

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 7634/2019

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE.....	SIGNATURE:.....

In the matter between:

MASHITISO MALESELA WILLIAM

FIRST APPLICANT

**MACHABAPHALA COMMUNAL PROPERTY
ASSOCIATION**

SECOND APPLICANT

and

MACHABAPHALA OUPA MATOME

FIRST RESPONDENT

MACHABAPHALA CHAROLINE

SECOND RESPONDENT

JACKY KWETEPANE

THIRD RESPONDENT

FIRST NATIONAL BANK LTD

FOURTH RESPONDENT

MACHAKA TRADITIONAL COUNCIL

FIFTH RESPONDENT

MINISTER OF AGRICULTURE, LAND REFORM

SIXTH RESPONDENT

AND RURAL DEVELOPMEN

JUDGEMENT

KGANYAGO J

- [1] The first applicant acting on behalf of the second applicant brought an urgent application on *ex-parte* basis. The applicants are seeking an interdict against the first, second and third respondents (respondents). The second applicant is a Community Property Association. The applicants obtained an interim order with a *rule nisi* issued on 8th November 2019 and varied on 26th November 2019. The respondents are opposing the applicants' application and have raised several points *in limine*.
- [2] The applicants in their founding affidavit aver that Machabaphala community has lodged a successful land claim which resulted in the formation of the second applicant. On formation of the second applicant, the first respondent was appointed as its chairperson, second respondent its treasury and third respondent as its secretary. The respondents were tasked with the opening of a bank account for the second applicant and also to be the signatories to that bank account. According to the applicants, the respondents did not manage the bank account to the benefit of the members of the second applicant.
- [3] The applicants aver that at a members meeting of the 3rd November 2019 which the respondents did not attend, the members took a resolution to replace the entire executive of the second applicant comprising of the respondents with a new executive. The first applicant was appointed as new chairperson, Malema Emely Nakedi as new treasury and Kwetepane

Malesela Andries as new secretary general. After their appointment they were mandated to appoint a legal practitioner who will approach the court and freeze the account of the second applicant as the respondents were not accounting to beneficiaries and/or members of the second applicant.

- [4] The respondents in their answering affidavit have raised four points *in limine* being that of *locus standi*; lack of urgency; non-notice; and non-compliance with Rule 6(4) and directive. When this application was argued, the point *in limine* of lack of urgency has been rendered *moot* and will therefore not be dealt with.
- [5] With regard to the point *in limine* of *locus standi*, the respondents have submitted that the first applicant lacks *locus standi* to represent the second applicant. The grounds upon which the respondents arguments are based are (i) that the first applicant is not member, nor a beneficiary of the second applicant; (ii) the first applicant does not appear in the verified list; (iii) the first to third respondents are the leaders of the second applicant, and although they are prohibited by the order of the 8th November 2019 from performing their duties, they were not removed from their positions; (iv) that the first applicant has failed to attach a resolution authorising him to represent the second applicant; (v) that the attendance register of the alleged meeting of the 3rd November 2019 attached to the applicants' founding affidavit is fraudulent as the person mentioned in item 19 to have been present at the meeting has passed away on 12th July 2018.
- [6] Regarding the non-notice point *in limine*, the respondents have submitted that there were no grounds justifying why the applicants have obtained the order in their absence. With regard to the point *in limine* of non-compliance

with Rule 6(4) and directive, the respondents have submitted that no grounds for non-compliance are set out in the founding affidavit, nor condonation was sought for non-compliance.

[7] Counsel for both parties have agreed to first argue the points *in limine* before the main application is heard. It is trite that in litigation proceedings, the first thing to establish is the *locus standi in iudicio* of the litigant.

[8] In **Four Wheel Drive Accessory Distributors CC v Rattan NO**¹ Schippers JA said:

“The logical starting point is *locus standi* – whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for *locus standi* are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove *locus standi* rests on the party instituting the proceedings.”

[9] Section 38 of the Constitution has introduced a departure from common law in relation to standing. It provides as follows:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

¹ [2018] ZACSA 124; 2019 (3) SA 451 (SCA) (26 September 2018) at para 7

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.”

[10] On plain reading of section 38 of the Constitution, it is applicable where a party is alleging that a right in the Bill of Rights has been infringed or threatened. In other words, ordinarily section 38 may be invoked where a challenge is based on a right in chapter 2 of the Constitution.

[11] In **Kruger v President of the Republic of South Africa and Others**² Skweyiya J said:

“Section 38, however, is not of direct application in this case as it does not concern a challenge based on a right in chapter 2 of the Constitution. Nevertheless, in my view, we should adopt a generous approach to standing in this case. In so doing, I am mindful of the fact that constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights. Such an approach to standing will facilitate the protection of the Constitution.”

[12] The applicants’ counsel in his heads of arguments has relied on section 38 (c) and (e) of the Constitution. However, the applicants’ papers did not show that their case concern a challenge based on a right in chapter 2 of the Constitution. The challenge based on section 38 was raised for the first time in their heads of arguments. The applicants are therefore bound to stand and fall by their papers. A case is made up in the founding affidavit and not in the heads of arguments. Section 38 (c) relates to where a party is acting as a member, or in the interest of a group or class of persons, whilst section 38 (e) relates to an association acting in the interest of its members.

² 2009 (1) SA 417 (CC) at 428 C-D

[13] In determining whether the first applicant has *locus standi* to represent the second applicant, it must first be determined with the specific relief he has sought. (See **Polokwane Taxi Association v Limpopo Permissions Board and Others**³). Part B of the applicants' notice of motion read as follows:

"1. Interdicting the first, second and third respondent from withdrawing the funds of the second applicant's members held with the fourth respondent pending the finalization of this application (reg no: CPA14/1397/A);

2. Ordering the fourth respondent to retain and/or preserve the funds in favour of the second applicant pending the finalization of this application.

3. That the following members of the second applicant be appointed:

3.3.1 Mashitsho Malesela William being appointed as the interim chairperson pending the formal elections of the new chairperson;

3.3.2 Malema Nakedi Emely being appointed as the treasury pending the formal elections of the new treasury general;

3.3.3 Malesela Andries Kwetepane being appointed as the secretary general pending the formal elections of the secretary general.

4. Ordering the fourth respondent to provide the new interim executive committee with three months bank statement of the second applicant."

[14] The first applicant regards himself as a member of the second applicant and also been duly mandated to represent it and institute the present application against the respondents. The respondents on the other hand dispute that the first applicant is a member or beneficiary of the second applicant. Clause 2.2 of the constitution of the second applicant defines a member as follows:

³ [2017] ZASCA 44 (30 March 2017)

“Every person whose name appears in a separate list of names of members which shall be annexed to this constitution document and shall form an integral part hereof and any person admitted from time to time upon proof of qualification as a member of the Association in terms of the constitution and in accordance with clause 15”

[15] Clause 16 of the second applicants’ constitution read as follows”

“MEMBERSHIP

16.1 Membership of the Association shall be reserved only for:-

16.1.1 People dispossessed of their lands rights on farms stated in clause 3;

16.1.2 People who proved to the satisfaction of the association that they were dispossessed of their land right on farms stated in clause 3, or

16.1.3 Is the direct descendant of such person or

16.1.4 Is the spouse of such a person, originally dispossessed persons;

16.1.5 Membership of the Association is based on household which are made up of beneficiaries and spouses of the originally disposed persons;

16.2 In the event of any dispute arising relating to membership, such a dispute shall first be referred to the Department of Rural Development and Land Reform for resolution in a manner that may deem fit”

[16] The respondents in their answering affidavit have attached a document which they regard as verified list of the second applicant’s members and beneficiaries. The first applicant’s name does not appear on that list. In their replying affidavit the applicants did not dispute the authenticity of the list, but have stated that the list is not definite and that some of the beneficiaries does not appear on the list. The first applicant conceded that his name does not appear on that list, but that the names that appears on that list are that of his mother.

[17] With the concession made by the first applicant that his name does not appear on the verified list of the second applicant's members and beneficiaries, the first applicant was therefore not a member of the second applicant at the time of the institution of this application as per clause 2.2 of the second applicant's constitution. It therefore follows that his appointment as chairperson on 3rd November 2019 was unlawful and invalid, and of no force and effect as he was not eligible to be appointed as such. As the first applicant was not a member or beneficiary of the second applicant, he therefore does not have any standing to institute legal proceedings on behalf of the second applicant.

[18] The mere fact that the first applicant is not a member of the second applicant does not mean that he is precluded from instituting action against the respondents. The first applicant's mother is a member and beneficiary of the second applicant and that makes the first applicant to have interest in the running of the affairs of second applicant. However, as long as he was not yet admitted as a member of the second applicant, any action he intends to bring should be in another capacity and not purport to be acting on behalf of the second applicant. If the first applicant was acting on behalf of his mother who might be due to other circumstances, incapacitated, it should have been clearly stated in his founding affidavit and not purport to act on behalf of the second applicant. The applicants' application is not based on a challenge to a right in chapter 2 of the Constitution, and therefore section 38 is not applicable.

[19] Under the circumstances the respondents point *in limine* of *locus standi* has merit and stand to be upheld. Since this point *in limine* disposes the whole

matter there is no need to deal with the remainder of the respondents' point *in limine*. Had the court on 8th and 26th November 2019 been made aware of these facts, the interim order would not have been granted.

[20] In the results I make the following order:

20.1 The respondents' point *in limine* of *locus standi* is upheld.

20.2 The interim relief granted on 8th and 26th November 2019 is discharged.

20.3 The application for an interim relief is dismissed with costs on party and party scale.

MF. KGANYAGO J

**JUDGE OF HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCE:

COUNSEL FOR THE APPLICANT : Adv. TD Sibiya

INSTRUCTED BY : Adv TD Sibiya

COUNSEL FOR 1ST, 2ND & 3RD RESPONDENTS : Mr Chidi

INSTRUCTED BY : Chidi Attorneys

DATE OF HEARING :11 June 2020

DATE OF JUDGEMENT : 7TH JULY 2020