THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No. 399/97

In the matter between:

ROBERT THORNTON SMITH **Appellant**

and

KWANONQUBELA TOWN COUNCIL
Respondent

Coram: SMALBERGER, GROSSKOPF, HARMS, OLIVIER JJA and MADLANGA AJA
Heard: 19 AUGUST 1999
Delivered: 10 SEPTEMBER 1999

Key words: Civil procedure - lack of locus standi - ratification - leave to appeal and balance of convenience

JUDGMENT

HARMS JA/

HARMS JA:

[1] The point in this appeal relates to a point *in limine* - it

concerns the *locus standi* (in the sense of a lack of authority) of Mr Norman Watson who instituted these proceedings in the Eastern Cape High Court, purportedly acting on behalf of the Town Council of Kwanonqubela. Pursuant to a stated case which dealt with this objection only, Erasmus J came to the conclusion that Watson had the necessary *locus standi*, and he dismissed the objection with costs. The order is appealable (*cf Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A)) and Erasmus J granted the necessary leave.

[2] During the period of political upheaval and social unrest which preceded the 1994 election, the appellant, Mr R T Smith, came under pressure from the local civic organization. He was at the time the chief executive officer of the Town Council. The civics also demanded that the town councillors should resign *en masse*. On 27 July 1993, the Town Council adopted a resolution entitling Smith to take early retirement due to political pressure. Part of the resolution was to the effect that the Council would pay him his full salary and other benefits for a further thirty months, that his pension would be paid up and that certain car allowances be paid to him. During the same meeting all the councillors resigned.

[3] At the time the Administrator of the Cape Province had delegated power to authorise any person to exercise, perform or fulfil the rights, powers and functions of a local authority if, due to the number of vacancies on the council, it was unable to act (s 29A of the Black Local Authorities Act 102 of 1982; it was introduced by the

Laws on Co-operation and Development Second Amendment Act 90 of 1985). Watson, an employee of the Provincial Administration, was duly appointed in terms of this provision, initially from 6 August 1993 to 30 November 1993 and then from 1 December 1993 until 31 May 1994.

[4] The second term of his appointment was interrupted by the repeal of the Black Local Authorities Act (see the Local Government Transition Act 209 of 1993 which commenced on 2 February 1994). In spite of the repeal, any council or committee established under the repealed act was to continue to exist (s 13(2) of the latter Act). Erasmus J held that Watson was neither a "council" nor a "committee" and that, consequently, his authorisation to act in the stead of the Town Council had lapsed on 2 February 1994. In the end all of this is of academic or historical interest only because the action taken by Watson in the name of the Town Council, and which is the subject of the dispute, took place on 16 August 1994, a date well after the expiry of the second term of his authorisation.

[5] On that date an application was launched in the name of the Town Council, citing Smith as the respondent and praying for the setting aside of the Town Council's resolution and for repayment of certain sums of money paid to Smith according to the terms of the resolution. The deponent to the founding affidavit was Watson who alleged that he was duly authorised to act on behalf of the Town Council in bringing the application by virtue of his appointment under s 29A of Act 102 of 1982 (dealt with in par [3] above).

[6] Apart from answering the allegations on the merits, Smith raised the issue of Watson's lack of *locus standi*. In his replying affidavit Watson attempted to meet the point by alleging that his appointment had in fact been extended from 1 June 1994, but with the change of government the extension had not yet been published.

In the event no appointment was published but by letter dated 29 November 1994 it was recorded that authority had been granted for Watson's appointment as a commissioner of the Town Council in terms of s 28(1) of the Municipal Ordinance 20 of 1974 (Cape) for the period 1 June 1994 to 30 September 1994, covering the date of the institution of the application.

[7] Section 28(1) of the Ordinance empowers the Administrator (now the Premier of the Province) to appoint a commissioner to act as the council of a municipality if, at any time, the municipality has no councillors. The purported application of the provision gave rise , i a, to the question whether the section by necessary implication authorises an appointment with retroactive effect. Erasmus J held in the affirmative and had

> "no difficulty in applying the fiction that at 16 August 1994 he [Watson] had *locus standi in judicio* to bring the present application, even though he acquired that status *ex post facto*. It is not a case of the Administrator ratifying Watson's act, or of him validating Watson's void or voidable act (Baxter *op cit* 363-364); but of Watson retrospectively acquiring the competency *de novo* to have instituted the proceedings on 16 August 1994."

On this basis the objection to Watson's *locus standi* was dismissed.

Although s 28 may by necessary implication authorise an appointment

with retroactive effect, I have some difficulty in appreciating the difference between such an appointment and a ratification of actions taken by the commissioner during that period. For reasons that will become apparent, I do not deem it necessary to decide the case upon this basis.

[8] In the course of the recent constitutional development the Town Council was incorporated into the Alexandria Transitional Council and it is not in dispute that the rights and duties of the Town Council devolved upon the Transitional Council.[1] The latter, at a meeting of 2 December 1994, discussed this case (according to the minutes) "in full" and resolved to proceed with it. This, it is alleged by the Town Council in the stated case, "constituted sufficient authorisation of Watson's *locus standi* to represent the Applicant". I proceed to consider the validity of this submission which raises the question whether Watson's unauthorised institution of the proceedings was capable of ratification.

[9] It is in general essential for a valid ratification "that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent done on his behalf, and that the intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be" (*Reid and Others v Warner* 1907 TS 961 at 971 *in fine* - 972). Counsel for Smith submitted that there is no evidence that the councillors of the Transitional Council had knowledge of the fact that Watson's action had been unauthorised and, consequently, that the purported ratification was of no effect. I do not think, on the wording of the stated case, that this argument is open to Smith. In any event, the minutes of the meeting state that the matter was discussed in full and, further, the decision to proceed with the case evinces a clear intention to ratify whatever action was taken, irrespective of the legal niceties involved.

[10] The next attack upon the purported ratification was along these lines: Watson's contentious act was an administrative one; it was not authorised by law; an unauthorised act is invalid; an invalid

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[1] 1 The true respondent before us is therefore the Transitional Council, but the necessary substitution has not yet taken place. Nothing turns on the point.

act cannot be ratified. The argument, I fear, already breaks down at the first proposition and it becomes unnecessary to consider the others. The launching of legal proceedings is not an administrative act but a procedural one open to any member of the public. Watson apparently believed on insubstantial grounds that he had the necessary authority to act on behalf of the Town Council. He was wrong. His expressed intention was to act on behalf of the Town Council and not on his own behalf. It is a general rule of the law of agency that such an act of an "unauthorised agent" can be ratified with retrospective effect (*cf Uitenhage Municipality v Uys* 1974 (3) SA (E) 806H-807H).

[11] It was further argued that, after an objection has been taken to the authority of a person to act on behalf of another, reliance may not be placed upon a ratification that did not exist when the objection was taken. The same issue arose in *Moosa and Cassim NNO v Community Development Board* 1990 (3) SA 175 (A), and in the course of the judgment Nicholas AJA (at 181B-C) noted that counsel had "conceded, correctly in my opinion" that he could not urge upon this Court that the rejection of the same submission in the court below was wrong. I would have thought that Nicholas AJA, as he was wont to do, expressed himself clearly and said what he had in mind, namely that there was no merit in the point. Jansen J thought otherwise (*South African Allied Workers' Union and Others v De Klerk NO and Others* 1990 (3) SA 425 (E) 431E-433E) but Conradie J, with the customary deference, held that Jansen J's interpretation was artificial (*Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd and Another* 1994 (1) SA 659 (C) 661E). Lest there be any future doubt about the matter, this judgment holds that the point is bad for the reasons that follow.

[12] Halsbury's *Laws of England* states since its first edition that:

> "Ratification, to be effective, must be made either within a period fixed by the nature of the particular case, or within a reasonable time, after which it cannot be ratified to the prejudice of a third person."

(1st ed vol 1 par 384; 4th ed reissue vol 1(2) par 78). This, the full court in *Finbro Furnishers (Pty) Ltd v Peimer* 1935 CPD 378 at 380

found, justified the general rule that when an act has to be done within a fixed time, performance of that act by an unauthorised agent cannot be ratified by the principal after the lapse of such fixed time to the prejudice of another who has acquired some right or advantage from non-performance within the fixed time. As was pointed out rather pertinently in *Garment Workers' Union of the Cape and Another v Garment Workers' Union and Another* 1946 AD 370 at 378, the emphasis in that case was on acts which have to be performed within a fixed time. Both these cases dealt with ratification of the unauthorised prosecution of appeals. In *Finbro* the ratification was held to be ineffectual because it took place after the period fixed; in *Garment Workers' Union* the correctness of *Finbro* was not considered because the ratification concerned took place within the fixed period. In the present case there was no fixed period within which the proceedings in the court below had to be instituted, nor is it a requirement that they have to be instituted within a reasonable time. Neither the rule as formulated by *Halsbury* nor as restated in *Finbro* is thus of application to the present case.

[13] Two principles, if not one, were mentioned in *Jagersfontein Garage & Transport Co v Secretary, State Advances Recoveries Office* 1939 OPD 37: ratification cannot affect vested

rights previously acquired by third parties (at 41 *in fine*) and a person ratifying cannot by his unilateral act bridge the interval so as to prejudice others, not parties to the transaction (at 46 *in fine* - 47). In the context of the case the right involved concerned ownership and the third party whose interest was at stake was someone other than the agent, the principal and the other party to the transaction. Fisher J (at 41) pointed out that one authority, *Bowstead on Agency* par 30 (probably the 8th ed) limited the proposition to proprietary rights. Bowstead has since wavered slightly and has extended the rule to possessory rights vested in third parties (*Bowstead & Reynolds on Agency* 16th ed art 20). Windscheid (*Lehrbuch des Pandektenrechts* par 74 presumably at vol 1 p 371), the other authority quoted by Fisher J, also deals with substantive rights only and it is apparent from his discussion that the third party he had in mind is not the other party to the transaction. Peckius *De Regulis Juris* X 16-17, also relied upon, is too cryptic for any conclusion. Van Jaarsveld *Die Leerstuk van Ratifikasie in die Suid-Afrikaanse Verteenwoordigingsreg* (LLD thesis, Pretoria, 1971) p 489-492, on the other hand, is quite clear that the rights that may not be affected are substantive rights of a party other than the third party to the transaction which, in the instant case, is the litigation.

[14] Apart from the fact that no substantive right of a third party is affected by the ratification, the next question is if any vested right of Smith was affected or prejudiced. Kannemeyer J in *South African Milling Co (Pty) Ltd v Reddy* 1980 (3) SA 431 (SE) at 437F held that a respondent acquired "a right to move for the dismissal of the application on the ground of lack of *locus standi*". Goldstone J had difficulty with this because to him the so-called right is "hardly what one would envisage as constituting a 'vested right'." (See *Baeck & Co SA (Pty) Ltd v Van Zummeren and Another* 1982 (2) SA 112 (W) 119H.) Conradie J in *Merlin Gerin* agreed with Goldstone J, reasoning that the right involved is no more than the "right" to take a point and to require a court not to turn a good point into a bad one. I am in general in agreement with the analysis and conclusion reached in *Merlin Gerin*. Apart from making perfectly good sense and being practical, it is legally sound. A party to litigation does not have the right to prevent the other party from rectifying a procedural defect. Were it otherwise, one party would for instance not be entitled to amend a pleading, especially not after the filing of a valid exception. The ratification in the present instance did not affect any substantive rights of Smith.

[15] In *South African Milling* (at 436F-437C) the matter was

also approached from a procedural point, namely that a party is not entitled to make out a case in reply and that a ratification relied upon in reply infringes this rule. This part of the ratio is strictly speaking not apposite to the present case because the issue here was decided upon a stated case which did not raise this point. It remains, however, in view of persistent difficulties in this regard, necessary to emphasise that this Court in *Moosa and Cassim NNO* has clearly adopted as correct the refutation in *Baeck & Co* (at 114E-119B) of the approach, and to state that I fully subscribe to that view . The rule against new matter in reply is not absolute (*cf Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 499 (T) 511F) and should be applied with a fair measure of common sense. For instance, in the present case, the point provided no material or substantial advantage to Smith - at least, counsel could not point to any - and it simply at great cost postponed the day of possible reckoning (*cf Merlin Gerin* at 660I-J; *National Co-op Dairies Ltd v Smith* 1996 (2) SA 717 (N) 719E-F).

[16] Before concluding this judgment and dismissing the appeal, I wish to draw attention to another procedural matter which is often overlooked in the grant of leave to appeal and which causes delay and unnecessary costs. In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 531D it was said that, in granting leave to appeal, a court should do more than consider whether the jurisdictional requirements for leave are present:

> "But, if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words, the test is then 'whether the appeal - if leave were given - would lead to a just and reasonably prompt resolution of the real issue between the parties'."

I am satisfied that if this consideration had been put to the judge below, he would not have granted leave to appeal before the proceedings had been terminated.

The appeal is dismissed with costs.

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L T C HARMS
JUDGE OF

APPEAL

Concur:

SMALBERGER, JA
GROSSKOPF, JA
OLIVIER, JA
MADLANGA, AJA