

REPUBLIC OF SOUTH AFRICA



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

Case Number: 051018/24

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
5/2/2025	
DATE	SIGNATURE

In the matter between:

KANIVEST 3146 CC (REGISTRATION NO: 2000/039077/23)

First Applicant

KOOP DE VRIES STYGER

Second Applicant

And

PETATYPE (PTY) LTD (REGISTRATION NO: 2021/469203/07)

Respondent

JUDGMENT – LEAVE TO APPEAL

MAHOMED J

- [1] This is an application for leave to appeal an order I granted for provisional liquidation. The matter was on my unopposed roll on 3 December 2024. The Respondent applied for a postponement of the matter, no substantive application was before me, the application was opposed. I dismissed the application and granted the provisional order.

- [2] Counsel for the Applicant Advocate Louw submitted that the matter was properly before me on the unopposed roll, both the motion papers and set down were served on the Respondent and no answering papers were filed. Furthermore, counsel contended that the claim was for a liquidated amount, being costs awarded to the Applicant in previous litigation, one was awarded 3 years ago. The Respondent paid some of the costs awarded others remain unpaid.
- [3] The evidence is that the Respondent filed a Notice of Appeal, against a finding and leave was granted in 2021 but it did nothing thereafter, the appeal lapsed and in 2022, the Applicant in that instance was again awarded costs, about two years ago. In 2024 the Applicant demanded payment, they were ignored, and in May 2024 it launched this application before me for an order for provisional liquidation. Advocate Louw for the applicant confirmed that the papers were served, the Respondent filed a notice to oppose, but no answering papers were filed. A notice of set down was served. A further attempt to delay the finalisation of this matter, an no version by the respondent, for either the applicant or this court to work with. Mr Louw contended that in August 2024, the respondent issued a summons and in August filed a stay application to this matter.
- [4] Mr. Louw argued that the Respondent failed to satisfy the requirements for a postponement. The application for postponement is made only days before the hearing there is no explanation as to why the application for a postponement could not have been filed much earlier. It was argued that the application for the postponement is again a tactic to buy more time and delay the finalisation of the matter.
- [5] The Respondent applied for a postponement, pending the outcome of the action proceedings. I noted that it was not a postponement to file its answering papers to the application before me. Moreover, I noted in its papers it is alleged that it is not insolvent, however, the debt remained unpaid. In *Epstein v Epstein*¹, it was held that a Court has the discretion to grant or refuse the order. In *Fedco v Meyer*², the Court held that actual proof of solvency was payment of the debt. At the hearing of the application counsel was unable to provide an explanation for

¹ 1987 (4) DS 606 (C)

² 1988 (4) SA 207 ECD at 212 F-H

the Respondents failure to apply for the postponement much earlier. It was not disputed that the Respondent had sufficient time from the date of service of the application, after it filed its notice to defend, several months ago. Mr. Louw submitted that the Respondents have not met the first requirement for a postponement, in addressing the time delay.

- [6] I noted that there are no facts before this Court which demonstrated the Respondent's bona fides in bringing this application for postponement. No proper reasons are before this Court, and given the congested court roll, if the matter is postponed pending the outcome of the trial, the Respondent would have gained a further two to four years. Effectively there is the danger to the unsuspecting public, as it continues to operate in insolvent circumstances.
- [7] It was not disputed that the set down of both the application and the date on the unopposed roll was served. The Respondent's counsel Advocate Du Plessis, submitted that there was a stay application and that the matter must be postponed pending the outcome of that application.
- [8] Mr. Louw argued that this was another tactic brought late in the proceedings to obstruct the Applicants, he submitted that there was no nexus between the action and the liquidation application. Mr. Louw reminded me that the dispute between the parties commenced back in 2014 regarding the ownership of certain parking bays in a complex development.

JUDGMENT

- [9] I was satisfied that the matter was properly before me on the unopposed roll, I dismissed the application for a postponement, there was no substantive application before me. The practise is established and known that there must be a substantive application for postponement of a matter. Counsel for the Respondent, proffered that he was instructed only to apply for a postponement of the application for provisional liquidation, on grounds that there was a stay application pending, he could not take the matter further. I noted Mr. Louw's submissions that there is no nexus between the action proceedings, for constitutional damages and the application before me. In *London Estates (Pty)*

*Ltd v Nair*³ the court stated that in provisional liquidation there needs to be only a prima facie proof of facts. I noted Mr. Louw's submission that where a claim is based on a liquid debt, there is a presumption of insolvency in this instance. The claim is for payment of costs awarded in earlier litigation and as taxed by the taxing master.

- [10] The Respondent in its grounds of appeal stated that the order I granted was invalid in that I addressed the stay application, which is pending and that it was not before me. Furthermore, it was submitted that I overlooked the fact that the Applicant's security was stale, it was paid after the dies permitted in the Companies Act, and this itself precluded the Court from granting this order for provisional liquidation. Another ground for appeal was that the Respondent was denied its constitutional right to a fair hearing. The Respondent's failure to raise those defences earlier, all within its knowledge begs the question, why it failed to file answering papers timeously, or at all, where it could have presented the several defences it now raises in this leave application.
- [11] I gained the impression that the application for a postponement was an attempt to buy more time, there was nothing of substance before this Court to grant the application.
- [12] Based on the facts before me, I am not persuaded that the Applicant's leave to appeal satisfies the requirements for a leave to appeal as set out in s17(1)(a)⁴, where an Applicant must demonstrate it has probabilities of success to a certainty, not just some chance. In *MEC for Health, Eastern Cape v Mkhitha and Another*⁵, it was held:

"Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there are reasonable prospects of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the Judge concerned is of the opinion that the appeal

³ 1957 (3) SA 591 N at 593

⁴ Act 10 of 2013

⁵ [2016]ZASCA 176 (25 November 2016)

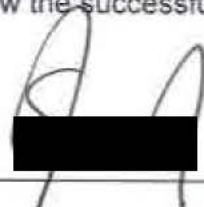
would have a reasonable prospect of success, or there is some compelling reason why it should be heard."

" An Applicant for leave to appeal must convince a Court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case, or one that is not hopeless is not good enough. There must be sound rational basis to conclude that there is a reasonable prospect of success on appeal."

- [13] The debt was due and payable years ago, it is a liquid debt, there is no chance of any further debate on liability. Mr. Louw's submissions that there was no nexus between the action proceedings and the application for provisional liquidation remained unchallenged. The stay application is in my view having considered the history and behaviour of the respondents another attempt to delay the finalisation of the matter. Advocate du Plessis's submissions that the court is denying the Respondent its constitutional right to a hearing, is rejected, blame must lie at the door of the Respondent or its legal representatives.
- [14] I am of the view that the points/grounds raised in the notice of appeal were known and could have been raised in opposing papers, or in a substantive application for a postponement. There is no other compelling reason for the appeal to be heard.

Order

- [15] Accordingly, the application for leave to appeal is refused. I found no reason to deviate from the general rule that costs must follow the successful party.


MAHOMED J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Mr. M. Louw
instructed by Jaco Roos Inc Attorneys

For the Respondent: Mr. J. C. Viljoen
Instructed by Jacques Classen Inc Attorneys

Date of hearing: 24 January 2025

Date of Judgment: 05 February 2025