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

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

Case No: 1094/2022
Heard: 08/09/2022
Date delivered: 13/09/2022

In the matter between:

SHANIE TALJAARD
(Previously Fourie, ID No: [redacted]) 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: RECUSAL APPLICATION

Mamosebo J

[1] On 08 September 2022 the applicants, Shanie Taljaard and Curo Consultancy (Pty) Ltd, brought an application for my recusal as the presiding judge in the main and counter applications in case number 1094/2022. The application does not disclose the existence of any

actual bias and was premised purely on the apprehension of bias. Having heard the parties' submissions, I reserved the ruling and postponed the applications to 13 September 2022.

[2] The historical background is necessary. On 08 June 2022 the applicants filed an application under Case Number 1094/2022 in which they sought relief, divided into three parts: Part A – Intervention and Joinder; Part B – Constitutional Challenge; and Part C – Business Rescue, to be heard together with the consolidated matters under Case Numbers 963/2021; 964/2021 and 2436/2021 on 11 October 2022.

[3] Following the launching aforementioned application, and on 05 August 2022, Land Bank set down for hearing the applicants' main application. It simultaneously filed an affidavit which served a dual purpose: first, as an answering affidavit to the main application, and secondly, as an urgent counter-application seeking a declarator that the business rescue as proposed by the applicants to the present application is not achievable on reasonably objective grounds. The liquidators/trustees also filed an urgent counter-application conditional upon the Land Banks' counter-application being heard seeking, *inter alia*, extension of their powers.

[4] The applicants then filed a notice in terms of Rule 30(1) of the Uniform Rules of Court objecting to the approach adopted by Land Bank in bringing the counter-application. The applicants, as a result thereof, did not file the replying affidavit in the main application and the answering affidavit to the counter-application, stating that the filing of such affidavits would have amounted to 'the taking of a further step' in the proceedings which is impermissible.

[5] It follows that on 05 August 2022, the focus of the hearing shifted to the Rule 30 applications and thereafter, judgment on the matter was reserved. The parties before me were the following: the applicants in the main application, Ms Shanie Taljaard and Curo Consultancy (Pty) Ltd, represented by Adv. J De Vries. The first respondent who is also the applicant in the counter-application, the Land and Agricultural Development Bank of South Africa, represented by Adv. FH Terblanche SC assisted by Adv. S Tsangarakis. The second respondent, the Minister of Trade and Industry, represented by Adv. W Coetzee SC. The 5th to 10th and 12th respondents (the provisional liquidators and trustees) represented by Adv. U Van Niekerk while Adv. D Jankowitz was on a brief by Transvaal Landbou Unie (TLU).

[6] On 10 August 2022, I invited all the instructing correspondent attorneys to my chambers. By agreement between all the parties the main and counter-applications which concerns the Intervention and Joinder, constitutional challenges, business rescue applications as well as the counter-applications seeking the dismissal of the main application and the extension of the liquidators/trustees powers were set down for 08 September 2022 through the office of the Registrar. The parties also agreed to the filing of further papers and the heads of argument. This was followed by the judgment on 15 August 2022 not only encapsulating the terms agreed to by the parties for the filing of further papers and the heads of argument but also dismissing the Rule 30 applications thereby postponing the applications to 08 September 2022 as agreed.

[7] Following the circulation of the Rule 30 judgment, the applicants filed another application, this time, for the postponement of the applications set down for 08 September 2022 to a three-day period of 14, 15 and 16 September 2022. I heard the postponement

application on 02 September 2022 where Adv JG van Niekerk SC represented the applicants, Adv. S Tsangarakis represented the Land Bank, Adv. W Coetzee SC represented the Minister of Trade and Industry and Adv. R van Schalkwyk represented the liquidators/trustees. There was no representation by the *amicus curiae* on behalf of TLU. Having considered both the written and the oral submissions by counsel I was of the view that the applicants have not made out a case for a postponement and subsequently refused the granting thereof. The original date of 08 September 2022 was retained for the parties to argue the main application and counter-application.

[8] On the late afternoon of 07 September 2022, the eve of the hearing, the applicants served an application for my recusal. The applicants relied on five grounds forming the basis of the relief sought. According to them, a reasonable apprehension is formed that they may not receive a fair hearing because:

(a) When dealing with the application for condonation of the late filing of their replying affidavit and the intervention application on 09 and 10 May 2022 **I should have considered the merits** of the main application and invited argument on the constitutional issue and the business rescue application, but have failed to do so;

(b) In stark contradiction, they contend that when dealing with the application for condonation of the late filing of their replying affidavit and the intervention application **I considered the merits** (made a predetermination) of the constitutional issue and the business rescue application and arrived at a conclusion, without hearing argument on those

two issues, that both the constitutional issues and the business rescue application are devoid of merit;

(c) When the counter application was enrolled on 05 August 2022 together with the Rule 30 applications I should not have heard the matters as I had, already on 09 and 10 May 2022, **predetermined the merits** of the two central issues, namely, the constitutional issues and the business rescue application;

(d) I should not have heard the postponement application on 02 September 2022 as I had already predetermined the merits pertaining to the constitutional issues and the business rescue application on 09 May 2022; and

(e) In my judgment handed down on 15 August 2022 dealing with their Rule 30 applications, I made factual findings based on the allegations made by Land Bank, which the applicants had not been afforded the opportunity to respond thereto, but also, which Land Bank relies on to maintain that this application is part-heard before me.

[9] Mr Van Tonder, for the applicants, further made the submission that the considerations I listed at para 19 of the ruling in the postponement application amounts to factual findings which adds to the apprehension of bias alleged by the applicants. This is what appears at para 19 of the Rule 30 application:

Counsel,[referring to Mr Terblanche] relied on the unreported judgment of this Court in C Rock (Pty) v H.C Van Wyk Diamonds Ltd and Others (2355/2018A) [2018] ZANCHC 91(7 December 2018) paras 12, 13 and 17, urging me, that unless I find that C-Rock is clearly wrong, I should follow it. Williams J granted the application and heard the business rescue application on an urgent basis. These are the other considerations:

19.1 *The allegations of dissipation or spiriting away of sheep of approximately R6.4 million plus VAT. In addition proceeds of about 7 037 head of sheep have been spirited away despite being the Land Banks' securities in a form of a cession and pledge; disturbingly, the amounts received are deposited into the bank account of Merwede Ranching (Pty) Ltd which is a separate company not under the two companies in liquidation and Merwede Trust. The directors of Merwede Ranching are Ms Taljaard and the already finally sequestrated Mr Van der Merwe.*

19.2 *A Toyota Land Cruiser VX Luxury 4X4 and a Beechcraft airplane, registered in the name of Project Multiply has been transferred to the Ronnie Van der Merwe Trust. Whereas the contents of the letter from Johan Victor Attorneys addressed to the corporate liquidators dated 20 January 2022 dealt with the stock units and group stock and assets sold it remained silent on the Land Cruiser.*

19.3 *The fact that the debt is growing exponentially now standing at R83,649,687.34 and there has not been any repayment since 2018.*

19.4 *The fact that Land Bank is the major secured creditor with over 95% of the voting right while Ms Taljaard has a disputed less than 1% is also not insignificant.*

19.5 *Land Bank has expressed itself that it does not support the pending business rescue plan.*

19.6 *The report by the forensic auditor.*

19.7 *On **30 May 2022, this date is 12 days after I had granted a provisional liquidation order,** Ms Taljaard addressed an email to Belinda under the subject "aansoek vir slagting" (application for slaughter) and it reads:*

"Hallo Belinda
Laat weet asb indien jy nog ietsie kort?
Onthou ook asb Dewit en Hernes se kontak nommers? Sal jy asb vleispryse ook aanstuur? Epos of whatsapp na 0839765307 en 0799862206
Baie dankie
Groete
Curo Consultancies
Shanie Taljaard
(+27)79 986 2206"

19.8 *More importantly is the order on 10 May 2022 terminating the business rescue proceedings and granting provisional liquidation of the two companies and provisionally sequestrating the trust with the return date of 11 October 2022. Mr Terblanche submitted that the Rule 30 application should be dismissed with costs on a punitive scale.*

[10] The apprehension of bias may arise, either from the association or interest that the judicial officer has in one of the litigants before the court, or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but must be seen to be independent and impartial.[1]

[11] The test for recusal was laid down in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[2] there, the Constitutional Court unanimously dismissed an application brought by Dr Louis Luyt for the recusal of 4 of the Court's Judges. The court not only established that the question of judicial recusal is a constitutional matter[3] but also formulated the proper approach to recusal in this fashion[4]:

> "*[48] It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal*

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[1] 2011 (4) BCLR 329 (CC) at para 28
[2] 1999 (7) BCLR 725 (CC)
[3] Ibid para 30
[4] Ibid para 48

beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

[12] The Constitutional Court in *Bernert*[5] also emphasised the nature of the judicial function that requires judicial officers to be impartial, hence the presumption of impartiality resulting from their oath of office. Resultantly, it is significant, as emphasised by the Court in *Bernert*[6] for *the* apprehension of bias to be reasonable. This is explained in *South African Commercial Catering and Allied Workers Union and Others v Irvin Johnson Limited*[7] (SACCAWU) by Cameron AJ, then, as follows:

"The 'double' unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that it should be countenanced in law."

[13] Of further significance are the remarks by the Constitutional Court in SACCAWU[8] where the Court pronounced:

"...*Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts' very vulnerability serves*

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[5] Ibid para 32
[6] Ibid para 34
[7] 2000 (3) SA 705 (CC) at para 16
[8] Ibid para 17

to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. ***In striking the correct balance, it is "as wrong to yield to a tenuous or frivolous objection" as it is "to ignore an objection of substance".***"
(Own emphasis)

[14] I first consider the contention that, when I heard the condonation application for the late filing of the replying affidavit and Ms Taljaard's intervention in the consolidated proceedings, I should have considered the merits of the previously filed applications in respect of the business rescue and the constitutional challenge. It bears emphasis that in terms of the order dated 10 May 2022, by agreement between the parties, the voluntary resolutions, adopted by the boards of Project Multiply (Pty) Ltd and Velvetcream 15 (Pty) Ltd on 20 January 2021 commencing business rescue proceedings of the two companies was declared a nullity and set aside. The business rescue proceedings were terminated. The two businesses were placed under provisional liquidation. The estate of Merwede Trust was placed under provisional sequestration. It is significant to state that Mr du Toit, the business rescue practitioner, was the applicant then. Despite that the applications were postponed by agreement from 29 October 2021 to 09 to 13 May 2022, he failed to furnish a satisfactory explanation for the late filing of the replying affidavit whose admission was vehemently opposed. It is after the unsuccessful condonation application that counsel for the applicant sought an adjournment, which I granted. Thereafter, the parties approached me in my chambers for orders by agreement already referred to.

[15] Condonation is not to be had merely for the asking[9]. An applicant for condonation must give a reasonable and full explanation

[9]Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) at para 6

covering the entire period of the delay[10]. I was not persuaded by the explanation furnished and it followed that the application for condonation could not succeed.

[16] The argument that when the main and counter applications were set down on 05 August 2022 I should not have heard the Rule 30 applications, is without any merit. This is so because these were interlocutory applications filed within the main and counter applications. It is unclear, from the papers and the oral arguments made on behalf of the applicants, why the application ought not to have been disposed of because I am and was seized with the matter. I had found that the applicants had failed to substantiate their case and dismissed the Rule 30 applications. Application for postponement of the matter is an indulgence granted by the Court[11]. The applicants also raised the issue of legal representation, more particularly, legal representatives of their choice, as a reason for seeking a postponement.

[17] The SCA made these informative remarks pertaining to legal representation in *Pangarker v Botha and another*[12]*:*

> *"[34] The right to legal representation is a corollary of the right of access to justice. The denial of this right has wide-ranging consequences for the nature and experience of justice. Nevertheless, a litigant may not benefit from his own misconduct or otherwise careless approach to legal proceedings. ...The High Court took the view that he was entitled to an attorney of his own choice. This was an incorrect approach when regard is had to the history of the matter and the rights of the other party.*
>
> *[35] ...Accordingly his lack of legal representation cannot be a basis for a finding of any "grossly irregular" conduct on the part of the Magistrate."*

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[10] Van Wyk v Unitas Hospital and Another [2007] ZACC 24; 2008 (2) SA 472 (CC) para 22
[11] Lekolwane and Another v Minister of Justice and Constitutional Development 2007 (3) BCLR 280 (CC) at para 17;
[12] [2014] JOL 32106 (SCA) at paras 34 and 35

[18] The Constitutional Court in *S v Basson*[13] made these remarks regarding the issue of a Judge prejudging an issue in the case:

> *"[43] As far as the second category is concerned, that the Judge had prejudged an issue in the case, the remarks of the Courts in Silber [R v Silber 1952 (2) SA 475 (A)] and Take and Save Trading [Take and Save Trading CC and Others v Standard Bank of SA 2004 (4) SA 1 (SCA)] are of assistance. Both make it clear that it is rare that a court will uphold a complaint of bias arising from a judge's conduct during a trial and affirm that it is not inappropriate for a court to express views about certain aspects of the evidence. They make it clear, as well, that the fact that a judge may express incorrect views is not sufficient to ground a claim of bias."*

[19] As stated earlier, I have been dealing with interlocutory applications and made rulings as these applications progressed. For every ruling made I furnished reasons thereto. The grounds for recusal related solely to what had transpired during the hearing of the application. In *Silber* Schreiner JA said the following on this score:

> *"(T)he grounds related purely to what had happened in the course of the trial. Neither counsel has been able to find any reported case in which an application for recusal has been made in the course of a trial on the ground that the judicial officer has shown bias by his conduct of the proceedings. And this is not surprising, since the ordinary way of meeting any apparent bias shown by the court in its conduct of the proceedings would be by challenging his eventual decision in an appeal or review. Bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestions of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person,*

[13] 2005 (12) BCLR 1192 (CC); 2007 (1) SACR 566 (CC) at para 43

least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with bias."

[20] The contention that I failed to consider the merits pertaining to the business rescue application and the constitutional challenge applications when the matter was before me on 10 to 13 May 2022 is also without any substance. Mr De Vries, counsel for the applicant, Mr du Toit at that time, addressed the court at great length without being confined to what he could or should argue. It must be borne in mind that it is after the applications that he brought were dealt with in terms of the orders by agreement as referred to at para 14 (above) that Ms Taljaard brought a new application, now referred to as the main application, wherefrom stems all these interlocutory applications. In any event, the business rescue application and the constitutional challenge were set down to be heard on 08 August 2022.

[21] No pronouncement could have been made on the business rescue and the constitutional challenge because the merits have not been argued. I only granted TLU leave to file papers with regard to its admission as *amicus*. The views expressed in para 19 of the Rule 30 application (referred to in para 9 above) remain some of the considerations that necessitate both the main and the counter applications to be heard expeditiously. The remarks, in my view, were not factual findings on the merits.

[22] The applicants have, in my view, failed to discharge the *onus* of establishing that their apprehension of bias is reasonable. It therefore follows that their application for my recusal stands to fail as no case has been made out. There is no reason to depart from the general rule relating to costs, namely, that they should follow the result.

[23] In the result, the following order is made:

1. The recusal application is dismissed with costs, including the costs consequent upon the employment of two counsel.

2. The applicants are to pay the respondents' costs jointly and severally, the one paying, the other to be absolved.'

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the 1st and 2nd applicants:	Adv. AG van Tonder
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 respondents:	Adv. JE Smit
Instructed by:	JI Van Niekerk Attorneys c/o Majiedt Swart Inc
Amicus Curiae:	Adv. B Braun
Instructed by:	PGMO Attorneys