

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 7428/2024

In the matter between:

DR TSHEPO MOFFAT SHIKWANE	First Applicant
MARABI LEVI LESIFI	Second Applicant
NDUMISO LEON MASHAO	Third Applicant
NTUKULOGA HENILE BOPAPE	Fourth Applicant
ROSETTA MODITSANA MAKHAMATHE	Fifth Applicant
HANS LEBOGHE MAMABOLO	Sixth Applicant

And

WOODHILL HOME OWNERS ASSOCIATION REG NO: 2007/031770/08	First Respondent
THE BOARD OF DIRECTORS WOODHILL HOME OWNERS ASSOCIATION	Second Respondent
LUFUNO NEVONDWE	Third Respondent

S. MDHLULI	Fourth Respondent
SP ENGELBRECHT	Fifth Respondent
K ENGELBRCHT	Sixth Respondent
A VAN DER MERWE	Seventh Respondent
DR I PRIKRILOVA	Eighth Respondent
BRADELEY MAPITI	Ninth Respondent
M MAKHURA	Tenth Respondent
N HLAISE	Eleventh Respondent
TYSOCON (PTY) LTD	Twelfth Respondent
CSOS	Thirteenth Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **12 February 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] *Locus standi in judicio*, or rather the rights of the applicants to stand and litigate in court, and the non-joinder of parties with substantial interests in the outcome

of the litigation are the topical issues at this stage of the application. They became so because the opposing respondents contend in these proceedings that the applicants do not have the right to institute the application and that, if they have the right, they have failed to join all the parties who would be affected by the outcome of the application. Naturally, the applicants argue that these contentions are meritless and should be dismissed with costs.

[2] The applicants instituted this application to assail a number of decisions and actions taken by the Board of Directors of the Woodhill Homeowners Association (HOA). They also ask the court to remove the Directors, who are the third to the eleventh respondents, from their positions amid allegations of impropriety. Importantly, the applicants are asking for a declaration that the provisions of the HOA are inconsistent with the Constitution and accordingly invalid. Also, that the MOI that was lodged with the Commission was not in line with Special Resolution 1 of on 22 November 2022 and, on that basis, it is *pro non scripto*.

[3] The first to the eleventh respondents are opposing the application as a collective. Then, the twelfth respondent acting separately has also entered issue and is also opposing the application. Only the thirteenth respondent has stayed clear of the litigation by filing a notice to abide the outcome of the application. I will, for purposes of convenience, refer to all the opposing parties as the respondents.

[4] In addition to the technical points that I have mentioned earlier, the application is opposed also on the merits. Both on the papers filed and during the hearing of oral arguments, the respondents made common cause in respect of the two points in limine and I will, for that reason, deal with them as if they had been raised by just one party. To do them proper justice, I determine the points separately.

The *locus standi* objection

[5] To determine whether the applicants have established locus standi I need to look into their founding papers, and any clarity proffered in their replying affidavits. What ignited this application appears to be the fines or penalties that the HOA has imposed on the applicants, or some of them, in accordance with the terms of the

MOI. For a myriad of reasons, the applicants challenge, in the main, the validity of the provisions of the MOI which permit the imposition of such fines or penalties without prior hearing.

[6] In pith, the respondents say that the applicants have failed to allege and prove their standing in court. To elucidate this contention the respondents pointed to the fact that the applicants' founding affidavit merely states that they are residents in the estate, occupying the various properties that have been identified.

[6] This is a sample of how the averments read:

“5. The 1st Applicant is Dr Tshepo Moffat Shikwane, an adult male medical practitioner, employed by the Department of Health Limpopo, and residing at Erf 6[...] Woodhill Estate, Bendor, Polokwane.

6. The 2nd Applicant is Marabi Livy Lesufi, an adult male pensioner, residing at Erf 5[...] Woodhill Estate, Bendor, Polokwane.”

[7] The respondents say that these allegations are not sufficient to sustain the applicants' *locus standi in judicio*. They contended that the applicants should have presented facts in their founding papers, with proof to show that they are entitled to litigate and to ask the court to grant relief contained in the Notice of Motion. In the founding affidavit the deponent placing himself on the pedestal makes mention that ‘*some of us, such as the 2nd Applicant purchased sites at Woodhill ...*’.

[8] Additionally, the respondents argued that some of the respondents are co-owners or joint property owners with other people and therefore, acting as individuals, they do not have the required capacity to stand as litigants in this application. The respondents then isolated the sixth respondent and pointed out that the property in which he resides is owned by a Trust, the Mamabolo Family Trust, and that the trustees must litigate on the trust's behalf. The applicants concede this point.

[9] When the applicants replied and clarified their positions with regard to ownership of the properties, the respondents raised the contention that they are not

entitled to make a new case in reply. Apart from impugning the terms of the MOI, the applicants also take issue with the imposition upon them of penalty levies based on the terms of the MOI, which they are seeking to assail in this application. The say, *inter alia*, the following in their founding affidavit:

“83. The Director elected to impose fines in the sum of R1950 per person on the 3rd, 4th and 5th Applicant, for allegedly being a nuisance, in that it is alleged the stopped vehicles of members and went into members’ houses to inform them of the AGM and request members to attend or those who are not available to provide proxy forms.”

[10] The applicants also rely on a circular published by CSOS, Circular No. 1, which provides for the imposition of penalties by the HOA’s on members. The circular provides that, much like the now constitutionally subsumed rules of natural justice, that trustees (in this case Directors) do not *‘have the power to impose fines and penalties on their own or to take any action against an owner or occupier - the fair and equitable procedure as set out in the rules must have been followed’*.

[11] Furthermore, the applicants decrying the imposition of fines upon them without a prior hearing, saying that:

“91. On affording the 3rd to 5th Applicant a hearing, they would have established that the purpose of visiting members was not for self-interest but to inform members of the impending AGM and issues regarding the MOI and importance of providing proxies. The 2nd Respondent would have been aware that they fell short of the right to impose a fine or penalty in terms of CSOS Circular 1 of 2021, Clause 1 relating to fines and penalties.”

[13] Taking the matter further, the applicants state that:

“94. The Director on 3 June 2024 upon being challenged with contravention of clause 2.4 retracted the fine and issued a “WARNING” which at the same time called upon the three members to make representations. I am advised on a conspectus of facts, this was a red airing, as a decision was already taken

and members are afforded an opportunity to make representations so as to ensure that the Directors are able to produce a response of the members to a fait accompli, just to return the same verdict of a fine.” (**Emphasis added**)

[14] Recently the Supreme Court of Appeal, in upholding an appeal in *Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another*,¹ reminded us of the long-established test for determining whether a party to proceedings has the necessary *locus standi*. The court held *inter alia* that:

“[6] *Locus standi in iudicio* is an access mechanism controlled by the court itself. Generally, the requirements for *locus standi* are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant’s interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant.” (**Emphasis added**)

[15] The principles upon which the court relied to uphold the appeal are well-known and accord with the dictum in *Four Wheel Drive CC v Leshni Rattan NO*.² As it was posited in these decisions, the enquiry to determine *locus standi* is fact-based and the duty of the court is to establish from the pleadings before it whether the party that is required to prove standing has managed to demonstrate that it has sufficient interest in the matter at hand.

[16] On the facts that were presented before me, if it was ever unclear as to the identity of the applicants, at least in so far as the 2nd to 5th applicant are concerned, the passages that I have referenced make clear any confusion. But the respondents,

¹ *Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another* (483/22) [2023] ZASCA 107; 2024 (6) SA 52 (SCA) (27 June 2023) at para 6.

² [2018] ZASCA 124 para 7.

despite challenging the applicants' *locus standi*, are aware of the identities of the applicants. They took the point opportunistically, and on the misconceived belief that nothing in the founding papers has clothed the applicants with *locus standi*.

[17] In several of their own correspondences to some of the applicants, including the second applicant, the respondents identify them as owners. This is important because membership of the HOA is based on ownership. It does not cover the respondents with any measure of glory that they sought to dispute the applicants' *locus standi*, and based on their mechanical reasoning that they did not allege in the founding affidavit that they were owners or members of the HOA. I have shown the instances where at least some of the applicants have been referred to as members. In any event, it is evident that the application was partially birthed by the imposition of fines or penalties on the applicants at the hands of the respondents. The applicants clearly have an adequate interest in the subject matter of the litigation

[18] in any event, to pass the threshold for becoming a member of an HOA is not difficult to achieve. As it was explained by the court in *Mtshali v Harbour Town Homeowners Association*³:

“[57] To become a member of the HOA, the appellant had to agree to become and member, and her name had to be placed on the register. Once these requirements are met, the appellant is a member of the HOA.”

[19] Here, the list of members is in the HOA and Directors' possession and control. They know who the applicants are- and it would be concerning if they did not- hence they were even able to place it on record that some of them co-own properties with other individuals who are not participating in the proceedings. It is unhelpful for the respondents to plead that some of the applicants are joint owners and that, for that reason, as an example, the second respondent does not have *locus standi*. What they actually mean is that they are aware that the second applicant co-owns property with his wife, with obligations or right jointly and severally, yet they say that he has

³ *Mtshali v Harbour Town Homeowners Association* (A2024-034881) [2025] ZAGPJHC 84 (21 January 2025).

not established *locus standi* because the allegations of ownership have not been made in the founding affidavit.

[20] The applicants also suggest that the *ex post facto* ratification of the second applicant's wife should be disregarded in that he is trying to make a new case in reply. So too they challenge the clarifications of ownership which were made by the other applicants as new cases in reply. The following passages from the *Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another* authorities that I mentioned above are important to mention:

“[8] On the strength of its finding on voidness, the high court concluded that *ex post facto* ratification was not possible. As the former has been found to be wanting, the latter must suffer a similar fate. In any event, it is clear from the common cause facts that the practitioner had consented to the institution of the action. Significantly, in this regard, well before the institution of the action the appellant's attorney sought the practitioner's consent. On 2 December 2020, the practitioner's representative confirmed that the practitioner had consented to the institution of the action. Thereafter, the appellant's attorney proceeded to issue the summons.

[9] Approximately two months later, there was an intimation that the practitioner may not have consented because his representative had confused this action with another. However, once the practitioner became aware that there may have been some confusion, he signed a power of attorney authorising the institution of the proceedings. Accordingly, the members of the appellant had the requisite approval of the practitioner to institute the action against the respondents.” (Emphasis added)

[21] Therefore, on the strength of the confirmations by the spouses of the applicants that they have authorised the application, the continued contention that the affected applicants did not make a case to be allowed to stand before court cannot be accepted. It seems cynical to hold onto the contention and it must be rejected. Apart from the sixth applicant, I am satisfied that the applicants have sufficiently established their *locus standi* to be heard in this application.

Non-joinder point

[22] The respondents aver that the application ought to have been served on all the homeowners individually. There are more than 600 homeowners at Woodhill Estate, who together form the HOA. They argued, referencing section 15 of the Companies Act,⁴ that because the MOI is binding between the members and the HOA, it cannot be amended without members' participation. As a result, the argument went further, all the individual members ought to have been joined in the litigation.

[23] The twelfth respondent sought to offer a solution that the applicants should send out notifications to all the members and invite them to observe the application at the HOA offices. Then, as it goes, it would be up to the members to decide whether they are to participate in the legal proceedings.

[24] The test for joinder is not complicated and can best be illustrated from the authority in *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others*⁵ which reads *inter alia* that:

“[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.”

[25] For decades before the above authority it has been understood that an order of court is unenforceable against a person who was not cited and served with court papers, and who was not given an opportunity to participate in the proceedings.

⁴ Act No. 71 of 2008.

⁵ *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017) para 10.

[26] The respondents contend that the individual property owners must be cited and served with the court papers because their individual contracts with the HOA are to be affected by amendments to the MOI which the applicants are asking for from the court. It is so that the applicants are challenging the validity of the MOI and on various grounds. Chief amongst the grounds was that some of the provisions of the MOI were not preceded by resolutions taken at a duly constituted annual general meeting of the members.

[27] The applicants intend to argue at the appropriate time that the MOI contains provisions which are invalid and, if successful, the offending provisions of the MOI may be severed therefrom. This is what ignited the respondent's contention that the MOI or some of its terms will be amended without the individual homeowners voting for such amendments.

[28] I understand an HOA to be a body that is composed by property owners within an estate. In that sense the HOA operates in a way akin to a voluntary association. The purpose of an HOA is to administer and manage the communal interests of owners in an Estate. It is the body that determines the levies, fines and penalties that are payable by members as well as the rights, and obligations of owners, and it also maintains communal property on behalf of the members. An HOA achieves these things through elected Trustees or Directors, as the case may be.

[29] In *Bushwillow Park Home Owners v Fernandes and Others*⁶ it was held by Sutherland J that:

“6. The estate consists of 591 plots upon which owners may build freestanding homes. The estate is secured and gated. A condition of ownership is that the unitholder becomes subject to the authority of the applicant in several prescribed respects. The relationship between the applicant and all the 591 unitholders is regulated by contract. Self- evidently, the sum of their reciprocal rights and obligations derives solely from contract. The applicant is a representative body elected by all the unitholders.

⁶ *Bushwillow Park Home Owners v Fernandes and Others* (2014/31526) [2015] ZAGPJHC 250 (23 October 2015).

Decisions made by the applicant, through its elected office-bearers, are therefore made within the compass of conferred authority. Axiomatically, the limits of such authority are determined by the proper meaning to be given to the instruments which articulate that authority.” (Emphasis added)

[30] The HOA and its directors have been granted authority to take representative decisions on behalf of the members in matters of common interests. That, in my view, includes the instances where litigation is instituted impugning the validity of the MOI or any of its provisions. In any case, I fail to see how this application impacts on individual contractual rights of the members. My view is that the application does not. Disputes in which the validity of MOIs and their provisions are replete in our jurisprudence. Invariably, the representative body of members is- and must be- cited as a party in such proceedings.

[31] On the last issue pertaining to costs, I see no reason why they should not follow the result.

Order

[32] I make the following order:

[a] The points *in limine* raised by the respondents as to lack of *locus standi in judicio* and non-joinder are dismissed with costs.

[b] The respondents are jointly and severally liable to pay the costs awarded in terms of paragraph [a] above, the one paying the others to be absolved.

MOKGERWA MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR APPLICANTS : MH MASILO

HLM MAMABOLO ATTORNEYS POLOKWANE

FOR 1ST TO 11TH RESPONDENTS : C GOUWS SC

BOSMAN ATTORNEYS POLOKWANE

FOR 12TH RESPONDENT : J OBERHOLZER

DE BRUIN OBERHOLZER ATT POLOKWANE

HEARD ON : 06 FEBRUARY 2025

DELIVERED ON : 12 FEBRUARY 2025