Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 2049/2022
Date heard: 19-01-2023
Date delivered: 10-02-2023

In the matter between:

SA Diatomite (PTY) LTD **Applicant**

And

Barend Frederik Maritz N.O. **1st Respondent**
Barend Frederik Maritz **2nd Respondent**
Norman Maritz **3rd Respondent**
Martie Maritz **4th Respondent**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. This is an application in which the applicant, SA Diatomite (Pty) Ltd, sought urgent relief against the respondents. The first respondent is cited in his capacity as the trustee of the B and S Maritz Family Trust, the owner of a farm on which the applicant holds a mining permit to mine for diatomite on a designated mining area thereon. The second, third and fourth respondents reside on the farm.

2. The relief sought in the Notice of Motion dated 21 October 2022 reads as follows:

> *"1. That this application be heard as an urgent basis in terms of the provisions of Rule 6912) of the Uniform Rules of Court and that the forms and service provided for in the Uniform Rules of Court be dispensed with:*
>
> *2. That the respondents be interdicted from:*
>
> *a) accessing and entering the mining area on a portion of Farm Rossville 638 described in mining permit number MP26/2012, a copy of which is annexed hereto marked "Y" (**"mining area"**);*
>
> *b) any conduct which would constitute the obstruction of the applicant's right to mine the mining area;*
>
> *c) any conduct which would constitute the obstruction of the applicant's right to mine the mining area;*
>
> *d) engaging in any form whatsoever with any employees of the applicant;*
>
> *e) the taking of any video or photos of the mining area either physically or by way of a remote-controlled camera;*
>
> *3. Costs of the application on a scale as between attorney and client; and"*

3. The application became opposed and initially served before Nxumalo J on 28 October 2022. At that stage the learned Judge essentially dealt with two aspects of the matter. Firstly, that of urgency and secondly, an application to amend the Notice of Motion in the following respects:

> *"1. That the applicant be granted leave to amend the notice of motion herein, dated the 21st of October 2022, in the following respect;*

1.1 By the substitution of prayers 2(a) to 2(e) with the following:

*a) accessing and entering the mining area on a portion of Farm Rossville 638 described in mining permit number MP26/2012, a copy of which is annexed hereto marked "Y" ("****mining area");***

b) accessing and entering the mining area and the area of 25 hectares on a portion of Farm Rossville 638;

c) any conduct which would constitute the obstruction of the applicant's right to mine on the mining area and conduct business activities on the 25 hectares area;

d) any conduct which would prevent the applicant and/or its employees from gaining access to the mining area and the 25 hectares area;

e) engaging in any form whatsoever with any employees of the applicant;

f) the taking of any video of photos of the above area either physically of by way of a remote-controlled camera."

4. It should be noted that the original relief relates to the prohibition of interference on the mining area and the proposed amendment encompasses an additional 25 hectare area, which the respondents dispute the applicant is entitled to.

5. On the issue of urgency, the learned Judge ruled in favour of the applicant. With regards to the proposed amendment, the respondents were given an opportunity, after argument was heard on the issue, to consider the amendment and to deal with the issues raised as a result thereof in a supplementary affidavit, if they were so inclined.

6. To this end the matter was postponed to 1 December 2022 and interim order agreed to in terms of which the respondents were not to interfere in any way with the mining activities of the applicant pending the finalization of the application.

7. The respondents elected not to file a supplementary affidavit. Instead on 30 November 2022 they filed a supporting affidavit deposed to by Mr Willem Johannes Maritz, which supports the challenge made by the respondents in the answering affidavit to the authority of Ms Aletta Sophia Maritz to initiate the proceedings on behalf of the applicant and to depose to the affidavits on behalf of the applicant.

8. Ms Maritz responded in a separate affidavit to the allegations of Mr WJ Maritz and when the matter appeared before me on 1 December 2022, the overriding issue was that of the authority of Ms Maritz. I turn now to deal in more detail with the allegations made.

9. In the founding affidavit, Ms Maritz makes the allegations that she is a director of the applicant and that she is duly authorized to depose to the affidavit on behalf of the applicant. In the answering affidavit the respondents dispute the authority of Ms Maritz to bring the application on behalf of the applicant on the basis that she fails to set out in what capacity she acts on behalf of the applicant and fails to attach documentary proof of such authority. In the replying affidavit Ms Maritz responds to this challenge to her authority by confirming that she is a duly appointed director of the applicant; that the applicant has duly authorized its attorney to institute the

application; and that the respondents ought to have filed a notice in terms of Rule 7(1) if they were desirous to challenge the authority of the institution of the proceedings.

10. In the respondents' supporting affidavit deposed to by Mr WJ Maritz he alleges that he has been informed of the urgent application and had the opportunity to read the papers filed herein. He states that the applicant has two actively registered directors namely Ms Maritz and himself. He attaches a certificate from the Companies and Intellectual Properties Commission (CIPC) in support of this allegation. He also states that he was never informed of any decision by the applicant to institute these proceedings; that he was not present at any board meeting where the institution of these proceedings were discussed; that no resolution was tabled or passed by the board of the applicant to authorize the institution of these proceedings; that he personally never authorized the institution of the proceedings; and that Ms Maritz was never given a mandate or authority to commence the proceedings or to depose to the affidavits on behalf of the applicant.

11. Ms Maritz in turn responded to the allegations made by Mr WJ Maritz by reiterating the procedure envisaged in Rule 7(1) whereby authority is challenged. She goes on to state that the appointment of Mr WJ Maritz as a director of the applicant occurred without her knowledge and is irregular due to number of factors (not elucidated upon), and that she is currently assessing her options as a majority shareholder in the applicant to deal with Mr WJ Maritz' appointment as a director of the applicant in due course. That in

any event, where a proper challenge in terms of Rule 7(1) is not before Court, there exists a rebuttable presumption that there is proper authority to act.

12. After hearing argument on the issue of authority and with the suggestion that the appointment of Mr WJ Maritz as director is irregular, I allowed the applicant a postponement to obtain clarity on the matter and in order to satisfy me that the proceedings have been properly authorized.

13. Ms Maritz thereafter deposed to a further affidavit wherein she detailed the history of the applicant and the directorships held therein. It appears from the CIPC records attached to the affidavit that Mr WJ Maritz, the brother-in-law of Ms Maritz (brother to her late husband) had, together with her husband and two others, been a founding director of the applicant during 2003 until his resignation in 2016. The two other directors resigned during 2003 and 2016. Ms Maritz' late husband resigned due to ill health during 2017 whereupon she was appointed as director of the applicant. On 12 May 2022 Mr WJ Maritz was reappointed as director after having been successful in representations to the CIPC that his resignation during 2016 was done fraudulently.

14. Ms Maritz states, that despite Mr WJ Maritz' reappointment as director in May 2022, which she in any event deems questionable since she as majority shareholder and director of the applicant was unaware of until shortly after instructing the applicant's attorney of record to institute these proceedings, he has never been active nor played any role in the business of the applicant, at least since she became a director of the applicant.

15. Nevertheless she called a meeting of the shareholders and directors of the applicant to be held on 18 January 2023, a day before the application was on the roll for further argument. The intention was for the meeting to remove Mr WJ Maritz as director of the applicant and to ratify the decision to institute these proceedings on behalf of the applicant. The desired outcome was not achieved however since the shareholder's meeting did not quorate and Mr WJ Maritz who attended the directors meeting by proxy, refused to ratify the institution of these proceedings.

16. The upshot therefore is that there is no resolution by the applicant's board of directors to authorize the institution of these proceedings on behalf of the applicant. Neither Ms Maritz nor the applicant's attorney of record could gainsay the allegations made by Mr WJ Maritz.

17. Counsel for the applicant however persisted with the argument that in the absence of the Rule 7(1) procedure having been followed, the respondents' challenge to the authority of Ms Maritz should be disregarded.

Discussion

18. Rule 7(1) reads as follows:

> *"1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any*

> *time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorized so to act, and to enable him to do so the court may postpone the hearing of the action or application."*

19 The authority contemplated in Rule 7(1) is that given by a client to his attorney to institute or defend legal proceedings on his behalf. In *Eskom vs Soweto City Council* 1992(2) SA 703 (WLD) at 705 F-H, Flemming DJP held as follows:

> *"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, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions."*

20. The judgment in the *Eskom* case which deals with the challenge to the authority of a person acting on behalf of a party was referred to with approval in the Supreme Court of Appeal matters of *Ganes and Another v Telecom Namibia Ltd 2004(3) SA 615 at 624I – 625 A* and *Unlawful Occupiers, School Site v City of Johannesburg 2005(4) SA 199 at 206 G-207H.*

21. The import of the remedy provided in Rule 7(1) for the respondent who wishes to challenge the authority of a person acting on behalf of the applicant is clear. It obviates the need for an attorney to file a power of attorney in every action or application instituted or defended unless his authority to act is disputed. It also serves to eliminate the often unnecessary challenges to the authority of deponents to affidavits and the like, since it has been held that when an attorney acting for a party is authorized so to act here is no need for any other person involved to be additionally authorized.

22. Does this then mean that if the Rule 7(1) procedure is not followed, that the fact of an unauthorized application should be ignored? I do not think so. Even in the matters of *Eskom*, *Ganes and Unlawful Occupiers* referred to herein-above, the courts, while decrying the fact that the Rule 7(1) procedure had not been followed to challenge the authority of a particular person, still had to satisfy itself that there was in fact sufficient authority for such person so to act.

23. In *Mall (Cape)(Pty) Ltd v Merino Ko-Operasie BPK* 1957(2) CPD, the court considered the position of artificial persons such as companies and co-operatives where objection was made to an attorney's authority and stated as follows at 351 D-G:

> *"In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the Court to show that the applicant has duly authorised the institution of notice of motion proceedings (see for example Royal Worcester Corset Co. v Kesler's Stores, 1927 C.P.D. 143: Langeberg Ko-operasie Beperk*

v. Folscher and Another, 1950 (2) S.A 618 (C). Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorised by it.

There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so."

24. *In casu* there is no question that the respondents could have followed the Rule 7(1) procedure and the applicant's attorney would most likely have had to produce a resolution of the applicant company that the proceedings have been properly authorized – which the attorney would not have been able to provide given the evidence of Mr WJ Maritz. To insist in these circumstances that the Rule 7(1) procedure should be followed is to place form above substance.

25. The institution of these proceedings have been shown not to be authorized by the applicant and as such I do not have to consider any of the other issues raised. The application must be dismissed and costs should follow the result.

The following order is made:

The *rule nisi* issued on 28 October 2022 is discharged and the application is dismissed with costs.

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C C WILLIAMS

JUDGE

For Applicant: Adv. C Sterk and Adv. J Olivier
Japie Van Zyl Attorneys
c/o Van de Wall Inc.

For Respondent: Adv. F.G Janse Van Rensburg
CJ Willemse & Babinky Attorneys
c/o Engelsman Magabane Inc.