IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 3508/2013

Date Heard: 12 June 2014

Date Delivered: 1 July 2014

In the matter between:

INVESTEC BANK LIMITED Applicant

and

BEVERLY ANN CARRUTHERS Respondent

JUDGMENT

EKSTEEN, J:

[1] The applicant initially sought to interdict the respondent from taking any steps whatsoever in the proceedings relating to the sequestration of the Jeandon Trust in case no. 10801/2012 by means of the filing of documents purportedly on behalf of the Trust or otherwise until she has satisfied this court, as envisaged in rule 7, that she is properly authorised on behalf of the Trust to do so. The applicant further sought a declaratory order that none of the steps purportedly taken by the respondent on behalf of the Jeandon Trust after the delivery of the applicant's notice in terms of rule 7 on 20 September 2013 have any force or effect.

[2] In due course, subsequent to the launching of the application and the filing of papers a power of attorney which satisfied the applicant of the respondent's mandate

was delivered. In the circumstances all that remains in issue between the parties is the question of the costs occasioned by the application. Each party seeks a costs order against the other.

[3] There is a long history of litigation between the applicant herein and the Jeandon Trust. In May 2010 the applicant obtained a judgment by default (herein referred to as the "default judgment") in a considerable sum against the Jeandon Trust. The default judgment remained unsatisfied for a lengthy period and ultimately the applicant instituted sequestration proceedings against the Jeandon Trust. The respondent became involved in her capacity as an attorney on behalf of the Jeandon Trust during or about 2012. She represented the Trust in the sequestration proceedings. A final order of sequestration was ultimately granted by Mjali J on 14 February 2013. At the time she did not provide reasons for the order which she made and indicated that reasons would be provided if requested. In due course the respondent requested Mjali J to provide reasons for the order which she made. The reasons were duly delivered during or about September 2013.

[4] In the interim, on 20 August 2013 Royden Edward Minto Thompson, one of the trustees in the Jeandon Trust prior to its sequestration and himself a judgment debtor in the default judgment was placed under provisional sequestration. He was finally sequestrated on 8 October 2013.

[5] Mjali J duly delivered the reasons for her order during or about September 2013 and subsequently an application for leave to appeal against the sequestration order was filed. The application was ultimately dismissed.

[6] On 20 September 2013, however, the respondent delivered to the applicant a "NOTICE TO PRODUCE DOCUMENTS IN PLEADINGS". This prompted Attorney Schoeman, acting on behalf of the applicant to deliver a formal notice to the respondent purportedly in terms of the provisions of rule 7 of the Uniform Rules of Court. The notice provides:

> "KINDLY TAKE NOTICE that the Applicant challenges the authority of Carruthers Attorneys to act on behalf of the First, Second and Third Respondents."

[7] The first second and third respondents in the sequestration proceedings were the trustees for the time being of the Jeandon Trust.

[8] As is apparent from the aforegoing the respondent continued to act on behalf of the Jeandon Trust, however, she failed initially to respond to the "NOTICE IN TERMS OF RULE 7". Eventually, on 23 October 2013 the respondent produced a "power of attorney" recording that Jeanette Thompson had appointed the respondent to be her lawful attorney and agent in her name, place and stead, in the appeal against a judgment of Mjali J. Jeanette Thompson, in her capacity as a trustee of the Jeandon Trust was the second respondent in the sequestration proceedings.

[9] It is not in dispute that the said "power of attorney" does not constitute a mandate to act on behalf of the Trust. It did not therefore establish any authority to the respondent to act.

[10] In her answering affidavit in the application Attorney Carruthers explains the predicament as follows:

> "4.1 On 20 August 2013 the Applicant herein obtained an order of provisional sequestration of the personal estate of Mr Royden Thompson, one of the trustees of the three trustees (*sic)* of the Jeandon Trust ...
>
> 4.2 Thereupon various meetings were held by the said Mr Royden Thomspon together with the other trustees of the Jeandon Trust to appoint a trustee to replace him as a trustee of the Jeandon Trust. At that point in time Mr David Jackson, another of the trustees advised of his intention in the near future to withdraw as trustee of the said Jeandon Trust.
>
> 4.3 This being the position it was decided at such meetings that two further trustees would be appointed in order to allow therefore and to maintain the *quorum* of the trust as required by the Jeandon Trust Deed.
>
> 4.4 I advise that the two incoming trustees, namely Marius Vincent and Ashley Meier at meetings with the existing trustees addressed the issue of the manner in which the time period during which the *quorum* of trustees; *(sic*) as set out in the trust deed could not be satisfied; (*sic*) due to the administration processes at the offices of the Master of the High Court which needed to occur to appoint them; how best the interests of the Jeandon Trust would be protect (*sic*).
>
> 4.5 It was in such meetings decided the all pending legal matters should continue to be dealt with and would subsequently be ratified after the appointment of the two further trustees had been attended to by the Master of the High Court."

[11] The explanation is not a model of clarity. It appears however from the trust deed of the Jeandon Trust, which is annexed to the founding papers, that it provides that the office of a trustee shall be vacated if a trustee becomes insolvent. In this

context as I understand the explanation as set out in the answering affidavit, it was acknowledged that Royden Thompson was unable to act as a trustee by virtue of his provisional sequestration. It was accordingly recognised that no valid resolution could be taken at that stage by virtue thereof that there were insufficient trustees to constitute a quorum in terms of the trust deed.

[12] In any event, by virtue of the failure to respond timeously and appropriately to the "NOTICE IN TERMS OF RULE 7", the present proceedings were launched. The conduct of the matter by the respondent was ultimately ratified, much later, by the newly appointed trustees of the Trust. The authority of the respondent to act on behalf of the trust was then accepted and, as set out earlier, all that remains is a dispute as to the costs of the application.

[13] In terms of the provisions of rule 7 of the Uniform Rules of Court an attorney instituting proceedings on behalf of a litigant is not required as a matter of course to file a power of attorney. If, however, an attorney's authority to act on behalf of any party is challenged in accordance with the provisions of rule 7 then the attorney is required to satisfy the court that he is properly authorised to act on behalf of the litigant. Until he has done so, he is precluded from acting further. In order to do so he is required to produce proof of his mandate. This is usually done by the production of a power of attorney, although the rule does not lay down any fixed method of satisfying the court of his mandate.

[14] Rule 7(1) provides that:

> "… 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 authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

[15] It seems to me that the rule provides that when it has come to the knowledge of any party that a particular attorney is acting on behalf of any other party to the litigation he is entitled, within ten days, to dispute the authority of such attorney to act. No particular formality is laid down by the rule and the challenge may be delivered in any appropriate form provided it clearly disputes the authority of such attorney to act. In the event that a party fails to take up the issue within the ten day period provided in the rule he may nevertheless do so provided that he must then first obtain the leave of the court, which will be granted upon good cause shown.

[16] In the present instance the applicant has not complied with the time period prescribed in rule 7(1) and no attempt was made to obtain the leave of the court to place the authority of the respondent in dispute after the expiry of the said period. In these circumstances I consider that the notice was irregular. There was no obligation on the respondent to respond to the notice.

[17] There is a further procedural difficulty which arises from the form of the application. The applicant herein seeks a declarator that all steps purportedly taken by the respondent on behalf of the Jeandon Trust after the date of the

applicant's notice in terms of rule 7 have no force or effect. This would render the application for leave to appeal which was filed in October 2013 void which could materially affect the rights of the trustees in the Trust. It is well established that a third party who has, or may have, a direct and substantial interest in any order which the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, such party is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined. (See for example ***Amalgamated Engineering Union v Minister of Labour*** 1949 (3) SA 637 (A); ***Van der Walt and Another v Saffy*** 1950 (2) SA 578 (O) at 581; **Henry Viljoen (Pty) Ltd v Awerbuch Brothers** 1953 (2) SA 151 (O) at 165-167; ***Toekies Butchery (Edms) Beperk en andere v Stassen*** 1974 (4) SA 771 (T) and ***Erasmus v Fourwill Motors (Edms) Beperk*** 1975 (4) SA 57 (T).) I consider that the trustees of the Jeandon Trust have such an interest in these proceedings and that the failure to join them constitutes a non-joinder.

[18] Notwithstanding these shortcomings, for the reasons which I have already set out earlier, the respondent was unable to obtain a mandate on behalf of the Trust at the time that the challenge was made. The rule, does not require that a power of attorney must necessarily be filed and the court may be satisfied in any other manner that the respondent was duly mandated. There is however, no allegation in the answering papers of any earlier resolution by the trustees of the Trust nor are any other facts set out in the answering affidavit from which it might be gleaned that the respondent had a valid mandate to proceed. I accordingly find that she did not have a mandate at the time.

[19] On a consideration of all the facts I consider that it would be appropriate in the present matter that each party pay its own costs. I accordingly make no order as to costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances

For Applicant:	Adv P Scott, SC instructed by BLC Attorneys, Port Elizabeth
For Respondent:	Ms B Carruthers, in person