



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 24 October 2022

Status: Immediate

The following Summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Naude and Another v Louis Pasteur Medical Investments (Pty) Ltd and Others

(31/2021) [2022] ZASCA 139 (24 October 2022)

The first appellant, Mr Etienne Jacques Naude (Naude) a business rescue practitioner of the second appellant, Louis Pasteur Hospital Holdings (Pty) Ltd (in business rescue) (Pasteur Holdings) sought to appeal an order: (1) uplifting the moratorium against Pasteur Holdings, and (2) conferring Louis Pasteur Medical Investments (Pty) Ltd (Pasteur Investments) and First Clinic Properties One (Pty) Ltd (First Clinic), legal standing to participate at a meeting convened for creditors in terms of s 145 of the Act. Pasteur Investments is a major shareholder in Pasteur Holdings and the balance of the shareholding is held by Bonitas Medical Fund. First Clinic had a sub-lease agreement with Pasteur

Holdings. The order by the high court followed an urgent application launched by Pasteur Investments and First Clinic, the first and second respondents in the appeal, to interdict Naude from holding further meetings of creditors.

Naude had tabled a business rescue plan for adoption which entailed the sale of Pasteur Holdings as a going concern to an external entity, RH Managers. Despite receiving a competing offer from Lenmed Investments (Pty) Ltd, Naude rejected it without presenting it to creditors. On 6 June 2019, the creditors rejected the business rescue plan, and Naude launched an application to set aside the vote in terms of s 153(1)(a)(ii) (the no vote application). One of the creditors, Arjohuntleigh Africa (Pty) Ltd (Arjohuntleigh), cited as the 23rd respondent in the appeal, petitioned the high court to liquidate Louis Pasteur Hospital Holdings (the liquidation application).

The two applications were amongst several disputes pertaining to the business rescue under case management by a different Judge. Naude obtained a directive from the case management Judge authorising him to convene a further meeting of creditors. Pasteur Investments and First Clinic approached the urgent court to stop Naude from convening a second meeting and the high court duly interdicted Naude. This aspect of the court order was not challenged and was therefore not the subject of the appeal.

Preceding the urgent application, Lenmed and RH Managers as the contending parties for the purchase of Pasteur Holdings, acquired creditor claims of Arjohuntleigh and Bonitas Medical Fund in Pasteur Holdings. Lenmed sought to intervene and to be substituted for Arjohuntleigh, in the urgent application. It contended that it was an 'affected person' as defined in s 128 (1)(a) and had the right to intervene and participate in the urgent court proceedings based on the acquired claim. At the time, Lenmed had filed an application for substitution

which is opposed and was pending adjudication. The presiding judge did not entertain Lenmed's substitution and intervention application on the grounds that the application was not urgent. He ruled that the application should be dealt with in conjunction with other pending disputes under case management. During the application for leave to appeal, Lenmed sought to intervene in that application. The court confirmed its earlier approach. As a result, Lenmed approached this Court for leave to intervene in the appeal. The shared view by Arjohuntleigh and Lenmed is that Naude cannot lawfully convene a second meeting of creditors as intended by s 151 read with s 152 of the Act, after creditors rejected the first plan.

The appeal was scheduled for hearing on 24 August 2022. On 1 August 2022, shortly before the hearing, Naude and Louis Pasteur Hospital Holdings filed a notice of removal of the appeal from the roll on the basis that the dispute had been settled. Pasteur Investments had filed a notice in terms of Rule 41(2) abandoning the relief granted in its favour by the high court. Lenmed opposed the removal of the appeal as well as the abandonment of the relief. It contended that, absent a withdrawal, the appeal remains live. The opposition prompted Naude and Pasteur Holdings to launch a substantive application to declare the appeal moot.

Against this background, the Court had to consider the intervention application and the application to declare the appeal moot. Lenmed contended that it had a direct and substantial interest in the appeal, urging the Court to determine whether Naude can lawfully convene a meeting of creditors after the rejection of the business rescue plan and to rule on whether the rescue proceedings came to an end on 14 June 2019. These questions were not properly before the Court on appeal and are the subject of the pending no vote and liquidation applications before the high court. Confronted with this, Lenmed argued that there is a discreet question of law to be determined in the 'public interest' concerning the

confirmation of paragraphs 5.1 and 5.2 of the interim order interdicting further meetings, to protect the interests of all affected parties.

The crux of the contested questions on appeal was of a domestic nature between the primary litigants. The abandonment by Pasteur Investments and First Clinic did not extinguish the existence of the interim order which remains extant until varied, rescinded or set aside. Any ‘public interest’ Lenmed sought to protect was served by the existence of those orders. The interdict preventing further meetings had no immediate or adverse effect on the rights of Arjohuntleigh or Lenmed. On the contrary, it supports their desire to prevent further meetings. The appeal was declared “moot”, and as there was no live dispute before the Court for Lenmed to intervene, the intervention application was struck from the roll. The Court ordered Lenmed to pay costs of both applications on an attorney and client scale for the abuse of the processes of the Court.