IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case Number: 3159/2020

In the matter between:

LOUIS JONKER First Applicant

JOHANNA JACOBA JONKER Second Applicant

and

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA First Respondent

DEON MARIUS BOTHA N.O. Second Respondent

JOHANNES ZACHARIAS HUMAN MULLER N.O. Third Respondent

LOUISA SIBIYA N.O. Fourth Respondent

THE MASTER OF THE HIGH COURT, BLOEMFONTEIN Fifth Respondent

AFFECTED PARTIES OF JONKER PRODUCTS CC AS PER LIST ANNEXED AS ANNUXURE "A" Sixth Respondent

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JUDGMENT BY: REINDERS, J

HEARD ON: 15 FEBRUARY 2024

DELIVERED ON: 16 AUGUST 2024

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[1] The two applicants are married to each other out of community of property. They jointly move for the setting aside of a final liquidation order of an entity previously known as Jonker Products CC (in liquidation) [the CC].

[2] The first applicant according to his founding affidavit avers that he is the sole member of the CC. The second applicant applies on the basis that she is a creditor as well as an employee of the CC. For sake of clarity and in distinction to the present application and other litigation, reference to the current applicants would hereafter also include "the Jonkers/Mr Jonker" where applicable. The application is opposed by the first respondent, namely the Land and Agricultural Development Bank of South Africa (Land Bank), whom according to the papers moved for the liquidation of the CC during 2020.

[3] The application is voluminous as a result of the inclusion of, amongst others, the papers filed in applications that previously served before this court (and in some instances other Divisions), previous heads of arguments and judgments granted. Ultimately, the issues and the relief claimed, remains the setting aside of a final winding-up order granted by this court.

[4] It is common cause that the application for liquidation (under the same case number as in the current application) originally served before Grobler AJ on 9 September 2020 on an urgent basis. He granted amongst others an order placing the CC under provisional liquidation with the return date on 29 October 2020. The aforementioned rule nisi was confirmed by Daniso J on 29 October 2020 on the same papers. Of significance however is that the application before Grobler AJ was opposed by the CC, and not granted without having heard full arguments by the CC. The full reasons granted by court was attached to the papers and consists of some 40 paragraphs. Of note is paragraph [13] of the judgment wherein the court made mention that the CC denied that the Land Bank had *locus standi* to pursue the relief it sought in the notice of motion. Ultimately he granted the mentioned orders.

[5] The Jonkers now, three years after the final order being granted, aver that Land Bank indeed did not have the required *locus standi* to have moved the application at the time of granting of the provisional and final winding-up, and that Grobler, J

did not deal with the averred lack of *locus standi*. Moreover, so the argument went, there were essential documentation lacking by Land Bank which, had it been placed before Grobler, AJ, would not have persuaded the judge to grant the relief. In the notice of motion, it is prayed that the final liquidation order granted on 29 October 2020 be set aside, and in the alternative that an interim order be granted prohibiting the liquidators from continuing with the liquidation processes of the CC pending an action to be instituted by the applicants within one month from the date of the proposed order to set aside the liquidation proceedings. At the commencement of hearing the application, counsel for applicants indicated that they no longer rely on the interim relief sought and merely moves for the setting aside of the final order of liquidation. However, I was requested to refer the matter for trial. The latter relief was objected to by counsel for Land Bank.

[6] In moving their case the Jonkers in the founding affidavit and subsequently their replying affidavit, state that the relief for setting aside is brought in terms of the common law only, and neither in terms of Section 354 of the Companies Act[1] which provides authority for a court to set aside a winding up order that was previously granted, nor in terms of Uniform Rule 42 dealing with rescission applications.

[7] In its founding affidavit the deponent, Mr Jonker, under the heading "the purpose of this application":

> "12.1 The purpose of this application is to set aside the winding-up order of Jonker Products, which we submit were improperly obtained by the First Respondent by intentionally misrepresenting the facts to the Court, when the Application was moved on an urgent basis.
>
> 12.2 Alternatively, in the event that the Court is not inclined to grant the primary relief sought on motion papers, for an interim interdict prohibiting the Second to Fourth Respondents from continuing with the liquidation processes of Jonker Products pending finalisation of an action to be instituted to set aside the orders of liquidation and

[1] , 61 of 1973 (Such provisions are applicable to close corporations in terms of Sec 66 of the Close Corp Act 69 of 1984)

sequestration, which action must be instituted within 1 month from date of this order.

12.3 The Applicants contend that the Land Bank intentionally misrepresented their *locus standi* in bringing the application for the winding-up of Jonker Products on the basis that the CC was unable to pay its debts, as envisaged in section 345 of the Companies Act, act 61 of 1973, in that the Land Bank claimed that it is a creditor of Jonker Products, in an amount of R 18 189 196.47, as at 31 May 2020, under circumstances where the Land Bank is not a creditor of Jonker Products at all, since all the loan agreements relied upon are concluded between Jonker Products and Unigro Financial services (Pty) Ltd (Unigro), and not the Land Bank.

12.4 The Land Bank's *locus standi* to launch the liquidation proceedings was disputed from inception, but the way in which the manner was dealt with by the Court, precluded the Court from adjudicating the issue of *locus standi*, and the court indeed did not deal with the issue of *locus standi* in its judgment, and simply accepted the Land Bank's "say so" that indeed it has *locus standi*.

12.5 The Applicants are advised that the Court would not have granted the order of liquidation if the Court was aware of the true facts and the Applicants are therefore entitled to set aside the order of liquidation in terms of the common law."

[8] The nub of the submissions relates thereto that Land Bank placed reliance for its *locus standi* to prove the CC's indebtedness to it based on certain alleged cessions and sales agreements in terms whereof it acquired the book debts of, amongst others, the legal entity known as UniGro Financial Services(Ltd) Pty [UniGro). According to Mr Jonker, Grobler AJ in his judgment did not deal therewith that the Land Bank did not have the required *locus standi*. It is averred that applicants were not in possession of all these documentation, notwithstanding an application in terms of Rule 35(12) for discovery.

[9] The applicants in addition under the heading: "The rescission of judgments which were obtained by intentional misrepresentation" further relies thereon that Land Bank through its functionaries and attorney misrepresented the true facts to court, that it was made with the intention to mislead, and had the true facts been placed before court, the court would not have granted the aforementioned order. The deponent states that he has been advised that, as a general rule, it is practically impossible to establish intentional misrepresentation by way of motion proceedings.

[10] Mr Jonker states that "we were completely unaware of the Land Bank's intentional misrepresentation and it only came to our knowledge when we were informed of a similar case that was dealt with by the same attorney on behalf of the Land Bank..." Reference is made to an application for the liquidation of the entity Somerhoek Boerdery (Pty) Ltd (Somerhoek Boerdery) in the High Court of South Africa, Limpopo Divison in 2022. According to Mr Jonker the Somerhoek Boerdery application was settled on the basis that the application for winding-up was abandoned, and Land Bank agreed to Somerhoek being placed in business rescue. These application documents were obtained during April 2023. According to Mr Jonker, having perused these documents, "it is abundantly clear that Land Bank knew that it did not have the necessary *locus standi* in Somerhoek". It is averred that Land Bank knew that the agreements relied upon contained information that would have been relevant to the CC, and had the full contents of these agreements been to their (the CC's) knowledge, it would have been used to formulate a defence against the liquidation application. Mr Jonker states that the CC was thus deprived of the opportunity to raise "these defences".

[11] I was referred to the judgment of ***Waldeck NO and Others v The Land and Agricultural Bank of SA***[2] for the proposition that the Land Bank misrepresented facts to Grobler AJ in relation to its *locus standi*. Counsel for applicants also directed my attention to a judgment delivered in the Gauteng Division, Johannesburg ***Trakman N.O. and Others v The Master of the High Court and***

[2] Unreported judgment in the Mpumalanga High Court Case Number 4103/2018.

Others[3] where the Land Bank was found wanting in producing the required cession agreement to proof its *locus standi.*

[12] In its answering affidavit the Land Bank emphasised from the outset that it denies any allegation or suggestion in the applicant's founding affidavit of any misrepresentation made by Land Bank and/or its representatives when the matter was heard before Grobler AJ. According to the Land Bank, even though the learned judge did not specifically deal with the dispute in respect of *locus standi*, it was fully canvassed in argument and the court made a finding that Land Bank had the required *locus standi* to bring the application. The Land Bank submits that the applicants should have appealed the decision, but had failed to do so for approximately three years.

[13] Land Bank submitted that the creditors of the CC would be severely prejudiced by the setting-aside of the winding-up order and from a practical viewpoint, all material assets of the CC have already been sold and transferred in the administration of the liquidated estate and under these circumstances it would be "practically impossible to unscramble the egg".

[14] In answering to the allegations of misrepresentation as averred by the Jonkers in its founding affidavit (placing heavy reliance on the Somerhoek Boerdery application), the Land Bank extensively deals with and explains what exactly transpired in the latter application. It is averred that Somerhoek Boerdery in several written agreements acknowledged its indebtedness to Land Bank in clear and express terms. Somerhoek Boerdery further formally consented to default judgment in terms of Rule 31 of the Uniform Court Rules in favour of Land Bank (and not UniGro).

[15] Counsel for Land Bank submitted that of great significance in this regard is the undisputed evidence that the business rescue practitioners acknowledged and accepted the Land Bank's claim in Somerhoek Boerdery after their appointment as business rescue practitioners. The fact that the three business rescue practitioners acknowledged and accepted Somerhoek Boerdery's indebtedness

[3] Unreported judgment Case number 2020/12432 delivered on 21 may 2021.

towards Land Bank clearly illustrate that the inference that the present Applicants wish to draw is wrong and definitely not substantiated by their reliance on the Somerhoek Boerdery matter. Moreover, so the argument went, the allegation in the founding affidavit that the Land Bank failed to deal with a denial of *locus standi* in the replying affidavit because they believed that the Land Bank had no *locus standi*, is untrue. In the answering affidavit a portion of the replying affidavit filed in the Somerhoek Boerdery matter was quoted dealing with this issue. Land Bank submitted that it was convincingly illustrated that Somerhoek Boerdery, by its own admission, on several occasions and in writing expressly admitted liability towards Land Bank.

[16] It was submitted by Land Bank that, at the time of arguments before Grobler AJ, it referred to several judgments in various divisions of the High Court wherein the *locus standi* of Land Bank in n respect of ceded claims were adjudicated upon and confirmed. In ***Land and Agricultural Development Bank of South Africa v WAA Engelbrecht NO and Others***[4] the learned judge made a finding that "there exists a valid cession of rights between applicant and Unigo. As the cessionary, applicant has a valid claim against Anlem Trust and thus the necessary *locus standi* to institute the present proceedings has been established." In this division in the matter of ***Land and Agricultural Development Bank of South Africa v Casparus Johannes Rynhardus Cilliers***[5] having heard arguments in respect of Land Bank's *locus standi* it was held:

> "[11] It was submitted, rightly so, that the applicant needs to prove its legal standing to claim. It was contended that the applicant did not establish sufficiently the fulfilment of the suspensive conditions and therefore applicant cannot perfect the security. I do not agree and in my view the recordal referred to in paragraph [4] above and signed by all the parties on 14 April 2024 leaves no doubt in my mind that the Land Bank (present applicant) has *locus standi* to perfect the security. See: Aussenkehr Farms Farms (Pty) Ltd v Trio Transport CC 2002 (4) SA 483 (SCA) at para [26]."

[4] Unreported judgment in the Limpopo Division of the High Court under Case Number 2973/2020 delivered on 30 June 2020.
[5] Unreported judgment under Case Number 4201/2019 delivered on 19 December 2019.

[17] Counsel for Land Bank referred me also to a recent unreported judgment of ***Shanie Taljaard and Another v The Land and Agricultural Development and Others***[6] in the High Court of South Africa (Norther Cape Division, Kimberley delivered on 1 December 2023 under case number 1335/2021) wherein the Land Bank's *locus standi* was confirmed.

[18] Land Bank submitted that the ***Waldeck*** decision does not assist the applicants as Land Bank specifically stated in its founding affidavit that the documents relating to Land Bank's transfer of rights, were available for inspection. ***Waldeck*** dealt with Land Bank's failure to adhere to a request for discovery in terms of Sec 35 of the Uniform Rules.

[19] In reply Mr Jonker stressed that the application is brought on the grounds of common law and denied that the issue of *locus standi* was properly adjudicated upon. Counsel for applicants submitted that the judgments relied upon by the Land Bank ,"are clearly wrong". Counsel however could not indicate that any of these cases had been successfully overturned on appeal.

[20] I deem it appropriate to state that, in requesting that the matter be referred for trial, it would axiomatically imply that the liquidation proceedings would be stayed pending the outcome of such litigation. Counsel for Land Bank submitted that this would be tantamount to the applicants' alternative interim relief, for which the Jonkers did not make out a proper case in its papers at all. I am in agreement, and do not intend to make such an order herein.

[21] The Supreme Court of Appeal in ***Ferris & Another v Firstrand Bank***[7] held that an applicant in a rescission application based on the common law, must show good cause for the granting of such relief. Such good cause must be illustrated in clear terms in the founding affidavit.[8]

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[6] Unreported judgment under Case Number 1355/2021 delivered on 1 December 2023.

[7] 2014(3) SA 39 (SCA)

[8] See: ***Shakot Investments (pty) Ltd v Town Counsel of the Borough of of Stanger*** 1976(2) SA 70 (D).

[22] Although good cause cannot be defined comprehensively, in ***Storti v Nugent and Others***[9] it was held that recision under common law involves establishing "sufficient cause" which in turn involves two essential elements

(a) the party seeking the relief must present a reasonable and acceptable explanation for his default; and

(b) on the merits such person must have a bona fide defence which, prima facie, carries some prospects of success.

[23] For the applicants to succeed in in its claim of setting aside a judgment on grounds of intentional misrepresentation, it must allege and proof that there was a misrepresentation and the Land Bank and its attorney subjectively knew that it did not have *locus standi*.

[24] An applicant must show that:

24.1 the litigant was a party to the fraud[10];
24.2 the evidence was in fact incorrect[11];
24.3 it was made fraudulently and with the intent to mislead[12];
24.4 and it diverged to such an extent that from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence given[13].

[25] Although the applicants state that it does not rely on Section 354 of the Companies Act[14] for the relief claimed, I deem it appropriate to quote the same. The section provides authority for a court to set aside a winding up order that was previously

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[9] 2001(3) SA 783 (W) at 807A.
[10] See: ***Makings v Makings*** 1958 (1) SA (A) at 344H-345A.
[11] See: ***Fraai Uitzicht 1798 Farm (Pty) Ltd v McCoullough*** (unreported Supreme Court of Appeal case number 118/2019 deliverd on 5 June 2020.
[12] See: ***Minister of Land Tenure v Sizwe Development*** 1991 (1) SA 677 (TK) at 680 B.
[13] See: ***Rowe v Rowe*** 1997 (4) SA 160 (SCA) at 1661.
[14] 61 of 1973.

granted. Such provisions are applicable to close corporations in terms of Sec 66 of the Close Corporation Act[15]

Sec 354 directs:

"(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary wind-up on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence."

[25] In ***Storti*** *supra* the Court defined six principles that define this power:

1 The Court's discretionary power is not limited to rescission on common-law grounds;

2 Unusual or exceptional circumstances must exist to justify the relief sought;

3 The section may not be invoked to obtain a re-hearing of the sequestration application:

4 Where the relief is sought on the basis that the sequestration order should never have been granted, the facts must at least support a common-law rescission:

5 .Where the application is based upon supervening events, it should involve unnecessary hardship to restrict the debtor to the ordinary rehabilitation relief; and

6 A Court will not exercise this relief if setting aside the order would cause undesirable consequences.

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[15] 69 of 1984.

[26] In ***Ward and Another v Smith and Others: In re Girr v Zambia Airways Corporation Ltd*** [16] the court found that the object of the section is not to provide for a re-hearing of the winding-up proceedings nor for the court to sit on appeal upon the merits of the judgment in respect of those proceedings.

[27] I have quoted verbatim the basis on which the Jonkers rely for the rescission of the final order of liquidation. Reliance for the relief sought is placed thereon that Land Bank intentionally misrepresented to Grobler AJ that Land Bank was not a creditor of the CC and thus lacked *locus standi.* The reasons proffered for the alleged misrepresentation by Land Bank in the founding affidavit, consist in my view of inferences drawn and speculation by the Jonkers on how they perceive the Land Bank to have somehow known that they lack *locus standi* in the Somerhoek litigation. The Land Bank in opposing these averments, set out comprehensively what had transpired and put paid to the Jonkers' averments in this regard. In any event, the applicants opposed the application before Grobler AJ, and the averment by the Jonkers that they would have been "able to formulate a defence", is untenable.

[28] In respect of the allegations of fraud and/or misrepresentation I keep in mind what was stated in ***Raubex Construction (Pty) Ltd v Bryte Insurance Company (Pty)***[17] Ltd at paragraph [24], namely that fraud will not easily be inferred where it is sought in motion proceedings. A party has to show that the representor advanced contentions in bad faith knowing it to be incorrect. Land Bank avers that *locus standi* had been dealt with extensively before the trial court and that various judgments supported their view of *locus standi* at the time. I agree with the contention on behalf of Land Bank that it would be insufficient to only convince me that Land Bank did not have the required *locus standi* at the time. I agree that in addition for me to interfere with the order granted, applicants would have to proof subjective knowledge of those facts and the intention by Land Bank and its legal representative to mislead the court in respect of the winding-up proceedings. Such

[16] 1998 (8) SA 175 (SCA)
[17] 2019 (2) All SA 322 SCA.

intention and subjective knowledge have in my view not been proved by the applicants on the papers.

[29] In ***Shani Taljaard***[18] the applicants moved for the rescission of liquidation and sequestration orders granted against them on the same basis as in casu, namely that the Land Bank lacked *locus standi* to have brought such applications and had intentionally misrepresented its *locus standi* in that there was no proof of a cession between Land Bank and Unigro of the debts owed to Unigro by the applicants. In some 6 paragraphs, the learned judge dealt comprehensively with the aspect of Land Bank's *locus standi* and concluded that the Land Bank had proven its *locus standi*. I align myself with such conclusion.

[30] The Land Bank opposed the application for a rescission of the winding up of the CC in the respects as mentioned herein above. The CC dealt with its *locus standi* and explained same covering almost eight pages and which covered the documentation that it relied upon. The CC disputed the *locus standi* of Land Bank in its opposing affidavit as a point in limine consisting of approximately six pages. In the present application and in argument that Land Bank's *locus standi* was disputed at the inception of the litigation. As mentioned above, the trial judge granting the provisional order gave his reasons why he concluded that a proper case had been made out which included a reference to the disputed *locus standi* of the Land Bank. Put differently, that court assessed and concluded the question of *locus standi* and it would be improper for me to have what would essentially amount to a re-hearing of the winding-up proceedings or to attempt to sit on appeal as a single judge upon the merits of a judgment by a different judge of similar status. As pointed out by Land Bank, the applicants had been aware of the judgment by Grobler AJ since September 2020 and never appealed the order.

[31] The above conclusion appears to me to be the end of the matter and the application cannot succeed. The applicants did not avail itself of its remedy to appeal the final order where they could apply if so advised to convince a court of appeal to hear further evidence.

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[18] Supra

[32] The applicants in their founding affidavit makes mention thereof that following the appointment of liquidators they filed an urgent application to have the meetings and decisions taken thereat set aside for want of compliance with section 78(1) of the CC Act. A rule nisi was granted and confirmed, setting aside the first and second meetings and the decisions taken thereat. Leave was granted to the Land Bank to appeal the order, and judgment have since been delivered.[19] The Supreme Court of Appeal (majority judgment) ordered a declarator that s78(1) of the Close Corporations Act 69 of 1984 permits the Master to grant consent to a liquidator to summon a first meeting of creditors and members after the expiry of one month from the date of final liquidation, at any time before the meeting so summoned is held.

[33] In my view the finding of the SCA does not bear effect on this application for setting aside the final order of liquidation. The SCA was most certainly not required to deal with the aspect of *locus standi*. I was informed that other litigation (the exact detail of which is unknown to me) in respect of the parties before me, are still pending in this Division.

[34] Land Bank raised a point of non-joinder which may or may not be a good point. I do not consider it necessary for purposes hereof to finally adjudicate same.

[35] Having reached the conclusions herein above, the application for the setting aside of the final liquidation order granted in this Division on 29 September 2020 cannot succeed. Both parties were represented by senior and junior counsel and requested costs of two counsel. Land Bank pressed on me to make a punitive cost order against the applicants. In the exercise of my discretion costs would be on a party and party scale.

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[19] ***Botha NO and Others v Jonker and Others*** (1003/2022) [2024] ZASCA 78; [2024] 3 All SA 365 (SCA) (27 May 2024).

[36] Accordingly I grant the following order:

The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

pp [redacted]

C REINDERS, J

On behalf of the Applicant: Adv GD Maritz SC
Adv FG Janse van Rensburg

Instructed by: Eugene Geyser Attorneys
c/o Lovius Block Attorneys
BLOEMFONTEIN

On behalf of the First Respondent: Adv J Marais SC
Adv S Tsangarakis

Instructed by: Strydom and Bredenkamp
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