IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 40575/2018

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

29/03/2021 .... DATE SIGNATURE

In the matter between:

MNDENDI TWALA	First applicant
LUCY CELESTE MACKAY	Second applicant
380 OTHERS	Third to Three Hundred and Eighty Applicants

And

PF NHLEKO N.O.	First respondent
RS DABNGWA N.O.	Second respondent
I CHARNLEY N.O	Third respondent
ZJ SITHOLE N.O.	Fourth respondent
W LUCAS-BULL N.O	Fifth respondent
P JENKINS N.O.	Sixth respondent
MTN GROUP LTD (1994/009584/06)	Seventh respondent

JUDGMENT

ENGELBRECHT, AJ:

Introduction

1. On 2 March 2020, I heard argument in respect of two applications related to litigation instituted by employees and former employees of the seventh respondent (MTN). This judgment concerns -

   1.1. interlocutory relief (including condonation and leave to amend) sought by the applicants (members of a group known as the "*Tsunami Group*", being employees and former employees of MTN, who are capital beneficiaries of the Alpine Trust (an empowerment scheme established for the benefit of previously disadvantaged individuals who were employed by MTN)); and

   1.2. a counter-application by the respondents, seeking a stay of the main application to which the interlocutory relief relates, and referral of the issues to arbitration.

2. The application for interlocutory relief was made consistently with a directive by his Lordship Mr Justice Senyatsi that these interlocutory matters be disposed of prior to a set-down of the main application.

3. The counter-application was not specifically provided for in the directive, but Mr Greg Fourie SC, who appeared on behalf of the applicants, accepted that it would be permissible for this Court to entertain the counter-application, despite the absence of a reference to it in the order that gave rise to the application for interlocutory relief. Mr Fourie, who had urged this Court to adopt a pragmatic approach, in the interests of justice, to advance his case for condonation, correctly conceded that such pragmatism conceivably

included the consideration of the counter-application, the outcome of which would have a bearing on further entertainment of the main application.

4. In the answer to the counter-application, the applicants did contend that the matters raised therein had not been properly ventilated in the papers in the main application, but Mr Fourie correctly accepted that there could be no argument of procedural unfairness in circumstances where the applicants had enjoyed the opportunity to answer to the counter-application. However, he did indicate that he had not addressed the application for referral to arbitration fully in heads of argument, in light of the applicants' stance that the counter-application was not to be entertained before me. This issue was addressed through an opportunity being given to the parties to submit additional heads of argument, which they duly did on 3 and 5 March 2021, respectively.

5. The interlocutory application raises a myriad of legal issues. However, if I grant the application for a stay and referral to arbitration, the various relief in the interlocutory application would become obsolete, and therefore do not have to be decided. This would mean that the counter-application falls to be decided first. Only if I dismiss the counter-application, do the issues in the interlocutory application arise.

6. Before I turn to the consideration of the issues before me, I shall set out the chronology.

Chronology

7. On 31 October 2018, the applicants launched the main application, seeking various relief against the respondents. The applicants claim to have been

underpaid by significant amounts, and they wish for the Trustees to provide a full accounting to them in respect of the affairs of the Alpine Trust, and payment of amounts said to be owing to them.

8. The answering affidavit was filed on 13 December 2018. The applicants only filed their replying affidavit (the First Replying Affidavit) on 30 May 2019. In the body of the reply, the applicants made application for condonation for the late filing. They also signaled an intention to seek amended relief, including a referral of disputes to trial.

9. On 16 July 2019, the applicants filed a notice of intention to amend the notice of motion (the First Notice to Amend). This was left unanswered.

10. On 18 July 2019, the applicants filed a practice note and heads of argument in support of a request that the matter be set down for argument on the claim for a full accounting. Thereafter, on 25 July 2019, they filed an expert affidavit in support of the application to order the respondents to provide a full accounting of the affairs of the Trust.

11. On 24 October 2019, the respondents filed a supplementary answering affidavit, which included further information concerning the affairs of the Alpine Trust. The respondents also raised a challenge to the authority of the applicants' attorneys, with the result that, on 8 November 2019, powers of attorney in respect of 249 of the applicants were filed. The supplementary answering affidavit raised various points *in limine*, including (i) the failure of the applicants to bring a substantive application for condonation; (ii) the operation of an arbitration clause in the Trust Deed of the Alpine Trust; (iii) the

alleged material non-joinder of Newshelf 664 (Pty) Ltd (Newshelf); and (iv) prescription.

12. On 6 January 2020, the applicants filed a notice in terms of Rule 35(3) and (12), calling for the production of certain documents by the respondents. The respondents indicated in correspondence that they refused to provide the requested documents. The applicants did not pursue this by way of application.

13. On 17 February 2020, the applicants filed a replying affidavit (the Second Replying Affidavit), as well as a notice to amend the notice of motion (the Second Notice to Amend), with the aim of obtaining the documents that had been referred to in the applicants' Rule 35 Notice.

14. On 2 March 2020, the respondents filed a notice of objection to the proposed amendment.

15. In light of an impasse on the proper future prosecution of the matter, case management was requested. The request was granted, and a case management conference was scheduled for 15 September 2020. The case management was conducted by my brother Senyatsi J.

16. On 17 September 2020, he ordered that certain issues be consolidated and heard in one interlocutory hearing prior to the main application. These were (i) the application for condonation of the late filing of the applicants' replying affidavit; (ii) leave for the introduction of the latest proposed amendment to the applicants' notice of motion dated 14 February 2020; and (iii) the inadequate and incomplete filing of the applicants' powers of attorney and confirmatory

affidavits. A timetable for the exchange of papers was set, leading up to enrolment of the *"interlocutory disputes as aforesaid"* on the opposed interlocutory roll.

17. On 9 October 2020, the applicants filed an application as envisaged in the aforesaid order. They sought: (i) condonation for the late filing of the applicants' replying affidavit; (ii) condonation *"to all parties"* for the filing of additional affidavits, and the non-compliance with the normal rules and time periods relating to the filing of affidavits in motion proceedings, in respect of *"all affidavits filed to date"*; (iii) leave for the applicants to amend their notice of motion, as foreshadowed in an amended notice of motion of 14 February 2020; (iv) leave for the respondents to file further supplementary affidavits within 15 days of the order granting leave to amend the notice of motion; (v) condonation for the inadequate and incomplete filing of the applicants' powers of attorney and confirmatory affidavit (applicable to Part A of the amended notice of motion) and (vi) an order that the hearing in respect of Part A of the amended notice of motion be set down for hearing on an expedited basis.

18. On 2 November 2020, the respondents launched a counter-application, seeking an order that the main application be stayed and referred to arbitration, relying for this purpose of the terms of the Alpine Trust Deed. The affidavit attached to the notice of motion in support of the counter-application served also as the answering affidavit to the 9 October 2020 application. In the affidavit, the respondents questioned the authority of the deponent to the founding affidavit in the interlocutories, highlighting the failure to identify prospective applicants mentioned by the deponent, and threatened delivery of a Rule 7(1) notice.

<u>The counter-application: stay and referral to arbitration</u>

19. The respondents rely on the Trust Deed of the Alpine Trust, which contains an arbitration clause. In terms of clause 18.1.3, disputes that arise with regard to *"any of the beneficiaries' rights and obligations arising"* from the Trust Deed, or *"out of or pursuant to this trust... shall be submitted to and decided by arbitration"*. They submit that -

    19.1. the beneficiaries of the Trust, by accepting the benefits bestowed upon them by the Trust, *"expressly acquiesced to the terms and conditions of the Trust Deed"*, and accordingly they cannot avoid the prescripts of the Trust Deed; and

    19.2. it is *"clear that the relief the alleged applicants seek in the main application falls within the scope and ambit of"* the arbitration provision.

20. It is only if the relief sought does fall within the scope and ambit of the arbitration provision that the question arises whether the beneficiaries are bound by it. That requires consideration of the relief that is being sought.

    20.1. The relief sought (as formulated prior to the amendment sought in the interlocutory application) is to be found in the Notice to Amend Notice of Motion of 16 July 2019. This, in circumstances where no opposition to this proposed amendment was filed, and the time for doing so has come and gone.

20.2. In Part A, the applicants seek an order that the respondents *"provide the Applicants with a full accounting of the affairs of the Alpine Trust since its inception, to date"* and that the respondents be ordered to provide the applicants' legal representatives with identified documentation, namely:

20.2.1. the annual financial statements of Newshelf from date of incorporation;

20.2.2. the annual financial statements of the Alpine Trust from 2002;

20.2.3. all documents pertaining to the distribution of shares and/or monies from the Alpine Trust during December 2008 and/or January 2009;

20.2.4. all documents pertaining to the further dealings between the Alpine Trust and Newshelf;

20.2.5. all financial contracts concluded with financiers in respect of the MTN shares purchased by the Alpine Trust;

20.2.6. all documents and agreements pertaining to the distribution of the preference shares in the Alpine Trust; and

20.2.7. copies of the various accounting packs as provided to the auditors of the Alpine Trust used to prepare the annual financial statements.

20.3. Also in Part A the applicants seek an order interdicting the respondents from taking any steps to wind up the Alpine Trust pending the final determination of Part B of the main application.

20.4. In Part B, the applicants seek an order that –

20.4.1. the respondents make payment of all amounts found to be due and owing to the applicants by virtue of their status as beneficiaries of the Alpine Trust, in accordance with their participation ratios in the Alpine Trust; and

20.4.2. to the extent that the respondents are found to have been negligent in their administration of the Alpine Trust or the management of their assets, to the detriment of the applicants, the Trustees be declared to be personally liable to the applicants for the losses caused as a result of the negligence.

20.5. In the alternative, the applicants seek an order that –

20.5.1. all shares be quantified and allocated as per the share allocation to the applicants;

20.5.2. a curator be appointed in the management of the Trust in order to effect payment to the applicants "*as per the share holders at the current share price*";

20.5.3. all dividends due to the applicants be quantified and paid over "*at the current share trading price*";

20.5.4. interest be paid on the outstanding dividends "*pre-dating to inception of the share allocation*"; and

20.5.5. all shareholdings "*as per the Applicants*" be "*immediately dissolved and sold with the shareholding values to be paid to the Applicants*".

20.6. obliging the "*respondents to make payment of all amounts found due to be owing to the applicants by virtue of their status as beneficiaries of the Alpine Trust, in accordance with their participation ratios in the Alpine Trust*" and "*to the extent that it is found that the respondents were negligent in their administration of the Alpine Trust or the management of its assets, to the detriment of the applicants, that the respondents be declared to be personally liable to the applicants for any losses caused as a result of their negligence*".

21. The question that arises is whether the assertion that the relief claimed patently falls within the arbitration clause, is correct. Mr Bester, who appeared on behalf the respondents, asserted that it was, relying for the purpose on the provisions of the Trust Deed read as a whole. These provisions include:

21.1. clause 3, which deals with the creation of the trust, which was to "*be administered by the trustees for the benefit of the beneficiaries and in the manner and upon the terms as set out herein*";

21.2. clause 6, which regulates accounting matters, requiring that proper books of account be kept (clause 6.1) and that such books be audited (clause 6.3);

21.3. clause 8, which regulates the powers of the trustees; and

21.4. clause 10 which deals with the duties of trustees, including the duty to "*cause proper records and books of account to be kept of the business and affairs of the trust and their administration thereof, which records, and books shall be in the custody of the directors of the trust*" (clause 10.2) and to have the balance sheet and income statement prepared and audited (clause 10.4).

22. I find myself in agreement with Mr Bester's submissions. Whilst one may go about splitting hairs about particulars of the relief sought, it is quite evident that the documentation sought, the interdict prayed for and the Part B relief all ultimately concern the entitlements of the beneficiaries under the Trust Deed, including their entitlement to the accounting that is demanded. To my mind, it is not useful to draw a distinction between the relief sought in Part A and Part B, or to contend that the Part A relief is not concerned with the enforcement by the applicants of their rights under the Trust Deed. The accounting and documentation sought is directly relevant to the entitlements of the applicants under the Trust Deed, as asserted.

23. That being so, the only basis upon which the applicants can avoid the order for a stay and referral to arbitration would be that the applicants are not bound by the terms of the Trust Deed.

24. Mr Fourie submitted that the applicants are not parties to the Trust Deed, and that they were never made aware of the full terms of the Trust Deed (including the arbitration provision now relied upon).

25. Mr Bester countered that the applicants, having accepted the benefits bestowed upon them by the Trust, accepted the terms and conditions associated therewith, including the terms and conditions set out in the Trust Deed. This, in consequence of correspondence of 30 July 2003, directed at the proposed beneficiaries stating that:

> "*We will assume that you have wholly and unconditionally accepted the terms and conditions set out in this letter and the trust deed (as amended from time to time). You are not entitled to accept only part of the offer or a part of the terms and conditions. If you do not wish to accept the offer wholly and unconditionally then please inform us in writing.*"

26. Notably, that same correspondence, at the outset brought to the attention of the recipients thereof that the Trust Deed could be reviewed at the offices of the auditors of the Trust.

27. On the applicants' own version, they accepted the offer. The respondents say, therefore, that the applicants became bound by the Trust Deed, including the arbitration clause. The approach appears to be correct, even though the arbitration clause was not specifically pointed out to the applicants (see *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA) at para 9). The applicants cannot escape this conclusion on the basis that the Trust Deed is not a *stipulatio alteri*, or that a waiver of rights cannot easily be inferred. The bottom line is that the applicants' attention was drawn to the relevance of the Trust Deed to their entitlements, and they accepted the terms of the Trust Deed through their acceptance of the benefits thereunder (albeit through inaction). The applicants cannot at once (i) rely on the Trust Deed to

assert the rights that they seek to enforce; and (ii) decline to accept the arbitration clause. They may not be parties to the Trust Deed, but by virtue of their failure to object to the arbitration clause contained therein, they did become parties to an arbitration agreement when they accepted the terms and conditions of the Trust Deed, which provided for arbitration of issues related to their entitlements thereunder.

28. In consequence, the applicants cannot resort to section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), as they do in submissions before me. The applicants' submission to arbitration constituted through their acceptance of the terms of the Trust Deed amounted to a decision by them to accept adjudication of disputes in a private forum (*Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews & Bopanang Construction CC* 2009 (4) SA 529 (CC) at para 216). The arbitration clause does not oust the jurisdiction of the Courts, as section 3(2) of the Arbitration Act 42 of 1965 makes plain. The applicants have not invoked their entitlement under that provision to have the arbitration clause set aside.

29. In the circumstances, the application for the stay and referral to arbitration fall to be granted.

<u>Further considerations</u>

30. In light of my finding concerning the stay and referral to arbitration, the matters raised in the interlocutory application need not be adjudicated upon. That said, this Court wishes to express the view that the stay and referral to arbitration would be in the interests of justice more generally, as appears from

consideration of issues raised in the interlocutory application for condonation and leave to amend the notice of motion.

31. In support of the application for condonation, the founding papers asserted that it was "*clear from the chronology of events set out above that this matter has deviated significantly from the normal course, and that there has been material non-compliance with the Rules of Court by both parties. Papers have been filed out of time, and additional affidavits not contemplated by Rule 6 have been filed by both parties*". The applicants candidly accepted "*primary responsibility for this non-compliance*", occasioned in the main (they say) by a "*change of tack in legal representatives, which resulted in different relief being sought*". All of this is certainly true, with the Court being faced with a myriad of affidavits and an ever-evolving case.

32. It was the applicants' position before me that the dispute has been fully ventilated on the papers, in the "*numerous affidavits*" and that it would be in the interests of justice if condonation were granted. The applicants asserted that this "*robust approach would allow for a fair ventilation of the dispute on Part A, without any prejudice to any of the parties*". They said that a refusal of the condonation application would simply lead to the issue of a new application, which would once more be opposed, with the parties relying on the same facts as are currently ventilated in the numerous affidavits. The consequence, they said, would not be a reduction of this court's caseload, but simply a duplication of costs.

33. The applicants found support for their case on condonation in *PPE International Inc (BVI) and others v Industrial Development Corporation of*

South Africa Limited 2013 (1) BCLR 55 (CC), where the Constitutional Court emphasized that "*rules are made for courts to facilitate the adjudication of cases*", and that the Superior Courts "*enjoy the power to regulate their processes, taking into account the interests of justice*" (at para 30), recognizing that in "*some cases the mechanical application of a particular rule may lead to an injustice*", which must be avoided (at para 31). Reliance was also placed on the judgment of this Court in *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others* 2019 (4) SA 279 (CC) to the effect that "*Courts have always been inclined to adopt a pragmatic approach in dealing with formalistic and technical objections*" (at para 37). That judgment, in turn, made reference to the judgment of the Supreme Court of Appeal in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA), which sets as the "*overriding factor*" to be taken into account the "*question of prejudice*" and which baulks at the notion of a "*pointless waste of time and costs*" that may be brought about by a failure to condone technical irregularities.

34. But that does not detract from the obligation under Uniform Rule 27(3) to show good cause for condonation to be granted.

35. In *Competition Commission v Yara South Africa (Pty) Ltd and Others* 2012 (9) BCLR 923 (CC), the Constitutional Court was concerned with an application for condonation of the late filing by the Competition Commission of an application for leave to appeal. It considered that "*There can be no doubt that a delay of four and a half months, where the Rules prescribe 15 court days, is excessive*" (at para 23). Noting the explanations offered by the Commission for the delay (at paras 24 to 26), the Constitutional Court listed certain matters

not addressed by the explanation (at para 27), noting that *"All of this is important information that would have assisted us in assessing the diligence with which the Commission dealt with the matter"* (at para 28). The Constitutional Court then explained (at para 29) that:

"The Commissioner elected not to take this Court into his confidence and provide it with all relevant facts. A litigant who approaches a court for an indulgence and fails in this serious way to take the Court into its confidence does not deserve the indulgence of the Court. It is difficult to see how it can ever be in the interests of justice for the Court to come to the assistance of a litigant who withholds so much relevant information from it which it needs to decide whether or not to come to his assistance after failing to comply with its Rules."

36. In that case, the Court particularly bemoaned the absence from the application for condonation of an explanation for a delay of about three and a half months, making the point that *"the explanation that the Commission attempts to advance is so manifestly unsatisfactory that it can almost be rejected as no explanation at all"* (at para 34). Even assuming in favour of the Commission that it enjoyed reasonable prospects of success, the Constitutional Court opinoed that this alone did not entitle the Commission to condonation, expressing the view that *all* factors had to be taken into account to arrive at a decision on the grant of condonation (at para 35).

37. The facts in the present case show a remarkable resemblance to the facts in the *Yara* case.

37.1. First, the applicants filed the First Replying Affidavit months out of time.

37.2. The explanation offered for the excessive delay was dealt with in a few perfunctory paragraphs of the reply, as follows:

"60. This affidavit has been filed outside of the normal time periods for filing a replying affidavit. The reasons for the late filing are as follows:

60.1 Given the number of applicants involved, it is a time-consuming process to discuss the matter and obtain a mandate on the way forward from all of the members of the Tsunami Group.

60.2 In February 2019 the applicants changed attorneys and counsel. The new legal team required time to get up to speed with what is a complex factual and legal matter.

60.3 Consultations were held during mid-February 2019.

60.4 Between late February and April 2019, the applicants' new legal team attempted to engage the respondents' representatives in informal discussions and an informal disclosure of the affairs of the Trust. As set out above, this attempt ultimately proved fruitless, as the respondents refused to disclose the books of the Trust to the applicants' expert.

60.5 The applicants then instructed their legal team to proceed with the replying affidavit."

38. The respondents duly raised an objection to the applicants' failure to bring a substantive application for condonation, treating condonation as if it were simply there for the asking. The point was made that "*they mention only vague highlights of events that took place over a period of more than six months in an effort to justify their delay, notwithstanding that the Applicants are required to provide full details of the facts and reasons for the non-compliance with the Uniform Rules of Court and their purported inability to file a Replying Affidavit in a timely manner at any point during the six month interval*". In their *seriatim* response, the respondents explained:

"*197.1 I deny that a proper case for condonation has been made out.*

197.2 The delay is of an inordinate nature and one that has not been adequately explained.

197.3 No indication is given of when a mandate was first sought, what steps were taken to engage the beneficiaries and when precisely a mandate was received.

197.4 The absence of these basic factual details is telling to say the least and shows that the Applicants have not taken the court into their confidence"

197.5 The suggestion that there is no prejudice to the Trust is self-serving. The delay alone is prejudicial as the Trust cannot be subjected to protracted litigation of this kind on the basis of the Applicants taking six months to deliver a replying affidavit."

38.1. I agree with the basis for opposition. In the view of this Court, a proper case for condonation was not made out, and in the absence of a referral to arbitration, this application would be beset by all sorts of difficulties arising from the consequences of such a finding.

39. Moreover, the interlocutory application includes an application for leave to amend the notice of motion once more. The leave sought to amend the notice of motion is motivated because the applicants say that the amendment "*seeks to incorporate specific reference to the documents and information sought in the January 2020 Rule 35 notice (which was also mentioned in the expert affidavit filed in July 2019) with the changes previously foreshadowed in the first replying affidavit and the first notice to amend, filed during June 2020. The aim of the amended notice of motion is to clarify the exact relief sought in both Part A and Part B. The basis for the claim as amended is set out in the applicants' founding and two replying affidavits*". They also assert that granting an opportunity to the respondents to file a third answering affidavit would "*do away with any potential prejudice*".

40. What this foreshadows is the exchange of yet further affidavits. This, in circumstances where the applicants themselves recognize that the matter now raises so many factual disputes that a referral to oral evidence would be appropriate. Overall, the impression created is that the interests of the applicants themselves would be served by a proper formulation of the case in the form of a statement of claim, and ultimately the presentation of oral evidence, rather than to pursue an application that has become completely unwieldy. The need for the applicants to formulate their case in such a statement of claim might just motivate them to instill discipline in the process,

and to formulate the precise basis upon which they say they were entitled to more than they have received. A properly formulated case will provide the basis for the discovery and production of documents to be regulated by the arbitrator(s) under sections 14(1)(a)(i) and 14(1)(b)(iii) of the Arbitration Act.

Conclusion and costs

41. The Constitution guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate another independent and impartial tribunal or forum. In reality, the right is all too often not realized, because so few have the means to pursue relief.

42. In this case, the applicants launched a poorly pleaded case and then sought to patch it up in a replying affidavit that was filed extraordinarily long out of time, without offering a detailed explanation for the delays, and ultimately satisfying themselves with a submission that the Court must take a robust approach in the interests of justice despite the many shortcomings of its explanation.

43. The case for condonation was not properly motivated, and the need for the case to be formulated comprehensively is evident from a consideration of the full set of papers filed of record. In addition, since the applicants themselves foreshadow a referral to oral evidence, the interests of justice suggest that the referral to arbitration would in any event not unduly delay the matter. in fact, in view of the case load of this Court, resolution of the disputes may well be achieved more expeditiously through a properly managed arbitration process.

44. In the many years since the applicants have indicated their resolve to challenge the actions of the Trustees and the allocation of benefits to them, they may have been expected to become aware of the provisions of the Trust Deed that provide for the resolution of disputes concerning their entitlements in the form of arbitration. They did not. However, the respondents have now raised this issue, and in the view of this Court, the applicants are bound by the arbitration clause. The referral to arbitration presents an opportunity to the applicants to formulate their case with precision, and to obtain access to documents relevant to their claim in that forum.

45. Despite my criticism of the conduct of the applicants, I am not minded to make an adverse costs order. The applicants are not people of great means, and this Court takes the view that it would be inappropriate to make an adverse costs order against individuals who genuinely seek to assert their rights. The interests of justice dictate that the applicants' claims should now be taken to the right forum and adjudicated upon there. To burden the applicants with a costs order would not be conducive to the resolution of the matter.

46. Added to that is my consideration that the respondents unnecessarily raised issues such as the authority of the deponent to the founding affidavit in the interlocutory application and threatened the issue of a Rule 7(1) notice. The applicants, correctly, submitted in the reply that a deponent to an affidavit does not require authority to depose to an affidavit on behalf of other entities or persons. No Rule 7(1) Notice was ultimately issued, but in heads of argument filed on 30 November 2020, the deponent's authority was again pertinently raised.

46.1. It is trite law that Rule 7(1) is concerned, not with determining the authority of a deponent to an affidavit in an application, but with the authority of the attorney. If an attorney acting for a party is authorised so to act, there is no need for any other person, whether he be a witness or someone who becomes involved, to be additionally authorised (see *Eskom v Soweto City Council* 1992 (2) SA 703 (W)).

46.2. Plainly put, in applications it is the institution of the proceedings and the prosecution thereof which must be authorised. It is irrelevant whether the deponent had been authorised to depose to the founding affidavit (*Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G–I).

46.3. The true issue here was the alleged failure to properly identify the applicants in the application, which was to be distinguished from the issue of authority.

46.4. It is a matter of some concern that, despite the clear legal position as enunciated by the Supreme Court of Appeal and this Court, and discussed in *Erasmus Superior Court Practice* in the commentary on Rule 7, legal representatives still inappropriately invoke the rule and challenge the authority of deponents to affidavits.

47. Accordingly, I make the following order:

47.1. the application under case number 40575/2018 is hereby stayed and referred to arbitration in terms of clause 18.1 of annexure RL1 to the founding affidavit in the counter-application;

47.2. there is no order as to costs.

M ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 MARCH 2021.

Date of hearing: 2 March 2021

Date of judgment: 29 March 2021

Appearances

For the applicants: Adv. G Fourie SC

Instructed by: Di Siena Attorneys

For the respondents: Adv. C Bester

Instructed by: Fluxmans Attorneys