

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

Case No: 758 / 2021-

In the matter between:

JACQUES DU TOIT N.O.

First Applicant

*(in his capacity as business rescue practitioner of
Velvetcream 15 (Pty) Ltd (in business rescue)
Reg. No: 2005/033276/07 and Project
Multiply (Pty) Ltd (in business rescue)
Reg. No: 1993/005325/07)*

VELVETCREAM 15 (PTY) LTD

Second Applicant

*(in business rescue)
(Reg. No.: 2005/033276/07)*

PROJECT MULTIPLY (PTY) LTD

Third Applicant

*(in business rescue)
(Reg. No.: 1993/005325/07)*

CAREL ARON VAN DER MERWE

Fourth Applicant

(ID No.: 680607 5143 002)

CAREL ARON VAN DER MERWE (SNR) N.O.

Fifth Applicant

*(in his capacity as co-trustee of the
Merwede Trust (IT 1534/98))*

CATHARINA SUSANNA VAN DER MERWE N.O.

Sixth Applicant

*(in her capacity as co-trustee of the
Merwede Trust (IT 1534/98))*

CAREL ARON VAN DER MERWE (JNR) N.O.

Seventh Applicant

*(in his capacity as co-trustee of the
Merwede Trust (IT 1534/98))*

and

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

First Respondent

INSTRUCTING ATTORNEYS
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UNIGRO FINANCIAL SERVICES (PTY) LTD	Second Respondent
MINISTER OF TRADE AND INDUSTRY	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fifth Respondent
AFFECTED PARTIES AS PER THE LIST ANNEXED HERETO, MARKED "A"	Sixth to Fifteenth Respondents

NOTICE IN TERMS OF RULE 16A(1)

BE PLEASED TO TAKE NOTICE THAT the above-named Applicants are of the intention to raise the following constitutional issues at the hearing of the above application:

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

2. **DECLARING** section 1 of the **Companies Act 71 of 2008** (*"the Act"*) as unconstitutional in that it unfairly discriminates between:

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

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

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

4. **DIRECTING** that, until such time as Parliament corrects the defect, an extension of the definition of 'companies' in the section 1 of the Companies Act, is granted, by a reading-in of the following subsection immediately after the subsection(c) thereof:

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

5. **IN THE ALTERNATIVE:**

- 5.1. Declaring that section **133(2)** of the Act, is unconstitutional in that it does not provide the same or a comparable discretion to a Court to adjourn or to stay proceedings against sureties of a company in business

rescue, *in casu* trusts and natural persons, as it does in respect of a company in business rescue, the latter who is also liable in terms of a deed of suretyship.

- 5.2. Declaring that this differentiation is arbitrary and contrary to section **9(1)** of the Constitution and, in any event, contrary to the right to a fair civil hearing, entrenched in Section **34** of the Constitution.
- 5.3. Suspending the declarations made in paragraphs **5.1** and **5.2** above for a period of two years for Parliament to correct the defect
- 5.4. Directing that, until such time as the Legislature has addressed the unconstitutional differentiation, it would be just and equitable in the present circumstances, by a reading-in of the following subsection **133(2) bis** immediately after the subsection **133(2)** of the Act:

“133(2) bis During business rescue proceedings, a guarantee or surety who is a trust or natural person, which trust or natural person is in an inter-related and subsidiary relationship with a company in business rescue, may not be enforced except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.”

TAKE NOTICE FURTHER that any party interested in the relief claimed may, with the written consent of all the parties to the proceedings given, not later than **20** (twenty) days after the filing of this Notice, be admitted as *amicus curiae*, upon such terms and conditions as may be agreed to between the parties.

TAKE NOTICE FURTHER that the written consent referred to immediately above, shall be lodged with the Registrar of the Civil Division, within **5** (five) days of agreement; and that the *amicus curiae* shall comply with the time-frames agreed for the lodging of written argument.

TAKE NOTICE FURTHER that the agreement entered into may be amended by this Court in the interests of justice.

TAKE NOTICE FURTHER that in the event that the interested party is unable to obtain consent from the parties, it may, within **5** (five) days from expiry of the **20** (twenty) day period above, apply on notice to the parties, to this Court to be admitted as an *amicus curiae* to these proceedings. To this end, such application shall:

1. Briefly describe the interest of the *amicus curiae* to these proceedings;

2. Clearly set out the submissions to be addressed by it in these proceedings; and their relevance to the constitutional issue;
3. The reasons why the submissions will assist the Court, and that they will be different from the submissions advanced by the parties to the proceedings; and
4. Shall be served on all parties to the proceedings.

TAKE NOTICE FURTHER that any party who opposes the admission of the interested party as an *amicus curiae*, shall file a Notice of Opposition and an Answering Affidavit within **5** (five) days from the date of service of the interested party's application to be admitted as an *amicus curiae*.

KINDLY PLACE A COPY OF THIS NOTICE ON THE NOTICE BOARD

SIGNED AND DATED AT CAPE TOWN ON THIS 13TH DAY OF APRIL 2021



PER: JOHAN VICTOR
JOHAN VICTOR ATTORNEYS
APPLICANTS' ATTORNEYS
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TO: **THE REGISTRAR** **BY HAND**
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

AND TO: **THE LAND AND AGRICULTURAL** **BY SHERIFF**
DEVELOPMENT BANK OF SOUTH
AFRICA
FIRST RESPONDENT
BLOCK D
2 ECO GLADES
WITCH-HAZEL ROAD
PRETORIA

AND TO: **UNIGRO FINANCIAL SERVICES (PTY) LTD** **BY SHERIFF**
SECOND RESPONDENT
12 BYLS BRIDGE BOULEVARD
HIGHVEL EXTENSION 73
CENTURION
GAUTENG

AND TO: **MINISTER OF TRADE AND INDUSTRY** **BY SHERIFF**
THIRD RESPONDENT

c/o **THE STATE ATTORNEY**

COR. LENNOX & CHAPEL STREETS
1ST FLOOR
WOOLWORTHS BUILDING
KIMBERLEY
NORTHERN CAPE

**AND TO: MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT
FOURTH RESPONDENT**

BY SHERIFF

**c/o THE STATE ATTORNEY
COR. LENNOX & CHAPEL STREETS
1ST FLOOR
WOOLWORTHS BUILDING
KIMBERLEY
NORTHERN CAPE**

**AND TO: THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION
FIFTH RESPONDENT**

BY E-MAIL

**AND TO: AFFECTED PARTIES AS PER THE LIST
ANNEXED HERETO, MARKED "A"**

BY E-MAIL