IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 14432/2008

DATE: 3 DECEMBER 2008

In the matter between:

FADL HENDRICKS APPLICANT

And

CAPE KINGDOM (PTY) LTD RESPONDENT

JUDGMENT

ALLIE, J:

In relation to the postponement application, I have read the papers, both of the postponement application as well as of the main application. I have heard extensive submissions made by counsel in this matter. I have looked at the authorities, some of which are familiar to me and it can certainly be regarded as trite, particularly in relation to a postponement application of this nature and I have to have regard primarily to the authority of Myburgh Transport v Botha, t/a SA Truck Bodies, 1991(3) SA 310 (NMS) which in my view establishes the principles applicable to a Court dealing with an application for postponement of a hearing and to quote they are as follows,

"1. The trial Court has a discretion as to whether

an application for a postponement should be granted or refused."

It clearly – so it really applies to a Court dealing with an application as well.

"2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons."

And then the Court goes on to describe a whole host of other criteria and then finally deals with the following propositions, namely;

"5. A Court should be slow to refuse a postponement where the true reasons for a parties non preparedness has been fully explained where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case."

The Court in that matter goes on to say the following;

"6. An application for a postponement must be made timeously or as soon as his circumstances which might justify, such an application become known to the Applicant. Where however fundamental fairness and justice justifies a postponement, the Court

may in an appropriate case allow such an application for postponement, even if the application was not timeously made."

The Court then goes on to say the following,

"7. An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the Applicant is not legitimately entitled.

8. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the Applicant for postponement can fairly be compensated by an appropriate order for costs or any other ancillary mechanisms.

9. The Court should weigh the prejudice which will be caused to the Respondent in such an application if the postponement is granted against the prejudice which will be caused to the Applicant if it is not.

10. Where the Applicant for a postponement has not made his application timeously or is otherwise to

> blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement, but direct the Applicant in the suitable case to pay the wasted costs of the postponement occasion to such a Respondent on the scale of an attorney and client. Such an Applicant might even be directed to pay the costs of his adversary before he's allowed to proceed with his action or defence in the action as the case may be."

I went through all of these criteria primarily to say that yes indeed it is clear that where it is in the interests of justice and fairness and where the inconvenience caused by a postponement can be cured by a mere costs order or such other direction, a Court would be slow to refuse a postponement. However the criterion that concerns me or the applicability of the criterion that concerns me in the quoted passage primarily is the one of *bona fides* and for this I do not refer at all to the replying papers in the main application. I do believe it would have been the correct procedure for a *bona fide* Respondent such as the Respondent contends he is, to have brought an application to strike out new matter in the replying affidavit to which he would not have had an

opportunity to respond or which may be the vexatious or irrelevant. For a whole host of other reasons, this Respondent has chosen not to do so. This Respondent has clearly chosen to seize the opportunity that there may well be new matter in the replying affidavits, to seize that opportunity to seek a postponement. The Respondent in this matter had an opportunity to deal with all the allegations contained in the founding papers in great depth; both in his answering papers in the main application and substantially again in his application for the postponement, both in his founding papers and in his replying papers in the application for the postponement. He certainly had the opportunity to deal with issues which he claims he needs more opportunity to deal with in a further affidavit. He was quite capable of dealing with some of these issues in his application for a postponement and so the conduct of this Respondent in this particular matter begs the question of its *bona fides*. The course of action he chose to take in dealing with the alleged new matter is curious. In as much as, there was old matter which was supplemented, without dealing with the supplementation thereof, the Respondent chose not to use the opportunity to deal with the old matter once again in his answering papers.

I am of course concerned that on the Respondent's own version there appears to be allegations of the improper use of company funds and whether this is directly prejudicial to the

Applicant or not is not necessarily a factor. It is whether in fact it is prejudicial to the body of creditors as a whole which is disconcerting and whether of course it is prejudicial to other shareholders. So it is a concern that the Applicant on his own version admits at least some conduct of an improper nature. Although he in fact offers to make good on some payments, that does not in effect deal with the fact that there is improper conduct which he concedes. I would say that in circumstances such as this, the matter is of a relatively urgent nature and certainly by no means something that ought to have been set down on the urgent roll, but we do have degrees of urgency. I would say that it is of a sufficiently urgent nature to protect the interests of shareholders and to protect the interests of creditors that in fact the application that is the main application be proceeded with. In the circumstances I am REFUSING THE POSTPONEMENT and I am ordering that the RESPONDENT PAYS THE COSTS OCCASSIONED BY THE APPLICATION FOR POSTPONEMENT, INCLUDING THE COSTS OF TWO COUNSEL. I would now like to hear the Applicant commence argument in relation to any other issues on the main application that he would like to deal with.

ALLIE, J

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 14432/2008

DATE: 4 DECEMBER 2008

In the matter between:

FADL HENDRICKS APPLICANT

And

CAPE KINGDOM (PTY) LTD RESPONDENT

ORDER

ALLIE, J:

Having heard counsel in this matter and having obviously perused the papers and having looked at the authorities, I am in fact persuaded that the Applicant has made out a case on the basis of having shown that due to the conduct of Mr Stander in utilising company funds for personal use without authorisation, in fact, in promising to repay funds, which he then subsequently failed to do and in facilitating the removal or the voluntary resignation of both directors and staff, Mr Stander has in fact created a *de facto* situation where he is in sole control of a company which by the account of its own auditors has not followed proper procedures in terms of the Companies Act in regard to accounting. With regard to the

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accounting specifically, more so in relation to the movement of monies. In the circumstances, I am convinced in fact that the Applicant has made out a case for a provisional winding up order on the basis that it is just and equitable for a company that is being mismanaged. Purely on the founding papers of the Applicant read together with the answering papers of the Respondent, one can certainly conclude that in fact the company has been mismanaged, inasmuch as, both the provisions of the Companies Act and the provisions of the shareholders agreement have not been abided by and that in fact it is a situation where trustees or liquidators, in fact, need to step in to protect the interests not only of shareholders but also of creditors. In the circumstances, I am persuaded that a provisional winding up order should be GRANTED.

An order is made in terms of the Draft as varied.

ALLIE, J