



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
JUDGMENT**

**Not Reportable
Case no: 11256/2023**

In the matter between:

ARMIN AEGERHARD

APPLICANT

and

**SIGNAL VIEW CLOSE HOMEOWNERS
ASSOCIATION**

FIRST RESPONDENT

MARK PIENAAR

SECOND RESPONDENT

ALEWIJN ERHARDT JOUBERT

THIRD RESPONDENT

BELLINGAN-JOUBERT-MULLER ATTORNEYS

FOURTH RESPONDENT

NO. 1 K[...] ROAD (PTY) LTD

FIFTH RESPONDENT

CITY OF CAPE TOWN

SIXTH RESPONDENT

REGISTRAR OF DEEDS

SEVENTH RESPONDENT

Neutral citation: Aeberhard v Signal View Close Corporation and Others (Case no 11256/2023) [2025] ZAWCHC 188 (05 May 2025)

Coram: NUKU J

Heard: 4 February 2025

Delivered: 5 May 2025

Summary: Practice – locus standi – issue of locus standi to be decided in limine before any consideration of the merits – a party approaching court in terms of section 38 of the Constitution must allege infringement or threat to a right in the Bill of Rights – failure to do so fatal to the party's locus standi.

ORDER

1 The application is dismissed with costs on scale B, including costs of two counsel, where so employed.

JUDGMENT

Nuku J

Introduction

[1] The applicant seeks declaratory relief that the encroachment and use of Portion 13 of Erf 1[...] Tamboerskloof (the property) by the first respondent and its members is unlawful (the declaratory relief). In addition, the applicant seeks an interdictory relief directing the first respondent and its members to reverse the unlawful encroachment onto the property at their expense and cost (the interdictory relief). Lastly the applicant seeks costs of suit against those respondents who oppose the application.

[2] The applicant is a Swiss national who owns immovable property situated at [...] Signal View Close, Cape Town, Western Cape (the applicant's property). The

applicant's property forms part of a community scheme in respect of which the first respondent was established as the Homeowners Association, and as such the applicant is a member of the first respondent.

[3] The first respondent is a Homeowners Association which was established in respect of a community scheme that resulted from the subdivision of Remainder Erf 1[...] Tamboerskloof, Cape Town also known as No.1 K[...] Road (the original property). The first respondent opposes the application.

[4] The second respondent is also a member of the first respondent and at some stage was its chairperson. He is cited in these proceedings in his capacity as the chairperson of the first respondent, but it is common cause that he is no longer the chairperson of the first respondent. The third respondent is also a member of the first respondent, an attorney practising as such under the name and style of the fourth respondent and the sole director of the fifth respondent. The second to fourth respondents do not oppose the application.

[5] The fifth respondent is the owner of the original property over which the community scheme known as Signal View Close was developed and in respect of which the first respondent was established as the Homeowners Association. The fifth respondent opposes the application.

[6] The sixth respondent is the Municipality that exercises jurisdiction over the property that forms the subject matter of this application. It approved the subdivision of the original property and imposed conditions and one of those conditions is central to this application. The seventh respondent is responsible for registration of transfers of properties in the Western Cape Province, including the properties that form the subject matter of these proceedings. The sixth and seventh respondents do not oppose the application.

[7] In opposing the application, the first and fifth respondents contend that (a) the applicant lacks the necessary locus standi to bring this application, (b) this court lacks jurisdiction to hear the application, (c) the applicant should be non-suited for failure to join the South African National Parks, and (d) the applicant has not made

out the case for the relief he seeks. Before considering these issues, it is necessary to set out the factual background that culminated with the applicant instituting this application.

Factual Background

[8] The dispute in this matter originates from the subdivision of the original property. The subdivision was approved by the sixth respondent on 27 December 1993. The approval authorised the subdivision of the original property into 14 portions. The property, in terms of the original conditions of the approval of the subdivision, was designated as a Public Open Space which was to be held in title by a Homeowners Owners Association to be formed.

[9] On 20 November 1996 and prior to the registration of the subdivision, the sixth respondent wrote to Miller Gruss Katz & Traub Attorneys (these being the attorneys who were attending to the registration of the subdivision) advising of the amendment of the conditions of the approval of the subdivision of the original property. The sixth respondent's letter, in the relevant part, reads:

'1. In terms of Section 42 (3) of the Land Use Planning Ordinance 1985 the conditions of Council's subdivision approval SE 13653 dated 1993-12-27 are hereby amended by the addition of the following:

"13.1 TRANSFER OF PORTION 13 TO COUNCIL

13.1 Portion 13 (zoned Public Open Space) shall be transferred to Council free of compensation."

2. The above was omitted in error from the original approval and arises from (a) the original owner's intention to give the land represented by Portion 13 to Council, and (b) By the requirement of Council that this portion of land become part of the New National Park and be managed as such.

3. Please arrange for the transfer of the said Portion of land as soon as possible.'

[10] The sixth respondent's letter advising of the amendment of the conditions of the approval of the subdivision appears to have caused some anxiety to some of the purchasers of the portions of the original property. To this extent, C & A Friedlander Attorneys addressed a letter dated 4 December 1996 to Miller Gruss Katz & Traub Attorneys requesting that the subdivision should be registered without the transfer of the property to the sixth respondent 'so as to afford the purchasers ... the opportunity once the Home Owners Association has been formed, to formulate a view on the matter and, to take the necessary action to protect their interests.' In response, Miller Gruss Katz & Traub Attorneys confirmed, in their letter dated 5 December 1996, that 'the transfers have been lodged as previously planned, without transfer of the property to the Council.'

[11] On 5 February 1997, the third respondent addressed a letter to the sixth respondent. The letter was in the fourth respondent's letterhead and the third respondent advised that he was acting on behalf of nine of the twelve owners of the subdivided property. The letter recorded the distress and anguish caused by the error referred to in the sixth respondent's letter dated 4 December 1996 regarding the amendment of the conditions of the approval of the subdivision of the original property. The letter went on to request the sixth respondent's consent to have the property registered in the name of the first respondent, as per the original conditions of approval.

[12] The Executive Director: Planning and Economic Development of the sixth respondent responded in a letter dated 17 July 1997 that:

'The hatched portion lettered ABCDEF was acquired by the City, but transfer was not taken and title not registered in the name of the Municipality of Cape Town. It should be noted that in the circumstances registration is not obligatory.

The subdivisional plan for Erf 1[...] including the hatched portion was submitted and approved subject inter alia to the hatched portion being retained as Public Open Space.

On registration of the first portion the subdivision became effective and the Public Open Space, although registered in the name of No. 1 K[...] Road (Pty) Ltd, in fact vested in the Municipality of Cape Town as it still does.

It should be noted further please that by virtue of its position in relation to the nature reserve boundary the National Parks Board insists that that it be included in the nature reserve.'

[13] The applicant's discontent with the first respondent, as gleaned from the papers, started when the first respondent's trustees resolved to erect a new fence. Part of this new fence was to encroach onto the property. This appears from his email of 9 August 2006 where he wrote:

'Thanks for the clarification. In order to clarify from my side I NEVER gave my agreement to the "clarified version" of section 13 either. ... Everybody has the right to know what is going to happen with the existing fence and with the "new acquired" land....'

[14] On 23 November 2006, Steer Property Services (Pty) Ltd wrote to all the members of the first respondent advising, among other things, that "The fence will be electrified and will be set back 25m from the existing boundary. Alewijn Joubert has arranged for the title to this land to be passed back to Signal View Close Homeowners Association...."

[15] On 16 February 2016, the sixth respondent served the first respondent with a Notice of Intention to issue a Notice of Contravention of Section 11 (1) (r) of the City of Cape Town Public Parks By-Law (the Notice of intention to issue a Contravention Notice). The Notice of intention to issue a Contravention Notice alleged that the first respondent had contravened the provisions of City of Cape Town Public Parks By-Law (the By-Law) by erecting a fence that encroaches over the property. The first

respondent was given an opportunity to make written representations as to why it should not be issued with a Notice of Contravention directing it to remedy the harm caused by the erection of the fence over the property.

[16] The first respondent responded to the Notice of intention to issue a Contravention Notice by way of a letter dated 29 February 2016 disputing that the fence encroaches over the property. The letter further advised that the decision to erect the fence was taken during 2006 at a time when the fifth respondent held title to the property. The letter further suggested the leasing of the property by the first respondent from the sixth respondent. This was done in an attempt to resolve the matter amicably.

[17] Having received the response to its Notice of intention to issue a Contravention Notice, the sixth respondent did not proceed with the issuing of a Notice of Contravention. Instead, further correspondence ensued between the parties exploring the possibility of the first respondent leasing the property from the sixth respondent. It is safe to say that the sixth respondent has not made a final decision on this issue of the lease of the property by the first respondent.

[18] On 24 May 2016, the applicant met with the then executive mayor of the sixth respondent, Alderman Patricia De Lille (Ms De Lille) to raise his concerns about what he considered to be the first respondent's encroachment onto the property. When nothing came of this meeting, he followed up with an email dated 6 December 2016 to which Ms De Lille responded on 25 January 2017 advising that the sixth respondent is aware of the contravention and that the Parks Department was currently liaising with the chairperson of the first respondent who had made a formal application to formally lease the property. Ms De Lille further advised that no final decision had been made by the sixth respondent at that stage.

[19] On 8 November 2017, Ms Pauline McConney (Ms McConney), addressed a letter to the second respondent on behalf of the sixth respondent advising that she had considered the lease proposal and resolved that the first respondent may apply to lease the property through the sixth respondent's processes provided for applications for such leases of the sixth respondent's properties.

[20] On the same day referred to in the preceding paragraph, Knowles Hussain Lindsay Inc Attorneys, acting on behalf of the applicant, addressed a letter to the sixth respondent recording the applicant's objection to the proposed lease of the property.

[21] Ms McConney responded to the letter from Knowles Hussain Lindsay Inc Attorneys advising that the matter is receiving attention, and that the sixth respondent has to follow due process which includes public participation and consultation processes. She concluded her response by stating that "until this matter is concluded with definite outcomes, I can assure you that we are giving it the attention it requires."

[22] On 3 May 2018, Paddocks who were also acting on behalf of the applicant, addressed a letter to Ms McConney advising that "over one hundred new plants have been established along the fence, erected without due authorization on the property, and that certain members of the first respondent are in the process of attempting to install security infrastructure along the aforementioned fence." The letter requested further information relating to the timelines for the resolution of the matter.

[23] There is no indication that the applicant received any response to the above correspondence. Instead, he launched the present application more than five years later seeking wide ranging relief which has since been trimmed down to the relief referred to in paragraph [1] above.

[24] As already stated the application is opposed only by the first and fifth respondents. The notice of opposition on behalf of the first respondent was delivered on 28 July 2023 simultaneously with the first respondent's notice in terms of Rule 35 (12) and (14) of the Uniform Rules of Court (Rule 35 Notice).

[25] The applicant responded by delivering a notice in terms of Rule 30A of the Uniform Rules (Rule 30A Notice) contending that the first respondent's Rule 35 Notice constitutes an irregular step. The first respondent was afforded a period of 10

days within which to remove the cause of complaint. Failing such removal, the applicant threatened to apply for the setting aside of the first respondent's Rule 35 Notice.

[26] It is not apparent from the papers whether the first respondent responded to the applicant's Rule 30A Notice. The next set of documents that the applicant delivered on 21 August 2023 are its response to the first respondent's Rule 35 Notice as well as its Notice in terms of Rule 7 (Rule 7 Notice) by which it disputed the authority of the first respondent's attorneys of record to act on behalf of the first respondent.

[27] A special power of attorney dated 23 August 2023 signed by the second respondent in his capacity as the trustee of the first respondent and authorizing the first respondent's attorneys of record to act on its behalf was delivered on 24 August 2023.

[28] The first respondent's answering affidavit was delivered on 19 September 2023 wherein the first respondent, in addition to opposing the application on the merits, took issue with (a) the applicant's locus standi to bring this application, (b) the jurisdiction of this court in light of the provisions of the first respondent's constitution, of which the applicant is a member, which requires disputes between members and trustees to be referred to arbitration, and (c) non-joinder, in view of the applicant's failure to join the South African National Parks (SANParks).

[29] In reply, the applicant, in addition to dealing with the merits of the first respondent's response, persisted with his disputation of the authority of the first respondent's attorneys of record to act on behalf of the first respondent.

Issues for determination

[30] From the above narration it is clear that there are a number of preliminary issues that require determination prior to the determination of the merits of the application.

[31] The first issue relates to the applicant's locus standi to bring the application. The issue of locus standi requires determination first because the lack of locus standi may be dispositive of a matter. This is because on the authority of the Constitutional Court in *Giant Concerts* when a party has no standing, it is not necessary to consider the merits, unless there is at least a strong indication of fraud or other gross irregularity in the conduct of a public body.

[32] In the event that the applicant gets over the hurdle of standing, the next issue that would have to be considered is the court's jurisdiction. As with the standing, the issue of jurisdiction, if decided against the applicant may be dispositive of the matter because the court cannot consider the merits of the application where it lacks the necessary jurisdiction to do so.

[33] Once the jurisdiction of the court is established the next issue to be considered would have to be the applicant's objection to the representation of the first respondent by its current attorneys of record. Thereafter the issue of non-joinder would have to be considered and then the merits of the application. With that said I consider the issue of the applicant's locus standi.

Does the applicant have the locus standi to bring this application?

The applicant's pleaded case

[34] The applicant claims to bring this application in his own interest as well as in the public interest.

[35] At the commencement of the hearing counsel for the applicant was requested to direct the court's attention to the specific paragraphs in the papers dealing with the applicant's locus standi. In this regard he referred to the Court to paragraphs 3, 6, 63, 64, and 91 to 93 of the founding affidavit as well as paragraphs 44, 92, 107 and 108 of the replying affidavit. I consider it necessary to reproduce these paragraphs before setting out the parties' submissions regarding the applicant's locus standi.

[36] In sub-paragraph 3.1 of the founding affidavit the applicant states that “I depose to this affidavit in my personal capacity with due regard to the public’s interest herein”. In a section of the founding affidavit dedicated to the locus standi, the applicant states the following:

‘4. I have the necessary locus standi in judicio to act as a litigant herein.

5. My interest in this matter is derived from section 38 of the Constitution of the Republic of South Africa, 1996 which provides for the following:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights”.

6. Considering the above, I approach this honourable court on the following grounds:

6.1 In my own interest;

6.2 In public interest.’

[37] In paragraphs 63 and 64 of the founding affidavit states that:

‘63. The first respondent elected to unlawfully fence off the Public Open Space and extend its territory by encroaching onto the Public Open Space to the detriment of the public’s rights and privileges thereto.

64. The first respondent has further created private gardens on the Public Open Space through its members.’

[38] Finally and under a section of the founding affidavit dealing with applicant’s clear right he states that:

‘91. I humbly refer this honourable court to annexure “FA 8” which confirms that, the Public Open Space has been reserved for inclusion into the national park of the sixth respondent for environmental conservation reasons.

92. Section 24(b)(ii) of the Constitution of the Republic of South Africa, 1996 provides for the following:

“Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that promote conservation”.

93. Section 25(1) of the Constitution of the Republic of South Africa, 1996, provides further:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”.’

[39] The first respondent, in its answering affidavit, criticised the applicant for failing to set out a proper factual basis in support of its claim to have the necessary locus standi to bring this application. The response by the applicant was to deny that it had not set out a proper factual basis in support of its claim to have the necessary locus standi to bring this application. In paragraph 44 of his replying affidavit, the applicant stated that “I seek the relief both in my own interest and in the public interest.” In paragraph 92, he further stated that “The Public is being prejudiced on the first respondent’s own version.”

[40] In a section of the replying affidavit dealing with the first respondent’s challenge to the applicant’s locus standi, the applicant stated that:

‘107. The conduct of the first respondent in encroaching on and using the Public Open Space, to the exclusion of the general public, is clearly unlawful. It stands to reason that civil society cannot allow Homeowners Associations to simply annex and appropriate public land. Moreover, the use of the Public Open Space in this way may constitute a material contravention of inter alia

the Planning Bylaw and the Public Parks Bylaw, 2010, as pointed out in the contravention notice attached to the founding affidavit as Annexure “FA11”. These contraventions constitute criminal offences.

108. My rights are affected because, as a member of the first respondent, I am effectively an unwilling participant in this unlawful and illegal conduct. I have an interest and correlative right to prevent the first respondent from engaging in such conduct. Particularly so in this instance where the first respondent has been hijacked by a minority of trustees who are in reality acting in their own self-interest. The relief sought in the Notice of Motion is designed to prevent the perpetuation of this unlawful conduct by the first respondent.

109. However, as foreshadowed at paragraph 99.2 of my founding affidavit, the primary thrust of the application is to protect the general public from the unlawful conduct of the first respondent. This on the basis that it is manifestly in the public interest to ensure that the public has access to the Public Open Space and that it is in the interests of justice that Homeowners Associations, including the first respondent, are discouraged from simply annexing and appropriating public land.

110. In any event, I am a member of the class of persons in whose favour the prohibitions in the bylaws are intended to protect and I am thus entitled to enforce the prohibitions on this basis too.’

The first and fifth respondent’s pleaded case

[41] The deponent to the answering affidavit filed on behalf of the first respondent, in addition to criticizing the applicant for failure to set out a proper factual basis in support of his claim to have the necessary locus standi to bring this application, stated that:

‘27. I am advised that a successful challenge to a public decision can be brought only if the right remedy is sought by the right person in the right

proceedings. An own interest litigant under the Constitution does not acquire standing from the invalidity of the challenged decision or law, but from the direct effect it will have on that litigant's rights or interests.

28. The applicant does not explain, which he is by law obliged to do, how the ownership dispute regarding the public open space affects his rights or interests (as an own interest litigant). The applicant seems to accept that he has no personal right or interest. He says so at paragraph 99.2, "I Have no personal interest in the subject matter, save for the public benefit hereof".

29. The applicant purports to act on behalf of the public, in terms of section 38 (d) of the Constitution, to vindicate the public's rights in terms of sections 24 (Environment) and section 25 (Property) of the Constitution. However, these allegations are similarly vague and unsubstantiated. No factual basis for these allegations has been established.

30. I deny that the applicant, a Swiss national acts in the public interest. This is with respect a charade. The applicant is a disgruntled member of the HOA (he is a co-owner of unit 3). He has no broad or unqualified capacity to litigate against illegalities (to the extent that they exist which is denied).

31. Certainly, the applicant has no standing to act on behalf of the Municipality. It is the Municipality's obligation, should it see fit to do so, to ensure that the Company transfers the public open space to it (if that is in fact its legal position).'

[42] For its part, the fifth respondent simply denied that the applicant has the necessary locus standi to seek the relief he seeks both in his personal capacity as well as in the public interest.

[43] Having set out the case pleaded by each of the parties I now turn to the submissions that were made on behalf of each of the parties.

Submissions on behalf of the applicant

[44] Starting with own interest standing, it was submitted that the applicant has explained that his rights are affected because, as a member of the first respondent, he is effectively an unwilling participant in this unlawful and illegal conduct. Because of that, it was submitted, the applicant has an interest and a correlative right to prevent the first respondent from engaging in such conduct and the relief sought in the Notice of Motion is designed to prevent the perpetuation of the unlawful conduct by the first respondent.

[45] It was further submitted that in any event, the applicant is a member of the class of persons in whose favour the prohibitions in the bylaws are intended to operate and he is thus entitled to enforce the prohibitions on this basis too. Referring to the Notice of intention to issue a Contravention Notice, it was submitted that the sixth respondent warned the first respondent that its conduct is a violation of, inter alia, the Public Parks Bylaw, 2010 ("the Parks Bylaw") and that this constitutes a criminal offence.

[46] Regarding the public interest standing it was submitted that a person acting in the public interest must simply show that the public have a sufficient interest in obtaining the relief claimed. However, this is subject to the important qualification that an applicant who claims standing on the grounds that he or she is acting in the public interest must show that he or she is genuinely acting in the public interest. In order to determine whether an applicant is genuinely acting in the public interest, a Court will take certain factors into account. These include whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity those persons or groups have to present evidence and argument to the Court..

[47] Turning to the facts of the matter at hand it was submitted that the applicant alleges that the first respondent elected to unlawfully fence off the Public Open Space (Portion 13) "to the detriment of the public's rights and privileges thereto" and that this amounts to "clear unlawfulness and injustice taking place." This was said to

be particularly so because the property has been reserved for inclusion into the National Park for environmental conservation reasons. Reference was further made to the allegations by the applicant that the public has a clear right pertaining to the Public Open Space and would suffer undue prejudice in being deprived of such rights.

[48] It follows, so it was argued, that the relief sought in this application is undoubtedly and genuinely in the public interest, particularly so as the sixth respondent has adopted a supine approach to asserting the rights of the public to the Public Open Space, of which the sixth respondent is the custodian on behalf of the general public.

[49] Reference was made to the preamble to the Western Cape Land Use Planning Act 3 of 2014 which establishes that the purpose of the Act is inter alia to provide for the regulation of public places and municipal roads arising from subdivisions. So too was reference made to section 2 and 3 which provide that Municipalities are responsible for land use planning within their respective areas and that Municipalities must enforce their decisions and applicable bylaws in this regard.

[50] This Court was further referred to the provisions of Chapter 12, Part 2 of the Development Management Scheme (Schedule 3 of the Municipal Planning Bylaw, 2015) which provide as follows in relation to public open space (which are deemed as OS2 zoning):

‘The OS2 zoning provides for active and passive recreational areas on public land, as well as protection of landscape and heritage areas including woodlands, ridges, watercourses, wetlands and coastline. It is important to recognise the interests of the general public for access to and preservation of public open spaces.’

[51] Having regard to the definition of “public place” in the Municipal Planning Bylaw, it was argued that, the definition makes express reference to the fact that whilst such spaces may be owned by or vest in the sixth respondent, they are for the use and “in favour of the general public”.

[52] Explaining what motivated the applicant to take up the cause, it was submitted that despite the fact that the sixth respondent has a duty to regulate, preserve and ensure the access of the general public to the property which is a public open space, the sixth respondent has inexplicably failed to do so and thus, the conduct of the first respondent and certain of its members in encroaching on and using the property, to the exclusion of the general public, is clearly unlawful.

[53] Finally it was submitted that the applicant has stepped into the breach by instituting this application and it stands to reason that civil society cannot allow Homeowners Associations to simply annex and appropriate land. In light of the Municipality's failure to discharge its obligations, the applicant is justified in doing so. He undoubtedly acts in the public interest within the meaning of section 38 of the Constitution.

Submissions on behalf of the first and fifth respondents

[54] The submissions on behalf of the first and fifth respondents were prefaced with regards to the general rule that it is for the party instituting proceedings to allege and prove the locus standi, with the onus of establishing that issue resting upon the applicant.

[55] Dealing with the own interest standing, it was submitted that an own interest litigant under the Constitution does not acquire standing from the invalidity of the challenged decision or law, but from the direct effect it will have on that litigant's rights or interests.

[56] With reference to the applicant's explanation that "My rights are affected because, as a member of the first respondent , I am effectively an unwilling participant in this unlawful and illegal conduct", the applicant was criticised for not explaining how the ownership dispute regarding the property affects his rights or interests (as an own interest litigant). It was further submitted that the use of the property in its current form does not impact on the applicant's rights and interests – at all.

[57] It was further submitted that there is no illegality, as alleged by the applicant, because the sixth respondent has indicated its willingness to enter into a lease agreement with the first respondent although it has not taken a final decision in that regard.

[58] To the extent that the applicant is aggrieved by the sixth respondent's failure to take a decision, it was submitted that, he is empowered to challenge that failure under the Promotion of Administrative Justice Act, 3 of 2000 and this is because the definition of "administrative action" includes any decision taken or "any failure to take a decision". It was further submitted that it is that conduct that a litigant with appropriate standing could challenge and as such the applicant is the wrong person, in the wrong forum, seeking the wrong relief.

[59] Turning to the public interest standing, it was pointed out that applicant says that he purports to act on primarily behalf of the public, in terms of section 38 (d) of the Constitution, in order to vindicate the public's rights in terms of section 24 (Environment) and section 25 (Property) of the Constitution.

[60] The applicant, however, was criticised for not specifying in his founding papers whose "property" he seeks to protect as it is not clear whether he is referring to the property of the State, or the land of the City of Cape Town, or the public's right to access land based on custom or established property rights.

[61] It was further submitted that it is also not clear whether the applicant wishes to remove the first respondent's usage of the public open space as a firebreak and he has failed to specify any specific environmental issues that he seeks to vindicate by this application.

[62] To the extent that the applicant sought to bolster his allegations relating to section 25 of the Constitution, in his replying affidavit by alleging that "It stands to reason that civil society cannot allow [HOA's] to simply annex and appropriate public land" it was submitted that he has misstated the facts and misunderstood the law. This is because not every person or entity who alleges an infringement of a

fundamental right has an unfettered right of access to court. A successful challenge to a public decision can be brought only if “the right remedy is sought by the right person in the right proceedings”.

[63] It was submitted that the applicant accepts that the factors set out in *Ferreira v Levin* must be applied in order to determine whether a person is genuinely acting in the public interest. However, none of these factors were addressed in the applicant’s founding papers. As a result, the heads of argument filed on behalf of the applicant cannot take the matter further. The papers are silent as to the range of persons or groups who may be directly or indirectly affected by any order made by the Court, for example. The papers are silent about the evidence of the public’s alleged deprivation of rights.

[64] On the evidence before court, it was submitted that it is an uncontroverted fact that public do not – and have never – accessed the property. Regarding the applicant’s attempts to rely on a lone and unsupported fact that in 1997 Portion 13 was apparently reserved for inclusion into the “New National Park” for environmental conservations reasons, it was submitted that this is unavailing. This is because in 2025, and as matters stand, SANParks disavows any responsibility for the public open space and do not want to maintain it, a fact confirmed by SANParks’ own maps, and correspondence received by the first respondent.

[65] Finally it was submitted that the applicant who is a Swiss national does not genuinely act in the public interest. This is, with respect, a charade. The applicant is a disgruntled member of the first respondent and he has no broad and unqualified capacity to litigate against illegalities, to the extent that they exist and which is denied.

Discussion

[66] The applicant’s founding papers contain internal contradictions in so far as his claim to own interests standing. As pointed out on behalf the first respondent, at sub-paragraph 99.2 of the founding affidavit, the applicant expressly states that “I Have no personal interest in the subject matter, save for the public benefit hereof”.

[67] Where the applicant claims to be acting as an own interest litigant he says so without making any averments as to his interests which he seeks to protect or advance by instituting these proceedings. That is not difficult to understand because where he says he has no personal interest he cannot at the same time elaborate on the interests that he seeks to protect by these proceedings.

[68] On the facts as set out above, the applicant is aware that there is a process underway regarding the possibility of the first respondent leasing the property from the sixth respondent. He was assured by Ms. McConney that he would be advised of the outcome of that process which was to involve public participation.

[69] It is also clear that the applicant has strong objections to the first respondent leasing the property from the sixth respondent to the extent that he characterized the Notice of Intention to issue a Contravention Notice as a Contravention Notice. Having treated the Notice of Intention to issue a Contravention Notice as a Contravention Notice, he uses that to state as a fact, that the conduct of the first respondent is unlawful despite him being aware that the sixth respondent has not issued a notice to the effect that the first respondent's conduct is unlawful. To the contrary, the parties, that is the first and sixth respondents, are engaged in a process that may well result in the property being leased to the first respondent. As submitted on behalf of the first and sixth respondent, the applicant has misstated the facts in that regard.

[70] In any event the applicant's difficulty concerning his locus standi is foundational. He states that he approaches the court in terms of section 38 of the Constitution of the Republic of South Africa, 1996 but fails to allege a right in the Bill of Rights that has been infringed or threatened. Even when he refers to sections 24 and 25 of the Constitution, he does so without alleging whose rights relative to these two provisions have been infringed or threatened. Instead, he merely repeats these provisions without any substantiation.

[71] At the core of this matter is a potential dispute between the first respondent, the fifth respondent and the sixth respondent regarding the ownership of the property.

If one recalls the property was part of the original property which was owned by the fifth respondent. Upon the subdivision of the property, the property was designated as a public open space which was to be held in title by the first respondent upon its establishment, hence the first respondent's potential claim to the property. The property, however, remains registered in the name of the sixth respondent because it has never been transferred either to the first respondent or to the sixth respondent. The sixth respondent's claim to the property arises from the amendment of the original conditions of approval of the subdivision of the original property in terms of the letter that advised that the property vests in the sixth respondent and that the registration of the transfer is not necessary as it vests by operation of the law.

[72] In the midst of engagements between the parties who lay claim to the property, the applicant, without so much laying any claim to the property, would have this court declare the first respondent's conduct unlawful. In my view, the applicant cannot have any legal standing to do so either as an own interest litigant or on the basis of the public interest standing.

[73] The applicant does not and cannot, on the fact allege let alone establish fraud or gross irregularity and the consequence of that is that this Court cannot enter the merits of the applicant's claim. The conclusion also renders it unnecessary to consider the other preliminary points. The applicant's failure to establish locus standi must result in the failure of the entire application

Costs

[74] The first and fifth respondents have been successful and the usual rule that costs follow the result applies. The first and fifth respondents sought costs on Scale C, but I am not persuaded that that scale of costs is justified in the circumstances. The matter was not sufficiently complex to warrant costs on Scale C. Costs will be awarded on Scale B.

Order

[75] In the result I make the following order:

The application is dismissed with costs inclusive of counsel's costs to be taxed on Scale B

L G NUKU
JUDGE OF THE HIGH COURT

Appearances

For applicant:	C Cutler
Instructed by:	C K Attorneys Inc, Bloubergrant
Care of:	Bisset Boehmke McBlain Attorneys, Cape Town
For 1 st and 5 th respondents:	G Solik
Instructed by:	STBB Attorneys, Cape Town
For 2 nd to 4 th , 6 th and 7 th respondents:	No appearance