



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.: 976/2024, 912/2024, 913/2024, 914/2024
Date heard: 06-02-2025
Date delivered: 09-09-2025

In the matter between:

FIRSTRAND BANK LIMITED

**976/2024
Applicant**

AND

OMSTAAN BOERDERY CC

Respondent

And in the application between:

912/2024

FIRSTRAND BANK LIMITED

Applicant

And

**THE TRUSTEES FOR THE TIME BEING OF
SKANSKOP TRUST, IT 1987/96**

Respondent

And in the application between:

913/2024

FIRSTRAND BANK LIMITED

Applicant

AND

**THE TRUSTEES FOR THE TIME BEING OF
EMERALD TRUST, IT198/96**

Respondent

And in the application between:

914/2024

**FIRSTRAND BANK LIMITED
AND**

Applicant

**THE TRUSTEES FOR THE TIME BEING OF
MERBINE TRUST, IT1983/96**

Respondent

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. On 6 February 2025 I made orders *inter alia* confirming the provisional liquidation order in matter 976/2024 and the provisional orders of sequestration in matters 912, 913 and 914/2024 and granted final orders in the above matters. My reasons now follow:
2. Omstaan Boerdery CC (Omstaan CC) owes the applicant Firststrand Bank Ltd an undisputed amount in excess of R41, 3 million. The Skanskop Trust, the Emerald Trust and the Merbine Trust (the Trusts) in their capacity as sureties and co-principal debtors of Omstaan CC are indebted to the applicant in the amount of R22 million.
3. On 6 September 2024 and by agreement between the parties, Omstaan CC and the Trusts were placed in provisional liquidation and sequestration.
4. Omstaan CC and the Trusts however opposed the confirmation of the provisional orders on the basis (i) that the Omstaan Group is not insolvent, (ii) that it would not be to the advantage of creditors; and (iii) that special or unusual circumstances exist for the court to exercise its discretion in refusing the final orders sought by the applicant.

Background

5. During April 2024 Omstaan CC was indebted to the applicant in an amount in excess of R37 million.
6. After being served with the applications for the provisional liquidation and sequestrations, the respondents and the applicant entered into acknowledgement of debt agreements which were made orders of court on 24 May 2024 and the applications for the provisional orders were postponed to 6 September 2024.
7. The acknowledgment of debt orders were to the effect that:

- 7.1 Omstaan CC admitted its debt to the applicant in the total amount plus interest from 1 February 2024 to date of payment;
 - 7.2 Omstaan CC undertook to make full payment of the above amount by close of business on 2 September 2024, alternatively have bank guarantees issued by 2 September 2024 in favour of the applicant, providing for payment of its indebtedness in full by 30 September 2024;
 - 7.3 In the event of breach of the acknowledgment of debt order, Omstaan CC agreed to be placed in final liquidation;
 - 7.4 The Trusts acknowledged their indebtedness to the applicant in the amount of R22 million each (the limit of their suretyship) plus interest from 1 February 2024 until date of payment;
 - 7.5 The Trusts undertook to make full payment of their indebtedness by close of business on 2 September 2024 alternatively provide bank guarantees for payment by 30 September 2024;
 - 7.6 In the event of breach of the acknowledgement of debt orders the Trusts agreed that the applicant be entitled to proceed with obtaining final sequestration orders against it.
8. On 30 August 2024, three days before full and final payment was due or bank guarantees were issued in terms of the acknowledgment of debt orders, the respondents provided the applicant with a new settlement proposal, which the respondents have incorporated into their answering affidavit and which proposal is set out as follows:
- 8.1 From 30 September 2024 until 31 May 2025 the respondents will make a minimum payment of R500, 000.00 per month to be applied towards the interest incurred monthly;

- 8.2 The respondents would cede to the applicant and secure payment of the raisin and cotton proceeds, to be paid directly to the applicant as a capital reduction, which would reduce the current outstanding amount, on the basis that interest is served as per paragraph 8.1 above, by at least R5 million by end of May 2025;
- 8.3 The respondents would then require a payment holiday over the winter months of June, July and August 2025 as the winter yields are far less than in summer and it is not envisaged that the interest payments of R500, 000. 00 per month will be met. The respondents will however make payment to the applicant of whatever they harvest in respect of lucerne.
- 8.4 From September 2025 until end of May 2026, the cycle will repeat.
- 8.5 The above process should reduce the outstanding amount by about R10 million over a period of two years.
- 8.6 By end of May 2026 the respondents would pay the balance owing by being in a position to get finance elsewhere, alternatively, the farms can then be sold.
- 8.7 In the meantime the respondents will consent to a notarial bond being registered over the movable assets of the “group”, which would increase the applicant’s security by at least R5 million to R7 million.
9. The above settlement offer is embodied in a letter by the attorney of record for the respondents and aside from the settlement proposal, the letter, which forms part of the respondents’ answering affidavit in all the matters before me, discloses other pertinent information regarding the respondents’ financial standing.
10. The Omstaan Boerdery Group conducts a farming enterprise in the Northern Cape. Mr and Mrs Visser Senior are the registered owners of 14

hectares, Mr AJ Visser (Junior) is the owner of 21 hectares, the Omstaan Trust is the owner of 46 hectares, the Emerald Trust is the owner of 14 Hectares, Merbine Trust is the owner of 14 hectares and Skanskop Trust is the owner of 14 hectares.

11. Omstaan CC, is the trading/farming entity and owns the movable assets (tractors, lorries and farming implements) with which the farming is conducted, valued between R10 million and R20 million.
12. The land described above was developed as one farming unit from the middle seventies, focusing mainly on grape/raisin production until about two years ago, when due to *inter alia* flooding, the Covid 19 pandemic and changing market conditions, the reliance on an income from raisins alone no longer made commercial sense. The Omstaan Boerdery Group then diversified its farming operations to include the productions of lucerne and cotton.
13. The letter states that whilst it can be argued that the individual Trusts and the CC are factually insolvent, the Omstaan Boerdery Group is solvent in that the value of its assets exceeds the extent of its outstanding debt.
14. Valuation reports for the immovable properties described in paragraph 10 above were attached to the answering affidavit as well as for a farm in the Kenhardt region which belongs to the Omstaan Trust and a holiday property in Port Nolloth which belongs to A J Visser Junior. The total value of the group's immovable property amounts to about R50 million.
15. The respondents allege further that they only have one other creditor of note, SASFIN, in respect of some of the farming equipment.
16. The respondents allege further that the Omstaan Group has an income sufficient to not only service its debt but also to meaningfully repay a portion of the outstanding capital annually, continue to farm and provide labour opportunities, provide food security locally and internationally and to provide

an opportunity for the next generation of Vissers to continue the development of the land.

Discussion

17. Whilst one has empathy for the dilemma of the Visser family, the stark reality is as follows:

17.1 The applicant has called up the indebtedness of Omstaan CC as far back as 7 May 2023. A notice of demand in terms of s 69(1)(a) of the Close Corporation Act, 69 of 1984, demanding payment within 3 weeks, was served on Omstaan CC on 7 March 2024. At the time Omstaan CC's indebtedness to the applicant stood at about R35 million plus interest. At 28 November 2024 Omstaan CC's indebtedness towards the applicant stood at R41.2 million plus interest. A mere R191, 574, 00 has been paid towards this debt between July 2023 and 5 December 2024, when the replying affidavit was deposed to. In the meantime interests was accruing and compounding on the indebtedness in the amount of about R430, 000.00 per month.

17.2 The respondent Trusts have failed to make any payment towards the indebtedness, which in effect means that over a period of 17 months the respondents failed to service even one month's interest on the indebtedness, notwithstanding the acknowledgment of debt orders of 24 May 2024 or the settlement proposal of September 2024.

17.3 The respondents' allegations that the Omstaan Group is solvent and that the applicant is in any event over-secured cannot stand. The respondents contend that the total value of the immovable property of the Omstaan Group is some R50. 25 million. Since this amount exceeds the admitted debt of R41. 3 million, the argument is that the Omstaan Group is solvent.

18. The above argument is flawed in that it takes into account the total assets of the Group, which is not an legal entity, and not that of the individual entities which have contracted with the applicant. In addition it involves assets of persons and a trust not before court, such as Mr and Mrs Visser senior, Mr A.J Visser junior and the Omstaan Trust. The argument also does not take into account the debt to SASFIN, which not surprisingly has not been fully disclosed, other than being the only other major creditor.
19. The Omstaan Boerdery CC itself does not own any immovable property. Its debt to the applicant is R41. 3 million and its assets, consisting of movable property, amount to at best for the CC, some R20 million.
20. The Skanskop Trust has known assets to the value of R7. 3 million. The Emerald Trust's assets are valued at R5 million and that of the Merbine Trust at R4. 95 million. Each of the Trusts admitted liability to the applicant amounts to R22 million. The respondents are all factually insolvent.
21. The respondents' contention that the applicant is over-secured likewise holds no water. The total value of the applicant's mortgage bonds registered over the imovable properties of the **Omstaan Group** only totals R34. 85 million. The mortgage bond over the immovable property of Skanskop Trust provides the applicant with security in the amount of R4 million. The mortgage bond registered over the Emerald Trust's immovable property provides the applicant with security of R3 million. The mortgage bond over the Merbine Trust's immovable property provides the applicant with security in the amount of R2 million.
22. As far as Omstaan CC is concerned, it has not in its answering affidavit disputed that it is commercially insolvent.
23. S 69 of the Close Corporation Act sets out the circumstances under which a close corporation is deemed unable to pay its debts. The circumstances relevant to this application are contained in s69(1)(a) and (c), which read as follows:

"If -

69(1)(a) *a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or*

(b) *.....*

(c) *it is proved to the satisfaction of the Court that the corporation is unable to pay its debts."*

24. The applicant, in satisfying the requirements in S69(1)(a) delivered a demand upon Omstaan CC on 23 February 2024. Omstaan CC failed to pay, secure or compound the debt within 21 days of receiving the demand and it is therefore deemed to be commercially insolvent.
25. Omstaan CC has only paid a total amount of R4, 175 since the AOD order of 24 May 2024. Before that and between July 2023 and April 2024 the Omstaan CC paid only amounts totalling R187, 399. From July 2023 to date of hearing the Omstaan CC had paid a total of only R191, 574 towards its admitted debt of R41.3 million, which is less than half the interest accruing monthly.
26. The applicant has therefore also satisfied the requirement in s 69) (1) (c), in that it has shown unequivocally that Omstaan CC is unable to pay its debts and is commercially insolvent.
27. Mr Olivier, who appeared for the respondents. argued that it would not be in the interest of justice in all the applications if the respondents be liquidated and sequestrated and in the case of the Trusts that it may not be to the advantage of creditors should the Trusts be sequestrated. The argument is that there are other reasonable options or alternative means for the applicant to recoup its monies rather than liquidation and sequestration of the respondents, which would allow the respondents to

continue its business operations. Considerations such as an extended period within which to pay off its debt to the applicant whilst the provisional orders are discharged, alternatively extending the provisional orders for the respondents to service the debt. With lucerne and cotton crops now in place, it was argued that the respondent Trusts will now be getting an income from such crops, further alternatively allowing the respondents an opportunity to procure alternative finance to service its debt to the applicants.

28. In dealing with the submissions on behalf of respondents, it is important to note firstly, that Omstaan CC had already approached ABSA Bank Ltd to take over its debt to the applicant, but that ABSA would not consider such an application in the absence of certain documents and information which the Omstaan CC failed to provide; secondly the respondents have already defaulted on previous agreements and undertakings to make payment to the applicant, on its very own terms; thirdly, although the respondents state in their opposing affidavit that agreements have been entered into with international buyers of lucerne and that the Omstaan Group has contracted with a buyer for the sale of cotton, no such agreements have been annexed to their affidavit. Given the past behaviour of the respondents it is hardly surprising that the applicant is no longer prepared to give the respondents a further grace period in which to make payment, merely on the say so of the respondents.

29. It is so that a court has a discretion whether or not to order the winding-up of a close corporation or company despite the creditor having satisfied the requirements for such an order. In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* 2015(4) 449 (WCC), Rogers J gave a few examples of when the *ex debito justitiae maxim* would not be applied, *inter alia* where the creditors have a difference of opinion as to the need for a winding-up; where a company has been deemed to be unable to pay its debts in terms of s 345(1)(a) of the Companies Act 61 of 1973, but is in fact commercially solvent; or there are

competing applications for liquidation and business rescue or the debt is disputed on *bona fide* and reasonable grounds.

30. None of the above situations apply *in casu*. Mr Olivier referred to the matter of *Standard Bank of South Africa limited v Marais* (884/221) [2022] SAGPPHC 134 (14 March 2022), where Van der Schyff J refused to confirm a provisional sequestration order despite the respondent's history of not honouring payment agreements and evading responsibilities agreed to with the applicant, in similar vein as the respondents have done *in casu*. In the *Marais* matter however, the respondent has been shown to be factually solvent and was in the process of obtaining bridging finance and of selling his immovable farming properties in order to settle the applicant's claim in full.
31. The same considerations do not apply here. The respondents have all been shown to be factually insolvent in addition to the Omstaan CC being commercially insolvent.
32. In my view the applicant has complied with all the requirements for the granting of final orders for liquidation and sequestration in these matters. The Omstaan CC has failed to show any compelling reason why a final liquidation order should not be granted. The respondent Trusts each have immovable property which, if sold, will provide a substantial dividend to creditors and it can only be to the advantage of the general body of creditors that the Trusts be sequestrated.

Costs

33. As far as the costs of the various applications are concerned I ordered that it be paid on an attorney and client scale in accordance with the various financial agreements entered into between the parties.

The above are the reasons for the orders made.



CC WILLIAMS
JUDGE

For Applicant: Adv J Van Niekerk SC
 Adv C Morgan
 Werksman Attorneys
 c/o Sean Squire Attorneys

For Respondents: Adv J Olivier
 Stryom & Bredenkamp Attorneys
 c/o Van de Wall Inc