

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 17 January 202
SIGNATURE: [REDACTED]

CASE NUMBER: 2023/019694

In the matter between:

Mandlakayise Prince Ndamase

APPLICANT

And

**COMMISSIONER: PRIVATE INQUIRY INTO THE AFFAIRS OF SNS HOLDINGS (PTY) LTD
(IN LIQUIDATION)**

FIRST RESPONDENT

KURT ROBERT KNOOP

SECOND RESPONDENT

TASMEEN SHAIK MAHOMED

THIRD RESPONDENT

ZAHEER SHAIK MAHOMED

FOURTH RESPONDENT

THAMSANQA EUGENE MSHENGU

FIFTH RESPONDENT

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 17 January 2024.*

Summary: *Commission of inquiry -liquidated company-applicant summoned. Thus-application from Bar-postponement. Rule 41-Uniform Rules of Court-bona fide discretion. Constitutional Court-judgment-likely to influence the matter at hand. Application-without affidavit-justified and was granted.*

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This application was set down as an opposed motion before me on 06 November 2023. The crux of the main application was the summons issued against the applicant to appear before an enquiry to investigate the private affairs of a liquidated company (Supreme National Stocks Holdings (Pty) Limited (NSH). I postponed the matter *sine die* until the finalization of the Constitutional Court matter after hearing the submissions regarding the postponement of this matter from the parties.

[2] The applicant sought relief for:

- [2.1] the review and setting aside of a summons issued by the first respondent directing the applicant to appear before the enquiry convened in terms of sections 416 and 417 of the Companies Act 61 of 1973; alternatively, review and setting aside the annexure attached to the summons.
- [2.2] an order declaring the venue of the enquiry, namely, offices of the second-fifth respondents inappropriate for the purpose of an impartial enquiry by an impartial Commissioner; the first respondent.

[2.3] a costs order in the event of the application being opposed.

[3] The matter was opposed by the defendants.

[4] Before I could deal with the merits of this application, Counsel for the applicant applied for the postponement of the matter from the bar due to another similarly situated case that is before the Constitutional Court, wherein its outcomes would be of direct relevance to the determination of the case at hand. I must mention, the application was submitted orally with no substantive documentation or affidavit that contextualised and captured the essence of the application regarding the quest for the postponement.

[5] On the other hand, Counsel for the defendants vehemently opposed the postponement of this case matter highlighting amongst other reasons the unnecessary delay on the finality of the matter. The urgency on the speedily resolve of the matter considering the public interest on liquidation matters. Further, there was no formal documentation or affidavit tabling the reasons and rationale for the application.

Regulating the postponement proceedings

[6] The postponement of proceedings are regulated by Rule 41 of the Uniform Rules of the Court which require the court to exercise a ***bona fide*** discretion in granting the application for postponements. The implication of this Rule is not about '***justice being done***' but '***justice being seen to be done***' considering the interests of both parties in the litigation. '***Seeing justice being done***' with a wider focus on the general implications for human rights give content to sections 34 of the Constitution, 1996. The latter section provides that '*everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum*'. Mokgoro J in ***Beinash v Ernest & Young (CCT12/98) [1998] ZACC 19*** contextualised the substance of this provision and held that '*this right is of cardinal importance for the adjudication of justiciable disputes,*' (***para 17***). This court is equally guided by this provision in the consideration of this application from the bar that the main application would not be '***judicially impoverished***' on the development of principles that have a potential to guide the interpretation of the substance of the core

application. Also, to expand the evolution of the principles of access to court which encapsulate the broader development of the principles of access to justice.

- [8] I also need not restate the caution to be exercised by this court on granting an application for the postponement of this matter in that Nkabinde ACJ in ***Psychological Society of South African v Qwelane 2017 (8) BCLR 1039 (CC)*** held that:

postponements are not merely for the taking. They have to be properly motivated and substantiated. And when considering an application for a postponement a court has to exercise its discretion whether to grant the application. It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court cannot substitute its decision simply because it disagrees. The decision to postpone is primarily one for the first instance court to make, (para 30).

- [9] The quest for a substantive submission enables a more and concise discretion that is based on sound and sufficient reasons that inform the interpretation of the applicable rules and principles.

Assessment

- [10] This application for postponement was particularly important for the consideration of the development of the principles Rule 41 that serve as a guide for matters not to be postponed just to be dragged to frustrate the other party in the litigation. The outcomes of the Constitutional Court judgment and its effect on the development of the basic principles of the law which should serve as a guide on the apprehension of 'bias', is of direct link not for the immediate parties to the litigation but broader society. The '*specialist inquiries*' which are to be run by established Commissions play a central role in ensuring that they are equally not diverted from their mandate and have their processes tainted by what may be perceived as bias or prejudice against the other party in the investigation. Therefore, this court was in no position to '**jump-start**' whilst guidance on similar principles likely to affect the substance of this application was being considered by the Constitutional Court.

[11] I am of the considered view that the applicant's quest for the postponement of the matter was designed by a genuine belief in the guidance to be received from the outcome of the Constitutional Court in addressing the matter at hand. I find no doubt on the credibility of the application and the Counsel, as an officer of this court, committed to uphold the prescripts of the profession at large, carries an equal responsibility in the dispensation of justice without fail. Mogoeng J in **Motshegoa v Motshegoa 995/98** Bophuthatswana Provincial Division of the High Court of South Africa had to this to say about the applicable principles that should guide the court in the exercise of its discretion regarding the granting of postponements and held:

*before or on the day of the hearing any party may apply on notice for a postponement. **Such an application need not always be made on affidavit. It may and is sometimes made from the Bar.** The granting of such an application is an indulgence and that indulgence is not to be had for the asking. It lies entirely within the court's discretion whether to grant the indulgence sought. That discretion is a judicial one and can be corrected on appeal if not exercised in a judicial manner. A party who applies for a postponement must therefore show good cause for the interference with the other party's procedural right to proceed, (page 4, my emphasis and footnotes omitted).*

[12] As is the case in this matter, the application for a postponement was submitted from the bar and without a substantive affidavit. As guided by Mogoeng J in the **Motshegoa** judgment, I found nothing amiss and untoward in bringing this application from the bar considering the greater effect it would have on the development of the principles that are the subject of the main application. This court acknowledges the urgency on the finality of this matter; thus, such undertaking should be informed by properly ventilated principles which are grounded on the basic rights and fundamentals that are envisaged in the Constitution, 1996. The interests of justice that are infused in section 34 alongside the granting of just and equitable remedies in section 172 of the Constitution need not be '**thumb sucked**' at the prejudice and anxiety for finality of the matter that would limit the substantive conception and broader effect it would have on human rights. This application is not a matter of recklessness where the plaintiff must '**lie on the bed that he has made it for himself**', (**Zulu v Road Accident Fund (89670/18) [2023] ZAGPHC 108, para 14**). As endorsed by Mokgoro J in the **Beinash** judgment above, in that '*the court is under a*


constitutional duty to protect bona fide litigants, the processes of the courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that “[n]o person or organ of state may interfere with the functioning of the courts.” The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed’, (para 17, footnotes omitted). This is the gist of the reasoning herein for this court to determine the merits of the application for the postponement of this matter which it found the reasons proffered justified. The reasoning herein gives substance to the significance of the principles of new dispensation to ensure that the judiciary is not impoverished and dismisses matters that would be of value in the generation of the jurisprudence that intersect the various principles of the new dawn of democracy. The defendants opposed this application and prayed for the matter to proceed as enrolled and for the finality of this matter. Thus, as expressed herein, I am not persuaded that what I would refer as ‘**anxiety for finality**’ would serve as a guiding determinant of the substance of the litigation. Legal anxiety has the potential to destabilise an orderly and peaceful society that requires a systemic resolution of disputes and give substance to the foundational values of the new dispensation as envisaged in section 1 of the Constitution, 1996. Therefore, the plaintiff had given a sound and **bona fide** reason that justified the granting of the postponement of the matter.

[13] In the circumstances, I make an order for:

[13.1] Postponement of the matter *sine die* until the judgment of the Constitutional Court is delivered.

[13.2] The defendants may also approach the office of the Deputy Judge President for the allocation of a preferential date following the guidance from the apex Court in South Africa.

[13.3] The costs are reserved for the main cause in this application.


N NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date Heard: 06 November 2023

Date Delivered: 17 January 2024

Appearances:

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