



**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 18392/2024

In the matter between:

**TUSK FINANCIAL SERVICES (PTY) LTD
REGISTRATION NUMBER: 2022/798842/07**

First Applicant

**TUSK CONSTRUCTION SUPPORT SERVICES
REGISTRATION NUMBER: 1999/001303/07**

Second Applicant

And

**87 CIVIL (PTY) LTD
REGISTRATION NUMBER: 2015/208610/07**

Respondent

Heard: 07 October 2024

Delivered: Electronically on 16 October 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This is an application for the provisional liquidation of the respondent. The applicants seek an order that the respondent be placed under provisional liquidation in the hands of the Master of the High Court of South Africa. The applicants also seek an order that a rule nisi be issued calling upon the respondent or any other interested party to show cause to this Court on a date to be determined by the registrar why a final liquidation order should not be granted against the respondent and why the costs of this application should not be costs in the liquidation of the respondent.

[2] The applicant's application is based on a loan agreement, as well as goods supplied, and services rendered by the applicant at the special instance and request of the respondent. The applicants assert that the respondent is indebted to them in the total sum of R4 09 4637,24. According to section 345 of the Companies Act 61 of 1973 (*the Companies Act 1973*), the applicants sent the respondent a statutory demand on 18 July 2024, demanding immediate payment of R4 094 637,24. This amount is for breach of the loan agreement and for goods supplied and services rendered by the applicant to the respondent at the latter's special instance and request. However, despite the demand, no payment was made.

[3] Given the respondent's failure to meet its obligations under the various agreements with the applicants and to respond to the applicant's statutory demand to rehabilitate accounts and to settle the full outstanding balance owing, the applicants contended that the respondent is unable to pay its debts in the ordinary course of business as contemplated in section 344 read with section 345 of the Companies Act 1973.

[4] In addition, the applicants asserted that the failure by the respondent to meet its financial obligations under the various agreements and the failure to pay its debts when it fell due renders the respondent insolvent. According to the applicants, the respondent remains indebted to the applicants and is deemed to be unable to pay its debts as envisaged in section 344(f) of the Companies Act 1973. The applicants asserted that there had been proper service on all parties in compliance with section 346(4A) of the Companies Act 1973.

[5] The applicant issued this application and complied with the statutory requirements set out in section 346 of the Companies Act 1973. To this end, the applicant served the Notice of Motion together with the founding affidavit and annexures thereto upon the respondent at the respondent's registered address, to a registered trade union - the Amalgamated Union of Building Trade Workers of South Africa, to the employees of the respondent, to the Master of the High Court and to the South African Revenue Services in compliance with section 346 of the Companies Act 1973. The applicant also filed the necessary service affidavit in terms of section 346(4A)(b) of the Companies Act 1973 specifying how service was effected as envisaged in section 346(4A)(a) of the Act.

[6] The Master of the High Court certified in his report that the copy of the applicants' petition with annexures had been lodged with his office as required by section 346(4)(a) of the Companies Act 1973 read with section 66(1) of the Close Corporation Act 1984. In addition, the Master certified that in terms of section 9(3)(b) of the Insolvency Act 24 of 1936, due security had been found for payment of all fees and charges necessary for the prosecution of all winding up proceedings and of all costs of administering the company in liquidation until a Liquidator has been appointed and if no liquidator is appointed, of all fees and charges necessary for the discharge of the company from winding-up.

Principal Submissions by the parties

[7] At the hearing of this application for a provisional order, the respondent's Counsel, Mr Nothling, applied for the postponement of the application and handed a notice to oppose supported by an affidavit from the respondent's attorney. Mr Nothling argued that the directors of the respondent did not receive the application and only became aware of it on Friday afternoon, 4 October 2024. They discovered that the application had been slated for a hearing on Monday, 7 October 2024. Counsel contended that the service of the application and the statutory demand at the respondent's designated address did not guarantee effective service.

[8] According to Mr Nothling, the fact that the application was served on the respondent's registered address does not mean that service was given. In developing this argument, Counsel contended that this does not mean that the service was not in compliance with the rules of court. However, he contended that the application did not come to the attention of the respondent. Mr Nothling further submitted that the directors of the respondent were unaware that the matter was on a roll, and they only became aware on Friday, the 4 October 2024, in the afternoon around 15h00. They did not know who the legal representatives of the applicant were. To this end, Counsel pleaded with the court on behalf of the respondent to postpone the matter so that the respondent could investigate the matter, take legal advice and act accordingly.

[9] On the other hand, Mr. Coston, the applicant's counsel, objected to the respondent's application for postponement and urged the court to grant the provisional order as stipulated in the Notice of Motion. Mr Coston submitted that the applicant complied with the requirements of the Companies Act 1973. Counsel further submitted that the statutory letter of demand and the application were served at the respondent's registered address. Furthermore, Mr Coston contended that when the various agreements were executed between the applicants and the respondent, the respondent designated 5 Fynbos, Welgevonden Estate Stellenbosch, as its *domicilium* address. The letter of demand and the application were sent to this address. Counsel implored the court to dismiss the postponement application and to grant the provisional order against the respondent.

Applicable Legal Principles in Postponement Applications

[10] The legal principles applicable to an application for the grant of a postponement by the court are well established in our law and need not be rehashed in detail in this judgment. The postponement of a matter set down for hearing on a particular date cannot be claimed as of right.¹ A party seeking a postponement must proffer good and strong reasons and must give full and satisfactory explanation of

¹ *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC) at para 4.

the circumstances that give rise to the application.² The postponement application itself must be *bona fide* and must not be used as a tactical endeavour to obtain an advantage to which the applicant is not entitled.³ The factors to be considered include whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.⁴

[11] A standard way to mitigate prejudice to other parties is for the party asking for the court's indulgence to postpone a hearing - particularly one requested at the last minute - to offer, or to be ordered, to pay the costs of the postponement. In *Psychological Society of South Africa v Qwelane and Others*,⁵ the Constitutional Court stated:

“In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.”

Discussion

[12] In this matter, the sheriff served the application on 26 August 2024 upon the respondent at its registered address. The Sheriff executed service by affixing a copy thereof to the outer principal door at the property. The sheriff noted in his return of service that no other service was possible after he conducted a diligent search. The demand was also served at the registered address of the respondent which is also its *domicilium* address. The applicant seeks a postponement of this matter on the

² *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amicus Curiae)* 2007 (5) SA 620 (CC) at 624B-C.

³ *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315E.

⁴ *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) at para 10.

⁵ 2017 (8) BCLA 1039 (CC) para 31.

basis that it only became aware of the notice of this application on Friday, and they did not know the attorneys for the applicant.

[13] In my view, the explanation proffered by the respondent is very much flimsy and deficient. If, indeed, on Friday, 4 October 2024, the respondent expressed a desire to ascertain the identity of the applicant's legal representative for the purpose of discussing a remand, it would have been feasible for them to directly contact the court registrar to obtain this information from the court file. I also find it peculiar in the postponement application that the respondent's directors, who claimed to have incidentally learned of this application on Friday, did not submit an affidavit to substantiate this assertion or to elucidate why the liquidation application eluded their attention despite the application being served at the registered and *domicilium* address designated by the respondent.

[14] The respondent submitted a notice to oppose and an affidavit from its legal representative requesting a remand of this matter. In the affidavit, the respondent did not refute its indebtedness to the applicant. It is my perspective that the circumstances would have been different had the respondent explicitly declared in the remand application that it did not owe the applicants any money. In his submission, Mr. Nothling apprised the court that the respondent had vacated its registered address and failed to update its records with the Companies and Intellectual Property Commission. (*'CIPC'*).

[15] I must emphasise that section 23(3) of the Companies Act 71 of 2008 (*'Companies Act 2008'*) requires every company to have a registered office as indicated in its Notice of Incorporation. This address, as registered, is the place where the company may be found and the place where it conducts its business, a place where court processes may be served. The registered office of the company has the same purpose as the *domicilium citandi et executandi*. By registering an office or a principal office in accordance with the provisions of section 23(3), the company clearly indicates its location for any purposes or where legal processes can be served.

[16] If it subsequently changes the registered office, it must file a notice of change of registered office together with the prescribed fee in terms of section 23(3)(b)(ii) of the Companies Act 2008. Until there has been registration by the commission of an office as its registered office, a company has no registered office.⁶ Regulation 21 of the Companies Act provides that a company must notify the CIPC of a change in its registered address, indicating the effective date of the change which must be at least five business days after the date on which the notice is filed.

[17] In the present matter, the liquidation application was served upon the respondent at its registered address in terms of Rule 4(1)(a)(v) of the Uniform Rules. The respondent also chose its registered address as its *domicilium* address. In terms of rule 4(1)(a)(v) of the Uniform Rules, service of process on a company may be effected at the registered address or its principal place of business within the court's jurisdiction by delivering a copy to a responsible employee thereof at its registered office or if there is no such employee willing to accept service, by affixing a copy to the main door of such office or place of business or in any manner provided by law.

[18] The respondent's reason for requesting a postponement is that the application did not come to the directors' attention. In my view, this reason does not bear scrutiny. The respondent's directors should have informed the court and explained why they were not aware of this application. Furthermore, to the extent that a notice to oppose had been submitted, it was incumbent upon the respondent to provide a detailed explanation regarding the existence of any outstanding debts owed to the applicants. The proposition that the applicant has changed its registered address and left the *domicilium* address was only raised from the bar by the respondent's Counsel. There is nothing before this Court indicating that, indeed, the respondent has changed its *domicilium* address.

[19] In my view, the applicant complied with the rules and the relevant statutory requirements. At the risk of repeating myself, by choosing a registered address or *domicilium*, the respondent assured the public that any service of legal process will only be valid if served at the company's registered office. By choosing a registered

⁶ *BP & JM Investment (Pty) Ltd v Hardroad (Pty) Ltd* 1978 (2) SA 481 (T) at 485.

address or *domicilium*, the respondent guaranteed that in the event of it changing its registered office, it will notify the public by filing proper notice as required in section 23(3)(b)(ii) of the Companies Act 2008. The respondent is also aware that when the public wishes to know where it is situated it will find the information at the CIPC.⁷

[20] Mr Nothling argued that the service effected was not effective in the sense that the application did not come to the respondent's attention. From the Sheriff's return of service, the application for the provisional liquidation of the respondent was served by affixing a copy thereof to the outer or principal door at the registered address of the respondents. It is trite that if a *domicilium citandi* has been chosen, service there will be good even though the defendant is known not to live there.⁸ However, the manner of service at the *domicilium* address must be effective. It must be such that the process served at that address would, in the ordinary course, come to the attention of and be received by the intended recipient.

[21] In my view, the service of the application by affixing on the door of the principal place of the respondent company would in the ordinary course come to the attention of the respondent. The respondent did not explain why this application did not come to their attention. The allegation that they have left their given address appears to be an opportunistic claim. The applicant could not have served this application to any address other than the one the respondent chose when the various agreements were concluded. The respondent did not provide a valid and sufficient reason for the postponement of this application.

[22] Given all these considerations, I am of the view that the respondent's application for postponement must be refused. Furthermore, the applicant's application is for a provisional liquidation of the respondent. If the respondent intends to oppose the confirmation of the provisional liquidation, it can still do so on the return date of the rule nisi.

Order

⁷ *Southernera Diamonds Incorporated v San Contracting Services* CC 2014 JDR 1731 (GP) at para 15; See also *Mfwethu Investment v Citiq* 2020 (6) SA 578 (WCC) at para 21 and 23.

⁸ *Amcoal Collieries Ltd v Truter* [1990] 1 All 248 (A).

[23] In the result, the following order is granted:

[24] The respondent is placed under provisional liquidation in the hands of the Master of the High Court of South Africa.

[25] A rule nisi is issued calling upon the respondent or any other interested parties, to show cause, if any, to this Court on 21 November 2024, at 10h00, as to why:

25.1 Final liquidation order should not be granted against the respondent,

25.2 The costs of this application should not be costs in the liquidation of the respondent.

[26] It is ordered that the service of this order shall be affected by the sheriff, or his lawful deputy as follows:

26.1 On the respondent at its registered address and principal place of business situated at Fynboss 5, Welgevonden, Stellenbosch, Western Cape.

26.2 On the employees of the respondent and or any trade unions to which the employees might be affiliated with, if any, at the respondent's registered address and principal place of business as set out above by affixing a copy of this order to any notice board to which the employees may have access inside the premises or by affixing a copy thereof to the front door of the premises.

26.3 On the offices of the South African Revenue Services in (Receiver of revenue) at 17 Lower Long Street, Cape Town City Centre, Cape Town.

26.4 By one publication in each Cape Times and Die Burger newspaper.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants: Adv. Coston
Instructed by: Dunster Attorneys
 42 Keerom Street
 Cape Town

For the Respondent: Adv. Nothling
Instructed by: NSW Attorneys
 Constantia