



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 483/22

In the matter between:

FIRM-O-SEAL CC

APPELLANT

and

WYNAND PRINSLOO & VAN EEDEN INC.
DERICK VAN WYK

FIRST RESPONDENT
SECOND RESPONDENT

Neutral citation: *Firm-O-Seal CC v Prinsloo & Van Eeden Inc. and Another*
(483/22) [2023] ZASCA 107 (27 June 2023)

Coram: PONNAN and MEYER JJA and KATHREE-SETILOANE AJA

Heard: 19 May 2023

Delivered: 27 June 2023

Summary: Locus standi - section 137(4) of the Companies Act 71 of 2008 - special plea of lack of locus standi to institute legal proceedings.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Ratshibvumo J, sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and replaced with the following:
‘The special plea of lack of *locus standi* is dismissed with costs.’

JUDGMENT

Ponnan JA and Kathree-Setiloane AJA (Meyer JA concurring):

[1] The appellant, Firm-O-Seal CC, instituted action in the Mpumalanga Division of the High Court, Middelburg (the high court) against the first respondent, Wynand Prinsloo & Van Eeden Inc., and the second respondent, Mr Derick van Wyk, who, at the relevant time, served as an attorney and director of the first respondent.

[2] Four claims were asserted arising out of professional legal services rendered by the respondents to the appellant. The claims were met by five special pleas - four of prescription and one of lack of *locus standi*. The parties agreed, pursuant to Rule 33(4) of the Uniform Rules of Court, that the special pleas be adjudicated prior to and separately from the remaining issues and the high court made an order to that effect. After hearing the parties, the high court upheld the special plea of lack of *locus standi* and consequently dismissed the claims with costs. It did not think it necessary to consider the four remaining special pleas of prescription or to enter into the substantive merits of the matter. It took the view that the finding on the special plea of lack of *locus standi* was dispositive of the matter. The appeal is with the leave of that court.

[3] The special plea was framed thus:

‘1.5. SPECIAL PLEA: LACK OF *LOCUS STANDI*

1.5.1. The summons was issued in the name of and on instruction of the directors of “Firm-O-Seal CC” on 2 December 2020.

1.5.2. The particulars of claim appended to the summons at paragraph 2 contain the averment that the respondent was placed under business rescue on 5 June 2019.

1.5.3. On 27 January 2021, the attorneys for the appointed business rescue practitioner, confirmed that the business rescue practitioner Mr Mahier Tayob did not authorize the action already instituted against the defendants . . .

1.5.4. On 2 February 2021, the defendants requested that the respondent furnish them with a power of attorney as contemplated under Rule 7 . . .

1.5.5. On 4 March 2021, the respondent favoured the defendants with its reply under Rule 7 . . .

1.5.6. Annexure “A” as read with annexure “C” confirmed the fact that when the process was issued, the plaintiff has not resolved and was consequently not authorised to have bought the action.

1.5.7. The director(s) of the respondent in bringing the action acted outside the scope and ambit of section 137(2)(b) of the Companies Act 71 of 2011 (the “Act”).

1.5.8. Consequently the bringing of the action is void as contemplated under section 137(4) of the Act.

1.5.9. In the premises, the plaintiff did not resolve and therefore lacked *locus standi* to have instituted the action and on that basis the particulars of claim as read with annexures “A” and “C” cannot sustain a cause of action.’

[4] The special plea was answered by the following replication:

‘10.1 The plaintiff denies the defendants’ allegation that the plaintiff does not have locus standi and puts the defendants to the proof thereof.

10.2 . . . the plaintiff further pleads as follows:

10.2.1 On the 25th of November 2020, Mr Schutte of Karien Schutte Attorneys, forwarded to Mr Essop, who at all material times represented the business rescue practitioner, the draft particulars of claim in this action.

10.2.2 Mr Essop was requested by Mr Schutte to obtain the business rescue practitioner’s consent to proceed with the issuing of the action.

10.2.3 On the 2nd of December 2020, Mr Essop confirmed to Mr Schutte that the business rescue practitioner had consented to the institution of the action.

10.2.4 Karien Schutte Attorneys accordingly proceeded with the issuing of summons.

10.2.5 However, it later transpired that in confirming consent to proceed, Mr Essop had confused this action with another matter, which was also dealt with by Karien Schutte Attorneys, also on behalf of the plaintiff.

10.2.6 The business rescue practitioner has upon learning the correct situation, and after considering the merits of the plaintiff's case against the defendants, mandated and authorised the action by plaintiff against the defendants, for which purpose the business rescue practitioner on 3 March 2021 has signed a written power of attorney. The power of attorney is attached to the plaintiff's reply in terms of Uniform Rule 7(1) and is repeated here, as if specifically pleaded.

10.2.7 The business rescue practitioner has also ratified the steps already undertaken by the plaintiff in this action.

10.3 The plaintiff accordingly denies the defendants' allegation that the plaintiff does not have locus standi and puts the defendants to the proof thereof.

10.4 Alternatively, the plaintiff pleads that the institution of the action was ratified in terms of Section 137(4) of the Companies Act 71 of 2008 by the business rescue practitioner.

10.5 Section 137(4) . . . provides:

If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.

. . .'

[5] We have quoted *in extenso* from the pleadings to show that the high court appears to have misapprehended the enquiry. It approached the enquiry on the basis of the general rule that 'a contract or agreement which is expressly prohibited by statute is illegal and null and void' (*Neugarten and Others v Standard Bank of South Africa Ltd*¹). However, with respect to the high court, that was to misconstrue the enquiry.

[6] *Locus standi in iudicio* is an access mechanism controlled by the court itself.² 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.³ Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant's interest in the

¹ *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A) at 808D - 809E.

² *Watt v Sea Plant Products Bpk* [1998] 4 All SA 109 (C) at 113H.

³ *Four Wheel Drive CC v Leshni Rattan NO* [2018] ZASCA 124 para 7.

proceedings.⁴ The sufficiency of the interest depends on the particular facts in any given situation.⁵ The real enquiry being whether the events constitute a wrong as against the litigant.⁶

[7] The high court failed to consider whether, in each instance, the claim asserted was indeed in the nature of an 'action' that 'requires the approval of the practitioner' as contemplated by the section. Absent that determination, the special plea could not succeed. This, because where *locus standi* is challenged, it must be dealt with on the assumption that all allegations of fact relied upon by the party whose *locus standi* is attacked are true.⁷ Properly construed, as the debate at the bar in this Court appeared to demonstrate, the question perhaps is rather whether the claims as pleaded are bad in law. But, that is not before us for the present and need not detain us.

[8] On the strength of its finding on voidness, the high court concluded that *ex post facto* ratification was not possible. As the former has been found to be wanting, the latter must suffer a similar fate. In any event, it is clear from the common cause facts that the practitioner had consented to the institution of the action. Significantly, in this regard, well before the institution of the action the appellant's attorney sought the practitioner's consent. On 2 December 2020, the practitioner's representative confirmed that the practitioner had consented to the institution of the action. Thereafter, the appellant's attorney proceeded to issue the summons.

[9] Approximately two months later, there was an intimation that the practitioner may not have consented because his representative had confused this action with another. However, once the practitioner became aware that there may have been some confusion, he signed a power of attorney authorising the institution of the proceedings. Accordingly, the members of the appellant had the requisite approval of the practitioner to institute the action against the respondents.

⁴ *Wessels en Andere v Sinodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk*, OVS 1978 (3) SA 716 (A) at 725H; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 11 (A) at 388B-E.

⁵ *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534D; *Gross and Others v Pentz* 1996 (4) SA 617 (A) 632 B-D.

⁶ *Muller v De Wet NO & Others* 2001(2) SA 489 (W).

⁷ *Kuter v SA Pharmacy Board* 1953 (2) SA 307 (T) at 313; *Letseng Diamonds Limited v JCI Limited and Others* [2007] ZAGPHC 119 para 13.

[10] It follows that the conclusion reached by the high court that the appellant lacked *locus standi* to approach the court for the relief sought cannot be supported. It remains to observe that there is little to commend the approach of the high court. In confining itself to the single issue, as it did, the approach of the high court ‘opened the door to a fractional disposal of proceedings and the piecemeal hearings of appeals on each part so disposed of’.⁸

[11] In the result:

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and replaced with the following:
‘The special plea of lack of *locus standi* is dismissed with costs.’

VM PONNAN
JUDGE OF APPEAL

F KATHREE-SETILOANE
ACTING JUDGE OF APPEAL

⁸ *Theron NO and Another v Loubser NO and Others: In Re: Theron NO and Another v Loubser and Others* [2013] ZASCA 195; [2014] 1 All SA 460 (SCA); 2014 (3) SA 323 (SCA) para 19.

Appearances

For appellant:

PJ Greyling

Instructed by:

Karien Schutte Attorneys, Johannesburg

Maree Partners, Bloemfontein

For respondent:

SJ Myburg with E Mann

Instructed by:

Ngwane Mamod Inc, Johannesburg

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