CASE NO. A196/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AUGUST MALETZKY	1ST APPLICANT
HEROLD SAMUEL GORASEB	2ND APPLICANT

and

STANDARD BANK NAMIBIA LIMITED	1ST RESPONDENT
JAQUEL KAKUARUKUA NJEMBO	2ND RESPONDENT
DEPUTY SHERIFF WINDHOEK	3RD RESPONDENT
REGISTRAR OF DEEDS	4TH RESPONDENT

CORAM: GEIER, A J

Heard on: 2011.02.14

Delivered: 2011.02.14

JUDGMENT

GEIER, AJ: [1] The parties are agreed that the only issue that I have to determine at this stage of the proceedings is whether or not the 1st Applicant has *locus standi* in this matter, being an Application for the rescission of a Judgment granted against the 2nd Applicant on 28th August 2008.

[2] This Application was brought in terms of Rule 44(1)(a) of the Rules of High Court, which provides that such Application may be brought by " ... any party affected thereby... ".

[3] It appears from the commentary made in Erasmus Superior Court Practice at page B1- 308 revision service 35/2010 that the phrase 'any party affected thereby' is to be interpreted to mean that :

> " An Applicant under this sub-rule must show, in order to establish *locus standi,* that he or she has an interest in the subject matter of the judgment or order sufficiently direct and substantial to entitle him or her to have intervened in the original application upon which the judgment was given or order granted. He or she must have a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court[1].

[4] Amongst those authorities is the case of *Standard General Insurance Co Ltd v Gutman NO 1981 (2) SA 426 (C) 433H-434C were the following was stated:*

> "*The question of what class of persons has the necessary locus standi to bring an application for the rescission of a judgment was considered in the United Watch & Diamond Co Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) ...*

[1] I also refer to the authorities cited in footnote 5

"Corbett J,(as he then was), in dealing with the question of their locus standi to bring the application said at page 415A-B:

> *'In my opinion, an applicant for an order setting aside or varying a judgment of order or a court must show in order to establish locus standi that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted. Before this approach can be usefully applied, however, it is necessary to determine more closely the right of a party to intervene in legal proceedings.*

Having concluded such an examination which involved a consideration of the principles applicable, where a defendant demanded the joinder of another party or the Court so ordered. Corbett J came to the conclusion (at 416 B-C) that *when leave to intervene was sought –*

> *" ... , the test of a direct and a substantial interest in the subject matter of the action is again regarded as being the decisive criterion ... ".*

In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O)* Horwitz J with whom Van Blerk J concurred held that t*he 'direct interest'*

required by the Appellate decision, in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) in which it was held that a person having a 'direct and substantial interest' in the litigation should be joined as a party connoted

"an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation".

(At 169H) Applying this test, Corbett J held that t*he Applicants in the United Watch and Diamond case, supra had no locus standi to apply for rescission of judgment, despite the fact that they could be prejudicially affected by it".*

[5] I also refer to the case, the Namibian case of *Clear Channel Independent Advertising Namibia (Pty) Ltd and Another v Transnamib Holdings Ltd and Others 2006 (1) NR 121 HC at138* paragraph *45.*

[6] In the further Namibian decision of *Stelmacher v Christiaans 2008 (2) NR 587 HC* his Lordship Mr Justice Silungwe held at page 591 C in paragraph 16 that:

"The expression interested person judicially means someone who has a direct and substantial interest in the subject matter and the outcome of the litigation. The interest must be a real interest not merely an abstract or academic interest. A mere financial or commercial interest will not suffice".

See *Family Benefit Friendly Society* case, supra at page *124 F-J*[2]

[7] It appears from paragraph 3 of the founding papers that the 1st Applicant is alleged to be a creditor of the 2nd Applicant in the amount of one hundred thousand Namibian Dollars (N$100 000.00) in respect of a consent to Judgment which is annexed to such papers marked A.

[8] The 1st Applicant, Mr Maletzky, who appeared in person also deposed to a confirmatory Affidavit in which he confirms the allegations of the 2nd Applicant as made in the founding papers and more particularly the 1st Applicant states:

> "*I confirm that I am the 1st Applicant in this matter and that my interest in the matter stem from the acknowledgment and consent to Judgment by the 2nd Applicant. I confirm that I have a compelling interest in the hearing of this matter as I stand to loss one hundred thousand Namibian Dollars (N$100 000.00) due to me in terms of the aforestated claim. I say, should the property in question have been sold for its true market value, as indicated in the evaluation of the property annexure C of the Founding Affidavit herein, I would have stand a real chance of being paid by the 2nd Applicant herein. Furthermore, I say that it is apparent that the property was sold for almost half of its market value and the result in decrease in the 2nd Applicant's estate negatively impacts on my rights as 2nd Applicant's creditor".*

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[2] *1995 (4) SA 120 (T)*

[9] Annexure A to the founding papers is a consent of judgment which is dated the 2nd day of March 2009 and it reads:

> *"I Harold Samuel Goraseb, bearing of a Namibian identity number 64121300157, adult Namibian male 44 years of age and resident at Erf 1200 No. 16 Ngama Street, Khomasdal Windhoek, Namibia, do hereby admit liability in the amount of one hundred thousand Namibian Dollars (N$100 000.00) to August Maletzky. Accordingly I consent to Judgment in the aforesaid amount.*
>
> *Dated at Windhoek on the 2nd day of March 2009.*
>
> *Signed Harold Goraseb".*

[10] It appears that Default Judgment herein was granted some months prior to this consent to Judgment.

[11] It follows also from the aforesaid authorities that the 1st Applicant had to show that he was a party affected by that Judgment, within the parameters of the judicial authority that I have just quoted.

[12] As such he had to show that he had an interest in the subject matter, sufficiently direct and substantial to have entitled him to have intervened in the original action.

[13] This is neither alleged nor shown. This is also not the cause of the 1st Applicant's alleged interest which is stated to be in essence 'the risk of loosing one hundred thousand Namibian Dollars (N$100 000.00)' as the property in question was sold below its true market value, as a result of which 1st Applicant's risk of not being paid increased.

[14] These allegations show that the 1st Applicant's concerns do not, and at no stage, really related to the merits or demerits of the 1st Respondent's claim against the 2nd Applicant. There is nothing on the papers before me which shows that the consent to judgment which was given on the 2nd of May 2009 would have entitled the 1st Applicant to intervene in the original case before default judgment was granted against the 2nd Applicant.

[15] The 1st Applicant's interest herein is also clearly of a financial nature only.

[16] Despite Mr Maletzky referring me to South African authority, in the *First National Bank and Agribank case 2006 (BCLR) 536 (O)* at page *591* and which seems to be authority to the effect that also a purely financial interest would afford an applicant the necessary *locus standi* to intervene or to bring an application of rescission in terms of Rule 44, I am bound to follow the Namibian line of authority which is clearly to the effect that a purely financial interest does not vest *locus standi* in a party to intervene in proceedings or to bring an application for rescission as a party affected in terms of Rule 44.

[17] In the result the following Order is made:

1. The 1st Applicant is declared not to have the necessary *locus standi* to have brought this application for a rescission of judgment under case No. A196/2009.

2. The 1st and 2nd Respondent's point in *limine,* in this regard, is accordingly upheld with costs, such costs to include the costs of one instructed and one instructing counsel.

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GEIER, AJ

ON BEHALF OF THE APPLICANT	IN PERSON
ON BEHALF OF THE 1st RESPONDENT	ADV. OBBES
Instructed by:	Etzold-Duvenhage
ON BEHALF OF THE 2ND RESPONDENT	ADV. GROBLER
	Grobler & Company