

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

CASE NO: 2024-054106

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

25 AUGUST 2026

DATE

SIGNATURE

In the matter between:

SONIA SIZAKHELE LUBBE

[ID 6[...]]

Applicant

And

KAREN KEEVY N.O.

[In her capacity as joint liquidator of Lubbe
Construction (Pty) Ltd (in liquidation)
Master's reference G987/2021]

First Respondent

SIMON JIYANE N.O.

[In his capacity as joint liquidator of Lubbe
Construction (Pty) Ltd (in liquidation)
Master's reference G987/2021]

Second Respondent

BENNIE KEEVY N.O.

[In his capacity as joint liquidator of Sam Lubbe
Investments (Pty) Ltd (in liquidation)
Master's reference G1222/2024]

Third Respondent

TASNEEM SHAIK MAHOMED N.O.

[In her capacity as joint liquidator of Sam Lubbe
Investments (Pty) Ltd (in liquidation)
Master's reference G1222/2024]

Fourth Respondent

**MASTER OF THE SOUTH GAUTENG HIGH
COURT JOHANNESBURG**

Fifth Respondent

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Sixth Respondent

In re:

KAREN KEEVY N.O.

First Applicant

[In her capacity as joint liquidator of Lubbe
Construction (Pty) Ltd (in liquidation)
Master's reference G987/2021]

SIMON JIYANE N.O

Second Applicant

[In his capacity as joint liquidator of Lubbe
Construction (Pty) Ltd (in liquidation)
Master's reference G987/2021]

And

SAM LUBBE INVESTMENTS (PTY) LTD

Respondent

JUDGMENT

DE VILLIERS-GOLDING AJ

Introduction

[1] This is an interlocutory application, by way of which the applicant seeks the referral of a disputed issue in the main application to oral evidence in terms of Uniform Rule 6(5)(g). The first to fourth respondents oppose this application on procedural grounds.

[2] The disputed issue concerns the correct identity of the holder of an ABSA Bank account, with account number 9[...] (*"the ABSA Bank account"*). It is common cause that the disputed issue is central to the determination of the main application.

[3] The relevant background and context can be summarised as follows:

- a) On 22 October 2024, the first and second respondents, in their capacities as the joint final liquidators of Lubbe Construction (Pty) Ltd (in liquidation) ("*Lubbe Construction*"), procured a final-winding up order in respect of Sam Lubbe Investments (Pty) Ltd ("*SLI*") on an unopposed basis ("*the liquidation order*").
- b) The liquidation of SLI was sought based on *inter alia* the allegation that SLI is indebted to Lubbe Construction in the amount of R10 000 000.00 given the following facts:
 - i) on 6 and 7 July 2017, Lubbe Construction made two payments of R5 000 000.00 each, from its bank account to the bank account of SLI, the latter being the ABSA Bank account;
 - ii) these payments were dispositions without any value as contemplated in section 26 of the Insolvency Act (24 of 1936), alternatively were paid without a valid *causa*; and
 - iii) SLI has not repaid the amount of R10 000 000.00 to Lubbe Construction, despite demand as provided for in section 345 of the Companies Act (61 of 1973) ("*the old Act*").
- c) On 11 August 2025, the applicant (the sole director of SLI) instituted the main application, wherein she seeks an order in terms of which the liquidation order is set aside in terms of section 354 of the old Act. The applicant contends *inter alia* that she was unaware of the liquidation application; and Lubbe Construction did not pay SLI, and SLI did not receive, R10 000 000.00 as alleged in the liquidation application.
- d) The applicant specifically contends that SLI is not the account holder of the ABSA Bank account. The applicant states in paragraph 32 of the founding affidavit in the main application as follows:

"On investigation, I discovered that ABSA account 9[...] does not belong to Sam Lubbe Investments but to Lubbe Construction (Pty) Ltd. I attach hereto as "SFA 4" an ABSA print-out of the account reflecting Lubbe Construction Pty Ltd as the account

holder. It appears that account 9[...] was a cash investment account belonging to Lubbe Construction Pty Ltd.”

e) The first and second respondents oppose the main application. They *inter alia*¹ persist with the contention that SLI is the account holder of the ABSA Bank account. In this regard, they rely on the following:

i) The evidence of Mr. Mandla Samual Lubbe during an enquiry in terms of sections 417 and 418 of the old Act, in relation to Lubbe Construction. It is asserted in the answering affidavit that Mr. Lubbe “*admitted the payments were made to SLInvestments from Lubbe Construction to avoid attachment thereof*”². It is also stated that Mr. Lubbe confirmed under oath that three disclosed bank accounts, which did not include the ABSA Bank account, were the only bank accounts ever opened in the name of Lubbe Construction.³

ii) The following averment in paragraph 5.10 of the answering affidavit in the main application:

*“In addition, I can confirm that as part of the enquiry and in compliance of our statutory duties in the administration of Lubbe Construction, all of the major banks were subpoenaed to produce information and/or bank statements of any and/or all bank accounts opened at their institutions by Lubbe Construction and no other number but the three accounts referred to above, was forthcoming.”*⁴

f) A replying affidavit, wherein the applicant reiterates her position with regard to the ABSA Bank account, has been delivered.

¹ The first and second respondents also challenge the applicant's *locus standi* and raise a point *in limine* of non-joinder.

² Answering affidavit, CL15-24, para 5.4.

³ Answering affidavit, CL15-27, paras 5.7 to 5.9.

⁴ These three accounts exclude the ABSA Bank account.

- g) The applicant subsequently delivered a notice in terms of Uniform Rule 35(12) calling on the first and second respondents to *inter alia* make available for inspection:

“The bank statement of Lubbe Construction Pty Ltd (in liquidation) for its bank account number 9[...] held at ABSA Bank Limited for the period 1 July 2017 to 31 July 2017.”

- h) The first and second respondents replied (by way of notice) to the Rule 35(12) notice, stating as follows:

“This document does not exist. From the bank account statements provided by Mr. Lubbe and/or ABSA, Lubbe Construction (Pty) Ltd never held a bank account at Absa with account number 9[...].”

- i) On or about 15 May 2026, the applicant delivered a notice in terms of Rule 6(5)(g), in the following terms:

*“**TAKE NOTICE** that application will be made on behalf of the abovenamed applicant on a date and time to be determined by the Registrar for an order in the following terms:*

- 1. With regard to the affidavits filed of record, the Rule 35(12) Notice and the answer thereto, directing that the issue specified below be referred to oral evidence as contemplated in Rule 6(5)(g) of the Uniform Rules of Court;*
- 2. Granting the applicant leave to subpoena such a person employed by ABSA Bank Limited for the purpose of giving viva voce evidence at the hearing of the main application as contemplated in 1. above;*

THE SPECIFIED ISSUE

The determination of the identity of the account holder of ABSA bank account 9[...] as disputed in the papers before the Court as follows:

- *The applicant's allegation in, inter alia, paragraph 32 of the founding affidavit that the account holder of the said account is/was Lubbe Construction Pty Ltd;*
 - *The respondents' allegation in, inter alia, paragraph 5.10 of the answering affidavit that the holder of the said account is/was Sam Lubbe investments Pty Ltd;*
 - *The applicant's repeated allegation in, inter alia, paragraph 27.1 of the replying affidavit that the account holder of the said bank account is/was Lubbe Construction (Pty) Ltd."*
- j) On 14 July 2026, the first to fourth respondents delivered a notice of intention to oppose the application in terms of Rule 6(5)(g). I pause to mention that the third and fourth respondents are cited in the main application as the joint liquidators of SLI. It has not been explained why the third and fourth respondents oppose this application, but seemingly do not oppose the main application (only the first and second respondents have delivered an answering affidavit in the main application). Nonetheless, this does not inform the reasoning and outcome below.

The applicant's stance

- [4] The applicant cautiously approaches the disputed issue as constituting a genuine dispute of fact, which puts the applicant at risk, given the required application of the Plascon-Evans Rule in the main application.⁵ A referral of

⁵ In **Democratic Alliance in re: Electoral Commission of South Africa v. Minister of Co-operative Governance** 2022 (1) BCLR 1 (CC) this Rule was described in footnote 15, as follows:

"The Plascon-Evans rule is that an application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or of which its denials plainly lack credence and can be rejected outright on the papers."

the disputed issue to oral evidence is accordingly, so the applicant contends, justified.⁶

- [5] The applicant acknowledges the established principle that an application for the referral of a disputed issue to oral evidence should be made as soon as affidavits are exchanged, *in limine* (on the threshold) or *initio* (in the beginning) and not after arguing the merits.⁷
- [6] The applicant contends that, absent this interlocutory application, the practical impact that a referral to oral evidence will have, is a postponement, with concomitant costs. This is so, because the applicant requires a representative of ABSA Bank to be subpoenaed.
- [7] This is the fundamental reason why the applicant approaches the court on an interlocutory basis. Mr. Nel, who appeared on behalf of the applicant, submitted that, in these circumstances, it is necessary to approach the court by way of an interlocutory application, in order to obtain the required order, implement the said order and have an appropriate ABSA Bank representative subpoenaed. In this manner, the applicant seeks to ensure that when the main application is set down for hearing, it is ripe for hearing and can proceed (in an orderly fashion) during the motion court week, as directed by the presiding judge.

The respondents' grounds of opposition

- [8] Four principal grounds of opposition were asserted by the first to fourth respondents (hereinafter referred to collectively as "*the respondents*") in the heads of argument delivered on their behalf.
- [9] In the first instance, it was contended that a Rule 6(5)(g) application is required to be made by way of a notice of motion, supported by an affidavit, and the applicant's notice in terms of Rule 6(5)(g), absent a supporting affidavit, is irregular and impermissible.

⁶ With reliance placed on **Room Hire Co (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T).

⁷ With reference to **Parker v. Quantum Leap Investments 386 (Pty) Ltd** [2024] ZAWCHC 70 and **Africa's Best Foods (Pty) Ltd v. CISA Specialita Alimentari S.R.L.** 2025 JDR 1074 (GJ) at [29].

- [10] This contention was advanced with reference to **Molatjane v. Joffe and Another**⁸ and in particular what was stated by Friedman AJ in paragraph 14 of the judgment, emphasised in the quote below:

“Despite saying, in the letter dated 24 May 2021, that Ms Molatjane’s next step would be to issue summons, the applicant took a different approach. On 3 August 2021, the applicant uploaded onto Caselines a defective application in terms of rule 6(5)(g) of the Uniform Rules seeking an order referring the matter to trial. In doing so, the applicant sought further relief directing the founding affidavit to stand as the declaration in the action and the answering affidavit as the plea. The application is defective because it was not brought on notice of motion supported by a founding affidavit. It also seeks relief which plainly cannot be granted – most notably the request that the answering affidavit should stand as a plea, which would prevent the respondents from asserting their rights in terms of rule 23 of the Uniform Rules.”

- [11] I do not read the aforesaid statement as an articulation of the general legal position, as it is, or should be. Considered in context, the statement relates to the application and facts in the case that presented in **Molatjane** specifically.
- [12] In any event, during argument, Mr. Marais, who appeared on behalf of the respondents, accepted (correctly, in my view) that an application in terms of Rule 6(5)(g) may be brought on notice (absent a supporting affidavit), as per the express provisions of Rule 6(11) and as explained in **Africa’s Best Foods (Pty) Ltd v. CISA Specialita Alimentari S.R.L.**⁹
- [13] Mr. Marais clarified that the respondents’ contention is not that a supporting affidavit is required as an absolute rule, but rather that a supporting affidavit is required in the circumstances of this case, given that the applicant seeks

⁸ **Molatjane v. Joffe and Another** 2022 JDR 0711 (GJ).

⁹ **Africa’s Best Foods (Pty) Ltd v. CISA Specialita Alimentari S.R.L.** 2025 JDR 1074 (GJ) at [30] to [42].

leave to subpoena an ABSA Bank representative, and the details of this representative ought to have been disclosed in a supporting affidavit.

[14] The second ground of opposition is premised on the contention that it is only the court seized with the main application that has the discretion to refer a disputed issue to oral evidence as provided for in Rule 6(5)(g). In this regard, the respondents rely on three averments:

- a) The express wording of Rule 6(5)(g) contemplates that the application for referral ought to be made *in limine* before the court hearing the main application and not by way of a separate interlocutory application.¹⁰
- b) The Insolvency Motion Court (“IMC”) Directive (“*Directive*”) precludes a separate interlocutory application. This averment is articulated as follows in paragraph 11 of the respondents’ heads of argument:

“Paragraphs 14 and 15 of the IMC Directive provide that where disputes requiring oral evidence arise, the Judge allocated to hear the IMC matter gives the necessary procedural directions, including directions concerning oral evidence and referral to trial. No Judge has yet been allocated. The notice therefore seeks to invoke that power prematurely.”

- c) The court deciding the application in terms of Rule 6(5)(g) needs to have regard to the affidavits in the main application, and the suggestion is that this court cannot have regard to the affidavits in the main application as it is not seized with the determination of the main application.

[15] The third ground of opposition is premised on the contention, with reference to **Africa’s Best Foods**,¹¹ that an applicant in an interlocutory application in terms of Rule 6(5)(g) must demonstrate that the hearing of the application for

¹⁰ Further reliance was placed on **Lombaard v. Droprop CC and Others** 2010 (5) SA 1 (SCA) at [53] wherein it was reiterated that an application to refer a disputed issue to evidence should be made at the outset and not after argument on the merits. This is simply a restatement of the established legal position that an applicant must make its election as to a referral at the outset.

¹¹ **Africa’s Best Foods (Pty) Ltd v. CISA Specialita Alimentari S.R.L.** 2025 JDR 1074 (GJ) at [57].

referral is both convenient and will not disrupt the hearing of the main application, and that the applicant has failed to do so.

[16] This (the third) ground evidently contradicts the second ground of opposition, in that it is premised on the contention that an interlocutory application in terms of Rule 6(5)(g) is permissible, subject to the stated condition.

[17] The fourth and final ground of opposition is that the interlocutory determination of the Rule 6(5)(g) application “*creates the possibility that one Court will determine the procedural framework while another determines the merits*”.¹²

Overview: established principles regarding the referral to oral evidence as contemplated in Rule 6(5)(g)

[18] Rule 6(5)(g) provides as follows (with emphasis added):

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

[19] Accordingly, if facts are in dispute, rendering a court unable to make a decision on the affidavits, the court has a discretion as to the future conduct of the proceedings. The court may dismiss the application, or refer a specified issue for determination by way of oral evidence, or refer the matter to trial.

¹² Respondents’ heads of argument, CL14-36, para 25.

- [20] The court has a wide judicial discretion to determine the most just and expeditious path forward.¹³
- [21] In respect of the latter two options (mentioned in paragraph 19), the court is required to select the most suitable method of employing *viva voce* evidence for the determination of the dispute.¹⁴
- [22] The court will refer a specified issue to oral evidence when the factual dispute is within a narrow compass and can be expeditiously disposed of.¹⁵
- [23] Once it is established that a genuine dispute of fact exists, the test is whether the referral to oral evidence *could* affect the outcome of the main application. Stated differently, whether there are prospects of *viva voce* evidence “*tipping the balance*” in favour of the applicant.¹⁶ This question is ultimately decided against the backdrop of the Plascon-Evans Rule and the benefit that oral evidence provides.¹⁷

Analysis: the respondent’s opposition

The first ground – the supporting affidavit argument

- [24] As stated above, the respondents’ argument is that the Rule 6(5)(g) application ought to have been supported by an affidavit, which ought to have addressed the identity of the ABSA Bank representative sought to be subpoenaed. During argument, the line of reasoning was that the respondents are entitled to know who the Absa Bank representative is that

¹³ **Metallurgical and Commercial Consultants v. Metal Sales Co (Pty) Ltd** 1971 (2) SA 388 (W) and **Wood v. Miller and Another** 2025 JDR 1737 GJ.

¹⁴ **Room Hire Co (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1162 - 1165.

¹⁵ **Standard Bank of SA Limited v. Neugarten** 1987 (3) SA 695 (W) at 699C.

¹⁶ **Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO** 1978 (4) SA 281 (A) at 294D- 295A; **Kalil v. Decotex (Pty) Ltd** 1988 (1) SA 943 (A) at 979B – 980B; **Knipe v. Kameelhoek (Pty) Ltd** 2014 (1) SA 52 (FB) at 60D-E; **Hansa Silver (Pty) Ltd v. Obifon (Pty) Ltd t/a The High Street Auction Co** 2015 (4) SA 17 (SCA) at 26D-F; **Shoprite Holdings Limited v. Oblovitz** [2006] 3 All SA 491 (C) under the heading “Recourse to oral evidence”. See also **4 Africa Exchange (Pty) Ltd v. Financial Sector Conduct Authority** 2020 (6) SA 428 (GJ) at [10].

¹⁷ I.e., the opportunity to observe witnesses. See for instance **Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO** 1978 (4) SA 281 (A) at 294D- 295A and the authorities referred to therein.

will be called and what this person will say. The suggestion was that absent such information, the respondents are prejudiced.

[25] This argument disregards two important points:

- a) First: the disputed issue is narrow and well-defined. Its materiality to the determination of the main application is also common cause. The Rule 6(5)(g) notice makes it plain that: [i] the applicant seeks the referral of the disputed issue to oral evidence; [ii] she seeks to call an appropriate ABSA Bank representative to give evidence in respect of the disputed issue; and [iii] to that end, she seeks leave to subpoena the said representative. It cannot be said that the respondents do not know what case they are called upon to meet in this – the Rule 6(5)(g) – application. I also did not understand Mr. Marais to contend differently.
- b) Related to, and as a consequence of, the first point, the respondents know for what purpose the ABSA Bank representative is sought to be subpoenaed and called as a witness: to give evidence regarding the identity of the account holder of the ABSA Bank account.
- c) Second: the proposed order, which aligns with the salutary formulation¹⁸ in **Metallurgical and Commercial Consultants (Pty) Ltd v. Metal Sales Co (Pty) Ltd**¹⁹ ensures that the respondents will know the identity of the witnesses that the applicant will call and what such witnesses intend (broadly speaking) to say, and *vice versa*.

[26] I accordingly reject the first ground of opposition.

The second ground – the “premature” argument

[27] Rule 6(5)(g) does not provide that only the court seized with the main application may exercise the referral powers provided for in the Rule. “*The court*” referred to in Rule 6(5)(g), includes an interlocutory court. This is

¹⁸ See **Standard Bank of SA Limited v. Neugarten** 1987 (3) SA 695 (W).

¹⁹ **Metallurgical and Commercial Consultants (Pty) Ltd v. Metal Sales Co (Pty) Ltd** 1971 (2) SA 388 (W).

acknowledged in *inter alia* **Africa's Best Foods**²⁰, on which the respondents rely.

[28] The express provisions of the Directive do also not support the legal conclusion contended for by the respondents. In fact, the provisions of paragraph 14 and 15 of the Directive suggest the opposite: it is not necessarily the court that orders the referral to oral evidence, that ultimately hears the oral evidence and determines the main application. These paragraphs provide as follows (with emphasis added):

"14. To the extent that:

14.1. there is a dispute in the application proceedings that requires oral evidence or determination by trial, or,

14.2 the affidavits and documents in the application are of such a volume and/or complexity that the application cannot practicably be heard in the IMC and therefore requires a special allocation (generally, matters that can be argued within a day by the IMC will not fall into this category and are to be determined by the IMC);

then, the judge allocated to hear the matter in the IMC shall, after hearing submissions from the parties (where such submissions are, as may be directed by the allocated judge, made in open court, in chambers, by way of a virtual case management meeting and/or by way of written submissions made before the hearing), give such directions as may be necessary to ensure that the matter is ripe for hearing so that it may be specially allocated by the DJP (whether before the same judge, in due course, or to another judge). The objective is that parties are to engage constructively with the allocated judge to advance the efficient determination of the matter, and that the appropriate directions are put in place by no later than the conclusion of the allocated judge's roll in the IMC for that

²⁰ **Africa's Best Foods (Pty) Ltd v. CISA Specialita Alimentari S.R.L.** 2025 JDR 1074 (GJ) at [58].

week, and so facilitate the subsequent allocation of the matter by the DJP to the extent that the allocated judge cannot determine or otherwise dispose the matter on his or her IMC roll during that week.

15. *Such directions by that judge shall include directions in relation to:*

15.1. *the exchange of further affidavits between the parties, including in relation to the intervention and/or joinder of any further parties and the exchange of any further heads of argument and practice notes, due regard being had to the caution against the deliberate protraction of proceedings;*

15.2. *the appropriate narrowing of and identification of issues that remain in dispute;*

15.3. *the ad hoc hearing of oral evidence by that judge in that week in the IMC, which would be particularly appropriate where a factual dispute is narrow and requires limited oral evidence;*

15.4. *to the extent that there is a factual dispute that requires determination by oral evidence that cannot be decided as provided for in the preceding sub-paragraph, the formulation of an appropriate Metallurgical-type order* (see *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) at 396G – 397B*);

15.5 *to the extent there is to be referral to trial, the formulation of an appropriate referral order including as to the role of the affidavits that have been delivered, particularly for purposes of narrowing the issues in dispute (regard being had to inter alia Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (5) SA 246 (SCA), paragraph 32)”*

[29] Mr. Marais, upon being confronted with paragraph 14.2 of the Directive (as emphasised in the quote above) submitted that I am not “*the judge allocated to hear the matter in the IMC*” as it is not the main application (i.e., “*the*

matter”), but rather the interlocutory application, that presents before me (in the IMC). I disagree.

- [30] The aim of the interlocutory application, as advanced by the applicant, is specifically to meet the objective as expressed in paragraph 14.2 of the Directive: constructive engagement, to “*advance the efficient determination of the matter*”.
- [31] The interpretation contended for by the respondents, promotes form over substance, which is contrary – and will achieve the exact opposite – to this objective, and is thus unsustainable.
- [32] This brings me to the respondents’ third averment in support of the second ground of opposition. I agree that the court tasked with deciding whether to refer a disputed issue to oral evidence, needs to have regard to the affidavits in the main application. Given that a Rule 6(5)(g) application may in appropriate cases be brought on notice (without a supporting affidavit), such as the present matter, the court will by implication need to consider the affidavits in the main application and specifically the portions referred to in the Rule 6(5)(g) notice which identifies where the disputed issue/s present of the papers.
- [33] I disagree with the contention that an interlocutory court cannot or may not have regard to the main application papers. Whilst this submission is made by the respondents, it is unsubstantiated. An interlocutory court does not sit with proverbial blinkers on and is simply not precluded from having regard to the affidavits in the main application.²¹
- [34] As appears from the background summarised in paragraph 3, I have considered the application papers. Further, as stated in paragraph 2, it is common cause that the disputed issue is central to the determination of the main application. I expand on this, to the extent necessary, under the heading “*Conclusion and order*” below.

²¹ See for example **Coetzer v. Wesbank t/a FirstRand Bank Ltd** 2022 (2) SA 178 (GJ) and **WB v. RB** 2024 (4) SA 316 KZD [8].

[35] I accordingly reject the second ground of opposition.

The third ground – the “not convenient” argument

[36] Whilst **Africa’s Best Foods**,²² on which the respondents rely, relate to an application for the referral of an application to trial, as opposed to the referral of a narrow defined issue to oral evidence, I agree that an applicant that approaches a court for a referral as contemplated in Rule 6(5)(g) by way of an interlocutory application must demonstrate that such an approach is appropriate in all the circumstances and will facilitate the efficient determination of the matter. Various factors play a role. A core factor is the ambit of the dispute and whether a referral to oral evidence or trial is being sought.

[37] The Directive also provides guidance and indicates that practicality is encouraged. Parties and their legal representatives are required to apply their minds to procedural issues. An expedient and cost-effective approach is endorsed.

[38] I am of the view that the applicant has demonstrated that the manner in which the Rule 6(5)(g) application has been prosecuted is appropriate in all the circumstances and will facilitate the efficient determination of the main application. The applicant cannot be faulted for proceeding in terms of Rule 6(5)(g), in the manner that she has. In this regard, I refer to what is stated in paragraph 7 above and hereinbelow.

[39] In response to the applicant’s motivation, it was submitted on behalf of the respondents that there is no reason why the referral to oral evidence, subpoena process and hearing of the main application, including the hearing of oral evidence, cannot take place during the motion court week that the main application is set down for hearing. This submission does not take into account various processes, procedures and practicalities, such as those catered for in the recommended order (as per **Metallurgical and**

²² **Africa’s Best Foods (Pty) Ltd v. CISA Specialita Alimentari S.R.L.** 2025 JDR 1074 (GJ) at [57].

Commercial Consultants v. Metal Sales Co (Pty) Ltd²³ when referring a specified disputed issue to oral evidence.

- [40] The reality is that a subpoenaed witness is entitled to reasonable notice and an opposing party is entitled to an opportunity to prepare to cross-examine a witness. These are but two practical issues that require attendances and time. They are also the exact issues that counter the prejudice alluded to on behalf of the respondents under their first ground of opposition.
- [41] In addition, it is unlikely that the presiding judge in any given week in the IMC will only have one matter to dedicate the week to. The Directive (as quoted above) acknowledges this.
- [42] The respondents' suggested approach is impractical and will undoubtedly lead to a postponement, with attendant costs and further delay.
- [43] I accordingly reject the third ground of opposition.

The fourth ground – the “fragmented” argument

- [44] The crux of the fourth ground of opposition is the assertion that the court seized with the main application, may hold a different view to this court in respect of the referral of the disputed issue to oral evidence and nevertheless be bound by the decision of this court.
- [45] This assertion is incorrect. Given that the finding of this court is interlocutory, should the court seized with the main application hold a different view, and thus that oral evidence is not necessary, (be it for example that the dispute is in fact not genuine and can be rejected on the basis of the answering affidavit or that the main application ought to be dismissed for a different reason), the court may decide the matter on the affidavits.²⁴ Such a decision

²³ **Metallurgical and Commercial Consultants v. Metal Sales Co (Pty) Ltd** 1971 (2) SA 388 (W).

²⁴ **Wallach v. Lew Geffen Estates CC** 1993 (3) SA 258 (A) at 262I to 263I; and **Shoprite Holdings Limited v. Oblovitz** [2006] 3 All SA 491 (C) at 500F to 501B. See also **Zondi v. MEC, Traditional and Local Government Affairs, and Others** 2006 (3) SA 1 (CC) at para [30].

ought obviously not to be taken lightly and ought to be informed by the facts and status of the matter at the relevant time.

- [46] This principle was articulated in **Wallach v. Lew Geffen Estates CC** as follows:²⁵

“That being so, it was open to the Court a quo to hold, as it did, that it was unnecessary to hear oral evidence and to decide the matter on the papers. I do not consider that it did so lightly. Indeed there were considerations of the most weighty why it should do so. To have heard oral evidence in circumstances where that would not and could not have affected the outcome of the claim for substantive relief would have been to incur wholly unnecessary costs and to involve wholly unnecessary delay.”

- [47] The further suggestion that there is some irregularity in one court issuing procedural directives and another court determining the merits of the matter, as quoted in paragraph 17 above, is also unsustainable. Our law of civil procedure (motion and action) caters for a myriad of procedural rulings and directives that a court may issue, which is not necessarily the court ultimately seized with the determination of the merits of the case, which aids the efficient administration of justice.

- [48] In this instance, I have found that the procedure adopted by the applicant is appropriate for the efficient determination of the main application. I refer to what I have stated in respect of the third ground of opposition above. I further find, as expanded upon in the conclusion below, that it is necessary and just for oral evidence to be heard on the dispute issue.

- [49] I accordingly reject the fourth ground of opposition.

Conclusion and order

- [50] The disputed issue falls within the first category of factual disputes considered in **Room Hire Co (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd**²⁶ and it is central to the determination of the main application.²⁷

²⁵ **Wallach v. Lew Geffen Estates CC** 1993 (3) SA 258 (A) at 263G.

- [51] Given that the liquidation order was sought and granted based on SLI's alleged indebtedness to Lubbe Construction (as described in paragraph 3.b), I am also of the view that the determination of the disputed issue is required for the fair and just determination of the main application.
- [52] There are prospects that *viva voce* evidence *could* affect the outcome of the main application and the test (as described in paragraph 23) has been met.
- [53] In all the circumstances, I am of the view that it is appropriate to refer the disputed issue to oral evidence.
- [54] Costs ought to follow the result. On the question of the scale of costs, submissions were made (on behalf of the applicant and respondents) in support of a punitive costs order. I decline to grant a punitive order.
- [55] During argument, I was advised that the respondents' attorneys applied for and were allocated 7 September 2026 as a date for the hearing of the main application (on the opposed IMC roll). I was further advised that the application for a date was made after the institution of the Rule 6(5)(g) application. I am not certain on what basis the Registrar could have been approached for an opposed hearing date whilst the Rule 6(5)(g) application remained pending and given that a joint practice note as contemplated in paragraph 8.1.1 has seemingly not been delivered. The submissions did not go further than that stated herein and as such I refrain from making any finding in this regard.
- [56] Given the order that I make below, the main application will not be ripe for hearing on 7 September 2026. The matter ought to be removed from the roll by way of notice and the Registrar ought to be informed accordingly, without delay.
- [57] I formulate the order below, based on **Metallurgical and Commercial Consultants (Pty) Ltd v. Metal Sales Co (Pty) Ltd**.²⁸ I am mindful that the

²⁶ 1949 (3) SA 1155 (T) at 1163.

²⁷ This is common cause, as stated in paragraph 2.

²⁸ **Metallurgical and Commercial Consultants (Pty) Ltd v. Metal Sales Co (Pty) Ltd** 1971 (2) SA 388 (W).

time periods provided for in the order need to be adjusted to ensure the required exchanges occur timeously, and prior to the hearing date, as the matter ought to be ripe for hearing, and the parties ought to have engaged on a meaningful joint practice note, when application is made for a date. I have endeavoured to adjust the time periods accordingly.

[58] In the result, I make the following order:

- a) The matter is referred for the hearing of oral evidence, at the hearing of the main application, on the question of the correct identity of the holder of ABSA Bank account number 9[...].
- b) The evidence shall be that of any witnesses whom the parties or either of them may elect to call.
- c) Neither party shall be entitled to call any witness unless:
 - i) he/she has served on the other party a statement wherein the evidence to be given in chief by such person is set out. Such statement shall be delivered, in the case of a witness to be called by the applicant, within 25 court days of making this order, and, in the case of a witness to be called by any of the respondents, within 30 court days of making this order; or
 - ii) the court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his/her evidence.
- d) Either party may subpoena any person to give evidence at the hearing whether such person has consented to furnish a statement or not.
- e) The fact that a party has served a statement in terms of sub-paragraph (c)(i) above, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.
- f) Within 20 court days of the making of this order, each of the parties shall make discovery on oath of all documents relating to the issue

referred to in paragraph (a) above, which are or have at any time been in the possession or under the control of such party.

- g) Such discovery shall be made in accordance with Uniform Rule 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.
- h) The costs of this Rule 6(5)(g) application shall be paid by the first to fourth respondents (jointly and severally, the one paying the other to be absolved) including the costs of counsel, on scale B.

C De Villiers-Golding
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

This judgment and order is made by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the parties/their legal representatives by email. The judgment and order will be uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of this judgment and order is deemed to be 25 Augustus 2026.

Heard: 30 July 2026
Judgment: 25 August 2026

For the applicant: Adv. CJC Nel
Instructed by: Van der Meer & Schoonbee Attorneys

For the first to fourth respondents: Adv. JJ Marais
Instructed by: Rabie Botha & Associates Inc.