Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NUMBER: 207/19

In the matter between:

DE WET NEL	Applicant
and	
JACOBA SUSANNA JOHANNA SUSARA VAN SCHALKWYK N.O.	First Respondent
JACOBA SUSANNA JOHANNA SUSARA VAN SCHALKWYK	Second Respondent
MICHAEL JOHANNES VAN SCHALKWYL	Third Respondent
THE REGISTRAR OF DEEDS, KIMBERLEY	Fourth Respondent
MASTER OF THE HIGH COURT, KIMBERLEY	Fifth Respondent
GERRIT DIRKSE VAN SCHALKWYK	Sixth Respondent
DE WET VAN SCHALKWYK	Seventh Respondent

JUDGMENT

Per NXUMALO, AJ

INTRODUCTION

1. In this application which was lodged on 01 February 2019, the applicant, seeks a final mandatory interdict. First, compelling the first to third respondents[1] to hand over originals of a certain deed of transfer (T19106/2005) in respect of immovable property; to *wit*: the remaining Extent of Portion 4 of Gansvlei Farm number 554, situate in the Kareeberg Municipal District, Carnarvon Division, Northern Cape Province (also known as Trouw Fontein Farm) and letters of executorship in respect of the estate of the late Mr AMV van Schalkwyk (112/2204). Second, directing the opposing respondents to sign an application in terms of section 4 (1) (b) of the Deeds Registries Act 47 of 1937 (the Act). Third, authorising the registrar to rectify the impugned deed to include a *fedeicommissum* in favour of the eldest son of the third respondent, who is still alive at the time of the latter's death. Third, the applicant also seeks costs of the application to be borne by his opponents. He seeks such costs to be granted against them jointly and severally, the one paying the other to be absolved. No relief is sought against fifth to seventh respondents, who have been cited herein only to the extent that they may be interested in the outcome of this application.

The parties

2. The applicant is one, De Wet Nel, a conveyancer who apparently transferred the impugned property into the name of the third respondent more than 16 years ago on 09 March 2004. The first and second respondents is the same person, i.e. Jacoba Susanna Johanna Susara van Schalkwyk. She is sued herein both in her personal and official capacities. The former as heir and surviving spouse of the deceased and the latter as the duly appointed executrix of the deceased's estate. The third respondent is Michael Johannes van Schalkwyk, a co-heir to the deceased's estate and now registered owner

[1] The opposing respondents.

of the impugned property. The third respondent inherited the impugned property from the deceased. The fourth and fifth respondents are both organs of state within the contemplation of section 239 of the Constitution.[2] The former is appointed, exercises power and performs functions in terms of the Act, whilst the latter does the same under the Administration of Estates Act 66 of 1965 (the Estates Act). The sixth respondent is Gerrit Dirkse van Schalkwyk, the eldest son of the third respondent and allegedly the intended *fedeicommissary*. The seventh respondent is De Wet van Schalkwyk, the youngest son of the third respondent.

PRELIMINARY ISSUES FOR DETERMINATION

3. The opposing respondents in their answering affidavit delivered on 21 February 2019, raised a point *in limine* regarding the applicant's lack of *locus standi in judicio.* The applicant subsequently delivered a replying affidavit on or about 04 September 2019 and delivered heads of argument on 25 May of the same year. The opposing respondents' heads of argument were thereafter delivered on 27 May 2020. Therein, the opposing respondents sought to strike-out certain matter from the applicant's replying affidavit, without notice.[3] Logically, it is imperative that one first dispose of the latter issue before turning to the former.

The application to strike-out

4. Rule 6 (15) of the Uniform Rules of Court expressly empowers a court on application, to order to be struck out from any affidavit, any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The rule contemporaneously restrains the court not to grant the application to strike-out, unless it is satisfied that the applicant will be prejudiced, if

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2 According to the said section an "organ of state" means (a) any department of state or administration in the national, provincial or local sphere of government; (b) any other functionary or institution –(i) exercising a power or performing a function in terms of the Constitution or provincial constitution; or (ii)exercising a public power or performing a public function in terms of legislation, but does not include a court or judicial officer.

3 See pp31-34, respondent's heads of argument, 27/05/20.

the application is not granted. These expressions have been defined as follows, in turn: (a) "*scandalous matter*", are allegations which may or may not be relevant but which are so worded as to be abusive or defamatory; (b) "*vexatious matter*", are allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and (c) "*irrelevant matter*", are allegations which do not apply to the matter at hand and do not contribute in one way or the other to a decision of such matter.[4]

5. It can be deduced from the foregoing that two requirements must be satisfied before an application to strike-out matter from any affidavit can succeed; to *wit*: firstly, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; secondly, the court must be satisfied that if such matter is not struck out, the party seeking such relief would be prejudiced.[5] To the extent that scandalous or irrelevant matter may be defamatory of the other party, it follows that the retention of such matter will therefore be prejudicial to such party.[6] Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal.[7] Section 173 of the Constitution expressly gives our superior courts the inherent powers to protect and regulate their own processes and to develop the common law, taking into account the interests of justice. The use of the word "*may*" in the text of the rule also unambiguously indicates that our courts have the discretion in applications to strike-out matter from affidavits and the concomitant duty to exercise such powers judiciously.[8] The court more also has a wide discretion to make an appropriate costs order, including an order for costs on the basis as

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4 See *NDPP v Zuma 2009 (2) SA 277 (SCA) at 289G.*
5 *See UFS v Afriforum 2017 (4) SA 283 (SCA) at296E.*
6 See *Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 567B.*
7 See section 34 of the Constitution.
8 See *Titty's Bar v ABC Garage 1974 (4) SA 362 (T) at 368G.*

between attorney and client, depending on the facts and circumstances of the matter.[9]

6. In sum, the opposing respondents seek to strike-out the following paragraphs and annexure from the replying affidavit, to *wit*: 15.3 and 15.5;[10] the whole of annexure RA;[11] and the third sentence of paragraph 30.1. of the replying affidavit.[12] In the confirmatory affidavit of Van Zijl, they impugn paragraphs 4.4 and 4.6 and the second sentence of paragraph 4.5.[13] This application is *contra Wiese v Joubert*, where it was held that an application to strike out must be on notice in terms of rule 6 (11).[14] I invited oral submissions in this regard and no prejudice was raised on behalf of the applicant with regard to the opposing respondent's non-compliance with the said rule. All the applicant sought to do was to justify the inclusion of the impugned matter on the basis that same is relevant and provides a complete picture of the genesis and context of the current dispute ensuing between the parties. I find that all matter sought to be struck out, except the third sentence in paragraph 30.1 of the replying affidavit is indeed scandalous, vexatious and irrelevant. One only has to read same *vis-à-vis* the issue for determination, to find so. I am satisfied that if such matter is not struck out, the third respondent would be prejudiced.[15] I will order accordingly.

7. The opposing respondent's only grief regarding the third sentence in paragraph 30.1 of the replying affidavit is that same constitutes prejudicial new matter which he was not able to respond to, as same was not contained in the founding affidavit. The impugned sentence is to the effect that: it was only when the possibility of a court application

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9 See *Rail Commuters Action Group v Transnet 2003 (5) SA 518 (C) at 589F-G.*
10 p154, RA.
11 p164-171, ibid.
12 p159, RA.
13 pp174-175, *ibid.*
14 *1983 (4) SA 182 (O) at 197D.*
15 See *UFS v Afriforum 2017 (4) SA 283 (SCA) at296E.*

and cost thereof was explained to the third respondent that he agreed to sign the section 4 (1) (b) application.[16] I disagree with the opposing respondents. I do because it is evident that the applicant in paragraphs 11.1 and 11.3 of the founding affidavit[17] previously alluded to filing the said application and even attached the relevant annexure to that effect.[18] Each of these annexure variously and patently do make mention of a possible court application and who would bear the costs thereof.[19] In the premise, I find that the impugned sentence is not new matter and thus not susceptible to be struck-out and dismiss this aspect of the application to strike out. I will also order accordingly.

Whether the applicant has locus standi in judicio

8. He who has a right to sue in an action is said to have a *locus standi* in such action, and *vice versa.* The opposing respondents have placed the applicant's *locus standi* squarely in dispute. The test is whether the applicant has a direct personal interest in the suit to be considered "his cause". [20] In *Minister of Safety and Security v Lupacchini and Others [2015] JOL 33825 (FD),* two connotations of the expression were aptly identified. It was well said that its primary sense, it refers to the capacity to litigate or that is the capacity to sue or to be sued. It was correctly pointed out that whilst the capacity to litigate is of course not the same as the capacity to act, there is usually a close correlation between them. In its secondary sense, the expression denotes whether a person has a sufficient interest in the subject matter of the case to be allowed to bring or defend the claim.

9. *Locus standi* is thus an issue which needs to be determined preliminarily in a judicial process.[21] In other words, the issue of *locus*

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16 See p 159, RA.
17 See p 17, FA.
18 See pp 37-41, *ibid.*
19 See para 4, p38 and paras 3-4, pp39-40, *ibid.*
20 *per* Searle, JP in *Rescue Committee, DRC v Martheze 1929 CPD 300.*
21 See *Watt v Sea Plant Products 1998 (4) All SA 109 (C) at 113-114.*

standi has to be decided *in limine* before the merits.[22] That the parties have the necessary legal standing or *locus standi in judicio* must accordingly appear *ex facie* the founding pleadings.[23] Of significance in this regard is the fact that on 13 March 2019, the opposing respondents delivered a notice in terms of rule 35 (12) and (14) notices requiring the applicant to make available for inspection and to permit them to make copies of *inter-alia*, the written power of attorney and/or mandate from the first respondent establishing the applicant's responsibility to correct the alleged error and attend to the section 4 (1) (b) application for an amendment to include the *fideicommissum* in the impugned deed, as alluded in paragraph 14 of the founding affidavit.[24]

10. The applicant's reply to the said notices essentially acknowledged that he had no written power of attorney and/or mandate because he received all instructions verbally. In this regard, he also contends in paragraph 8 of the replying affidavit that a section 4 (1) (b) application does not require a power of attorney as it is only required to be signed by the registered owner(s) and any party having an interest in the property. He further contends that he has acquired *locus standi* to institute these proceedings from his mandate as the duly appointed conveyancer. To this extent, he further contends that he has the professional responsibility to correct his error of omitting the *fedeicommissum*. He laments that he might be liable to be sued for damages by the *fideicommissary* heir, should the latter's rights not be registered.[25] It can be deduced from the foregoing that the applicant might, at best have a financial interest in the outcome of these proceedings.

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22 See *Giant Concert v Rinaldo 2013 (3) BCLR 251 (CC) at 58.*

23 *See Commissioner of Inland Revenue v van der Heever 1999 (3) SA 1051 (SCA) at par 10.*

24 See paras 6, pp3 and 7 of the said notices, respectively.

25 See pp151-152, RA.

THE ARGUMENTS IN SUM

The opposing respondents' argument

11. The opposing respondents, in sum impugn the applicant's standing in these proceedings on the basis that being *functus officio* as their erstwhile conveyancer, the respondent lacks the necessary *locus standi in judicio* to institute these proceedings and to seek the relief sought. They also argue that section 4 of the Act, singularly and exclusively regulates the statutory powers of the registrar and therefore cannot be the origin or source of a conveyancer's power or authority of conveyancers or the basis of their *locus standi* to make applications for rectification of registry documents they deem defective.[26] They also argue that applicant cannot found any authority or seek correction of the impugned deed in terms of section 4 (1) of the Act, other than in terms of a written power of attorney. They say it is so simply because any conveyancer who intends to effect any changes to a deed of transfer has to obtain a new power of attorney specifically authorising him to do so.[27] They maintain that the applicant is *functus officio* since as their former conveyancer after executing in terms of the erstwhile power of attorney, he lost authority to act further on their behalf. He has no interest in the relief sought, they also say.[28] According to them, he could not have acquired any *locus standi in judicio* through his erstwhile mandate to attend to the transfer of the farm to the third respondent.[29] They also insist that applicant needs the consent of all other affected parties appearing in the impugned deed to launch this application.[30]

12. They also deny that the first respondent ever gave any oral instructions to the applicant or agreed to assist the applicant to launch any section 4 (1) (b) application. Alternatively, they deny that they are obliged to

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26 Seer para 8.2.2, p73, AA.
27 See para 8.1.10 and 8.2.3 pp73-74, AA.
28 See paras 8.1.9 and 84, pp72 and 75, AA.
29 See para 8.1, p70, AA.
30 See paras 8.3.1-8.3.2, AA.

execute any consent in terms of section 4 (1) (b) of the Act at the behest of the applicant.[31] They maintain that if such an instruction was given at all *sans* being in writing as alleged, same would not suffice for the applicant to found *locus standi.*[32] As far as they are concerned, the applicant or whichever conveyancer intended to make any change to the impugned deed would have to obtain a new or fresh power of attorney to do so.[33]

The applicant's argument

13. The applicant, for his own part, maintains that he has *locus standi in judicio* in these proceedings. He says that as the conveyancer who is the author of the alleged *bona fide* error of failing to include the said *fedeicommissum* in the impugned deed, it incumbent on him to correct same. When he discussed the matter with the opposing respondents, they verbally undertook to provide the necessary assistance in correcting the alleged error and to execute the necessary documents, in that regard.[34] He is entitled to reclamation of the sought documents as he remains responsible to correct the alleged error and to attend to the section 4 (1) (b) application to include the impugned *fedeicommissum* in the impugned deed.[35] He is entitled to gain temporary possession of the sought documents to enable him to submit same to the registrar in the intended application. To the extent that he has not discharged his functions as conveyancer and being the author of the said error, he remains responsible and obliged to attend to the section 4 (1) (b) rectification. He cannot be *functus officio* and is entitled to compel the opposing respondents to sign the said section 4 (1) (b) application. According to him, he contemporaneously entitled to seek the registrar to be authorised to rectify the impugned deed accordingly. As the duly appointed conveyancer, he acquired the mandate to attend

31 See para45, p91, FA.
32 See para8.3, p74, AA.
33 See para8.1.10, p 73, AA.
34 See paras 9.1-9.2, p15, FA.
35 See paras 13-14, p 18, FA.

to the transfer of the immovable property and accordingly has the requisite *locus standi* to launch this application.[36] And he has a professional responsibility to correct his error because he may be held responsible in damages by the *fedeicommissary* heir should his rights not be registered.[37]

THE ISSUE FOR DETERMINATION

14. The issue for determination is therefore whether the mere fact that the applicant might have committed an error in transferring the impugned property some sixteen years ago *ipso facto* grants him the right or *locus standi* to launch a section 4 (1) (b) application to the registrar to rectify same without a mandate to do so from any person appearing from the deed or other document to be interested in the rectification? A proper consideration of the issue for determination requires a whole and purposively reading of the section in question.

DISSERTATION

15. Section 4 expressly and peremptorily stipulates as follows:

"4. Powers of registrar

(1) Each registrar shall have power-

(a) to require the production of proof upon affidavit or otherwise of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in his registry;

(b) whenever it is in his opinion necessary or desirable to rectify in any deed or other document, registered or filed in his registry, an error in the name or the

36 See para 8.3, pp151-152, RA.

37 See para 8.3, p152, RA.

description of any person or property mentioned therein or in the conditions affecting any such property, to rectify the error: Provided that-

(i) every person appearing from the deed or other document to be interested in the rectification, has consented thereto in writing;

(ii) if any such person refuses to consent thereto the rectification may be made on the authority of an order of Court;

(iii) if the error is common to two or more deeds or other documents, including any register in his registry, the error shall be rectified in all those deeds or other documents;

(iv) no such rectification shall be made if it would have the effect of transferring any right;

(v) ....

(c) to issue, under conditions prescribed by regulation, certified copies of deeds or other documents registered or filed in his registry;

(d) if in his opinion any deed or other document submitted to him has become illegible or unserviceable, to require that a certified copy thereof be obtained to take its place.

16. It is trite that headings to chapters and sections of a legislative instrument are part of the instrument describing the contents of the chapters or sections following them even though the legislature does not vote on them. Headings may thus in principle be consulted in determining the meaning of doubtful or ambiguous parts of the contents of the specific chapter or section which they refer to.[38] It is so even if the uncertainty of ambiguity does not arise from the wording of the provision in question, but from other considerations as well.[39] In fact, the Constitutional Court has held that headings can be consulted

38 See *Greater Johannesburg TMC v ABSA 1997 (2) 591 (W) 607D-F.*

39 See *Turffontein Estates v Mining Commissioner 1917 AD 419.*

in constitutional interpretations too.[40] It is also so that if there is doubt arising from ambiguity or anything else as to the meaning of a provision under its heading, it is permissible when construing the provision, to read the heading in conjunction with the provision ranged thereunder, as the heading is an element (or pointer) in the process of ascertaining the intention of the legislature enacting the immediately following provision.[41]

17. Section 4 is deliberately and aptly headed "powers of registrar". Whilst it is so that where the intention of the law-giver as expressed in any particular provision of an Act is clear, the meaning of the provision cannot be overridden by the wording of its heading. It is also so that where general words in a provision are clear and unambiguous, they may be limited by a restrictive heading indicative of the legislature's intention. Where a tribunal is so constituted that it is given a specific power in such terms as "it shall have the power" in the context in which it is enacted, it means that the power amounts to a strict legal duty to perform same and it should be interpreted as such.[42]

18. It has also long been recognised in our law that giving effect to the policy or object or purpose of legislation is an accepted strategy of statutory interpretation.[43] A purposive interpretation section 4 of the Act is that it exclusively arrogates and regulates the powers of the registrar and nothing more pretentious. For instance, section 4 (1) (a) unambiguously empowers the registrar to require the production of proof upon affidavit or otherwise of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in his registry. It is *vide* this section that the registrar is entitled to demand powers of attorneys from all conveyancers appearing in the deeds registry to perform certain juristic acts. Section 4 (1) (b) of the Act, for its own part,

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40 See *President of RSA v Hugo 1997 (6) BCLR 708 (CC) para 12.*

41 See EA Kellaway, Principles of Legal Interpretation, pp265-265 at para 3.1.

42 See *Veriava v President of SAMDC 1985 (2) SA 293 (T).*

43 See *Stopforth v Minister of Justice 2000 (1) SA 113 (SCA) para 21.*

inter-alia expressly empowers the registrar, whenever it is in his opinion necessary or desirable, to rectify any deed or document, registered or filed in his registry, an error in the name or the description of any personal property mentioned therein or the conditions affecting any such property, to rectify the error. Provided that every person appearing from the deed or other document to be interested in the rectification has consented thereto in writing. If any such person should refuse to consent thereto, the rectification may be made on the authority of an order of court.

19. Whilst it is trite that our courts will not be unduly technical with regard to *locus standi* as each case should be considered on its own merits. And whilst the issue of standing is always determined in light of the factual and legal context of each case. And also whilst it is true that our courts sometimes take a pragmatic approach where there is objection to a party's standing, and another party on the same side has standing, they simply proceed to determine the merits, finding it unnecessary to resolve the disputes surrounding the *locus standi* of the other parties on a particular side.[44] It is also true that there is no rule of law that allows a court to confer *locus standi* upon a party (especially a single litigator) who otherwise has none, on the ground of expediency or to obviate impractical and undesirable procedures-*see Gross v Penz 1996 (4) SA 617 (A) at 632.*

20. Whilst the question of *locus standi* in a sense is procedural, it is also a matter of substance. It concerns the sufficiency and directness of a person's interest in litigation in order for that person to be accepted as a litigating party. Because sufficiency of interest depends on the facts of each case because there are no fixed rules.[45] Generically, it is for the party instituting proceedings to allege and prove its *locus standi.* The *onus* of establishing the issue rests on that party. It is thus necessary

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44 See *Oakdene v Farm Bothasfontein 2013 (3) All SA 303 (SCA) para 6.*

45 See *Gross v Pentz 1996 (4) SA 617 (SCA).*

for a party in all cases to allege in its pleadings facts sufficient to show that it has *locus standi* to bring an action. This applies to all proceedings, whether brought by way of application or summons.[46]

21. Although the relationship between an attorney or conveyancer and his client is of a very special character with certain peculiar aspects, the legal principles which apply in those relationships are generically those of the law of agency. It is so because the relationship of an attorney and his client is based on *mandatum* with some features which are peculiar to the particular kind of agency- *see Goodrick v Auto Protection Insurance Coy 1968 (1) SA 717 (A) 722H.* It therefore follows that the services which an attorney or conveyancer renders to his client are mainly, with the exception of advisory, consultative and similar functions, those which an agent renders to its principal.

22. It is trite in our law that, an agent generically has no *locus standi* to sue or be sued on the principal obligation between the principal and the other party.[47] It is also trite that where an applicant sues in his capacity as an agent without his principal being a party to the litigation, it is essential that he establishes his *locus standi* in his founding affidavit and where he fails to do so, the application may be fatally defective. However urgent the matter may be and however complicated, his endeavours to rectify the matter by relying on material set forth in his replying affidavits may be of no avail.

23. It is clear from the facts and circumstances of this case that the applicant seeks both to perform an act and/or seeks something to be performed or rectified in the deeds registry on behalf of another person as contemplated by section 4 (1) (a) of the Act and regulation 65 of the General Regulations published under section 10 of the Act. Regulation

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46 See *Wilson v Zondi 1967 (4) SA 713 (N).*

47 See *Springfield v Peter Maskell Auction 2006 (4) All SA 483 (N).*

65 of the General Regulations published under section 10 of the Act, expressly provide that any person seeking to perform any other act in the deeds registry on behalf of any other person must, except as otherwise provided in the Act, lodge for filing with the registrar, the original power under which he claims to act. It is also clear that such a person would be acting as an agent and performing a juristic act on behalf of another. Section 10 (1) (n) of the Act, expressly empowers the Deeds Registries Regulation Board, established in terms of section 9 of the Act, to make regulations; *inter-alia,* prescribing the manner and form in which consent shall be signified to any cancellation, cession, part payment, release or amendment of or other registrable transaction affecting any bond or other document registered in the deeds registry.

24. The Registrar's Conference Resolution 10 of 2009, expressly provides that an owner, alternatively the conveyancer may launch a section 4 (1) (b) with the registrar, with the consent of other interested parties. This does not mean that a conveyancer is authorised to go on a frolic of his own and launch such an application. It is trite that a conveyancer may only act within the four corners of his power of attorney. Regard being had to the facts and circumstances of this case is clear that the applicant's mandate was discharged as far back as 09 March 2004, where after, in my view he instantly became *funtus officio.* Thereafter he had no authority whatsoever to attend to any aspect in relation to the impugned deed. It is so since, generically, an attorney or conveyancer can only acquire authority to conclude a juristic act on behalf of his client if his client has by word or conduct expressed his will that he has power to do so. There is no rule in law which lays down what "implied powers" attorneys or conveyancers have, other than what stands in the four corners of the power of attorney. In each case it is a question of fact whether an attorney or conveyancer has been authorised to conclude a juristic act on behalf of a client. That is why in our law, it is peremptory for a party who relies on an agency to allege and prove the existence and scope of the authority of the alleged agent whether

express or implied.[48] Regulation 65 of the General Regulations under Section 10 of the Act, GNR. 474, 29 March 1963, expressly and peremptorily provides, *inter alia*, as follows; that:

"*(1)* *Any person seeking to pass, cede or cancel a deed* ***or to perform any other act*** *in a deeds registry* ***on behalf of any other person must****, except as hereinafter provided,* ***lodge for filing with the Registrar the original power under which he claims to act.***

(2) ....

(3) ....

(4) ***A general Power of Attorney shall not be available for the purpose of dealing with immovable property unless it contains express authority empowering the agent to do so".***[49]

25. Regulation 44A of the Regulations for its own part, expressly provides as follows; that:

"44A ***The person signing the preparation certificate prescribed by Regulation 43 and 44(1) of the Regulations accepts, in terms of Section 15A (1) and (2) of the Act to the extent provided for in this regulation, take responsibility for the correctness of the undermentioned facts stated in the Deeds or***

48 See *ABSA v Arif 2014 (2) SA 466 (SCA).*

49 My emphasis.

documents concerned or which are relevant in connection with the registration or filing thereof, namely:

(a) ...

(b) ***that, in the case of a deed of transfer or certificate of title to land, all the applicable conditions of title contained in or endorsed upon the owner's copy of the title deed,*** *together with any applicable proclaimed township conditions* ***have been correctly brought forward in that deed of transfer or certificate of title to land;***

(c) ...

(d) ...

(e) that, in the case where a conveyancer is signing the preparation certificate on a deed of transfer, certificate of title conferring title to immovable property or a mortgage bond, he shall accept responsibility that the particulars in the deed mentioned in paragraph (d)(i), have been brought forward correctly from the special power of attorney or application relating thereto."

26. If it is correct that relationship between an attorney and a client is based on contract of mandate.[50] The same would apply to the relationship between a conveyancer and a client. The scope of an agent's mandate such as an attorney or conveyancer thus, depends on its express, tacit or implied terms.[51] Authority may be evinced by direct

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50 See *Mort v Chiat 2001 (1) SA 464 (C).*

51 See *Joubbert Scholtz v Elandsfontein BM 2012 (3) All SA 24 (SCA).*

proof of an express authorisation or by way of inference. In *Inter-Continental Finance and Leasing Corp v Stands 56 and 57 1979 (3) SA 740 (W)*, it was held that the authority of an agent must be established as a matter of actual fact, unless a party is able to rely on ostensible authority.

27. The applicant herein does no rely on any express, tacit or implied authority. Nor is he alleging any ostensible authority. He simply infers his authority solely from the fact that since he committed a *bona fide* error by failing to include the said *fedeicommissum* in the impugned deed as the conveyancer who transferred the said farm to the third respondent, he is responsible to correct the alleged error and to attend the section 4 (1) (b) application. In *Absa Bank v Arif 2014 (2) SA 466 (SCA)*, it was held that a party wishing to rely on agency must allege and prove scope and authority of the alleged agent, whether express or implied. Yet nowhere in his founding affidavit does the applicant traverse any direct proof of an express, inferred or ostensible authority to launch the section 4 (1) (b) application or this one. All he relies on is the fact that he drafted the necessary transfer documents which resulted in the immoveable property being transferred to the third respondent, excluding the *fedeicommissum.*[52] In the premise, as the "conveyancer", so he contends, he remains responsible to correct the error and to attend to the section 4 (1) (b) application for an amendment to include the *fedeicommissum* in the impugned deed.[53]

28. The question whether the applicant has a mandate to act on behalf of the "interested parties" is vital to the debate whether he has any *locus standi* in these proceedings. It determines whether he was authorised in the first place to approach the registrar for rectification in the first place. If the answer is no- then he should not be here. Whilst instructions to an attorney or conveyancer may be formulated so widely

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52 See para7, p14, FA.

53 See para 14, p18, FA.

as to include, expressly or impliedly, an authority to enter into settlement on behalf of a client.[54] A mere power of attorney to transfer certain property from one to another by deed of transfer cannot include the authority to compel persons appearing in such a deed to consent to the rectification of any perceived error therein after the termination of such a power of attorney as it is sought to be done by the applicant in these proceedings. It is so since ordinarily, the relationship between an attorney and his/her client is terminated by the completion of the services to be rendered generally or in connection with a particular matter.

29. In my view, the consideration whether a party has *locus standi* in certain proceedings is to some extent analogous to the determination whether a party should be joined or not in proceedings. It all boils down to whether or not a party has a "direct and substantial interest" or legal interest in the subject matter of the litigation which may be prejudicially affected by the judgment of the court. [55] To the extent that the applicant does not have a *"direct and substantial interest"* in the subject matter of the litigation which may be affected prejudicially by the judgment of this court such that his non-citation would have amounted to non-joinder, it follows that he lacks the requisite *locus standi in judicio* in these proceedings. An own-interest litigant does not acquire standing from the merits of the cause of action but from the effect the alleged offending act will have on its interests.[56] The mere fact that the applicant may be sued by the heir *fedeicommissary* does not enrich the discussion. It is so because in our law, mere financial interest in the outcome of a matter is an indirect interest which may not require joinder of a person with such interest.[57] The person who sues must have a direct interest in the subject-matter of the suit. It has long been well observed that:

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54 *Goosen v Van Zyl 1980 (1) SA 706 (O).*

55 *ABSA v Naude 2016 (6) SA 540 (SCA) at 542-543.*

56 See *Giant Concerts v Rinaldo Investments 2013 (3) BCLR 251 (CC) at 58.*

57 See *Xantha v HBRC 2018 (6) SA 320 (WCC) at 327.*

"...In a wide sense every individual has an interest in every suit that is pending, for he/she may be placed tomorrow in the same position of either plaintiff or defendant in which the same principle may be involved. Courts of law, however are not constituted for the discussion of academic questions, and they require the litigant to have not only an interest but also an interest not too remote. Whether the interest is remote or not depends upon the circumstances of the case and no definite rule can be laid down."[58]

30. The *ratio* in *Roamer Watch v African Textile Distributors* [59] is also apposite. There, the court was concerned, *inter-alia,* with an interdict relating to an infringement of a trade mark and passing-off. The second applicant was the holder of the sole franchise for selling 'Roamer' watches in South Africa, and the agent of first applicant. In relation to the separate aspects of the case made out for the applicants, namely, infringement of a trade mark, on the one hand, and passing off, on the other, the *locus standi* of the second applicant was in issue. It appeared on the papers that the second applicant purchased Roamer Watches outright from first applicant, and that he became the owner of such watches, and then resold them for this own account in South Africa. The second applicant, however, had no proprietary interest in the trade mark 'Roamer'. It was consequently held that in so far as the application was founded on the delict of passing off, the second applicant had *locus standi* to bring the application, but it had no *locus standi* in so far as the application was founded on the infringement of the trade mark 'Roamer'. Similarly, to the extent that the applicant does not have any proprietary interest in the impugned property or deed, he cannot predicate his application against section 4 (1) (b) of the Act. By parity of reason, a power of attorney in favour of a conveyancer to draft the power of attorney and transfer deed of a certain property is not a

58 See *Dalrymple v Colonial Treasurer 1910 TS 372 at 380.*

59 See *1980 (2) SA 254 (W).*

mandate or *locus standi* to rectify anything therefrom *ex post facto* or *functus officio.*[60]

CONCLUSION

31. Section 4 (1) (a) of the Act expressly and unambiguously regulates the powers of the registrar and nothing more. It empowers him to require the production of proof upon affidavit or otherwise of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in his registry. Section 4 (b) for its own part expressly empowers him, whenever it is in his opinion necessary or desirable to rectify in any deed or other document, registered or filed in his registry, an error in the name or the description of any person or property mentioned therein, or the conditions affecting any such property to rectify the error necessary; provided the conditions in section 4 (1) (b) are met.

32. It follows from the foregoing that the only manner and form which consent of the opposing respondents to the proposed rectification may be signified by the applicant is as prescribed by the Board; to *wit*: by lodging for filing with the registrar the original power under which he claims to act, at all material times hereto. He has failed to do so. The applicant cannot found any authority or seek correction of the impugned deed of transfer in terms of section 4 (1) of the Act, other than in terms of a fresh written power of attorney specifically authorising him to do so. The mere fact that he might have made an error in transferring the impugned property some sixteen years ago does not *ipso facto* grant him the right or *locus standi* to launch a section 4 (1) (b) application to the registrar without a power of attorney from anyone of the persons appearing from the impugned deed to be interested in the rectification.

60 See *Goosen v Van Zyl 1980 (1) SA 706 (O).*

33. It also follows from the foregoing that as a conveyancer, without more, the applicant obviously has no *locus standi* to sue or be sued on the principal obligation between the principal and any other party unless expressly mandated to do so.[61] The mere fact that he may have an interest in the outcome of the litigation, also does not warrant him any *locus standi* in these proceedings.[62] The applicant has clearly hung his jacket where he cannot reach it. The application is therefore fatally defective for his lack of *locus standi in judicio* in these proceedings. Given my finding on the preliminary point, there is no need to adjudicate the merits. The application therefore falls to be dismissed with costs, on this preliminary alone.

Costs

34. The applicant sought costs of this application against his opponents, jointly and severally, the one paying the other to be absolved. His opponents in turn sought costs against him on a punitive scale. The reasons for costs being sought on a punitive scale being the allegation that the applicant has been disingenuous, is conflicted and less than open or frank with regard to his motive for bringing this ill-fated application.[63] Whilst the application might have been ill-conceived, I am not convinced that the applicant has been disingenuous. I will therefore not grant any costs on a punitive scale.

Order

35. In the result, I order as follows:

(a) The opposing respondents' application to strike the following paragraphs and annexure from the replying affidavit, to *wit*: 15.3 and 15.5; 30.1 and annexure RA1; and paragraphs 4.4 and 4.6 and the second sentence of paragraph 4.5. in the confirmatory affidavit of Van Zijl, succeeds with costs;

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61 See *Springfield v Peter Maskell Auction 2006 (4) All SA 483 (N).*

62 See *JSC v Cape Bar Council 2013 (1) SA 170 (SCA) at 176-177.*

63 See paras 42.7, p87; 42.9, p90; 51, p94 AA and para77, p43, respondent's heads of argument.

(b) The opposing respondents' application to strike the third sentence in paragraph 30.1 of the replying affidavit is denied.

(c) The opposing respondent's point *in limine* regarding the applicant's lack of *locus standi* is upheld and the application is dismissed with costs.

APS NXUMALO

Acting Judge of the High Court of South Africa

Northern Cape Division, Kimberley

APPEARANCES

Counsel for applicant	:	Adv A Stanton
Instructed by	:	Duncan & Rothman, Kimberley
Counsel for respondents	:	Advocate MC Louw
Instructed by	:	C/O Hugo Mathewson & Oosthuizen Inc, Kimberley.
Date of hearing	:	29 May 2020
Date of Judgment	:	26 June 2020