THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 724/2020

In the matter between:

PAULINE MASIBE MASAKO **APPELLANT**

and

MOLEFE STEPHENS MASAKO **FIRST RESPONDENT**

ELSEPCH NOMAHLUBI

BELINDA KHWINANA **SECOND RESPONDENT**

Neutral citation: *Masako v Masako & Another* (Case no 724/20) [2021] ZASCA 168 (3 December 2021)

Coram: DAMBUZA, SCHIPPERS and MABINDLA-BOQWANA JJA

Heard: Matter disposed without oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 3 December 2021.

Summary: Locus standi – whether an attorney requires authority from client to depose to an affidavit – distinction between right to institute proceedings, authority to act on behalf of client and the basis for deposing to an affidavit – attorney's founding affidavit based on facts known to her – inquiry into attorney's legal standing irrelevant – appeal upheld.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Nobanda AJ and Djaje J concurring, sitting as a court of appeal): judgment reported as *sub nom Masako v Masako and Another; In re: Masako v Masako* 2021 (6) SA 197 (NWM)

1 The appeal is upheld.

2 The order of the North West Division of the High Court, Mahikeng is set aside and replaced with the following order:

'1 The appeal is upheld with costs, and the ruling of the Regional Court, Garankuwa dated 3 October 2018 is set aside and replaced with the following:

"The point in limine is dismissed with costs."

2 The matter is remitted to the Regional Court, Garankuwa for the determination of the merits of the rescission application.'

JUDGMENT

Mabindla-Boqwana JA (Dambuza and Schippers JJA concurring):

[1] This appeal concerns a narrow question of whether an attorney who deposed to an affidavit in support of a rescission application was required to obtain authorisation from her client to do so. The Regional Court in Garankuwa (regional court), whose decision was confirmed by the North West Division of the High Court, Mahikeng (high court), held that she did. The appeal is with the leave of this Court and is unopposed. It was determined without hearing oral

argument, in terms of s 19*(a)* of the Superior Courts Act 10 of 2013, by agreement with the parties.

[2] The appellant and the first respondent were previously married, and their marriage was dissolved by a decree of divorce incorporating a settlement agreement on 13 February 2013. One of the terms of the agreement was that each party would 'retain those assets presently in their respective possession and/or under their respective control in settlement of their respective claims in the joint estate.' According to the appellant, both parties retained immovable properties registered in their names. She retained the immovable property described as Erf 477, Winterveld JR, North West, which was registered in her name and was under her control and possession.

[3] Despite this agreement, on 24 May 2016, the first respondent launched an application in the regional court seeking an order, inter alia, '[a]ppointing a Receiver and Liquidator of the assets of the joint estate subsisting between the [first respondent] and the [appellant].' The Liquidator would, among other things, be vested with the right to 'determine the value of the assets of the communal estate as at date of Divorce and ascertain which party retained which of the assets when the [first respondent] left communal home and thereafter divide the assets on [an] equal basis between the parties taking into consideration all outstanding debts as at date of Divorce.'

[4] The appellant appointed Ms Nkagiseng Moduka, an attorney, to act on her behalf in opposing the application, and an answering affidavit was delivered. The application was set down for hearing on 17 April 2018. That day an order was granted in favour of the first respondent in the absence of the appellant. This led to the appellant bringing an application for the rescission of the order on 21 May 2018. Ms Moduka deposed to the founding affidavit in support of the

application for rescission. She alleged that an administrative error in her office had led to the rescission application being incorrectly diarised for 17 May 2018 instead of 17 April 2018.

[5] The rescission application was opposed by the first respondent, who raised a point in limine challenging Ms Moduka's 'locus standi' on the basis that, as the attorney for the appellant, she was not the person affected by the judgment sought to be rescinded. He contended that she did not have a 'direct and substantial interest in the main application', which would entitle her to bring the rescission application. In reply the appellant filed a confirmatory affidavit in which she attested to having instructed her attorney to represent her in all proceedings brought by the first respondent in the matter.

[6] The regional court agreed with the first respondent and upheld the point in limine. It found that Ms Moduka had not been authorised to bring the application by the appellant. It held that the appellant's confirmatory affidavit was:

'. . . an attempt to usher in her authorisation through the back-door. . . in that nothing prevented her giving her authorisation earlier, other than wait till a point is reached attacking the attorney's *locus standi*.

The fact that the attorney takes the position of the real applicant has the potential of muddling the waters further. . . which creates the impression that she was the purchaser of Erf 477, which is factually not correct.

The end result is that the point *in limine* succeeds on the basis of her lack of standing.'

[7] The appellant appealed that ruling to the high court. The high court dismissed the appeal on the same basis as the regional court. It found that Ms Moduka 'lacked locus standi to bring the application for rescission in the absence of authorisation by the appellant'. Having considered s 36(1) of the Magistrates'

Courts Act 32 of 1944[1] and rule 49[2] of the Magistrates' Court Rules, the high court concluded that an attorney and an advocate are not 'a party' for the purposes of rule 49(1) in that they do not have a 'legal interest' in a matter. Theirs is an indirect, general interest to advance their client's case and bring it to conclusion. It further held that:

'Section 36(1)*(a)* requires the applicant to have been 'affected' by such a judgment. "Affected party" is defined by **Erasmus** as [*a person who] has an interest in the subject matter of the judgment or order sufficiently direct and substantial to entitle him to intervene in the original application upon which the judgment was given or granted. He must have a legal interest in the subject matter of the action which could be prejudicial to the judgment of the Court.'* (Footnote omitted)

[8] In my view, both the regional court and the high court appear to have conflated (a) the legal standing of the party seeking rescission of judgment; (b) the basis for deposing to an affidavit and (c) the authority to represent a party. I deal with these in turn.

[9] As regards the first issue, a party will have legal standing (locus standi) if he or she has a direct and substantial interest in the subject-matter of the judgment sought to be rescinded.[3] The appellant, as the respondent in the main application,

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[1] Section 36(1), inter alia provides: 'The court may, upon application by any person affected thereby, or, in cases falling under paragraph *(c), suo motu-*

(a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted.'

[2] Rule 49(1) states: 'A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of subrule (5) or (5A).'

[3] *De Villiers and Others v Trustees for the Time Being of the GJN Trust and Others* [2018] ZASCA 80; 2019 (1) SA 120 (SCA) para 22.

had opposed the main application brought by the first respondent relating to the appointment of a Receiver and Liquidator of the assets in the joint estate. She appointed Moduka Attorneys in opposing that matter. Upon learning of the default judgment granted against her, the appellant instituted an application seeking rescission of the default judgment. She accordingly had the necessary standing as she was the party affected by the judgment sought to be rescinded. The inquiry into Ms Moduka's legal standing was thus irrelevant in the matter.

[10] Turning to the issue of authority to depose to an affidavit, the judgment of this Court in *Ganes and Another v Telecom Namibia Ltd*[4] provides a complete answer to this question. It held that:

'. . . it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C - J.)'

[11] Ms Moduka alleged that her reason for deposing to the founding affidavit was that the facts that gave rise to the need for a rescission application lay

[4] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA); (2004) 25 ILJ 995 (SCA); [2004] 2 All SA 609 (SCA) para 19.

squarely within her knowledge as the attorney who was dealing with the matter. It stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms to the truthfulness of such statements. She is no different from a witness who testifies orally, on oath or affirmation, regarding events within her knowledge. Thus, when Ms Moduka deposed to the founding affidavit, she needed no authorisation from her client.

[12] As to the last issue, the appellant clearly indicated that she had given Ms Moduka instructions to act on her behalf in all proceedings. Ms Moduka stated that she was the attorney who had been instructed by the appellant to oppose the main application and had accordingly been involved in the matter from its inception. She went further in the replying affidavit, and said that her mandate had never been questioned by the first respondent and that her instructions came from 'a person who had been affected by the order that was granted and [she] was not acting on the frolic of [her] own . . .'. As already stated, she had attached a confirmatory affidavit of the appellant, who confirmed that she had instructed Ms Moduka to institute the rescission application. These allegations were not challenged.

[13] In any event, in terms of rule 52(2)*(a)*[5] of the Magistrates' Court Rules, an attorney does not need to allege that they are authorised to act for a party. A party wishing to challenge an attorney's authority to represent a party may do so in terms of the procedure outlined in that rule. The first respondent brought no such challenge. Accordingly, there was no reason for the regional court and the high

[5] Rule 52(2)*(a)* of the Magistrates' Court Rules provides: 'It shall not be necessary for any person to file a power of attorney to act, but the authority of any person acting for a party may be challenged on notice by the other party within 10 days of such party becoming aware that such person is so acting or with the leave of the court on good cause shown at any time before judgment.' This is equivalent to Rule 7(1) in the Uniform Rules of Court.

court to find that Ms Moduka lacked authority. For those reasons, the decision of the high court falls to be set aside.

[14] In the result, the following order is made:

1 The appeal is upheld.

2 The order of the North West Division of the High Court, Mahikeng is set aside and replaced with the following order:

'1 The appeal is upheld with costs, and the ruling of the Regional Court, Garankuwa dated 3 October 2018 is set aside and replaced with the following:

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N P MABINDLA-BOQWANA

JUDGE OF APPEAL

Written submissions

For the appellant:	A J D’Oliveira
Instructed by:	Moduka Attorneys, Pretoria