

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

CASE NO: 017911/2023

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

DATE: 15 JULY 2024

SIGNATURE OF JUDGE:

In the matter between:

INVESTEC BANK LIMITED

APPLICANT

Registration No: 1969/004764/06

and

NISHANI MICHELLE SINGH

FIRST RESPONDENT

Date of birth: 20 April 1973

ID number: 7[...]

Residential Address: 2[...] A[...] Street, Waterkloof, Pretoria

Marital Status: Married in community of property to Stephen John Killick

STEPHEN JOHN KILLICK

SECOND RESPONDENT

Date of birth: 9 December 1962

ID number: 6[...]

Residential Address: 2[...] A[...] Street, Waterkloof, Pretoria

Marital Status: Married in community property to Nishani Michelle Singh

JUDGMENT

COWEN J

Introduction

1. Investec Bank Limited (Investec) has applied to sequestrate the joint estate of the respondents, Nishani Michelle Singh (Singh) and Stephen John Killick (Killick)¹ in circumstances where the joint estate is alleged to owe Investec debt in excess of R470 million. Singh and Killick married in 2003, in community of property, and they live in Waterkloof, Pretoria.
2. The joint estate's alleged indebtedness arises from various sureties (styled guarantees)² Singh provided Investec and her private bank facility at Investec. Singh allegedly provided the guarantees to Investec for the indebtedness of BIG Business Innovations Group (Pty) Ltd (BIG) and 12 Infinite Innovations Proprietary Limited (12 Infinite). BIG is one of the main entities through which Singh has pursued her business and professional affairs, which, until late 2022, entailed a multi-million Rand business with operations both locally and in Ghana. Where Singh conducted her affairs through BIG locally, she conducted her affairs in Ghana through a company known as Ghana Infrastructure Company Limited (GIC). BIG is the sole shareholder of GIC. 12 Infinite served as a local property holding entity. Singh allegedly provided further guarantees in respect of a liability of 12 Infinite and four instalment sale agreements pursuant to which Investec financed the purchase of motor vehicles for BIG. These are referred to in the affidavits as the IS guarantees and comprise the Deal 005 Guarantee, the Deal 006 Guarantee, the Deal 007 Guarantee and the Deal 008 Guarantee.

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 parties refer to the sureties as guarantees, and for that reason I use the terminology of guarantee, but there is no dispute that they are in substance sureties.

3. When Investec instituted the sequestration application in February 2023, the alleged indebtedness to Investec of Singh, and in turn the joint estate, arising from these transactions was in the aggregate amount of some R189 525 735.50 plus interest. Investec alleges a further indebtedness of the joint estate in an amount of some R281 638 056.92, which is also said to arise from Singh having guaranteed BIG's debts, one of which is BIG's guarantee of GIC's indebtedness to Investec's Corporate and Institutional Bank Division (ICIB and the GIC debt). Singh and Killick oppose the application.
4. The guarantees relate primarily to three loan transactions between *inter alia* Investec and BIG concluded in 2021.
 - 4.1. First, a written working capital facility agreement concluded in January 2021 between Investec, BIG and GIC (as guarantor) in terms of which Investec made a working capital facility available to BIG (the working capital facility agreement). Pursuant to that agreement, Investec provided BIG with a working capital facility in an aggregate amount of R35 million, to be repaid in full on the termination date.³
 - 4.2. Secondly, an addendum to the working capital agreement concluded in February 2022 between Investec, BIG, GIC and Quixie Investments Eight Proprietary Limited (Quixie), Singh and Rushil Singh (the addendum). Rushil Singh is Singh's brother. The main purpose of the addendum was to extend the repayment date under the working capital facility agreement by six months to 25 August 2022. Investec alleges an amount of R36 166 173.59 with penalty interest is payable in terms of the working capital facility agreement.
 - 4.3. On 25 January 2021, Singh and her brother Rushil Singh allegedly signed a joint and several guarantee for BIG's indebtedness to Investec in terms of the working capital facility agreement (the BIG joint guarantee).

³ The termination date was defined to be the date which falls 364 days from the effective date.

4.4. Thirdly, in April 2021, Investec and BIG allegedly concluded a written term facility agreement in terms of which Investec agreed to advance a loan to BIG (the term loan agreement). Investec made a facility in the amount of R150 750 000.00 available to BIG. Investec alleges that the total amount BIG owes it under the term loan agreement is R145 244 129.81.

4.5. Also during April 2021, Singh allegedly signed a guarantee in favour of Investec for the BIG's indebtedness in terms of the term loan agreement (the BIG individual guarantee).

5. The sequestration application was instituted on 21 February 2023 on an urgent basis. It was so instituted in circumstances where Investec had become apprised of information grounding a suspicion of a web of fraud and dishonesty surrounding the 2021 BIG transactions. Investec believes that the fraud was perpetrated by Singh and her brother Rushil Singh. Singh and Rushil Singh are each 50% shareholders of BIG and Rushil Singh is understood to be the sole shareholder of 12 Infinite. Both are directors of the companies, although both companies are now in liquidation.⁴ Information about suspected fraud and dishonesty apparently came to light in the course of an enquiry conducted in terms of section 417 read with section 418 of the Companies Act 61 of 1973,⁵ which Investec triggered. Investec triggered the enquiry when Stanbic Bank Ghana Limited (Stanbic Ghana) declined to honour two demand guarantees Singh had supplied to Investec in respect of the working capital facility agreement and the term loan agreement saying that they were fake or forged.

6. As mentioned, both Singh and Killick oppose the application.⁶ They request its dismissal alternatively its stay. In the event the application is not dismissed, Singh seeks a referral to trial or oral evidence. In a counter-application, Killick

⁴ BIG was placed under a provisional winding up order on 29 November 2023 and a final winding up order on 6 November 2023. 12 Infinite was placed under a provisional winding up order on 3 February 2023.

⁵ The provisions remain in force under the Companies Act 71 of 2008.

⁶ Nishani Singh delivered a notice of intention to oppose on 10 March 2023. Stephen Killick delivered a notice of intention to oppose on 24 February 2023.

seeks the return to his Investec bank account of nearly R1 million that Investec has retained as set-off for part of the alleged debt. Killick also seeks a stay of this application pending determination of an action he intends to institute against Investec to declare void the guarantees that underpin the application on the basis that Investec breached its duty of care to Killick in respect thereof, alternatively to claim damages from Investec for loss he will suffer if the joint estate is held liable under the guarantees.

7. Killick is a chartered accountant and a partner at PwC. He has, in total, provided approximately 30 years of service at PwC. Killick also has a private bank account with Investec. Notably, Singh and Killick are separately represented and have defended the application on markedly different bases. This has ensued in circumstances where it has transpired, and is now common cause, at least between Investec and Killick, that Killick himself is the victim of fraud and forgery, specifically regarding spousal consents to guarantees Singh supplied. Moreover, while the couple are still married and reside at the same property, Killick avers that their relationship has for some time been distant and they are now estranged and lead separate lives. He says that their relationship started to break down as far back as 2012/2013. However, as a devout Catholic who believes in the sanctity and indissolubility of a Catholic marriage, Killick did not want to institute divorce proceedings. In 2021, Killick had nevertheless initiated a process to have a post nuptial contract registered, which would separate the assets of the joint estate, but that process was placed on hold as he did not consider it a matter of urgency. In November 2022, he sought to get the process back on track but it was again placed on hold because he then began to learn of the position of Singh's business and he did not want to take any steps relating to the assets of the joint estate that could be viewed in a bad light.
8. In this case, and these being proceedings for a provisional sequestration order, Investec must establish *prima facie* that:⁷

8.1. It has a liquidated claim against the joint estate for not less than R100;

⁷ Section 10 of the Insolvency Act 24 of 1936 (Insolvency Act).

- 8.2. The joint estate is insolvent;
- 8.3. There is reason to believe that it will be to the advantage of creditors if the joint estate is sequestrated.
9. Even if these requirements are established, the Court retains a discretion whether to grant a sequestration order. The discretion is narrow and is only exercised if a respondents shows special or unusual circumstances.⁸
10. This judgment deals with the following issues:
- 10.1. Whether Investec has *locus standi*, a point taken by Singh.
- 10.2. Whether the joint estate is insolvent. This entails consideration of three related issues: first, whether the proven liabilities exceed the assets in the joint estate; secondly, whether the joint estate is bound by the BIG joint guarantee and the BIG individual guarantee in view of section 15(4) of the Matrimonial Property Act 88 of 1984 (the MPA) and thirdly, whether Investec has made out a case for liability of the joint estate in delict.
- 10.3. Whether there is advantage to creditors if the estate is sequestrated.
- 10.4. Whether there is any basis for exercising the Court's discretion to decline a sequestration order.
- 10.5. Killick's counter-application.
- 10.6. Killick and Singh's application for a stay / referral to evidence.

⁸ *FirstRand Bank Ltd v Evans* 2011(4) SA 597 (KZD) para 27; *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022(1) SA 91 (SCA) at para 12 n 16.

11. The sequestration application runs into thousands of pages. It has taken a tortuous and unusual course, and its fair adjudication requires an appreciation both of how the pleadings and affidavits have unfolded chronologically and their key elements at various stages. I detail these features upfront before turning to the issues that arise and the related facts.

Litigation background

12. The litigation appears to have commenced in early November 2022 when Investec sent BIG letters of demand for payment of the amounts of R35 161 886,38 in respect of the working capital facility agreement, as read with the addendum, and R141 257 857.40 in respect of the term loan agreement. BIG did not respond.

13. On 9 November 2022, Investec sent letters of demand to Stanbic Ghana in respect of the two Stanbic demand guarantees Singh had supplied to Investec. Investec pleads that it was a security condition under the working capital agreement and the term loan agreement that BIG procure from Stanbic Ghana demand guarantees in Investec's favour.

14. On 11 November 2022, Investec sent Singh and Killick letters of demand in respect of the amounts allegedly due in terms of the BIG joint guarantee and the BIG individual guarantee. Investec also demanded payment of the amounts outstanding in terms of Singh's private bank account and the 12 Infinite Guarantee.

15. On 15 November 2022, Stanbic Ghana responded to Investec's demands and stated *inter alia* that the 'two documents did not emanate from Stanbic and are fake or forged.' Stanbic Ghana denied any liability to Investec arising therefrom.

16. On 16 November 2022, Investec requested an urgent meeting with the directors of BIG and GIC to discuss the response from Stanbic Ghana, of which they were notified. Killick was copied on the correspondence. Singh declined to attend the meeting in any capacity. Neither did Killick, who explains that he understood that the issue would be dealt with by Singh.

17. On 29 November 2022, Collis J placed BIG under provisional liquidation. Investec applied to convene the section 417 enquiry due to the alleged Stanbic Ghana fraud.
18. On 2 December 2022, Investec sent Singh letters of demand in respect of her private bank account and the 12 Infinite Guarantee.
19. On 9 December 2022, the section 417 enquiry was convened in respect of BIG and on 11 January 2023, Investec received further feedback from Stanbic Ghana.
20. On 31 January 2023, Killick became aware that spousal consents were purportedly signed by him in respect of various guarantees, and on 2 February 2023, Killick's attorneys wrote to Investec asserting that he denies signing them.
21. On 6 February 2023, Investec wrote to Killick contending that his consent was not required in law. On 10 February 2023, Killick requested copies of all guarantees signed by Singh and any related consents allegedly signed by him. Investec supplied these to him on 16 February 2023.
22. On 14 February 2023, R951 845.58 was received into Killick's Investec private bank account. Soon thereafter, Investec advised him that the funds had been set off against the joint estate's indebtedness. Also on 14 February 2023, the BIG provisional winding up order was extended to 5 June 2023.
23. When the sequestration application was instituted on 21 February 2023, the notice of motion advised that Investec would set it down on the urgent roll on 14 March 2023, three weeks later. In the founding affidavit, Investec alleged that, while not strictly required, Killick had consented to the joint guarantee, the individual guarantee and the 12 Infinite guarantee. Copies of documents recording his consent are attached to the founding affidavit in the sequestration application (the spousal consent documents).

24. On 8 March 2023, Stephen Killick delivered an answering affidavit and a counter-application.⁹ He disputed the urgency of the application and sought to answer the case, albeit under onerous time constraints. A key feature of his answer is that the signatures to the spousal consent documents are forged. He unequivocally records that he did not sign any of the spousal consent documents and sought access to the original documents for forensic analysis.¹⁰ Killick contends that his consent was required for the guarantees to be valid. He also sought access to various further information including the due diligence process embarked upon by Investec before concluding the 2021 BIG transactions and advancing the significant sums of money to BIG. On the available information, however, he contends that Investec's conduct was reckless, grossly negligent and wrongful. In his counter-application, he sought, and still seeks the immediate restoration of access to funds in his own private bank account at Investec and a refund of the moneys Investec retained by way of set-off.¹¹ He also seeks a stay pending the institution of action proceedings to declare the guarantees void and for damages in the event that the liability flowing from the guarantees is visited on the joint estate. Investec replied the next day (9 March 2023), *inter alia* persisting with the stance that the spousal consents were not a pre-requisite for the validity of the guarantees.

25. On 10 March 2023, Singh delivered a detailed notice in terms of Rule 35(12) of the Uniform Rules of Court (the Rules) seeking inspection of 104 documentary items. Investec replied the next day, providing access to many of the requested items. On 13 March 2023, Singh delivered what she styled a 'provisional' answering affidavit to the sequestration application, *inter alia*, disputing urgency.¹² A main theme in her affidavit is the contention that she was seeking access to documents concerning the agreements relied upon to source the alleged indebtedness and accordingly would not be responding to the application in full. She makes a series of high level claims effectively suggesting that the agreements, each of which is denied, may not be authentic and says she intends

⁹ I refer to this affidavit as Killick's March 2023 answering affidavit and counter-application.

¹⁰ He had inspected these on 3 March 2023.

¹¹ Referred to as 'the Killick counter-application'.

¹² I refer to this affidavit as Singh's March 2023 provisional answering affidavit.

to have the documents examined by a forensic examiner to determine whether the signatures that purport to be hers are indeed hers. Singh points out too that since BIG was placed under provisional liquidation, she no longer has access to any documents she requires in order to mount her defence. She also avers that the application is an abuse of process aimed at forcing a settlement, altering her status and thereby preventing her from defending the corporate entities involved in the matter. She describes Investec as acting in bad faith, seeking to hide criminal conduct on the part of its own employees, and its 'tactics' as 'clandestine, gestapo tactics'. She disputes that the case – which she says amounts to debt enforcement – can be brought in motion proceedings. She contends that Investec has failed to demonstrate any advantage to creditors. She also contends that once she has access to the accounting records of BIG she will demonstrate that Investec 'has been paid a substantial portion of its claim and that what is left is just the interest portion which in any event will be paid from the admitted debts owed by the Ghanaian Government.' Singh seeks the dismissal alternatively a stay of the application pending a referral to oral evidence or trial: If Investec proves any debts 'under pain of cross-examination', she tenders to pay.

26. On 13 March 2023, Killick delivered a detailed Rule 35(12) notice, to which Investec replied the same day.

27. On 14 March 2023, the sequestration application came before Van der Westhuizen J, who made an order by agreement between the parties, postponing the application until 5 and 6 June 2023 to be heard together with Investec's application to obtain a final order liquidating BIG. The order regulated the further conduct of both applications and imminent applications to be instituted by Singh under Rule 30A of the Rules to compel further compliance with the Rule 35(12) notices.¹³

¹³ On 23 March 2023, Singh delivered her Rule 30A application. Invested answered on 24 March 2023, and Singh replied on 28 March 2023.

28. On 28 April 2023 Killick delivered a replying affidavit in his counter-application and a 'further affidavit' in the sequestration application.¹⁴ Amongst other matters, the further affidavit deals with matter raised in Investec's replying affidavit, elaborates on contentions why the guarantees were not in the ordinary course of business and supplies expert findings regarding his signatures to the spousal consent documents.¹⁵ The experts confirm that the signatures are not Killick's signatures.
29. On 11 May 2024, Investec delivered a supplementary replying affidavit dealing with Killick's 28 April 2023 replying and further affidavit.¹⁶ Investec also sought to supplement its founding affidavit by pleading that by virtue of Singh's fraudulent conduct, she – and thus the joint estate – is liable to it in delict for damages.
30. On 19 May 2023, Singh's dispute regarding the Rule 35(12) notices was ventilated before Du Plessis AJ, who dismissed the application. By the time that the matter was heard, the dispute had narrowed as Investec had, on 16 March 2023, made the original agreements it relied upon available for inspection to Singh and her representatives. On 24 May 2023, Singh requested reasons for the decision.
31. The matters were not ripe for hearing in June 2023, and on 5 June 2023, and under the direction of the Deputy Judge President, the liquidation application and the sequestration application were postponed until 17 and 18 October 2023 to be heard as a special motion, with time frames set for their further conduct.
32. The time frames set by the Deputy Judge President required Singh to deliver her answering affidavit by 9 June 2023, which she failed to do. By that time, she had access to the original documentation she requested in March 2023.

¹⁴ I refer to the affidavit as Killick's 28 April 2023 replying and further affidavit.

¹⁵ The experts are documents examiners, a Brigadier Johannes Frederick Hattingh and a Mr Adriaan Bam.

¹⁶ I refer to this as the '11 May 2024 supplementary founding and replying affidavit'.

33. On 23 June 2023, Investec replied to Singh's March 2023 provisional answering affidavit. Investec points out that Singh had failed to supplement her answering affidavit notwithstanding her access to the original documents underlying the agreements and had not obtained a forensic examination. This without any explanation and despite the time frames set by the Deputy Judge President.
34. On 10 October 2023, Singh delivered an urgent 'counter-application' in the sequestration application, which Investec answered on 13 October 2023, and to which Singh replied on 16 October 2023. On 12 October 2023, Du Plessis AJ delivered his reasons for dismissing Singh's Rule 30A application.
35. On 17 October 2023, four applications came before me in Third Court, the BIG liquidation application, the sequestration application, Singh's urgent 'counter-application' and a similar 'counter-application' brought by BIG in the liquidation application. I initially heard argument in the 'counter-applications', which I thereafter dismissed with costs on an attorney and client scale.¹⁷ In my reasons for decision, I explain the nature of these applications. For present purposes, it suffices to note that in substance the applications amounted to a postponement or stay application to allow Singh to appeal the judgment of Du Plessis AJ, to obtain a forensic analysis of the documents underlying the agreements Investec relies upon and to obtain further information before answering the case. I pointed out that the decision did not close the door on any fuller answer by Singh to the sequestration application, but that she must conduct litigation under the Rules.
36. Killick's counsel had, however, raised a preliminary issue which led, by agreement between the parties, to the postponement of the sequestration application to be heard on 25 January 2023.¹⁸ I heard the BIG winding-up application on 18 October 2023 and on 6 November 2023, I confirmed the provisional order placing BIG in final liquidation.

¹⁷ *Investec Bank Limited v Singh and another* [2023] ZAGPPHC 1887 (6 November 2023). Singh has since applied for leave to appeal against that decision.

¹⁸ The terms of the postponement are detailed in an order I made on 18 October 2023 (the October 2023 postponement order).

37. The postponement order provided for further discovery by Investec of documents relating to the procurement of Killick's signature of the spousal consents and for Singh and Killick to deliver provisional supplementary answering affidavits to Investec's 11 May 2023 supplementary founding affidavit and to deal provisionally with a point raised in connection with section 15(9) of the MPA.¹⁹ On 27 November 2023, Singh delivered a provisional supplementary answering affidavit. On 28 November 2023, Killick delivered his further affidavit. On 14 December 2023, Investec responded separately to both of these affidavits.²⁰

38. The application was substantially argued on 25 January 2024. However, the parties required a further opportunity to deliver further submissions and the matter stood down to allow the receipt of further submissions. I reserved judgment on 9 February 2024. In circumstances where all urgency had long dissipated, I had intended to deliver judgment at the end of May 2024 and informed the parties accordingly.²¹ There was however a further delay because Singh, with new attorneys appointed in early May 2024, applied to deliver yet a further affidavit to produce new evidence relating to alleged changes in the financial position of the joint estate. Investec objected to the receipt of the affidavit and to ensure fairness, I requested submissions from the parties which were furnished on 21 June 2024.

Admission of affidavits out of sequence

39. Unsurprisingly, when the matter was heard, disputes ensued about whether the Court can accept all submitted affidavits. I turn to these disputes.

Investec's supplementation of its founding affidavit in May 2023

40. Killick took issue with Investec's belated supplementation of its founding affidavit in May 2023, in which Investec raises the alleged delictual liability of the joint estate. Singh aligned herself with the objection. Investec defended its approach

¹⁹ The section 15(9) point was not ultimately persisted with at this stage.

²⁰ I refer to these as Singh's November 2023 supplementary answering affidavit; Killick's November 2023 supplementary answering affidavit and Investec's December 2023 supplementary replying affidavits.

²¹ There was a brief delay due to illness.

on the basis that material information relating to the fraudulent consents came to light only after the application was instituted.

41. It is trite that a party must make out its case in its founding affidavit.²² Moreover, it is well-established that 'it is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed.'²³ The Rules need not always be rigidly applied, but where a party seeks to tender an affidavit out of sequence, they are seeking an indulgence and are not exercising a right and must both advance the explanation and satisfy the Court, in the circumstances of the case, that the affidavit should be received.²⁴ Investec applied for leave to admit the affidavit.

42. In my view, in the circumstances of this case, fairness dictates that the supplementary founding affidavit should be received, with the costs arising being costs in the cause. The information regarding the forged spousal consents, which is material to the delictual claim, came to light gradually and – while Killick pertinently informed Investec that he would dispute the signatures before the application was instituted – was only pertinently addressed in Killick's March 2023 answering affidavit and counter-application, and thereafter his 28 April 2023 replying and further affidavit, in which he supplied the outcome of the forensic analysis. Investec delivered the supplementary founding and replying affidavit on 11 May 2024, shortly thereafter. Investec thus cannot be accused of shaping the case 'to relieve the pinch of the shoe.' The affidavit was supplied in response to what came to light which entailed fraud prejudicing both Investec and Killick. The issues raised are material, as they ground an alternative claim against the joint estate in circumstances where Killick had raised a potential legal defence to the guarantees. Furthermore, Killick and Singh had a full opportunity to respond to the affidavit a consequence of the postponement order granted in October 2023.

²² *My Vote Counts NPC v Speaker of the National Assembly* 2016(1) SA 132 (CC) at para 177.

²³ *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963(4) SA 656 (A) at 660E.

²⁴ *Id* at 660E-G.

Singh's November 2023 supplementary answering affidavit

43. Investec takes issue with the extent of Singh's November 2023 supplementary affidavit. Investec is, in my view, justified in its complaint that the affidavit traversed matter well beyond what was contemplated by the October 2023 postponement order, and centrally purports to provide Singh's further answer to the case. In this regard, when I dismissed Singh's counter-application in October 2023, I expressly did not close the door to Singh supplementing her provisional answering affidavit. What is disconcerting about her approach, rather, is that at no point in her November 2023 supplementary affidavit does she ask for leave to do what she is doing, nor does she pertinently seek condonation.²⁵ Rather, she adopts the stance that she is entitled to conduct herself in this fashion. She points out that she has lodged an application for leave to appeal against the Court's dismissal of her counter-application, in which she had, as a prayer, sought to admit a provisional answering affidavit dealing in some measure with the same issues that she dealt with again in November. However, she did not seek to have the application for leave to appeal heard, nor did she seek a postponement, and it is difficult to see how any of the events absolve her from conducting herself in accordance with the Rules. A further concern is that the affidavit falls far short of a genuine and full explanation for the failure to comply timeously and rather evidences a pattern of brazen disregard and non-compliance with the Rules.

44. I am mindful, nevertheless, that, unlike in October 2023, when Singh last sought to introduce at least much of the material, Investec had a fair opportunity to respond, and the affidavit contains Singh's central effort to defend the application, which concerns her status and in which she is accused of serious misconduct. I am also mindful that there is a degree of overlap between the answer to the founding affidavit and the somewhat brief answer to the supplementary founding

²⁵ The test for condonation is set out in *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* 2008(2) SA 472 (CC). The test is the interests of justice test which depends on the facts and circumstances of each case. The Constitutional Court held: '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. ...'

affidavit, which relies for its substantive import on the rest of the affidavit. Yet only the latter was expressly contemplated by the October 2023 postponement order. I have accordingly had to consider the import of all of the evidence. In circumstances where I conclude that it cannot sustain a *bona fide* defence to the application, I decline to admit the bulk of the affidavit. Only the answer to the supplementary affidavit is admitted. To the extent necessary, however, and in order to give credence to that portion, I have where necessary had regard to the fuller content of the affidavit and Investec's reply thereto. In the circumstances, no special costs order is warranted.

Singh's belated May 2024 affidavit

45. I have also concluded that Singh's belated May 2024 affidavit cannot be admitted.²⁶ First, the affidavit was delivered when the Court intended to deliver judgment, conduct strongly suggestive of yet a further attempt to delay proceedings, which was partly achieved. But even if that was not Singh's motive, the high water mark of the explanation for the sheer lateness is a change of attorneys in early May when a view was then formed to place the information before Court. A change of attorneys after hearing a matter, is not, on its own, a ground to re-open the evidence. Furthermore, on the facts, the delay is not justified. For example, mention is made of BIG's liquidator realizing funds through the sale of vehicles. But even during the January 2024 hearing, Singh's counsel sought to refer to those processes from the bar. For the most part, the information is contained in affidavits dated April 2024 exchanged in a postponement application in the Rushil Singh sequestration proceedings, which concern events prior thereto.

46. Secondly, although any urgency in the proceedings has long dissipated, the demands of finality are now acute. Thirdly, the introduction of new evidence will seriously prejudice the applicant given the stage the proceedings have reached, will entail further affidavits at significant cost and a rehearing on at least certain

²⁶ *Hano Trading CC v JR 209 Investments (Pty) Ltd and another* 2013(1) SA 161 (SCA) at para 11. *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000(4) SA 598 (C) at 617B-F details relevant considerations to which I have had regard.

aspects.²⁷ Singh's suggestion that there is no prejudice because the issues were canvassed in the parallel sequestration proceedings is unpersuasive as the costs and delay would nevertheless be significant.

47. Fourthly, I am not satisfied that the evidence is sufficiently material to justify its admission. The evidence in the affidavit itself is scant, and relies for its force on the affidavits exchanged in parallel sequestration proceedings, which are deposed to by Rushil Singh and Investec's deponent. I agree with Investec that without confirmation the evidence is inadmissible hearsay evidence. In any event, the information raises more questions regarding Singh's case than it answers. Specifically, one element of the evidence is a claim by Singh that BIG has now paid Investec some R80 million to discharge its indebtedness. Singh disputes what Investec alleged in the parallel sequestration proceedings, that the payment was in respect of the GIC debt to ICIB. What is not explained is how she reconciles these claims with her primary defence, which entails an attempt to dispute any of BIG's indebtedness to Investec, an inconsistency that renders the version in the evidence highly questionable. At least at this stage, the evidence would – at best for Singh – ultimately serve to corroborate BIG's indebtedness to Investec and on the information to hand, the Court would be compelled to accept Investec's explanation regarding the R80 million payment being that the funds were to discharge a portion of the GIC debt to ICIB. That evidence would have no material bearing on the application because I place no reliance on that debt for my findings. Moreover, the recovery by BIG's liquidator of monies either from BIG's debtors or from a sale of assets does not at this stage of that process serve to discharge any debt to Investec whether owed by BIG or the joint estate. In all the circumstances, I have come to the conclusion that the application to admit the May 2024 affidavit must be dismissed with costs including the costs of two counsel. Scale C is plainly applicable under Rule 67A of the Rules of Court.²⁸

Approach to the application

²⁷ *Hano Trading CC*, supra n 26 at para 14.

²⁸ *Mashavha v EnaexAfrica (Pty) Ltd* [2024] ZAGPJHC 387.

48. At this stage, Investec seeks a provisional sequestration order and to grant the relief, the Court must be of the opinion that *prima facie* the necessary facts exist to ground a sequestration order. The test is whether, on a conspectus of all the affidavits, a case for sequestration is made out on a balance of probabilities.
49. This Court must remain cognizant of the *Badenhorst* rule, which emphasizes:
- ‘Sequestration proceedings are designed to bring about a *concursum creditorem* to ensure an equal distribution between creditors, and are inappropriate to resolve a dispute as to the existence or otherwise of a debt. Consequently, where there is a genuine and *bona fide* dispute as to whether a respondent in sequestration proceedings is indebted to the applicant, ... the court should as a general rule dismiss the application.’²⁹
50. The *Badenhorst* rule does not preclude a sequestering Court from deciding legal questions even where there may be genuine and reasonable argument as to whether in law facts give rise to a claim.³⁰

The first issue: A claim against the joint estate for not less than R100?

51. Killick’s counsel responsibly conceded in argument that Investec has a claim against the joint estate for not less than R100. The concession was made based on Singh’s debt in respect of her private bank account with Investec which, at the date of institution of proceedings was R468 346.00. Singh made no such concession, but there can be no real debate on this point. In any event, as explained below, I have concluded that Investec has established

²⁹ *Badenhorst v Northern Construction Enterprises Ltd* 1956(2) SA 346 (T) at 347-8, reaffirmed in *Kalil v Decotex (Pty) Ltd and another* 1988(1) SA 943 (A) at 980B (*Kalil v Decotex*). See recently *Exploitatie - en Beleggingsmaatschappij Argonauten 11 BV and another v Honis* [2012] 2 All SA 22 (SCA) at para 11.

³⁰ *Orestisolve (Pty) Ltd t/a Essa Investment Holdings (Pty) Ltd and another* 2015(4) SA 449 (WCC) at para 12 cited with approval in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018(1) SA 94 (CC) at para 92.

further indebtedness on the part of the joint estate based on most of the guarantees. I deal further with Singh's contentions below.

The second issue: Insolvency

52. The dispute about whether the joint estate is in fact insolvent resolves into three questions, which are sensibly dealt with together:

- 52.1. What are the assets and liabilities of the joint estate;
- 52.2. Whether the joint estate is bound by the BIG joint guarantee and the BIG individual guarantee in view of section 15(4) of the MPA;
- 52.3. Alternatively, whether Investec has made out a case for liability of the joint estate in delict.

The assets of the joint estate

53. According to Investec, the total assets of the joint estate comprise R181 195 309.83, whereas the liabilities comprise R475 881 947.42, made up of liabilities to its private banking division in the amount of R189 525 735.50 and to ICIB for R281 638 056.02, arising from the GIC debt. If, as I conclude *prima facie*, the asset value is R181 195 309.83, then Investec can rely on the alleged liability to either its private banking division or ICIB to establish insolvency. Investec's version is contained in a balance sheet attached to the founding affidavit as FA55 (Annexure FA55).

54. Investec relied upon various sources of information to demonstrate insolvency in Annexure FA55 including a personal balance sheet Singh provided Investec as at 31 January 2022 (Singh's balance sheet of 31 January 2022), a schedule of assets and liabilities attached to a draft post nuptial contract which Killick had instructed attorneys to prepare and which reflect the assets and liabilities of the joint estate as at November 2022 (Killick's schedule of November 2022), valuations of immovable assets and vehicles Investec procured, bank statements

reflecting Singh's investment held with Stanbic Ghana and searches conducted by the applicant on public registers such as the Deeds Registry.

55. Investec contends that the assets of the joint estate comprise the following:

55.1. Immovable assets in the value of R27 837 000.00 made up of two properties in Portugal (R12 000 000.00), a property in Hermanus (R6 837 000.00) and a property in Waterkloof, Pretoria (R9 000 000.00). Investec excludes from consideration, in my view correctly, a property referred to as the Raslouw property which is referenced in Singh's balance sheet of 31 January 2022. Investec has demonstrated that the property is registered in the name of Quixie and it is not reflected in Killick's schedule of November 2022. The values that Investec attaches to the South African properties are based on sworn valuations and the value attached to the Portuguese properties is what Singh proffers in her balance sheet of 31 January 2022. In Killick's March 2023 answering affidavit, he does not seriously put in issue Investec's version as reflected in Annexure FA55. Singh only addresses the allegations in her November 2023 supplementary answering affidavit which allegations I have declined to admit. However, even having regard thereto, there is no serious dispute raised with how Investec has calculated the assets. Issue is taken with the liabilities.

55.2. Regarding movable assets, Investec relies on a total value of R153 358 309.83 comprised of the assets of both Killick and Singh. Killick's assets comprise his retirement annuities and investments, a Mercedes Benz and a share of PwC's Waterfall partnership. The value of the Mercedes Benz is confirmed by valuation and the remaining values are consistent with Killick's schedule of November 2022.

55.3. Singh's assets include retirement annuities and investments, a BMW Mini Cooper, a loan to Treda Trading (Pty) Ltd, a foreign cash investment in Ghana, other cash investments and art and Kruger coins. In this regard:

- 55.3.1. The value attached to the BMW Mini Cooper is confirmed by valuation.
- 55.3.2. The value attached to the loan to Treda Trading (Pty) Ltd is taken from Singh's balance sheet of 31 January 2022, which is consistent with the value in Killick's schedule of November 2022.
- 55.3.3. The value of the art and Kruger coins is taken from Killick's schedule of November 2022 which reflects a materially higher value than the value in Singh's balance sheet of 31 January 2022.
- 55.3.4. The value of the 'other cash investments' (R16 000 000) is taken from Singh's balance sheet of 31 January 2022 which is a generous assumption on the part of Investec in view of the material discrepancy reflected in Killick's schedule of November 2022 (R1 000 000).
- 55.3.5. Investec accepts the value of Singh's cash investment in Stanbic to be R64 429 835.83 as at 19 February 2023. It is apparent from the information to hand that the investment value is deteriorating and the February 2023 value is based on a bank statement dated October 2022. Singh has at no stage proffered any different value in any affidavit in these proceedings. The only value Singh has apparently attached to the investment is in her balance sheet of 31 January 2022 which reflects a value of R155 000 000. The value in Killick's subsequent schedule of November 2022 reflects a lower value of R115 000 000. On this evidence, I accept Investec's reliance on the October 2022 bank statement. Indeed, in the absence of any countervailing evidence, the inference can be drawn that it was a generous estimate.
- 55.4. In calculating the asset value of the joint estate, Investec discounted any reliance on value in Singh's shares in BIG and two vehicles, a McLaren 600 LT and a G-Wagon. I broadly accept Investec's

approach. According to a NATIS search, the two vehicles do not appear to be owned by Singh. Investec's explanation for discounting any value in Singh's shares in BIG are set out persuasively in the founding affidavit and I rely specifically on what is explained in paragraphs 92.1 to 92.3, not least the provisional liquidators' report of 12 December 2022. While Singh disputes BIG's liability to Investec, which in turn would have a material bearing on the value of its shares, I am unable to accept her explanations on the information before me. Her explanation ultimately resorts to a contention that Investec has defrauded BIG and Singh by inserting a former employee as a director in BIG's ranks to cash in on BIG's business in Ghana and avoid their own liability under a prior arrangement. The explanation is unsubstantiated and, without substantiation, has no traction.

- 55.5. In sum, I accept Investec's valuation of the joint estate's assets, save to note that the valuations are based on generous assumptions where Investec could not independently verify an asset value.

The liabilities of the joint estate

56. There are two uncontentioned liabilities: a PWC suretyship in Killick's name and a Standard Bank liability being a bond over the Waterkloof property. Together these come to R4 718 155.00. Insolvency thus turns on whether the Court can accept Investec's alleged debts of R189 525 735.50 (relating to its private banking division) and / or the debt of R281 638 056.02 (the GIC debt to ICIB).
57. Counsel paid little attention during argument to the alleged ICIB liability (R281 638 056.02), but Investec did not abandon reliance on it. Investec pleads the debt on the basis that Singh had guaranteed all and any indebtedness of BIG to Investec pursuant to any Finance Documents as defined in the various agreements concluded between Investec and BIG. BIG is said to be an unlimited guarantor for GIC for its indebtedness to ICIB and GIC is said to be indebted to Investec in an amount of R281 638 056.92, being the conversion of an amount owed in US dollars as at 17 February 2023. Investec's difficulty in

these proceedings at this stage, is that it has failed to plead the debt adequately either in the hands of BIG or the joint estate.

58. The issue of insolvency accordingly turns on the alleged debts of R189 525 735.50 owed to Investec's private banking division. The joint estate is said to be indebted in that sum, which is comprised several amounts, each determined as at 17 February 2023 and each of which attract interest:

58.1. R145 244 129.81 - the BIG individual guarantee;

58.2. R36 166 173.59 - the BIG joint guarantee;

58.3. R3 900 000.00 - the 12 Infinite guarantee;

58.4. R468 346.00 - Singh's private bank account;

58.5. R25 080.42.00 – the Deal 005 Guarantee;

58.6. R500 262.04 – the Deal 006 Guarantee;

58.7. R887 063.81 – the Deal 007 Guarantee;

58.8. R2 334 679.83 – the Deal 008 Guarantee.

59. Insolvency is established *prima facie* if Investec establishes liability of the joint estate under the BIG joint guarantee and the BIG individual guarantee, which together come to R181 410 303.40. Conversely, without these amounts, Investec is compelled to rely on its alleged delictual claim.

60. Singh disputed the liability of the joint estate for *inter alia* these debts by contending that Investec had failed to establish BIG's indebtedness to Investec under the working capital facility agreement (and addendum) or the term loan agreement. If so, there can be no indebtedness of the joint estate under the various guarantees.

61. In my view, Investec has satisfactorily established BIG's indebtedness under the agreements relied upon, including the working capital facility agreement (and addendum) and the term loan agreement. Indeed, in her March 2023 provisional answering affidavit, Singh admits that BIG is the borrower under the working capital facility agreement and the term loan agreement and she admits that there has been an instance of default in respect of the term loan agreement. In Investec's reply to the March 2023 provisional answering affidavit, it points out – in response to Singh's tender to pay any proven debt – that Singh has made no attempt to make payment of any outstanding debts and that by that time, all of the accounts Investec relied upon were in arrears. What Singh took issue with at that stage, is Investec accelerating BIG's debts under the remaining agreements relying on cross default provisions, which she describes as a 'catastrophic knee jerk reaction'. What she does not explain is why Investec was not entitled to accelerate these debts, whereas Investec pleads that entitlement and it is apparent from the agreements.

62. Singh's counsel submitted, nevertheless, that Singh has genuinely and *bona fide* disputed all of the pleaded debts, including on BIG's part. Notably, Singh indicated in her March 2023 provisional answering affidavit that she intended, before answering fully, to obtain a forensic analysis of the original agreements. But at no stage did she do so, even in circumstances where – in her October 2023 counter-application – she again said she intended to 'authenticate' the agreements. Rather, in her November 2023 supplementary answering affidavit, and similarly to what she sought to do in the October 2023 counter-application, was to point the Court to alleged inconsistencies and difficulties with the documents Investec relies upon. I have declined to admit that affidavit inasmuch as it constitutes an answer to the founding affidavit, but before doing so, I considered the materiality of the evidence and I concluded that my view of the case would not be altered even if I had admitted it. In a number of respects, the issues that Singh raised in November 2023 are the same as those that she raised in her October counter-applications and which I dealt with in my judgments dismissing them. In this regard, Investec raises the issue of *res judicata*. However, in circumstances where the questions for decision are different, and

Investec did not plead issue estoppel, I considered their merits. Nonetheless, as in the counter-claims, the inferences Singh sought to draw were speculative and are not justified on the evidence.³¹ In short, even if the Court had admitted Singh's November 2023 supplementary answering affidavit in full, I would not have concluded that she has genuinely or *bona fide* disputed any of the agreements Investec relies upon.³² Nor are there any real disputes that Investec

³¹ *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.

³² In respect of the working capital facility agreement, Singh takes issue with the fact that the agreements are not initialed on each page by their signatories. The point is also taken in respect of the addendum and term loan agreement. She points out too that the GIC Security Agreement is not mentioned in the definitions section of the version of the working capital facility agreement attached to the BIG winding up application or in the definition referencing security documents. The inference that is drawn is that Investec has been fraudulently adding to the agreements to suit their case in the sequestration applications against both Rushil Singh and Singh. What is not explained is how the differences in fact advance Investec's case and the inferences are speculative. Furthermore, as matters transpired, Investec fully addressed the concern in the replying affidavit explaining that the incorrect version of the agreement had mistakenly been attached and that save for the reference to the GIC Security Agreement, the versions were identical. That clause had been excluded before the agreements were finalized, at the request of BIG. Singh also takes issue with the fact that the schedules to the working capital agreement are not signed or initialed. In this regard, Schedule 3 is meant to contain specimen signatures of the duly authorized directors of BIG, but these are not reflected. The provision of specimen signatures is said to be a condition precedent to the initial utilization in terms of Schedule 1. However, as Investec contends in reply, the material terms of the agreement, which was implemented, are ultimately undisputed. Singh points out that the working capital facility agreement contains signature pages, which are not numbered which is compared with an index to the agreement in the winding up application which does not reference these signature pages. The inference Singh draws is that the documents have been tampered with and the signature pages have been appended *ex post facto*. I can see no sound basis for accepting the inference alleged, which is disputed. A further point taken in respect of the term loan agreement relates to a witness signature, which does not appear in the copy of the agreement attached to the sequestration agreement but does appear in the copy of the agreement attached to Singh's sequestration agreement. The signature was apparently missing from the original document supplied at the inspection. Singh infers as 'the only plausible explanation' that the signature was inserted before bringing the application to sequester Singh's brother. Investec's explanation in reply is that the witness, a Ms Maritzel Cronje, in fact witnessed the signing of the agreement on 19 April 2021, but when it was scanned, she had not yet appended her signature. During or about the same month Investec realized that she had omitted to affix her signature. Ms Cronje deposes to a confirmatory affidavit. The inference Singh seeks to draw is, in my view, not warranted on a consideration of all the evidence. Further, Singh compares the signature pages of the BIG joint guarantee produced as originals in March 2023 with those attached to the founding affidavit demonstrating that those produced as originals were unsigned whereas those attached are signed. Investec explains this as a clerical error in that Investec erroneously produced an undated prior version of the guarantee when the originals were produced. Singh does then dispute that the signature is hers. I do not regard this to be a *bona fide* dispute. Despite repeatedly indicating she would obtain a forensic analysis, Singh declined to do so and there is nothing obviously contentious on a cursory comparison between the signatures on record. Moreover, the heart of her defence is less that she did not sign any guarantee, but that she is unable to confirm that the agreements relied upon are the agreements that she in fact signed. On this issue, her difficulty – she says – is that when BIG was placed under a provisional winding up order, she was no longer able to access its records. However, when viewed as a whole, I am unpersuaded that any of the alleged discrepancies point to anything that casts any doubt on the material terms of the agreements Investec relies upon, nor their initial conclusion as pleaded. Singh then seeks to invoke the remedy of Rule 35(12)(b), to preclude Investec's reliance on the agreements,

in fact advanced the monies to BIG, that there was at least one default, that that entitled Investec to accelerate all debts and that Singh had guaranteed their payment under each of the pleaded guarantees.

Section 15 of the MPA

63. The issue that then arises is whether Investec can rely on the guarantees – which give rise to the indebtedness of the joint estate – in the circumstances of this case in view of the provisions of section 15 of the MPA, and specifically sections 15(1), (2)(j) and (6).

64. Section 15 of the MPA is entitled 'Powers of spouses' and regulates *inter alia* the circumstances in which the consent of a spouse married in community of property is required for purposes of performing juristic acts.³³ Section 15(1) provides that

but it is doubtful that it can avail her in the circumstances of this case as Investec did comply with that part of the Rule 35(12) notice, even if it made certain errors in that regard. But even if the remedy would be available to Singh in view of Investec's errors, the Court would be entitled to permit Investec to rely on the agreements and it is difficult to see on what basis such leave could be refused in this case.

³³ Section 15 provides in full:

(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse-

(a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;

(b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;

(c) alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;

(d) alienate or pledge any jewellery, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments;

(e) withdraw money held in the name of the other spouse in any account in a banking institution, a building society or the Post Office Savings Bank of the Republic of South Africa;

(f) enter, as a consumer, into a credit agreement to which the provisions of the National Credit Act, 2005 (Act 34 of 2005) apply, as 'consumer' and 'credit agreement' are respectively defined in that Act, but this paragraph does not require the written consent of a spouse before incurring each successive charge under a credit facility, as defined in that Act;

(g) as a purchaser enter into a contract as defined in the Alienation of Land Act, 1981 (Act 68 of 1981), and to which the provisions of that Act apply;

(h) bind himself as surety.

(3) A spouse shall not without the consent of the other spouse-

(a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate;

(b) receive any money due or accruing to that other spouse or the joint estate by way of-

a spouse married in community of property 'may perform any juristic act with regard to the joint estate without the consent of the other spouse.' This power is, however subject to the provisions of subsections (2), (3) and (7). Subsection 15(2) details a series of juristic acts that a spouse married in community of property shall not perform without the written consent of the other spouse, including, in subsection 15(2)(h) to bind him or herself as surety. Subsection 15(6), however provides that the provisions of *inter alia* subsection 15(2)(h) 'do

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- (i) remuneration, earnings, bonus, allowance, royalty, pension or gratuity, by virtue of his profession, trade, business, or services rendered by him;
 - (ii) damages for loss of income contemplated in subparagraph (i);
 - (iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;
 - (iv) income derived from the separate property of the other spouse;
 - (v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse;
 - (vi) the proceeds of any insurance policy or annuity in favour of the other spouse;
 - (c) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection.
 - (4) The consent required for the purposes of paragraphs (b) to (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds registry, also be given by way of ratification within a reasonable time after the act concerned.
 - (5) The consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses.
 - (6) The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.
 - (7) Notwithstanding the provisions of subsection (2) (c), a spouse may without the consent of the other spouse-
 - (a) sell listed securities on the stock exchange and cede or pledge listed securities in order to buy listed securities;
 - (b) alienate, cede or pledge-
 - (i) a deposit held in his name at a building society or banking institution;
 - (ii) building society shares registered in his name.
 - (8) In determining whether a donation or alienation contemplated in subsection (3) (c) does not or probably will not unreasonably prejudice the interest of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the opinion of the court should be taken into account.
 - (9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and-
 - (a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;
 - (b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.

not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.'

65. The SCA has held, when interpreting section 15(2)(h) and section 15(6) of the MPA, that the question is not whether a spouse normally stands surety in the course of their business, trade or profession but whether the (single) juristic act in question was performed in the ordinary course of the spouse's business.³⁴ The authorities are, moreover, clear, that section 15(6) applies where a spouse conducts his or her business through a company or close corporation, as Singh does through at least BIG and GIC.³⁵ Indeed, but for the peculiar circumstances of this case, the parties were *ad idem*, in my view correctly, that the BIG guarantees were, in their nature, guarantees supplied in the ordinary course of Singh's business as contemplated by section 15(6) of the MPA.³⁶ Rather, Killick submitted that section 15(6) does not avail Investec in this case for three reasons, to be viewed separately and cumulatively: the express provisions of the working capital facility agreement and term loan agreement, the fraudulent circumstances surrounding the guarantees and Investec's own negligence or absence of due diligence.

66. I am unable to accept these submissions. In explaining my reasons, it is important to note that Killick did not plead or contend that the guarantees were invalid or susceptible to rescission as a result of any fraud or forgery.³⁷ The issue Killick raised is that in the circumstances of this case, the guarantees could not be regarded as being in the ordinary course of Singh's business as contemplated by section 15(6) and thus required Killick's consent to bind the joint estate, which consent had not in fact been obtained.

67. For his first contention, Killick relies on the express provisions of the working capital facility agreement,³⁸ the BIG joint guarantee,³⁹ the term loan agreement⁴⁰

³⁴ *Amalgamated Bank of SA Ltd v De Goede* 1997(4) SA 66 (SCA) (*Amalgamated Bank*) at 75G-I.

³⁵ *Amalgamated Bank*, supra n 34; *Strydom v Engen Petroleum* 2013(2) SA 187 (SCA) (*Strydom*).

³⁶ The transactions fall squarely within the ratio of *Strydom*, supra n 35 paras 10 and 11.

³⁷ See generally Forsyth and Pretorius *Caney's Law of Suretyship* 2010, Juta, 6 ed at 67.

³⁸ Clause 18.1.4 of the working capital facility agreement provides that, "Nishani is married in community of property and her spouse has provided his written consent to the entry into and

and the BIG individual guarantee.⁴¹ The import of the clauses in the working capital agreement and the term loan agreement is that the provision of spousal consent was a condition precedent to the conclusion of the both agreements and the fact of the provision of spousal consent was expressly recorded in view of the respondents' known in-community marital property regime. In turn, the signatory to the guarantees – Singh – represented and warranted to Investec that spousal consent was in place in view of the respondents' in-community marital property regime.

68. In my view, the fact that when BIG and Investec (and others) contracted they agreed that spousal consent was required for the guarantees, does not deprive Investec of its protection under section 15(6) of the MPA vis-a-vis the guarantor – being the joint estate. The working capital facility agreement is an agreement between BIG, GIC and Investec and regulates their contractual relationship, and centrally the relationship between Investec as creditor and BIG as principal debtor. I am mindful that when the addendum was concluded it was also signed

performance of the obligations contemplated by the Finance Documents to which she is a party." Clause 5.5 of Schedule 1 (Conditions Precedent) provides that the borrower must provide as a condition precedent, "Evidence to the Lender's satisfaction that, to the extent that an Individual Guarantor is married in community of property, his/her spouse has consented to his/her entry into the Finance Documents to which he/she is a party."

³⁹ Clause 5.1 of the BIG joint guarantee provides that, "Each Guarantor acknowledges that the Lender has entered into the Facility Agreement, this Guarantee and the other Finance Documents to which the Lender is a party on the basis of, and in full reliance on, representations and warranties in the following terms and each Guarantor now represents and warrants to the Lender as follows – 5.1.1. Nishani is married in community of property and her spouse has provided written consent to the entry into of, and performance by him/her of this Guarantee".

⁴⁰ Clause 8.1.4 of Annexure D (Transaction Terms) of the term loan agreement provides that, "Nishani Michelle Singh is married in community of property and her spouse has provided his written consent to the entry into, and performance of the obligations contemplated by, the Finance Documents to which she is a party."

Clause 3.6 of Annexure A (Conditions Precedent) of the term loan agreement provides that the borrower must provide as a condition precedent, "Evidence to the Lender's satisfaction that, to the extent that and Individual Guarantor is married in community of property, his/her spouse has consented to his/her entry into of the Finance Documents to which he/she is a party."

⁴¹ Clause 5.1 of the BIG individual guarantee provides that, "The Guarantor acknowledges that Investec has entered into the Facility Agreement, to other Finance Documents and this Guarantee on the basis of, and in full reliance on, representations and warranties in the following terms, and the Guarantor now represents and warrants to Investec as follows: 5.1.3 the Guarantor is not married in community of property, or if married in community of property the Guarantor has obtained the consent of the Guarantor's spouse to enter into this Guarantee and has full power to bind the Guarantor's assets pursuant to this Guarantee."

by *inter alia* Singh as guarantor. But the working capital facility agreement does not regulate the contractual relationship between Investec and the surety, the joint estate: that is regulated by the BIG Joint Guarantee. That guarantee records a representation and warranty on the part of Singh and its import is to confer contractual and / or delictual protections upon Investec as creditor. It is not a requirement or condition precedent to that agreement that there is a spousal consent in place. I arrive at the same conclusion regarding the term loan agreement which was concluded between Investec, as creditor, and BIG, as principal debtor. The relationship between Investec and the joint estate is regulated by the BIG individual guarantee which is in similar terms to the BIG joint guarantee and confers contractual and delictual protections upon Investec by way of Singh representing and warranting that she has her husband's consent to the transaction. The provision of a spousal consent is not a requirement or condition precedent to that agreement.

69. These issues do not arise in respect of the remaining guarantees because, even though spousal consents were ostensibly obtained (although forged) there is nothing in the underlying agreements, let alone the guarantees, that required them. Banks or other third parties may well opt to obtain spousal consents to *inter alia* suretyships as a matter of caution, even if they are not legally required. On its own, such cautionary conduct cannot, in my view, deprive banks or other third parties of the protections of section 15(6), if it is subsequently found that there is a defect in the consent so obtained.⁴²

70. The second contention is that the guarantees were not supplied in the ordinary course of Singh's business because of the surrounding fraud, specifically the fraud on the spousal consents, the Stanbic Ghana fraud and BIG's fraudulent audited financial statements. The latter fraud relates to two sets of BIG's financial statements for the financial year ending 31 May 2021.

⁴² Thus, inasmuch as such conduct may, in an appropriate case, give rise to a defence such as waiver or estoppel, no such defence was pleaded.

71. It is often said that fraud unravels all⁴³ and its consequences are, indeed, very far-reaching.⁴⁴ However, the Constitutional Court held in *Absa Bank Ltd v Moore and another*:⁴⁵ 'The maxim is not a flamethrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.' While the ambit of the Constitutional Court's holding was not debated before me, in this case, even if there may be grounds to unravel one or more of the contracts at play whether between Investec and principal debtor or the surety, neither Investec nor Killick (nor Singh for that matter) have sought to rescind them based on the alleged fraud. Indeed, Killick does not plead any invalidity as a result of any fraud: he contends that one or more of the three pleaded frauds mean they were not supplied in the ordinary course of business.

72. To support this contention, Killick relies heavily on *Amalgamated Banks*,⁴⁶ in which the SCA considered the meaning of 'the ordinary course of business' in section 15(6). In doing so, the SCA noted that the expression appears in other legislation, but that it does not necessarily carry exactly the same meaning in all cases. The SCA concluded that a Court must approach the question under section 15(6) whether a transaction is in the ordinary course of business objectively when asking whether, taking into account the terms of the agreement and the circumstances under which it was entered into, the agreement in question is one that would normally be entered into between business people.⁴⁷

⁴³ Usually with reference to dicta in *United City Merchants (Investments) Ltd and others v Royal Bank of Canada and others* [1982] 2 All ER 720 (HL) at 725h (per Lord Diplock) or *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712 (per Lord Denning). See eg *Afrisure CC and another v Watson NO and another* 2009(2) SA 127 (SCA) at para 38 and *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* [2014] ZASCA 21 (SCA) at para 25.

⁴⁴ In *FirstRand Bank Ltd (t/a Rand Merchant Bank) and another v Master of the High Court, Cape Town and others* 2014(2) SA 527 (WCC) at para 22: 'In South Africa, the 'insidious' effect of fraud permeates the entire legal system. It renders contracts voidable. It is one of the elements of a delictual liability. It constitutes a crime. Fraud excludes the effect of an ouster clause in legislation ... it also nullifies a contractual exemption clause which purports to exclude a party from the consequences of fraudulent conduct. ...'

⁴⁵ 2017 (1) SA 255 (CC) (2017 (2) BCLR 131; [2016] ZACC 34 at para 39.

⁴⁶ *Supra* n 34.

⁴⁷ *Id* at 77. The SCA arrived at this test by adapting the test it had held to apply to the expression in section 29 of the Insolvency Act (which deals with voidable preferences) which had been determined in *Hendricks NO v Swanepoel* 1962(4) SA 338 (A) at 345B in the following terms: '*Die Hof benader*

What Killick emphasizes is the SCA's reference to both the terms of the agreement and *the circumstances* under which a transaction was entered into.

73. There is of course nothing 'ordinary' in conducting business in the circumstances of this case. It cannot be said to be 'ordinary' business practice to forge spousal consent to a suretyship and thereby allow a third party to believe that a consent is in place, even if not legally required and it is not 'ordinary' to conduct business on the strength of forged financial statements or to procure a substantial loan by forging a guarantee from a foreign bank. Whatever Singh's personal role in these events, the evidence shows *prima facie* that these events probably took place at the instance of BIG and at least some of its employees to the detriment of both Investec and the joint estate.

74. But does this mean that Singh's suretyships were beyond the 'ordinary course' of her 'business' as contemplated by section 15(6) of the MPA, properly interpreted?⁴⁸ Such an interpretation would mean that the transaction must be

die vraag of n transaksie in die gewone loop van sake geskied het, objektief wanneer hy hom afvra of, in ag genome die voorwaardes van die ooreenkoms en die omstandighede waaronder dit aangegaan is, die bedoelde ooreenkoms een is wat normaalweg tussen solvent besigheidsmense aangegaan sou word.' The extract is translated as 'The Court approaches the question of whether a transaction took place in the ordinary course of business objectively when it asks itself whether, taking into account the terms of the agreement and the circumstances under which it was entered into, the agreement in question is one that would normally be entered into between solvent businessmen.' The adaptation was merely to remove the reference in the last clause to *solvent* business people and to refer only to business people. Section 29(a) provides: 'Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.'

⁴⁸ In interpreting a statute, a Court must, at the same time, consider text, context and purpose. See *Shoprite Checkers (Pty) Ltd v Mafate* 2023 (4) SA 537 (SCA) para 21 where the SCA refers to multiple decisions of the Constitutional Court and Supreme Court of Appeal in support of this holding. In *Minister of Police and Others v Fidelity Security Services (Pty) Ltd and Others* 2022 (2) SACR 519 (CC) ([2022] ZACC 16) para 34, the Constitutional Court summarised the principles of statutory interpretation in the following terms, with reference (in n 19) to a series of its decisions or decisions of the Supreme Court of Appeal it had approved.

'(a) Words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.

(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.

untainted by fraud. While the law provides far-reaching remedies for fraud, I am not persuaded in this case that it lies in section 15(6).

75. It is to be recalled that section 15 of the MPA was introduced when, in 1984, marital power was abolished. Section 15 introduced the system of administration that replaced marital power in in-community of property marriages. In short, spouses in in-community marriages were granted equal powers in relation to the joint estate.⁴⁹ Section 15 strikes a balance between the interests of third parties and the interests of spouses to such marriages. It accepts, as its default, that either spouse can bind the joint estate without the consent of the other. However, in respect of a series of specified transactions, spousal consent is required under section 15(2). The SCA held in *Amalgamated Banks* that these are legal acts that may harm the other spouse's interests.⁵⁰ The purpose of section 15(2) is thus protective of the interests of the non-contracting spouse, primarily and at least historically of a wife, who until the abolition of marital power, had been at the mercy of her husband in his administration of the joint estate.⁵¹ The section 15(6) exception, however, serves to ensure that the normal course of trade is not unnecessarily impeded or restricted⁵² and protects third parties who conduct business with a married person in respect of a narrow category of transactions, including the provision of suretyships, a lifeblood of commerce. The contours of that protection are further delineated by the provisions of section 15(9)(a) and (b) which are triggered when a spouse enters into a transaction contrary to the

(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification 'reasonably possible' is a reminder that judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

(d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.

⁴⁹ *Id* at 74.

⁵⁰ *Id* at 74. According to the Explanatory Memorandum on the Matrimonial Property Act 1984 'These are the juristic acts which are considered to be of such importance that unilateral action could either lead to serious friction between the spouses or to the prejudice of the joint estate.' See Wille's Principles of South African Law 9 ed Juta 2007 at 276.

⁵¹ *Kotze NO v Oosthuizen* 1988(3) SA 578 (C) at 579G-H.

⁵² *Amalgamated Bank*, *supra* n 34 at 74; Hahlo HR *The South African Law of Husband and Wife* 5 ed 1985 at 250; Barnard, Cronje, Olivier *The South African Law of Persons & Family Law Butterworths* 1986 2 ed p 273.

provisions of *inter alia* subsection 15(2) or (3), but no party is relying on that provision at this stage of the process. What is significant for present purposes is that when section 15(9)(a) is triggered – namely in circumstances where the third party does not know and cannot reasonably know that the transaction is being entered into contrary to the mentioned provisions, consent is deemed, and when section 15(9)(b) is triggered – namely when *inter alia* a spouse knows or ought reasonably to know that he or she will probably not obtain the necessary consent, the aggrieved spouse's remedy lies not in any invalidity or ability to rescind the transaction, but in an adjustment being effected in his or her favour upon the division of the joint estate.

76. Thus the test for determining whether a transaction is in the ordinary course of business under section 15(6) is an objective one and the enquiry entails a consideration whether the transaction is one that would normally be entered into between business people taking into account the terms of the agreement and the circumstances under which it was entered into.⁵³ As the SCA explained in *Amalgamated Banks*, that approach is plainly aligned with the purposes of section 15 generally, and section 15(6) in particular, and accords with its broader context.⁵⁴

77. An interpretation of the 'ordinary course' provision that focuses on whether the transaction is tainted by fraud would in my view deprive the enquiry of its objective nature and in turn place an undue burden on third parties. And it would ultimately unnecessarily impede or restrict the ordinary course of trade and business, for which the provision of suretyships, as one relevant transaction, is often a lifeblood. The interpretation would also generate profound uncertainty into business and commerce to the detriment of all players. Moreover, it would create an absurd scenario – and one that would defeat public policy – that a third party who wishes to bind a joint estate but is aware a transaction may be tainted by fraud, can seek to do so by ensuring a spousal consent is obtained. Finally, inasmuch as Killick's counsel sought to rely on cases which hold that where a

⁵³ *Amalgamated Bank*, supra n 34 at 77.

⁵⁴ *Id* at 74 to 77 discussed more fully above.

disposition (as contemplated by section 29 of the Insolvency Act)⁵⁵ or set-off (as contemplated by section 46 of the Insolvency Act)⁵⁶ in fraud of third parties cannot be in the ordinary course of business, this reliance is, in my view, misplaced.⁵⁷ In *Schwartz*, the Court was concerned with an appeal against a conviction under *inter alia* section 132(d) of the Insolvency Act in which fraud is expressly a consideration.⁵⁸ In *Al-Kharafi*, the fraud referred to is reflected in the expression *in fraudem creditorum* for example where the object of a transaction were to give one creditor an advantage over other creditors in cases of insolvency, not fraud in the criminal sense of the word.⁵⁹ If the dicta referred to are simply transposed to an interpretation of section 15(6) of the MPA, the consequences for third parties would be destructive, not protective, and would defeat the purpose and ignore the broader context of section 15 of the MPA.

78. Importantly, this interpretive approach does not leave an aggrieved spouse without remedy when a transaction is tainted by fraud, but that spouse would

⁵⁵ Section 29(1) provides: 'Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.'

⁵⁶ Section 46, titled 'Set-off' provides: 'If two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is sequestrated within a period of six months after the taking place of the set-off, or if a person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is sequestrated; then the trustee of the sequestrated estate may in either case abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, with the approval of the Master disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place: Provided that any set-off shall be effective and binding on the trustee of the insolvent estate if it takes place between an exchange or a market participant as defined in section 35A and any other party in accordance with the rules of such an exchange, or if it takes place under an agreement defined in section 35B.'

⁵⁷ The cases referred to are *S v Schwartz* 1972(2) SA 295 (C) at 303-4 (*Schwartz*) and *Al-Kharafi & Sons v Pema and others* NNO 2010(2) SA 360 (W) (*Al-Kharafi*) at para 15.

⁵⁸ The Court in *Schwartz* refers to *R v Sanfield* 1931 EDL 100 (*Sanfield*) at 106 and *Estate Van Schalkwyk v Hayman & Lessem* 1947(2) SA 1035 (C) (*Estate van Schalkwyk*). *Sanfield* is, like *Schwartz*, concerned with an appeal against a criminal conviction under the equivalent section of the Insolvency Act 32 of 1916. *Estate Van Schalkwyk* is concerned, however, with a voidable preference under section 29(1) of the Insolvency Act but, relying on *Sanfield*, deals with a case of a disposition made in fraud of third party rights.

⁵⁹ *Al-Kharafi*, para 15.

either need to resist a claim against a third party on the ordinary principles of contract governing fraud or pursue their remedies as against their spouse. In this case, and whatever Killick's remedies may be, he limited his case by grounding it squarely on the contention that the fraudulent circumstances took the transactions outside of the ordinary course of Singh's business as contemplated by section 15(6).

79. Killick's third contention to avoid Investec's reliance on section 15(6) concerns Investec's own conduct when procuring the guarantees. More specifically, Investec's alleged failure to exercise proper care or conduct the most elementary due diligence. Investec's alleged conduct described variously as 'negligent', 'cavalier' and 'reckless', take several forms including the following, amongst others.

79.1. Investec has at all material times been in possession of Killick's specimen signature as he is a long-standing Investec client. However, Investec failed to check his specimen signature against any of the signatures to the consents which 'obviously differ vastly'.

79.2. Investec accepted, contrary to its own policies, a consent that was, to its knowledge not signed in the presence of two witnesses. It also accepted consents that were not in original form but were scanned and sent electronically.

79.3. The witnesses to the consents were not independent but were employees of BIG.

79.4. Investec failed to contact Killick to confirm that he had consented to the guarantees.

79.5. Killick makes it quite clear that had he in fact been asked to consent to the guarantees he would have said no or at least insisted that the transactions be structured in a manner that did not expose the joint estate.

79.6. Investec failed to contact Stanbic Ghana to confirm the validity of the guarantees supplied in its name. Had Investec ensured the validity of these guarantees, which were conditions precedent to the working capital facility agreement and the term loan agreement, any exposure of the joint estate would have been relatively insignificant. More specifically, the exposure would have been some R11.4 million rather than in excess of R181 million.

79.7. It is suggested that had Investec conducted an effective due diligence enquiry prior to advancing the loans it would have realized that the one set of financial statements for the year ending March 2021 (ostensibly audited by Mazarz) were fraudulent. Investec ultimately failed to ensure that the BIG and GIC had been properly and validly audited by a registered and recognized audit firm.

80. The contention, in effect, is that a joint estate can avoid the ordinary course of business provision in section 15(6) where a third party fails to conduct itself with due diligence or care when procuring a surety. I disagree as that interpretation too would generate undue uncertainty in business transactions and undermine their efficacy. It would defeat the protective purposes of section 15(6) for third parties and importantly, would denude the enquiry of its objective nature. This does not mean, however, that where a creditor or third party fails to conduct its due diligence, there will be no legal consequence or that its conduct may not, in an appropriate case, give rise to delictual liability to an aggrieved party. Indeed, it is precisely such an action that Killick seeks to pursue against Investec when he asks, in the alternative, for a stay of proceedings should the joint estate be visited with liability under the guarantees.

81. What this means, in turn is that Investec has *prima facie* established the indebtedness of the joint estate (and thus also standing) in respect of most of the items referred to in paragraphs 58.1 to 58.8 above. The only item in respect of which I am not satisfied that the indebtedness is established is the 12 Infinite Guarantee because there are insufficient facts pleaded to bring the transaction into the ordinary course of Singh's business. However, nothing turns on this.

82. In the result, I have concluded that Investec has established *prima facie* that the joint estate is liable to it for most of the pleaded debts and that, on a proper interpretation of section 15(2)(h) and 15(6) of the MPA, there is no genuine or *bona fide* dispute in respect thereof.

83. Thus the joint estate. Investec has established factual insolvency on the applicable test. In view of this conclusion, it is not necessary for me to determine whether Investec has established any delictual claim against Singh.

Advantage to creditors

84. I am satisfied that there may be advantage to creditors if a sequestration order is granted. There are substantial assets in the joint estate, there is a reasonable prospect that a pecuniary benefit will result to creditors⁶⁰ and further advantage may flow from any resultant investigation into the fraudulent circumstances surrounding the guarantees, not least the spousal consents.

Discretion

85. The facts and circumstances of this case are indeed interesting. In my view, they do not, however, generate special or unusual circumstances that would warrant the exercise of the Courts discretion to decline to grant a sequestration order.

Killick's counter-claim

86. The counter-claim arises in circumstances where, as mentioned above, on 14 February 2023, funds in the amount of R951 845.58 were received into Killick's Investec private bank account, and soon thereafter, Investec advised that the funds had been set off against the indebtedness of the joint estate. This ensued shortly before the sequestration proceedings were instituted. The funds were received into Killick's account from a restricted equity fund established by PwC for its partners. The funds were payable to Killick when the fund was terminated. Investec relies on a common law right of set off.

⁶⁰ *Stratford v Investec Bank Ltd* 2015(3) SA 1 (CC) at para 43 to 45.

87. Killick seeks the payment or release of these funds contending that they were unlawfully retained by Investec. The first ground upon which he does so is that the joint estate is not liable because the guarantees are a nullity, a ground which cannot succeed in view of my conclusions above. However, Killick also seeks their return relying on section 90(2)(n)⁶¹ and section 124⁶² of the National Credit Act 34 of 2005 (the NCA). The section has application, he submits, because his private bank account with Investec is subject to the NCA pursuant to section 8.⁶³

⁶¹ Section 90 of the NCA regulates unlawful provisions of credit agreements. Section 90(1) provides that a credit agreement must not contain an unlawful provision. Section 90(2) sets out, in subsections (a) to (o), a series of provisions that are unlawful. Section 90(2)(n) thus provides:

(2) A provision of a credit agreement is unlawful if –

(n) it purports to authorise or permit the credit provider to satisfy an obligation of the consumer by making a charge against an asset, account, or amount deposited by or for the benefit of the consumer and held by the credit provider or a third party, except by way of a standing debt arrangement, or to the extent permitted by section 124; ...'

⁶² Section 124 is titled 'Charges to other accounts' and provides:

(1) It is lawful for a consumer to provide, a credit provider to request or a credit agreement to include an authorisation to the credit provider to make a charge or series of charges contemplated in section 90 (2) (n), if such authorisation meets all the following conditions-

(a) the charge or series of charges may be made only against an asset, account, or amount that has been-

(i) deposited by or for the benefit of the consumer and held by that credit provider or that third party; and

(ii) specifically named by the consumer in the authorisation;

(b) the charge or series of charges may be made only to satisfy-

(i) a single obligation under the credit agreement; or

(ii) a series of recurring obligations under the credit agreement, specifically set out in the authorisation;

(c) the charge or series of charges may be made only for an amount that is-

(i) calculated by reference to the obligation it is intended to satisfy under the credit agreement, and

(ii) specifically set out in the authorisation;

(d) the charge or series of charges may be made only on or after a specified date, or series of specified dates-

(i) corresponding to the date on which an obligation arises, or the dates on which a series of recurring obligations arise, under the credit agreement; and

(ii) specifically set out in the authorisation; and

(e) any authorisation not given in writing, must be recorded electromagnetically and subsequently reduced to writing.

(2) Before making a single charge, or the initial charge of a series of charges, to be made under a particular authorisation, the credit provider must give the consumer notice in the prescribed manner and form, setting out the particulars as required by this subsection, of the charge or charges to be made under that authorisation.

(3) If there is a conflict between a provision of this section and a provision of the National Payment Systems Act, 1998 (Act 78 of 1998), the provisions of that Act prevail.

⁶³ Section 8 is titled 'Credit agreement' and section 8(1)(a) provides:

(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is-

(a) a credit facility, as described in subsection (3);

(b) ...

Section 8(3) provides:

The application of the NCA to the account, is, moreover, acknowledged in the applicable terms and conditions and has been acknowledged in correspondence between Investec's attorneys and Killick. In turn, Killick relies on *NCR v Standard Bank*⁶⁴ to submit that once the NCA is applicable to his personal bank account, the common law right of set-off is excluded for all purposes involving money held in the account. I agree.

88. Indeed, Investec ultimately accepts that the private bank account is subject to the NCA. It contends, rather, that the BIG guarantees, being the source of the indebtedness do not fall within the ambit of the NCA and that the NCA does not apply to their recovery.

89. I disagree. The provisions of the NCA regulate the operation of the private bank account, and the funds Investec 'set off' were funds in that account paid to Killick from the PwC private equity fund. To this extent, and while now subject to the provisional sequestration order I now grant, the funds must be returned to Killick's account.

Stay of proceedings

90. Singh seeks a stay of proceedings pending a referral to oral evidence or trial. I can see no basis for referring any aspect to oral evidence. I have been unable to conclude that any material *bona fide* dispute of fact has arisen and in any event,

(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4 (6) (b), constitutes a credit facility if, in terms of that agreement-

(a) a credit provider undertakes-

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to-

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of-

(i) any amount deferred as contemplated in paragraph (a) (ii) (aa); or

(ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.'

⁶⁴ *National Credit Regulator v Standard Bank of South Africa Ltd* 2019(5) SA 512 (GJ). The Court interpreted the provisions of the NCA and declared that in light of ss 90(2)(n) and 124 of the NCA, the common law right to set-off is not applicable in respect of credit agreements which are the subject of the NCA holding, in para 71, that 'these provisions are plainly intended to alter, and to oust, the common-law position as regards credit agreements regulated by the Act.'

at the provisional stage, such a referral would only be granted in exceptional circumstances.⁶⁵ If anything, the circumstances of the case tend to support the grant of an order. Different considerations may apply at a later stage if and when Investec seeks a final sequestration order. Singh also seeks a referral to trial contending that in truth Investec is seeking to enforce a debt which is not the purpose of sequestration proceedings, which Investec is abusing. I am unpersuaded that such a finding is justified in the circumstances of this case.

91. Killick seeks a stay of proceedings to pursue a delictual action against Investec for his loss. Killick's counsel dedicated substantial effort in formulating his submissions as to the basis upon which such an action may be grounded. In considering whether a stay should be granted, I have assumed that there may well be merit to his claims. To ground the stay, however, Killick relied on the principle underlying Rule 22(4) which provides for the postponement of a claim in convention pending determination of a claim in reconvention. It was not explained on what basis that Rule would apply in this case. But whatever the basis for any stay, I can see no sound reason to delay the grant of a provisional order. Any claim of the joint estate may be pursued by the trustee, who, when appointed, will need to give the submissions advanced and the affidavits exchanged in these proceedings due consideration.

Order

92. The following order is made:

- 92.1. The joint estate of the respondents is placed under provisional sequestration.
- 92.2. A *rule nisi* is issued calling on all persons who have a legitimate interest to advance reasons, if any, at 10h00 on 25 November 2024 as to why this Court should not order that the joint estate of the Respondents be placed under final sequestration.

⁶⁵ *Provincial Building Society of South Africa v Du Bois* 1966(3) SA 76 (W) at 82A; *Kalil v Decotex (Pty) Ltd and another* 1988(1) SA 943 (A) at 977-8.

92.3. The applicant is to deliver a copy of this order to the Master of the High Court and to the South African Revenue Services.

92.4. A copy of this order shall be served on:

92.4.1. The respondents by way of service on their attorneys of record and at their home address at 2[...] A[...] Street, Waterkloof, Pretoria, Gauteng.

92.4.2. The employees of the respondents, if any;

92.4.3. All registered trade unions representing the employees of the respondents, if any.

92.5. Save as is set out below the costs of the application are to be costs in the sequestration of the joint estate of the respondents.

92.6. The first respondent's application of 28 May 2024 to admit a further affidavit is dismissed with costs, including the costs of two counsel, with Scale C applied, where applicable.

S J COWEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Date of hearing: 25 January 2024

Date of final submissions: 21 June 2024

Date of judgment: 15 July 2024

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.