

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D10954/2023**

In the matter between:

NEDBANK LIMITED

APPLICANT

and

LOCOCO 3 (PROPRIETARY) LIMITED
(Reg. No. 1999/006598/07)

RESPONDENT

Coram: Mossop J

Heard: 20 June 2024

Delivered: 21 June 2024

ORDER

The following order is granted:

1. The application for a postponement of the application is refused with costs, such to include the costs of two counsel, where so employed, on scale C.
2. An identical order is granted in the matters with the following case numbers:

- 2.1 D10914/2023;
- 2.2 D10955/2023;
- 2.3 D10956/2023;
- 2.4 D10957/2023;
- 2.5 D10958/2023;
- 2.6 D10959/2023;
- 2.7 D10960/2023;
- 2.8 D11378/2023; and
- 2.9 D11379/2023.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore decision that is not intended to be a full judgment given the time constraints under which it is prepared.

[2] Nedbank Limited, (the applicant) has brought 10 liquidation applications in which it seeks to liquidate 10 companies forming part of the Leo Chetty Group of Companies. The Public Investment Corporation and the Government Employees Pension Fund (collectively referred to as the intervening creditors) seek leave to intervene in three of those liquidation applications and seek the liquidation of the respondents in those three applications.

[3] All those matters, including certain additional interlocutory applications, were enrolled to be heard before me over the last week of the second term, from 18 June to 21 June 2024 (the reserved period). I point out that the allocation of these matters to me necessitated my duties being completely changed: I was due to return to Pietermaritzburg, my home court, this session but was directed by the Judge President to remain in Durban to deal with these matters. I was also withdrawn from all court duties to allow me time to read the approximately 10 000 pages that comprise all the liquidation applications.

[4] Each respondent in each of the ten liquidation applications brought an application for discovery against the applicant in each of those 10 applications. Each discovery application was opposed by the applicant. One of the discovery applications in the 10 liquidation applications was selected to be argued, and the selected matter happened to involve Lococo 3 (Pty) Ltd (the respondent).

[5] I heard argument on the discovery application on 13 May 2024 and delivered a written judgment on 22 May 2024, dismissing the application. The respondent thereafter delivered a notice of application for leave to appeal that decision. The only available date that Mr Harpur SC and Mr Gevers, who appear for the respondent, had to argue their own application was the first day of the reserved period, despite earlier dates being offered.

[6] Accordingly, on Tuesday, 18 June 2024, being the first day of the reserved period, I heard the application for leave to appeal and I delivered a judgment dismissing the application the next day, being the second day of the reserved period. The respondent made it quite apparent during argument that were I to dismiss the application for leave to appeal it intended to seek leave to appeal from the Supreme Court of Appeal.

[7] The application having been dismissed, the respondent then indicated that it would require a postponement of the matter. Surprisingly, it had not prepared a substantive application for such a postponement at that stage. It must have considered that there were only two likely outcomes of the application for leave to

appeal: it would either be granted or it would be refused. It ought to have, at least, prepared its application for an adjournment in the event of its application for leave to appeal being unsuccessful. But it did not. Instead, it indicated that it required to utilise time set aside in the reserved period to do so. I consequently gave it until 16h00 on the second day of the reserved period to deliver its application. The application for an adjournment was opposed by the applicant and the intervening creditors. They delivered their answering affidavits to the respondent's founding affidavit overnight, an unsigned copy of the applicant's answering affidavit being delivered electronically shortly after 21h00. The respondent did not attempt to prepare its replying affidavit overnight but came to court on Thursday, 20 June 2024, being the third day of the reserved period, and asked for time to reply. It initially asked for the entire third day of the reserved period to do so. I was not prepared to give it that time and agreed to give it two and a quarter hours to do so until 12h00 on the third day of the reserved period. The respondent had no affidavit ready at 12h00 and asked for more time. I gave it until 13h00. I then heard the application for an adjournment on the afternoon of the third day of the reserved period and indicated that I would render my decision on the morning of Friday, 21 June 2024, the fourth day of the reserved period. This is my decision.

[8] From this potted history, it will be discerned that virtually the entire duration of the reserved period has been consumed by issues other than that for which the reserved period was set aside. All this while the applicant and the intervening creditors remain ready to deal with the main applications.

[9] I have considered the authorities on the issue of postponements of which the most notable is the judgment of Mahomed AJA in *Myburgh Transport v Botha t/a SA Truck Bodies*,¹ to which I was directed by Mr Harpur, in which the relevant principles applicable to considerations of postponements are crystallised. I understand that I have a discretion, which I must exercise judicially. That simply means that my decision should not be arrived at 'capriciously but for substantial reasons.'² In *Merber*

¹ *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (Nm).

² *Rex v Zackey* 1945 AD 505 at 513.

v Merber,³ the court referred, with approval, to the English matter of *Ritter v Godfrey*, where the following was said on this issue:

‘The discretion must be judicially exercised and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If however there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial and this Court cannot interfere with his discretion.’⁴

[10] The gravamen of the respondent’s application for an adjournment is that time is needed by it to prepare its application for leave to appeal to the Supreme Court of Appeal concerning my decision to deny it leave to appeal. The fact that this is what the respondent desires to do does not mean that the main proceedings are stayed pending that application.

[11] But sight must not be lost of the fact that the application for discovery was only directed against the applicant and not against the intervening creditors. That, of course, can only mean that the intervening creditors are not impacted upon by the intention to apply for leave to appeal to the Supreme Court of Appeal nor by the application for an adjournment. There can, therefore, be no impediment to the intervening creditor’s application to intervene being heard, and in the event of it being granted, their liquidation application. Mr Harpur appeared to have conceded that this must be so during argument but has attempted to argue that such can only occur subject to certain conditions that he believes should be imposed upon the ability of the intervening creditors to argue their case. I see no need to consider these conditions in this judgment for they have no relevance to the postponement application. They are, in any event, entirely predicated on the applicant not being permitted to argue its liquidation application at the same time. Therefore, insofar as the application for a postponement was intended to include a postponement of the intervening creditors application as well, it must be refused.

[12] The true dispute on the question of a postponement lies between the respondent and the applicant. An application for a postponement is an application for

³ *Merber v Merber* 1948 (1) SA 446 at 452-3.

⁴ *Ritter v Godfrey* (1920) 2.K.B. 47.

an indulgence.⁵ The party seeking the postponement must show good cause. In *Terblanche and others v Offshore Design Co (Pty) Ltd*,⁶ the following was stated by Van Reenen J:

‘In my view, the need to show good cause for a postponement is even more acute, where as in the instant case, an unpaid creditor, in the absence of opposition on the part of other creditors, is entitled to seek an order of winding-up *ex debite justitiae* because he or she has brought him- or herself within the winding-up provisions of the Companies Act and accordingly is justified in refusing to allow a respondent any further indulgences.’

[13] The factors alluded to the by the learned judge in the just mentioned extract apply to the facts of this matter. The applicant brings a claim in accordance with the winding-up provisions of the Companies Act and there is no opposition to it doing so on the part of the other creditors of the respondent. On the contrary, it has freely been mentioned that there are other creditors waiting to liquidate the respondent and other companies within the Leo Chetty Group of Companies.

[14] It is important to bear in mind that the liquidation application was presented to this court by the applicant as an urgent application on 2 October 2023. Some eight months later, the applicant has not been able to argue its application. My view is that liquidation applications are inherently urgent, a view that is clearly expressed in my judgment refusing leave to appeal. In that judgment, I made reference to the judgment of Unterhalter AJA in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others*,⁷ in which the learned judge decried the occurrence of piecemeal appeals being brought to the appeal court which had the effect of delaying the resolution of the main issues before the lower court.⁸ I subscribe to those views. This is even more apposite in liquidation applications.

⁵ *Terblanche and others v Offshore Design Co (Pty) Ltd* 2001 (1) SA 824 (C) 827.

⁶ *Infra* page 828; See also *E Sacks Futeran and Co (Pty) Ltd v Linorama (Pty) Ltd; Ex Parte Linorama (Pty) Ltd* 1985 (4) SA 686 (C) at 687E-F; *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others* 1993 (4) SA 436 (C) at 440J-441A.

⁷ *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others* [2023] ZASCA 63.

⁸ *Infra* para 21.

[15] The contentious issue is the issue of discovery. It is not a common feature of our legal system where it comes to application proceedings. It only occurs in exceptional circumstances and I found none to exist in this application. In the view that I take of the matter, the request for discovery has all the hallmarks of a fishing expedition. It is general, vague and non-specific. The respondent wants disclosure of anything that establishes an oral agreement that it relies upon, this notwithstanding that the loan agreement that governs the arrangement between the applicant and the respondent does not permit oral variations. That the underlying loan agreement was varied in the past brooks of no doubt: it was varied on seven occasions, but each time that was done in writing. The respondent itself has not a single shred of writing establishing the eighth variation, upon which it relies. It seems to me in those circumstances it is unlikely that another court will come to a different decision than that to which I came. The contemplated application to the Supreme Court of Appeal does not, in my view, have much to commend itself.

[16] I am fortified in that view by the fact that these are liquidation proceedings, which themselves are unique. They are applications which require urgent attention and consideration and are not intended to be drawn out. Mr Rood SC pointed out the difficulties that arise when there is an excessive delay between the date of delivery of the application and the date upon which an order of provisional liquidation is granted. The longer the delay, the greater the difficulties for the liquidators who take control of the liquidated entity. I must not be understood to mean thereby that a liquidation order is inevitable in this matter. It is not. But it is a consideration that I must weigh up when exercising my discretion.

[17] The respondent claims that it will be prejudiced if its application for a postponement is refused. That prejudice consists, primarily, in the respondent being placed in provisional liquidation. If that occurs, and it is by no means certain that it will, then, as Mr Rood correctly submitted in argument, it is likely that there will be some prejudice to the respondent. But as he also submitted, there is a mechanism in place in s 354 of the Companies Act 61 of 1973 that would allow the respondent to extract itself from provisional liquidation if it succeeds before the Supreme Court of Appeal. Mr Harpur claimed that this is a time consuming and onerous provision which will only serve to increase the prejudice that the respondent will suffer if the

Supreme Court of Appeal ultimately agrees that discovery should have occurred. I do not agree that there is the risk at this stage of any actual prejudice. Firstly, there is the hurdle of acquiring the leave of the Supreme Court of Appeal to seek leave to appeal my decision. That is not merely there for the asking. However, assuming that is granted, and it may not be, there is the task of persuading the Supreme Court of Appeal that I was wrong. I have already expressed a view on this. There is then the need to hear argument on the liquidation applications. In the interim, there is no obvious reason why the respondent cannot prepare its application to the Supreme Court of Appeal.

[18] After consideration, I am not persuaded that good cause has been shown for the postponement. The present prejudice being experienced is no less relevant than the potential prejudice that the respondent contends it will suffer in the future. I accordingly exercise my discretion against granting the application for a postponement. In the circumstances, I make the following order:

1. The application for a postponement of the application is refused with costs, such to include the costs of two counsel, where so employed, on scale C.
2. An identical order is granted in the matters with the following case numbers:
 - 2.1 D10914/2023;
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2.9 D11379/2023.

MOSSOP J

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