Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

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

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1094/2022
Heard: 13/09/2022
Date delivered: 11/10/2022

In the matter between:

SHANIE TALJAARD
(Previously Fourie, ID No: [...]) 1st Applicant
CURO CONSULTANCY (PTY) LTD 2nd Applicant

and

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA 1st Respondent
MINISTER OF TRADE AND INDUSTRY 2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 3rd Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC) 4th Respondent
JOCHEN ECKHOFF N.O.
(in his capacity as provisional co-liquidator of Project Multiply (Pty) Ltd (in provisional liquidation) (Reg No: 1993/005325/07) and Velvetcream 15 (Pty) Ltd (in provisional liquidation) Reg No: 2005/033276/07); and in his capacity as provisional co-trustee of the Merwede Trust (IT1534/98) in his capacity as co-trustee of the insolvent estate of Carel Aaron van der Merwe) 5th Respondent
DEON MARIUS BOTHA N.O.
(in his capacity as provisional co-liquidator of Project Multiply (Pty) Ltd (in provisional liquidation) (Reg No: 1993/005325/07) and in his capacity as co-trustee of the insolvent estate of Carel Aaron van der Merwe) 6th Respondent
JOHANNES ZACHARIAS HUMAN MULLER N.O.
(in his capacity as provisional co-liquidator of Velvetcream 15

(Pty) Ltd (in provisional liquidation) (Reg No: 2005/033276/07; and in his capacity as provisional co-trustee of the Merwede Trust (IT1534/98) 7th Respondent

FUSI PATRICK RAMPOPORO N.O.
(in his capacity as provisional co-liquidator of Project Multiply (Pty) Ltd (in provisional liquidation)
(Reg No: 1993/005325/07) 8th Respondent

SIMON MALEBO RAMPOPORO N.O.
(in his capacity as provisional co-liquidator of Velvetcream 15 (Pty) Ltd (in provisional liquidation)
(Reg No: 2005/033276/07) 9th Respondent

ANGELINE POOLE N.O.
(in her capacity as provisional co-trustee of the Merwede Trust (IT1534/98) 10th Respondent

CATHARINA SUSANNE VAN DER MERWE N.O.
(in her capacity as sole remaining trustee of the Merwede Trust (IT1534/98) 11th Respondent

PHILEMON TATENDA MAWIRE N.O.
(in his capacity as co-trustee of the insolvent estate of Carel Aron van der Merwe) 12th Respondent

AGRI SOUTH AFRICA NPC 13th Respondent

MASTER OF THE HIGH COURT, KIMBERLEY 14th Respondent

MASTER OF THE HIGH COURT, CAPE TOWN 15th Respondent

AFFECTED PARTIES OF PROJECT MULTIPLY (PTY) LTD AS PER LIST ANNEXED HERETO, MARKED "A" 16th Respondent

AFFECTED PARTIES OF VELVETCREAM 15 (PTY) LTD AS PER LIST ANNEXED HERETO, MARKED "B" 17th Respondent

AFFECTED PARTIES OF THE MERWEDE TRUST AS PER THE LIST ANNEXED HERETO, MARKED "C" 18th Respondent

AFFECTED PARTIES OF CAREL ARON VAN DER MERWE AS PER LIST ANNEXED HERETO MARKED "D" 19th Respondent

In re:

Case No: 963/2021

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Applicant

and

JACQUES DU TOIT N.O. (in his erstwhile capacity as Business Rescue Practitioner of Project Multiply (Pty) Ltd (in provisional liquidation 1st Respondent

PROJECT MULTIPLY (PTY) LTD (in provisional Liquidation) (Reg No: 1993/005325/07) 2nd Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC) 3rd Respondent

ALL AFFECTED PARTIES 4th Respondent

AND in re:

Case No: 964/2021

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Applicant

and

JACQUES DU TOIT N.O. (in his erstwhile capacity as Business Rescue Practitioner of Velvetcream 15 (Pty) Ltd (in provisional liquidation)
(Reg No: 2005/033276/07) 1st Respondent
VELVETCREAM 15 (PTY) LTD
(in provisional liquidation)
(Reg No: 2005/033276/07) 2nd Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC) 3rd Respondent
ALL AFFECTED PARTIES 4th Respondent

AND in re:

Mahikeng Case No: M557/2021/27
Kimberley Case No: 2436/2021

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Applicant

and

CAREL ARON VAN DER MERWE (SNR) N.O. 1st Respondent
CATHARINE SUSANNA VAN DER MERWE N.O. 2nd Respondent
CAREL ARON VAN DER MERWE (JNR) N.O. 3rd Respondent
(in their capacities as co-trustees of the Merwede Trust (IT 1534/98))

JUDGMENT

Mamosebo J

[1] This application involves the fundamental question, premised on a constitutional challenge, whether the exclusion of individuals and trusts from the business rescue provision set out in the Companies Act, 71 of 2008 (the Act) is unconstitutional. Related to this question is whether there should be an order dismissing the provisional winding-up and sequestration orders of Project Multiply

(Pty) Ltd, Velvetcream 15 (Pty) Ltd and Merwede Trust and a further order placing the said companies and Trust, including Mr Van der Merwe, under supervision and commencing with the business rescue proceedings in terms of s 131(1) of the Act.

[2] These are the parties in the application.

2.1 The first applicant is Ms Shanie Taljaard. A director and employee of Velvetcream 15 (Pty) Ltd (in provisional liquidation) under case number 964/2021; Project Multiply (Pty) Ltd (in provisional liquidation) under case number 963/2021; an employee and creditor of Merwede Trust (in provisional sequestration) under case number 2436/2021; an employee and creditor of Carel Aron Van der Merwe finally sequestrated by order of the Western Cape High Court on 18 March 2022 under case number 15365/2021. She is also the sole director of Curo Consultancy, the second applicant with their business address at Farm Stofbakkies, Vanwyksvlei, Northern Cape.

2.2 The first respondent is the Land and Agricultural Development Bank of South Africa (the Landbank), a statutory body established in terms of the Land and Agricultural Bank Act, 15 of 2002.

2.3 The second respondent is the Minister of Trade and Industry referred to in section 1 of the Companies Act as the member of cabinet responsible for companies and the Minister responsible for the implementation of the Act.

2.4 The third respondent is the Minister of Justice and Constitutional Development who abides the decision of the Court.

2.5 The Fourth respondent is the Companies and Intellectual Property Commission who did not file any opposing papers.

2.6. The Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Twelfth respondents are the insolvency practitioners appointed as provisional co-liquidators and provisional co-trustees.

2.7 The eleventh respondent is Catharina Susanna Van der Merwe cited as the sole remaining trustee of the Merwede Trust.

2.8 Agri South Africa (13th respondent), Master of the High Court, Kimberley (14th respondent), Master of the High Court, Cape Town (15th respondent), affected parties of Project Multiply (Pty) Ltd (16th respondent), affected parties of Velvetcream 15 (Pty) Ltd (17th respondent), affected parties of the Merwede Trust (18th respondent), affected parties of Carel Aron Van der Merwe (19th respondent) are not participating in these proceedings.

[3] The applicants in the main application are seeking the following relief in the Notice of Motion:

3.1 **Part A**: An order of intervention and joinder to the winding-up applications of Project Multiply (Pty) Ltd and Velvetcream 15 (Pty) Ltd, under case numbers 963/2021 and 964/2021, respectively, as well as orders of intervention and joinder in the sequestration application of the Merwede Trust under case number 2436/2021.

3.2 **Part B**: An order on the constitutional challenge, fundamentally on the basis that individuals and trusts fall to be placed under business rescue as envisaged in Chapter 6 of the Companies Act, 71 of 2008, and that their exclusion from the protection of business rescue is unconstitutional; and

3.3 **Part C**: orders dismissing the provisional winding-up and sequestration orders of Project Multiply, Velvetcream and Merwede Trust and an order placing the said companies and trust and Mr Carel Aron Van der Merwe under supervision and that business rescue proceedings be commenced in terms of s 131(1) of the Companies Act, 2008.

<u>Relief sought by the Landbank</u>

[4] The Landbank, in its counter-application, sought the following relief:

4.1 That the counter application be deemed urgent and heard on 5 August 2022. That due to the urgency of the application the form and services provided for in the Rules be dispensed with in terms of rule 6(12)(a);

4.2 That all forms of relief sought by the applicants, Ms Shanie Taljaard and Curo Consultancy under case number 1094/2022 (intervention and joinder, constitutional challenge, and business rescue application) be set down on 5 August 2022 and be dismissed with costs on an attorney and client scale, including the costs consequent upon the employment of two counsel;

4.3 That it be declared that the proposed [business rescue] plan, as deposed to by Ms Shanie Taljaard on 6 June 2022 and filed in support of the relief sought for business rescue under case number 1094/2022, is not achievable on reasonably objective grounds; and

4.4 Costs on the scale as between attorney and own client.

Relief sought by the provisional liquidators and trustees

[5] In the Notice of Motion in the provisional counter application, the liquidators' application, which hinged on the Landbank's counter application, are seeking the following relief:

"1. That this counter application be deemed urgent. That due to the urgency of the application the form and services provided for in the Rules be dispensed with in terms of rule 6(12)(a);

2. That the fifth, sixth and eighth respondents' powers be extended in terms of s 386(4)(a) to (i) of the Companies Act, 61 of 1973;

2.1 That the fifth, sixth and eighth respondents be granted leave in their capacities as the joint liquidators of the insolvent company to convene a commission of enquiry into the trade, dealings, affairs and property of Project Multiply (Pty) Ltd (in liquidation) in terms of the provisions of s 417, read with section 418 of the Companies Act, 61 of 1973,

and to be chaired by Judge Bertelsmann who has consented to be so appointed;

2.2 That the costs of the enquiry be borne by the insolvent estate of Project Multiply (Pty) Ltd (in liquidation), including costs of the commissioner, attorney and/or counsel and all other costs and expenses incidental to the enquiry.

3. That the fifth, seventh and ninth respondents' powers be extended in terms of s 386(4)(a) to (i) of the Companies Act, 61 of 1973;

3.1 That the fifth, seventh and ninth respondents be granted leave in their capacities as the joint liquidators of the insolvent company to convene a commission of enquiry into the trade, dealings, affairs and property of Velvetcream 15 (Pty) Ltd (in liquidation) in terms of the provisions of s 417, read with section 418 of the Companies Act, 61 of 1973, and to be chaired by Judge Bertelsmann who has consented to be so appointed;

3.2 That the costs of the enquiry be borne by the insolvent estate of Velvetcream 15 (Pty) Ltd (in liquidation), including costs of the commissioner, attorney and/or counsel and all other costs and expenses incidental to the enquiry.

4. That the provisional trustee's powers be extended in terms of s 18(3) and 73 of the Insolvency Act 24 of 1936, in order to have the powers and duties of a trustee as provided for by the Insolvency Act to bring and defend legal proceedings and to dispose of the livestock and/or other assets necessary in the administration of the insolvent estate, and to appoint legal practitioners to assist them in the investigation and/or administration of the insolvent estate.

5. That the costs of this application be costs in the administration in the winding-up of an insolvent company and the insolvent estates."

The application by TLU SA for admission as *amicus curiae*

[6] TLU SA, a national non-profit agricultural organisation, applied to be admitted as *amicus curiae* in terms of Rule 16A. Only the applicants filed their written consent to TLU's entry as *amicus*. TLU SA brought this application in the public interest and in the interests of its members.

[7] The Constitutional Court in *Ex Parte Institute for Security Studies: In Re S v Basson*[1] pronounced:

[1] 2006 (6) SA (CC) at para 7

> "*[7] In the exercise of its discretion whether or not to admit a person as an amicus this Court will have regard to the principles that govern the admission of an amicus. These principles are whether the submissions sought to be advanced are relevant to the issues before the Court, will be useful to the Court and are different from those of the other parties. As Rule 10(7) indicates, the submission should raise new contentions and 'should not repeat any matter set forth in the argument of the other parties'. It is the duty of this Court, in the exercise of its discretion, to ensure that these principles are satisfied before a person can be admitted as an amicus. Where these principles are not satisfied a person cannot be admitted as an amicus. It follows therefore that this Court is not bound to admit a person who has obtained written consent of all the parties. This Court may refuse to admit such a person where the underlying principles referred to above are not satisfied. Nor does the fact that a person was admitted as an amicus curia in the Court below matter.*"

[8] On 13 September 2022 Adv J De Vries, confirmed his appearances on behalf of TLU SA which claims to be representing approximately 6,000 farmers, of which about 70% conduct businesses as sole proprietors, their families and the workers, their families and dependants live on these farms. These statistics do not form part of this record. TLU SA maintains that the nature of the relief sought has a substantial impact on the agricultural community. Mr de Vries contended that trusts and natural persons should enjoy the protection afforded to companies under business rescue. The Court has a discretion whether the threshold for the extension of the protection is extended to farmers employing not less than five or ten employees.

[9] I have noted, however, that the main arguments by TLU SA are already covered by the applicants in their submissions, to name but a few:

9.1 That the differentiation between companies and close corporations, on the one hand, and sole proprietorships on the other, is arbitrary, not connected to any legitimate

governmental purpose, and accordingly inconsistent with section 9 of the Constitution;

9.2 The current differentiation is unintentional and came about because the Legislature gave preference to the reform of company law over insolvency law.

9.3 The existence of a lacuna in the insolvency law pertaining to the (un)availability of business rescue proceedings for a natural person and or trust.

9.4 Reliance on the affidavit by Mr Lawrence Basset, Deputy Chief State Law Adviser: Legislative Development in the Department of Justice and Constitutional Development.

[10] What is striking in the submission made on behalf of TLU SA is that the organisation is not saying that all natural persons or all farmers must be protected by the business rescue proceedings but only those that employ more than 5 or 10 people, leaving the threshold in the court's discretion. This submission begs the question, whether selective protection will not be a further perpetuation of the purported differentiation among the very community TLU SA claims to be representing.

[11] The Constitutional Court in *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others*[2] remarked:

> *"[5] The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party,* ***an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions****; and generally, these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence."*

[2] 2002 (5) SA 713 (CC) at para 5

[12] Taking cue from the principles enunciated by the Constitutional Court in *Basson*[3] and *In Re Certain Amicus Curiae Applications*[4] , the issues raised by the *amicus* are no different from those already advanced by the other parties. It is noteworthy from the papers and the explanation advanced in the affidavit of the *amicus*' attorney and the fact that Mr De Vries, applicants' junior counsel, ended up arguing the case for the *amicus* that aimed to advance the applicants' case. In any event, the *amicus* was afforded a hearing.

Landbank's counter application

[13] Following the decision of this Court in the unreported judgment by Williams J in *C Rock (Pty) v HC Van Wyk Diamonds Ltd and Others*[5] in which the Court held that business rescue applications are in their nature urgent, there is no reason to disagree with the Court's finding. I found that the business rescue and the constitutional challenge applications as well as the counter application must be heard on an urgent basis. On this score, the Landbank was partially successful in its relief because of the order confirming urgency and the date of hearing as 08 September 2022 which is much earlier than the return dates for the winding up proceedings set down for 11 to 13 October 2022. Mr Terblanche SC submitted that in order to curtail proceedings the Landbank will not seek separate orders in terms of the relief sought in the remainder of prayers 2, namely, the dismissal of the main application, and 3, due to their overlap with the main application.

[14] A lot was made of Landbank's counter application not being a counter application in a true sense; that it should have merely opposed the main application; that it should further not have set

[3]Ibid para 4

[4]Ibid para 10

[5](2355/2018A) [2018] ZANCHC 71 (7 December 2018)

the main and counter application down for 5 August 2022, and that by doing so the Landbank was abusing Court process.

[15] To this end, I refer to the seminal remarks by the Constitutional Court in *Eke v Parsons*[6] where the Court said:

> *"[39] ...Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said '(i)t is trite that the rules exist for the courts, and not the courts for the rules'.*
>
> *[40]* ***Under our constitutional dispensation the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to 'secure the inexpensive and expeditious completion of litigation and… to further the administration of justice'****. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power* ***the High Court has always been able to regulate its own proceedings*** *for a number of reasons,* ***including catering for circumstances not adequately covered by the Uniform Rules****,* ***and generally ensuring the efficient administration of the courts' judicial functions****." (Emphasis added)*

[16] On the basis of the aforesaid decision of the Constitutional Court I deemed it necessary to hear the applications expeditiously despite having been set down by the Landbank as the first respondent in the main application. It is indeed so that the arguments advanced overlapped somewhat and it would be convenient to consider the issues together.

<u>The main application</u>

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[6] 2016 (3) SA 37 (CC) at 53A -D

[17] At commencement of the argument, Mr Van Niekerk SC, counsel for the applicants, abandoned the relief sought under Part A, that of intervention and joinder of the applicants to the liquidation and sequestration proceedings and only argued the relief under Parts B and C.

[18] Part B has to do with the constitutional challenge and Part C with business rescue. The applicants base their constitutional challenge on the provisions of s 9(1) of the Constitution[7] which guarantees equality of everyone before the law and the right to equal protection and benefit of the law. It is on this basis that the applicants urge this Court to declare s 1 (the definition of a company) and Chapter 6 of the Companies Act unconstitutional.

[19] **PART B – CONSTITUTIONAL CHALLENGE**

Under this head, the applicants are seeking an order to this effect:

19.1 Declaring that the differentiation brought about by the adoption of Chapter 6 of the Companies Act in the applicability of business rescue proceedings between companies and close corporations, on the one hand, sole proprietorships and natural persons and trusts, on the other, is arbitrary, contrary to section 9(1) of the Constitution and invalid.

19.2 Declaring section 1 of the Companies Act 71 of 2008 (the Act) as unconstitutional in that it unfairly discriminates between:

19.2.1 juristic persons which are trusts, on the one hand and juristic persons such as companies and close corporations, on the other, as there is no justification for the omission of a trust from business rescue proceedings, in circumstances where the trust is in a subsidiary relationship to a company or companies and that company or any

[7] The Constitution of the Republic of South Africa Act, 108 of 1996 as amended

one or more of those companies have commenced business rescue proceedings.

19.2.2 natural persons, on the one hand and juristic persons such as companies and close corporations, on the other hand, as there is no justification for the omission of a natural person from business rescue proceedings, in circumstances where the natural person is in an inter-related subsidiary relationship to a company or companies and that company or any or more of those companies have commenced business rescue proceedings.

19.3 Suspending the declarations made in paragraph 1 and 2 above for a period of two years for Parliament to correct the defect.

19.4 Directing that until such time as Parliament corrects the defects, an extension of the definition of "companies" in the section 1 of the Companies Act, is granted, by a reading-in of the following subsection immediately after subsection (c) thereof:

"*or (d) for purposes of the application of Chapter 6 of the Act, a trust and/or natural person which are/is in an inter-related and subsidiary relationship with a company or companies, but only in so far as that company or any or more of those companies have commenced business rescue proceedings, and will the "trustees of the trust" have a similar meaning to "board of a company" and will such a natural person be equated to a "board of a company.""*

PART C – BUSINESS RESCUE

19.5 An order dismissing the winding-up and sequestration applications of Project Multiply, Velvetcream and Merwede Trust.

19.6 An order placing Project Multiply, Velvetcream, Merwede Trust and Van der Merwe under supervision and that business rescue proceedings be commenced in terms of s

131 (1) of the Companies Act 71 of 2008 (the Companies Act);

19.7 An order appointing Jacques du Toit and a business rescue practitioner nominated by Landbank, as joint business rescue practitioners to conduct the business of Project Multiply, Velvetcream, Merwede Trust and Van der Merwe with all powers and duties entrusted to them in terms of the Companies Act.

The background

[20] The two companies, Project Multiply and Velvetcream, the Merwede Trust and Carel Aron Van der Merwe operate as a "group" under the name "Merwede Farming". They describe their farming operation as 'a unique South African large-scale sheep farming' on approximately 75,000 hectares in the Karoo and 2,200 hectares in the Mahikeng district, Northwest Province. They farm in the Boesmanlander, South African bred sheep. The group was financed by the Landbank.

[21] The group experienced financial distress which was exacerbated by elements like drought over a period of seven years in the Northern Cape and the Covid-19 pandemic. The profitability and cash flow of their farming operations was affected. The Northern Cape was declared a disaster area. The capital injection by government of two instalment of R3,000.00 and R9,000.00 per farmer was inadequate to address the relief needed. They continued to suffer from lower revenues and increased revenue costs, resultantly struggling to pay the creditors.

[22] The boards of both companies, Project Multiply and Velvetcream, took a resolution to commence business rescue on 20 January 2021. Mr Carel Van der Merwe completed and signed the notice of appointment of Business Rescue Practitioner (BRP) known as CoR123.2 forms, appointing Mr Jacques du Toit as the business

rescue practitioner. Operating expenses were downscaled to R250,000.00 per month and the expenses were carried from the Post Commencement finance concluded between Ronnie van der Merwe Trust represented by Mr Ronnie van der Merwe as its trustee and Project Multiply represented by Mr Jacques du Toit, the business rescue practitioner (BRP). The total amount of the loan was R600,000.00 repayable by 20 January 2023 or upon cancellation of the agreement. The BRP convened the first meeting of creditors and employees on 1 and 2 February 2021. The business rescue plans for the two companies dated 21 February 2021 were published on 24 February 2021.

[23] The second meeting of creditors for both Project Multiply and Velvetcream was held on Monday, 8 March 2021 in order to vote for the adoption or rejection of the business rescue plans. Section 152(2) requires 75% of the creditors' voting interest to vote in favour of the business rescue. The Landbank, being the holder of 95.54% of the voting rights for Project Multiply and 99.78% for Velvetcream, therefore being the majority creditor, voted against the adoption of the business rescue plans which led to their rejection.

[24] The BRP informed those present at the meeting that he would be approaching the Court in terms of s 153(1)(a)(ii) of the Act[8] for the Court to set aside the Landbank's vote as inappropriate. The BRP, Mr Jacques du Toit, on behalf of Project Multiply and Velvetcream, Mr Carel Aron van der Merwe and the trustees of the Merwede Trust brought an application in terms of s 153(1)(a)(ii) of the Act on 19 April 2021 simultaneously raising the same constitutional issues in the current application under case number 758/2021. The

[8] 153. Failure to adopt business rescue plan-
(1)(a) If a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may –
(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

Landbank opposed this application and also launched liquidation applications against Project Multiply and Velvetcream under case numbers 963/2021 and 964/2021 and the sequestration of Merwede Trust, an application initially launched in the North west High Court under case number M557/2021 and subsequently transferred to this Court.

[25] On 29 October 2021, this Court, having heard Adv Tsangarakis for Landbank and Adv. De Vries for Jacques du Toit N.O., Velvetcream, Project Multiply, Carel Aron van der Merwe and the affected parties, made the following orders by agreement:

1. The matters issued under case number 758/2021, 963/2021, and 964/2021 issued out of this Court are hereby consolidated.
2. The consolidated matters are all postponed for hearing on 9 to 13 May 2022.
3. The Land and Agricultural Development Bank of South Africa records that they will not oppose the application for transfer of the matter issued in the Mahikeng High Court under case number M557/2021, which application has been set down for 11 November 2021 if so transferred that application will be heard together with the consolidated application.
4. All respondents to file their answering affidavit on or before 20 January 2022.
5. All applicants to file their replying affidavit on or before 20 March 2022.
6. All applicants to file heads of argument by 11 April 2022.
7. All respondents to file heads of argument by 25 April 2022.
8. Costs to stand over for later determination.

[26] In the meantime, an application for the sequestration of Carel Aron van der Merwe was heard in the Western Cape High Court under case number 15365/2021. Despite the applicants stating that Van der Merwe’s oversight was the reason for not bringing the

sequestration application to the attention of his legal representative, his insistence to have the application transferred to the Northern Cape failed. Mangcu-Lockwood J granted the provisional sequestration order on 15 October 2021 returnable on 16 November 2021. Mr van der Merwe filed an affidavit, spanning 122 paragraphs and 133 pages, serving a dual purpose: a provisional answering affidavit for the sequestration application and a founding affidavit in support of the application for transfer of the matter to the Northern Cape Division in terms of s 27(1)(b) of the Superior Courts Act[9]. He failed to oppose the provisional sequestration order. Le Grange J granted the final sequestration order against him on 18 March 2022. I will revert to the Le Grange judgment later.

[27] On 10 May 2022, despite this Court's order postponing the applications by agreement granted on 29 October 2021 with a timetable for the further exchange of pleadings, the applicants not only failed to file their lengthy replying affidavit by 20 March 2022 but the affidavit also introduced significant new material. The applicants brought a condonation application for the late filing of the replying affidavit which was refused. They further brought an intervention application which was also refused. The applicants sought an adjournment of the matter. Shortly thereafter, the parties approached me in chambers with four orders by agreement. In 963/21 and 964/21 granting the Landbank leave in terms of s 133(1)(b) of the Companies Act to proceed with relief sought prayers 2, 3 and 4, quoted in relevant part:

> *"2 The voluntary resolution, adopted by the board of the second respondent (each company under its own case number, Project Multiply (Pty) Ltd and Velvetcream 15 (Pty) Ltd) on 20 January 2021 commencing business rescue proceedings of the second respondent and placing the second respondent under business rescue, is declared a*

[9] 10 of 2013

nullity and is hereby set aside in accordance with the provisions of s 130(1)(a)(ii) and/or (iii) of the Act.

3. *The business rescue proceedings of the second respondent be and is hereby terminated.*
4. *The second respondent is placed under provisional liquidation in the hands of the Master of the Northern Cape High Court, Kimberley."*[10]

[28] The estate of the Merwede Trust (IT1534/98) has been placed under provisional sequestration in the hands of the Master of the Northern Cape High Court, Kimberley. The return date for these provisional orders is 11 October 2022. The business rescue practitioner, Mr Jacques du Toit withdrew his application in which he sought that this Court declare the vote by the Landbank inappropriate. The Landbank holds security over fixed property of the Group by virtue of special mortgage bonds registered in favour of Unigro Financial Services (Pty) Ltd which bonds have been ceded to the Landbank. In addition to the aforesaid security there are suretyships signed in favour of the bank as well as a cession of all proceeds of agricultural products produced by the two companies, Project Multiply and Velvetcream, and/or produce to be produced by these two companies and other members of the group in future.

[29] With the above synopsis in mind, the relief sought by the applicants in the present application, Ms Shanie Taljaard and Curo Consultancy (Pty) Ltd, is that the protection mechanism created by Chapter 6 of the Companies Act 71 of 2008 be made available to trusts and natural persons. They further contend that s 1 of the Companies Act is unconstitutional in that it unfairly discriminates against companies and close corporations on the one hand and trusts and sole proprietors or natural persons on the other. Section 9(1) of the Constitution provides:

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

[10] See JDT1 and JDT 2 at pages 169 -174 of bundle 2

[30] The South African Constitution is an egalitarian Constitution premised on addressing the injustices of the past. The achievement of equality is one of the founding values of the Republic of South Africa. The constitutional court in *President of the Republic of South Africa v Hugo*[11] recognised that injustices of the past have led to inequalities and that these inequalities cannot be addressed by treating all persons equally at all times.

[31] The Constitution enjoins the courts in constitutional matters to exercise the following powers in terms of s 172:

> *"(1) When deciding a constitutional matter within its power, a court –*
> *(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and*
> *(b) may make any order that is just and equitable, including –*
> *(i) an order limiting the retrospective effect of the declaration of invalidity; and*
> *(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."*

Moseneke DCJ in *Mazibuko N.O. v Sisulu N.O*.[12] held that there can be no merit in delaying a challenge to the constitutional validity of a statute on the basis of the purported imminence of reforming legislation. Therefore, should I find that the applicants have made out a case for constitutional invalidity, it will be perfectly in order to make the declaration.

[32] According to Mr Van Niekerk, for the applicants, the differentiation between companies and close corporations on the one hand and between sole proprietors, individuals and trusts on the other has no

[11] 1997 (6) BCLR 708 (CC)

[12] [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at paras 70 - 71

rational basis. He referred to the affidavit by Mr Lawrence Basset, Deputy State Law Advisor: Legislative Development in the Department of Justice and Constitutional Development, filed in an unreported case of *Oosthuizen Development Group (Pty) Ltd and Others v The Minister of Trade and Industry and Others*[13]. He deposed to the said affidavit as head of the unit responsible for the review and development of statutes for which the Minister of Justice and Constitutional Development, who was not before Court, is administratively responsible. The applicants contend that the differentiation in Chapter 6, though unintended, came about as a result of the legislature giving preference to reforming the company law as opposed to the insolvency law in general. To determine whether the challenge in terms of s 9(1) is correct, it is necessary to consider the proper approach to be taken when applying the section.

[33] The Constitutional Court in *Prinsloo v Van der Linde*[14] held:

> *"[17] If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s 33, or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. As Hogg puts it:*
> *'What is meant by a guarantee of equality? It cannot mean that the law must treat everyone equally. The Criminal Code imposes punishments on persons convicted of criminal offences; no similar burdens are imposed on the innocent. Education Acts require children to attend school; no similar obligation is imposed on adults. Manufacturers of food and drugs are subject to more stringent regulations than the manufacturers of automobile parts. The legal profession is regulated differently from the accounting profession. The Wills Act prescribes a different distribution of the property of a person who dies leaving a will from that of a person who dies leaving no will. The Income Tax Act*

[13] Case No 4781/2014; 1948/2014;1389/2013; 13818/2013; 13817/2013; 15968/2013;15969/2013 marked "JDT44" page 1166 of the record

[14] 1997 (6) BCLR 759 (CC) at para 17

imposes a higher rate of tax on those with high incomes than on those with low incomes.
The Courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, ***it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory 'in the constitutional sense'****. (*Emphasis added)

The Concourt further said[15]:

"[25] It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes "a bridge away from a culture of authority…. to a culture of justification.""

[34] The submission by counsel for the applicants is not to remove the protection afforded to companies and close corporations but to suspend it and to order a read-in for the interim period by extending the protection afforded by business rescue provisions to natural persons and trusts. The applicants' contention is that in the absence of this protection s9(1) of the Constitution is infringed. Although the applicants are aware that it is the duty of the legislature to make or change legislation, and that the process to do so was initiated some eight years ago through the consolidated draft Insolvency Bill, there is no reason why this Court should not make the appropriate order to declare the lacuna created by this situation unconstitutional.

[15] At para 25

[35] The first enquiry must be directed at the question whether the impugned provision, in this instance section 1 and Chapter 6 of the Companies Act, differentiates between people or categories of people. If they do differentiate, then in order not to offend s 9(1) of the Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of s 9(1).

[36] If, however, the differentiation complained of by the applicants bears no rational connection to a legitimate governmental purpose, which is proferred to validate it, then the impugned provisions violate the provisions of s 9(1) of the Constitution. If there is such a rational connection, then it becomes necessary to proceed to s 9(2) to determine whether, despite such rationality, the differentiation none the less amounts to unfair discrimination.

[37] In *"Harksen v Lane NO and Others*[16]*,* the Constitutional Court tabulated the stages of an enquiry into a violation of the equality clause along the following lines:

> *"(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
> *(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*
> *(i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental*

[16] 1998 (1) SA 300 CC

human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) Secondly, if the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 9(3) and (4).

(c) If the discrimination if found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause."[17]

[38] In the relief sought the applicants, neither sought an order setting aside the sequestration against Mr Carel Aron Van der Merwe's estate granted in the Western Cape High Court, who is finally sequestrated, nor attacked the Insolvency Act 24 of 1936 except the remarks by counsel that it predates our democracy. The effect is that that order stands. Even if Mr Van der Merwe may have noted an appeal with the Supreme Court of Appeal, argued Mr Terblanche, s 150(3) of the Insolvency Act is applicable to him. The section provides:

"(3) When an appeal has been noted (whether under this section) or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned."

[39] Meskin[18] explains that although corporate rescue is categorised as an insolvency procedure in most jurisdictions, a policy decision was made to promulgate the new business rescue procedure as part of the Companies Act 2008, and not to include it in a unified insolvency statute. The business rescue procedure has been

[17] See Bill of Rights Handbook Iain Currie & Johan de Waal Sixth Edition Juta

[18] Insolvency Law and its operation in winding-up, service 52, LexisNexis, issue 39, 18-1

designed to prevent the demise, through winding-up of viable companies by making provision for their possible rescue. If a plan cannot be devised to rescue the company under the provisions of Chapter 6, the alternative would be a plan that achieves a better return for the company's creditors than what would ensue pursuant to the company's winding-up. If none of the objectives set by Chapter 6 is achieved, the company may be wound up.[19]

[40] It is clear that what Meskin wrote supports what was deposed to by Basset[20] when he said:

"*5.2.4 A consolidated draft Insolvency Bill was submitted and approved by National Cabinet in 2003. However, during this period the Companies Act 1973, was also subject to a review process. It became apparent that the review of the Companies Act would have an enormous impact on the law of insolvency and the review thereof. It was therefore not expedient or prudent to continue with the promotion of the Insolvency Bill at that stage. The review culminated in the Companies Act 71 of 2008.*

5.2.5 After the promulgation of the new Companies Act, the draft Insolvency Bill was adapted to incorporate in it aspects of, and to align it with, the New Companies Act. However, the adapted draft Insolvency Bill has not been submitted to the Minister and Cabinet for consideration and approval yet. Due to the fact that [the] Bill is still in progress and has no legislative status yet,…"

[41] The aim of business rescue is to allow for the supervision of a distressed company by the business rescue practitioner with the objective of either rescuing the company and allowing it to trade out of its financial predicament or offering creditors a better dividend than would otherwise be achieved by way of liquidation[21].

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[19] Dr Eric Levenstein, *South African Business Rescue Procedure*, Issue 5, LexisNexis, 7-1

[20] Paras 5.2.4 and 5.2.5 at p 1177

[21] See Rushworth ' A critical analysis of business rescue regime in the Companies Act 71 of 2008' 375. For an overview of the objectives of the business rescue process, see A Nwafor ' Exploring the goal of

Chapter 6 of the Companies Act was designed to prevent the demise, through winding-up, of viable companies by making provision for their possible rescue. If the developed plan cannot rescue the company then it must provide for a better return for the company's creditors than what would pursuant to the company's winding-up[22].

[42] Dr Eric Levenstein[23] wrote:

"One of the major themes of the 2008 Companies Act is the creation of a system of 'corporate rescue' appropriate to the needs of a modern South African economy. This theme is amplified in section 7(k) of the Act which confirms that one of the purposes of the 2008 Companies Act is to 'provide for efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all the relevant stakeholders."

[43] Levenstein explains further that "by 'rescue' is meant the reorganisation of the company to restore it to profitability and avoid liquidation."

[44] The definition of business rescue is contained in s 128(1)(b) of the 2008 Companies Act:

"Business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(i) The temporary supervision of the company, and of the management of its affairs, business and property;

(ii) A temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) The development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company….. ".

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business rescue through the lens of the South African Companies Act 71 of 2009' 597 – 613.

[22] Meskin Insolvency *Law and its Operations in Winding up 18-1*

[23] South African Business Rescue Procedure, LexisNexis, Issue 5, November 2021.

[45] The rationale behind the 2008 Act, more particularly, Chapter 6 thereof is to make it easier for companies in financial difficulties to be rescued to avoid the winding-up processes. If companies are rescued, liquidation is avoided, jobs are saved, economic resources are not wasted and the revenue service is paid.

[46] In *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others*[24] the SCA held:

> *"'business rescue' means to facilitate 'rehabilitation', which in turn means the achievement of one of two goals: (a) to return the company to solvency, or (b) to provide a better deal for creditors and shareholders than what they would receive through liquidation. This construction would also coincide with the reference in s 128(1)(h) to the achievement of the goals set out in s 128(1)(b). It follows, as I see it, that the achievement of any one of the two goals referred to in s 128(1)(b) would qualify as 'business rescue' in terms of s 131(4)."*

[47] In an article by Annelie Loubser titled *"Business rescue in South Africa: a procedure in search of a home?"*[25] A comparison is made between the different jurisdictions internationally on where business rescue is housed in the pieces of legislation. The South African company law is taken from the English law.[26]

[48] In England, the Insolvency Act 1985 (c65) that regulated individual insolvency, and those provisions of the Companies Act 1985 (c6) that dealt with corporate insolvency, including corporate rescues, were consolidated in the Insolvency Act 1986 as from 29 December 1986. This gave effect to the recommendation of the Cork Report that one consolidated Act should regulate insolvency procedures

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[24] [2013] 3 All SA 303 (SCA); 2013 (4) SA 539 (SCA) at para 26

[25] BA (Law) LLB (UP): LLM (Corporate Law) (UNISA): Attorney, Notary and Conveyancer of the High Court of South Africa: Associate Professor: School of Law, University of South Africa.

[26] HS Cilliers, ML Benade, JJ Henning, JJ du Plessis, PA Delport, L de Koker & JT Pretorius *Corporate Law (3ed 2000) par 2.06*

relating to both individual and corporate debtors. In spite of this consolidation, the traditional distinction between corporate and individual insolvency in English law has endured. As a result, the two business rescue procedures in English law, namely administration and company voluntary arrangements, although regulated in the Insolvency Act 1986, both apply only to companies.[27]

[49] The German Insolvezordnung (which came into effect on 1 January 1999 and replaced both the previous Bankruptcy Act (Konkursordnung) of 1877 and the Composition Act (Vergleichsordnung) of 1935) is the only one of the listed examples that contains an almost integrated system. The Act provides for one insolvency procedure that is initiated by an application to court and may lead to either reorganisation or liquidation or a combination of both, depending on the plan approved by the creditors. The procedure thus contains no bias or built-in preference for either rescue or liquidation. Furthermore, the procedure applies to the estate of any natural or legal person that is engaged in business. Because of this wide application of the procedure, the Act places very few restrictions on the reorganisation plan that the debtor or administrator may submit for approval to the creditors and the court.[28]

[50] The Australian approach is probably the closest to the present situation in South Africa because the provisions regulating corporate insolvency and rescue in Australia are found in the Corporations Act (Cth) 50 of 2001 that regulates company law in general. The provisions relating to the Australian corporate rescue procedure of voluntary administration are found in Part 5.3A of the Corporations Act 2001 and apply only to companies incorporated or taken to be incorporated under the Act.

[27] Ibid at 163

[28] Ibid at 166

Compulsory liquidation in terms of the Act applies not only to companies but also to certain other bodies under certain specified circumstances. Included in this group is a partnership, association, or other body (whether a body corporate or not) that consists of more than five members.

The Australian Law Reform Commission that had been instructed in 1983 to review Australian personal and corporate insolvency law specifically stated in the report that it did not regard unification of insolvency law to be of major significance and consequently the issue was not addressed further.[29]

[51] The observation by Loubser regarding the similarity in South Africa and Australia is shared by Eloff AJ in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* as follows:

> *"[2] Like its Australian equivalent, one of the aims of the remedy is to render it possible for companies in financial difficulty to avoid winding-up and to be restored to commercial viability. Both jurisdictions recognise the desirability of a company in distress to continue in existence. Business rescue does, however, not necessarily entail a complete recovery of the company in the sense that, after the procedure, the company will have regained its solvency, its business will have been restored and its creditors paid. There is also the further recognition that even though the company may not continue in existence, better returns may be gained by adopting the rescue procedure.*
>
> *[3] The scheme created by the business rescue provisions in Ch 6 of the new Act envisages that the company in financial distress will be afforded an essential breathing space while a business rescue plan is implemented by a business rescue practitioner. It is, however, necessary to caution against the possible abuse of the business rescue procedure, for instance, by rendering the company temporarily immune to actions by creditors so as to enable the directors or other stakeholders to pursue their own ends. The courts in Australia have been careful not to allow their equivalent*

[29] See General Insolvency Inquiry 1988 (ALRC 45) generally known as the Harmer Report after Ronald Harmer, the Commissioner in charge of the inquiry.

procedure to be used where there appears to be an ulterior purpose behind the appointment of an administrator by the directors. It is necessary that an application for business rescue be carefully scrutinised so as to ensure that it entails a genuine attempt to achieve the aims of the statutory remedy. The instant case is one where such attempt was not discernible from the affidavits filed of record."

[52] In her article *"Defining the unincorporated business in financial distress: Should it be treated as a business or as a consumer?* Loubser[30] explains some of the reasons for and implications of debtors in insolvency law and the difficulties in finding the appropriate classification system for small unincorporated businesses, particularly sole proprietorships. Loubser moves from the premise that there is a difference in respect of cause and effect when dealing with an insolvent individual or consumer on the one hand and a business on the other. When dealing with an insolvent consumer some of the considerations made pertain to the effects of the insolvency on the consumer's legal status, whether assets should be excluded from the insolvent estate, the discharge of some debts and eventually, his or her rehabilitation.

[53] Whereas, with a company the considerations are different. The number of interested parties may be substantially larger, there may be a detrimental effect on its employees, investors, suppliers and if it is a major company, socio-economic effects on the broader society within which it is operating. This explains the reason for business rescue as one of the options preceding liquidation in ailing businesses. Another distinction is that bigger businesses are usually incorporated whereas the high unemployment rate has produced millions of individual traders or sole proprietorships unfamiliar with the concept of incorporation.

[30] Anneli Loubser, University of South Africa, the analysis is based on a paper she delivered at the 11th International Conference on Common Law, held on 11 -13 April 2007 in Cape Town. 2007 SA Merc LJ 444.

[54] The current South African situation is that a debtor who is a juristic person will be a company or close corporation. Other business forms are: partnerships, business trusts and sole proprietorships which do not enjoy a legal personality. Of significance is that the Companies Act prohibits partnerships and business trusts from acquiring a legal personality. Section 31 of the Companies Act, 1973, stipulates that an association of persons formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or by the individual members thereof, will not be recognised as a body corporate, unless it is registered as a company under this Act or any other Act. The insolvency of the associations and individuals is regulated by the Insolvency Act, 24 of 1936.

[55] In this article, Loubser compares jurisdictions like the United States of America (USA), Belgium, Germany and England and concludes that the problem of dealing with smaller businesses in distress is not unique to South Africa. In the USA, despite that their procedure is available to all businesses despite form and size, their Chapter 11 reorganisation is regarded as a model rescue procedure. It was criticized however, for delays, high costs and high failure rate. The Bankruptcy Review Commission recommended three measures to address problems experienced in small-business cases which were subsequently adopted by the Congress, namely (i) improving oversight of the debtor by requiring the filing of detailed financial statements and through monitoring of the debtor's progress by the United States Trustee; (ii) reducing delays by allowing the debtor only 90 days in which to file his plan; and (iii) cutting costs by the use of standardised plans and disclosure statements. See the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub L No 109-8, 119 Stat 23) introduced the amending provisions into the Bankruptcy Code under the subtitle of 'Small Business Provisions' (see Carlson & Hayes op cit at 649). There is also Chapter 13 of the Bankruptcy

Code which also offers the option of rehabilitation rather than liquidation for small businesses. It is, however, limited to sole proprietorships.

[56] Loubser observed that although voluntary administration was designed to be less expensive and onerous than other business rescue procedures, it is only available to companies. Contrasting this position with the compulsory liquidation in terms of the Australian Corporation Act which can sometimes apply to partnerships, associations or other bodies.

[57] In Belgium Loubser records that the business rescue procedure is contained in its own dedicated statute known as the Judicial Composition Act (Wrt betreffende het Gerechtelijk Akkoord) of 17 July 1997 applicable to all traders irrespective of whether they are natural or juristic persons. An individual trader is defined in s 1 of the Belgian Commercial Code as any person whose main or supplementary profession is the performance of commercial acts. The Act gives the debtors flexibility which some critics contend may be the reason for the unsuccessful procedure in reducing the number of insolvency cases.

[58] The German Insolvency Code of 5 October 1994 (the *Insolvenzordnung*, commonly referred to as 'InsO': see generally Axel Flessner 'National Report for Germany' in: WW McBryde, A Flessner & SCJJ Kortmann (eds) *Principles of European Insolvency Law (2003) at 313)* came into force on 1 January 1999 and regulates all debtors. There is a clear distinction between business debtors and consumers. Although there is flexibility and non-prescriptive procedures for business rescues, an insolvency plan is used only in exceptional cases.

[59] Loubser confirms that the closest resemblance to the South African insolvency system in as far as classification of debtors is concerned

is the England system. In England, the Insolvency Act, 1986 (c45) though regulating all debtors, has separate parts regulating corporate debtors and individual debtors. The Act is divided into three main parts: (i) company insolvency and winding up; (ii) regulates only the insolvency of individuals and (iii) contains general provisions applicable to both companies and individual insolvencies. Their Insolvency Act makes provision for two business rescue procedures.

[60] Loubser makes a sensible conclusion which I tend to agree with. Until the Legislative Arm of Government designs a simple, affordable and effective business rescue procedure for the unincorporated businesses, including sole proprietorship, it is safer and more pragmatic to retain the division between juristic and natural persons. The unincorporated business retains the position of being treated as a consumer in the South African insolvency law. There can never be a one-size-fits-all solution for business insolvencies. The absence of a one-size-fits-all solution does not translate into any form of inequality. It is clear from the consideration of other jurisdictions that variations and special provisions were still required for small businesses.

[61] The applicants attack s 1, more particularly the definition of ‘company’ and Chapter 6, particularly the protection afforded by business rescue. In terms of s1 “company” means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date –

(a) was registered in terms of the –

(i) Companies Act, 1973 9Act No. 61 of 1973), other than as an external company as defined in that Act; or

(ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;

(b) was in existence and recognised as an “existing company” in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act;

[Definition of “*company*” amended by s 1 (1)(g) of Act No. 3 of 2011. (g) by the substitution in the definition of "company" of the words preceding paragraph (a) of the following words:

"'*company*' means a juristic person incorporated in terms of this Act, domesticated company, or a juristic person that, immediately before the effective date-"].

[62] The question that has to follow is whether it would be arbitrary or capricious not to extend the provisions of s 1 (the definition of a company) and Chapter 6 of the Companies Act to natural persons or Trusts in the light of the circumstances which, according to the applicants, are relevant?

[63] The applicants’ contention moves from the premise that both the Merwede Trust and Van der Merwe are part of the business group which includes Project Multiply and Velvetcream jointly conducting business under name Merwede Farming. The group shared employees, movable assets and managers as one interrelated group. Counsel submitted that if this Court accepts that there is inequality between juristic persons and natural persons for purposes of business rescue, then a situation arises where assets that falls under the estate of Van der Merwe or the Trust could be taken into account when considering a business plan to resuscitate the group as a whole. This purported differentiation and lack of protection for some forms of the business renders chapter 6 incapable of achieving its objectives, so the argument went. In the scenario where the companies are considered separately from individuals and trusts, they are deprived of the assets and business

trading stock which would otherwise be available if the entire group is afforded the protection of the rescue.

[64] Mr Van Niekerk invoked *Van der Merwe v RAF and Another (Amicus Curiae Women's Legal Centre Trust)*[31] to support the applicants' contention of inequality. This case does not help the applicants because it dealt with the constitutional validity of the legislative provisions concerning patrimonial arrangements between spouses married in community of property and of profit and loss. The provisions regulate the right of a spouse married in community of property to recover delictual patrimonial damages from her husband who had run her over with his motor vehicle causing her bodily injuries. The Constitutional Court found the provisions unjustifiably intrusive upon the dignity and non-discrimination guarantees that the Constitution affords everyone. The facts are clearly distinguishable from this case involving a natural person, a trust and two companies under very different circumstances.

[65] Mr Van Niekerk submitted that the differences between Trusts and companies do not explain why the one business should qualify for business rescue while the other does not. Counsel submitted that the legislative scheme is clearly inconsistent with s 9(1) of the Constitution and cannot be justified under s 36 of the Constitution.

[66] Moseneke DCJ cautioned in *National Treasury v Opposition to Urban Tolling Alliance*[32]*:*

> *"[44] ...Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of*

[31] 2006(4) SA 230 (CC); 2006 BCLR 682 (CC)

[32] 2012 (6) SA 223 (CC) at para 44

> *government unless the intrusion is mandated by the Constitution itself."*
>
> Also see *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 25 and *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) at paras 18 and 43.

[67] This Court is empowered by s 173 of the Constitution to protect and regulate its own process and develop the common law, taking into account the interests of justice.

[68] As alluded to earlier, the objective of chapter 6 was to circumvent winding-up of companies. It is true that the draft Insolvency Bill was also adopted by Cabinet. There is no evidence, however, of precisely when the required processes relating to the said Insolvency Bill will be embarked upon and seen to fruition. The applicants have not established, outside their own situation, that is other than the Merwede Farming, that the exclusion of natural persons and trusts denied many natural persons and trusts their right to protection under chapter 6 thereby challenging its constitutionality. As argued by Mr Terblanche, there is legislation regulating each separate entity including the different protections during financial hardships. Some of the relevant legislation under these circumstances is the National Credit Act[33] and its amendment[34], Trust Property Control Act[35], Income Tax Act[36] and the Insolvency Act[37], among others, read with all the amendments.

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[33] 34 of 2005

[34] 19 of 2014

[35] 57 of 1988

[36] 34 of 1953

[37] 24 of 1936

[68] I foreshadowed earlier to return to the sequestration judgment by Le Grange J granted on 18 March 2022 against Mr Carel Aron van der Merwe. It records that Van der Merwe is factually insolvent to the tune of R80 million. The following remarks at para 14 are apposite:

> *"[14] According to Van der Merwe, he is currently the controlling mind of the companies and the Merwede Trust. All these entities, are part of the group structure in business rescue and each relies on the others successful operation and or compliance. Van der Merwe firmly believes that if one fails, all will fail. Moreover, his estate had been incorporated in the business rescue plans due to his involvement in the group and his capabilities to restore it to the position it was before becoming financially distressed."*

[69] Both companies are provisionally liquidated while the trust is provisionally sequestrated. Van der Merwe is finally sequestrated as he was factually insolvent. For the parties to allege differentiation and demand to be protected under business rescue, changing what ought to involve legislative processes and public consultation is to me self-serving and promotes an ulterior motive. Even if there may be a need to review the insolvency law and to bring it on par with the rest of the global jurisdictions, this is not the way to go about it.

[70] Of significance is that the Landbank holding a 95% vote as a major creditor has voted against the business rescue plan and has made it clear that it will vote against the envisaged and proposed plan again. The SCA made these remarks in *Oakdene*[38]

> *"[38] If the statement is intended to convey that the declared intent to oppose by the majority creditors should in principle be ignored in considering business rescue, I do not agree. As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be*

[38] Ibid at para 38

said to be unreasonable or mala fide. By virtue of s 132(2)(c)(i) read with s 152 of the Act, rejection of the proposed rescue plan by the majority of creditors will normally sound the death knell of the proceedings. It is true that such rejection can be revisited by the court in terms of s 153. But that, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable.
In these circumstances I do not believe that the court a quo can be criticised for having regard to the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants."

[71] The purpose of Chapter 6 has been explained. In my view, the discrimination alleged is not based on any specified ground or on any grounds analogous to them. What to me seems very conspicuous is that the applicants are trying to enforce the "equality clause and equal protection of the law" under the umbrella of business rescue for companies to extend the protection to the already sequestrated Van der Merwe and the Merwede Trust. The exclusion of Van der Merwe and Merwede Trust does not amount to discrimination. It does not imply that natural persons and trusts do not have their own separate but adequate pieces of legislation that protect them when experiencing financial difficulties. As stated by the Constitutional Court in *Prinsloo* every statute or regulation employs classifications of one kind or another for the imposition of burdens or the grant of benefits. Laws never provide the same treatment for everyone.

[72] Even if it were to be found that the exclusion of Van der Merwe and Merwede Trust amounted to discrimination, that discrimination may be justifiable under s 36 of the Constitution, the limitation clause. The legislature has already initiated this process of reviewing the insolvency legislation and the Court cannot be usurping their sphere to legislate. Nevertheless, I find that there is a rational connection between the differentiation and a legitimate government purpose.
In my view, the differentiation is not arbitrary.

The attitude of the Minister of Trade and Industry (the Minister)

[73] In opposing the application for the granting of the relief sought in the constitutional challenge, more particularly, the extension of the definition of s 1 of the Companies Act to include natural persons and trusts, Mr Coetzee SC, appearing for the Minister, invoked *Harksen v Lane N.O. and Others*[39] on the applicable test to be followed in determining whether the differentiation amounts to unfair discrimination. In his opposition counsel submitted that this would be open to abuse, but aligned himself with the submissions made by Mr Terblanche appearing for the Landbank.

[74] The applicants advanced an argument based on the alleged breach of s 9(1) of the Constitution. However, it is clear from what appears in this judgment that although Chapter 6 may be said to differentiate between the different categories of people, there is a rational connection between the measure and the legitimate government purpose to facilitate business rescue for companies. No discrimination or unfairness has been established.

It therefore follows that the attack on the constitutionality of s 1 and Chapter 6 fails.

Business rescue application

[75] The relief sought by the applicants under this head is an order dismissing the winding-up and sequestration applications of Project Multiply, Velvetcream, Merwede Trust and van der Merwe; an order placing them under supervision and that business rescue proceedings be commenced with in terms of s 131(1) of the Companies Act; an order appointing Jacques du Toit and a business rescue practitioner nominated by Landbank as joint business rescue practitioners to conduct the business of Project Multiply,

[39] **Supra**, 1998 (1) SA 300 (CC)

Velvetcream, Merwede Trust and Van der Merwe with all powers and duties entrusted to them in terms of the Companies Act. I accept that each entity in the group applied separately for its own credit.

[76] As stated, Van der Merwe has already been finally sequestrated due to his factual insolvency. The insolvency laws are applicable to him. His estate is placed in the hands of the Master of the High Court in the Western Cape. The Master has appointed provisional trustees, Jochen Eckhoff N.O., Deon Marius Botha N.O., and Philemon Tatenda Mawire N.O., for the administration of his estate.

[77] Project Multiply and Velvetcream are both placed under provisional liquidation in the hands of the Master who appointed Deon Marius Botha N.O., Jochen Eckhoff N.O. and Fusi Patrick Rampoporo for Project Multiply and Jochen Eckhoff N.O., Johannes Zacharius Human Muller N.O. and Simon Malebo Rampoporo N.O. for Velvetcream. Jochen Eckhoff N.O., Johannes Zacharius Human Muller N.O. and Angelene Poole are appointed co-provisional trustees of the Merwede Trust.

[78] Section 5(1) of the Companies Act states that the Act must be interpreted and applied in a manner that gives effect to the purpose set out in s 7. Section 7(d) reaffirms the concept of the company as a means of achieving economic and social benefits while section 7(k) provides for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. The mere fact that the company is commercially or factually insolvent is no bar to be considered for business rescue.

[79] The board of the company may initiate business rescue proceedings if it has reasonable grounds for believing that the company is financially distressed and there appears to be a

reasonable prospect of rescuing the company under s 129(1) or by way of a court order as contemplated in s 131(1). This application is brought by the applicants as affected parties in terms of s131(4) of the Act which stipulates:

"After considering an application in terms of subsection (1), the court may-

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-
  (i) the company is financially distressed;
  (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
  (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

[80] 'Financially distressed' as contemplated in s 128(1)(f) and in reference to a particular **company** at any particular time, means that –

(i) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

[81] Notwithstanding, the applicants *in casu*, maintain the following as their reasons for business rescue to be considered favourably:

81.1 The applicants have attached the Department of Agriculture, Land Reform & Rural Development's annual report 2015/2016 marked annexure "JDT 12". The report deals with its overall performance and while acknowledging

the drought emphasises the support it gave to the farmers during the period including financial and technical support.

81.2 In the 2019/2020 Agriculture Drought Report confirmed severe drought suffered in the Northern Cape. There was low natural grazing resources, reproduction capacity and a decrease in production unit weight, increase in production intervals and lower quality produces and meat prices dropped. At page 233 the following is recorded:

"All farmers (commercial, emerging, small-scale and subsistence) have received aid from fundraising projects and donations."

81.3 The good rainfall as reflected under "JDT 30".

81.4 Preventing job losses and families losing a revenue stream.

81.5 The probable dividend on liquidation for secured creditors will be 40 cents in the Rand for Project Multiply and 29.47 cents in the Rand for Velvetcream while concurrent creditors will receive 0 cents in the Rand for both companies.

81.6 Annexure "JDT 19" is the business rescue plan for Project Multiply (Pty) Ltd. The BRP contemplates recovery over a period of 36 months (3 years) and proposed the planned rescue in 3 phases. At 14.3.5 the BRP wrote that the repayment of creditors will depend on proceeds of the sale of the assets predicted to be R6 million in the first year, 12.8 million in the second year and R18.8 million in the third year. There are plans to develop wind and solar farm operations. While there is a claim to have signed a renewable energy development agreement with a development company yet to be ratified by the BRP, they expect a development budget of R30 million per site. Landbank as the secured creditor was not furnished with the details of this agreement as indicated in the note by the

BRP. In the third year focus will be on the post drought recovery strategy. They contemplate to have settled in full all the creditors by February 2024.

81.7 The BRP records the following at clause 22.1 of the plan:

"It is uncertain at this stage whether the rights of the security holders of the company will be affected because of the approval of the plan. To the extent that it will be affected, the approval of the security holders will be sought in terms of s 152(3)(c) of the Companies Act."

[82] The business rescue plan of Velvetcream 15 (Pty) Ltd is marked annexure "JDT 20". The disclaimer and the certification reads exactly the same. The contents of the plan are also more or less the same, differing only in the list of assets per company. It is unnecessary to repeat what I stated pertaining to the business rescue plan of Project Multiply because the approach is equally applicable.

[83] The BRP has prepared another business rescue plan dated 30 March 2022 marked annexure "JDT 33". Of significance regarding this plan is that it is a business rescue plan prepared for the Merwede Group including Project Multiply (Pty) Ltd, Velvetcream 15 (Pty) Ltd, Merwede Trust and Carel Aron van der Merwe. Following my finding on the challenged constitutionality of s 1 and Chapter 6 of the Companies Act, I have considered relevant portions common to the original plans in respect of the two companies (in liquidation) there is no basis for me to consider the position of the group business rescue plan as legislatively it has not been provided for.

[84] Mr Terblanche, for Landbank, reiterated that whether or not the applicants succeed with the constitutional challenge, the Landbank will again vote against the business rescue plan. In *Firstrand Bank*

Ltd v KJ Foods (CC) (in business rescue)[40] the Supreme Court of Appeal provided the correct interpretation of section 153(1)(a)(ii) and (7) of the Act to this effect:

> *"[75] In interpreting the provisions of the Act the principles enunciated in Natal Joint Municipal Pension Fund v Endumeni Municipality; and Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd find application. These cases and other earlier ones provide support for the trite proposition that the interpretive process involves considering the words used in the Act in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. Furthermore, as was said in Endumeni, 'a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results'. Thus, when a problem such as the present arises, the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. Accordingly, in this instance, the proper approach in the interpretation of the provisions is one that is in sync with the objects of the Act, which includes '[enabling] the efficient rescue and recovery of financially distressed companies,* ***in a manner that balances the rights and interests of all relevant stakeholders***'*."* (My emphasis)

[85] The effect of granting the relief as sought by the applicants would be ignoring the following based on the invoices and annexures attached by the applicants and the Landbank's replying affidavit:

85.1 Mr Van der Merwe is factually insolvent to the tune of about R74 million. He failed to disclose additional monies that he owes in the sum of R5,839,808.94 which were discovered when requisitions of creditors were submitted to the Master, this adds to the amount of R74 million to substantiate his factual insolvency status which brings the total amount of his insolvency to about R80 million.

85.2 The applicants do not deal in their papers with the dissipation of assets, to the detriment of the creditors,

[40] 2017 (5) SA 40 (SCA) at para 75

which is of concern. There is no mention of 7,000 flock of sheep which were sold and the proceeds of their sale unaccounted for. Further, the livestock number is diminishing.

85.3 It is not in dispute that the livestock forms part of the Landbank's security. This notwithstanding, the applicants maintain that the business rescue practitioner has consented to the sale of the livestock in the absence of the consent by the Landbank. To the contrary, the business rescue practitioner gave the Landbank a written undertaking to this effect:

"...not to sell or trade with livestock, as in terms of the attached livestock asset list, without the written consent of your client."

At para 48 of Mr Van der Merwe's provisional answering affidavit in the sequestration application he stated:

"the security cannot be sold off in business rescue without the consent of the secured creditor."

Notwithstanding, the applicants and van der Merwe later said that stock was sold in the ordinary course of business. As correctly argued on behalf of the Landbank, this type of conduct by van der Merwe and the applicants is in complete disregard of the law and the protection afforded secured creditors. Whether the business rescue practitioner has acquiesced or not will never be known because he did not participate in this application. What is apparent is that the applicants have not mentioned anything regarding stock counting. Mr de Jager has conducted stock counting on behalf of the Landbank. Landbank argues that the failure by the applicants to provide records on stock numbers should be met with a negative inference justifying the allegation by the Landbank of disposition.

85.4 It is not just the failure by the business rescue practitioner to attend the farms where business was carried out but he also failed to open a separate bank account for the entities under business rescue. The circumstances around the Merwede Ranching banking account as the treasury account for the group are murky. The proceeds of the sale of the livestock ought to have benefitted the Landbank. This is where the distinction between *Firstrand Bank Ltd v KJ Foods CC (in business rescue)*[41] *is* relevant. In *KJ Food,* First National Bank (FNB) and Wesbank were both secured creditors owed R6,337,587.37. The plan projected that all the other creditors, excluding the secured creditors, would be paid within the 52 months period and the secured creditors repayment period will be slightly longer. However, by the time the matter was heard, the FNB claim was reduced. The respondent had maintained all payments due to the parties. The applicants in *casu* present a different scenario of not honouring their debts except for the belated three payments in 2019 referred to in paragraph 85.20 below.

85.5 There is the issue of interest. According to Landbank, the entities have attracted interest in the amount of R11 million. Even if the applicants may raise the *in duplum rule* as they do, the amount is still too significant to be ignored. Landbank pressed on the issue submitting that the prejudice suffered is both plain and obvious.

85.6 Whereas the applicants claim that the sheep slaughtered belonged to Mrs van der Merwe, Carnarvon Abattoir issued a tax invoice made out to Merwede Trust,[42] and the name of

[41] [2017] 3 All SA 1 (SCA)

[42] Paginated papers page 449

the seller is reflected as Merwede. Considering pages 2609 to 2614, it is clear that Ms Taljaard and Mr van der Merwe continued to slaughter livestock after 14 October 2021 whereas their attorney of record wrote at annexure "TAL 6" that it is practically impossible to state with certainty which assets belong to van der Merwe and which assets belong to the other group of entities.

85.7 Annexure "TAL 1"[43] shows the breakdown of Carnarvon Abattoir's purchase transactions dated 10 May 2022. Of significance is that while there were sales of livestock of R7,299,527.04 (rounded off to R7.3 million) indicated as income for Merwede Ranching, only R58, 607.24 remained as at 10 May 2022. It was argued on behalf of the Landbank that this is a clear illustration that the farming operation is not viable. What exacerbates matters is that the R7.3 million was due to the Landbank as its undisputed security.

85.8 An amount of R413 721.35 is reflected in the document as farm expenses for Merwede Ranching. What is disconcerting is the claim that Merwede Ranching purchased the Toyota Landcruiser for R686,000.00 from the proceeds of the Carnarvon Abattoir sales. What it effectively boils down to is that Merwede Ranching bought the vehicle from van der Merwe with the proceeds of Landbank's security. Nevertheless, annexure 7[44] referred to in support of the Merwede vehicle transaction in the amount of R686,000.00 is in fact VAT recon of Merwede Ranching. The applicants aver that Merwede Ranching used the proceeds of the sale of sheep to buy the Landcruiser for itself.

[43] Paginated papers page 2599

[44] Page 2662 of the paginated papers

85.9 What is also noteworthy is that if Merwede Ranching is what it purports to be, namely, a treasury account, how can it be possible that it has the Landcruiser vehicle as its fixed asset? Furthermore, how does it claim vatable expenses as a treasury account?

85.10 At page 2663 appears Project Multiply- income and expenses received and paid by Merwede Trust. What is inexplicable is the claim by Merwede Ranching of VAT on expenses e.g the co-operation account by Project Multiply. It also charged Project Multiply a management fee of R227,450.00 which management fee is included in the total Project Multiply expenses listed at p2663 and (allegedly)paid for by Merwede Ranching.

85.11 The total expenses of Merwede Trust at p 2665 under the head “Merwede Trust Income Feb 2022” included legal fees in the amount of R 651,101.67 presumably paid from the sale of livestock as appears from annexure 7 at p2662.

85.12 Van der Merwe’s expenses up to February 2022 included legal fees in the amount of R491,250.02 paid by Merwede Ranching as well as business rescue fees in the amount of R50,000.00, also paid by Merwede Ranching from the proceeds of the sale of the livestock.

85.13 Invoice 022 dated 31 March 2021[45] relates to the Toyota Landcruiser. It is unclear how Mr van der Merwe could have charged VAT on it.

85.14 At page 2666 appears CA van der Merwe – income and expenses February 2022. The amount of R686,000.00 is not separately reflected in his income and expenses. What is

[45] At paginated papers 2632

clear is that his personal expenditure was paid for from the proceeds of the Landbank's security. Moreover, about R1 million of the Landbank's security was used to fund litigation against the Landbank.

85.15 No doubt, the Merwede Ranching Account is utilised by the applicants and van der Merwe to fund living expenses and legal fees as opposed to the furtherance of the business operation or the preservation of assets.

85.16 Ms Shanie Taljaard (the first applicant) and buyer on behalf of Merwede Ranching and Mr van der Merwe as the seller purportedly entered into a sale agreement on 1 October 2020, see "TAL 3" [46] for the sale of the Toyota Landcruiser 200 VX. Ms Taljaard was not a director of Merwede Ranching when the agreement was concluded as she was appointed only 1 year and 9 days after the conclusion of the alleged contract. The Landbank persists with the argument that there was no sale of the vehicle and in the event that there was, the proceeds of the sale of the livestock was used to acquire the Landcruiser.

85.17 While there is no income from the sale reflected in van der Merwe's income and expenses during the relevant period, there is a total amount of R1,740,500.00 reflected as income from Merwede Ranching. This amount is derived from the sale of livestock to Carnarvon Abattoir.

85.18 Despite the allegation by the applicants that the aeroplane was transferred in 2018 the registration documents attached as Annexure "TAL 7" was only issued on 9 March 2021 when Project Multiply was already in business rescue.

[46] Page 2667 of the paginated papers

85.19 I have earlier in the judgment dealt with the persistence by the Landbank to vote against the business rescue plan because the entities according to the bank are factually insolvent and have relied on evidence on the valuation of the assets which was not confirmed under oath rendering it inadmissible. The Landbank, on the contrary, filed valuations confirmed under oath seeking to illustrate the factual insolvency of the entities forming the subject matter of this application. It is so that the applicants ought to have made their case in founding and to attempt to file the valuer's affidavit at an advanced stage of the proceedings without even seeking an indulgence of the court does not avail the applicants. It is the Landbank's case that the business rescue plan is entirely based on its security and there is no guarantee that the immovable property will be sold during the time anticipated by the applicants.

85.20 In an attempt to substantiate the argument that there has been payment made to the Landbank which the Landbank has not referred to, the Landbank conceded that the applicants made three belated payments to the total amount of R400,000.00 in 2019 which are not only far below the repayments amounts but came after a period of 3 years of non-payment.

[86] I have a concern in respect of the business rescue plan dated 24 February 2021. Notwithstanding that the BRP, Mr Jacques du Toit, prepared the plan, the disclaimer at page 2 is disconcerting. He says the plan is formulated from *"books and records recovered from the company"* and nowhere in the plan are those books and records specified. He has "interviewed relevant persons" and it is also not stated who those relevant persons are. What is further unsettling is the statement that his "investigations *have been limited due to time constraints*". The Act prescribes these

periods and it is unclear, as an experienced BRP why he would be prevented from performing this function due to time constraints. He would have at least pointed out how much more time was needed to cover which specific areas and whether or not, with or without the extension of time the information captured in the plan will suffice to support the business rescue. The BRP has also not conducted "an audit of the company documents nor had adequate opportunity to verify any of the information provided by the company except where expressly stated."

[87] The certification by the BRP does not provide the assurance either. It reads in relevant part:

"(a) the information provided herein ***appears to be accurate, complete and up to date.***

(b) The projections provided ***are estimates*** *made in good faith* ***based on information and assumptions*** *as set out herein.*

(c) In preparing the Plan ***I have not undertaken an audit of the information provided to me, although where practical, I have endeavoured to satisfy myself of the accuracy of such information."***

[88] The BRP records at clause 16 of the plan that the company has already reduced its workforce by 50% during the past few months. It does not explain in detail the process of reduction. However, I infer from the follow-up statement that its management was not affected by the reduction or retrenchment because it says that they were willing to only receive 50% of their salaries. I deal with this aspect because during argument emphasis was made not only by TLU as the *amicus curiae* but on behalf of the applicants that the main reason why business rescue will be the preferred option is because it is aimed at saving jobs of the employees and will benefit the welfare of their families.

[89] The South African Revenue Service (SARS) is noted by the BRP in the plan as a contingent creditor until such time as all VAT returns have been filed and its claim determined. This aspect has compliance consequences and should have been prioritised by the time the BRP reduced the information to writing.

[90] More concerning for me is the fact that the BRP seems not to be in complete control of the process and there are areas that I referred to earlier where his role was short-circuited. The bank has repeatedly complained about the contents of the business rescue plan. In my view, the business plan does not provide information, which, on its proper assessment is convincing that there exists reasonable prospects for the rescue of at least the two companies. The fact that they are intertwined in their business relations with van der Merwe and Merwede Trust complicates issues. I am not persuaded that the companies, Mr Van der Merwe and the Merwede Trust can be rescued by business rescue. There is a danger that the Companies Act will be abused in order to justify wrongful conduct or non-compliance by disgruntled businesses who seek to fend off the consequential winding-up. This is such a case in my view.

It is for this reason that their application stands to fail.

The counter-application by the liquidators

[91] Since the provisional joint-liquidators and joint-trustees' application is conditional upon the Landbank's application being heard, the inter-relatedness of these applications and the nature and importance of the issues at stake impels me, on the interests of justice, to hear their application.

[92] Mr Smit, appearing for the joint provisional liquidators and provisional sequestration, agreed with the submissions by Mr Terblanche. Mr Smit submitted that the liquidators/trustees are not seeking powers to dispose of the assets but rather their main

contention is the lack of cooperation by the director or trustees of the provisionally liquidated companies and the provisionally sequestrated Merwede Trust.

[93] The submission made on behalf of the liquidators and trustees that more than R6.4 million worth of sheep was slaughtered and proceeds thereof spirited away, is disturbing, to say the least. Rightfully, these proceeds should have been deposited into the respective insolvents' account. Earlier in this judgment I have already remarked about the Merwede Ranching bank account which has nothing to do with the managed insolvent's bank account or even a business rescue account. I have also dealt with the statement earlier that concerns the liquidators/trustees that to determine under which entity the sheep's ownership vests poses to be an insurmountable hurdle. It is not in issue that the liquidators/trustees lack relevant detail to enable them to perform their fiduciary duties. What exacerbates matters is when the liquidators and trustees also struggle to find cooperation from the business rescue practitioner himself. This situation cannot be allowed to continue. The insolvent estates have been placed in the hands of the Master and it is not for the applicants or van der Merwe to obstruct them or to prevent them from fulfilling their mandate.

[94] Mr Deon Marius Botha who deposed to the founding affidavit as one of the provisional liquidators/trustees, gave an indication of the cost implication stating that the process of preservation involved placing guards on remote farms equates to R220,000.00 per month. In addition, the cost of tending to the animals like providing feeds and nutritional support cost R43,500.00 and will cost R22,500.00 per month going forward. This has an adverse effect on the concurrent creditors. Another astonishing allegation is that van der Merwe disposed of close to R7 million worth of sheep without ceding the proceeds thereof to the Landbank. The

liquidators/trustees operate from a position of no free residue assets in the estates because there is only unencumbered assets and proceeds of agricultural products ceded to the Landbank.

[95] In conclusion, the liquidators/trustees have, in my view, made out a case to be granted the relief sought. Their immediate need is to address the issue of the livestock.

[96] On the issue of costs. There is no reason why costs should not follow the result which should include for previous appearances when costs were reserved. The parties have not addressed me on the issue of awarding costs on a punitive scale and I will therefore refrain from awarding costs on an attorney and client scale.

[97] In the result, the following orders are made:

1. The main application is dismissed with costs, including the costs consequent upon the employment of two counsel where applicable. Such costs to include the costs of 5 August 2022, 2 September 2022 and 8 September 2022
2. The Fifth, Sixth and Eighth respondents' powers are extended in terms of Sections 386(4)(a) to (i) of the Companies Act, 61 of 1973.
3. That the Fifth, Sixth and Eighth respondents are granted leave in their capacities as the joint liquidators of the insolvent company to convene a commission of enquiry into the trade, dealings, affairs and property of Project Multiply (Pty) Ltd (in liquidation) in terms of the provisions of section 417, read with section 418 of the Companies Act, 61 of 1973, to be chaired by retired Judge Eberhardt Bertelsmann who has consented to be so appointed, same consent has been attached to the Notice of Motion and marked annexure "E" .

4. That the costs of the enquiry be borne by the insolvent estate of Project Multiply (Pty) Ltd (in liquidation), including costs of the commissioner, attorney and/or counsel and all other costs and expenses incidental to the enquiry.
5. That the Fifth, Seventh and Ninth respondents' powers be extended in terms of Sections 386(4)(a) to (i) of the Companies Act, 61 of 1973.
6. That the Fifth, Seventh and Ninth respondents are granted leave in their capacities as the joint liquidators of the insolvent company to convene a commission of enquiry into the trade, dealings, affairs and property of Velvetcream 15 (Pty) Ltd (in liquidation) in terms of the provisions of section 417, read with section 418 of the Companies Act, 61 of 1973, and to be chaired by retired Judge Eberhardt Bertelsmann who has consented to be so appointed, same consent has been attached to the Notice of Motion and marked annexure "E" .
7. That the costs of the enquiry be borne by the insolvent estate of Velvetcream 15 (Pty) Ltd (in liquidation), including costs of the commissioner, attorney and/or counsel and all other costs and expenses incidental to the enquiry.
8. That the provisional trustees' powers are extended in terms of section 18(3) and 73 of the Insolvency Act 24 of 1936, in order to have the powers and the duties of a trustee as provided for by the Insolvency Act to bring and defend legal proceedings and to dispose of the livestock and/or other assets necessary in the administration of the insolvent estate, and to appoint legal practitioners to assist them in the investigation and/or administration of the insolvent estate.
9. That the costs of this application be costs in the administration of the insolvent company and the insolvent estates.

M.C. MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

	For the 1st and 2nd applicants: Adv. JG van Niekerk, SC Assisted by: Adv. JD De Vries Instructed by: Johan Victor Attorneys c/o Engelsman, Magabane Inc.
For the 1st respondent:	Adv. FH Terblanche SC
Assisted by:	Adv. S. Tsangarakis
Instructed by:	Strydom & Bredenkamp Inc c/o Van de Wall Inc.
For the 2nd respondent:	Adv. W Coetzee SC
Instructed by:	Office of the State Attorney
For the 3rd respondent:	Abiding
For the 5th-10th & 12th respondent:	Adv. JE Smit
Instructed by:	JI Van Niekerk Attorneys c/o Majiedt Swart Inc
Amicus Curiae:	Adv. JD De Vries
Instructed by:	Brink De Beer & Potgieter Inc c/o PGMO Attorneys Inc