REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 31186/2016

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

4 September 2019 .....

In the matter between:

WYCLIFFE THIPE MOTHULOE **APPLICANT**

and

EWAN CARTER SMITH NO **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction and background facts

[1] This is an interlocutory application in the main action between the applicant as the defendant and one Neil David Rissik (Rissik) as the plaintiff, who was substituted by the respondent on 1 November 2018 in terms of Notice in terms of Rule 15.

[2] In the main action, instituted on 8 September 2016, Rissik, who was a practising attorney, represented by Bowman Gilfillan Attorneys, claims from the applicant, likewise a practising attorney, the sums of R3 058 620.00 and R2 920.00 together with interest thereon and costs, arising from a dispute between the parties over the purchase and sale of cattle during February 2007. Rissik's claim was based on an alleged breach of a written settlement agreement concluded between the parties. The applicant, represented by attorneys, defends the action and delivered a plea and counterclaim for payment of R36,7m. In response thereto, Rissik's attorneys delivered a plea to the counterclaim.

[3] The applicant states that 'during 2017' he became aware that Rissik had become *non-compos mentis* as from February 2015, as result of having contracted dementia of the Alzheimer type, during February 2017. This prompted the applicant, on 14 September 2017, to issue and serves a Notice in terms of Rule 7, on Rissik's attorneys. The notice reads as follows:

> 'Take notice that the defendant disputes the authority of the representatives acting on behalf of the plaintiff, being Mr Miles Carter of Bowman Gilfillan Attorneys, and their Advocate, *ab initio* such representation.
> Those representatives are required to deliver Power of Attorney alternatively, such document indicating that they are authorised so to act.'

[4] In December 2017 Rissik's wife instituted proceedings in terms of Rule 57 for the appointment of a curator *bonis*. On 10 October 2018, Alberts AJ made an order granting the applicant leave to intervene in the Rule 57 application and to proceed with the application for an appointment of a curator *bonis*. On the same date, the respondent was appointed as the curator *bonis* of Rissik. On 1 November 2018 and in terms of a Notice in terms of Rule 15, issued by the *applicant's attorneys of record*, the respondent was substituted for Rissik as the plaintiff in the main action.

[5] On 1 March 2019, the respondent signed a power of attorney appointing Frank Botha & Vickers Attorneys to act as his attorneys in the main action, a copy of which is attached to the papers in this application. The firm also acts as the attorneys of record on behalf of the respondent in this application.

The relief sought by the applicant

[6] In terms of the Notice of Motion in the present application, the applicant 'has invoked' Rule 6(11), read with Rules 7 and 30A(1) and (2) for seeking the following relief:

1. That the claim of the respondent against the applicant and the defence(s) of the respondent against the applicant's counter-claim in the main action be and are hereby struck down.
2. That this application serves as the application for the enrolment of the main action between the parties as an unopposed trial.
3. That in the event this honourable court is inclined to and has granted the payers in terms of Rule 7 read with Rule 30A(1) and (2) the main action between the parties be and is hereby enrolled as an unopposed trial.
4. That the costs are awarded on the scale as between attorney and client in favour of the applicant in relation to the totality of litigations including the application by applicant in case no 47220/2017 in relation to the appointment of respondent.

Evaluation

[7] Rule 7(1) of the Uniform Rules of Court, on which the applicant relies, provides as follows:

> '(1) Subject to the provisions of sub-rules (2) and (3) a power of attorney need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[8] It is necessary to briefly examine the nature and scope of Rule 7. In *Eskom v Soweto City Council* 1992 (2) SA 703 (W) 705F, Flemming DJP stated:

> "If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant ... 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 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).'

and further at 706D:

> 'In the absence of a prescribed mode of proof, it is a factual question whether a particular person holds a specific authority. It may be proved in the same way as any other fact. Adjudication involves consideration of what the credible evidence means and the extent of quality of and sometimes the absence of contradiction or other reason to remain unconvinced. There are several decisions wherein this approach is evident. Compare *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 352G.'

[9] The proof required to establish authorisation of an attorney, was dealt with by Botha J in *Administrator, Transvaal v Mponyane and Others* 1990 (4) SA 407 (WLD) 409C-E as follows:

> 'In my view there is nothing in Rule 7 in its present form that requires the authorisation of an attorney to be embodied in a document styled a power of attorney. The provisions of Rule 7 specifically requiring powers of attorney in appeals fortifies the impression that otherwise an attorney's mandate can be proved otherwise than by the production of a written power of attorney. I also think that Rule 7 should be viewed against the background of its original form.
>
> Before its recent amendment it only required powers of attorney to be lodged in the case of actions and appeals. See *Edmund Woodhouse (Pty) Ltd v Brits* 1967 (4) SA 318 (T), and *Brown v Oosthuizen en 'n Ander* 1980 (2) SA 155 (O). I have no doubt that the underlying intention of the recent amendment of Rule 7 was to make the Rule less cumbersome and formalistic.
>
> *I therefore conclude that proof of the authority of the respondents' attorney is not dependent on the production of a written power of attorney.*' [emphasis added]

[10] Against this background the first question arising is whether the applicant's Rule 7 notice complies with the provisions of Rule 7. Rule 7 does not specify how the authority must be proved. It merely provides that proof of authority so to act, must be provided to the satisfaction of the court. That, as was held in *Eskom*, is a factual question. The self-imposed requirement that the representatives were to deliver a power of attorney or some document indicating that they were authorised so to act, which lies at the heart of the applicant's case, is not provided for in Rule 7 and accordingly, renders the notice defective.

[11] On this ground alone the application is doomed to failure.

[12] The applicant contends that due to Rissik's mental state, it is legally and factually impossible for him to comply with the Rule 7 notice, which the applicant proffers, is the

reason why he is 'proceeding directly to praying for an order that his (Rissik's) claim and defences be struck down'. The applicant clearly laboured under the illusion that it would be necessary for Rissik to satisfy the court that his attorneys and advocate were duly authorised, which the applicant presumptuously concludes, is 'impossible to cure'.

[13] The applicant has plainly misconceived the nature and scope of Rule 7. The sanction for non-compliance with the rule is that the attorney may no longer act until he has satisfied the court that he has authority so to act. The party represented by the challenged attorney is not affected in any way. The nature and limited scope of Rule 7 were explained by the Court in *Johannesburg City Council v Elesander Investments* 1979 (3) SA (T) 1279H-1280C, as follows:

> 'The Rule is concerned with the representation of parties, and with nothing else. It was designed to dispense with the necessity of an attorney obtaining a power of attorney to act, and to provide for a procedure whereby an attorney can be challenged to satisfy the court that he is authorised to act for a party. The Rule contemplates that a challenge of authority (which need not be in the form of a power of attorney) and all that is required is that the court must be satisfied that authority exists at the time when proof of it is proffered. We can find nothing in the Rule to suggest that a magistrate is obliged, or even entitled, to investigate the validity of past acts in the context of the authority to act. When an attorney's authority is challenged, he may not act further until he satisfies the court that he is authorised to do so, but the effect of the Rule does not go beyond that: the Rule does not require him either expressly or by implication, to satisfy the court that he had authority at any particular point of time in the past. The concept of representation as dealt with in the Rules involves no more than an investigation into the state of affairs relating to authority as at the time when the challenged attorney seeks to satisfy the court on that score.'

[14] Ratifying authority to act where no authority existed previously, was recognised and approved by Ackermann J, in *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (PtY) Ltd* 1981 (4) SA 919 (T) 924D (Cf *Gainsford and Others NNO v HIAB AB* 2000 (3) SA 635 (W) 639J-640C).

[15] Applying the *dictum* in *Johannesburg City Council* to the applicant's Rule 7 notice, his attempt to obtain proof of authorisation *ab initio* their representation, likewise is way beyond the scope of the procedure provided for in Rule 7 and therefore is improper.

[16] In the light of the provisions of Rule 7(1) the applicant was required to have noted his challenge of Rissik's attorneys' authority within 10 days of becoming aware that Rissik's attorneys were acting without authority. Scant attention, if any, was afforded to this requirement by the applicant. The applicant merely mentions becoming aware of Rissik's mental state 'during 2017'. No explanation of the exact date is given nor has a condonation application been filed. It is therefore ironic that, whilst the applicant pretended so studiously to ensure compliance with his Rule 7 notice, the same is not evident when it pertained to the applicant himself.

[17] For the above stated reasons the application must fail.

Costs

[18] Counsel for the respondent asked for costs on the punitive scale and submitted that the applicant has abused the Rule 7 procedure and the provisions of Rule 30A in order to obtain the disposal without a hearing of a claim against him as well as the defences raised against his counterclaim, and consequently a substantial judgment in his favour.

[19] The applicant has in exhaustive detail dealt with the merits of Rissik's claim against him, his defences thereto and his counterclaim which he, likewise to the relief sought in this application, considers 'indefensible'. In addition he has referred to and attached numerous irrelevant documents, *inter alia* in regard to charges of fraud and fraudulent misrepresentation he has laid at the Sandston police station against a variety of persons including the respondent, Rissik, Mrs Rissik, as well as an advocate. All this contributed to a formidable record in this application extending into almost 400 pages. What should have been a relatively simple and uncomplicated application, has mushroomed into a mass of paper most of which being wholly irrelevant to the adjudication of this application.

[20] A more serious and disturbing feature in the consideration of an appropriate costs order, is the untoward manner in which the applicant has expressed himself in the founding and replying affidavits. The applicant has sought to bolster a case seemingly without merit, in employing tactics of relentlessly accusing all and sunder of fraud, theft and fraudulent misrepresentation. The affidavits I have referred to are replete with abusive, derogating and insulting allegations and insinuations, notably made without substantiation or justification. The attack on integrity strikes at Rissik, his attorneys and the respondent, who once again without foundation or justification, are disingenuously

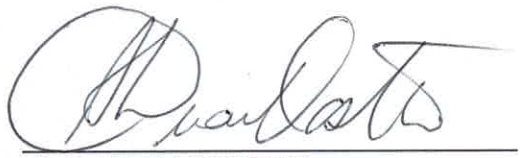
accused of mala fides. The respondent, he surmises, has no answers to this application and merely seeks to 'invoke a sense of sympathy' of this court while hiding behind the sickness of Rissik.

[21] Litigants, in this case the applicant, resorting to unwarranted scurrilous attacks on the integrity and reputation of others in court documents, can expect the court as a mark of its disapproval of such conduct, to order punitive costs. This in my view, in the circumstances of this case, is the appropriate order I propose to make.

Order

[22] In the result the following order is made:

1. The application is dismissed.
2. The applicant is to pay the costs of the application such costs to include the costs consequent upon the employment of senior counsel, on the scale as between attorney and client.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

APPLICANT	***IN PERSON***
APPLICANT'S ATTORNEYS	***MORRIS POKROY ATTORNEYS***
COUNSEL FOR RESPONDENT	***ADV HB MARAIS SC***
RESPONDENT'S ATTORNEYS	***FRANK BOTHA & VICKERS ATT***
DATE OF HEARING	***2 SEPTEMBER 2019***
DATE OF ORDER	***2 SEPTEMBER 2019***
DATE OF JUDGMENT	***4 SEPTEMBER 2019***