

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 046686/2022

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

DATE: 06 November 2023

SIGNATURE OF JUDGE:

In the matter between:

INVESTEC BANK LIMITED

APPLICANT

and

BIG BUSINESS INNOVATIONS GROUP (PTY) LTD

RESPONDENT

JUDGMENT

COWEN J:

Introduction

1. This Court convened on 17 and 18 October 2023 to hear two applications as special motions. First, an application instituted by Investec Bank Limited (Investec)¹ to wind-up Big Business Innovations Group (Pty) Ltd (BIG) (the winding up application).² The hearing dates were the return dates, as extended, of a provisional winding-up order granted by Judge Collis on an urgent basis on 29 November 2022. Secondly, an application instituted by Investec to sequester Nishani Michelle Singh (Singh) and Stephen John Killick (Killick), which – as matters transpired – was postponed (the sequestration application). This judgment is concerned with the winding-up application, but for reasons that will become apparent, I refer in this judgment to both applications.

2. At the commencement of the hearing on 17 October 2023, the parties addressed me in respect of two counter-applications instituted on an urgent basis, respectively, a counter-application by BIG in the winding-up application, and a counter-application by Singh in the sequestration application. I heard argument in the counter-applications during the morning of 17 October 2023. The

¹ Investec Bank Limited is acting through its private bank division, and is registered as a commercial bank with registration number 1969/004763/06.

² BIG is a private company with registration number 2000/002131/07.

afternoon session was used to hear argument on a preliminary issue raised by Killick's counsel in the sequestration application which ultimately led, by agreement between the parties, to its postponement for hearing on 25 January 2023.³

3. At the close of proceedings on 17 October 2023, I delivered my orders in the counter-applications. I dismissed both counter-applications with costs on an attorney and client scale including the costs of two counsel.
4. On 18 October 2023, I heard argument in the winding-up application.⁴ I have decided to confirm the provisional order. I deal in this judgment with my reasons for this decision and my reasons for dismissing the counter-claim in the winding-up application.⁵ A separate judgment setting out my reasons for dismissing the counter-claim in the sequestration application is delivered simultaneously and, as appears from that judgment, much of what I set out below applies with equal force to that decision, specifically what is set out in paragraphs 5 to 44.

Background

5. Investec instituted the winding-up application on 14 November 2022. It did so on the basis that BIG is unable to pay its debts as contemplated by section 344(f)⁶ read with section 345(c)⁷ of the Companies Act 61 of 1973 as amended (the 1973

³ The terms of the postponement are detailed in an order I made in that application on 18 October 2023.

⁴ In circumstances where BIG had delivered no answering affidavit and no heads of argument, BIG's counsel was constrained to argue the matter on the applicant's papers. I provided BIG's counsel a full opportunity to do so mindful that Investec's counsel would then be constrained to respond without the benefit of heads of argument.

⁵ I had initially hoped to give my reasons for dismissing both counter-claims on 18 October 2023 before proceeding with argument in the winding up, but time constraints precluded this. At this juncture it is convenient to deal with the two decisions in the liquidation application.

⁶ Section 344 is titled 'Circumstances in which company may be wound up by Court' and section 344(f) makes provision for such winding up when 'the company is unable to pay its debts as described in section 345.'

⁷ Section 345 is titled 'When company deemed unable to pay its debts' and provides.

Companies Act) as read with item 9 of Schedule 5 of the Companies Act 71 of 2008 as amended (the 2008 Companies Act).⁸

6. BIG is a multi-disciplinary professional services firm offering a range of professional services such as business development, management consulting, procurement management, program and project management, corporate governance, internal audit and IT services and management. Investec alleges that BIG is indebted to it in an amount in excess of R176 million. The debt arises from two agreements: an agreement referred to as the Working Capital Facility Agreement (and its Addendum) and an agreement referred to as the Term Loan Agreement.

7. According to Investec, the Working Capital Facility Agreement was concluded on 25 January 2021 between Investec (as lender), BIG (as borrower) and GIC Ghana Infrastructure Group Limited (GIC) (as guarantor). Under the agreement, Investec made available to BIG a working capital facility in the amount of R35 million. On 23 February 2022, Investec (as lender) and BIG (as borrower) concluded an agreement referred to as the Addendum to the Working Capital Facility Agreement (the Addendum). GIC, Quixie Investments Eight Propriety

-
- (1) A company or body corporate shall be deemed to be unable to pay its debts if-
- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
 - (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
 - (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
 - (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
 - (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.
- (2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.

⁸ Item 9 renders Chapter 14 of the 1973 Companies Act of continued application at this juncture despite the enactment of the 2008 Companies Act.

Limited (Quixie), Singh and Rushil Singh (Singh's brother) were also parties to the Addendum as guarantors. Under the Addendum, further amounts were to be advanced (Addendum Fees). Investec avers in the founding affidavit that it complied with its obligations under the Working Capital Facility Agreement read with the Addendum, and BIG became indebted to Investec under its terms. Investec pleads BIG's breach of these agreements arising from a failure to pay the amounts outstanding on or before the termination date being 25 August 2022. On 8 November 2022, Investec (through its attorneys) sent BIG a letter of demand for the amount due being R35 161 866.38 plus interest, but BIG failed to pay. That amount is certified as owing.

8. Investec alleges that the Term Loan Agreement was concluded on 19 April 2021 between Investec and BIG. In terms of that agreement, Investec agreed to advance a loan to BIG in an amount of R150 750 000.00 (one hundred and fifty million seven hundred and fifty thousand rands) pursuant to a loan facility. Investec avers in the founding affidavit that it complied with its obligations under the Term Loan Agreement and that BIG became indebted to it under its terms. BIG is alleged to have breached its terms by failing to make payment of the instalment due for payment on 31 October 2022. On 8 November 2022, Investec (through its attorneys) sent BIG a letter of demand notifying BIG that due to non-payment of the instalment and of the amounts due under the Working Capital Facility Agreement, the full amount outstanding, being R141 257 857.40, is payable together with interest. That amount is certified to be owing.
9. Investec also relies on BIG's indebtedness to it under five instalment sale agreements concluded between Investec and BIG to acquire and finance

vehicles. Investec pleads BIG's indebtedness to it under five contracts in the amounts, respectively, of R32 504.56; R530 859.42; R912 553.81; R2 391 731.46 and R1 066 904.32. Investec explains that these agreements are in default as a result of cross default provisions contained in the respective agreements. However, the agreements are not attached and the alleged indebtedness is pleaded in very general terms.

10. In the founding affidavit, Investec explained that it holds security for BIG's indebtedness in respect of both the Working Capital Facility Agreement (read with the Addendum) and in respect of the Term Loan Agreement and referred to what security was held. Before instituting the winding-up application, Investec had exercised its rights under a security cession in terms of which BIG's debtors would be required to pay amounts due to BIG directly to Investec (the security cession). It was still in the process of exercising its rights in terms of the remaining security. For present purposes one form of security is particularly material, being certain demand guarantees purportedly issued by Stanbic Bank Ghana Limited (Stanbic).

11. Matters took a turn shortly after Investec instituted the winding-up application on 14 November 2022. The material events are detailed in a supplementary founding affidavit dated 18 November 2023, which reveals that Investec had ascertained that the security it thought it held, had proved to be of limited value, which left Investec heavily exposed. Investec filed the supplementary affidavit to demonstrate that the application had become urgent. The main event that triggered the urgency is a communication from Stanbic that it did not consider itself liable to Investec under the demand guarantees. The reason is that Stanbic

had carefully reviewed the guarantees and conducted internal investigations to ascertain their authenticity: Stanbic stated unequivocally that the guarantees were not issued by Stanbic and are fake or forged. Moreover, Investec was encountering difficulties realizing its security under the security cession in circumstances that appear to have led Investec to question whether it could rely on the debtors' information supplied to it.

12. In the result, the winding-up application was heard on an urgent basis before Judge Collis, who granted a provisional order on 29 November 2022. The return day was initially set for 14 February 2023. Counsel for Investec and BIG confirmed that the order had been granted on an unopposed basis and in circumstances where BIG was represented by both senior and junior counsel.

13. BIG delivered a notice of intention to oppose on 8 February 2023 and on 9 February 2023, delivered a notice in terms of Rule 35(12). In the notice, BIG sought access to multiple items. On 14 February 2023, Judge Mokose granted an order by agreement between the parties, extending the return date to 5 June 2023 and regulating the further conduct of the matter. In this regard, Investec was to deliver a response to the Rule 35(12) notice by 17 February 2023. BIG was to deliver its affidavit in opposition to the final liquidation order by no later than 3 March 2023 and further dates were set for a replying affidavit and heads of argument.

14. On 17 February 2022, Investec delivered its response to the Rule 35(12) notice but on 22 February 2022, BIG delivered a notice in terms of Rule 30A setting out its complaints regarding the response. In this regard, Investec had provided most

of the items sought. One of several points of contention was that BIG sought to inspect original documents, not least in respect of the alleged agreements.

15. On 21 February 2023, Investec instituted the sequestration application in respect of the estates of Singh and Killick. For present purposes, it should be noted that Singh pursued a Rule 35(12) notice and Rule 30A application in the sequestration application, also seeking multiple documents, many of which were provided. It can also be noted that around this period, Investec instituted various other related applications including (amongst others) an application to liquidate Quixie (instituted on 15 February 2023) and an application to sequester Rushil Singh.

16. On 14 March 2023, and by agreement between the parties, Judge Van der Westhuizen granted an order postponing the sequestration application to enable it to be heard on 5 and 6 June 2023 together with the winding-up application. The order also regulated the further conduct of the Rule 30A applications (the Van der Westhuizen order). In brief, the Van der Westhuizen order contemplated that the Rule 30A applications be delivered by 20 March 2023⁹ and argued on 21 April 2023. In paragraph 3 of the order, Singh, Killick and BIG were directed to file any supplementary affidavits in both applications by no later than 28 April 2023. Investec was to file its replying affidavit in both applications by 8 May 2023.

17. On 16 March 2023, Investec produced some 41 items for inspection and copying including, amongst others, the originals of the Working Capital Facility Agreement, its Addendum, the Term Loan Agreement and the instalment sale

⁹ It appears the Rule 30A applications were delivered on 9 March 2023.

agreements. Investec also produced either originals or copies of the security documentation. In the result, the ongoing dispute between the parties regarding access to documentation was substantially narrowed.

18. The remaining disputed item was 'records, accounts and other relevant documents' in the possession of the deponent to the founding affidavit. In the liquidation application, the request under Rule 35(12) was made in connection with an allegation in paragraph 3 of the founding affidavit where Investec's deponent, Mr Geetaben Bhagwandas, explained the basis upon which he has knowledge of Investec's claims against BIG and upon which the liquidation application is based. He stated:

'I have knowledge of [the claims] and the facts upon which the claims are based as a result of the execution of my functions as a legal manager in the employ of [Investec]. In the ordinary course of my duties as legal manager and having regard to [Investec's] records, accounts and other relevant documents in my possession and under my control, I have acquired personal knowledge of [BIG's] financial standing with [Investec].'

19. BIG persisted with the Rule 30A application centrally because it sought substantive relief in respect of access to these 'records, accounts and other relevant documents' referred to by Mr Bhagwandas and to obtain a costs order. BIG alleged that she wishes to inspect these documents to establish the alleged indebtedness that the applicant contends for and that it is axiomatic that she should be able to do so in order to advance her case. This item also featured in the Rule 30A application in the sequestration application.

20. The Rule 30A application was heard on 19 May 2023 before Acting Judge Marx du Plessis, who dismissed the application with costs on an attorney and client scale. On 24 May 2023, BIG requested reasons for the decision but they were not immediately forthcoming.
21. At that stage, BIG had in mind an application to consolidate the various related applications and to 'stay' them pending the finalization of an investigation into the authenticity of and forensic analysis of the documents attached to the papers. On the information to hand, the application appears to have been brought as a counter-application to the sequestration application of Rushil Singh. However, on 23 May 2023, Rushil was placed under provisional sequestration and the counter-application was removed from the roll.
22. On 31 May 2023, Deputy Judge President Ledwaba issued further directives and an order in the winding up and the sequestration applications (the DJP's directives and order). He did so in response to a request for directives written by Investec's attorneys on 24 May 2023. In terms of the DJP's directives, both matters were set down for hearing on 17 and 18 October 2023. BIG was directed to deliver its answering affidavit by 9 June 2023, Investec was directed to deliver its replying affidavit by 23 June 2023 and dates were set for the delivery of heads of argument, in BIG's case 18 August 2023. Under the DJP's order, the return date in the winding-up application was extended until 17 and 18 October 2023. In the counter-application in the liquidation application before me, BIG complained that the directives should never have been sought or obtained as the consolidation application was still pending and reasons for the dismissal of the Rule 30A application were outstanding.

23. BIG delivered neither an answering affidavit nor heads of argument. Investec delivered its heads of argument on 28 July 2023. The parties thereafter delivered joint practice notes.

24. The counter-applications now before me, in both the liquidation application and the sequestration application, were instituted on 9 October 2023, just over a week before the return day as extended. The founding affidavits are deposed to by Rushil Singh and are confirmed by Singh. However, they styles themselves as both an answering affidavit to the respective applications and the founding affidavit in the counter-applications. Shortly thereafter, Marx du Plessis AJ delivered reasons for dismissing the Rule 30A applications.

25. I now turn to the counter-application in the liquidation application. [As indicated, much of what is said below applies with equal force to the counter-application in the sequestration application.]

Counter-application of 9 October 2023 in the liquidation application

Relief

26. The relief sought in the counter-applications is as follows:¹⁰

- '1. Dispensing with the time periods, service, forms and procedures provided for in the Uniform Rules of Court and Practice of this Court and disposing of the application on an urgent basis.

¹⁰ It is substantially the same in the counter-application in the sequestration application.

2. That a *rule nisi* be issued calling upon Investec to show cause why the following order should not be made final:
 - 2.1 That [Investec] be and is hereby directed to make available to the directors of [BIG] access to, *inter alia*, the servers, laptops and all hard copies of the documents of BIG and its related entities, including the personal documents of the Directors.
 - 2.2 That the documents relied upon by [Investec] in the founding affidavit herein, and the documents relied upon by [Investec] [in the sequestration application against Rushil Singh] are to be scrutinized and examined by a forensic document examiner so as to determine the authenticity or otherwise of the signatures appearing thereon, who shall report his / her findings to this Honourable Court upon completion of his or her investigations and analysis.
 - 2.3 That pending the delivery of written reasons by this Honourable Court to [BIG] in respect of its interlocutory application in terms of Rule 30A, the main application herein for [the winding up of BIG] be and is hereby stayed.
 - 2.4 That the late filing of the First Respondent's answering affidavit be and is hereby condoned.
- 3 That pending the final determination of this application, the relief provided for in paragraph 2 hereof shall operate with full and immediate interim effect.
- 4 [Investec] is directed to bear the cost of the counter application and the costs of the main application to date on the scale as between attorney and client.'

27. As is apparent, the relief is sought in the form of a *rule nisi*, to operate as an interim interdict pending the final determination of the application. Mr Mohamed did not address the Court on why the relief was framed in the way it is, which is somewhat unusual. However, on analysis, the relief sought is final relief, for example, condonation, a forensic evaluation and access to documents. Moreover, in substance, it amounts to either a stay application or a postponement application (albeit without seeking an extension of the rule). The latter conclusion is fortified by the fact that the central submission advanced during the hearing was that the matters are not yet ripe for hearing. The reason, put simply, is that BIG [and Singh in the sequestration application] seek access to

information, they seek forensic evaluation of certain documents and they wish to prosecute an appeal against the decision of Marx du Plessis AJ. They wish to do so before they deliver any comprehensive answering affidavit, and against that background, they seek condonation for its late filing.

28. At this stage, no comprehensive answering affidavit has been delivered, notwithstanding the prior directives not least the DJP's directives. As indicated, the founding affidavit in the counter application is partly styled as an answering affidavit. The responses to the merits of the application are, however, limited and fall into two main broad categories: first, contentions regarding alleged discrepancies in documents and second, answers to specific paragraphs in the founding and supplementary founding affidavits. One material theme running through the 'answer' is a denial that BIG and Singh are responsible for any fraud. Conversely it is suggested Investec is. Another is that until all documents are to hand, and a further opportunity has been provided to BIG determine the authenticity of the alleged agreements upon, the agreements, debts and security upon which Investec relies to ground the winding-up are denied. There are other points raised, including contentions that Investec has failed, on its own affidavits, to make out a case for various reasons. Ultimately, BIG seeks to reserve its right to supplement its answer once it has access to the information it seeks and once it has sought to authenticate the agreements.

29. Part of the alleged difficulty faced by BIG and Singh is that when BIG was placed under a provisional winding-up order, on 29 November 2022, all of the company information was taken into the custody of the provisional liquidators. This ensued because of the alleged fraud, which BIG disputes, suggesting that, rather, BIG

may be the victim of wrong-doing by Investec. Another difficulty is that there was a delay in the furnishment of reasons by Marx du Plessis AJ, which, BIG contended, disabled it from applying for leave to appeal.

Urgency

30. As indicated above, any urgency in the counter-applications was in my view self-created. There was no justification proffered for waiting until the eleventh hour to institute the applications. There is nothing that ensued shortly before the October hearing dates that triggered the applications. However, I concluded that the interests of justice, including finality, warranted that I entertain the applications on their merits. I arrived at this conclusion in circumstances where BIG (and Singh) are essentially contending in the counter-applications that their rights to be duly heard, fundamental to fair process, are in issue. Some of the issues that are relevant to urgency were, moreover, also relevant to the merits, and in those circumstances, I considered that the position of BIG (and Singh), and whether their rights may be prejudiced required due consideration. I accordingly turn to the merits.

Legal principles

31. I have indicated above that in my view, the relief sought is final in nature (even though cast as an interim interdict) and in substance, amounts to either a stay application or a postponement application (albeit without seeking the extension of the rule *nisi*). Nevertheless, out of caution, in approaching the applications, I have also considered the test for interim relief, which would operate in BIG's (and

Singh's) favour. The test is well-established. The applicant must show a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; that the balance of convenience favours the grant of an interim interdict; and that the applicant has no other satisfactory remedy.¹¹

32. In *Psychological Society of South Africa v Qwelane*,¹² the Constitutional Court dealt with postponements in the following terms (in relevant part with footnotes omitted):

[30] 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.

...

[31] 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.

33. Section 354 of the 1973 Companies Act read with item 9 of Schedule 5 of the 2008 Companies Act deals with the Court's power to stay or set aside a winding-up. It provides:

¹¹ The test was formulated in *Webster v Mitchell* 1948 (1) SA 1186 (W) and qualified by *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688C. This formulation of the requirements was accepted by the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 41.

¹² [2016] ZACC 48.

'(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.
(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.'

34. Notably, the company itself, through its directors, has no standing to institute such an application.¹³

35. The Constitutional Court set out the test for condonation in *Van Wyk v Unitas Hospital*¹⁴ in context of a late application for leave to appeal in the following terms (footnotes omitted):

'[20] This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of any delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation of the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

...

[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.'

¹³ *Storti v Nugent and others* 2001(3) SA 783 (W) at 794D-E.

¹⁴ *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* 2008(2) SA 472 (CC).

36. On 17 October 2023, I came to the conclusion that BIG had failed to make out a case on any of the above principles, even on a *prima facie* basis. I deal below with the primary considerations that informed my decision.

37. First, I considered the explanation for the failure to deliver an answering affidavit at that stage to be unsatisfactory and unreasonable. There is nothing substantial that has happened, since June 2023, that had given rise to the application. In June 2023, proceedings in connection with the liquidation of Quixie were underway. BIG explains that those proceedings, with others that were on the go at and before that time, are part of a strategy by Investec to exert pressure on BIG and its related entities and directors, on all fronts. But even assuming that is so, which I need not determine, there is no adequate explanation why, in June 2023, BIG did not then act to secure its position. Almost all of the circumstances which underpin the counter-application had, at that stage, already arisen. That includes the issue of DJP Ledwaba's directives and order of 31 May 2023, the inspection of the original documents in March 2023 (which gave rise to some of the alleged concerns about authenticity of the agreements Investec relies on), the removal of the consolidation application from the roll and the refusal of the Rule 30A application. Yet no steps whatsoever were taken to address its alleged predicament in respect of any of these issues until the eleventh hour.

38. Indeed, an attempt is made to lay blame at the door of others, including Investec's legal representatives. Specifically, for failing to draw to DJP Ledwaba's attention BIG's position when requesting directives on 24 May 2023. Yet the request for directives pertinently states that the proposals are made

without BIG's agreement and were only issued a week later on 31 May 2023. BIG did not make any representations of its own, apparently because its legal representatives did not see the e-mail of 24 May 2023 until it was too late, but even accepting that to be so, there is no explanation why their alleged predicament was not then taken up immediately thereafter including with the Deputy Judge President. BIG has, moreover, taken no steps in connection with the authentication of documents nor has it disclosed any steps taken to have the consolidation application enrolled, nor indeed, why the consolidation application, which is not before me, was brought (only) as a counter-application rather than as a separate application in respect of all matters.

39. I deal briefly with two further issues raised to justify BIG's (and Singh's) position.

First, BIG's deponents (Rushil Singh and Singh) claim that it became necessary to access funds from friends for legal fees given the multiple proceedings and their impact on access to funds. But there is no particularity given in this regard whatsoever, and notably in circumstances where vast sums of money are in issue. Moreover, it is not explained why at least certain steps could not have been taken, for example, if BIG (or Singh) were genuinely dissatisfied with the directives and order of DJP Ledwaba and wished to ventilate a complaint that they had not been duly heard in that process, a letter ought to have been addressed immediately in that regard. Their attorneys remained on record. Instead, the deponents seek to lay blame at the door of Investec's legal representatives for failing to do what its own representatives ought to have done. Secondly, BIG (and Singh) point to the absence of reasons for the decision of Marx du Plessis AJ, in respect of which an appeal was 'pending'. The reasons

were only delivered shortly before the October hearing and after the counter-applications were issued. I accept that the reasons were delayed and I accept further, as Mr Mohamed explained, that although no appeal is pending, BIG (and Singh) intended to apply for leave to appeal the decision.¹⁵ I do not venture into the territory of the appealability of that order. For present purposes, their difficulty is a different one, which is that they have failed – in the proceedings before this Court – adequately to explain how the documents still sought justify the relief sought in the counter-application, and such an explanation ought to have been forthcoming not least in view of the directives and order of DJP Ledwaba.

40. Secondly, and related to this latter issue, BIG has failed to provide any adequate indication of any substantive defence to the application nor has it adequately explained how the alleged documents or authentication process are required in order to mount such a defence. Indeed, BIG has astutely avoided advancing a substantive defence, claiming rather that it still requires access to further documents and information. to assess what defence it might mount. On the facts of this case, this does not add up. To sustain the winding-up application, Investec relies pertinently on BIG's inability to pay its debts. It relies on the failure to pay its debts in terms of the Working Capital Facility Agreement (and its Addendum) and Term Loan Agreement, the invocation of the security cession and the failure of the Stanbic guarantees. The answering affidavit that BIG now seeks to introduce does not respond pertinently to these issues. Rather, BIG avoids answering the allegations by maintaining that it cannot do so without the documents it sought in the Rule 35(12) application and to which access was

¹⁵ A few days before this judgment was delivered, an application for leave to appeal was uploaded onto Caselines.

denied by Marx du Plessis AJ or because it requires forensic evaluation of the agreements relied upon.

41. I am unable to accept that this conduct is justified in the circumstances of this case. These are motion proceedings. If BIG wished to dispute any allegation of fact, it was entitled to do so and to explain on what basis. Any dispute of fact would be decided on the principles in *Plascon Evans*¹⁶ and *Wightman*,¹⁷ which would favour BIG (and Singh). For example, if BIG intends to dispute the conclusion of either the Working Capital Facility Agreement (and its Addendum) or the Term Loan Agreement – which it has had access to in both original and copy form, there was nothing precluding it from doing so. The signatures in respect of which authenticity is allegedly questioned are, materially, those of Singh and Rushil Singh themselves. BIG's deponents must know what security was ultimately agreed upon, specifically as regards the Stanbic guarantees and the security cession. BIG (and Singh) are in a position to dispute any signatures or agreements if they genuinely intend to. The same applies to the advance of the funds, and the resultant incurrence of the debt, of which BIG's directors must have sufficient knowledge. Similarly, the failure to repay any debt whether in whole or in part. But BIG has avoided clearly indicating its defence. Moreover, an applicant who contends that an application cannot properly be decided on affidavit has its remedies under Rule 6(5)(g) of the Uniform Rules of Court.¹⁸ In

¹⁶ *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) at 634H-635C.

¹⁷ *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA) para 13.

¹⁸ Rule 6(5)(g) provides: 'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

regard to the above, I considered each of the alleged discrepancies drawn to the Court's attention and the documents still said to be outstanding, and I am unpersuaded that BIG was prejudiced in its ability to deliver an answering affidavit, whether for purposes of invoking Rule 6(5)(g) or otherwise.

42. The alleged discrepancies entail a comparison of documents, but raise a series of issues and I refer to some of them. One is the absence of initialization of the pages to the agreements relied upon. Another is the attachment of a different version of the Working Capital Facility Agreement in the winding-up application, on the one hand, and the two sequestration applications on the other (being the Rushil Singh sequestration application and the Singh / Killick sequestration application), the primary import of which is that the copy attached to the sequestration applications refers to an additional form of security being a GIC Security Agreement. Attention is drawn to the fact that the Working Capital Agreement is then longer than the other by several lines, specifically on its page 70. Further alleged discrepancies concern comparisons of certain documents attached to sequestration or liquidation applications and the original documents produced at the inspection in March 2023 and various comparisons of signatures of Singh and Rushil Singh. BIG's deponents infer from the alleged discrepancies that Investec has misrepresented the facts, tampered with documents and itself perpetrated a fraud. But if consideration is given to each of the issues raised, the inferences sought to be drawn amount to speculation and are not justified by the evidence. Rather, the issues raised are of a sort that one would expect can

probably readily be innocently explained, not least if pertinently raised in an answering affidavit.¹⁹

43. This notwithstanding, I remain cognizant that BIG has suggested that it is not Investec but BIG, its directors and related companies that have been subjected to a fraud. This Court is in no position to determine precisely what fraudulent conduct has been committed and who is responsible. Nothing in this judgment should be construed as such. BIG's difficulty is that to the extent that the alleged fraud in respect of the Stanbic guarantees generated and still generates urgency, that urgency exists irrespective of who is responsible. BIG's further difficulty is that had it wished to mount a substantive defence in respect of the alleged fraud, it was open for it to raise it, and if need be refer that issue to oral evidence or trial, but it has pertinently not done so. At best, it has pointed to a series of alleged inconsistencies which might be explained on a number of bases and which do not appear to undermine the basis of the liquidation application itself. Moreover, if fraud on BIG manifests in due course, then BIG has its remedies.

44. I ultimately formed the view that the interests of justice militated against the grant of any relief sought in the counter-applications. The failure to mount any defence to the application at this stage lies at BIG's (and Singh's) door and viewed in context, the counter-application is no more than a delay tactic adopted at the eleventh hour. As to costs, I ordered costs on an attorney and client scale. Not

¹⁹ *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA) at paras 40 and 42. At para 40 it is held: 'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts.' At para 42 (footnotes omitted): 'Any inference sought to be drawn must be 'consistent with all the proved facts: If it is not, then the inference cannot be drawn', moreover, 'it must be the "more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities. In this respect, it is important to distinguish inference from conjecture or speculation.'

only was the application unsubstantiated (however framed), but amounted to a misuse of process that warrants the rebuke of this Court.²⁰

The winding-up application

45. On 18 October 2023, I heard argument in the liquidation application and Investec's counsel moved for a final order. In doing so, the Court was reminded that while the test for a final winding-up order is different to that of a provisional winding-up order, there is limited scope for finding that a debt is *bona fide* disputed where there is no genuine factual dispute regarding the existence of the applicant's claim.²¹ Moreover, the scope of the Court's discretion to refuse a winding-up order in these circumstances is a narrow one.²²

46. Mr Smit submitted that a case had been made out in the founding affidavit, which is unanswered. I agree. In brief, Investec has established that BIG is unable to pay its debts as contemplated by section 344(4) read with section 345(c) of the Companies Act as read with item 9 of Schedule 5 of the 2008 Companies Act. In this regard, I am satisfied that BIG is unable to pay its debts in circumstances where Investec has established that BIG has failed, despite demand, to pay the loan and amounts outstanding due and owing to Investec in terms of the Working Capital Facility Agreement (and its Addendum) or to pay the instalment due and owing to Investec in terms of the Term Loan Agreement. It has now failed to pay what is owing for a long period of time. Moreover, Investec has exercised its

²⁰ *Plastic Converters Association of SA obo Members v National Union of Metalworkers of SA* [2020] ZALAC 39; (2016) 37 ILJ 2815 (LAC) at para 46; *Public Protector v South African Reserve Bank* [2019] ZACC 29 (SARB) at para 8 and 225; *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18 at para 23.

²¹ *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd* 2015(4) SA 449 9WCC at para 11.

²² *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022(1) SA 91 (SCA) para 12 and 13 .

rights in terms of the security cession by requesting BIG's debtors to pay the amounts due to BIG directly to Investec. This in circumstances where, whoever is ultimately responsible for the apparent failure of the Stanbic guarantees, Stanbic has informed Investec that these were either fake or forged and that Stanbic does not consider itself bound thereby.

47. The requirements of the provisional order had been complied with. This is demonstrated by way of an affidavit deposed to by candidate legal practitioner, Mr Calvin Kekana, who confirmed, as ordered, service of the court order on the respondent, the respondent's employees, registered trade unions, the Master and the South African Revenue Services.

48. As indicated above, I afforded Mr Mahomed an opportunity to address me in respect of any deficiencies in the applicant's own papers. In doing so, Mr Mahomed both traversed some of the alleged discrepancies in the documentation traversed in the counter-application, at this stage to submit that a case is not made out and raised some further issues. I have considered the issues raised, and am unpersuaded that Investec has not made out a case in its founding affidavit. The necessary allegations are made, substantiated and, importantly, are unanswered. I do not deal below with each submission advanced by Mr Mahomed but mention a few by way of illustration. Mr Mahomed submitted that it is apparent from the annexures to the founding affidavit that one of Investec's signatories to the Addendum (SM Ackermann) was not duly authorized by Investec. He also suggested that the Term Loan Agreement, on its own terms, did not contemplate the provision of security, referring to Annexure C thereof, titled Security Documents, under which the word 'none' appears. In my view,

these issues ought to have been duly raised in an answering affidavit, and, in any event, the inferences cannot be drawn merely from the documents referred to. On the latter issue, Annexure D deals with the transaction terms and makes express provision for security. In any event, this does not assist BIG in respect of debts arising from the Working Capital Agreement, which makes express provision for, *inter alia*, the Stanbic guarantees and the security cession. Mr Mahomed suggested that this Court cannot assume that the agreements placed before the Court are the correct agreements because, in a separate application, Investec accepted that it had annexed the incorrect agreement. In my view, the contrary inference, if any, is warranted.

49. On the information before me, the statutory requirements are met and there is no basis to exercise the Court's discretion to decline to grant the order Investec seeks. Despite ample opportunity, BIG has failed *bona fide* or reasonably to dispute its indebtedness to Investec and there are no circumstances that militate against the grant of the order.

50. I make the following order in the winding-up application:

50.1. The rule nisi of 29 November 2022 and extended from time to time is confirmed and the respondent is placed under final winding-up.

50.2. The costs of the application are to be costs in the winding-up of the respondent.

SJ COWEN

**JUDGE, HIGH COURT,
PRETORIA**

Date of hearing: 17 & 18 October 2023

Date of judgment: 6 November 2023

Appearances:

Applicant: Mr JE Smit and Mr PG Louw instructed by ENSafrica Incorporated

Respondent: Mr Mahomed instructed by Motala and Associates