HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU

CASE NO:

1812/2022

In the matter between

RICHARD KEAY POLLOCK N.O	**FIRST APPLICANT**
NURJEHAN ABDOOL GAFAAR OMAR N.O	**SECOND APPLICANT**
OSCAR JABULANI SITHOLE N.O	**THIRD APPLICANT**
IGNATIUS CLEMENT MIKATEKO SHIRILELE N.O	**FOURTH APPLICANT**
MICHELLE SCHUTTE N.O	**FIFTH APPLICANT**
VELE INVESTMENTS (PTY) LIMITED (in liquidation)	**SIXTH APPLICANT**

and

PAUL MAKHAVHU	**RESPONDENT**

JUDGMENT

IM KHOSA AJ

Introduction

[1] The applicant seeks, to declare 38 payments made by Sixth

Applicant, Vele Investments (Pty) Limited “Vele Investments”, to Paul Makhavhu “the Respondent”, as dispositions without value in terms of Section 26(1) of the Insolvency Act, and, repayment of the sum of R 6 491 429.81 by the Respondent to Vele Investments. In the alternative, the Applicants brought a claim for repayment of the monies to Vele Investments on the basis of unjustified enrichment. The Respondent opposes the application.

Factual background

[2] A multi-million rand fraudulent scheme was perpetrated against VBS Mutual Bank “VBS Bank” by its senior officials. The senior officials registered Vele Investments and used it as a vehicle to siphon monies from VBS Bank. Various banking facilities were then extended to Vele Investments by the VBS Bank. Monies were transferred into Vele Investment bank account held with VBS Bank and thereafter transferred to various people at the behest of the senior officials.

[3] It is common cause that during the period of January 2017 and February 2018, the Respondent received the 38 payments from Vele Investments. Three payments were made into his Nedbank account, eleven payments made into his VBS home loan account and twenty-four payments made into the Respondent’s current account held with VBS Bank.

[4] Vele Investments was at all times, insolvent, as it did not make any legitimate income. With every payment Vele Investments received from VBS Bank, a corresponding liability was created to repay that money back to VBS Bank. On 31 July 2018 Vele Investments was wound up by an order of the High Court and is duly represented by the 1st to 5th Applicants as joint liquidators in this matter.

Application for a postponement

[5] On the morning of the hearing, the Respondent filed an application for postponement of the hearing. The application was for postponement *sine die* with costs reserved. The Application was opposed by the Applicants. After hearing the parties' submissions on the postponement application, I made an order refusing postponement with costs and ordered that the reasons will be furnished with the main judgment.

[6] Before setting out the reasons for the refusal of the postponement, I refer to the well-established legal principles applicable to a request for a postponement.

[7] In the case of *Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society,* the court stated the following:

"In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply:

(a) The trial judge has a discretion as to whether an application should be granted or refused,

(b) That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.

(c) The trial judge must reach a decision after properly directing his/her attention to all relevant facts and principles.

(d) An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement, even though the application was not timeously made.

(e) The application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately

entitled.

(f) *Considerations of prejudice will ordinarily constitute the dominate component of the total structure in terms of which the discretion of a court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.*

(g) *The court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.*

(h) *Where the applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which the applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a* *respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action or defence in the action, as the case may be."*

[8] In *National Police Service Union and Others,* the court held that: *"…the question is whether it is in the interests of justice for a postponement to be granted by court. A postponement cannot be claimed as of right. The party applying for postponement must therefore show good cause that one should be granted."*

[9] In *Lekolwane*, the court stated that factors to be considered in the postponement application are the following:

(a) the broader public interest;
(b) the prospects of success on the merits
(c) the reason for the lateness;
(d) the conduct of counsel;
(e) the costs involved in the postponement;
(f) the potential prejudice to the other interested parties;
(g) the consequences of not granting a postponement; and
(h) the scope of the issues that ultimately must be decided.

[10] The Respondent's reasons for the request for postponement, are that the Respondent lacked funds to travel from Limpopo to Sandton for inspection of documents when they were tendered by the

Applicants; that Mr Maluleke, his legal representative, was not available to attend the inspection and the fact that the documents provided as per the Rule 35(12) order, are voluminous.

[11] The Respondent further avers that his attorney of record and himself were able to inspect the documents on 17 October 2023 and the documents were availed to them electronically on the same day. They did not have enough time to consider the documents given their volume.

[12] The Respondent further contends that he may file another Rule 35(12) notice requesting documents which were before retired Judge Southwood and may supplement his answering affidavit to place the said documents before court.

[13] It is trite that the granting of an application for postponement is by its nature an indulgence granted by the court to a litigant in the exercise of a judicial discretion and that indulgence is not to be had for the asking.

[14] A party who applies for a postponement must show good cause for the interference with the other party's procedural right to proceed with hearing.

[15] A court should be slow to refuse a postponement where the true reason for the party's non-preparedness has been fully

explained. The Respondent's non-preparedness to proceed must not be due to delaying tactics and justice should demand that he should have more time for presenting his case.

[16] In his affidavit in support of the application for postponement, the Respondent advances no explanation for his failure to launch the application for postponement earlier than the hearing date. As early as the 17 October 2023, when the Respondent first gained sight of the documents, the Respondent must have realised that the documents are voluminous and that he may require more time to consider them.

[17] That was an opportune moment for the Respondent to launch the application for postponement and it ought to have been launched immediately after the inspection on the 17 October 2023.

[18] Our law requires that an application for a postponement be made timeously. During the hearing of the application for postponement, the Respondent's Counsel conceded that the delay in bringing the Application for a postponement is a criticism the Respondent could not escape. This inexcusable delay in launching the application for a postponement weigh against the granting of the postponement.

[19] When a postponement is sought on the day of hearing, as it is the case in this matter, the history of the proceedings is a relevant factor for consideration. The history of this matter shows that the Respondent delayed filing his answering affidavit until the date on which the main application was set down for hearing on the unopposed motion roll. The court order set out timelines for the filing of the heads of argument and the Respondent failed to comply with that order.

[20] At the request of the Applicants, this court issued a directive that the Respondent file his heads of argument on the 30 August 2023. The Respondent did not comply with that directive. The Respondent instituted his Rule 35(12) application after the main application was set down for hearing on the opposed roll of the 31 October 2023, despite filing the rule 35(12) notice months before and potentially rendering the main application not ready for hearing.

[21] The Respondent had to be coerced to file his heads of argument by an order that the Rule 35(12) documents be furnished to him after he has filed his heads of argument. On 20 September 2023, a day after the Rule 35(12) order was granted, the Applicants tendered the inspection of the documents. On 3 October 2023, Applicants followed up on its tender of inspection in vain.

[22] The Respondent’s historic conduct display a general disregard of time limits set in court rules, orders and directives. Such a conduct is unbecoming of a legal practitioner. In my view, the Respondent tactically failed to attend this matter with the earnestness it deserves.

[23] The delay in the institution of the application for postponement, viewed in the light of the Respondent historical conduct I mentioned above and without an explanation for not bringing the application earlier, appears to me as a calculated manoeuvre to delay the finalization of this matter. It concretises the Respondent’s tedious approach in this proceedings. I am of the view that the application for postponement is not made *bona fide.* Granting a postponement will indefensibly violate the Applicants’ procedural right to proceed with hearing of the matter.

[24] Despite inspecting and being furnished with the documents two full weeks prior the hearing of the main application, the Respondent fails to take this court into confidence by explicitly setting out the information he has gathered in the documents furnished in terms of the Rule 35(12) order, which in his view, will advance or in one way or the other, affect his defence in the main application.

[25] In the circumstances, such failure is not only astonishing, but is

also discordant with what one would naturally expect of a Respondent who has, by an order of court, extracted the documents from the Applicants.

[26] The Respondent thought it best to launch an application for postponement on the morning of the hearing under the guise of a possibility of filing another Rule 35(12) notice and a possible supplementary affidavit. Those possible documents would seek to introduce what was, as at the date of filing the application for postponement, unknown to the Respondent.

[27] Plainly put, a postponement must be sought to achieve something. In my view, the Respondent's failure to spell out the information he desires to introduce to the main application through the possible Rule 35(12) notice and supplementary affidavit renders the application for postponement devoid of purpose. Without a clear purpose for a postponement, it is undesirable for this court to grant a postponement.

[28] Thousands of creditors await finalization of the winding up to ultimately find closure. In the circumstances, the broader public interest, fundamental fairness and the interest of justice does not justify a postponement of the hearing.

[29] The lack of funds and unavailability of preferred Counsel cannot serve as a basis for a postponement. The Respondent failed to

show good cause for the postponement of the hearing of the main application. For these reasons, I refused postponement with costs.

Non-joinder of Vele petroport

[30] The Respondent raised a *point in limine* of non-joinder of Vele Petroport. It is the Respondent's case that if the relief sought by the Applicants is granted, it will result in Vele petroport being indebted to the Respondent in the same amount and thus Vele Petroport has a direct and substantial interest in this application. I disagree.

[31] The Respondent's proposition is incorrect. The granting of the relief sought by the Applicants cannot give birth to Vele Petroport liability to the Respondent for the same amount. Vele Petroport liability and the extent thereof, towards the Respondent originates from the service provider relationship and the actual services the Respondent avers to have rendered to Vele Petroport.

[32] The test for non- joinder is set by the court in *Absa Bank Ltd v Naude NO*, in the following terms:

"The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which

may prejudice the party that has not been joined. In Gordon v Department of Health, Kwazulu-Natal it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."

[33] The order in this matter will not prejudice the interests of Vele Petroport. For this reason, I find that the *point in limine* of non-joinder of Vele Petroport is unsustainable and stand to be dismissed.

The issue

[34] The issue for determination is whether the payments made by Vele Investments to the Respondent are dispositions without value and liable for repayment to Vele Investment. An alternative issue is whether the payments unjustly enriched the Respondent at the expense of Vele Investments and to its impoverishment and thus liable for repayment to Vele Investments.

The law

[35] In Section 2 of the Insolvency Act, disposition is defined as;

"disposition" means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release,

compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the Court; and "dispose" has a corresponding meaning;"

[36] Section 26(1) of the Insolvency Act provides as follows:

"Dispositions without value

(1) Every disposition of property not made for value may be set aside by the Court if such disposition was made by an insolvent—

(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."

Evaluation

[37] Vele Investment was wound-up on the 31 July 2018. The

insolvency of Vele Investment and the payments made by Vele Investment to the three accounts of the Respondent are also not in dispute. A payment is per definition, a disposition.

[38] The one payment that was made to the Respondent's Nedbank account on the 30 July 2016 falls under the provisions of Section 26(1) (a) of the Insolvency Act. In respect of that payment, the Liquidators bear the onus of proving that Vele Investments was insolvent after making the payment.

[39] With regard to the other 37 payments made within 2 years of Vele Investments' liquidation, in terms of Section 26(1) (b) of the Insolvency Act, the Respondent bears the onus to prove that Vele Investments was not insolvent immediately after each payment was made.

[40] The Respondent contends that there are disputes of facts incapable of resolution on papers. Before dealing with the issue of whether the dispositions were made without value to Vele Investments, I deal with the issue of disputes of fact immediately below.

Disputes of fact

[41] In *Wightman v Headfour (Pty) Ltd*, the court held that

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

[42] The Respondent's answering affidavit must clearly and concisely contradict the averments made by the Applicants in the founding affidavit. The Respondent fails to do so. It is trite law that a party rise and falls on its papers. The Respondent's counsel referred the court to the disputes of fact in the heads of argument. Disputes of fact raised in the heads of argument are surely misplaced.

[43] Having said that, what the Respondent contends are disputes of fact are by their nature, not disputes of fact. They are issues incidental to the Respondent's defence in that they are introduced by the Respondent in his answering affidavit as his version and not in contradiction with averments made by the Applicants.

[44] The Respondent bears the evidentiary burden to prove those issues in the course of discharging the onus of proving his defence.

Without value

[45] The Respondent’s basis of defence is that there was value or benefit to Vele Investments for the payments he received from Vele Investments. It is the Respondent’s defence that he was a service provider and has rendered services to Vele Petroport.

[46] The Respondent contends that Vele Investments benefitted from the services he rendered to Vele Petroport. Vele Petroport and Vele Investments are two separate legal entities and are autonomous. The Respondent’s basis for the contended indirect benefit to Vele Investments is that Vele Petroport and Vele Investments had a subsidiary or shareholder relationship.

[47] Further, the Respondent contends that Vele investment paid him on behalf and in discharge of the obligations of Vele Petroport. As to the reason why Vele Investments took Vele Petroport’s obligation to pay the Respondent, the Respondent’s version evolves.

[48] It begins as Vele Petroport being a subsidiary of Vele Investments, then becomes a “*shareholding relationship or some other arrangements*”, then escalates to being Vele Investments’ *“decision”* to take responsibility for the Respondent’s fees and ultimately reaches the pinnacle as a concretised fact that Vele investment took responsibility for payment of salaries due by Vele Petroport.

[49] The Respondent's defence is not sustainable. The Respondent did not adduce evidence of the services he rendered to Vele Petroport and the amount payable to him for those services.

[50] Further, the Respondent adduced no evidence to prove the subsidiary or shareholder relationship between Vele Investments and Vele Petroport or any factual and legal basis for Vele Investments to assume Vele Petroport's obligations to pay him. The bank statements of Vele Petroport Holdings reflects that Vele Petroport Holdings paid the Respondent between August 2016 and December 2016.

[51] In the circumstances, the Respondent's defence that Vele investments benefitted from the services he rendered to Vele Petroport perishes. The insolvency of Vele investments is common cause. The Respondent is liable to repay Vele Investments the 38 payments totalling to the sum of R 6 491 429.81 to Vele Investments as they are dispositions made for no value to Vele Investments when Vele Investments' liabilities exceeded its assets.

[52] Having found that the Respondent is liable to repay Vele Investments under the Applicants' main claim, it is not necessary that I deal with the alternative claim of unjustified enrichment.

Costs

[53] A general principle is that costs are in the discretion of the court. The Applicants seek costs for the employment of 2 counsel. The Respondent also engaged services of 2 counsel in this matter. The nature and magnitude of this matter justifies the employment of 2 counsel. The applicants are successful and are entitled to costs including costs of employment of 2 counsel.

Orders

[54] The order I made on 31 October 2023 stands as follows:

[54.1] the application for postponement is refused with costs.

[55] In the circumstances, I made the following order:

[55.1] The *point in limine* of non-joinder of Vele Petroport is dismissed.

[55.2] The payments listed in paragraphs 1.1 – 1.38 of the notice of motion made to the Respondent by the Sixth Applicant are declared dispositions without value in terms of Section 26(1) of the Insolvency Act 24 of 1936 and are hereby set aside.

[55.2] The Respondent shall repay the Sixth Applicant the amounts in paragraphs 1.1 – 1.21 of the notice of motion, together with interest on each amount at the rate of 10.5% per annum from the date each disposition was made, to the date of final payment.

[55.3] The Respondent shall repay the Sixth Applicant the amounts in paragraphs 1.22 – 1.38 of the notice of motion, together with interest on each amount at the rate of 10.25% per annum from the date each disposition was made, to the date of final payment.

[54.4] The Respondent is ordered to pay the Applicants costs, including the costs of employment of two counsel.

IM KHOSA

ACTING JUSTICE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

For The Applicants : **Adv E Van Vuuren SC**

Adv M J Cooke

Instructed by **: Werkmans Attorneys**

For the Respondent **: Adv K Tsatsawane SC**

Mr T Maluleke

Instructed by **: Rambevha Morobane Attorneys**

Virtually heard **: 31 OCTOBER 2023**

Judgment **: ____ February 2024**

JUDGEMENT DATE : Judgment handed down in court and electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is ___ February 2024.