REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 12194/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:NO/ YES

[4 March 2021] .....
SIGNATURE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	APPLICANT
AND	
LOUIS PASTEUR INVESTMENTS (PTY) LTD (IN BUSINESS RESCUE)	1ST RESPONDENT
ADRIAAN EVERT PRAKKE N.O.	2ND RESPONDENT
THE AFFECTED PERSONS RELATING TO LOUIS PASTEUR INVESTMENTS (PTY) LTD (Louis Pasteur group (Pty) ltd	3RD RESPONDENT
ETIENNE JACQUES NAUDE	4TH RESPONDENT

J U D G M E N T

MUDAU, J:

[1] This is an application for orders that concern the relief sought in Part B of the notice of motion. First, the applicant seeks an order in terms of section 132(2)(ii) of the Companies Act, 71 of 2008 ("the Act") for the conversion of the business rescue proceedings relating to the first respondent, Louis Pasteur Investments (Pty) Ltd ("LPI") to liquidation proceedings and for the final liquidation of LPI. In the alternative, that this court remove the second respondent as the business rescue practitioner ("BRP") of LPI in terms of section 139 of the Act. Alternatively, that this court grant the applicant leave in terms of section 133 of the Act to enforce its cause of action against LPI by proceeding with summons, judgment and execution. Second, the applicant seeks an order of costs of this application *de bonis propriis* against the erstwhile BRP cited here as the fourth respondent, in his personal capacity.

[2] Judgment relating to the relief claimed in Part A of the Notice of Motion was delivered on 4 May 2018. The Court (per Pienaar AJ) ordered that the moratorium on legal proceedings against LPI be lifted and, that leave be granted to the applicant to proceed with Part B of its application against the respondents, including the order to serve the application by substituted service in terms of Rule 4 (2) of the Uniform Rules of Court..

The Parties

[3] The applicant is the Commissioner for the South African Revenue Service, appointed in terms of section 6 of the South African Revenue Service Act, 34 of 1997 ("the SARS Act"). SARS is stablished in terms of section 2 of the SARS Act.

[4] The first respondent is LPI, a company with limited liability. It is an investment and property-owning company duly registered as such in terms of the laws of the Republic of South Africa and was placed under business rescue on 20 August 2012. The second respondent is A.E. Prakke N.O., who substituted Etienne Jacques Naude N.O. as BRP of LPI and is cited in his representative capacity.

[5] The third respondent is all Affected Persons as described in section 128(1) (a) of the Act, reflected in a list annexed to the founding affidavit as Annexure

"A3". Pienaar AJ granted leave to the applicant to cite the affected parties collectively as the "third respondent" and allowed service of the application to the third respondent ("affected persons") by means of substituted service as provided for in Rule 4(2) of the Uniform Rules of Court and by means of publication in the Government Gazette and several newspapers. The learned AJ reasoned that the citation of the 246 Affected Persons as one respondent was convenient and practical and that the court, by virtue of its inherent powers to regulate its processes, remains vested with a discretion to authorise a method of service it deems appropriate in the circumstances. In so doing, Pienaar AJ was however, mindful of an SCA decision in which it was held that should affected persons not be joined as parties to the proceedings that would constitute in each instance a non-joinder of an affected person who has a real and substantial interest in the outcome of the proceedings[1] . Louis Pasteur Group (Pty) Ltd ('LPG''), the affected person and only intervening party.

[6] The fourth respondent is Etienne Jacques Naude ("Mr Naude") in personal capacity, an adult male attorney of the High Court of South Africa, due to the cost order *de bonis propriis* applied for against him.

Chronology

[7] The relevant background is as follows: On 19 June 2012, the board of directors of LPI passed a resolution for LPI to voluntary begin with business rescue proceedings. Consequently, LPI was placed under business rescue on 20 June 2012. The fourth respondent (Mr Naude) was appointed the business rescue practitioner on 25 June 2012. The first meeting of creditors took place on 29 August 2012. A business rescue plan was approved by all attending creditors on 12 October 2012. In terms of section 150(2) (b) (ii) of the Act, the plan must propose how the company is to discharge its debts.

[8] In this matter, the applicant disputes receiving notification of the initial meeting held on 29 August 2012 and 12 October 2012. However, once the business plan has been adopted, section 152(4) of the Act is prescriptive in stating that: "*A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the*

[1] Absa Bank Limited Naude N.O. & Others 2016 SA SCA 540 at para 10.

company's securities, whether or not such a person— (a) was present at the meeting; (b) voted in favour of adoption of the plan; or (c) in the case of creditors, had proven their claims against the company."

[9] In terms of the business rescue plan, creditors were offered 100% of their claims, with the first payments scheduled for 1 November 2012. The second respondent, apart from costs and expenses, was to be remunerated at R2000-00 per hour. Those entities who were previously debenture holders were no longer creditors of the company, but preference shareholders in LPI. Accordingly, apart from the secured creditors, all of the erstwhile debenture holders who invested approximately R 53 million in the company prior to the commencement of business rescue, although now preferent shareholders, are entitled to payment in terms of their rights as preferent shareholders, to be paid at a rate of R 5.00 for each preferent share. That all debenture holders are now shareholders and not creditors is disputed by the third respondent, LPG and Dr Mohamed Adam ("Dr Adam"), a director of LPG.

[10] The duration of the moratorium, and so the business rescue is 10 (ten) years. In the business rescue plan a "disputed" debt to SARS in the amount of R5 million was reflected under "claims received", although SARS did not submit a claim in respect of the business rescue proceedings as SARS was, on its version, excluded from the business rescue process by the BPR not giving proper notice to SARS of relevant meetings.

[11] On the applicant's version, LPI is indebted to the applicant in unpaid taxes and levies to an amount in excess of R197 million. Due to LPI's failure and inability to pay the outstanding taxes and levies, the current application, to convert the business rescue proceedings to liquidation proceedings was launched by the applicant on 20 February 2017. The opposing affidavit was filed on 5 April 2017. The replying affidavit is dated 19 April 2017. Part A of the application for the lifting of the moratorium and service of the application was heard by the court on 28 August 2017.

[12] The court, as indicated above, granted the application in a judgment dated 4 May 2018. On 16 October 2018, Mr Naude resigned as the BRP of LPI. The resignation of Mr Naude has rendered the first part of the relief asked for (his removal) redundant. The order sought will be inconsequential. The hearing of

Part B of the application was set down for the 25 October 2018. The hearing was postponed *sine die* to allow the intervening party, LPG to file its opposing affidavit. Dr Adam was ordered to pay the costs occasioned by the postponement.

[13] It is an unusual feature of these proceedings that the affidavits delivered by the various parties were not confined to the usual three sets contemplated in application proceedings, i.e. the founding papers, the opposing or answering papers and the replying papers. The delivery of a fourth set or further sets of affidavits is not generally approved and is usually permitted in specified and restricted circumstances only.[2] On 25 October 2018, the respondents filed their opposing affidavits to which the applicant filed its replying affidavit on 11 December 2018.

[14] On 26 February 2019, the Acting Deputy Judge President Raulinga issued a directive to the parties in terms of which the practice note and the chronology of events were to be filed. The application was initially set down for 7 and 8 August 2019. On 7 August 2019 however, the substituting BRP, Mr Prakke, a forensic chartered accountant launched an application on the day of the set down. He sought certain relief pursuant to his appointment as business rescue practitioner of LPI against Mr Naude to provide him with all financial books, records and other financial documentation of LPI.

[15] In terms of the order granted on 7 August 2019, Mr Prakke had to produce a report regarding the financial position of LPI, the viability of a business rescue plan and the merits of business rescue proceedings as opposed to liquidating LPI. The report had to be filed within 120 days after receipt of said documentation from Mr Naude. The order, which was made an order of court by agreement, was that the application be postponed *sine die* and would be enrolled for adjudication in terms of a directive upon meeting with the Deputy Judge President. Mr Prakke however, contrary to the order published and dispatched the report only on 16 March 2020. On 28 April 2020, a virtual meeting was held between the parties before Potterill ADJP.

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[2] *Lagoon Beach Hotel (Pty) Ltd v Lehane NO* 2016 (3) SA 143 (SCA); see also *Mostert v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) at 448D–F

[16] In his answering affidavit, Mr Prakke detailed his inability to file the report within the period of 120 days as ordered and applied for condonation for the late filing of the report. On 7 October 2020, the condonation application was granted on an unopposed basis. The application was set-down for hearing over a period of two days, being 7 and 8 October 2020, which days were to be the final date for hearing. Potterill ADJP indicated that no further requests for postponement would be entertained.

[17] As agreed in the meeting, on 30 June 2020, Mr Prakke filed his answering affidavit, which was substantial, on behalf of LPI. The answering affidavit comprised more than 90 pages and had many annexures. This practically resulted in the overflow of affidavits. In response to Mr. Prakke's answering affidavit, Mr Naude filed his further affidavit dated 29 June 2020. On 1 July 2020, LPG also filed its further affidavit. The applicant filed a supplementary replying affidavit dated 23 July 2020. On 7 August 2020, the applicant filed its heads of argument. LPI filed their heads of argument on 14 September 2020. LPG as an Affected Person filed its heads of argument on 18 September 2020 and a further affidavit on 22 September 2020 subject to condonation. This elicited a further affidavit by LPI in response to a further affidavit filed by LPG.

[18] According to the applicant, as indicated, SARS was excluded from the business rescue process by the then BRP, Mr Naude by not giving proper notice to SARS of relevant meetings in 2012. In the business rescue plan a "disputed" debt to SARS in the amount of R5 million was reflected under "claims received", although SARS did not submit a claim in respect of business rescue proceedings. The R5 million claim was not founded on any assessment by SARS. Legally, the BRP is the representative taxpayer liable to make payment to SARS in terms of Section 1 of the Income Tax Act, 58 of 1962 (“the ITA”) and in terms of section 46(a) of the Value-Added Tax Act 89 of 1991. As representative taxpayer, the BRP is to fulfil the duties, responsibilities and liabilities of LPI to SARS in terms of section 154 of the Tax Administration Act 28 of 2011 (“the TAA”). It is the applicant’s case that taxes and levies due to SARS by LPI amounted to a total of R197 269 662,76 on 22 November 2016.

[19] The amounts owed to SARS in respect of the tax periods 2006 to 2010 are, according to the deponent to the applicant's founding affidavit the following: Income tax: an adjustment amount of R64 842 202,44 with an understatement penalty of R9 147 432,20; VAT: an adjustment amount of R124 022 996-95, with an understatement penalty of R17 363 219,57; PAYE, an adjustment amount of R30 169 326,36, with an understatement penalty of R13 169 326,36; Skills Development Levy (SDL): an adjustment amount of R339 091,66 with an understatement penalty of R339 091,66.

[20] However, as at 22 November 2016 the debt (pre- and post-business rescue) of LPI to SARS was constituted as follows: Company income tax: R99 295 614,25 (capital plus interest); VAT: R59 286 145,61 (capital, additional tax, penalties plus interest); PAYE/Employees tax: R37 586 081,40 (capital, additional tax, penalties plus interest); Unemployment Insurance Fund (UIF): R31 851,71 (capital, penalties plus interest); SDL: R1 069 969-79 (capital, additional fax, penalties).

[21] Consequently, the total taxes and levies amounted to a total of R197 269 662,76 on 22 November 2016. The total amount is R242 392 687, 00 if all outstanding debts is considered. Notices of assessment were sent to LPI. Despite the total debt to the applicant, the last payment made by LPI to the applicant was an amount of R7 825.21 on 8 January 2016, in respect of VAT and PAYE.

[22] SARS' notices of assessments were sent to LPI. LPI did not object to the assessments, neither Mr Naude as the BRP nor Mr Prakke since the latter's appointment in May 2019 have availed themselves of the dispute resolution procedures under Chapter 9 of the TAA. Consequently, and in terms of section 100 of the TAA the assessments became final, and any attempt to challenge them is according to the applicant, futile. It is accepted that the amount of taxes and levies owed by LPI to the applicant up to November 2016 keep escalating with time due to non-payment.

[23] In *Van Staden NO v Pro-Wiz Group (Pty) Ltd*[3] the following was said: *"It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of*

[3] 2019 (4) SA 532 SCA

being restored to profitability or, if that is impossible, to be employed when it will lead to creditors receiving an enhanced dividend. Its use to delay a winding -up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied that the purpose behind a business rescue application was not to achieve either of these goals, a punitive costs order is appropriate."[4]

[24] According to Mr Prakke, he found the company in business rescue for more than seven (7) years with an adopted business rescue plan dated 12 October 2012, which plan inexplicably, was not executed. There were no financial statements for 2011 to 2018. He found that there were no funds in the company and no income received or receivable. According to Mr Prakke, he later established that Dr Adam exercised *de facto* control over the group of companies, of which LPI comprised.

[25] He established that Dr Adam abused the process of business rescue to the prejudice of creditors. He received large amounts of money in his personal capacity, although not an employee or director of LPI. A certain quantity of financial records in hard copy were received from "Louis Pasteur Hospital" where they were kept in several offices. However, a large quantity of the financial records, under the control of Dr Adam were locked away in one of the properties of LPI. Dr Adam had unfettered access to the bank account of LPI since business rescue proceedings commenced. His access to the bank accounts was never terminated, and he dealt with the funds in his own discretion, which was irregular.

[26] He also established that Dr Adam's estate was in provisional sequestration since late 2019, and thus disqualifying him from acting as a director of any of the companies. According to Prakke, by virtue of the abuse of the corporate entities of the Louis Pasteur Group of Companies, Dr Adam, with his son (the deponent to the Affected Persons' affidavit) as his front, endeavoured to preserve the properties in the entities at all costs for his own financial advantage and to the prejudice of creditors and Affected Persons.

[4] At para 22

Significantly, he was of the view that Dr Adam and the directors of LPI were also abusing the process of business rescue.

[27] Mr Prakke's evidence is that LPI owns valuable assets in terms of the book values forming part of the business rescue plan, that a reasonable net asset value is ascertainable from the documentation available to him. Other entities in the group, i.e. Louis Pasteur Holdings (Pty) Ltd and First City Property 1 (Pty) Ltd are indebted to LPI in large sums of money - R300 million and R 800 million respectively. He identified dubious loans, which are immediately collectable from these companies. On his version, applications to liquidate these two companies may be required. Significantly, he recorded that the certainty of the recoverability is not guaranteed with no value placed thereon. In terms of the business rescue plan, no forced sales of properties of LPI are allowed. There were serious irregularities with regard to LPI's liability to SARS and LPI was possibly abused for purposes of tax evasion.

[28] However, from Mr Prakke's supplementary affidavits, it is readily admitted that LPI is commercially insolvent and cannot pay its day-to-day debts as same become due. No income is generated, no funds are available and the legal expenses of LPI cannot be paid. Similarly, expenses of LPI were unpaid because there were no funds available to pay operational costs, bond accounts, outstanding rates and taxes, interest and taxes. There are no cash reserves available in LPI's bank accounts.

[29] According to Mr Prakke, the last audited financial statement available for LPI is for 2010. There are management statements up to 2016, without indication who the author is. Also, there were no available financial records for 2017, 2018 and 2019 respectively. No employees have been employed by LPI since business rescue commenced and as at the date of adoption of the business rescue plan. Notwithstanding this fact, Mr Prakke, at a meeting held on 17 July 2019 confirmed that an official of the Department of Labour indicated that employees of LPI who had not been paid contacted the Department and applied for payment of the UIF.

[30] Although LPI is the registered owner of several immovable properties, bond instalments, rates and taxes as indicated above, were not paid for a substantial period. In this regard, the applicant pointed out in evidence that all

income tax returns of LPI since 2011 are outstanding; there are 15 PAYE returns outstanding and 21 VAT returns outstanding. The applicant argues that the interest on outstanding bonds and the rates and taxes are eroding the total equity in the properties. SARS will not be in a position to consider any form of compromise, whether in business rescue or separately. On the applicant's version, SARS is legally bound by the TAA and cannot compromise a tax debt with LPI if returns are outstanding. SARS has as early as 2010 and 2011 already obtained judgments for the outstanding taxes, including VAT, PAYE and UIF against LPI. According to SARS, the new assessments issued during 2013 and subsequent assessments were additional assessments.

[31] According to Mr Prakke, during the period since the adoption of the business rescue plan until the resignation of Mr Naude on 16 October 2018, very little progress was made to execute the plan and or to pay the creditors of LPI. After a period of six years of business rescue proceedings with Mr Naude at the helm, he could not present him with financial statements and records under his control.

[32] Mr Naude could not, notwithstanding repeated requests, give him access to financial documents. Mr Naude was compelled through an application made to this Court to provide Mr Prakke with the financial books, records and other financial documents of LPI. Mr Naude first alleged he did not have any electronic bookkeeping records, notwithstanding continuous assertions that financial statements were drawn, the last audited statement available for LPI being 2010. Eventually electronic statements relating to LPI were only made available to Prakke just before the Covid 19 lockdown in March 2020.

[33] Eventually, the deponent of the applicant's replying affidavit pointed out that, when Mr Naude was unsuccessful in his opposition of the relief sought by SARS in Part A of the Notice of Motion, Mr Naude simply abdicated and left LPI in the hands of Dr Adam and others for a period in excess of 5 months, without any financial management. LPI and Mr Prakke however, in spite of the foregoing, contend that the prospects under business rescue are good should the latter be granted the opportunity of executing his obligations.

[34] In *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd &others*[5] Brand JA stated: "*The potential business rescue plan s 128(1)(b)(iii) thus contemplates two objects or goals: a primary goal, which is to facilitate the continued existence of the company in a state of solvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation*".[6] As Van der Merwe J earlier stated in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd And Another*[7] "[*T*]*here can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved"*.[8]

[35] It is manifest however, that business rescue proceedings, by their very nature, must be conducted with a maximum possible expedition. In terms of section 132(3) of the Act, business rescue proceedings should terminate within a period of 3 months, unless a court on application extends the period. A business rescue plan should be developed and implemented within a reasonable period.[9] In this case, the delay has been extraordinary. Both the applicant and the substituting BRP, Mr Prakke find the delay deplorable. In *Koen & another v Wedgewood Village Golf & Country Estate (Pty) Ltd & others*[10] Binns-Ward J stated the following:

> *"…It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight time lines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings — however dubious might be their prospects of*

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[5] 2013 (4) SA 539 (SCA)
[6] At para 23
[7] 2013 (1) SA 542 (FB)
[8] At para 11
[9] *Alderbaran (Pty) Ltd v Bouwer & others* 2018 (5) SA 215 WCC at paras 48-49
[10] 2012 (2) SA 378 (WCC)

> *success in a given case — materially affects the rights of third parties to enforce their rights against the subject company.*"[11]

The learned Binns-Ward J cautioned that once a company is in business rescue, the rights of third parties and creditors are materially affected for the simple reason that they are unable to enforce their rights against the company.

[36] In terms of the Act, if a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner may allow, the practitioner must prepare a progress report of the business rescue proceedings and update it at the end of each subsequent month and deliver it to each affected person until the end of the proceedings.[12] In this case, the second respondent, as the BRP failed to do so since 2012.[13]

[37] Further, in *DH Brothers Industries (Pty) Ltd v Gribnitz NO & others*[14] Gorven J stated:

> *"Business rescue proceedings are geared at providing a window of opportunity to restore an ailing company to financial health and functionality…The window of opportunity does not remain open indefinitely."*[15]

[38] Section 133 of the Act contains a general moratorium on legal proceedings against a company in business rescue. It provides that during business rescue proceedings, no legal proceedings against a company may be "commenced or proceeded with" in any forum, except with the written consent of the BRP or with the leave of the court, in accordance with such terms as the court may deem suitable This is what the applicant sought to achieve in Part A of the application.

[39] The applicant relies upon the commercial insolvency of LPI, coupled with its inability to pay its debt and that it is just and equitable to obtain a winding-up order, under the grounds set out in sections 344(f) and 344(h) of the Companies Act, 61 of 1973 as Mr Prakke confirmed that LPI could not pay its day-to-day debts as same become due. LPI does not generate income. LPI does not have funds available. The legal expenses of LPI cannot be paid.

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[11] At para 10
[12] Section 132(3) (a)-(b)
[13] See *South African Bank of Athens v Zennies Fresh Fruit* 2018 (3) SA 278 WCC at para 34
[14] 2014 (1) SA 103 (KZP)
[15] At para 27

Similarly, expenses of LPI have not been paid because there were no funds available to pay operational costs, bond accounts, outstanding rates and taxes, interest and taxes. No cash reserves are available in LPI's bank account. The applicant contends on this basis that, not only should the conversion application be granted as the business rescue proceedings have failed, but that the liquidation should be final.

[40] Section 141(1) of the Act requires a practitioner, as soon as practicable after being appointed, to investigate the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued. The existence of a reasonable prospect of rescuing the company is a factual exercise, which involves a value judgment.[16] In terms of section 132(2) (a) (ii) business rescue proceedings end when the court has converted the proceedings to liquidation proceedings.

[41] The applicant's contention that the business rescue proceedings should end in terms of section 132(2) (a) (ii) and that the court convert the proceedings to liquidation proceedings; and that such termination should follow under section 141(2)(a)(ii) is not supported by the respondents. They contend that only the BRP can bring the application under section 141(2) (a). In terms of section 132(2) (a) (ii) however, there is no time limitation within which a court may convert business rescue proceedings to liquidation proceedings. Accordingly, the fact that the business rescue plan was adopted in respect of LPI is in my view, no bar to the relief sought by SARS as the applicant contended.

[42] The argument that the adoption of a business rescue plan is final and binding on creditors and the company, and that for that reason liquidation of a company under business rescue with an adopted business rescue plan is no longer possible, is at odds by the proviso of section 141(2)(a)(ii) which allows the business rescue practitioner, at any time during business rescue proceedings, to apply to court for an order discontinuing the business rescue proceedings and placing the company into liquidation. The inference that the

[16] *Tyre Corporation Cape Town (Pty) Ltd and Others v G T Logistics (Pty) Ltd* 2017 (3) SA 74 WCC

adoption of business rescue plan is no hurdle for the later liquidation of the company under business rescue is overwhelming as counsel for the applicant contended. Significantly, whether a liquidation order should ensue is indivisibly linked to the question of the viability of business rescue proceedings.

[43] With due regard to all the circumstances and competing interests, the 10 years allowed for the business rescue plan to be implemented, is not only in conflict with the business rescue procedure intended by the legislature when the Act came into operation, but also evidently has failed to yield the desired results. Further, the BRP committed a material mistake in failing to conclude over the last eight years the implementation of the business rescue plan would not result in a better return as contemplated by section 128(1) (b) (iii) of the Act, consideration being had to the common cause facts[17]. Under these circumstances, I hold that the applicant has *locus standi* to bring an application for the conversion of business rescue proceedings to liquidation. The available evidence does not support the submission that an improved return by virtual of business rescue would be forthcoming. It follows, accordingly, that the conversion of business rescue proceedings into liquidation proceedings is completely justified by the facts of this matter.

[44] The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound-up because it is commercially insolvent is whether or not it has liquid or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading.[18] It matters not that the company's assets fairly valued, far exceeds its liabilities. As Berman J stated in *Rhebokskloof*: *"[O]nce the court find that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of section 345(1) as read with section 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound- up*."[19]

[45] Objectively, the totality of the evidence shows that LPI is simply not in a position to pay the amounts due to the applicant and other creditors. LPI's

[17] see CSARS v Beginsel 2013(1) SA 307 (WCC)
[18] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & others* 1993 (4) SA 436 (C)
[19] At 440G-H. See also *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962 (4) SA 593 (D)

ability to pay is not advanced in any of the opposing affidavits by the respondents or LPG. On the contrary, it is conceded that the only way to pay debts is the liquidation of LPI's eleven immovable properties, five of which have been sold. These properties are heavily bonded with mortgage bonds in respect of which only secured creditors were paid. Concurrent creditors, like SARS, would have to settle for the residue, if any remains after such disposal, which thus far remains elusive. The debt owed to SARS is not being serviced and continues to mount. LPI contends that the penalties were not properly computed. However, the dispute in this regard, if material was never taken up with the applicant timeously. In any event, it is not in dispute that the applicant is owed millions in tax revenue by LPI, sorely needed for public good. Similarly, the longer the final liquidation of the first respondent is deferred, the less chances of any return on investment existing for the debenture holders.

[46] Section 7(k) of the Act provides for the efficient rescue and recovery of financially distressed companies in a manner that balance the rights and interests of all relevant stakeholders. There is no valid reason why LPI's restoration to solvency should be subsidised by creditors such as the applicant whom the second respondent regards as noncritical.[20] It is cold comfort to suggest that ordinary creditors will, in due course get more than on liquidation. Importantly, as indicated, the prospects of business rescue are non-existent when the facts are objectively considered.

[47] In his initial opposing affidavit Dr Adam, the director of LPG, the intervening party alleges that LPG has a shareholding of 99.5% in LPI. He states further that he is a former director of LPI. However, LPG was registered as a company on 8 October 2015, after the commencement of business rescue proceedings of LPI. Significantly, he did not say whether LPI is indebted to LPG and the extent thereof, if any. Mr Prakke disputes Dr Adam's intervention in these proceedings in an additional affidavit. He takes issue that LPG does not cite him but the previous BRP, Mr Naude does.

[48] Mr Prakke points out that Dr Adam is not a director of LPI according to Annexure 2 of the founding papers and for that reason, is in no position to allege that he has knowledge of its affairs. He also points out that the

[20] See *Tyre Corporation* at para 42 (fn 15 above)

deponent did not attend any meeting of LPI called by the then BRP, Mr Naude. Prakke disputes the transfer of shares as alleged by Dr Adam particularly since the latter failed to attach share certificates as proof of his claims pursuant to section 51 (b) of the Act. Accordingly, on Prakke's version, Dr Adam's version borders on criminal conduct. Dr Adams's allegations are not only far-fetched, but are so unworthy of credence that they can safely be rejected on the papers. LPG abandoned an attempt to introduce an additional affidavit in this regard in which they sought to clarify the position further. Nothing needs to be said any further, as Mr Prakke's evidence was not challenged. In the circumstances, I conclude that it is just and equitable that the first respondent be wound-up. The prospects of success for business rescue of LPI are negated when one has regard to the overall objective facts regarding this matter.

Costs De Bonis Propriis

[49] SARS, as indicated, requests a cost order *de bonis propriis* in this matter. Mr Naude filed a further affidavit in opposition to this relief that is sought against him personally. An order of this nature may be granted against a representative to pay costs out of his own pocket by way of a penalty for some improper conduct. It is trite that such an order is not easily granted and good reason for such a cause should be shown, such as want of bona fides or unreasonable action or improper conduct[21]. On his version, SARS has done absolutely nothing to collect the outstanding amounts for the periods 2006-2010. He disputes that he purposefully failed to carry out his duties as BPR.

[50] It is trite that costs *de bonis propriis* should only be awarded in exceptional circumstances.[22] This kind of cost order is granted against individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibilities, and where they acted inappropriately and in an egregious manner. The assessment of the gravity of the conduct is objective and lies within the discretion of the court.[23]

[51] This court is called upon to mulct Mr Naude with a punitive costs order *de bonis propiis* given his conduct as the BRP. As an officer of the court, it is an

[21] Grobbelaar v Grobbelaar 1959 (4) SA 719 (AD) at 725
[22] *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) at para 69
[23] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC)

inflexible requirement that a business rescue practitioner execute his or her duties in good faith, bearing in mind that the benefit of earning fees should never outweigh the duty to act in good faith. Good faith implies that the business rescue practitioner is obligated to execute his/her duties with the utmost trust, confidence and loyalty to the benefit of all stakeholders in the business rescue process. By virtue of their role, business rescue practitioners are therefore held to a higher professional and ethical standard.[24] It is evident in this matter that Mr Naude, during his tenure, failed to perform the duties of a BRP since he failed to report to the creditors and other affected parties monthly as required by the section 132(3) of the Act.

[52] It is of concern to this court that during the period 16 October 2018 to 4 May 2019 LPI existed under business rescue, with no BRP appointed after the fourth respondent abandoned ship. The fourth respondent, in his official capacity had a duty to advise that the business rescue proceedings were not bearing any fruits and that liquidation was the more viable process. He failed to do so. No trace of any formal management of LPI could be found as Mr Prakke pointed out.

[53] On his version, he resigned because he was appointed as BRP of Louis Pasteur Hospital Holdings, which required his fulltime attention. The effect of the fourth respondent's resignation is that he no longer has the capacity to act as a representative of LPI when he deposed to the answering affidavit at the commencement of these proceedings in relation to Part A. In addition, by his resignation he terminated his official position of as BRP of LPI. The law is clear. If it transpires at any stage of the process that the company cannot be rescued, the BRP is obliged to give notice of this and approach the court for a liquidation order.[25] The language of the legislature stipulated in Section 141(2) (a) of the Act is clear in that regard as it is couched in peremptory terms. Mr Naude failed to do this. That LPI cannot be rescued at that point can reasonably be inferred from Mr Naude's resignation.

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[24] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2015 (5) SA 192 SCA at paras 35, 37-38

[25] Section 141(2) (a) of the Act

[54] In *Knoop and another NNO v Gupta* (*Tayob Intervening*)[26] Willis JA aptly stated: "*…Whilst in a voluntary business rescue the BRP owes their appointment to the directors of the company, they must not allow themselves to be dictated to by the directors or shareholders or any third party. They must at all times exercise an independent judgment taking into account the potentially conflicting interests of different affected parties*".[27] To abandon ship as Mr Naude did without terminating business rescue proceedings was a serious dereliction of duty that cannot be condoned.

[55] In terms of section 141 (2) (c) of the Act, at any stage of the business rescue process, in case of evidence in the dealings of the company related to fraud or other contravention of any law relating to the company, he was duty-bound to for the evidence to be referred to the appropriate authority for further investigations and possible prosecution. These he failed to do in relation to tax related allegations by SARS against LPI in his investigation of the company's affairs, business, property, and financial situation as contemplated in section 141 (2) of the Act. Mr Prakke confirms the tax evasion allegations, which Mr.Naude was duty-bound to investigate and or bring to the attention of the relevant authorities.

[56] Against this background, I conclude that Mr Naude was the material cause of the disaster that ensued and after his resignation without closing the business of rescuing LPI, and on his version, to take up a full-time position as a BRP in another entity within the Louis Pasteur group of companies. With no one at the helm of LPI, Dr Adams continued to pilfer the monetary resources of LPI, which Mr Naude should have anticipated. The applicant has firmly established the case for a cost order *de bonis propriis.*

Order

1. The business rescue proceedings in respect of the first respondent is converted into liquidation proceedings in terms of section 132(2) (ii) of the Companies Act, 71 of 2008.

[26] [2021] 1 All SA 726 (SCA)
[27] At para 24

2. The estate of the first respondent is placed under provisional liquidation in the hands of the Master of the High Court.

3. A rule *nisi* is issued calling upon all interested parties to furnish reasons, if any, to this court on Friday, 30 July 2021 at 10am or as soon thereafter as the matter may be heard, why the Court should not order the final winding-up of the respondent company (the first respondent).

4. This order is to be served by the Sheriff or his or her duly authorised deputy at the first respondent's registered office and principal place of business at Louis Pasteur Medical Centre, Room 842, 374 Schoeman Street, Pretoria.

5. A copy of this order must be served on:

   5.1. any registered trade union that, as far as the sheriff can reasonably ascertain, represents any of the employees of the first respondent; and

   5.2. the first respondent's employees, if any, by affixing a copy of the order to any notice board to which the employees have access inside the first respondent's premises, alternatively by affixing a copy thereof to the front gate, where applicable, alternatively the front door of the premises from which the first respondent conducts any business at the address given in 4 above, and

   5.3. The Master.

6. This order is to be published in:

   6.1. the Government Gazette;

   6.2. in the Sunday Times newspaper;

   6.3. in the Rapport newspaper;

   6.4. in the Star newspaper; and

   6.5. in the Business Day newspaper.

7. The third respondent (Louis Pasteur Group (Pty) Ltd) and the fourth respondent (ETIENNE JACQUES NAUDE from his own pocket) are ordered to pay the costs of the application jointly and severally, on an attorney and client scale, including costs of two counsel from the date of

notice of opposition to this application to the date of judgment. Any outstanding costs shall be costs in the liquidation.

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T.P. MUDAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARENCES

Counsel for applicant:	Adv. JG Bergenthuin SC
	Adv. M Tjiana
Instructed by:	VZLR Inc.
Counsel for 1st & 2nd respondents:	Adv. MA Badenhorst SC
	Adv M Jacobs
Instructed by:	Geyster Attorneys
Attorney for 3rd (or 5th) respondent:	Morne Coetzee Attorneys
Counsel for 4th respondent:	Adv. R Du Plessis SC
Instructed by:	Walter Niedinger and Associates
Date of hearing:	8 & 9 October 2020
Date of judgment:	4 March 2021