IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 023166/2022

Date: 20 September 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

20 SEPTEMBER 2023 [redacted]
DATE SIGNATURE

In the matter between:

MTHEMBU N	Applicant
And	
ALLIED HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	First Respondent
DR LOUIS MULLINDER	Second Respondent
THE MINISTER OF HEALTH	Third Respondent

JUDGMENT

MINNAAR AJ,

[1] The applicant is seeking a declaratory order that the power of attorney, dated 1 and 2 June 2022, filed by the first respondent's attorney is not in compliance with the provisions of Rule 7 of the Uniform Rules of Court ("Rule 7"). In terms of the power of attorney, Van Gaalen Attorneys was appointed to represent the first respondent in the main application.

[2] In paragraph 3 of the answering affidavit, an attack is levied against the *locus standi* of the applicant. Reference is made that this point was taken in the answering affidavit to be main application. The aspect of *locus standi* will be best addressed when the main application is adjudicated and as such I will not entertain the challenge to this applicant's *locus standi* in this judgment.

[3] In terms of the provisions of Rule 7(1), a power of attorney to act need not be filed. 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 a person is so acting, 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.

[4] Rule 7(4) provides that every power of attorney filed by an attorney shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law; provided that where a power of attorney is signed on behalf of the party giving it, proof of authority to sign on

behalf of such party shall be produced to the registrar, who shall note that fact on the said power of attorney.

[5] During April 2022 the applicant issued the main application herein. On 9 May 2022 Van Gaalen Attorneys delivered a notice of intention to oppose, stating that it acts on behalf of the first- and second respondent.

[6] In response to this notice to oppose, the applicant delivered a rule 7 notice to dispute the authority of Van Gaalen Attorneys to act on behalf of the first respondent. On my enquiry it was submitted by applicant's counsel that this notice was delivered on 23 May 2022. The delivery of this notice was thus within the 10 day period provided for in the rule.

[7] On 3 June 2022 a power of attorney was delivered. The applicant delivered an objection to this power of attorney on 8 June 2022. Subsequent thereto, a flurry of notices were issued, applications brought and opposed. Not once was the authority of Van Gaalen Attorneys challenged by the applicant or was any attempt made to prevent the first respondent from proceeding through the representation of Van Gaalen Attorneys. It was only on 12 June 2023 that the applicant delivered the application in terms of rule 7 which is before me.

[8] In terms of the aforesaid notice, no condonation is sought for the late filing of the application and no formal application in terms of rule 27 was brought. On my enquiry as to why the applicant waited so long to place

the rule 7 before court, the explanation form the bar was that the applicant did not have the funds to pursue same. No such allegation is contained in the applicant's founding affidavit herein and as such there is no acceptable explanation as to why this application was only brought at this late stage.

[9] My understanding of the purpose of Rule 7 is that the attack on authority should be expedious and brought at the earliest possible opportunity to prevent unnecessary costs from being incured. Such an application should further be *bona fide.*

[10] Rule 7(1) provides that the court must by satisfied that the person acting is so authorised to act. As per *Gainsford NNO v Hiab AB* 2000 (3) SA 635 (W), the subrule does not prescribe the method of establishing authority where such authority is challenged. No obligation is placed on the court to investigate the validity of past acts in the context of the authority to act: see in this regard *Johannesburg City Council v Elesander Investments (Pty) Ltd* 1979 (3) SA 1273 (T), *Texeira v Industrial and Mercantile Corporation* 1979 (4) SA 532 (O) and *Marais v City of Cape Town* 1997 (3) SA 1097 (C).

[11] The power of attorney filed by the first respondent was issued by the executive committee of the first respondent and signed on 1 and 2 June 2022 respectively.

[12] In the power of attorney specific reference is made to the application brought by the applicant under case number 23166/2022. It is further specifically stated:

"Further for the purpose of opposing the aforesaid application in the name of the First Respondent, being the Allied Health Professions Council of South Africa, VAN GAALEN ATTORNEYS are authorised to sign and/or lodge all documents which they in their aforesaid capacity may deem necessary or desireable, and to alter and amend such documents where necessary. Van Gaalen Attorneys are further authorised to do all things necesssary to ***oppose the aforesaid application*** *and to bring it to a final conclusion.*

The Executive members hereby ***ratify any decissions and action already taken*** *in respect of the application brought before the High Court of South Africa under case number 23166/2022."* (my emphasis)

[13] In the objection to the power of attorney, the applicant raised the following grounds:

(a) *The applicant deliberately cited the first respondent as an interested and affected party and deliberately omitted to cite the Executive Committee of the Council as an inerested and affected party.*

(b) *The Executive Committee of the Council has no authority to act on behalf of the first respondent in case number 231666/2022 issued by the applicant against the first respondent in this court.*

(c) *Section 9 of the Allied Health Professions Act 63 of 1982 does not grant the Executive Committee of the Council the authority to sign the power of attorney on behalf of the first respondent in case number 23166/2022 issued by the applicant against the first respondent in this court.*

(d) *There is no direction or authority granted by the first respondent to the Executive Committee of the Council referred to in section 9(2) of the Allied Professions Act 63 of 1982."*

[14] In essence it is thus the case of the applicant that the Executive Committee of the first respondent was not authorised to resolve that Van Gaalen Attorneys is authorised to represent the first respondent herein and as such that the power of attorney is a nullity.

[15] Section 9 of the Allied Health Professions Act 63 of 1982 ("the Act") reads:

"9 Executive committee of council

(1) There shall be an executive committee of the council, which shall be constituted as prescribed.

(2) The executive committee of the council may, subject to the directions of the council, during periods between meetings of the council perform all the functions of the council, but shall not have the power, except in so far as the council otherwise directs, to amend or set aside any decision of the council, and any act performed or decision made by the executive

committee shall be of force and effect unless it is amended or set aside by the council at its next ensuing meeting."

[16] Section 8 of the Act read:

"8 Meetings of council

(1) The council shall meet at the times and places determined by the council, but shall meet at least twice in every year.

(2) (a) The chairperson may at any time convene a special meeting of the council, to be held on such date and at such place as he may determine, and he shall, upon the written request of the Minister or a written request signed by a majority of the members of the council, convene a special meeting, to be held within 30 days after the date of receipt by him of the request, on such date and at such place as he may determine.

(b) Any such written request shall state clearly the purpose for which the meeting is to be convened."

[17] If the applicant is correct in its approach, then it means that only the first respondent may resolve to appoint attorneys and such decisions can only be taken at the meetings of the first respondent, which meetings only has to be held, at least twice a year, as enunciated by section 8(1) of the Act. Alternatively, it would mean that decisions taken by the Executive Committee to appoint Van Gaalen Attorneys is of no force and effect as same can only be rectified at the next meeting of the First Respondent.

[18] The approach adopted by the applicant is untenable as it would make it impossible for the first respondent, without the actions of the Executive Committee, to partake in day to day litigation. For example, when an urgent application is issued, it would mean that the Executive Committee will not be able to defend the urgent application as its election or decision to do so will first have to be authorised by a meeting of the first respondent where first respondent only need to meet at a minimum of two meetings per year. Equally so, first respondent will never be able to properly appoint an attorney to defend any action or application unless it was so resolved at the meeting of the first respondent, and that only need to happen twice a year if the provisions of section 8(1) of the Act is applied.

[19] Section 9(2) of the Act is clear: the Executive Committee shall, during the periods between meetings of the first respondent, perform all the functions of the first respondent. Such functions must by interpretation include the appointment of attorneys to defend legal actions taken against the first respondent. This section further provides: "... *any act performed or decision made by the executive committee* ***shall be of force and effect unless*** *it is amended or set aside by the council at its next ensuing meeting."* Section 9(2) does not speak of rectification or ratification of an act or decision made by the Executive Committee. It clearly states that any such act performed or decision made by the Executive Committee shall be of force and effect **unless** it is **amended or set aside** by the first respondent at its next ensuing meeting.

[20] It is therefore my conclusion that the decision by the Executive Committee to appoint Van Gaalen Attorneys to defend the application herein, is proper in terms of the provisions of section 9(2) of the Act read with Rule 7.

[21] Applicant's counsel further argued that the power of attorney, signed on 1 and 2 June 2022 respectively, is void as the decision was taken subsequent to the notice of intention to defend being delivered. Applicant's counsel was adamant that the appointment of Van Gaalen Attorneys could not be ratified by the Executive Committee. Reliance was placed on *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

[22] I could not find any such direction given in *Ganes. Ganes* deals with the principle that it is the institution of proceedings and the prosecution thereof which must be authorised and that it is irrelevant whether the deponent to the affidavit had been authorised to depose to the founding affidavit.

[23] The applicant's approach on the ratification is further flawed as it was found in *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T) that in appropriate cases the common-law rules of ratification may be applied to the procedural requirements of Rule 7. Thus, where the authority of the person who signed the power of attorney is defective, appropriate steps may be

taken to ratify the defective power and therefore it cannot be said that the proceedings prior to ratification were a nullity. In this instance see *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) confirmed on appeal *sub nomine MEC for Economic Affairs, Environment and Tourism v Kruizenga* 2010 (4) SA 122 (SCA).

[24] Van Gaalen Attorneys acted on behalf of the first respondent when the notice of intention to defend was delivered. That position was confirmed and ratified when the power of attorney was signed.

[25] In *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) the following is stated by Harms JA in paragraph 9:

"It is in general essential for a valid ratification

'that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent done on his behalf, and that that intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be'

(Reid and Others v Warner 1907 TS 961 at 971 in fine - 972)"

[26] In *Smith,* Harms JA further states in paragraph 10:

"The launching of legal proceedings is not an administrative act but a procedural one open to any member of the public. ... It is a general rule of the law of agency that such an act of an 'unauthorised agent' can be

ratified with retrospective effect (cf Uitenhage Municipality v Uys 1974 (3) SA 800 (E) at 806H - 807H).”

And in paragraph 14 of the judgment it is stated:

“A party to litigation does not have the right to prevent the other party from rectifying a procedural defect.”

[27] If the principles in *Smith* is applied herein, then it is clear that, in as far as it was necessary, that the election or action to appoint Van Gaalen Attorneys to oppose the main application was properly ratified. There is no basis upon which the applicant can prevent the first respondent the right to rectify a procedural defect (as in this instance).

[28] The unneccessary challenge to authority has been decried. See for instance *Eskom v Soweto City Council* 1992 (2) SA 703 (W). Where an attorney acts on behalf of a party, the sound approach is that such an attorney is acting with the required authority. Such authority, in my view, is almost sacred and should not, at a whim be challenged but should be carefully considered and sparingly applied.

[29] In as far as there was any suspision as to the authority of Van Gaalen Attorneys to represent the first respondent when the notice of intention to defend was delivered, such suspicson was adressed when the power of attorney was delivered. The applicant should have accepted Van Gaalen Attorney’s authority at that stage. The applicant’s election to persist with this crusade is frowned upon as same is without

sound legal or factual basis and should be regarded as a *mala fide* attempt to prevent the first respondent from defending the main application on a technical point.

[30] The first respondent's request for punitive costs is well founded and there is no basis upon which this court should order otherwise. The application is not only brought way out of time but was pursued after various other applications and notices were exchanged. The authority of Van Gaalen Attorneys was cast in doubt where no basis existed for such an ascertion.

[31] Consequently, I make the following order:

1. The application in terms of Rule 7 is dismissed with costs on the scale as between attorney and client.

[redacted]

Minnaar AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Heard on	: 5 September 2023
For the Applicant / Plaintiff	: Adv. LG P Ledwaba
Instructed by	: Lamola Attorneys
For the Defendant	: Adv. G M Young
Instructed by	: Van Gaalen Attorneys
Date of Judgment	: 20 September 2023