IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED:

Date: **4 MAY 2022** Signature: _____

CASE NO: 43422/20

In the matter between:

K MALAO INC	First Applicant
KOTSOKOANE ATTORNEYS	Second Applicant
SENNE INC	Third Applicant
MABUSE ATTORNEYS	Fourth Applicant
MATUVHATSHINDI ATTORNEYS	Fifth Applicant
NDOU INC	Sixth Applicant

and

THE MINISTER OF TRANSPORT	First Respondent
THE CHAIRPERSON OF THE BOARD: ROAD ACCIDENT FUND	Second Respondent

THE ROAD ACCIDENT FUND Third Respondent

MR COLLINS LETSOALO Fourth Respondent

NEUKIRCHER J:

1] This is an application for leave to appeal the judgment and order handed down, electronically, on 31 March 2022. The applicants in the main application are seeking leave to appeal the order dismissing their application with costs including the costs of two counsel. By agreement, the application was decided on the papers and the parties were all given the opportunity to file heads of argument, which they did.

2] The application is, briefly stated, based on the grounds set out in the Application for Leave to Appeal, which in essence state that the court erred in the approach that was taken in the determination of the applicants' locus standi in the matter, more especially given the fact that the application raises constitutional issues and concerns rights entrenched in the Bill of Rights. The applicants complain that the appointment of Letsoalo threatens their section 22 constitutional rights and that, on a broad approach[1] to standing under section 38 of the Constitution, the applicants had locus standi to challenge the appointment of Letsoalo as CEO of the RAF. The last ground is that the matter is one of broad public importance. The applicants state that the appeal has reasonable prospects of success and another court would arrive at a different conclusion.

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[1] As opposed to the alleged narrow approach taken by the court

3] Over and above the provisions of s17(a)(i) of the Superior Courts Act[2], the applicants also appear to reply on the provisions of s17(a)(ii) which makes provision for the grant of leave to appeal where *"there is some other compelling reason why the appeal should be heard"* . This argument is based on the submission that the matter raises matters of sufficient public interest to require a hearing by a court of appeal.

4] It is now trite that in considering an application for leave to appeal, a higher threshold needs to be met before leave will be granted. As stated in **Fair-Trade Independent Tobacco Assoc v President of the Republic for South Africa and another**[3]

"...There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both the facts and the law."

5] The applicants base much of their argument on the Constitutional Court judgment of **Kruger v President of the RSA**[4], in which the standing of a personal injury attorney to challenge the constitutionality of certain proclamations was recognised. But what the applicants ignore is the factual matrix of that matter. There, the issue was the constitutional validity of the two Proclamations[5], both of which were issued by the President with the

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2 10 of 2013

3 (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) at para 6

4 2009 (1) SA 417 (CC)

5 The one, Proclamation R27, was published in the Government Gazette on 19 July 2006 (the First

intention of bringing into operation certain sections of the Road Accident Fund Amendment Act no 19 of 2005, and which would result in the amendment of a number of sections of the Principal Act. The issue was the following:

"[53] First, it would not be possible to determine what injuries entitle a third party to claim compensation for general damages, for the following reasons:

(a) section 6 of the Amendment Act substitutes section 17 of the Principal Act. Section 17(1) as amended provides that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a "serious injury";

(b) section 11 of the Amendment Act substitutes section 26 of the Principal Act. It authorises the Minister to make regulations regarding "injuries which, for the purposes of section 17, are not regarded as serious injuries"; and

(c) regulations have not been made determining what constitutes a "serious injury".

The result is that it is impossible for an attorney to advise a client as to whether he or she may claim compensation for non-pecuniary loss as a consequence of injuries suffered in an accident.

[54] Second, it is not possible to determine at what rate the medical expenses will be reimbursed by the Fund:

(a) section 6 of the Amendment Act introduces section 17(4B) into the Principal Act. This provides that the liability of the Fund for medical expenses shall be limited to a tariff prescribed by legislation and regulation.

Proclamation) and the other, Proclamation R32, was published in the Government Gazette on 31 July 2006 (the Second Proclamation)

(b) no such tariff has been prescribed.

The result is that it is impossible for an attorney to advise a client as to what medical expenses he or she may claim from the Fund. It may even be that no expenses may be claimed..."

6] Given the underlined portions[6] supra, it is not surprising that the attorney was found to have sufficient *locus standi* in that matter, as the provision of legal advice to a client on whether they have a claim at all, is fundamental to the attorney-client relationship. There is no such impediment in this natter and there is no indication that the applicants are unable to discharge any of their duties. In this, the *caveat* in the **Kruger** matter must be borne in mind:

"Legal practitioners must not assume that they will be allowed to bring applications to this Court for a declaration of invalidity based purely on financial self-interest or in circumstances where they cannot show that it will be in the administration of justice that they do so."

7] I am also of the view that the matter of **Director General of the Department of Home Affairs v De Saude Attorneys and Another**[7] does not assist the applicants on the facts of that matter, where the applicants were indeed hamstrung by the lack of co-operation and systemic failures within the Department to process their clients' visa applications, sometimes leading to delays of over 7 years. In the matter to hand, the complaint is one based

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6 My underlining and emphasis

7 (1211/2017) [2019] ZASCA 46; [2019] 2 All SA 665 (SCA) (29 March 2019)

on their own section 22, and their clients' section 34, constitutional rights. It is not necessary for me to repeat the reasons I found that these are not sufficient to found the applicants' locus standi – I refer to the judgment of 31 March 2022 in this regard.

8] Similarly, and as stated in the main judgment, the fact that the applicants' are entitled to fees for their services does not cloak them with sufficient *locus standi*[8]. At the end of the day their mandate is from their client and their fees are recuperated from their clients – whether by way of ordinary fee arrangements, or by way of a contingency fee agreement. The applicants' financial self-interest does not provide them with sufficient direct interest to found their *locus standi* in this matter for the reasons set out in the main judgment. Even were the test to have been narrowly applied, instead of broadly as contended by the applicants it should have been, I am of the view that the particular facts of this matter do not change the basis of the finding[9].

9] The applicants contend that even were their standing "*questionable*", the court should have considered the merits because of broader considerations of accountability and responsiveness. However, in **Giant Concerts CC v Rinaldo**, the court stated:

"32. And in determining Giant's standing, we must assume that its complaints about the lawfulness of the transaction are correct. This is because in

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8 Giant Concerts CC v Rinaldo Inv (Pty) Ltd 2013 (3) BCLR 251 (CC); Areva NP v Eskom Holdings SOC Limited and Another 2017 (6) SA 621 (CC) at para 32

9 Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at para 166

determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified. As Hoexter explains:

> *"The issue of standing is divorced from the substance of the case. It is therefore a question to be decided in limine [at the outset], before the merits are considered." "*

The court also stated that

"...standing determines solely whether this particular litigant is entitled to mount the challenge: 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." "[10]

10] I am not persuaded that the applicants are the "*right persons*" seeking the "*right remedy*" in the "*right proceedings*" and therefore I am of the view that the threshold set by section 17 of the Superior Courts Act has not been met.

11] Thus the order I make is the following:

The application for leave to appeal is dismissed with costs, which costs shall include the costs of two counsel.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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10 at para 34

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 MAY 2022.

For the applicant	:	EC Labuschagne SC, with him V Mabuza
Instructed by	:	K Malao Inc
For the 1st respondent	:	M Mphaga SC, with him MV Magagane
Instructed by	:	State Attorney, Pretoria
For the 2nd and 3rd respondents	:	NA Cassim SC, with him S Freese
Instructed by	:	Malatji & Co. Inc
For the 4th respondent	:	C Puckrin SC, with him R Schoeman and P Nyapholi-Motsie
Instructed by	:	Malatji & Co. Inc