REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2021/12760:

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
10/10/2022

DATE SIGNATURE

In the matter between:

PETRUS VAN DEN STEEN N.O. First Applicant

DAVID LAKE N.O. Second Applicant
(In their capacities as joint business rescue practitioners of Group Five Construction (Pty) Ltd (in business rescue))

and

KHEWIJA ENGINEERING AND CONSTRUCTION PROPRIETARY LIMITED Respondent

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This matter Includes an application for provisional alternatively final liquidation of the respondent ("Khewija"), a condonation application for late filing of an answering affidavit, Rule 30 and postponement application.

[2] Furthermore, central to this application is the question whether the respondent is abusing the court process and as such is preventing the machinery provided for the purpose of expediting the business of the court to run smoothly. When deciding on this aspect, I have to decide whether the respondent's failure to file its answering affidavit, in the liquidation application ("main application'), which entails a counterclaim and a request for postponement in the main application are an indication of abuse of the administration of justice.

[3] During the course of this judgment, I will deal with the various questions before me in turn under different headings. I am also of the view in deciding on the said issues, it is necessary to comprehensively refer to the background facts and litigation history in the matter.

Parties

[4] The first applicant, Petrus van den Steen, cited in his capacity as a duly appointed joint business rescue practitioner of Group Five Construction (Pty) Ltd (in business rescue) ("Group Five").

[5] The second applicant, David Lake, cited in his capacity as joint business rescue practitioner of Group Five.

[6] The first and second applicants are business rescue practitioners practicing as such at Metis Strategic Advisors Pty (Ltd).

[7] The respondent is Khewija Engineering and Construction Proprietary Limited (registration number 2009/021544/07), a company with limited liability, duly registered in accordance with the laws of the Republic of South Africa.

Nature of application

[8] This is an application to provisionally or alternatively, finally winding up of Khewija. Accordingly, this application is brought under section 344(f) as read with section 345(1)(a) and/or (c) of the Companies Act 61 of 1973 ("the 1973 Companies Act") as read with Item 9 of Schedule 5 of the 2008 Companies Act ("Companies Act").

Background of relevant facts and Litigation History

[9] On 1 June 2017, Group Five and Khewija concluded a written construction and engineering contract ("Contract").

[10] For the purposes of this application, the material express terms of the contract are *inter alia* the following:

1. Group Five would render construction and engineering services to Khewija in relation to the Sasol Alrode Expansion II Project ("the services");
2. Group Five would invoice Khewija on the assessment date for the services rendered; and,
3. Khewija would pay Group Five within 4 weeks of presentation of an invoice by Group Five.

[11] On 27 June 2019, Group Five presented an invoice to Khewija for R6 216 655.31 in respect of the services rendered.

[12] Khewija breached its obligations in terms of the contract in that it failed to make payment of the amount invoiced when it became due and payable on 31 July 2019.

[13] On 22 January 2020, Group Five's attorneys of record ("Werksmans") sent a letter of demand to Khewija in terms of section 345 of the 1973 Companies Act, in which

payment of Khewija's debt to Group Five was demanded within three weeks of demand.

[14] Notwithstanding the section 345 notice, Khewija failed to pay its indebtedness to the reasonable satisfaction of Group Five within three weeks of the section 345 notice.

[15] On 13 February 2020, Khewija sent a letter to Werksmans Attorneys, in which Khewija outlined a payment proposal in relation to the debt owed to Group Five. In the letter Khewija acknowledged that there was a debt due to Group Five. However, it stated that it had it "suffered adverse trading conditions over the last 12 months", which included cost overruns, and had negatively affected Khewija's ability to pay all its creditors". It proposed to make payment of the debt to Group Five as follows:

1. R1 million on 30 April 2020;
2. R1 million on 29 May 2020; and
3. The balance of R4 523 126.60 on 30 June 2020.

[16] Group Five accepted Khewija's payment proposal.

[17] On 20 April 2020, ten days before the first payment to Group Five was due, Khewija sent a letter to Werksmans in which it cited the negative effects of the nationwide lockdown and requested an extension to pay the full debt by 31 October 2020.

[18] As before, Group Five indulged Khewija by accepting its payment proposal.

[19] But on 31 July 2020, Khewija sent a further letter to Werksmans in which it again requested an extension to pay the full debt by 30 November 2020.

[20] Despite Group Five having agreed to a further extension, Khewija failed to make payment of the full debt by 30 November 2020, as agreed.

[21] Thereafter, on 1 December 2020, Khewija's attorneys of record ("Harris Billing") sent a letter to Werksmans in which it indicated that Khewija was "unable to effect payment" to Group Five as undertaken and advised that Khewija would pay the entire debt by 11 December 2020.

[22] On 2 December 2020, Werksmans confirmed that Group Five would grant Khewija an indulgence to payment the entire debt by 11 December 2020.

[23] But instead of paying its debt to Group Five as it agreed and undertook to do, on 11 December 2020, Harris Billings sent a letter to Werksmans indicating that Khewija would make pay the debt within the first quarter of 2021, and therefore, requesting an indulgence until then.

[24] On 19 January 2021, Werksmans responded to the letter and,

1. Noted all the deferrals for payment which Khewija requested;
2. Indicated that Khewija failed to make payment on every occasion where it was granted a deferral for payment;
3. Informed Harris Billings that Khewija's conducted demonstrated an inability to pay its debts;
4. Informed Harris Billings that Khewija was indebted to Group Five in the amount of R7 037 805.03 together with interest as at 19 January 2021;
5. Made an offer on behalf of Group Five to Khewija for Khewija to make payment of its indebtedness to Group Five as follows:

    5.1 Payment of the Debt (as at the date of the section 345 notice) in 3 equal monthly instalments — with the last instalment falling due on the last day of the first quarter of 2021 (being the date on which Khewija had indicated it would settle the debt);

    5.2 Payment of the amount of R7 037 037 825.03 (being the amount outstanding as at 19 January 2021) in 12 equal monthly instalments; and

    5.3 That the directors of Khewija execute suretyships in favour of Group Five for the due and punctual fulfilment of all payment obligations by Khewija.

[25] On 20 January 2021, in response to Group Five's offer, (in a letter from Harris Billings) Khewija indicated that it was willing to accept Group Five's offer for it to make payment of its indebtedness over a period of 12 months, but that its directors were not

prepared to execute suretyships in favour of Group Five. Khewija, therefore, did not accept Group Five's offer.

[26] On 22 January 2021, Werksmans sent a letter to Harris Billings in which it indicated that Group Five's offer constitutes a final offer to Khewija and that it remains open for acceptance until 26 January 2021. In reply, Harris Billings responded and requested a further indulgence for Khewija to make payment of its indebtedness to Group Five by 26 February 2021.

[27] In response to Harris Billings letter, on 29 January 2021, Werksmans indicated that,

1. Khewija breached its obligations in terms of the contract in that it failed to make payment of the amount invoiced when it became due and payable on 31 July 2019.

2. Khewija's conduct after the delivery of the section 345 demand further demonstrates that Khewija is in fact unable to pay its debts as contemplated in section 345(1)(c) of the 1973 Companies Act; and

3. Should Khewija fail to make payment of its indebtedness by 26 February 2021, Group Five would institute proceeding for the winding-up of Khewija.

[28] On 16 March 2021, Group Five launched this liquidation application.

[29] The said application was opposed and Khewija's answering affidavit was due on 15 April 2021, which it failed to file.

[30] Instead, on 21 April 2021, Harris Billings send a letter to Group Five in which it asserted;

1. Khewija had a counterclaim against Group Five for R 15 021 910("the counterclaim"),

2. The counterclaim was for costs of remedying a defective design, which was allegedly provided by Group Five,

3. The counterclaim was discovered in January 2020, but could only be quantified once the remedial works had been completed, which was said to have occurred in March 2021, and

4. The counterclaim should be referred to arbitration, failing which Khewija would launch an application to stay the liquidation application pending the adjudication of the counterclaim.

[31] On 27 May 2021, Werksmans enrolled the liquidation application on the unopposed motion roll. Before obtaining a date on the unopposed roll, without filing an answering affidavit, on 11 August 2021, Khewija launched an application to stay the liquidation application pending a referral of the counterclaim to arbitration ("the stay application").

[32] On 14 September 2021, Group Five filed its answering affidavit to stay the liquidation application, various points were raised as to why the stay application was defective, not genuine, a belated contrivance, and without merit.

[33] After filing an answering affidavit, Khewija did not take any steps to progress the stay application. In fact, after failing to file a replying affidavit, on 15 December 2021, Harris Billings withdrew as Khewija's attorney of record.

[34] Group Five proceeded and obtained a date on the unopposed motion court roll and the matter was setdown for hearing on 19 May 2022 before Crutchfield J.

[35] However, on 18 May 2022, a day before the hearing, Khewija appointed new attorneys of record, namely BBM, who with their notice of appointment, also delivered a notice in terms of Rule 30, which contended that Group Five had impermissibly set the matter down on the unopposed roll when the stay application was still pending.

[36] After hearing arguments by both counsel, Crutchfield J made the following order;

"1. The matter is hereby removed from the roll;
2. The respondent is ordered to file its answering affidavit in the application under case number 21/12760 ("Main Application") by no later than 22 June 2022;
3. That the respondent is ordered to file its replying affidavit, if any, in the application under

Case number 21/12760 (“Interlocutory Application”) by no later than 22 June 2022;

4. The applicant is ordered to file its replying affidavit, if any, in the Main Application by no later than 7 July 2022;
5. The filing by the respondent of its answering affidavit in the Main Application will not constitute, in any manner, a waiver or acquiescence in the stay application.
6. The wasted costs occasioned by the removal are awarded against the respondent on an attorney and client scale.”

[37] Even though, Crutchfield J gave Khewija one more opportunity, on 20 June 2022, two days before its affidavits were due, BBM wrote to Werksmans to request a further extension of three weeks, until 12 July 2022, to file the affidavits. Group Five rejected the said request and informed Khewija that if its affidavits as required by the court order, were not filed, the applications will be set down on the unopposed roll.

[38] On 24 June 2022 BBM sent Werksmans a letter in which it proposed a payment plan to settle the debt in 12 monthly instalments. Group Five indicated that it was prepared to explore settlement as long it was done in parallel with litigation and further, as proof of Khewija’s solvency, Group Five would accept payment of the capital debt.

[39] Khewija did not pay the debt, it did not bring a formal application for an extension of time frames as stated in the court order, and it did not file its replying affidavit in the stay application, nor did it file an answering affidavit in the liquidation application.

[40] On 24 August 2022 Group Five filed a supplementary affidavit in this application in which it apprised this court of the developments that had taken place since Crutchfield J delivered her order.

[41] Furthermore, Group Five obtained a date on the unopposed motion court roll for 6 September 2022, this application.

[42] On 1 September 2022, BBM withdrew as Khewija’s attorneys of record, and new attorneys, Purdon and Munsamy Attorneys (“P&M”) came on record.

[43] P&M immediately filed a Rule 30 notice in terms of which it took two points, firstly, that Group Five’s supplementary affidavit was irregular because it not sought and

obtained this court's leave to file such, and secondly, Group Five impermissibly referred to and attached so-called "without prejudice" correspondence in its supplementary affidavit, which was said to be prejudicial to Khewija.

[44] A day before the hearing of the liquidation application, 5 September 2022, Khewija filed its answering affidavit in the liquidation application, a condonation application for the failure to deliver its answering affidavit on 22 June 2022. Furthermore, on 6 September 2022 a postponement application was delivered in court on Group Five.

Unopposed Motion Court hearing 6 September 2022

[45] On the date of hearing a substantive postponement application was handed in by counsel appearing on behalf of Khewija. In essence the purpose to the postponement application was to postpone the hearing of the liquidation application from the unopposed roll, to a date determined by the Registrar, so that the respondent's condonation application for the late filing of the answering affidavit could be heard and determined. Furthermore, for the respondent's stay application on the main application to be enrolled and determined prior or together with the liquidation application.

[46] The applicants opposed the application for postponed and extensive oral argument was placed before me. After hearing counsel for both parties, I requested written submissions to be filed by no later than 20 September 2022.

[47] On 19 September 2022 the applicants delivered a further supplementary affidavit in support of a provisional liquidation order, this affidavit contained new facts that were not presented in its founding affidavit or during arguments on 6 September 2022.

[48] I am indebted to counsel for their inputs and extensive written submission in this matter.

Issues

[49] The following questions require determination:

1. Should the postponement requested by Khewija be granted on the basis that a condonation application for late filing of its answering affidavit in the main application should be heard in due course on the opposed motion court roll.

2. When deciding on refusing the postponement, what effect will that have on the stay application in the main application.
3. Is the postponement application by Khewija and abuse of the court process?
4. Does the Rule 30 Notices have merit?
5. What cost order is appropriate?

Application for Condonation- Late filing of Answering affidavit

[50] It is not disputed that Khewija did not file its answering affidavit in the main application in accordance with the Rules of Court. The answering affidavit was due on 15 April 2021. In terms of the court order granted by Crutchfield J on 19 May 2022, Khewija was placed on terms in that an answering affidavit in the main application should be filed by 22 June 2022, which it failed to comply with. On 6 September 2022, the day of the hearing, the said affidavit was filed accompanied with a condonation application for the late filling.

[51] Group Five objected to the late filing of the answering affidavit, as well as hearing of the condonation application, it summitted that Khewija is abusing court process and the late appearance of counsel, on 19 May and 6 September 2022, is an indication of its *modus operandi* in preventing Group Five in its attempts to vindicate its rights. It was further argued that this court has the power and the duty to prevent blatant abuse of court process.

[52] On the other hand, counsel for Khewija argued that when the postponement is granted, a court will have to determine the merits of the condonation application, which was not argued on 6 September 2022. The notice of motion for condonation is supported by a founding affidavit by Mr Themba Aubrey Mabuza, director of Khewija, wherein an explanation was tendered for the delay.

[53] Khewija further submitted if the postponement application is granted, all parties will have the opportunity to argue and be heard by the court in respect of the merits of the condonation application and consequently, the defences raised in the answering affidavit. Therefore, it requested the postponement in the main application be granted in order for the condonation application to be argued in due course.

[54] It is important to note that a party in civil litigation is not given unlimited time within which to determine whether or not to file an answering affidavit. Such would bring the administration of justice to a halt and justice delayed is justice denied.

[55] In Erasmus, Superior Court Practice, Vol 2, pp D1-552A, the following is said about postponements (footnotes omitted):

"The legal principles applicable to an application for the grant of a postponement by the court are as follows:

(a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.

(b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.

(c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i e the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's 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.

(d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.

(e) An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.

(g) The balance of convenience or inconvenience to both parties should be considered: 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."

[56] In considering this application I bear these principles in mind. I take into account that due to prolonged discussion regarding settlement of the claim and the failure of the respondent to adhere to various payment agreements, and the fact that, the main application was launched as far back as March 2021. The respondent failed to deliver its answering affidavit and as a result Group Five approached this court on unopposed basis, where after an order was granted whereby Khewija was put on terms to deliver and file its answering affidavit in the main application and its replying affidavit in the stay application. The order was not adhered to which led to the application before me. This could be sufficient grounds to refuse the postponement. As always, there are known disadvantages in postponing matters, one of which the interference of the other party's right to proceed with its application.

[57] When looking at the history of this matter, it is evident the Khewija disregarded not only the Rules of Court and practice, but also a court order granted on 19 May 2022. The conduct of Khewija in delivering substantive postponement and condonation applications at the 11th hour of a hearing enrolled on the unopposed motion court roll, is unreasonable and unsatisfactory, notwithstanding the disruption that such late delivery courses in these proceedings.

[58] Be that as it may, the condonation application was filed and the application is pending. The said application is not before me, and Group Five still has the opportunity to file an answering affidavit in the said application.

[59] It is trite that an application for postponement can be brought on the day of the hearing, but this should be discouraged as the opposing party is prejudiced. In the matter before me, Khewija did just that. A substantive application for postponement was brought which included an application for condonation.

[60] I am alive to the principle that a court should be slow to refuse a postponement when the true reason for a party's non-preparedness has been fully explained. Furthermore,

this application does not only involve a request for postponement, I also have to consider the fact that there are various pending applications in the matter.

Stay application

[61] On 11 August 2021 Khewija instituted an application to stay the main application. It is not disputed that the application is still pending and not enrolled for hearing. Furthermore, it is not disputed by the parties that Group Five filed a notice to oppose the said application and its answering affidavit was filed.

[62] The stay application is based on the following allegations:

1. During September/October 2018 Khewija contracted Group Five to design and construct a tank in the Secunda Tank Farm West;
2. Group Five employed a sub-contractor, Axis to design the tank;
3. During November 2018 to February 2019 Group Five through Axis submitted several designs of the tank to Khewija for approval, and Axis proceeded with construction of the tank after approval of the last design;
4. During March 2019 Group Five was placed under business rescue and therefore was unable to issue performance bond to Khewija and as a result Khewija terminated the contract;
5. During August 2019, five months after the contract was terminated, Khewija appointed Trotech to proceed with the construction of the tank;
6. Ten months after the termination of the contract Trotech queried Group Five's design for the roof of the tank;
7. Khewija alleged that due to the deficiency it incurred substantial cost in remedying the defect, and it seeks to recover the costs from Group Five in the counterclaim;
8. Khewija should be permitted to refer the counterclaim to arbitration proceedings;
9. The counterclaim exceeds the debt owed by Khewija to Group Five and therefore, if Khewija succeeds with the counterclaim the liquidation application by Group Five would fall away.

[63] Counsel for the applicants argued that the stay application is an abuse of process. The basis for the argument is, firstly that the stay application is defective for non-joinder, secondly, the counterapplication is time-barred, which means that it does not exist, thirdly the design drawings were approved by Khewija and months later it claims that

the design was defective, fourthly, Khewija did not seek leave to institute the stay application against Group Five, and lastly the stay application is patently not genuine, because after filing its answering affidavit in the stay application, Khewija did not take any further step to progress the stay application.

[64] Counsel for Khewija argued that the stay application is pending and not before me, and therefore the matter ought to be removed from the unopposed roll. It stated that the arguments raised by Group Five in that the stay application is without merit should be argued and canvasses at the hearing of the stay application.

[65] Khewija argued that the arguments of non-joinder raised by Group Five will be addressed at the hearing of the application. In addition, Group Five filed an answering affidavit in the stay application and during argument counsel on behalf of Group Five acknowledges that the stay application must first be dismissed or at least dealt with, before I can deal with the liquidation application.

[66] The stay application has not been enrolled for hearing and the parties have not delivered their heads of argument enabling the matter to be heard on the opposed roll. Therefore, I am of the view that the stay application must be determined first.

Main Application- Liquidation

[67] Counsel on behalf of Khewija argued that the application for liquidation is not a matter that can be adjudicated upon in the unopposed motion court, *inter alia* while an application to stay the application is pending and not set down for hearing. It submitted that to ignore the pending and live application to stay, would be procedurally incorrect and furthermore is tantamount to an adjudication on the merits of the stay application, which is not before the court. It therefore argued that the application for postponement should be granted.

[68] Khewija further argued that Group Five was entitled to enrol the stay application, after realising that Khewija did not file a replying affidavit, Group Five neglected to do this and now requests this court to proceed with determining an application not before it. It was further argued, that notwithstanding Group Five's entitlement to set the stay application down in terms of the Practice Manual of the Court, the applicant was also at

liberty to institute an application in terms of Rule 30A, for failure to follow a direction of court, and to seek the dismissal of the stay application. This was not done.

[69] Khewija argued that this court is confined to consider the application for condonation, postponement, and the Rule 30A. It contended that if the court makes a finding on the stay application it will be a complete bar to the liquidation application proceeding. On the other hand, if this court entertains the liquidation application, and makes any order, provisional or otherwise, it would be in effect of a premature decision on the stay application, which is not before the court.

[70] In turn, Group Five argued that the court is entitled to, and duty bound to make a determination on the merits of the stay application and to dismiss it. Counsel further stated that that the court is also entitled to hear the main application and to grant a final winding up order or at least a provisional winding up order, despite the respondent's opposition.

[71] In *National Police Service Union and Others v Minister of Safety and Security and Others*[1] Mokoro J said;

> "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. All these factors will be weighed by the Court to determine whether it is in the interests of justice to grant the postponement.

[1] 2000 (4) SA 1110 (CC) at paragraph [4] and [7]. Also see *Lekolwane and Another v Minister of Justice and Constitutional Development* [2006] ZACC 19 at paragraph [17].

[7] It is necessary to emphasise that a postponement will not be granted simply because the parties agree to it. Ordinarily therefore, if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives for the opposing party *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."

[72] At the onset of the hearing counsel for Khewija raised a *point in limine* in that Group Five did not complied with the provisions of section 346(4A)(b) of the 1973 Companies Act[2] which is applicable by virtue of the provisions of item 9 of schedule 5 of the Companies Act, since no affidavit had been filed by the person who furnished the application on the parties referred to in the section, setting out the manner in which section 346(4A)(a) had been complied with.

[73] Khewija takes issue with the requirements in regard to proof of service of the liquidation application in respect of employees and trade unions. The confirmatory affidavit by Siyabonga Gugulethu Galela, a candidate attorney employed by Werksmans purports to deal with the compliance with the requirements of the section.

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[2] Section 346(4A) provides that:

(4A)(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –

(i) registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and

(ii) to the employees themselves –
(aa) by affixing a copy of the application any noticeboard which the applicant and the employees access inside the premises of the company; or
(bb) there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted in a business at the time of the application;

(iii) the South African revenue service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy if the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) the applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with."

[74] During the postponement hearing Group Five uploaded a service affidavit of Silvester Amos Nkuna wherein he stated that; "I confirm that the application for the liquidation of Khewija Engineering and Construction Proprietary Limited under case number 12760l2021 was served by me as set out in the affidavit that was deposed to by Siyabonga Gugulethu Galela per the return of service attached as annexure SG thereto. Therefore the argument of non-compliance with section 346(4A)(a) has no legal standing.

[75] I was referred to a plethora of authority dealing with the requirements relevant to service of the liquidation application.[3]

[76] Even though, this issue was raised, I am of the view arguments in this regard falls squarely within the determination of the main application. Therefore, I make no determination on the compliance of section 346(4A)(a).

Abuse of the Court Process

[77] With regard to the arguments raised by Group Five in that Khewija is abusing court process, this court carefully notes the submissions made.

[78] Our legal system is a powerful tool to address wrongs. The downside of this is that legal process can be abused, and the expense of delayed litigation can cause significant harm to a litigant in instances of abuse of the process. Abuse of process can be defined as the unjustified and unreasonable use of legal proceedings or process.

[79] In *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*[4], Southwood AJA said;

> "Frivolous or vexatious litigation has been held to be an abuse of process (per Innes CJ in *Western Assurance v Caldwell's Trustee* supra at 271 and in *Corderoy v Union Government (Minister of Finance)* supra at 517) and it has been said that 'an attempt made to use for ulterior purposes machinery devised for the better administration of justice' would constitute an abuse of the process

[3] *Pilot Freight v Von Landsberg Trading 2015 (2) SA 550 (GJ)* at paragraph [29], *Sphandile Trading Enterprise (Pty) Ltd and Another v Hwibidu Security Services CC and Others* 2014 (3) SA 231 (GJ) at paragraph [18], *EB Stream Company (Pty) Ltd v Eskom Holdings SOC Ltd* [2014] All SA 294 (SCA) at paragraph [9] and [12]

[4] [2004] 3 All SA 20 (SCA) at paragraph [50].

(*Hudson v Hudson and another* supra at 268). In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of *mala fides*. In order to prove *mala fides* a further inference that an improper result was intended is required. Such an application of a court procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition, of *mala fides*. Purpose or motive, even a mischievous or malicious motive, is not in general a criteria for unlawfulness or invalidity. An improper motive may however be a factor where the abuse of court process is in issue. (*Brummer v Gorfil Brothers Investments (Pty) Ltd en andere* supra at 412I-J; 414I-J and 416B)."

[80] The failure of Khewija to adhere to time frames set out in the Rules of Court as well that those contained in the court order granted of 19 May 2022 paralyzed Group Five in obtaining a provisional or final liquidation order. Group Five is currently in business rescue and the impact of time delays in the application may have detrimental effects on Group Five's creditors.

[81] However, before me is a substantial application for postponement, which I have to consider in the light of various other pending applications in the main application. It is also of importance to note that Group Five filed a supplementary affidavit in this matter on 19 September 2022. This was done after oral arguments were delivered on 6 September 2022.

[82] In paragraph 24 of the supplementary affidavit, Group Five concedes that if the Khewija wants an opportunity to respond to the contents of the supplementary affidavit, it must be afforded an opportunity to do so. At paragraph 24, Group Five states: -

"The facts in this affidavit are vital to the determination of this matter, and that is why they are placed before this court. Respectfully, there can be no prejudice to Khewija if this court determines this matter on all the relevant facts. Indeed, if Khewija has an explanation for its conduct beyond what it advanced before the Labour Court, then Khewija may respond to these allegations in an affidavit of its own."

[83] It goes without saying, the filing of the supplementary affidavit at such a late stage is a concern to this court. The contents of the said affidavit boil down to scathing allegations against Khewija regarding to events that transpired in the Labour Court on 26 July 2022, which details I find unnecessary to discuss in this judgment. However, Khewija cannot be denied the opportunity to answer to the allegations, which is a further factor to consider in the application for postponement.

[84] As a result of filing a supplementary affidavit on 19 September 2022, Khewija filed a Notice in terms of Rule 30A/Rule 30, wherein it contends that Group Five's further affidavit constitutes an irregular step in terms of the Rules. Group Five stands to respond to the averments made in this regard.

Conclusion

[85] It is my view, that despite the water being muddied in this matter before me, the issue that I have to decide upon, is whether or not to grant a postponement to Khewija in the main application. That is the only application before me. The stay, condonation and Rule 30 applications are not before me and therefore I am not seized with those applications. It follows that the postponement must be granted.

Costs

[86] On 27 June 2019 Group Five presented an invoice to Khewija for the amount due for services rendered in terms of the agreement. Payment was due on 31 July 2019, which was not done. Group Five launched its liquidation application two years after the agreement was cancelled in March 2021. In the period July 2019 to March 2021 Khewija indicated that it was committed in settling the outstanding amount, no less than 7 undertakings were made in this regard. Khewija did not honour any of its undertakings and the debt is still outstanding.

[87] The postponement application was made in September 2022, thus more than 3 years after Group Five issued its demand for payment, there can be no doubt that Group Five is prejudiced by the actions and delays caused by Khewija.

[88] A party seeking a postponement essentially requests an indulgence. Khewija has caused the postponement by its failure to adhere to court rules and a previous court order, and so it must pay costs wasted as a result of the postponement. Khewija's conduct in its persistent noncompliance with court rules and the order of Crutchfield J is reprehensible in the circumstances. Therefore, a cost order on the attorney and client scale is justified in these circumstances.

Order

[89] In the premises of the above I make the following order;

1. The application is postponed *sine die,*
2. The respondent is to file and serve its heads of argument in the interlocutor stay application under case number 2021/12760 on or before Monday, 17 October 2022 no later than 16h00.
3. The applicant is to file and serve its heads of argument in the interlocutor stay application under case number 2021/12760 on or before Monday, 24 October 2022 no later than 16h00.
4. In event that either party fails to deliver their respective heads of argument within the period stipulated in (3) and (4), the other party may present its order to the Registrar of the Court for an allocation of the stay application under case number 2021/12760 on the opposed motion court roll after delivering its own heads of argument.
5. The normal periods for the filing of an answering affidavit and replying affidavits in the counter and condonation application shall take place in accordance with the Uniform Court Rules.
6. The stay application and condonation application must be place on the court roll for hearing simultaneously.
7. The respondent is directed to pay the wasted as a result of the postponement on the attorney and client scale.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 10 October 2022.

DATE OF HEARING: **6 September 2022**

DATE JUDGMENT DELIVERED: **10 October 2022**

APPEARANCES:

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