IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO: **4438/2023**

In the matter between:

THE MINISTER OF WATER AND SANITATION	Applicant
and	
CLACKSON POWER (PTY) LTD	First Respondent
CEDERBERG LOCAL MUNICIPALITY	Second Respondent

Date of hearing: 7 February 2024
Date of judgment: 20 March 2024

JUDGMENT HANDED DOWN ELECTRONICALLY ON 20 MARCH 2024

BACKGROUND FACTS

1. In this opposed motion, the Minister of Water and Sanitation ("the Minister") cited in his official capacity as "the Minister charged with the administration and implementation of the National Water Act, 36 of 1998 ("the NWA")", seeks the following relief:

1.1 That the first respondent (“Clackson”) be ordered to stop operating the hydro-power plant at Clanwilliam Dam, Western Cape;

1.2 That Clackson be ordered to remove all its assets and to vacate the premises at the Clanwilliam Dam;

1.3 That Clackson complies with the orders in paragraphs 1.1 and 1.2 above within 30 days of the court order;

1.4 That Clackson be liable for the costs of this application on an attorney and client scale.

2. Clackson is an independent power producer. It holds a NERSA (National Energy Regulations of South Africa) licence for the operation of power generation facilities in terms of which it operates, *inter alia*, a hydro-power plant at the Clanwilliam Dam (“the dam”) and supplies electricity to its clients, which include the second respondent (“the Municipality”). The licence is valid for 20 years, until approximately the end of March 2028.

3. Clackson purchased the hydro-power plant from the Municipality in May 1998, with which it then concluded a Power Purchase Agreement (“the PPA”) in terms of which it would sell all power generated from the power station to the Municipality.

4. The generation of power by the hydro power plant is made possible by permanent water releases from the dam, which is under the control of

the Department of Water and Sanitation ("the DWS"). On 17 April 2001 Clackson concluded an Operations Agreement ("the OA") with the DWS to operate the hydro-power plant, in terms of which, *inter alia*, Clackson would only use water released from the dam down to the Bulshoek Dam to drive the power station turbine.

5. The DWS has approved and embarked upon a project to raise the dam wall by 13m which would increase the yield of the dam by about 70 million cubic meters per annum. This is needed to augment the water supplies to the Olifants River Irrigation Scheme as well as to assist the development of resources for poor farmers. Remedial work to improve the safety of the dam is also required. All of this involves major construction works.

6. The raising of the dam wall project implementation is already at 12% completion, which includes site establishment, access roads, support infrastructure, upgrades to the N7 National road, etc, and will be followed by Phase Two which includes the upgrading and expansion of the conveyance network downstream of the Bulshoek Dam.

7. According to the Minister's founding papers, the project requires termination of the OA. Consequently, the DWS has addressed correspondence to Clackson terminating the OA, the termination to take effect on 29 February 2022. Follow-up letters were sent to Clackson, the latest being a letter dated 13 September 2022 in which Clackson was again requested to cease the power station operations

and to remove all the machinery from the site within 14 days of the letter.

8. Clackson responded per letter dated 19 September 2022 in which it denied the DWS's competence to terminate the OA and refused to cease operation and vacate the property.

9. An impasse was reached, which gave rise to these proceedings.

THE COMPETING CONTENTIONS OF THE PARTIES

10. The OA contains no provisions relating to its termination whatsoever. The Minister contends that it is accordingly a contract of unspecified duration and that it is therefore a question of interpretation to ascertain what the intention of the parties was regarding termination.

11. Having regard to the other terms of the OA, the Minister points out that it contains no indication that the parties intended to be bound in perpetuity and that, on a proper interpretation, a tacit term must be imported into the OA to the effect that the OA would be terminable on reasonable notice by either party. The Minister contends further that reasonable notice of termination was given, that the OA has accordingly been lawfully terminated and that the DWS, as owner of the property, is entitled to obtain an order that Clackson must cease its operations and vacate the property.

12. Clackson raises the following grounds of opposition to the application:

12.1 That the Minister's deponent "*lacks the necessary authority to bring this application or depose to the affidavit on behalf of the applicant*";

12.2 That Clackson is in possession of a NERSA licence which is valid until March 2028, which authorises it to operate the hydro-power plant and sell electricity to the Municipality as well as four other clients;

12.3 That Clackson has a right to occupy the property and possess the land, based on an agreement of servitude dated 31 March 1998, the contract of sale between it and the Municipality dated 27 February 1998, the PPA dated 8 December 2011, and the OA dated 17 April 2001;

12.4 That an "arrangement" has been reached that the DWS' construction works will be managed in such a manner that Clackson will be able to proceed with its established business with minimal interruption;

12.5 That the DWS' intended construction works are unlawful.

13. For reasons that will become apparent, I deal with the issue of authority first.

THE AUTHORITY OF THE DEPONENT TO INSTITUTE PROCEEDINGS OR TO DEPOSE TO FOUNDING AFFIDAVIT ON BEHALF OF THE MINISTER

Relevant facts

14. The Minister's deponent, Mr Aloious Muwengwa Chaminuka, in his founding affidavit stated that he is "*an adult male Director-General of the Department of Water and Sanitation*" and further that "*I am duly authorised to depose to this affidavit and to institute the current application on behalf of the Department*".

15. In the statement quoted above, Mr Chaminuka professed to institute the proceedings on behalf of the DWS and not the Minister but nothing turns on this. Proceedings on behalf of the State may be commenced both in the name of the State or the Government and in the name of a nominal plaintiff or applicant, usually the Minister as the embodiment of the Department. Proceedings may also be commenced by the administrative head of the Department.[1]

16. In its answering affidavit, Clackson denied those averments and attached a document titled "Department of Water Affairs and Forestry General Power of Attorney" ("the GPOA"). It obtained the GPOA from the Minister's attorneys in response to a specific request for the letter of appointment or written delegated authority / delegation of authority in terms of which Mr Chaminuka claims to be authorised to bring the application and to depose to the founding affidavit on behalf of the Minister.

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[1] **Farocean Marine (Pty) Ltd v Minister of Trade and Industry** 2007 (2) SA 334 (SCA) para 8

17. In the GPOA, the then Minister of the Department of Water Affairs and Forestry nominated and appointed certain functionaries "*to perform and exercise on my behalf and in my place the actions and powers set out herein*". The power "*To institute any legal action or defend any legal action instituted against myself, and to sign any documents, applications, pleadings, notice and sworn affidavits in connection with such legal action*" is given to various incumbent and future officials, including the Director-General.

18. In Clackson's answering affidavit, its deponent, Mr Clack, denied that Mr Chaminuka is the Director-General of the DWS, it being public knowledge that such position and appointment is actually held by Dr Sean Phillips. Mr Clack further pointed out that it appears from one of the documents annexed to the Minister's own founding papers,[2] that Mr Chaminuka is actually the "Chief-Director: Engineering Services" which contradicts and disproves the statement made by him under oath in his founding papers and also shows that he was in fact not clothed with the necessary authority to bring the application on behalf of the Minister or to depose to the affidavit.

19. In his replying affidavit, Mr Chaminuka described himself as the Chief Director: Engineering Services of the Department of Water and Sanitation. In response to Clackson's attack on his authority as referred to above, he stated in reply that the proceedings are instituted by the Minister in terms of the State Liability Act, 20 of 1957, that he is

[2] Namely Annexure "FA3" which is a letter from the DWS to Clackson dated 11 December 2018.

> "*merely a witness used by the Minister in advancing the Department's case*"

and that

> "*accordingly it is incorrect to suggest that I have brought proceedings on behalf of the Minister or the applicant herein*."

20. He stated further that he has been advised that a deponent to an affidavit does not need to be authorised as he is merely a witness like any other.

21. It is surprising, to say the least, that there was no attempt at explaining the false evidence given in his founding affidavit relating to his designation nor the purpose and effect of the GPOA. There was also no attempt at ratifying Mr Chaminuka's actions by an authorised official.

22. Moreover, it is simply incorrect to deny, as he did in his replying affidavit, that he brought the proceedings on behalf of the Minister. As I have pointed out, he stated in his founding affidavit that he brought the proceedings on behalf of the DWS, but in the context he clearly made no distinction between the Minister and the DWS. He based his authority on the false statement that he is the Director-General of the DWS.

23. No explanation is provided by the Minister in the heads of argument filed by his counsel either. Instead a new basis is offered on which it must be accepted that the institution of the proceedings were properly authorised, namely that "*The current application is instituted by the*

Office of the State Attorney on the instruction of the Minister of Water and Sanitation and such authority has not been challenged as per the prescripts of Rule 7(1) of the Uniform Rules of Court".

24. It must be pointed out that not even after the authority of Mr Chaminuka was challenged, was there any statement made in the Minister's papers to the effect that the application was instituted by the State Attorney on his behalf. In any event, as will be seen from the discussion below, the authority of an attorney to act on behalf of a litigant must be distinguished from the authority of the person providing the instructions on behalf of a litigant who is not a natural person. It is the latter that is under challenge by Clackson in this matter.

25. It is necessary to examine the submissions made by the Minister regarding this issue.

The Minister's submissions

26. First, with reference to the judgment of the Constitutional Court in **President of the Republic of South Africa and Others v M&G Media Ltd** 2012 (2) SA 50 (CC), it is submitted on behalf of the Minister that the key question is whether or not the deponent would in the ordinary course of his or her duty or as a result of some other capacity described in the affidavit have had the opportunity to acquire information or knowledge alleged. Reference is also made to the case of **Barclays National Bank Ltd v Love** 1975 (2) SA 514 (C).

27. However, those cases did not deal with, and have no bearing on, the issue at hand at all. In **President of the Republic of South Africa** the issue was, in the context of an application in terms of the Promotion of Access to Information Act, 2 of 2000, whether an affidavit by an official discharged the State's burden to provide information. In **Barclays National Bank** the context was whether an affidavit in support of summary judgment on the face of it complied with the requirement that it must be by a person who can positively swear to the facts.

28. Second, reference is also made to the following oft-cited dictum in the case of **Ganes and Another v Telkom Namibia Ltd** 2004 (3) SA 614:

> "*It is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.*"

29. However, that passage merely establishes the principle that a deponent need not be authorised to depose to an affidavit. Indeed, the last sentence makes precisely the point taken by Clackson, namely that it is the institution of the proceedings and the prosecution thereof that must be authorised.

30. Lastly, the Minister refers to the provisions of Uniform Rule 7(1) and the judgments in the cases of **Eskom v Soweto City Council** 1992 (2) SA 703 (WD) and **Administrator, Transvaal v Mponyane and Others** 1990 (4) SA 407 (WLD) for the submission that

"*In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.*"

31. I have already pointed out that Clackson's challenge is not to the authority of the State Attorney. However, since its amendment in 1987, Rule 7(1) in clear terms applies not only when the authority of an attorney is challenged but when the authority of anyone acting on behalf of a party is challenged. The Rule now provides as follows:

> "*7(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of the party may, within ten days after it has come to the notice of the party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised to act, and to enable him to do so the court may postpone the hearing of the action or application*."

32. As I have also already alluded to, by seeking to shift the focus to the authority of the State Attorney, the Minister, wittingly or unwittingly, overlooks the distinction between the two types of authority that are at issue in these matters, namely (a) the authority of the legal practitioner who instutes or defends legal proceedings on behalf of a party and (b) the second type of authority, which is relevant to this matter, namely whether, in the case of the litigant that is not a natural person, the institution of the proceedings were properly authorised by the party

itself. Put differently, the second type of authority involves the question as to whether the person who instructed the legal practitioner had proper authority to give such instructions.[3]

33. The Minister's submission referred to in paragraph 30 above is not unequivocally to the effect that an authority to institute proceedings can only be challenged by using the procedure prescribed in Rule 7(1), but my understanding is that that is, in effect, the Minister's case, or part of his case. In any event, the issue is the subject of some judicial discord and accordingly requires closer scrutiny.

Can authority to institute proceedings only be challenged in terms of Uniform Rule 7(1)?

34. The starting point of this enquiry is what was long considered to be an uncontentious rule that an applicant must make out a case in the papers that the person who instituted the proceedings was duly authorised by the applicant (when it is not a natural person) to do so. This rule was articulated as follows by a Full Court of this Division in the case of **Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk** 1957 (2) SA 347 (C):

> "*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 (see for example Lurie Brothers Ltd v Arcache 1927 NPD 139, and the other cases mentioned in Herbstein & Van Winsen,*

[3] **Herbstein and Van Winsen: Civil Practice of the Superior Courts of South Africa**, Vol 1, 6th Ed.at p 6-2. See also **Lancaster 101 (RF) (Pty) Ltd v Steinhoff International Holdings** [2021] 4 All SA 810 (WCC) at para [13] where the authority of an attorney is described as an "extension" of the authority to institute proceedings.

> *Civil Practice of the Superior Court in South Africa at pp 37-38). This seems to me to be a salutary rule and one which should also apply to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has resolved the instituted proceedings and that the proceedings are instituted at its instance. Unlike the case of an affidavit, the mere signature of the notice of motion by an attorney and the fact that the proceedings purported to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.*" [Emphasis provided.]

35. **Mall (Cape)** was decided before the amendment to Rule 7(1), but it was referred to with approval after the amendment by the Supreme Court of Appeal in the case of **Tattersall and Another v Nedcor Bank Ltd** 1995 (3) SA 222 (A).[4]

36. As is pointed out by the learned authors in **Herbstein and Van Winsen** (*supra*),[5] the position as set out above was followed and applied in motion proceedings for almost fifty years, up to 2005 when the waters

[4] At 228F – 229D
[5] At p 6-3 a.f.

became somewhat muddied by the judgment of the Supreme Court of Appeal in the case of **Unlawful Occupiers, School Site v City of Johannesburg** 2005 (4) SA 199 (SCA) in which, with reference to the judgments in **Eskom v Soweto City Council** 1992 (2) SA 703 (W) and **Ganes** (*supra*) it was *inter alia* held by Brand JA that:

> "*The import of the judgment in **Eskom** is that the remedy of the respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court…*"[6]

and

> "*…now that the new Rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, i.e. by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority*."[7]

37. Although **Mall (Cape)** and **Tattersall** were included in the list of authorities referred to by counsel in **School Site**, those cases were not referred to by Brand JA in the judgment. Moreover, the passages quoted above did not in my view unequivocally introduce a rule that authority to institute proceedings can only be challenged by using the Rule 7(1) procedure. The statement that a party "should not" follow the old procedure does not necessarily mean a party "may not" do that.

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[6] At 206G-H
[7] At 207F-G

38. However, in the case of **ANC Umvoti Council Caucus and Others v Umvoti Municipality** 2010 (3) SA 31 (KZP) the Full Court relied on those passages to expressly decline to follow **Mall (Cape)** and unequivocally hold that Rule 7(1) now provides the only procedure by which the authority for institution of the proceedings can be challenged. Gorven J for the Full Court, *inter alia* held that

> "*I am therefore of the view that the position must change, since Watermeyer J set out the approach in the Merino Ko-operasie Bpk case. The position now is that, absent a specific challenge by way of Rule 7(1), 'the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant' is sufficient*. *It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used.*"[8]

39. The Court rejected the attack on the authority of the acting municipal manager to bring the application on behalf of the **Umvoti Municipality** despite expressing "…*grave reservations whether the court a quo was correct in its conclusion that a case was made out on the papers that the manager had authority to institute the proceedings, this despite the fact that certain averments in the replying affidavit relating to authority went unanswered*", on the mere basis that the Rule 7 procedure had not been used.

[8] At para 28

40. Respectfully, that approach appears to disregard the principle that the Rules are not an end in themselves.[9] It must also be pointed out in this regard that Rule 7(1) does not provide any specific procedure for its implementation.

41. In **Lancaster 101** (*supra*) this Division referred with approval to a view expressed by the learned author **Van Loggerenberg** (*supra*) that a challenge to Authority "*…may be raised in a variety of ways, inter alia in appropriate circumstances by notice, with or without supporting evidence, in a defendant's plea or special plea; in an answering affidavit or orally at the trial*".[10]

42. It must be noted that the learned author **Van Loggerenberg** (*supra*) in the latest revision, namely Service 22, 2023, retracted that view "*…in the light of the cases referred to in the notes to Rule 7 SV 'General' above*" being the cases of **Eskom v Soweto City Council**, **School Site**, **Ganes** and **ANC Umvoti**.[11]

43. On the other hand, the learned authors of **Herbstein and Van Winsen** (*supra*) have stridently criticised the judgment in **ANC Umvoti** and reiterated the position that: "*Rule 7(1) does not say how the challenge to the authority of the person acting for a party should be made. It is submitted that it may be made by way of a special plea, in an affidavit or by notice*."[12]

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[9] **Van Loggerenberg: *Erasmus* Superior Courts Practice**, 2nd Ed, Vol 2 p D107; **Centre for Child Law v Hoërskool Fochville** 2016 (2) 121 (SCA) at 131G-H

[10] At para 22

[11] At pp D7-6 – 7-7

[12] At p 6-9

44. To the criticism of **ANC Umvoti** expressed in **Herbstein and Van Winsen**[13] may be added that the Court gave no recognition of the fact that **Mall (Cape)** was approved and applied by the erstwhile Appellate Division in **Tattersall**, which was decided after the amendment to Rule 7(1). The Court (in **ANC Umvoti**) relied heavily on the judgment of the Supreme Court of Appeal in **School Site** but, as I have already mentioned, that case did in my view not expressly bring about the change suggested by the Court. This proposition is confirmed by the fact that Brand JA did not refer to **Mall (Cape)** and **Tattersall** in his judgment at all. Had the intention of the Supreme Court of Appeal in **School Site** been to bring about such a change, it would have dealt with **Tattersall**, at least, extensively.

45. The authors of **Herbstein and Van Winsen** in my view correctly point out that Brand JA had earlier in the judgment referred to the fact that it was conceded by counsel for the appellant that she could not support the submission that the deponent had failed to prove that he was duly authorised. His remarks regarding Rule 7(1) were accordingly not necessary for the outcome of the case, and thus *obiter*.

46. **ANC Umvoti** appears to be the only case in which **Mall (Cape)** was expressly not followed and it, in turn, appears not to have been followed in any reported judgments. It has however also not expressly been criticised or rejected by other courts.

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[13] *Supra*

47. In the case of **Boerboonfontein BK v La Grange NO en 'n Ander** 2011 (1) SA 58 (WCC), Binns-Ward J for a Full Court of this Division, without discussion, applied the rule in **Mall (Cape)**.[14] In the case of **Graham v Park Mews Body Corporate and Another** 2012 (1)SA 355 (WCC), Henney J, in a slightly different context, referred with approval to both **Mall (Cape)** and **Tattersall**.[15] In **Lancaster 101** (*supra*) Kusevitsky J had no hesitation in referring to **Mall (Cape)** with approval. However, in that case a Rule 7(1) notice had been filed which was followed by a Rule 30A notice and application.

48. More recently, **Mall (Cape)** and **Tattersall** were followed in the case of **HR Computek v Dr WAA Gouws** 2023 (6) SA 268 (GJ) at para 28.[16]

49. **ANC Umvoti**, being a judgment of a Full Court of another Division must be given its due respect but this Court is not bound by it and I respectfully decline to follow it. In doing so, I am mostly persuaded by the fact that in **School Site**, the Supreme Court of Appeal did not even mention **Mall (Cape)** or **Tattersall**. In terms of the *sub silentio* principle,[17] **School Site** does not serve as precedent for the conclusion reached in **ANC Umvoti**.

50. It can in my view accordingly safely be said that the rules and principles set out in **Mall (Cape)** and **Tattersall** still apply, and that the authority

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[14] At para [16]
[15] At para [21]
[16] In that case, the court declined to strike out the affidavits of the respondent on the basis that the attorneys were not properly authorised without first providing them with an opportunity to provide proof of their authority and mandate, but that was not on the basis that Rule 7(1) must be followed.
[17] **Santam Insurance Co Ltd v Vilakasi** 1967 (1) SA 246 (A) at 259A-B

of the person instituting the proceedings on behalf of a litigant can be challenged on the papers. Rule 7(1) provides the benefit to the party challenging the authority that the proceedings are effectively stayed until the Court has been satisfied of the authority, but a litigant can in my view elect not to make use of that benefit. There may be circumstances in which challenging the authority in the papers instead of Rule 7(1) might warrant an adverse costs order, but in my view this is not such a case.

51. When it appears so clearly from the papers, including the applicant's own papers, that the proceedings were not properly authorised, as it does in this matter, the application should be dismissed on that basis, and I do so.

52. It is accordingly neither necessary nor sensible to deal with the remaining issues raised in this case.

Costs

53. The Minister's deponent falsely testified that he is the Director-General of the DWS, and on that basis alleged authority to institute the proceedings on the Minister's behalf. When this was challenged by Clackson in its answering papers, one would have expected not only an explanation for the false evidence but also an apology, together with an attempt to rectifiy the problem by way of ratification of the proceedings by an authorised official. None of that was forthcoming and instead the Minister's deponent simply changed tack by

contending that the proceedings were instituted by the State Attorney on behalf of the Minister. In my view, this is the kind of conduct in litigating a matter that is deserving of an adverse special costs order.

CONCLUSION

54. Accordingly, I make the following order:

54.1 The application is dismissed with costs on the scale on the scale as between attorney and client.

_____
DC JOUBERT AJ

Date: _____

Applicant's counsel:	Adv HA Mpshe
	Adv M Jiana
Respondent's counsel:	Adv M Tsele