THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 326/2021

In the matter between:

IMPERIAL LOGISTICS ADVANCE (PTY) LTD **Appellant**

and

REMNANT WEALTH HOLDINGS (PTY) LTD **Respondent**

Neutral Citation: *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd (326/2021)* [2022] ZASCA 143 (24 October 2022)

Coram: ZONDI, PLASKET and MABINDLA-BOQWANA JJA and DAFFUE and SIWENDU AJJA

Heard: 25 August 2022

Delivered: 24 October 2022

Summary: Procedure – application for postponement – unavailability of current legal representative – no satisfactory explanation furnished for postponement – company law – application for a final order of liquidation – debt admitted by the respondent – indebtedness not disputed on *bona fide* and reasonable grounds – existence of a counterclaim not established – provisional liquidation order granted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance):

1 The application for postponement is dismissed with costs.

2 The appeal is upheld with costs, including costs of two counsel.

3 The order of the Gauteng Division of the High Court, Pretoria, is set aside and is replaced with the following order:

'1 The respondent is placed under provisional order of 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 Newton, 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, at the 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.'

JUDGMENT

Zondi JA (Plasket and Mabindla-Boqwana JJA and Daffue and Siwendu AJJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (the high court), dismissing Imperial Logistics Advance (Pty) Ltd's (the appellant) application for the final liquidation of Remnant Wealth Holdings (Pty) Ltd (the respondent) for want of urgency. The appeal is with leave of the high court.

[2] The appeal was set down for hearing in this Court on 25 August 2022. On 1 August 2022, the respondent's attorneys addressed a letter to the appellant's attorneys requesting that they consent to the removal of the matter from the roll and tendered costs associated with the removal. The reasons given for this were that the respondent's counsel was not available on 25 August 2022 to argue the matter and that obtaining alternative counsel was not possible as the respondent preferred the current counsel to proceed with the matter since he was fully acquainted with the facts. The appellant's attorneys refused the request for the removal.

[3] Thereafter the respondent's attorneys wrote a letter to the Registrar of this Court requesting the postponement of the matter. On 15 August 2022, the Registrar informed the parties that if they were unable to agree to a postponement before 25 August 2022, the matter would proceed as scheduled and that any request for a postponement would have to be dealt with on the date of the hearing.

[4] This prompted the respondent to bring an urgent application for a postponement on 23 August 2022, in which the appellant was called upon to file an answering affidavit by 24 August 2022. As expected, the appellant took

exception to the time period set for filing the answering affidavit. It instructed its attorneys of record to oppose the application on the basis that it was *mala fide*, designedly late and failed to make out a case for the postponement.

[5] On the date of the hearing, 25 August 2022, counsel for the respondent, informed us that he was new in the matter, his instruction was only to argue the application for a postponement of the matter, and he had no mandate to argue the appeal. After hearing arguments from the parties' legal representatives, we dismissed the application and excused the respondent's counsel as requested by him. The appeal proceeded in the absence of the respondent or its legal representative. Having heard the submissions made by the appellant's counsel, we upheld the appeal, set aside the order of the high court, and replaced it with an order placing the respondent under a provisional order of liquidation. We indicated that the reasons for both orders would be furnished in due course. These are the reasons.

Application for postponement

[6] The court has a discretion as to whether an application for a postponement should be granted or refused. It may refuse a postponement even when wasted costs are tendered. An applicant in an application for a postponement must furnish a full and satisfactory explanation of the circumstances that gave rise to the application.[1] The Constitutional Court in *Lekolwane and Another v Minister of Justice* held:[2]

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A 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 ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes 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

[1] *Myburgh Transport v Botha t/a S A Truck Bodies* [1991] 4 All SA 574 (NmS); 1991 (3) SA 310 (Nms) at 576-578.
[2] *Lekolwane and Another v Minister of Justice* [2006] ZACC 19; 2007(3) BCLR 280 (CC) para 17. (Footnotes Omitted.)

postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application.'

[7] Turning to the facts of this case, the reasons advanced by the respondent for the postponement are that the respondent was not aware of the set down date, as its correspondent attorneys in Bloemfontein had emailed a notice of set down to Mr Madhi, who at the relevant time was no longer with the firm. Mr Ntaka, who took over the matter after the departure of Mr Madhi, did not have access to Mr Madhi's email account. Mr Ntaka fortuitously became aware of the set down date on 26 July 2022 when the firm's secretary, who had access to the central email account for the firm, brought him the appellant's replacement heads which the correspondent attorneys had transmitted to Mr Madhi's email account. Mr Ntaka notified the respondent's junior counsel of the date of the set down of the appeal. Counsel informed Mr Ntaka that he and the senior counsel were not available on 25 August 2022 to argue the appeal.

[8] The respondent's attorneys of record further alleged that seeing that the appellant had by then replaced the heads of argument that it had initially served and filed, it became apparent to the respondent that it would be prejudicial to it to appoint new counsel. The new counsel would have to read the voluminous record to prepare for the appeal. Moreover, to secure the services of counsel, especially senior counsel, the respondent would have had to raise a substantial amount of fees. According to the respondent, the arrangement it had with the current counsel was that counsel would only invoice the respondent after arguing the appeal, which would have given the respondent sufficient time to raise funds.

[9] The appellant opposed the application. It argued that unavailability of counsel is not an excuse as this Court's and the Constitutional Court's matters take precedence over matters in other courts.

[10] The explanation given by the respondent for postponement is not satisfactory. It is not explained why the secretary of the respondent's firm did not access the email account of Mr Madhi before 25 July 2022. In any event, unavailability of counsel is not an excuse. When the respondent's attorneys of record became aware that the preferred counsel would not be available, they had almost a month to find an alternative counsel. The application was made only two days before the hearing of the appeal putting the appellant under limited time constraints in which to file an answering affidavit. In addition, the record was not 'voluminous' as suggested by the respondent and neither were the issues of fact and law complex. The application for a postponement was accordingly dismissed with costs.

The merits of the appeal

[11] As regards the merits, the facts are straightforward. The respondent is indebted to one of the appellant's trading divisions, KWS Logistics (KWS), in an amount of more than R80 802 540.29 plus interest. KWS rendered transport services to the respondent as a subcontractor. It rendered these services, on behalf of the respondent, to the respondent's sole client, South 32 SA Ltd (South 32). The respondent received an aggregate amount of more than R304 405 111.03 from South 32 for the services rendered by KWS.

[12] Despite the respondent's receipt of such payments from South 32 and the respondent executing an acknowledgement of debt (AOD) in favour of KWS, it failed to pay the substantial amounts owed by it to KWS. The respondent's reasons for its failure to make such payment to KWS are inexplicable. So too, is its refusal to account for the revenue it received from South 32.

[13] On 27 July 2020, the appellant brought an application for the liquidation of the respondent on an urgent basis, on the grounds that the appellant is a substantial unsatisfied creditor of the respondent as contemplated by s 346(1)*(b)* of the Companies Act, 1973 (the Act); the respondent is commercially and factually insolvent; the respondent is unable to pay its debts

as envisaged in s 344*(f),* as read with s 345(1)*(c)* of the Act; and it is also just and equitable that the respondent be wound-up as provided for in terms of s 344*(h)* of the Act.

[14] This liquidation application was preceded by an application brought on an *ex parte* basis, in which the appellant sought the freezing of the respondent's bank accounts, getting access to its bank statements and their financial interest, and interdicting and restraining the respondent and its director, Mr Mulinda Neluheni (Neluheni), the deponent to the answering affidavit, from disposing of, encumbering or dealing with their property and vehicles pending the outcome of the proceedings that were to be brought (anti-dissipation application). The anti-dissipation order was granted on 30 June 2020 with a return date of 25 August 2020.

[15] The liquidation and anti-dissipation applications were later consolidated, and heard by Hughes J. On 1 December 2020, the learned judge discharged the rule *nisi* relating to the anti-dissipation application and dismissed the application for the liquidation of the respondent for want of urgency. The appellant's application for leave to appeal against the discharge of the rule *nisi* was dismissed. Nothing further needs to be said about the anti-dissipation application. The high court granted the appellant leave to appeal against an order dismissing the liquidation application. It is this appeal that concerns this Court. As I have already stated, the appeal is with leave of that court.

[16] The issues are, firstly, whether the high court was correct in determining that the winding-up application was not urgent and dismissing it on that ground, and secondly, whether a case for the winding-up of the respondent had been made out.

[17] The issues must be considered against the following factual background. During 2018, the respondent submitted a bid for the provision of logistical services to South 32, for the transportation of manganese products from South 32's operations in Hotazel and Meyerton to, among others, the

Durban, Saldana Bay, and Richard's Bay ports or the South 32 Alloys Meyerton Branch. The transportation of the manganese products was to be done with 34-ton capacity tipper trucks. The respondent was the successful bidder and entered into a contract with South 32 to render the logistical services for South 32 on about 13 December 2018. The respondent did not have sufficient trucks to transport South 32's manganese products. The appellant offered to make its trucks available for use by the respondent on a sub-contract basis.

[18] Initially, KWS rendered the transport services in terms of the oral agreement, which covered the initial period of the respondent's 'onboarding' with South 32. On 7 February 2020, KWS and the respondent concluded a formal three-year transport services agreement in terms of which KWS would render logistics services to the respondent as an independent contractor to allow it to perform and meet its obligations under the agreement with South 32.

[19] KWS complied with its contractual obligations by providing services to the respondent and invoicing it for services rendered. KWS alleged that the respondent is indebted to it in the sum of R80 802 540.29 plus interest for the services it rendered in terms of the transport services agreement. On or about January 2020, the respondent admitted that it was indebted to KWS in the sum of R68 011 880.16, in respect of which the respondent signed an AOD.

[20] On 24 April 2020, the appellant, through its attorneys, addressed a letter of demand to the respondent demanding payment of the amount owing in terms of the AOD and transport services agreement. The amount outstanding under the AOD was R42 309 259.07 plus R34 893 142.80 for unpaid invoices for January 2020 to March 2020.

[21] On 4 May 2020, the parties concluded a written addendum to the AOD, the purpose of which was to set out the payment plan for the amount of R42 309 259.07.

[22] In opposing the liquidation application, the respondent sought to dispute its indebtedness to the appellant. It contended that the application was not brought *bona fide*. It argued that the purpose of the application was to get South 32 to cancel the contract so that the appellant could reclaim it. The respondent alleged that the appellant failed to disclose a verbal agreement concluded in April 2019, which preceded the written transport services agreement.

[23] The respondent alleged that in terms of a verbal agreement, the appellant would be a principal sub-contractor on the contract; the respondent would pay the appellant after 14 days of the submission of an invoice, and the respondent would be entitled to five per cent (5%) of the invoice submitted to South 32 in terms of the contract between it and South 32. The appellant would get 95 per cent (95%) of the invoice.

[24] The respondent alleged that it would invoice South 32 every Monday for the previous week's work. South 32 would, in turn, make payment after 7 to 10 days of the invoice submission. It later came to its attention that the invoices issued by the appellant would sometimes be higher than what the respondent had invoiced South 32.

[25] The respondent conceded that some of the appellant's invoices were paid late. But it contended that the appellant was partly to blame for the delay because there were discrepancies in the invoices submitted by the appellant. It further stated that the tonnage did not tally up and therefore the invoices submitted by the appellant needed to be reconciled. Mr Neluheni alleged that the appellant refused to meet with him. Additionally, the respondent's business account had a daily limit of R4.99 million, and anything above that amount would be paid the next day.

[26] As regards the respondent's liability to the appellant, Mr Neluheni claimed that the AOD he signed on 20 January 2020 for the arrear amounts for November 2019, December 2019, and January 2020 and the addendum

he signed on 17 March 2020 are invalid in that he signed them under duress (under threat of withdrawing the appellant's trucks).

[27] Mr Neluheni admitted that he informed the appellant's representative that he had been involved in an RDP project in association with his brother in which he had invested R3 million. He had hoped that he would use whatever return on this investment to settle his indebtedness to the appellant. He later discovered that the project was a scam, and lost his entire investment.

[28] The respondent denied that it was commercially and factually insolvent. It alleged that in addition to the claim of R52 375 595.17 against South 32 and a claim of R11 million against the appellant, it has assets to the value of R41 137 696.69, which, when taken together, far exceeded the amount of R80,8 million claimed by the appellant.

[29] As alluded to above, the high court dismissed the winding-up application for lack of urgency. It held:

'In light of the aforesaid has this winding up application been legitimately launched as an urgent winding up application? In my view, it has not. In the result the application for winding up the respondent, alternatively provisional winding up of the respondent is dismissed for want of urgency with costs.'

[30] The high court erred. Winding-up applications are, in general by their nature, urgent.[3] The urgency, the appellant alleged, lay in the fact that the respondent's director had made false statements to it regarding the source of funds which he represented would permit payment to be made by the respondent of the amounts owed to the appellant. Further, the respondent had been receiving payment from South 32 but was not paying the appellant.

[31] Even if the high court was correct to find that the application was not urgent, it should have struck the application off the urgent roll, not dismissed

[3] *Van Greunen v Sigma Switchboard Manufacturing CC* [2003] ZAECHC 12 para 8-10.

it. As Cameron JA in *Commissioner for SARS v Hawker Services (Pty) Ltd* explained:[4]

'Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)*(a)*). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)*(a).* The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance.'

[32] The dismissal of the application on the basis that it lacked urgency was therefore, not competent. The matter was urgent and should have been treated as such by the high court.

[33] The next question is whether the appellant had made out a case for the liquidation of the respondent. It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds. The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt.[5]

[34] Where, however, the respondent's indebtedness has *prima facie* been established, the onus is on it to show that this indebtedness is indeed disputed on *bona fide* and reasonable grounds.[6] In addition to its statutory discretion, the court has an inherent jurisdiction to prevent abuse of its process and, therefore, even where a good ground for winding-up is established, the court will not grant the order where the sole or predominant

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[4] *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* [2006] ZASCA 51; 2006 (4) SA 292 (SCA); [2006] 2 All SA 565 (SCA) para 9.
[5] *Badenhorst v Northern Construction Enterprise (Pty) Ltd* [1956] (2) SA 346 (T) para 347-348.
[6] *Kalil v Decotex (Pty) Ltd and Another* 1988(1) SA 943 (A) at 980D.

motive or purpose of the applicant is something other than the *bona fide* bringing of the company's liquidation for its own sake.

[35] In my view, the appellant has established the respondent's indebtedness. I say this because it is common cause, alternatively, it cannot be seriously disputed that: KWS rendered transport services to the respondent (as a subcontractor) for its transport services obligations to South 32, and KWS issued valid tax invoices to the respondent for the services rendered. Initially, KWS rendered the transport services in terms of the oral agreement, which covered the initial period of the respondent's 'onboarding' with South 32.

[36] The terms of this antecedent oral agreement are, however, irrelevant within the broader context of, *inter alia*, the respondent's subsequent furnishing of an AOD, the conclusion of a written agreement, and a subsequent addendum to the AOD.

[37] The question which arises is whether the respondent has established that it has reasonable grounds for disputing the existence of the appellant's claims. This calls for scrutiny of the allegations forming the basis of the respondent's defences. Firstly, there is no substance to the respondent's claims that the winding-up application was brought in order to get South 32 to cancel the contract with the respondent, so that the appellant could reclaim it. It is apparent from the evidence that the appellant's claims against the respondent are based on the AOD and unpaid invoices for the transport services rendered by the appellant on behalf of the respondent. The AOD, the transport services agreement, and the addendum to the AOD were not signed under duress as claimed by Mr Neluheni, an accomplished and experienced businessman. The amended AOD was only signed and returned to the appellant 10 days after the meeting in which the parties discussed the terms, indicating that Mr Neluheni had sufficient time to reflect.

[38] Secondly, as to the alleged counterclaim which is sought to be asserted by the respondent against the appellant, its formulation is not clear

because, after the suspension of the contract between South 32 and the respondent, the appellant was free to provide transport services to South 32 as the respondent's contract with South 32 contained no exclusivity clause.

[39] Thirdly, as regards its solvency, the respondent alleged that South 32 owes it a substantial amount of money being a balance on the transportation of 72 978.02 tons of manganese that the appellant and its subcontractors made on the respondent's behalf. As such, the respondent asserted that it has a claim in respect of this tonnage differential against South 32. But the respondent has, however, not provided any sustainable and admissible evidence of how this amount will be calculated.

[40] *Prima facie*, the respondent's defences do not have prospects of success, and the appellant would suffer more prejudice if postponement were to be granted than if it was refused. The respondent's indebtedness to the appellant is substantial, and the appellant, as an unpaid creditor, has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt.

[41] In the result, we made the following order:

1 The application for postponement is dismissed with costs.

2 The appeal is upheld with costs, including costs of two counsel.

3 The order of the Gauteng Division of the High Court, Pretoria, is set aside and is replaced with the following order:

'1 The respondent is placed under provisional order of 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 Newton, 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, at the 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.'

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DH Zondi
Judge of Appeal

Appearances

For appellant:	M R Hellens SC (with G Amm and G Mamabolo)
Instructed by:	Webber Wentzel Attorneys, Johannesburg
	Symington & De Kok Attorneys, Bloemfontein
For respondent:	S E Motloung
Instructed by:	Saleem Ebrahim Attorneys, Johannesburg
	Bezuidenhouts Incorporated, Bloemfontein