

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 017911/2023

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

NISHANI MICHELLE SINGH

FIRST

RESPONDENT

STEPHEN JOHN KILICK

SECOND

RESPONDENT

JUDGMENT IN COUNTER-APPLICATION

COWEN J

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 Secondly, the above matter, being an application instituted by Investec to sequester Nishani Michelle Singh (Singh) and Stephen John Killick (Killick) (the sequestration application). This judgment concerns the sequestration application.
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 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 orders in the counter-applications. In doing so, I noted that while I was not satisfied that BIG

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 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.

³ The terms of the postponement are detailed in an order dated 18 October 2023.

and Singh had made out a case for urgency, as any urgency was self-created, I was of the view that the interests of justice, including finality in the proceedings, warranted that I consider the applications rather than striking them from the roll. 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 In a separately judgment delivered at the same time as this one, I confirmed the provisional order and set out my reasons for dismissing the counter-application in the winding-up application. I had initially hoped to give my reasons for dismissing both counter-applications on 18 October 2023 before proceeding with argument in the winding up, but time constraints precluded this.
5. For the most part my reasons for dismissing the counter-application in the sequestration application are the same as my reasons for dismissing the counter-application in the liquidation application. No purpose would be served by repeating what I have set out in that judgment, specifically in the sections where I set out the background to both proceedings and in the section that follows (with its subsections) where I deal with why I dismissed the counter-application to the liquidation application. What I say there applies with equal force in this context.
6. The counter-applications were for the same relief and were based on substantially the same grounds and facts, although there are some differences in perspective and detail. In my view, although there are material differences between liquidation and sequestration proceedings, and the parties are different,

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.

these differences were not ultimately material to the outcome of the interlocutory applications.

7. One of the issues underpinning the counter-application is Investec's alleged failure to produce all documents sought in the Rule 35(12) and Rule 30A application, dismissed by Marx du Plessis AJ. The documents still sought in the sequestration application are not on all fours with those still sought in the liquidation application. Singh also seeks access to Investec's application in terms of section 417 read with section 418 of the 1973 Companies Act as referred to in paragraphs 83 and 84 of the founding affidavit, including the record of evidence at the enquiry currently underway. In these paragraphs, Investec's deponent, Mr Geetaben Bhagwandas explains that Investec applied to convene an enquiry and is in the process of holding sittings. I do not consider it necessary (or prudent) to venture squarely into the merits of the Rule 30A application, which is now subject to an application for leave to appeal.⁵ But Singh's difficulty in the counter-application regarding the documents it still seeks is at least two-fold. First, she has failed, timeously or at all, to invoke the provisions of section 417(7) of the 1973 Companies Act to obtain access to what are otherwise private and confidential proceedings.⁶ Secondly, it is simply not explained why this request precluded her from responding to the relevant sequestration application in accordance with the DJP's directives and if need be to invoke Rule 6(5)(g). Rather it is treated as self-evident where it is not. In circumstances where, for the most part, the Rule 35(12) dispute had been resolved, and DJP Ledwaba had

⁵ The application for leave to appeal was delivered only recently. At the time I made the orders, Singh's counsel indicated that Singh intended to apply for leave to appeal having only recently received the reasons for the decision.

⁶ Section 417(7) provides: 'Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.' Singh is entitled to a record of her own evidence, if any, at the enquiry under section 418(4) of the 1973 Companies Act.

issued directives and an order in connection with the hearing of the sequestration application and the delivery of *inter alia*, answering affidavits, an explanation should have been given.

8. A further distinguishing consideration is that one of the discrepancies alleged to ground the need for a forensic documentary analysis has particular resonance in the sequestration application, being alleged discrepancies between original documents and copies attached to the application in respect of a Guarantee allegedly concluded between Rushil Singh, Singh and Investec. However, as with the other discrepancies raised, the inferences sought to be drawn amount to speculation and are not justified by the evidence and the matters Singh seeks to raise are matters that should and can be pertinently raised in an answering affidavit. If left to speculate about the alleged discrepancies, one can readily conceive of innocent explanation.⁷

9. Furthermore, I considered whether the provisional answer to the sequestration application stood on a different footing to the “provisional” answer to the liquidation application. Although there are more fortified suggestions of a substantive defence, the affidavit remains self-avowedly contingent on what further information might come to hand. In these circumstances, and despite the then imminent postponement of the sequestration application, it was my view that the interests of justice would not be served if the affidavit was admitted pursuant to the counter-claim and in its extant form.

⁷ *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.’

10. In conclusion, it must be emphasized that the decision does not close the door on any answer by Singh to the sequestration application or to her invoking other remedies she may have. But parties must conduct litigation under the Rules of this Court. If a postponement or condonation is to be sought to enable an answer or to invoke other remedies even at this late stage, relief should be sought timeously and in the usual manner.

SJ COWEN

**JUDGE, HIGH COURT,
PRETORIA**

Date of hearing: 17 October 2023

Date of judgment: 6 November 2023

Appearances:

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

First Respondent: Mr Mahomed instructed by Motala and Associates

Second Respondent: Mr CHJ Badenhorst SC and Mr CT Vetter instructed by Small-Smith and Associates Inc.

