

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/20516

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED

date 11/10/21

A handwritten signature in black ink, appearing to read "E. Molokwane", is written over a horizontal line.

In the matter between:-

FLUXMANS INCORPORATED

APPLICANT

AND

BARATA PROJECTS CC

RESPONDENT

Delivery: Transmitted by email to the parties' legal representatives. The judgment is deemed to have been delivered on 11 October 2021 2021.

Summary: Application for liquidation of the respondent. Application for postponement of the hearing. Principles governing postponement restated. Application for postponement dismissed.

JUDGMENT

Molahlehi J

[1] This is an application in which the applicant seeks an order placing the respondent under winding-up in the hands of the Master of the High Court. The applicant contends that the respondent is indebted to it in the sum of R63 860. 00 for professional services rendered. It further contends that the respondent has admitted the indebtedness with several undertakings to pay the debt to no avail.

[2] This matter was enrolled for hearing on the unopposed roll on 4 October 2021. On that day, the respondent's Counsel appeared and indicated that the respondent wished to oppose the matter and thus requested that the hearing be postponed.

[3] The appearance by Counsel was, it would appear, consequent the notice to oppose filed by the respondent on 28 September 2021, which is clearly out of time.

[4] On 4 October 2021, the matter stood down for hearing on 6 October 2021. In the meantime, the respondent's attorneys of record addressed a letter to the applicant's attorneys of record on 5 October 2021. The essence of the letter is that the respondent sought to have the matter postponed for thirty days pending payment from its clients. In paragraphs 2 and 4 of the letter, the respondent states the following:

"2. That the application be postponed with costs being born by Our Client. The reason for the postponement is that the client is awaiting payments from its clients who have delayed in paying it.

3. . . .

4. Kindly note that we are not able to bring a substantial formal application as the Director or/ Member of of Our Client is currently out of reach and the last time we spoke to him, he was in Limpopo."

[5] It is trite that in considering an application for a postponement, the court has the discretion to be exercised judicially. It is also trite that a postponement is not a right but an indulgence given by the court. For this reason, in seeking a postponement, the applicant must furnish a full and satisfactory explanation of the circumstances that gave rise to the need for a postponement. And as repeatedly stated by the authorities, postponement is not there for the taking. ¹

[6] As indicated earlier, this matter was set down for hearing on 4 October 2021 but stood down when the respondent raised the issue of the postponement to 6 October 2021. In my view, this provided an opportunity for the respondent to prepare a substantive application for the postponement. Be that as it may, even the application from the bar does not satisfy the requirement for a postponement. The respondent's Counsel's explanation that a substantive application could not be made because the main member of the respondent was away in Limpopo is not satisfactory. There is no explanation as to why he could not be contacted and arrangements made for him to join the electronic platform on which the hearing was conducted.

[7] In his application for the postponement of the matter from the bar, the respondent's Counsel tendered cost to be occasioned by the postponement. A tender

¹ M F v Cummins South Africa (Pty) Ltd and Others: (27028/2019) [2020] ZAGPJHC 143 (16 April 2020.

for costs is an important factor to consider in weighing whether a postponement should be granted. It is, however not a determining factor.

[8] It is important to note that the respondent's Counsel did not deal with the prospects of success, which is an essential factor in an application for postponement. In fact, in the context of this matter, there are no prospects of success, even on the respondent's version.

[9] The essence of the above is that the respondent affirms the case made by the applicant in its founding affidavit, and thus this means there are no prospects of success, as it also appears in more details below.

[10] For the above reasons, the application to postpone the matter stands to fail.

[11] I now turn to deal with the merits of the application, which remains unopposed.

[12] It is trite that liquidation proceedings are instituted when a debtor company cannot pay its debt as when the debt becomes due. It is also trite that the grounds for winding-up of a close corporation, as is the case in the present matter, is the same as in the case of a company. The grounds for winding of a close corporation are those set out in sections 344 and 345 of the Companies Act.

[13] The court may, amongst others, grant a winding-up order when satisfied that the closed corporation, like a company, is unable to pay its debts.

[14] After exchanging correspondence relating to the debt, the applicant finally addressed a letter of demand to the respondent, which was delivered by hand to the respondent's head office on 17 February 2021. The relevant part of the letter, which was issued in terms of section 345(1) (a) of the Companies Act 61 of 1973 read with section 66(1) of the Close Corporations Act 69 of 1984 reads as follows:

"You are indebted to Fluxman Inc in the sum of R63, 860.25 . . . in respect of professional services rendered to you at your special instance and request during May 2019 and June 2019 and disbursements incurred in connection therewith. The full sum is due owing and payable together with mora interest at the rate of 7% per annum reckoned from date of demand . . . to date of payment."

[15] In response to the above letter, Mpho Malahlele of the respondent addressed an email to the applicant that acknowledged the respondent's indebtedness to the applicant. The letter reads as follows:

"Good day Colin

Hope this letter finds well and safe.

We take note of your letter of demand and yes we are well aware of our indebtedness to Fluxman, our Attorneys for years and we do not want to prejudice our long standing relationship.

Please note payment will be done within the prescribed period from date of receipt of the letter or before, as soon as receive payment from our client we will effect payment immediately.

Regards. Mpho Malhlele."

[16] Following the above, the applicant addressed an email to the respondent dated 9 March 2021 and reminded respondent that the payment which was expected had not been received. In an email, the respondent apologised for the failure to effect the

payment and indicated that it was because they were still awaiting payment from their client.

[17] It is clear from the above that the respondent's indebtedness to the applicant is not in dispute. It is also clear that the respondent is not able to pay its debt to the applicant.

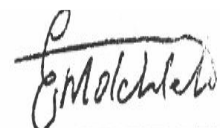
[18] The inability of the respondent to pay its debt falls squarely within the provisions of section 69 (1) (a) and (c) of the Close Corporation Act and section 344 (f) read with section 345 (1) (a) and (c) of the Companies Act 61 of 1973.

[19] In the circumstances, I am satisfied that the respondent is unable to pay its liquidated debt which is due and owing to the applicant. Thus it is just and equitable that the respondent deserves to be wound-up in terms section 68 (d)) of the Close Corporations Act read with section 344 (h) of the Companies Act.

Order

[20] In the circumstances, I make the following order:

1. The application to postpone the hearing is dismissed.
2. The respondent be placed in final liquidation;
3. The costs of the application be costs in the liquidation of the respondent.



E MOLAHLEHI J

JUDGE OF THE HIGH COURT GAUTENG DIVISION, JOHANNESBURG

Representatives:

For the applicant: Adv KJ Van Hyssteen

Instructed by: Fluxmans Inc.

For the defendant:

Instructed by: VM Mashele Attorneys

Hearing date: 06 October 2021

Delivered: 11 October 2021