THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 574/10

In the matter between:

SHEREEN CASSIM	**First Appellant**
NEILOPAHR CASSIM	**Second Appellant**

and

VOYAGER PROPERTY MANAGEMENT (PTY) LTD	**First Respondent**
BELLAIR MANAGEMENT SERVICES t/a BMS ESTATE AGENTS	**Second Respondent**
DEON J J STRAUSS N O	**Third Respondent**
JUAN LE FEVRE N O	**Fourth Respondent**

In Re:

SHEREEN CASSIM	**First Plaintiff**
NEILOPAHR CASSIM	**Second Plaintiff**

and

ST MORITZ BODY CORPORATE	**First Defendant**
VOYAGER PROPERTY MANAGEMENT (PTY) LTD	**Second Defendant**
BELLAIR MANAGEMENT SERVICES t/a BMS ESTATE AGENTS	**Third Defendant**
DEON J J STRAUSS N O	**Fourth Defendant**
JUAN LE FEVRE N O	**Fifth Defendant**
VERONICA SWANEPOEL N O	**Sixth Defendant**

Neutral citation:	***Cassim v Voyager Property Management (Pty) Ltd* (574/10) [2011] ZASCA 143 (23 September 2011)**
Bench:	**CLOETE, PONNAN, SHONGWE, LEACH and SERITI JJA**
Heard:	**30 AUGUST 2011**
Delivered:	**23 SEPTEMBER 2011**
Summary:	**Sectional title scheme – *locus standi* of unit owner to institute proceedings on behalf of body corporate – s 41(1) of the Sectional Titles Act 95 of 1986 – owner obliged to apply for a *curator ad litem* to investigate grounds and desirability of instituting proceedings.**

ORDER

On appeal from: KwaZulu-Natal High Court (Durban)
(Van der Reyden J sitting as court of first instance):

(a) The appeal is dismissed.

(b) The first respondent's application to supplement the record is dismissed with costs.

(c) Brink Property Administration is directed to reimburse the appellants for such portion of the costs incurred by the appellants as relate to the procuring of an additional copy of the appeal record.

(d) The appellants are ordered to pay the costs of the appeal save for those costs referred to in paragraphs (b) and (c).

JUDGMENT

PONNAN JA (CLOETE, SHONGWE, LEACH and SERITI JJA concurring):

[1] During 1992 the sisters Cassim - Shereen, the first appellant and Neilopahr, the second appellant – together with their now deceased mother, purchased three sectional title units in what they believed was a prestigious block of flats known as St Moritz, which is located at the corner of John Milne and West Streets in Durban. The building which consists of 88 flats and three shops appealed to them because of its three street frontages, proximity to shops, restaurants, the beach and the bus route.

[2] By 2001, however, the appellants, who lived in Johannesburg and who had purchased their units as an investment, started to become concerned at what they perceived to be mismanagement of the building. When their endeavours at securing information from the managing agent of the building and its body corporate came to nought they launched a series of applications in the Durban High Court. Of a veritable avalanche of court applications only three, by way of background, are alluded to. The first application sought an order against the St Moritz body corporate that it hold an annual general meeting (the AGM) on 13 November 2004 to be chaired by a person to be agreed by the parties or, failing agreement, to be appointed by the President of the Law Society of KwaZulu-Natal. The second sought an order that the appellants be entitled to be nominated as trustees and to vote at that meeting. What prompted the second application was an alleged dispute between them and the body corporate as to whether they were in default with the payment of their levies in respect of their units. If so, so contended the body corporate, they were precluded in terms of the body corporate rules from participating in the AGM. The third application sought an order that an administrator be appointed to the body corporate in terms of s 46 of the Sectional Titles Act 95 of 1986 (the Act) with such powers as were to include the power to appoint a registered auditor to conduct a forensic audit and to scrutinise the books and financial affairs of the body corporate from June 1999.

[3] On 13 November 2004 and pursuant to an order of court the AGM of the body corporate was held. It was chaired by an attorney, Mr Lomas-Walker. That meeting came to be adjourned to 29 January 2005. On the latter date both appellants were elected as trustees of the St Moritz body corporate. The others who also came to be elected members were Mr J J Strauss, Mr J Le Fevre and Ms V Swanepoel.

[4] On 26 April 2005 the three applications were consolidated and referred to trial with the notice of motion in each case to stand as the summons. In due course a declaration came to be filed in the consolidated action. The declaration cited the St Moritz Body Corporate (the Body Corporate) as the first defendant, Voyager Property

Management (Pty) Ltd (Voyager) as the second defendant, the managing agent of the building, Bellair Management Services (Bellair) as the third defendant and Strauss, Fevre and Swanepoel, the other three trustees aside from the appellants elected at the AGM, as the fourth, fifth and sixth defendants, respectively.

[5] Of the seven claims advanced in the declaration, only three, namely claims C, D and E are relevant to this appeal. To the extent here relevant, they read:

' **7.**

CLAIM C

7.1 Both in terms of the Sectional Titles Act and Management Rule 35(2), the Fourth, Fifth and Sixth Defendants are obliged to make all or any of the books of account and records of the First Defendant available for inspection to owners.

7.2 At the Annual General Meeting of the First Defendant on 29 January 2005, the First and Second Plaintiffs were appointed as trustees.

7.3 Management Rule 35(1) and the Sectional Titles Act obliges the trustees to cause proper books of account and records to be kept so as fairly to explain the transactions and financial position of the First Defendant including:-

(a) a record of the assets and liabilities of the First Defendant.

(b) a record of all sums of money received and expended by the First Defendant and the matters in respect of which such receipt and expenditure occurred.

7.4 In order to comply with their obligations referred to in paragraph 8.3 above, the Plaintiffs during the period from 2 February 2005 requested the Defendants to furnish them with copies of the documents referred to in . . . in order to comply with their obligations as trustees.

7.5 In spite of such requests, the Defendants have to date failed and/or refused to furnish Plaintiffs with copies of the documents referred to in Schedule "A".

8.

CLAIM D

. . .

8.5 Without the knowledge of, consultation with and approval of approximately 32 owners and members of the First Defendant including the Plaintiffs and on 2 March 2004, the Fourth and Fifth Defendants entered into a loan agreement with the Second Defendant, in terms of which agreement, the Fourth and Fifth Defendants allegedly borrowed undisclosed sums of monies on behalf of the First Defendant from the Second Defendant.

8.6 As at 2 March 2004, the Fifth Defendant was not a trustee duly appointed at an Annual General Meeting and consequently he had no authority to enter into the loan agreement on behalf of the First Defendant nor could he bind the First Defendant thereto.

8.7 In terms of the Loan Agreement, . . . the Second Defendant continues to advance monies to the First Defendant on a monthly basis to the prejudice of 32 of the members of the First Defendant including the Plaintiffs.

8.8 The Loan Agreement concluded between the First and Second Defendants on 2 March 2004 is invalid and of no force and effect, alternatively void for vagueness, further alternatively, voidable at the instance of the First Defendant and falls to be set aside on the grounds as appear in paragraphs 8.9.1 to 8.14 inclusive hereunder.

. . .

9.

CLAIM E

9.1 (i) Every owner is a member of the First Defendant by virtue of the provisions of Section 36 of the Act.

(ii) By virtue of the provision of Regulation 35(i) of the Act read with the Management Rule 35(i), the trustees shall cause proper books of account and records to be kept so as fairly to explain the transactions and financial position of the Body Corporate including:-

(a) A record of the assets and liabilities of the Body Corporate.

(b) A record of all sums of money received and expended by the Body Corporate and the matters in respect of which such receipt and expenditure occur.

(iii) The Plaintiffs were appointed trustees at the AGM of 29 January 2005 and are both owners and members of the First Defendant.

(iv) On 2 March 2004 the Second Defendant concluded the Loan Agreement with the First Defendant.

(v) Plaintiffs as trustees and in compliance with their duties of a fiduciary nature, are obliged to take this action on behalf of the First Defendant and pursuant to the provisions of both Sections 35 and 41 respectively of the Act.

(vi) By virtue of the unlawful and irregular conduct on the part of the Fourth and fifth Defendants as referred to in paragraph 11 hereunder, the Plaintiffs as trustees are obliged to act in the absence of the full board of trustees.

9.2 As owners and trustees and members of the First Defendant, the Plaintiffs are entitled to statements of accounts with supporting documentation in respect of all the financial transactions for the period of 2 March 2004 to date of trial, in terms of the Loan Agreement concluded between the First Defendant and Second Defendant including . . .

WHEREFORE the Plaintiffs pray for orders as follows:-

. . .

CLAIM C

3. Compelling the Second, Third, Fourth, Fifth and Sixth Defendants to furnish the Plaintiffs with access to copies of the documents listed in Schedule "A" annexed hereto.

CLAIM D

4.1 Declaring that the Loan Agreement concluded between the First and Second Defendants on 2 March 2004 is invalid and of no force and effect.

4,2 Cancelling the Loan Agreement concluded between the First and Second Defendants on 2 March 2004.

4.3 The First and Third Defendants be interdicted from paying any monies over to the Second Defendant and the Second Defendant be interdicted from receiving any monies from the First or Third Defendants.

4.4 Interdicting and restraining the Second Defendant from advancing and or lending any further monies to the First Defendant in terms of the Loan Agreement concluded between the parties on 2 March 2004 and interdicting and restraining the First Defendant from receiving any further loan and/or monies from the Second Defendant.

CLAIM E

5. Compelling the First and Second Defendant to render a statement of account with supporting documentation to the Plaintiffs in respect of all the financial transactions for the period 2 March 2004 to 28 February 2005 in terms of the Loan Agreement concluded between the parties on 2 March 2004, inclusive of all payments of Value Added Tax by Second Defendant to service providers of First Defendant as contemplated in Clause 18.2 of the Loan Agreement and documentation of the proof of such reclaimed VAT estimated to be R400 000-00.

. . .

8. Compelling the First, Second, Third, Fourth, Fifth and Sixth Defendants to render a statement of account to the Plaintiffs in respect of:-

8.1 All levies collected for the period July 1999 to date of trial on behalf of the First Defendant in respect of all 88 units in the St Moritz building.

8.2 All payments supported by documentation made to the Municipality in respect of electricity and water accounts on behalf of the First Defendant for the period July 1999 to date of trial.

8.3 All payments supported by documentation made to the Municipality in respect of rates on behalf of the First Defendant for the period July 1999 to date of trial.

8.4 In respect of the Loan Agreement concluded between the First and Second Defendant on 2 March 2004:-

(i) All loan amounts and monthly loans advanced by Second Defendant to First Defendant for the period March 2004 to date of trial.

(ii) All interest payments made by First Defendant to Second Defendant for the period March 2004 to date of trial.

(iii) All levies paid over by First Defendant to Second Defendant for the period March 2004 to date of trial.

(iv) All amounts due by First Defendant to Second Defendant as at 13/11/04, 29/01/05 and 08/03/05 inclusive of all charges.

(v) Disbursements and/or raising fees and/or administrative fees and/or collection commission paid by the Second Defendant to Third Defendant for the period March 2004 to date of trial.

(vi) All amounts paid by Second Defendant to Fourth and Fifth Defendants in respect of interest referred to in Clause 1.1.5 of the Loan Agreement dated 2 March 2004.

(vii) All VAT recovered from service providers acting on behalf of First Defendant such as rates, electricity, classic decorations, plumbing, Titan Lifts etc.'

[6] In its plea to the declaration Voyager denied that the appellants had locus standi to institute the proceedings in their capacity as trustees of the body corporate. It asserted, in the alternative, that to the extent they may have had *locus standi* when they had commenced the proceedings, that changed on the 29 August 2005 when by order of court the entire board of trustees was suspended.

[7] The appellants' declaration also elicited a special plea from the third, fourth and fifth defendants in these terms:

‘ . . .

2.

The said Defendants plead that the Plaintiffs are non suited in this matter on the grounds that

2.1 The Plaintiffs cite themselves in their personal capacities in their numerous applications and actions.

2.2 Accordingly the Plaintiffs were bound to take action against the said Defendants in terms of Section 41 of the Sectional Titles Act No. 96 of 1986, but failed to do so.

3.

The Plaintiffs claim in their Amended Declaration that they acted as trustees but such averment does not assist them, because

3.1 the Plaintiffs acted as trustees for the seven month period 29 January 2005 to 29 August 2005 only and the majority of their legal challenges occurred outside this period of time.

3.2 the Plaintiff failed to plead that in acting as trustees they obtained the authority of the majority of trustees to so act in terms of Section 22 of the Management Rules.

4.

The Plaintiffs claim in their amended Declaration that they in their capacity as trustees, were obliged to launch the actions and application they did, on behalf of the Body Corporate, the First Defendant.

5.

Since it is evident that the Plaintiffs acted in their personal capacities they were obliged to comply with section 41 of the Sectional Title Act but failed to do so and in addition contrary to the requirements of Section 41 of the Act, they proceeded to sue the Body corporate and claim costs against it, the very body they claim to protect.

. . .

8.

In the premise the Plaintiffs do not have the locus standi to bring their several legal challenges against the Defendants.

9.

WHEREFORE the Third, Fourth and Fifth Defendants pray that the Plaintiffs several actions and application be dismissed with costs.'

[7] The consolidated applications proceeded to trial before Van der Reyden J. On 7 August 2007 Voyager successfully applied as a matter of urgency for the issue of the appellants' locus standi to be adjudicated as a separated issue in terms of Rule 33(4). After certain other legal skirmishes, none of which are relevant for present purposes, the learned judge held on 11 June 2010:

'1. The First and Second Plaintiffs lack *locus standi* in respect of all claims in which they were obliged but failed to follow the procedure provided for in section 41 of the Sectional Titles Act and more specifically lack *locus standi* in respect of Claims C, D and E.

2. The First and Second Plaintiffs are to pay the Second, Third, Fourth and Fifth Defendants' costs pertaining to the Rule 33(4) application and the hearing of argument on the issue of *locus standi*.'

Voyager opposed the appeal as did Strauss and Le Fevre. Ms Swanepoel took no part in the proceedings either in this court or the one below. A further party, Brink Property Administrators (Brink), who had been appointed as the managing agent of the body corporate on 12 March 2006, also sought to oppose the appeal. I shall revert to Brink and its participation in this appeal later in this judgment.

[8] The present appeal with the leave of the learned trial judge seeks to assail the conclusion that the appellants lacked *locus standi* in respect of claims C, D and E. In my view, for the reasons that follow, it is unassailable.

[9] Each of the appellants only served as a trustee of the body corporate for a fairly brief period from 29 January 2005, when they were elected to that office, until 29 August 2005, when by order of the high court all of the trustees (including the appellants) were suspended from continuing in office. That order still remains extant. Once it issued, each could no longer thereafter act *qua* trustee. The effect was that they could not thereafter prosecute the action that had been instituted to finality in that capacity. To the extent that they persisted in the action each could only have done so in her capacity as an owner of a unit in the sectional title scheme. Indeed that was the thrust of the argument advanced before this court. It is thus necessary to consider whether they could have done so *qua* owner.

[10] Section 41 of the Act, headed: 'Proceedings on behalf of bodies corporate', provides:

'(1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36(6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2)*(a)* Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under para *(b)* will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court for an order appointing a *curator ad litem* for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The Court may on such application, if it is satisfied—

(a) that the body corporate has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in ss (3), or confirm the appointment of the *curator ad litem* for the body corporate, and issue such directions as it may deem necessary as to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the *curator ad litem*.'

[11] The jurisdictional facts provided for in s 41(1) are that an owner be of the opinion that he, she or it and the body corporate 'have been deprived of any benefit in respect of a matter mentioned in s 36(6)'. Section 36(6) provides:

'The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of -

(a) any contract made by it;

(b) any damage to the common property;

(c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;

(d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; . . . '

[12] In *Wimbledon Lodge (Pty) Ltd v Gore NO & others* 2003 (5) SA 315 (SCA) Schutz JA stated (para 13):

'The jurisdictional facts that an owner must establish in order to entitle him to apply for the appointment of a *curator* are set out in s 41(1). They are:

1. The owner must hold an opinion.

2. The opinion must be either (*a*) that he and the body corporate have suffered damages (again *sic*) or loss or (*b*) that he and the body corporate have been deprived of a benefit in respect of a matter mentioned in s 36(6).

3. The body corporate has not instituted proceedings for recovery.'

The first two requirements proved uncontentious. In argument before us it was accepted that the appellants held the opinion that they and the body corporate had suffered damage or loss in consequence of the matters complained of by them. That leaves the third requirement. That it should be a requirement is a necessary counterpart to the sections of the Act divesting individual owners of control and vesting it in the body corporate (*Wimbledon Lodge* para 14). The enquiry envisaged is a purely factual one.

On the facts here present the body corporate has not instituted the proceedings. That one would have thought would be the end of the enquiry. But, says the appellants, that requirement could not be met: first, because the appellants and the other trustees fell into two divergent camps who were at loggerheads with each other, accordingly, so the argument went, it could hardly be expected of the appellants in those circumstances to call upon the body corporate to institute the proceedings; and, second, the body corporate is for all practical purposes an empty shell.

[13] As to the first: it appears to me that the section finds application precisely when there is disharmony and disunity in the body corporate. The more dysfunctional the body corporate, the greater, I dare say, the need for a curator. On the view that I take of the matter, the argument advanced by and on behalf of the appellants misconstrues the section. The section does not require an owner to cause the body corporate to act in a particular way if the latter is unwilling to do so. All that is envisaged is for an owner to effect service of a notice on the body corporate calling upon it within the stated period to institute the contemplated proceedings. Should it fail to do so the envisaged remedy available to the owner is not to compel compliance with the notice but rather to approach the court for the appointment of a *curator ad litem* for the purposes of instituting and conducting the proceedings on behalf of the body corporate.

[14] As to the second: in terms of s 36(6) of the Act the body corporate has perpetual succession. And whatever its current limitations, at the time that the proceedings commenced it was fully functional and there was therefore no impediment to service of the notice being effected upon it. It follows that there was no permanently existing impossibility then in relation to calling upon it to carry out such obligations and duties as were imposed upon it by the Act. That may have changed with the grant of the order suspending all of the trustees from office. Since then the body corporate has been dormant and therefore unable to act. In those circumstances there is much to be said for the suggestion that there would be little point in calling upon the body corporate to institute the proceedings. Were that to be the case the maxim *lex non cogit ad impossibilia* (the law does not compel the performance of impossibilities) could be

invoked (*Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 634E – 635A). There is authority for the proposition that the maxim is applicable even in relation to the performance of statutory requirements (*Ex Parte Mackenzie NO* 1960 (1) SA 793 (W) at 796E-F). It follows that in those circumstances applicants in the position of the appellants can be authorised by a court to dispense with the notice requirement.

[15] The last string to counsel's bow on this aspect of the case was the following statement from *Wimbledon Lodge* (para 14): 'If the body corporate is seen not to do its duty, then an individual's powers may, to an extent, be restored'. Plainly what Schutz JA intended to convey was this: an individual's powers may to the extent provided for in s 41 be restored. Indeed, as Schutz JA pointed out (para 18), that accords with the general principle at common law that where a wrong is done to it, only the company (in this case the body corporate) and not the individual members may take proceedings against the wrongdoers (*Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189)). Schutz JA's statement thus affords no authority for the proposition that owners who find themselves in the position of the present appellants are exempt from the provisions of s 41. The conclusion that I therefore reach is that s 41 finds application to the appellants.

[16] Were that conclusion to be reached, submitted the appellants, their right of access to court guaranteed by the s 38 of the Constitution would be infringed. Our Constitution enjoins us to adopt a broad approach to standing. That serves to ensure that constitutional rights enjoy the full measure of protection to which they are entitled (*Ferreira v Levin NO & others* 1996 (1) SA 984 (CC) para 165). I, however, do not see s 41 as imperilling or negating the right. On the contrary, s 41 provides a comprehensive statutory right to an owner of a sectional title unit aggrieved at the failure of the body corporate to act in respect of a matter mentioned in s 36(6). The relief available to an owner in the position of the appellants is to approach the court for the appointment of a *curator ad litem* to the body corporate, so that he or she may investigate the events complained of and, if so advised, take action aimed at somehow remedying the position.

[17] The substance of the matter according to Schutz JA (*Wimbledon Lodge* para 21) is that 'the body corporate is little more than the aggregation of all the individual owners. Their good is its good. Their ill is its ill. The body corporate is not an island, whatever the law of persons may say.' Section 41 is an important component of that structural scheme. On the one hand it filters out unmeritorious claims by over zealous individuals. On the other it ensures that individuals complaining should have the advantage of the information and the funds of their corporation in pursuing legitimate claims. As to whether a *curator* ought to be appointed, Schutz JA expressed himself thus: 'the court has a discretion under s 41(3), having regard to whether it is satisfied that the body corporate has not sued . . ., that there are *prima facie* grounds for such proceedings . . . and that an investigation into the desirability of instituting proceedings is justified' (*Wimbledon Lodge* para 26).

[18] No doubt a *curator ad litem* would obtain proper advice and properly investigate the facts before taking any further legal steps. Even then he or she would have to first report to the court, which may issue such directions as to it seems meet (s 41(4); see *Meridian Bay Restaurant (Pty) Ltd & others v Mitchell NO* 2011 (4) SA 1 (SCA)). The facts of this case illustrate why a filter mechanism is indeed necessary. At an annual general meeting of the body corporate held on 13 November 2004 the appellants proposed to the meeting that it adopt a resolution that the Voyager contract be terminated. The motion was put to the floor. It failed - the vote being three (including the two appellants) ayes and fifteen nays with five abstentions. Despite failing by a substantial margin to carry the day at the meeting the appellants thereafter approached the high court seeking amongst others precisely the selfsame relief. Fairly serious allegations were levelled by them against the previous trustees of the body corporate. It was suggested that the Voyager agreement was a collusive transaction that fell to be set aside. At that stage those allegations, notwithstanding the vehemence with which they were asserted by the appellants, remained precisely that – untested allegations. One imagines that is precisely where a *curator ad litem* would prove invaluable. To the *curator* would fall the task of separating the wheat from the chaff.

[19] The real difficulty for the appellants in this case, however, is that they did not impugn the constitutionality of s 41 or any other provision of the Act. Accordingly, to borrow from Mokgoro J in *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 29: 'in these circumstances, and in the circumstances of this case, the Act cannot be bypassed'. Section 41 read with s 36(6) plainly encompassed within its scope the three claims in respect of which the appellants came to be non-suited by Van den Reyden J. It follows that the conclusion of the learned judge cannot be faulted and in the result the appeal must fail.

[20] There remains the question of costs. The appellants submit that the lack of *locus standi* defence should have been raised by the respondents by way of exception. Accordingly, so the submission went, the respondents should only be entitled to costs as on exception. In *Algoa Milling Company v Arkell and Douglas* 1918 AD 145, Innes CJ stated:

'The declaration as drafted disclosed no cause of action, and should therefore have been excepted to. Had that been done, there would have been a speedy end of the litigation and the heavy costs subsequently incurred would have been unnecessary. The defendants, therefore, will be entitled to such costs in the court below as would have been incurred had they excepted to the declaration.'

But as Greenberg JA made plain in *Cohen v Hayward* 1948 (3) SA 365 (A) at 374:

'I do not think, however, that it was the intention of the Court in the cases quoted to lay down an inflexible rule which deprive the Court of its discretion in regard to costs and disentitle it, in a proper case, from departing from the rule.'

[21] However, as the following excerpts from the record reveal, responsibility for the failure to expeditiously dispose of the matter on the preliminary point of *locus standi,* must regrettably be laid squarely at the door of the learned trial judge.

'My personal view is this application for the removal of [the appellants] on the basis of lack of *locus standi* is that it's absolutely a waste of time. If at the end of the day there is sufficient indication that they never had *locus standi* then obviously the Court can make an appropriate costs order.

. . .

[A]nd I made it quite clear to all the litigants that I am going to see this case through right till the end, and I made it quite clear that my aim in this case is to see what can be done to put St Moritz on an even keel again. If after the conclusion of this case St Moritz still goes under, well, that's beyond my control. I've

also made it quite clear that the only people who were prepared to take up the cause of St Moritz were [the appellants], the two Cassim sisters.

. . .

[T]his is a sincere call on the parties to reconsider this application based on lack of *locus standi*. I don't see any point in finding in the second defendant's favour because it's just going to delay the outcome of this case.

. . .

The issue is really — it has been put on the back-burner and it will be decided at the conclusion of this trial. I am not in position to grant an order against any of the parties at this stage. I will be in the best position to decide what costs order I should make at the conclusion of the trial. I am not even going to call on the other side. I am going to reserve costs.

. . . I am the person responsible for delaying this decision on the issue of *locus standi*. It's not a decision of any of the parties. I had a look at the papers again. I reconsidered the situation and I made the declaration in court and I had reaction to that. So on what basis can I at this stage penalise any of the parties with a costs order if the initiative came from me?'

There is thus no warrant for limiting the respondents' costs to only those as on exception. In any event the appellants opposed the rule 33(4) application for the issue of their *locus standi* to be decided preliminarily and separately from any other issue. They must accordingly bear the consequences.

[22] The issue on appeal is a narrow one. The learned judge in the court below cautioned: 'the record that goes up to the Court of Appeal . . . must be absolutely material, crisp and to the point'. That notwithstanding, the record that served before this court consisted of 20 volumes running to 1727 pages. It was replete with all manner of irrelevant material. Before us Voyager objected to the record. It sought, moreover, to supplement the record. Its application together with the proposed supplementary pages ran to 128 pages. In short the additional material sought to be placed before us was irrelevant to the adjudication of the issue that served before us on appeal. Properly analysed Voyager's complaint amounted to this: the appellants have included irrelevant material in the record and we (Voyager) will be prejudiced unless we are given an opportunity to likewise file irrelevant material. That proposition merely has to be stated to be rejected. It follows that Voyager's application must fail and notwithstanding the outcome of the appeal it is appropriate that Voyager bear the costs of that application.

[23] I come now to Brink. On 29 August 2005 and pursuant to an application to court by the first appellant, it was appointed as the interim administrator of the body corporate. On 12 May 2006 on the application of both appellants Brink was released from its duties as interim administrator and appointed the managing agent of the body corporate. During July 2007 both appellants launched contempt of court proceedings against Brink. That application was postponed from time to time and eventually postponed sine die on 23 May 2008. Brink was not a Defendant in the main trial before Van der Reyden J, nor was it a respondent in the *locus standi* proceedings. No relief had been sought against it as the managing agent in the high court and that which had been sought against its predecessor had fallen away. That notwithstanding, its attorney, who also represented Strauss and Le Fevre, insisted that Brink was a party to the appeal and demanded on Brink's behalf an additional copy of the appeal record. Brink plainly had no interest in the appeal. Brink was represented in this court by the same counsel who represented Strauss and Le Fevre. Thus the fact that Brink chose to oppose the appeal when it was not entitled to do so has in truth occasioned no real extra costs to the appellants, save for the additional record that had to be procured by them. It follows that Brink should be directed to reimburse the appellants by paying to them the costs of that additional record.

[24] In the result:

(a) The appeal is dismissed.

(b) The first respondent's application to supplement the record is dismissed with costs.

(c) Brink Property Administration is directed to reimburse the appellants for such portion of the costs incurred by the appellants as relate to the procuring of an additional copy of the appeal record.

(d) The appellants are ordered to pay the costs of the appeal save for those costs referred to in paragraphs (b) and (c).

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For 1st Appellant	A J H Bosman SC Instructed by: Fathima Karodia Attorneys Durban Naudes Bloemfontein
For 2nd Appellant	N Cassim (in person) c/o Fathima Karodia Attorneys Durban Naudes Bloemfontein
For 1st Respondent:	D G Tobias Instructed by: Du Toit Havemann & Lloyd Durban Bezuidenhouts Inc Bloemfontein
For 2nd Respondent:	No appearance
For 3rd and 4th Respondents and Brink Property Administration	E Levin Instructed by: Chelin & Associates Glenwood Bezuidenhouts Inc Bloemfontein