THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 161/2013
Reportable

In the matter between:

GIDEON JOHANNES JACOBUS THERON N.O.	**FIRST APPELLANT**
ANTOINETTE THERON N.O.	**SECOND APPELLANT**

and

ANDREW THOMAS LOUBSER N.O.	**FIRST RESPONDENT**
ANNA LOUBSER N.O.	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT	**THIRD RESPONDENT**

AND

In the matter between:

GIDEON JOHANNES JACOBUS THERON N.O.	**FIRST APPELLANT**
ANTOINETTE THERON N.O.	**SECOND APPELLANT**

and

ANDREW THOMAS LOUBSER	**FIRST RESPONDENT**
ANNA LOUBSER	**SECOND RESPONDENT**
ANDREW THOMAS LOUBSER N.O.	**THIRD RESPONDENT**
ANNA LOUBSER N.O.	**FOURTH RESPONDENT**
THE MASTER OF THE HIGH COURT	**FIFTH RESPONDENT**

Neutral citation: *Theron v Loubser* (161/13) [2013] ZASCA 195 (2 December 2013)

Bench: Ponnan, Leach, Majiedt, Wallis and Petse JJA

Heard: **13 November 2013**
Delivered: **2 December 2013**

Summary: Trusts – locus standi - any person who has an interest in entitled to approach the court for declaratory relief as to who are the trustees of the trusts.

ORDER

On appeal from: Western Cape High Court, Cape Town (Cloete AJ sitting as court of first instance):

(a) The appeal is upheld with costs.

(b) The order of the high court dismissing the application under case number 12238/06 is set aside.

(c) The order of the high court dismissing the application under case number 13978/11 is set aside.

(d) Both matters are remitted to the high court.

JUDGMENT

PONNAN JA:

[1] 'Two households both alike in dignity,
In fair Verona, where we lay our scene,
From ancient grudge break to new mutiny,
Where civil blood makes civil hands unclean',

is William Shakespeare's introduction to the feuding families in *Romeo and Juliet* (Prologue 1-4). Substitute the Cape for fair Verona and the Therons and Loubsers for the Montagues and Capulets and that, I daresay, would perhaps be an equally apt

introduction in this matter. The Therons – Gideon and Antoinette (the first and second appellants) – and the Loubsers – Dr Andrew and Anna (the first and second respondents) – are the protagonists in a long-standing family feud (Gideon and Anna are siblings) which has culminated in extensive litigation between them. Dr Andrew Loubser explains:

'Currently there are at least 12 to 15 matters pending in the Magistrate's court and at least 2 applications and 5 actions pending in the High Court. A report is also awaited from the presiding officer in an enquiry in terms of the Companies Act relating to the liquidation of the company in which the parties were all involved previously and from which various allegations of fraud, misappropriation of funds, mismanagement, theft, dishonesty, etc. emanate.'

[2] The present is an appeal with the leave of this court from the Western Cape High Court. Three separate applications served before the high court. The first application related to the Jacknet Trust. In it, the Therons sought an order:

'1. Dat die besluit geneem deur Eerste en Tweede Respondente [Andrew and Anna Loubser NNO] tydens ongeveer middel 2005 om Eerste en Tweede Applikante [Gideon and Antoinette Theron NNO] te onthef van hul pligte as trustees van die Jacknet Trust (IT 951/95) nietig en kragteloos is.

2. Dat verklaar word dat Eerste Applikant, Tweede Applikant, Eerste Respondent en Tweede Respondent die huidige trustees is van die gemelde Trust.

3. Dat die Meester (Derde Respondent) versoek en gelas word om 'n Meestersertifikaat uit te reik wat die huidige trustees aandui soos vermeld in paragraaf 2 hierbo.'

In the second application under case number 12238/06, which related to the Namakwari Trust (the Namakwari application), the Therons sought an order:

'1. Dat die (gepoogde) aanstelling van Eerste Respondent [Andrew Loubser] as trustee van die Namakwari Trust (IT 4018/95) op 20 Junie 2006 ongeldig en dus nietig is.

2. Dat die besluit geneem op 'n vergadering van die trustees van die Namakwari Trust op 23 Augustus 2006, in terme waarvan Tweede Respondent [Anna Loubser] onthef is van haar amp as trustee van die gemelde trust, geldig is.

3. Dat verklaar word dat Eerste en Tweede Applikante die huidige trustees is van die gemelde Trust.

4. Dat die Meester (Derde Respondent) versoek en gelas word om 'n Meestersertifikaat uit te reik wat die huidige trustees aandui soos vermeld in paragraapf 3 hierbo.'

And, in the third application, bearing case number 13978/11 (which came to be described by the parties as the 2011 application) the Therons sought, inter alia, the following relief:

‘ . . .

2. That it be declared that First and Second Respondents, having committed deeds of insolvency, have been (automatically) discharged as trustees of each of the following trusts as provided for in such trusts' respective trust deeds:

2.1 Traka 5 Trust;

2.2 Traka 6 Trust;

2.3 Traka 7 Trust;

2.4 Traka 8 Trusts;

2.5 Traka 9 Trust;

2.6 Traka 10 Trust;

2.7 The Jacknet Trust;

2.8 The Namakwari Trust;

. . . '

[3] All three applications came before Cloete AJ, who after hearing argument over the course of several days, granted the relief sought in the first application and dismissed the other two. In dismissing the Namakwari and 2011 applications the high court held that the Therons lacked 'the necessary *locus standi* to have brought those applications'. It reasoned (paras 30-32):

'It must surely be that before exercising any power conferred on them by the trust instrument the trustees must resolve to exercise that power; and that in order to effect a resolution they must follow the procedure set out in clauses 4.5.1 to 4.5.3.

To find otherwise would mean that each trustee would be able to act independently of the others in relation to the powers set out in the trust instrument. This would offend not only against the trust instrument itself but also the common law.

With regard to legal proceedings the common law position is that unless one of the trustees is authorised by the remaining trustee or trustees, all of the trustees must be joined in suing and all must be joined when action is instituted against the trust. . . .'

[4] Clauses 4.5.1 to 4.5.3 provide:

'4.5.1 Twee (2) Trustees (waarvan een 'n party moet wees wat te alle tye onafhanklik en vry is van die beheer van die Stigter of van enige ander party wat enige bates aan hierdie Trust oorgemaak het) sal 'n kworum uitmaak.

4.5.2 Voldoende kennis (afhangende van hoe dringend die vergadering gehou moet word) van elke vergadering van die Trustees en die sake wat by sodanige vergadering bespreek sal word, moet aan elke Trustee gegee word by sy woonadres (as hy 'n natuurlike persoon is) of sy besigheidsadres (as hy 'n regspersoon is) soos in die rekords van die Trust opgeteken. Die tydelike afwesigheid van 'n Trustee by sodanige adres wanneer sodanige kennis gegee word, maak die kennisgewing nie ongeldig nie.

4.5.3 Geen besluit geneem by enige vergadering van Trustees sal geldig en van krag wees nie tensy die Trustees wat teenwoordig is 'n kworum uitmaak en almal ten gunste van die besluit stem.'

[5] A trust is not a legal persona. In its strictly technical sense a trust is ‘a legal institution *sui generis* . . . The trustee is the owner of the trust property for purposes of administration of the trust but *qua* trustee has no beneficial interest therein'. (*Braun v Blann and Botha NNO & another* 1984 (2) SA 850 (A) at 859E-H, *Commissioner for Inland Revenue v Friedman & others NNO* 1993 (1) SA 353 (A) at 370.) As Nugent JA explained in *Lupacchini NO & another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) para 1:

'A trust that is established by a trust deed is not a legal person – it is a legal relationship of a special kind that is described by the authors of *Honoré's South African Law of Trusts* as "a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose". In *Land and Agricultural Bank of South Arica v Parker and others* [2005 (2) SA 77 (SCA)] Cameron JA elaborated:

"[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them–and it is only through the trustees, specified as in the trust instrument, that the trust can act. . . .

It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust

estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.'"

[6] Here though in demanding compliance with clauses 4.5.1 to 4.5.3 of the trust deed, the high court appeared to lose from sight that the litigation was not being conducted in the name of or on behalf of the trust. Rather the application to court was intended to have a logically anterior question resolved, namely, who are the trustees of each of the trusts in question? Until that issue was resolved it would continue to remain the subject of dispute between the parties as to who exactly was supposed to participate in the formal process contemplated by the trust deed. In those circumstances any person who had an interest in those trusts, whether as trustee or beneficiary or otherwise, was entitled to approach the court for declaratory relief on that score.

[7] In support of the relief sought in the Namakwari application Mr Theron asserted:

'2. Ek bring hierdie aansoek in my hoedanigheid as trustee van die Namakwari Trust . . . .'

The response that that allegation elicited was:

'21. **AD PARAGRAAF 2**

Ek ontken dat die Eerste Applikant 'n trustee is van die Trust en soos in meer besonderhede hieronder sal blyk, is hy outomaties onthef as trustee in terme van die Trust se trustakte.'

Likewise, in the 2011 application Mr Theron alleged:

'I am a trustee of each of the trusts mentioned in paragraph 6 below, and bring this application in such capacity.'

Those allegations by Mr Theron plainly established an interest by him in the various trusts sufficient to entitle him to approach the court for the relief sought.

[8] Moreover, in an affidavit filed in support of the 2011 application, Mr Theron alleged:

'7. This application is for a declaratory order to confirm that First and Second Respondents have been (automatically) discharged as trustees of the trusts.

8.

8.1 The trust deed of each of the trusts provides that a trustee *"word outomaties van sy amp onthef [amongst others] indien hy 'n daad van insolvensie pleeg soos in die insolvensiewet … bedoel"*.

8.2 First and Second Respondents have each committed an act of insolvency in that:

(a) In terms of section 8*(b)* of the Insolvency Act 24 of 1936 ("the Act") they failed, upon demand of the sheriff, to satisfy a judgment against them or to indicate to him disposable property sufficient to satisfy the judgment debt. It furthermore appears from the Sheriff's return that he did not find sufficient disposable property to satisfy the judgment debt.

(b) Furthermore, irrespective of the above, in terms of section 8*(g)* of the Act, Respondents gave notice in writing that they are (were) unable to pay the judgment debt.'

Given its approach to the matter the high court did not deal with this aspect of the case. Accordingly, whether the Loubsers had committed certain acts of insolvency and thereby automatically fell to be disqualified remained unresolved. In the light of those allegations, as also the other evident disputes between the parties as to who could rightly claim to be trustees of the trusts in question, it was plainly absurd to insist on a formal meeting and resolution as a necessary pre-requisite to the launch of the application. It goes without saying that in the circumstances just sketched it is hardly likely that a formal meeting of trustees could even have been convened, much less that a resolution could have been adopted to approach the court. What makes the high court's insistence on a formal meeting all the more bizarre is the following observation in its judgment:

'. . . (the "*appointment*" of Andrew as trustee of Namakwari on 20 June 2006 was conceded by his counsel during argument as being invalid for purposes of determination of the merits.)'

That observation begs the obvious question: If a meeting of the trustees of the Namakwari Trust is to be held as insisted upon by the high court, did it have to include Dr Andrew Loubser?

[9] It must follow, I consider, that the high court's conclusion that both of the Therons lacked locus standi to approach the court for the relief sought cannot be supported. For, as I have endeavoured to demonstrate, on the Therons' showing, at the very least Mr Theron had established that he possessed the requisite standing to approach the court.

It is thus unnecessary to consider separately the position of his wife, Ms Antoinette Theron.

[10] It remains to comment on the approach adopted by the high court to the matter. The high court stated:

'Having regard to the aforegoing I have come to the conclusion that the Therons lacked the necessary *locus standi* to have brought this application and it falls to be dismissed on that ground alone. It is accordingly not necessary for me to consider the merits of the application.'

What commended this approach to the high court remains unexplained.

[11] It bears noting that the approach adopted by the high court is not sanctioned by rule 33(4), which only applies to actions. But, as Nestadt J put it in *Reymond v Abdulnabi & others* 1985 (3) SA 348 (W) at 349E-F:

'Though it is not sanctioned by Supreme Court Rule 33 (4), which applies only to actions, and is unfortunately not one of those sections which, in terms of Rule 6 (14), is made applicable to applications, the suggested procedure is obviously a convenient and sensible one, which, under my inherent jurisdiction, I am, I consider, empowered to adopt. It would, if first respondent be successful, avoid a trial in which applicant's cause of action would, *ex hypothesi*, be stillborn. Moreover, it is one sanctioned by authority (*Aling and Streak v Olivier* 1949 (1) SA 215 (T) at 216). In any event, Mr *Goodman*, for applicant, had no objection to it being adopted, though he very much disputed the correctness of the point being taken.'

In *Aling and Streak*, which Nestadt J relied on, Price J had this to say:

'The matter comes before the Court by way of an application but, as there is a dispute of fact on the papers, the parties have brought witnesses to Court to give *viva voce* evidence of the facts set out in the affidavits. Before hearing evidence, however, the Court suggested that argument might be heard (assuming the facts in the petition to be correct) on the question as to whether the restraint provided for in the agreement to which I shall refer later is reasonable and valid. Counsel have argued the case, therefore, on the basis that the facts set out in the petition are correct. . . .'

Significantly therefore, no reasons were advanced by Price J as to why he believed that that course was open to him.

[12] *Reymond* has gained some currency in recent times. In two different matters: *Union Finance Holdings Ltd v I S Mirk Office Machines II (Pty) Ltd & another* 2001 (4) SA 842 (W) at 843F-G and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & others* 2002 (6) SA 370 (W) at 374G-H, the same judge (Epstein AJ), relying on *Reymond*, had this to say:

'Although Rule 33(4) of the High Court Rules applies only to actions, it is within the inherent jurisdiction of the Court to deal with this application on the basis that the point *in limine* is one which may conveniently be decided separately from the other questions in this matter, as envisaged by the Rule. . . .'

Locus standi or rather the lack thereof was the point in limine that Epstein AJ was concerned with in each of those cases.

[13] In *Persadh & another v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) Plasket J, albeit in a somewhat different context, stated:

'[W]hile Rule 19(5) only applies to actions, and it is not one of the Rules that, in terms of Rule 6(14), also applies to applications, I have a discretion, grounded in the inherent jurisdiction, to apply it to applications. . . . '

In addition to *Reymond*, Plasket J also referred to *Academy of Learning (Pty) Ltd v Hancock & others* 2001 (1) SA 941 (C) para 27, *Ter Beek v United Resources CC & another* 1997 (3) SA 315 (C) at 333D and *Truter v Degenaar* 1990 (1) SA 206 (T) at 208F-H to support that conclusion. Those other cases though were concerned with rule 22(4) of the uniform rules. In *Academy of Learning* (para 27), Brand J put it thus:

'My second consideration why these issues cannot be determined on the papers relates to respondents' counterclaims for damages. It is true that, since these claims are not liquidated, respondents cannot apply set-off. However, Rule 22(4) of the Uniform Rules of this Court provides that a defendant may ask that judgment on the claim against it be postponed until judgment is given on its counterclaim. In terms of this Rule, the Court then has a discretion to grant or refuse the defendant's request. Although the Rule specifically refers to action proceedings it has been accepted that it applies to motion proceedings as well (see, for example, *Truter v Degenaar* 1990 (1) SA 206 (T)). In the circumstances of this case, where the applicant's claims in convention are in any event not capable of determination on the papers and where respondents' counterclaims cannot be described as frivolous or vexatious, I believe I should exercise my discretion in respondents' favour. Consequently, I propose to refer the

determination of applicant's claims sounding in money as well as the determination of respondents' counterclaims to trial.'

[14] In *Brian Khan Inc v Samsudin* 2012 (3) SA 310 (GSJ) para 4, the Full Court (per Van Eeden AJ (CJ Claassen and Heaton-Nicholls JJ concurring)), with reference to *Reymond*, *Union Finance Holdings* and *De Reuck*, stated:

'It brooks of no doubt that a court is empowered, in the exercise of its discretion, to direct that a preliminary point be disposed of first in motion proceedings. It will be ordered when the issue is one of substance that may dispose of the matter as a whole, or at least of a substantial portion thereof. In such circumstances it will normally be convenient to allow the parties to first complete argument on the preliminary issue and, depending on the outcome thereof, to only then proceed with the remainder of the matter.'

Van Eeden AJ added:

'This procedure is particularly apposite when the legal issues are crisp and far removed from any conflict of fact, much like when parties first argue a legal issue, but nevertheless request a court to refer the matter to oral evidence if the appellant should lose the legal point.'

[15] In support of that last proposition the learned judge referred to *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D) at 167I-168A, where Hugo J stated:

'There are, it seems to me, cases where the legal issues are so crisp and so far removed from the conflict of fact that it would be fair to both parties to allow argument thereon *in initio*. If the applicant loses the legal battle he should not then be penalised for having tried to save the costs involved in hearing *viva voce* evidence. (Provided of course that his efforts were *bona fide* and well considered and not merely frivolous.)

In my view this is a case in which counsel was justified in arguing the legal point *in initio* and making his application for reference to evidence dependent upon my not finding in his favour.'

[16] There is thus a body of authority – the correctness of which I leave open (that remains for another day after fuller forensically tested argument) – that the high court may have called in aid in support of its approach in this case.

[17] In *S v Malinde & others* 1990 (1) SA 57 (A) at 67F-G it was said:

‘This Court is in principle strongly opposed to the hearing of appeals in piecemeal fashion. . . . An exception may be made, however, where unusual circumstances call for such procedure . . . or in “enkele gevalle van 'n besondere aard” . . . .'

In *Pharmaceutical Society of South Africa & others v Tshabala-Msimang & another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & anothe*r 2005 (3) SA 238 (SCA) para 15, after referring to that excerpt just quoted from *Malinde*, Harms JA stated:

‘The same applies to applications, Nicholas AJA proceeded to state (at 68C-E):

"Substantial grounds should exist for the exercise of the power. The basis of the jurisdiction is convenience – the convenience not only of the parties but also of the Court. The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application.'"

[18] In *Malinde*, Nicholas AJA added (at 67I-J) that there are no reported cases which discuss the factors which may influence the court to direct that an appeal be heard in stages. Nicholas AJA accordingly sought guidance from the judgment of Miller J in *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D). Miller J was there dealing with an application under rule 33(4). Nicholas AJA endorsed Miller J’s approach (at 68D-E) in these terms:

‘When deciding an application under the subrule [33(4)], the Court is not called upon to give a decision on the merits. But it must consider the cogency of the point concerned, because unless it has substance a separate hearing would be a waste of time and costs. So, the Court should not grant an application for a separate hearing “unless there appears to be a reasonable degree of likelihood that the alleged advantages would in fact result”. . . .'

Assuming that rule 33(4) did indeed find application in this case, the high court simply refrained from embarking upon the enquiry postulated by Nicholas AJA. Had it done so, it may have recognised that in contradistinction to such advantages as may have been present, its approach opened the door to a fractional disposal of proceedings and the piecemeal hearing of appeals on each part so disposed of.

[19] It was not disputed before us that the judgment of the high court is indeed appealable (see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J-533A). Moreover, that leave to appeal to this court was sought and obtained by the Therons means that the jurisdictional fact necessary for the appeal has been satisfied (*Pharmaceutical Society of South Africa* para 22). In those circumstances, it seems to me, that the conclusion of the high court, which is obviously erroneous and has the effect of non-suiting the Therons, cannot be allowed to stand. In *Manong & Associates (Pty) Ltd v Minister of Public Works & another* 2010 (2) SA 167 (SCA), this court emphasized that our superior courts have a residual discretion arising from their inherent power to regulate their own proceedings. It said (para 11):

'That our courts were endowed with such power even in our pre-constitutional era is evident from the following dictum of Corbett JA:

“There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice. . . .”

Courts now derive their power from the Constitution itself, which in s 173 provides:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common-law, taking into account the interests of justice”.

As it was put by the Constitutional Court in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*:

“This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common-law . . . . The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power *must take into account* the interests of justice.'

[20] Having disposed of the matter on the preliminary issue, the high court did not give a decision on the merits of the matter. In *Karoluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*; *Read Head Boer (Edms) Bpk v Eerste*

Nasionale Bank van Suider-Afrika Bpk; *Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank* van Suider-Afrika Bpk 1994 (3) SA 407 (AD) at 416 C-D, Hefer JA put it thus:

'Wanneer dit dan–hetsy in 'n aksie of in mosieverrigtinge–gaan om 'n spesiale verweer wat afsonderlik verhoor is, kom dit my logies voor om te let op die effek van die uitspraak op die regshulp wat deur die *verweerder* of *respondent* aangevra is. In wese is die Verhoorhof in so 'n geval gemoeid met 'n versoek van die verweerder of respondent om die eis van die hand te wys op grond van 'n verweer wat niks te make het met die meriete van die saak nie. Dít is die regshulp wat op daardie stadium ter sprake is.'

[21] The entire record of the proceedings did not serve before this court on appeal. The record came to be limited by agreement between the parties in the light of the solitary issue that had been decided by the high court and which, in turn, required determination on appeal. But even if the full record had served before us, the high court had declined to enter into a consideration of any of the other issues in the application. This court has thus been deprived of the benefit of the high court's view on any of those issues. In the result this court will in effect be sitting both as a court of first instance, as also, a court of appeal insofar as those issues are concerned. It follows that the matter has to be remitted to the high court for a determination of each of the two applications which are the subject of this appeal. In the event, it was agreed from the bar in this court that that course should be adopted. For the rest, it will be left to the Judge President of the Western Cape High Court to issue directions to the parties as to the further conduct of the matter in that court.

[22] In the result:

(a) The appeal is upheld with costs.

(b) The order of the high court dismissing the application under case number 12238/06 is set aside.

(c) The order of the high court dismissing the application under case number 13978/11 is set aside.

(d) Both matters are remitted to the high court.

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V PONNAN
JUDGE OF APPEAL

WALLIS JA (LEACH, MAJIEDT and PETSE JJA concurring):

[23] I agree with Ponnan JA that the appellants clearly had *locus standi* to bring these applications and that they must be remitted to the high court for further disposal. But I do not think that it is necessary to discuss, as he does in paras 10 to 20 of his judgment, an issue that does not arise here, of the circumstances in which a high court may, in the exercise of its inherent jurisdiction, separate issues in application proceedings. The issue does not arise because, contrary to what might be thought from paras 10 and 16 of my colleague's judgment, the judge did not agree to separate the issue of *locus standi* from the remaining issues. It is unnecessary and in my view undesirable to examine cases in the high court where that has been done, especially as to do so may be taken, notwithstanding the express reservation in paragraph 16, as implying an endorsement of some or all of those cases.

[24] These cases were argued in full over four days and the judge dismissed both of the applications that are on appeal before us solely on the issue of *locus standi* without expressing any view on the merits. She was perfectly entitled to adopt that approach, although it would have been preferable for her to set out her views on the merits, against the eventuality that she might have erred in regard to the *locus standi* issue.

[25] Leave to appeal was sought and granted by this court on an unrestricted basis. In the ordinary course therefore we would have been faced with a full record and the matters would have been fully argued before us so that we could, if we held, as we do, that the *locus standi* point was bad, dispose of the applications on their merits or refer them to trial or for the hearing of oral evidence. We have been precluded from following

this conventional course because the parties reached a private agreement to limit the record before us to the portions necessary to determine the issue of *locus standi*. They did so on the basis that if the appeals succeeded the applications would be remitted to the high court for adjudication on the merits.

[26] Needless to say this approach is most unsatisfactory because it results in the piecemeal determination of the litigation.[1] This is not a case where the court below was asked hear a point *in limine* without traversing the merits. That is a course that has on occasions been followed by courts in application proceedings, where for example there is a dispute of fact that will otherwise need to be resolved by oral evidence, but the respondent contends that even if the applicant's factual allegations are proved it will not be entitled to the relief sought.[2] Similarly, in *Reymond v Abdulnabi & others*,[3] where the court was seized of a reference to oral evidence, it disposed of the case on the preliminary point that even accepting the applicant's version, the application had to fail as a matter of law. In general, however, the desirable course to be followed in application proceedings, where the affidavits are both the evidence and the pleadings,[4] is for all the affidavits to be delivered and the entire application to be disposed of in a single hearing.[5] Whilst there are two recent judgments[6] in which it has been suggested that issues of *locus standi* are suitable for separate disposition in this way, caution must be exercised in that regard as pointed out by this court in the *Democratic Alliance* case.[7]

[27] However, this is not a case where the court below decided the issue of *locus standi* as a separate issue, so those considerations should not detain us further. The

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[1] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) paras 48 and 49.
[2] *Aling and Streak v Olivier* 1949 (1) SA 215 (T) at 216; *Taylor v Welkom Theatres (Pty.) Ltd & others* 1954 (3) SA 339 (O); *Bader & another v Weston & another* 1967 (1) SA 134 (C) 136B-137D; *Aspek Pipe Co (Pty) Ltd & another v Mauerberger & others* 1968 (1) SA 517 (C) at 519E-G;
[3] *Reymond v Abdulnabi & others* 1985 (3) SA 348 (W) at 349E-F.
[4] *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E.
[5] *Bader v Weston, supra,* 136E-F. See also *Kolbatschenko v King NO & others* 2001 (4) SA 336 (C) at 358A-359E.
[6] *Union Finance Holdings Ltd v IS Mirk Office Machines II (Pty) Ltd* 2001 (4) SA 842 (W); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & others* 2002 (6) SA 370 (W), coincidentally decided by the same acting judge.
[7] Footnote 1 *supra*.

court below heard the applications in their entirety and decided that they fell to be dismissed on the *locus standi* point without expressing a view on the substantive merits. The appeals to this court were against the dismissal of the applications and, had the merits been canvassed, and had we found that they lacked merit, they would have been dismissed. This would have been so notwithstanding our taking a different view to the judge on the issue of *locus standi*. Instead what has happened is that the parties, through a misunderstanding, have sought of their own volition in this court to separate the *locus standi* issue from the merits. There is no rule or practice entitling them to do so and if they had thought it appropriate they should have brought an application for a direction to that effect as was done in *Malinde*.[8] The cases where this court will accede to such a request are rare and a separation is not to be had for the asking.[9]

[28] Having said that, the unpalatable alternative to remitting the applications would be to strike the appeals from the roll with a considerable wastage of costs and direct the parties to provide us with a full record so that the appeals could be heard at a later stage. That would add to the heavy burden of cases awaiting a hearing in this court and might nonetheless result in the case being remitted for the hearing of oral evidence to resolve disputed factual issues. In those circumstances I am satisfied that in the interests of justice the applications should be remitted to the high court for adjudication pursuant to our upholding the appeals on the issue of *locus standi*. However, it must be said in the strongest possible terms that the course adopted by the parties in this case should not be followed in the future. If parties wish to separate issues in this court they must bring an application directed to that end.

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M J D WALLIS
JUDGE OF APPEAL

[8] *S v Malinde* 1990 (1) SA 57 (A) at 67F-G
[9] *Pharmaceutical Society of South Africa & others v Tshabalala-Msimang & another* 2005 (3) SA 238 (SCA) paras 15-17

APPEARANCES:

For Appellants:	C H J Maree
	Instructed by: Theron & Partners, Stellenbosch Matsepes Inc, Bloemfontein
For Respondents:	W P Coetzee
	Instructed by: Denys Stroebel Attorneys, Durbanville Symington & De Kok, Bloemfontein