

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

CASE NO: 12745/18P

COUNCIL FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN CONSTITUTION

Applicant

and

THE INGONYAMA TRUST

First Respondent

THE INGONYAMA TRUST BOARD

Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned

LAWSON PARMANANDA NAIDOO

hereby make oath and say:

- 1 I am the Executive Director of the Applicant ("CASAC"). I deposed to the founding affidavit in the main application in this matter. I depose to this affidavit on the same basis.
- 2 I am authorised by CASAC to bring this application on its behalf.
- 3 The facts stated in this affidavit are to the best of my knowledge true and correct. They are within my personal knowledge unless otherwise apparent from the context.

The respondents

- 4 The first respondent is the Ingonyama Trust ("the Trust") established in terms of section 2 (1) of the KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994 ("the Act").
- 5 The second respondent is the Ingonyama Trust Board ("the Board") established in terms of 2A of the Act.

PURPOSE OF THIS APPLICATION

- 6 I depose to this affidavit in support of an interlocutory application in terms of Rule 30A (2) of the Uniform Rules of Court for an order striking out a notice of application for leave to appeal purportedly filed on behalf of the Trust and the Board.
- 7 In the alternative to that relief, CASAC seeks an order declaring that the First and Second Respondents' attorneys of record, Mason Incorporated, may no

longer act on behalf of the Trust and the Board unless they have satisfied the Court, and the Court has so declared, that they are authorised so to act in applying for leave to appeal and in prosecuting an appeal.

- 8 In the further alternative, an order is sought directing the Trust and the Board to comply with CASAC's Rule 7(1) Notice, to which I refer below, within a period of 5 days.
- 9 If the application succeeds, CASAC submits that it is appropriate for the chairperson of the Board, Mr Jerome Ngwenya, to be ordered to pay the costs of this application from his own pocket. He will no doubt become aware that CASAC seeks such an order when this application is served on the Board. CASAC's attorneys will also have a copy of this application delivered to Mr Ngwenya and will write directly to him bringing this to his attention.
- 10 In what follows I address:
 - 10.1 firstly, the background to this application;
 - 10.2 secondly, the absence of proof of authority to apply for leave to appeal and prosecute an appeal;
 - 10.3 thirdly, the appropriate remedy; and
 - 10.4 fourthly, the issue of costs.


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BACKGROUND

- 11 On 11 June 2021 the Full Court of this Division (per Madondo DJP, Olsen J and the late Mnguni J) handed down judgment in the application by CASAC and its co-applicants against *inter alia* the Trust, the Board, and the Minister of Land Reform and Rural Development ("the Minister").
- 12 A copy of the judgment and order of the Full Court is annexed marked **LPN1**. The Court made declaratory and mandatory orders against the Trust, the Board and the Minister arising from the unlawful and unconstitutional conduct of the Trust and the Board in concluding residential lease agreements with persons living on Trust-held land.
- 13 On 5 July 2021 Mason Incorporated delivered a Notice of Application for Leave to Appeal against the judgment and order made by the Full Court. The Notice of Application for Leave to Appeal was purportedly delivered on behalf of the Trust and the Board. A copy is annexed marked **LPN2**.
- 14 The Minister has not applied for leave to appeal.
- 15 On 7 July 2021 CASAC's attorneys, the Legal Resources Centre ("LRC"), delivered a Rule 7(1) Notice disputing the authority of Mason Incorporated to appeal and prosecute an appeal on behalf of the Trust and the Board. The notice required Mason Incorporated to produce proof of their authority to apply for leave to appeal and prosecute an appeal on behalf of the Trust and the Board, including

resolutions authorising them to apply for leave to appeal and prosecute an appeal. A copy of the Rule 7(1) Notice is annexed marked **LPN3**.

- 16 Mason Incorporated responded to the Rule 7(1) Notice by filing a document purporting to be a resolution of the Board dated 14 June 2021 and styled "*Certified extract of a resolution of the Ingonyama Trust Special Board Meeting*" allegedly held at Anew Hotel in Hilton on 14 June 2021.
- 17 A copy of this document and the filing sheet under which it was filed is annexed marked **LPN4**.
- 18 For the reasons which I set out below, CASAC contends that this document, standing alone, does not prove the authority of the attorneys to apply for leave to appeal and prosecute an appeal on behalf of the Trust and the Board.
- 19 On 6 August 2021 the LRC accordingly served a Rule 30A (1) Notice recording that the Trust and the Board had failed to comply with CASAC's Rule 7(1) Notice. The Rule 30A (1) Notice was served on Mason Incorporated on 29 July 2021 and a copy is annexed marked **LPN5**.
- 20 On 23 August 2021 Mason Incorporated sent an email to the LRC in response to CASAC's Rule 30A (1) Notice. The email attached a document purporting to be a "*Special Power of Attorney*" dated 19 August 2021 and signed by Mr Ngwenya.

- 21 The email stated "...our clients dispute that the resolution filed failed to comply with your clients notice in terms of Rule 7(1). However, to avoid incurring the costs of an opposed motion we are instructed to serve the attached Power of Attorney." A copy of this email and its attachment are annexed marked **LPN6** and **LPN7**.

ABSENCE OF PROOF OF AUTHORITY

- 22 Rule 7(1) provides that where the authority of anyone acting on behalf of a party is disputed, such person may no longer act unless he has satisfied the court that he is authorised to so act.
- 23 CASAC has disputed the authority of Mason Incorporated to act on behalf of the Trust and the Board in applying for leave to appeal and prosecuting an appeal.
- 24 Mason Incorporated has in response delivered two documents purporting to prove their authority:
- 24.1 The "*resolution*" of the Board delivered on 22 July 2021; and
- 24.2 The Special Power of Attorney delivered on 23 August 2021.
- 25 Neither of these documents proves the authority of Mason Incorporated to apply for leave to appeal and prosecute and appeal on behalf of the Trust or the Board.

The "resolution"

- 26 The "resolution" does not constitute such proof:
- 26.1 It is signed by a person whose identity, authority, and knowledge of the "resolution" are not stated and demonstrated.
- 26.2 It does not prove that a valid resolution was passed by the Board, in that it does not state which members of the Board attended the meeting in question, which of them voted for the resolution, which of them voted against the resolution, and which of them abstained. It does not say how many of them were present, and how many of them voted for the resolution, voted against or abstained.
- 26.3 It does not say that the Board has decided to prosecute an appeal against the judgment: to the contrary, it states that the Board has not made such a decision.
- 26.4 Meetings and procedures of the Board are regulated by section 2A of the Act, read with Regulations 10-20 of the KwaZulu-Natal Ingonyama Trust Administrative Regulations, 1998. There is no demonstration of compliance with the Regulations. I point out in this regard that regulation 15 prescribes what constitutes a quorum for the purposes of making a decision, and regulation 20 (7) provides that the head of the Secretariat of the Board must ensure that an attendance register is kept in which every participant present at a meeting of the Board is required to sign his or her name.

- 27 The notice in terms of Rule 30A (1) drew attention to these defects in the "resolution".

The Special Power of Attorney

- 28 The Special Power of Attorney signed by Mr Ngwenya purports to appoint Mason Incorporated "...to be the *First and Second Respondents true and lawful attorneys*" in order to lodge an application for leave to appeal against the judgment of the Full Court.
- 29 This document takes the matter no further. It does not demonstrate that Mr Ngwenya was authorised by the Board to grant this power of attorney. It does not say on what basis he asserts that authority.
- 30 The only possible source of such authority which might be divined from the papers filed by Mason Incorporated is the "resolution". But as I have pointed out, the "resolution" does not prove that the Board made such a decision.
- 31 This was specifically referred to in the Rule 30A (1) notice. Despite this, Mr Ngwenya has still not provided proof that the Board resolved to authorise him to appoint Mason Incorporated.
- 32 Further, if the "resolution" is accepted as proof that the Board made such a decision, the power of attorney is inconsistent with it. The resolution states that the Board did not decide to prosecute an appeal, yet in the power of attorney Mr

Ngwenya purports to grant Mason Incorporated the power to prosecute an appeal.

33 These are no mere technical objections. As I have pointed out, the Minister has not applied for leave to appeal. She is responsible for appointing eight of the nine members of the Board (section 2A (3) of the Act). Her Department is responsible for the cost of administration of the Board (section 4 of the Act). It has been reported in the media that she "instructed" the Board not to appeal against the judgment (attached marked **LPN 8**). Whether or not she has the power to issue a binding instruction in this regard, there is very real reason to doubt that Mason Incorporated have been validly authorised by the Board (as opposed to Mr Ngwenya) to apply for leave to appeal and prosecute an appeal. The fact that they have now failed on two occasions to provide proof that they have been so authorised, when this would be a simple matter to prove if it were the case, gives every reason to doubt that they have such authority.

34 I respectfully submit that under the circumstances, the Court will not be satisfied that they are so authorised.

REMEDY

35 Mason Incorporated have not complied with the request for proof of their authority.

36 In the circumstances I submit that the appropriate remedy is for the Notice of Application for Leave to Appeal delivered by Mason Incorporated, purportedly on

behalf of the First and Second Respondents, to be struck out in terms of Rule 30A (2) as null and void.

- 37 In the event that the Notice of Application for Leave to Appeal does not fall to be struck out on these grounds, CASAC submits that it would be just and equitable for the court to grant the alternative relief set out in the notice of motion.

COSTS

- 38 It seems clear that it is Mr Ngwenya who gave the instructions to Mason Incorporated, purportedly on behalf of the Trust and the Board.
- 39 Mr Ngwenya has failed to show that the "resolution" is a valid resolution taken at a meeting of the Board; and he has failed to show that he was authorised by the Board to grant the special power of attorney. He has so failed despite being given two opportunities to provide the required proof. He is not a lay person who can claim not to understand what constitutes proof in this regard. He is a former Judge of the High Court.
- 40 Mr Ngwenya is not entitled to act on a frolic of his own in instructing attorneys to seek leave to appeal and prosecute an appeal in the name of the Trust and the Board. On the papers, given his repeated failure to provide the simple proof that is required, it is reasonable to conclude that he is so acting.
- 41 In the circumstances, I respectfully submit that it is appropriate that Mr Ngwenya be ordered to pay the costs of this application (or a part of the costs determined

by the Court) from his own pocket; alternatively, the Board should pay the costs, as it is the Board's chairperson who has so acted, the Board is vicariously liable for his conduct, and the Board will have recourse against him.

- 42 If the application fails, I submit that the Board should pay the costs, as it will have been its conduct which has justified and necessitated the bringing of this application.

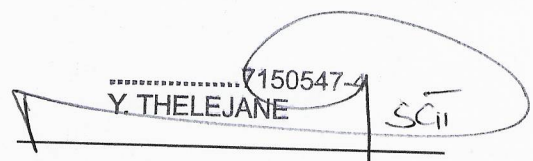
CONCLUSION

- 43 I respectfully submit that CASAC has made out a proper case for the relief sought in the notice of motion.



LAWSON PARMANANDA NAIDOO

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Cape Town on this 21 day of September 2021, the regulations contained in Government Notice No. R1258 of 21 July 1972, having been complied with.



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