REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: **14052/22**

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

2022

In the matter between: -

JEFFREY TURNER	**FIRST APPLICANT**
KEITH MATTHEWS	**SECOND APPLICANT**
CHRISTOPHER HARTLEY CARTER	**THIRD APPLICANT**
HENRY YOUNG	**FOURTH APPLICANT**

and

EUROPLAW GROUP INC.	**RESPONDENT**

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 18 November 2022.

1. This is an application in terms of which the applicants seek, first, a final winding-up order and, in the alternative, that the respondent be placed under provisional liquidation together with the usual relief relating to publication of the order and the like. There is a further alternative prayer for payment of the amount of 505 000 Euros, together with interest.

2. The application is founded on two bases. First, the applicants contend that they are creditors of the respondent and that the respondent is unable to pay its debts. The second basis is that it is just and equitable to do so because, so say the applicants, the respondent is conducting its business by utilising fraudulent schemes to target financially vulnerable individuals.

3. At the proverbial eleventh hour the respondent's attorney of record withdrew and he was replaced, simultaneously with an application for a postponement of this matter. The constitutional court has said:

'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 must 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'[1].

4. Mr Jardine appeared on behalf of the respondent in the application to postpone. He advised me that he only has instructions to appear in respect of the application for postponement and if it should be dismissed, he has no instructions on the merits and would then ask the court to be excused.

5. I dismissed the application for postponement and advised Mr Jardine that the reasons therefore would appear in the judgment on the merits of the matter,

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[1] *National Police Service Union and others v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1113D

although they should readily have been apparent to him during the course of my debate with him. I then advised Mr Jardine that he could be excused from the matter as was his request, adjourned the court for a few minutes to give him an opportunity to leave and then reconvened. I heard the application on the merits and granted the alternative relief of a provisional winding-up. What follows are my reasons for refusing the postponement application and also for granting the order which I did. Before I do so, I deal with some preliminary issues and I set out some of the facts which I believe to be of relevance in this matter.

6. In coming to my decision I heard oral argument from Mr Jardine only on the postponement application. Notwithstanding this, and notwithstanding that the respondent had no legal representation in court after the application for postponement was dismissed, I nevertheless took cognisance of the answering affidavit of the respondent in the main application as well as the heads of argument that had been filed on its behalf by the erstwhile attorney on 20 September 2022, Mr Bekker, who was to appear. I considered them but was not persuaded by the submissions contained therein.

7. During the first quarter of 2018 the applicants were advised by two entities; namely Forshaw Capital Group Ltd and Alprimo AG of an investment opportunity which had promised a return of 8% per annum on the respective investments of the applicants. They had each decided to invest separate amounts, together amounting to in excess of 500 million Euros. This money would be paid to Forshaw and Alprimo who would, in turn, invest such monies in the project which had promised the necessary riches. But, as so eloquently written by Justice Holmes for the minority in *Yannakou v Apollo Club*[2] 'riches certainly make themselves wings', and the investment was not, it seems, a wise one.

8. Pursuant to escrow agreements which Forshaw and Alprimo AG had with the respondent, Europlaw Group Incorporated, the applicants were advised to pay

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[2] 1974 (1) AD 614 at 616 A-C

the money to Europlaw which was to be held as the appointed escrow agent for the project. In turn, Europlaw had nominated a bank account at a German bank, Volksbank, which Europlaw contends is the bank account of an organisation known as Ithuba. A statement of account obtained in November 2018 from Ithuba shows that it holds an amount of 437 000 Euros to the credit of Europlaw as the account holder. The applicants were requested by their escrow agent, Europlaw, to pay the monies that Europlaw had to hold for them in this particular bank account. The envisaged project never materialised, although it seems that some monies were in fact paid towards the project in its infancy stages. That, however is not relevant for the purposes of this application. When the project did not materialise, the applicants requested a repayment from Europlaw of the money that it kept in escrow.

9. The founding affidavit is replete with many attempts made by the applicants to get payment. Various promises and assurances were made which simply never materialised. In fact, at one stage Mr Vorster, representing Europlaw, had confirmed that Europlaw had received confirmation and proof of payment from Ithuba, that payment had been affected from a European bank to a local bank and that Europlaw was simply awaiting for the funds to clear. He said that the attorney of record has a copy of such payment and even volunteered that Europlaw's attorneys can confirm it.

10. My reading of the founding affidavit and the correspondence is that, in essence, Europlaw had accepted liability for repayment of the money but, at some stage, turned and blamed its banker, Ithuba, for failure to comply with the payment obligations.

11. To date, there has been no payment.

12. In essence, Europlaw contends that is bankers had not complied with its obligations toward it and, as a result, it cannot comply with its obligations towards the applicant.

13. Throughout these proceedings, Europlaw has been represented by a certain Mr Bekker, an attorney from Bloemfontein. The papers allege that he is also a director of one of the subsidiary companies in the Europlaw group of companies known as Europlaw Central (Pty) Ltd and that he is instrumental in introducing the financially destitude farmers who form part of the fraudulent scheme. I make no finding in that regard.

14. With that background in mind, I now deal with the application for postponement.

15. The matter was set down in the week commencing 14 November 2022. It was set down, by notice, on 5 October 2022. On 10 November, an application for postponement was filed, without tendering any costs for the postponement.

16. The affidavit is deposed to by a certain Ms Chanelle Kapp, who describes herself as a female practicing attorney and a director of Darran Ledden Inc. in support of the application for postponement. Not only did Ms Kapp, the now attorney of record, not have the common courtesy to be present in court, nor was she represented by either a member of her firm or from her correspondent firm, she also did not mention in her founding papers that she is in fact a director of the holding company of Europlaw. This was raised in the answering affidavit and confirmed by counsel appearing and instructed by her. Regretfully, it happens all too often these days. Apart from making it difficult for counsel to obtain instructions when they have to, it shows little or no respect for either the court or the client which is being represented. I take a dim view of this, more so when she was accused in the answering affidavit of being dishonest. This is a serious allegation to which she decided not to respond to by filing a replying affidavit. However, this has not clouded my reasons for refusing the application for postponement.

17. The reason I also mention this is that, the probabilities must be overwhelming given that she, as a director of the holding company of the respondent, was aware of the litigation that was commenced in March 2022 although this, too,

matters not. It does however bring into question the impression created in paragraph 4.2 of her founding affidavit that her offices was contacted on approximately 13 October 2022, seemingly out of the blue, to take over this matter.

18. A delay then occurred between 13 October and 10 November when the application for postponement was ultimately launched. That delay is inadequately explained but that too, is not the reason for the refusal of the application.

19. According to the affidavit of Ms Kapp, the respondent relies on three reasons for the postponement. First, it is stated in paragraphs 4.4 and 4.5 of her founding affidavit thus:

'4.4 Upon my perusal of the documents filed in the matter it became clear that there are numerous shortcomings in the drafting of the opposing affidavit (and the opposing papers as a whole, which needed to be canvassed and/or addressed.

4.5 It is therefore my submission that should the main application not be postponed the respondent will be severely prejudiced in that due to the voluminous nature of the document exchanged to date, the complexity of the matter and the serious nature of the relief as sought, the respondent would not be adequately represented in the ventilation of the matter accordingly. It is therefore unquestionable, that the potential risk the applicant faces, should the matter proceed on the papers as they stand, it immense'.

20. The explanation given is the epitome of vagueness. It is terse and contains a dearth of information. Mere verbiage from which it is impossible to distill anything meaningful.

21. The authorities and principles to be taken into account when postponements are sought are summarised in Erasmus, Superior Court Practice at pp D1-553 to D1-555. It is trite that an applicant must show good cause and strong reasons as to why the postponement should be granted. Given the paragraphs upon which reliance is placed, I am unable to reach any conclusion as is to what the

reasons are. There is simply no statement as to what the shortcomings are in the answering affidavit and what in addition needs to be addressed and how this would in any way affect whatever defences are to be raised. There is no indication of what additional facts there are or what any additional grounds of opposition would be.

22. A change of legal representation does not of itself give a right to a postponement[3].

23. I am not persuaded that Europlaw has made out any case for the postponement on this ground. No good cause is revealed.

24. What is next relied upon is that the matter is not ripe for hearing because there is a pending application for security for costs. This is without merit too.

25. On 20 June 2022 Europlaw, ill-advisedly, launched an application in terms of the provisions of rule 47 that the applicants each pay security in the amount of R2 000 000,00 (that is R8 000 000,00 in total) or an amount to be paid by the registrar. This was clearly an irregular proceeding in view of the fact that no notice in terms of rule 47(1) had been filed.

26. The application was withdrawn and subsequently Europlaw filed a rule 47(1) notice. The applicants did not dispute their liability to furnish security and only contested the amount. They offered R150 000,00 and advised that the matter should be determined by the taxing master. Once more, and ill-advised application was launched in terms of rule 47(3), rather than to file the necessary documents to have the amount taxed by the taxing master. That ill-advised pending application is no ground for postponement. Europlaw could have finalised that issue prior to this hearing, had it really wanted.

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[3] See in this regard the introductory paragraphs of *Take & Save Trading CC and others v The Standard Bank of SA Ltd* [2004] ZASCA (1)

27. Just the extraordinary large amounts requested lead me to believe that it was simply an attempt to delay the matter.

28. When Mr Bekker, the erstwhile attorney for Europlaw was advised of the set-down date, he immediately advised that he is unavailable during the week of 14 November 2022. He was, on the same day, or the day thereafter, advised that the matter would be heard on that date and he should brief or find alternative legal representation for the respondent. This, too, instills no confidence in me that the reasons given for the postponement are *bona fide*. There is no explanation why Europlaw would jump ship, just prior to the hearing, from one skippered by Mr Bekker who clearly has an interest in the matter, to one in which Ms Kapp was thrust at the helm, who also must have an interest in the matter.

29. The next ground deals with the fact that there is an application to supplement the answering affidavit by way of supplementary affidavits.

30. On 9 May the replying affidavit was filed. Two months later there was an application to file further affidavits, without any application for leave to do so. Following a notice in terms of rule 30 on 15 July, the respondent on 22nd July filed an application for leave to file supplementary papers.

31. An answering affidavit to this interlocutory application was filed, but there is no replying affidavit.

32. The respondent contends that on 29 July 2022 it made application for a hearing date of this interlocutory application and it is still awaiting a date. It seems however that the application for a hearing date was made even before any notice of opposition was filed. Then once more, nothing further was done by the respondent to have this application heard on the opposed roll.

33. I advised Mr Jardine that whatever they wished to state they can do so on the return date, should a provisional order be granted. There was no real response to my proposition.

34. All in all I am left with the abiding impression that the respondent simply wishes to delay this matter and I do not believe that good cause has been demonstrated for the postponement. For the aforesaid reasons I dismiss the application for a postponement and order that the costs of the application for postponement be in the administration of the respondent.

35. I now turn to the merits of the matter.

36. Europlaw denies that the above honourable court has the necessary jurisdiction to adjudicate the application. There can be no merit in this in view of the fact that Europlaw is registered within the jurisdictional area of this court. The court has jurisdiction[4]. Equally, foreign creditors may also apply for the liquidation[5].

37. I have already above indicated a brief history of the facts and in my view, there can be no doubt, given the common cause facts that Europlaw is a debtor of the applicants. The money was paid into the bank account of Europlaw's bankers and on its instructions. Europlaw, if they are to be believed, has done its best, although it ultimately has failed, to obtain repayment of that money from its bankers. That does not absolve its responsibilities toward the applicants. There seems to be me to be no *bona fide* dispute in this regard. At the very least the applicants are contingent or prospective creditors.

38. A company may be wound up if it is unable to pay its debts as described in section 345 of the 1973 Companies Act. Europlaw has only raised one defence, in essence, and that has been rejected. There is no evidence, whatever, that it is in a position to pay, at the very least, the amount of 473 000 Euros held in its nominated bank account of Ithuba. It does not deny that is unable to pay its debts. It merely states that it has not done so because the banker in Europe has failed to make payment. It clearly has failed to pay the demand made to it

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[4] *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd* 2012 (1) SA 191 (WCC)

[5] Mars, The Law of Insolvency in South Africa, Bertelsmann *et al*, at p 113

and the fact that it is reliant on the payment of its banker to pay the money to it before it can pay, seems to me to be an indication that it is unable to do so.

39. I am not dealing with the grounds of just and equitable in view of the fact that I am of the view that the grounds which I have dealt with above are the strongest grounds to order a winding-up.

Order

I make the following order:

[38] The application for postponement is dismissed with costs, such cost to is in the administration of the applicant.

[39] That the respondent be placed under provisional liquidation.

[40] That the rule *nisi* issued, calling upon the respondent and all interested parties to show cause. If any, to the above honourable court on the 27th day of February 2023, why a final order in the following terms should not be granted:

40.1 That the respondent be finally liquidated;
40.2 Directing that the costs of this application be costs in the liquidation.

[41] Service of this order be affected:

41.1 by the sheriff of this court on respondent at its registered office;
41.2 by the sheriff of this court on the employees of the respondent (of it be ascertained that respondent does have employees) at respondent's principal place of business, by affixing a copy thereof to any notice board to which the employees have access inside the premises or by affixing a copy to the front door of the premises from which the respondent conducts business;
41.3 by the sheriff of this court on every trade union that, as far as the applicants can ascertain, represents any of the respondent's employees;
41.4 by publication in each of the 'The Citizen' and 'Die Beeld' newspapers;

41.5 on the offices of the south african revenue services.

[42] That costs of this application to date, be in the administration of the respondent.

REINARD MICHAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 15 November 2022

Date of judgment: 18 November 2022

Appearance

On behalf of the Applicants	Adv R Raubenheimer Cell: 082 551 2004
Instructed by	Mostert & Bosman Attorneys
On behalf of the Respondents	Adv Jardine for application for postponement