REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

27/9/2019 .....
DATE SIGNATURE

CASE NUMBERS:22968/2018
23559/2018
25001/2018
28506/2018
28507/2018
30330/2018

In the following Commercial Court matters:

INVESTEC IMPORT SOLUTIONS (PTY) LTD Applicant

and

NORTHEND SHOWROOM CC t/a BRANDED Respondent

RIHSAAN CC t/a BRANDED Applicant

and

INVESTEC IMPORT SOLUTIONS (PTY) LTD Respondent

INVESTEC IMPORT SOLUTIONS (PTY) LTD	Applicant
and	
NORTHEND SHOWROOM CC t/a BRANDED	First Respondent
RIHSAAN CC t/a BRANDED	Second Respondent
RIYADH DOOLA	Third Respondent
FIRST NATIONAL BANK	Fourth Respondent

INVESTEC IMPORT SOLUTIONS (PTY) LTD	Applicant
and	
NORTHEND SHOWROOM CC t/a BRANDED	Respondent

INVESTEC IMPORT SOLUTIONS (PTY) LTD	Applicant
and	
RIHSAAN CC t/a BRANDED	Respondent

INVESTEC IMPORT SOLUTIONS (PTY) LTD	Applicant
and	
RIYADH DOOLA	Respondent

J U D G M E N T

MOSHIDI, J et WINDELL J:

INTRODUCTION

[1] This commercial court matter of rather complex factual and legal issues was allocated to us shortly before the December 2018 recess for expeditious adjudication in the newly re-established Commercial Court.

[2] For now, and in brief, the matter, which consists of six applications, has its origin in an application instituted by the applicant, Investec Import Solutions (Pty) Ltd ("Investec"), previously known as Blue Strata Trading (Pty) Ltd, attempting to perfect its security (real right) based on certain general notarial bonds, against Northend Showroom cc t/a Branded ("Northend").

[3] Northend trades in the retail of clothing and conducts business from No.4 Limpopo Road, Emmarentia, Johannesburg ('the business premises") and at two shops located at the Oriental Plaza, Johannesburg ("the Oriental plaza shop"), and at Clearwater Mall, ("the Clearwater Mall Shop"). Mr. Riyaad Doola ("Mr. Doola") is the sole member of Northend and was also the sole member of Rihsaan CC, t/a Branded, ("Rihsaan") until 15 March 2018. Since 15 March 2018, the members' interest in Rihsaan is owned by the Rinaara Trust ("the Trust") of which Mr. Doola is the founder, a trustee and a beneficiary.

BACKGROUND

[4] The genesis of the dispute which underlies all these applications is a Trade Facility Agreement ("the agreement") concluded between Investec and Northend on 6 October 2014. The agreement was subsequently amended by agreement between Investec and Northend on three separate occasions.

[5] For immediate purposes, and briefly, in terms of the agreement, Investec made payment to Northend's suppliers on its behalf. In return for advancing monies on behalf of Northend to its suppliers, Investec charged Northend an agreed margin or fee being a percentage of the amount advanced by Investec on Northend's behalf. If Northend repaid Investec within 30 days, Investec charged Northend a margin of 3%. A margin of 4% was charged if Northend repaid Investec within 60 days and a margin of 5% was charged for payments made within 90 days.[1] In terms of the agreement, Investec was entitled to charge Northend interest and penalty interest on late payments. The trade facility afforded to Northend was initially R3 million but was later increased to R4.5 million, R6 million and R7.5 million in terms of the three amendments to the agreement which were concluded on 20 August 2015, 4 April 2016 and 14 March 2017 respectively.

[6] As security for Northend's obligations in terms of the agreement, Investec

[1] Northend *ex parte* application, Vol 1, p11, para 12.2

procured *inter alia*:

1) Three general notarial covering bonds over the moveable property and stock-in-trade of Northend ("the notarial bonds").

2) A personal guarantee signed by Mr. Doola on 7 October 2014 for the obligations of Northend to Investec ("the guarantee").

[7] On the version of Investec, which was heavily contested in the proceedings before us, Northend defaulted on its obligations to Investec under the agreement during April 2018, and a demand for payment was issued. In spite hereof, Northend failed to make payment of the amount claimed, and instead, alleged that it was owed money by Investec, which was denied. As a consequence, Investec launched an urgent *ex-parte* application to perfect its security in terms of the notarial bonds, on 21 June 2018 ("the *ex-parte* application").

[8] The *ex-parte* application was brought, in two parts: In Part A of the application, Investec alleged, *inter-alia*, that Northend breached the terms of the agreement and since Northend was indebted to it, it sought to complete and perfect its security under the notarial bonds. Investec therefore sought an urgent interim order authorising it, with the due assistance of the Sheriff, to enter Northend's business premises and the Oriental plaza shop and the Clearwater Mall Shop, and/or anywhere else Northend carried on business, and to take possession of the movable property and stock–in-trade belonging

to Northend. In Part B of the urgent application, Investec sought a final order in the terms of the interim order, as well as additional relief allowing it to sell and dispose of the movable property and stock-in-trade of Northend in order to settle Northend's indebtedness to Investec.

[9] On 26 June 2018 Part A of the *ex-parte* application came before Makhubele J. She granted an order in terms of Part A of the Notice of Motion and reserved the costs for determination in Part B of the *ex-parte* application ("the Makhubele J order"). On 27 June 2018, the Sheriff of the court executed the Makhubele J order at the Clearwater Mall Shop and the Oriental Plaza Shop. At the same time the bank account held by Northend with First National Bank ("FNB") was also frozen under the Makhubele J order.

[10] On the next day, namely 28 June 2018, Rihsaan, which purports to conduct business as a retailer of certain branded clothing and claimed to conduct business using the same trading name as Northend i.e. "*Branded*", launched an urgent application in this court in which it sought an order declaring, *inter-alia*, that it, and not Northend, traded from the Clearwater Mall Shop and the Oriental Plaza Shop, and accordingly, that the movable property and stock-in-trade contained in the two shops, and which had been attached by the Sheriff pursuant to the execution, belonged to it, and not Northend ("the Rihsaan application"). In addition Rihsaan sought an order directing the Sheriff to release the movable property and to restore unfettered possession of the property to Rihsaan.

[11] On the same day, namely 28 June 2015, Northend brought an urgent application in terms of Uniform Rule 6(12)(c) for the reconsideration of the Makhubele J order ("the Northend Reconsideration application"). In the Northend Reconsideration application, Northend firstly complained that the Makhubele J order was a final order, and not an interim one. The second complaint against the order was that it allowed the two shops to be closed, which was contrary to the undertaking given by Investec in its founding affidavit and contrary to what was initially sought, namely to merely permit the Sheriff to take possession of the movable property at the shops, and not to cause interruption to the businesses conducted thereat. In addition, Northend also complained about the manner in which the Makhubele J order was executed at the two shops. It is not immediately clear what the basis for the complaints is since Rihsaan had alleged, as mentioned above, that it, and not Northend, conducted business at the shops.

[12] The Rihsaan application came before Victor J on 28 June 2018. She postponed both the Rihsaan application and the Northend Reconsideration Application to 4 July 2018 and reserved the costs. At the same time, Rihsaan and Northend were ordered to make discovery of certain documents ("the Victor J order"). On 2 July 2018 Northend and Rihsaan delivered discovery affidavits deposed to Mr. Doola and Ms Leandra Grobler of Northend.

[13] On 4 July 2018 both the Rihsaan application and the Northend Reconsideration application came before Wright J. He ordered that the Makhubele J order remains in force subject to the inclusion of the undertakings that had been given by Investec in its founding papers in the Northend *ex-parte* application, namely that, on the granting of the order, it would do no more than, attend at the shops, and take an inventory of the movable property and stock-in-trade, and post a duly authorized representative at the shops to ensure that no stock was removed, other than in the ordinary course of Northend's business ("the Wright J order"). He further ordered that the Victor J order remains in force and that the ordinary running of the business would not be hindered until such time as the order had been made final. Wright J also postponed the Rihsaan application and the Northend Reconsideration application to the opposed motion court roll of 29 July 2018, with costs reserved. He further directed that unless Investec brought an application to freeze Northend's bank account at FNB by 14h00 on 6 July 2018, such bank account would be unfrozen automatically. As a consequence, Investec launched an application on 6 July 2018, seeking an order declaring that the bank account of Northend had been lawfully frozen in terms of the Makhubele J order and, insofar as it was necessary, that the bank account of Northend held with FNB should remain frozen ("the Bank Account Freezing application").

[14] Further litigation ensued. On 2 August 2018 Investec launched an application seeking the liquidation of Northend ("the Northend Liquidation

application") as well as an *ex-parte* application to liquidate Rihsaan ("the Rihsaan Liquidation application"). The Rihsaan Liquidation application was withdrawn at the hearing of this matter and Investec tendered the wasted costs.

[15] Two weeks later, Investec launched a further application against Mr. Doola in his personal capacity, seeking from him payment of the sum of R8 619 299.92, pursuant to the written guarantee that Mr. Doola executed in favour of Investec on 6 October 2014 ("the Guarantee application"). In terms of the guarantee, Mr. Doola irrevocably and unconditionally guaranteed and undertook to pay Investec on demand, every sum, of money that may then, or any time thereafter, be or become owing by Northend to Investec, from whatsoever cause or causes arising.

[16] This court is therefore required to determine the following five applications:

[16.1] Part B of the Northend *ex parte* application and the Northend Reconsideration Application;

[16.2] the Rihsaan Application;

[16.3] the Bank Account Freezing Application;

[16.4] the Northend Liquidation Application;

[16.5] the Guarantee Application.

[17] The litigation in all the applications is prolix and endemic. However, what remained significant for the purposes of the adjudication of the applications is that the Victor J and Wright J orders confirmed the Makhubele J order. These orders, with necessary and cautionary but collateral variations, therefore remained extant.

[18] The factual and legal issues involved in these applications required to be condensed substantially. I commence briefly, with the attack, on the *ex-parte* order granted by Makhubele J. The attack was set out extensively in the Northend Reconsideration application and further elaborated upon in the heads of argument of Mr. Van Wyk, who then appeared for Northend.

THE NORTHEND *EX PARTE* APPLICATION AND THE NORTHEND RECONSIDERATION APPLICATION

[19] It is trite that in *ex parte* applications, good faith must be shown by the applicant. All the material facts must be disclosed and set out in order for the court to exercise its discretion properly. See, for example *Wilkies Continental Circus v De Raedts Circus*[2] and *Schlesinger v Schlesinger.*[3]

[2] 1958(2) SA 598 (SWA) at 604 A – 605B
[3] 1979(4) SA 342 (W)

[20] Various defences, some in the form of points *in limine*, were raised in the Northend Reconsideration Application as well as in the other applications which triggered a plethora of litigation. Some of the points *in limine* included that:

[20.1] Investec lacked the necessary ***locus standi*** to have brought the *ex-parte* application in the first place due to the alleged cession of its contested claim to an entity called Credit Guarantee Insurance Company (CGIC);

[20.2] **Non – joinder** of CGIC in the proceedings;

[20.3] The **pending Northend action** against Investec creates an dispute of fact that cannot be decided on the papers.

[21] In addition to the above points *in limine*, as well as the contention that the *ex parte* order was final in nature and an abuse of court process, Northend and the other parties also raised other defences. Their main arguments can be summarised as follows:

[21.1] Investec has failed to properly plead the terms of the contract on which it relies because it has not pleaded that the suspensive conditions contained in the agreement were fulfilled or timeously waived by Investec.

[21.2] Investec failed to disclose that Northend had made payments of approximately R6 million between the period of December 2017 and February 2018.

[21.3] Investec failed to establish Northend's indebtedness as the certificate of balance does not constitute *prima facie* proof of Northend's indebtedness.

[22] On a proper consideration of the entire evidence, and the plain ordinary construction of the notarial bonds, all the defences, whether as points *in limine* or on merits, raised by Northend and others, amounted to red herrings and bereft of any merit at all. This for a number of palpable reasons – dealt with immediately below.

Locus standi, cession and non-joinder

[23] Northend contends that Investec does not have the necessary *locus standi* to claim payment from Northend's because it has ceded its claim against Investec to a credit insurer, Credit Guarantee Insurance Company ("CGIC"). Similarly, Northend submits that CGIC ought to have been joined in the proceedings because of its material interest in the outcome thereof, as it has taken cession of Investec's claim. This point is premised on numerous speculative contentions by Northend and has no merit. Ms. Amina Ackerman, a Senior Manager for Claims and Collections at CGIC, who has first-hand knowledge, confirmed that no such cession has taken place. As no cession

has taken place, CGIC has no interest in the outcome of applications.

The pending Northend action against Investec

[24] It is common cause that, at the time of the hearing of the applications under discussion, that there was a pending action instituted by Northend against Investec under case number 25931/2018 ("the Northend Action"). The Northend action is defended by Investec and a plea has been filed. No more need to be said about the Northend action here as it is not a matter before this court. I am however satisfied, after hearing all parties, that the institution of the action has no bearing on the outcome of the applications before this court.

Failure to plead suspensive conditions

[25] This defence was not pleaded anywhere in the papers and was, for the first time, raised in Northend's heads of argument.

[26] Clause 2.2 of the agreement makes provision for certain suspensive conditions to be fulfilled within three months from date of signature of the agreement, or such period as Investec may permit. One of the suspensive conditions were the lodgement of the General Notarial Bond over the moveable assets to the value of R3 million. Clause 2.2 specifically sets out that the suspensive conditions are for the benefit of Investec and that it can be

waived by Investec in full or in part, in its sole discretion, and that if any suspensive conditions are not fulfilled, the agreement (save for the provisions of clause 2 above), shall not be of any force or effect at the **sole discretion of Investec** (my emphasis). It is common cause that the General Notarial Bond was registered more than 3 months after the date of signature. Considering that Investec executed many transactions under the agreement by providing Northend with millions of Rands, Investec plainly permitted a further period for registration. This defence has no merit.

The certificate of balance and payments not reflected

[27] Northend agreed that a certificate signed by a director of Investec specifying the amount due by Northend to Investec would be *prima facie* proof of such indebtedness, and the fact that the amount was due, owing and payable for the purposes of the execution of the notarial bonds. Northend and the other opposing parties' main contention in all the matters, was that the certificates of indebtedness relied upon by Investec were incorrect.

[28] Clause 19 of each of the notarial bonds provides for a certificate of balance in the following terms:

> *" A certificate signed by the director, regional manager, branch manager or other authorised officer..... specifying the amount owing by the mortgagor to the mortgagee and further stating that such amount is due, owing and payable by the mortgagor to the mortgagee,*

shall be prima facie proof of the amount of such indebtedness and of the fact such amount is so due owing and payable, for the purpose of obtaining provisional sentence or other judgment in any competent court as well as execution under this bond"[4]

[29] The certificate in dispute in the *ex parte* application was signed by Mr. D.H Meltzer ("Meltzer")[5], a Director of Investec. It was argued by Northend that the certificate of balance failed to comply with the provisions of clause 19 as it did not state that the amount was due, owing and payable by Northend to Investec. The same criticism was levelled against the other two remaining certificates of balance, with the conclusion that the certificates did not constitute *prima facie* proof of Northend's indebtedness.

[30] Northend's first challenge to the validity of the certificate of balance is to pick apart the wording of the certificate to try and demonstrate that it is invalid. This is a purely technical defence and does not, in my view, defeat the validity of the certificate. All it does is to inappropriately raise form over substance in an attempt to escape liability.

[31] The second challenge relates to the different amounts reflected on the certificates. It is common cause that Investec, in pursuing its claim, relied on three certificates of indebtedness in the five applications. It is further common

[4] Northend Ex-Parte Application vol 1 page 21 paragraph 26 .8.8.1
[5] See "FA11" PAGE 126

cause that each certificate of balance relied upon reflected different amounts for the period of July 2018 to August 2018. It was plain, on a proper reading, that due to the passage of time, between the issue of the certificates, that this ought to explain the differing amounts, given that the amount due by Northend to Investec increased over time with the addition of interest, penalty interest and other charges which are permitted by the agreement. Nothing really ought to have turned on this aspect, as it would have been strange in any way if the certificates were issued for an identical amount. Investec readily conceded, and correctly so, that certain payments made by Northend in the interim were not referred to or reflected in the founding papers. However, having regard to the overall picture, these amounts could not serve to extinguish Northend's indebtedness to Investec. [6] Indeed, a full reconciliation was attached to the replying affidavit delivered by Investec in the Northend *ex-parte* application which reflected all amounts advanced by Investec on behalf of Northend from 7 December 2017, and all payments made by Northend. As at 10 October 2018, the amount due by Northend to Investec was in the region of R10, 021,104-53[7].

[32] It is trite that a certificate of balance stands as *prima facie* proof of the substance of its contents. Northend prepared a schedule attached to its supplementary affidavit, which was disallowed and to which I will return to later, through which it seeks to suggest that the amount reflected in the certificate of balance is not correct. Even if the supplementary affidavit was

[6] See Northend Ex-parte application Vol 8, page 554-560, paragraph 8.53.-40
[7] See Northend Ex-parte Application, Vol 9, RA5, page 784.

allowed, it remains a guessing-game if and the extent to which the certificate of balance fell to be reduced. Northend failed to rebut the *prima facie* evidence afforded by the certificate of balance. Consequently, in the absence of evidence to the contrary it has become conclusive proof.

[33] Prior to the launching of the *ex-parte* application, Northend had fallen into arrears with its repayments in terms of the notarial bonds. To this end, Northend negotiated extensions with Investec. This once more, demonstrated the fallacy of the contention that Northend was not indebted at all to Investec. The indebtedness was proved on a balance of probabilities on the papers.

[34] It is more than plain that the terms of the notarial bonds, and in circumstances where Northend was in default of its obligations, and payments obligations to Investec, that Investec was perfectly entitled to approach the court and seek the relief as set out in part A of the Notice of Motion on urgent *ex-parte* basis, as it did.

[35] Based on all of the above, the inevitable and logical conclusion was that none of the defences proffered by Northend had any merit and that the *ex-parte* order was correctly and properly granted. These orders were not tampered with by both the Victor J order, and the Wright J order. There is plainly no justifiable reason why this court should now do so.

[36] In terms of the above notarial bonds, the terms of which Northend did not, and could not dispute, Northend declared and acknowledged that it was bound in favour of Investec to a total of R7.5 million as continuing security for the indebtedness of Northend to Investec, of whatever cause and bound and hypothecated its movable property and effects (at the Oriental Plaza Shop and the Clearwater Mall Shop), or whether they may be situated, as continuing covering security for its indebtedness to Investec. Northend also pledged and ceded, to Investec, as continuing covering security, its rights, title and interest in and to all of its incorporeal movable assets, including, but not limited to claims in debts of whatsoever nature or kind, permits, licenses, quotas, patents, trademarks and the likes. In addition Northend declared that it was the sole owner of all the plant, machinery, fixtures and fittings, office furniture and stock in trade on the premises situated at the above mentioned shops and agreed not to pledge, hypothecate, alienate or in any way deal with any of the movable assets owned by it for the duration of the notarial bonds, except with the consent of Investec. It further agreed that its movable assets would at all times remain at its premises provided that it could not, without the consent of Investec, sell and deliver stock-in-trade and other movable assets in the normal and ordinary course of business. Northend also agreed that, in the event of default in the payment of any amount due to Investec, which is secured by the notarial bonds, Investec was entitled to claim and recover from it any sums secured by the notarial bonds and to take and retain possession of the business and movable assets of Northend and to sell and dispose of such business assets or any portion thereof to satisfy its debt owed to

Investec. The right of Investec to take and retain possession of the business and movable assets of Northend included the right to operate and draw on the banking account of Northend and to instruct that all funds in such account or which may be paid into such account be paid to the applicant (Investec) or not withdrawn therefrom except by or to the order of Investec.

THE RIHSAAN APPLICATION

[37] The above finding of proven indebtedness must of necessity have a bearing on the remaining applications. In the Rihsaan application, also brought on an urgent basis, Rihsaan sought, *inter alia*, a declaratory order that it is the owner of the business as conducted at the Oriental Plaza Shop and at the Clearwater Mall, and that Investec had no entitlement to attach or take possession of the movable property and stock-in-trade situated at these shops. In addition Rihsaan also sought an order that the attachment of the movable property and stock-in-trade pursuant to execution of the *ex-parte* application order be released and that Rihsaan's alleged unfettered possession thereof be restored. Rihsaan also sought an order ordering Investec and the respective Sheriffs to remove all locks, padlocks, chains, and other lock-out devices from two shops, and return any and all goods removed from the shops.[8] The application was opposed by Investec.

[8] See Rhisaan Application Notice of Motion – Prayers 1-7 vol 1, page 2

[38] In essence Rihsaan's case was the following: Rihsaan had leased the Clearwater Mall Shop in terms of a written lease agreement which was concluded during October 2017, but only signed by the landlord, Hyprop Investments Limited, on 20 March 2018. Rihsaan also concluded a written lease agreement in respect of the Oriental Plaza Shop on 28 December 2017. Here the landlord was Riyashaad Investments CC. It is alleged that Rihsaan and Northend, who coincidentally trade under the same name, namely "Branded", are entirely separate legal entities and Rihsaan was therefore not a party to the present dispute between Northend and Investec. It is however not disputed that Rihsaan and Northend have the same registration numbers, bank accounts and VAT numbers and that Northend was in fact the previous tenant on both the shops in question. Rihsaan alleges that when Northend did not renew its leases, Rihsaan stepped in and leased these premises. It is alleged that Mr. Doola informed Mr. Bruce Sutherland, a Credit Manager of Investec, that Northend would not be renewing its leases in respect of the two shops under discussion, and that Investec was in possession of the relevant lease agreements 'at all material times'. As a consequence, so it is argued, Investec was at all material times aware, prior to the execution of the *ex-parte* application order that Northend was no longer trading from the two shops in question.

[39] Mr. Sutherland, who deposed of an affidavit in support of Investec, denied the version of Northend and/or Mr. Doola. Investec specifically placed in dispute that it is Rihsaan, and not Northend, that trades from the premises

situated at the Oriental Plaza and the Clearwater Mall Shops and that Rihsaan and Northend are separate and independent entities as contended by Rihsaan. Mr. Sutherland further disputed that Investec knew "at all relevant times" that it was Rihsaan, and not Northend, that was trading at the shops.

[40] Investec's most compelling argument, in opposition to the Rihsaan application, is the uncontroverted evidence of Mr. Daniel De Gouveia, a representative of Investec's attorneys of record. On Saturday 30 June 2018, shortly after the execution of the *ex-parte* application order, Mr. Gouveia attended at both the shops in question. He purchased a shirt from each store, and received a till slip once he paid for each shirt. Both till slips reflected that the VAT registration number of the stores (i.e the trading entities), as 4200199760, which is the VAT registration number of Northend, and not of Rihsaan[9]. Based on this, Investec argued that there could be no credible reason for Rihsaan to have used the VAT number of Northend in respect of the sale of goods from the two shops if in fact these were two separate trading business operations. I agree.

[41] In addition, there are many unanswered questions in relation to the business of Northend. Considering the facts revealed by Northend's VAT returns, the Doola Group (consisting of Mr. Doola, Northend, Rihsaan and the Trust) at no stage in these protracted proceedings, provided any rational explanation as to the precise nature of Northend's current business or from

[9] See Rihsaan Application AA pages 115 Paragraph 73, page 194 and 195 and 192-194

where it is trading from. If it is correct that Northend no longer traded from the Oriental Plaza and Clearwater Mall, the question as to the location of Northend's stock-in-trade and movable property still remains a mystery. Northend also maintained that it still has employees. The question is where are these employees?

[42] Rihsaan purports to trade under the name "Branded", the very same that Northend traded under. Mr. Doola is the sole member of Northend, and until 15 March 2018, Mr. Doola was the founder, beneficiary and trustee of the Rihsaan Trust, which now allegedly owns the member's interest in Rihsaan.[10] The commonality of Mr. Doola's interests in these two entities, as agued by Investec is patent. The version of Rihsaan is a stratagem which was manifestly designed to not only confuse *bona fide* third parties, but also to frustrate Investec in attempting to perfect its security in terms of the notarial bonds. Northend warranted that it was the owner of the stock-in-trade at the two shops. As a consequence, Northend was not permitted, in terms of the notarial bonds to hypothecate pledge, or in any way alienate the stock of Northend without the consent of Investec, save in so far as such hypothecation, pledge or alienation took place in the ordinary course of business.[11]

[10] See Rihsaan liquidation, vol 1 page 19, para 61, Northend Liquidation Application vol2 FA16 page 157
[11] See Rhisaan liquidation application, vol1, page 30-32 para 69, 15-16 16-69, 15,20, Northend Liquidation Application FA30, FA31, FA3, vol 2, pages 229-237

[43] In this regard, it could hardly be said that, in respect of the Rihsaan application, and the Northend Reconsideration application, there existed disputes of fact. If there were, then this court was perfectly entitled to adopt the robust common approach as enunciated in *Soffiantini v Mould* [12] where the following was held:

> *"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless for a respondent can always defeat or delay a petitioner by such a device. It is necessary to take a robust, common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so.*[13] *Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."* See also *Plascon Evans Paints Ltd v Van Riebeck Paints (Pty)Ltd.* [14]

[44] There were replying papers and further affidavits filed in regard to the Rihsaan application. It is not necessary to traverse fully the contents of the affidavits for present purposes. The stratagem employed by Rihsaan,

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[12] 1956 (4)SA150 (EDLD)154 F-18

[13] Ndlovu v Minister of Justice 1976 (4) SA 250 (N) at 252; Minister of Health v Drums & Pails Reconditioning CC t/a Village Drums & Pails 1997 (3) SA 867 (N) at 872

[14] 1984 (3) SA 623 (A) wherein the court held at p634 I -635 B that " *In certain instances the denial by a respondent of a fact alleged by the applicant may not be such to raise a real, genuine or bona fide dispute of fact...if in such case the respondent has not availed himself on his right to cross-examination under Rule 6(5)(g) of the Uniform Rules of Court...and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks..."*

Northend and cohorts, was simply to frustrate Investec from perfecting its security in terms of the notarial bonds. It back fired spectacularly. In fact, lead counsel for Investec, *Mr. Badenhorst SC*, labelled it outright fraud perpetrated by Mr. Doola through the two close corporations over which he has effective control, (Northend and Rihsaan), which is central to all these applications, and at the heart of the issue for determination by this court. For present purposes, I am more than satisfied that the version of Rihsaan, by all accounts on the objective facts, is farfetched, contrived, and false, entitling this court to reject it without any hesitation, which I do. The explanation offered by Rihsaan for the use of Northend's VAT number by Rihsaan presented no genuine dispute of fact which was incapable of resolution on the papers and I am satisfied, on the objective facts, that it was Northend, and not Rihsaan, that was trading from the two shops under discussion. On a proper consideration of the conspectus of the evidence, I am therefore satisfied that Rihsaan is not the owner of the moveable property and stock-in-trade situated at the Clearwater Mall and Oriental Plaza stores. Investec was therefore entitled to perfect its security because Northend was in default of its obligations to Investec.

[45] The Rihsaan application, calls to be dismissed with costs including the reserved costs as indicated in the order below. Investec is entitled to an order that the moveables, and stock-in-trade attached by the Sheriff, be sold in order to cover the indebtedness of Northend to Investec.

THE BANK FREEZING APPLICATION

[46] I now turn to the Bank Account Freezing Application. The question is really whether the bank account of Northend was properly and correctly frozen pursuant to the *ex-parte* order as well as the perfection of the notarial bonds. It is a factual determination.

[47] The order freezing the account was launched and granted pursuant to the Wright J order.[15] The order reads as follows:

> *"The applicant is authorised.....to operate and draw on the banking account of the respondent and to instruct that all funds in such account, or which may be paid into such account, be paid to the applicant or be not withdrawn therefrom except by or to the order of the applicant."*

[48] It was not in dispute that the account in question is owned and operated by Northend, and is accordingly an account which falls in the purview of the terms of court order aforesaid. In addition, the account is covered by the provisions of the three notarial bonds, executed by Northend in favour of Investec on the 26/11/2015, 13/7/2016 and 28/4/2017. The relevant clauses, which are identical in each of the notarial bonds, are clauses 15.2 and 15.2.2.1. They read as follows:

[15] See Freezing Application, paragraphs 12 page 8

"15.2 the applicant shall be entitled , but not obliged,.....

15.2.2.1 to operate and draws on the banking account of the Mortgagor (the first respondent) and to instruct that all funds in such account, or which may be paid into such account, be paid to Mortgagee (the applicant) or be not withdrawn therefrom except by or to the order of (the applicant)"

[49] Mr. Doola deposed of an affidavit in opposition of the Bank Account Freezing Application. The defences raised in the answering affidavit are the same raised as points *in limine* in the other applications and which had already been discounted to be untenable. These included that, that Investec had no *locus standi* to have launched the application; that Investec had ceded its claim to CGIC; the concomitant non-joinder of (CGIC) in the proceedings; that Investec had not made out a case for the relief sought; and that there were disputes of fact on the papers. There is no merit at all in the defences raised and they are rejected. The terms of the notarial bonds, quoted above, are clear and unequivocal, and also mirrored in Parts A and B of the Notice of Motion in the Northend *ex-parte* application.

[50] On the conspectus of the evidence, and on a balance of probabilities, the conclusion that the FNB account of Northend was correctly and properly frozen pursuant to the execution of the notarial bonds and the Investec *ex*

parte application order, and that the freezing application ought to be granted, becomes irresistible. The criticism levelled against how the Sheriff, and third parties, carried out the execution has no merit at all. Investec was perfectly entitled to perfect its security, and thereafter protect its interest.

THE GUARANTEE APPLICATION

[51] I turn to the Guarantee Application. On 6 October 2014, and pursuant to the terms of the agreement, Mr. Doola signed the guarantee. In terms of the guarantee Mr. Doola:

> [51.1] irrevocably and unconditionally guaranteed and undertook in favour of Investec to pay to Investec on demand every sum of money owing by Northend to Investec;
>
> [51.2] undertook to pay the amount of all costs, charges and expenses of whatever nature, including legal costs as between attorney and own client incurred by Investec in securing or endeavouring to secure payment of the debt owing by Northend to Investec;
>
> [51.3] agreed to pay Investec any amount claimed by Investec as being due by Northend forthwith against receipt by him of a written demand from Investec stating that such amount was due and payable by Northend to Investec notwithstanding that either he or Northend may dispute the amount claimed and/or Northend's liability to make such payments;

[51.4] agreed that all payments made by him in terms of the Guarantee would be in cash without set-off or deduction of any nature whatever, and would be made into the bank account stipulated by Investec in writing for this purpose;

[51.5] agreed that demand for payment by Investec under the Guarantee could be made by Investec from time to time and his liability and obligations under the Guarantee could be enforced, irrespective of whether any demands, steps and/or proceedings had been made or taken against Northend or any other third party;

[51.6] agreed that the payment obligations under the Guarantee were absolute and unconditional and accordingly he had no right to defer, withhold or adjust any payment which was due and payable to Investec arising out of the Guarantee, nor to obtain the deferment of any judgment for any such payment or part thereof nor to obtain deferment of execution of any judgment;

[51.7] agreed that should he fail to pay any amount for which he was liable to Investec in terms of the Guarantee after demand made therefore, Investec would be entitled to levy interest on the outstanding amount from the due date for payment to the date actual payment in full, at the rate of prime plus 2% and that any such interest would be paid by him to Investec in full, free of any deductions of whatsoever nature on demand by Investec; and

[51.8] agreed that a certificate signed by a director of Investec would constitute *prima facie* proof of the amount due by him to Investec.

[52] The indebtedness of Northend, as discussed above, has already been established. Accordingly, a demand was despatched to Mr. Doola for payment of the sum of R8 241 229.43 on 30 July 2018. Payment was demanded to be made on or before 3 August 2018. The amount demanded was in accordance with a certificate of balance certified by Investec's Managing Director.[16] Mr. Doola failed to make payment of the amount demanded.

[53] Mr. Doola disputes the validity of the letter of demand dated 30 July 2018 by attempting to pick apart the wording of the letter. The high point of Mr. Doola's argument in this regard is that the letter of 30 July 2018 does not constitute a demand because it does not specifically stipulates that an amount claimed by Investec was "due and payable" by Northend. The letter does however state that the amount was "owing" by Northend to Investec. I am content that it is a distinction without a difference and only an attempt by Mr. Doola to elevate form over substance.

[54] It is significant that Mr. Doola raised substantially the same defences to the Guarantee Application as Northend did to Investec's claim against it. In fact, Mr. Doola attached to his answering affidavit the answering affidavit delivered in the Northend *ex-parte* application to his answering affidavit in the

[16] See Guarantee Application,vol 1 page 20 paragraphs 53, FA9, VOL 1, pages 57-60

Guarantee Application. The most peculiar defence however raised by Mr. Doola in his papers, is that he was not bound by the guarantee attached to the founding affidavit (FA1), as this guarantee was only valid for one year and expired on 31 October 2015. In this regard, Mr. Doola contended that he was provided with a draft copy of the guarantee by a representative of Investec, Mr. Brad Vermeulen ("Vermeulen"), on or about 6 October 2014. He states that although he initially signed the guarantee, he asked to consult with his lawyers about its contents. Mr. Doola contends that he had a discussion with Vermeulen and later cancelled the guarantee and signed a second guarantee on 7 October 2014, which he alleges he amended by hand to reflect that it was only valid for a period of a year (i.e until 31 October 2015). He later signed a further guarantee ("AA4")[17] which, again, he amended by hand to reflect that it was only valid for a period of a year (until 30 November 2016). He states that he was later provided with a typed version of this amended guarantee. He did not enter into any other guarantees upon the expiry of the aforementioned guarantee on 30 November 2016. Therefore, on Mr. Doola's version, the last guarantee that he signed expired on 30 November 2016 and no further guarantees were concluded between him and Investec.

[55] The simple response and answer to Mr. Doola's version, and proffered by Investec, was that such version was not only self-serving, but also fabricated in order to avoid his obligations under the guarantee. In addition, the version was contrary to clause 2.1.1.1 of the agreement namely that an unlimited personal guarantee was required by Investec from Mr. Doola as security for

[17] Guarantee application, Vol 2, p216

the debts of Northend. This was a condition of the agreement and a condition on which funds were advanced on behalf of Northend by Investec. I agree with Investec that, in circumstances where the agreement expressly provided for an unlimited guarantee by Mr. Doola, that it is inconceivable that Investec would have been willing to accept a limited guarantee from Mr. Doola for a period of 1 year as security for Northend's debts to Investec. To do so would make no commercial sense given that in terms of the agreement, as amended, Investec could advance funds on behalf of Northend to the value of R7.5 million against security in the form of a personal guarantee which fell away after a period of a year regardless of Northend's indebtedness to Investec. Such security would be of little use to Investec. Investec states that it is for this reason that, as a matter of policy, it does not enter into yearly guarantees or limited guarantees or any sort as security for the debts of any of its clients. This argument by Investec had considerable merit and for a number of obvious reasons unnecessary to elaborate on any further.

[56] In addition to the above, the alleged amended versions of the guarantee, bearing only Mr. Doola's handwriting, were never agreed to, or counter-signed by Investec. Furthermore, the version of Mr. Doola is plainly contrary to the express provisions of the guarantee (clause 26), which stipulates that:

> *"No variation or amendment of, addition to, deletion from or consensual cancellation of this guarantee or any of its terms and conditions and/or no waiver of any of the terms and conditions of this guarantee and/or any of the creditor's rights in terms of hereof*

> *and/or no latitude and/or indulgences allowed or granted to* [Mr. Doola] *shall be of any force or effect unless reduced to writing and signed by* [Mr. Doola] *and agreed to by the creditor in writing*" (Emphasis added).

[57] Mr. Doola's also relies on an email from Mr. Chris Mabatsane's, the credit and risk manager at Investec ("Mabatsane"), attached to his answering affidavit "AA8", dated 17 May 2017 to support his contention that the guarantee was limited in time to one year. The email Mr. Doola relies upon reads as follows:

> *"Due to the security being a personal guarantee on an annual basis, we shall be requesting an updated personal statement of assets and liabilities from each guarantor."*

[58] Investec contends that Mr. Doola has misled the Court in relation to the contents of Mabatsane's email and has failed to accurately quote the portion of Mabatsane's e-mail reflected in his answering affidavit. In the quote contained in Mr. Doola's answering affidavit, Mr. Doola has inserted a comma after the phrase "on an annual basis", when no comma appears in the relevant portion of AA8[18] to the answering affidavit in the guarantee application. It is submitted that the correct portion of AA8 to the answering affidavit[19] reads as follows:

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[18] p270

[19] p270

> *"Due to the security being a personal guarantee on an annual basis we shall be requesting an updated personal statement of assets and liabilities from each guarantor."*

[59] I agree with Investec's submission that it is clear that the email meant that since Mr. Doola had signed a personal guarantee in favour of Investec, Investec would be requesting an updated personal statement of assets and liabilities from each guarantor "on an annual basis". In other words, the phrase "on an annual basis" was not meant to describe the personal guarantee, but rather the updated statement of personal assets and liabilities. By inserting the comma into the quote contained in the paragraph, Mr. Doola has altered the meaning of the sentence to fit with his version of events. It is clear that Mr. Doola's version is fabricated and untrue.

[60] I am more than satisfied that the order sought by Investec that Mr. Doola pays it R8 619 299-42, together with interest thereon and costs, as claimed, was by all accounts, justified.

THE NORTHEND LIQUIDATION

[61] I now turn to the Northend Liquidation Application launched by Investec. As alluded before, all the applications are substantially interwoven. It follows that the findings made above ought to impact on the finding in the Northend Liquidation.

[62] The application to provisionally liquidate Northend was brought by Investec in terms of section 344(1)(f), read with section 345(1)(c) of the Companies Act 61 of 1973 ("the Companies Act"), read with item 9 of Schedule 5 of the Companies Act 71 of 2008 ("the Companies Act 2008"), read with section 66(1) of the Close Corporations Act 69 of 1984 ("the Close Corporations Act"). The basis of the application is the inability of Northend to pay its debts, including the debt of R8 169 299.42 owed to Investec, and as discussed above, in particular under the guarantee application.[20]

[63] In the alternative, the liquidation application was brought in terms of section 67(1) of the Close Corporations Act, read with sections 81(1)(c)(ii), alternatively, 81(1)(d)(i) of the Companies Act 2008. The basis was that it is just and equitable for Northend to be wound up since Northend has colluded with Rihsaan and Mr. Doola to perpetrate what Investec labelled a fraud on Investec to ensure that Investec is unable to exercise its rights in terms of the notarial bonds, and to attach and sell the movable property and assets situated at Oriental Plaza Shop and the Clearwater Mall Shop.

[64] At the time that the Northend *ex parte* application was launched, Northend was in default of its repayment obligations to Investec and was indebted to Investec in the amount of R7 759 357.02. At the time of hearing

[20] See Northend Liquidation Application, Vol1, page 7 , paragraphs 10.2

the application Northend's indebtedness to Investec had increased by virtue of the passage of time and the addition of interest, penalty interest and charges which are permitted in terms of the agreement (as amended). When the replying affidavit in the Northend *ex parte* application was deposed to, Northend's indebtedness to Investec had risen to R10 021 109.53.

[65] As stated before, Northend and Mr. Doola raised identical defences in opposing Part B of the Northend *ex parte* application, the Bank Account Freezing Application, the Northend Liquidation Application and the Guarantee Application. These defences have been dealt with above and emphatically discounted. There is no need for repetition here.

[66] In matters of this nature, it is trite that the court retains a discretion, and that the onus is always on the applicant for liquidation to make out a *prima facie* case, and compliance with applicable law. Some of the crucial considerations are proof that the company is unable to pay its debts (see section 344 read with section 345(1)(c) and 2 of the Companies Act. The other consideration is, whether it is just and equitable that the company be wound-up.

[67] In *Rosenbach and Company (Pty) Ltd v Singh's Bazzars (Pty) Ltd*[21] , the court held that "*the approach in deciding whether a company should be wounded up because it is commercially insolvent appears to be that if it is established that a company is unable to pay its debts, in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency: that it is unable to pay its debts may be established by means provided ..... by proper evidence. If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.*" See also *Tjospomie Boedery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and another.*[22]

[68] Based on all the above legal principles, when applied to the proven facts of the present matter it was plains that, Northend is not only unable to pay its debt owed to Investec, but also that it is just and equitable for it to be provisionally wound –up, as sought by Investec. There were no genuine factual disputes at all. Neither was there any merit in the numerous defences advanced by Northend. All the defences were simply smoke and mirrors. This finding, like previous ones, must of necessity, impact on the other

[21] 1962(4) SA 593 (D).
[22] 1989 (4) SA 31(T) at 41-42.

outstanding matters, where applicable. One of such matters is the Rihsaan liquidation application, which I deal with briefly immediately below.

[69] In the Rihsaan Liquidation Application, Investec sought an order for the provisional winding-up of Rihsaan in terms of both the Close Corporations Act and the Companies Act 2008. The basis was that it is just and equitable that Rihsaan be wound-up since Rihsaan has, in collusion with Northend, perpetrated what Investec termed a fraud on Investec. However, during the course of the hearing before us, Investec withdrew the application and tendered the costs. I need to say no more about this application except in the final order below.

The Supplementary affidavit

[70] Prior to concluding, there is one other matter which equally requires brief mention. That is that, immediately prior to the hearing, and less than three court days before the hearing of all these applications, Rihsaan launched an application for leave to admit a supplementary affidavit. However, the manner in which, and the circumstances under which this supplementary affidavit was filed; the timing thereof; and the contents thereof, were all infested with endless problems.

[71] In filing the said affidavit, reliance was placed on the provisions of Uniform Court Rule 6(5)(e). The affidavit merely alleged that, it contained crucial and important facts which were omitted from the other previous affidavits. However, there was patently no plausible explanation tendered for the late delivery of the supplementary affidavit, and what relevance it actually had in allegedly assisting the court in arriving at a proper decision. There was no acceptable explanation proffered in either the affidavit itself or the heads of argument as to why such important facts and information had suddenly and so late become so important, and not made available earlier.

[72] In the considered view of the court, and for the sake of brevity, once more, the filing of the supplementary affidavit in the manner described, was a further red-herring and pure ruse to, not only further delay the conclusion of the matter, but also to create artificial factual disputes. It ignored not only all potential prejudice to Investec, but also the sound and trite principle that there should be finality in litigation.

[73] The filing of the supplementary affidavit was not only unexpectedly, and viciously yet appropriately opposed by Investec on grounds more elaborate and credible than the problematic grounds alluded to above. These are all on record. It included, inter alia, the notion that the filing of the affidavit was prompted by, "shaping it to relieve the pinch of the shoe", as was described in

case law such as *Mkwanzi v Van der Merwe.*[23] Indeed, this observation was not out of place in the instant matter. In the end, the court was more than satisfied that it would simply not be in the interest of justice to allow the filing of the supplementary affidavit and to reject the application thereof, as I hereby do.

ORDER

[1] For all the above reasons, the following order is made

[1] The Northend Reconsideration Application is dismissed with costs.

[2] The Rihsaan Application is dismissed with costs.

[3] An order is granted in terms of Part B of the Notice of Motion in the Northend *ex-parte* application and Northend shall pay Investec's costs of that application, including the reserved costs of Part A thereof.

[4] An order is granted in terms of the Notice of Motion in respect of the Bank Account Freezing Application, and that Northend, Rihsaan and Mr. Doola pay Investec's costs jointly and severally, the one paying the other to be absolved.

[5] An order is granted against Mr. Doola in terms of the Notice of Motion in respect of the Guarantee Application and Mr. Doola pay Investec's costs.

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[23] 1970 (1) SA 609(A)

[6] That Northend be hereby provisionally liquidated. All persons who have legitimate interest are hereby called upon to advance their reasons why this court order should not be made final on Tuesday 22/10/2019 at 10h00 or as soon thereafter as the matter maybe heard; a copy of this order must be served on Northend at its registered office; a copy of this order must be published forth with once in the Government Gazette; and forwded to each known creditor by prepaid registered post, or by electronically receipted telefax transmission; and served on all interested parties (SARS the Master and employees). The costs shall be in the winding –up.

[7] In respect of orders 1 and 2 above, the costs shall include the reserved costs of the appearances on 28/6/2018; the 29/6/2018 and the 4/7/2018, and shall be on the scale as between attorney and client. In addition, all the costs orders made above, shall be on the scale as between attorney and client, where provided in the agreements between the parties.

[8] Finally, Investec shall pay the costs of the withdrawn Rishaan Liquidation Application, as tendered.

DSS MOSHIDI
Judge of the High Court of South Africa

Gauteng, Local Division, Johannesburg

I concur

L WINDELL
Judge of the High Courtt of South Africa
Gauteng, Local Division, Johannesburg

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Instructed by:	Amod and Van Schalk Inc
Dates of hearing	23-25 January 2019 & 24 May 2019
Date of judgment	20 September 2019