THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 490/2016

In the matter between:

POLOKWANE LOCAL & LONG DISTANCE TAXI ASSOCIATION	**APPELLANT**

and

LIMPOPO PERMISSIONS BOARD	**FIRST RESPONDENT**
THE PROVINCIAL TAXI REGISTRAR, LIMPOPO PROVINCE	**SECOND RESPONDENT**
MEC: DEPARTMENT OF ROADS AND TRANSPORT, LIMPOPO PROVINCE	**THIRD RESPONDENT**
RSA TAXI ASSOCIATION	**FOURTH RESPONDENT**

Neutral citation: *Polokwane Taxi Association v Limpopo Permissions Board and others* (490/2016) ZASCA 44 (30 March 2017)

Coram: Maya AP and Willis, Mbha and Mocumie JJA and Fourie AJA

Heard: 23 February 2017

Delivered: 30 March 2017

Summary: Court Practice: *locus standi*: whether appellant could bring the application: whether appellant had direct and substantial interest in the subject matter.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J, Pretorius and Phatudi JJ sitting as court of appeal):

1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel, where employed.
2. The order of the full court is set aside and substituted with the following order:

'(a) The appeal is upheld with costs

(b) The order of the court a quo is substituted with the following order –

i) The applicant has the necessary *locus standi in iudicio* to institute the application.

ii) The point *in limine* is dismissed with costs.

(c) The application is referred back to the court a quo for consideration of its merits.'

JUDGMENT

Mbha JA (Maya AP and Willis, Mbha, Mocumie JJA and Fourie AJA concurring):

[1] This appeal is against the judgment of the full court of the Gauteng Division of the High Court, Pretoria (Mavundla J with Pretorius and Phatudi JJ concurring) made on

29 January 2016, upholding the finding of the high court of the same division (AA Louw J), that the appellant lacked the necessary *locus standi* to have instituted the application proceedings in question. Special leave to appeal to this court against the aforementioned judgment and order of the full court was granted by this court on 3 May 2016.

[2] During 2012 the appellant, a taxi association duly registered in terms of the Limpopo Interim Passenger Transport Act, 4 of 1999 (the Act), instituted urgent application proceedings in the high court. The appellant sought certain interim relief pending review, and the setting aside of a ruling made by the first respondent, the Limpopo Permissions Board (the Board), on 2 March 2012. In terms of this ruling, which was conveyed to the appellant on 2 April 2012, the appellant's members who are taxi owners and operators, who wished to operate on the route from Polokwane to Johannesburg and return, could do so only if they became members of the fourth respondent, the RSA Taxi Association, a taxi association registered in terms of the Act.

[3] The appellants sought to review and set aside the above ruling on the basis that it compelled the appellant's members to join the fourth respondent, should they wish to operate the aforesaid route, in violation of the appellant's members' right to freedom of association which is guaranteed in s 18 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

[4] The application proceeded as an opposed matter. The high court, having raised the issue of the appellant's standing *mero motu*, dismissed the application after finding that the appellant failed to make out a case for the relief it sought because it lacked the necessary standing. In arriving at this conclusion, the high court reasoned that as an operating licence is a personal right which is issued to a specified person and in respect of a specific vehicle and time, only the owner or operator of an operating licence has an inalienable direct and substantial personal legal interest in any issue or dispute arising from that operating licence. Accordingly, it is such owner or operator only who can enforce the rights conferred by such licence.

[5] The high court then concluded that the appellant, a *universitas*, which is a separate legal entity, could not enforce the rights of its members which they possess by reason of their membership to the association, and did not institute the proceedings to protect or enforce an interest which it had as an association. Instead, it had sought rather to protect or enforce rights acquired and held by its members in their personal capacities. The high court also held that all of the appellant's members mentioned in the annexure to the founding affidavit should have been cited as applicants and, not only be required to individually prove their operating licences, but also fully set out why relief in respect of their specific licences should be granted.

[6] Unhappy with the outcome the appellant appealed, with leave of the high court, to the full court. The sole issue for determination by the full court was whether the appellant had *locus standi* to litigate on behalf of its members in circumstances where

the individual members have not in their individual capacity instituted the action nor filed verifying affidavits.

[7] In determining the appeal, the full court agreed with the high court that the appellant, being a *universitas*, was a legal entity capable of suing and being sued in its own name, and possessed rights independent of its members. It also held that in order to bring the application on behalf of its members, the appellant had to show that it had a direct and substantial interest in the outcome of the proceedings. In other words, what was required was that it had a legal interest in the subject matter of the action which would be prejudicially affected by the judgment.

[8] The full court relied on the matter of *Ex-TRTC United Workers Front & others v Premier, Eastern Cape Province*[1], to find that the appellant lacked a direct and substantial interest in the subject matter Van Zyl J stated that:

'The second consideration … is whether there exists a sufficient nexus between the individual members in their capacities as members of the association, and the right that forms the subject matter of the litigation. Applied to the present matter, the first plaintiff did not, in my view institute these proceedings to protect or enforce an interest which it had as a body or organisation. Stated otherwise, it does not propose to enforce the rights of its members which they possess by reason of their membership of the association. As stated earlier, the right to claim damages from the defendant for the alleged breach of contract is a personal right that vests in each one of the members of the association individually. The right which they pursue in these proceedings

[1] *Ex-TRTC United Workers Front & others v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB) para 25.

therefore exists independently of their membership of the first plaintiff… It did not arise by virtue of their membership of the first plaintiff.'

[9] The full court went on to find that the appellant did not institute the proceedings with a view to assert or protect an interest which vested in it as an association. Furthermore, the full court held that the granting of a licence to an individual was not dependent on his membership to the appellant and, as the latter had not alleged any right in respect of the licences of its members, it could not assert any such right to any particular route in its individual capacity nor could it do so on behalf of its members.

[10] In relation to s 38(*e*) of the Constitution, the full court held that a party seeking to rely on this section had the onus of persuading the court that it possessed such a right and must make specific averments, buttressed with facts, that this right was threatened and required protection. However, in this matter the appellant did not acquit itself of the onus resting on it to show that the rights of its members were so intertwined with its rights and that as such, that it had a legal interest in bringing these proceedings and possessed the standing to do so.

[11] Although it is so that this appeal concerns only the rulings and findings in respect of the judicial review, in which both the high court and the full court agreed that the appellant was not possessed of standing, before us the fourth respondent attempted, however, to raise a preliminary point in limine namely, that the appeal is moot. This point was raised on the basis that since the appellant does not appeal the second ground upon which the high court dismissed the review application, namely that the

relief sought was vague, the dismissal of the review must in fact stand even if this court were to uphold the appeal on the issue of *locus standi*.

[12] This point which the fourth respondent's counsel, quite correctly, did not pursue with much vigour is clearly misconceived and cannot succeed. First, a simple reading of Louw J's judgment reveals that no such order was in fact made. Furthermore, reference to any vague, relief was clearly no more than a remark made in passing. Secondly, both the high court and the full court clearly discerned that the only issue for determination related to the appellant's standing to institute the proceedings. Likewise, this remains the single issue for determination in this appeal.

[13] The point of mootness raised fails on another ground. S 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013 provides that:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'.

It is trite that this court has a discretion which must be exercised according to what justice requires, deciding issues on appeal even where they no longer present existing or live controversies.[2] A prerequisite for the exercise of this discretion is that any order which the court may make will have some practical effect on the parties or on others.

[2] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para [9] – [11]; *South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others* 2016 (2) SA 522 (SCA); *Legal Aid South Africa v Magidiwana & others* 2015 (6) SA 494 (CC); *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate Pty (Ltd) & others* 2014 (1) SA 521 (CC).

[14] The full court's decision that a duly registered taxi association in the appellant's position, lacks standing to bring proceedings on behalf of its members holds potentially prejudicial future repercussions for the entire taxi industry as a whole, should the import of the decision remain unchallenged.

[15] The question whether or not the appellant was possessed of standing to institute the proceedings must first be determined with reference to the specific relief it had sought. The relevant paragraphs of the Notice of Motion read as follows:

'5. That the decision of first respondent to force those members of applicant who are entitled to travel on the route from Polokwane to Johannesburg and return, to become members of the fourth respondent prior to being entitled to operate such mini-bus taxi service, is declared to be invalid and set aside;

6. That the first respondent is ordered to issue to applicant an amended route registration to include to route from Polokwane to Johannesburg and return;

7. That the first respondent is ordered to issue licences to applicant's members who have previously operated a mini-bus taxi service on the route from Polokwane to Johannesburg and return, to include the route in its operating licences, without having to register with the fourth respondent as members;

8. Alternatively to prayers 6 and 7, that the decision that applicant's members who have previously operated a mini-bus service on the route from Polokwane to Johannesburg and return, have to join the fourth respondent as members, before being able to do so in future, be referred back for reconsideration with the instruction that the first respondent may not impose a condition to force members of applicant to join fourth respondent, prior to operating a mini-bus taxi service.'

[16] As has been mentioned earlier, it is not disputed that the appellant is a duly registered taxi association. Both the high court and the full court found that it is a *universitas* with legal standing distinct from its members, and with the capacity to sue and be sued in its own name. This categorisation of the appellant was not challenged by any of the parties. It is also common cause that one of the Board's functions is to register a taxi association to a specific allocated route through a register referred to as "RAS" (Route Allocation System).

[17] In light of the aforegoing, it is clear that the full court did not give weight to the full import of the relief sought in paragraph 6 of the Notice of Motion, in which the appellant sought an order compelling the first respondent to register and allocate to appellant an amended route from Polokwane to Johannesburg. This is self-standing relief that was sought by the appellant in its own right without any reference whatsoever to its members.

[18] Clearly, the appellant has a direct and substantial interest in the outcome of the relief sought in this paragraph, which accords fully with the reasoning in the matter of *AAIL (SA) v Muslim Judicial Council,*[3] where Tebbutt J explained the concept of a direct and substantial interest in a matter, in the following terms:

'It is clear that in our law a person who sues must have an interest in the subject-matter of the suit and that such interest must be a direct one (see *Dalyrymple & Others v H Colonial*

[3] *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) & another (SA) v Muslim Judicial Council (Cape) and others* 1983 (4) 855 (C) at 863H-864A.

Treasurer 1910 TS 372). In *P E Bosman Transport Works Committee & Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804B, ELOFF J states that:

"It is well settled that, in order to justify its participation in a suit such as the present, a party... has to show that it has a direct and substantial interest in the subject-matter and outcome of the application".

The learned Judge cited with approval the view expressed in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O), approved by CORBETT J in *United Watch & Diamond Co (Pty) Ltd & Others v Disa Hotels Ltd & Another* 1972 (4) SA 409 (C), that the concept of a "direct and substantial interest" connoted "an interest in the right which is the subject-matter of the litigation". Corbett J went on to say at 415H:

'This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which would be prejudicially affected by the judgment of the Court'.

[19] Regard being had to the content of paragraph 6 in the Notice of Motion, it cannot be disputed that the appellant has a direct and substantial interest in the order it seeks in terms of this paragraph. In other words, the appellant had the right to institute the proceedings. On this ground alone, this appeal ought to succeed.

[20] With regard to the relief the appellant sought on behalf of its members as contained in paragraphs 5, 7 and 8 of the Notice of Motion, it is significant that the appellant's averment in the founding affidavit, that it was duly authorised to institute the proceedings on behalf of its members by virtue of a special power attorney duly signed by the members and attached thereto, was neither challenged nor disputed. The full court ignored this important fact and did not pronounce itself in any way on the

significance of such authorisation. This authorisation cried out for attention by the full court. Clearly, this authorisation vested the appellant with the necessary standing to institute the proceedings on behalf of its members.

[21] The full court's finding that the appellant lacked *locus standi* on the basis that the granting of a licence to an individual was not dependent on his membership of the appellant, and that the right to a particular route arose from the allocation of that licence, is wrong on two fronts. First, in terms of s 39(11) of the Act '[n]o permission may be granted unless the applicant is a member of an association that has been registered by the Registrar under s 29 and the application is supported in writing by the association, or the Registrar certifies in writing that the applicant qualifies as a registered non-members under that section and has applied for registration as such'. To this extent the issuing of a taxi licence is dependent on membership of an association. Secondly, the appellant in its application for judicial review, relies upon the fact that this is a decision that affects its members. The focus of the enquiry by the full court should therefore have been the standing of the appellant and should not have been on ancillary issues.

[22] The full court overlooked the fact that the relief relating to the setting aside of the Board's decision compelling the appellant's members to join and belong to the fourth respondent if they wished to operate on the aforementioned route, was predicated on an alleged infringement of the appellant's members' right to freedom of association as contained in the Bill of Rights. This right, contained in s 18 of the Constitution, provides that everyone has the right to freedom of association and the founding affidavit makes

specific allegations and references to the first respondent's actions thwarting the appellant's members' rights to freedom of association.

[23] The full court further erroneously failed to recognise that the appellant was, in terms of s 38(*e*)[4] of the Constitution, within its rights to approach a competent court as an association acting in the interest of its members, alleging that their constitutionality guaranteed right to freedom of association has been infringed or threatened. In terms of these provisions an association acting in the interest of its members 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 then grant appropriate relief.

[24] The relief of review sought by the appellant to set aside the impugned decision which prejudicially affects the rights of its members falls squarely within the ambit of s 38(*e*). Accordingly, the appellant had the necessary standing to have instituted the proceedings on behalf of its members to protect their constitutional rights.

[25] The full court misdirected itself by ignoring the import of s 38(*e*) of the Constitution which refers specifically to cases in which a right in the Bill of Rights is infringed or threatened. It instead relied on the matter of *Ex-TRTC United Workers Front*

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[4] Section 38(*e*) of the Constitution provides:
'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—
…
…
…
…
(e) an association acting in the interest of its members.'

v Premier, E Cape by requiring that the appellant show that it has a direct and substantial interest in the outcome of the proceedings to wit, a legal interest in the subject matter of the application that would be prejudicially affected by the judgment. In my view, *Ex-TRTC United Workers Front v Premier, E Cape* is distinguishable. The full court did not consider the full import of s 38(*e*) of the Constitution as a mechanism conferring statutory standing on an association similar to the appellant, acting on behalf of its members. Moreover, the Constitutional Court has cautioned against the adoption of a narrow approach to the issue of standing in constitutional cases. In *Ferreira v Levin NO & others*,[5] Chaskalson P explained as follows in relation to s 7(4)(*b*) of the interim Constitution (the precursor to s 38):

'whilst it is important that this court… should devote its scarce resources to issues that are properly before it, I can 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'.

The courts are impelled to adopt a broad and liberal approach to standing when interpreting s 38(*e*) of the Constitution.

[26] The full court adopted too restricted an approach in determining standing. The appeal must therefore succeed. As the merits of the review remains extant, it follows that this matter must be referred back to the high court for finalisation. It is not necessary to consider the alternative ground of appeal namely, whether the appellant could rely on the provisions of s 38 of the Constitution in asserting for judicial review under PAJA.

[5] *Ferreira v Levin No & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC).

[27] I accordingly make the following order:

‘1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel, where employed.

2. The order of the full court is set aside and substituted with the following order:

‘(a) The appeal is upheld with costs.

(b) The order of the court a quo is substituted with the following order –

(i) The applicant has the necessary *locus standi in iudicio* to have instituted the application.

(ii) The point *in limine* is dismissed with costs.

(c) The application is referred back to the court a quo for consideration of its merits.’

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B H Mbha

Judge of Appeal

APPEARANCES:

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