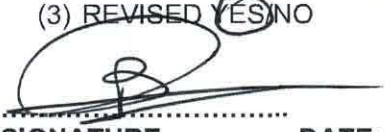


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 33585/2020

(1) REPORTABLE: YES <input checked="" type="radio"/> NO
(2) OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO
(3) REVISED YES <input checked="" type="radio"/> NO
 SIGNATURE
DATE: 14 October 2022

In the matter between:

IMPERIAL LOGISTICS ADVANCE (PTY) LTD

Applicant

and

REMNANT WEALTH HOLDINGS (PTY) LTD

Respondent

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JUDGMENT

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SWANEPOEL, AJ

## Introduction

[1] On 29 August 2022 the Supreme Court of Appeal ("SCA") under Case No 362/2021 ordered that:

- "1     *The appeal is upheld with costs including the costs of two counsel.*
- 2     *The order of the high court is set aside and replaced with the following order:*
  - '1     *The respondent is placed under provisional winding-up.*
  - 2     *A rule nisi is issued calling upon the respondent to show cause on Monday 10 October 2022 at 10h00 or as soon thereafter as counsel may be heard why:*
    - (a)   *it should not be placed under a final order of winding-up; and*
    - (b)   *the costs of this application should not be costs in the winding-up.*
  - 3     *Service of this order shall be effected by the Sheriff:*
    - (a)   *On the respondent at its registered address, namely 23 Ebbehout Street, Chantelle, Akasia, Pretoria, and care of its attorneys of record, Saleem Ebrahim Attorneys, 37 Quinn Street, The Newtown, Ground Floor, Newton, Johannesburg;*
    - (b)   *On the Companies and Intellectual Property Commission of South Africa;*
    - (c)   *On the Master of the High Court, Pretoria;*
    - (d)   *On the South African Revenue Service, Pretoria; and*
    - (e)   *On the respondent's employees, if any, respondent's registered address set out in paragraph 3(a) above, and on any trade union that may represent those employees.*
  - 4     *A copy of this order is to be published once in both the Government Gazette and the Citizen newspaper."*

[2] This is the return date of the provisional winding-up order granted by the SCA.

[3] At approximately 12h44 on Thursday, 13 October 2022, and before commencement of the hearing of the return date scheduled for 14h00, this court received electronic access to the respondent's "postponement application" (filed on the Caselines platform under section 031-1 – 031-31).

[4] In its notice of application dated 13 October 2022 the respondent (as applicant) gave notice that it will apply for an order on 13 October 2022 in the following terms:

*"1.1 That the rule nisi granted by the Supreme Court of Appeal on 29 August 2022 is extended to 30 January 2023.*

*1.2 That the matter is postponed to 30 January 2023.*

*1.3 That the applicant is ordered to file a supplementary answering affidavit by no later than 30 November 2022.*

*1.4 That the costs occasioned by the postponement shall be paid by the applicant including the costs consequent upon the employment of two counsel.*

*1.5 That the applicant be granted such further or alternative relief as the Court may deem appropriate."*

[5] In the quoted section under paragraph [4] above the reference to "applicant" is a reference to the respondent in the main winding-up application. I will refer to the parties as "applicant" and "respondent" respectively as in the winding-up application.

[6] Counsel for the applicant indicated that the postponement application is opposed. The applicant did not file an answering affidavit. Its legal representatives received the respondent's postponement application earlier on 13 October 2022. Mr Tsatsawane SC for the respondent indicated that he (together with his junior) was only briefed to appear and represent the respondent in the application for postponement. He indicated that he did not have opportunity to read the papers of record in the winding-up application.



[7] On that basis the application for postponement (including extension of the rule nisi and other relief mentioned above) was argued first. The main application must still be adjudicated. Judgment in respect of the postponement application was reserved, to be given on 14 October 2022 at 10h00, to which date and time the main application stood down.

### **Postponement application**

[8] The respondent's founding affidavit in the postponement application was deposed to by Mr M I Neluheni, a director of the respondent. By way of summary, the basis of the postponement application is stated in paragraphs 3 and 3.1 to 3.52 of the respondent's founding affidavit:

- 1) It is stated that the respondent was not represented in the SCA when the order was granted placing it under provisional winding-up. Mr Neluheni stated the reasons why it was not represented in the SCA. This culminated in the statement that despite the respondent's best efforts its previous attorneys of record did not take *"the necessary steps to ensure that the applicant [a reference to the respondent in the main application] was properly represented before the Supreme Court of Appeal"*.
- 2) The respondent stated that it intends to oppose the confirmation of the provisional winding-up order because the respondent is *"an interested party and it is entitled and it intends to oppose the final order"*.

In this regard the respondent further stated in its affidavit that:

- (a) There is a need for the respondent to file an affidavit to place *"additional evidence before the Court to demonstrate that it is not insolvent as alleged"* by the applicant (paragraph 3.36 of the respondent's affidavit).
- (b) The respondent *"has secured lucrative orders pursuant to which it renders services to, amongst others, South 32 SA Limited and will be in a position to improve its financial position and to settle the respondent's liability once it has been properly determined"* (underlining as it appears in the respondent's affidavit, paragraph 3.37).

- (c) It disputes its indebtedness to the applicant *"in the full amount alleged by it"* (respondent's affidavit in support of its postponement application, paragraph 3.38) and that *"(f)or this reason, it is necessary that a proper assessment of what is actually due by the applicant [a reference to the respondent in the main application] to the respondent [a reference to the applicant in the main application] be done. The applicant [a reference to the respondent in the main application] needs more time to place further evidence before this Court to demonstrate that it is in fact not indebted to the respondent [a reference to the applicant in the main application] in the full amount claimed from it and that its financial position is such that it ought not to be liquidated"* (underlining as it appears in the respondent's affidavit, paragraph 3.38).
- (d) It has not stopped operations and it continues to receive purchase orders from third parties to render services to them and that this *"clearly indicates that it remains a going concern and that it will in due course settle the respondent's liability once that has been properly determined pursuant to a proper and fair hearing"*.
- (e) It has appointed a new legal team to represent it *"and such team must now study the papers filed of record and prepare heads of argument in order to oppose the application. The applicant [a reference to the respondent in the main application] accordingly seeks an indulgence to enable its new legal team to attend to this."*

[9] The respondent has in its affidavit stated that it accepts that the relief that it seeks in the postponement application will delay the consideration whether a final liquidation order should be granted. In this respect the respondent has, curiously, stated in paragraph 3.42 of its affidavit that *"the respondent [a reference to the applicant in the main application] has not demonstrated any additional prejudice as a result of the delay caused by the ongoing litigation"*.

[10] The respondent tenders the costs occasioned by the relief that it seeks including the costs consequent upon the employment of two counsel.

[11] Before considering the grounds upon which the respondent relies in support of its application for postponement (and extension of the provisional winding-up order) it is



necessary to refer to the general state of the law in this jurisdiction insofar as applications for postponement are concerned.

[12] It is trite that this court has a discretion whether an application for postponement should be granted or refused.

[13] It is also trite that a party seeking a postponement seeks an indulgence and must show good and strong reasons which consist of a full and satisfactory explanation of the circumstances that give rise to the application. In *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 494 para [28], the SCA held *inter alia* that “(i)t is also in the public interest that there should be an end to litigation. Accordingly, in order for an applicant for a postponement to succeed, he must show a ‘good and strong reason’ for the grant of such relief”. In its judgment the SCA referred to the decision of the Constitutional Court in *National Police Service Union and others v Minister of Safety and Security and others* 2000 (4) SA 1110 (CC) at 1112C-F, where it was held:

*“The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.”*

[14] Without attempting to provide an exhaustive list of factors relevant for consideration by this court in an application for postponement, it appears from the authorities referred to above (and other reported decisions) that those legal principles include the following: an application for postponement must always be *bona fide*; postponement should not be

sought as a tactical manoeuvre for obtaining an advantage to which a litigant is not legitimately entitled; considerations of prejudice and the balance of convenience or inconvenience to both parties must be considered; a court should weigh the prejudice that will be caused to a litigant in an application for postponement if the postponement is granted against the prejudice which will be caused to the other litigant if it is not granted; the broader public interest is of relevance; the party seeking a postponement's prospects of success on the merits of the main matter; and the scope of the issues that must ultimately be decided.

[15] In *National Police Service Union and others v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1113D, the Constitutional Court held:

*"Ordinarily ... if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives ... must appear and be ready to assist the Court both in regard to the application for the postponement itself and, if the application is refused, the consequences that would follow."*

#### **The respondent's application for postponement**

[16] It is common cause that the applicant's appeal in the SCA against the judgment and order of the High Court [given on 1 December 2020, in terms whereof *inter alia* the application for winding-up was dismissed] was argued in the SCA on 25 August 2022 and that thereafter the aforesaid order was made by the SCA in terms whereof the respondent was placed under provisional winding-up.

[17] Mr Neluheni stated in the respondent's founding affidavit [in support of the application for postponement] that he received a copy of the SCA order from the Registrar of that court *"on or about 2 September 2022"* (respondent's founding affidavit, para 3.28). In stating the conduct of the respondent after Mr Neluheni became aware of the SCA order, various references are made to dates in September and October 2022 on which Mr Neluheni stated that he took further action or steps on behalf of the respondent and in its best interest. Mr Neluheni stated in paragraph 3.34 of the respondent's affidavit that *"(i)t is clear from what I have stated above that the applicant [a reference to the respondent in the main application] was let down by its previous attorneys. The applicant [a reference*



to the respondent in the main application] *has not abandoned its intention to oppose the granting of the final liquidation order.*"

[18] In the absence of any contrary evidence this court is bound to accept the evidence presented on behalf of the respondent as part of its application for postponement. However, that does not by necessary implication have the effect that the mere say-so of the respondent must be accepted. This court is required to, in the exercise of a judicial discretion and in applying the legal principles referred to above, evaluate the evidence presented on behalf of the respondent which includes determination of its credibility and adequacy. Such evaluation must be performed in the context of the applicable factual circumstances, which includes the fact that the application for postponement is made on the return date of a provisional winding-up order granted by the SCA on 29 August 2022 and that the respondent's director, Mr Neluheni, became aware of that order on 2 September 2022. Further relevant context includes the fact that this litigation stems from the main application that was instituted during or about July 2020.

[19] In my view, after a careful consideration of the respondent's founding affidavit as a whole, the respondent has treated its obligations to this court with disdain. I am not convinced that the respondent's application for postponement constitutes a *bona fide* application. I am further not convinced that the respondent has brought its application for postponement timeously (with the requisite haste as soon as the circumstances permitted the respondent to do so). In addition, in my view, a consideration of the balance of convenience for both parties does not lead to the conclusion that the postponement sought by the respondent ought to be granted. Furthermore, the respondent has failed to establish that it would be in the interests of justice, as well as in the broader public interest, that the postponement relief should be granted. In addition, it bears mentioning that the respondent has failed to make use of the opportunity to, in its affidavit, address its prospects of success on the merits of the main winding-up application. The reasons for these findings are provided in the paragraphs that follow.

[20] I regard the respondent's attempt to lay the blame for the fact that it was not represented in the SCA at the door of its previous attorneys of record as a lame excuse. Nowhere in the respondent's affidavit has Mr Neluheni explained why he, as a director of



the respondent, or any other authorized representative, failed to be more involved in the process of litigation in the SCA (which includes by necessary implication knowledge regarding papers being prepared for and on behalf of the respondent and the briefing of counsel as well as the date of the court hearing).

- (a) The fact that Mr Neluheni states that the respondent's previous attorneys of record did not take the necessary steps to ensure that it was properly represented before the SCA, does not mean that those "*steps to ensure*", to which reference is made, need not be comprehensively stated and explained.
- (b) Although Mr Neluheni's evidence on behalf of the respondent commences (in paragraph 3.9 of the respondent's affidavit) with a reference to events at the beginning of 2022, he proceeds quickly and with relative ease to the period May 2022, June 2022 and thereafter August, September and October 2022 - without mentioning exactly what actions he took in the period leading up to the SCA appeal hearing, to ensure that the respondent was adequately represented and that its case was sufficiently argued on its behalf in that court.
- (c) In any event [even if I am wrong in my consideration of Mr Neluheni's lack of sufficient explanation as regards the steps taken by him on behalf of the respondent in ensuring that the respondent's erstwhile attorneys took all reasonable steps timeously to ensure that the respondent's case was sufficiently argued in the SCA] the conduct of the respondent's erstwhile attorneys in the process leading up to 25 August 2022 when the appeal was argued in the SCA does not, on its own, constitute a material consideration or factor in the adjudication of the postponement application.

[21] It is relevant to consider whether the postponement application was timeously made. Counsel for the respondent conceded, correctly in my view, that the respondent's founding affidavit fails to comprehensively address the action (if any) taken on behalf of the respondent after Mr Neluheni became aware of the SCA judgment. For example, although Mr Neluheni stated that he revisited the respondent's previous attorneys on or about 5 September 2022 (to collect the outstanding documents in the files, in respect of

which no particulars were provided), he provided no explanation on what steps (if any) were taken on behalf of the respondent after that date up to the 14<sup>th</sup> September 2022 when he contacted the respondent's previous attorney (again regarding the collection of the files) at which stage he was informed that *"the files are not ready, and I was to attend to collect the files the following week"*.

- (a) Similarly, in respect of the period 14 September 2022 to 23 September 2022 [the latter date was when Mr Neluheni attended at the respondent's previous attorneys' offices *"to collect the files"*] no explanation is proffered regarding any steps taken on behalf of the respondent to ensure its continued opposition of the winding-up application.
- (b) Mr Neluheni was informed [on 23 September 2022] that Mr Ntaka of the respondent's previous attorneys had resigned and that he *"was to call Mr Ebrahim directly to collect the files"*. He further states that he received a copy of the applicant's practice note from its attorneys on 4 October 2022. Mr Neluheni failed to explain what steps (if any) were taken by him on behalf of the respondent in the period from 23 September 2022 to 4 October 2022 to ensure its continued opposition of the winding-up application.
- (c) Even if I am wrong in my consideration of the respondent's failure to comprehensively explain what steps were taken on its behalf during the period 2 September 2022 to 13 October 2022 when the postponement application was made, it bears mentioning that the respondent's case as stated in its founding affidavit is not that its inability to collect or receive *"the files"* from its previous attorneys had the effect that it could not (i) instruct new attorneys to represent the respondent and/or (ii) proceed with preparation of the application for postponement at an earlier date, as soon as it became apparent to the respondent that it would not be able to oppose the application on the return date of the provisional winding-up order in an attempt to have that order set aside.

[22] In the circumstances I find it reasonable to conclude that the postponement application was not timeously made.



[23] In addition, the respondent has failed to, in its affidavit in support of the application for postponement, provide any explanation why it waited until shortly before the return date of the provisional winding-up order to instruct new attorneys to represent it. This, even though the respondent has made full use of the opportunity to, in its affidavit, cast blame on its previous attorneys of record.

[24] Whilst accepting that the respondent is an interested party to show cause why a final winding-up order should not be granted, its failure to take necessary action in the period between 2 September 2022 and 13 October 2022 is not irrelevant. The respondent's criticism of its previous attorneys of record cannot have the automatic effect that this court must excuse its failure to explain why it waited until shortly before the hearing of the return date of the provisional winding-up order to deliver its application for postponement and why it has failed to deliver its further affidavit(s) and evidence in opposition to the main application.

[25] The reasons advanced by the respondent in support of the postponement that it seeks are stated in paragraphs 3.35 to 3.41 of its founding affidavit. They can conveniently be summarized as follows:

- (a) It is stated that there is a need for the respondent *"to file an affidavit to place additional evidence before the Court to demonstrate that it is not insolvent as alleged"* by the applicant.
- (b) It is stated that the respondent *"has secured lucrative orders pursuant to which it renders services to, amongst others, South 32 SA Ltd and will be in a position to improve its financial position and to settle the respondent's liability once it has been properly determined"*.
- (c) In addition, the respondent has stated that it disputes that it is indebted to the applicant in the *"full amount as alleged by it"*. It is further stated that it is necessary *"that a proper assessment of what is actually due"* by the respondent to the applicant *"be done"*.



[26] In considering the reasons for seeking a postponement, it is significant that the respondent has failed to explain why, between the period 2 September 2022 and 13 October 2022, it has not been able to prepare its further affidavit(s) in opposition to the final winding-up relief sought by the applicant. It is further significant that the respondent apparently does not dispute its indebtedness to the applicant but only that it is indebted *"in the full amount alleged"* by the applicant. In this regard the respondent has failed to take this court into its confidence by furnishing particulars of that part of the indebtedness admitted by it and the part thereof that it wishes to continue to dispute. This, whilst bearing in mind that the litigation stems from winding-up proceedings instituted during July 2020 already.

[27] It is not stated in the respondent's affidavit that there exists any reason(s) why this additional evidence (of which no particulars were provided) could not be obtained earlier and presented to the court as part of its intended opposition to a final winding-up order. The respondent has not stated that the evidence that it intends to present is for some or other reason not available to it.

[28] In my view the reasons on which the respondent relies for a postponement were not furnished in a full and complete manner. The respondent's affidavit is replete with general and bold statements, and it lacks specificity. This conduct by the respondent must be understood in its proper context, which includes the fact that the respondent has had opportunity to present its case in the court *a quo* as well as in the SCA.

[29] Even if I am wrong in my consideration of the veracity of the reasons proffered by the respondent in support of the postponement application, it bears mentioning that the respondent's asserted ability to in future improve its financial position cannot reasonably be regarded as a valid factor in determining whether a good case for postponement has been presented. The respondent's affidavit lacks specificity and a positive assertion insofar as it concerns its prospects of success in the main application. This is particularly evident from the respondent's statement that *"[I]t is unfortunate that the respondent [applicant in the main application] chose to bring liquidation proceedings instead of instituting action proceedings to claim the amount allegedly due to it"* and further the statement that this *"would have allowed a full ventilation of the issues in dispute between*

*the parties*" for a court to properly determine "*as to exactly how much is due to the respondent*" [a reference to the applicant in the main application].

[30] Essentially the respondent seeks more time to present more evidence. This, in circumstances where the respondent has failed to explain why, since 2020 to date, it has failed to produce the "*additional evidence*" that it now seeks to place before the court.

[31] In my view, a consideration of the respondent's affidavit as a whole reveal that the application for postponement is not *bona fide*.

[32] Insofar as it has been argued by counsel for the respondent that the adjudication of the main application in the absence of opportunity being afforded to the respondent to present further evidence would be prejudicial to the respondent, the respondent's own version as contained in its founding affidavit in the application for postponement reveals that it was the respondent's own inaction (particularly during the period 2 September 2022 to 13 October 2022) that caused the respondent to find itself in its current position. It is in the interests of justice that litigation must be finalised. It is clear from a reading of the respondent's affidavit that it is attempting to avoid the final adjudication of the main application. The respondent's tender to make payment of the costs occasioned by the relief which it seeks is of no moment. It certainly does not address the prejudice that the applicant will suffer if this matter is to be further postponed, particularly in circumstances where the respondent has failed to show good cause in support of the postponement relief that it seeks.

[33] Counsel for the applicant has argued that even if the application for postponement is to be refused and if the applicant is to be successful in the main application (which must still be adjudicated), the relief available to *inter alia* a member of a company in s 354 of the Companies Act 61 of 1973 (as amended) remains available. In s 354(1) of that Act it is provided that "*the court may at any time after the commencement of a winding up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding up on such terms and conditions as the court may deem fit*". Therefore,



if as alleged by the respondent in its founding affidavit it has secured lucrative orders and if it has not stopped operations and if it continues to receive purchase orders from third parties to render services to them and it remains a going concern and if it is able to in due course settle its indebtedness to the applicant, there would be no reason why its member(s) would not be able to rely on the provisions of s 354(1). In my view it is not necessary to make a finding on this in circumstances where the postponement application is manifestly not *bona fide*.

### **Costs**

[34] There is no reason why the applicant should not be entitled to its costs in respect of its opposition of the postponement application. Considering my finding that the postponement application is not a *bona fide* application, it would be appropriate to award costs on the attorney and client scale, including the costs of two counsel (in circumstances where the applicant was represented by three counsel and the respondent by two counsel).

### **Order**

In the circumstances the following order is made in respect of the respondent's postponement application:

1. The application is dismissed; and
2. The respondent is ordered to pay the applicant's costs on the attorney and client scale including the costs of two counsel.



**PA SWANEPOEL**

ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA



**Date of hearing : 13 October 2022**

**Date of judgment : 14 October 2022**

**Appearances:**

Counsel for applicant: Adv M R Hellens SC

Adv G Amm

Adv G Mamabolo

Counsel for respondent: Adv NK Tsatsawane SC

Adv B Bhabha