IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: YES
DATE: 11 April 2022

SIGNATURE:

Case No. 12194/2017

In the matter between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES	**Applicant**
And	
LOUIS PASTEUR INVESTMENTS (PTY) LTD (IN PROVISIONAL LIQUIDATION)	**1ST Respondent**
PRAKKE, ADRIAAN EVERT N.O	**2ND Respondent**
THE AFFECTED PERSONS RELATING TO LOUIS PASTEUR INVESTMENTS (PTY) LTD	**3RD Respondent**

NAUDE, ETIENNE JACQUES **4TH Respondent**

LOUIS PASTEUR GROUP (PTY) LTD **Affected Person**

MIA, ZUBEIDA ALLI **Intervening Party**

Coram: Millar J

Heard on: 23 & 24 February 2022

Delivered: 11 April 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 11 April 2022.

Summary: Company Law – Business Rescue and Liquidation – Lifting of moratorium on legal proceedings - Creditor's right to apply for liquidation at any time on good cause shown – Section 132(2)(a)(ii) – Statutory confirmation of Court's inherent right to hear application for liquidation notwithstanding the adoption and implementation of a business rescue – Business rescue plan a sham designed to subvert rights of creditors –– Practitioner is an officer of the Court and obliged to apply for liquidation or at least not oppose liquidation in circumstances where no prospect of a better dividend to creditors through continued implementation of the plan – Opposition unreasonable - and meriting censure by court - final winding up order granted with punitive order for costs.

ORDER

It is Ordered:

1. The First Respondent is placed in final winding up in the hands of the Master of the High Court.

2. The Second Respondent personally *(de bonis propriis*) is ordered to pay the costs of the application from 5 March 2021 to date of judgment on the scale as between attorney and client save as set out in 3 below.

3. The Second Respondent personally *(de bonis propriis)* and the intervening party is ordered, jointly and severally, the one paying the other to be absolved, to pay the costs for 23 and 24 February 2022 on the scale as between attorney and client.

4. Save as set out in paragraphs 2 and 3 above and not already provided for in the court orders granted on 4 May 2018 and 4 March 2021, all costs are to be costs in the liquidation.

JUDGMENT

MILLAR J

1. The applicant ('SARS') seeks an order for the final winding up the First Respondent, Louis Pasteur Investments (Pty) Ltd ('LPI'). It is not disputed that LPI is presently insolvent and unable to pay its debts. This notwithstanding, this Court was also called upon to decide an application for intervention, an application for rescission of the order converting the business rescue proceedings into liquidation proceedings and also the discharge of the provisional winding up order.

2. During June 2012, LPI was placed in business rescue[1] and a formal business rescue plan adopted on 15 November 2012. From this date onwards, the Fourth Respondent ('Mr. Naude') the business rescue practitioner, proceeded with the business rescue. It is a particular feature of business rescue proceedings that for so long as those proceedings endure, there is, in terms of section 133(1) of the Act, a general moratorium on all legal proceedings.

3. Notwithstanding the general moratorium, various legal actions were brought against LPI by secured creditors, being mainly commercial banks in whose favour mortgage bonds had been registered over immovable properties owned by LPI.

4. In each instance where there were such proceedings, Mr. Naude was able to take steps to settle the liabilities and the litigation. The present application was brought on 20 February 2017, 5 years into the business rescue plan. SARS brought the application in 2 parts and initially sought leave to serve the application by way of substituted service on all the affected persons[2] and having obtained an order on 4 May 2018, served on the affected parties and then proceeded to set the matter down for an order converting the business rescue to liquidation proceedings and for the winding up of LPI.

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[1] In terms of Section 128(1)(b) of the Companies Act 71 of 2008,- 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for (i) the temporary supervision of the company, and of the management of its affairs, business and property;(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

[2] Sections 145(1)(b) and 146(a) and 146(b) of the Act provide for the rights of both creditors as well as shareholders to be given notice as 'affected parties' of the litigation. See ABSA Bank Ltd v Naude NO and Others 2016 (6) SA 540 (SCA) at paras 10 and 11.

5. On 16 October 2018, a few months after the order authorizing service on the affected parties was granted, Mr. Naude resigned as the business rescue practitioner of LPI. His resignation had as its direct consequence, a delay in the proceedings.

6. Although Mr. Naude had resigned as business rescue practitioner on 16 October 2018, it was not until 11 February 2019 that the board of directors of LPI had resolved to appoint the Second Respondent ('Mr. Prakke') as business rescue practitioner - this notwithstanding the fact that he was not an accredited business rescue practitioner at the time.

7. No explanation has ever been furnished for why the directors of LPI took 5 months to resolve to appoint a new business rescue practitioner, who was not even an accredited business rescue practitioner at the time of his appointment. There is similarly no explanation as to how LPI operated during this period.

8. Coincidently on resignation as the business rescue practitioner of LPI, Mr. Naude then took up appointment as the business rescue practitioner for Louis Pasteur Hospital Holdings (Pty) Ltd and Mr. Prakke who had been a director of that company which now also was placed under business rescue, resigned as a director and then sought accreditation and was appointed as the business rescue practitioner of LPI on 4 May 2019[3].

[3] The Act does not provide specifically for the resignation of a business rescue practitioner but only provides in section 139(3) that: 'The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of Section 130 (1) (b) to set aside that new appointment' See also in regard to the conduct of persons within the group of companies using business rescue as a means to frustrate liquidation proceedings: Louis Pasteur Holdings (Pty) Ltd v ABSA Bank Ltd 2019 3 (SA) 97 (SCA) at paras 3-6.

9. On 7 August 2019, when the matter came before the Court, the application for the provisional winding up of LPI did not proceed. The Court ordered Mr. Prakke to produce a report by 5 December 2019. It was only on 16 March 2020 that Mr. Prakke issued his report. The reasons for not complying timeously were laid at the door of Mr. Naude. In consequence of this report, further affidavits were filed and the application was eventually heard in October 2020.

10. By this time more than 8 years had passed since SARS had obtained its initial judgment and 3 years since the present application had been launched.

11. On 4 March 2021, an order was granted which inter alia converted the business rescue proceedings to liquidation proceedings by making an order in terms of section 132 (2)(a)(ii) and also placing LPI in provisional liquidation.

12. The Court also granted a punitive order for costs against Mr. Naude. This order is presently the subject matter of an appeal to a full Court of this division. SARS, besides seeking the final winding up order, also seeks a punitive order for costs *de bonis propriis* against Mr. Prakke.

13. At the end of October 2021, the application for the granting of a final order was set down for hearing as a special motion. Two weeks before the hearing, the intervening party (‘Ms. Mia’), brought an application to intervene in the proceedings and for the rescission of the order that set aside the business rescue proceedings and converted them into liquidation proceedings.

14. The basis upon which this application was brought was that she, as an 'affected person', had not been given notice of the hearing in October 2020. The order converting the business rescue to liquidation proceedings, which was a final order and which was not the subject of an appeal by either LPI or Mr. Prakke or any other affected party, was granted in her absence and on that basis ought to be rescinded. Subject to success in obtaining a rescission, Ms. Mia made common cause with LPI and Mr. Prakke in opposing the granting of a final order for the winding up of LPI.

15. SARS did not oppose Ms. Mia's intervention but did oppose the relief she sought in the main application. It was on this basis that an order was made granting her leave to intervene at the commencement of the hearing.

16. The opposition to the granting of the final order of liquidation was argued on 3 bases.

17. Firstly, that the order converting the business rescue proceedings into liquidation proceedings should be rescinded because an affected person (Ms. Mia) had not been given notice of the proceedings in October 2020.

18. Secondly, that as a matter of law it was not competent for a creditor such as SARS to apply to Court to convert business rescue proceedings into liquidation proceedings – such an application, so the argument went, could only be made by the business rescue practitioner acting in that capacity.

19. Thirdly, that having regard to the report of Mr. Prakke, the business was in fact possibly capable of being 'rescued' in the 8 months between the time of the hearing of the application on 23 February 2022 and the expiry of the 10-year period of the business rescue plan on 15 November 2022.

20. SARS argued that the entire business rescue plan in respect of LPI was nothing more than a sham. It was a winding up of a hopelessly insolvent company clothed as a business rescue.

21. The only beneficiaries, aside those creditors fortunate enough to have security, were the debenture holders and business rescuer. This was specifically to the prejudice of SARS.

22. Before dealing with each of the arguments, it is apposite to set out the circumstances of LPI from the time that it was placed in business rescue to the present.

23. LPI is one of 19 interlinked entities owned and controlled by the Adam Family Trust through Louis Pasteur Holdings (Pty) Ltd. LPI is registered as being in the 'Financial Intermediation, Insurance, Real Estate and Business Services' industry. It conducted business as – 'an investment company, comprising the borrowing of money through the issue of debentures, and the on lending of money, primarily to subsidiaries' – both its own subsidiaries and to others within the wider Louis Pasteur Holdings (Pty) Ltd group.

24. On 29 January 2010 and 12 December 2011 respectively, SARS obtained judgments in terms of sections 172 and 174 of the Tax Administration Act[4] and section 40(2)(a) of the Value Added Tax Act[5] against LPI. The total of the judgments obtained in 2010 was R3 485 340,59 and in 2011 was R10 230 024,21. The combined total was by the end of 2011 totalled R13 715 364,80. Neither of these 2 judgments have ever been challenged and remain presently unimpeached.

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4 28 0f 2011
5 89 of 1991

25. On 20 June 2012, LPI was placed under business rescue and the final rescue business plan adopted on 15 November of that year. At a meeting in October 2012 all attending creditors had approved a plan, the crux of which was that 'debt was to be converted to Equity in the Company, or in any other Company where applicable' and that the plan would be applied for a period of 10 years.

26. During the course of its business in the period preceding business rescue, LPI had issued debentures to investors in the amount of R123 million. According to Mr. Prakke, by the time business rescue proceedings had commenced in 2012, most of the debentures had been repaid although there was an amount of R87 459 301.00 of debenture liability which was still unpaid when the plan was adopted. By the time the present application came before court in October 2020, an amount of R53 million in respect of this initial liability was still outstanding.

27. Initially while under business rescue, two disputed issues arose. The first was whether all debenture holders had in fact become shareholders and the second, was the amount of SARS claim. By converting the debenture holders to shareholders, most of the disclosed unsecured debt of LPI was extinguished and also by including the SARS claim in the sum of R5 million and then recording it as 'disputed', an otherwise insolvent enterprise was, after the adoption of the plan presented as one for which business rescue was entirely appropriate and which would achieve its purpose over the following 10 years.

28. SARS contended from the outset that it was never informed of the intention to place LPI in business rescue and was never invited to any of the meetings

prior to the adoption of the plan. There is merit to this contention. When Mr. Naude was requested to provide proof that SARS had been notified, he was unable to do so. Rather, he sought to suggest that a person employed by another creditor who had been notified and had sometime later then been employed by SARS, had received notification on behalf of SARS. Significantly, the SARS's judgments in the sum of R13 715 364.80 were not included when the plan was conceived or adopted.

29. Furthermore, after the business rescue had commenced – albeit unknown to SARS an audit of LPI for the 2006, 2007, 2008, 2009 and 2010 tax years was undertaken. LPI was notified of this audit on 18 December 2012. The audit was finalised by 30 April 2013. As a result the amount of the claims by SARS were revised.

30. The outcome of this audit were new assessments which were comprehensively motivated and explained in a written report to LPI with reference to each of the years under review. The last audited financial statements submitted by LPI were for 2010 and so these SARS assessments were based on LPI's own audited financial statements.

31. It is common cause that these were the last audited financial statements ever submitted by LPI or even produced. The last ten years in respect of which no financial statements have been audited represent a period for which SARS has yet to make any assessment.

32. The liability of LPI as of 30 April 2013 was now an additional R242 392 687,20. Considering the tax judgments and new assessments the total was R256 108 052,00. Consonant with the approach to the judgments obtained in 2010 and 2011, the 2013 assessments have also remained unimpeached[6].

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[6] Barnard Labuschagne Incorporated v South African Revenue Service and Another (CCT 60/21) [2022] ZACC 8 (11 March 2022) in which the Constitutional Court affirmed that judgments obtained against a taxpayer in their absence may be rescinded. This is in addition to internal remedies provided for in the Tax Administration Act 28 of 2011 such as an objection in terms of section 104 or an appeal in terms of section 107.

33. Surprisingly, no steps were ever taken to rescind the judgments obtained or to pursue objections or appeals to the assessments. Despite this, only once the present application was brought, Mr. Naude and then Mr. Prakke sought to impugn the judgments and assessments – without any substantive basis for doing so other than to try and relegate SARS claim to being a disputed claim which should be disregarded in the determination of whether a final winding up order should be granted.

34. The present application is not the first litigation initiated against LPI post business rescue. During the period from the adoption of the plan in November 2012 until the end of 2016, secured creditors[7] – mainly commercial banks at various stages threatened or brought applications to liquidate LPI. However, in each of those cases funds were 'obtained' in order to discharge the debt to those secured creditors and to procure the settlement or withdrawal of those particular proceedings.

35. Turning now to the arguments raised in opposing the granting of the orders sought.

36. Firstly, Ms. Mia argued that she was unaware of the current proceedings and that the application had not been served on her. Her assertion was that

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[7] Investec Bank Ltd v Louis Pasteur Investments (Pty) (Ltd) [in business rescue] & Another with case number 7939/2016 instituted in the Gauteng Division, Pretoria; Absa Bank Limited v Naude NO and Others 2016 (6) SA 540 (SCA)

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'approximately two (2) weeks ago, it came to my knowledge that LPI was placed under provisional liquidation in terms of an order by this Honourable Court on 4 March 2021.'

And that

'in this regard I communicated with the business rescue practitioner of LPI, Mr. AE Prakke who I came to know in that capacity since his appointment in May 2019. Since 2019, I spoke on several occasions with Mr Prakke with regard to my claim outstanding under business rescue in respect of which he assisted me and other investors who were in the same position as I am, to comply with the obligations of the business rescue plan of LPI, to ourselves as investors.'

37. All affected parties, which include Ms. Mia, received service of the application by substituted service in consequence of the order granted on 4 May 2018. Both Mr. Naude and Mr. Prakke in their respective affidavits asserted that they had reported to affected persons on the status of the business rescue proceedings as required by Section 132(3)(a) and Section 132(3)(b) of the Act[8]. Proof of such reporting formed part of the papers filed of record.

38. In Mr. Prakke's report of 21 August 2020 to the affected parties he specifically refers to the present proceedings. The assertions by Ms. Mia that she did not know about the present proceedings are simply not borne out by her own version that she had been in communication with Mr. Prakke since his appointment in 2019 on a number of occasions or the report of Mr. Prakke to affected persons.

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[8] Section 132(3)(a) and (b) provide: *' 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 –*

(a) Prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings and

(b) *Deliver the report and each update in the prescribed manner to each affected person, . . .'*

39. Ms. Mia's application to intervene in the present proceedings was brought on the eve of the hearing, it seems to me that this was to serve no other purpose than to facilitate the hearing of the argument that the court ought not to have granted the order that it did in terms of section 132(2)(a)(ii).

40. Neither LPI nor Mr. Prakke has appealed this particular order. The only way in which the argument could be made (in the event that the argument was countered by an argument of acquiescence) was if an affected party applied to intervene and then sought the rescission of that particular order.

41. Ms. Mia failed in her application, other than to make common cause with LPI and Mr. Prakke, to set out any prima facie defence[9] to the granting of a final winding up order.

42. I find that Ms. Mia was given notice of these proceedings and was kept appraised of the course of the proceedings by Mr. Prakke. For this reason, her failure to intervene when the matter was heard in October 2020 was advertent and it certainly cannot be said that the order granted in terms of section 132(2)(a)(ii) was granted in her absence[10].

43. Secondly, can a creditor apply to court for an order that the court convert business rescue proceedings into liquidation proceedings or can this only be done by the business rescue practitioner?

44. Section 132(2) of the Act provides:

> '(2) Business rescue proceedings end when-

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[9] Helderberg Laboratories CC v Sola Technologies 2008 2 (SA) 627 (CPD) at para 37.

[10] In regard to the requirements for the granting of rescission of an order see De Wet v Western Bank 1977 (4) SA 770 (T) at 780H-781A and also De Wet v Western Bank 1979 (2) SA 1031 (A) at 1042F-1043A

(a) the Court-

(i) sets aside the resolution or Order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings;

(b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or

(c) a business rescue plan has been-

(i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or

(ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan'.

45. The Act clearly envisages 3 separate scenarios in which business rescue proceedings, once commenced in terms of section 132(1) may be terminated.

45.1 The first is provided for in section 132(2)(a) where the court either sets aside the resolution or court order that commenced the proceedings or orders the conversion of the business rescue to liquidation proceedings.[11]

[11] Section 132(2)(a)(i) and (ii)

45.2 The second is where the business rescue practitioner files for the termination of the proceedings[12].

45.3 The third is where the business rescue plan 'falls away' either because it was not adopted or alternatively because it was substantially implemented.[13]

46. From the plain meaning[14] of section 132(2), it is readily apparent that each of the procedures set out in sub sections (a), (b) and (c) respectively are separate and distinct and each is to be considered and applied as such[15].

47. It was argued on behalf of LPI and Mr. Prakke that, properly construed, section 132(2) means that only the business rescue practitioner can apply for the conversion of the business rescue into liquidation proceedings.

48. It was argued that the only way in which the provisions of section 132(2)(a)(ii) could be invoked is if there were first an application in terms of section 141(2)(a)(ii) by the business rescue practitioner himself.

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[12] Section 132(2)(b)

[13] Section 132(2)(c)

[14] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para [18] in which it was held:. 'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, considerations must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself," read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[15] South African Business Rescue Procedure, Dr E Levenstein, Lexis Nexis, 2017 at page 8-67.

49. In this regard I was referred to a judgment of the full court of this division in The Commissioner for the South African Revenue Service v Primrose Goldmines (Pty) Ltd & Others[16] which it was argued confirmed the judgment in Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd and Others intervening).[17]

50. In the former case, the issue for decision was whether or not the business rescue practitioners were still in office at the time that they themselves brought an application for liquidation and in the latter, whether or not liquidation proceedings which had been instituted prior to the company being placed under business rescue were to be suspended pending the determination of an application to place the company under business rescue in terms of section 131(1) of the Act.

51. Both cases are distinguishable on the facts – in the present matter there is no dispute about the locus standi of any of the parties before the court and the application was brought some years after the plan had already been adopted and implemented.

52. It was also argued that since the SARS judgment and claims arose prior to the adoption of the business rescue plan, in terms of section 152(2) read together with section 152(4) meant that the SARS claim could not be enforced except to the extent provided in the business rescue plan. This against the background of SARS not having been given notice of the business rescue or adoption of the plan as well as the understatement, as a disputed provision, of the SARS claim at the time that the plan was adopted. It was argued that had SARS wished to challenge the plan, then that is the procedure that it ought to have followed.

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16 [2016] ZAGPPHC 737 (23 August 2016)
17 [2012] JOL 28484 (WCC)

53. I was referred to the judgment of the Supreme Court of Appeal in Van Zyl v Auto Commodities (Pty) Ltd.[18] The paragraphs I was referred to deal with the contrast in language between section 154(1) and 154(2) which pertain to the discharge of debts and claims. Both sections speak specifically to the enforcement of debt, a situation distinguishable from the present application which is not a proceeding for the enforcement of any debt.

54. It was held in *Ex Parte:* Target Shelf 284 CC (in business rescue): Commissioner, South African Revenue Services and Another v Cawood N O and Others[19] that:

> '[72] The Act does not allow for an automatic termination of business rescue proceedings. Even though section 132 provides for circumstances under which business rescue proceedings end, there is still a process which must ensue in order for the business rescue process to be finalized. When business rescue proceedings come to an end, either a court shall have set aside the resolution or order that began the proceedings; or converted the proceedings to liquidation proceedings; or the business rescue plan was proposed and rejected and the practitioner (s) subsequently filed a notice of substantial implementation of that plan. SARS and Business Partners are aware of this, they have as such approached this Court in terms of section 132(2)(c)(i) for a declaratory order to terminate the business rescue proceedings and in the same breath seek an order in terms of section 132(2)(a)(ii) to convert the business rescue proceedings to liquidation proceedings.
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> [73] In the Primrose judgment above, I took a view that the practitioner in that judgment was the person suited to apply to court for the discontinuance of the business rescue proceedings, however, on a proper reading of section 132(2)(a) it is not specifically stated who must apply to have the

[18] 2021 5 (SA) 171 (SCA) at paras 29-30
[19] [2017] JOL 37690 (GP) at paras 72 and 73

business rescue proceedings set aside or converted to liquidation proceedings. I am, therefore, of the view that in the circumstances of this matter, the creditors are entitled to apply for conversion of the business rescue proceedings to liquidation proceedings and such application ought to be granted'

55. This argument also disregards the provisions of section 133(1) which does not provide a 'blanket' moratorium which once 'wrapped around a company' offers an absolute and indefinite protection against action by creditors.

56. The moratorium is of general application but may be lifted. Section 133(1) of the Act which provides that:

'**General moratorium on legal proceedings against company.**

(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

(a) . . .

(b) with the leave of the court and in accordance with any terms of the court considers suitable.'

57. SARS, obtained an order[20] lifting the moratorium in terms of section 133(1)(b) at the same time that it sought the order seeking permission to serve the application on affected persons by way of substituted service.

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[20] The order of 4 May 2018 granted by Pienaar AJ was that 'That the moratorium on legal proceedings against First Respondent, in business rescue, be uplifted in terms of section 132(2)(a)(ii) of the

58. In the circumstances, properly considered, section 132(2)(a)(ii) does provide a separate and distinct way in which business rescue can be ended and that in the circumstances of the present application, the order sought by SARS was in my view, correctly granted.

59. The last and third argument advanced on behalf of LPI and Mr. Prakke, was that LPI is still capable of being rescued and that notwithstanding that it is presently both factually and commercially insolvent, a final order of winding up ought not to be granted. Various grounds were advanced as to how LPI could possibly between February 2022 and November 2022 become solvent and pay its debts.

60. What is business rescue and how could LPI after 9 years of business rescue now become solvent and pay its debts?

61. Generally:

> 'Business rescue is designed to resolve a company's future direction quickly. An independent and suitably qualified person, referred to as a business rescue practitioner, takes full control of the company to try to work out a way to save the business. Where a turnaround is unlikely to succeed, the aim is to administer the affairs of the company in a way that results in a better return for the creditors than they would have received if the company had been liquidated'[21]

and

> 'Modern corporate rescue and reorganization seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judicial

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Companies Act'. – The order erroneously refers to section 132(2)(a)(ii) instead of section 133(1)(b) but in its terms it is clear that it was meant to refer to the latter section. This issue was raised by Ms. Mia in her application but was correctly, in my view, not pursued in argument.

[21] Smits, A. J. 1999. 'Corporate administration: a proposed model', De Jure, 32: 80-107

bankruptcy procedures, reorganization seeks to maximise, preserve and possibly even enhance the value of a debtors enterprise, in order to maximise payment to the creditors of the distressed debtor.'[22]

62. Section 128(1)(b) defines business rescue as follows:

'(b) '**business rescue'** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

(i) The temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of the claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company'

63. Two of the features of LPI's adopted business rescue plan bear consideration.

63.1 Firstly, the debenture holders exchanged their claims[23] against LPI for equity in the form of shares. Once they did so, they ceased to be creditors and then became holders of securities in LPI.[24]

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[22] Expectations a business rescue plan: International directives for Chapter 6 implementation, M Pretorius and W Rosslyn-Smith, Southern African Business Review Volume 18 Number 2 2014.

63.2 Secondly, is the duration of the business plan: - 10 years[25]. It is unclear as to how the unsecured creditors and in particular the debenture holders decided that it would be in their and LPI's interests for a business rescue plan of such long duration. It is clear from a consideration of sections 128 to 137 of the Act which deal with business rescue proceedings, as a whole that such proceedings were designed and intended to be implemented within a limited period of time. Regard need only be had to the definition of 'business rescue' in section 128(b) and to the use of the word 'temporary'[26] in sections 128(1)(b)(i) and (ii).

63.3 Furthermore, section 132(3) of the Act sets the norm for the completion of the process of business rescue at 3 months from when the proceedings start.[27]

64. When first appointed and after being ordered to deliver a report, Mr. Prakke raised a number of issues and these included inter alia:

64.1 Why the claims by SARS were not properly investigated or objected to by Mr. Naude and the directors?

64.2 Why LPI continuously entered into contracts which caused financial loss and which were unexplained?

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[23] Section 154(1)

[24] Section 146

[25] In ABSA Bank Ltd v Caine N O, in re: ABSA Bank Ltd v Caine N O & Another [2014] ZAFSHC 45 at para 48 it was held that: '. . .this was definitely not the idea of the legislature that creditors could be held ransom and be prevented from exercising their normal contractual rights for such an extraordinary period of time'

[26] 'temporary' – lasting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need. The Shorter Oxford English Dictionary, Volume 2, 6th ed, Oxford University Press, 2007.page 2304

[27] See Diener N.O v Minister of Justice and Constitutional Development & Others 2018 (2) SA 399 (SCA) at paras [28] & [40] & [54]

64.3 The circumstances under which loans were provided to LPI by other group associated entities without any transfer of underlying assets with the result that claims were created with no value being provided.

64.4 Why Mr. Naude allowed a former director to withdraw large amounts of money from the bank account of LPI which amounts were paid into that director's account?

64.5 Why the former director remained in control of the finances of LPI and operated the bank accounts of LPI for his own benefit?

64.6 Although LPI owned various improved immovable properties, a number of these were occupied by the former director and family members. No rental was paid for the occupation of these properties and neither were the monthly bond installments or municipal rates and taxes paid. In some instances, even though the bonds had been paid up to August 2018, thereafter they were not and, in some instances, the municipal rates and taxes had not been paid for up to 7 years.

64.7 In 2015 a decision was taken, while Mr. Naude was still the business rescue practitioner for LPI, to sell one of the properties and to settle what was owed on the mortgage bond of that property to ABSA as well as other unsecured liabilities owed to ABSA.

64.8 It was Mr. Prakke's opinion that the decision to sell the property and to settle the other secured liabilities owed to ABSA was done in circumstances where the former director had stood surety or was personally exposed to liability.

65. None of the questions raised by Mr. Prakke in the initial report have been addressed and the true extent of the consequences of events and conduct during the tenure of Mr. Naude in the 6 years that he was the business rescue practitioner remain unrevealed.

66. The contents of the initial report made clear that the business rescue plan had not achieved its purpose to any degree in the preceeding 8 years up to the time of the preparation of the report. Surprisingly, Mr. Prakke then opposed the grant of the final order of winding up – making a volte face in which he then formed the view that in the year or so remaining of the 10 year plan, LPI could be restored to solvency.

67. His view was premised on the basis that at the time of the onset of business rescue proceedings, LPI had been the registered owner of 11 different immovable properties. LPI had no cash flow to speak of and that it was necessary to dispose of those properties in order to pursue the business rescue proceedings.

68. This had been brought about, at least until Mr. Prakke was appointed as business rescue practitioner in 2019 by reason of:

68.1 The former director of LPI being in de facto control of the Louis Pasteur Group of companies and was in fact still exercising full control over LPI .

68.2 The former director having managed the affairs of the group and used the bank accounts of LPI to enrich himself.

68.3 The former director having been finally sequestrated.

68.4 No immediate cash resources being available to the company and that the former director and his family members had acted in concert through other entities to maintain control of the assets of the group and in particular LPI to the prejudice of the creditors and other affected persons.

68.5 The steps taken by the former director and his family members to interfere with the discharge of his duties and to prevent the sale of assets.

68.6 The fact that by August 2020 – 6 of the 11[28] properties had been sold

69. In a comprehensive report submitted to the affected persons on 21 August 2020, it was recorded that:

'Funding for the administration of the company and for opposing litigation

The BRP needs funding for the following reasons if he is to rescue this company and pay creditors and investors their money:

12.1 To pay administration costs,

[28] 1 property had been sold in 2015 while Mr. Naude was the business rescue practitioner and the next 5 sold during 2020 when Mr. Prakke was business rescue practitioner. The remaining properties did not fetch acceptable bids having regard to the valuations obtained and so those properties remain unsold.

12.2 To pay legal cost specifically to oppose the liquidation application of SARS and the opposition to the Applicants adventurous and opportunistic application.

12.3 To make payment to persons to assist in drafting financial records and statements which are essential for the proper management of the company, opposing of the Sars liquidation application and to verify the claims of creditors of which a number seems to be fraudulently and or collusively made.

12.4 To investigate where the assets of the company are as the assets have been sold or transferred without receiving value. In this regard, millions of Rands worth of assets were merely transfers [sic] or "sold" under dubious circumstances. Linked to this is also the collective income streams linked to these substantial assets.

12.5 To enable the BRP to properly and diligently perform his function as BRP of the company.'

70. In addition, this report that was disclosed to affected persons, that in respect of the unsold properties, there were outstanding mortgage bonds of R4.2 million due to Investec Bank Ltd and R3 million to Nedbank Ltd. There were also outstanding municipal rates and taxes of approximately R1 759 000.00.

71. Against all the liabilities, he indicated that a final demand had been issued to Louis Pasteur Holdings (Pty) Ltd for R135 million in respect of outstanding interest on debentures. I was informed from the bar during the argument that this company too had been placed under business rescue.

72. By the time Mr. Prakke deposed to the affidavit of 28 July 2021, he had also ascertained that:

> ’12.1.2 Apart from the fact that the company is the owner of extremely valuable assets and on the basis that the company is possessed in terms of the book values forming part of the business rescue plan, a reasonable net asset value which is ascertainable from the documentation available to me;
>
> 12.1.3 Both the companies Louis Pasteur Holdings (Pty) Ltd and First City Property 1 (Pty) Ltd is indebted to LPI collectively in the sum of almost R1 billion even though First City Properties has since been liquidated, the claim against Louis Pasteur Holdings still exist and will be collected. Even if only 10% to 20% is realized, the company will pay all of its liabilities and retain sufficient capital to continue as a going concern with a large and attractive available tax redemption
>
> 12.1.4 Moreover, the two (2) entities liable to LPI have fixed property of real value and as soon as these claims have been collected under business rescue, the available proceeds derived will be sufficient to settle the claim of the Applicant as stated, and other creditors the true quantum of which is much lower in terms of the evidence set out herein above;
>
> 12.1.5 In terms of the evidence presented by me [sic] arising from the investigations set out in my report, there are immovable assets available in the estate in terms of the remaining immovable property of which LPI is the owner;
>
> 12.1.6 I [sic] further identified substantial claims, the particulars of which are set out in detail in my report and in respect of which I in terms of my evidence in the answering affidavit, demonstrated are collectable and will render a substantial income sufficient to pay the company’s liabilities in full.
>
> And

12.1.30 Apart from the banks as the secured creditors and the Applicant, the erstwhile debenture holders invested monies in the company in the sum of approximately R 53 million. These debenture holders who have been translated into preference shareholders in terms of the business rescue plan, are entitled to redeem those preferent shares and accumulated dividends thereunder;'

73. Unaudited financial statements were obtained by Mr. Prakke for the 2015 and 2016 financial years. These offer no insight into the true state of LPI's affairs and make no provision whatsoever, even though income is disclosed in those years, for the payment of any taxes to SARS let alone to provide properly or at all for the judgment or claims of SARS. The financial statements are of no assistance and only serve, in their brevity, to obfuscate the true financial position of LPI during those financial years.

74. There is no doubt on any consideration of the financial status of LPI that it is hopelessly insolvent[29] and that all things being equal, the granting of a final winding up order is apposite. In such circumstances, the court has a limited discretion to refuse such an order.[30]

75. It was argued on behalf of LPI that the discretion should be exercised in its favour as section 128(1)(f)[31] created a threshold which disregarded factual or commercial insolvency and that notwithstanding such factual or commercial insolvency, the continuation of the current business rescue of LPI was apposite.

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29 The test to be applied is whether or not LPI is commercially insolvent, which it is common cause it is. See Murray v African Global Holdings 2020 2 (SA) 93 (SCA) at para 23.

30 AFGRI Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA); ABSA Bank Ltd v Rhebokskloof (Pty) Ltd 1993 4 (SA) 436 (CPD) at 440F-H.

31 '**financially distressed**' in reference to a particular company at any particular time, means that-
(i) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediate ensuing six months; or
(ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;'

76. It may well be that there are circumstances where the discretion could be exercised in favour of LPI. However, having regard to the provisions of section 128(1)(f)(i) and 128(1)(f)(ii), the threshold referred to in that section applies only in respect of a period of 6 months - the 6 month period can only apply from the time that the resolution is passed to place the company in business rescue and the adoption of the plan – it can never mean that the threshold is to apply at any given time on a prospective basis – such an interpretation would necessarily mean that the process could continue indefinitely.

77. The argument for refusing to grant a final winding up order, besides disputing without any basis the judgment and claims of SARS, the single biggest creditor, is premised on the sale of the remaining assets and also the collection of debts. At least some of those debts are owed by companies that are also under business rescue.

78. Axiomatically a business rescue plan cannot be premised on the business being denuded of its assets necessary for it to function as a business. No plan which adopts this course of action can ever be regarded as a proper plan as provided for in section 150 and would certainly not meet the requirement of section 150(2)(b)(vi) which provides that a plan must include consideration of inter alia :

> 'the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation'.

79. Mr. Prakke suggests that to restore LPI to solvency, the remaining fixed assets be liquidated, a comprehensive audit and writing up of the books of LPI for a 10 year period, action to challenge or dispute SARS claim as well as institution of action against parties (themselves in business rescue) can all take place before 15 November 2022. No reasonable business practitioner

could, on an objective consideration of the facts in this matter, *bona fide* hold this view[32].

80. The proposed action is in fact a winding up and not a business rescue. The consequences of allowing the plan to continue and necessarily be extended, as demonstrated in the present case, is not the rehabilitation of the business and the payment of a full or better dividend to all creditors but rather a preference in favour so some to the detriment of others. Were a final up order not granted, the remaining assets would be liquidated as proposed by Mr. Prakke and the proceeds then utilized towards professional legal and accounting fees, including his own[33] in order to pursue debts, the recovery of a portion of which is only 10% to 20%. These are speculative claims.

81. While the business rescue continues, the general moratorium on legal proceedings applies and so the unsecured claims of SARS, the municipalities and others remain unenforceable without legal action – such action to be instituted against a company which has not conducted any business for 10 years and which has and continues to be denuded of its assets.

82. There is simply no commercial or rational basis for the continuation of the plan for LPI. In similar circumstances, the view was expressed obiter in SARS v Beginsel NO[34] that:

> 'I accordingly accept, without deciding, that the court has the power to intervene where it is shown that the BRPs [business rescue practitioners] have committed a material mistake in concluding that the continued implementation of the business

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32 This in contrast to Carroll v Michael Carroll CC in re: In the application for liquidation of : Michael Carroll CC (under supervision) [2019] ZAGPPHC 74 (15 March 2019): An application for the liquidation of a company under business rescue was considered by the Court, but not granted. The reason for the dismissal of the liquidation application was, according to the Court, that the company under business rescue had in fact been rescued by the implementation of the adopted business rescue plan. See also SA Bank of Athens v Zennies Fresh Fruit 2018 3 (SA) 278 (WCC) at para 43.

33 Section 143(5) which provides that 'to the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in the priority before the claims of all other secured and unsecured creditors.'

34 2013 (1) SA 307 (WCC) at 321A-B

rescue plan would result in a better return for the creditors of the company as envisaged in section 128(1)(b)(iii) of the Act.'

83. I agree with this view. LPI was and is hopelessly insolvent. The actions already taken and proposed by Mr. Prakke do not contemplate the operation or rehabilitation of LPI. They are in effect nothing more than an informal winding up[35]. For this reason, I intend to make the order that I do.

84. Business rescue provides a shield for a business that, absent the delivery of the proverbial mortal blow by an unsympathetic creditor, can be rescued. It does not and nor was it ever intended to provide a sword to be used by the directors and/or business rescue practitioners to keep the creditors at bay irrespective of the prospect of the payment of a better dividend and saving of the business.

85. Lastly, in regard to costs. The court on 4 March 2021 granted a punitive order for costs *de bonis propris* against Mr. Naude. What remains for consideration are the costs incurred from that date. Since then, Mr. Prakke has been the business rescue practitioner and it is he who has opposed the granting of a final winding up order.

86. The special position of a business rescue practitioner is set out in section 140(3)(a) and (b) of the Act[36]. Besides the duties and liabilities of a director of a company, the business rescue practitioner is also an officer of the court and expected to conduct himself with the utmost good faith and to provide an objective and reasoned approach in assessing the state of the business and then deciding whether or not to continue with business rescue.

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[35] See also SA Bank of Athens v Zennies Fresh Fruit 2018 3 (SA) 278 (WCC) at para 40.

[36] 'During a company's business rescue proceedings, the practitioner –

(a) Is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;

(b) Has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and . . .'

87. The practitioner must act at all times in the furtherance of the purpose for which he was appointed[37] and as soon as it becomes apparent that the company is unlikely to continue in existence on a solvent basis or if there is unlikely to be a better return to the company's creditors or shareholders, to then apply to convert the business rescue to liquidation[38] proceedings. He is specifically enjoined to do so by virtue of the office that he holds.[39]

88. 'Attempting to delay the inevitable liquidation of the company when there is no realistic hope or prospect of recovery is a dangerous practice and one which should be discouraged. It is submitted that a long business rescue process can result in diminished liquidation dividends which will seriously affect the creditor's ability to recover. Business rescue practitioners who delay the process do so at substantial risk to themselves, especially when disgruntles creditors go looking for the proverbial 'scapegoat' once the company goes into liquidation.'[40]

89. The present application is now in its 5th year from the time that it was instituted. After the granting of the order on 4 May 2018 and Mr. Naude's resignation on 16 October 2018, there ensued a number of entirely avoidable delays before the hearing of the application in October 2020. These delays are not germane to the present matter save that bears mentioning that Mr. Prakke's appointment and investigation and delay in reporting to the court contributed significantly to this.

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37 Section 128(1)(b)(iii)

38 The consequence of liquidation is a Concursus creditorum – In Walker v Syfret NO 1911 AD 141 at 166 it was held "the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.

39 African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd 2015 (5) SA 192 (SCA) at paras 35 -38 and 56

40 South African Business Rescue Procedure, Dr E Levenstein, LexisNexis, 2017 page 8 - 75

90. Despite having investigated and initially correctly identified that:

90.1 the business rescue plan was nothing more than a sham[41]

90.2 designed or at the very least in effect perpetuated so as to keep creditors at bay; and

90.3 to allow the former director a free hand to continue to use LPI and its funds for his own benefit and for the benefit of members of his family,

He then, rather than making common cause with the order sought by SARS, made a volte face and chose to oppose the granting of a final winding up order[42].

91. The opposition was ill considered and deliberate in flagrant disregard of his obligations. The eleventh-hour application for intervention by Ms. Mia and the spurious basis on which it was made make it clear that it was contrived and designed to put the creditors and in particular SARS to unnecessary and costly further litigation.

92. In so doing, many hundreds of pages of affidavits and annexures (many of which were already before the court) were filed. They contained circuitous and repetitious argument, with no substantive basis, the tenor of which that SARS was bringing the application in a 'predatory' fashion and in order to steal a preference was made.

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[41] Greissel v Lizemore 2016 (6) SA 236 (GJ) at paras 83 and 84
[42] See Gupta v Knoop 2020 (4) SA 218 (GP) at para 37.

93. This served no purpose other than to burden the papers to such an extent that the application could not be heard on the ordinary opposed motion roll but had to be set down for hearing as a special motion – causing a further delay. All of this has as its consequence substantial and additional unnecessary costs to SARS and LPI while Mr. Prakke stands behind the statutory preference[43] for payment of his own remuneration and expenses.

94. The way in which Mr. Prakke, after he had reported to the court the state of the affairs of LPI, conducted himself was neither *bona fide* nor reasonable[44].

95. The Supreme Court of Appeal[45] held in circumstances similar to the present case that:

> 'All of that constituted an abuse of the process of the court and an abuse of the business rescue procedure. It has repeatedly been stressed that business rescue exits for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where I 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 order is appropriate.'

96. In the circumstances, I make the following orders: -

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[43] Section 143(5)
[44] Visser v Cryopreservation Technology CC 2003 (6) SA 607 (TPD) at para 6
[45] Van Staden v Pro-Wizz 2019 (4) SA 532 (SCA) at para 22

96.1 The First Respondent is placed in final winding up in the hands of the Master of the High Court.

96.2 The Second Respondent personally *(de bonis propriis*) is ordered to pay the costs of the application from 5 March 2021 to date of judgment on the scale as between attorney and client save as set out in 96.3 below.

96.3 The Second Respondent personally *(de bonis propriis)* and the intervening party is ordered, jointly and severally, the one paying the other to be absolved, to pay the costs for 23 and 24 February 2022 on the scale as between attorney and client.

96.4 Save as set out in paragraphs 96.2 and 96.3 above and not already provided for in the court orders granted on 4 May 2018 and 4 March 2021, all costs are to be costs in the liquidation.

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A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 23 & 24 FEBRUARY 2022

JUDGMENT DELIVERED ON:	11 APRIL 2022
COUNSEL FOR THE APPLICANT:	ADV. B BERGENTHUIN SC
INSTRUCTED BY:	VZLR INC.
REFERENCE:	MR. T FARI
COUNSEL FOR THE 1ST & 2ND RESPONDENTS:	ADV. MA BADENHORST SC
INSTRUCTED BY:	EUGENE GEYSER ATTORNEYS
REFERENCE:	MR. L BOTHA
COUNSEL FOR THE INTERVENING PARTY:	ADV. MA BADENHORST SC
INSTRUCTED BY:	GRUNDLINGH & ASSOCIATES
REFERENCE:	MR. GRUNDLINGH

NO APPEARANCES FOR ANY OF THE OTHER CITED PARTIES