



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

CASE NO. A139/21

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

**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**

3RD RESPONDENT

(IN BUSINESS RESCUE)

ETIENNE JACQUES J NAUDE

4TH RESPONDENT

AND

AFFECTED PASTEUR GROUP (PTY) LIMITED

5TH RESPONDENT

JUDGMENT

MAKHOPA J

1. This is an appeal against the judgment and order of Modau J where he ordered the appellant to pay costs *de bonis propriis* in the liquidation application of Louis Pasteur Investment (Pty) Ltd.
2. The appellant is Etienne Jacques Naude (“Mr Naude”). He was appointed as the business rescue practitioner (“BRP”) on the 25th June 2012, for the second respondent. On the 16th October 2018, appellant resigned as the business rescue practitioner.
3. The first Respondent is the Commissioner for the South African Revenue Service, appointed in terms of section 6 of the South African Revenue Service Act, 34 of 1977.
4. The second respondent is Louis Pasteur Investments (Pty) Ltd (“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 the 20th August 2012.

5. The third respondent is Adriaan Evert Prakke (“Mr Prakke”), he is cited in his official capacity. He substituted Mr Naude as BRP of LPI.
6. The fourth respondent is “The affected persons relating to Louis Pasteur Investments” as described in section 128(1)(a) of the Act.
7. The court a quo ordered that the business rescue proceedings in respect of the second respondent be converted into liquidation proceedings in terms of section 132 (2)(ii) of the Companies Act 71 of 2008.
8. Paragraph seven of the order reads as follows:

“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.”

Thus, the appeal is against paragraph seven of this order by the court a quo.

9. The appellant applied to present new evidence to us which evidence was not heard and considered by the court a quo when it gave the cost order against him. The new evidence is marked Annexure “A1”, “A2”, “A3” and “A4” annexed to the founding affidavit as part of the application to present new evidence.

APPLICATION TO PRESENT NEW EVIDENCE

10. The appellant set out what he relies as new evidence as follows:

10.1. After the rule nisi was granted, Mr Prakke, the new BRP, filed a further affidavit in answer to the founding affidavit in the main application which did not serve before the court a quo.

10.2. An affidavit was also filed for consideration at the hearing of the application for leave to appeal by appellant, which sets out facts and evidence that was not before the court a quo.

11. In a nutshell, it submitted on behalf of the appellant that the above evidence was not available to him to present to the court a quo, with specific reference to the affidavit of Mr Prakke. The appellant is of the view that if such evidence was before the court a quo, the costs order would not have been granted.

12. Furthermore, it is contended by appellant that SARS should have placed certain facts and evidence before the court *a quo*, which it did not, it is therefore in the public interest and also a Constitutional requirement that the new evidence should be considered.

13. In reply to the appellant submissions on behalf of the first respondent it is submitted as follows:

13.1. The annexures to Prakke's affidavit already formed part of the main application.

13.2. Annexure “A2” is an excerpt from an affidavit deposed to by Appellant, which already forms part of the Appeal Record.¹

13.3. Annexure “A3” is an Affidavit by the Appellant himself which is headed “RESPONSE TO THE HONOURABLE JUDGE MUDAU’S JUDGMENT DATED 2021”. In respect of this affidavit it is argued that there is no single critical issue addressed by Appellant in the affidavit, and no new evidence is revealed, which can uncontested be presented to the court of appeal.

13.4. Annexure “A4” is a reported judgment of the Constitutional Court which appellant is free to refer to an argument before court.

14. In *De Aguiar v Real People Housing*² the requirement to be met before the court can hear further evidence which was heard in the court a quo are as follows:

(a) There should be some reasonable sufficient explanation based on allegations which may be true why the evidence which it is sought to be lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.

15. After hearing the submissions by both the appellant and the 1st Respondent we dismissed the application to lead further evidence by the appellant for the following reasons:

¹ Appeal record Volume 3 pages 252-256.

² 2011 (1) SA 16 SCA at paragraphs 10 and 11.

- 15.1. The further affidavit by Mr Prakke does not contain any issue which was not raised before the court a quo.
- 15.2. What is contained in Mr Prakke's affidavit is also contained in the affidavit by the appellant and annexed as annexure "AE6" to Mr Prakke's affidavit.
- 15.3. Mr Prakke was appointed as the business rescue practitioner on the 4th May 2019 and he had no extensive knowledge about what was happening in the business of the 2nd respondent.
- 15.4. At some stage Mr Prakke implicated the appellant for obstructing further business rescue proceedings of the 2nd respondent.
- 15.5. The evidence contained in Mr Prakke's evidence does not support the appellant's application to produce further evidence.
- 15.6. In addition, we found that annexures A1-A4 do not in any way assist the appellant in his application.

APPEAL AGAINST COST ORDER

16. It was submitted on behalf of the appellant as follows:

- 16.1. That failure to report to the creditors by a BRP cannot result in a cost order against him. Neither is failure by the BRP to convert the business rescue into liquidation must result in a cost order against him.

- 16.2. In addition, the applicant's failure to report contravention of any law to SARS cannot be held against him since SARS was well aware of such transgressions.
- 16.3. Moreover, the appellant's resignation without terminating business rescue can never be the basis for costs *de bonis propriis*. Not all creditors were given notice of this application and on this basis alone the order should not have been granted.
- 16.4. Furthermore, it was submitted that the applicant was not grossly negligent but SARS was the main cause of the delays since 2013. Applicant also blames the directors of LPI for the long period of the business rescue process. The LPI neglected to appoint a new business rescue practitioner timeously.
17. In the light of the above-mentioned it is submitted that a cost *de bonis* should not have been granted.
18. In closing his argument counsel submitted that costs *de bonis propriis* should only be ordered if the business rescue practitioner has acted negligently or unreasonably in the litigation.
19. The first respondent asked the court to dismiss the appeal on an attorney and client scale.
20. The new Companies Act requires the business rescue practitioner to be a person of integrity, impartiality and during the course of the rescue proceedings the practitioner functions as an officer of the court.³ Again he

³ Knoop v Gupta 2021 (3) SA 88 SCA paragraphs 31 to 33.

has the responsibilities, duties and liabilities of a director during the business rescue process.

21. In an appeal involving a cost order by a lower court, the power to interfere is limited to cases in which it is found that the court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question, or did not act for substantial reasons.⁴
22. In *Ward v Sulzer*⁵ the court held that “In appeals against costs the question is whether there was an improper exercise of judicial discretion i.e. whether the award is vitiated by irregularity or misdirection or is disquietly in appropriate. The court will not interfere merely because it might have taken a different view.”
23. In *African Banking Corporation of Botswana v Kariba Furniture*⁶, the court remarked that the practitioner must show objectivity and support the business rescue plan and must make a proper assessment of its prospects of success.
24. I agree with the views expressed by Modau J in paragraphs 51 and 56 of his judgment.
25. Again, it is my view that there are a number of instances where the appellant did not act in accordance with the standard of a business rescue practitioner during his term as business rescue practitioner.

⁴ *Manong and Associates v City of Cape Town*, 2011 (2) ZA 90 SCA, Paragraph 92.

⁵ 1973 (3) SA 701 at 706G-707A.

⁶ 2015 (5) 192 SCA. See also *Griessel v Lizamore* 2016 (6) SA 236 GJ at paragraph 95.

26. It is apparent from the evidence before us that the appellant did not appreciate the seriousness of the office he held. In his conduct, the appellant was reckless to the extreme.

27. His resignation was a nail in the coffin of his objectionable reckless conduct.

28. I cannot find any fault in the judgment and order of the court a quo and I am of the view that the appeal must fail.

29. It is submitted on behalf of the first Respondent that there was no real prospect that appellant might be successful with his appeal and that he should pay the costs of appeal taxed on attorney and client scale. Although there is a lot of criticism that can be levelled against the appellant's conduct, I am of the view that the punitive cost order by the court a quo is sufficient and it will be unfair to again award a punitive cost order against him.

30. In the premises, I make the following order.

1. The application to lead new evidence on appeal is dismissed with costs.
2. The appeal is dismissed with costs.

D. MAKHOBA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

RATIEF
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
I, AGREE

MPOFU
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
I, AGREE

APPEARANCES

For the Applicant: **Advocate J.G Bergenthuin SC**

Advocate M. Tjiana

Instruction: **VZLR Attorneys**

For the first and second respondent: **Advocate A. Badenhorst SC**

Instructed by: **Geyster Attorneys**

For the third respondent: **Mr Morne Coetzee**

Instructed by: **Morne Coetzee Attorney**