IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

1.	REPORTABLE: YES / NO
2.	OF INTEREST TO OTHER JUDGES: YES/NO
3.	REVISED. ✓

....11/12/2025 .. [redacted]
DATE SIGNATURE

CASE NO: 2025-011279

In the matter between:

SIGMA KP HOLDINGS (PTY) LTD Applicant/Respondent

and

ALPHA UPGRADE (PTY) LTD Respondent/Applicant

Summary:

[1] Company – legal representation – neither a director nor a business development manager can represent company in legal proceedings in Court – company needs to be represented in legal proceedings in Court by legal practitioner with right of audience

[2] Postponement – application for by respondent in application for its liquidation – ground for application to await outcome of referral to arbitration of validity of acknowledgment of debt and amount of claim – neither of the two issues referred to arbitration an obstacle to liquidation of respondent on the papers as they stand – referral to the arbitration therefore not a ground for postponement of application

[3] Practice and procedure – referral to arbitration during legal proceedings – proper approach to apply for stay of proceedings pending outcome of arbitration – recognition of right to do so without having raised it in answering affidavits and without prior notice

[4] Arbitration – referral to – liquidation affects status of company – section 2(b) of the Arbitration Act 42 of 1965 excludes from arbitration any matter relating to status – proof of claim and validity of underlying contract in application for liquidation matters relating to status of respondent company which are excluded from arbitration

In an application for liquidation, a director and a business development manager of the respondent company sought to represent the respondent in the liquidation proceedings in Court. They were advised by the Court that a company needs to be represented in Court by a legal practitioner with right of audience. Upon their request, the matter stood down for them to arrange for a legal practitioner with right of audience to represent the respondent company.

Upon the recall of the matter, an advocate appearing for the respondent company notified the Court that the respondent was launching a substantive written application for postponement of the application for liquidation pending the outcome of a referral to arbitration by the respondent of the validity of the acknowledgment of debt which was the causa for the applicant's claim and of the amount of the claim itself. Held, a respondent has the right to do so even without having raised it in answering affidavits and without prior notice. Hed further, a stay of the proceedings pending the outcome of the arbitration is the appropriate order that should have been sought by the respondent. Held further, the Court was entitled to have regard to the matter as if it was *correctly launched as an application for a stay of the proceedings pending the outcome of the arbitration and to dispose of the matter from that vantage point.*

On the two issues referred to arbitration, namely [1] the validity of the acknowledgment of debt due to alleged inducement by economic duress and [2] the validity of the applicant's claim due to unlawfully imposed interest, [1] the acknowledgment of debt, although having novated the amount of the claim and the terms of repayment in the original loan agreement, in its terms specifically preserved the validity of the original loan agreement inter alia as security for the acknowledgment of debt, thereby neutralizing the contention of a potential absence of a valid causa for the applicant's claim emerging from the arbitration if the acknowledgment of debt was ruled to be unenforceable due to the economic duress, and [2] the referral of the amount of the applicant's claim to arbitration was focussed on interest leaving the balance of the capital outstanding of R 516 000.00 untouched by the referral to arbitration, which was sufficient to prove an unpaid claim of at least more than R 100.00 to ground the application for liquidation. Held accordingly, the issues referred to arbitration were not obstacles to the granting of the liquidation on the papers as they stand resulting in the failure of an application for a stay of the proceedings pending the outcome of the arbitration and no good cause for the application for postponement.

The application for postponement refused.

JUDGMENT

KATZEW AJ:

[1] This is an application by Sigma KP Holdings (Pty) Ltd (hereinafter referred to as *"Sigma"*) for a postponement of the application for its liquidation by

Alpha Upgrade (Pty) Ltd (hereinafter referred to as *"Alpha Upgrade"*).

[2] *Alpha Upgrade's* application for liquidation first came before me at 10h00 on Wednesday, 5 December 2025 in the Insolvency Court. Mr R De Leeuw appeared on behalf of *Alpha Upgrade* but there was no formally appointed legal representative on behalf of *Sigma*. A notice of withdrawal of *Sigma's* attorney had been uploaded onto CaseLines on 27 November 2025. The notice of withdrawal as attorney of record was accompanied by a letter from the attorney to *Alpha Upgrade's* attorney stating that its withdrawal was due to non-payment of fees.

[3] When the matter was called, two persons moved from the Gallery into the Well of the Court and identified themselves as Kedibone Moja, a Director of *Sigma*, and Reabetswe Kgoroeadira, a Business Development Manager of *Sigma*. They both sought the right to represent *Sigma* in the proceedings.

[4] I pointed out to Mr Moja and Ms Kgoroeadira that there is a common law rule in South African law that a company can only be represented in legal proceedings by a legal practitioner with right of audience in the Court.

[5] They requested that I stand the matter down to Friday, 5 December 2025 to enable them to arrange for a legal practitioner with right of audience to represent *Sigma*. I responded that I was prepared to stand the matter down to 14h00 on Thursday, 4 December 2025, which I did.

[6] When the matter was called on 4 December 2025, Ms R Blumenthal, a practising Advocate at the Johannesburg Bar, appeared on behalf of *Sigma* and indicated to the Court that *Sigma* is applying for a postponement of the application pursuant to a **Respondent's Application for Postponement** supported by an affidavit deposed to by Kedibone Moja.

[7] The primary relief sought by *Sigma* in the postponement application is that the application for liquidation be postponed pending the outcome of a referral to the Arbitration Foundation of South Africa of a dispute resolution process provided for in an Acknowledgment of Debt by *Sigma* to *Alpha Upgrade* that forms part of the application for liquidation.

[8] Mr De Leeuw on behalf of *Alpha Upgrade* indicated to the Court that *Alpha Upgrade* opposes the application for a postponement and intends doing so in argument based on the papers in the application for a postponement and in the application for liquidation. The only additional papers he sought leave to hand to the Court in support of *Alpha Upgrade's* opposition to the application for a postponement was an **APPLICANT'S [*ALPHA UPGRADE'S*] SUPPLEMENTARY HEADS OF ARGUMENT: MISPLACED RELIANCE ON THE BADENHORST PRINCIPLE** wrongly dated 2 September 2025.

[9] I accordingly called on Ms Blumenthal to address the Court on the application for a postponement, which she did by relying on the notice of application for postponement and the contents of the supporting affidavit together with references to the competing papers in the application for liquidation.

[10] There are essentially two grounds for the application for a postponement summarised in the supporting affidavit as follows:

[10.1] To enable the proper invocation and completion of the contractual dispute-resolution process contained in clause 9.1 of the Acknowledgment of Debt.

[10.2] To enable *Sigma* to properly prepare for the application for its liquidation, which it was denied through a combination of factors including the conduct of its former attorneys in failing to notify it of the set-down and in failing to advise it of the implications of the dispute-resolution clause in the Acknowledgment of Debt and that the enforceability of the Acknowledgment of Debt was a contractual dispute requiring invocation of the mediation and arbitration proceedings.

[11] The deponent to the supporting affidavit further discloses that coupled with these two grounds were ongoing settlement negotiations which created the reasonable belief by *Sigma* that the matter was not proceeding.

[12] The arbitration clause in question is couched in the following terms in the Acknowledgment of Debt:

"9. <u>DISPUTE RESOLUTION</u>

9.1 Any dispute, controversy, or claim arising out of or relating to this Agreement shall be resolved through good faith negotiations between the parties. If the parties are unable to resolve the dispute amicably within 10 (ten) days, the dispute shall be referred to mediation in accordance with the Rules of the Arbitration Foundation of Southern Africa ("AFSA") and the parties will attempt to settle the dispute by mediation. Should mediation fail, the dispute shall be finally resolved by arbitration in accordance with the Rules of AFSA."

[13] A general right to rely on an arbitration clause without having raised it in answering affidavits on the merits and without prior notice was recognised by De Wet, J.P. in *Elebelle (Pty) Ltd v Szynkarski,* [1] as follows at 593D-F:

"Lengthy answering affidavits were filed dealing with the merits of the application, but when the matter was called Mr Nathan, who appeared for

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[1] 1966 (1) SA 592 (W).

the respondent, applied for the stay of the proceedings because of the arbitration clause ... No formal notice had been given to the applicant that this point would be taken, but it is conceded that an objection amounting to a plea in bar can be taken at this late stage. (See The Rhodesian Railways Ltd. v Mackintosh, 1932 A.D. 359). It is conceded that para. 6(1) of the new Arbitration Act, 42 of 1965, is similar to the provisions considered in the case mentioned, and that no change has been effected in the legal position."

[14] An identical situation arose in *Lancaster v Wallace, N.O.*, [2] where Margo, J. is reported as follows at 845A:

"On behalf of the respondent an application has been made in limine for the dismissal of the applicant's claims on the ground that the present dispute is subject to a general reference to arbitration under an arbitration clause embodied in the contract. It is clear that what is in fact sought is a stay of the proceedings under sec. 6 of the Arbitration Act, 42 of 1965."

[15] From a procedural point of view, it emerges from these authorities that the proper course for *Sigma* to have followed was to have applied for a stay of the liquidation proceedings pending the outcome of the referral of the contractual dispute in the application to arbitration.

[16] I will accordingly assume in favour of *Sigma* that that is the application before the Court, and I will approach the question of the competency of the application from that vantage point.

[17] It is common cause on the competing papers in the liquidation application that *Alpha Upgrade* loaned *Sigma* R 2 691 000,00 in terms of the original Purchase Order Vendor Funding Agreement, of which *Sigma* has repaid R 2 175 000,00, leaving a balance of R 516 000.00 due, owing and

[2] 1975 (1) SA 844 (W).

payable by *Sigma* to *Alpha Upgrade* against the capital of the loan, apart from interest. This much was conceded by Ms Blumenthal in argument.

[18] The controversy raised by *Sigma* in its Answering Affidavit to the application for liquidation and in its application for a postponement relates to the interest component to the Acknowledgment of Debt which followed the Purchase Order Vending Funding Agreement and to the enforceability of the Acknowledgment of Debt due to alleged economic duress exerted on *Sigma* by *Alpha Upgrade* to agree to the amount of the indebtedness in the Acknowledgment of Debt.

[19] The balance of R 516 000.00 left due, owing and payable between the loan capital advanced by *Alpha Upgrade* to *Sigma* and the payments by *Sigma* against the capital is untouched by this controversy, which leaves *Sigma* with an admission of liability to *Alpha Upgrade* in the sum of R 516 000,00 in the application for liquidation, which *Sigma* has failed to pay.

[20] There is therefore no dispute in the application for liquidation of an existing claim of at least R 100,00 which is due, owing and payable but nevertheless unpaid to support the application for liquidation. The following extract from the judgment of Malan J in *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd,* [3] is instructive in this regard:

"If the respondent admits a debt over R 100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts."

[21] *A fortiori* there is no dispute in the application for liquidation requiring any

[3] 2003 (5) SA 414 (W) at 428B.

form of alternative dispute resolution obstructing the resolution of the application for liquidation on the papers as they stand.

[22] There was a suggestion in argument by Ms Blumenthal that any claim in the application for liquidation requires a valid cause of action which will not exist if the Acknowledgment of Debt is found to be invalid once the dispute resolution procedure in the Acknowledgment of Debt has taken its course.

[23] This suggestion is neutralized by the following provision in the Acknowledgment of Debt:

> *"3. <u>BREACH</u>*
>
> *3.1 ...*
>
> *3.2 In the event that* [Sigma] *fails to perform in accordance with the terms and conditions set forth in this Acknowledgment of Debt (AOD), all previously signed agreements, including but not limited to any personal sureties provided by* [Sigma] *shall remain in full force and effect and shall be binding on the Parties. The failure of* [Sigma] *to adhere to the terms of this AOD shall not nullify or affect the validity of any such agreements or sureties,* and [Alpha Upgrade] *shall retain all rights and remedies available under those agreements and sureties. Furthermore,* [Sigma] *acknowledges that such agreements and sureties are provided as security for the due performance of its obligations under this AOD."*

[24] Finally, the application for liquidation concerns the status of *Sigma*. The issue of its indebtedness to *Alpha Upgrade* in the liquidation application therefore impacts on its status, which is a matter relating to status as contemplated in the exclusion from arbitration of any matter relating to

status provided for in section 2(b) of the Arbitration Act 42 of 1965.

[25] For all the above reasons *Sigma* would not succeed in an application for a stay of the liquidation application pending the outcome of the dispute referred by it to arbitration. Similarly, if postponement pending the outcome of an arbitration is to be regarded as competent, *Sigma* has failed to show good cause for the postponement, which is one of the requirements for an application for postponement to succeed.

[26] The ground of unpreparedness for the application induced by lack of notice of the set-down and settlement negotiations has not been carried through to the notice of application for a postponement, which is confined to the arbitration clause. Although mentioned obliquely by Ms Blumenthal in argument, the need for a postponement to adduce further evidence is also not canvassed in the papers in the application for postponement. The only objective lack of preparedness on the part of *Sigma* for the application for liquidation is the absence of heads of argument, which was never specifically included in the prejudice complained of in the application for postponement.

[27] *Sigma's* new legal representatives have now had an extra week to prepare for the application for liquidation, which conceivably overcomes this prejudice. Before the adjournment last Friday, I invited the parties to submit further heads of argument if they so wish, which left it open to *Sigma* to deliver heads of argument in the application for liquidation.

[28] In refusing the application for postponement, I intend ruling that the wasted costs occasioned by the application for postponement be confined to the opposed motion week from 1 to 5 December 2025. The opposed argument in the application for postponement ended at 16h20 on Thursday, 4 December, and I intended giving judgment at 10h00 on Friday, 5 December. However, Ms Blumenthal, who had been brought into the matter at extremely short notice on Wednesday, 3 December,

indicated that she was unavailable to return to Court on Friday, 5 December. I therefore agreed to stand the matter down to the earliest available date for all parties, which is 11 December, on the understanding that the costs in both the application for liquidation and the application for postponement be confined to the motion week from 1 to 5 December 2025.

[29] I accordingly make the following order:

1. The application for a postponement is refused.

2. *Sigma* is to pay the wasted costs occasioned by the application for postponement, such costs to be limited to the motion week from 1 to 5 December 2025.

[redacted]

S M KATZEW
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

ON BEHALF OF APPLICANT:	R. De Leeuw Instructed by EY Stuart Incorporated
ON BEHALF OF RESPONDENT:	R. Blumenthal Instructed by M Attorneys Inc.
Date of Hearing:	5 December 2025
Date of Judgment:	11 December 2025