THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No:
31/2021

In the matter between

ETIENNE JACQUES NAUDE	**First Appellant**
LOUIS PASTEUR HOSPITAL HOLDINGS (PTY) LTD	**Second Appellant**

and

LOUIS PASTEUR MEDICAL INVESTMENTS (PTY) LTD	**First Respondent**
FIRST CLINIC PROPERTIES ONE LIMITED	**Second Respondent**
VARIOUS OTHER PARTIES	**3rd to 47th Respondents**

In the application of:

LENMED INVESTMENTS LIMITED	**Intervening Party**

and

EJ NAUDE N.O. & 48 OTHERS **1st to 49th Respondents**

Neutral Citation: *Naude and Another v Louis Pasteur Medical Investments (Pty) Ltd and Others* (31/2021) [2022] ZASCA 139 (24 October 2022)

Coram: ZONDI, MOLEMELA and HUGHES JJA and GOOSEN and SIWENDU AJJA

Heard: 24 August 2022

Delivered: 24 October 2022

Summary: Business rescue ─ appeal against an order granting a shareholder and a disputed creditor legal standing at meetings of creditors ─ settlement of appeal between primary litigants ─ removal of appeal ─ opposition to removal of appeal by intervening party ─ appellants contending the appeal moot ─ intervening party opposing the declaration of mootness ─ settlement between primary litigants rendering the appeal moot ─ appeal declared moot ─ intervention application struck from the roll.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Holland-Müter AJ, sitting as the court of first instance):

1 The appeal is declared moot and is removed from the roll.

2 The intervention application is struck from the roll.

3 Lenmed Investments (Pty) Ltd is ordered to pay the costs of the intervention application and the application for declaration of mootness on an attorney and client scale, such costs to include costs of two counsel where so employed.

JUDGMENT

Siwendu AJA (Zondi, Molemela and Hughes JJA and Goosen AJA concurring):

Introduction

[1] The second appellant, Louis Pasteur Hospital Holdings (Pty) (Pasteur Holdings) (in business rescue), is a well-known healthcare service provider and operates a standalone hospital in the Pretoria central business district. It commenced voluntary business rescue proceedings (the proceedings) in June 2018 and appointed the first appellant, Mr Etienne Jacques Naude (Naude) as the business rescue practitioner.

[2] The first respondent, Louis Pasteur Medical Investments (Pty) Ltd (Pasteur Investments) and Bonitas Medical Fund (Bonitas) are joint shareholders in Pasteur Holdings. Pasteur Investments holds 74 per cent of the

issued shares, while Bonitas holds the balance of 26 per cent. The business of Pasteur Holdings is organised in a complex group structure with several related and connected entities, one of which is the second respondent, First Clinic Properties One Limited (First Clinic).

[3] In August 2016, Bonitas obtained a judgment against Pasteur Holdings,[1] as a result, Bonitas and SARS are the largest creditors and jointly hold more than 92 per cent of the calculated voting interest. Another creditor is Arjohuntleigh Africa (Pty) Ltd (Arjohuntleigh), cited as the 23rd respondent in the appeal. Its claim of R42 276 against Pasteur Holdings represents less than 0,17 of the voting interest.

[4] On 6 June 2019, Naude convened a meeting of creditors and tabled a business rescue plan for adoption which was rejected. Exercising the election in s 153(1)*(a)(ii)*[2] of the Companies Act 71 of 2008 (the Act), Naude brought an application to set aside the vote on the grounds that it was 'inappropriate' (the no vote application). He did not launch the application within the 5 days envisaged in the Act. On 21 June 2019, Arjohuntleigh applied for the liquidation of Pasteur Holdings (the liquidation application). In addition, Arjohuntleigh sought an order compelling Naude to file a notice of the termination of the proceedings as contemplated by s 132(2)*(b)* of the Act.[3]

[1] Pasteur Holdings commenced business rescue proceedings after its application for leave to appeal against a judgment obtained by Bonitas in the sum of R44 245 350.68 was dismissed by this Court on 31 May 2018. By 2019, the value of the claim had increased to approximately R88m.

[2] Section 153 (1)(*a)(ii)* states that if a business rescue plan has been rejected as contemplated in section 152 (3) (*a*) or (*c)(ii)(bb)* the practitioner may advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interest or shareholders, as the case may be, on the ground that it was inappropriate.

[3] Section 132 (2)(*b*) states that business rescue proceedings end when the practitioner has filed with the Commission a notice of the termination of business rescue proceedings.

[5] The no vote and liquidation applications were amongst several applications[4] assigned to Ranchod J as a case manager. On 4 November 2019, Ranchod J issued a directive authorising a meeting of creditors on 12 November 2019. Pasteur Investments objected to this meeting, as a result, Ranchod J retracted the directive and convened a case management meeting with representatives of all affected parties. On 20 November 2019, he issued a second directive authorising Naude to convene a meeting of creditors and holders of voting interests. The purpose of the meeting was to obtain approval from creditors to prepare, publish and vote on a revised business rescue plan.

[6] Pasteur Investments objected to the authorised meeting and, together with First Clinic, launched an urgent application in the Gauteng Division of the High Court, Pretoria (the high court) on the 15 January 2020 which served before Holland-Müter AJ. The learned Acting Judge granted the following order:

'1. The First and Second Applicants are entitled to proceed with this application against the First and Second Respondents and the general moratorium on legal proceedings for purposes of this application is uplifted in terms of section 133(1)(*b*) of the Companies Act 71 of 2008 ("the Act")

2. Leave is granted to the First and Second Applicants to intervene in the pending business rescue of the Second Respondent;

3. This application, including Part B of the application, is subject to case management, together with all pending applications, which case management is conducted by his Lordship Mr Justice Ranchod;

4. [deleted] . . .

5. Pending the finalisation of this application,

5.1 the creditors meeting which is being convened for 15 January 2020 is postponed;

5.2 the First and Second Respondents are interdicted and restrained from considering, publishing or call a meeting to vote and/or adopt a business rescue plan in terms of section 150, 151 and/or 152 of the Act subject to the finalisation of the pending no-vote application instituted by the Business Rescue Practitioner

[4] At least nine applications including interlocutory applications as wells as two civil actions were pending and under case management before the Pretoria high court.

6. Costs are reserved.'

[7] During the urgent application proceedings, Lenmed Investments (Pty) Ltd (Lenmed) sought leave to intervene, alternatively to be substituted for Arjohuntleigh, the petitioning creditor in the liquidation application. Holland-Müter AJ did not consider the application on the grounds that it was not urgent, but ruled that Lenmed's substitution application should be heard in the normal course. When Naude and Pasteur Holdings applied for leave to appeal the order of Holland-Müter AJ to this Court, Lenmed applied for leave to intervene in that application. Holland-Müter AJ confirmed his previous ruling that Lenmed had not been substituted, and therefore had no standing before him. He emphasised that Lenmed's application was to be dealt with as part of a range of applications pending judicial case management before Ranchod J. He granted Naude and Pasteur Holdings leave to appeal to this Court.

[8] Holland-Müter AJ's order pertaining to the substitution application is characteristically not appealable, and Lenmed did not appeal or cross-appeal the decision. Lenmed instead filed an application seeking leave to be substituted for Arjohuntleigh, the 23rd respondent in the appeal and or to be granted leave to intervene and participate in the appeal in this Court (the intervention application). Lenmed contends that it is an 'affected person' as defined in s 128 (1)*(a)*,[5] based on the claim acquired from Arjohuntleigh. Consequently, it asserts that it has a right in law to intervene and participate in any proceedings

[5] Section 128 (1) provides that 'In this Chapter- *(a)* 'affected person', in relation to a company, means- (i) a shareholder or creditor of the company; (ii) any registered trade union representing employees of the company; and (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;'

afforded to creditors in s 145.[6] It claims that it has a direct and substantial interest in the appeal.

[9] The appeal was scheduled for hearing on 24 August 2022. On 1 August 2022, shortly before the hearing, Naude and Pasteur Holdings filed a notice of removal of the appeal from the roll on the basis that the dispute with Pasteur Holdings and First Clinic had been settled. The notice of removal was preceded by a notice filed by Pasteur Investments in terms of Uniform Rule 41(2),[7] abandoning the order granted in its favour on 15 January 2020 forming the subject of the appeal. Lenmed objected to the removal as well as the abandonment of the order by Pasteur Investments and First Clinic, and persisted that its application for intervention and substitution should be heard by this Court. Consequently, on 18 August 2022, Naude launched a substantive application to declare the appeal 'moot.' Unrelenting, Lenmed opposed this application.

[10] Arising from the dispute about the removal of the appeal are two interlocutory applications, namely the intervention application and the application to declare the appeal moot. (the mootness application). Naude and Pasteur Holdings seek a postponement and for leave to file opposing papers in the event that the Court finds there is a live appeal before it. Given that Lenmed's intervention application is associated with the dispute about the mootness of the appeal, it must be accepted that if Naude and Pasteur Holdings

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[6] Section 145 (1) reads: 'Each creditor is entitled to—

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and

(d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.

[7] (2) 'Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of subrule (1) relating to costs shall mutatis mutandis apply in the case of a notice delivered in terms of this subrule.'

succeed, then there will be no basis for this Court to entertain the intervention application. Accordingly, the question of mootness must be determined first.

Background

[11] A brief background is necessary to give context to the appeal and the two applications. From the get-go, Naude has been embroiled in litigation involving several affected parties which threaten to undermine the proceedings. Since inception, Bonitas favoured the liquidation of Pasteur Holdings because it believed that the proceedings were a ruse to avoid paying its judgment debt. Relevant to the appeal is that Naude terminated a sub-lease agreement between Pasteur Holdings and Frist Clinic, and applied[8] to set aside the sub-lease agreement because of alleged irregularities. This, amongst many other actions, set him on a collision course with some of the affected parties.

[12] By the time Naude convened the meeting of creditors, there were divergent interests associated with several affected parties. In February 2019, RH Managers, an external entity, made an offer to purchase Pasteur Holdings as a going concern for R200 million. Soon after this offer, Lenmed presented a competing offer to acquire Pasteur Holdings for R200 million. Naude rejected Lenmed's offer on the basis that its funder, Rand Merchant Bank did not provide a binding letter of commitment for the purchase price[9]. He did not present Lenmed's offer at the meeting of creditors held on 6 June 2019. During the urgent application proceedings, Pasteur Investments complained that Naude was partial towards RH Managers, and withheld pertinent information. Subsequent to the meeting of creditors, Lenmed revised its offer to R400 million, twice the amount offered by RH Managers.

[8] Case number 85285/2018.

[9] The sale of the business is not the primary goal of the rescue proceedings to turn Pasteur Holdings around to trade, but is, consistent with the secondary goal to realise a better return than would be the case if Pasteur Holdings were liquidated.

[13] On 5 October 2019, after the failed meeting of creditors, Bonitas sold its judgment debt of R88 million to RH Managers. On 19 December 2019, Arjohuntleigh sold its claim of R42 276 to Lenmed. The consequence is that RH Managers and Lenmed are contenders for the purchase of Pasteur Holdings and have each acquired pre-existing claims of creditors. The legal effect of a sale of creditor claims on voting interests is the subject of Lenmed's substitution application. It bears mentioning that at the time of the purchase, Naude had made a tender to settle Arjohuntleigh's claim with interest and costs. Arjohuntleigh declined the offer resulting in the formal tender made in terms of Uniform Rule 34, which is amongst matters pending before high court.

[14] The urgent application was to prevent Naude from convening further meetings of creditors, while the no vote and liquidation applications were pending. The shared view by Pasteur Investments, Arjohuntleigh and Lenmed is that Naude cannot lawfully convene a second meeting of creditors as intended by s 151[10] read with s 152[11] of the Act, after creditors rejected the first plan or before a court has determined the no vote and liquidation applications.

[15] However, the dispute on appeal related to the aspects of the order: (1) uplifting the moratorium against Pasteur Holdings, and (2) conferring Pasteur Investments and First Clinic legal standing (as a shareholder and a creditor respectively) to participate at a meeting convened for creditors in terms of s 145[12] of the Act. In addition, the status of the directive issued by Ranchod J which paved the way for a second meeting of creditors was challenged. In my

[10] Section 151 provides that within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.
[11]The provisions of section 152 deal with the introduction of the business rescue plan, representations by stakeholders and voting and approval of the plan.
[12] Section 145(1)*(b)* provides: 'Each creditor is entitled to participate in any court proceedings arising during the business rescue proceedings.'

view, the crux of the contested questions was of a domestic nature between the primary litigants.

[16] The challenge on appeal was that Holland-Müter AJ granted Pasteur Investments legal standing even though it had ceded its claims in Pasteur Holdings to Nedbank Ltd in terms of a cession agreement dated 5 October 2010 and therefore held no voting interests and was not an admitted 'creditor' of Pasteur Holdings. In relation to First Clinic, Naude had terminated a sub-lease agreement between it and Pasteur Holdings and had rejected First Clinic's claim as a 'creditor.' First Clinic had not challenged that decision. The interim order interdicting further meetings is not the subject of the appeal since Naude and Pasteur Holdings do not challenge it.

Mootness

[17] As a general principle, an appeal is moot when there is no longer 'an existing or live controversy.' However, the qualification is that the court may exercise its discretionary power and entertain an appeal, even if moot where: (a) there remains a discrete legal issue of public importance that will affect matters in future[13] or where (b) the interests of justice so require.[14]

[18] Counsel for Naude and Pasteur Holdings submitted that the settlement of the disputed issues between the primary litigants renders the appeal moot in terms of s 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013.[15] The appeal, they argued, will have no practical effect or result. In opposition, counsel for Lenmed submitted that absent a withdrawal, the appeal remains live and Pasteur

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[13] *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2016] ZASCA 163; [2017] 1 All SA 1 (SCA).

[14] *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC).

[15] Section 16(2)*(a)*(i) provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

Investments and First Clinic cannot merely abandon or remove it. Lenmed urged this Court to determine whether the rescue proceedings came to an end on 14 June 2019. Lenmed is resolute in its contention that Naude cannot lawfully convene a second meeting of creditors after they rejected the first plan or before a court has determined the no vote application. The insurmountable difficulty confronting Lenmed is that these questions are not properly before this Court and are, in any event the subject of the no vote and liquidation applications which are pending before the high court.

[19] Faced with this, Counsel for Lenmed, relying on *Van Staden v Pro- Wiz*[16], sought to persuade us that there is a discreet question of law to be determined in the 'public interest.' This, so the argument went, concerned the confirmation of paragraphs 5.1 and 5.2 of the interim order interdicting further meetings. He argued that such confirmation will protect the interests of all affected parties.

[20] Uniform Rule 41(2) permits an abandonment of a judgment at any time, including on appeal[17]. The abandonment by Pasteur Investments and First Clinic does not extinguish the existence of the interim order which remains extant until varied, rescinded or set aside.[18] Any 'public interest' in the discreet question of law which underpins the orders is served by the existence of those orders. Moreover, the interdict preventing further meetings has no immediate or adverse effect on the rights of Arjohuntleigh or Lenmed. On the contrary, it supports their desire to prevent further meetings.

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[16] *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* [2019] ZASCA 7; 2019 (4) SA 532.
[17] *Department, Transport, Province of Kwazulu-Natal v Ramsaran* (unreported, SCA case no 1274/2017 dated 23 May 2019) para [6].
[18] *Coetzer v Wesbank t/a Firstrand Bank Limited* 2022 (2) SA 178 (GJ) para 26-27; and *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) para 26.

[21] However, in so far as Naude, Pasteur Holdings, Pasteur Investments and First Clinic are concerned, the dispute about legal standing has become settled. The effect of the removal of the appeal from the roll means it is no longer an issue for adjudication by this Court. Thus, the appeal is moot and Lenmed's opposition must fail. It follows that there is no live dispute before this Court in which Lenmed can intervene and the intervention application falls to be struck from the roll.

[22] Counsel for Naude and Pasteur Holdings urged this Court, as a mark of its displeasure, to censure Lenmed by a punitive costs order. Distilled to their essence, both applications are exclusively fuelled by Lenmed's desire to protect its commercial interests. Lenmed was aware that none of the issues raised before us had been adjudicated by the high court or were appealable. The interim order preventing further meetings protected the interests of all affected persons. On removal of the appeal, Lenmed had no cogent reason to persist with its intervention or opposition to the removal. The conduct deserves censure as an abuse of the processes of this Court.

[23] In the result, the following order is made:

1 The appeal is declared moot and is removed from the roll.

2 The intervention application is struck from the roll.

3 Lenmed Investments (Pty) Ltd is ordered to pay the costs of the intervention application and the application for declaration of mootness on an attorney and client scale, such costs to include the costs of two counsel where so employed.

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NTY SIWENDU

ACTING JUDGE OF APPEAL

Appearances:

For Appellant:	R du Plessis SC (with MM Boonzaaier)
Instructed by:	Walter Niedinger & Associates, Pretoria West FJ Senekal Inc, Bloemfontein
For First and Second Respondent:	MC Louw
Instructed by:	Jaffer Inc, Pretoria West Free State Society of Advocates, Bloemfontein
For Lenmed Investments Ltd:	P Lourens
	Werksman Attorneys, Pretoria Symington & De Kok, Bloemfontein