IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 27756/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 24 FEBRUARY 2023

SIGNATURE: ***ML SENYATSI***

In the matter between:

THE MUNICIPAL EMPLOYEES PENSION FUND

Plaintiff

And

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY First Respondent

BUILDING CONTROL OFFICER, CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Respondent

NORDIC LIGHT PROPERTIES (PTY) LTD Third Respondent

ASSOCIATED MOTOR HOLDINGS (PTY) LTD Fourth Respondent

BASILEUS PROPERTIES P2 (PTY) LTD Fifth Respondent

WILLIAM NICOL WEST PROPERTY OWNERS Sixth Respondent

ASSOCIATION NPC

STANDARD BANK OF SOUTH AFRICA LIMITED Seventh Respondent

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 24 February 2023.*

JUDGMENT

SENYATSI J:

[1] This is an opposed application for a declaratory order, alternatively for the review and setting aside, in terms of rule 53, of certain decisions of the first and second respondents and auxiliary relief. The decisions sought to be reviewed relate to the rezoning of the property owned by the third respondent.

[2] The applicant, Municipal Employees Pension Fund ("The Fund"), also seeks an order granting it condonation extension in time in respect of the late filing of its replying affidavit until 8 February 2022. Furthermore, the applicant seeks an order striking out those parts of the answering affidavits as set out in the notice in terms of rule 6(15). The third respondent, Nordic Light Properties (Pty) Ltd ("Nordic Light"), is the registered owner of the properties the rezoning of which has been approved by the first respondent, City of Johannesburg Metropolitan Municipality ("City of Johannesburg"). The initial notice of motion to challenge

the approval of the rezoning was launched by Erf 82 Bryanston Properties Pty Ltd ("Erf 82"), the erstwhile owner of William Nicol Shopping Centre. However, as the litigation was continuing, it sold the shopping centre to the Fund.

[3] Nordic Light has raised, as a point of law in its heads of argument of a point *in limine* that the applicant lacks the requisite *locus standi* to seek out the relief in the amended notice of motion. It contends that this is so because when the decision sought to be impugned was taken, the Fund was not the owner of the property and could not have raised any objection as it was not a rate payer related to the shopping centre. It matters not that the Fund substituted Erf 82 as the applicant subsequent to becoming the owner of the shopping centre.

[4] During November 2017, a rezoning application was lodged by Nordic Light who owns a property adjacent to the shopping centre for the development of a residential multi -storey building. The challenge to the approved rezoning was premised on the fact that during the development of the residential multi-storey building by Nordic Light, there was likely going to be a congestion of traffic which would adversely affect the customers of the shopping centre. Erf 82 in its initial application raised various grounds on why the decision to approve the rezoning stood to be reviewed and set aside. The points become of importance when regard is had to the merits which will be dealt with in the event the point *in limine* is dismissed.

[5] At the time of lodging the rezoning application, the shopping mall was owned by Erf 82. This company initiated the legal proceedings for declaratory order and certain ancillary reliefs.

[6] The shopping mall was sold by Erf 82 to the present applicant during 2021 and the transfer and registration of ownership to the applicant was registered on 15 December 2021. This was at the time when the litigation between Erf 82 and the respondents was in progress. At the heart of the defence of lack of standing by the Fund is the fact that the Fund did not have an interest in the rezoning sought to be impugned because it had no title to the shopping centre, was not a tenant or a rate payer in respect of the shopping centre at the time.

[7] Erf 82 and the applicant concluded an agreement in terms of which the applicant will continue with the litigation. The agreement was given effect to by the Order of Sutherland DJP on 17 May 2022 in terms of which Erf 82 was substituted by the Fund as the applicant. Nordic Light argues that the substitution order cannot create the standing where none existed.

[8] Accordingly, Erf 82 has no more interest on the subject property owing to the disposal thereof by sale.

[9] The controversy now is whether the Fund has the necessary standing in the litigation. The respondents contend it does not have any standing despite the substitution of Erf 82 by itself, the Pension Fund. This is the only point, in my view, which is raised *in limine* in the heads of arguments that should be determined. The Fund claims it has standing because the substitution was not challenged.

[10] Standing in litigation is a matter of procedural justifiability and relates to the appropriateness of the party seeking relief from the court.[1]

[1] See Cora Hoexter and Glenn Penfold, Administrative Law in South Africa, Juta 3rd ed, at 659

[11] In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*[2], the Constitutional Court had to consider leave to appeal against a judgment of the Supreme Court of Appeal that found it did not have legal standing to challenge the lawfulness of a contract under which the third respondent, the eThekwini Municipality, sold land to the first respondent Rinaldo Investments (Pty) Ltd. The court held that where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities, something more must be shown.[3]

[12] The authorities in our law make it plain that constitutional own - interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interest are directly affected by the challenged law or conduct.

[13] The following are the requirements to determine standing:

(a) To establish own-interest standing under a constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires [4]– but must still show that a contested law or decision directly affects his or her rights or interests or potential rights or interests.[5]

(b) This requirement must be generously and broadly interpreted to accord with constitution goals.[6]

(c) The interest must, however, be real and not hypothetical or academic.[7]

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[2] (CCT25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012)
[3] Supra at para [35]
[4] See Ferreira v Levin N.O. and Others; Vryenhoek and Others v Powell NO & Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 488
[5] See Ferreira (supra) at paras 162 and 166 - 8
[6] Ferreira (supra) at para 165
[7] See Jacobs en Ander v Waks en Ander [1991] ZASCA 152, 1992 (1) SA 521 (A) at 535 A - B

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation[8] – but in a challenge to legislation purely on financial self-interest may not be enough-the interest of justice must also favour affording standing;[9]

(e) Standing is not a technical or strictly – defined concept[10] – And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time[11] – and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement[12] – And here a measure of pragmatism is needed.[13]

[14] I now deal with whether or not it is appropriate to raise a point of law in argument. It is now well – established that a point of law such as a challenge to standing may be raised by a party at any stage, subject to the condition that the point is supported by the facts as they appear on the affidavits and that the point will not result in prejudice or unfairness to the other party.[14]

[15] In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*[15] in confirming the well-established practice of the legal argument, Joffe J ,as he then was, said the following:

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[8] Jacobs above at 535 A - B
[9] Jacobs above at para 26
[10] Jacobs above at 534 A - B
[11] Ferreira above at para 165
[12] Ferreira supra at 541E
[13] Jacobs supra N 6 at 541E
[14] Academy of Learning (Pty) Ltd v Hancock and Others 2001 (1) SA 941 (C) at paras [42] and [43]
[15] 1999 (2) SA 279 (T) at 324 H - I

> "In *Heckroodt NO v Gamiet 1959 (9) SA 244 (T) at 246A – C and Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509 E – 510B, it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged. As was held in *Cabinet for the Territory of South West Africa v Chikane and Another* 1989 (1) SA 349 (A) at 360 G, the principle is clear but its application is not without difficulty. In *Minister van Wet en Order v Matshoba* 1990 (1) SA 280 (A) at 285 G it was held that this principle:
>
> > 'word egter gekwalifiseer deur die voorbehoud dat die Hof alleen so kan optree as daar geen onbillikheid teenoor die respondent geskied nie. In die sake word hierdie element gewoonlik uitgedruk deur te vereis dat alle relevante feite voor die Hof moet wees … Hierdeur word die mees voor die hand liggende bron van hawige geval gaan dit egter on 'n leemte in die getuienis.'

[16] It is evident from the passage quoted that the court must guard against unfairness to the other party and ensure that the point of law raised is supported by the facts that are in the papers before it. Absent these facts, the point raised will not be accepted by the court.

[17] The applicant in the instant case claims that it is prejudiced by the point of law raised by the respondents. The applicant filed a supplementary affidavit to deal with the new point raised in limine.

[18] The applicant now seeks to amend its notice of motion in an attempt to circumvent the standing defence by stating that its review is based on the

Promotion of Administration of Justice Act 3 of 2000 ("PAJA"). Its seeks a declaratory order to the effect that the original rezoning application served before the City of Johannesburg was deemed to have been refused and the consequent on that declaration, an order that the final promulgation of the rezoning be set aside. No relief is sought in respect of the City's decision to approve the rezoning of the subject property. In the alternative, the applicant persists in the initial applicants original prayer for the review and setting aside the City's decision to approve the rezoning.

[19] The applicant states that whilst it was not the initial applicant in the litigation as Erf 82 was, however, following its acquisition of the shopping centre its interest will be affected by the rezoning of the property of the third respondent and that the impact will affect it adversely.

[20] The applicant referred me to a passage in *Minister of Land Affairs and Agriculture and Others v DH Wevell Trust and Others*[16] where Cloete JA said the following:

> "It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to refute the new case on the facts. The applicant contends that based on this passage, the point *in limine* must be dismissed."

[16] 2008 (2) SA 184 (SCA) at para [43]

[21] The facts in the quoted passage are distinguishable from the case before me. In this case, when Erf 82 issued the proceedings and the answer thereto was provided by the respondents, there was no knowledge that the shopping centre was either sold or on the point of being sold. In other words, Erf 82 had a clear standing to pursue the proceedings. In fact, as at February 2022 when Erf 82 replied to the answering affidavits, the shopping centre had already been sold. The sale of the shopping centre came to the knowledge of the respondents in a reply to the answering affidavit. However, it is evident following the sale that the respondents were entitled to raise the standing of the applicant. This is so despite the substitution of the parties that was ordered as already stated. The agreement between Erf 82 and the Fund that the latter would continue with litigation and the subsequent substitution order under these circumstances, did not in my respective view, confer the standing where none existed.

[22] The primary controversy remains whether as at 2020 when the rezoning complained of was dealt with whether the subsequent purchaser of a property had standing to institute or more importantly even substitute the original or initial applicant in the proceedings of this nature.

[23] It should be stated that Erf 82 was not acquired by the applicant. Only the shopping centre was acquired and transfer and registration of ownership was registered in favour of the Fund. This, as already stated, is at the heart of the point raised in limine that given the transfer to the Fund, the latter lacks the necessary standing to continue with litigation.

[24] The applicant contends that because clause 18 of the sale agreement concluded between Erf 82 and the applicant states that the parties agreed that the Fund (applicant) had purchased the letting enterprise with the intention that it would apply to be substituted as the applicant in the review application and that it would prosecute the application in order to procure the relief formulated in the notice of motion and that once the substitution happens through a court order, the standing cannot possibly be an issue.

[25] The applicant contends that because the condonation as well as substitution applications were not opposed by any of the respondents, it is impermissible for the respondents to raise standing *in limine* as a defence.

[26] I was referred to the case of *Techmed (Pty) Ltd v Nissko Iwai Corporation*[17] which Sutherland DJP relied on for his order of substitution.

[27] I was also referred to a passage in Trustees for the Time Being of the Legacy *Body Corporate v BAE Estates and Estates (Pty) Ltd*[18] where Makgoka JA said the following:

> "[35] Significantly, this point was not even pleaded. In paras 8 – 10 above, I have set out fairly comprehensively, the points in the trustees' answering affidavit upon which they rested their defence to the application. This was not one of them. The point was raised for the first time in the application for leave to appeal. Ordinarily, a point of lack of locus standi should have been pertinently raised in answering

[17] 2011 (1) SA 35 (SCA) at 40I to41B
[18] 2022 (1) SA 424 (SCA) at paras [35] and [36]

affidavit to enable BAE Estates to meet it, and for the high court to pronounce on it.

[36] It is so that the mere fact that a point of law is raised for the first time on appeal is not in itself a sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed a court may in the exercise of its discretion consider the point.[19] It would be unfair to the other party if the point of law and all its ramifications were not canvassed and investigates at trial.[20] In this case the point was neither covered in the affidavits, nor was it canvassed and investigated in the high court. It is therefore, patently unfair to BAE Estates to have to be confronted with the point for the first time on appeal. For this reason alone, the locus standi point must be dismissed. This is clearly a correct principle."

[28] I have stated previously that it would not have been possible for the respondents to raise the locus standi defence when the answering affidavits were filed as the subject properly had not yet, to their knowledge, changed hands. As far as the respondents were concerned, Erf 82 was the applicant in the matter. This is so because as late as 8 February 2002, Erf 82 prepared the replying affidavit as if it were still the owner of the subject property. This it did, despite its full knowledge that it had sold the property to the Fund. The pleadings pertinently reveal that the point is covered by the pleadings owing the disposal of the shopping centre by Erf 82 to the Fund. It is therefore my

[19] Alexor Ltd and Another v The Richterveld Community and Others 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) para 44; Cole v Government of the Union of SA 1910 AD 263 at 273. Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 24 -5 and Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) 276 (A) at 290

[20] Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA)

considered view that the present applicant was not prejudiced by the point raised in limine on lack of standing. The point should therefore be allowed to be raised.

[29] I am fortified on this view by the fact that when the litigation started, the Fund was not the owner of the subject property and could therefore not have been adversely affected by the alleged impugned administrative action taken by the City of Johannesburg to approve the rezoning of the third respondent. If the standing were to be found to exist under the present circumstances, this would have an unintended consequence of conferring standing retrospectively. This is impermissible under common law.

[30] The applicant, now, in the face of the lack of standing, as already stated, seeks to challenge the approval of the rezoning in terms of PAJA. I was referred by counsel for the Fund to the case of *JDJ Properties CC and Another v Umngeni Local Municipality and Another*[21] where the court held that owners of land, and lessees of land, have locus standi to enforce a town planning scheme and a by – law or regulation which enacted for the benefit of a class of persons of which such owner or lessee was a member. This is undoubtedly the correct point of law. As I understand it, the affected person must still prove that he or she has standing in the administrative action sought to be impugned. Such interest must exist at the time the administrative action challenged is taken. It can never be the purpose of the principle that an administrative action taken can be challenged by subsequent owners or lessees of the land retrospectively. This is so because in terms of the City of Johannesburg By-laws, objections and

[21] 2013 (SA) 395 SCA [26] - [35]

challenge to rezoning for instance, have time limits within which objection must be raised. If that were to be permissible, this would work against the true intention of the by-law concerned as well as PAJA in so far as showing that the party has the locus standi to challenge an administrative action is concerned.

[31] In support of the contention that the applicant has a standing in the matter, I was also referred by its counsel to *Illovo Opportunities Partnership #61 v Illovo Junction Properties (Pty) Ltd*[22] where Cachalia JA said the following:

"[18] Notwithstanding the fact that the appellant's application for declaratory relief is outwardly aimed at establishing the rights and obligations of third parties, the court's decision has a material bearing on its ability to exploit the development rights in the property, and if necessary its own rights to claim a repayment from the seller in the event it is compelled for practical reasons to pay the contribution. Furthermore, properly understood, the order sought carries with it necessary implication that, if granted, the appellant shall have the right to resist an application by the City to enforce a claim for the contribution against it, if it chooses to exercise its rights under the scheme.

Finally, whether or not the appellant succeeds in its application, the outcome of this court's judgment on the merits, i.e. on the proper construction to be given to the ordinance will be res judicata between the parties, determining the legal rights inter se of all three parties. That is an important factor in deciding the standing issue.[23]

[19] In my view the appellant has, therefore, established a legal interest in the relief sought. It follows that the seller's objection to the appellants standing was not well taken."

[22] 2014 JDR 1889 (SCA) paras [18 -19]
[23] Ex Parte Nell 1963 (1) SA 754 (A) at 760C

[32] The facts of the *Illovo* case are distinguishable in that once the scheme in the *Illovo* case came into operation the seller would pay the required R8.8 million contributions. No such similarity exists in the present case because the approved multi storey residential rezoning of the third respondent property has no financial bearing on the Fund. Instead, and of course without venturing too much in the merits, the potential traffic congestion likely to be caused by the construction trucks that would likely follow during construction which would disrupt the traffic flow to the shopping centre was at the centre of Erf 82's initial application. Accordingly, as the approval took place prior to the disposal of the subject property, I do not find any legal basis to say the applicant has locus standi.

[33] The other important consideration is whether an agreement between the buyer and seller can confer standing where none existed. Put differently, can standing be conferred retrospectively prior to the sale of the property. The applicant submits that it can and also that the fact that there was no objection on the substitution of Erf 82, the respondents should not be permitted to raise a point in limine on lack of standing based on the Sutherland DJP'S order of substitution. I have not been referred to any authority for the proposition as advanced by the applicant.

[34] It should be remembered that when Erf 82 and the applicant sought to agree that the latter would continue with the litigation, this was premised on the initial application that Erf 82 had commenced with.

[35] Having regard to the trite principles on locus standi in a lawsuit, I am of the view that the Fund has failed to show that it does indeed have locus standi to

continue with the litigation and attack the administrative decision taken before it became the owner of the subject property.

[36] This is despite the fact that the applicant substituted Erf 82 in terms of the Sutherland DJP order.

[37] It follows therefore that the respondents have succeeded with their point *in limine* on lack of *locus standi*.

ORDER

[38] The following order is made:

(a) The application is dismissed with costs.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE JUDGMENT RESERVED: 19 October 2022

DATE JUDGMENT DELIVERED: 24 February 2023

APPEARANCES

Counsel for the Applicant: Adv J Botha SC

Adv LM du Plessis

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