

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

2022-10-26

DATE

SIGNATURE

Case Number: 51476/2021

In the matter between:

ETIENNE JACQUES NAUDÉ N.O.
1st Applicant

LOUIS PASTEUR HOSPITAL HOLDINGS (PTY) LTD
2nd Applicant

and

LOUIS PASTEUR MEDICAL INVESTMENTS LTD
1st Respondent

DR MOHAMED ADAM
2nd Respondent

ABDOOL SATTAR AKOOB
3rd Respondent

YUSSUF SULIMAN
4th Respondent

DINGAAN DAKA
5th Respondent

ABOOHAKER JOOSUB MAHOMED

6th Respondent

KENNETHH CLIVE MARION

7th Respondent

COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

8th Respondent

ALBRECHT NURSING COMPANY

9th Respondent

LOUIS PASTEUR INVESTMENT HOLDINGS

10th Respondent

BOUWER CARDONA INC

11th Respondent

B BRAUN MEDICAL

12th Respondent

EASYBUILD

13th Respondent

ELECTRIC CENTRE PTA/VOLTEX

14th Respondent

FEDICS (PTY) LTD

15th Respondent

HOME HYPER CITY

16th Respondent

ARJO HUNTLEIGH AFRICA

17th Respondent

IMAGINE THAT DESIGN AND PRINT

18th Respondent

JAB AUTOCLAVES AND SERVICES CC

19th Respondent

K CARRIM GROUP

20th Respondent

STILCO SECURITY (PTY) LTD

21st Respondent

MEDHOLD MEDICAL (PTY) LTD

22nd Respondent

MEDIKREDIT

23rd Respondent

METRO HOME CENTRE

24th Respondent

NEW MEDICA

25th Respondent

PURPLE SURGICAL SOUTH AFRICA (PTY) LTD

Respondent

26th

SAB & T AUDITORS

27th Respondent

SRYSKER OSTEONICS (PTY) LTD

28th Respondent

SURGICAL INNOVATIONS

29th Respondent

TEXTILE WORLD

30th Respondent

TOPAS ELECTRONICS

31st Respondent

VALHALLA GENERAL DEALER CC

32nd

Respondent

WALTONS

33rd Respondent

WESTRAND BOX

34th Respondent

SOUTH AFRICA REVENUE SERVICES

35th

Respondent

HOSPERSA

36th Respondent

DENOSA

37th Respondent

NEDBANK

38th Respondent

EMPLOYEES OF SECOND APPLICANT

39th

Respondent

Not Represented by a Trade Union

(Annexure “X2” to the Notice of motion)

THE CREDITORS OF THE SECOND APPLICANT 40th

Respondent

(Annexure “X1”to the Notice of motion)

FIRST CLINIC PROPERTIES ONE (PTY) LTD 41st

Respondent

CONRAD VAN STADEN NO

42nd Respondent

HARRY KAPLAN

43rd Respondent

AAG KHAMMISA

44th Respondent

SUJAI NAIDOO

45th Respondent

JUDGMENT

POTTERILL J

Introduction

- [1] Louis Pasteur Hospital Holdings (Pty) Ltd [LPHH] was placed in business rescue with in 2018 Mr Naudé duly appointed as business rescue practitioner by LPHH's directors. From this flows a minefield of litigation of which this application is but one.
- [2] The Board of LPHH in 2019 purported to appoint Mr Kaplan and Ms Khamissa as co-BRPs. Mr Kaplan passed away and the Board purportedly substituted Mr Kaplan with Mr Naidoo. On 24 October 2022, with no opposition thereto, Mr Naude's (as BRP) application to remove Mr Kaplan and Ms Khamissa was granted with costs.
- [3] The application by Mr Naude to remove Mr Naidoo as co-BRP is belatedly opposed by Louis Pasteur Medical Investments Ltd [LPMI]. The crux of this matter is thus whether Mr Naidoo must be removed as co-BRP. Furthermore, whether a belated counter-application to remove Mr Naudé as BRP must be granted. Also relevant to the matter is whether Gothe Attorneys are authorised to act on behalf of LPMI. The first issue to consider is whether condonation should be granted for the late filing of the answering affidavit and the counterapplication.

Should condonation be granted for late filing of the answering affidavit to the removal application of Mr Naidoo and the counter-application.

- [4] On the version of LPMI Gothe Attorneys was appointed on 11 August 2022 to act on its behalf. The answering affidavit was commissioned two months later

and uploaded onto CaseLines on 18 October 2022 with the hearing date being 24 October 2022; three working days before the application was to be heard. My registrar was not informed of this and we received no email as a courtesy to take note of this extremely belated opposition and counter-application filed on CaseLines. CaseLines is not to be utilised to circumvent compliance with Court Rules. An attorney cannot slip a document in by uploading it on CaseLines. The court's permission needs to be obtained. This conduct is unacceptable.

[5] It must be remarked that Mr Smit, counsel for LPMI, already appeared at the case management meeting on 22 August 2022 and was well aware of this application to be heard on 24 October 2022. The attorney for LPMI stated that she lacked instructions at the case management meeting. Not a single reason is provided why nothing happened between the period 11 August 2022 and 18 October 2022. At the case management meeting the authority of Gothe Attorneys to act on behalf of LPMI was already placed in dispute.

[6] Seemingly a response Gothe Attorneys had to a "*courtesy letter*" that Gothe Attorneys had sent to the erstwhile attorneys delayed the filing of the necessary affidavits. A courtesy letter begged no response and any response thereto is no excuse for the delay. If Gothe Attorneys was lawfully appointed and had authority to act, they should have done so timeously. The degree of lateness of the answering affidavit and the counter-application and the lack of reasons therefor is frowned upon. Seeking an indulgence requires full disclosure of the reasons for the degree of lateness

- [7] The condonation was not pertinently raised in oral argument by counsel for Mr Naude. A court has a discretion and I exercise my discretion to grant condonation to prevent another flurry of unnecessary litigation and to put to bed these issues. LPMI is however to carry the costs for the condonation application due to no good cause shown for the time delay.

Does Gothe Attorneys have the authority to act on behalf of LPMI?

- [8] The version of the LPMI is that on 11 August 2022 a resolution passed by the Board of directors appointed Gothe Attorneys. On 23 August 2022 LPMI's directors passed three resolutions with the relevant resolution reading as follows:

“The Board of directors confirms and ratifies the appointment of Gothe Attorneys as attorneys of record of the Company with effect from the 11th of August 2022 and confirms that M B Adam was duly authorised by the Board of Directors of the Company on the 11th of August 2022 to sign a power of Attorney appointing Gothe Attorneys as the duly appointed and authorised attorneys of record of the Company on all legal matters and litigation.”

This they argue is proof that Gothe Attorneys are authorised to act.

[9] The resolution of 11 August 2022 is signed by Mariam Bibi Adam, Zaynub Adam, Tasneem Adam and Mohamed Yaseen Adam. It does not grant Mr Maine, the deponent to the answering affidavit, a power of attorney to act on behalf of the Board. This resolution is signed by only 4 of the 6 directors and Mohammed Yaseen Adam who was not a director on 18 August 2022. This resolution is signed by a Board that was not properly constituted and is a nullity.

[10] In the answering affidavit Mr Maine relies for his authority to sign the affidavit on a round-robin resolution passed by LPMI's directors on 23 August 2022. This resolution ostensibly ratifies the appointment of Gothe Attorneys from 11 August 2022. The relevant part of the resolution reads as follows:

“3. The Board of Directors confirms and ratifies the appointment of Gothe Attorneys as attorneys of Record of the Company with effect from the 11th August 2022 and confirms that M B Adam was duly mandated and authorised by the Board of Directors of the Company on the 11th August 2022 to sign a power of Attorney appointing Gothe Attorneys as the duly appointed and authorised attorneys of record of the Company on all legal matters and all litigation.”

The written recordal hereof is attached to an affidavit that is signed on 17 October 2022 and the recordal of this meeting is curiously also only signed on the 17th of October 2022.

[11] Contrary to the answering affidavit wherein it was stated that three resolutions were taken, in the answer to the Rule 35(12) a second version appears reflecting that in fact six resolutions were passed on 23 August 2022, however the only common denominator is resolution 2. Resolution 1 reads as follows:

“Any and all mandates, instructions and powers of attorney purportedly given to Geyser Attorneys by the Company or members of the Board of the Company acting in such official capacity or purporting to so act, is hereby withdrawn and terminated ...”

[12] The resolution taken on 11 August 2022 is a nullity. A nullity cannot be ratified.

The purpose of the resolution of 23 August had the intent to render that nullity effective. The insertion of resolution 1 on 23 August can only have one purpose and that is to deal with the contretemps between the two sets of attorneys for LPMI described in the answering affidavit. The only inference is that on 23 August 2022 LPMI did not ratify Mrs Adam's signature of a power of attorney to appoint Gothe Attorneys. Further doubt is cast with the answer to the Rule 7(1) notice confirming that the directors of LPMI resolved to appoint Gothe Attorneys, ignoring the power of appointment signed by Mrs Mariam Adam on 19 August 2022.

[13] I am satisfied that LPMI's version that they lawfully appointed Gothe Attorneys is untenable and that Gothe Attorneys have not demonstrated they have the authority to act on behalf of LPMI.

Must Mr Naidoo be removed as co-BRP?

- [14] The above finding should end the matter. I find it prudent, to despite this finding, address the removal of Mr Naidoo as a co-BRP and the removal of Mr Naudé as BRP, so that these issues can be finalised for legal certainty and the way forward.
- [15] Mr Naidoo must be removed, if so appointed, as a co-BRP. When a BRP dies a new BRP must be appointed.¹ Mr Kaplan's appointment was not endorsed by the CIPC and his removal was ordered by this court. Mr Naidoo accordingly cannot step into the unlawful appointment of Mr Kaplan.
- [16] Furthermore, the appointment of a BRP is a function of the directors.² But, when business rescue proceedings have been initiated the directors exercise their functions "*subject to the authority of the business rescue practitioner.*" With it being common cause that Mr Naudé was oblivious to the appointment of Mr Naidoo, any action taken without the approval of the BRP is void. Mr Naidoo is to be removed as BRP.
- [17] The averment that an exco of LPMI appointed Mr Naidoo takes the matter no further because in *Panamo Properties (Pty) Ltd and another v Nel and others* NNO 2015 (5) SA 63 (SCA) par [22] it was found that the Board of directors must appoint a BRP. An exco does not constitute a Board of directors and it is not empowered to appoint a BRP.

¹ Section 139(3), the Companies Act 71 of 2008 [the Act]

² Section 129(3) of the Act

[18] But, more importantly, another ratification relied on of 4 June 2021 for this exco decision, has no legal effect because on 18 June 2021 a Court order declared all the actions and decisions taken by the board of LPMI since the date of the business rescue were void and invalid. Mr Naude must be removed as the c0-BRP.

Must the counter-application to remove Mr Naudé be granted?

[19] In oral argument it was conceded that the issue raised in the counter-application that Mr Naudé ceased to be a BRP to LPHH because his appointment had lapsed between 16 April 2021 and 27 September 2021 was ill-conceived in lieu of the *ratio* expressed in the *Panamo*-matter that only a court on application can set aside a resolution to appoint a BRP and to terminate business rescue proceedings.³ This is so because an appointed BRP does not automatically lose their appointment if their licence lapses; only a court can remove a BRP.

[20] Much reliance was then placed on Mr Naude not informing the affected parties that the CIPC had neglected to renew his licence and this fact constituted recklessness and a demonstrable breach of his fiduciary duties. His failure to disclose his disqualification led to an abandonment of his duties of care and a clear breach of trust.

³ Par [29]

[21] This argument is to be rejected. As an attorney Mr Naude was never disqualified; he was not licensed for a period of 5 months. In terms of s138(2) the CIPC “*may*” licence a person. The whole tenure of the licencing in the Act read with the ratio in par 29 of the *Panamo*-matter of trivial non-compliances not leading to termination of the business rescue, cannot lead to an inference that Mr Naude’s non-licencing constituted reckless conduct. With no factual basis for recklessness there can be no breach of trust.

[22] I accordingly make the following order:

[22.1] The application for condonation is granted. The first respondent is to carry the costs thereof.

[22.2] The application to remove Mr Naidoo as business rescue practitioner is granted. The first to six respondents as the exco that appointed Mr Naidoo as well as Mr Naidoo are to pay the costs.

[22.3] The counter-application is dismissed with costs.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 51476/2021

HEARD ON: 24 October

FOR THE 1ST APPLICANT: ADV. R. PATRICK

INSTRUCTED BY: Bernard Vukic Potash & Getz

FOR THE 1ST RESPONDENT: ADV. J. SMIT

INSTRUCTED BY: Gothe Attorneys

DATE OF JUDGMENT: 26 October 2022