REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2025-007239

1. NOT REPORTABLE
2. NOT OF INTEREST TO OTHER JUDGES
Date: 04 May 2026
Signature: Khaba AJ

In the matter between:

OLICACRON (PTY) LTD
[Registration Number:2014/064500/07] First Applicant/ Second Third Party

HENMAG HOLDINGS (PTY) LTD
[Registration Number: 2010/018617/07] Second Applicant/ Third Third Party

And

BLACK MOUNTAIN MINING (PTY) LTD
[Registration Number: 2005/040096/07] First Respondent/ Applicant

OLD MUTUAL ALTERNATIVE RISK TRANSFER INSURE LTD

[Registration Number: 1966/010741/06] Second Respondent/ Respondent

LEAD ENGINEERING & PROJECTS (PTY) LTD

[Registration Number: 2012/147101/07] Third Respondent/ First Third Party

In re:

BLACK MOUNTAIN MINING (PTY) LTD

[Registration Number: 2005/040096/07] Respondent/ Applicant

And

OLD MUTUAL ALTERNATIVE RISK TRANSFER INSURE LTD

[Registration Number: 1966/010741/06] Respondent

LEAD ENGINEERING & PROJECTS (PTY) LTD

[Registration Number: 2012/147101/07] First Third Party

OLICACRON (PTY) LTD

[Registration Number: 2014/064500/07] Second Third Party

HENMAG HOLDINGS (PTY) LTD

[Registration Number: 2010/018617/07] Third Third Party

Neutral Citation: *Olicacron (Pty) Ltd & Henmag Holdings (Pty) Ltd v Black Mountain Mining (Pty) Ltd & Old Mutual Alternative Risk Transfer Insure Ltd and Lead Engineering & Projects (Pty) Ltd (007239-2025) [2026] ZAGPJHC ------ (04 May 2026)*

Coram: Khaba AJ

Heard: 28 April 2026.

Delivered: 04 May 2026 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date for hand-down is deemed to be 04 May 2026.

Summary: The effect of a final winding-up order on interconnected legal proceedings and the grant of a postponement *sine die* to prevent the piecemeal adjudication of inextricably linked issues in violation of the statutory moratorium and the right to a fair hearing.

ORDER

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1. The application instituted by Black Mountain Mining (Pty) Ltd against Old Mutual Alternative Risk Transfer Insurance Limited under case number: 2025-007209, together with the Rule 13 third-party proceedings consequential thereon, is removed from the roll of 28 April 2026 and postponed *sine die.*

2. The first respondent in this application, Black Mountain Mining (Pty) Ltd is ordered to pay the costs of the first and second applicants on an attorney and client scale, such costs to include the costs of senior counsel were employed and the costs of junior counsel on scale C.

APPLICATION FOR POSTPONEMENT

JUDGMENT

KHABA AJ:

Introduction:

[1] This is an opposed interlocutory application for the postponement *sine die* of the main application. The applicants, Olicacron (Pty) Ltd and Henmag Holdings (Pty) Ltd ("the applicants"), cited as the second and third parties in the main proceedings, seek an order removing the matter from the roll of 28 April 2026. The application is opposed by Black Mountain Mining (Pty) Ltd ("BMM"), the applicant in the main action. The second respondent in the main application, Old Mutual Alternative Risk Transfer Insured Ltd ("OMART"), abides the decision of this court but has filed an affidavit in support of a postponement to avoid a piecemeal adjudication of the dispute.

[2] The genesis of the postponement application lies in a supervening event, the final liquidation of the principal debtor and first third party, Lead Engineering & Projects (Pty) Ltd ("Lead"), on 06 March 2026. The crisp question for determination is whether, in light of Lead's final winding-up and the consequential statutory suspension of legal proceedings against it in terms of section 359(1)(a) of the Companies Act 61 of 1973, it is just and equitable for the main application to proceed in Lead's absence.

[3] Before delving into the substance of the dispute, this court is compelled to address a procedural irregularity that touches directly on the decorum and efficient functioning of this division. The practice directives of this court are not mere guidelines or aspirational suggestions; they are directives with the force of

law, designed to ensure the orderly and expeditious adjudication of disputes. They require, *inter alia*, the timeous filing of heads of arguments and a practice note by all parties to an opposed motion. Despite the voluminous nature of the papers and the complexity of the legal issues, counsel for the first respondent Mr. Peter SC elected not to file any heads of argument on behalf of BMM, let alone his practice note, in this interlocutory application. When the court sought an explanation for this flagrant non-compliance with the consolidated directive 1 of 2004 as amended of this division, no plausible or acceptable reason was tendered. This conduct is contrary to the practice directives of this division and unacceptable. This conduct is disrespectful to the court, prejudicial to the opponents who had prepared their case in anticipation of the arguments to be met and is unequivocally condemned. It is a practice that strikes at the heart of our adversarial system.

The Comprehensive Factual Background:

[4] The factual matrix underpinning this application is intricate but can be distilled to its essential commercial and procedural components.

[5] The genesis of the dispute: The dispute arises from an Engineering, Procurement, and Construction ("EPC") contract concluded on 25 October 2021 between BMM and Lead, wherein Lead undertook to perform substantial works on an iron processing plant for BMM. In terms of the EPC contract, Lead was required to furnish certain performance guarantees in BMM's favour. At Lead's behest, OMART stepped into the fray as guarantor and issued both advance payment and performance guarantees in November 2021 and again in February 2024.

[6] The demands and the fraud allegations: On 10 December 2024, BMM made formal written demands upon OMART for payment under these guarantees,

asserting that Lead was in breach of its repayment obligations under the EPC contract. The payment was refused. OMART's refusal was not arbitrary; it was grounded in a well-articulated position, communicated formally, that Lead had raised serious and credible allegations of fraud against BMM. Lead's attorneys, in a letter dated 16 December 2024, placed OMART on express notice that they contended BMM's demands under the guarantees were fraudulent, as no breach of the EPC contract had occurred, and BMM knew it. OMART, as a cautious stakeholder, took the view that such grave allegations could not be unilaterally resolved by a guarantor but required judicial determination.

[7] The Institution of the main application: BMM launched the main application on 22 January 2025, seeking payment from OMART. OMART delivered an answering affidavit, substantively relying on the fraud exception to the autonomy principle of demand guarantees, as famously articulated in *Loomcraft Fabrics CC v Nedbank and Another* 1996 (1) SA 812 (A)[1]. OMART's defence is, in essence, the defence of Lead. Simultaneously, OMART exercised its procedural rights under Uniform Rule 13, serving third-party notices on Lead, Olicacron, and Henmag. These three entities, against whom OMART seeks an indemnity in the event it is found liable to BMM, joined forces in the litigation. They appointed the same firm of attorneys, WJJ Badenhorst Incorporated, delivered a single, consolidated opposing affidavit.

[8] The centrality of lead: It is critical to appreciate the position of Lead in this commercial and legal landscape. Lead is the EPC contractor. It is the protagonist in the underlying factual narrative of contractual performance, breach, and the alleged fraud. The applicants, Olicacron and Henmag, are not parties to the EPC contract. Their role is, in the words of their deponent, akin to sureties. They executed a Deed of Indemnity in favour of OMART. Their liability is accessory to Lead's. Their knowledge of the EPC contract's implementation is derivative of Lead's knowledge. Their defence against OMART's indemnity

[1] *Loomcraft Fabrics CC v Nedbank and Another 1996 (1) SA 812 (A).*

claim, and concomitantly against BMM's main claim, is entirely symbiotic with Lead's defence. They aver in their founding papers that, without Lead, they are "compelled to rely on Lead's evidence" and cannot present their case effectively with "one hand tied behind their backs."

[9] The supervening event: The Final Liquidation of Lead: The equilibrium of the litigation was shattered on 02 March 2026 when the Honourable Acting Justice Stais in a considered judgment concerning a different creditor, Ruwacon (Pty) Ltd, granted a final winding-up order against Lead. The order, annexed as "FA3" to the founding papers, speaks for itself. Its legal consequence is stark and immediate. Section 359(1)(a) of the Companies Act 61 of 1973 *("The Act")* provides that "all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator." Provisional liquidators have been appointed, but their certificates of appointment are yet to be issued. They are, as a matter of practical reality, not in a position to give instructions, adopt, amend, or abandon the forensic stance previously taken by Lead's erstwhile management. The administration of Lead's estate is in a state of statutory paralysis.

The Application for Postponement: The Applicants submissions:

[10] Counsel for the first and second third parties Ms. Ngakane, in well-structured heads of argument and oral submissions, advanced a compelling case for the postponement *sine die*, founded on four mutually reinforcing pillars: the statutory moratorium, the indivisible nature of the issues, the irreparable procedural prejudice, and the balance of convenience.

[11] The First Pillar: The statutory imperative (section 359): The point of departure is section 359 of the Companies Act. Ms. Ngakane submitted that this provision is peremptory and fundamental to the *concursus creditorum* established upon insolvency. The suspension of civil proceedings is designed to protect the

insolvent estate from piecemeal attrition and to ensure that all claims are adjudicated within the structured framework of the insolvency, presided over by a duly authorised liquidator who acts in the interests of the general body of creditors. To proceed with the main application, which directly seeks to establish liability upon which the indemnity against Lead's estate will immediately crystallise, is to circumvent the statutory shield erected by the legislature. It is to allow, through the back door of the third-party proceedings, an adjudication that directly and profoundly affects Lead's estate without its lawful representative being at the helm.

[12] The Second Pillar: The inseparability of the issues (fragmented justice): Ms. Ngakane argued forcefully against the artificial compartmentalisation urged by BMM. BMM contended that since its claim on the face of the notice of motion is only against OMART, Lead's absence is legally irrelevant. This was met with the powerful rebuttal that the principal defence to BMM's claim on the merits is the fraud exception, a defence which is framed, substantiated, and populated in its factual content exclusively by Lead. BMM's demand asserted a breach of contract by Lead. The fraud allegation asserts that BMM knew this statement was false. These are not two separate disputes; they are the opposing faces of a single coin. To proceed against OMART alone is to stage a trial on the most contentious issues without the principal witness and party. The court is left with the hollow shell of a defence, presented by a surety and a guarantor, both of whom have no direct knowledge. This is a recipe for an adjudication that is not only unfair but also dangerously incomplete and unreliable.

[13] The Third Pillar: irreparable procedural prejudice: The prejudice to the applicants is not merely that of inconvenience or delay; it is fundamental and structural. Ms. Ngakane submitted that if the matter proceeds and BMM is successful, the judgment will, by necessary implication, contain findings that Lead breached the EPC contract and that the fraud allegation was unsustainable. Those findings will be *res judicata* against Lead's estate yet

made in its absence and without its participation. When a final liquidator is eventually appointed, they will inherit a materially compromised position, their hands tied by a judicial pronouncement made without their input. For the sureties, Olicacron and Henmag, the prejudice is equally severe. They face a judgment on an indemnity claim without the principal debtor, whose conduct is the very *causa* of the dispute, being able to lead evidence, make submissions, or protect the integrity of the factual narrative. They would be held liable in circumstances where the principal's own defence, if it could be properly articulated and advanced by a liquidator, might well have succeeded. This, counsel submitted, is a violation of the section 34 constitutional right to a fair hearing.

[14] The Fourth Pillar: The balance of convenience: In weighing the prejudice, Ms. Ngakane invited the court to consider the nature of the harms. BMM's prejudice is commercial and, importantly, compensable. Its claim is for a monetary amount under the guarantees. Interest continues to run. The delay, while commercially frustrating, results in a quantifiable loss that can be remedied by an award of interest and, if circumstances warrant, a future *ad hoc* costs order. Conversely, the prejudice to the applicants and to the integrity of the judicial process is irremediable. An unfair hearing that produces a binding judgment cannot be unwound. The risk of a multiplicity of proceedings, where a future court may be called upon to traverse the identical factual terrain once a liquidator is appointed, is a profligate waste of judicial resources that militates overwhelmingly in favour of a single, coherent, and procedurally pure hearing.

The Position of the Second Respondent (OMART):

[15] A feature of this application that lends considerable weight to the applicants' case is the position adopted by OMART. In an affidavit deposed to by Ms. Cornelia Moll, OMART's attorney of record, and supported by a confirmatory affidavit from Mr. Zakhele Motha, OMART placed its institutional view before the

court. OMART is "ready to proceed" in the narrow sense that it has its papers in order. However, it does not subscribe to BMM's vision of a truncated hearing. Counsel on behalf of the second respondent Mr. Carelse endorsed the concerns raised by the applicants. OMART confirmed that the factual substratum of the fraud allegations lies within the exclusive knowledge of Lead, that it cannot independently advance this evidence, and that it finds itself in an "invidious position." OMART's considered view, as expressed in its correspondence and its affidavit, is that a piecemeal adjudication carries a real risk of duplication, inconsistent findings, and prejudice to its rights of recourse. The joinder of the respondent in the main application to the substance of the applicants' concerns transforms this from a purely tactical defence application into a broad consensus among all parties defending the case that the matter is not ripe for a fair and final hearing.

The Opposition by BMM and its Failings:

[16] BMM's opposition, articulated in the answering affidavit of Ms. Johanna Alida Rossouw rested on two main contentions: first, that BMM claims no relief against Lead and therefore its absence is immaterial, and secondly, that the prejudice of further commercial delay is overwhelming.

[17] The first contention has been addressed but must be robustly rejected again. It exalts form over substance. The principle of independence of guarantees does not grant litigants a license to ignore the evidentiary and procedural realities of the dispute. When the guarantor's sole defence is the beneficiary's fraud, the independence principle has already been breached by the nature of the defence itself. The court is then duty-bound to examine the underlying contract. One cannot decide a case about whether Lead breached a contract and whether BMM lied about it, without Lead. To hold otherwise would be to allow procedural sophistry to triumph over substantive justice

[18] On the issue of delay, BMM's deponent alleged that the applicants had not acted promptly after the winding-up judgment of 02 March 2026. This submission, with respect, does not withstand scrutiny. The chronology demonstrates that the applicants' attorneys engaged BMM and OMART on 31 March 2026, seeking a pragmatic accommodation. BMM's response was to challenge the applicants to bring a formal application "without delay." This was done on 16 April 2026. There was no *culpable inertia*. The criticism of delay is opportunistic, particularly in light of BMM's own failure to seek a timely resolution.

The Evaluation and Legal Analysis:

[19] A postponement is an indulgence. The party seeking it must show good cause. The court retains a broad judicial discretion, to be exercised judicially, having regard to all the circumstances. The overriding consideration is the interests of justice. It is not a mechanical balancing of prejudice; it is a qualitative assessment of what a fair trial demands.

[20] In *Cross v Ferreira (1950 (3) SA 443 (C) 447*[2] the court held that a postponement should be granted where it is necessary to prevent a situation where the 'real issues' cannot be properly adjudicated. This dictum resonates powerfully in the present case. The "real issue" between BMM and OMART is the fraud exception. That issue is not merely better served by Lead's participation; it is, as a matter of evidentiary reality, impossible to justly determine without it. No amount of legal ingenuity by the sureties or the guarantor can conjure the direct factual knowledge of the principal debtor.

[21] Furthermore, section 359 of the Companies Act is not a technicality. It embodies a public policy imperative. Its purpose is to ring-fence the insolvent estate and centralize litigation. Allowing the main application to proceed, with

[2] *Cross v Ferreira (1950 (3) SA 443 (C) 447.*

the inevitable consequence that the liability of Lead's estate on the indemnity will be directly determined, would drive a horse and cart through this protective statutory framework. It would allow an individual creditor (BMM), not to prove a claim in the liquidation, but to reshape the liabilities of the estate through the back door of the principal proceedings, all before the liquidator can blink.

[22] I am satisfied that the applicants have demonstrated not merely good cause, but a compelling case for a postponement. The prejudice to the applicants and to the proper administration of justice in permitting a fragmented hearing is immense and irreparable. The prejudice to BMM, while real and commercially significant, is the lesser of two profound evils, and is one that can be ameliorated through the payment of *mora* interest and an appropriately managed future allocation of a hearing date.

Costs:

[23] This brings me to the issue of costs. A party who succeeds in a postponement application will not ordinarily be awarded costs. However, this is an extraordinary case. BMM's opposition was wholly unreasonable. It was legally unsustainable on the facts, as demonstrated by the convergence of views between the applicants, OMART, and the plain meaning of section 359. It was procedurally blighted by counsel's failure to file heads of arguments, let alone a practice note, a form of professional discourtesy that must be met with a punitive costs sanction. The applicants' founding papers contained a tender to only seek costs in the event of opposition. That event has materialized, and BMM's opposition warrants the mark of this court's strongest disapproval. An attorney and client costs order is justified.

Order:

[24] In the result, the following order is made:

1. The application instituted by Black Mountain Mining (Pty) Ltd against Old Mutual Alternative Risk Transfer Insurance Limited under case number 2025-007209, together with the Rule 13 third- party proceedings consequential thereon is removed from the roll of 28 April 2026 and postponed *sine die*.

2. The first respondent in this application, Black Mountain Mining (Pty) Ltd, is ordered to pay the costs of the first and second applicants on an attorney and client scale, such costs to include the costs of senior counsel were employed and the costs of junior counsel on scale C.

[redacted]

KHABA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

Counsel for first and second Third Parties	Adv. T Ngakala
Instructed by:	WJJ Badenhorst Incorporated
Tel:	083 414 5545
Email:	**wessel.badenhorst@wbincorp.com**
Email:	**elmien.liebenberg@wbincorp.com**

Counsel for the First Respondent	Adv. J Peter SC
Instructed by:	Tiefenthaler Attorneys
Tel:	011 807 0834
Email:	**martin@constructionlaw.co.za**
Email:	**bradely@constructionlaw.co.za**

Counsel for the Second Respondent:	Adv. C Carelse
Instructed by:	Moll Quibbell and Associates
Tel:	010 446 5621
Email:	**corrie@mqlaw.co.za**
Email:	**daniel@mqlaw.co.za**

Date of Hearing:	28 April 2026
Date of Judgment:	04 May 2026