



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

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **2635/2019**
Heard: **30/07/2021**
Delivered: **01/10/2021**

In the matter between:

NICODEMUS GOSIAME MOGOJE

Applicant

and

DROOGFONTEIN COMMUNAL PROPERTY ASSOCIATION Respondent

JUDGMENT

Mamosebo J

- [1] On 29 November 2019 the applicant, Mr Nicodemus Gosiame Mogoje, brought an urgent application seeking an order interdicting the respondent, Droogfontein Communal Property Association (DCPA), from holding a “special business meeting” scheduled for 30 November 2019 at 10:00. This Court issued a rule *nisi* calling upon DCPA to show cause on 17 January 2020 why the interdict should not be made final. A further order was made that the rule was to operate as interim interdictory relief pending the final determination of the application, which came before me on the extended return day of 30 July 2021.

[2] The relief sought by the applicant is confirmation of the rule with costs. The DCPA is opposing the application and has raised various defences:

- 2.1 First, his lack of *locus standi* to bring this application;
- 2.2 Secondly, the non-joinder of other members of the DCPA;
- 2.3 Thirdly, his failure to show the existence of a clear right; and,
- 2.4 Finally, the presence of an appropriate alternative remedy.

Based on the aforesaid, the DCPA is seeking a discharge of the rule with costs.

[3] The date for the meeting has since passed. The meeting did not materialise. The matter has become moot in as far as the meeting is concerned. The only issue that remains for determination is the costs. In order to make such, it is necessary to deal with the relevant facts that led to the application. Mr Kgotlagomang, for the applicant, invoking *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others*¹ where the court was faced with issues of jurisdiction in matters involving striking employees, submitted that the fundamental feature of our judicial system is to decide disputes before them and not abstract issues. This case finds no application in this matter. His further reference to para 21 of the *National Coalition For Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*² which deals with the ripeness of a matter for hearing does not assist Mr Kgotlagomang either.

[4] The background facts are as follows. On 16 November 2019 the DCPA Secretary, OG Selao, issued a Notice to its members inviting

¹ 2001 (2) SA 872 (SCA) at para 9

² 2000 (2) SA 1 (CC) at para 21

them to a Special Business meeting to be held at Sanlam Building, Kimberley. The items on the agenda:

- 4.1 Clarity on the chairperson position;
- 4.2 Rezoning for residential purposes;
- 4.3 The Annual General Meeting (AGM);
- 4.4 Ill-discipline in the broader [Community Property Association] (CPA);
- 4.5 Update on verifications;
- 4.6 Finalisation of the merger;
- 4.7 Update on [the] current solar project; and,
- 4.8 Co-options.

[5] The DCPA is a communal property association constituted in terms of its constitution and established in accordance with the Communal Property Association Act, 28 of 1996. A member is defined in its constitution as *'family of a claimant represented by one person duly nominated and appointed by the family from time to time to represent them in all matters pertaining to the association.'*

[6] The nominated representative for the Mogoje family is Ms Jennifer Mbengo who resides in Johannesburg. On 29 November 2019 Ms Mbengo completed a Special Power of Attorney marked "NOM2" nominating the applicant to: Investigate and launch an application against DCPA or its committee; negotiate with all the interested parties and proceed with the necessary cause of action; institute legal proceedings on behalf of her family and appoint an advocate if necessary; and to sign all the necessary documents on her behalf.

[7] On 25 November 2019 the applicant arranged a meeting with the Department which took place on the following day, 26 November 2019. The Department furnished him with the "NOM 4" report

which, according to him, did not address his concerns. He subsequently met with his attorney, Mr Kgotlagomang of the firm Towell and Groenewaldt and gave him the instructions to have the meeting of 30 November 2019 cancelled. Mr Kgotlagomang addressed a letter of demand dated 27 November 2019 to the Chairperson of the DCPA objecting to the listed items being discussed at a special business meeting and the non-compliance with the notice period afforded by the constitution to members for a meeting. The Chairperson was given until 28 November 2019 at 12:00 to confirm that the meeting will not be proceeded with, failing which an urgent application would be brought. That precipitated this application launched the very next day.

- [8] Clause 16 of the constitution deals with Special Business Meetings which reads in relevant part in this manner:

"16.1 No decision of the Committee or of a General meeting, involving a matter that represents Special Business shall be of force or effect unless it shall have been approved, either generally or specifically, as follows:

16.1.1 In terms of a Special Resolution passed at a Special General Meeting duly convened on 14 days' notice and passed by two-thirds of the members present and voting. The notice conveying such a meeting shall state the nature of the Special Business concerned.

16.2 The following matters shall be considered Special Business:

16.2.1 Any transaction contemplated by section 12(1) of the Act, including the proposed disposal or encumbrance of any immovable property or any right [or] interest in and to movable or immovable property or any part thereof of the Association or to which the Association is entitled to or expects to obtain a right, whether by sale, lease, donation, exchange, mortgage, or otherwise howsoever."

[9] Mr Kgotlagomang relied on Clause 16 of the DCPA's constitution, emphasising the operative word "shall" in his submission that the agenda items as appearing at para 5(above) are not items meant for the special business meeting. The only issue that qualifies for discussion under special business is item 4.6, finalisation of the merger. Mr Kgotlagomang further argued that, in any event, item 4.6 was considered before as it appears in the undated progress report of the DCPA, from 2011 to date, addressed to the Director Tenure Security System, (DTSS) Department of Rural Development marked "NOM4" under the head "Malu and Eridanus contract".

[10] Mr Kgotlagomang argued that it is the applicant's case that this matter was discussed and finalised as reflected at page 60 of the report. However, in the DCPA special business minutes dated 29 June 2019, marked "DCPA 8", the following resolution was taken:

"Resolution granted to the Executive to enter into contractual agreements with potential investors (Malu and Eridanus) in as far as the new proposed partnership is concerned and a copy of final contract will be made available at the office for family reps."

[11] In countering applicant's submission, Mr Van Niekerk SC, for the DCPA, submitted that it boils down to the interpretation of Clause 16. Counsel argued that the Special Business Meeting is a special general meeting of members convened on 14 days' notice whose resolution is by a two-thirds vote of members in attendance while the ordinary general meeting's resolution passes by consent of members or as the constitution may prescribe. Counsel intimated that if Mr Kgotlagomang took issue with the interpretation by the DCPA what becomes of the 14-days' notice in Clause 16.1.1? Mr Van Niekerk contended that what was required was 14 days' notice, which was given.

- [12] Mr Kgotlagomang submitted that the Court should note the concession made by the DCPA at para 17.2 of its answering affidavit that the meeting called for 30 November 2019 was merely an information meeting. The applicant maintains that the information sharing could not have been done under the umbrella of a Special Business Meeting but ought to have been under a general meeting which must be convened quarterly. Para 17.2 states:

"It is, however, apposite to point out that the meeting of 30 November 2019 was an information meeting, save for the resolution that had to be considered with regard to the transaction between MALU Landgoed (Pty) Ltd, Fieldsvie, the CPA and Newco. Due to the interim order granted herein, no resolution could be taken with regard to this transaction. A copy of the unsigned proposed resolution is attached hereto as annexure "DCPA4".

Locus standi

- [13] In as far as the contention that the applicant lacks the necessary *locus standi* to bring the application is concerned the applicant's deposition is to this effect:

"I am a descendant of a claimant of the respondent. Therefore, my family is a beneficiary of the respondent. My sister, namely Jennifer Mbengo has been nominated as a family representative in the respondent and she has authorised me to launch this application. I attach hereto a copy of the power of attorney duly signed and mark it as annexure 'NOM2'".

Mr Kgotlagomang submitted that Clause 22 of the constitution³ reserves the right to any member and that applicant is a member entitled to approach the court for the necessary relief. I do not agree. Sec 22 is specific in terms of the circumstances under which

³ Clause 22 of the constitution stipulates: Notwithstanding anything to the contrary herein contained or implied, the right is further reserved to any member or committee member, or any other person having a material interest therein, to apply to court for appropriate relief to redress in the event of any refusal or failure on the part of the Committee to give proper effect to the principles of equity stipulated in Clause 5 above, or to implement the terms of the Constitution, in accordance with its intent and purpose.

a member or committee member may invoke it. I find that it is not relevant in this instance.

- [14] In countering the claim by the applicant, the DCPA contended as follows in its answering affidavit:

"The CPA's constitution defines a 'member' as 'a family of a claimant represented by one person duly nominated and appointed by the family from time to time to represent them in all matters pertaining to the association.' The applicant is a member of the Mogoje family, a member family, but he is not [a] duly nominated person who represents the Mogoje family. The applicant's sister, Ms Jennifer Mbengo, is the duly nominated and authorised family representative of the Mogoje family. I attach hereto as annexure DCPA3, a copy of the list of the family representatives, confirming same. At no stage, has the applicant been nominated to replace Mrs J Mbengo as the duly authorised family representative. The applicant is also not a special member admitted in terms of paragraphs 4.2.5 and 9.6.3 of the CPA's constitution.⁴ The proxy form attached to the founding affidavit (annexure NOM1) is not dated nor signed by Ms J Mbengo. The special power of attorney attached to the founding affidavit (NOM2) also does not authorise the applicant to interdict any meeting of the CPA. In view of the above and the CPA constitution, I submit that the applicant does not have the required locus standi to file this application in his personal or even in a representative capacity. I submit that this application should be dismissed, with a cost order in favour of the CPA, for this reason alone."

These contentions by the DCPA were neither admitted, denied nor noted by the applicant in reply.

- [15] Whereas in *Gross and Others v Pentz*⁵, a case involving trusts and trustees, and whether or not a beneficiary had *locus standi* to bring

⁴ Clause 4.2.5 : To enter into agreements, grant rights of occupation, enter into participation agreements and award "special membership" to any outside party whose involvement with the association will be of benefit to all members of the association.

Clause 9.6.3: The association will be allowed to appoint people into the committee who are not part of the claimant community of Droogfontein who might bring certain expertise and this will be limited to 2 (two) people only, who will have no right to vote at meetings of the Committee.

⁵ 1996 (4) SA 617 (A) at 632C-F

a dispute against the trust, the majority judgment, by Corbett JA, dealt with the general rule that the trustee and not the beneficiary has *locus standi* to bring the proceedings. The minority judgment by Harms JA, clarified the aspect of *locus standi* further as follows:

"The question of locus standi is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as a litigating party (Wessels en Andere v Sinodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk, OVS 1978 (3) SA 716 (A) at 725H; Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) at 388B-E). The sufficiency of interest is 'altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie....' (Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) at 534D). The general rule is 'that it is for the party instituting proceedings to allege and prove that he has locus standi, the onus of establishing that issue rests upon the applicant. It is an onus in the true sense; the overall onus...' (Mars Incorporated v Candy World (Pty) Ltd 1991 (1) SA 567 (A) at 575H-I). It follows from this that the question cannot always be settled in initio and that it is an inherent risk of litigation that it may only at the end of the matter be established whether locus standi was present or not."

- [16] I am not persuaded by the applicant's averments that he had a right which he was entitled to enforce in court, like interdicting the said scheduled meeting. Evidently, he is not the nominated representative of the claimant family. The only name submitted to DCPA to accord with Clause 7.6 of the DCPA constitution is that of Ms J Mbengo. The constitution does not make provision for this right to be transferred. Regardless of the fact that Ms J Mbengo has issued a Special Power of Attorney to the applicant, she does not show the source from which that power was derived.

I therefore find that the applicant lacked the necessary *locus standi* to bring the application to Court.

Joinder

- [17] Mr Van Niekerk submitted that the non-joinder of all the other members of the DCPA by the applicant was fatal, because they had a direct and substantial interest in the issue whether the meeting was to be proceeded with or not. Fagan AJA, then, has succinctly pronounced on the issue of joinder in *Amalgamated Engineering Union v Minister of Labour*⁶ when he said:

"Indeed, it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect the party's interests."

- [18] Van den Heever AJ in *Hartland Implemente (Edms) Bpk v Enal Eiendomme Bk en Andere*⁷ explained a direct and substantial interest as an interest in the right which is the subject-matter of the litigation and not merely a financial interest. The Supreme Court of Appeal in *Burger v Rand Water Board and Another*⁸ made the following insightful remarks:

"[7] The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the court might make."

- [19] Mr Kgotlagomang has refrained from arguing the issue of joinder either in the written heads or orally. The founding papers have not dealt with the issue of joinder and no replying affidavit was filed.

⁶ 1949 (3) SA 637 (AD) at 659

⁷ 2002 (3) SA 653 (NC) at 663E-H

⁸ 2007 (1) SA 30 (SCA) at 33 para 7

[20] Undeniably, the other members of DCPA had a direct and substantial interest in the outcome of the application. The deponent has only focused on the Special Power of Attorney he possessed and being a descendant of the claimant to bring the application. He did not think of the effect this application or its outcome may have on the other members. It is unknown at this stage whether they were even aware of the application because the founding papers are silent on this aspect. Failure to join, in these particular circumstances, is indeed fatal. The applicant should have joined other members and/or produced proof that he had served them with the papers and they chose to abide the decision of the Court.

It follows therefore that the applicant also stands to fail in this application on the basis of non-joinder.

Final interdict

[21] The applicant is seeking confirmation of the rule. The requisites for the right to claim a final interdict are trite. In *Hotz and Others v University of Cape Town*⁹ Wallis JA, (Navsa JA, Bosielo JA, Theron JA, and Mathopo JA concurring), made the following instructive remarks:

"[29] *The law in regard to the grant of a final interdict is settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. Once the applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief. That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to*

⁹ 2017 (2) SA 485 (SCA) at para 29

withhold an interdict, that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts for the resolution of disputes, and potentially infringe the rights of security of the person enjoyed by students, staff and other persons on the campus."

[22] The applicant, though a descendant, is not the nominated representative. He can therefore not claim a clear right, under these circumstances. The meeting scheduled for 30 November 2019 was stopped from being convened by way of interim interdict. The applicant cannot argue that his right has been infringed because he was clearly not the holder of a protectable right under the DCPA constitution.

[23] Was there any suitable alternative remedy other than an interim interdict? The applicant only conveyed the following in the founding affidavit pertaining to the existence or absence of an alternative remedy:

"In the light of the developments on 28 November 2019, it is clear that the applicant has no alternative remedy but to approach the Honourable Court for the relief in the notice of motion."

To recap, the developments are the request by letter for the DCPA to cancel the meeting.

[24] The aforementioned explanation falls short of persuasion. It is inexplicable why the applicant did not attend the scheduled meeting and raise a point of order in respect of what ought to be the items qualifying as special business items. By so doing he could have afforded other members the opportunity to meaningfully engage on the aspect or to convince him otherwise. If the meeting proceeded regardless the applicant could also have challenged it afterwards through the appropriate relief. Of significance is that item 4.6 on

the agenda fell squarely within the purview of a Special Business Meeting. Because the meeting was stopped the proposed resolution relating to Malu remained unsigned. This item alone and the decision for the stopping of the meeting has, in my view, adversely affected other members who have a direct and substantial interest in the matter. The applicant's averment that the matter was finalised cannot be correct because "DCPA4" clearly shows that the resolution remains unsigned.

I therefore find that the applicant has not demonstrated a clear right which has been infringed and further fell short of making a case that there were no alternative remedies at his disposal.

Costs

[25] Mr Kgotlagomang submitted that the DCPA should be mulcted with a punitive cost order because the interim order had a final effect and that it was unnecessary for the DCPA to file opposing papers after the matter had become moot. Mr Van Niekerk, on the other hand countered that the answering affidavit was filed for the Court to consider the merits and the de-merits of the application. Invoking *Phuma KZN Athletic Club v KwaZulu-Natal Athletics*,¹⁰ counsel urged Court to consider whether the applicant had a prospect of obtaining a final order or not, and if not, then there is no basis why costs should not follow the result.

[26] The correct approach, however, in determining the issue of costs where the merits have been disposed of, can be found in *Giliomee v Cilliers*¹¹ where Fagan JA made the following remarks:

¹⁰ 2015 JDR 0169 (KZD)

¹¹ 1958 (3) SA 97 (AD) at 101D-E

"In 'n saak wat voor my kollega PRICE in die Witwatersrandse Hof gedien het, Jenkins v SA Boiler Makers, Iron & Steel Workers & Ship Building Society 1946 WLD 15, lees ons in die hoofnota:

'Where a disputed application is settled on a basis which disposes of the merits in so far as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must with the material at its disposal make a proper allocation of costs'."

[27] Resultantly, and for the foregoing reasons, I make the following order:

The rule *nisi* is discharged with costs.



M.C.MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

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