

SOUTH AFRICA / JUDGMENT

Atlantic Oil Inland (Pty) Ltd v Calitz and Others (596/20) [2023] ZANWHC 72 (9 June 2023)

[2023] ZANWHC 72

COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

596/20

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NO: 596/20

Reportable:

YES
/ NO
Circulate
to Judges: YES
/ NO
Circulate
to Magistrates: YES
/ NO
Circulate
to Regional Magistrates: YES / NO
In

the matter between:

ATLANTIC
OIL INLAND (PTY) LTD
PLAINTIFF
And
ANNELIZE
CALITZ 1ST
DEFENDANT
ANNELIZE
CALITZ N.O 2ND
DEFENDANT
JAN
JACOBUS MARHINUS CALITZ N.O 3RD
DEFENDANT
JAN
JACOBUS MARHINUS 4TH
DEFENDANT

JUDGMENT

Introduction

- [1] This is an opposed application to lift the bar in terms of Rule 27 of the Uniform Rules of Court. In the main action, the first and second applicants, are the first and second defendants, Jan Jacobus Marhinus Calitz N.O. in his capacity as a Trustee of Anja Trust, is cited as the third defendant. The fourth defendant is cited in his personal capacity as Jan Jacobus Marhinus Calitz. The respondent is the plaintiff.
- [2] For the sake of continuity and the ease of reference, I intend to refer to the parties as cited in the main action given the fact that there are two applicants cited and four defendants in the main action. I am inclined to believe that the fourth defendant is not cited due to his passing. I will return to the question of the misjoinder of the third defendant in this application, later on in this judgment.
- [3] The first and second defendants sought an order as follows:
- “1. The bar which took effect ipso facto on 22 May 2020 against the First and Second Applicant’s Exception be lifted;*
2. That the First and Second Applicant serve and file their Notice of Exception on the Respondent within 5 days from the granting of the Order;
3. The Respondent to pay the costs in the event that the Application to lift the Bar is opposed.”
- [4] The plaintiff in a counter application seeks the following relief:
- “14.1 In so far as necessary the respondent herewith counter applies to set aside the notice of withdrawal as invalid and void ab initio;*

14.2. In the alternative an order in terms of Rule 30 to set aside the second application as an irregular step, in the event of the applicants not removing the cause of complaint on 10 days' notice;

14.3 Dismissing the first and/or the second application;

14.4. The respondent simultaneously herewith brings a counter application granting default judgment, in the event of the court dismissing the first and second application for the upliftment of bar, and

14.5. the first application will be enrolled simultaneously with the second application.”

The cause of action

- [5] The plaintiff is Atlantic Oil Inland (Pty) Ltd (previously known as Intercomp Twenty-Four (Pty) Ltd t/a BP North West). The first defendant is Annelize Calitz, cited in her personal capacity. The second and third defendants are cited as Annelize Calitz N.O and Jan Jacobus Marhinus Calitz N.O in their capacities as duly appointed trustees of the Anja Trust. For purposes of completeness as alluded to, the fourth defendant is Jan Jacobus Marhinus Calitz cited in his personal capacity.
- [6] The first defendant on 25 July 2012 executed a deed of suretyship, where the first defendant, bound herself jointly and severally as surety and co-principal debtor in solidum with Rich Rewards 440 (Pty) Ltd, a company that ordered and purchased fuel and fuel related products from the plaintiff. Rich Rewards 440(Pty) Ltd, applied for credit facilities from the plaintiff. The deed of suretyship was incorporated in the application for credit facilities. As at 6 January 2020, the amount indebted to the plaintiff is R8 129 290.79 together with interest. No payments have been made by Rich Rewards 440 (Pty) Ltd. Consequently, the plaintiff has applied for the liquidation of Rich Rewards 440 (Pty) Ltd.
- [7] On or about 20 July 2012, the second and third defendants in their capacities as trustees of the Anja Trust, in writing signed an acknowledgement of debt, in terms of which the Anja Trust bound itself as principal debtor and guaranteed to pay the plaintiff an amount of R1 200 000.00. Pursuant and in execution of the guarantee, a notarial bond was registered over Anja Trusts immovable property described as Portion 195, Wilgeboom 458 North West. Accordingly, the plaintiff is due an amount of R1 200 00 00 from the Anja Trust. No payments were made by Anja Trust.
- [8] In the premises, extracting from the particulars of claim, the plaintiff prays for the following orders:

“Claim 1

WHEREFORE Plaintiff prays for the following order against the first Defendant:

1. Payment of the amount of R8 129 290.79.

2. In the alternative to prayer one, payment of the amount outstanding after payment(s) received from the Anja Trust;
3. Interest on the amount of R8 129 290.79 at the rate of 15% per year from January 2020 to date of payment.
4. Cost on the scale of attorney and own client.
5. Further and/or alternative relief.

Claim 2

WHEREFORE Plaintiff prays for the following order against the Second and Third Defendants in their capacities as trustees of the Anja Trust, the one paying the other to be absolved:

1. Payment of the amount of R1 200 000 00;
2. Interest on the amount of R1 200 000 00 at the rate of 15% per year from 13 August 2012 to date of payment;
3. An order declaring the following property of the Anja Trust specially executable:

Portion 195 (a portion of portion 160) of the Farm Wilgeboom 458, Registration Division I.Q Province North West Measuring: 20, 6252 (TWENTY COMMA SIX TWO) hectares. Held by Deed of Transfer T 104416/2012

4. An order authorizing the issuing of a Warrant of Execution and directing execution against the trust's property.
5. Cost on the scale of attorney and own client
6. Further and/or alternative relief."

Litigation History

[9] The plaintiff caused summons to be issued out of this Court on 10 March

2020. All the defendants duly entered an appearance to defend on 1 April 2020. The defendants failure to comply with the next peremptory step by failing to file a plea, exception, notice to strike out, with or without a counterclaim with twenty(20) days, resulted in a notice of bar being served on 14 May 2020. As a result, the defendants were ipso facto barred on 21 May 2020. Against the grain of established process, the defendants delivered an exception on 27 May
2020. The plaintiff countered by delivering a Rule 30 notice. Undeterred by the Rule 30 notice, the defendants proceeded on motion in terms of Rule
27. The plaintiff filed an answering affidavit, which embodied a counter application to have the irregular step set aside.

- [10] On 28 July 2020, the defendants delivered a notice of the withdrawal of the exception, without a tender for the wasted costs occasioned by the counter application. The latter costs are still pursued in the current application. The time lines as alluded to, are common cause.

The defendants' case

- [11] The defendants confirm, the receipt of the notice of bar on 14 May 2020. Subsequent to this, the defendants duly instructed their attorneys of record and accordingly a notice of exception was drafted and sent electronically to the correspondent attorney for delivery on 20 May 2020. The correspondent attorneys confirmed receipt of same on 20 May 2020. On 26 May 2020, a stamped copy of the delivered notice of exception was requested from the defendants' correspondent attorney. None could be provided. Further enquiries, on the same date to the plaintiff's attorneys of record, confirmed that there had been no service of the notice of exception on the plaintiff's attorneys. On 27 May 2020, the notice of exception was served on the plaintiff. On the latter date, the defendants' correspondent attorney tendered a written apology for the dilatory delivery of the notice of exception. On 10 June 2020, the plaintiff's attorney served a Rule 30 notice, denoting that the service of the notice of exception was an irregular step, post the defendants being ipso facto barred.
- [12] In short, the failure of the defendants' attorney to have delivered the notice of exception was not foreseeable, and was the primary reason for the notice of exception not being timeously delivered.
- [13] The defendants intended filing a notice of exception to the plaintiff's particulars of claim. I set out the basis of the notice, as encapsulated in the founding affidavit:
- "28. The Notice of Exception relates to the principal debtor of the Respondent for which debt I have allegedly signed surety of. The credit agreement between the liquidated principal debtor and Respondent was for R1 200 000.00, yet a claim in excess of R8 000 000.00 has been instituted by the Respondent without stating on what basis such amount is calculated or why same exceeds the agreed amount. There is no allegation of default made by the Respondent against the principal debtor.*
29. The Respondents further fail to attach the credit agreement to the Particulars of Claim which underpins the alleged Deed of Surety thereby rendering the claim vague and embarrassing. The terms of the credit agreement are further not pleaded by the Respondent.
30. It is submitted that the exception goes to the heart of the Respondent's Particulars Claim and if upheld the pleadings would be deemed to be vague and embarrassing and/or incapable of sustaining a cause of action.

31. I further submit that the Respondent has not got the correct breakdown of the indebtedness under claim A to the Particulars of Claim and the amount is disputed. While the principal debtor was in business prior to liquidation payment of the amounts due and owing per the agreement were paid and this evidence will be ventilated fully at trial. The Certificate of Balance in support of claim A is rejected as it is not a true reflection of the alleged indebtedness.
32. Regarding Claim B which involves my capacity as Trustee of the Anja Trust, I submit that the bond registered over the immovable property was for R1 200 000.00 only and that such amount of R1 100 000.00 was paid towards the bond. I attach hereto proof of payment (marked Annexure “FA7”) clearly indicating that the amount for which the Respondent has mortgage over the immovable property has been. The Respondent has not called up the bond or demanded the R100 000.00 outstanding. Further the bond held by the Respondent is not for the amount claimed in Part A of the Particulars of Claim as the mortgage bond was only limited amount as registered.
- [14] The defendants conclude that the previous application for the bar to be uplifted was withdrawn due to an oversight. In view of the bona fide defence set out, the defendant will suffer no prejudice if the removal of the bar is ordered.

The plaintiff's case

- [15] The plaintiff's opposition to the granting of the removal of bar is founded on three primary pillars. I turn to elucidate each:

Locus standi

[15.1] The plaintiff contends that the second defendant, in her capacity as trustee of the Anja Trust does not have the requisite locus standi. The Anja Trust, had two trustees. The argument ran, that a trust can only act on behalf of all the trustees. The second trustee (the second defendant) passed on during 1 May 2020. The first defendant has not been amenable to disclosing the duly appointed executor of the deceased trustee's estate and the identity. Further thereto, no resolution was attached which was granted by the trustees to allow the second defendant to depose to the affidavit on behalf of the trust, nor is the trustee cited as a party. Concluding on locus standi, the plaintiff submits that the second defendant “cannot confirm any fact in her official capacity, nor can she bring this application on behalf of the Anja Trust and that the application should be struck from the roll due to lack of locus stand alternatively, misjoinder.”

Invalid Withdrawal

[15.2] There exists no lis that the current application is the second of such within the purview of Rule 27 of the Uniform Rules of Court. The first application was filed on 23 June 2020. It was to be heard on 21 January 2022. A notice of withdrawal was served on 12 January 2022. The plaintiff, therefore contends that “the withdrawal took that place by the applicant, no consent of the respondent was requested prior to the removal, nor was the leave of the court obtained.” As a result this withdrawal of the first application in terms of Rule 27 was invalid. It so follows

according to the plaintiff that this withdrawal is invalid and void ab initio.

[15.3] The plaintiff therefore counter applies for the notice of the withdrawal to be set aside as invalid and/or declared void ab initio, in the alternative, a Rule 30 notice for an irregular step is filed. Logically, so the plaintiff contends, the defendants have not

withdrawn the first application in terms of Rule 27, the second application will not have any legal life as it is either *lis pendens* or an irregular step.

Abuse of Process

[15.4] The plaintiff exponentially develops the phrase abuse of process along the following: The first application to lift the bar was served on 23 June 2020. The defendants did not prosecute this first application and the plaintiff had to be seized with the enrollment of the application. The application was accordingly enrolled for 21 January

2022. The defendants did not file the peremptory practice note and heads of argument. Nine days before the hearing, the defendants withdrew the first Rule 27 application.

[15.5] Pursuant, to this, the plaintiff launched an application for default judgment on 24 January 2022. A notice of set down was served on the defendants on 9 February 2022. A day later (10 February 2022), the current Rule 27 application was served. The latter application axiomatically hamstrung the default judgment which had to be rationally removed. The current Rule 27 application is merely a legal maneuver to stifle the default judgment proceeding so it was contended.

Ancillary Grounds

[15.6] Additionally, it was submitted, that the defendants did not address adequately the reasons for the delay in filing a pleading. The absence of the latter, it was submitted, left the court in the untenable position of being unable to assess the conduct and motives of the defendants for the court to understand how the default had occurred. Critically, the defendants have not disclosed a *bona fide* defence.

Counter Application

[16] The plaintiff avows that the defendants failure to competently withdraw the first application for removal of bar, has the consequence that the second application for the removal of bar, wherein the exact same relief cannot be brought concurrently. Succinctly put, the plaintiff contends *lis pendens*.

Defendants in reply

[17] Regarding the *locus standi* of the second defendant to depose to the affidavit, the first defendant brushes this averment aside, by proffering that the issue of *locus standi* was not raised in the first application for the removal of bar. The first defendant concedes that the Anja Trust, had two trustees. To the contention that a trust can only act on behalf of all trustees, the first defendant opines that “this averment is nonsensical and I cannot answer

thereto.” In respect of the resolution that is to be granted by the trustees as sought by the plaintiff, the first defendant retorts as follows: “ I am not aware if any other trustee has been appointed, but to the best of my knowledge currently I am the only trustee of the Anja Trust.”

[18] I put forward, to deal with the question of locus standi, as this may be dispositive of the entire application. Our jurisprudence requires of any person intending to institute proceedings must have the necessary locus standi. Locus standi evinces the following legal principles:

“(i) *In Mars Incorporated v Candy World (Pty) Ltd* 1991

(1) SA567 (A) it was held that the general rule is for the party instituting proceedings to allege and prove that he or she has locus standi, the onus of establishing that issue rests upon the applicant.

(ii) It must accordingly appear ex facie the particulars of claim (founding affidavit) that the parties thereof have the necessary locus standi in iudicio. See: *Kommissaries van Binnelandse Inkomste v Van de Heever* 1990

(3) SA 1051 (SCA) par 10.

(iii) A person intending to institute or defend legal proceedings must have a direct and substantial interest in the right which is the subject of the litigation. *Kommissaries van Binnelandse Inkomste v Van de Heever* 1990

(3) SA 1051 (SCA) par 10.

(iv) Locus standi concerns the ‘sufficiency’ and directness of the litigant’s interest in proceedings which warrant his or her title to prosecute the claim asserted. *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg and Another*

[2008] ZASCA 104; 2009 (1) SA 317 (SCA).”

[19] The defendants claim to locus standi is founded in the following paragraphs of the founding affidavit.

“1. I am an adult female businesswoman residing within the jurisdiction of the Honourable Court.

2.

3. The First and Second Applicant brings this Application in terms of Rule 27 of the Uniform Rules to lift the Bar that is in place ipso facto against the First and Second Applicants following the Respondent filing a Notice of Bar following service of its summons and Particulars of Claim.

4. The reason for the removal of the Bar is required so that the First and Second Applicant can file their Notice of Exception to the Respondent’s Particulars of Claim.

5. I can confirm that I cannot depose to an affidavit on behalf of the third and Fourth Defendants in the main action, Jan Calitz as Mr Calitz has passed away during May 2020.”

[20] The plaintiff contends that the first defendant in her capacity as trustee of the trust does not have the requisite locus standi to depose to an affidavit on behalf of the Anja Trust. Given the common cause fact the Anja Trust has two trustees, the plaintiff

contends that a trust can only act on behalf of all trustees. The second trustee (Jan Jacobus Marhinus Calitz) passed during May 2020 and no executor has been disclosed.

[21] A trust is not a legal persona. In its strictly technical sense a trust is ‘a legal institution sui generis . . . The trustee is the owner of the trust property for purposes of administration of the trust but qua trustee has no beneficial interest therein’. (Braun v Blann and Botha NNO & Another [1984] ZASCA 19; 1984 (2) SA 850 (A) at 859E-H, Commissioner for Inland Revenue v Friedman & others NNO [1992] ZASCA 190; 1993 (1) SA 353 (A) at 370.)

[22] In Lupacchini NO & Another v Minister of Safety and Security 2010 (6) SA 457 (SCA) at para [1], the following was stated:

“A trust that is established by a trust deed is not a legal person – it is a legal relationship of a special kind that is described by the authors of Honore’s South African Law of Trusts as “a legal institution in which a person, the trustee, subject to public supervision, holds or administers property

separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose.”

[23] In Land and Agricultural Bank of South Africa v Parker and others

[2005] (2) SA 77 (SCA), the following was stated:

“[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them—and it is only through the trustees, specified as in the trust instrument, that the trust can act. . . . It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.”

[24] What the first defendant seems to be oblivious of or prevaricate is that the notice of bar served on 14 May 2020, had the effect of ipso facto barring all four of the defendants, as per the citing in the summons. The fourth defendant (the second trustee) had passed on 1 May 2020. The principle of locus standi still finds application, but the complexion of the principle somewhat changes.

[25] It appears the principles enunciated in Parker, supra, have been by design overlooked by the first defendant. The locus standi of the first defendant was pertinently spoken to in the answering affidavit whereat the following is submitted:

“.....

[42] The respondent in amplification states that the first applicant in her personal capacity cannot simply depose to an affidavit on behalf of the Anja Trust.

[43] No mention is made of the identity of the deceased's executor who should have been substituted in these proceedings.

[44] The applicant also makes no mention of who the new trustee is who replaced the fourth defendant in the main action, no trust deed, letter of authority is provided or attached for the courts notice.

[45] The applicants are challenged to take the court into its confidence and provide the requisite information and documents.”

[26] In reply the first defendant, disavows to deposing to the founding affidavit in her personal capacity on behalf of the Anja Trust and that the same was done as a Trustee of the Anja Trust. Relating to information focussing on the demise of the fourth defendant, it was suggested that the plaintiff as dominus litis should have taken the initiative to secure documentation confirming the death of the fourth defendant. On the salient question of other trustees the first defendant ripostes “[80] As I have stated to the best of my knowledge there is no other appointed Trustee.”

[27] The first defendant conflates a trite legal principle pertaining to locus standi. Locus standi is a matter of law. See: *Exparte Johannesburg Congregation of the Apostolic Church* 1968

(3) SA 377 (W) *Rapotsonyane v Sekhukhu Syndicate* 2006

(2) BLR 607 CA, *Morenane Syndicate and Others v Loeto* [2005] 2 BLR 37

[28] Locus standi is thus an issue which needs to be adjudicated on at the rudiment of legal proceedings. See: *Watt v Sea Plant Products* 1998

(4) All SA 109 (C) at 113-114. Reasonably, locus standi must be found in limine before the merits. See: *Giant Concert v Rinaldo* 2013

(3) BCLR 251 (CC) at 58. To conclude on locus standi, two symbiotic legal principles must co-exist. Firstly, generically the duty to establish locus standi is that of the defendants and secondly the required legal standing or locus standi must accordingly appear ex facie the founding affidavit. See: *Commissioner of Inland Revenue v Van der Heever* 1990

(3) SA 1051 (SCA) at par [10].

- [29] The first defendant has embarked on what can be best colloquially described as a cut and paste process to establish locus standi in the founding affidavit. I digress to provide some context. In the founding affidavit deposed to on 22 June 2020, (approximately six (6) weeks after the passing of the fourth defendant), Odette Odendall the attorney of record of the first and second defendants, the following is penned: “I confirm that I cannot depose to an affidavit on behalf of Third and Fourth Defendants in main action, Jan Calitz as Mr Calitz has passed away during May 2020.”
- [30] The ipsissima verba as highlighted in the preceding paragraph is transported to the current application without any qualms. In essence, even a benevolent reading of the present application, does not make out a case for the first defendant’s locus standi as is required.
- [31] What stands out is notwithstanding the demise of the fourth defendant and the averment that the first defendant was appointed as the executor of the fourth defendant’s estate, these changes were not incorporated in the current application to establish locus standi. A liberal calculation of the hiatus between the death of the fourth defendant and the attesting of the founding affidavit in this current application, is approximated to be a period of some nineteen (19) months. The relevance of the latter period would have provided the first defendant ample time to prepare an application which would cross the threshold of locus standi, which the first defendant was obliged to.
- [32] In motion proceedings the affidavits constitute both the pleadings and the evidence. The respective cases of both parties should appear clearly therefrom. See: Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D. It is trite that the applicant in application proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant’s favour.
- [33] An applicant must stand or fall by his/her founding affidavit. See: Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H – 636D. Ex facie, the founding affidavit, the first defendant was to have made it clear as to her locus standi, in relation to the Anja Trust. Given the peculiar circumstances of the Anja Trust, the direction provided in Parker, supra ought to have been incorporated in predicating the legal standing of the first defendant. The first defendant harboured under a serious misapprehension, that the brandishing of legal concepts of dominus litis and Rule 35 of the Uniform Rules of Court exonerated the first defendant from, in this instance proving on a balance of probability locus standi.
- [34] The first defendant, did not make out a case for locus standi. In the replying affidavit, the first defendant concedes to being the executor of her deceased husband’s estate. The legal

consequences of this has not been delineated in the form of the deed of trust and the way forward as regards decisions of the trust on the passing of a member. The first defendant contends that she has been appointed as the executor of the fourth defendant. Given the passage of time, the first defendant does not ventilate how the death of the fourth defendant and her appointment as the executor of his estate clothes her with the required locus standi.

[35] To simply allude in reply that to “the best of my knowledge there are no other trustees” does not demonstrate locus standi. The reason why the first defendant is required to prove her locus standi is because a court “should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it.” See: *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996

(1) SA 984 (CC) at para 168.

[36] Given my finding on locus standi, the question of misjoinder and other ancillary legal points needs no further expanding. Regarding the counter application, of the plaintiff, I echo the same.

[37] On the aspect of costs, I see no reason to deviate from the usual cost order. Accordingly, I make the following order:

Order:

(i) The point in limine is upheld.

(ii) The first defendant does not have the locus standi to have instituted the application.

(iii) The defendants are to pay the costs, jointly and severally, the one paying the other to be absolved.

A REDDY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

Appearances:

Date of Hearing: 25 November 2022

Date of Judgment: 09 June 2023

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