04/05/2018

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**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

**Case Number:** 12194/2017

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

4/5/2018
DATE

SIGNATURE

In the matter between:

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| **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** | **APPLICANT** |
| and | |
| **LOUIS PASTEUR INVESTMENTS (PTY) LTD (in business rescue)** | **FIRST RESPONDENT** |
| **ETIENNE JACQUES NAUDÉ N.O.** | **SECOND RESPONDENT** |
| **THE AFFECTED PERSONS RELATING TO LOUIS PASTEUR INVESTMENTS (PTY) LTD (in business rescue)** | **THIRD RESPONDENT** |

**ETIENNE JACQUES NAUDÉ** **FOURTH RESPONDENT**

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**JUDGEMENT**

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**PIENAAR A J**

[1]The Applicant, the Commissioner for the South African Revenue Service, launched an application against Louis Pasteur Investments (Pty) Ltd, in business rescue, the First Respondent, Etienne Jacques Naudé N.O., Second Respondent, The Affected Persons relating to Louis Pasteur Investments (Pty) Ltd, in business rescue, Third Respondent, and Etienne Jacques Naudé, in his personal capacity, Fourth Respondent.

[2]The application launched by Applicant is aimed primarily at obtaining and order in terms of section 132(2)(a)(ii) of the Companies Act, 71 of 2008, (hereinafter referred to as 'the Companies Act'), for the conversion of the business rescue proceedings relating to First Respondent to liquidation proceedings and ultimately for the final liquidation of First Respondent on the grounds that First Respondent is unable to pay its debts.

[3]Alternatively, should Applicant not be successful in its endeavour to have the business rescue proceedings relating to First Respondent converted to liquidation proceedings and the final liquidation of First Respondent on the grounds that First Respondent is unable to pay its debts, Applicant intends applying for an order for the removal of Second Respondent as the

business rescue practitioner of First Respondent with leave of the Court in terms of section 133(1)(b) of the Companies Act.

[4]In this matter Applicant is represented by Adv. J G Bergenthuin SC with Adv. M Tjiana, whilst Second and Fourth Respondents are represented by Adv. J M Suttner SC and Adv. P M Cirone with no appearance on behalf of First Respondent, in business rescue.

[5]In order for Applicant to be able to proceed with its application against First, Second and Fourth Respondents it is incumbent upon the Applicant to have the moratorium on legal proceedings against First Respondent, in business rescue, uplifted, and once such relief has been granted to the Applicant, the Applicant would be entitled to proceed to obtain an order in terms of section 132(2)(a)(ii) of the Companies Act for the conversion of the business rescue proceedings of First Respondent to liquidation proceedings for the final liquidation of First Respondent on the grounds that First Respondent is unable to pay its debts, alternatively, for the removal of Second Respondent as the business rescue practitioner of First Respondent[1]. The moratorium on legal proceedings provided for in section 133(1)(a)-(e) of the Companies Act is not an absolute bar to legal proceedings, but merely serves as a procedural limitation on a party's rights of action[2].

[6]In order to proceed with its application for the conversion of the business rescue proceedings to liquidation proceedings, alternatively, for the removal of Second Respondent, it is incumbent upon the Applicant to give notice of its application to all

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[1] ABSA Bank Ltd v Naude N.O. and Others 2016(6) SA 540 (SCA).
[2] Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another 2017(4) SA 51 (WC) at par 50 – 51, p 69B – D and the cases cited in footnote 89.

parties affected by the business rescue proceedings who had proved claims against First Respondent and who subsequently adopted the business rescue plan for First Respondent that was presented by Second Respondent and that was approved on 12 October 2012, albeit apparently not in accordance with the prescribed requirements, which the Court is not called upon to adjudicate.

[7]There can be no doubt that the creditors of First Respondent who had proved their claims are affected parties who have a direct legal interest in Applicant's application. It is clear that the application launched by the Applicant could be to the prejudice of the creditors. In recognition of the aforesaid requirement Applicant is applying in Part A of its application to have service on the affected parties effected by substituted service by e-mail in order to join them as a party to the application, albeit collectively as a group[3].

[8]Due to the fact that the majority of the affected parties or creditors, which in total number 246, and who have agreed to accept notices by means of their e-mail addresses, Applicant has deemed it meet to approach the Court for leave to effect notice of Applicant's application to all affected parties by means of substituted service effected by means of notice to their e-mail addresses, and for leave to cite them collectively as The Affected Persons relating to Louis Pasteur Investments (Pty) Ltd, in business rescue.

[9]The practice to cite persons with a direct interest in litigation

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[3] ABSA Bank Ltd v Naude N.O. and Others, *supra* at par 10, p542 – 543.

collectively as a group without identifying them individually, is not foreign to our current constitutional dispensation, which has received the *imprimatur* of the Constitutional Court[4]. This practice has been approved notwithstanding the peremptory provisions of Rule 17(4) of the Uniform Rules of Court.

[10]The required approach to be followed by the Court is a broad approach requiring the affected parties to be sufficiently identified having determined that they have a direct and substantial interest in the subject matter[5]. The Court is satisfied that Applicant has identified the affected parties sufficiently that qualify as parties that have a direct and substantial interest in Applicant's application.

[11]Accordingly, Applicant concluded that it would be proper to proceed with its application by obtaining leave to give notice of its application by means of substituted service to all affected persons cited collectively as a group at their e-mail addresses. Should the order be granted, and service having been effected, to proceed with its application for the conversion of the business rescue proceedings of First Respondent to liquidation proceedings, alternatively, for the removal of Second Respondent as the business rescue practitioner of First Respondent.

[12]Therefore Applicant's application consists of Part A, which refers to the application for the upliftment of the moratorium on legal proceedings against First Respondent in terms of section 133(1)(b) of the Companies Act and for leave to effect service on

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[4] Herbstein & Van Winsen, The Civil Practice of the High Courts, 5th edition, Vol I at p146 and the authorities cited in footnote 13.

[5] Beukes v Krugersdorp Transitional Local Council and Another 1996(3) SA 467 (WLD) at p474D-E and G-I

all the affected persons, cited collectively as a group, by means of substituted service by notice to their e-mail addresses, whilst Part B refers to the main application for the aforesaid conversion, alternatively, the removal of Second Respondent as the business rescue practitioner of First Respondent. Applicant's decision to proceed with interim relief in Part A of its application is proper and not objectionable[6].

[13]Presently the Court is only engaged with Part A of the application, being the application to uplift the moratorium on legal proceedings and to effect service on the affected parties cited collectively as a group by means of substituted service by e-mail.

[14]Having regard to the aforesaid, the Court is not required to adjudicate the question whether First Respondent's business rescue proceedings should be converted to liquidation proceedings, alternatively, for the removal of Second Respondent as the business rescue practitioner of First Respondent.

[15]Second Respondent in his representative capacity *nomine officio,* and in his personal capacity, has elected to oppose Part A of Applicant's application.

[16]Although First Respondent, in business rescue, gave notice of its intention to oppose the application launched by the Applicant, First Respondent failed to serve and file an opposing affidavit indicating whether it was opposing Part A or Part B of Applicant's application. It follows therefore that First Respondent, in business

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[6] Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another, *supra*, at par 54 – 56, p70 – 71

rescue, due to its aforesaid failure has elected not to oppose the relief being claimed by Applicant in Part A of its application.

[17]Due to Second and Fourth Respondents' election at this stage only to oppose the relief claimed by Applicant in Part A of its application, Second and Fourth Respondents in their opposing affidavit restricted themselves only to respond to Part A of Applicant's application, reserving their right, should the relief claimed by Applicant in Part A be granted, to subsequently respond in a further opposing affidavit to the relief being claimed by Applicant in Part B of its application.

[18]Second and Fourth Respondents' opposition to the relief being claimed by Applicant in Part A of its application is founded primarily thereon that Applicant has referred to the approved creditors as affected persons collectively as a group cited as Third Respondent, whilst such reference should be to the parties individually who have an interest in the relief being claimed by Applicant, and lastly that Applicant has failed to make out a proper case for service to be effected on the affected persons collectively as a group, cited as Third Respondent, by means of substituted service by e-mail rather than in terms of Rule 4 of the Uniform Rules of Court on the affected persons or parties individually. Strong emphasis was placed on the provisions contained in Rule 4 of the Uniform Rules of Court that required service to be effected by the Sheriff.

[19]The Court is well aware of the dictum in Absa Bank Ltd v Naude N.O. and Another[7] that referred with approval to the

[7] ABSA Bank Ltd v Naude N.O. and Another, *supra*, at par 9, p542G – H.

statement in Amalgamated Engineering Union v Minister of Labour[8] that an interested party's non-intervention without more-

> *'after receipt of a notice of legal proceedings short of a citation, cannot therefore.... be treated as if it were a representation, express or tacit, that the party concerned will submit to and be bound by, any judgement that may be given.'*

The Court is satisfied that the procedure suggested by Applicant is proper and sufficient to enable the affected parties to make an informed decision as to whether to oppose the application or not[9].

[20]Having considered the submissions advanced on behalf of Second and Fourth Respondents in this regard the Court is of the opinion that the said opposition is unfounded and without merit. The Companies Act continually refers to the creditors and employees as 'affected persons', even after having proved their claims against a Respondent, in business rescue.

[21]In the Court's opinion the purpose of Part A of Applicant's application is clear without any ambiguity regarding the parties reference is made to. Since the advent of the present constitutional dispensation reference to a group of persons for the purpose of citation as a single party has been allowed and approved. It is quite clear that the acceptance and approval of such a citation has been sanctioned founded on the requirements of practicality, requiring a discretion to be exercised judicially

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[8] Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637 (A) at 662-663.
[9] See Absa Bank Ltd v Naude N.O. and Another, *supra*, par 54, p70E – F.

based on considerations of convenience and fairness and in the interest of justice, rather than pure formalism[10].

[22]Further, Second and Fourth Respondents' opposition is founded thereon that Applicant's application to effect service on all interested parties by means of substituted service by e-mail is not in accordance with the provisions of Rule 4 of the Uniform Rules of Court and consequently the Court is not endowed with the authority to ignore the provisions of Rule 4 of the Uniform Rules of Court. As set out hereinbefore, after having seriously considered the submissions made on behalf of Second and Fourth Respondents the Court is of the opinion that this is a proper case for the Court to regulate its own process.

[23]In this regard it is to be noted that Applicant's application for leave to effect service by means of substituted service is founded thereon that Applicant is faced with the practical difficulty, although not an absolute impracticality, having regard to the circumstances of this matter, to cite 246 affected parties individually and to effect service accordingly. Should all information regarding the affected parties be at hand, considering the costs involved in effecting service in the normal manner in terms of Rule 4 of the Uniform Rules of Court, it would be costly and result in the expenditure of public funds, which expenditure would be curtailed, should service and notice to all affected parties be effected by means of substituted service by e-mail as proposed by the Applicant[11].

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[10] Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another, *supra*, at par 54 – 56, p70 – 71
[11] Ex Parte Harris 1931 WLD 57

[24]The Court is of the opinion that the provisions of Rule 4 of the Uniform Rules of Court are not peremptory and unambiguously provides that a Court may prescribe the manner in which service is to be effected, having regard to the facts and circumstances of the particular case, and if deemed meet, to determine and to indicate the manner in which service is to be effected, whereby is included an order for substituted service by e-mail as the most costs effective manner, especially where the expenditure of public funds are involved[12].

[25]In this regard it is to be noted that section 34 of the Constitution guarantees everyone access to a competent court to have their disputes resolved and decided in a fair manner. The Court's power to determine how disputes are to be placed before it is recognised and preserved by the Constitution[13]. Flexibility is required of the Courts when applying the Rules of Court to make them the master of their own process[14]. Rigidity has no place in the operation of Court procedures. In Mukkadam v Pioneer Foods (Pty) Ltd and Others[14] the Constitutional Court approved and applied the principle that rules of procedure must be applied flexibly with reference to PFE International and Others v Industrial Development Corporation of South Africa Ltd[15] wherein it was stated as follows:

> *'Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that*

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[12] Ex Parte Harris, *supra*
[13] See Section 173 of the Constitution.
[14] Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013(5) SA 89 (CC) at par 39, p100D-F.
[15] PFE International and Others v Industrial Development Corporation of South Africa Ltd 2013(1) SA 1 (CC).

*makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interest of justice depart from its own rules.'*

Accordingly this Court has an inherent power to protect and regulate its own process on matters of procedure consistent with the interest of justice. The Court is satisfied that the facts of this case requires a procedure different from the one normally followed[16].

[26]Second and Fourth Respondents' attempts to propound the conclusion that service can only be effected in terms of the provisions of Rule 4 of the Uniform Rules of Court, and that any ruling by this Court to have service effected by means of substituted service by e-mail on the affected persons collectively as a group would be improper, wrong and not to be countenanced, is not persuasive and founded. Second and Fourth Respondents' stance in this regard is without weight and fails to carry the day. The fact must not be lost sight of that the provisions of Rule 4 of the Uniform Rules of Court are not cast in stone[17].

[27]It should be kept in mind that Second Respondent in his capacity as a senior business rescue practitioner of First Respondent is an officer of the Court in terms of section 140(3)(a) of the Companies Act, besides the fact that he is a duly admitted

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[16] Mukaddam v Pioneer Foods (Pty) Ltd and Others , *supra*, at par 42, p101D-F.
[17] PFE International and Others v Industrial Development Corporation of South Africa Ltd , *supra*, at par 39, p100D – F.

attorney and as such also an officer of the Court. As such Second Respondent is obliged to be of assistance, not only to the Court, but to all affected parties, whereby is included a party, such as Applicant to whom R197 269 662.76 was allegedly due and owing on 22 November 2016, and who intends to approach the Court to have the business rescue proceedings converted to liquidation proceedings. The business rescue practitioner is required to be objective and impartial in his conduct. Any attempt to frustrate and/or prevent an affected party in its endeavours to proceed to obtain such an order would be improper, and depending on the circumstances pertaining in each case, may even be unethical and unprofessional. This obligation with which the business rescue practitioner is burdened applies even though an Applicant intends proceeding with an application to have such business rescue practitioner removed in terms of section 139(1) or (2) of the Companies Act.

[28]Having regard to the conduct of Second Respondent and the submissions made on Second and Fourth Respondents' behalf, the conduct of Second Respondent is, to say the least, objectionable leaving much to be desired and failing to meet the high standards required in the conduct of a business rescue practitioner as an officer of the Court.

[29]In this regard cognisance is taken of the fact that Second Respondent, as the appointed business rescue practitioner, has elected to communicate with all affected parties by means of e-mail notifications. It is unclear whether Second Respondent also has full particulars regarding the identity of the said persons or entities to which the e-mail addresses refer. It appears to be highly improbable that a meeting of creditors, being the affected

parties, had been convened in order to prove their claims and to discuss and approve the business rescue plan presented by the business rescue practitioner, being Second Respondent, without such affected parties having identified themselves. Surely it is to be expected that the business rescue practitioner would require full particulars regarding a creditor in order to evaluate such creditor's claim and to either accept or reject it.

[30]It is significant that Second Respondent, although tendering information before the application proceeded, withdrew its tender, once rejected by the Applicant on the grounds that the impracticality it faced would still persist. Nor has Second Respondent conveyed its willingness to assist or be of assistance to the Applicant in its endeavour to effect service by e-mail on the affected parties collectively as a group. Second and Fourth Respondents' stance is simply that such service is not permissible nor impractical in terms of Rule 4 of the Uniform Rules of Court, and the Court is obliged to act accordingly without any leeway to exercise a discretion. The impracticality that Rule 4 of the Uniform Rules of Court refers to is absolute impracticality, and not to any impracticality due to the costs involved. This conclusion the Court finds unacceptable and unfounded[18]. It is to be noted that Second Respondent's conduct in this regard is obstructive and aimed primarily thereat to frustrate the Applicant in its endeavour to proceed with its application as set out in Part B.

[31]As indicated hereinbefore, the Court is clothed with the jurisdiction to exercise a discretion either in favour of or against the Applicant. The discretion the Court is clothed with is not

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[18] Ex Parte Harris, *supra*

uncurtailed and requires the Court to consider and evaluate all the facts and circumstances pertaining to the matter at hand in order to reach a conclusion that would be just and equitable, not only to the Applicant but also to the First Respondent, Second and Fourth Respondents and the affected parties, being the creditors and employees of First Respondent and in the interest of justice.

[32]In this regard the Court is satisfied that the Applicant has succeeded in putting forth facts and circumstances that would justify the Court to grant leave to the Applicant to proceed and to effect service by means of substituted service by e-mail on the affected parties by referring to and citing them collectively as a single party. The Court finds that service effected by means of substituted service by e-mail, as prayed for, would be practical and cost effective having regard to the facts and circumstances of this matter.

[33]Accordingly the Court finds that Second and Fourth Respondents' opposition to the relief claimed by the Applicant in Part A of its application is not founded, justifiable, reasonable or equitable having regard to the circumstances of this case. By denying Applicant the relief prayed for would undoubtedly not be in the interest of justice and be prejudicial to the Applicant, a major affected creditor of First Respondent, whose indebtedness in the amount alleged by Applicant is not disputed with any conviction.

[34]Lastly the Court was called upon to mulct Fourth Respondent with a punitive costs order *de bonis propiis* having regard to Second Respondent's conduct as the responsible business rescue practitioner. The Court has concluded that Second Respondent's

conduct was obstructive aimed thereat to frustrate the Applicant to proceed with Part B of its application.

[35]Nonetheless the Court is of the opinion that it would not be just and equitable to mulct Fourth Respondent with a punitive costs order. Accordingly the Court finds that the interests of justice will be served best if the costs follows the result by ordering Fourth Respondent to pay the costs on a party and party scale.

[36] In this regard the Court concludes that it would be proper to uplift the moratorium on legal proceedings and to grant an order providing for the citation of the affected parties collectively as a single Respondent and for service on the affected parties to be effected by means of substituted service by e-mail as set out hereinafter.

[37]Having regard to the aforesaid, the Court concludes in favour of the Applicant and orders as follows:

1. That the moratorium on legal proceedings against First Respondent, in business rescue, be uplifted in terms of section 132(2)(a)(ii) of the Companies Act.

2. Leave be granted to Applicant to proceed with Part B of its application against First, Second, Third and Fourth Respondents.

3. Leave be granted to Applicant to cite the affected parties collectively as Third Respondent.

4. Leave be granted to effect service of the application contained in Part B on all affected parties by means of substituted service by e-mail of the Notice of Motion.

5. Service to be effected by means of notice to the affected parties at their e-mail addresses as set out in annexure "C" to the Applicant's founding affidavit.

6. Service is further to be effected by means of a notice of Applicant's Notice of Motion by means of publication:

   6.1 in 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. Leave be granted for such application to be served by means of publication only of the Notice of Motion.

8. Such publications and notice by e-mail to clearly indicate that the complete application is obtainable from Applicant's attorneys of record, being VZLR Inc, 1st Floor, Block 3, Monument Office Park, Cnr Steenbok and Elephant Streets,

Monument Park, Pretoria, Gauteng with reference T. FARI/PC/MAT95085 and contact number (012) 435-9444.

9. The costs of obtaining the complete application by any of the affected parties to be borne by the Applicant.

10. Second Respondent is ordered to assist, if so requested, and to inform all affected parties of their rights to oppose the application and to file opposing affidavits in terms of the Rules of the High Court.

11. Notice of this application to be served on the Companies and Intellectual Property Commission.

12. Fourth Respondent to pay the costs of Part A of the application on party and party scale, such costs to include the costs incumbent upon the employment of two counsel.

**W. F. PIENAAR SC**
**ACTING JUDGE OF THE**
**HIGH COURT**

**ON BEHALF OF APPLICANT:** **ADV J G BERGENTHUIN SC**
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**ON BEHALF OF SECOND AND THIRD RESPONDENTS:**

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