



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 17584/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 27 MAY 2022

SIGNATURE

In the matter between:

MAHOMED MAHIER TAYOB

Applicant

and

LIFESTYLE FURNISHERS CC (in liquidation)

First Respondent

SHIRISHKUMAR JIVAN KALIANJEE N. O.

Second Respondent

TRACY HILL N. O.

Third Respondent

NURJEHAN ABDOOL GAFAAR ORMAR N. O.

Fourth Respondent

CHETAN KUMAR VENILAL TANNA N. O.

Fifth Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Sixth Respondent

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

Seventh Respondent

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Eighth Respondent

THE LEGAL PRACTICE COUNCIL

Ninth Respondent

Reasons for Judgment

This matter has been heard in open court and was otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J**[1] Introduction**

At the hearing of this matter on 24 November 2021, this court refused an application for postponement by the applicant and dismissed his application together with costs on a punitive scale. These are the reasons for that order.

[2] Relief claimed by the applicant

The applicant claimed the following relief in his Notice of Motion:

- “1. Declaring that the applicant fully complied with the court orders under case number 13174/2020 in the above Honourable Court as well as case number 38079/2018.*
- 2. An order suspending the proceedings under case number 14835/2020 by virtue of the applicant’s compliance with the parallel proceedings under case number 13174/2020 as well as case number 38079/2018....*

3. *That the Second, Third, Fourth and Fifth Respondents be ordered to pay the costs of this application on a punitive scale”.*

[3] Chronology

To make sense of the relied claimed by the applicant, it is necessary to refer the chronological procedural history of the preceding litigation. In a nutshell, it is this:

- 3.1 The close corporation which forms the subject matter of the litigation is Lifestyle Furnishers CC (Lifestyle). It is currently in liquidation and the second, third, fourth and fifth respondents are the joint liquidators thereof (the liquidators).
- 3.2 Prior to its liquidation, Lifestyle had commenced business rescue proceedings on 23 October 2017. Its sole member Mr Aboobaker had nominated the applicant as business rescue practitioner (BRP).
- 3.3 This court, per Sardiwalla J, placed Lifestyle in provisional liquidation on 20 March 2018 at the instance of a creditor thereof. The applicant initially opposed this application but later abided the decision.
- 3.4 On 1 June 2018 a certain Mr Hoosen (Hoosen) launched a second business rescue application (under case number 38079/2018), (the Hoosen application) effectively suspending the winding-up proceedings.
- 3.5 On 27 June 2018, a certain Mr Stokes (Stokes) was appointed as interim manager of Lifestyle pending the finalisation of the Hoosen application, by way of an order of Kollapen J.

- 3.6 Stokes applied in the Hoosen application for an order to compel various individuals, including Aboobaker, Hoosen and the applicant to co-operate with him in order to enable him to prepare his report to this court. He also cited the liquidators as respondents to his application.
- 3.7 On 18 September 2018 Mphahlele J ordered Hoosen and Aboobaker to assist Stokes in the preparation of his report. An agreement was included in the order of Mphahlele J that the applicant would consult with Stokes in respect of the financial affairs of Lifestyle.
- 3.8 On 25 October 2018 Millar AJ set aside Hoosen's application for business rescue. Pursuant to this, Lifestyle was finally wound-up on 7 November 2018, which also ended Stokes' tenure as interim manager.
- 3.9 On 29 July 2019 the Master appointed the liquidators as final liquidators of Lifestyle.
- 3.10 Since their appointment, the liquidators have pursued the following litigation against the applicant (and some others):
- An action under case number 14835/2020 in terms of Section 64 of the Close Corporations Act No 69 of 1984 in order to hold the defendants thereto personally liable for the debts of Lifestyle for having run the business thereof fraudulently or recklessly. The amount involved exceeds R 82 million.
 - An application under case number 13174/2020 wherein the liquidators obtained an order against the applicant, directing him as erstwhile BRP of Lifestyle to account for his administration thereof.

- A review application regarding a certain decision taken by a Magistrate who had presided over an insolvency requiry. The applicant features as a respondent in the review application.

3.11 The review application and the action under case number 14835/2020 were at the time of the hearing of this application still pending.

3.12 The application in which the applicant had been ordered to account for the period that Lifestyle was temporary under his control as BRP (Case no13174/2020, had its own history:

- It was served on the applicant on 6 March 2020.
- On 24 March 2020 the applicant delivered his notice to oppose.
- By 4 May 2020 the liquidators set the matter down on the unopposed motion court roll of 14 May 2020 due to the applicant's failure to file his answering affidavit.
- On 12 May 2020, that is two days prior to the hearing of the matter, the applicant belatedly delivered his answering affidavit, thereby causing the matter to become an opposed application.
- On 26 May 2020 the liquidators delivered their replying affidavit.
- On 3 July 2020 the liquidators delivered their Heads of Argument. The applicant failed to deliver any, despite having requested an extension to do so to 24 July 2020.
- On 31 July 2020 the liquidators launched an interlocutory application to compel the applicant to deliver his Heads of Argument.

- On 3 August 2020 the applicant by email withdrew his opposition to the application. This resulted in a costs order against the applicant on the date on which the interlocutory application had been enrolled, being 14 August 2022.
- On 7 September 2020, Raulinga J ordered the applicant to fully account to the liquidators, the applicant's "report" thus far submitted not having carried the day. This much is clear from the transcription of what happened before Raulinga J, who expressed this court's annoyance at the manner in which the applicant had conducted his opposition.

3.13 It is not clear how far the applicant had complied with the order of Mphahlele J of 18 September 2018 as Stokes has not been joined by the applicant in the current matter. This issue has, incidentally been raised as one of fatal non-joinder by the liquidators.

3.14 It is against this background that the applicant's current application must be adjudicated.

[4] The applicant's contentions

4.1 The applicant contends that the litigation against him is a vendetta, an abuse of process and amounts to vexatious litigation.

4.2 The applicant, however, is a forensic auditor and, as a business rescue practitioner, he is an officer of this court. As such, he should be aware of the duties of liquidators and their need for full accounting of the corporation they are to wind up. All the litigation undertaken by the liquidators, having regard to the relief claimed, are aimed at discharging their duties. This can hardly be labelled vexatious.

- 4.3 It must also be beyond contention that an officer of the court, having been in control of the entity and the estate that the liquidators are winding-up, has a duty to co-operate and account for what had happened under his watch.
- 4.4 The contentions raised by the applicant in his founding affidavit are, to say the least, “unique”. He, for example, claims that “*the declaratory relief sought from this Honourable Court is not dependent on any other consequential relief*” and “*should this Honourable Court properly consider the facts and the background, it would not only conclude that there would be a tangible advantage should this Honourable Court grant the declaratory relief sought, but also that it and the specific proceedings would not further burden this Honourable Court*”.
- 4.5 It appears that the applicant, rather than confront the specific applications and actions against him, seeks to have them ended by way of declaratory orders in this, a separate proceeding. In order to consider whether this is at all permissible, I shall briefly refer to the applicable law hereunder, on which the applicant also relies.

[5] The nature of declaratory relief

- 5.1 Section 21(1)(c) of the Superior Courts Act, 10 of 2013, provides that a High Court may grant a declaratory order:

“In its discretion, and at the insistence of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination”.

- 5.2 The correct approach to Section 21(1) (c) of the Superior Courts Act, 10 of 2013 appears from the following summation by Corbett CJ in *Shoba v OC, Temporary Police Camp, Wagendrift Dam and Another, South African Police Murder and Robbery Unit, Pietermaritzburg and Others* 1995 (4) SA 1 (A) at 14F-I in dealing with the similarly worded predecessor of the section, being section 19(1)(a) of the Supreme Court Act 59 of 1959:

“An existing or concrete dispute between persons is not a prerequisite for the exercise by the court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, because the court or refuse to exercise its discretion in a particular case (see Ex Parte Nell 1936 (1) SA 754 (a) at 759H – 760B). But because it is not the function of the court to act as an adviser, it is a requirement of the exercise of its jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (Nell’s case 760B – C). In Nell’s case, supra at 759A – B, Steyn CJ referred with approval to the following statement by Watermeyer JA in Durban City Council v Association of Building Societies 1942 AD 27 at 32, with reference to the identically worded s 102 of the General Law Amended Act 46 of 1935: “the question whether or not an order should be made under this subsection has to be examined in two stages. First, the court must decide whether the case is a proper one for the exercise of discretion conferred on it”.

- 5.3 The Supreme Court of Appeal in *Cordiant Trading CC v Daimler Chrysler Financial Service (Pty) Ltd* 2005 (6) SA 205 (SCA) confirmed the two-stage approach adopted by the then appellant division in *Durban City Council v Association of Building Societies* 1942 AD 27 at 32 and held that:

“The two-stage approach under the subsection consists of the following. During the first leg of the enquiry, the court must be satisfied that the applicant has an interest in an ‘existing, future or contingent right or obligation’. At this stage, the focus is only upon establishing that the necessary conditions precedent for the existence of the court’s discretion exists. If the court is satisfied that the existence of such condition has been provided, it has to exercise discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry”.

- 5.4 In the more recent matter of *Langa v Hlope* 2009 (4) SA 382 (SCA) at paragraph 28, the Supreme Court of Appeal has once again confirmed the position and approach as set out in the matter of *Durban City Council v Association of Building Societies* (above).

[6] Evaluation

- 6.1 It is clear that the “interests” that the applicant has in an “existing, future or contingent right or obligation” in this matter are his rights to participate as a respondent and defendant respectively in the application in case no 13174/2020 (the application for rendering an account launched by the liquidators) and as a defendant in case no 14835/2020 (the action instituted by the liquidators).
- 6.2 The “interests” are therefore in separate litigation in this Court. At the outset, I find it improper that this court be approached in a fresh application with a claim to grant orders which impact on other matters. Put simply, if the applicant wants an order to be made in respect of any relief granted in

case no 13174/2020, then he should seek the relief in that matter. The same applies in respect of the other cases.

6.3 Quite apart from the impropriety referred to above, the applicant alleges that he has complied with the order made against him in case no 13174/2020. Despite the applicant's papers spanning almost 400 pages, very little is said by him in his founding affidavit about compliance with the order of court granted against him in that application, which he calls the "Application launched for the documents". It appears that the liquidators were after more than simply "documents". The applicant concedes that the liquidators sought "an account" from the applicant as to what had occurred in respect of the business of Lifestyle which under his control as BRP. The extent of his compliance, as stated by him, is that "*... all the information which ever was in the possession of the applicant, has been provided to the liquidators on the previous occasion*". The remainder of the applicant's affidavit under this rubric deals with the chronology briefly referred to in paragraph 3.12 above and complaints about costs orders and taxation. I find that, particularly for a forensic auditor, this evidence of alleged compliance with a court order regarding particularity of the discharge of a fiduciary duty by an officer of the court, falls far short of what would be required to make a determination of compliance, had it even been proper to do so in separate proceedings.

6.4 Much the same applies to the alleged compliance with the order for assistance sought by Mr Stokes in the "Hoosen application" in case number 38079/2018. In the event those proceedings were still alive, any compliance or non-compliance issues should be addressed in those proceedings. Apart from this, the relief in respect of that matter cannot even be considered in the absence of the other parties thereto (Hoosen and

Stokes had not been cited as respondents in the applicants' present application, in which he cited a number of respondents against whom no relief is sought, such as the Legal Practice Council, the Companies and Intellectual Property Commission and the Special Investigation Unit.

- 6.5 The second leg of the relief sought by the applicant relates to the pending action in case number 14835/2020. This relief has a number of inherent difficulties. The first is that, if a party seeks a "suspension" of a matter, it should be sought in that matter and not in separate proceedings. The second, more fundamental hurdle, is the absence of a right to "suspend" proceedings. The liquidators are *dominus litis* and have the right (and obligation) to pursue litigation to its finality. It is not open to a co-defendant to "suspend" this, whatever "suspension" may mean in these circumstances. There is no special plea for a stay of the liquidator's claims (such as where there is an agreed arbitration to be completed, which may oust a court's jurisdiction or determine a matter in an agreed fashion). The basis for this relief is the alleged compliance with cases 13174/2020 and 38079/2018, labelled by the applicant as "parallel proceedings". I have already indicated above that there are no factual grounds to grant the relief sought in respect of those cases and, even if compliance had been established (which it has not) then this is not an appropriate case where a court should exercise its discretion to issue declaratory relief in respect of other cases.

[7] Postponement

- 7.1 On the day prior to the hearing of this matter, the applicant delivered an application for postponement, claiming the costs thereof against the liquidators.

- 7.2 The basis for the postponement was that the applicant had laid complaints against the second respondent (Mr Kalianjee) in June 2018 at the Master of this Court, both in Pretoria and in Johannesburg and with the Special Investigating Unit and, in respect of the liquidators' attorneys, with the Legal Practice Council. The applicant, in his complaint and subsequent correspondence with the Master/s insisted that the second respondent be removed as a liquidator.
- 7.3 Based on the above and the allegation that the investigations have not been concluded, the applicant contended that his application must be postponed sine die and for this reason, briefed Adv. Van Rensburg SC the evening before the hearing.
- 7.4 The respondents who took part in the application, principally, the liquidators, had no time to respond to a 65 page application for postponement which, despite the contents thereof having been known to the applicant for many months (if not years), was only delivered at 15h30 on the day prior to the hearing. The liquidators did respond, however, by way of written argument delivered on their behalf.
- 7.5 In the liquidators' Heads of Argument, they pointed out that all the allegations contained in the affidavit delivered in support of the application for postponement, had been known to the applicant at the time when he launched his application and were dealt with him in his founding affidavit as purported justification for the joinder of the Master and those parties or entities to whom he had directed his complaints. Significantly, none of them chose to deliver any affidavit, either in the main application or in support of the application for postponement.

- 7.6 Had the applicant deemed it necessary to postpone his application pending the finalization of the investigations, he failed to explain why he launched the postponement application only at the eleventh hour. In the liquidators' answering affidavit in the main application, delivered as long ago as 17 May 2021, it was pointed out that the investigations, such as they may be, had nothing to do with the merits of the matter.
- 7.7 It is trite that a party seeking a postponement, is thereby seeking an indulgence. The set-down of the main application on the opposed motion court roll of 22 November 2021, had been done as long ago as 11 October 2021. Save for the fact that a hearing in respect of one of the liquidators' attorneys by the Legal Practice Council, set down for 3 December 2021 (that is on a day after the opposed motion court roll on which the main application had been set down) had been postponed, there are no cogent reasons set out in the applicant's aforementioned founding affidavit why his request for an indulgence had been made so belatedly. This is a weighty factor to be considered when a court exercises its discretion as to whether to grant or refuse a postponement. See *inter alia Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS).
- 7.8 I could find no reason why the matter should be postponed. The complaints do no impact on the existing court order against the applicant, nor on his duties as officer of this court. In view of the lack of prospects of success of the main application I was not convinced of the *bona fides* of the application for postponement. See *Lekolwane v Minister of Justice and Constitutional Development* 2007 (3) BCLR 280 (CC) at [17] and *Shilubana v Nwamitwa (National Movement for Rural Women and Commission for Gender Equality as amici curiae)* 2007 (5) SA 620 (CC) at 624 E – F.

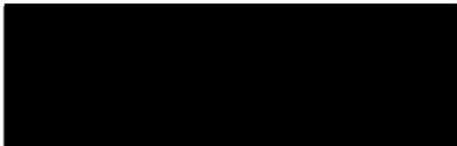
- 7.9 As a consequence and, in the exercise of the court's discretion, the application for postponement was refused. Adv Van Rensburg SC thereupon, informed the Court that he had nothing to add or submit in respect of the merits of the application. In *National Police Service Union and Other's v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1113D the Constitutional Court held that "*ordinarily ... if an application for postponement is to be made on the day of the hearing of a case, the legal representatives ... must appear and be ready to assist the Court both in regard to the application for the postponement itself and, if the application is refused, the consequences that would follow*". A court is entitled to expect senior counsel to be aware of this principle and this court would therefore be justified in assuming that nothing of substance could be advanced in favour of the applicant's main application, hence Adv Van Rensburg SC's reluctance to make submissions.
- 7.10 Even if I were wrong in the aforementioned assumption, the main application, as I have already pointed out, is devoid of merit.
- 7.11 In the circumstances where there is not only a glaring absence of merit but also clearly a persistence in an improper attempt at litigating by way of "parallel proceedings" (to borrow from the applicant's own wording) for declaratory relief adjunct to the actual proceedings from which the relief emanated, such conduct amounts to an abuse of this court's proceedings. This abuse becomes even more serious when it is perpetrated by an officer of this court. To this I must add that the lack of proof of compliance with a court order (being one of the applicant's grounds for his application) means that the applicant is not before the court with clean hands. The fact that he may genuinely harbor a belief in the validity of his complaints about one or more of the liquidators or their attorneys, does not detract from any

of these factors. I was therefore, in the exercise of my discretion, of the view that a punitive costs order was justified. There is no reason why the liquidators, representing an insolvent estate, should be “out of pocket” for any portion of the costs.

[8] Order

It was in the circumstances as set out above that the orders which had been given, had been made. For the sake of clarity and convenience, they are repeated here as follows, even though they were contained in two separate orders on 24 November 2021:

1. The application for postponement is dismissed with costs on the scale as between attorney and client, including those consequent upon the employment of three counsel.
2. The main application is dismissed with costs on the scale as between attorney and client, including those consequent upon the employment of three counsel



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 24 November 2021

Date of order: 24 November 2021

Reasons furnished: 27 May 2022

APPEARANCES:

For Applicant:

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