

SOUTH AFRICA / JUDGMENT

Joubert and Others v Louw (CIV APP RC 08/2022) [2023] ZANWHC 102 (22 June 2023) [2023] ZANWHC 102

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid, A Reddy

CASE / FILE NUMBER

CIV APP RC 08/2022

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Policy

FLYNOTES:

CIVIL PROCEDURE – Locus standi – Power of attorney –
Damages arising from construction to husband's
house –
Claim against attorneys for failure to institute action timeously
against construction business – Power
of attorney attached
in replication and not as part of claim – Not having
sufficient and direct interest in the litigation
that concerned
money that was paid by husband to contractor for construction –
Appeal is upheld and the order of the
court a quo replaced with
one holding that the plaintiff has no locus standi and dismissing
the action.
IN
THE HIGH COURT OF SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CASE
NUMBER: CIV APP RC 08/2022

Reportable: YES/NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO
In
the matter between:-
DANEEL
JOUBERT
First
Appellant
LAMPEN
ATTORNEYS
Second
Appellant
GEERT
LAMPEN
Third
Appellant
and
JACOBA
ELIZABETH IGNATIA LOUW
Respondent
22
June 2023
ORDER

QUORAM:

REID J et REDDY AJ: i)
The appeal is upheld.
ii)
The order of the court a quo of 20 July 2022 is

set aside and substituted
with the following order:

“1.
The plaintiff has no locus
standi
to
institute the action.
2.
The action is dismissed.
3.
Each party is to pay its own costs.”
iii)
Each party is to pay their own cost in the appeal.
iv)
The Registrar of this Court is to serve a copy of
this judgment on the Director of the
Legal Practice Council National Office
Thornhill Office Park, Building 2[...], B[...] Road 9[...], V[...]
V[...], Midrand, Gauteng and on the Director

of the Legal Practitioners Indemnity Insurance Fund (the Indemnity Fund, or LPIIF).

JUDGMENT

FMM REID J

Introduction:

- [1] This is an appeal against an order made by Regional Magistrate Ms I.D.L Serei from the Regional Court for the Regional Division of North West held at Potchefstroom (the Court a quo) on 20 July 2022.
- [2] The Court a quo ordered the appellant to pay to the respondent an amount of R181,310.00 (One Hundred and Eighty Thousand Three Hundred and Ten Rand) plus interest and legal costs, for damages suffered by the respondent.
- [3] The appellant applied for condonation in filing a supplemented record to complete the record of transcription before the Court a quo. The application for condonation was not opposed and this Court granted the appellant condonation to file the supplemented record of proceedings.
- [4] The respondent (Mrs Louw) was the successful plaintiff in the Court a quo and the appellants were the defendants. The first appellant (Joubert) is an attorney of profession and was in the process of completing his articles of clerkship at the firm Lampen Attorneys (the attorneys firm) which is the second appellant. The third appellant (Lampen) is the practicing attorney under which Joubert completed his articles of clerkship.
- [5] For ease of reference, I will refer to the parties by virtue of their identities or to their citations in these proceedings, where applicable.

Factual

background

- [6] The factual background is mostly common cause between the parties and can be succinctly set out as follows. On 9 September 2019 Mrs Louw, in her personal capacity, issued summons against the appellants claiming damages in the amount of R399,000.00 (Three Hundred Ninety-Nine Thousand Rand). Mrs Louw claimed for delictual damages arising from a failure to institute action timeously against J Constructions and/or J Saayman for breach of contract in that she paid in advance for construction and building work at her residence, which was not done.
- [7] The cause of action is set out partly as follows in paragraph [6] of the particulars of claim:

“6.

During October 2011, the First Defendant (sic – Louw), while in the employment of the Second Defendant (sic – Lampen) as a practicing attorney and under the guidance and leadership of his principal and owner and representative of the Second Defendant (sic – Lampen Attorneys), Geert Lampen (Third Defendant) accepted instructions from the Plaintiff to perform, inter alia, the following professional services as the Plaintiff’s attorney of record:

6.1 To claim the amount of R399,000.00 (THREE HUNDRED AND NINETY-NINE THOUSAND RAND) from Mr J Saayman who worked under the company name of J Construction for money which was paid in advance for building and construction work to be done at the Plaintiff’s residence but was never completed.”

[8] During October 2011 Mrs Louw corresponded with Joubert and testified that she laboured under the impression that the claim was duly instituted, was successful and is to be executed. On 17 August 2017 Mrs Louw terminated her mandate with Lampen Attorneys but on receiving the content of the office file, it was discovered that no legal action was instituted against Mr J Saayman or J Construction. The claim (if any) that Mrs Louw had against Saayman or J Construction has become prescribed at the time that the mandate was terminated.

[9] Mrs Louw’s attorneys contacted the Attorneys Insurance Indemnity Fund during March 2018 and on 19 February 2019 the attorneys’ firm were informed that the Attorneys Insurance Indemnity Fund (the Indemnity Fund) were in the process of obtaining the fidelity fund certificate of Lampen Attorneys. A representative from the Indemnity Fund contacted the attorneys’ firm, on which the attorneys’ firm provided the Indemnity Fund with the requested documents. Mrs Louw and her attorneys, as well as Lampen Attorneys, did not receive any further information or assistance from the Indemnity Fund.

[10] After receiving the summons, Lampen Attorneys and Lampen served their plea, in which they:

10.1.

Denied that Joubert was acting on behalf of the attorneys’ firm and pleaded that Joubert was acting on a frolic of his own, not related to the attorney’s firm or to Lampen;

10.2.

They denied that Mrs Louw paid any amount to J Saayman or J Construction. The also denied that the building and construction work had to be done at Mrs Louw’s residence;

10.3.

Specifically pleaded that Mrs Louw is married to Mr Leslie Adriaan Louw, out of community of property and the immovable property in respect of which the building and construction work was to be done and not completed, is registered in the name of Mr Leslie Adriaan Louw and not that of Mrs Louw;

10.4.

Denied that Mrs Louw has suffered any damages that could be claimed from Saayman and/or J Construction;

10.5.

On the basis of the above, specifically denied the locus standi of Mrs Louw to institute the action.

[11] Joubert's plea consisted of a denial that Mrs Louw has suffered any damages or had any claim against J Saayman and/or J Construction. Joubert pleaded a bare denial to the remainder of the allegations. Joubert also specifically denied that Mrs Louw has locus standi to institute the action.

[12] In turn, Mrs Louw filed a replication to which she attached a general power of attorney and pleaded that:

"4.2 It is specifically pleaded that Leslie Adriaan Louw left the country during 2006 in order to take on work as an expat and therefore a general power of attorney (attached Annexure "S") was executed which authorised the plaintiff to manage and perform his/their matters in the Republic of South Africa and any other area of land in the world.

4.3 The plaintiff used this general power of attorney to attend to the negotiations and any matters regarding/relating to the building of the immovable property concerned. This included the providing of instructions to an attorney to institute legal action against Mr J Saayman who worked under the company name of J Construction."

[13] It was also pleaded in replication that, had the attorney's firm not accepted the instruction of Mrs Louw acting on behalf of Mr Louw, the attorney's firm should have insisted to work with Mr Louw and not Mrs Louw. Put differently, it was pleaded that that the attorneys had the professional duty to advise their client that the mandate she provided (namely the power of attorney) was not sufficient and Mr Louw would be the appropriate person to institute the action against the construction company.

[14] In the Court a quo, both Mr and Mrs Louw testified on behalf of the plaintiff. After the plaintiff closed her case, the defendants applied for an absolution of instance.

[15] On 2 August 2021 the Court a quo provided a written judgment in which the application for absolution from the instance was dismissed. This judgment also relates to the issue of locus standi and held as follows:

“The power of attorney does indeed give her locus standi to act on behalf of her husband. It gives her the power to represent her husband in all legal matters.

The defendants communicated with the Plaintiff and never insisted on all the communications they had with her that she does not have locus standi.

The power of attorney gives her “the right to institute settle or defend any action, proceedings, money collection and legal steps of me and my property or with reference to my cases, in any other court or other institution in the RSA or in other area or country.””

[16] The defendants elected to not lead any evidence and closed its case. It is argued by Adv Gründling on behalf of the appellants that there was no “case to meet”, in other words no claim to defend, and as such it was not necessary to call any witnesses as Mrs Louw has not acquitted the onus that rests on her as plaintiff, which onus includes that she should prove she has the necessary locus standi to institute the proceedings.

The Appeal

[17] The issues on appeal is crisp:

17.1.

Whether Mrs Louw had locus standi to institute the claim against the appellant, in that:

17.1.1.

The power of attorney as supplied in replication does not form part of the cause of action since Mrs Louw claims, in her particulars of claim, that she personally had an agreement with the appellants and the failure to do the construction work was to her house;

17.1.2.

That, should the power of attorney be accepted as part of the cause of action, the power of attorney itself does not provide for litigation to be instituted on behalf of Mr Louw.

17.2.

That, should Mrs Louw have the necessary locus standi to institute the claim, she has not proven that she has suffered any damages on the basis that:

17.2.1.

The house at which the construction work was to be conducted belonged to Mr Louw; and

17.2.2.

She did not prove that her potential claim against the Construction Company would have had a reasonable prospect of success.

[18] These grounds for appeal are closely interlinked and can effectively be summarised as follows:

18.1.

That Mrs Louw lacked the necessary locus standi to institute the claim; and

18.2.

Should the Court find that Mrs Louw had locus standi, she did not prove that she personally suffered damages.

Legal position

[19] A sensible approach is to first and foremost establish whether Mrs Louw had the necessary locus standi to institute the action against the attorneys' firm. Should she have had the necessary locus standi the next step would be to determine (a) whether the power of attorney encompasses the authority to claim damages, and (b) whether Mrs Louw has proven her damages on a balance of probabilities in the amount of R181,310.00 as ordered by the Court a quo.

[20] Having regard to the facts of the matter, it is important to separate the claim that Mrs Louw has against the attorneys' firm (for professional negligence) from the claim that Mrs Louw has against the contractor firm (for breach of contract). To establish locus standi in Mrs Louw as a party to litigation, it is only the claim against the attorneys' firm that is relevant to the first leg of this appeal. Only after locus standi has been proven, the question of whether Mrs Louw's claim was proven against the contractors' firm, will become relevant.

[21] Locus Standi is described in LAWSA (The Law of South Africa) LexisNexis JA Faris et al Durban 2022 as follows:

"He who has a right to sue in an action is said to have a locus standi in such action, and vice versa.

"Everyone has a right to be heard in his own cause, and no one, save a qualified practitioner, has a right to be heard in the cause of another" (per SEARLE, JP in Rescue Committee, DRC v Martheze 1926 CPD 300). The test is, "has the person appearing a direct personal interest in the suit". In that case, it may be considered as 'his cause'" (ibid)."

[22] In Amlers Precedents of Pleadings LexisNexis LTC Harms et al 2018 on page 248 the following is said:

"The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person's interest

in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jurat act.

Sufficiency of interest depends on the facts of each case and there are no fixed rules.

Jacobs v Waks 1992 (1) SA 521 (A)

p. 534D

Gross v Pentz [1996] 4 All SA 63 (A), 1996 (4) SA 617 (A)

The general rule is that it is for the party instituting proceedings to allege and prove its locus standi, and the onus of establishing it, rests on that party. It must accordingly appear ex facie the founding papers that the parties have the necessary legal standing (locus standi in iudicio).

Mars Inc v Candy World (Pty) Ltd 1991 (1) SA 567 (A)

p. 575

Kommissaris van Binnelandse Inkomste v Van der Heever [1999] 3 All SA 115 (A), 1999 (3) SA 1051 (SCA) para. 10”.

[23] In the unreported matter of COPE and Others v Lekota and Another (2010) JOL 26558 (GSJ), also available from SAFLII Congress of the People and Others v Lekota and Another (A5043/10) [2010] ZAGPJHC 132 (10 December 2010) the High Court sat as a full bench (with 3 judges) on appeal against the finding of a single judge. status of a power of attorney which is defective, was discussed. The mini summary of the COPE matter reads as follows:

“The respondents, as office bearers of the first appellant, successfully applied for an (sic- urgent) interdict preventing the holding of an election by the first appellant.

After noting an appeal, the appellants allowed the appeal to lapse. They therefore brought an application for condonation and for the reinstatement of the appeal. Condonation was sought in respect of the late filing of the appellants’ notice of appeal; the filing of an incomplete or defective power of attorney; the late filing and inclusion of several pages of the appeal record and the late filing of the appellants’ heads of argument.”

[24] In the COPE matter the court of appeal found that the filing of a power of attorney in compliance with Rule 7(2) and 7(4) of the Uniform Rules of Court is peremptory, and where the requirements have not been met, the appeal has not been properly enrolled. The Court referred to Aymac CC & Another v Widgerow 2009 (6) SA 433 (W). Due to the failure to apply for condonation in terms of Rule 49(6)(a) (amongst other reasons) the appeal was found moot

and consequently dismissed.

[25] In my view, the COPE matter aptly illustrates the importance to comply with the formalistic rules laid down for the implementation of justice. It simultaneously underscores the value of substantive compliance to ensure fairness. These rules are important to grant structure to the legal field and uniform application, subject of course to the individual circumstances of each case, ensures fairness to both parties in litigation.

[26] The locus standi of the plaintiff a quo is vested in the power of attorney that she received from her husband. In Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa Jutastat e-publications ISSN2224-7319, 2009 5th Edition Chapter 8 on page 267 a power of attorney is described as follows:

“A power of attorney is an authorisation conferring authority upon an agent to act for a principal, either in a specific matter or matters or in general to perform on behalf of the principal all acts which the latter may personally perform. In this work we are concerned only with a special type of power, namely the written authority which is given by a client to an attorney in order to authorise the latter to initiate or defend legal proceedings on his behalf and to act in regard to certain matters incidental to the lawsuit.

Some of the purposes of such a power are to prevent a person whose name is used in the process as plaintiff or defendant from afterwards

repudiating the process altogether and denying the giving of authority, and to prevent the institution or defence of an action in the name of a person who never authorised it.”

(footnotes omitted)

[27] It is trite law, and has been confirmed in *Eskom v Soweto City Council* 1992

(2) SA 703 (W) at 706D that it is a factual question whether a person has been authorised to bring proceedings.

[28] As mentioned, the Court a quo dismissed the application for absolution from the instance after the close of the plaintiff's case. This, however, does not mean that the Court a quo could have accepted it as a fact that the plaintiff had locus standi on the merits of the application. In *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983

(4) SA 921 (A) at 928C-D the following is stated:

“In so far as the application for absolution from the instance was concerned, the only question before the Court a quo was

whether, at the close of the plaintiff's case, there was such evidence before it upon which a reasonable Court might, not should,

give judgment against defendant. See *Gascoyne v Paul and Hunter* 1917 TPD 170. The judgment given and order made by the Court a quo refusing to grant absolution from the instance was not the final refusal of specific relief. It amounted to no more than a direction or ruling that the case should proceed. The defendant could then have elected either to close its case and once more apply for absolution from the instance or for judgment in its favour. Or it could have elected to lead evidence before closing its case. After the close of the defendant's case the question is whether on all the evidence before it judgment should be granted for the plaintiff or the defendant or whether absolution from the instance should be ordered. The fact that the Court refused to grant absolution from the instance at the close of plaintiff's case is an irrelevant

consideration in determining the issues between the parties after the close of the defendant's case.

Argument and analysis

[29] To determine a factual question, the Court has to have cognisance of the facts before it. In this appeal these relevant facts would include the following:

29.1.

Ms Louw issued summons in her personal capacity;

29.2.

Ms Louw claims for personal damages;

29.3.

The wording of the power of attorney from which she derives locus standi;

29.4.

The fact that the power of attorney has been attached in replication and not as part of the claim;

29.5.

The house at which the damages is suffered, is in the name of Mr Louw and as such belongs to Mr Louw.

[30] In *Administrator, Transvaal v Mponyane and Others* 1990

(4) SA 407 (W) Botha J dealt with the situation where some 1,400 employees from the Johannesburg Hospital executed a strike and the Administrator of Transvaal approached the Court with an application for an interdict preventing the strike. An interim interdict (rule nisi) was obtained and in the answering affidavit, the authority of Mponyane (the first respondent) to act on behalf of the other employees were disputed. In reply, the Administrator attached affidavits with specific authorisation granted by 866 employees. However, the authorisation was obtained after the filing of the application. Botha J held that the signatures attached to the replying affidavit was sufficient to establish that there was opposition to the confirmation of the rule nisi on the return date, and the interdict could not be granted by default. However, the Court found that the merits of the rule nisi warranted a confirmation of the interdict.

[31] In coming to the above conclusion, Botha J found as follows at 409:

“However, as far as the only respondent cited by name, ie Janet Mponyane, and her two co-deponents, are concerned, I am of the view that their authorisation of the attorney can be inferred from the fact that they made affidavits resisting the confirmation of the rule. See Ex parte De Villiers 1973

- (2) SA 396 (NC). Janet Mponyane specifically refers to herself as a respondent and concludes her affidavit by the statement that the respondents request that the application be dismissed with costs. That, to my mind, is a clear, if not express indication of her association with the resistance to the confirmation of the rule. I am of the view, therefore, that there is opposition to the confirmation of the rule and that it cannot be confirmed, as it were, by default.

In all the circumstances I am of the view that there was a reasonable apprehension of a continuation of the actions of the

respondents. I have no doubt that the action of the respondents posed a severe threat to the proper functioning of the hospital. In the circumstances I am of the view that the rule should be confirmed.”

- [32] The above illustrates the importance of balancing the formalistic requirements of litigation, with the substantive and individual issues in arriving at a conclusion that is just and fair.
- [33] It is argued by Adv Gründling that the cause of action set out in the founding papers, is not complete since the power of attorneys were attached to the replication and not in amended particulars of claim.
- [34] It is a well-established principle in our law that a litigant’s case has to be made out in the founding papers: whether it be in the particulars of claim in action proceedings or in the founding affidavit in application proceedings. The argument is that it would only form part of the cause of action if the particulars of claim were amended to include the power of attorney, which would then grant the defendants the opportunity to amend their plea accordingly.
- [35] Being supplied in replication, the defendants had no opportunity to reply thereto and it effectively renders the particulars of claim and power of attorney mutually exclusive, or in contradiction with each other: in the particulars of claim Mrs Louw claims personally for damages to her house, as opposed to the replication with power of attorney that Mrs Louw claims on behalf of Mr Louw for damages to his house. Despite the fact that both Mr and Mrs Louw testified to the fact that they were led to believe that their pleadings in the claim against the attorneys were sufficient, it does not change the reality that the defendants were denied an opportunity to plead to the supplemented (or alternative) cause of action, namely the power of attorney.
- [36] This legal principle is one of fairness. Every defendant has the right to know what case it has to meet at trial. I agree with the argument of Adv Gründling that the case that the plaintiff set forth in the trial, namely that of the power of attorney, is not the case set out in the particulars of claim. Every party is bound to its pleadings.

- [37] It is argued by Adv Nel on behalf of Mrs Louw that the plaintiff was ambushed at trial when confronted with the issue of locus standi. This cannot be, if one has regard to the pleadings where the defendants raised the issue of locus standi and the reasons therefore. The argument that it should have been encompassed as a special plea and not curtailed in the pleadings as it is, would be overly formalistic. There can be no doubt that the plaintiff had sufficient notice and time to prepare for the point of locus standi to be raised.
- [38] The particulars of claim, as it stood before the Court a quo was that Mrs Louw claims in her personal capacity for damages suffered resultant from defective construction to her residence. The fact is that the residence is not her residence, but that of her husband, and any damages suffered resultant from defective construction is that of Mr Louw and not Mrs Louw.
- [39] In application for the test of locus standi the fundamental question is: does Mrs Louw have the right to be heard in her own cause and does Mrs Louw have a sufficient and direct interest to be accepted as a litigating party. The litigation a quo was not for the cause of Mrs Louw, but for her husband who is the owner of the residence. I also find that, despite being married and labouring under the impression that the power of attorney grants her sufficient power, she does not have a sufficient and direct interest in the litigation that concern money that was paid by Mr Louw to the contractor, for construction work on the residence of Mr Louw.
- [40] It follows that I find that the Court a quo erred in finding that Mrs Louw has proven that she has the necessary locus standi to institute the action. Having come to this conclusion, there is no need to discuss the further issues on appeal as it becomes irrelevant.
- [41] However, the argument of Adv Nel on behalf of the respondent, that the attorneys had the professional duty to advise their client that the mandate that Mrs Louw provided (namely the power of attorney) was not sufficient and Mr Louw would be the appropriate person to institute the action against the construction company, has merit in my view. On this basis I will order that this judgment be brought to the attention of the Legal Practice Counsel and the Insurance Indemnity Fund.

Attorneys Insurance Indemnity Fund

- [42] I deem it important, due to the material facts of this matter and for the reasons set out above, that this judgment should be brought to the attention of the Legal Practice Council (LPC) which is a national, statutory body established in terms of section 4 of the Legal Practice Act 28 of 2014. A copy should also be served on the Director of the Legal Practitioners Indemnity Insurance Fund (the Indemnity Fund, or LPIIF).

[43] It is noted with concern that the plaintiff and defendants in the court a quo are ad idem that their respective full co-operation was provided to the Indemnity Fund, but no feedback has been received.

[44] Since neither the LPC or LPIIF has been a party to the proceedings since commencement of the legal proceedings, I only deem it necessary to have this judgment brought to their attention.

Costs

[45] The normal rule is that a party that is successful in the proceedings is to be compensated by the unsuccessful party.

[46] In this case, a member of the public litigates against an attorneys' firm and a (then) candidate attorney. This in itself distinguishes it from the norm.

[47] Keeping in mind that the plaintiff in the Court a quo remains a lay person standing in litigation against lawyers, I hold the view that it would be a suitable reason to depart from the normal rules in relation to costs.

[48] In my view it would be just and fair that each party is ordered to pay their own costs, which costs is to include the costs of the litigation in the court a quo and the costs of this appeal.

Order:

[49] In the premises I propose the following order:

- i) The appeal is upheld.
2. The action is dismissed.
3. Each party is to pay its own costs."

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

I agree / not agree

A REDDY

ACTING JUDGE OF THE HIGH COURT

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