



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: D10784/2021

In the matter between:

VOLTEX (PTY) LTD

APPLICANT

and

EP INLAND (PTY) LTD

(FORMERLY KNOWN AS EDISON POWER

GAUTENG (PTY) LTD)

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be on 22 July 2024 at 14:30

ORDER

The following order is made:

1. The respondent is placed in final liquidation.
2. The applicant's costs are to be costs in the liquidation. Such costs to include the costs of two counsel, where employed, on Scale C.

JUDGMENT

Broster AJ

[1] This is an opposed application wherein the applicant seeks a final winding-up order against the respondent. The provisional order was granted by the Honourable Madam Acting Justice Gabriel on 11 May 2023.

[2] The applicant is a supplier of electrical goods. In 2013 the respondent, represented by Vathasallum Reddy & Thaseegavasen Govender signed credit application agreements¹ with the applicant for the supply and delivery of electrical goods at the respondent's special instance and request. During the period from 2020 to August 2021² the applicant sold and delivered electrical goods to the respondent at the respondent's special instance and request to the value of R 6 688 763.18. Despite delivery of the goods, the respondent did not pay for those electrical goods. On 8 October 2021, the applicant, by Sheriff, served a notice in terms of s 345(1)(a)(i) of the Companies Act 61 of 1973 ('the Act') at the respondent's registered address.³ Subsequently, on 1 December 2021, the applicant initiated these liquidation proceedings, which were also served on the respondent's registered address. On 9 March 2022, the applicant filed a supplementary founding affidavit, which set out that the respondent's director, Etienne Singh, had acknowledged liability for the debt and had made an offer to settle. Additionally, it was noted that the respondent's assets had been subject to attachment, and default judgments had been obtained against the respondent by South African Revenue Service ('SARS') and Diesel Electric (Pty) Ltd.⁴

[3] On 5 April 2022, the respondent filed its initial answering affidavit, deposed to by Etienne Singh, who alleged that:

¹ Vol 1 at 6.

² Vol 1 at 7.

³ Vol 1 at 25; Sheriff's return of service at 769.

⁴ Vol 1 at 53.

- (i) In 2019, a whistle-blower informed the respondent's shareholder of a large-scale fraud involving the misappropriation of significant funds belonging to the respondent was being perpetrated by senior managers and directors of the respondent in collusion with suppliers;⁵
- (ii) A forensic inquiry was in progress, and that various criminal complaints were lodged with the Hawks in July, August and November 2020;⁶
- (iii) The respondent undertook efforts to verify the authenticity of the applicant's claim due to alleged collusion between key managers, directors of the respondent, and certain suppliers;⁷
- (iv) The respondent's shareholder had allegedly provided security in the amount of R 7 million by depositing funds into the trust account held by the respondent's attorney of record..

[4] On 14 April 2022, the applicant served its replying affidavit, asserting that the respondent's previous attorneys of record believed that the applicant's debt had been liquidated. The applicant highlighted that the respondent's answering affidavit did not dispute the debt, and subsequently attached 500 invoices and delivery notes as evidence supporting its claim regarding sales and deliveries of goods.⁸

[5] Subsequently, and with the leave of the court, on 8 February 2023, the respondent filed a supplementary answering affidavit. The affidavit was deposed to by Etienne Singh and in attempting to elaborate on the content of the initial answering affidavit, he:

- (i) Reiterated allegations that the respondent had been the victim of a large-scale fraud however, provided no further details regarding the alleged fraud;
- (ii) Contradicted the initial answering affidavit by asserting that the analysis of the alleged fraud lacked the involvement of an accountant with forensic expertise;⁹
- (iii) Alleged that, due to his appointed in March 2020 and active involvement in the day-to-day business from June 2021, the invoices and delivery notes annexed

⁵ Vol 2 at 114.

⁶ Vol 2 at 115.

⁷ Vol 2 at 115.

⁸ Vol 2 at 139 to Vol 8 at 757.

⁹ Vol 8 at 757-758.

to the applicant's replying affidavit had occurred before his employment at the business.¹⁰ However, the dates on these documents span from June 2021 to August 2021, with only a minor portion falling within the May to April 2021 timeframe;¹¹

- (iv) Clarified that he was not suggesting that the applicant was involved with any criminal or untoward conduct;¹²
- (v) Asserted that certain invoices and delivery notes contained false purchase orders and numbers.¹³ Annexure "ES1" provided a list of 75 "transactions" which total R833 559.02.¹⁴
- (vi) Admitted to agreeing to a payment plan with the applicant, but stipulated that the plan was provisional and depended on the verification of the applicant's claim.¹⁵

[6] The applicant then filed a substantial replying affidavit to the supplementary affidavit. The matter was set down for argument before the Honourable Madam Acting Justice Gabriel, who granted a provisional winding-up order on 11 May 2023.¹⁶ The provisional order was duly served on SARS,¹⁷ published in the Government Gazette,¹⁸ published in the local newspapers,¹⁹ on the employees of the respondent²⁰ and on the creditors of the respondent.

[7] On 24 August 2023, the respondent filed an answering affidavit to the final winding-up order. The deponent to this answering affidavit was Siyabonga Temba, another director of the respondent. Temba asserted the following allegations:

¹⁰ Vol 9 at 759.

¹¹ Vol 8 at 701-740.

¹² Vol 9 at 761.

¹³ Vol 9 at 763.

¹⁴ Vol 9 at 791-792.

¹⁵ Vol 9 at 766.

¹⁶ Vol 12 at 1019-1021.

¹⁷ Vol 12 at 1022.

¹⁸ Vol 12 at 1025-1026.

¹⁹ Vol 12 at 1023-1024.

²⁰ Vol 12 at 1027-1170.

- (i) That in March/April 2023, the respondent ceased accepting new work and was not working on any further projects, resulting in the respondent's cessation of its operations ;²¹
- (ii) The respondent had instituted various legal proceedings against its former directors, including sequestration and anti-dissipation applications, with the aim of recovering funds allegedly misappropriated by those directors from the respondent ;²²
- (iii) That the applicant and other secured creditors should await receipt by the respondent of the funds potentially recovered in the litigation to ensure payment to both the applicant and unsecured creditors, and that the liquidation was not in the interests of justice.²³

[8] Temba's answering affidavit did not attempt to dispute the applicant's claim; instead, Temba contended that the debt was not due, relying on statements made in previous affidavits by Etienne Singh.²⁴

[9] On 28 September 2023, the applicant filed its replying affidavit, asserting that despite the lapse of four years since the 2019 whistle-blower allegation, no allegations or evidence substantiated fraud or collusion between the applicant and the directors of the respondent. Additionally, the applicant disputed that there was any factual basis for recovery in respect of the allegations of fraud, maintaining that the respondent remained insolvent and justifying the winding-up order.

[10] On 29 January 2024, the morning of the hearing for the opposed motion for final winding-up, the respondent again launched an application to supplement their papers. The respondent sought leave to introduce a bank statement of its former director, Govender, which revealed a payment of R 85 000 made to Govender in August 2019. The amount was paid from Voltex Group Account.²⁵ The allegation based on the bank account statement was that the payment constituted a "kickback" paid by the applicant to the respondent's former director, with the purpose of approving

²¹ Vol 12 at1222-1230.

²² Vol 12 at1228-1229

²³ Vol 12 at1231.

²⁴ Vol 12 at1221.

²⁵ Vol 15 at 1306.

the applicant's supply of goods at inflated prices, for goods not required, or goods not delivered by the applicant to the respondent.²⁶

[11] Considering the lateness of the application to supplement, I ordered that the parties exchange further affidavits and adjourned the matter to 22 February 2024, for the continuation of the opposed motion.

[12] On 5 February 2024, the respondent filed a further supplementary affidavit attempting to connect the R85 000 kickback to transactions between the applicant and the respondent on the "XON Project", which concluded in March 2019.²⁷ It must be pointed out that the respondent did not establish a connection between the R85 000 payment and any specific invoice or delivery note in respect of the amounts claimed by the applicant in the period of May 2021 to August 2021. Further, the respondent again failed to demonstrate that any items indicated on those delivery notes were either charged at an inflated price, not delivered to the respondent, or were not ordered at all.

[13] The applicant filed a reply to the further supplementary affidavit and sought to explain the payment of R85 000 was an *ex gratia* payment made by the then CEO of the applicant to Govender. This payment aimed to promote the applicant's products to consulting engineers in Johannesburg between 2008 to 2019.²⁸

[14] At the hearing of the opposed motion:

- (i) Counsel for the applicant submitted that there was no basis to admit the further supplementary affidavit and that the information contained therein had been available to the respondent since at least 2019 and ought to have been included in the affidavits previously filed by the respondent. Additionally, counsel for the applicant submitted that the statutory requirements for the service of the provisional order had been complied with, the debt claimed was not disputed on reasonable grounds and that the respondent was factually insolvent, justifying the applicant's entitlement to a final winding-up order;

²⁶ Vol 15 at1303.

²⁷ Vol 15 at1322.

²⁸ Vol 15 at1367-1375.

- (ii) Counsel for the respondent submitted that the court possesses a discretion to refuse a winding-up order, that there were reasonable prospects that the respondent could recover monies. Once these monies are recovered, the respondent would have sufficient funds to settle the applicant's debt together with the other trade creditors. Further, the payment of R85 000 raised concerns that the applicant may have been party to a fraudulent scheme with the former directors of the respondent. This issue necessitated the hearing of oral evidence.

[15] In my engagement with counsel for the respondent, counsel was constrained to concede that there was no allegation connecting the R 85 000 payment to any portion of the debt claimed by the applicant in these proceedings. Further, counsel for the respondent was constrained to concede that the allegations of corruption and/or collusion were, at best, speculation and relied on three paragraphs from the supplementary affidavit filed in February 2024.²⁹

Admission of supplementary affidavit

[16] There is much to be said for the applicant's proposition that the facts outlined in the supplementary answering affidavit, filed on 29 January 2024, were already within the respondent's knowledge at the time of the filing of the other affidavits in this matter. However, considering that the applicant had the opportunity to reply to the supplementary answering affidavit, and the view I take as a whole, I am inclined to grant the respondent leave to file the further supplementary affidavit.

Issues

[17] The factual circumstances give rise to the following considerations before this court::

- (i) Is the applicant's debt disputed, and is the dispute of fact a genuine?
- (ii) What is the nature of the discretion of a court in deciding a final winding-up or liquidation proceeding?

²⁹ Supplementary Affidavit, paras 9.1, 9.9 and 19.

- (iii) Are there sufficient grounds present for the court to exercise its discretion to refuse a final winding-up order?

Legal principles

[18] Where a final winding-up order is sought, the applicant must establish its claim on a balance of probability. However, in matters where facts are disputed, the court is not permitted to determine the dispute on a balance of probability and must instead apply the *Plascon-Evans*³⁰ test.³¹ If a genuine dispute of fact exists regarding the existence of the applicant's claim at a final liquidation stage, the application must fail.³²

[19] Where a respondent wants to dispute the Applicant's debt and alleges that that dispute, if proved, would constitute a defence, but is unable to provide an affidavit containing allegations that prima facie establish that defence, then the respondent is obliged to follow the method set out by Cloete J in *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*³³ at paragraph 56:

"In the situation presently being considered the respondent may not dispute the facts alleged by the applicant, but does seek an opportunity to prove allegations which would constitute a defence to the applicant's claim. In the former case the respondent in effect says: given the opportunity, I propose showing that the applicant will not be able to establish the facts which it must establish in order to obtain the relief it seeks; and in the latter the respondent in effect says: given the opportunity, I propose showing that even if the facts alleged by the applicant are true, I can prove a defence. (It is no answer to say that motion proceedings must be decided on the version of the respondent even when the onus of proving that version rests upon the respondent, because *ex hypothesi* the respondent is unable to produce evidence in affidavit form in support of its version.) It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available.

³⁰ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.

³¹ *Paarwater v South Sahara Investments (Pty) Ltd* [2005] ZASCA 4; [2005] 4 All SA 185 (SCA) para 4.

³² *Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* [2015] ZAWCHC 71; 2015 (4) SA 449 (WCC) para 10.

³³ *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* [2007] ZASCA 153; [2007] SCA 153 (RSA); 2008 (2) SA 184.

Most importantly, and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established.”

[20] When a respondent raises commercial bribery or kickbacks as part of its defence to contract or claim predicated on fraud, the essential elements of commercial bribery that must be alleged are outlined in *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd*³⁴ where Nienaber JA stated that:

“Elements of commercial bribery that can be identified are: (i) a reward (ii) paid or promised (iii) by one party, the briber, (iv) to another, the agent (who may be an agent in the true sense or merely a go-between or facilitator), (v) who is able to exert influence over (vi) a third party, the principal (vii) with the intention that the agent (viii) should induce the principal (ix) without the latter's knowledge and (x) for the direct or indirect benefit of the briber (xi) to enter into or maintain or alter a contractual relationship (xii) with the briber, his principal, associate or subordinate.”³⁵

[21] Where a party seeks a referral to oral evidence, the Constitutional Court in *Mamadi and Another v Premier of Limpopo Province and Others*³⁶ recently explained that:

“General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged.”³⁷

Has the applicant established a claim?

[22] The applicant contends that the respondent ought to be subject to winding-up proceedings in terms of s344(f) of the Act by virtue of the fact that the respondent is deemed to be unable to pay its debts or provided for in terms of s 345(1)(a)(i) of the Act, and/or that the respondent is unable to pay its debts stipulated in terms of s

³⁴ *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* [1998] ZASCA 67; 1999 (2) SA 719 (SCA); [1998] 4 All SA 465 (A).

³⁵ Ibid at 724.

³⁶ *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26; 2023 (6) BCLR 733 (CC); 2024 (1) SA 1 (CC).

³⁷ Ibid para 44.

345(1)(c) of the Act.³⁸ The respondent does not dispute the service of the s 345(1)(c) notice in terms of the Act. However, the debt alleged in that statutory demand is allegedly disputed.

[23] The applicant alleges that the debt arises from goods sold and delivered during the period from March 2021 to August 2021. The applicant provided a comprehensive set of invoices and delivery notes justifying the amounts claimed. However, despite these documents being part of the pleadings since August 2021,³⁹ there has been no genuine *bona fide* attempt by the respondent to dispute any of the invoices or amounts claimed. Notably, this is more problematic given that the respondent has, on two occasions, sought to supplement its affidavits in these proceedings. In each of the supplementary affidavits the respondent sought to advance the proposition that a fraud had been perpetrated on the respondent. Despite the lapse of time between 2019 when the fraud was first discovered and the hearing of this matter in February 2024, the respondent has singularly failed to indicate that the invoices were inflated, that goods were not delivered, or not ordered at all.

[24] The crux of the respondent's argument in respect of disputing the debt owed to the applicant may be found within the respondent's first supplementary affidavit, where the respondent alleges that 75 transactions contained no purchase order numbers⁴⁰ and annexure "ES1" tabulates the alleged questionable transactions which amount to R837 559.02.

[25] Even if one accepts the respondent's version of the transactions outlined in annexure "ES1" and acknowledging that these transactions are genuinely disputed, there remains an unchallenged balance of R 5 851 204.16 in favour of the applicant's claim. The respondent complains of a lack of time to analyse the applicant's invoices and delivery notes however, despite the lapse of two years from the date of the filing of the applicant's replying affidavit in 2022, which contained the invoices and delivery notes, the respondent has not :

- (i) Attempted to dispute the invoices and delivery notes properly;

³⁸ Vol 1 at 9.

³⁹ Date of when the applicant filed its replying affidavit in the provisional liquidation stage.

⁴⁰ Vol 9 at 762.

- (ii) Set out which of the invoices the prices were inflated;
- (iii) Set out which of the invoices demonstrated goods that had not been delivered or orders that had not been placed.

[26] These failures inevitably lead to the conclusion that the debt is not genuinely disputed.

[27] The next question is whether the R85 000 kickback allegation creates a genuine dispute of fact or is sufficient to require a reference to oral evidence. Commercial bribery, if properly alleged, would create a genuine dispute of fact concerning the applicant's claim. However, the allegations made by the respondent significantly fail to meet the elements required as set out in *Extel Industries*⁴¹ because:

- (i) There is no nexus pleaded between the R85 000 kickback and the invoices which are the subject matter of the applicant's claim in s 345(1)(a)(i) notice;
- (ii) There is no allegation that the contract between the applicant and the respondent was created to the prejudice of the respondent by Govender;
- (iii) There is no allegation that Govender was involved in, ordered, or took delivery of any goods recorded in the invoices which occurred between March 2021 and August 2021.

[28] Instead, dealing with the applicant's debt which arose from May 2021 to August 2021, the respondent sought to rely on overpayment in an "XON Project" which concluded in March 2019.⁴² The respondent pleads an overpayment in some detail in the "XON Project" but made no attempt to demonstrate any overpayments concerning the applicant's debt between May 2021 and August 2021.

[29] It would appear from the affidavits filed by the respondent over a two-year period that the fraud perpetrated on the respondent was discovered in 2019, that criminal referrals were made in July, August and October 2020 and Etienne Singh was

⁴¹ *Extel Industries* above fn 34.

⁴² Vol 15 at 1323-1324.

a director during the period from June 2020 to November 2021 and was appointed to “unravel the fraud perpetrated on the respondent” in August 2021.⁴³

[30] Notwithstanding the sequence of events outlined above, there is no evidence presented in respect of the alleged commercial bribery between the applicant and Govender. It would have been a simple matter to examine the invoices and delivery notes put up by the applicant in these papers to determine whether the orders were placed, goods were not delivered, invoice prices were inflated or to plead what involvement Govender had with the orders and how such involvement prejudiced the respondent. Commercial bribery is a serious allegation, and the more serious the allegation, the higher standard of evidence must be required for a court to establish the validity of the allegation.⁴⁴

[31] Accordingly, the respondent has failed to establish the elements of commercial bribery and has equally failed to plead facts sufficient to create a genuine dispute of fact in respect of the debt. Mere speculation is not sufficient to create a genuine dispute of fact.

[32] In argument, counsel for the respondent sought to refer the issue of “commercial bribery” to the hearing of oral evidence. Had the respondent made these allegations seriously and made a timely effort to raise the issue of bribery, it should have raised the issue squarely in the pleadings and pleaded evidence to justify those allegations; or if the respondent lacked the necessary affidavits to justify the allegation then to plead the reference to oral evidence properly and plead what cross-examination would reveal by adhering to the directions outlined by Cloete JA in *D & F Wevell Trust*.⁴⁵ Having done none of these things, there is no discernible dispute to refer to oral evidence and as such the requested referral must be dismissed.

Nature of court’s discretion in final winding up order

⁴³ Vol 15, annexure “EP9.1” at 1261-1262.

⁴⁴ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 27.

⁴⁵ *D & F Wevell Trust* above fn 33.

[33] Counsel for the respondent referred to a number of cases⁴⁶ to demonstrate that the court had a “wide” discretion to refuse a final winding-up order where an unpaid debt had been established. Relying on *Firststrand Bank Limited v DLX Properties (Pty) Ltd*⁴⁷, it was argued that the ambit of the court’s discretion ought to be a “wide discretion”.

[34] The *DLX Properties*⁴⁸ judgment pertains to the leave to appeal application. The learned Acting Judge had dismissed the liquidation and had exercised a wide discretion. In the leave to appeal application, reference was made to *Afgri Operations Limited v Hamba Fleet (Pty) Limited*⁴⁹ wherein Willis JA stated at paragraph 13 as follows:

“The principles of which the court a quo lost sight are: (a) as set out in *Badenhorst and Kalil*, once the respondent’s indebtedness has prima facie been established, the onus is on it to show that this indebtedness is disputed on bona fide and reasonable grounds and (b) the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide.”

[35] The learned Acting Judge in *DLX Properties*⁵⁰ had proceeded from the wrong principle in law and had assumed a wide discretion which led to the refusal of the liquidation. However, that “wide discretion” had been rejected by the Supreme Court of Appeal in *Afgri Operations*.⁵¹ It is important to note that the *DLX Properties*⁵² judgment does not support the proposition that a court in a final winding-up application possesses such a wide discretion.

[36] Thereafter, counsel for the respondent invoked *Absa Bank Limited v Newcity Group (Pty) Ltd*⁵³, where the Honourable Mr Justice Sutherland addressed a final liquidation and a competing business rescue application brought by Newcity. The order granted preserved the right of Absa to return to court for a winding-up order if

⁴⁶ *Absa Bank Limited v Newcity Group (Pty) Ltd and another related matter* [2013] 3 All SA 146 (GSJ); *Firststrand Bank Limited v DLX Properties (Pty) Ltd* [2022] ZAWCHC 29.

⁴⁷ *DLX Properties* *ibid*.

⁴⁸ *Ibid*.

⁴⁹ *Afgri Operations Limited v Hamba Fleet (Pty) Limited* [2017] ZASCA 24; 2022 (1) SA 91 (SCA).

⁵⁰ *DLX Properties* above fn 46.

⁵¹ *Afgri Operations* above fn 49.

⁵² *DLX Properties* above fn 46.

⁵³ *Newcity Group* above fn 46.

Newcity failed to make payments. The facts of *Newcity*⁵⁴ are clearly distinguishable from the present matter, primarily because Newcity had offered to dispose of assets to make payment to Absa Bank of its debt.

[37] Finally, counsel for the respondent relied on *Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd*⁵⁵ in which Rogers J, provides a detailed description of the nature of the discretion and concluded that:

"I doubt that the *ex debito justitiae* maxim has ever been, or justified, an inflexible limitation on the court's discretion. In one of the leading English cases on the discretion to refuse a winding-up, *Re Southard & Co Ltd* [1979] 3 All ER (CA), Buckley LJ said that, where a judicial discretion is concerned, it is mistaken to attempt to lay down rules for its exercise and that no judge can fetter any other judge in the manner of its exercise or lay down rules binding on others in the exercise of the discretion (562b-c). The *ex debito justitiae* maxim, I venture to suggest, conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order (and see Blackman *op cit* Vol 3 at 14-91). To borrow another judge's memorable phrase, the court 'does not sit under a palm tree'. There must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld."⁵⁶

[38] However, Rogers J went to state at paragraph 21 of *Orestisolve* as follows:

"[21] Another circumstance which, in my view, would favour an exercise of the court's discretion against winding-up is where, despite the deemed inability to pay debts created by s 345(1)(a), the evidence shows that the company is not in fact commercially insolvent. It may also be relevant in this regard that the company's failure to pay is attributable to a genuine dispute concerning the claim, even if the court in the event considers the grounds of dispute are ill-founded."

[39] The distinction between a "wide" or "narrow" discretion is not without difficulty. The discretion is also described as a "loose" or "true" discretion. In *Trencon*

⁵⁴ *Ibid.*

⁵⁵ *Orestisolve* above fn 32.

⁵⁶ *Ibid* para 18.

Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited,⁵⁷ Khampepe J described the distinction as follows:

"[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense—

'means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.'"⁵⁸

[40] From the above, it is clear that the discretion afforded to a court hearing a liquidation application is a narrow one and must be exercised in light of the special circumstances of each case. The discretion could never be a "wide" or "loose" discretion because that would defeat the purpose of liquidation applications and give the Judge hearing the matter licence to have regard to facts unconnected to the case or other "incommensurate" features.

[41] A final winding-up order may be refused if special circumstances exist, such special circumstances include the solvency of the company. The factual position in respect of the respondent's solvency in this matter has never been adequately explained nor established by way of proper audited financial statements. The respondent alleges the potential recovery by way of litigation as a mechanism to satisfy the debt owed to the applicant.⁵⁹ This assertion amounts to speculation, and at best, the respondent's claims can be described as contingent claims dependent on success in the litigation and on the defendant in those actions having realisable assets. The respondent makes the admission that it only has realisable assets of R3.9 million,

⁵⁷ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

⁵⁸ *Ibid* paras 83-86.

⁵⁹ Vol 14 at 1222; Vol 14 at 1228-1229; Vol 14 at 1229.

which is insufficient to cover the debt owed to the applicant. Additionally, the respondent also alleges that it has ceased trading.

[42] Therefore, the facts alleged by the respondent are insufficient to create "special circumstances" to justify the exercise of the narrow discretion afforded to refuse the final winding-up order.

Order

[43] In the circumstances, I make the following order :

1. The respondent is placed in final liquidation.
2. The applicant's costs are to be costs in the liquidation. Such costs to include the costs of two counsel, where employed, on Scale "C".



BROSTER AJ

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Date of Judgment: 22 July 2024 – Electronically