

REPUBLIC OF SOUTH AFRICA



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

Case Number: 19444/2016

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

.....10/31/2022....

denise.fisher.

CONSOLIDATED CASE NUMBER: 2816/2017

In the matter action between:

MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD

Plaintiff

t/a MERCHANT FACTORS

and,

HLATINI MANAGEMENT AND FINANCE (PTY) LTD

First Defendant

BLUE CLOUD INVESTMENTS 79 (PTY) LTD

Second Defendant

CROSS ATLANTIC PROPERTIES 136 (PTY) LTD	Third Defendant
DALHOUSIE FORESTS CC	Fourth Defendant
GRANT HUGH RAMSAY	Fifth Defendant
HIGH LANDS SECURITIES (PTY) LTD	Sixth Defendant
HLATINI FARMING (PTY) LTD	Seventh Defendant
HLATINI FINANCE CORPORATION (PTY) LTD	Eighth Defendant
HLATINI INVESTMENT HOLDINGS LIMITED	Ninth Defendant
HLATINI MANAGEMENT AND FINANCE (PTY) LTD	Tenth Defendant
LAGOON HOMES (PTY) LTD	Eleventh Defendant
MOGWALE TRADING 154 (PTY) LTD	Twelfth Defendant
NCY TRADE & INVEST (PTY) LTD	Thirteenth Defendant
STAND 827 MARLBORO PARK (PTY) LTD	Fourteenth Defendant
RST TRADE & INVEST (PTY) LTD	Fifteenth Defendant
TRIBAL PROPERTIES [PTY] LTD	Sixteenth Defendant
HORIZION INVESTMENT TRADING (PTY)	Seventeenth Defendant

AND

Case No.: 2816/2017

In the application between:

TRIBAL PROPERTIES (PTY) LTD	First Applicant
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CROSS ATLANTIC PROPERTIES (PTY) LTD	Second Applicant
LAGOON HOMES (PTY) LTD	Third Applicant
STAND 827 MALBORO PARK (PTY) LTD	Fourth Applicant
HORIZION INVESTMENT TRADING (PTY) LTD	Fifth Applicant
and	
MERCHANT COMMERCIAL FINANCE (PTY) LTD	First Respondent
GRANT HUGH RAMSAY	Second Respondent
HLATINI MANAGEMENT AND FINANCE (PTY) LTD	Third Respondent
BONATLA PROPRTIES (PTY) LTD	Fourth Respondent
NIKITAS GHIKAS VONTOS	Fifth Respondent
THE REGISTRAR OF DEEDS	Sixth Respondent
THE CIPC	Seventh Respondent

AND

In the application between:

Case No.: 34887/2016

MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD	Applicant
t/a MERCHANT FACTORS	
and	
THE BEVTEC PARTNERSHIP	Respondent

J U D G M E N T (CONDONATION)

FISHER (J):**Introduction**

[1] This judgement deals with condonation for the late filing of an application for leave to appeal against a refusal of a postponement.

[2] The reasons for the postponement are set out fully in the judgment as are the material facts. Neither bear repetition.

[3] The refusal of the postponement led the applicants' (the liquidators) counsel to withdraw from the proceedings as he was not prepared to run the trial. This was notwithstanding that the liquidators' legal representatives had agreed to a trial of long duration. The matter was set down for ten days. The application for the postponement was made four days before the trial date for argument at the commencement of the trial. After the refusal of the postponement, the attorney for the liquidators conducted a watching brief in the virtual hearing and was on-line when the trial proceeded and the judgment by default was granted after evidence was led by the respondent.

[4] The applicants now wants to appeal the refusal of the postponement. It has brought the application for leave to appeal more than three months late. The judgment was handed down on 20 May 2022. The dies for the bringing of the application for leave expired on 10 June 2022. The application was brought on 04 October 2022.

The postponement

[5] In a nutshell the reason given for the postponement was that the applicants wished to pursue an inquiry under section 417 of the insolvency provisions of the 1973 companies Act. The inquiry had been instituted but not completed. Employees of the Plaintiff had been subpoenaed to give evidence at the inquiry but had applied to review the issue of their subpoenas. The review was pending at the time the trial commenced.

[6] The case of the liquidators' is essentially that the directors of Horizon were defrauded by, the fifth defendant, Mr Ramsay who secured the loan in issue and put up the properties as security and that the plaintiff should have known that he was

acting fraudulently. They place reliance on the alleged negligence of the plaintiff's employees. It is not denied that the properties were placed under Mr Ramsay's control by the erstwhile directors of Horizon and that he used this control to secure the loans in issue.

[7] It is pleaded that, had the Plaintiff performed a reasonable investigation, it would have uncovered that Mr Ramsay had a criminal record and that the loans in issue should not be granted. The point is made by the plaintiff that, on their own version, the directors knew of Mr Ramsay's criminal record when they gave control of the properties to Mr Ramsay. They make the point also that the documents reflect that Mr Ramsay was the controller of the Propcos and their properties in that the share transfer had taken place in the absence of a reservation of ownership.

[8] As I have said in the judgment – it seems to me not to be reasonable for the court proceedings to be stalled pending the defendant liquidators being satisfied that the inquiry has yielded fruits which may allow them to decide if it is worth pursuing the trial. The section 417 inquiry process is relatively informal as to the arrangement of the sittings. Inquires under s417 are controlled, to a large extent, by the liquidators as to when they will eventually come to a conclusion.

[9] A postponement pending the finalisation of the inquiry or the reaching thereof of a stage which satisfied the liquidators' purposes would create a situation where the plaintiff would be in a position where the obtaining of relief under its contracts could be delayed inevitably.

[10] Clearly, in weighing up the rights of the parties to finality in the process, this factor featured very heavily against the granting of the postponement. Counsel for the liquidators, Mr Blou SC argued that, this notwithstanding, 'the door should not have been closed' to the liquidators and they should have been allowed the postponement so that they could pursue the inquiry and thus be allowed to decide whether to continue with the litigation. It is on this basis that it is submitted on behalf of the liquidators that another court may weigh the plaintiff's right to finality as less important to the right of the liquidators to follow their chosen course of pursuing the inquiry and having the trial process held up as part of this process.

The application for condonation

[11] The application for leave to appeal together with the application for condonation was delivered on 04 October 2022. The delay is thus relatively substantial, being as I have said more than three months.

[12] It is well settled that in considering applications for condonation the court has a discretion which is to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation, the prospects of success on appeal, the respondent's interest in the finality of the judgment, the convenience of the court. The list of factors to consider is not exhaustive and the factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an inadequate explanation and long delay.

With these principles in mind I move to consider the explanation for delay

The explanation for the delay

[13] The explanation given for the delay is, in essence, as follows:

- The liquidators wished to seek the consent of the of Horizon's Creditors, as contemplated in Section 386(1)(d) read with Sections 386(3)(a) and (4)(a) of the 1973 Companies Act.
- There were 'obstacles' to obtaining such consent.
- These obstacles were brought about by a systemic failure on the part of the Government Printers in relation to the printing of the Government Gazette which led to problems with the printing of the notice advertising the second meeting of creditors.

- The Joint Liquidators were ‘ultimately only able to hold a second Meeting of Creditors on 18 July 2022, after finally succeeding in giving Notice in the Government Gazette dated 24 June 2022’.
- The resolutions needed to obtain the consent of the creditors to continue with the litigation were obtained at this meeting of 18 July 2022.
- The liquidators did not take any further steps to pursue the litigation for a month because during this time they had been advised by a person who is not disclosed that they should apply to rescind the judgment.
- On 18 August 2022 they sought the advice of Mr Blou SC who advised that they should bring an application for leave to appeal and that a rescission would be inappropriate.
- The applications for leave to appeal and condonation were, thereafter, brought on 04 October 2022.

[14] The explanation for the delay thus falls into three phases. First, the delay from the expiring of the dies for bringing the application for leave to appeal being 10 June to 18 July (approximately one month). Second, the delay from the second meeting to the briefing of counsel (approximately another month). Third, the delay from the briefing of counsel to the filing of the applications (approximately another month).

I will deal with the explanations provided for each of these phases.

Phase 1- from the expiry of the dies for bringing the application for leave to appeal

[15] After the handing down of judgment the liquidators took no immediate or even semi-immediate steps in the litigation. They say that this is because they now wanted the consent of creditors. This was notwithstanding that they had pursued the substantial litigation comprising a number of interlinking applications to the cusp of a ten day trial without the consent of creditors.

[16] They explain that the convening of the second meeting of creditors held difficulties for them. They provide no specific detail of these difficulties save to refer to the fact that there were industry-wide problems with the printing of the Government

Gazette which were attributed to lockdown. These problems led to an application being brought by the South African Restructuring and Insolvency Practitioners Association in January 2021 the result of which was an order against the relevant authorities in terms of which they were directed to ensure that the Government Gazettes were published in the proper way.

[17] As I have said, this order was a general order in the industry and was not specific to these liquidators. An attempt is made by the liquidators to suggest that they were affected by this lack of proper publication in the Gazettes. The problem is that they give no specific information as to their personal engagement with the advertising process. This is a serious lacuna in the explanation. It should be borne in mind that this problem in the printing works was apparently resolved by court order in early 2021. The applicant's alleged travails occurred a more than a year later. Thus, this attempt to use this difficulty with the printing of the Gazette amounts to no explanation at all.

[18] It is also relevant that it was argued in the application, I assume under instruction that the delays were due to problems in the Master's office. This seems, on the face of it, to contradict the version now given, being the problem at the Government Printers. It may be that some confusion arose in relation to the exact nature of the problem. However, this confusion would not have arisen if a detailed explanation had been provided in the application for postponement. This lack of explanation was specifically raised by me in the judgement as being 'a lazy approach'. Clearly then more detail was needed. And yet in the application for postponement there is still no detail provided. This leads to the impression that there is no real explanation for this delay.

Phase 2 – from the obtaining of creditor consent to the briefing of counsel.

[19] This is purportedly explained by the version that the liquidators mistakenly believed that they should apply for a rescission of the judgment. The problem is that it is common cause that they did not apply for rescission. The Court is also not told who advised them that rescission was the proper approach. I must state also that the fact that a review was not competent in the circumstances is legally elementary and it is difficult to appreciate how this misapprehension arose and why it was the cause of so

many wasted weeks. In any event this is not explained. Again, the explanation for this delay is inadequate.

Phase 3 – The briefing of senior counsel to the bringing of the application.

[20] Whilst I appreciate that practitioners are often swamped with work, there has to be a management of this work according to the requirements of process. It seems to me that given the urgency of the matter, the wasting of yet another month was not reasonable. If counsel's diary does not permit the accommodation of the matter, another counsel can be approached.

[21] To my mind, the applicants have provided little or no explanation for the substantial delay. A picture emerges of liquidators who are uncertain of their prospects of success and who thus lack the required commitment to the litigation.

I now move to these prospects of success.

Prospects of success on the appeal.

[22] The appeal is against the exercise of this Court's judicial discretion as to the granting of a postponement.

[23] In *S v Smith Plasket AJA* emphasized that:

"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[24] It is trite that a court, sitting as a court of appeal, will not lightly interfere with any judgment where the court *a quo* exercised a discretion when deciding on the issue, on condition that the discretion was judicially exercised. In essence, whether I exercised my discretion judicially, entails an investigation as to whether the decision is based on grounds upon which a reasonable person would have reached the same conclusion.

[25] The complaint on the part of the liquidators is that, in exercising the discretion, I did not give sufficient weight to the fact that the refusal of the postponement would lead to judgment by default which 'closed the door to the applicants'.

[26] This submission loses sight of the fact that the liquidators were given the opportunity of proceeding with the trial under circumstances where they had acquiesced in the specially allocated trial. The practice being what it is, the office of the Deputy Judge President would not have granted the special allocation had it not been indicated that they were ready to proceed with the trial.

[27] A further factor is that the reason given for the postponement was not of the nature of an event outside of their control which suddenly impinged on the hearing. The liquidators, at the eleventh hour, simply changed their minds and decided that they did not wish to proceed with the trial until they had run the section 417 inquiry. The inquiry was authorised in 2021 the application for such authorisation having been brought in 2020. Thus there had been plenty of time to attempt to stay the proceedings pending the inquiry and the review had they seen fit to do so.

[28] Whilst the appeal is against the refusal of the postponement, the prospects of success in the action are also indirectly implicated.

[29] I thus move to consider those prospects afresh, in the context of this application.

Prospects of success in the action

[30] It is Horizon's case that it was (until Ramsay's fraud), the beneficial owner of the four immovable properties which have been declared executable. This beneficial ownership derived from its 100% shareholding in each of the Propcos. The relief which is purportedly sought on behalf of the Propcos is thus derivative.

[31] The plaintiff claims that, in order for Horizon as shareholder to seek the derivative relief which it soes on behalf of the Propcos it would need to have sent a demand in terms of section 165 of the 2007 Companies Act. It has not done so.

[32] The liquidators accordingly seek an order in terms of section 165(6) which reads as follows:

(6) In exceptional circumstances, a person contemplated in subsection (2) may apply to a court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that subsection, or without affording the company time to respond to the demand in accordance with subsection (4), and the court may grant leave only if the court is satisfied that—

(a) the delay required for the procedures contemplated in subsections (3) to (5) to be completed may result in—

(i) irreparable harm to the company; or

(ii) substantial prejudice to the interests of the applicant or another person;

(b) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect; and

(c) that the requirements of subsection (5)(b) are satisfied.' (Emphasis added).

[33] All parties recognised that a determination of this special defence had the potential to be dispositive of the case. The liquidators were invited to deal with this defence at the commencement of the trial. Their response was and has since been that they require 'evidence' to deal with this defence. As stated in the judgment, the nature of the evidence was not explained. It is still not explained. This is

notwithstanding a compelling argument which presents itself to the effect that the defence is technical and can be run on assumptions or a stated case. Section 165 (6) requires exceptional circumstances and a delay factor. The liquidators have not sought to set out facts relating to these aspects. It is relevant also that the liquidators are *dominus litus* as to this relief under section 165.

[34] To my mind the liquidators' prospects of success on this issue do not seem to be strong.

[35] A further difficulty for the liquidators is that it is central to the factual matrix that there was no reservation of ownership of the shares. Horizon's case is that Ramsay acting for Hlatini approached the shareholders of the Propcos and Horizon, Messrs Jeffery Woodward, Malcolm Wyper and Richard Harris with a proposal that Hlatini purchase Horizon's shares in the Propcos. It is alleged that the intention was that, through such share purchase, Hlatini would acquire the immovable properties registered in the names of the Propcos for R26 million and would lease same back to Messrs Woodward, Wyper and Harris. Thereafter, the interlinked written agreements were concluded by including a sale of shares agreement in respect of the shares of Horizon.

[36] The liquidators stated at the trial that they sought to amend the pleadings to include a claim of rectification to the effect that it was the intention of the parties in concluding the sale of shares that such a reservation of ownership would be included. Pursuant to the transactions, Mr Ramsey became the, sole director of the Propcos and Horizon controlled by Mr Ramsay assumed control of their shares. The fraud alleged is that such control was assumed by Mr Ramsay with fraudulent intent, being to obtain control of the Propcos so that he could obtain the loan in issue using the properties as security. It is alleged that Mr Ramsay had no intention of paying either the purchase price for the shares or repaying the loan. Thus, Horizon contends that the shares were not validly transferred and seeks that the interlinked transactions be declared void or voidable at the instance of Horizon and the Propcos.

[37] It is difficult to reconcile this version as to fraudulent intent with the amendment which provides that it was the intention of the parties that there be a reservation of

ownership. Indeed it seems that the central problem for the liquidators is that they allowed the share transfer without receiving payment.

[38] These difficulties are discerned from the pleadings and the evidence in the affidavits in the various applications which were consolidated for deliberation over the ten day trial. They were raised in the judgment refusing the postponement. Against this backdrop the liquidators have made no attempt to suggest that they have good or even adequate prospects of success on these merits. At best they trot out the mantra that 'fraud unravels all'. This does not suffice in that it is not the plaintiff's fraud that is at issue, but Mr Ramsay's.

Conclusion

[39] In all the circumstances, on a weighing up of these factors, it is unlikely that another Court would come to another decision as to the refusal of the postponement. It was the onus of the liquidators to address the issues raised including the general prospects of appeal. This they failed to do in the application for postponement and they have failed again to do so in this application.

In the circumstances I make the following order:

1. The application for condonation is dismissed with costs.



FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 28 October 2022.

Judgment Delivered: 31 October 2022.

APPEARANCES:

For the Applicants : Adv J Blou SC.

Instructed by : Hirschowitz Flionis Attorneys.

For the Respondents : Adv LM Olivier SC.

Instructed by : Brink De Beer Potgieter Inc.