



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 5901/2024

In the matter between:

INVESTEC BANK LIMITED

APPLICANT

and

FOURWAYS PRECINCT PROPRIETARY LIMITED

RESPONDENT

Neutral citation: *Investec Bank Limited v Fourways Precinct Proprietary Limited*
(5901/2024) [2026] ZAFSHC 93 (11 March 2026)

Coram: DEANE AJ

Heard: 5 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 14h30 on 11 March 2026.

Summary: Winding up – provisional order – return day – rule *nisi* – postponement – further affidavits – rule 6(5)(e) of the Uniform Rules of Court – admission of evidence – practice directives – late filing of heads of argument.

ORDER

- 1 The applicant's application for a further postponement is dismissed.
- 2 The respondent's first further affidavit dated 11 March 2025, second further affidavit dated 11 June 2025, and third further affidavit dated 26 June 2025 are not admitted and remain excluded from the record.
- 3 The hearing of the return day of the rule *nisi* is postponed to the opposed motion roll of 26 March 2026.
- 4 The rule *nisi* is extended to 26 March 2026.
- 5 The rights of the parties are reserved.
- 6 Costs are reserved.

REASONS FOR RULING

Deane AJ

Introduction

1 This matter concerns the return day of a provisional winding-up order granted by Cilliers AJ on 22 August 2025, together with a rule *nisi* calling upon the respondent to show cause why it should not be placed under final winding-up. The rule *nisi* was issued with a return day of 9 October 2025. The applicant, Investec Bank Limited, seeks an order confirming the rule *nisi*, as extended from time to time, and placing the respondent, Fourways Precinct Proprietary Limited, under final winding-up.

2 On 6 October 2025, the respondent delivered an answering affidavit opposing the granting of a final winding-up order. The rule *nisi* was thereafter extended from time to time. The final extension was granted from 4 December 2025 to 5 March 2026, which date was agreed upon between the parties. The applicant delivered its replying affidavit on 11 February 2026, responding to the respondent's answering affidavit of 6 October 2025. When the matter was called on 5 March 2026, two preliminary issues arose for determination before the merits of the application could be considered, namely:

(a) whether the rule *nisi* should be further extended in terms of the notice of motion filed

by the applicant on 4 March 2026; and

(b) whether further affidavits excluded under the Cilliers AJ judgment should be admitted into the record.

3 At the hearing I dismissed the application for a further extension of the rule *nisi*. I further ruled that the affidavits which had previously not been admitted in terms of the judgment of Cilliers AJ would not be received into evidence and remain excluded from the record. The reasons for the rulings made in respect of these preliminary issues are set out below.

Applicant's submissions

4 The applicant submitted that, in accordance with the practice in the Free State Division, Bloemfontein, a respondent's practice note and heads of argument are required to be filed on the Friday immediately preceding the hearing. It was contended that the respondent failed to comply with this practice. The respondent delivered its practice note together with supplementary heads of argument, comprising approximately seventy-two pages, only on Monday, 2 March 2026, three court days prior to the hearing on 5 March 2026. A bundle of authorities consisting of approximately 810 pages and containing 37 new/additional cases was delivered simultaneously.

5 According to the applicant, the late delivery of these documents caused prejudice to its legal representatives, who were required to consider extensive new submissions within a limited time period while also preparing for another matter involving the same counsel which was set down for hearing on 5 and 6 March 2026. The applicant further submitted that the respondent's supplementary heads of argument referred, *inter alia*, to affidavits which had not been admitted by the court and which were therefore not properly before it.

6 In this regard, the applicant referred to the order granted by Cilliers AJ on 22 August 2025, in terms of which the respondent was placed under provisional liquidation and a rule *nisi* was issued calling upon interested parties to show cause on 9 October 2025 why a final winding-up order should not be granted. The applicant emphasised that paragraph 2 of the provisional order recorded that the acceptance of further affidavits filed after the founding affidavit was refused.

7 The applicant submitted that this direction was made against the backdrop of several affidavits which had been filed by the respondent without leave of the court, namely:

- (a) an affidavit dated 11 March 2025 (referred to as the respondent's first further affidavit);
- (b) an affidavit dated 11 June 2025 (the respondent's second further affidavit); and
- (c) an affidavit dated 26 June 2025 (the respondent's third further affidavit).

8 The applicant pointed out that it had previously objected to the admission of these affidavits in affidavits delivered on 13 March 2025 and 12 June 2025, respectively. It was further submitted that in the judgment delivered on 22 August 2025, Cilliers AJ indicated that the court was 'not inclined to accept any of the further affidavits that were filed subsequent to the filing of the replying affidavit by the applicant on 6 December 2024'. The applicant acknowledged that, following the granting of the provisional order, the respondent delivered a further answering affidavit opposing the rule *nisi* on 6 October 2025, to which the applicant responded on 11 February 2026.

9 The applicant submitted, however, that the respondent's supplementary heads of argument made reference, *inter alia*, to the respondent's second further affidavit, which had not been admitted by the court and therefore did not form part of the evidential material properly before the court. According to the applicant, it would be prejudicial if the respondent were permitted to rely upon allegations contained in affidavits which had not been admitted and in respect of which the applicant had not been afforded an opportunity to respond should they be admitted. The applicant also submitted that in several instances the respondent's supplementary heads of argument contained submissions without clear reference to the evidential material on which they were based, thereby requiring the court and the applicant's legal representatives to search through the record in order to identify the relevant factual foundation.

10 Correspondence was exchanged between the parties on 2 and 3 March 2026 in relation to the late filing of the respondent's supplementary heads of argument and the objections raised by the applicant. The applicant submitted that the respondent's response

to the objection did not address the issue of reliance upon affidavits which had previously been refused by the court.

11 In these circumstances, the applicant contended that the late delivery of the respondent's supplementary heads of argument necessitated an extension of the rule *nisi* in order to afford the applicant a proper opportunity to consider the submissions and authorities relied upon and, if necessary, to deliver further supplementary heads of argument. The applicant further submitted that, having regard to the constitutional issues raised in the respondent's supplementary heads of argument and the number of authorities relied upon, the argument of the matter would likely require two court days, necessitating a special allocation from the office of the Judge President.

12 The applicant also drew attention to the underlying basis of the winding-up application, namely that the respondent had executed guarantees and indemnities in favour of the applicant during December 2013 and November 2016, and that a demand in terms of s 345 of the Companies Act 61 of 1973 had been served on 10 September 2024, requiring payment of R255 000 000 within three weeks. The applicant emphasised that, in granting the provisional winding-up order, Cilliers AJ had been satisfied that the applicant had the necessary locus standi, that the respondent had failed to satisfy the demand in terms of s 345, and that the respondent was unable to pay its debts.

13 In light of the above, the applicant submitted that it would suffer prejudice if the rule *nisi* were not extended so as to enable it to properly address the respondent's late and extensive supplementary heads of argument.

Respondent's submissions

14 The respondent opposed the applicant's request for a postponement and submitted that the application failed to satisfy the requirements consistently applied by the courts before such an indulgence will be granted. The respondent pointed out that its supplementary heads of argument were delivered at 06h51 on Monday, 2 March 2026, while the hearing was scheduled for 5 March 2026, a date long known to the applicant and its legal representatives. The respondent therefore submitted that the applicant had sufficient time to consider those submissions prior to the hearing.

15 It was further contended that the applicant had no entitlement to file replying heads of argument and had elected not to file supplementary heads prior to the respondent delivering its own. According to the respondent, the applicant could not rely on its own election as a basis for seeking a postponement. The respondent disputed the applicant's contention that the supplementary heads introduced new material requiring additional time to address. It submitted that the supplementary heads contained legal argument only and were based on facts already contained in affidavits forming part of the record.

16 In this regard, the respondent pointed out that the issues referred to in its supplementary heads had been raised in the affidavits filed in the proceedings. As an example, the respondent referred to its public policy defence, which it submitted had been pleaded in paragraphs 10.2 and 10.3 of the respondent's further answering affidavit opposing the rule *nisi*, delivered on 6 October 2025. The applicant had responded to that affidavit on 11 February 2026 and had therefore had ample opportunity to deal with the issues raised.

17 The respondent also submitted that the explanation advanced by the applicant for the postponement was not full or satisfactory, particularly in light of the fact that the applicant was represented by experienced legal practitioners, including senior and junior counsel. The respondent further submitted that the matter had been allocated one day for hearing, which it contended was sufficient, and that a postponement would cause it material prejudice. It pointed out that it had filed its first heads of argument on 14 March 2025 and had been ready to proceed for several months.

18 In this regard, the respondent submitted that it wished to pursue a claim against the applicant relating to the Leroy Merlin properties but that the provisional liquidators had indicated that they would not approach the Master for an extension of their powers pending the outcome of the rule *nisi* proceedings. The respondent contended that a postponement would prolong the uncertainty surrounding the matter and the continued operation of the rule *nisi*, which it submitted carried reputational and commercial consequences for both the respondent and its sole director. By contrast, the respondent submitted that the applicant had not demonstrated any concrete prejudice that would arise if the matter proceeded as scheduled.

19 The respondent also submitted that the applicant's case for postponement was internally inconsistent. On the one hand, the applicant contended that certain further affidavits relied upon by the respondent were not properly before the court. On the other hand, the applicant contended that it required additional time to prepare submissions dealing with those affidavits. The respondent submitted that these positions were mutually destructive.

20 The respondent further addressed the applicant's objection to the reliance on certain further affidavits. It submitted that the order granted by Cilliers AJ on 22 August 2025 should be read together with the accompanying judgment, in which it was observed that the parties would be able to ventilate further affidavits and formulate their arguments in additional heads of argument, subject to the determination of the court hearing the matter on the return day. The respondent submitted that it had acted consistently with those observations. In its further answering affidavit opposing the rule *nisi*, delivered on 6 October 2025, the respondent stated that the affidavit was complementary to earlier affidavits filed on its behalf and that it should be read together with them.

21 The respondent further submitted that the applicant filed its response to that affidavit on 11 February 2026, approximately four months after it had been delivered, and had therefore enjoyed a fair opportunity to address its contents as well as the affidavits referred to therein. According to the respondent, the applicant did not dispute the incorporation of those earlier affidavits when responding to the further answering affidavit. The respondent therefore contended that the affidavits referred to in its supplementary heads formed part of the material before the court and that the applicant had had a fair opportunity to deal with them.

22 The respondent denied that the filing of its supplementary heads of argument constituted an ambush and submitted that their purpose was simply to advance legal submissions based on facts already contained in the affidavits filed in the proceedings. In those circumstances, the respondent submitted that no proper basis had been established for the granting of a postponement.

Applicable legal framework and analysis

Postponements

23 The law relating to postponements is trite. It is not there for the taking. The Constitutional Court in *Lekolwane and Another v Minister of Justice*¹ held that:-

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application.'

24 In applications for postponement the court retains a discretion which must be exercised judicially, having regard to the interests of justice and the circumstances of the particular case. In exercising that discretion, a court considers, among other factors, whether the application for postponement has been timeously made, whether the explanation provided for the postponement is full and satisfactory, whether any party will suffer prejudice if the postponement is granted or refused, whether the application is opposed, and the broader interests of justice.

25 The present application for postponement arose from the respondent's filing of supplementary heads of argument and an accompanying bundle of authorities on 2 March 2026, shortly before the hearing scheduled for 5 March 2026. The applicant contended that the supplementary heads, which comprise approximately 72 pages and are accompanied by a bundle of authorities of approximately 810 pages, raised issues requiring careful consideration by its legal representatives. The applicant further submitted that the supplementary heads of argument referred to affidavits which, according to the applicant, had previously not been admitted by the court. The applicant contended that it would be prejudiced if it were required to address submissions premised on allegations contained in those affidavits.

¹ *Lekolwane and Another v Minister of Justice* [2006] ZACC 19; 2007 (3) BCLR 280 (CC) para 17.

26 The respondent, in opposing the application for postponement, submitted that the supplementary heads introduced no new evidence and dealt only with issues arising from the affidavits already forming part of the record. The respondent contended that the applicant had access to those affidavits for some time and had already filed a response to the respondent's further answering affidavit delivered on 6 October 2025, which response was delivered on 11 February 2026. The respondent further submitted that the issues addressed in the supplementary heads of argument, including the respondent's public policy defence, had already been raised in the papers and were therefore known to the applicant well in advance of the hearing.

27 In relation to prejudice, the applicant submitted that the late filing of extensive supplementary heads of argument shortly before the hearing deprived it of adequate time to consider the submissions and the authorities relied upon and to prepare a meaningful response. The respondent, on the other hand, submitted that it would suffer prejudice if the matter were postponed. It pointed out that the rule *nisi* had been granted on 22 August 2025 and that the return day had now arrived. According to the respondent, the continued existence of the rule *nisi* carried reputational and commercial consequences for the respondent and its sole director, and the postponement of the matter would prolong the uncertainty surrounding the proceedings. The respondent further emphasised that it had filed its first heads of argument as early as 14 March 2025 and had been ready to proceed with the matter for some time.

28 It is well established that a postponement constitutes an indulgence and that a party seeking such relief bears the onus of establishing good cause for the matter not to proceed on the allocated hearing date. While the supplementary heads of argument were filed shortly before the hearing, the filing of additional legal argument does not, without more, ordinarily justify the postponement of a matter, particularly where the issues addressed in such argument arise from the pleadings or affidavits already before the court. In the present matter, the issues addressed in the respondent's supplementary heads arise from the affidavits filed in the proceedings, including the respondent's further answering affidavit delivered on 6 October 2025. The applicant delivered its response to that affidavit on 11 February 2026 and therefore had an opportunity to address the substance of the issues raised in the papers.

29 To the extent that the applicant raised concerns regarding references in the supplementary heads to certain affidavits, the question whether those affidavits properly form part of the evidentiary record is a separate issue which falls to be determined independently of the application for postponement. The prejudice relied upon by the applicant relates primarily to the limited time available to consider the respondent's additional legal submissions and authorities. While that concern is understandable, it must be weighed against the fact that the hearing date had long been known to the parties and that the issues underlying the dispute had been ventilated in the papers for some time. By contrast, the respondent would suffer continuing prejudice if the matter were postponed, as the continued operation of the rule *nisi* would prolong the period of uncertainty affecting the respondent and its affairs.

30 Having regard to these considerations, and weighing the respective prejudice contended for by the parties, I am not persuaded that the applicant has demonstrated good cause for the postponement of the matter. In the exercise of the court's discretion, and having regard to the interests of justice, the application for postponement accordingly falls to be refused.

Further Affidavits

31 Rule 6(5)(e) of the Uniform Rules of Court reads as follows:

'(1) Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

...

(e) Within 10 days of the service upon the respondent of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.' (My emphasis.)

Rule 6(5)(e) clearly states that the Court has a discretion whether to allow further affidavits or not. The court could only exercise its discretion when an application to file further affidavits had been launched.

32 In the unreported matter of *Ndlebe v Budget Insurance Limited*² (*Ndlebe*) it was held that:

'It is trite that there are normally three sets of affidavits in motion proceedings. However, the Court

² *Ndlebe v Budget Insurance Limited* (7457/2017) [2019] ZAGPJHC 320 (22 February 2019) para 7.

has a wide discretion to allow the filing of further affidavits. *It is upon the litigant who seeks to file a further affidavit to provide an explanation to the satisfaction of the Court that it was not malicious in its endeavour, to file the further affidavit and that the other party will not be prejudiced thereby.*' (My emphasis.)

33 It was held in *Hano Trading CC v JR 209 Investments (Pty Ltd)*³ (*Hano Trading*) that:

'[11] Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is a good reason for doing so.

[12] This court stated in *James Brown & Hamer (Pty) Ltd* (previously named *Gilbert Hamer & Co Ltd*) v *Simmons* NO 1963(4) SA 656 (A) at 660D-H that:

"It is in the interest 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. *That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted.....*"

[13] It was then later stated by Dlodlo J in *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) in paras 12-13:

"The applicant is simply not allowed in law to take it upon himself and (to) file an additional affidavit and put same on record without even serving the other party with the said affidavit.....

Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as pro non scripto.' (My emphasis.)

34 In evaluating the admittance of further affidavits, the starting point is rule 6(5)(e) of the Uniform Rules of Court which makes it clear that, after the replying affidavit has been filed, any further affidavits may be received only with the leave of the court. The general principle remains that motion proceedings ordinarily comprise three sets of affidavits, and any deviation from that structure requires a proper application supported by a full and satisfactory explanation, demonstration of materiality, and an absence of undue prejudice.

³ *Hano Trading CC v JR 209 Investments (Pty) (Ltd)* [2012] ZASCA 127; 2013 (1) SA 161; [2013] 1 All SA 142 (SCA).

35 The authorities emphasise that this discretionary indulgence must be exercised in the interests of orderly motion practice. In *James Brown & Hamer*⁴ the court confirmed that while flexibility is permitted, the general rule should not lightly be departed from. In *Hano Trading*,⁵ the Supreme Court of Appeal held that the rule requires a 'good reason' for the reception of a further affidavit and that the matter falls strictly within the court's discretion. Furthermore, in *Standard Bank of SA Ltd v Sewpersadh*,⁶ the Court held that a litigant may not simply add affidavits to the record without leave, and any such affidavit is to be treated as *pro non scripto*. The decision in *Ndlebe*⁷ reinforces the principle that a litigant seeking to file a further affidavit must set out a satisfactory explanation and demonstrate the absence of prejudice to the opponent.

36 Against this backdrop, the procedural posture of this matter is significant. When granting the provisional winding-up order on 22 August 2025, Cilliers AJ expressly refused the acceptance of all further affidavits filed after the applicant's replying affidavit of 6 December 2024. That ruling, which was not ambiguous in its terms, encompassed the respondent's 'first further affidavit' dated 11 March 2025, its 'second further affidavit' dated 11 June 2025, and its 'third further affidavit' dated 26 June 2025. As matters presently stand, those affidavits remain excluded unless and until the Court, on a proper application under rule 6(5)(e), decides otherwise. No such application has been launched.

37 The respondent's attempt to rely on those affidavits through references in its supplementary heads of argument or by purporting to incorporate them into its further answering affidavit delivered on 6 October 2025 cannot displace the earlier judicial ruling. Incorporation by reference cannot operate as a mechanism to revive material that has already been rejected by order of the Court. The proper procedural route was to seek leave by way of a substantive application, supported by a full explanation dealing with lateness, relevance, materiality, and prejudice. Since no such application is before me, those affidavits remain excluded.

38 The respondent's explanation that its supplementary heads merely advance legal submissions and do not introduce new evidence does not address, let alone cure, the

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

⁵ Op cit fn 3 para 11.

⁶ *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) para 12.

⁷ Op cit fn 2 para 7.

procedural deficiency arising from the fact that the excluded affidavits continue to form part of the factual substratum upon which the supplementary submissions rely. Nor does the respondent's reliance on the fact that its further answering affidavit opposing the rule *nisi*, delivered on 6 October 2025, incorporated by reference the earlier affidavits, provide a lawful basis for their admission.

39 An affidavit that is *pro non scripto* by order of Court does not acquire evidential force simply by being mentioned or adopted in a later affidavit. The respondent's submissions therefore fail to overcome the requirement of a formal application for leave. Furthermore, the respondent has not provided an adequate explanation for why the earlier affidavits ought now to be admitted, nor why they were not properly introduced at an earlier stage despite the ruling of Cilliers AJ.

40 In addition, and in light of the confusion expressed by counsel regarding the ruling made on the day, it is necessary to clarify the following. A distinct position applies to the respondent's further answering affidavit opposing the rule *nisi* delivered on 6 October 2025. That affidavit is part of the return-day process and, on the present record, is properly before the Court. The respondent may rely on the facts, denials, explanations, and defences set out within the four corners of that affidavit and on the documents that form part of the admissible record (namely, the founding, answering and replying affidavits properly filed, together with their admitted annexures). The respondent may also advance legal submissions based on those admissible facts.

41 However, the October affidavit may not import, adopt, or rely upon the contents of the excluded affidavits of 11 March 2025, 11 June 2025, or 26 June 2025, whether by explicit cross-reference, by purported 'incorporation', or by paraphrasing or repeating their substance as a backdoor means of placing that material before the Court. Any portion of the October affidavit that purports to do so must necessarily be disregarded unless the respondent first obtains leave under rule 6(5)(e) upon a substantive application meeting the recognised criteria. Put differently, the October affidavit can include what it states on its own admissible foundation; it cannot 'sneak in' content from the excluded affidavits by reference or so-called 're-packaging'.

42 Furthermore, the prior judgment of Cilliers AJ, while commenting on the earlier

affidavits, does not bind this Court, and does not constitute an order admitting any of them. Accordingly, the respondent's first, second and third further affidavits (11 March 2025; 11 June 2025; 26 June 2025) are not admitted; references to them in the respondent's supplementary heads are disregarded. The further answering affidavit opposing the rule *nisi* dated 6 October 2025 remains part of the record to the extent mentioned above.

43 After this ruling, it became apparent that the respondent's supplementary heads of argument could not include material contained in the excluded affidavits of 11 March 2025, 11 June 2025, and 26 June 2025. The applicant did not, at that stage, seek the striking out of those portions. Instead, counsel for both parties requested that the proceedings stand down to enable the applicant's legal representatives to consider the respondent's further answering affidavit delivered on 6 October 2025, with a view to identifying which portions of that affidavit were properly admissible and which, if any, impermissibly sought to incorporate matter from the excluded affidavits. A request was made for a short adjournment for this purpose.

44 The matter accordingly stood down. However, the applicant's representatives only returned to court at approximately 15h55, by which time the court day had effectively come to an end. In those circumstances, and after hearing the submissions of both parties on the appropriate procedural course, I directed that the matter be postponed to the unopposed motion roll of 26 March 2026, and that the rule *nisi* be extended to said date as well. For the avoidance of doubt, I indicated that all rights of the parties were reserved as well as the costs to be reserved.

Order

Accordingly, the following order is made:

- 1 The applicant's application for a further postponement is dismissed.
- 2 The respondent's first further affidavit dated 11 March 2025, second further affidavit dated 11 June 2025, and third further affidavit dated 26 June 2025 are not admitted and remain excluded from the record.
- 3 The hearing of the return day of the rule *nisi* is postponed to the unopposed motion roll of 26 March 2026.
- 4 The rule *nisi* is extended to 26 March 2026.
- 5 The rights of the parties are reserved.

6 Costs are reserved.




Deane AJ

ACTING JUDGE OF THE HIGH COURT

Appearances

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