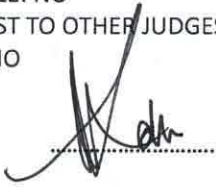


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2020/56445

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>18/5/2023</u>	
DATE	MOKOSE SNI

In the matter between:

RICHARD KEAY POLLOCK N.O.	1 st Applicant
NURJEHAN ABDOOL GAFAAR OMAR N.O.	2 nd Applicant
OSCAR JABULANI SITHOLE N.O.	3 rd Applicant
IGNATIUS CLEMENT MIKATEKO SHIRELELE	4 th Applicant
MITCHELE SCHUTTE N.O.	5 th Applicant
(in their capacities as the Joint Liquidators of the Sixth Applicant)	
VELE INVESTMENTS (PTY) LTD (in liquidation)	6 th Applicant

and

THIFHELIBILU ERNEST NESANE	1 st Respondent
RUDZANI MORRIS NNDWAMMBI	2 nd Respondent
PARALLEL PROPERTY HOLDINGS (PTY) LTD	3 rd Respondent
TSHIANNE ONICA NESANE	4 th Respondent
AZIMBO LODGE CLOSE CORPORATION	5 th Respondent
PAUL MAGULA	6 th Respondent

REASONS

MOKOSE J

[1] The matter came before me on the unopposed motion roll of 18 January 2021. The parties have requested written reasons for the order which was granted in favour of the applicants wherein the following order was granted:

- (i) the disposition in the sum of R5 600 000,00 from Vele Investments (in liquidation) to any one or more of the first to fifth respondents was set aside in terms of Section 31 of the Insolvency Act 24 of 1936 (“the Insolvency Act”);
- (ii) the first to fifth respondents shall, jointly and severally, the one paying the others to be absolved, pay the sum of R5 600 000,00 to the applicants;
- (iii) the first to the fifth respondents shall, jointly and severally, the one paying the others to be absolved, pay a further amount of R5 600 000,00 by way of a penalty in terms of Section 31(2) of the Insolvency Act to the applicants;
- (iv) the first to fifth respondent shall pay interest at a rate of 7% per annum on the amounts referred to in (ii) and (iii) above calculated from date of judgment to date of final payment;
- (v) the disposition of the amount of R6 100 000,00 from Vele Investments (in liquidation) to any one or more of the Sixth to Eighth respondents is set aside in terms of Section 31 of the Insolvency Act;
- (vi) the sixth to eighth respondents shall, jointly and severally, the one paying the other to be absolved, pay the sim of R6 100 000,00 to the applicants;
- (vii) the sixth to eighth respondents shall, jointly and severally, the one paying he others to be absolved, pay a further amount of R6 100 000,00 by way of a penalty in terms of Section 31(2) of the Insolvency Act to the applicants;
- (viii) the sixth to eighth respondent shall pay interest at a rate of 7% per annum on the amounts referred to in (vi) and (vii) above calculated from the date of judgment to date of final payment;

(ix) the first to the eighth respondents shall pay the costs of the application including the costs of Senior and Junior counsel on an attorney and own client scale, the one paying the others to be absolved.

[2] Furthermore, an order in respect of the application for postponement was dismissed with costs of two counsel was granted.

[3] Counsel for the first to fifth respondents appeared in court on the 18th January 2021 and alerted the court to an application for postponement of the matter which I was subsequently informed had been filed the night before the hearing, that being 17th January 2021. The application was brought by the first to fifth respondents where an order was sought, *inter alia*, to remove the motion court application which was to be heard on 18 January 2021 and to postpone it to the opposed motion court roll. Because of the lateness of the postponement application, the applicants in the main application had not filed any opposing papers but gave submissions in opposition to the postponement of the matter.

[4] The legal principles for an application for a postponement are the same in respect of both trials and motion proceedings. The court has the discretion to grant or refuse such an application even if costs are tendered and where it is by agreement that the matter be postponed. Such discretion must be exercised by the court in a judicial manner. It cannot be exercised in a capricious manner or upon a wrong principle, but for substantial reasons.¹ The applicant in an application for a postponement asks the court for an indulgence. In so doing, it must show good reason and must furnish a full and satisfactory explanation of the circumstances which give rise to the application. Such an application must also be made timeously - that is as soon as the circumstances which might justify such an application for postponement become known to the applicant.

[5] An application for a postponement must be *bona fide* and not be used as a tactical manoeuvre for the purpose of obtaining an advantage over the other party which the applicant would not be legitimately entitled to.² The court also needs to consider the prejudice to the parties which could be

¹ National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at 14A-C

² Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmS) at 315E

caused by a postponement. The court is obliged to ascertain whether the prejudice to be caused by a postponement can be fairly compensated by an appropriate costs order or other ancillary mechanism.³ The balance of convenience or inconvenience to both parties must also be considered and weighed in consideration of the application.

[6] The court in the matter of *Lekolwane v Minister of Justice and Constitutional Development*⁴ held that in granting a postponement, the broader public interest, and the prospects of success on the merits need to be considered.

[7] The applicants in the application for a postponement (the first to fifth respondents in the main application) contend in their founding affidavit that until 14 January 2021 there were two identical applications brought by the respondents predicated on the same facts and grounds and that on realising that the applications were identical, contacted Werksmans Attorneys to clarify the position. An intention to oppose the application was filed in respect of the one application which the deponent believed will cause Werksmans Attorneys to remove the application from the roll of the 18th January. They were surprised when this did not happen which necessitated the application for the postponement of the matter. The deponent further avers that he could not have brought this application any earlier as he had been awaiting a withdrawal of one of the two applications. Subsequently and on 14th January 2021 the application under case number 12637/2020 was withdrawn.

[8] Counsel for the applicants in the main matter conceded that two applications which were similar in nature, were issued against the respondents. However, since the beginning of December 2020 there had been no contact between the parties. The application had been served on all the respondents who filed a notice of intention to oppose the matter. None of the respondents delivered an answering affidavit in opposition to the main application. The affidavits were due on 8th and 12th January 2021 respectively and the matter was accordingly set down on the unopposed motion roll.

³ *Myburgh Transport v Botha t/a SA truck Bodies* (supra) at 315F


⁴ 2007 (3) BCLR 280 (CC) at para [17]

[9] Counsel for the applicants in the main matter were of the view that the application for the postponement was lacking in that all the criteria for an application for postponement was not dealt with in the application. For example, the respondents failed to plead *lis pendens*. Furthermore, no affidavit had been signed by any of the respondents in support of the application – it was signed by the attorney of record.

[10] I note that the respondents opted to make an application for the postponement of the matter instead of filing a replying affidavit in the matter. The time used to draft such an application could have been used draft and file an answering affidavit to the main application. Further, the respondents do not inform the court of when they contacted Werksman Attorneys to ascertain what had happened as there were two similar applications which had been served on them. This does not deal with the requirement of furnishing a full and satisfactory account of the need for the postponement. The respondents also dealt with some of the requirements for a postponement but chose to ignore some of the important ones. Furthermore, the respondents failed to deal with the prospects of success and the merits in the main application, both very important requirements for the granting of a postponement. This results in a fatal flaw in the application.

[11] As a result, the application for postponement of the matter was dismissed with costs including the costs of two counsel.

[12] The court then proceeded and dealt with the main application being the application in terms of Section 31 of the Insolvency Act. I was of the view that the applicants had complied with all the requirements. The order as enunciated in paragraph [1] above was then granted.



MOKOSE J

18 May 2023