Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Application number: 3059/2021

In the MAIN APPLICATION between:

TOBIAS CASPARUS DU PLESSIS 1st Applicant
(ID No: […])

ANNA CORNELIA JACOMINA DU PLESSIS N.O. 2nd Applicant

TOBIAS CASPARUS DU PLESSIS N.O. 3rd Applicant

ANNA CORNELIA JACOMINA JOUBERT N.O. 4th Applicant
(In their capacity as **Trustees** of the **Tafelkop Boerdery Trust**,
IT No: 2207/2000)

and

DONOVAN MAJIEDT N.O. 1st Respondent
(In his capacity as **a liquidator** of **Full Circle Projects Twenty CC**,
Registration No. 1999/036589/23 **[in liquidation]**)

NICKY DE KLERK 2nd Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN 3rd Respondent

MASTER OF THE HIGH COURT, MAHIKENG 4th Respondent

MASTER OF THE HIGH COURT, BLOEMFONTEIN 5th Respondent

NICOLAAS DANIËL DE KLERK N.O. 6th Respondent

SUSANNA JOHANNA ELIZABETH DE KLERK N.O. 7th Respondent
(In their capacity as **Trustees** of the **De Klerk Family Trust**,
IT No. 1382/2000

AND

In the COUNTER APPLICATION between:

NICOLAAS DANIËL DE KLERK N.O. 1st Applicant/
6th Respondent in Main Application

SUSANNA JOHANNA ELIZABETH DE KLERK N.O. 2nd Applicant/
(In their capacity as **Trustees** 7th Respondent in Main Application
of the **De Klerk Family Trust**,
IT No. 1382/2000)

and

TOBIAS CASPARUS DU PLESSIS 1st Respondent/
(ID No: […]) 1st Applicant in Main Application

DONOVAN MAJIEDT N.O. 2nd Respondent/
1st Respondent in Main Application

LINDIWE FLORENCE KAABA N.O. 3rd Respondent
(In their capacity as **liquidators** of **Full Circle Projects Twenty CC**, Registration No. 036589/23 **[in liquidation]**)

GERT LOUWRENS DE WET N.O. 4th Respondent

GONASAGREE GOVENDER N.O. 5th Respondent
(In their capacity as **provisional trustees** of the **Insolvent Estate** of **Tobias Casparus du Plessis**, ID No: […])

CORAM: VAN ZYL, J

HEARD ON: 21 APRIL 2023

DELIVERED ON: 8 AUGUST 2023

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[1] This is an application for leave to appeal by Mr Tobias Casparus du Plessis ("Mr Du Plessis"), being the first applicant in the main application and who was also cited as the first respondent in the counter-application. Mr De Koning, assisted by Mr Lubbe, appeared on behalf of Mr Du Plessis, as they did during the hearing of the main application and the counter-application.

[2] The application for leave to appeal is being opposed by the first respondent in the main application and who was also cited as the second respondent in the counter-application, Mr Majiedt N.O and the third respondent in the counter-application, Ms Kaaba N.O, both of whom are the appointed liquidators ("the liquidators") of the liquidated estate of Full Circle Projects Twenty CC ("Full Circle"). Mr Zietsman appeared on their behalf, as he did previously.

[3] The application for leave to appeal is also being opposed by the sixth and seventh respondents in the main application, who are also the first and second applicants in the counter-application. They are Mr De Klerk N.O and Mrs De Klerk N.O in their capacities as the Trustees of the De Klerk Family Trust ("the De Klerk Family Trust"). Mr Pienaar, as previously, again appeared on their behalf.

[4] Mr Du Plessis and the second to fourth applicants approached court by means of the main application for, *inter alia*, an order in the following terms:

"1. That the time periods described (*sic*) by this Honourable Court pertaining to service and time limits be condoned and that the application be heard as urgent in terms of Rule 6(12).

2. That the applicant is granted the powers to institute action and/or file an application as advised.

3. That the Registrar of Deeds is stay (*sic*) from transferring the farm:

REMAINING EXTENT OF THE FARM GEWONNE 494, DISTRICT THEUNISSEN, FREE STATE PROVINCE
EXTENT 85,4198 HECTARES
HELD BY DEED OF TRANSFER T11655/2000

into the name of Mr Nicky de Klerk, any entity represented by Mr Nicky de Klerk and/or any other entity or person.

4. That Mr Donovan Majiedt, appointed liquidator of Full Circle Projects Twenty CC, with Registration Number 1999/036589/23 in liquidation and the Master of the High Court, Mmabatho is (*sic*) ordered to produce full disclosure and copies of all documentation needed by the applicant under case number M000090/2020.

5. That paragraph 3 above is stayed for a period of thirty (30) days after receiving the documentation referred to in paragraph 4 above, for all the applicants to issue and service summons against all the interesting parties to cancel the offer accepted by the first respondent made by the second respondent.

6. That the first to fifth respondents pay the costs of this application, only if opposed. That any other party opposing this application be ordered to pay the costs, jointly and separately (*sic*) with the first respondent, the one pay the other be absolved.

7. That paragraph 1 to 7 (*sic*) be made an interim Court Order and that any interested parties be called upon to give reasons on or before the 12th of August 2021 why this order not be made a final (*sic*)."

[5] In terms of the counter-application the De Klerk Family Trust sought the following relief:

"1. That leave be granted to the applicants in the counter-application to join and bring the counter-application against the abovementioned second to fifth respondents in the counter-application.

2. That condonation be granted for the failure by the applicants in the counter-application to comply with the time periods stipulated in paragraph 2 of the order issued by the court on 16 September 2021….

3. That it be declared that the lease agreement which was concluded between Tobias Casparus du Plessis and Full Circle Projects Twenty CC on 15 August 2018, a copy of which lease agreement is annexed as Annexure "J" to the first respondent's founding affidavit in the main application, is null and void; alternatively, unenforceable.

4. That the first respondent in the counter-application be ordered to pay the costs of the counter-application.

5. In the event that the counter-application is opposed by any of the other parties to the counter-application or the main application, that such party be ordered to pay the costs of the counter-application, jointly and severally with the first respondent in the counter-application."

[6] On 27 September 2022 I made the following order:

"**Ad the procedural relief sought in the counter application:**

1. With regard to the leave sought by the first and second applicants in the counter application, namely the Trustees of the De Klerk Family Trust, IT No: 1382/2000, the following is granted:

    1.1 The joinder of Lindiwe Florence Kaaba N.O, the co-liquidator of Full Circle Projects Twenty CC, Registration No. 1999/036589/23 [in liquidation], in her official capacity as such as the third respondent in the counter application; and

    1.2 The joinder of Gert Louwrens Steyn de Wet N.O. and Gonasagree Govender N.O, the provisional Trustees of the Insolvent Estate of Tobias Casparus du Plessis, ID No. 791120 5121 081, in their official capacities as such as the fourth and fifth respondents respectively in the counter application; and

    1.3 The institution of the counter application against the aforesaid respondents, together with the first and second respondents as cited therein.

2. Insofar as the Notice of Counter Application and the affidavit thereto were not filed and served timeously in accordance with the Court Order of 16 September 2021, condonation is granted for such non-compliance.

Ad the main application:

1. The main application is dismissed.

4. The first applicant in the main application, Tobias Casparus du Plessis, and the Trustees of the Tafelkop Boerdery Trust, IT No: 2207/2000 in their official capacities as such, are to pay the costs of the main application, jointly and severally, payment by the one, the other to be absolved.

Ad the counter application:

5. The lease agreement concluded between the first respondent in the counter application, Tobias Casparus du Plessis, and Full Circle Projects Twenty CC on 15 August 2018, a copy of which lease agreement is annexed to the first respondent`s founding affidavit in the main application as annexure "J", is declared to be void and/or unenforceable.

6. The first respondent in the counter application, Tobias Casparus du Plessis, is to pay the costs of the counter application.

Ad the costs of the application of the first applicant in the main application/first respondent in the counter application to file a further affidavit:

7. The first applicant in the main application/first respondent in the counter application, Tobias Casparus du Plessis, is to pay the costs of the aforesaid application.

Ad the costs of the application of the sixth and seventh respondents in the main application for leave to be joined as respondents therein:

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8. The first applicant in the main application, Tobias Casparus du Plessis, and the Trustees of the Tafelkop Boerdery Trust, IT No: 2207/2000 in their official capacities as such, are to pay the costs of the aforesaid application, jointly and severally, payment by the one, the other to be absolved."

[7] In terms of Mr Du Plessis` application for leave to appeal, as supplemented, the grounds for the application are the following:

"1. The court erred in ordering that the lease agreement concluded by and between Tobias Casparus du Plessis and Full Circle Projects Twenty CC on 15 August 2018 was void and unenforceable. The court should

instead have found that the lease agreement is binding on the parties, remained extant until 1 September 2027, and that '*huur gaat voor koop*'.

2. The court erred by effectively holding that the impugned sale of the farm 'Gewonne' was unassailable and that the first applicant had no right, and/or *locus standi* to challenge the sale and/or transfer thereof to the De Klerk Family Trust. The court should stead have held that the first applicant had, despite the temporary provisional sequestration of his estate, retained a reversionary interest in his (then) provisionally sequestrated estate, and therefore the right to sue for protection thereof, as well as the required *locus standi*.

3. In issuing the impugned order, the court erred by non-suiting Du Plessis in both the main and counter-application, on the ground of him not having *locus standi*. Whereas there are reasonable prospects that another court would come to the conclusion that *locus standi* was not a matter of substantive law, but a procedural matter where no hard and fast rules apply, and that a litigant's compromised *locus standi* (or even the absence thereof), was capable of being cured, and *in casu* was so cured *ex post facto*, alternatively, that the court should have cured same. Insofar as Du Plessis, who was the first applicant in the main application (and also cited as the first respondent in the counter-application) albeit that he may have lacked *locus standi* at the time the applications (main and counter) were launched, same was cured, firstly, by the subsequent discharge of the provisional sequestration order, secondly, the citation and joinder of Du Plessis' provisional trustees as parties in the present law suit, and thirdly, the joint liquidators' ostensible wilful inaction, or failure to have participated in the proceedings, and/or their failure to have opposed the counter-application, despite having been joined, all of the papers having been received by them, and despite they therefore having had knowledge of Du Plessis' application directed at preserving what could have been nothing other than the reversionary rights in/to his insolvent estate.

4. The court erroneously failed to, in the exercise of its discretion, hold that Du Plessis did have *locus standi*; particularly against the backdrop of the dictates of public policy, not hold that Du Plessis had the right to institute the main application, and to defend the counter application (all the proceedings at hand), particularly in the face of the contention that the sale of the farm Gewonne had taken place at odds with the law, because of the existence of a binding lease agreement, as was contended for by Du Plessis;

5. The court erred in holding that the lease agreement under consideration was void and unenforceable, whereas there is a reasonable prospect that another court would hold that, the conclusion of the lease agreement concerned, in the absence of the written consent of the Third Bondholder, constituted merely a breach of the terms of the bond, or the underlying credit agreement, in contra distinction to rendering same void and unenforceable;

6. The court erred in following the precedent enunciated in Oosthuizen v Mari [2015] JOL 32341 (GJ), whereas the learned Judge should instead have held that the reasoning in the Oosthuizen-judgment was either wrong, or that the facts were distinguishable from the facts in the present case, and that there are therefore reasonable prospects that another court would hold differently as to the validity of the lease;

7. The court erred in applying the views expressed in Mars (The Law of Insolvency), quoted at [46] of her judgment, as if same were the law of the Medes and Persians, whereas the judgment of Nieuwoudt v The Master, (referred to and quoted at [52] of the court's judgment), clearly states (with reference to the joinder of an insolvent's trustee in matters where the insolvent's reversionary rights are at stake):- "Gewoonlik word egter vereis dat die kurator as party gevoeg moet word" (underling added.), and reasonable prospects exist that another court would subscribe to the approach followed in the De Polo-

judgement of Morris AJ, and the approach in the judgments in Financial Services Board & Another v De Wet & Other 2002 (3) SA 525 CPD at 592A-E and 624D-I, and Muller v De Wet N.O. & Others 1999 (2) SA 1024 WLD at 1027-1030, to the effect that joinder was not necessarily required;

8. The court erred in adjudicating the counter application on the basis as if Du Plessis had neither been cited, nor that he had filed opposing papers, i.e., as if it was an unopposed application. A party cannot blow hot and cold. The applicants (trustees N.O. for the De Klerk Family Trust) in the counter application (trustees N.O. for the De Klerk Family Trust) cited Du Plessis as a respondent, therefor it did not lay in their hands to supinely sit by and have the counter application adjudicated as if Du Plessis was not cited, had no interest in the matter (when his estate at the time of the hearing of the applications was no longer under provisional sequestration), and contend that Du Plessis supposedly had no *locus standi*;

9. The court erred in non-suiting Du Plessis on the basis of lack of *locus standi*, particularly in the face of the. court's own finding in paragraph [66] of the judgment, that it would have been improper of the trustees of the De Klerk Family Trust not to have cited Du Plessis, particularly not in circumstances where they later took the stance that he (Du Plessis) lacked *locus standi*. The court erred by holding that the joinder and citation of Du Plessis' trustees in the counter application were insufficient to cure any conceivable deficiency in his *locus standi* in the main application, and that joinder and citation in the main application was <u>also</u> required in order to have had effect of curing any lack of *locus standi*. There are for the reasons afore said reasonable prospects that another court would come to a different conclusion, i.e. that any compromise in Du Plessis' *locus standi*, that may have existed, was in fact cured, and had to have been so held.

10. The court erred in failing to take into account the fact that, the sale of bonded land subject to a lease by private treaty, as opposed to public auction, in the manner laid down in the de Jager judgement, would have been at odds with the prescripts of the law and therefor open to being set aside as invalid in law. The court also erred in ruling on Du Plessis' *locus standi* without reference to, or taking into account the prima facie unlawfulness of the said sale of the Farm Gewonne, because it was a sale of bonded land in respect of which there was a lease agreement, in which the principle of "*Huur gaat voor koop*" had to be accounted for, and that a sale other than by public auction would have been (and remained) at odds with the law;

11. The court erred in failing to give due consideration to the fact that Du Plessis' erstwhile provisional trustees, were joined and cited before the court adjudicated the main and counter applications, and that they, after having being joined and while in possession of all of the papers he papers, with full knowledge of the proceedings, and the issues as ventilated in the pleadings, in the words of the judgement of De Polo '*washed their hands of the position*', and that there are therefor reasonable prospects that another court would find that that cured any conceivable lack of Du Plessis' *locus standi*.

12. The court erred in dealing with the issue of Du Plessis's right to have launched the (main) application as if his standing was to be determined on the basis of "joinder", whereas same was to be dealt with on the basis of *locus standi* instead, and that that lead to non-suiting him, whereas there are reasonable prospects that another court would come to a different conclusion.

That there are therefor reasonable prospects that another court would have upheld the contentions of the Applicant, granted the orders prayed for, and dismissed the counter application with coast

<u>Compelling reason for leave to be granted:</u>

It is contended that the restoration of Du Plessis' status after commencement of proceedings, but before the hearing and adjudication of the triable issues, had an effect on the then pending litigation, that this aspect of the case is a matter in respect of which there seems to not be judicial pronouncements, same is *res nova*, and as such, constitutes a compelling reason why leave to appeal should be granted, in as much as there is a reasonable prospect that another court would come to a different conclusion in the prevailing circumstances, namely Du Plessis' regaining of his status and control over his estate *pendent lite*, and warranted a finding that he was not to be non-suited, and/or lacking *locus standi* in either the main and/or counter-application."

[8] Although it was stated in the application for leave to appeal that the appeal is directed at the whole of the judgment and order, it is evident from the aforesaid grounds that it is in effect directed at paragraphs 3, 4, 5 and 6 of the order and the judgment in relation thereto. Mr De Koning also indicate same during the hearing of the application.

[9] I deem it apposite to deal with the two main grounds of the application for leave to appeal.

Locus standi of Mr du Plessis:

[10] It is common cause that at the time when the main application and the counter-application were issued on 6 July 2021 and 4 October 2021, respectively, the estate of Mr du Plessis was subject to a provisional sequestration order, which order was issued on 18 March 2021. On 16 September 2021 First National Bank Limited ("FNB") intervened in the sequestration application of the estate of Mr Du Plessis, pursuant to which the initial order granted at the

instance of one Ms ACJ Joubert was discharged and substituted by a provisional sequestration order at the instance of FNB. However, the provisional sequestration order was discharged on 2 December 2021 as a result of a settlement agreement concluded between Mr du Plessis and FNB, which settlement agreement included an agreement that the provisional sequestration order was to be discharged against payment of the debt. Therefore, in terms of the said court order, dated 2 December 2021, the provisional sequestration order dated 16 September 2021 was discharged and the settlement agreement was made an order of court.

[11] At that stage the application and counter-application were still pending between the parties.

[12] At paragraphs [68] and [70] of my judgment I found that Mr du Plessis did not have *locus standi* to have instituted the main application and that he also did not have *locus standi* to have opposed the counter-application. The grounds upon which Mr Du Plessis is contesting these findings, are fully and clearly set out in the application for leave to appeal, already cited above.

[13] From the aforesaid grounds, it is evident that there is also, according to the Mr Du Plessis, a compelling reason for leave to appeal to be granted.

Applicable legal principles pertaining to applications for leave to appeal:

[14] Section 17(1)(a) of the Superior Courts Act, 10 of 2013 ("the Act") determines as follows:

> "1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> (a)(i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> (b) …"

[15] In the judgment of **Acting National Director of Public Prosecutions v Democratic Alliance *In Re* Democratic Alliance v Acting National Director of Public Prosecutions** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) the court held at para [25] of the judgment that the Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others** 2014 JDR 2325 (LCC), in which judgment the court held as follows at para [6]:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

See also **Rohde v S** 2020 (1) SACR 329 (SCA) at para [8] and **Fair-Trade Independent Tobacco Association v President of**

the Republic of South Africa and Another (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) at para [4].

[16] With regard to the test as to what constitutes "reasonable prospects of success" the well-known *dictum* in **S v Smith** 2012 (1) SACR 567 (SCA) at para [7] is applicable:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[17] In considering whether there is some other compelling reason why the proposed appeal should be heard, an important question of law may constitute such a compelling reason. However, the merits thereof still need to be considered in deciding whether to grant leave to appeal or not. In **Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd** 2020 (5) SA 35 (SCA) at para [2] the court determined as follows in this regard:

> [2] In order to be granted leave to appeal in terms of s 17(1)*(a)*(i) and s 17(1)*(a)*(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether

there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold." (My emphasis)

[18] In **Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank** (1104/2022) [2023] ZAECQBHC 16 (14 March 2023) the aforesaid principles were duly followed and applied:

"4. Irrespective of the prospects of success, there may nevertheless exist a compelling reason for the appeal to be heard. The subsection does not contain an exhaustive list of criteria, and each application for leave to appeal must be decided on its own facts.

5. It is the applicant for leave to appeal must demonstrate that there is a compelling reason why the appeal should be heard.

6. …

7. Other compelling reasons include the fact that the decision sought to be appealed against involves an important question of law and that the administration of justice, either generally or in the particular case concerned, requires the appeal to be heard. …

8. As far as compelling reasons are concerned, the merits of the prospects of success remain vitally important and are often decisive."

[19] In terms of section 16(1)(a)(i) of the Act the proposed appeal lies either to the Supreme Court of Appeal or a full court of this

Division, depending on the direction issued in terms of section 17(6). Section 17(6)(a) of the Act determines the following:

> (6) *(a)* If leave is granted under subsection (2) *(a)* or *(b)* to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-
>
> (i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or
>
> (ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision,
>
> in which case they must direct that the appeal be heard by the Supreme Court of Appeal."

Arguments presented on behalf of the respective parties:

[20] During the hearing of Mr De Koning`s arguments regarding the alleged compelling reason to grant leave to appeal, Mr De Koning indicated that since the date of the filing of the supplementary grounds for the application for leave to appeal, they have come across a judgment which in fact supports their contention as contained in the said compelling reason to grant such leave. He submitted that although it was therefore technically not correct to have stated in the supplementary grounds that that there is "*no judicial pronouncements*" on the issue, it remains a compelling reason since it is an important question of law which has a reasonable prospect that it would succeed on appeal. Mr De

Koning then referred to and relied on the full court judgment of **Manison v Oosterlaak** (1908) 29 NLR 515. With reference to the said judgment, Mr De Koning submitted that the refusal to issue a final order on the return day of a provisional sequestration order (*rule nisi*) and the consequent setting aside of the provisional sequestration order, restores the position of the person concerned retrospectively, as though he was never sequestrated.

[21] Mr De Koning further indicated that the only other judgment they were able to find during their research in which the reasoning was the closest to that in the **Oosterlaak**-judgment, is the judgment of **Sirioupoulos v Tzerefos** 1979 (3) SA 1197 (OPA) at 1204 G to 1205 B. I will return to this judgment.

[22] The finding in the **Oosterlaak**-judgment on which Mr De Koning relied during the said hearing appears at 517 of the judgment:

> "I quite agree that if the order for provisional sequestration had not been set aside then every act which was done during its pendency by the insolvent, as if he was a free agent, was absolutely invalid by reason of sections 25, 26 and 51 of the Insolvency Law. All the cases which have been cited only goes to emphasize this point: that after an order for provisional sequestration has been made the debtor's estate becomes vested in the Master and the debtor is deprived of any right or power to deal with his own estate in any shape or form. The proviso to Section 15, however, provides that (see Section 15). I think these words are as wide as they can possibly be… they cover every sort of right that the debtor could possibly have. The words 'or any right of such person' cover everything, and there could be no meaning in the proviso if it was merely to relate to something done by the debtor, before the order of provisional sequestration was made, as suggested by Mr Tatham. It can relate only to what was done by the debtor after the order of provisional

sequestration. It clearly means that which would otherwise have been invalid and illegal, in terms of the Insolvency Law, is to be considered and judged of as if such provisional order of sequestration had never been made. The debtor is put back in the same position as he was before the order, and any act done by him during the provisional insolvency becomes legalized and made good. …."

[23] Counsel for the liquidators and the De Klerk Family Trust, respectively, both indicated that they had been caught off guard since they had not been advised prior to the hearing of the application for leave to appeal that Mr De Koning will be relying on the said judgment.

[24] After hearing further arguments, during which the said counsel indicated that they would like an opportunity to properly study the said judgment in order to reply thereto, I granted the request and certain dates were agreed upon on which the respective parties were to file written heads of argument (no written heads of argument had been filed for purposes of the application for leave to appeal) pertaining to the particular judgment and the issue raised therein. All three parties duly complied with the arrangement regarding the filing of the such heads of argument.

[25] Both Mr Zietsman and Mr Pienaar indicated in their respective heads of argument that they had been unable to obtain a copy of Law 47 of 1887, which contains the said section 15 which was dealt with in the **Oosterlaak**-judgment, within the restricted time periods within which their respective heads of argument had to be filed. However, they indicated that from the context of the applicable finding made in the **Oosterlaak**-judgment they were

able to conclude and submit that the finding made was based on a proviso to section 15 of Law 47 of 1887. They further submitted that since the Insolvency Act, 24 of 1936, repealed all previous insolvency laws, and the prevailing Insolvency Act, Act 24 of 1936, does not contain a similar provision, the finding in the **Oosterlaak**-judgment is no longer applicable.

[26] Mr Zietsman further submitted that the **Oosterlaak**-judgment is in any event distinguishable from the present matter. In this regard Mr Zietsman referred to the reason and circumstances which led to the discharge of the provisional order of sequestration in the **Oosterlaak**-judgment, as opposed to the present matter where Mr Du Plessis paid the creditor who obtained the provisional order of sequestration against him in terms of an agreement between them, which agreement included the discharge of the sequestration order against payment of the debt.

[27] In his subsequent heads of argument Mr De Koning indicated that there is a further judgment of the full court of the Natal Division, by the same Judge and between the same parties, the citation of which is **1908 NLR 479**, in which the following was stated at 480 of the judgment:

> "The matter now comes before us for a final order of sequestration; and we have, in terms of section 15 of the Insolvency Law, to say whether the provisional order should be made final. It does not seem possible to say whether the debtor is in an insolvent condition or not, until we know whether the claim of the petitioning creditor founded on a provisional judgment obtained in the Magistrate's Court, which the debtor seeks to set aside, is a good one. The matter has not been heard, and so long as the provisional

order of sequestration is in force the debtor cannot bring his action in the Magistrate's Court to determine whether the amount in question is due to the petitioning creditor. In these circumstances I think that the court is entitled to exercise the discretion which it has under section 15 of the Insolvency Law which says that '… the court may for sufficient cause make no order and 'may dismiss the summons and petition and supersede the 'provisional order for sequestration'."

[28] Mr De Koning, in his heads of argument, further dealt with sections 10, 11(1), 12 and 150 of the Insolvency Act and relied on the following additional case law:

1. **Sirioupoulos v Tzerefos** 1979 (3) SA 1197 (OPA) at 1204 G to 1205 B [referred to earlier]:

> As die voorlopige sekwestrasiebevel 'n aldus beperkte werking het wanneer dit gevolg word deur 'n finale sekwestrasiebevel, kan dit skaars van aard verander omdat dit later blyk dat dit nie deur so 'n bevel gevolg word nie. Die oorweging dat die voorlopige sekwestrasiebevel in so 'n geval deur 'n Hofbevel spesifiek "vernietig" moet word spreek ook nie van 'n andersoortige aard nie. Selfs as die voorlopige bevel uitgewerk is op die tydstip wanneer die beslissing omtrent 'n finale sekwestrasiebevel gevel word, het dit sekere gevolge veroorsaak en sekere handelinge geregverdig. Blote uitwerking of selfs formele "opheffing" van die voorlopige bevel wat die toekoms betref, sou hierdie resultate nie ongedaan maak nie. 'n Bevel ter vernietiging van die voorlopige bevel is om daardie rede nodig. Die vernietigingsbevel sou die regsgevolge wat reeds ingetree het van hul grondslag ontneem alhoewel handelinge wat op die voorlopige bevel berus, weens die oorweging dat 'onregmatigheid' van optrede beoordeel word volgens die posisie tydens verrigting van die handeling, nie sonder meer as 'onregmati' aangemerk sou kon word

nie. Vernietiging van die voorlopige sekwestrasiebevel sou meebring dat die vestiging van bates in die Meester ongedaan gemaak word sonder die noodsaak van enige lewering ter oordrag van eiendomsreg en sou bv die respondent in staat stel om daarna te verklaar dat hy nie voorheen gesekwestreer was nie. Die vernietiging van die voorlopige bevel is nodig om 'n grondslag vir restitusie (in die breedste sin van die woord) van die gevolge van die voorlopige sekwestrasiebevel te lê."

2. **Ex Parte Beach Hotel: Amanzimtoti (Pty) Ltd** 1988 (3) SA 435 WLD at 438 F – H:

"Our modern sequestration procedure requires an order for 'provisional sequestration' (s 10 of the Insolvency Act 24 of 1936). Simultaneously a second order must be made (s 11), viz a rule *nisi* calling upon the debtor to show cause why his estate should not be 'sequestrated finally'. On the return date a third order is made. If sequestration is not ordered, the order creating provisional sequestration must be 'set aside'. See the wording of s 12(1). The rule is not 'discharged'. Alternatively, final sequestration is ordered. The rule is not 'confirmed'. See *Sirioupoulos v Tzerefos* 1979 (3) SA 1197 (O) at 1203, 1204. The rule *nisi* does not even call for the showing of cause why the rule should not be 'confirmed'."

3. **MV Snow Delta Discount Tonnage Ltd v Serva Ship Ltd** 1996 (4) SA 1234 (C) at 1235 B – D [which was confirmed in **MV Snow Delta Discount Tonnage Ltd v Serva Ship Ltd** 2000 (4) SA 746 (SCA) at 751 G – 752 D]:

"The effect of the setting aside of the attachment by Foxcroft J earlier today was analogous to the attachment having been unsuccessfully sought today for the first time. The grant of leave to appeal does not, in my view, revive the order which had earlier been granted *ex parte*.

> The view I hold corresponds with that which has prevailed for over a quarter of a century in this Division. (See *S A B Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C).) Thereafter the Full Bench of the Orange Free State Division of this Court reached a similar conclusion in *Sirioupoulos v Tzerefos* 1979 (3) SA 1197 (O)."

[29] Mr De Koning consequently contended as follows at paragraph 5 of his heads of argument:

> "In sum, although sections 10, 11, 12 and 150 of the Act do not *eo nominee*, contain words or a phrase identical to, or even similar to the above referred to portion of Section 15 of the Law of 47 of 1887, as demonstrated at the hand of the above excerpts from the Act and more recent *jurisprudence*, refusal to issue a final order on the return date of the *rule nisi*, and setting aside of the provisional sequestration order restores the position of the person concerned so that as if he was never sequestrated….."

[30] Mr De Koning therefore submitted that at the date of hearing of the main application and the counter-application, the applicant had *locus standi* to have launched and prosecuted the main application and to have opposed the counter-application. He further submitted that the applicant, insofar as may have been required, also had the rights pertaining to ratification available.

[31] Mr De Koning emphatically indicated that Mr Du Plessis is not abandoning the other grounds of the application for leave to appeal. In this regard he, *inter alia,* specifically referred to paragraphs 7, 8, 9, 11 and 12 and repeated his arguments advanced during the hearing of the main application and the counter-application, specifically again with reference to the

judgment of **De Polo and Another v Dreyer and Others** 1991 (2) SA 164 (WLD).

[32] Mr De Koning therefore submitted that there are reasonable prospects that another court would come to a different conclusion regarding the *locus standi* of Mr Du Plessis, both with regard to the ground referred to as the compelling reason and also the other stated grounds of the application for leave to appeal in respect of the *locus standi* issue.

[33] Mr Zietsman pointed out that an appeal lies against an order/orders of a court and not against the reasons for the order/orders. In this regard he referred to the judgment in **Baliso v Firstrand Bank Ltd t/a Wesbank** 2017 (1) SA 292 (CC) at para [8], which indeed states as much. He persisted with his submission that my finding regarding Mr Du Plessis` lack of *locus standi* is unassailable, but submitted that even if it was to be found by a court of appeal that I erred and that Mr Du Plessis did have the necessary *locus standi*, such a finding will make no difference to the orders I made, more specifically in relation to the main application. In this regard Mr Zietsman referred to the requirements for an interlocutory interdict and submitted that Mr Du Plessis failed to make out a proper case with regard to any of the four requirements. He submitted that Mr Du Plessis failed to even cross the hurdle of the first requirement, namely “a *prima facie right* though open to some doubt”, since Mr Du Plessis relied on the lease contract for purposes thereof, whereas it is evident that the lease agreement is void and/or unenforceable.

The validity of the lease agreement:

[34] It is common cause that Mr Du Plessis and Full Circle concluded a lease agreement pertaining to the farm "Gewonne 494" which farm was at the time owned by Full Circle. It is further common cause that a Continuing Covering Bond was registered as a third mortgage bond over the said farm by the Registrar of Deeds in favour of FNB. It is furthermore common cause that contrary to clause 3.3 of the third mortgage bond FNB did not, prior thereto, consent in writing to the conclusion of the lease agreement. Clause 3.3 reads as follows:

> "The mortgagor shall not mortgage or in any way alienate or further encumber the mortgaged property, or any part thereof, nor shall the mortgagor let or give up occupation of the mortgaged property or any part thereof without the prior written consent of the mortgagee."

[35] In the counter-application the De Klerk Family Trust contended that the said lease agreement is null and void due to the non-compliance with clause 3.3 of the mortgage bond.

[36] I found accordingly; namely, that the lease agreement is void and/or unenforceable due to the aforesaid reason and I granted the relief in the counter-application in respect thereof.

[37] Mr De Koning dealt with the grounds of the application for leave to appeal in respect of the counter-application. He again emphasized, with reference to paragraph 6 thereof, that I erred to have followed the judgment of **Oosthuizen v Mari** [2015] JOL 32341 (GJ) and

that I should have found that the failure to have complied with clause 3.3 of the third mortgage bond, merely constituted a breach of the relevant term of the bond as oppose to resulting in the lease agreement being void and unenforceable.

[38] Mr De Koning submitted that due to the fact that I erred in relation to my finding regarding the lack of *locus standi* of Mr Du Plessis, I further erred in having adjudicated the counter-application on an unopposed basis. He submitted that had I not erred in relation to the *locus standi* of Mr Du Plessis and considered the counter-application on a proper opposed basis, the counter-application could and should not have been granted. Mr De Koning therefore submitted that considering the prospects of success on appeal on the issue of the *locus standi* of Mr Du Plessis, there are also reasonable prospects that another court would come to a different conclusion regarding the counter-application, when same is to be adjudicated based on all the facts and not on an unopposed basis.

[39] Mr Pienaar, however, submitted that although I stated that I was to determine the counter-application on an unopposed basis, I in fact dealt with the common cause facts, which facts, considering that they were common cause, included the version of Mr Du Plessis. He therefore submitted that even should the appeal succeed on the *locus standi* issue, it would not impact upon the correctness of my finding that the lease agreement is void and/or unenforceable. Mr Pienaar consequently submitted that Mr Du Plessis does not have a reasonable prospect that a court of appeal would find differently.

[40] Mr Pienaar furthermore submitted that even should I grant leave to appeal with regard to the main application, it should not necessarily follow that leave is also to be granted in respect of the counter-application, since each of the two applications constitutes a distinct application in which different, substantive relief was being sought.

Considerations and conclusions:

[41] I have given due and proper consideration to all the arguments presented to me, as well as the case law I was referred to. *Prima facie* it does seem to me that the **Oosterlaak-**judgment(s) were probably based on the relevant section 15 of Law 47 of 1887 which was applicable in Natal at the time (and most probably not even in the Free State at the time as correctly pointed out by Mr Zietsman). However, having said that, the sections of the Act and the further case law which Mr De Koning is relying upon, especially the judgment of **Sirioupoulos v Tzerefos** (in which matter the said section 15 was not applicable at all), do appear to provide support to or at least a basis for his submissions regarding the alleged retrospective restoration of a person`s status when a provisional sequestration order is discharged and set aside.

[42] The distinction which Mr Zietsman drew between the reasons for the discharging of the applicable provisional sequestration orders, would, in my view, not necessarily have an impact upon the determination of the legal consequences of the discharging and setting aside of a provisional sequestration order in relation to the issue at hand.

[43] It goes without saying that the aforesaid is indeed a very important legal question which is also of public importance and which constitutes a compelling reason as intended in section 17(1)(a)(ii) of the Act and which, in my view, carries reasonable prospects of success as described in **S v Smith,** *supra,* and to the extent as required by the Act and the relevant case law.

[44] Mr De Koning did raise the aforesaid argument during the adjudication of the main application and the counter-application. However, at that stage he did not have any case law available to support his submissions, nor did he argue it to the extent he did during the application for leave to appeal. It therefore does not constitute a new legal question which has only now been raised for the first time. In addition, since the said is actually to be determined on the common cause facts, it in any event falls squarely within the following *dictum* stated in **Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others** 2016 (3) SA 317 (SCA) at para [24]:

> [24] That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being

decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage. But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued." (My emphasis)

[45] In addition to the aforesaid argument in respect of the *locus standi* of Mr Du Plessis, Mr De Koning also raised further valid submissions as contained in the other grounds of the application for leave to appeal, which are also not without merit either. Although I have considered same duly and thoroughly in my judgment, I am not able to state that these further submissions regarding the *locus standi* of Mr Du Plessis, do not carry a reasonable prospect that a different court would come to a different conclusion than what I did.

[46] Therefore, in my view, leave to appeal is to be granted in respect of my finding regarding Mr Du Plessis` lack of *locus standi.* The facts and the applicable issues in the main application and the counter-application are, in my view, very intertwined. My finding regarding Mr Du Plessis' lack of *locus standi* had a profound impact on both applications alike. Therefore, the said leave to appeal is to be granted in respect of both the main application and the counter-application.

[47] My finding in relation to the lack of Mr Du Plessis` *locus standi* had an essential impact on my approach regarding the determination of the issue in respect of the validity of the lease agreement, both in respect of the main application and the counter-application. As with

the *locus standi* issue, the validity of the lease agreement is an essential element and a determining factor of both applications. Although I indeed dealt with the common cause facts in relation thereto in the counter-application, as pointed out by Mr Pienaar, the fact remains that there are in addition thereto, a number of facts in dispute between the parties regarding the validity of the lease agreement and the impact thereof on the sale agreement. These facts were raised by Mr Du Plessis, the De Klerk Family Trust and the liquidators, respectively, in both the application and counter-application, but which facts I did not consider due to my finding regarding the *locus standi* aspect.

[48] Should the appeal be successful on the *locus standi* aspect and these facts are then indeed to be considered by the court of appeal, I cannot find that there is not a reasonable prospect that the court of appeal would make a different finding to mine regarding the validity of the lease agreement.

[49] My view that leave is also to be granted in respect of this issue, is fortified by the fact that Mr De Koning, during the hearing of the application and the counter-application, made use of an example in support of his contention that the lease agreement is valid, which was to the effect that:

1. C cannot attack the validity of a contract concluded between A and B, to which C was not a party, and/or

2. If B concludes an agreement with C, which contract constitutes a breach of an earlier concluded contract

between B and A to which C was not a party, C cannot attack the validity of his contract with B based on B`s breach of contract with A.

[50] The aforesaid examples are to be read in conjunction with case law such as:

1. **Letsing Diamonds Ltd v JCI Ltd and Others; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others** 2007 (5) SA 564 (W), which judgment dealt with two applications, at paras [19], [23] – [26] & [63] – [64].

2. **Letsing Diamonds Ltd v JCI Ltd and Others** 2009 (4) SA 58 (SCA), which set aside the judgment in 1 above, but not with regard to the general principles highlighted above. See also the dissenting judgment at para [23].

3. **Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others** 2009 (4) SA 89 SCA, which reversed the judgment in 1 above, but also not with regard to the aforesaid highlighted principles. See also the dissenting judgment at para [52].

4. **Prevance Bonds (Pty) Ltd v Voltex (Pty) Ltd** (58/2022) [2023] ZASCA 40; [2023] 2 All Sa 587 (SCA) (31 March 2023) at para [22].

[51] I do take cognisance of the fact that the liquidators are also parties to the application and the counter-application, that they “stand in

the shoes of Full Circle", who was a party to the Third General Bond and the lease agreement and that the liquidators also dispute the validity of the agreement. The impact thereof, if any, will however be decided by the court of appeal.

[52] Leave to appeal is therefore, in my view, also to be granted in respect of my finding pertaining to the validity of the lease agreement, both in respect of the main application and the counter application.

[53] From the totality of the aforesaid facts, legal principles and principles enunciated in case law, I am of the view that section 17(6)(a) of the Act is applicable and that I consequently must direct that the appeal is to be heard by the Supreme Court of Appeal.

Costs:

[54] The parties are *ad idem* that with regard to the wasted costs of 3 March 2023, no order to costs is to be made.

[55] With regard to the application for leave to appeal, the parties are also *ad idem* that the usual order that such costs are to be costs in the appeal, is to be made.

Order:

[56] I make the following order:

1. Leave is granted to the first applicant in the main application/the first respondent in the counter-application, Mr Du Plessis, to

appeal to the Supreme Court of Appeal against paragraphs 3, 4, 5 and 6 of the order and the judgment in relation thereto, issued and delivered by Van Zyl, J under the abovementioned case number, pertaining to both the main application and the counter-application.

2. No order as to costs in respect of the wasted costs of 13 March 2023

3. The costs of the application for leave to appeal, with the exclusion of the aforesaid costs, are costs in the appeal, which costs are to include the costs of two counsel where so employed and the costs occasioned by the drafting of the heads of argument.

_____

C. VAN ZYL, J

On behalf of the applicant in the leave to appeal application/ first applicant in the main application/first respondent in the counter-application (Mr Du Plessis):

Adv LW de Koning SC
Assisted by:
Adv J Lubbe
Instructed by:
EG Cooper Majiedt Inc.
BLOEMFONTEIN

On behalf of the respondents in the leave to appeal application/ first respondent in the main application/second and third respondents in the counter-application (Mr Majiedt N.O. & Ms Kaaba N.O.):

Adv P Zietsman SC

Instructed by:
Hendré Conradie Inc.
(Rossouws Attorneys)
BLOEMFONTEIN

On behalf of the respondents in the leave to appeal application/ sixth and seventh respondents in the main application/first and second applicants in the counter-application (Mr De Klerk N.O. & Ms De Klerk N.O.):

Adv CD Pienaar
Instructed by:
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