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: 24/11/2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail. The date and time for hand-down is deemed to be **14h00** on 13 December 2022.

In the matter between:

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) First Applicant

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) Second Applicant

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) Third Applicant

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) Fourth Applicant

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) Fifth Applicant

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

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

and

SHANIE TALJAARD
(Previously Fourie, ID No: […]) First Respondent

CURO CONSULTANCY (PTY) LTD Second Respondent

THE MASTER OF THE HIGH COURT, KIMBERLEY Third Respondent

IN RE: **CASE NO: 1094/2022**

SHANIE TALJAARD
(Previously Fourie, ID No: […]) First Applicant

CURO CONSULTANCY (PTY) LTD Second Applicant

and

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA First Respondent
MINISTER OF TRADE AND INDUSTRY Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC) Fourth Respondent
JOCHEN ECKHOFF N.O. Fifth Respondent
(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)

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) Sixth 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) Seventh 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) Eighth 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) Ninth Respondent

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

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: APPLICATION FOR A DECLARATOR OR IN TERMS OF S 18 OF THE SUPERIOR COURTS ACT 10 OF 2013

Mamosebo J

[1] The applicants are the provisional liquidators and trustees who were successful in the matter that served before me on 13 September 2022 and in whose favour the following orders were granted:

"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."

[2] The first and second respondents, Shanie Taljaard and Curo Consultancy (Pty) Ltd, (the respondents) noted an appeal with the Supreme Court of Appeal on 12 October 2022. The relief that the applicants/ liquidators and trustees, Deon Marius Both N.O., Jochen Eckhoff N.O., Johannes Zacharias Human Muller N.O. , Fusi Patrick Rampoporo N.O., Simon Malebo Rampoporo N.O., Angeline Poole N.O. and Philemon Tatenda Mawire N.O. now seek is first, for the application to be heard on an urgent basis in terms of Rule 6(11) and (12) of the Uniform Rules of Court; and a declaratory order that the orders granted in terms of paragraphs 2 to 9 of the Judgment dated 11 October 2022 are not suspended pending the outcome of the application for leave to appeal to the Supreme Court of Appeal dated 12 October 2022; alternatively, an order be granted to the liquidators and trustees in terms of s 18 of the Superior Courts Act, 10 of 2013, for leave to execute the orders granted by this Court on 11 October 2022, pending the decision on the application for leave to appeal, or the appeal itself, as the case may be; and, that the costs in this application be costs in the administration of the estates. The respondents (Ms Taljaard and Curo Consulting) are opposing this application. The master of the High Court, Kimberley, has played no role in these proceedings and it follows that any reference to “respondents” refers only to the first and second respondents.

[3] On 16 November 2022 the respondents also brought with this same application two applications: the first application was to strike out in terms of Rule 6(15) of the Uniform Rules of Court portions of the applicants’ founding affidavit dated 19 October 2022 and replying affidavit dated 01 November 2022 deposed to by Mr Deon Marius Botha on the basis that they constitute either vexatious or scandalous matter, new matter raised in reply, inadmissible hearsay evidence or legal argument based on incorrect premises of law or fact. In the second application the

respondents seek leave to file an additional affidavit. The liquidators and trustees are opposing these two applications.

[4] For convenience I will refer to the applicants as the applicants or the liquidators and trustees and the first and second respondents either as the respondents or Ms Taljaard and Curo Consulting.

Urgency

[5] Mr De Vries, counsel for the respondents, conceded that the matter is urgent. In substantiation on urgency, Ms Fourie SC, counsel for the applicants, submitted that this Court has already found, when ruling in favour of the liquidators and the trustees in their conditional counter-application, that their application is urgent and nothing has changed. They must still perform their statutory and fiduciary duties to secure and preserve the assets of the insolvent entities with no free residue. It should be borne in mind that the livestock involved are sheep that are susceptible to theft, death and even requires maintenance and security costs and some might even have to be disposed of for preservation purposes. Ms Fourie urged the Court not to accept the contention that Van der Merwe, an unrehabilitated insolvent, is caring for the livestock because that is the responsibility of the liquidators in the administration of the insolvent estates.

[6] There are also unauthorised transactions taking place resulting in the dissipation of funds and/or dispersion thereof to other individuals or entities and thus diminishing the estate of the insolvent entities to the detriment of the general body of creditors. The liquidators and trustees have to date not been informed of the specific proportionate ownership vesting in each entity as the information is withheld from them. This non-cooperation with and involvement of the liquidators and trustees in the administration of the insolvent estates makes the matter urgent.

[7] More importantly is that, despite the counter-application having been found to be urgent and adjudicated on an urgent basis and orders granted in their favour, the respondents' application for leave to appeal has thwarted the relief granted. Further, the refusal by the respondents' legal team, erstwhile business rescue practitioner and the respondents to attend the insolvency enquiry convened before retired Judge Bertelsmann on 31 October 2022 to 02 November 2022 is another factor that validates urgency because, while the conduct is a criminal offence punishable in law, it disempowers or disables the liquidators and trustees from effectively carrying out their statutory fiduciary duties.

Application for the admission of an additional affidavit and the striking applications:

[8] I first deal with the additional affidavit. The respondents seek the following relief in the Notice of Motion dated 16 November 2022:

> *"1. That the first and second respondents be granted leave to file the further [affixed] affidavit, dated 15 November 2022, and that same be admitted into the record.*
> *2. That the applicants be offered an opportunity to file a further set of affidavits in response to the first and second respondents' further affidavit.*
> *3. That any party that opposes the relief claimed in this application shall be ordered to pay the first and second respondents' costs associated with such opposition."*

[9] The practice pertaining to the number of affidavits in motion proceedings is settled. The ordinary rule is that three sets of affidavits are allowed and the Court may, in its discretion, admit the filing of a further affidavit. The discretion of the Court to admit this affidavit is provided for in Rule 6(5)(e) of the Uniform Rules of Court. This discretion must be exercised judicially taking into consideration all the relevant facts of the case. Where an affidavit is tendered in motion proceedings, both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court; he/she or it must advance not only an

explanation why the affidavit is out of time but must also satisfy the Court that, despite being late and regard being had to all the circumstances, it must still be received. The explanation must exclude *mala fides* or culpable remissness having contributed in the information not being before Court earlier. It is also crucial for the Court to be satisfied that there will be no prejudice to the other party which cannot be remedied by an order of costs.[1]

[10] This brings me to the facts and circumstances upon which the first applicant, Ms Taljaard's, application for the admission of the additional affidavit is predicated. First, she is querying reference made by the liquidators/trustees to the non-cooperation of Mr van der Merwe and the erstwhile business rescue practitioner (BRP), Mr Jacques du Toit, with them and also with the Commissioner appointed to conduct the insolvency enquiry and imputes such averments to the efforts by the liquidators to mislead this Court because, according to her, Van der Merwe and the BRP have given their full cooperation and furnished all the required documentation. She was, however, not in attendance when the said individuals attended the meeting and it is incomprehensible how she can be in a position to attest to same with certainty and as a matter of fact.

[11] The second gripe by Ms Taljaard refers to correspondence between the applicants' attorneys and my registrar, Ms Viljoen, and the chief registrar, Ms Basson, to secure a hearing date prior to launching the application in which they were allegedly not copied. The last aspect is that they were made to appear on an urgent basis before Williams J on 01 November 2022 and were informed that the matter will be adjudicated by Mamosebo J who is seized with it.

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[1] Court in James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963 (4) SA 656 (A) at 660E – H; Cohen NO v Nel and Another 1975(3) SA 963 (W); Transvaal Racing Club v Jockey Club of South Africa 1958 (3) SA 599 (W); Standard Bank of SA Ltd v Sewpersadh and Another 2005 (4) SA 148 (C).

[12] Ms Fourie SC, appearing for the applicants, submitted that the respondents have not shown any prejudice for them to succeed in this application; and that as far as the issue of new matters raised are concerned, the findings by the Court in its judgment are fact-based. Counsel pointed out that though she did not draft the papers she, nevertheless, noticed that there were allegations made by the one side to the other and vice versa: proverbially "*the pot calling the kettle black*". Counsel castigated the respondents, Van der Merwe, the BRP and the legal team for blatantly refusing to attend the insolvency enquiry even after they were subpoenaed to do so. They only attended the meeting held in the Western Cape.

[13] Mr De Vries, relying on *Viljoen v Federated Trust Ltd*[2], argued that the applicants did not give the respondents an opportunity to remove the cause of complaint whereas Mr Botha has filed a replication to the additional affidavit. Counsel urged this Court to disregard them and only focus on the pleaded case. Ms Fourie, countering this submission, highlighted that this Court must be mindful of the difference between striking out under Rule 6(15) in accordance with Rule 6(11) as opposed to Rule 23. The respondents have still not shown any prejudice. The affidavit filed by Mr Botha was to address the complaints raised by the respondents, the contention went.

[14] Before a court can accept a further affidavit, there must be fairness to both sides. Each case is determined on its own merits. The Court must be satisfied of the absence of prejudice caused by the filing of the additional affidavit which cannot be cured or remedied by an appropriate cost order.

[15] On a conspectus of the evidence before me I could not discern any *mala fides* on the part of the office of the Registrar. The communication for the allocation of a hearing date was done in the ordinary course of its administrative function. I must emphasise

[2] 1971 (1) SA 750 (OPD) at 753G

that I was not involved in the administrative functions and allocation of dates. I take note that the other party was not informed and this is to be discouraged as the acceptable practice is to keep the other side abreast of the developments in the matter. This, however, does not take away the fact that the demur has already been dealt with in the previous affidavits and judgments.

[16] I am convinced that the additional affidavit and the opposing affidavit were unnecessary and served not only to repeat what is already in the record but makes it unreasonably prolix. Having carefully considered all the factors bearing on the exercise of my discretion in the light of all the relevant authorities and the explanation advanced by the respondents, I have come to the conclusion that the additional affidavit deposed to by Ms Shanie Taljaard should not be admitted as part of the record and is regarded as *pro non scripto*.

The striking out application

[17] Striking out is regulated by Rule 6(15) of the Uniform Rules of Court which provides that the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

[18] For a party to succeed in the application to strike out, two requirements must be met as held by the Supreme Court of Appeal in *Beinash v Wixley*[3]: first, the matter sought to be struck out must be scandalous, vexatious or irrelevant; secondly, the court must be satisfied that if such matter was not struck out the party seeking such relief would be prejudiced.

[3] 1997 (3) SA 721 (SCA) at 732A - B

[19] Erasmus[4] explains: “Any matter which is scandalous, vexatious or irrelevant” the meaning of these terms has been stated as follows:

(a) Scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

(b) Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

(c) Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter. See also *Tshabalala-Msimang and Another v Makhanya and Others*[5]*; Vaatz v Law Society of Namibia*[6] and *Breedenkamp and Others v Standard Bank of South Africa Ltd and Another*[7]*; Swissborough Diamond Mines v The Government of the RSA*[8]*.*

[20] In her founding affidavit, Ms Taljaard attacked certain portions of the applicants’ founding affidavit dated 19 October 2022 and replying affidavit dated 01 November 2022 deposed to by Mr Deon Marius Botha on the grounds that they constitute either vexatious or scandalous matter, new matter raised in reply, inadmissible hearsay evidence or are argumentative. These allegations are set out in the founding affidavit at paras 46, 63, 76 and the replying affidavit at paras 10, 11, 12.3, 15.7, 27, 36, 41.5, 41.7, 41.8, 53,

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[4] Superior Courts Practice Volume 2 [Service 7, 2018] D1-91

[5] [2008] 1 All SA 509 (W) at 516e-f

[6] 1991 (3) SA 563 NmHC at 566C - E

[7] 2009 (5) SA 304 (GSJ) at 321C - E

[8] 1999 (2) SA 279 (TPD)

59, 60, 65, 104, 116, 124, 125, 141, 148,150, 151, 165, 173, and 179.

[21] It was contended on behalf of the respondents that the allegations contained in the above paragraphs were scandalous, vexatious speculative and argumentative. Mr De Vries, relied on *Knoop and Another NNO v Gupta (Tayob Intervening)*[9] *to* attack the credibility of the applicants' legal team and the insolvency practitioners, especially the deponent to the affidavits. The contents are distinguishable and do not support the contention by counsel.

[22] I have considered all the impugned paragraphs both in the founding and replying affidavits and disagree with the contention. What in my view they set out to emphasise, not in the manner alleged by the respondents, is that the liquidators/trustees are prevented from fulfilling their statutory mandate; they cannot leave the administration of the insolvent estates in the hands of Van der Merwe, who is himself an unrehabilitated insolvent; there is dissipation of assets taking place; Van der Merwe and the applicants cannot be trusted to continue to operate the entities as if it is business as usual.

[23] The correct approach in assessing the correctness of these allegations would be to determine the facts in totality. A piecemeal approach may provide a skewed and myopic view, out of kilter, with unintended consequences. In the ultimate determination of all these facts, lies the answer. I do not deem these allegations to be scandalous, vexatious, irrelevant or even argumentative. I am also satisfied that if such paragraphs are not struck out the respondents would not be prejudiced. The application to have them struck out is misplaced.

[9] 2021 (3) SA 88 (SCA) at para145

The application for a declarator alternatively relief in terms of s 18(3) of the Superior Courts Act, 10 of 2013.

[24] The relief sought by the liquidators and the trustees, opposed by the respondents, is a declaratory order that the orders I granted in my judgment dated 11 October 2022, paraphrased hereunder, are not suspended pending the outcome of the respondents' leave to appeal to the Supreme Court of Appeal dated 12 October 2022:

24.1 extended the liquidators' powers in terms of s 386(4)(a)-(i) and 386(5) of the Companies Act, 61 of 1973(the Companies Act);

24.2 granted the liquidators leave to convene a commission of enquiry into the trade, dealings, affairs and property of Project Multiply and Velvetcream 15 in terms of ss 417 and 418 of the Companies Act; and

24.3 extended the trustees' powers in terms of ss 18(3) and 73 of the Insolvency Act, 24 of 1936, alternatively, and only in the event that the applicants are not successful in obtaining a declarator, for leave to execute the orders as contemplated in s18(1) and 18(3) of the Superior Courts Act 10 of 2013 pending the decision on the application for leave to appeal or appeal, as the case may be, and that costs be in the administration of the estate.

[25] The events giving rise to this application are the following. The respondents, Ms Shanie Taljaard and Curo Consultancy (Pty) Ltd, brought an application (the main application) in three parts:

Part A, which was subsequently abandoned, comprised the intervention and joinder application in the winding-up and sequestration applications of Project Multiply, Velvetcream 15 and the Merwede Trust.

In Part B, declaratory relief was sought pertaining to a constitutional challenge to Chapter 6 of the Companies Act, 71 of 2008, on the basis that individuals and trusts fall to be placed under business rescue, and their exclusion from the protection of business rescue proceedings, is unconstitutional.

In Part C Taljaard and Curo Consultancy sought the dismissal of the winding-up and sequestration applications of Project Multiply, Velvetcream 15 and the Merwede Trust and orders that these entities be placed under business rescue in terms of s 131(1) of the Companies Act.

[26] The Land and Agricultural Bank of South Africa (the Landbank) opposed the main application and issued a counter-application to be heard on an urgent basis on 05 August 2022 seeking the following relief:

26.1 That the main application be dismissed with punitive costs;

26.2 That it be declared that the business rescue plan, proposed by Taljaard and filed in support of the application for business rescue, is not achievable on reasonably objective grounds; and

26.3 That costs be granted on a punitive scale.

[27] The liquidators and trustees filed a conditional counter-application: dependent upon the Court dismissing the main application and granting the counter-application by the Landbank. The main application was argued on 08 September 2022 and judgment delivered on 11 October 2022 dismissing the main application and upholding the Landbank's and the liquidators' and trustees' counter-applications. Taljaard and Curo filed an application for

leave to appeal on 12 October 2022. It is noteworthy that while the Notice of Motion seeks relief against the whole of the judgment and orders the founding affidavit seems to suggest differently.

[28] The deponent to the founding affidavit in the application for leave to appeal states in para 9: "*this matter is, first and foremost, a matter which calls on the Supreme Court of Appeal to consider a constitutional issue of national importance."* A few paras later, in para 14, the deponent states:" as *will be dealt with hereunder, the only relief that is sought is that the protection mechanism created by Chapter 6 of the Companies Act, 71 of 2008, for companies be made available for trusts and natural persons as the Minister of Justice and Constitutional Development intended back in the year 2014 already."* Much later, at para 44 the deponent states *"this case is about a lacuna in Chapter 6 business rescue provisions of the 2008 Companies Act."* The application for leave to appeal prompted the applicants to approach this Court for a declarator alternatively for the relief in terms of s 18 of the Superior Courts Act.

[29] In addition to drawing that distinction on the grounds upon which the respondents rely for application for leave to appeal, of significance is that the attack is primarily on the constitutional challenge to Chapter 6 of the Companies Act. As contended by the liquidators in their replying affidavit the respondents did not oppose their conditional counter-application nor appeal against the orders granted in the liquidators' favour. It is necessary to quote the respondents' reply[10] titled *'Replying affidavit in main application and answering affidavit in counter-applications":*

> *"I do not intend on dealing, ad seratium, with the liquidators'/trustees' provisional counter-application due to the fact that if the main application is dismissed/Landbank's counter-application is granted, there would be no reason for the applicants to flog the proverbial dead horse (or more aptly put, in casu, sheep). In any event, the justification for the relief sought by the*

[10] At para 409.1 of their replying/answering affidavit in the main application

liquidators/trustees is primarily based on the false and misleading allegations of Landbank, which I have already dealt with herein."

Unquestionably, the liquidators and trustees' counter-application was never expressly opposed by the respondents.

The declarator

[30] As stated earlier, the applicants are seeking a declaratory order that the orders granted in terms of paras 2 to 9 (at para 1 above) of my judgment dated 11 October 2022, are not suspended pending the outcome of the applicants' application for leave to appeal dated 12 October 2022.

[31] Farlam JA in *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd*[11] held:

"[62] ***Although the granting of a declaratory order is discretionary it can be granted only upon a judicial exercise of the discretion****. There can be no proper exercise of such discretion if essential elements of a declarator are not fulfilled. In Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd [2005 (6) SA 205 (SCA) at 17 – 18] this court said:*

> *'Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection [s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959],*[12] *at least there must be interested parties on whom the declaratory order would be binding.'*

...

(T)he two stage approach under the subsection consists of the following. During ***the first leg*** *of the enquiry* ***the Court must be satisfied that the applicant has an interest in an ''existing, future or contingent right or obligation***''*. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been*

[11] 2009 (4) SA 89 (SCA) at 106G

[12] Now section 21(1)(c) of the Superior Courts Act, 10 of 2013.

proved, it has to exercise this discretion by deciding either to refuse or grant the order sought. ***The consideration of whether or not to grant the order constitutes the second leg of the enquiry****.*'"
(Emphasis added)

[32] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*[13] O'Regan J pronounced:

"*[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances."*

The learned Judge continued at para 108:

"[108] It should also be borne in mind that ***declaratory relief is of particular value in a constitutional democracy*** *which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed."*

[33] Mr De Vries contended on behalf of the respondents that because there is a pending application for business rescue to the SCA the liquidation proceedings are suspended until the SCA has adjudicated the matter. He relies on s 131(6) of the Companies Act 71 of 2008 which provides:

"(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-
(a) the court has adjudicated upon the application; or

[13] 2005 (2) SA 359 (CC) at 410D – E (para 107)

(b) the business rescue proceedings end, if the court makes the order applied for."

[34] On 12 October 2022 this Court granted the Landbank final winding-up orders in respect of Velvetcream 15 and Project Multiply and a final sequestration order against the Merwede Trust. Le Grange J ordered a final sequestration order in the Western Cape High Court under Case Number 15365/2021 against Van der Merwe and later refused him leave to appeal. He petitioned the SCA but Justices Ponnan and Hughes JJA dismissed his application on 07 September 2022 on the grounds that there are no reasonable prospects of success in the application and no compelling reasons why an appeal should be heard.

[35] The main judgment dealt comprehensively with the relief sought by the respondents. Just to recap, the respondents in Part B of the relief were seeking a declarator relating to a constitutional challenge to Chapter 6 of the Companies Act, 71 of 2008, on the basis that individuals and trusts fall to be placed under business rescue and that their exclusion from the protection of business rescue proceedings is unconstitutional. In Part C, the relief sought was the dismissal of the winding-up and sequestration applications of Project Multiply, Velvetcream 15 and the Merwede Trust and ordered that they be placed under business rescue in terms of s 131(1) of the Companies Act.

[36] There are no prospects of success on appeal: the main constitutional challenge has no merit; the respondents are continuing to ignore the fact that each entity, company and close corporation, trust and individual is regulated by the different pieces of legislation and protected differently by those pieces of legislation; that Courts do not legislate by virtue of the doctrine of separation of powers but only adjudicate matters; and Van der Merwe is already finally sequestrated with no prospects of success on appeal as the SCA has already definitively pronounced.

[37] More importantly, the respondents continue to undermine the statutory and fiduciary duties afforded to the liquidators and trustees who bear the responsibility to administer the insolvent estates and report to the Master of the High Court. The less said regarding the conduct of the respondents, the erstwhile business rescue practitioner and the legal team in blatantly refusing to attend the Commission of enquiry ordered by this Court, the better. The attendance of this enquiry, in my view, will help the parties to unravel the necessary information, particularly of proportionate ownership, whether there has been dissipation or not and account to the Master and protect the general body of creditors. The hands of the liquidators and trustees need to be strengthened under these circumstances. The objective of the Insolvency Act and the Companies Act must be met. Turning a blind eye to the conduct of the respondents in leaving Van der Merwe and Taljaard to blatantly continue to operate the insolvent entities as if it is business as usual would render nugatory the statutory rights and obligations of the liquidators and trustees. This cannot be countenanced.

[38] The argument by Mr De Vries ignores the provisions of s 150(3) of the Insolvency Act which was dealt with at para 38 of the main judgment. The section provides that 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] Mr De Vries, invoking the *Natal Joint Municipal Fund v Endumeni Municipality*[14], urged this Court to follow the interpretation that is reasonable, sensible or business like when interpreting s 131(6) of the Companies Act. I must also attach its ordinary grammatical

[14] 2012 (4) SA 593 (SCA) at para 18

meaning[15] unless, as stated in *Smyth and Others v Investec Bank Limited and Another*[16], to do so would result in an absurdity. In other words, what Mr De Vries wants this Court to do is to say although I have already pronounced on the business rescue application and found against the respondents, the correct meaning to the phrase *"the court that has adjudicated upon the application"* does not refer to the High Court but to the SCA.

[40] The interpretation that Mr De Vries is urging this Court to attach to the phrase is flawed in more than one way. First, the constitutional challenge to Chapter 6 of the Companies Act, has no prospects of success. Mr van der Merwe has already failed on that leg. Secondly, the SCA in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami)(Pty) Ltd and Others*[17] cautioned that if the majority creditors declare that they will oppose any business rescue scheme based on those grounds, the Landbank holding 95% vote as a major creditor, there would be no reason why the proclaimed opposition should be ignored unless it was said to be unreasonable or *mala fide.* I have not found that to be the case. Landbank is owed R80 million whereas Ms Taljaard is owed R10,000.00 and Curo Consulting R160,000.00. Thirdly, the liquidators and trustees have statutory rights and obligations that continue to be undermined. Fourthly, the issue regarding dissipation of assets and operations of the insolvent estates still left in the hands of Van der Merwe with unauthorised transactions taking place is untenable. Lastly, the refusal by the respondents, the erstwhile business rescue practitioner and the legal team to attend the Commission of Enquiry where details pertaining to these insolvent entities would finally be thrashed out, is obstructionist. The respondents and their legal team have not explained how any of them would suffer prejudice should the enquiry proceed.

[15] Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at para 28

[16] 2018 (1) SA 494 (SCA) paras 28 -29

[17] 2013 (4) SA 539 (SCA) at para 38

Inferentially it can be concluded that they are not willing to answer questions and furnish the required details.

[41] I am satisfied that the applicants have an interest in an existing, future or contingent right or obligation in that, they have a right to perform statutory duties as the liquidators and trustees of the insolvent estates found to be both factually and commercially insolvent and are unable to pay their debts. The non-fulfilment of this statutory obligation will result in adverse consequences for the liquidators and trustees in both their official and personal capacities.

[42] The second leg of the requirement is that once I am satisfied that the right exists, I have a discretion to decide whether to grant the order or not, which discretion must be exercised judicially.

[43] Regard being had to all the relevant circumstances in the matter, I am of the view that the relief that this Court granted on 11 October 2022 in favour of the liquidators and trustees *ex facie* the founding affidavit in support of the application for leave to appeal, the orders granted are not subject to appeal, and therefore not subject to s 18 of the Superior Courts Act. The applicants have therefore made out a case for a declarator. I deem it unnecessary to consider s 18 in this matter.

<u>On the issue of costs</u>

[44] In estate matters costs are normally costs in the administration of the estate. However, Ms Fourie persuasively made the following submissions: While accepting that a punitive cost order was not foreshadowed in the Notice of Motion, the opposition of this application has not been *bona fide,* not only because of the enormity of the papers generated but also because the respondents also raised irrelevant matters in the interlocutory applications. Counsel submitted that the costs in the application

be costs in the administration of the estates but costs in the interlocutory applications be borne by Ms Taljaard and Curo Consulting. Mr De Vries merely asked the application be dismissed with costs.

[45] There is no reason why the applicants or the insolvent estate should continue to be mulcted in costs unduly. The respondents acted without circumspection in opposing this application for the relief sought by the applicants and are being dilatory to the point of being obstructionist. There was simply no reason for opposition and no prospects of success on appeal.

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

1. It is declared that the orders granted in terms of paragraphs 2 – 9 of the written judgment of Mamosebo J dated 11 October 2022, are not suspended pending the outcome of the first and second respondents' application for leave to appeal dated 12 October 2022, or appeal as the case may be.

2. Costs in the liquidators and trustees' application are costs in the administration of the estate.

3. The first and second respondents are ordered to pay the costs in the interlocutory applications (striking out and additional affidavit) on the scale as between attorney and client, 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 to 7th applicants: Adv HR Fourie SC Adv U Van Niekerk Instructed by:JI Van Niekerk Inc. Attorneys c/o Majiedt Swart Inc.
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