

SOUTH AFRICA / JUDGMENT

Madalane v Van Wyk (87/15) [2016] ZASCA 25 (18 March 2016)

[2016] ZASCA 25

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Zondi, Plasket

CASE / FILE NUMBER

87/15

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 87/15

DATE: 18 MARCH 2016

Not Reportable

In the matter between:

LINAH NTOMBI MADALANE obo CLERICIA MASUKUAPPELLANT

And

IZAK DANIEL VAN WYK RESPONDENT

Neutral Citation: Madalane v Van Wyk (87/2015) [2016] ZASCA 25 (18 March 2016)

Coram: Ponnan, Zondi JJA and Plasket AJA

Heard: 26 February 2016

Delivered: 18 March 2016

Summary: Locus standi in judicio – mother purporting to institute action on behalf of her adult daughter – lacks locus standi to do so.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria, (Thobane AJ sitting as court of first instance):

The appeal is dismissed with costs.

Zondi JA (Ponnan JA and Plasket AJA concurring):

- [1] This is an appeal against the judgment of Thobane AJ sitting in the Gauteng Division of the High Court, Pretoria, upholding the respondent's special plea of lack of locus standi in iudicio.
- [2] Ms Clericia Masuku was born on 12 February 1991. On 17 December 2003, when she was 12 years old, she was injured in a motor vehicle accident whilst she was a passenger on a trailer towed by a vehicle driven by the respondent. On 20 September 2010 her mother, Ms Linah Ntombi Madalane, caused summons to be issued against the respondent. Paragraph 1 of the Particulars of Claim, annexed to the summons, reads:

'EISERES, is 'n meederjarige huishulp met identiteitsnommer 651128 0743 089, wat hierin optree in haar hoedan[ig]heid as moeder en natuurlike voog van haar minderjarige kind Clericia Masuku (gebore op 12 Februarie 1991) en ook van dieselfde adres as die Eiseres naamlik Standplaas 162, Tshabalala Trust, Hazyview (hierna die minderjarige kind genoem).'

The summons was met with a special plea in these terms:

'1.1 Plaintiff is acting on behalf of Clericia Masuku, a female born on 12 February 1991.

1.2 Clericia Masuku attained majority on 12 February 2009, at the age of 18 years, in terms of sec. 17 of the Childrens Act no. 38 of 2005.

1.3 Plaintiff's summons was issued 20 September 2010, after Clericia Masuku attained majority.

1.4 In the premises Plaintiff lacks locus standi in iudicio and Defendant prays that the action be dismissed with costs.'

[3] The court a quo was asked in terms of Uniform rule 33 (4) to determine only the issue of locus standi. It determined that issue in the respondent's favour and accordingly upheld the special plea. The appeal is with the leave of this court.

[4] At that time of the collision, the age of majority was 21 years in terms of s 1 of the Age of Majority Act 57 of 1972. That was altered to 18 years by way of s 17 of the Children's Act 38 of 2005 (the Act), which came into operation on 1 July

2007. The Act repealed the Age of Majority Act but its repeal did not take effect until 1 July 2007 when s 17 came into operation.

[5] Ordinarily a minor's locus standi in iudicio is limited in that he or she cannot institute or defend any legal proceedings by himself or herself. He or she requires the assistance of his or her guardian and consequently can only sue or be sued in the name of his or her guardian as representing him or her, or in his or her own name assisted by the guardian.[1] The effect of s 17 of the Act is that minority with its limits on legal capacity terminates when a person turns 18 years. What this means, is that in the absence of any other legal impediment an 18

year old person can sue or be sued in his or her own name.

- [6] Counsel for the appellant submitted that under the Age of Majority Act - the applicable Act when her cause of action arose - Ms Masuku had a right to be assisted by her guardian in any legal proceedings by or against herself until she turned 21 years, and this was not affected by s 17. In support of this proposition he relied on the decision of this Court in *Malcolm v Premier, Western Cape Government*.^[2] He argued that as Ms Masuku's right to be assisted by her guardian vested in her prior to 1 July 2007, the appellant had the necessary locus standi to institute an action on her behalf (when she did on 20 September 2010). Reliance was also placed on the principle that statutes are presumed not to affect vested rights. They are presumed to govern transactions in the future and not those in the past.^[3] Counsel's reliance on *Malcolm* is misplaced. In that case this Court was concerned with the special plea of prescription in terms of the Prescription Act 68 of 1969 and the extent to which s 13(1)(a) of that Act was affected by s 17 of the Act. The question of locus standi did not arise at all for consideration by this Court. *Malcolm* is also distinguishable on the facts in that there *Malcolm* himself, not his guardian on his behalf, had instituted legal proceedings for the recovery of damages. In other words, the person who brought the action had the necessary locus standi and, therefore, his capacity to institute proceedings was not disputed.^[4] Moreover, from the perspective of the minor, the reduction in the age of majority from 21 to 18 by the Act, amounts to the removal a legal impediment, not the imposition of one. To put it another way, a child can now litigate in his or her own name (and without the assistance of his or her parent) from the time that such child turns 18, whereas in the past that very same child would have had to wait until 21 to do so.
- [7] In the present case at the issue of summons, Ms Masuku had been a major for over a year and a half. The allegation in the summons that she was then still a minor is accordingly factually inaccurate and bad in law. She could sue or be sued in her own name without the assistance of her legal guardian. The appellant did not therefore, at the time of institution of the action, have locus standi to act on her behalf. The court a quo was therefore correct in upholding a special plea.

- [8] In the result the appeal is dismissed with costs.

D H Zondi

Judge of Appeal

Appearances

For the Appellant: C van Jaarsveld

Instructed by: Frans Schutte Inc,

c/o Schutte De Jong Inc, Pretoria

Symington & De Kok, Bloemfontein

For the Respondent: B P Geach SC

Instructed by: Nell, Kotzé & Van Dyk Attorneys, Pretoria

Van den Berg Van Vuuren Attorneys, Bloemfontein

[1] F. du Bois Wille's Principles of South African law

(2007) 9 ed at 187; Guardian National Insurance Co Ltd v Van Gool NO

[1992] ZASCA 96; 1992 (4) SA 61 (A) at 66F-G.

[2] Malcolm v Premier, Western Cape Government [2014] ZASCA 9; 2014 (3) SA 177 (SCA).

[3] National Iranian Tanker Co v MV Pericles GC [1994] ZASCA 145; 1995 (1) SA 475 (A) at 483I-J.

[4] See para 4 of the judgment.

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