IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 1796/2011
DATE HEARD: 1/9/2015
DATE DELIVERED: 8/9/2015
NOT REPORTABLE

In the matter between:

BENJAMIN MZUVUKILE MFAZWE	**APPLICANT**
and	
A.N. GADI PROPERTY INVESTMENTS (PTY) LTD	**RESPONDENT**
ABSA BANK	**INTERVENING CREDITOR**

JUDGMENT

PLASKET J

[1] This matter has a long and troubled history. In September 2010, a few days short of five years before the matter was heard by me, ABSA Bank, the intervening creditor in these proceedings, took a default judgment against the respondent, AN Gadi Property Investments (Pty) Ltd, (AN Gadi) in the amount of R3 051 196.33 plus interest. A declaration was also made by the court that AN Gadi's immovable property, erf 131 Lusikisiki, was executable. That judgment remains unsatisfied, despite ABSA's best efforts.

[2] By notice of motion dated 24 May 2011, Mr BM Mfazwe, who described himself as an employee and creditor of AN Gadi, sought an order placing the company 'under supervision in order to start with Business Rescue Proceedings'. ABSA intervened in this application, opposed the relief sought and brought a counter-application in which it sought the winding-up of AN Gadi.

[3] The matter was heard by Sandi J who, in a judgment delivered on 13 December 2013, dismissed Mfazwe's application and made a provisional winding-up order against the company returnable on 9 January 2014. Mfazwe sought and was granted leave to appeal against the refusal of the application for business rescue.

[4] That matter was heard by a full bench of this court on 30 March 2015. On 7 April 2015, Pickering J, with Hartle and Stretch JJ concurring, dismissed the appeal. Thereafter Mfazwe petitioned the Supreme Court of Appeal for special leave to appeal but the petition was dismissed on 6 July 2015.

[5] The provisional winding-up order has been extended from time to time and the matter was set down for finalization on 13 August 2015. On that day, however, the matter was postponed to 1 September 2015.

[6] On 1 September 2015, Mfazwe appeared in person (despite having attorneys of record) and applied for a postponement. I refused the application and will furnish my reasons for doing so below. I heard the application for a final order and reserved judgment.

The application for a postponement

[7] In *Persadh & another v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE), para 13, I set out a number of principles that are relevant when a party applies for a postponement. I said:

'The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or

refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.'

[8] With those principles in mind, I turn now to the facts placed before me by both Mfazwe and ABSA's attorney, Mr M van der Veen.

[9] Van der Veen's affidavit pre-dates Mfazwe's. Its purpose was to establish compliance with the terms of the *rule nisi* and to update the court on the history of the matter, as ABSA's intention was to move for a final winding-up order.

[10] For present purposes, the period from April 2015 to the present is relevant. After the full bench judgment had been delivered on 7 April 2015, ABSA intended to apply for a final winding-up order on 21 April 2015. On the day before that, however, Van der Veen was contacted by Mfazwe's Grahamstown attorney, Mr M Marabini of the firm Netteltons, who said that his client intended to petition the Supreme Court of Appeal for special leave to appeal against the full bench's judgment and sought Van der Veen's consent to a postponement of the matter. Van der Veen, having taken instructions from his client, informed Marabini that he did not agree to a postponement. Marabini then filed a notice of opposition which had the effect of forcing the matter to be postponed to the opposed roll.

[11] Mfazwe proceeded to petition the Supreme Court of Appeal. On 11 May 2015, Netteltons and Mfazwe's East London attorneys, Bate, Chubb and Dickson, both withdrew as his attorneys of record. RS Siyila Inc of East London was appointed to act for him but, shortly thereafter, also withdrew. On 19 June 2015, Mfazwe's present attorneys, HS Toni Attorneys of Mthatha, informed Van der Veen that they were acting for Mfazwe.

[12] That HS Toni Attorneys still act for Mfazwe was confirmed by him when he appeared in person to apply for the postponement.

[13] On 6 July 2015, the Supreme Court of Appeal dismissed Mfazwe's petition. The order, made by Navsa ADP and Pillay JA, stated:

'The application for special leave to appeal is dismissed with costs on the grounds that the requirements for special leave to appeal are not satisfied.'

[14] On 24 July 2015, Van der Veen wrote to HS Toni Attorneys to inform them that 'we are instructing counsel to proceed to move for a Final Order of Liquidation on the 13th August 2015'. On that day, the matter was postponed to 1 September 2015. Van der Veen wrote to HS Toni Attorneys on 27 August 2015. He said:

'Please be advised that the Application to move for a Final Order of Liquidation originally set down for the 13th of August 2015 had to be postponed to the 1st of September 2015 and we intend moving to finalize this Application on the 1st of September 2015.'

[15] Van der Veen's affidavit was deposed to on 28 August 2015. Mfazwe's affidavit was deposed to on 1 September 2015. Attached to it is a letter dated 31 August 2015 from HS Toni Attorneys to Van der Veen which states:

'We thank you for your email dated 27 August 2017 advising us of the set down of the liquidation matter against AN Gadi Property Investments (Pty) Ltd.

We have referred the contents of your above letter to the representative of the said company for his attention and possible instructions. Our initial instruction was to pursue the leave to appeal matter before the Supreme Court of Appeal. The time aspects for hearing this matter does not afford us time to take proper instructions from client, consult and prepare in a realistic and meaningful way. Adding impetus to the above dilemma is the fact that our Mr Toni is already booked to appear in the East London Circuit Division for an urgent application on the same date. Time permitting we would consult with client and take proper instructions and assist.

In the circumstances is it not worth our while to have the matter either removed from the roll or postponed *sine die* to afford all concerned time to prepare and ventilate themselves. The matter may then be set down to a mutually convenient date and the Registrar may be approached to give an expedited date. It is our considered view that this is a matter of considerable importance as it pertains to the life and death of the company. We would be pleased if you could consider the above in a positive light as this will enable us to get on board and assist the company.

Kindly ponder the above and revert to us with your client's instructions which we will definitely convey to the company's representative as a matter of extreme urgency.'

[16] In his affidavit, Mfazwe stated that the Supreme Court of Appeal having refused his petition on the basis of 'the reasons for Special Leave to Appeal' not having been met, his attorneys were 'engaging with the judges [of the Supreme Court of Appeal] to establish which of these reasons have not been met'.

[17] Attached to his affidavit are two letters from HS Toni Attorneys to the Registrar of the Supreme Court of Appeal. The first is dated 29 July 2015. It stated:

'We confirm having received a Court Order in respect of the above matter dismissing the Special Leave to Appeal by client. The reason furnished by the learned Judges of Appeal is that the reasons for Special Leave to Appeal have not been met. It is not so clear in the said Order which of these reasons, leaving client in the dark as to the best option to explore in the circumstances.

Could you kindly proffer some assistance in this regard to enable us to advise client accordingly.

Counsel briefed to take this matter further is abroad and will only be back on 3 August 2015.

Could you further relent on the time aspects for correcting the situation to enable us consultation with him for his reflecting and further advices.

We thank you in anticipation of your assistance.'

[18] The next letter, which clearly follows the first one, is, strangely, dated 28 July 2015. In it, H.S Toni Attorneys say:

'Our previous correspondence as well as telephone conversations in this matter refers.

We have not received your response as yet and client is anxious to know the final outcome of our previous correspondence. Has anything been forthcoming from the Honourable Judges of Appeal as requested.

Kindly advise as a matter of urgency.'

[19] The basis for the postponement sought by Mfazwe is contained in paragraph 10 of his affidavit which reads as follows:

'10.1 I was not aware that this matter is enrolled for a final liquidation order on 1st September 2015. I only became aware that this matter was set down after receiving an email from my attorneys who represented me in pursuance of an application for leave to appeal in the Supreme Court of Appeal on Friday, 27 August 2015. In this email HS Toni Attorneys were forwarding an email from the Applicant's Attorneys

which was advising me that this matter was on the roll on the 13th August 2015 and was postponed to 1st September 2015.

10.2 When I approached Mr Toni of the said firm to appear for me, as they represented me in the leave to appeal matter, he said that he is unfortunately already booked for an urgent application to be heard before the East London Circuit Division on 1st September 2015. It was unfortunately too short a notice for me to seek the services of another firm of attorneys to represent me, it being a Friday afternoon.

10.3 I was not present in court when the matter was enrolled on 13th August 2015 and I could not have known that it was postponed for hearing on 1st September 2015.

10.4 Any order that this Honourable court may grant has serious and far reaching consequences for the Respondent. It might also negatively affect the change of status of the Respondent as the liquidation will result in its natural death. It is, therefore, in the interest of justice that the Applicant be allowed the legal remedies available to it to save the Respondent.

10.5 The Applicant has a right to be heard in terms of the rules of natural justice more that the application at hand pertaining to the death of the Respondent.'

[20] In essence, he stated, he wanted the matter to be 'removed from the roll or be postponed to a later date after the final decision of the Supreme Court of Appeal'.

[21] Has Mfazwe established good cause? In my view, for the reasons that follow, he has not.

[22] First, the application is premised on vague suggestions that the petition proceedings in the Supreme Court of Appeal are still live. They are not. They have been concluded and special leave to appeal has been denied. It is obvious from the order of the Supreme Court of Appeal that Navsa ADP and Pillay JA considered that the petition had not established either the ordinary requirement of reasonable prospects of success or 'special circumstances which merit a further appeal'. See *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A), 564H-I. In other words, whatever circumstances Mfazwe alleged were special circumstances in his petition were not considered to be so by the two judges of appeal.

[23] Secondly, the last time that HS Toni Attorneys, according to the letters attached to Mfazwe's affidavit, were in contact with the Registrar of the Supreme Court of Appeal was in late July 2015. Despite counsel being on brief (and back from an overseas trip on 3 August 2015) nothing had been done. The reason is probably because nothing can be done. No explanation is given for the inactivity for the entire month of August 2015.

[24] Thirdly, Mfazwe claims not to have known until a late stage, about the matter proceeding on 1 September 2015. That is belied by the fact that, from April 2015 onwards, Van der Veen has made it clear to Mfazwe's attorneys, including HS Toni Attorneys, that he intended to apply for a final order winding-up AN Gadi and that he kept them informed of the dates on which he intended to do so – 21 April 2015, 13 August 2015 and 1 September 2015.

[25] The responses from Mfazwe's attorneys are instructive: first, a notice of opposition was filed to engineer a postponement; secondly, despite being given about 20 days' notice, no interest whatsoever was shown in the matter, and certainly no indication that the matter would be opposed was forthcoming in respect of the hearing on 13 August 2015; and thirdly, when the matter was again postponed to 1 September 2015, an application for a postponement was made at a late stage. What is more, Mfazwe's attorneys have been aware of the matter since April 2015 and have not filed any papers – or even indicated that they intend to do so.

[26] From what is set out above, it is clear to me that the application for a postponement was not brought in good faith but was an ill-conceived and transparent attempt to delay the finalisation of the winding-up of AN Gadi, and to prejudice ABSA's right to have the matter finalised.

[27] I accordingly dismissed the application for a postponement with costs and proceeded to hear the main application.

<u>The main application</u>

[28] The solvency of AN Gadi and the reasons for its chaotic, dysfunctional state have been dealt with in detail in the judgment of Sandi J when he granted the provisional winding-up order and of Pickering J in the appeal against Sandi J's order. Little purpose would be served in rehashing in any detail what was said in those judgments.

[29] Suffice it to say that ABSA's judgment debt remains unsatisfied and the prospect of AN Gadi paying it are non-existent. The closest that the company appears to have come to paying its debt was a suggestion, some years ago, that it would pay the interest, a proposal that, not surprisingly, was rejected by ABSA. When the counter-application was launched on 3 February 2012, the amount owed to ABSA had escalated to more than R4.5 million. It can safely be assumed that now, more than three and a half years later, the debt has grown to somewhere approaching R6 million.

[30] It is clear from the papers that AN Gadi is hopelessly insolvent and should be wound-up.

[31] In the result, the provisional winding-up order is confirmed, with the costs of this application to be costs in the winding-up.

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C PLASKET
JUDGE OF THE HIGH COURT

APPEARANCES
For the applicant: In person
For the respondent: No appearance
For the intervening creditor: TS Miller instructed by Wheeldon, Rushmere & Cole