



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 5847/18P

In the matter between:

SHANKUMAR MAHARAJ

IN RE:

THE PEOPLES' FORUM

AGAINST ELECTRONIC BINGO TERMINALS

APPLICANT

AND

KWAZULU -NATAL GAMING AND BETTING BOARD 1ST RESPONDENT

MS PORTIA NONHLANHLA BALOYI NO 2ND RESPONDENT

VITUBYTE (PTY) LTD T/A GOLDRUSH MALVERN 3RD RESPONDENT

VAN

X (PTY) LTD T/A GOLDRUSH BALLITO 4TH RESPONDENT

**GALAXY BINGO AMANZIMTOTI (PTY) LTD
T/A GALAXY AMANZIMTOTI** 5TH RESPONDENT

**GALAXY BINGO PAVILION (PTY) LTD
T/A GALAXY PAVILION** 6TH RESPONDENT

**GALAXY BINGO GATEWAY (PTY) LTD
T/A GALAXY GATEWAY**

7TH RESPONDENT

**GALAXY BINGO SOUTH COAST (PTY) LTD
T/A GALAXY BINGO SOUTH COAST**

8TH RESPONDENT

**POPPY ICE TRADING 18 (PTY) LTD
POPPY ICE**

9TH RESPONDENT

**AFRISUN (PTY) LTD T/A SIBIYA CASINO AND
ENTERTAINMENT KINGDOM**

10TH RESPONDENT

PEERMONT GLOBAL KZN (PTY) LTD

11TH RESPONDENT

RULE 7 APPLICATION: JUDGMENT

Delivered on:

MNGADI, J

[1] This is an interlocutory application. It is an *ex parte* application by Shankumar Maharaj for a declaratory order that he has satisfied the court, as required by Rule 7(1) of the Uniform Rules of Court, that he is authorised to represent the applicant in the main application. He seeks an order in the following terms:

- a) That he is and was at all times material authorised to represent the applicant in case No. 5847/2018P
- b) That he was and was at all times authorised to instruct attorneys Franke & Associates to be attorneys of record for the applicant in Case No. 5847/2018P

That insofar as it may be necessary anything which the said Shankumar Maharaj and or the said Stephen Franke may have done on behalf of the applicant in Case No. 5847/2018P, be and is hereby ratified

[2] The application is opposed by the 3rd, 4th and 9th Respondents represented by Mr Barry Roux SC as well as by 5th, 6th, 7th and 8th Respondents represented by Mr Pillemer SC. Shankumar Maharaj is represented by Mr Pammenter SC. The 10th and 11th Respondents have filed a notice to abide with the decision of the court.

[3] In the main application the applicant is THE PEOPLES FORUM AGAINST ELECTRONIC BINGO TERMINALS hereinafter referred to as ('THE PEOPLES FORUM' also known as the FORUM), which in its constitution, is described as an association which is a non-profit organisation established for a public benefit, its objectives are to prevent and fight against the over proliferation of gambling in the province of KwaZulu-Natal with a power to institute or defend any legal or other proceedings and to settle any claims. In the main application THE PEOPLES FORUM instituted an urgent application to interdict the KwaZulu-Natal Betting and Gaming Board and the third to ninth respondents, pending proper compliance with the provisions of the KwaZulu-Natal Gaming and Betting Act 8 of 2010, alternatively; pending proper compliance with the provisions of the Promotion of Administrative Justice Act 3 of 2000 from approving the use of electronic bingo terminals (EBTs) contrary to the provisions of the applicable legislation. In the main application, the third, fourth and ninth respondents were referred to as 'the Goldrush respondents' and the fifth to eight respondents as 'the Galaxy Respondents'. Maharaj deposed to the founding affidavit wherein he stated that the institution of the main application was authorised by the applicant and he was authorised by the applicant and he had appointed the attorneys Franke and Associates to act on behalf of the applicant. The respondents, as their initial response to the main application disputed the authority of the attorneys Franke and Associates to act on behalf of the FORUM as well as the authority of Maharaj to act on behalf of the FORUM in accordance with the provisions of Rule 7.

[4] In this application, the *ex parte* application, Maharaj seeks to satisfy the court that he is authorised to act on behalf of the FORUM and being so authorised, he was authorised to give mandate to Franke and Associates to act on behalf of the FORUM. Initially all the respondents in the main application filed notices disputing authority. The filing of the dispute of the authority of the attorneys resulted in Maharaj signing certain processes himself which lead to the filing of a dispute of Maharaj's authority to act for the Peoples Forum. Rule 7(1) in its amended form refers to disputing the authority of anyone acting on behalf of a party. In *ANC Umvoti Council Caucuss and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) p41 the court indicated that the Rule 7(1) in its amended form has widened its scope.

[5] The usual way of satisfying a court that a person is authorised to represent another in legal proceedings as required by Rule 7(1) is by filing a power of attorney, although it is possible to do it in another manner such a filing of affidavits. See *Administrator Transvaal v Mponyane & Others* 1990 (4) SA 407 (W) wherein it was held: '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.' . Rule 7(1) provides: ' Subject to the provisions of sub-rule (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 leave of the court on good cause shown at any time before judgement, be disputed, where after 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' For purposes of this judgment it is accepted that the Rule 7(1) notices filed by the respondents were framed in compliance with the Rule and were filed as prescribed in the Rule.

[6] In response to the Rule 7(1) notices, the applicant filed a power of attorney. The respondents objected to the filed power of attorney. The filed power of attorney reads as follows:

'POWER OF ATTORNEY

BY PEOPLES FORUM AGAINST ELECTRONIC BINGO TERMINALS

ifo

SHANKUR MAHARAJ & FRANKE AND ASSOCIATES ATTORNEYS

Appointment of agent to commence or defend proceedings

We the undersigned persons and or bodies referred to in Column 1 of Annexure A hereto of the address referred to in CAOLUMN 2 of Annexure A hereto, do hereby appoint:

SHANKUMAR MAHARAJ,

OF No 1 Peppergreen Walk, Greenbury, Phoenix

(hereinafter called "agent"

Being the Chairperson of

THE PEOPLES FORUM AGAINST ELECTRONIC BINGO TERMINALS

(hereinafter called "the forum"

With power of substitution to be the Forum's lawful agent in the Forum's name by means of an attorney to do any or all of the following acts or things

- 1 To accept service of any application, summons, writ or other legal process.
2. To represent the Forum in Court. To appear and represent the Forum in any court and before all judicial or other officers whomsoever as the Agent may consider advisable.
3. To institute action/application. In the Forum's name to make any demand or claim and to commence and conduct any action, application or other proceedings in any court or tribunal for the recovery of any debt, sum of money, right, title, interest, property or matter whatsoever now due or payable or in any way belonging to the Forum by means or on any account whatsoever, and to prosecute , discontinue, compromise, terminate or abandon such action , application or proceedings as the Agent may see fit.
4. To defend proceedings and make counterclaims. To defend any action or proceedings brought against the Forum or in which the Forum may be joined in any court or tribunal (including any counter-claim or claim in reconvention made against the Forum) or to compromise any such action or proceedings or consent to judgement therein if the Agent sees fit, and on the Forum 's behalf to make any claim

in reconvention in such action or proceedings and such relief as the Agent may see fit.

5. Appeals. To note, prosecute, withdraw or abandon any appeal which may be allowed by law against any judgement or order made in the Forum's favour in any such action or proceedings, and to defend any appeal against such judgment or order made in the Forum's favour.

6. To sign documents. To sign all documents necessary in connection with any such action or proceedings.

7. To employ attorneys. When necessary, to employ and pay attorneys, such to include in particular Stephan Joseph Franke of Franke and Associates Attorneys and any counsel instructed by such attorneys /to conduct any such action, application or proceedings.

8. To take other means of recovering debts. To take such other lawful ways and means in order to recover any sum of money or other thing whatsoever which may be understood by the Agent to owing, belonging, or payable to the Forum by any person whomsoever.

9. Generally for effecting the purposes aforesaid, to do and cause to be done whatsoever may be requisite as fully and effectually for all intents and purposes as the Forum might or could do if personally present and acting herein.

AND

Ratification. The Forum hereby ratify and agree to ratify all and whatsoever the Agent lawfully do or cause to be done by virtue of these presents in the past and in the future

AND

Irrevocability. I declare that the power hereby created will be irrevocable.'

[7] Despite the filing of the said power of attorney, the respondents persisted in their dispute of authority. They, *inter alia*, contented that the filed power of attorney did not authorise the bringing of the main application. In terms of Rule 7 there is no obligation on the party disputing the authority to state the grounds on the basis of which the authority is disputed. Further, once what is regarded as proof of authority has been filed, it is the party whose authority has been disputed, to enquire from those who disputed the authority whether now they are withdrawing their dispute of authority, if not, to proceed with an application to satisfy the court of his/her authority to act. In *Shosholozza infra*

at par 25 the court placed the burden on those disputing the authority which, in my view, is not stipulated in Rule 7 (1)

[8] The background to the challenge to authority was that Maharaj (according to the 3rd, 4th respondents, in loyal support of Afrisun , by virtue of a beneficial relationship, was using the name of the Forum to advance the objections of Afrisun against the use of EBTs by the Goldrush and Galaxy respondents. Goldrush was concerned about the true identity of the Peoples Forum, as Goldrush had good reason to believe that Maharaj used the Peoples Forum as a 'concerned applicant' but in reality it was Afrisun in disguise and that names and entities of members and non-members of the Peoples Forum were being used to constitute the Peoples Forum , in circumstances where the so-called members or a substantial number of them (denying any possible quorum), have no knowledge of the main application and no interest in the activities of Maharaj and Afrisun. As such, Goldrush disputed that the chairperson Maharaj had the required resolutions and authority to act on behalf of the Peoples Forum and to instruct the attorneys Franke and Associates to act on behalf of the Peoples Forum. In the main application, in the answering affidavit, Goldrush averred that the Peoples Forum was merely a front for Afrisun which a licensed casino is consistently opposed to the use of EBTs by bingo operators such as Goldrush and Galaxy. Afrisun had previously applied unsuccessfully for a similar relief to the one in the main application.

[9] To meet the consistent challenge, Maharaj obtained affidavits in identical terms from 12 of the 19 constituent members of the Forum confirming that they were aware of the main application and approved the bringing thereof. The effort did not satisfy the respondents. They pointed out that it appeared Maharaj, although required by the Constitution of the Forum to keep a correct updated record of the members of the Forum he was not sure of who were the members of the Forum. He could not obtain consensus of all the members of the Forum. His failure to attach a register of the members was an indication that there were problems with the register of members. The attorneys of Goldrush pointed out that a resolution from the Applicant in accordance with the Constitution was required. There was no proof of unanimous consent. The persons that deposed to the affidavits did not furnish proof that they were so authorised by their organisations.

[10] Lastly, Maharaj attempted to call a Special General Meeting of members of the Forum. He states that the Governing Board of the applicant instructed

attorney Stephen Franke of Franke and Associates to give a notice of an urgent electronic meeting of the members of the applicant to be held on Sunday 15 July 2018. Franke sent a Whatsapp message to all the representatives of the constituent members. He had created a Whatsapp group for purposes of enabling the representatives to communicate with one another. He sent a message with an agenda and proposed resolutions, namely; condoning the short period for calling a meeting; ratifying all proceedings taken under case no. 5847/18P; authorising him to sign all necessary papers for the prosecution of the case; appointing certain members to the Governing Board. He then asked those who could not participate in the meeting to give him a proxy to do so on his or her behalf. In the founding affidavit, Maharaj annexed an e-mail with a list of those that responded to the message and the record of their responses. Franke was the only person physically present in the meeting. Maharaj avers that only five members did not give Franke a proxy and four of those had deposed to the rejected affidavits. Maharaj concludes all the members of the applicant have either granted authority in the affidavits or in meeting wherein they granted proxy or to both.

[11] The respondents point out that the Constitution of the FORUM in clause 7 provides that the management of the Peoples Forum is entrusted to its Governing Board and therefore, in order for the Peoples Forum to bring legal proceedings, such proceedings must be authorised by the Governing Board, at a meeting attended at least by two thirds of the members of the Board. The affidavits do not constitute the decision of the Governing Board neither is the Whatsapp meeting. Neither of the two established consensus by all the members of the Peoples Forum since no members register was furnished with the signed his affidavit. In my view, the respondents are correct in their objections to both the affidavits purporting to grant authority as well as to the 'meeting' convened by Whatsapp messages and physically attended by Franke only. I am also in agreement with the respondents that the power of attorney furnished in response to Rule 7(1) notices does not on the face of it show that it was a decision of all the members of the Peoples Forum and

neither does it purport to be a resolution by the Governing Board of the FORUM.

[12] In his reply to the answering affidavit in the Rule 7(1) application Maharaj stated; 'With regard to the resolutions required by those parties objecting to my authority, my authority goes back to a resolution passed at a meeting of the Forum on the 31 August 2014. In terms of a resolution signed on 3 February 2015, I was authorised to sign all documents in relation to any legal action taken by the Forum. I annex marked BT1, BT2 and BT3 copies of those resolutions.' The resolution BT3 reads as follows:'

RESOLUTION PASSED AT A MEETING OF THE PEOPLES FORUM AGAINST ELECTRONIC BINGO TERMINALS (THE FORUM AGAINST EBT'S) HELD AT DURBAN ON THE 3RD FEBRUARY 2015

RESOLVED THAT;

1. The Forum launches an Application for Leave to Appeal to Intervene in the matter of the Premier of KwaZulu-Natal under Case Number 1366/2015 and any other litigation it is deemed desirable in the interests of the objects of the Forum.
2. That Sham Maharaj is hereby authorised to sign all documents in relation to any legal action taken by the Forum'

The Resolution is signed by the Chairperson, the Vice-Chairperson, The Secretary, the Vice-Secretary and the Treasury. The Resolution was not invoked by Maharaj as the basis of his authority in the founding affidavit. It was also not, at any stage in the engagement with the respondents on the issue, disclosed or referred to. The applicant's counsel in his Heads of Argument did not refer to the said Resolution. Generally speaking, an applicant must stand or fall by his founding affidavit, he is not allowed to make out his case or rely upon new grounds in the replying affidavit. The main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny. See *Shosholozza* par. 26. In *casu* Maharaj made the necessary factual averments in his founding affidavit but failed to refer to the 3 February 2015 Resolution. Therefore, it is not entirely correct that Maharaj made his case in reply. He certainly provided proof in reply. In any case it is not an absolute

rule that a case made in reply must not be considered, it may result in the respondents being granted leave to supplement their papers with a suitable order relating to costs. The respondents did not seek leave to supplement but were content to challenge on merit the Resolution referred to in reply.

[13] The respondents argue that the Resolution did not at all refer to the main application. It was taken in 2015 relating to the proceedings in question at the time. If Maharaj, it is argued, believed the Resolution to be the source of his authority he would have referred to it from the start. He would not have embarked on all the said stratagems as the source of his authority. The reliance, it is argued, on the 2015 resolution indicates that there are problems in the constitution of the Governing Board of the FORUM. If the Governing Board was in place, there would have been no attempt to elect new members of the Governing Board in the one-man meeting.

[14] It appears to me that it is possible that Maharaj had forgotten about the 3 February 2015 Resolution or belatedly realised that it could be the basis of his authority. The various attempts to prove his authority indicates that Maharaj believed that the application was authorised by the FORUM. It indicates that a substantial number of interested persons supported the action that was being taken in the interest of the Forum. It is also important that the Resolution was produced by Maharaj, although belatedly. There is no suggestion that the FORUM is non-existent although there is an indication that the Governing Board might not be operational. In *Gainsford and Others NNO v Hiab AB* 2000 (3) SA 635 (W) at 640A it was held: 'All the party whose authority is challenged has to do is to satisfy the court that he has the necessary authority so to act which authority can even be obtained after the action has been instituted or the defence filed.' The Galaxy respondents argued strongly that: 'Maharaj in reply was relying on a Resolution not part of his case in the founding affidavit. This coupled with his various flawed attempts to prove his authority is indicative of a person who has no authority. In the main application, it is argued, Maharaj alleged supposed authority to bring that application making allegations which were plainly false. The annexure to that affidavit which was alleged to be a round robin resolution by all members of the Forum authorising the main application

and Maharaj's and Franke & Associates roles therein was furthermore a fraud. There was in fact no such resolution by the Forum's members'. As indicated somewhere in this judgement, Maharaj has not handled the issue in the ideal manner, but it will be going too far to infer from that, that he is a sham. This application does not deal with the substance of the matter. The respondents concede that the 3 February 2015 Resolution is in the correct format as the resolution of the FORUM granting the necessary authorisation as envisaged in Rule 7(1). Their gripe with it is that it does not refer to the current litigation.

[15] The argument that the Resolution properly interpreted is no authority for the proceedings in the main application, in my view, overlooks the fact that the resolution refers to any other litigation which is within the objectives of the FORUM. It contemplated future litigation if it is within the objectives of the FORUM. The fact that the Resolution refers to if deemed desirable does not change the substance of the Resolution. The phrase 'deemed desirable' was meant to accommodate the FORUM in that it was not obliged to get involved in each and every litigation which is in line with its objectives. There is no doubt that the issues in the main application are in line with the objectives of the FORUM. In my view, the Resolution promotes access to courts and it will be correct to give to it a generous construction. See *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC) at par 17.

[16] It is argued that there is no indication that the Peoples Forum as of today authorises the institution of the current legal proceedings. The FORUM is a legal entity. There is no suggestion that its has stopped existing. Decisions properly taken continue to exist until rescinded. It is not necessary to revive decisions taken for them to have force and effect. If the Resolution is a properly taken decision of the Peoples Forum it provides the necessary lawful authority to Maharaj and consequently to Franke and Associates even if Maharaj had temporarily forgotten about it and thinking that he had other source of his authority. It provides the jurisdictional basis for the institution of the application by the Peoples Forum and for Maharaj to put that decision into effect. The Resolution is construed contextually and textually bearing in mind

that it is a Resolution at a meeting, it is not a provision in a statute. What matters is the substance rather than the form. See *Shosholoza Auctioneers CC v Ngqura Harbour Contractors* (4222/07) [2008] ZAKZHC 87 (4 November 2008 at par.20. In *South African Allied Workers Union v De Klerk* 1990 (3) SA 425 (ECD) at 436f/j-437b it was stated: 'The power of attorney contemplated by Rule 7(1) is a power to take certain formal procedural steps, namely; to issue process and sign court documentation such as summons or notice of motion on behalf of a litigant...'

[17] It is correct that the Rule 7(1) application was brought by Maharaj not by Franke and Associates. Stephan Joseph Franke deposed to a confirmatory affidavit in support of the fact that he had been properly appointed as an attorney for the Forum. Rule 7(1) refers to the person whose authority is disputed satisfying the court of his authority so to act. Maharaj instructed Franke and Associates to act for the Forum. It was in his interest to ensure that his authority and that of Franke and Associates is sorted out. It would have been an unnecessary duplication for Franke and Associates to lodge a similar application. Rule 7(1), due to amendments made to it, cover a wider scope than the authority of the attorney to act in the matter. It also covered the position of Maharaj to act on behalf of the Forum. Therefore, the relief sought in the notice of motion is, in my view, within the provisions of Rule 7(1).

[18] In addition, Maharaj argues that the main application was brought to vindicate constitutional rights, namely; the right to equality and the right to an environment which is not harmful to wellbeing. Section 38 of the Constitution draws a distinction between private litigation and litigation of a public character. In the latter, different considerations may be appropriate to determine standing to launch litigation and courts should adopt a broad rather than a narrow approach to standing to ensure that constitutional rights enjoy the full measure of protection, so it is argued. In my view, Maharaj misses the point. In these proceedings the standing of the Peoples Forum is not the issue. The issue is the authority of Maharaj and that of Franke & Associates to represent the Peoples Forum.

[19] On the question of costs. The general rule is that costs follow the result. It appears to me that even if Maharaj had produced the 3 February 2015 Resolution when the Rule 7(1) notices were served, the respondents would have continued to dispute his authority. There is no indication that they would have framed their challenge differently. The various attempts made by Maharaj to satisfy the respondents of his authority were an attempt to establish that the institution on the proceedings was not a frolic of his own. They were pathetic attempts, but I do not think they justify Maharaj being deprived of his costs since the result favoured him. In my view, the 3 February 2015 Resolution is valid and of force and effect. It authorises Maharaj to act on behalf of the FORUM in the litigation envisaged in the main application. Maharaj is entitled to appoint the attorneys Franke & Associates to act on behalf of or to assist the FORUM in the envisaged litigation.

[19] In the result. I make the following order:

1. That in terms of Rule 6 (12) (a), the forms and service provided for in the Uniform Rules of Court be disposed of and that this matter be treated as an urgent application.
2. That it be and is hereby declared that Shankumar Maharaj has satisfied this Court in terms of Rule 7 of the Uniform Rules of Court:
 - 2.1 that he is and was at all times material hereto authorised to represent the applicant in Case No. 5847/2018P,
 - 2.2 was and was at all times material hereto authorised to instruct attorneys Franke & Associates to be attorneys of record for the Applicant in Case Number 5847/2018P
3. That insofar as it may be necessary, anything which the said Shankumar Maharaj and or the said Stephan Franke may have done on behalf of the applicant in Case Number 5847/2018P, be and is hereby ratified.

4. That the 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents, jointly and severally, are ordered to pay costs of the application, including costs occasioned by the employment of two counsel, where so employed.

.....
MNGADI, J

APPEARANCES

Case Number : CASE NO: 5847/18P

For Shankumar Maharaj : Adv C.J. PAMMENTER SC

Represented by : Franke & Associates
c/o Austen Smith
Pietermaritzburg

For the 3rd, 4th and 9th respondents : Adv. Barry Roux SC
With Adv. M Smith

Instructed by : Cliffe Dekker Hofmeyer Inc.
c/o Ayoob Attorneys
Pietermaritzburg

For the 5th, 6th, 7th and 8th respondents : Adv Maurice Pillemer SC
With Adv. Paul Farlam SC

Instructed by : Edward Nathan Sonnenbergs
c/o Tatham Wilkes Inc.
Pietermaritzburg

Date of Hearing : 30 November 2018

Date of judgement : 07 December 2018