IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 12443/07

In the matter between

ROLAND HOWARD CARELSE — FIRST APPLICANT
LYNN AKERS — SECOND APPLICANT

AND

STANDARD BANK OF SOUTH AFRICA LIMITED — RESPONDENT

Heard: 12 August 2021

JUDGMENT DELIVERED ON 22 OCTOBER 2021

THULARE AJ

[1] The second applicant (Akers), the eldest daughter of the first applicant and his late wife (the couple) launched three applications where she sought to intervene in the matter between her parents and the respondent, rescission of a judgment granted in favour of the respondent against her parents, the setting aside of an order

directing that the opposed rescission application be heard on 12 August 2021 and that instead the applicants be granted default judgment.

INTERVENTION

[2] The couple obtained a home loan in respect of a vacant plot,[….] (the property) from the respondent. The couple fell into arrears with the bond repayments and the respondent obtained default judgment against them on 16 March 2008 for an amount of R330 992.18 with ancillary relief which included a declaration that the property was executable.

[3] Around November 2016 to February 2017 the respondent's attorneys were communicating with the couple through the first applicant. Amongst others, he was informed that the outstanding balance on the account was R170 632.58 excluding future legal costs and interests. He was further informed that the respondent had given them 80%, which left the settlement amount at R34 126.52 which was valid until December 2017. On 17 February 2017 the attorneys gave the couple 24 hours' notice that their furniture, vehicles and property may be attached if judgment was obtained against them on the home loan account and that immediate payment was urgently required.

[4] The 1st applicant then brought the warning and threat to the attention of Akers and asked her to intervene on their behalf. The mother passed on in the meantime. The 1st applicant asked Akers to handle his affairs and to address the rescission of the default judgment. He was fragile and an older person on state pension and was financially ruined. He then provided Akers with two signed documents whose relevant contents read as follows:

"POWER OF ATTORNEY

I Roland Howard Carelse (ID no: [….]), hereby grant my daughter Lynn Akers (ID no: [….]), Power of Attorney in this legal dispute/matter with Standard Bank.

As per the emails attached, my daughter has been helping me with the matter and this matter has affected our family directly.

We have attached a certified copy of our ID's to this document, as well as copies of the emails reflecting communication between parties.

Kindest regards"

"POWER OF ATTORNEY
I hereby grant permission to my daughter Lynn Akers ([….]), to enquire on my behalf with regards to my Standard Bank Account.
ACCOUNT NAME: Recoveries SAP Account
ACCOUNT NUMBER: […]
BRANCH CODE: 000205
REFERENCE: 320832376

I hereby also grant permission to your organization to provide her with my any/and all documents pertaining to the above mentioned account.

Please feel free to contact me should you have any queries.

Yours thankfully".

It is against this background that Akers prays that the court permits her, although a layman and *prope persona,* to address the rescission of default judgment on behalf of the 1st applicant as per the couple's wishes, as well as all other related matters. She relied on the provisions of sections 4(1), 5(1)(b), 5(3)(b) and 9(1) of the Older Persons Act, 2006 (Act No. 13 of 2006) (the OPA) and section 38(a) and (c) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution).

[5] The application is opposed on three main grounds. First, on the ground that Akers had failed to show her direct and substantial interest in the dispute and had not shown a *prima facie* case or defence that she in her personal capacity may have and had not indicated the nature of the dispute between her and the respondent which required intervention. Secondly, on the ground that she cannot use the power of attorney. The power of attorney essentially facilitated the establishment of the authority of an attorney to act for his or her client and her not being an attorney nor not purporting to be one, she could not rely on it to establish her authority to

represent her father. Thirdly, Akers could not rely on the provisions of the OPA as the OPA applied specifically to organs of State who render services to older persons and she did not explain the basis upon which she sought to rely on the Constitution.

[6] Section 38 (a) and (c) of the Constitution provides as follows:

"38. Enforcement of rights. – 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 the court are –

(a) Anyone acting in their own interest;

(b) …

(c) Anyone acting as a member of, or in the interest of, a group or class of persons."

[7] The purpose of these provisions was said to be clear and unequivocal and expressly made provision for virtually unlimited *locus standi in audicio* and that there were no limitations placed in the manner in which persons could approach the court, the nature of the investigation that must occur or the relief which could be granted by the court [*Gerber v Kommissie vir Waarheid en Versoening* 1998 (2) SA 559 (TPD) at 569D-E]. In E-F it was said further that the reason therefore was because it was of utmost importance that rights were protected and as a consequence the court must be in a position to determine whether the applicant's constitutional rights were infringed or threatened and to grant the appropriate relief. The procedure, investigation and relief must advance the full meaning of the Constitution and the Bill of Rights.

[8] In *Freedom of Expression Inst v President, Ordinary Court Martial* 1999 (2) SA 471 (CPD) at para 12 it was said:

"The section provides that anyone has the right to approach a competent court, alleging that a right contained in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights. The right to approach the Court is extended to anyone acting as a member of, or in the interest of, a group or a class of persons, and anyone acting in the public interest."

The core question is whether the right of Akers has been infringed or threatened to trigger her to approach the court in her own interest or as a member of or having an interest as a member of her family. An answer in the affirmative would place her

properly before the Court [*National & Overseas Modular Construction v Tender Board, FS* 1999 (1) SA 701 (OPD) at 704D].

[9] In *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (TPD) it was said at 373I:

"It is a prerequisite for the section to operate that the applicant must allege that a right in the Bill of Rights has been infringed or threatened."

In *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2002 (2) SA 1 (CC) at para 47 it was said:

"[47] It is important to emphasise that over the past decades an accelerating process of transformation has taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises."

Akers relied on section 38 of the Constitution in her plea to be allowed to intervene. It did not matter whether the claim was good or bad as that went to the merits. The court was duty bound to enter the stage of a jurisdictional enquiry and decide whether the case concerned a violation of a fundamental right and exercise its jurisdiction. The court was duty bound to pronounce itself on her claim [*Naptosa and Others v Minister of Education, WC* 2001 (2) SA 112 (CPD) at 120I-121A].

[10] In *Ngxuza & Others v Permanent Secretary, Dept of Welfare, E Cape* 2001 (2) SA 609 (ECD) at 619A it was said:

"There is no cogent reason for a restrictive interpretation of the provisions of the section because of the narrow content given to standing under the common law (compare *Ferreira v Levin NO and Others; Vryehoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1)."

The provisions raised difficult questions. In *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at 934B-D it was said:

"For example, and with specific reference to s 38(c), the following are by no means easy questions to answer:

(a) Whether a person bringing a constitutional challenge as a member of, or in the interests of, a group or class of persons requires a mandate from members of the group or class.
(b) What is it that constitutes a class or group – what should the nature of the common thread or factor be.

(c) What entitles someone who is not a member of the group or class to act on behalf of those who are:
   - Must such person demonstrate some connection with a member or some interest in the outcome of the litigation;
   - What should the nature of such 'connection' or 'interest' be;
   - In what way, if at all, must the 'interest' differ from that envisaged in s 38(a).

(d) Whether a local government, even if it has the capacity to act on its own behalf in regard to a particular Bill of Rights issue, has the power (in the sense of *vires*) to do so in the interest of others."

[11] The salient issues in this matter, in my view, related to whether Akers had the requisite 'interest' and whether her intervention was 'competent' and should be 'permitted' [*Lifestyle Amusement Centre (Pty) Ltd and Others v The Minister of Justice and Others* 1995 (1) BCLR 104 (C)].

[12] In *Mukaddam v Pioneer Foods* 2013 (5) SA 89 it was said in paragraph 29, 30 and 38:

"[29] Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the state. Our courts are mandated to review the exercise of any power by state functionaries, from the lowest – to the highest-ranking officials.

[30] In *Chief Lesapo v North West Agricultural Bank and Another,* this court inderstood the importance of access to courts in these terms:

"The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable,'

[Footnote omitted.]

…

[38] Courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions."

[13] In deciding whether a group or class should be allowed, the court is bound to apply the interests of justice standard [*Mukaddam, supra,* at paragraph 47]. The factors that will guide a court are set out in paragraphs 15-18 of that judgment and these are:

(a) The group or class must have identifiable members, defined with sufficient precision that permits an objective determination of who qualifies as a member.

(b) An applicant must show that the class has a cause of action which raises a triable issue and allege facts sufficiently showing that a new claim must be recognized when policy issues are taken into account

(c) The various claims by members of the group or class must raise common issues of fact or law, with a commonality that must be of such a nature that the determination of the issue may be achieved by deciding a single ground common to all claims and

(d) A representative in whose name the class action would be brought must be identified. The interests of the representative must not be in conflict with those of the members of the class and in addition the representative must have the capacity to prosecute the class action, including funds necessary for litigation.

This list is not exhaustive and a court would be free to consider any factor relevant and material to its enquiry [para 47F].

[14] In *Children's Resource Centre Trust v Pioneer Food* 2013 (2) SA 213 (SCA) at para 21 it was said:

"[21] In my judgment it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal-injury cases or consumer litigation."

At para 22 the court continued:

"Where necessary we must develop the common law in order to achieve this, for example, by expanding the scope of the res judicata principle. But, as the international

literature shows, fundamental issues of policy may arise in determining the structure of such actions and their consequences. The resolution of those issues involves difficult policy choices that have received differing answers in different jurisdictions. It is not for us, in laying down procedural requirements, to make policy choices that may impinge upon, or even remove, existing rights."

[15] In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (AD) at 388A-H the court said:

"A person who claims relief from a Court in respect of any matter must, as a general rule, establish that he has a direct interest in that matter in order to acquire the necessary *locus standi* to seek relief. Reference to a few cases, mentioned in the next paragraph, will be sufficient to illustrate the point.

In *Dalrymple and Others v Colonial Treasurer* 1910 TS 372 at 390 Wessels J stated that:

'The person who sues must have an interest in the subject-matter of the suit, and that interest must be a direct interest.'

And that:

'Courts of law … are not constituted for the discussion of academic questions, and they require the litigant to have not only an interest, but also in interest that it not too remote.'

A little later in this judgment (at 392) the learned Judge said that since the *actio popularis* had disappeared,

'courts of law have required the applicant to show some direct interest in the subject-matter of the litigation or some grievance special to himself'.

In *Geldenhuys and Neethling v Beuthin* 1918 AD 426 Innes CJ referred to the function of courts of law in terms similar to those employed in *Dalrymple*'s case *supra.* The learned Chief Justice said: (at 441):

'After all, courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'

In *Ex parte Mouton and Another* 1955 (4) SA 460 (A) Van den Heever JA cited (at 463H) the passage in *Geldenhuys and Neethling v Beuthin* which I have just quoted and said that it contained a statement of a procedural rule of the common law ('gemeenskaplike prosesreel). He indicated, too (at 464A-B), that an applicant who asked the Court to make certain declarations as to the meaning of a will has to show an actual and existing interest ('n' aktuele en teeonwoordige belang') in the matter. Finally, in *Roodepoort- Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 101 Wessels CJ referred to the requirement that a plaintiff has to show a direct interest in the matter in issue in the following terms:

'… (B)y our law any person can bring an action to vindicate a right which he possesses (*interesse*) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have.'

[16] A family, as a group, deals with primary relationships from which people derive emotional and material security. In South Africa we need to endeavor to integrate the different systems from our diverse concepts of family [*The Law of Marriage,* Vol 1, Sinclair assisted by Heaton, Pluralism in South African marriage Laws, page 211]. The complexity of our families should be simplified in our construction of South African law. The tensions and conflict of our different systems should find harmony.

[17] Parents and children need not become one in law, but recognition should be given to the love, loyalty, affection, sympathetic care, physical care, financial and the general mutual-support mindset in the life of each other. The components of passion, companionship and self-giving [*T v T* 1968 (3) SA 554 (R)] should not just be limited to spouses and should find recognition in the broader family [*Towards the Recognition of Filial Consortium* J Church & S Parmanand (1987) 20 CILSA 230 at 232-5]. The responsibilities and rights that the parent-child relationship imposes are reciprocal and its concentration is more in the early days of the child and the latter days of a parent. It is not all responsibilities and rights that require legal sanction to enforce or protect.

[18] The enquiry into the interest included a determination whether the relationship between Akers and her parents by its nature created certain obligations for her towards them and/or their estate, such that the conduct of the Bank caused her as their child and them as a family to suffer, and because of such injury, to entitle her to the remedy of joinder, variation and/or substitution. Akers relied on her familial relationship with her parents. The remaining parent not only deposed to an affidavit but he also signed a 'Power of Attorney".

[19] In *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (WLD) it was said at 474B-E:

> "It is difficult to see what more can or should be required of the applicant and the class in whose interest he asserts that he is litigating. Chaskalson P observed in *Ferreira v Levin*

NO and Others above at 1082G-H that, while it was important that the Constitutional Court should not be required to deal with abstract hypothetical issues, and that it should devote its scarce resources to issues that are properly before it, he could 'see no good reason for adopting a narrow approach to the issue of standing in constitutional cases'.

"On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of s 7 (4) of the Constitution …."

(Paragraph [165].)

This approach seems to me to be appropriate not only to the Constitutional Court, but to all Courts that are called upon to adjudicate constitutional claims. It seems to me further that a broad approach should be taken not only to who qualifies as having standing under s 7(4)(b), but to how that standing may be evidenced."

[20] In my view, the interest of Akers is not direct. The relief claimed by the Bank, at best, related to the estate of her parents. Her interest, which was primarily in the proper administration of the estate, was merely contingent [*Gross and Others v Pentz* 1996 (4) SA 617 (AD) at 626C-J]. The general rule is that she lacked *locus standi in judicio.* It seems to me that Akers is beneficially interested in the just outcome of the litigation between her parents and the Bank. This is not a case where her parents are defaulting or delinquent as a result of which they are impeached, in which case the *Beningfield exception* would be triggered.

[21] In *Beningfield v Baxter* (1866) 12 AC 167 (PC) at 178-9 it was said:

"This first question which arises is, whether the plaintiff, not being executrix, and not having any specific interest in the Equeefa estate, could sue to set aside that purchase. Their Lordships have no doubt that she could. When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty: *Travis v Milne (1)."*

[22] The purpose of OPA was set out as:

"To deal effectively with the plight of older persons by establishing a framework aimed at the empowerment and protection of older persons and at the promotion and maintenance of

their status, rights, well-being, safety and security; and to provide for matters connected therewith."

Part of the preamble to OPA reads:

"AND Whereas it is necessary to effect changes to existing laws relating to older persons in order to facilitate accessible, equitable and affordable services to older persons and to empower older persons to continue to live meaningfully and constructively in a society that recognizes them as important sources of knowledge, wisdom and expertise,"

[23] The first applicant is a male 66 years of age and as such is an older person as defined in OPA. There is no evidence to suggest that he is a frail older person, who is defined as one who needed 24-hour care due to a physical or mental condition which rendered him incapable of caring for himself or herself. The objects of OPA include to maintain and protect his rights and to combat his abuse, including economic abuse. A court of law is not an organ of state [section 239(b) in the definition of "organ of state"]. However, in my view, that does not mean that the general principles set out in sections 5 and 9 of OPA are guidelines of no consequence to our courts.

[24] In my judgment, in particular my approach to the family as a group, in my view, I have recognized the social and cultural contribution of the first applicant as a Black elder. This judgment will also assert promotion of his participation, as an older person, in decision-making processes, especially with regard to decisions that directly affect him or his interest. Section 9(b) of OPA provides that:

"9 Guiding principles for provision of services

Any service must be provided in an environment that –

(b) promotes participation of older persons in decision-making processes at all levels."

Service is defined as

" 'service' means any activity or programme designed to meet the needs of an older person."

[25] Nothing suggested that the first applicant did not have the capacity to litigate at all. There is also no evidence that sought to indicate that the first applicant was suspected to be incapable of managing his affairs for any reason. [*Road Accident Fund v Mdeyide* 2008 (1) SA 535 (CC) at para 38]. There was no reason on the facts to even suggest a need for an enquiry as envisaged or in the style of Rule 57 of the Uniform Rules of Court

[26] In my view, it has not been shown that Akers' father could no longer intelligibly engage with the litigation because of advanced age. There is no reason for the direct substitution or variation, as a party, as regards him. At best, Akers had shown that she was willing and available to her father to help him by doing some share of the work and by providing information, perhaps even money. This provision of money, resources or information to help someone qualifies as a meaning of assistance [*The Concise Oxford English Dictionary,* tenth edition, revised, Edited by Judy Pearsall, Oxford University Press, 2002]. Assistance to a party in court proceedings, primarily informed by that party's age and level of understanding, is a recognized concept in our law and has now found legislative confirmation in other areas of our law [section 65 of the Child Justice Act, 2008 (Act No. 75 of 2008). Courts have generally immensely benefitted from blood relations of parties who attended court, generally out of volition based on the filial relationship earlier referred to in this judgment, to assist the parties. Most initial enquiries by courts related to the mental illness or intellectual ability or otherwise of parties have been based on assistance to parties, from filial relationships.

[27] Representing another in High Court litigation is a serious exercise. South Africa requires that those who have a right to appear on behalf of another person in any court in the Republic [section 25(2) of the Legal Practice Act, 2014 (Act No. 28 of 2014) (the LPA)] should meet certain requirements. These include that that the person be duly qualified [section 26 of LPA], be a South African citizen or be permanently resident in the Republic, be a fit and proper person to be admitted and having served his credentials with the South African Legal Practice Council established by the LPA.

[28] There are in-built assessment [section 28 of LPA] and other strategies including vocational training in that Act to ensure successful attainment and maintenance of competence. There are codes setting out rules and standards relating to ethics, conduct and practice for those authorized to act on behalf of others. Nothing in the papers suggest, outside the clear capacity to read, write and debate, that Akers qualifies to appear on behalf of another in any court of law. The functional literacy to search the internet and argue the options is simply not enough.

[29] In the light of my findings and order, I deem it not necessary to engage with the rescission application and the application for judgment against the respondent for the simple reason that Akers cannot, in law, represent the first applicant in the rescission application, and has no *locus standi* to intervene as a member of the family. It is unfortunate that notwithstanding the advice to the applicants to seek legal advice, the applicants persisted with the application under the circumstances. I am alive to the reality that should the first applicant get proper legal representation, and there is cause for the application for rescission and the order by default to be pursued, the first applicant may need to pursue that and I hold the view that if it is so, he should be allowed to work on the same papers, duly supplemented

[30] For these reasons I make the following order:

(a) The application by second applicant for intervention as a party is dismissed.

(b) The application for rescission of judgment and the application for judgment against the respondent are dismissed on the papers.

(c) No cost order is made.

_____

DM THULARE

ACTING JUDGE OF THE HIGH COURT