not be disputed by the Applicants that the true party who they attempt to bring before the Court is the Trust. It is thus also the Trust on whose behalf the First to Sixth Applicants are attempting to act in their official capacities as trustees in the main application and who opposes the present Rule 30A(2) and Rule 15 applications.

[44] *See: par.14.1, CaseLines, p. 028 - 9*

[60] Although the Applicants have cited as the Seventh Applicant the Trust, it is trite that this citation does not bring the trust before the Court. A trust is a legal person sui geris that acts through its trustees and is brought before the court by joining all its Trustees as parties to the proceedings. The balance of authority holds that unless one or more of the trustees are authorised by the others, all the trustees must be joined in suing, and all must be joined when action is instituted against a trust.[45]

[61] Although I will deal with the defences raised by the Applicants more elaborately below, I already at this stage wish to mention that the Applicants adopted the view that they are entitled to act in the best interests of the Trust and therefore authorised in terms of the provisions of the Trust Deed and in terms of the Constitution of the Republic of South Africa to represent the Trust in their official capacities in the present main application[46] **and** that they were entitled and possessed the necessary authority, through the administrator, to issue the special power of attorney to Bokwa Law Incorporated to represent the trust as attorneys in the main application.[47]

[62] The Respondents do not agree and take issue with these defences.

Provisions of the Trust deed:

[63] It is common cause that the Trust, is an ***inter vivos*** trust.

[64] The Trust Property Control Act [48] regulates ***inter vivos*** trusts.

[65] In ***Lupacchini NO & Another v Minister of Safety and Security***[49] the Supreme Court of Appeal described a trust as follows:

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[45] *Goolam Ally Family Trust v Textile, Curtaining & Trimming 1989(4) SA 985 (C) (Goolam Ally) 988. Rosner v Lydia Swanepoel Trust 1998(2) SA 123 (W) at 127A-B. Deutschmann NO and others v Commissioner for the SARS; Shelton v Commissioner for the SARS 2000(2) SA) 106 (ECD) at 119F-H; Luppacchini v Minister of Safety and Security 2010(6) SA 457 (SCA) at para 2.*

[46] *See: par. 14 of Opposing Affidavit to Rule 30A application on CaseLines, p. 028 – 9 to 028 – 11*

[47] *See: par. 16.1 of Opposing Affidavit to Rule 30A application on CaseLines, p. 028 – 11 to 028 – 12*

[48] Act 57 of 1988 ("the Act")

[49] *2010 (SA SA457 (SCA); (2010) ZASCA 108 at par. [1]*

> "*A trust that is established by a trust deed is not a legal person – it is a legal relationship of a special kind. That is described by the authors of Honoré's South African Law of Trusts as a legal institution 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 or persons or for the furtherance of a charitable or other purpose ….*" [50]

[66] Although the trustees are holding the trust property separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, it must be administered by them. It is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed which is the trust's constitutive charter. Outside its provisions the trust estate cannot be bound.[51]

[67] In the premises, Trustees are legally bound to comply with the terms of the trust deed.[52]

[68] In order to determine whether the Applicants and in particular the trust possessed the necessary authority to appoint Bokwa Law Incorporated it requires the court to interpret the salient provisions of the trust deed. A copy of the trust deed was annexed as Annexure **FA4** to the Rule 30A(2) application.[53]

[69] I refer to the following provisions:

[69.1] In clause 1.17 "*trustees*" are defined to mean "*any trustees appointed in terms of paragraph 5 of this deed*";[54]

[69.2] Clause 5 of the trust deed *inter alia* provides as follows:

> "*5.1 There shall be 12 trustees at the establishment of the trust. The trustees shall at all relevant times be appointed as follows:*
>
> *5.1.1 One must be a representative of produces of wheat;*
>
> *5.1.2 One must be a representative of produces of barley;*

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[50] *See: Commissioner for Inland Revenue v MacNeillie's Estate 1961 (3) SA 833 (A) at 840 D – H; Commissioner for Inland Revenue v Friedman & Others NNO 1993 (1) SA 353 (A) at 370 E – I; Land and Agricultural Bank of South Africa v Parker & Others 2005 (2) SA 77 (SCA) at par 10*

[51] *See: Land and Agricultural Bank of South Africa v Parker (supra) at par. 10*

[52] *Shepstone & Willy Attorneys v De Witt & Others NNO. 2023 (6) SA 419 SCA at par. 20*

[53] *See: Annexure FA4 commencing from p. 025 – 22 to 025 - 41*

[54] *See: clause 1.17 of trust deed on CaseLines, p. 025 – 26*

5.1.3 One must be a representative of grain handlers;

5.1.4 One must be a representative of processes of winter cereal;

5.1.5 One must be a representative of bakers;

5.1.6 One must be a representative of consumers;

5.1.7 Six must be a representative of the Minister;

5.1.8 The trustees referred to in sub-paragraphs 5.1.1 and 5.1.2 above shall be nominated by the organisation representing produces of winter cereal who are responsible for the greater part of the production of winter cereal in the Republic of South Africa;

5.1.9 The trustee referred to in sub-paragraphs 5.1.3 shall be nominated by the organisation which can proof that it is a representative of grain handlers who are responsible for handling the greater part of the total production of winter cereal in the Republic of South Africa;

5.1.10 A trustee referred to in paragraph 5.1.4 shall be nominated by the organisation which can proof that it is a representative of processes of wheat who are responsible for processing the greater part of the total wheat processed for human consumption in the Republic of South Africa: provided that such nomination be done in consultation with the processors of barley who is responsible for processing the greater part of the total barley processed for human consumptions in the Republic of South Africa;

5.1.11 The trustee referred to in sub-paragraph 5.1.5 shall be nominated by the organisation which can proof that it is a representative of bakers who are responsible for producing the greater part of the total production of bread in the Republic of South Africa;

5.1.12 The trustee referred to in sub-paragraph 5.1.6 shall be nominated by a national representative bodies for consumers. If the representative bodies have not reached consensus on the nominee the trustee shall be nominated by the representative body which can proof that it is most representative of consumers; and trustees referred to in sub-paragraph 5.1.7 shall be nominated by the minister; provided that one of these trustees be selected from the nominations submitted to the minister by the organisation which can proof that it is a representative of most of the emerging farmers who produce winter cereal in the Republic of South Africa.

5.1.13 …

5.2 The number of trustees shall never be less than 12 subject to the provisions of paragraph 5.10;

5.3 In the event of the death, resignation, disqualification or termination of office of any trustee, the remaining trustees must ensure that another person be appointed as trustee by the relevant nominating body who initially appointed the relevant trustee within a period of 60 calendar days of the event.

5.4 …

5.5 …

5.6 …

5.7 …

5.8 …

5.9 …

5.10 In the event of the death, resignation, disqualification or termination of office of any trustee, the remaining trustees must ensure that another person be appointed as trustee by the relevant nominating body who initially appointed the relevant trustee within a period of 60 calendar days of the event."

[69.3] Clause 9 of the trust deed regulates the decisions of the trustees and ***inter alia*** provides:

"*9.4 Every trustee shall be entitled to one vote at the meeting of the trust. A quorum necessary for the purpose of the meeting of trustees shall be any seven trustees. Subject to the provisions of sub-paragraphs 5.8, 15.1 and 18.1 all decisions of the trust shall be taken by means of majority vote by those trustees present.*

9.5 The chairperson will have a casting vote;

9.9 Subject to the provisions of sub-paragraphs 5.8, 15.1 and 18.1 no decision taken at the meeting of trustees shall be valid of any form, unless the trustees present represent a quorum and the decision is a majority decision of the trustees present at the meeting."

[69.4] Clause 11 of the trust deed regulates the power and authority of the trustees. In this respect Clause 11 ***inter alia*** provides:

"*11.7 The trustees shall have the power to institute or defend legal `proceedings and to sign all deeds, powers of attorney and other documents that may be*

necessary for this purpose. The trustees shall have the power to take any steps of whatever nature in order

11.8 The trustees may employ such person and the trustees may consider it necessary for the proper performance of the functions and for the attainment of the object of the trust.

11.9 The trustees may employ the services of professional advisers and/or contractors for the benefit of the affairs of the trust and may remunerate such services from the trust fund.

11.10 The trustees may pay any expenses with regard to the administration of the trust from the trust fund."

[69.5] Clause 12 further provides:

"*The trustees are compelled to comply with their common law duties, those duties contained in the provisions of the act as well as the provisions of this trust deed*."

Sub-minimum Trustees:

[70] Clause 5.1 read with clause 5.2 of the Trust Deed is in no way ambiguous. Clause 5.2 uses imperative language and provides that there shall at no stage be less than 12 trustees, subject to the provisions of Clause 5.10.

[71] Clause 5.10 provides for a process that in the event of ***inter alia*** the death of a trustee the remaining trustees must ensure that another person be appointed as trustee by the relevant nominating body who initially appointed the relevant trustee within a period of 60 calendar days of the event.

[72] It has already been held by the Supreme Court of Appeal in ***Land & Agricultural Bank of South Africa v Parker & Others***[55] that a provision such as contained in paragraph 5.2, requiring that a specified minimum number of trustees must hold office, is a capacity finding condition. It lays down a prerequisite that must be fulfilled before the Trust estate can be bound. When fewer trustees than the number specified are in office, the Trust suffers from an incapacity that precludes action on its behalf.

[55] *Land & Agricultural Bank of South Africa v Parker & Others 2005 (2) SA 77 SCA at par. [11]*

[73] I can find no reason why the principle as provided for in the **Land & Agricultural Bank** matter (*supra*) is not applicable to the matter at hand.

[74] In the present matter it is common cause that one of the trustees, Ms van der Merwe passed away and that no trustee had yet been appointed to replace her. It is further common cause that since her passing away the trustees at all relevant times have remained 11 and hence below the sub-minimum of 12 trustees. In the premises since the passing away of Mrs Van Der Merwe the Trust suffered and still suffers from an incapacity that precludes action on its behalf.

[75] It is further trite that when the number of trustees is below the sub-minimum, it does not mean that a trust cease to exist. The Trust continue to exist.

[76] Clause 5.2 specifically refers to the provisions of Clause 5.10 of the Trust Deed aforementioned. This clause provides that the remaining trustees must ensure that another person be appointed as trustee by the relevant *"nominating body who initially appointed"* the relevant trustee, within a period of 60 calendar days of the event.

[77] What is evident from paragraph 5.10 read with paragraph 5.1 is that it is not the remaining trustees that are required to appoint a further trustee. It is the nominating body which initially appointed that particular trustee who passed away, who has to appoint her replacement.

[78] Although it is not indicated which organisation initially appointed Ms van der Merwe it appears that she is not one of the six ministerial appointed trustees.

[79] All that needed to be done by any of the trustees was to inform the relevant body who initially appointed Ms van der Merwe as a trustee, to appoint her replacement.

[80] I wish to reiterate that that for such appointment, it was not necessary for the trustees to act jointly at all. The appointment (or rather the nomination of the trustee to be appointed by the Master) was not to be done by them but by the independent body who

initially appointed Mrs van der Merwe. Any one of the trustees could have advised the relevant institution of the passing away of Mrs Van Der Merwe and the need to nominate a new trustee for appointment.

[81] No reason was provided why this procedure was not followed by **any** of the First- to Sixth Applicants.

[82] Even in the event that such procedure was followed and in the event that such body refused to appoint a replacement for Mrs van der Merwe, then and in that event the First to Sixth Applicants had other remedies available that they could utilise to bring the number of trustees above the required sub-minimum:

[82.1] The could have launched an application to compel the said nominating body to nominate a new trustee for appointment; ***alternatively***

[82.2] In the event of the nominating body's refusal or failure, the Trust Property Control Act gives the Master a default power to appoint trustees. In this respect Section 7(1) provides:

> "*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*"; further ***alternatively***

[82.3] It is a fundamental principle of trust law that a trust will not be allowed to fail for want of a trustee.[56] Although, as aforementioned, the Trust Property Control Act has made the Master rather than the court the normal agency for appointing trustees in vacancies and appointing co-trustees[57] nothing in the said statute abrogates the court's common law or statutory powers in these respects. There can thus be no doubt that a court retrains its wide jurisdiction in the appointment

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[56] *Ex parte Carter 1938 WLD 43; Holmess v Pietermartizburg CC 1975 (2) SA 713 (N) 719*

[57] *See: Section 7 of Act 57 of 1988*

of trustees.[58] In the premises the relevant Applicants could also have approached the court for such an appointment.

[83] In exercising the remedies referred to in paragraph 82.2 and 82.3 above it would not be the trust who acted nor would it be required that the trustees act jointly. Anyone of the trustees would be an interested party to approach either the Nominating Body, the Master or the Court for the required appointment. Because the trust suffered from an incapacity to act during this time the correct approach would be that any of these parties should approach either the Master or court in their personal capacities.

[84] There was no evidence placed before the court nor was it submitted at any time that the First- to Sixth Applicants approached either the initial nominating body who appointed Ms van der Merwe to appoint a replacement and that the said body refused or failed, or that the Master or the court was approached to appoint an alternative trustee to ensure that the sub-minimum trustees increase to an amount of 12.

[85] In ***The Land and Agricultural Bank*** case (*supra)* the Supreme Court of Appeal *inter alia* held as follows:

> *"[14]The Parkers in other words could not bind the trust because no one could. This does not mean that their duties as trustees ceased. On the contrary, the obligation to fulfil the trust object and to observe the provisions of the trust deed continued. These required that they appoint a third trustee when a vacancy occurred – a duty they signally failed to fulfil. But until they did so the trustee body envisaged in the trust deed was not in existence and the trust estate was not capable of being bound. For the Parkers to purport to bind the trust estate during this period was an act of usurpation that simply compounded the breach of trust they committed by failing to appoint a third trustee …"*[59]

[86] Since the amount of trustees was less than the required sub-minimum number of trustees, this court finds that since the passing away of Mrs Van Der Merwe the Trust

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[58] *See: Honore's South African Law of Trusts, 4th Ediction by Honore and Cameron on p. 164; See: Darroll v Tennant 1932 CPD 406 at p. 429 to 9; Ex parte Estate Leslie 1945 MPD 383; Bonsma NO v Meaker NO 1973 (4) SA 526 (R);Photocircuuit SA v De Klerk NO (1989) 10 ILJ 634C; Perskor v Schoeman NO (1989) 10 ILJ 650 T; Foskor v Schoeman NO (1989) 10 ILJ 861 T.*

[59] *See: par. [14] of Land & Agricultural Bank case (supra)*

suffered from an incapacity to act and will continue to suffer from such incapacity until such time as the number of trustees is restored to 12. In the premises the Trust could not provide authority to Messrs Bokwa Law Incorporated to act on behalf of the trust and the Trust could not institute the main application.

[87] During argument counsel appearing for the Applicants could not provide me with any reason how this court is should distinguish the ***Land and Agricultural Bank*** matter from the present facts.

Trustees must Act Jointly:

[88] But even if the court is wrong with its finding in **paragraph 86** above then there is a further reason why the trust could not provide Bokwa Law Incorporated with the required authority.

[89] It is a fundamental rule of trust law, which this court restated in ***Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk*** [60] that in the absence of a contrary provision in the trust deed, the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees' joint ownership of the trust property.[61]

[90] In ***Coetzee v Peet Smith Trust en Andere*** [62], the court held that unless the trust deed contained provisions to the contrary, there was legally no reason to follow a different rule. In the case of trusts, joint and unanimous conduct in the alienation, handling and management of trust assets is a prerequisite.

[91] A perusal of the trust deed in the present matter provides no provision that assist the Applicants in their actions in the present matter. I refer to the provisions of clause 5 of the Trust Deed referred to in paragraph 69 above.

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[60] *[2004] 1 All SA 396 (SCA); Shepstone & Wylie Attorneys v De Witt and Others NNO 2023 (6) SA 419 (SCA) from paragraph 13 to 33 and authorities referred therein.*

[61] *See: par. [15] of Land & Agricultural Bank of South Africa case (supra)*

[62] *2003 (5) SA 674 (T)*

[92] Although clause 9.4 of the trust deed as referred to in paragraph 69.3 above, provides a quorum provision, contrary to the normal rule of joint action, it is evident that even this provision does not assist the Applicants. It is common cause that the Applicants could not at any stage form a quorum of trustees to make any resolutions on behalf of the Trust and it is common cause that the decisions taken by the Applicants were not taken at properly constituted trust meetings.[63] At all relevant time the Applicants were only 6 trustees. They could not constitute a quorum of 7 trustees to act.

[93] In reaching this obvious conclusion I have not even addressed the legal requirement that all the trustees had to form part of the decision making process or at the very least have been notified of the trustees meetings where the intended resolutions were taken. It does not appear nor has it been alleged that the Respondents were at any time notified by the Applicants of any of the relevant trustee meetings.

[94] As was held by this court in ***Le Grange and Another v Louis and Andre Le Grange Family Trust NO and Others*** [64] the trustees, when dealing with trust property, are required to act jointly and even when the trust deed provides for a majority decision, the resolutions must be signed by all the trustees.

[95] In the case where the majority decision prevails, all trustees are still required to sign the resolution. **In *Land and Agricultural Bank of South Africa v Parker and Others*** supra this court held that when dealing with third parties, even if the trust instrument stipulates that the decision can be made by the majority of trustees, all trustees are required to participate in the decision-making and each has to sign the resolution. The court in ***Steyn and Others NNO v Blockpave (Pty) Ltd*** [65] restated the aforementioned

[63] *Paragraphs 14.1 and 14.2 of Opposing affidavit Case3Lines 028-9*
[64] *[2017] ZAKZPHC 2 (Le Grange).,*
[65] *2011 (3) SA 528 (FB)Blockpaver*

principles in *Parker*. It went on to state that a trust operates on resolutions and not on votes.

[96] Similarly, in ***Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others*** [66] the court also endorsed the principle that trustees have to act jointly and that the minority is obliged to act jointly with other trustees in executing the resolution adopted by the majority. A majority decision prevails only where there has been participation by all trustees where the trust deed expressly provides for it.

[97] In the present matter, on every possible interpretation there is no room to conclude that the Applicants could validly act on behalf of the Trust.

Defences Raised:

[98] Notwithstanding the Applicants submit that they are authorised in terms of the trust deed and in terms of the Constitution to act on behalf of the Trust.

[99] The Applicants submission that they are authorised in terms of the trust deed to act as they are doing in the circumstances[67] is without any merit.

[100] For this argument the Applicants attempt to rely on clause 11.7 of the Trust deed. Clause 11.7 ***inter alia*** provides that trustees are authorised to institute legal proceedings and that they shall have the right to protect the interests of the trust. As a consequence they are acting in the Trust's best interest and authorised to act.

[101] I do not agree. The powers and functions of the trustees in clause 11 cannot be read in isolation and must be interpreted within the context of the provisions of the trust deed as a whole and in accordance with the law of trusts.[68] Firstly, the powers and functions of the trustees, inclusive of clause 11.7, cannot cure the fact that the Trust suffers from an

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[66] *2010 (5) SA 555 (WCC) (Van der Merwe), supra [13*

[67] Par 14.3 of Opposing affidavit on CaseLines page 028-10

[68] *Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) paragraphs 18 and 19*

incapacity to act as duly dealt with above. In addition, the said powers can only be exercised if the trustees act jointly or in accordance with the provisions of the trust deed thus at the very least after a proper resolution was taken at a trustees meeting with the required quorum.

[102] The same argument is applicable on any of the other powers and functions of the trustees provided for in clause 11 of the trust deed. In the premises the Applicants reliance on clause 11.7 does not constitute a defence at all.

[103] The applicants' reliance on section 38 of the Constitution[69] is also misplaced.

[104] Section 38 of the Constitution provides:

> *"Anyone listed in the section has the right to approach a competent court, alleging that the right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are –*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) anyone acting as a member of, or in the interest of, a group of class of persons;*
>
> *(d) anyone acting in the public interest; and*
>
> *(e) an association acting in the interest of its members."*

[105] The section is to all intents and purposes identical to its predecessor under the interim Constitution [70]. Accordingly, the case law that has developed around section 7(4) of the interim Constitution is directly applicable in respect of the interpretation of section 38 of the Constitution. Cases decided thereunder can be used to give content to section 38 of the Constitution.

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[69] Constitution of South Africa of Act 108 of 1996

[70] *Act, No. 200 of 1993 ("the interim Constitution")*

[106] Section 38 only applies in cases where an infringement of or a threat to a right in the Bill of Rights is alleged. In the present matters before me it is alleged that the Trust's right to "Equality" and right to "Access to courts" have been infringed.

[107] Although the task of interpreting the chapter 3 fundamental rights rests, of course, with the Courts, it is for the applicants to prove the facts upon which they rely for their claim of infringement of the right in question.[71]

[108] The Applicants reliance on Clause 11.7 and Section 38 to justify their ability to act is a clear after thought. In the main application no mention is made of any infringement of any right nor their apparent reliance upon Section 38 of the Constitution. On the contrary they attempt to rely upon the so called Benningfield Exception [72] to justify their ability to bring the main application. At this stage I am not called upon to decide whether the Applicants can correctly rely upon this principle. I merely make mention of this fact to indicate that no mention was made of any infringement of any right nor was reliance place upon section 38 of the constitution.

[109] The Applicants reliance upon Section 38 of the Constitution is in any event misplaced. Section 38 first determines ***when*** the right to invoke the aid of a Court arise (infringement) and then proceeds to determine ***by whom*** that right (when it accrues) may be exercised.(subparagraphs (a) to (e))[73].

[110] Even if they were able to show that rights were indeed infringed, the Applicants dismally fail to make out a case in what capacity they wish to rely on the provisions of Section 38. Where do they slot in in subparagraphs (a) to (e).

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[71] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 1 SA 984 (CC)*

[72] *Benningfield v Baxter (1886) 12 AC 167 (PC)* accepted as part of our law in *Gross v Pentz [1996] ZASCA 78; 1996 (4) SA 617 (SCA); [1996] 4 All SA 63 (A)*

[73] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 1 SA 984 (CC)*

[111] The only two subparagraphs that could possibly apply are subparagraphs (a) and (b) providing for the following situations:

"(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name; "

[112] In the present matter not one of the two subparagraphs can be applicable.

[113] The First to Sixth Applicants are not before me in their personal capacities. Thus, they are not acting in their own interest.

[114] In paragraph 58 above I duly indicated that in the present applications before me the Applicants attempt to bring the trust itself before the court. They even attempted to make the Trust itself the Seventh Applicant in the main application (whether right or wrong I need not decide in the present matter). From the two documents provided in reply to the Rule 7 challenge it also appears that it is the trust who appointed Bokwa Law Incorporated and thus the trust who attempted to act.

[115] Where in the present matter the trust itself wishes to rely upon the provisions of Section 38(1)(a) that it is acting in its own interest, it is again struck with the incapacity to act which I have already dealt with above. Until such incapacities have been addressed it cannot act. In the premises subparagraph 38(1)(a) cannot never be applicable.

[116] Similarly subparagraph 38(1)(b) can also not be relied upon. Section 38(1)(b) refers to a person acting on behalf of another person who is not able to seek such relief in his or her own name.

[117] As indicated, the Applicants contend that the trust is before me and that the trust has appointed Bokwa Law Incorporated and that it is the trust acting.[74] There is thus no

[74] *Par 58 judgement above*

room to argue on their version that they are acting on behalf of "..*another person who cannot act in their own name".*

[118] The person referred to in section 38 not being able to act, i.e., the trust in the present matter, is exactly the party attempting to act in the present matter and not other parties attempting to act on its behalf.

[119] For these reasons alone the Applicants reliance on the provisions of section 38 must fail.

[120] Notwithstanding there is another reason why they cannot rely on the provisions of section 38(1)(b). The subparagraph provides that the other person on whose behalf action is taken "cannot" act in its own name. The use of this word has a connotation of finality to the inability to act. I am certain that in enacting this provision it was not within the contemplation that a party may act on behalf of another that has a mere temporary disability to act, which temporary disability can be easily rectified.

[121] As indicated above, the trust's incapacity to act due to the number of trustees falling below the prescribed sub-minimum can easily be rectified by requesting the relevant organisation to nominate a new trustee and providing the Master with this nomination to issue a letter of authority in terms of the Trust Property Control Act. Other options such as approaching the Master or Court for an appointment are also available to them.

[122] In addition, the alleged rights infringed, have not yet been infringed at all. The Trust has not been denied access to the courts nor has it been treated unequal before the law to date. The fact that the trust lacks incapacity to act at this stage is due to the passing away of one of the trustees and the lack of action on behalf of the remaining trustees to

ensure the appointment of a new trustee. Once this has been cured the trust will be able to act to again within the boundaries of its trust deed.

[123] Once a further trustee has been appointed it may that there will be sufficient trustees to constitute the desired quorum of seven trustees to make lawful resolutions on behalf of the trust. This court cannot at this stage speculate that the prospective trustee to be nominated and appointed, the identity that is completely unknown at this stage, will refuse to participate in trustee meetings and resolutions and that the trust's inability to act will persist at that stage. It will only be once such circumstances persist that one would be in a position to determine whether any constitutional rights are infringed at that time.

Conclusion:

[124] In the premises I find that *Messrs Bokwa Law Incorporated lacks the necessary authority to act as Attorneys on behalf of the alternatively to act for the Winter Cereal Trust*.

[125] It is evident that the lack of authority complained of the present application persisted from the commencement of the action. It has been established by the Respondents that the trust could not act in the present litigation and that it could not appoint Messrs Bokwa Law Incorporated to represent them in the present litigation who were the attorneys from the commencement of the application.

[126] If the trust could not lawfully act then it follows that it could also not lawfully deal with the funds of the Trust in respect of the present litigation to date. In the premises I am satisfied that the Respondents, as co-trustees of the trust are entitled to be informed of all amounts paid from the trust funds to Messrs Bokwa Law Incorporated in respect of the present litigation.

[127] I am however not prepared to order that Messrs Bokwa Law Incorporated should repay all the funds received from the trust at this stage. Messrs Bokwa Law Incorporated has a direct and substantial interest in such relief and at the very least should have been joined as a party against whom such relief be sought. Messrs Bokwa Law Incorporated is not a party to the proceedings before me and was not provided with an opportunity to oppose such relief. It may be that they have a valid defence to repayment.

[128] I have also indicated above that in the relevant Rule 7 challenge only the authority of the Applicants attorneys was challenged. The Applicants authority to act on behalf of the Trust was not challenged in the said notice. Notwithstanding, the same questions of law that were necessary to be answered in respect of the challenge of the Applicants attorneys authority applies to the authority of the Applicants to act on behalf of the Trust. [75]

[129] In addition, in the Rule 30A(2) application the Respondents' relief not only relate to the lack of authority of Applicant's attorney to act but also to the Applicants' lack of authority to act on behalf of the Trust. No objection to this approach was taken by the Applicants in their opposition to the Rule 30A(2) application.

[130] In the interests of justice I am satisfied that it would be an utter waste of costs and unnecessary duplication of proceedings to arrive at the same findings in respect of the Applicants' authority to act on behalf of the Trust if the Respondents were expected to start afresh with a new Rule 7 challenge. In addition the Applicants flagrant disregard of the provisions of the trust deed should cease forthwith.

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[75] *Molusi & Others v Voges NO. & Others 2016 (3) SA 370 (CC) in paragraph 27; Fischer and Another v Ramahlele and Others 2014 (4) SA 614 (SCA) in paras 13 and 14; Also see: MEC for Health, Eastern Cape and Khumbulela Melane & Special Investigating Unit, unreported judgement with case no. 2017/2015 reported in the High Court of South Africa (Eastern Cape Local Division, Mthatha in par. 23; and Fischer & Another v Ramahlele & Others 2014 (4) SA 614 (SCA) at para. 13 – 14*

[131] In the premises I am satisfied that the relief in respect of the challenge of authority of the Applicants to act on behalf of the Trust should be granted as well.

[132] In the premises an order is made in terms of prayers 1, 2, 3 and 6 of the Rule 30A application.

RULE 15(4) APPLICATION:

[133] I will again refer to the parties in the Rule 15(4) application as they are cited in the main application.

[134] The Respondents launched the Rule 15(4) application pursuant to a notice of substitution dated the 28th of July 2023 that was filed by the Applicants dated on the 1st of August 2023 whereby the First-, Second, Third to Sixth Applicants in the main application are to be substituted as Applicants to the main application. A copy of the relevant notice was annexed as Annexure AB1 to the application in terms of Rule 15(4).

[135] Until the 9th of November 2022, the serving Trustees of the Trust were the six Ministerial Trustees (the First to Sixth Applicants), the five Industry Trustees (First to Fifth Respondents) and the Twelfth Trustee, Ms van der Merwe who have passed away.

[136] After the Respondents had launched the Rule 30A application above, but before a date for the hearing of the said application could be secured, the Master of the High Court processed a previous application for the replacement of the Ministerial Trustees submitted during June 2019. Pursuant thereto a new letter of authority for the trustees of the Trust was issued in a belated manner on the 9th of November 2022. A copy of that letter of authority is annexed as Annexure AB3 to the Rule 15(4) application.

[137] In terms of the new letter of authority all the trustees save for the First Applicant, First and Fourth Respondents in the main application and the late Ms van der Merwe were replaced as trustees of the Trust. In total eight of the previous twelve trustees were therefore replaced.

[138] Pursuant to the new letter of authority, Bokwa Law Incorporated. directed a letter to the Respondents' attorneys on the 2nd of February 2023, a copy that was annexed as Annexure AB4 to the Rule 15(4) application wherein they *inter alia* advised that:

[i] Bokwa Law Incorporated continued to act for and on behalf of the Trust;

[ii] As a consequence of the new letter of authority both the Ministerial and Industrial Trustees have been replaced;

[139] The Respondents' attorney replied to this letter in a letter that was annexed as Annexure AB5 to the Rule 15(4) application. In this letter Messrs Bokwa Law Incorporated. were advised:

[i] That in view of the passing away of Ms van der Merwe and in view of the persisting number of trustees being less than a sub-minimum of trustees that the Trust was still unable to act;

[ii] That the authority of Bokwa Law Incorporated. to act on behalf of the Trust was still under dispute being the subject of the Rule 30A application;

[iii] That the substitution of the trustees on the 9th of November 2022 would have an adverse effect on the Ministerial Trustees' main application and that the Ministerial Trustees are compelled to join all the newly appointed trustees to the main application.

[140] Subsequent to this reply Bokwa Law Incorporated proceeded and filed the Notice of substitution on the 1st of August 2023.

[141] In response to this Notice of substitution the Respondents' attorneys again directed a letter on the 17th of August 2023 to Messrs Bokwa law Incorporated. a copy of the letter annexed as Annexure AB6 to the Rule 15(4) application. Already at this stage Messrs Bokwa Law Incorporated. were advised that:

[i] the Notice of substitution that was served was defective and irregular in that Rule 15(1) provides for the substitution of parties where there is death, marriage, or a change of status of any of the parties to the litigation. The attorneys of the Respondents believed the appointment of different trustees does not fit either of the categories referred to in Rule 15(1) and that the reference to "change of status" within the rule meant a change in the legal and not personal status of a party;

[ii] that Rule 15(1) further provides that no such Notice of substitution shall be given after the commencement of the hearing of any opposed matter. The hearing of the main application had already commenced in the Urgent Court and later in the Opposed Motion Court before the Honourable Molefe J.

[iii] that the relevant Notice of substitution also referred to Rule 28(1) which rules applies to different circumstances, and which constitute a different process whereby an amendment to pleadings is undertaken.

[iv] that the newly appointed trustees should be formally joined to the proceedings in the main application.

[v] that previous costs orders were already granted against the Ministerial Trustees jointly and severally in their personal capacities and for this reason the existing Applicants in the main application cannot merely be substituted.

[vi] Messrs Bokwa Law Incorporated. was requested to formally withdraw the defective notice in terms of Rule 15(4) failing which an application in terms of Rule 15(4) would be brought.

[142] In reply to this letter Messrs Bokwa Law Incorporated. on the 22nd of August 2023 sent an email to the Respondents' attorneys, a copy annexed as Annexure AB7 to the Rule 15(4) application. In this communication Messrs Bokwa Law Incorporated advised that they have communicated the content of the Respondents' attorneys' letter (Annexure AB6) to their client and that they have been instructed to confer with Senior Counsel regarding the averments and requests made in the said letter. An indulgence was sought to respond to the letter by Friday the 25th of August 2023.

[143] On the 28th of August 2023, Bokwa Law Incorporated directed a further email, a copy which is annexed as Annexure AB8 to the Rule 15(4) application. In this communication Bokwa Law Incorporated. advised that the issues raised in the letter of the Respondents' attorneys (Annexure AB6) can be dealt with on the 10th of October 2023 at the meeting that was scheduled with the Honourable Deputy Judge President. Bokwa Law Incorporated further noted that should such a proposal not be acceptable, that the Applicants in this application would be entitled to exercise their rights.

[144] Although the Respondent initially acceded to the request that the issue be discussed at the meeting with the Deputy Judge President on the 10th of October 2023, the Respondents later on advice of counsel decided it would be more practical that the

application in terms of Rule 15(4) already be initiated before such meeting in order to discuss the process relating to this application as part of any Case Management Directives to be discussed and/or considered at the meeting. The Rule 15(4) application was filed on /or about the 4th of October 2023.

[145] The Applicants filed their Notice of Intention to Oppose this application on the 19th of October 2023.[76]

[146] In accordance with the time limits provided by the rules of this Court the Applicants were obliged to file their Opposing Affidavit on or before the 10th of November 2023. Notwithstanding they only proceeded to file their Answering Affidavit on the 4th of December 2023, approximately 10 days out of time.

Ad Condonation:

[147] The Notice of substitution was filed on the 1st August 2023.

[148] In terms of the Rule, an application in terms of Rule 15(4) should have been launched within 20 days, i.e., on or before the 29th August 2024.

[149] In its application in terms of Rule 15(4) the Respondents request condonation for the late filing. The Applicants take serious issue with the application for condonation, and it is prudent that this aspect first be disposed of.

[150] From what is discussed below I am satisfied that condonation should be granted for the late filing and that the Applicants opposition to the application for condonation is vexatious to state the least.

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[76] *See: Notice of Intention to Oppose on CaseLines, pp. 038 – 66*

[151] Rule 27 provides:

> *(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.*

(Own emphasis)

[152] The Respondents could file their 15(4) application before the 29th August 2023.

[153] On the 22nd of August 2023 the Applicants attorneys in terms of Annexure AB7 requested an indulgence to respond to the Respondents attorneys' letter (Annexure AB6) by Friday the 25th of August 2023.

[154] On the 28th of August 2023, Bokwa Law Incorporated on behalf of the Applicants in Annexure AB8 advised that the issues raised in the letter of the Respondents' attorneys (Annexure AB6) can be dealt with on the 10th of October 2023 at the meeting scheduled with the Honourable Deputy Judge President. Annexure AB6 dealt with the Respondents intention to bring a 15(4) application.

[155] It is evident that an agreement was reached to hold the launching of the intended Rule 15(4) application over until after the meeting with the Deputy Judge President on the 10th October 2023 and that such arrangement was initiated by the Applicants' attorneys.

[156] Thus not only did the parties enter into an agreement as contemplated within Rule 27(1) above, but the Applicants can hardly complain that they suffer any prejudice in circumstances where the Respondents decided to bring their Rule 15(4) application

prior to (and not after) the date agreed between the parties. On the contrary having regard to the agreement between the parties I believe it was not even necessary for the Respondents to request condonation as the Rule 15(4) application was not filed out of the time agreed.

[157] Insofar as may be necessary I find that the Rule 15(4) application was not served outside the time agreed between the parties alternatively condonation is granted to the Respondents.

Merits

[158] Sight should not be lost of the import of rule 15. The purpose of the rule was not to afford the High Court the power to substitute a party to proceedings. The High Court already had that inherent power under the common law.[77]. The court still has that power to grant a substitution of parties on substantive application where rule 15 does not apply.[78] The purpose of rule 15 is merely to provide a simplified form of substitution, subject to the right of any affected party to apply to court for relief in terms of rule 15(4).

[159] In ***Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another*** *supra* [79] the Supreme Court of Appeal inter alia held that in the absence of any substantive application for substitution the effectiveness of a rule 15 notice will obviously depend on whether it was given in a situation covered by the rule.

[160] No substantive application for substitution served before me and hence the court was restricted to determine whether the notice of substitution was covered by Rule 15.

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[77] *(see, for example, Curtis-Setchell & McKie v Koeppen 1948 (3) SA 1017 (W) at 1021; Putzier v Union and South West Africa Insurance Co Ltd 1976 (4) SA 392 (A) at 402E - F); Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another 2011 (1) SA 35 (SCA)*

[78] *(see, A for example, Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd and Another 1978 (1) SA 671 (A) at 678G; Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) 1994 (2) SA 363 (C) at 369F - 370B).*

[79] *Page 40 to 41*

[161] Rule 15(2) contains a proviso:

> "*Provided that save with the leave of the court granted on such terms (as to adjournment or otherwise) as to it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter*; ….

[162] In the present matter it is common cause that the Applicants initially commenced with the present application in the Urgent Court on the 10th of December 2021 on which date the Fourie J order was made and costs against the First to Sixth Applicants in their personal capacity.[80]

[163] This allegation has not been denied by the Applicants in the Answering Affidavit at all. On the contrary the Applicants adopted the approach that no significance can be attached to these costs' orders.[81]

[164] It is further not disputed that the application thereafter served on the opposed motion roll when the Molefe J order was made[82]. Although the allegations as contained in paragraph 4.16.2 of the founding papers are denied by way of a general denial by the Applicants[83], it appears that the Applicants premised their denial on their contention that Rule 15(2) should not be restrictively interpreted.[84] The Applicants contend that the plain language, circumstances and context of the wording of sub-rule 15(2) do not support the interpretation suggested by the Respondents and that if the Respondents' interpretation should be followed it will result in absurdity placing form over substance.[85] The Applicants, however, do not provide any grounds to substantiate their submissions of absurdity nor provide the correct interpretation of the rule which they content for.

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[80] *See: par. 4.6 of founding affidavit, CaseLines, p. 038 – 9*
[81] *See: par. 15.1 of Answering Affidavit, CaseLines, p. 038 - 42*
[82] *See: par 2(b) of Annexure AB6 to Rule 15(4) application, CaseLines, p. 038 – 27; See: par. 4.16.2 of founding papers, CaseLines, p. 038 – 12*
[83] *See: par. 28.1, CaseLines, p. 038 – 53*
[84] *See: par. 28.1, 28.3, CaseLines, p. 038 – 53 to 038 – 54*
[85] *See: par. 28.4, Answering Affidavit, CaseLines, p. 038 – 55*

[165] Nowhere in the Answering Affidavit do the Applicants pertinently deny that the matter served before my brother Molefe J. on the 26th of May 2023 and that he made the Molefe J order. This is understandable in view thereof that the order of Molefe J. has been uploaded onto CaseLines and was referred to by both parties during argument.[86]

[166] In respect of the Molefe J order:

[i] Molefe J. noted as follows:

> "*Having read the papers filed of record and having heard counsel for the Second to Sixth Respondents, the following order is made*:"

[ii] the relief granted accords with the relief that was requested by the Respondents in their conditional counterapplication filed in the main application.[87]

[iii] both the main and conditional counter application were set down for hearing on the 26th of May 2023, the date on which the Molefe J. order was made.[88] On the contrary from the joint practice note that was filed by the parties in respect of such date of hearing it appears that the said date was the date obtained by way of special allocation by the DJP for the hearing of the whole of the application.[89]

[iv] What was before my brother Molefe J. was a full fletched opposed motion with relief both requested in the main application by the Applicants and by the Respondents in their conditional counterapplication.

[v] Although it has not been explained to me why the order of Molefe J. only refers to Counsel of the Respondents, what is apparent is that from the nature of the order provided by Molefe J. he would not have been able to grant such an order

[86] *See: order of Molefe J. CaseLines, p. 0003 – 2*
[87] *See: counter-application, CaseLines, p. 007 – 1*
[88] *See: notice of set down, CaseLines, p. 019 – 1*
[89] *See: joint practice note, CaseLines, p. 018 – 1*

without having considered the documents filed in the application. This is evident from the content of the order itself.

[vi] Molefe J. reserved the costs of appearance on the 26th of May 2023.

[167] The costs orders that were made in terms of both orders are of the particular importance. I do not agree with the submission of the Applicants that no significance can be placed on the costs order against the First to Sixth Applicants:

[167.1] Fourie J made a cost order against the Applicants in their personal capacities. These orders were granted against the parties in an application who served before the Court. It is understandable that these parties cannot be removed as parties from that application unless the other party (Respondents) consent to their removal alternatively by order of this Court.

[167.2] In addition the Respondents from the commencement contended that the First to Sixth Applicants could not validly act on behalf of the Trust in the present application. On the contrary in the conditional counterapplication that was filed simultaneously with the Answering Affidavit in the main application, the Respondents in prayer 4 thereof again requested that the Applicants be ordered to pay the costs jointly and severally in their personal capacities. Even in their opposition to the main application Respondents request that the main application be dismissed with costs and that the Applicants be ordered in their personal capacity to pay the costs jointly and severally.[90]

[167.3] Logic dictates that these parties against whom personal costs orders are sought cannot merely disappear as parties from the application. Any new

[90] *See: par. 5.2.4.4*

trustees that have been appointed by the Master as trustees for the Trust were not responsible for the launching of the present proceedings. Although these new trustees needs to be joined as parties before the Court in order to enable the Trust to be in a position to litigate in the present proceedings (subject to what I have already found above in respect of the provisions relating to a sub-minimum trustees and provisions in respect of the quorum of the trustee meetings having been duly complied with) the other parties who commenced with the proceedings as co-applicants need to remain before the Court until the Court have excused them on terms which the Court deem fit.

[167.4] If the Applicants were allowed to merely substitute the relevant Applicants with the new trustees appointed by the Master by way of a Notice of substitution, and the Court should later found that the Respondents were correct and that the First to Sixth Applicants (initial Applicants) never had the authority nor the l*ocus standi* to bring the present application and that the Trust should not be mulcted with these costs but that the said First to Sixth Applicants should be ordered to pay the costs in their personal capacities, the position would be that those parties who commenced with the proceedings would no longer be before the Court against whom such a cost order could be made. It can never be expected that the new trustees that were merely substituted by way of a notice and who were not responsible for the bringing of the present application be mocked with costs in their personal capacities.

[167.5] The reserved costs order granted by Molefe J is also of importance. The essence is that the court had not yet decided which of the parties that served before it at that time should be responsible for the payment of those costs.

The parties that served before the court cannot merely be substituted by new parties and avoid any potential future costs order to be granted against them. Another court still need to adjudicate upon those costs in the future.

[167.6] I agree with the remarks of Wunch J in **Martin NO v Road Accident Fund[91] :**

"Costs are usually reserved if there is a real possibility that information may be put before the Court which eventually disposes of the action or the application which may be relevant to the exercise of a discretion in regard to them (cf Hillkloof Builders (Pty) Ltd v Jacomelli 1972 (4) SA 228 (D) at 233H), although, where the issues I affecting interlocutory costs are clear, the Court then dealing with the matter should not choose an easy way out to shift the task to another Court (Fleet Motors (Pty) Ltd v Epsom Motors (Pty) Ltd 1960 (3) SA 401 (D) at 404H - 405B; Trust Bank of Africa Ltd v Muller NO and Another 1979 (2) SA 368 (D) at 318C - D). Costs are reserved because there is no ready view about the liability for J them and they will not necessarily follow the result of the case. They are separate from the costs of the action or application. If a judgment A is given for a party with costs, an award to it of costs for an interlocutory proceeding which were reserved does

'not thereby become attached to or part of the judgment in favour of that party (for the relief to which it is entitled) and costs. . . . It remain(s) separate from and independent of that B judgment and (does) not necessarily follow the result of the action between the parties.'

(AA Mutual Insurance Association Ltd v Gcanga 1980 (1) SA 858 (A) at 869A.)"

[167.7] Wunch J also referred with approval to the remarks of Kekewich J in *How v Earl Winterton (No 4)* [92] where Kekewich J said:

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[91] *2000 (2) SA 1023 (W) on page 1027*

[92] *(1904) 91 LT 763 at 765*

'Now we come to another set of costs of which there are several instances here; that is, where on some applications the costs have been "reserved". It may have been the application of the plaintiff, the beneficiary, or it may have been the application of the defendant, B the trustee. For some reason, which one cannot investigate without going into all the history of the particular application, the Judge thought fit to reserve the costs. Now, it has been argued, and I have listened attentively to the argument as deserving consideration, that that only means reserved as between the plaintiff and the defendant, and all the Court does on such an occasion is to say that the application may turn out to be entirely wrong, in which case the C applicant will be ultimately ordered to pay the costs, or, on the other hand, it may have been entirely right, and therefore so foolishly and improperly opposed that the respondent of the application ought to pay all the costs, but the Court is not in a position at the time to know on whom the burden falls, and therefore the costs are reserved. Undoubtedly that is the effect, but, to my mind, that is not the only effect. I think that when costs are reserved it is necessarily implied, D and the practice of the Court sanctions the implication, that there is reserved the question of the incidence of those costs, quite apart from the question whether they are to be paid by the plaintiff or the defendant. It may turn out that they are to be paid by neither, and that the costs of both ought to come out of the estate, or be paid by a third party. In the meantime the Court has pronounced no opinion whatever, not only on the question whether the plaintiff should pay the E defendant or the defendant should pay the plaintiff but as to how the costs should be borne at all. It might in the end say that neither party should have any costs, or it might deal with them in one of the other ways I have suggested; but it is quite impossible, I think, for the Taxing Master, dealing with the costs of a defendant to an action, to look at any costs which have been reserved. His duty is to say that: F …"

[167.8] I am also in agreement with these remarks.

[168] In the premises the costs orders granted in the main application supports the interpretation of Rule 15(2) above that provides that parties cannot merely be substituted without the leave of the Court after the commencement of the hearing of any opposed matter.

[169] In the premises I find that the Applicants' Notice of substitution in terms of Rule 15(1) is completely defective and should be set aside.

[170] I also need to address the Applicants' reference to Rule 28(1) in the Notice of substitution. The Notice of substitution[93] *inter alia* reads as follows:

> "*Be pleased to take notice that pursuant to the subsequent and latest development and based on Rules 15(1)(a) and (2) to (4) read with Rule 28(1) of the Uniform Rules of Court, the existing First, Second and Third to Sixth Applicants are hereby substituted by the current Third to Sixth Applicants cited herein above*."

[171] The content of this paragraph must further be read with the title of the notice between the line that reads "*Notice of substitution of the parties*".

[172] It is evident that the said notice is not a notice of amendment but clearly constitutes a notice to substitute.

[173] Rule 28 that relates to amendment to pleadings and documents is an independent procedure having its own terms and provisions. By way of example Rule 28(2) provides that the notice referred to in Rule 28(1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice the amendment will be affected. It is evident that the present Notice of substitution contains no such a provision.

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[93] *on CaseLines, p. – 038 – 18*

[174] Rule 28(4) further provides that if a party objects to a Notice of intention to Amend, the party wishing to amend may, within 10 days, lodge an application for leave to amend.

[175] In the present matter no application for leave to amend was launched by the Applicants.

[176] Even if it can be argued that no Notice of objection was filed by the Respondents pursuant to the "*Notice of intention to Amend*" of the Applicants, the question remains when did the Applicants file its amended pages to affect the amendment or at all. In this respect Rule 28(4) provides that if no objection is delivered as contemplated in sub-rule (4) every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who that the notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in sub-rule (2) effects the amendment as contemplated in sub-rule (7).

[177] It is thus evident that the Applicants referral to the provisions of Rule 28(1) in their Notice of substitution bears no relevance at all.

[178] In the premises I am satisfied that the Rule 15(4) application of the Respondents should succeed. Having regard to what I have already stated above that the First to Sixth Applicants have no authority to act on behalf of the Trust I am satisfied that the costs order be granted against the First to Sixth Applicants in their personal capacities.

WHEREFORE I make the following order:

1. In respect of Rule 30A(2) application:

    1.1 Condonation is granted for the late filing of the Rule 30A(2) application;

1.2 It is declared that the First to Sixth Applicants have failed to satisfy the Court that they and their attorney, Bokwa Law Incorporated, are authorised to act on behalf of the Winter Cereal Trust in the main application under the abovementioned case number;

1.3 It is declared that the First to Sixth Applicants and their attorney, Messrs Bokwa Law Incorporated were prohibited to act on behalf of the Winter Cereal Trust in the bringing of the main application under the abovementioned case number;

1.4 The First to Sixth Applicants are ordered, jointly and severally, to disclose to the Second to Sixth Respondents the exact amount that were paid over from the Winter Cereal Trust Fund to their attorney, Messrs Bokwa Law Incorporated. in connection with the litigation under the abovementioned case number from the commencement of the proceedings to date;

1.5 The First to Sixth Applicants are ordered to pay the costs of the Rule 30A(2) application in their personal capacities, jointly and severally, the one to pay the other to be absolved.

2. Rule 15(4) application:

2.1 Condonation is granted to the Respondents for the bringing of the application in terms of Rule 15(4);

2.2 The Notice of substitution of a party dated 28th of July 2023 whereby the First, Second and Third to Sixth Applicants in the main application are substituted is herewith set aside;

2.3 The First to Sixth Applicants are ordered to pay the costs of the Rule 15(4) application in their personal capacities, jointly and severally the one paying the other to be absolved.

P J VERMEULEN

Acting Judge of the Court, Gauteng Division
Pretoria

Appearances

Counsel appearing on behalf of First to Seventh Applicants	**Adv G Shakoane SC** Cell: 0834739402 **Adv. M Mabena** Cell: 0828767547
Attorneys for the First to the Sixth Applicants:	Bokwa Inc. Tel no. (012) 4242900
Counsel appearing on behalf of the Second to Sixth Respondents:	**Adv T Strydom SC** Cell: 0834547771
Attorneys acting on behalf of the Second to Sixth Respondents:	**Prinsloo Bekker Attorneys** Tel no: (012) 3483906/7 Ref: SS27/30A Bekker
Date of Hearing:	2nd February 2024
Judgment delivered:	19th March 2024