



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

26/8/2016

CASE NO:51762/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED ✓

26/8/2016

DATE

[Signature]
SIGNATURE

In the matter between:

CULLINAN HOLDINGS LIMITED

APPLICANT

And

**LEZMIN 2768 CC
(REGISTRATION NO. 2003/084144/23)**

RESPONDENT

JUDGMENT

RANCHOD J

[1] The applicant launched this application on a semi-urgent basis in which it seeks the final liquidation of the respondent.

[2] In the founding affidavit the deponent states the following:

- '1. I am employed by Cullinan Holdings Limited, the applicant herein, in the position of divisional executive, at Third Floor, The Travel House, No. 6, Hood Avenue, Rosebank, Johannesburg.
2. I am duly authorised to represent the applicant herein and to depose to this affidavit on its behalf. I refer in this regard to the resolution of the applicant's board of directors annexed hereto marked "FA1".
3. The facts herein contained are within my personal knowledge, save where otherwise stated or the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.'

[3] In annexure "FA1" the following appears:

'EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF CULLINAN HOLDINGS LIMITED ("THE COMPANY") HELD ON THIS THE 29TH DAY OF JUNE 2016

RESOLVED:

1. That the Company make application to the High Court of South Africa, Gauteng Division, Pretoria, against Lezmin 2768 CC ("Lezmin") for:
 - 1.1 ...
 - 1.2 ...
 - 1.3 ...
2. That Seymour Grawitzky in his capacity as divisional executive of the Company, be and is hereby authorised to bring this application on behalf of the Company and to sign all such documents and affidavits and to do all such things in connection with the prosecution of the application as she may deem fit.
3. That all steps that have been taken thus far by Seymour Grawitzky in connection with the prosecution of the application are hereby approved, ratified and confirmed.

THUS DONE and SIGNED at Rosebank on this the 29th day of June 2016.

CERTIFIED A TRUE EXTRACT

(Sgd)

DIVISIONAL EXECUTIVE
SEYMOUR GRAWITZKY'.

[4] In its answering affidavit the respondent, *inter alia*, denies that the deponent to the Founding affidavit, Mr or Ms Seymour Grawitzky is duly authorised to depose to the affidavit. (It is not clear whether the deponent is a male or female as paragraph 2 of the extract from the minutes refers to the person in both the male and female pronouns). The respondent's member, Mr Ockert Theron Smit says in answer to paragraphs 2 and 3 of the founding affidavit (quoted above):

'AD PARAGRAPH 2 THEREOF:

The content of this paragraph is denied. The said resolution is not signed by the directors of the Applicant; the resolution is signed by the deponent himself. I therefore respectfully submit that the deponent is not duly authorised to depose to this affidavit.

AD PARAGRAPH 3 THEREOF:

The content of this paragraph is denied, I respectfully submit that the deponent is not truthful with this Honourable Court.'

[5] The challenge to Grawitzky's authority to act for the applicant is responded to in the replying affidavit as follows:

'I am indeed authorised to represent the applicant herein as appears from annexure FA1'.

[6] During the hearing and in written heads of argument handed up by respondent's counsel the thrust of the submissions related to the alleged lack of authority of Grawitzky whilst that of applicant's counsel did not deal with this issue. Judgment was due to be handed down on 29th July 2016.

However, on 28th July applicant's counsel, Mr Rood SC, sent an email to my registrar in which he sought to draw my attention to the reported case of *ANC Umvoti Council Caucus and Others v Umvoti Municipality 2010 (3) SA 31 KZP at paragraph 28*. Mr Rood SC also stated in the email that respondent's counsel, Ms Coetzee had informed him that her instructions were not to consent to the bringing of that case to my attention. I was of the view that bringing to my attention a reported case which may be relevant to the adjudication of the application cannot be prejudicial to the respondent if it is given an opportunity to make further submissions on the case law referred to and accordingly allowed it. Respondent's counsel thereafter filed supplementary heads of argument.

[7] Section 66(1) of the Companies Act 71 of 2008 provides as follows:
 'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

[8] Henochsberg on the Companies Act 71 of 2008, Vol 1 [Issue 5] 253-257 deals with the topic of directors and legal proceedings involving companies. The learned author says:

'The directors' powers under s 66 enable them to cause the company to participate in legal proceedings. For this purpose they must authorise the institution of the proceedings and the prosecution thereof (*Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624*). They must also authorise one of their number or someone else (eg a manager or the secretary) to represent the company in such proceedings.... There must be evidence before the Court that the person purporting to represent the company has been authorised accordingly with regard to the particular proceedings While in motion proceedings the best evidence would be an affidavit by an officer of the company annexing a copy of the relevant resolution of the board, such evidence is not "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 company] which is litigating and not some unauthorised person on its behalf" (*Mall (Cape) (Pty) Ltd v Merino Koöperasie Bpk* 1957 (2) SA 347 (C) at 351 – 352).

[9] In *Ganes* case *supra*, at 624 F-J the Supreme Court of Appeal held that it is irrelevant whether the deponent to an affidavit filed in support of an application on behalf of a company is authorised to depose to the affidavit. What is relevant is that it is 'the institution of the proceedings and the prosecution thereof that must be authorised.'

[10] In this matter before me Grawitzky says he (or she) is an employee of the applicant as 'Divisional Executive'. The 'certified extract' of the minutes of the meeting of the Board of Directors where the resolution was purportedly taken is signed by Grawitzky. A copy of the resolution signed by the directors has not been attached to the founding affidavit and, also not to the replying affidavit when the applicant had the opportunity to do so. What is before the court is an employee who says he is duly authorised and who has also signed the 'certified extract' of the minutes. In my view, the latter is not sufficient to show that Grawitzky is acting with the necessary authority of the board of directors.

[11] Applicant's counsel referred me to the *ANC Umvoti* case (*supra*). There, at paragraph 28 it is stated:

'[28] I am therefore of the view that the position has changed since Watermeyer J set out the approach in the *Merino Ko-Operasie Beperk* 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. This means that I

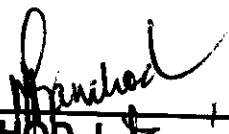
disagree with Mr Gajoo's submission that Rule 7(1) provides only one possible procedure and that, if a respondent elects to challenge the matter of authority on the application papers, the applicant is required to prove such authority on the papers.' (Footnote omitted).

[12] It is clear that what is said there is in the context of Rule 7(1) of the Uniform Rules which relates to the filing of a power of attorney to act on behalf of a party. The respondent has not disputed the power of attorney but the authority to institute legal proceedings on behalf of the applicant company as is required in terms of s66 of the Companies Act.

[13] The applicant could have ratified the institution of the action by filing a copy of the resolution but did not do so. As I said, there is only a (cryptic) response in the replying affidavit that Grawitzky's authority stems from annexure FA1 to the founding affidavit, which annexure is signed by himself.

[14] What has been placed before this Court by the applicant is in my view insufficient to meet the challenge raised by the respondent in the answering affidavit. It follows that the applicant has failed to demonstrate that it has authorised the present proceedings.

[15] In all the circumstances the application falls to be dismissed with costs.



RANCHOD J.
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant	: Adv P. Rood (SC)
Instructed by	: Fluxmans Inc
Counsel on behalf of Respondent	: Adv M. Coetzee
Instructed by	: Potgieter, Penzhorn & Taure
Date heard	: 29 July 2016
Date delivered	: 26 August 2016