



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

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

**CASE NO.: 1335/2021
Date heard: 24-07-2023
Date delivered: 01-12-2023**

In the matter between:

SHANIE TALJAARD

1st Applicant

CURRO CONSULTANCY (PTY) LIMITED

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.

5th Respondent

DEON MARIUS BOTHA N.O.

6th Respondent

JOHANNES ZACHARIAS HUMAN MULLER N.O.

7th Respondent

REFILWE TLHABANYANE N.O.

8th Respondent

VIMBI ANGELA TSOPOTSA N.O.

9th Respondent

ANGELINE POOLE N.O.

10th Respondent

PHILEMON MAWIRE N.O.

11th Respondent

AGRI SOUTH AFRICA NPC	12 th Respondent
MASTER OF THE HIGH COURT, KIMBERLEY	13 th Respondent
MASTER OF THE HIGH COURT, CAPE TOWN	14 th Respondent
AFFECTED PARTIES OF PROJECT MULTIPLY (PTY) LTD	15 th Respondent
AFFECTED PARTIES OF VELVETCREAM 15 (PTY) LTD	16 th Respondent
AFFECTED PARTIES OF THE MERWEDE TRUST AS PER	17 th Respondent
AFFECTED PARTIES OF CAREL ARON VAN DER MERWE	18 th Respondent
NATIONAL REAL ESTATE	19 TH Respondent
PIETER BURGER	20 th Respondent
PIET STEENKAMP	21 St Respondent
NARDUS SCHEEPERS	22 ND Respondent

IN RE:

CASE NO: 963/2021

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT BANK
OF SOUTH AFRICA**

Applicant

And

JACQUES DU TOIT N.O.	1 st Respondent
PROJECT MULTIPLY (PTY) LIMITED	2 nd Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC)	3 rd Respondent
ALL AFFECTED PARTIES	4 th Respondent

AND

CASE NO: 964/2021

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT BANK
OF SOUTH AFRICA** Applicant

And

JACQUES DU TOIT N.O. 1st Respondent

VELVET CREAM 15 (PTY) LTD (In Liquidation) 2nd Respondent

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

ALL AFFECTED PARTIES 4th Respondent

AND

**MAHIKENG CASE NUMBER: N557/2021
KIMBERLEY CASE NUMBER: 2436/2021**

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT
BANK OF SOUTH AFRICA** Applicant

AND

CAREL ARON VAN DER MERWE (SNR) N.O 1st Respondent

CATHARINA SUSANNA VAN DER MERWE N.O 2nd Respondent

CAREL ARON VAN DER MERWE (JNR) 3rd Respondent

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. This application was brought on an urgent basis for the following relief:

- “2. That the Fifth to Eleventh Respondents be interdicted from continuing with the liquidation process of Project Multiply (Pty) Ltd (in liquidation), Velvet Cream 15 (Pty) Ltd (in liquidation) and the sequestration process of the Merwede Trust, IT 1534/98, pending the finalization of the application to set aside the liquidation orders of Project Multiply (Pty) Ltd (in liquidation) and Velvet Cream 15 (Pty) Ltd (in liquidation) and the sequestration order of the Merwede Trust, IT 1534/98, dated 29 June 2023;*
- 3. The 22nd Respondent be interdicted from altering the infrastructure of the Farm Onverwacht, in the Northwest Province, and to further dissipate or dispose of any livestock or other movable assets on the Farm Onverwacht, and to maintain the status quo, on the Farm Onverwacht, pending the finalization of the application to set aside as set out in prayer 2 supra;*
- 4. That the costs of this application be paid by the Fifth to Twelfth Respondents, in their personal capacities, on the scale as between attorney and client, jointly and severally, with any other Respondent who opposed the application;*
- Further and/or alternative relief.*

Background

2. This application follows upon a long history of litigation between the parties. To contextualize this matter an abridged version of the litigation follows. I will however have to deal with it more fully later on in this judgment.

- 2.1 On 11 October 2022 Mamosebo J dismissed an application by the applicants wherein they sought:
- 2.2 Declaratory relief relating to a constitutional challenge to Chapter 6 of the Companies Act, 71 of 2008 on the basis that individuals and trust fall to be placed under business rescue and that their exclusion from the protection of business rescue proceedings is unconstitutional; and
- 2.3 The dismissal of the liquidation and sequestration proceedings relating to Project Multiply (Pty) Ltd, Velvet Cream 15 (Pty) Ltd and the Merwede Trust and orders that these entities be placed under business rescue.
- 2.4 Mamosebo J granted the conditional counter-application of the then provisional liquidators and trustees of the extension of their powers in terms of s 386(4) of the Companies Act and s 18 (3) of the Insolvency Act, 24 of 1936 respectively.
- 2.5 On 12 October 2022 the applicant application for leave to appeal the judgment and orders was dismissed by Mamosebo J. On the same day the provisional liquidation and sequestration orders were confirmed.
- 2.6 Also on 12 October 2022 the applicants petitioned the Supreme Court of Appeal for leave to appeal.
- 2.7 On 24 November 2022 the liquidators and trustees brought an urgent application for a declaratory order that the orders

granted in their favour (the extension of their powers) and which were not opposed by the applicants are not suspended pending the outcome of the application for leave to appeal, alternatively for an order in terms of s18 of the Superior Courts Act.

- 2.8 On 13 December 2022 Mamosebo J made a declaratory order that the orders in favour of the liquidators/trustees were not suspended pending the outcome of the applicants' application for leave to appeal of appeal.
- 2.9 On 19 December 2022 the applicants filed an appeal against the above mentioned order in terms of s 18(4) of the Superior Courts Act. This appeal was enrolled for hearing on 17 April 2023 but could not proceed because the court file was not in order. The appeal was thereafter set down for hearing on 17 July 2023. At the time of the hearing of this application judgment in the appeal had not been delivered yet.
- 2.10 In the meantime the applicants' application to the President of the SCA for reconsideration of their application for leave to appeal was dismissed.
- 2.11 On 29 June 2023 the applicants filed an application for the rescission of the liquidation and sequestration orders granted on 12 October 2022.

This Application

3. The application *in casu* is brought to interdict the liquidation and sequestration processes pending the outcome of the application for the rescission of the orders of liquidation and sequestration. The application is opposed by Land Bank and the 5th to 11th respondents, the liquidators and trustees.
4. The first applicant, who is also the deponent to the founding affidavit, is Ms Shanie Taljaard who describes herself as a businesswoman and farmer. She is also the director of the second applicant, Curro Consultancy (Pty) Ltd. The first applicant alleges that both she and the second applicant are creditors of the insolvent entities and that she is an employee of these entities. The applicants allege that as a result of the foregoing they have *locus standi* to bring this application.
5. The main basis on which the rescission application has been premised is an allegation by the applicants that Land Bank lacked the necessary *locus standi* to bring the applications for the liquidations of the companies and the sequestration of the trust. They contend that Land Bank had negligently or intentionally misrepresented its *locus standi* in the abovementioned applications to bring the applications for the liquidation within the terms of s345 of the Companies Act, 61 of 1973 and claimed to be a creditor of the entities in an amount of R75 million, where in fact it is only a creditor in the amount of R9 million. This contention is premised on the allegation that Land Bank has failed to provide the cession agreements between it and Unigro of the debts of the insolvent entities.

6. The applicants do however concede that Land Bank has a direct claim against the entities in the amount of R9 million, but allege that with livestock worth at least R26 million the entities could easily have settled its entire debt to Land Bank. They contend that the court would not have granted the orders of liquidation and sequestration had it been aware of these facts.
7. The applicants maintain that due to the procedure followed by the Court in hearing the matters relating to the liquidations and sequestration they could never raise the lack of *locus standi* of Land Bank as a *point in limine* in those proceedings. They also appear to allege that they had only become aware of the problems surrounding the *locus standi* of Land Bank when they learned of problems encountered by Land Bank in proving its *locus standi* in two similar matters ie *Land Bank v Somerhoek Boerdery (Pty) Ltd.* Limpopo Division, case number 1553/2022 and *Waldeck N.O and Others vs The Land and Agricultural Bank of SA*, Mpumalanga High Court case number 4013/2018.
8. In support of this urgent application for an interdict the applicants allege that despite an undertaking by the liquidators and trustees attorney, Mr JI Van Niekerk not to dispose of the assets of the insolvent entities pending the s18 (4) appeal, immovable property belonging to the entities have been sold on auction to Mr Nardus Scheepers, the 22nd respondent, hence the relief sought in paragraph 3 of the Notice of Motion. The liquidators/trustees have also continued to remove and dispose of livestock. They state that 100% of the cattle and an estimated 50% of the Boesmanlander sheep have already been unlawfully disposed of for less than value and without proper inventories being kept. That recovery of

the specific genetic material (of the Boesmanlander sheep) or value thereof, will hardly be possible and that the estates of the insolvent entities will suffer irreparable harm should further assets be disposed of and the rescission application and/or the s 18(4) appeal is successful. The applicants alleged further that the balance of convenience favour them and that they have no other satisfactory remedy.

9. Land Bank and the liquidators/trustees oppose the application on a number of grounds. The liquidators/trustees have also filed a counter-application in which they seek an order that the applicants be restrained/prohibited from instituting any further litigation against the liquidators and trustees in the insolvent estates of the entities without first having obtained leave from the Judge President or another judge appointed by him to do so.

Land Bank's *locus standi*

10. Land Bank denies that it does not have *locus standi* or did not have *locus standi* when the applications for the liquidations and sequestration were brought. It alleges that at all relevant times there had been an agreement of cession between Unigro and Land Bank and annexed to its answering affidavit in this matter the Land Bank's answering affidavit in the rescission application as annexure "X", and in which the process of the cession of Unigro's rights to Land Bank is explained. Mr Janse Van Rensburg who appeared for the applicants objected to this approach by Land Bank whereby it attached and incorporated its answering affidavit in the rescission application consisting of 6 arch lever files without referring to the specific portions of that affidavit relevant to this

application. Had this application been brought in the normal course, I would agree with Mr Janse Van Rensburg that annexure "X" be disallowed. However bearing in mind that this application was brought on an urgent basis with limited time to answer thereto meaningfully, I see no reason why not to extend the same latitude to the respondents as would normally be extended to applicants in applications brought on an urgent basis. After all, the inconvenience of wading through thousands of pages searching for the relevant information, was mine. I must also mention, in all fairness that Mr Cilliers SC, who appeared for Land Bank, referred me during argument to the relevant pages in the affidavits and the annexures thereto. Be that as it may, I will return to the explanation given in Land Bank's annexure "X".

11. Land Bank has also pointed out in its answering affidavit in this application that an official of Unigro, Mr Van Rensburg, had deposed to the founding affidavits on behalf of Land Bank in the applications for the liquidations and sequestration now in dispute as well as to that in the sequestration of Mr Carel Van der Merwe, who is considered to be the controlling mind behind the entities and is the life partner of the first applicant. Therein Mr Van Rensburg had given a truncated version of how the session agreement between Unigro and Land Bank came about.
12. Mr Carel Van der Merwe had appealed the sequestration order granted against his estate to the point of applying to the President of the SCA for a reconsideration of his application for leave to appeal, which was not granted, but without raising the point of the lack of Land Bank's *locus standi*.

13. The applicants *in casu* had not opposed the applications for provisional orders of liquidation and sequestration of the insolvent entities. The final orders were also granted on an unopposed basis. Land Bank contends that it is opportunistic and irresponsible of the applicants at this late stage and purely on reliance on applications, to which they were not parties, to base their allegation of Land Bank's lack of *locus standi* on.

14. In Land Bank's answering affidavit to the rescission application (annexure "X") Mr S Sebueng, Land Bank's Executive Manager: Legal Services and Mr J I Barnard, who was employed by Unigro as Chief Operating Officer during the subsistence of the Service Level Agreement concluded between Land Bank and Unigrow, deposed to affidavits explaining the transfer by Unigro's rights, title and interest in and interest in and to the loan agreements concluded between Unigro, as credit provider and Project Multiply and Merwede Trust as borrowers, and the rights of Unigro against Velvet Cream and Mr Carel Van der Merwe as sureties and co-principal debtors for the debts owed to Unigro by Project Multiply and the Merwede Trust, which were transferred to Land Bank in terms of a suit of agreements between Unigro and Land Bank. For purposes of this application I need not go into the detail of the operational process and the system implemented, as explained by Mr Barnard, save to state that both Mr Sebueng and Mr Barnard confirm the transfer of Unigro's rights in and to the loan agreements entered into with Project Multiply and the Merwede Trust. The covering mortgage bonds in respect of Project Multiply and the Merwede Trust were formally ceded to Land Bank as part

of the implementation of the process and were registered by the Registrar of Deeds as reflected on the mortgage bonds attached to annexure "X". I am satisfied that Land Bank had the *locus standi* to bring the applications for the liquidations and sequestration.

15. The applicant's insistence on being provided with a single agreement of cession between Unigro and Land Bank, with regard to the debts of the insolvent entities, in these circumstances, appear to be rather infantile.

Locus standi of the applicants

16. Both Land Bank and the liquidators/trustees dispute the *locus standi* of the applicants in bringing this application as well as the rescission application. As stated herein the applicants claim to have *locus standi* on the basis of their being creditors of the insolvent entities. The first applicant also relies on a contract of employment with the insolvent entities.
17. The liquidators/trustees make the allegation in their answering affidavit that neither of the applicants has proven claims in the respective insolvent estates. The second applicant submitted claims at the first meeting of creditors on 3 May 2023 but these claims were rejected for non-compliance with s44(6) of the Insolvency Act. The first applicant did not submit any claims at either the first or the second meeting of creditors held on 12 July 2023. It is significant, in my view, that the first applicant did not even attempt to prove any claim even after the filing of the rescission application.

18. Mr Janse Van Rensburg argued that it is trite that a creditor can prove a claim even after the second meeting of creditors was held and that in any event the applicants are not relying on s 354 of the Companies Act, which makes provision only for a liquidator, creditor or member to apply for a liquidation to be set aside, neither do they rely on s 149 of the Insolvency Act. The rescission application is brought under the common law and in addition to the two applicants being creditors of the insolvent entities, the first applicant is also a director of the insolvent companies. As such, she has a direct and substantial interest in the administration of the estates of the entities and may even be found personally liable for any irregularities.
19. As mentioned in paragraph 4 above, the applicants founded their *locus standi* on the fact that they are creditors of the insolvent entities. No reference was made in this regard to the first applicant being a director of the insolvent companies in the founding affidavit. It was only when confronted with allegations of lack of *locus standi* that the allegation of her being a director was made in the replying affidavit. The fact is that the first applicant is no longer a director of the insolvent companies. Upon liquidation the directors of a company cease to function as such and are deprived of their control on behalf of the company, of the property of the company, which is then deemed to be in the custody or control of the liquidator (see *Secretary for Customs and Excise v Millman* NO 1975 (3) SA 544 (AD) at 552 H).
20. What the first applicant's interests in the administration of the insolvent estates by the liquidators would be and her possible

liability therefore is not clear. The onus is on the applicants to prove their *locus standi*. In order to establish *locus standi* the applicants need to show an adequate interest in the subject matter of the application which could be prejudicially affected by the judgment of the court. That means that they need to show a direct and substantial interest in the judgment or orders which they wish to have rescinded.

21. I am in the circumstance of this matter not satisfied that the applicants have managed to establish the necessary *locus standi* to bring this application. As a necessary corollary of this finding, it means that the applicants have failed to establish a *prima facie* right to the relief claimed.
22. In the light of the above I need not deal in any detail with the other requisites of an interim interdict, save to state that those have also not been established. So, for instance the applicants do not even allege that they will suffer irreparable harm should the interim relief not be granted, nor has any consideration being given to the other creditors in assessing the balance of convenience.

Lis pendens

23. The liquidators/trustees and Land Bank have also raised the defense of *lis pendens* in that the applicants have sought the same relief i.e. the stay of the liquidations and sequestration proceedings pending the finalization of an application for the rescission of the respective orders during March 2023 and April 2023. The March application was withdrawn without the consent of all the parties and there appears to be a dispute over the costs of that matter.

The April application was struck from the roll with costs on the attorney and client scale. The liquidators/trustees contend that these matters have not been finalized and are still pending. The applicants dispute that these matters are still pending. The point may be arguable, but with the view I hold of this application, the issue of *lis pendens* need not be decided herein.

Urgency

24. Based on the view I hold, in light of the many applications brought by the applicants relating to the liquidations and sequestration of the insolvent entities, I had decided not to consider the fate of this matter based solely on the issue of urgency. My intention was to address the merits of this application, in as far it is necessary, in an attempt to prevent a proliferation of similar applications being brought. I need however to express my disapproval with the manner in which the applicants race to court (this is not the first occasion) with urgent applications, in this case after months of the alleged continuous breach of an undertaking given by the liquidators'/trustees' attorney and in which they prescribe time frames for the filing of papers which they themselves have difficulty complying with. This matter did not require the urgency with which it was brought.

The counter-application

25. The liquidators'/trustees' counter-application to prevent the applicants from bringing any further matters related to the liquidations and sequestration without first obtaining the permission of the Judge-President, applies. In support of this counter-application, the liquidators/trustees have provided a list of

13 matters brought by the applicants since the order by Mamosebo J on 11 October 2022 and this application, and of which all the matters that were heard, were dismissed. I may at this stage mention that the applicants' s18(4) appeal has also been dismissed in the meantime.

26. The liquidators/trustees contend that the relief is sought to protect them and the creditors in the insolvent estates from having to defend unmeritorious litigation brought in breach of the Rules, at enormous cost to the insolvent estates, where there is no prospect of recuperating the losses.
27. Mr Janse Van Rensburg has objected to the manner in which the counter-application has been brought, without having established any basis for the extreme urgency (1 day before the hearing) with which it was brought, without affording the applicants a reasonable opportunity to answer to the allegations made in an application which has such far reaching effects as to deny the applicants their right to access to the court. I agree with Mr Janse van Rensburg in this respect. There is no reason why the relief sought in the counter-application cannot be pursued in the normal course. The counter application stands to be struck from the roll for lack of urgency.

Cost of the application

28. Both Mr Cilliers and Ms Fourie SC, who appeared for the liquidators/trustees, have asked that the applicants bear the costs of this scurrilous and vexatious application on a punitive scale. In the circumstances of this matter I am of the view that such an order is warranted. Ms Fourie has however requested additionally that an order be granted that the applicants' attorney, Mr Marthinus

Schutte, be ordered to pay the cost of the application together with the applicants for reasons of his disregard for his professional responsibilities in the conduct of the application, his disregard for the Rules of Court and his failure to discourage the applicants from yet again bringing another unmeritorious urgent application. Ms Fourie has however conceded that Mr Schutte has only been the applicants' attorney of record for the last two applications. In the circumstance I am of the opinion that such an order is not warranted.

The following order is made:

a) The application is dismissed with costs on the attorney client scale, such costs to be borne by the applicants jointly and severally, the one paying the other to be absolved.

Such costs are to include, in respect of the 1st respondent, the costs consequent upon the employment of two counsel.

b) The counter-application is struck from the roll with costs.

C C WILLIAMS
JUDGE

For Applicants: Adv. F J Janse Van Rensburg
Schutte Attorneys
c/o Haarhoffs Inc

For 1st Respondent: Adv. J G Cilliers SC
with Adv S Tsangarakis
Strydom & Bredendamp Inc

For 5th to 11th Respondents: Adv Fourie SC
J L Van Niekerk Inc
c/o Majiedt Swart Attorneys Inc