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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: 7[....]1)

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: 22[....]0)

and

DONOVAN MAJIEDT N.O.

1st Respondent

(In his capacity as a **liquidator** of **Full Circle Projects Twenty CC**,
 Registration No. 100[....]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 DANIEL 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. 13[....]0

AND

In the counter application between:

NICOLAAS DANIEL DE KLERK N.O.

1st Applicant/

6th Respondent in Main Application

SUSANNA JOHANNA ELIZABETH DEKLERK N.O. 2nd Applicant/

7th Respondent in Main Application

(In their capacity as **Trustees** of the **De Klerk Family Trust**,

IT No. 13[....]0)

and

TOBIAS CASPARUS DU PLESSIS

1st Respondent/

1st Applicant in Main Application

(ID No: 7[....]1)

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. 03[....]3 **[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: 7[....]1)

CORAM: VANZYL, J

HEARD ON: 17 FEBRUARY 2022

DELIVERED ON: 27 SEPTEMBER 2022; 18 APRIL 2023

[1] 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: 13[....]0, 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. 100[....]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. 7[....]1, 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:

3. 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: 22[....]0 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:

8. The first applicant in the main application, Tobias Casparus du Plessis, and the Trustees of the Tafelkop Boerdery Trust, IT No: 22[....]0 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."

The papers filed in the main application and counter-application and the

respective parties as cited:

[2] The first to fourth applicants initially approached court by means of an application ("*the main application*") issued on 6 July 2021 against the first to fifth respondents for 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 G[....] 4[....], DISTRICT
THEUNISSEN, FREE STATE PROVINCE
EXTENT 85,4198 HECTARES
HELD BY DEED OF TRANSFER T11[....]0**

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 100[....]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*)."

[3] On 8 July 2021 and by agreement between the parties the application was removed from the roll, to be set down for hearing according to the Rules of Court and of practice of the Free State High Court in respect of opposed applications. Certain time frames were set out in the order for the first respondent to file his answering affidavit and thereafter for the applicants to file their replying affidavit, if any. Costs were to be costs in the application.

[4] In the main application the following parties were cited:

1. Mr Du Plessis as the first applicant.
2. The trustees of the Tafelkop Boerdery Trust as the second, third and fourth applicants. They were cited because of their financial interest since Tafelkop Boerdery trust signed surety for Mr Du Plessis in favour of FNB.
3. Mr Majiedt in his capacity as one of the appointed liquidators in the insolvent estate of the close corporation known as Full Circle Projects Twenty CC (In Liquidation) ("*Full Circle*").
4. Mr de Klerk in his personal capacity as the second respondent.
5. The Registrar of Deeds, the Master of the High Court, Mmabatho and the Master of the High Court, Bloemfontein as the third, fourth and fifth respondents respectively.

[5] On 27 July 2021 Mr Majiedt filed his answering affidavit.

[6] On 11 August 2021 Mr Du Plessis filed his replying affidavit.

[7] On 1 September 2021 Mr de Klerk and Mrs de Klerk in their capacity as the trustees of the De Klerk Family Trust, IT13[....]0 ("the De Klerk Family Trust") filed an application for leave to intervene in the main application and to be joined as the sixth and seventh respondents therein.

[8] On 16 September 2021 Molitsoane, J granted the application for leave to intervene with a prescribed time period for the De Klerk Family Trust to deliver its answering affidavit to the main application and to file its counter application. The costs of the application for leave to intervene stood over for determination during the adjudication of the main application.

[9] On 4 October 2021 the trustees of the De Klerk Family Trust as the first and second applicants filed a counter-application in which the following parties were cited as respondents:

1. Mr Du Plessis as the first respondent.
2. Mr Majiedt as the second respondent.
3. Ms Kaaba, the co-liquidator of Full Circle as the third respondent.
4. Mr de Wet and Mr Govender in their capacity as the provisional trustees appointed in the insolvent estate of Mr Du Plessis, as fourth and fifth respondents.

[10] 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."

[11] The De Klerk Family Trust duly filed an affidavit which they requested be considered to be in opposition to the relief which Mr Du Plessis and the Tafelkop Boerdery Trust were seeking in terms of the main application and further that it served as the founding affidavit in support of the counter-application.

[12] Only Mr Du Plessis and the Tafelkop Boerdery Trust opposed the counter-application and filed their answering affidavit to the counter-application on 28 October 2021.

[13] On 11 November 2021 the De Klerk Family Trust filed their replying affidavit in the counter-application.

[14] On 3 February 2022 a further affidavit of Mr Du Plessis was filed. In paragraph 3 of the said affidavit he stated as follows:

"Certain matters, germane to the issues in this application, occurred after the launching of the application, and the exchange of affidavits filed of record. I have been advised that the facts pertaining to those matters are material to the issues at hand, in fact that same are vital for the adjudication of both the main application and the counter-application, should therefore be placed before court as it is in the interest of justice for same to be considered when adjudicating the matter, hence the application to introduce a further affidavit."

[15] During the hearing of the application Mr Du Plessis was represented by Mr De Koning SC, assisted by Mr Lubbe. Mr Majiedt was represented by Mr Zietsman SC. The De Klerk Family Trust was represented by Mr Pienaar.

[16] At the commencement of the hearing Messrs Zietsman and Pienaar indicated that they do not have any objection to the filing of Mr Du Plessis' further affidavit and, subject to my ruling, that it be accepted into evidence. Mr Zietsman, however, placed it on record that the agreement that it be accepted into

evidence does not detract from his right to dispute the contents thereof on factual and/or procedural grounds on behalf of Mr Majiedt. I subsequently ruled that the further affidavit of Mr Du Plessis be allowed and accepted into evidence.

[17] The parties furthermore indicated that they are in agreement that any late filing of any of the papers in the application and counter- application, as well as any late filing of heads of argument, be condoned. I consequently ordered accordingly and after some debate between the parties, this condonation included my acceptance of supplementary heads of argument filed on behalf of Mr Du Plessis and the Tafelkop Boerdery Trust which were handed to me at the commencement of the hearing. For the sake of clarity, I again made an order pertaining to the condonation for the late filing of the counter-application and the affidavit thereto as part of the formal order which I issued in this matter, since it constituted a breach of a previous court order.

[18] In order to avoid confusion, I will continue to refer to the parties by name as set out above.

Succinct summary of the background facts:

[19] The papers filed in the application and counter-application are voluminous, filed in two lever arch files, with extensive factual allegations. The heads of argument filed on behalf of the respective parties, comprises a number of legal issues and relevant case law. In my view, the outcome of both the application and the counter-application is to the greatest extent going to be determined on the basis of legal principles. I am consequently going to provide only a brief outline of the relevant facts.

[20] Mr Du Plessis was provisionally sequestrated on 18 March 2021. Messrs de Wet and Govender were appointed as the provisional trustees of his insolvent estate.

[21] When the main application was issued on 6 July 2021, the estate of Mr Du Plessis was still under provisional sequestration. The aforesaid two provisional trustees were not cited in the main application, nor was any affidavit deposed to by them part of the founding papers.

[22] On 16 September 2021 First National Bank Limited ("*FNB*") intervened in the sequestration application pertaining to the estate of Mr Du Plessis, pursuant to which the initial order granted at the instance of Ms ACJ Joubert was discharged and substituted by a provisional sequestration order at the instance of FNB.

[23] The provisional sequestration order of Mr Du Plessis was discharged on 2 December 2021 as a result of a settlement agreement concluded between Mr Du Plessis and FNB under case number 1032/2021. The court order in terms whereof the provisional sequestration order was discharged and the settlement agreement made an order of court was attached to the further affidavit of Mr Du Plessis as "DUP1" and the settlement agreement as "DUP2".

[24] Mr Du Plessis is the sole member of Full Circle. Full Circle was initially placed under business rescue, but on 28 May 2020 the business rescue proceedings were discontinued and Full Circle was placed under provisional liquidation by the North-West Division of the High Court, Mahikeng. A final order of liquidation was issued on 22 January 2021.

[25] Mr Majiedt and Ms LF Kaaba were appointed as co-liquidators of Full Circle by the Master of the High Court, Mahikeng on 4 August 2020. Despite the fact that the certificate of appointment of the two liquidators were referred and attached to the founding affidavit in the main application, only Mr Majiedt was joined as a respondent in the main application. In his answering affidavit to the main application, Mr Majiedt pointed out the aforesaid failure to have joined Ms Kaaba as a respondent in the main application and therefore denied that the liquidators had been properly cited. Mr Du Plessis subsequently averred in paragraph 9 of his replying affidavit that he has instructed his attorney of record "*to add the second liquidator*", but no such joinder of Ms Kaaba occurred. It was only in the counter-application of the De Klerk Family Trust that they requested the joinder of Ms Kaaba.

[26] Full Circle was/is the owner of the remaining extent of the farm G [...] 4 [...], district Theunissen, Free State Province.

[27] Full Circle signed surety on behalf of Mr Du Plessis in favour of FNB. The trustees of the Tafelkop Boerdery Trust also signed surety on behalf of Mr Du Plessis in favour of FNB in their capacity as such.

[28] FNB held three bonds over the farm Gewonne.

[29] On 26 May 2021 the liquidators of Full Circle and the De Klerk Family Trust concluded a sale agreement in terms whereof the farm Gewonne was sold by the liquidators of Full Circle to the De Klerk Family Trust.

[30] The sale agreement was concluded by the liquidators pursuant to resolutions passed by creditors at the first and second meeting of creditors held in the liquidated estate of Full Circle on 19 May 2021.

[31] As bond holder over the farm Gewonne, FNB approved the sale of the farm to the De Klerk Family Trust on 26 May 2021.

[32] At the beginning of July 2021 the De Klerk Family Trust attempted to take possession of the farm Gewonne. However, Mr Du Plessis and Hanrize Boerdery (Pty) Ltd instituted a spoliation application in this court under case number 3128/2021, for an order directing Mr de Klerk to vacate the farm Gewonne and to put Mr Du Plessis and Hanrize Boerdery in possession thereof. The application was premised on a lease agreement between Mr Du Plessis and Full Circle which was signed on 15 August 2018, in terms whereof Mr Du Plessis leased the farm Gewonne from Full Circle for a period of 9 years until September 2027. The said lease agreement is attached to the founding affidavit filed in the main application as annexure "J". This is the lease agreement which forms the subject matter of the counter-application.

Locus standi of Mr Du Plessis:

[33] Rule 6(1) determines that every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

[34] The aforesaid facts which need to be set out, include the facts pertaining to an applicant's *locus standi*. It is *"trite law that appropriate allegations to establish the locus standi of an applicant should be made in the launching affidavits and not in the replying affidavits"*. See **Scott v Hanekom** 1980 (3) SA 1182 (C) at 1188 H.

[35] It is further trite that an applicant should make out its case in its founding affidavit and not in reply or worse, belatedly in argument.

See Director Hospital Services v Mistery 1979 (1) SA 626 at 636 A - B.

See also My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC) at para [177].

[36] Mr Du Plessis averred as follows in paragraph 1.1 of the founding affidavit in the main application:

"1.1 I am the first applicant, an adult male and farmer.....I am also the sole member of the close corporation known as Full Circle...(In Liquidation). I am also the third applicant in my capacity as Trustee of the Tafelkop Boerdery Trust...

1.2 I am also provisionally sequestrated and were De Wet and Govender appointed provisional curators of my estate. This provisional order stands to be uplifted."

[37] In my view it is evident from the aforesaid allegations that Mr Du Plessis approached court as though he had unfettered *locus standi* to have instituted the application at the time.

[38] In paragraphs 3.1 to 3.4 of the answering affidavit filed by Mr Majiedt, at p.112 of the main application, he opposed Mr Du Plessis' alleged *locus standi*:

"3.1 The ...first applicant acts firstly in his personal capacity as first applicant and secondly, as a trustee of the Tafelkop Trust...

3.2 On the first applicant's version, he does not have the necessary *locus standi* to act in this application as an applicant as he is insolvent at present. He has been sequestrated by the above Honourable Court.

3.3 In and because of the fact that *concursum creditorum* had been established as far as the first applicant is concerned, only the trustee of his insolvent estate may act in any litigation in a court of law subject to section 18(3) of the

Insolvency Act, 24 of 1936. With all due respect, no court of law may authorise an applicant to proceed with litigation in his personal capacity insofar as it is statutorily not possible.

3.4 Whereas the first applicant also avers that he acts as third applicant, being a trustee of the Tafelkop Trust, I also challenge his *locus standi* in this regard. A trustee of a Trust, who is sequestrated, save if the Trust Deed provides contrary thereto, is *ipso facto* disqualified from being a trustee of such trust. I attach a copy of the Trust Deed of the Tafelkop Trust as annexure "DM2" and refer the Honourable Court to clause 8 thereof, more specifically 8.1.4."

The aforesaid paragraph 8.1.4 specifically determines that a trustee shall *ipso facto* be disqualified from being a trustee and the position of such a trustee will be vacant should he be sequestrated.

[39] As correctly pointed out by Mr Pienaar during argument, Mr Du Plessis merely responded to the aforesaid allegations by having stated the following in paragraph 5 of his replying affidavit, at p. 231 of the main application:

"AD PARAGRAPH 3.1 TOT 3.4:

5.1 My *locus standi* in connection with my personal capacity will be argued before the Honourable Court by my legal representative.

5.2 As far as Tafelkop Boerdery Trust (*sic*), I confirm that I have already resigned. I, however, have a fiduciary responsibility until I am removed by the Master of the Honourable Court. The other applicants are however before the Honourable Court and have made confirmatory affidavits.

5.3 This will however be argued further by my legal representative."

[40] Mr Du Plessis consequently provided no further or additional factual allegations in support of his alleged *locus standi*.

[41] Mr Pienaar submitted that in terms of section 20 of the Insolvency Act, 24 of 1936 ("the Act"), upon the issuing of the provisional sequestration order in respect of Mr Du Plessis' estate on 18 March 2021, Mr Du Plessis was divested of his

estate. At the time of the institution of the main application, all the property of Mr Du Plessis vested in his provisional trustees. Furthermore, considering the definitions of "property", "immovable property" and "movable property" in the Act, it is evident that this included his membership in Full Circle and his rights in terms of any lease agreement.

[42] Section 23(6) of the Act states as follows:

(6) The insolvent may sue or may be sued in his own name without reference to the trustee of his estate in any matter relating to status or any right in so far as it does not affect his estate or in respect of any claim due to or against him under this section, but no cession of his earnings after the sequestration of his estate, whether made before or after the sequestration shall be of any effect so long as his estate is under sequestration. (My emphasis)

[43] The interdictory relief which Mr Du Plessis is seeking in terms of the main application with regard to the transfer of the farm Gewonne is based on his rights and interests pertaining to his membership in Full Circle and the 2018 lease agreement and therefore affects his insolvent estate.

[44] Considering the provisions of section 23(6) of the Act, Mr Du Plessis was consequently not entitled to have instituted the main application in his own name and without reference to the provisional trustees.

[45] Mr De Koning submitted during argument that Mr Du Plessis had the necessary *locus standi* to have instituted the application based on his reversionary interest in his estate. In this regard Mr De Koning, *inter alia*, relied on the judgment in **Marais v Engler Earthworks (Pty) Ltd** 1998 (2) SA 450 (ECO) at 453 D - I where the following dicta were stated:

'The correct starting point to my mind is the fact that prior to the sequestration of his estate, the applicant had full *locus standi in iudicio*. His capacity to litigate was affected by the sequestration to the extent only provided for by the Act. In such regard, s 20(1) states specifically that the effect of the sequestration order is to divest the insolvent of his estate, and to vest it in the Master until a trustee is appointed and thereafter in the

trustee. Section 23(1) states that subject to the provisions of s 23 and s 24 (which are irrelevant), all property acquired by an insolvent shall belong to his estate. The Act further recognises *persona standi in iudicio* of the insolvent in specific circumstances: the insolvent may sue or be sued in his own name without reference to the trustee in any matter relating to status or any right insofar as it does not affect his estate or in respect of any claim due to or against him under s 23 (s 23(6)); the insolvent may for his own benefit recover any pension to which he may have been entitled for services rendered by him (s 23(7)); the insolvent may for his own benefit recover any compensation for any loss or damage he may have suffered by reason of any defamation or personal injury (s 23(8)); subject to the rights of the trustee to the insolvent's income, the insolvent may recover for his own benefit the remuneration or reward for work done or for professional services rendered by him after the sequestration of his estate (s 23(9)).

I do not see these particular instances of *locus standi* of an insolvent to be exhaustive. The Act nowhere specifically deprives the insolvent of *locus standi*. In the absence of such provision, an insolvent retains general competency to sue and be sued (*Grevler v Landsdown en 'n Ander NNO* 1991 (3) SA 175 (T) at 177H). His disability is confined to the legal consequences arising from the fact that his estate vests in his trustee who then has exclusive authority to exercise all rights in respect of the property comprising the estate. The insolvent nevertheless has a real reversionary interest regarding the estate (*Mears v Rissik and Others* 1905 TS 303 at 305; *Nieuwoudt v The Master and Others NNO* 1988 (4) SA 513 (A) at 524H--525G)." (My emphasis)

[46] Mr Zietsman referred to the following passage from **Mars: The Law of Insolvency in South Africa**, 10th Edition, at paragraph 16.12.1, p. 390 top. 391:

"With regard to assets that vest that in an insolvent's trustee, the latter is primarily the person to take action, but, if he refused to do so, whether *bona fide* or *ma/a fide*, the insolvent is not without remedy. He cannot, it is true, compel his trustee to take action at any rate without offering him security for the costs of the action, but he may himself under such circumstances take action, and need not obtain the leave of the court to do

so. In all such cases his trustee must be joined as co-plaintiff in the suit if willing or as co-defendant if unwilling." (My emphasis)

[47] However, as contended by both Messrs Zietsman and Pienaar, it cannot be considered to have been Mr Du Plessis' case that the provisional trustees declined to institute the main application, since there is no such allegation in the founding affidavit. Furthermore, the two provisional trustees had not even been cited in the application. They consequently submitted that Mr Du Plessis cannot rely on his so-called reversionary interest in his estate in the circumstances.

[48] Mr De Koning contended in his heads of argument, which contention he repeated during his oral argument, that the two provisional trustees *"by virtue of section 18(3) of the Insolvency Act... could not have been cited without the authority of the court, first had and obtained, and that the provisional trustees themselves could not have either consented to be joined, or refused to be cited, the Act simply denies them the powers to do so."*

[49] Section 18(3) of the Act reads as follows:

"18 Appointment of provisional trustee by Master

(3) A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct."

[50] In my view the aforesaid contention by Mr De Koning is definitely not substantiated by section 18(3) of the Act. The wording of the said section is crystal clear. What a provisional trustee is not allowed to do without the authority of the court or for the purpose of obtaining such authority, is that he shall not bring or defend any legal proceedings. It does not mean that a provisional trustee may not be cited as respondent/defendant in legal proceedings; he is only prohibited from defending same without leave of the court.

[51] Mr De Koning further relied on the well-known judgment with regard to an insolvent's reversionary interest in his estate in **Mears v Rissik. MacKenzie N.O. and Mears' Trustee** 1905 TS 303 at 305:

"Now, no doubt the general rule is that an unrehabilitated insolvent cannot, over the head of his trustee, bring actions connected with his estate... The reason of the rule is that his estate has been taken out of him and vested in his trustee; and that therefore the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent. But from the fact that the insolvent is under this disability, it does not follow that he has no rights whatever regarding the estate. In my opinion he has a very real reversionary interest in it. The law provides that if there is any residue after paying the debts it is to be handed to the insolvent. Not only so, but it is to his interest that as many assets as possible shall be brought into the estate, and the debts reduced to their proper limits. He has an interest in seeing that that is done. An asset may suddenly become valuable which has been considered worthless, or he may have a legacy left to him which may enable him to clear off all his liabilities. Apart from that it is to the interests of the insolvent that his assets should be increased and his liabilities reduced, because in that way the stigma of insolvency rests less heavily upon him; and when he applies for his rehabilitation he is in a better position than if he had a very large margin of unpaid debts. Therefore, from whatever standpoint we regard it the insolvent has a very real interest in the administration of his estate. As I have said, generally the trustee is the person to take action in matters connected with the estate; but if the trustee will not do so, or whether bona fide or mala fide does not see his way to take action, is the insolvent on that ground to be without remedy? I should say upon general principles he ought not to be; the law should provide some remedy." (My emphasis)

[52] It is evident from the aforesaid passage that for purposes of relying on a reversionary interest, an insolvent has to make an averment with regard to the stance of the trustee(s). Mr De Koning also relied on the judgment of **Nieuwoudt v The Master** 1988 (4) SA 513 (AD). The court, at 524 H to 525 C of the judgment, referred to the aforesaid quotation from the **Mears-judgment** with approval. However, the court also held as follows at 524 G:

"Reeds sedert die vorige eeu word hier te lande sender teenspraak aanvaar dat 'n insolvent 'n resterende belang in sy insolvente boedel het. Daarom kan hy stappe neem ter inwinning van 'n bate, bestryding van 'n vordering, ensomeer indien die kurator dit nie wil doen nie. Gewoonlik word egter vereis dat die kurator as party gevoeg moet word."

[53] Mr De Koning heavily relied heavily on the judgment in the matter of **De Polo and Another v Dreyer and Others** 1991 (2) SA 164 (WLD) for purposes of making out a case regarding the *locus standi* of Mr Du Plessis, especially based on the following *dicta*:

"Now this means in effect that the insolvent cannot sue as of right and it seems to be the position that a refusal must be pleaded and proved and, ordinarily, that refusal should have occurred prior to the institution of proceedings. The question is of course whether that omission, or those omissions, can be cured." (1761 - 177A)

"Now the next question of course is whether it is right to say that the present waiver or refusal would be a juridical fiction if it could be held to have taken place prior to the institution of proceedings, or whether the attitude taken up by the trustees now becomes effective and validates the proceedings already instituted. Mr *Grbich* referred to the curing of a defect *ex post facto* and referred to certain textbooks and decisions of the Courts. For example, in *Fitzgerald v Green and Steytler* NO 1913 CPD 403, an insolvent was claiming a *declarator* in a matter relating to succession. His trustee had not been made a party to the suit but was subsequently joined as a defendant and agreed to submit to judgment subject to his right to claim the proceeds of the action from the plaintiff for the benefit of the insolvent estate. This was held to 'cure the defect in the plaintiff's status as an insolvent'.

I regard this decision as relating rather to *locus standi* than joinder. It had the same effect as in the present case because there the trustee made it clear that he had no interest in the litigation, and that entitled the insolvent to proceed with the matter." (177H - 178A)

"In my view the question of the effect of the subsequent consent and waiver

(regarded as a refusal) and joinder is procedural and a matter of judicial discretion. There is no question of a fiction that at the time summons was issued the first plaintiff was entitled to sue by virtue of his trustee's refusal to do so. It is recognised that he had no *locus standi* and that, on a proper construction of s 23(6), he was entitled to sue neither in his own name nor on behalf of the insolvent estate. However, whether a true waiver was competent or not, it is clear, as I have said, that the trustees will not now take action on behalf of the estate and in my view, that being so, it is right to allow the first plaintiff to do so." (179B - D)

[54] Mr De Koning consequently submitted that the "omission" to have joined the provisional trustees and/or to assert and prove the provisional trustees' refusal to take the legal action concerned, is curable. He submitted that I have a discretion to condone the omission and that I should, in the circumstances of this matter, refuse to allow Mr Du Plessis to be non-suited on technical grounds. He submitted that I should especially do so in view of the cumulative effect of the following facts and circumstances:

1. The prohibition in section 18(3) of the Act. (I have already dealt with this aspect and concluded that it does not have any merit.)
2. The discharge of the provisional sequestration order on 2 December 2021.
3. The concomitant result of the discharge of the provisional order, particularly that Mr Du Plessis' estate is no longer under sequestration and he no longer an insolvent.
4. The interest of justice, particularly the fact that Mr Du Plessis could notially commence a case again tomorrow (like it was stated by Morris AJ in De Polo's-case at 177 D).

[55] At a very late stage of the hearing of the application, during the hearing of Mr De Koning's argument in reply, Mr De Koning indicated that it has daunted upon him that in terms of prayer 1 of the counter-application the two provisional trustees have/will in fact now been joined as respondents in the proceedings. He furthermore pointed out, correctly so, that in terms of paragraph 30 at p. 24 of the affidavit of the De Klerk Family Trust filed in support of the counter-

application, both the application and the counter- application have now indeed been served upon the provisional trustees. In this regard the following is stated in paragraph 30:

"The counter-application, comprising of this affidavit as well as the notice of counter-application, together with a copy of the papers filed in the main application, shall be served electronically on the provisional trustees and thereafter be dispatched to the sheriff for service on the provisional trustees in terms of the provisions of the Uniform Rules of Court."

[56] Similarly, he pointed out that the replying affidavit filed in the counter-application has also been served on the provisional trustees by means of e-mail, as evident from a copy of the said e- mail which appears at p. 226 of the replying affidavit.

[57] After some discussions Mr Pienaar conceded that it can and should be accepted that the mentioned papers have in fact been served upon the provisional trustees as alleged above.

[58] Mr De Koning consequently submitted that the fact that the papers had indeed been served upon the two provisional trustees, that they therefore bear knowledge of the main application and the counter-application, but that they did not respond to it, are additional reasons why it will be appropriate and in the interest of justice not to non-suit Mr Du Plessis on the basis of an alleged lack of *locus standi*.

[59] In my view, the following considerations are essential:

1. I have already indicated that Mr Du Plessis initially approached court as though he is entitled to do so with no restriction on his *locus standi*, irrespective of the fact that at the time when the application was instituted, his estate was under provisional sequestration.
2. I have already dealt with the fact that Mr Majiedt, in his answering affidavit to the main application, raised the issue of Mr Du Plessis' lack of *locus standi*, both in his personal capacity and in his capacity as a trustee of the Tafelkop Boerdery Trust.

3. I have also dealt with Mr Du Plessis' response to the aforesaid in the replying affidavit filed in the main application, where he merely indicated that the issue pertaining to his personal *locus standi* will be argued in court. No attempt was made to provide any evidence in support of his alleged *locus standi*. Not a single allegation was made to indicate that he was relying on his reversionary interest for purposes of *locus standi*. In addition, no steps were taken to join the two provisional trustees. To the contrary, up to that point Mr Du Plessis had not even attempted to serve any of the papers filed in the main application upon the two provisional trustees, despite the fact that he and the trustees of the Tafelkop Boerdery Trust were *dominis litis* in the main application.

4. After the institution of the counter-application, Mr Du Plessis filed an answering affidavit in response thereto. The said affidavit is dated 28 October 2021, at which date Mr Du Plessis' estate was still under provisional sequestration. Despite the previous questions raised pertaining to the lack of his *locus standi*, he completely failed to make any allegation in the said answering affidavit with regard to the basis of his *locus standi*. There is also no indication that the said answering affidavit was served upon the two provisional trustees.

5. After the De Klerk Family Trust filed its replying affidavit in the counter-application, Mr Du Plessis requested special leave to file his further affidavit, which leave I granted, as already indicated earlier in the judgment.

6. In the further affidavit (which was presumably when Mr De Koning came into the picture) were attempts made to proverbially save the day with regard to the issue of Mr Du Plessis' *locus standi*. In this regard the following averments were made at paragraphs 8 to 12 of the further affidavit, p. 242 to p. 243 of the counter-application:

"8.

The aim of the main application was to protect my rights as sole member of the Close Corporation, (the CC), to the free residue that I believe there would be in the winding-up of the CC, and to preserve my rights as lessee of

the farm Gewonne, which it is common cause is the only asset of the CC.

9.

As can be gleaned from the papers in the main- and counter- applications, my estate at the time the main application was launched, was provisionally sequestrated, and I suffered the concomitant consequences thereof pertaining to *locus standi*.

10.

The provisional sequestration order was however discharged on 2 December 2021, when the matter between FNB and myself, ... was finally settled, and the provisional sequestration order as a part of the settlement was discharged....

11.

In as much as my *locus standi* to have launched the main application, and my *locus standi* to have defended the counter- application, was (so I have been advised), compromised, if not lacking, and also challenged on account of the provisional order and in as much as the discharge of the provisional sequestration order had the effect of reversing the effects of that order, and restoring my status, I request that I be allowed to proceed in my pursuit of protecting and preserving my rights alluded to.

12.

Insofar as same is necessary, I hereby ratify, and retrospectively confirm, and condone all I had done in this litigation while the provisional sequestration order, with the adverse consequences thereof, was extant."

7. Only then, at that extremely late stage of the proceedings, and after he was forewarned at an early stage of the proceedings regarding his lack of *locus standi*, were allegations made seemingly in support of Mr Du Plessis' attempt to place reliance on a reversionary interest for purposes of *locus standi*. However, what was still lacking, and glaringly so, was "a reference to the trustees".

8. The absolute last attempt to save the fatally defective *locus standi* of Mr Du Plessis, was the statement in paragraph 12, quoted above, that Mr Du Plessis ratifies, retrospectively confirms and condones all he had done in the application and the counter-application whilst his estate was still under provisional sequestration. However, this statement is legally unfounded and incompetent. Mr Du Plessis cannot condone and ratify the litigation whilst he was an insolvent. It is something which the provisional trustees had to ratify, which could and should have been done at the time when they still held office. Mr Du Plessis, however, took no steps at that stage to obtain such ratification from the provisional trustees.

[60] In my view there are essential differences between the facts in the De Polo-judgment and the present matter.

1. The De Polo-judgment dealt with an action where a special plea was filed by the defendants concerning the *locus standi* of the first plaintiff. The special plea, *inter alia*, stated that the estate of the first plaintiff was sequestrated, the effect whereof in terms of section 20 of the Insolvency Act, divested the first plaintiff of his estate, which vested in the Master and thereupon in the trustee. The first plaintiff then filed a replication wherein it was averred that the trustee of his insolvent estate has consented in writing to the first plaintiff having entered into the agreement which was the subject matter of the action, and furthermore, the said trustee has in writing waived any rights to join in such action, or be joined as a party therein, abides by the decision of the court and agrees to be bound by such decision. It was then further stated in the replication that insofar as the plaintiff might have lacked any *locus standi*, it has been cured by the intervention of the trustee.

Subsequently, and without opposition, the trustees in the estate were joined as fourth defendants and were represented by the attorney and counsel acting for the plaintiffs.

2. Then, very importantly, the first plaintiff called a witness in regard to the issues raised in the special plea and replication, being one Mr Bowman who was one of the joint trustees appointed by the Master. Mr Bowman confirmed the affidavits which had been filed in relation to consent, waiver and the

trustees' undertaking. He further presented evidence with regard to his motivation for the said consent, waiver and undertaking.

[61] In further applicable case law which I considered, in which judgments reference was made to and/or reliance was placed on the De Polo-judgment, there was also some form of evidence of what the stance of the trustee(s) was. In the present matter, which is an application, it is trite that the affidavits constitute both the pleadings and the evidence. However, there is no evidence before me with regard to the stance of the trustees (when they still held office) and also, very importantly, there is no indication that Mr Du Plessis at any stage attempted to obtain such evidence and/or a form of consent from the provisional trustees.

[62] The mere fact that the De Klerk Family Trust ensured that a copy of the main application and the counter-application were served upon the provisional trustees (excluding the answering affidavit to the counter-application and the further affidavit of Mr Du Plessis, which would have been the obligation of Mr Du Plessis to see to it that it be served upon the provisional trustees) and the fact that they did not in any way whatsoever responded thereto, cannot, in my view, be considered to be "evidence" upon which I can or should exercise my discretion, if any, in favour of Mr Du Plessis; especially not when considered against the other facts and circumstances set out above.

[63] One should also be mindful that waiver needs to be proven and is never presumed. In **Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others** 2005 (1) SA 398 (C) at 4178 - D the relevant principles were stated as follows:

"Waiver must always be strictly proved and is never presumed. The position is succinctly stated by Nienaber JA in *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) ([2000] 3 All SA 181) at para [19]:

'Because no one is presumed to waive his rights (cf *Ellis and Others v Laubscher* 1956 (4) SA 692 (A) at 702E - F), one, the *onus* is on the party alleging it and, two, clear proof is required of an intention to do so (*Hepner v Roodepoort-Maraiburg Town Council* 1962 (4) SA 772 (A) at 778D - 779A; *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) at 704F - H). The conduct from which waiver is inferred, so it has frequently been

stated, must be unequivocal, that is, consistent with no other hypothesis.'

The failure on the part of the first respondent to assert its copyright does not, in my view, amount to conduct from which an intention to waive and abandon those rights can be inferred."

[64] Consequently, and insofar as I may have a discretion, the facts, circumstances and principles set out above, necessitates me to exercise my discretion against Mr Du Plessis.

[65] The last aspect I consider necessary to address with regard to the *locus standi* of Mr Du Plessis, is the submission by Mr De Koning that the fact that the De Klerk Family Trust itself cited Mr Du Plessis in the counter-application, clothed him with *locus standi*, moreover so because the two provisional trustees were also joined and cited.

[66] I cannot agree with the aforesaid submission. Mr Du Plessis was the first applicant in the main application. Where the De Klerk Family Trust instituted a counter-application, it would have been improper of them not to have cited Mr Du Plessis merely because it is their opinion that he did not have *locus standi*. The fact that they persisted with their stance that he did not have *locus standi*, is, in my view, very evident from the wording of prayer 1 in the counter-application where it was specifically stated that the counter-application was directed against the "second to fifth respondents in the counter-application"; hence, they specifically did not acknowledge the first respondent, Mr Du Plessis. In his stead they requested the relief against the provisional trustees of Mr Du Plessis' insolvent estate. They also specifically stated in paragraph 25 of the affidavit filed in support of the counter- application, at p. 22 of the counter-application, as follows:

'The seventh respondent and I are advised that the provisional trustees of Mr du Plessis' insolvent estate and the liquidators of Full Circle have an interest in the relief which the De Klerk Family Trust seeks in terms of the counter- application in respect of the 2018 lease agreement."

[67] The joinder of the two provisional trustees to the counter- application does not have the effect that they can be considered to have *mutatis mutandis* been

joined in the main application.

Conclusion re the *locus standi* of Mr Du Plessis:

[68] I consequently find that Mr Du Plessis did not have *locus standi* to have instituted the main application. For the sake of completeness, I deem it necessary to record that the parties were *ad idem* that since the settlement between FNB and Mr Du Plessis, the Tafelkop Boerdery Trust had no further interest in these proceedings. The parties were furthermore *ad idem* that the financial interest which the Tafelkop Boerdery Trust might have had in these proceedings at the time when the main application was instituted, was in any event not of the nature to have clothed them with *locus standi* to have instituted the main application.

[69] The main application consequently stands to be dismissed.

[70] I further find that Mr Du Plessis did not have *locus standi* to have opposed the counter-application.

[71] The merits of the counter-application are consequently to be considered on an unopposed basis.

Merits of the counter-application on an unopposed basis: the lease agreement. valid or void:

[72] It is common cause that on 4 November 2013 a Continuing Covering Bond, 87040/2013, was registered as a third mortgage bond ("the third mortgage bond") over the farm G [...] 4[....], owned by Full Circle, by the Registrar of Deeds in favour of FNB.

[73] It is also common cause that clause 3.3 of the third mortgage bond determines 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." (My emphasis)

[74] It is furthermore common cause that the 2018 lease agreement was concluded between Full Circle and Mr Du Plessis on 15 August 2018, hence, after the third mortgage bond was registered.

[75] It is also common cause that FNB did not consent in writing thereto prior to the conclusion of the 2018 lease agreement.

[76] Mr De Koning submitted that the conclusion of the 2018 lease agreement at odds with the aforesaid requirement of prior written consent, merely constituted a breach of the loan agreement and/or the terms of the third mortgage bond, resulting in FNB being entitled to exercise its contractually agreed remedies pertaining to breach of contract.

[77] Messrs Zietsman and Pienaar contended that any agreement concluded contrary to the provisions of the aforesaid clause 3.3 of the third mortgage bond, is and will be unenforceable.

[78] In his heads of argument and also in his oral arguments, Mr Pienaar relied on the judgment in **Oosthuizen v Mari** [2015] JOL 32431 (GJ), in which matter the relevant mortgage bond over the applicable property determined that the mortgaged property or any part thereof shall not be let for a longer period than 3 consecutive months without the written consent of Nedbank. The mortgagor, however, concluded a lease agreement contrary to the aforesaid provision, in that the required written consent of Nedbank was not obtained. The court in its judgment, *inter alia*, referred to and agreed with the following case law and the enunciated principle:

"[14] In *Cooper supra*, and with reference to, *inter alia*, the repealed and notorious Native Urban Areas Act; *African United Domestic Worker's Club v London and Ker*; *Jones v Siebert*; *Kely v Right-Kok*; *Rall v Bester*; and *Camay v Bhayat*; it states that if the letting of the property required the consent of an official and his consent had not been obtained the lease will be null and void.

[15] In *Hissaias v Lehman and Another*, the applicant sold an erf to the respondent. A clause in the deed of sale provided that the

purchaser undertook not to cede his rights under the agreement or to sell or lease the property without the written consent of the seller which consent was not to be unreasonably withheld. Whilst the property was still registered in the name of the applicant, the second respondent, without obtaining the required consent, leased the property to the first respondent and placed him in occupation thereof. In granting an application for ejectment, the Court, said:

'As dominus he has the right of possession and occupation of it against all the world save and so far as he has parted with his right to such possession and occupation. In an agreement such as that contained in this deed of sale, the owner in effect says to the purchaser 'I give you immediate occupation but I will give no right of occupation to any person substituted for yourself in the occupation unless this is done with my written consent'. If a person is substituted without such consent that person, as it appears to me, is in unlawful occupation and in a position analogous to that of a trespasser.'

In *Absa Bank v Sweet and Others*, the Court said:

*'It is now accepted that a mortgagor may, in the absence of an express agreement to the contrary, grant a lease of mortgaged property without the consent of the mortgagee but he cannot by such lease confer any rights which will conflict with those of the mortgagee (see *Wille Mortgage and Pledge* 3rd ed at 160; *Cooper's South African Law of Landlord and Tenant* at 22; *Dreyer's Trustee v Lutley* (1884) 3 SC 59 at 61; *Henderson Consolidated Corporation Ltd v Registrar of Deeds and Receiver of Revenue* 1903 TS 661 at 675) ...' (My emphasis)*

For the aforesaid reason and also other reasons expressed in the judgment, the court concluded at para [21] of the judgment that the lease agreement was invalid.

[79] Mr de Koning submitted that the context of the **Oosthuizen-** judgment was different to that of the matter *in casu*. In the alternative he submitted that should I find that it is indeed applicable to the facts of the present matter, it was decided wrongly and should not be followed. I cannot agree with the aforesaid contention. In my view the relevant principle enunciated in the judgment is very much applicable to the present matter and I can see no reason why I should not

follow it, since I am respectfully in agreement with it.

Conclusion re the 2018 lease agreement:

[80] In my view the 2018 lease agreement is consequently void and/or unenforceable and the counter-application is to be granted in respect thereof.

Further issues:

[81] Due to my finding with regard to the lack of *locus standi* of Mr Du Plessis and the consequent dismissal of the main application, it is not necessary to adjudicate any of the further issues raised in the papers.

Costs:

[82] With regard to the main application, there is in my view no reason why the costs should not follow the outcome. The trustees of the Tafelkop Boerdery Trust remained part of the proceedings throughout and consequently I agree with the submissions of Messrs Zietsman and Pienaar that they should be included in the order as to costs.

[83] The costs of the counter-application are also to follow the outcome thereof. The trustees of the Tafelkop Boerdery Trust were not part of the counter-application. The first respondent in the counter application, Mr Du Plessis, is consequently to pay the costs of the counter application.

[84] The costs occasioned by Mr Du Plessis' application to file a further affidavit in the counter-application, are also to be paid by him.

[85] The application by the sixth and seventh respondents in the main application, being the trustees of the De Klerk Family Trust, for leave to be joined as respondents in the main application, was necessitated by the first to fourth applicants' failure to have cited them as respondents from the inception of the main application. They are consequently to bear the costs of the said application to be joined.

Order:

[86] For the aforesaid reasons I issued the order quoted in paragraph 1 of the judgment.

C. VAN ZYL, J

On behalf of the first to fourth applicants
in the main application/first respondent
in the counter-application:

Assisted by:

Instructed by:

Adv LW de Koning SC

Adv J Lubbe

EG Cooper Majiedt Inc.
BLOEMFONTEIN

On behalf of the first respondent in
the main application/second respondent
in the counter-application:

Instructed by:

Adv P Zietsman SC
Hendré Conradie Inc.
(Rossouws Attorneys)
BLOEMFONTEIN

On behalf of the sixth and seventh
respondents in the main
application/first and second applicants
in the counter-application:

Instructed by:

Adv CD Pienaar
Symington & de Kok
BLOEMFONTEIN