THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 841/2023

In the matter between:

TOBIAS CASPARUS DU PLESSIS	**APPELLANT**
and	
DONOVAN MAJIEDT N O	**FIRST RESPONDENT**
NICKY DE KLERK	**SECOND RESPONDENT**
REGISTRAR OF DEEDS,	
BLOEMFONTEIN	**THIRD RESPONDENT**
MASTER OF THE HIGH COURT,	
MAHIKENG	**FOURTH RESPONDENT**
MASTER OF THE HIGH COURT,	
BLOEMFONTEIN	**FIFTH RESPONDENT**
NICOLAAS DANIEL DE KLERK N O	**SIXTH RESPONDENT**
SUSANNA JOHANNA ELIZABETH	
DE KLERK N O	**SEVENTH RESPONDENT**

and

In the appeal in the counter-application between:

NICOLAAS DANIEL DE KLERK N O	**FIRST APPELLANT**
SUSANNA JOHANNA ELIZABETH DE KLERK NO	**SECOND APPELLANT**

and

TOBIAS CASPARUS DU PLESSIS	**FIRST RESPONDENT**
DONOVAN MAJIEDT N O	**SECOND RESPONDENT**
LINDIWE FLORENCE KAABA N O	**THIRD RESPONDENT**
GERT LOUWRENS DE WET N O	**FOURTH RESPONDENT**
GONASAGREE GOVENDER N O	**FIFTH RESPONDENT**

Neutral citation: *Du Plessis v Majiedt N O and Others* (Case no 841/2023) [2025] ZASCA 4 (28 January 2025)

Coram: DAMBUZA, MOLEFE, and SMITH JJA, and MJALI and NAIDOO AJJA

Heard: 3 SEPTEMBER 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 28 January 2025.

Summary: Insolvency – locus standi of insolvent to sue in his own name – Insolvency Act 24 of 1936 – trustees were the correct persons to take action – discharge of provisional sequestration order does not confer locus standi on the insolvent retrospectively.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Van Zyl J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Naidoo AJA (Dambuza JA, Molefe JA and Smith JA and Mjali AJA concurring):

[1] During July 2021, the appellant, Mr Tobias Du Plessis (Mr Du Plessis) and three trustees of the Tafelkop Trust (including Mr Du Plessis as one such trustee), instituted application proceedings in the Free State High Court, Bloemfontein (the main application), per Van Zyl J, (high court), against the first respondent, Mr Donovan Majiedt (Mr Majiedt), in his capacity as a liquidator of Full Circle Projects Twenty CC (in liquidation) (Full Circle). Mr Majiedt was one of two liquidators appointed to administer the insolvent estate of Full Circle. The other liquidator was Ms Lindiwe Florence Kaaba (Ms Kaaba), who was not joined as a party in the main application. In this application, Mr Du Plessis sought an interim interdict restricting the transfer of the property known as the Remaining Extent of the Farm Gewonne 494, District Theunissen, Free State Province, in Extent 85, 4198 hectares, held by Deed of Transfer T11665/2000 (the property), to the second respondent, Mr Nicky de Klerk (Mr De Klerk)

[2] The appellant, a farmer, is the sole member of Full Circle, which owns the property. He leased various farms in order to conduct his business operations, one such farm being the property. The lease agreement in respect of the property was concluded on 15 August 2018, for a period of 9 years until September 2027. Full

Circle was subsequently liquidated on 22 January 2021. Mr Du Plessis was also provisionally sequestrated on 18 March 2021. Gert Lourens Steyn De Wet and Gonasagree Govender were appointed as provisional trustees of his insolvent estate. Full Circle had, on 4 November 2013, prior to the lease agreement being concluded with Mr Du Plessis, registered a continuing covering bond over the property in favour of First National Bank Limited (FNB), as security for monies loaned and advanced to it by FNB. Mr Du Plessis represented Full Circle in signing the relevant documents for the registration of the bond. Clause 3.3 of the covering bond stipulated that 'The Mortgagor shall not mortgage or in any way alienate or further encumber the Mortgaged Property, or any part thereof, nor shall the Mortgagor give up occupation of the Mortgaged Property, or any part thereof, without the prior written consent of the Mortgagee'. It is not in dispute that at the time that Mr du Plessis instituted the main application, he had been provisionally sequestrated.

[3] The liquidators of Full Circle were mandated by its creditors to realise the assets of the company. Acting in terms of that mandate, the liquidators sold the property to the De Klerk Familie Trust (the De Klerk Trust), represented by Nicolaas Daniel De Klerk and Susanna Johanna Elizabeth De Klerk (Mr and Ms De Klerk), without taking into consideration the lease agreement. Their case, in this regard, is that there was no valid lease in existence at the time of the sale, hence the property was sold free of any lease. This is what catalysed the main application, which is the subject of this appeal.

[4] The relief Mr Du Plessis sought in the high court was, in summary:

4.1. granting him the power to institute action or application proceedings and/or oppose any action or application proceedings, as advised;

4.2 staying the transfer of the property, into the name of Nicky Swart;

4.3 directing Mr Donovan Majiedt, the Liquidator of Full Circle and the Master of the high court, Mmabatho, to produce full disclosure and copies of all documentation needed by all the applicants under case number M000090/2020;

4.4 staying the transfer of the property for a period of 30 days after receipt of the documents to enable the applicants to issue and serve summons upon all interested parties, for the cancellation of the offer made by the second respondent and accepted by Mr Majiedt;

4.5 the first to fifth respondents pay the costs of the application, only if opposed. Directing any other party opposing the application to pay the costs jointly and severally with the first respondent;

4.6 that paragraphs 1 to 7 operate as an interim court order and calling upon any interested parties be called upon to give reasons why the order should not be made final.

[5] Mr Majiedt opposed the application essentially on the ground that: (a) Mr Du Plessis who purported to act both in his personal capacity and as a trustee of the Tafelkop Trust, did not have locus standi because he was insolvent at the time he brought the main application; (b) with regard to acting in his personal capacity, the *concursus creditorum* had already been established and only the trustees of his insolvent estate were permitted to represent his estate in a court of law; and (c) in respect of his acting on behalf of the Tafelkop Trust, Mr Majiedt asserted that Mr Du Plessis similarly did not have locus standi, as an insolvent trustee is disqualified from being a trustee of the Trust.

[6] The counter-application was brought by Mr and Ms De Klerk, in their capacities as trustees of the De Klerk Trust. They cited, as respondents, Mr Du Plessis, the two liquidators of Full Circle, being Mr Majiedt and Ms Kaaba, and the

two provisional trustees of the appellant's insolvent estate, Messrs De Wet and Govender. The relief claimed in the counter-application is an order, in essence:

6.1 allowing the counter applicants (Mr and Ms De Klerk) to join the main proceedings and bring the counter-application against the liquidators of Full Circle and the provisional trustees of the appellant;

6.2 granting them condonation be for the late filing of the counter-application;

6.3 declaring the lease agreement entered into between Mr Du Plessis and Full Circle on 15 August 2018, null and void, alternatively unenforceable;

6.4 Directing the first respondent in the counter-application (Mr Du Plessis) to pay the costs of the counter-application;

6.5 In the event of the counter-application being opposed by any other party, such party is directed to pay the costs of the counter-application, jointly and severally with the first respondent.

[7] The high court dismissed the main application and granted the counter-application. The high court however, granted the appellant leave to appeal to this Court in respect orders 3, 4, 5 and 6, in terms of which the court, in essence, dismissed, orders 3 and 4, in the main application with costs. Orders 5 and 6 granted the counter-application with costs and declared the lease agreement concluded between Mr Du Plessis and Full Circle on 15 August 2018, void and/or unenforceable.

For the sake of completeness, I set out the content of orders 3, 4, 5 and 6, made by the high court*:*

'**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.: 2207/2000 in their official capacities as such, 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 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, shall pay the costs of the aforesaid application.'

[8] Three issues arise for determination in this appeal, namely the appellant's *locus standi in iudicio* (locus standi); the validity of the lease agreement; and the status of the sale of the property. Mr Majiedt reiterated that the liquidators of Full Circle opposed the appeal only in respect of orders 3 and 4 of the high court. He asserted that there were several issues which required consideration: (a) whether Mr Du Plessis could obtain an interim interdict against Mr Majiedt only, without joining his co-liquidator, Ms Kaaba; (b) whether Mr Du Plessis has satisfied the requirements for the grant of an interim interdict; and (c) whether Mr Du Plessis had locus standi to institute the main application, as he was provisionally sequestrated at the time.

[9] Mr Du Plessis argued that although the Ms Kaaba was not joined as a respondent in the main application, this defect was cured by the joinder of both trustees of Full Circle in the joinder application by the trustees of the De Klerk Trust (Mr De Klerk and Ms De Klerk), who themselves were granted leave to intervene as the sixth and seventh respondents in the main application. Similarly, the two provisional trustees of Mr du Plessis' insolvent estate were also joined in the joinder application by the De Klerk Trust. They therefore had notice of both the main and counter-applications, and, so the argument goes, their failure to oppose either,

indicated their intention not to proceed with the litigation on behalf of the appellant's insolvent estate, leaving him free to pursue such litigation.

[10] The provisional order of sequestration against Mr Du Plessis was discharged in December 2021. He argued that the effect of this is that everything the insolvent did during the period that the provisional sequestration order was in force, is not affected by such order. Put differently, it is as though the order was never granted, and he was never sequestrated. Mr Du Plessis therefore concluded that he had locus standi to bring the main application. In this regard, the appellant relied on the judgment of the court in *Manison v Oosterlaak*,[1] in which the court held that where a provisional order of sequestration is set aside, the debtor is restored to his *status quo ante* and everything is to be judged as if the order had never been made. Similar sentiments were expressed in *Sirioupoulos v Tzerefos*,[2] the other case relied upon by the appellant.

[11] Mr Du Plessis assailed the order of the high court declaring the lease agreement void and unenforceable on the ground that it was wrong and legally unsustainable, as the court placed reliance on *Oosthuizen v Mari*,[3] which dealt with the absence of consent at a statutory level, whereas the present matter required consent at a contractual level. He argued that his authority to enter into the lease agreement derived from his membership of Full Circle.

[12] He argued further that the sale of the property to the De Klerk Trust was irregular, as the liquidators did not follow the contractually stipulated procedure of first selling the property by public auction, subject to the lease agreement. Only if

[1] *Manison v Oosterlaak* (1908) 29 NLR 515.
[2] *Sirioupoulos v Tzerefos* 1979(3) SA 1197 (O) 1204G-1205B.
[3] *Oosthuizen v Mari* [2015] JOL 32431 (GJ).

such sale did not yield an amount sufficient to cover the outstanding debt, could the property be sold without taking the lease into consideration. The sale of the property by private treaty prevented him from enforcing his rights in terms of the lease agreement. With regard to the validity of the lease agreement, he argued that the mortgage bond simply created a contractual relationship between Full Circle and FNB and was not a requirement or condition for conclusion of a valid lease agreement. Non-compliance with any term of the bond entitled the bank immediately to claim all amounts due to it. It did not create a right enforceable against third parties.

[13] Mr Majiedt assailed Mr du Plessis' locus standi at two levels. First, he asserted that Mr du Plessis was insolvent at the time of launching the main application, and, as such, was disqualified from instituting court proceedings. Only his trustees could litigate on behalf of the Mr Du Plessis' insolvent estate. He therefore lacked locus standi to act in his personal capacity. Second, Mr du Plessis asserted that he acted in his capacity as a trustee of the Tafelkop Trust. Mr Majiedt argued further that unless the Trust Deed provides otherwise, a trustee who is insolvent is, ipso facto disqualified from being a trustee of the (Tafelkop) Trust.

[14] Mr Majiedt contended that since the lease agreement was entered into after the continuing covering bond on the property was registered in favour of FNB. Clause 3.3 of the bond required the written consent of FNB to alienate or encumber the property. It is not in dispute that no written consent from FNB was sought or furnished to enable Full Circle and the appellant to conclude a lease agreement in respect of the property. For this reason, the first respondent asserted that the lease agreement was void *ab initio* The property was, therefore, sold without the lease.

[15] With regard to the transfer of the property, Mr Majiedt asserted that the liquidators were authorised by the creditors of Full Circle to realise the assets of the insolvent estate. As a result of marketing the property, an offer was received from the De Klerk Trust, which was accepted by the liquidators, after FNB had approved the sale. That is how the property came to be sold without the lease being considered. Mr Majiedt further contends that the application stands to be dismissed because it is defective in that two liquidators were appointed to administer the insolvent estate of Full Circle, but the appellant cited and seeks relief from only one. This, he argues, is impermissible in terms of the law.

[16] For their part, Mr and Ms De Klerk asserted that three issues required the high court's attention: (a) whether the discharge of a provisional order of sequestration remedies the lack of legal standing of an insolvent who instituted legal proceedings in his own name, whilst under provisional sequestration and without the knowledge and assistance of his duly appointed trustees; (b) whether a written lease agreement, knowingly entered into, in contravention of the express provisions of a mortgage bond, is void and unenforceable and (c) whether the sale of immovable property by the liquidators of an insolvent mortgagor, is void and stands to be set aside because it was sold by private treaty, free from the lease agreement. Mr and Ms De Klerk were in agreement with the contention of Mr Majiedt, as well as the finding of the high court that Mr du Plessis lacked locus standi to bring the main application, and to oppose the counter-application. While they did not, however, agree with the finding of the high court that the counter-application had to be determined on an unopposed basis, they agreed with the court's finding that the discharge of the provisional sequestration order did not remedy Mr Du Plessis's lack of locus standi.

[17] In a similar vein to that argued by Mr Majiedt, Mr and Ms de Klerk were of the view that Full Circle's non-compliance with section 3.3 of the mortgage bond rendered the lease agreement void and unenforceable. They argued that the registration of the third mortgage bond created a limited real right over the property in favour of FNB, which was enforceable against third parties. They further contended that the property was sold to the De Klerk Trust pursuant to the liquidators of Full Circle being mandated to do so by the creditors of the insolvent estate. The value that FNB received from this sale was far more than the amounts/values that would have been realised if the property had been sold to one of the other three entities who had also made offers to purchase it. The amount received from the latter sale would have been insufficient to cover the amount of the debt owed to FNB. Hence the sale of the property to the De Klerk Trust was valid.

[18] A further point made by Mr and Ms De Klerk, as well as by Mr Majiedt, is that, even if this court should find that the lease agreement was valid, the liquidators of Full Circle were entitled to sell the property to the De Klerk Trust, by virtue of the value that was realised from such sale. The lease would have been terminated upon the conclusion of that sale and was not enforceable by the appellant. Therefore, the further consequence of the sale is that the basis upon which the appellant approached the court for interdictory relief fell away. The appellant, consequently failed to make out a case for the interdictory relief.

LOCUS STANDI

[19] The relevant provisions of section 20 the Insolvency Act,[4] read thus:

'(1) The effect of the sequestration of the estate of an insolvent shall be-

(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;

[4] Insolvency Act No 24 of 1936.

(b) . . .

(c) . . .

(d) . . .

(2) For the purposes of subsection (1) the estate of an insolvent shall include-

(a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;

(b) all property which the insolvent may acquire, or which may accrue to him during the sequestration, except as otherwise provided in section *twenty-three*.'

[20] Mr du Plessis was, upon the grant of the order for his provisional sequestration, divested of his estate and all his property, both movable and immovable, belonged to and vested in his provisional trustees. He cannot therefore institute legal proceedings in his own name, without the knowledge and consent of the provisional trustees. Section 23(6)[5] stipulates circumstances where the insolvent may sue or be sued in his own name. Where his trustees are aware of and approve the legal action, or where the trustees have acted improperly by not pursuing legal action, the insolvent retains his right to pursue such legal proceedings independently.[6] In this case, the relief sought by Mr Du Plessis was an interdict to stay the transfer of the property to Mr De Klerk, pending the institution of an action by him (Mr du Plessis) to set aside the Mr Majiedt's acceptance of the offer to purchase the property. Mr Du Plessis at no stage indicated that the trustees had approved of his initiating the main application or that they refused to so on behalf of his insolvent estate, and that he was, consequently, vested with locus standi. His argument that he derived his locus standi from his membership of Full Circle is not sustainable.

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[5] The section provides as follows: '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.'

[6] *Marais v Engler Earthworks (Pty) Ltd*; *Engler Earthworks (Pty) Ltd v Marais* 1998 (2) SA 450 (E), applied in *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2005 (1) SA 398 (C) at 424G.

[21] The starting point is that the right of a person who has been declared insolvent, whether provisionally or finally, to bring or defend legal proceedings is curtailed, save as provided in s23 of the Insolvency Act, and is vested in the trustee who has been appointed to administer his or her estate. Mr Du Plessis has not brought himself within the provisions of s 23. His invocation of his membership of Full Circle does not absolve him from the consequences of his insolvency. His interest in Full Circle is an asset in his insolvent estate of which he became divested once he became provisionally insolvent.[7] It is clear, in my view, that the appellant failed to establish his locus standi to bring the application in his own name.

[22] The further argument raised by the appellant was that although he was provisionally sequestrated at the time he launched the main application, the order for his provisional sequestration had been discharged by the time the matter was heard. Relying on *Manison*[8] and *Sirioupoulos*,[9] he argued that his lack of locus standi was remedied and restored retrospectively. The decision in *Manison* was based on s 15 of Law 47 of 1887, which was the Insolvency law applicable in Natal at that time. Section 15 stated that:

'At the hearing upon the return day of the summons, the Court or Judge shall require proof of the debt of the petitioning creditor, the service of the summons and of the act of insolvency, or if more than one act of insolvency is alleged in the summons, of some one of the alleged acts of insolvency, and if satisfied with the proof, may grant a final order sequestrating the debtor's estate. If the Court or Judge is not satisfied with the proof of the petitioning creditor's debt, or of the act of insolvency, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the summons and petition and supersede the provisional order for sequestration, or may stay all proceedings on the summons for such time as may in the discretion of the Court be deemed reasonable, and may

[7] His estate first vested in the Master and thereafter the appointed trustee(s).
[8] Footnote 1 supra.
[9] Footnote 2 supra.

require further proof of the matters in issue. Whenever such summons and petition shall be dismissed by the said Court, all questions affecting the estate of any person against whom it was presented, or any right of such person or of his creditors or debtors, or the validity of any alienation, transfer, gift, cession, delivery, mortgage, pledge, payment, acquittance, surrender or discharge made by such person, or payment made to such person, shall be judged of and determined as if such petition had never been presented.' *Manison* was therefore decided in the context of s 15 and is not in keeping with the current law on insolvency in South Africa.

[23] There is no dispute that the Insolvency Act 24 of 1936 repealed all previous provincial Insolvency Statutes. The Insolvency Act does not contain any provision that upon the discharge of an order of provisional sequestration, the insolvent is put in a position as though the order was never made. In any event, what is relevant is that when Mr Du Plessis launched the application there was an effective court order which deprived him of locus standi. He lacked the requisite legal ability to launch the application. Therefore, even on this argument, the appellant must fail, as his reliance on *Manison* and by implication, on s15 of Law 47 of 1887, is misplaced.

VALIDITY OF THE LEASE

[24] That is effectively the end of the appellant's case, making the consideration of the other issues raised by him unnecessary. However, it is perhaps prudent to deal briefly with the remaining issues. First, regarding the issue of the validity of the lease agreement. As correctly argued by the respondents, the mortgage bond registered over the property, in favour of FNB, conferred a limited real right in the property upon FNB, and as such, became enforceable against third parties. The appellant, as the sole member of Full Circle would have negotiated with FNB and signed the relevant documentation for registration of the mortgage bond. He knew what the terms and conditions of the bond were, particularly that the consent of FNB would have to be obtained for the property to be leased to him. He acted on behalf of Full

Circle and also represented himself when the lease agreement was entered into, knowing that Full Circle was not permitted to lease the property without the prior written consent of FNB and, more importantly, that such consent had not been obtained.

[25] Section 37(1) and (2) of the Insolvency Act stipulate that:

'(1) A lease entered into by any person as lessee shall not be determined by the sequestration of his estate, but the trustee of his insolvent estate may determine the lease by notice in writing to the lessor: Provided that the lessor may claim from the estate, compensation for any loss which he may have sustained by reason of the non-performance of the terms of such lease.

(2) If the trustee does not, within three months of his appointment notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have determined the lease at the end of such three months.'

It is common cause that Mr Du Plessis' provisional trustees did not indicate that they wished to extend the lease, within three months of their appointment on 30 March 2021, or at all. The trustees must therefore be deemed to have determined the lease at the end of those three months, meaning that the lease would have lapsed at that time. The main application was instituted by Mr Du Plessis in July 2021, being after the lease had lapsed. Therefore, there was no valid lease in existence which would have founded Mr Du Plessis' claim to a *prima facie* right for the interdictory relief that he claimed. On this score too, he has failed to make out a case for the relief he seeks. He also did not satisfy the other requirements for interdictory relief, namely (a) a reasonable apprehension of irreparable harm if the interdict was not granted, (b) that the balance of convenience favours the granting of the interdict and (c) that he has no other satisfactory remedy.

STATUS OF THE SALE

[26] It follows, therefore, that the sale of the property is unimpeachable. FNB asserts that it was unaware of the lease, hence it approved the sale by the liquidators of Full Circle. The latter were authorised by the creditors of the appellant, at the first and second meeting of creditors, to realise the assets of the insolvent, which they did. The liquidators cannot be criticised for selling the property by private treaty, as there was no valid lease in place when the sale of the property was concluded. This, coupled with the fact that the amount realised from the sale of the property to the De Klerk Trust was far more than would have been realised from the offers relied upon by Mr Du Plessis, renders the sale to the De Klerk Trust acceptable and justifiable. The appeal must therefore fail.

[27] With regard to costs, Mr Du Plessis asked for costs in his Notice of Motion, against the respondents, only if opposed. No mention was made of costs *de bonis propriis*. In this court he argues for such punitive costs. However, no basis had been shown for such an order. In any event, because two liquidators were appointed in the insolvent estate of Full Circle, it is impermissible to request costs against one liquidator and not the other.

[28] In the circumstances, the following order is made:

The appeal is dismissed with costs.

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NAIDOO AJA

ACTING JUDGE OF APPEAL

Appearances

For appellant:	LW De Koning SC (with him JH vd B Lubbe)
Instructed by:	Cristo Faber Attorneys, Hoopstad EG Cooper Majiedt, Bloemfontein
For first respondent:	P Zietsman SC
Instructed by:	Hendre Conradie Inc., Bloemfontein
For sixth and seventh respondents:	CD Pienaar
Instructed by:	Symington De Kok Inc., Bloemfontein.