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**

Case no: 1410/2023

In the matter between:

KURT ROBERT KNOOP N.O.	First Applicant
JOHAN LOUIS KLOPPER N.O.	Second Applicant
and	
ISLANDSITE INVESTMENTS 180 (PTY) LTD	First Respondent
RONICA RAGAVAN N.O.	Second Respondent
DINESH APPAVOO N.O.	Third Respondent
HUGH VINCENT COOKE	Fourth Respondent

CORAM: **CRONJÉ, AJ**

HEARD ON: **15 AUGUST 2023**

JUDGMENT BY: **CRONJÉ, AJ**

DELIVERED ON: **26 OCTOBER 2023**

[1] The Applicants and the Fourth Respondent, dissatisfied with my Judgment, bring applications for leave to appeal against the whole of my Judgment handed down on 2 May 2023.

[2] To the extent that I do not deal with each of the elements of the grounds of the respective appeals, it should not be deemed that they were not considered.

FIRST GROUND: NO APPLICANT VALIDLY BEFORE COURT:

[3] It is stated that the Applicants delivered a Notice in terms of Rule 7, disputing the authority of the First and Second Respondents (referred to as "*Islandsite*" and "*Mrs Ragavan*" respectively). It is argued that I should have held that only the BRP's had the power to bring and defend litigation on behalf of Islandsite as it was in business rescue and they did not authorize the main application. The company was therefore not properly before Court.

[4] It is alleged that I failed to follow or refer to the decision of this Court in *National Director of Public Prosecutions v Sharma*[1] which is binding on me unless I found that the decision was clearly wrong. I also allegedly failed to apply or refer to the numerous decisions in this Court and other divisions that found that only BRP's could institute litigation. I incorrectly distinguished the decision of the SCA in *Ragavan v Optimum Cole Terminal (Pty) Ltd.*[2]

[1] 2022 (1) SACR 289 (FB)

[2] [2023] ZASCA 34

[5] A Board of a Company is not a distinct legal entity capable of suing and being sued in its own name. I therefore erred in making the distinction and neither Islandsite or Mrs Ragavan were validly before Court.

[6] In *National Director of Public Prosecutions v Sharma and others*[3] *the learned Musi JP* stated:

> *"[1] This judgment concerns a point in limine. The applicant contended that the directors of the third defendant and their attorneys do not have locus standi to oppose a provisional order (order), issued by this court on 2 June 2021, in terms of section 26 of the Prevention of Organised Crime Act (POCA).*
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> *[2] The directors of the third defendant resolved that it begin voluntary business rescue proceedings and that the company be placed under supervision in terms of section 129 (1) of the Companies Act.*
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> *[29] It is correct that the directors remain directors but, importantly, they operate under the authority of the business rescue practitioners. If Mr Hellens' proposition is correct, it would mean that the directors may perform certain governance functions without the authorisation, consent, instruction or direction of the business rescue practitioners. This would undermine the whole business rescue scheme and would give rise to an undesirable parallel management of a company. It would effectively mean that the directors may hold meetings and resolve to institute or defend legal proceedings without the intervention or knowledge of the business rescue practitioners. This cannot be correct.*
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> *[30] Instituting or defending legal proceedings has financial implications. Costs orders against a financially distressed company may have far-reaching implications for the implementation of a business rescue plan and may result*

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[3] [2021] JOL 53845 (FB); The SCA did not finally determine the issue. See *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others* (136/2022) [2023] ZASCA 34; 2023 (4) SA 78 (SCA) (31 March 2023); See also *Tayob and Another v Shiva Uranium (Pty) Ltd and Others* (336/2019) [2020] ZASCA 162 (8 December 2020)

> *in the company not achieving a better return for its creditors or shareholders. This, on its own, is more than enough reason why the business rescue practitioners must be centrally involved when litigation on behalf of the company in business rescue is embarked upon."*

[7] Section 133 of the Act provides:

> *"133. General moratorium on legal proceedings against company.—(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except— ..."*

[8] My reading of the section, applied to the present matter, is that the application is not against the company. I revisited paragraphs [35] – [46] of my judgment, but still maintain that the directors are entitled to approach the Court to ensure that there are checks and balances in place in respect of the way the BRP's deals with the company, they are not the company. Section 137(2) does not relieve directors of their duties as directors. They therefore remain an integral part of the management of the company.[4]

[9] The BRP's in any event never indicated that they would have authorised or approved the institution of the application against themselves. A Court that finally determines Part B will be able to exercise its discretion in ordering that the costs, if the application fails, should be borne by any respective party.

[10] Mr Wickens SC argues that Mrs Ragavan's heads of argument foreshadows a supplementary founding affidavit in Part B, apparently premised on the findings in my judgment. Whether this is so, is not for me to decide. I dealt with the papers as they stood. The Court hearing Part B would be able to finally determine all the issues after exchange of all the papers, which I did not have

[4] See s 139 of the Companies Act as well as s 165

the benefit of when I heard the matter. This also applies to the submission in paragraph 14 of his heads. The matter came before me on an urgent basis.

[11] Applying the test on appeal, the first ground therefore has to fail.

SECOND GROUND: NO PRIMA FACIE RIGHT

[12] It is alleged that I failed to consider whether the *prima facie* right asserted by Islandsite and Mrs Ragavan was, as a matter of law, a sustainable basis upon which an interdict could be granted pending finalization of Part B. They state that I should have found that Islandsite and Mrs Ragavan requires preservation *pendente lite* by way of an interim interdict and not merely a *prima facie* right to review.

[13] I allegedly failed to consider whether the Curator was entitled to sell the property in terms of paragraph 1.21 of the Restraint Order, notwithstanding the terms of paragraph 1.11 of that Order. Paragraph 1.21 does not contain any of the requirements in paragraph 1.11 of the Restraint Order, which formed the basis of Islandsite and Mrs Ragavan's case.

[14] Mr Hellens SC argues that those provisions has to be read with paragraph 1.44 of the preservation order.

[15] To the extent that Islandsite and Mrs Ragavan bear an onus of establishing a *prima facie* right, they failed to do so as a matter of fact. There was no evidence upon which it could concluded that the purchase price of R20 million was not a fair purchase price reflective of the property's value. Annexure "FA3" had no probative value as it was merely a screenshot from a website and the claim by Mrs Ragavan that it could be sold for over R30 million was pure speculation and unsubstantiated. The statement from an estate agent was inadmissible hearsay. The business rescue plan valued the property for R19 250 000.00 with a forced sale value of R13 400 000.00. The Curator's

second report valued the property at R9 500 000.00 and a forced sale value R6 650 000.00 based on professional valuations.

[16] I furthermore allegedly erred in concluding that it was not apparent from the papers what the BRP's did for approximately five (5) years to maintain the property whereas paragraphs 62 – 85 of the BRP's answering affidavit sets out the history of the proceedings, involving *inter alia*, Mrs Ragavan. The BRP's only exercised control for approximately nine (9) months during 2018 and the Curator thereafter administered the property. Perusing the papers again, I concede that this is a valid point.

[17] It is furthermore averred that there was no evidence upon which I could conclude that the company was not illiquid as Islandsite and Mrs Ragavan did not present such evidence and Islandsite and Mrs Ragavan in fact made proposals where a third party would advance funds. Paragraphs 103, 108 and 143 of the BRP's answering affidavit stated that the company did not have the financial means to maintain the property. I also failed to consider paragraphs 19 – 25 of the Curator's answering affidavit which provided evidence of the municipal account owed in respect of the property and costs of repair.

[18] There was no evidence upon which the Court could find that the BRP's were not consulted as the Curator consulted and obtained the BRP's consent to sell the property and the BRP's considered the proposal made by Ms Ragavan prior to the sale. Therefore, the Court should have dismissed Part A of the application on any of the grounds.

[19] My view is that the *prima facie* right open to doubt was satisfied. A right to obtain declaratory orders, to review and set aside decisions, under Part B, is recognised in our law. The distinction that the Applicants wish to draw between the test in Part A and the test in Part B is not evident. I only had to establish whether there is a *prima facie* right to protection and also a *prima facie* right to review, not whether the review could/would succeed. There were

in my view sufficient facts and allegations set out in Part A which foreshadowed Part B, to grant interim relief.

[20] It would not, in my view, have been appropriate to strictly apply *Plascon Evans* where all the papers were not exchanged and the merits of Part B not fully canvassed before me.

[21] It is also important to note that by the time that I heard the application, the BRP's did not yet fully answer to Part B. They only filed a preliminary answering affidavit to Part A.[5] I was not called upon to determine the de/merits of Part B but only whether processes that were already undertaken and underway may *prima facie* be to the detriment of the Company.

[22] My views in respect of the value of the property, the probative value, if any of hearsay, and the process followed by either the Curator alone, or the BRP's alone, or them acting in concert, are not binding on a Court hearing the full application. I only had to consider a *prima facie* right

THIRD GROUND: NO IRREPARABLE HARM:

[23] In the papers, which were not yet complete, and not having the advantage of *viva voce* evidence or full argument, I had to exercise a discretion in deciding whether there may be harm and whether it would be irreparable. In this respect I was faced with the same dilemma in respect of a lack of certainty how the full picture would unfold.

[24] The BRP's refer to *City of Tshwane Metropolitan Municipality v Afriforum and Another*[6] where it was held:

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[5] Pleadings, p. 131

[6] (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016)

> *"[59] Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot make an order that would effectively undo the harm that would ensue should the interim order not be granted."*

[25] In *Moller N.O and Another v Murray N.O and Others*[7] it was also held that:

> *"[16] This entails a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to the Applicant. See LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C). Irreparable harm or loss is the loss of property (including incorporeal property and money) in circumstances where its recovery is impossible or improbable. The loss need not necessarily be any financial loss, it may consist of an irremediable breach of the applicant's rights. Braham V Hood 1956 (1) SA 651 (D) at 655B and Cliff v Electronic Media Network (Pty) Ltd and Another 2016 (2) All SA 102 (GJ).*
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> *[17] The Applicants assert that the irreparable harm which they will suffer is apparent. The only assets in the estate of the surety are the two immoveable properties. Moreover, as a property-owning company that does not trade, the sale of the immoveable properties in circumstances where the setting aside application subsequently succeeds, there can be no doubt of prejudice ensuing. The Applicants assert further that a risk that the immovable properties will be sold for far less than their value is real because the amount claimed by FirstRand Bank is far less than the value of the properties."*

[26] It is stated that it has not been proven that the effects or consequences sought to be interdicted cannot be reversed or undone and that a damages claim is available against the *Curator*. It was never the Respondents case that the company had plans with the property or would lose an opportunity. Reference is made to paragraphs 45 – 46 of the founding affidavit. A loss would be quantifiable. I disagree.

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[7] (2308/2021) [2021] ZAMPMBHC 34 (26 July 2021). My reading of that judgement is that the Court took no issue with irreparable harm but with the *prima facie* right asserted.

[27] Considering this ground of appeal, and the case law referred to, I conclude that another Court would not come to a different conclusion.

FOURTH GROUND OF APPEAL: BALANCE OF CONVENIENCE

[28] Mr Cooke, the purchaser, did not oppose the relief. He however entered the fray at the stage where leave to appeal is sought. I concluded that he was not of the view that he would be inconvenienced. It is argued that there was no averment by him that he lost interest in the property or that he cancelled the agreement to purchase.

[29] The BRP's state that I erred in concluding that they did not state that the estate is illiquid. In their answering affidavit they said that "*Islandsite has no liquid assets*".[8] My understanding, although I could not find case law that compared both these tests, is that liquid assets are those that can be easily converted into cash without affecting their market value, whilst illiquid assets are those that cannot be converted into cash as easily as liquid assets and require more time or effort to do so. Not much, if any, was said about other assets that can be liquidated.

[30] Whether there are reputational issues surrounding the Gupta family cannot in my view be the test. If the process of disposal in a case, which in my view raised *prima facie* concerns in this case, is not debateable, the property may still be sold for value. I already referred to the way the valuation was done, what the precise terms of the mandate was and the question raised in respect of who in fact had authority to legally sell the property and whether all the prerequisites were met.

[31] In *Gibb (Pty) Ltd v Passenger Rail Agency of South Africa and Another*[9]:

[8] Pleadings, p. 158, para 143

[9] (35870/2021) [2021] ZAGPJHC 146 (26 August 2021)

> *"13 Finally, the balance of convenience must favour the grant of an interim interdict. It has long been held that the stronger the prima facie right, the less the balance of convenience need tilt in the applicant's favour. In other words, a relatively weak prima facie right may be compensated for by a balance of convenience firmly in the applicant's favour, and a very strong prima facie right can make up for a balance of convenience adverse to the applicant. This is little more than common sense. Apparently weighty cases in the main claim ought to be heard out even if it puts the opposing parties to a great deal of trouble. Even weak but still arguable cases ought nonetheless to be entertained if they cause relatively little trouble to those who have to defend them (Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton 1973 (3) SA 685 (A) at 691E-G)"*

[32] I conclude that another Court would not come to a different conclusion.

FIFTH GROUND: SATISFACTORY ALTERNATIVE REMEDY:

[33] It is alleged that I should have found that the harm asserted by Islandsite and Mrs Ragavan is the difference between the sale price and the properties' alleged worth, which was purely financial. This could be remedied in a damages claim. The problem that the BRP's are faced with is that there is a material dispute as to the value of the property as elucidated above. In my view, this requirement has been met.

[34] Mr Hellens argues that as a matter of law, a claim for damages is controversial referring to *Bothongo Agriculture GP (Pty) Limited v Johannesburg Water Soc Limited.*[10]

FIST SUPPLEMENTARY GROUND: JURISDICTION:

[35] In its supplementary application for leave to appeal, the Applicants raise the issue of jurisdiction as there was neither a common law or statutory basis in the Act to provide for this in this matter. I reaffirm my views.

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[10] (2023-013882) [2023] ZAGPJHC 246 (20 March 2023); see para [70]

SECOND SUPPLEMENTARY GROUND: SECTION 133 OF THE COMPANIES ACT:

[36] I already dealt with most of the aspects under the ground raised in respect of *locus standi*. The BRP's refer to *SA Airlink v SAA (SOC) Ltd*[11] and *Cloete Murray N.N.O. v Firstrand Bank Ltd t/a Wesbank*[12]. Airlink was a creditor effectively seeking to enforce a claim for monies. I considered it and it remains distinguishable.

[37] They seek that the appeal be heard by the SCA, alternatively a Full Bench of this Court.

IS THE INTERIM ORDER APPEALABLE?

[38] The Constitutional Court held in *Machele and Others v Mailula and Others*[13]:

> *"21. "[T]he effect of granting leave to appeal against an order of interim execution will defeat the very purpose of that order. The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order."[13] (Footnote omitted.)*
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> *22. I pause to note, however, that while the rationale for the non-appealability of interim orders is generally sound, it does not always provide for situations where the injustice that arises falls not on the party in whose favour the interim order or special relief is granted, but on the party who would, in the ordinary course of events, seek to appeal against the interim order. This matter presents one of those situations. Such a concern is acknowledged by the decision in TAC I where, after holding that "it will generally not be in the interests of*

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[11] [2020] ZASCA 156

[12] 2015 (3) SA 438 (SCA), para [14]; see also para [17]

[13] (CCT 99/08) [2009] ZACC 7; 2010 (2) SA 257 (CC) ; 2009 (8) BCLR 767 (CC) (26 March 2009)

justice for a litigant to be granted leave to appeal against an interim order of execution", the Court continued to say the following:

> *"[F]or an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted – a matter which would, by definition, have been considered by the Court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail." (My emphasis.)*

23. *The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted. The applicant would have to show that irreparable harm would result if the interim order were not to be granted. A court will have regard to the possibility of irreparable harm and the balance of convenience." (footnotes omitted)*

[39] Mr Hellens refers to a number of cases for support that interim orders are not appealable, *inter alia Zweni v Minister of Law and Order of the Republic of South Africa*[14] and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[15].

[40] *Zweni* was referred to in *Mineral Sands Resources (Pty) Limited and others v Reddell and others.*[16] The Court held:

> *"[38] What bears consideration next, is the appealability of the dismissal of an exception. In Informal Traders, this Court held that whether an interlocutory decision is appealable is an interests of justice enquiry. A similar "interests of justice" enquiry ought to apply here. In Zweni, the Supreme Court of Appeal held that decisions that can be appealed must have the following three attributes: they must be final in effect and not susceptible to alteration by the court of first instance; they must be definitive in some respect of the rights of*

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[14] (310/91) [1992] ZASCA 197; [1993] 1 All SA 365 (A) (20 November 1992)

[15] (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010)

[16] 2023 (2) SA 68 (CC)

> *the parties; and they must have the effect of disposing of a substantial portion of the relief claimed." [my emphasis]*

[41] Mr Wickens quoted extensively from *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[17]. The Court made reference to the fact that the matter needs to dispose of any issue or any portion of the issue/s in the main action; whether any party may suffer an inconvenience of disadvantage which nothing but an appeal can set right and whether the decision would cause irreparable harm. In *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited*[18], the Court held that where the Respondent has a "*killer law point*" it should be decided there and then. I could not and still do not find such point. This is especially so as all the papers under Part B were not exchanged and the pleadings not yet closed. If it was different, the arguments may have been different and the outcome different. The Courts of appeal has warned against kicking for touch as well as granting leave where there is not basis on facts or law to do so. The facts in *Trinity* differs from what I am confronted with.

[42] My judgment is interlocutory and the test for interim relief open to some doubt is applied. With reference to s 133 of the Companies Act, I applied the *prima facie* test. It is not definitive, either for the Court hearing Part B or under the precedential argument.

[43] Mr Wickens refers to *Firm-O-Seal CC v Wynand Prinsloo and Van Eeden Inc and another*[19]. That judgment was set aside in *Firm-O-*

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[17] 1977 (3) SA 534 (AD) at p. 53

[18] (CCCT248/16) [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) (5 September 2017)

[19] [2021] JOL 52709 (ML)

Seal CC v Wynand Prinsloo & Van Eeden Incorporated and another[20] where the Court held:

> *"[6] Locus standi in iudicio is an access mechanism controlled by the court itself. Generally, the requirements for locus standi are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant's interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant.*
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> *[7] The High Court failed to consider whether, in each instance, the claim asserted was indeed in the nature of an "action" that "requires the approval of the practitioner" as contemplated by the section. Absent that determination, the special plea could not succeed. This, because where locus standi is challenged, it must be dealt with on the assumption that all allegations of fact relied upon by the party whose locus standi is attacked are true. Properly construed, as the debate at the bar in this Court appeared to demonstrate, the question perhaps is rather whether the claims as pleaded are bad in law. But, that is not before us for the present and need not detain us."* (footnotes omitted)

[20] [2023] JOL 59780 (SCA)

[44] I did not find that section 133 should be differently interpreted from what the case law states. Mr Wickens refers to *Absa Bank Limited v Marotex (Pty) Ltd and Others*[21] and the other cases referred to in his heads. I concluded that based on the relief sought, the BRP's would never consent to the relief claimed against themselves. They never did. Every case is determined on its own facts.

[45] I understand the enabling legislation that Mr Wickens refers to as POCA and not the Companies Act. The preservation order was granted in terms of POCA.

[46] I did not tie the BRP's hands. The pleadings were not yet closed. My finding is not definitive on law or fact. That question will be finally disposed of under Part B.

[47] *Absa Bank* also states:

> *"(a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) <u>those which have a final and definitive effect on the main action</u>; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not. (See generally Bell v. Bell, 1908 T.S. 887 at pp. 890-1; Steytler, N.O. v. Fitzgerald, supra at pp. 303, 311, 325-6, 342; Globe and Phoenix Gold Mining Co. Ltd. v. Rhodesian Corporation Ltd., 1932 A.D. 146 at pp. 153, 157-8, 162-3; Pretoria Garrison Institutes v. Danish Variety Products, supra at pp. 850, 867.)"*

[21] (1046/15) [2016] ZAGPPHC 1190 (28 October 2016)

[48] My order is not definitive. If the relief was final, it would have been definitive. I conclude that the ground cannot succeed.

[49] I ordered that the cost under Part A be costs in the cause. The outcome of Part B may either be in favour or adverse to the Applicants. I, specifically, do not distinguish between the Applicants as a Court who hears Part B would be in a better position to determine the respective liabilities of the parties to the litigation as a whole.

[51] There has been a flurry of correspondence served and exchanged subsequent to my judgment. I did not consider those, especially the letters that were sent to my chambers, as they were not sent by consent and had no bearing on the application for leave to appeal.

[52] On 31 July 2023, Mr Cooke filed an answering affidavit to Islandsite and Mrs Ragavan's Rule 30 application.

[53] Mr Cooke advances the argument that it is not necessary to file an affidavit by him in the application for leave to appeal and that he is not perempted from participating in the proceedings. It is argued that an application for leave to appeal is a question of substance and not a procedural matter regulated by the Rules of Court. A Court will, however, extend the period for filing an application for leave to appeal on good cause shown.

[54] His non-participation, he says, was due to the fact that he believed that there were no reasonable prospects for success in the urgent application. Mr Katz SC argues that my order is appealable as the issue of *locus standi* is a discrete question of law as it is dipositive of both the Part A and Part B relief. For the reasons stated above, I do not agree. I had to determine whether there was a *prima facie* right asserted, not a clear right. The arguments in respect of s 133 of were fully argued before me and I dealt with this above. My reading of the Act does not provide that the BRPs were appointed in *substitution* of the Board in respect of all matters. Section 140 provides that

they exercise full *management control* of the company. The relief in the matter before Musi JP also differed from the relief sought in the application before me. The caution that I expressed was premised on the facts and the argument raised before me.

[55] The argument that there is a novel question about whom has to be consulted where the company was placed in the hands of BRP's and a Curator appointed. My considerations went wider, when I, *inter alia,* considered the timelines and the fact that the agreement was apparently concluded outside the mandate period. I agree with Mr Hellens that there needs to be finality. However, on the principles enunciated in *National Union of Mineworkers of SA and Others v Fast Freeze*[22], I grant Mr Cooke the opportunity to participate in the appeal, this is notwithstanding that Mr Cooke may still participate in Part B of the application..

[56] Considering the history of the litigation and Mr Cooke's statement that he thought that there was not reasonable prospects for success, I cannot find that peremption applies. I suspect that the trigger for his participation may be that I remarked that he did not advance any grounds in the main application of prejudice and inconvenience.

[57] Islandsite and Mrs Ragavan served and filed a Rule 30 notice on the BRP's and Mr Cooke.

[58] In respect of Mr Cooke, Islandsite and Mrs Ragavan state that the *dies* for lodging an application for leave to appeal expired, that he is perempted from an appeal and no valid condonation application was filed under oath.

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[22] (1992) 13 ILJ 963 (LAC)

[59] In respect of the BRP's I conclude that there is nothing prohibiting a party to amend and expand its grounds of appeal. It is a question of prejudice and I cannot find any.

[60] In *Booi v Amathole District Municipality and others*[23] the Court stated that:

> *"[29] Another preliminary obstacle that must be overcome before I deal with the merits of this appeal is the issue of peremption. It cannot be gainsaid that the doctrine of peremption serves the important purpose of legal certainty, but it is trite that its application is not absolute. When a court faces the possible operation of the doctrine, the relevant enquiry is whether there are overriding policy considerations that militate against the enforcement of peremption of the party's right of appeal." (footnotes omitted)*

COSTS

[62] Mr Hellens askes that the BRPs pay the cost of the application *de bonis propriis*. In my judgment I ordered that the costs in Part A be costs in the cause. I am of the view that the costs of this application should be costs in the cause.

[63] I therefore make the following order.

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[23] [2022] 1 BLLR 1 (CC); See *SANDFU* fn 19 at para [23], where the Supreme Court of Appeal cited its earlier decision in *Von Abo* above in footnote 19 at para [19], and stated as follows: "*The general rule that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it is but one aspect of a broader policy that there must at some time be finality in litigation in the interests both of the parties and of the proper administration of justice. Bearing in mind the policy underlying the rule it must necessarily be open to a court to overlook the acquiescence where the broader interests of justice would otherwise not be served. As this Court said recently in Government of the Republic of South Africa v Von Abo, in response to a similar contention that the appeal had been perempted: 'It would be intolerable if, in the current situation, this Court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice followed by the appellants or an incorrect concession made by them.'*"

ORDER

1. The First and Second Applicants' application for leave to appeal is dismissed.

2. The costs of the dismissal shall be costs in the cause.

3. Each party pays its own costs in respect of the balance of the relief sought.

4. The Fourth Respondent's application for condonation is granted.

5. The Fourth Respondent's application for leave to appeal is dismissed.

6. The costs of the dismissal of shall be costs in the cause.

7. Each party pays its own costs in respect of the balance of the relief sought.

[redacted]

P R CRONJÉ, AJ

On behalf of the First and Second Applicants: Adv. G D Wickens SC
Adv T Scott
Instructed by:
Smit Sewgoolam Inc.
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BLOEMFONTEIN

On behalf of the First & Second Respondents:	Adv MR Hellens SC Adv Ben Prinsloo Instructed by: Van der Merwe & Van der Merwe c/o **Honey Attorneys** BLOEMFONTEIN
On behalf of the Fourth Respondent:	Adv. A Katz SC Adv K Perumalsamy Instructed by: Werksmans Attorneys c/o **Symington & De Kok** BLOEMFONTEIN