



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 17446/2024

In the matter between:

CEZ INVESTMENTS (PTY) LTD

Applicant

and

BLOCKKOID (PTY) LTD

First respondent

Registration number: 2014/064942/07

Registered address: 27th Floor, The Box

9 Lower Burg Street, Cape Town

THE FINANCIAL SECTOR CONDUCT AUTHORITY

Second respondent

Case number: 20613/2024

And in the matter between:

BLOCKKOID (PTY) LTD

Applicant

and

CEZ INVESTMENTS (PTY) LTD

First respondent

THE SHERIFF, CAPE TOWN WEST

Second respondent

REASONS DELIVERED ON 14 MARCH 2025

VAN ZYL AJ:

INTRODUCTION

1. On 14 November 2024 this Court dismissed, with costs (including counsel's fees taxed on Scale C), two opposed applications that served before it:
 - 1.1. The first¹ was an application for the provisional liquidation of the first respondent.²
 - 1.2. The second³ was an application for the interim suspension of the attachment of the first respondent's right, title and interest in an action instituted against the applicant, pending the final determination of the *ex parte* application (as it initially was) pursuant to which such attachment had been procured.⁴
2. These are the reasons for the orders granted. I shall discuss the liquidation application first, and thereafter deal with the suspension application. For the sake of convenience, I shall refer to the parties as they are in the liquidation application.

THE APPLICATION FOR THE PROVISIONAL LIQUIDATION OF THE FIRST RESPONDENT

Background

3. The relevant facts will be considered in more detail below, but this matter

¹ Under case number 17446/2024.

² The second respondent did not take part in the proceedings.

³ Under case number 20613/2024.

⁴ Again, the second respondent in this application did not take part in the proceedings.

arose, in brief, as follows: By agreement between the applicant and the first respondent this Court, on 9 April 2024 (“the April 2024 order”),⁵ *inter alia* ordered the first respondent to repay the sums of R29 897 520,69 and \$200 000,00 respectively to the applicant. Those sums had previously been paid by the applicant to the first respondent, a financial services provider,⁶ who had been given a mandate by the applicant to pay a party in Hong Kong with whom the applicant had a contractual relationship. The first respondent – for reasons that will be referred to in due course - did not pay the party in Hong Kong, and the applicant terminated the first respondent's mandate.

4. The April 2024 order was agreed to pursuant to the applicant's launch of an *ex parte* application on 15 March 2024 and the grant of a rule nisi on that date (“the March 2024 order”). The *ex parte* application was thereafter postponed for hearing on the semi urgent roll regarding a further amount claimed by the applicant from the first respondent.
5. The April 2024 order contains the following recordal: “*The payments above are paid without prejudice to any of the parties’ rights to claim or reclaim any amounts in respect of any cause (sic) action between the parties concerning the subject matter under the above case number*”.
6. The first respondent failed to pay the full judgment debt set out in the April 2024 order, and execution steps taken by the applicant were largely unsuccessful. A sum of R3 688 700,00 (plus interest) remains unpaid.
7. The applicant thus applied for the provisional liquidation of the first respondent on the bases that the latter was unable to pay its debts as they fell due in the ordinary course of business as contemplated in section 344(f), read with section 345(1)(c), of the Companies Act 61 of 1973,⁷ and that the grant of a provisional winding-up order was just and equitable.

⁵ Under case number 5369/2024.

⁶ In terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (“the FAIS Act”).

⁷ Read with Item 9 of Schedule 5 to the Companies Act 71 of 2008.

8. The first respondent opposed the application, contending that it was disputing the claim on *bona fide* and reasonable grounds, particularly because it had liquid and illiquid counterclaims against the applicant, the *quantum* of which exceeded the applicant's claim. It claimed that the applicant's claim had been extinguished by set-off and that the applicant therefore lacked the requisite *locus standi* to pursue the liquidation application. The first respondent pleaded further that the applicant was precluded by the *ex turpi causa* rule from claiming the funds because (as will appear from the discussion below) those funds had been paid in terms of an illegal payment arrangement.
9. In August 2024 the first respondent instituted action⁸ against the applicant, seeking the relief it says it is entitled to in terms of its counterclaims (as they are referred to in the liquidation application) against the applicant. The action is pending.

The relevant legal principles

10. It is apposite at the outset to refer to the legal principles involved in opposed applications for provision liquidation.
11. The applicant must establish its entitlement to an order on a *prima facie* basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour.⁹ This would include the existence of the claim where it is disputed. A distinction must be drawn between factual disputes relating to the respondent's liability to the applicant (i.e. relating to the applicant's claim) and disputes relating to the other requirements. At the provisional stage,¹⁰ the other requirements must be satisfied on a balance of probabilities with reference to the affidavits.

⁸ Under case number 17661/2024.

⁹ *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and another* 2015 (4) SA 449 (WCC) at para [7], with reference to *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 975J-979F.

¹⁰ The test for a final order is different. At that stage the applicant must establish her case on a balance of probabilities. Where the facts are disputed, the Court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the rule in *Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C (see *Orestisolve supra* at para [9]).

12. In relation to the applicant's claim, however, the Court must consider not only where the balance of probabilities lies on the papers but also whether the claim is *bona fide* disputed on reasonable grounds.¹¹ The accepted approach is based on the so-called *Badenhorst* rule,¹² to the effect that winding-up proceedings are inappropriate (and can be abusive) for the determination of complex factual (and perhaps legal)¹³ disputes as to the existence of an indebtedness and, conversely, a claim.
13. A court may conclude that the claim is so disputed even though on a balance of probabilities (based on the papers) the applicant's claim has been made out.¹⁴ However, where the applicant at the provisional stage shows that the debt *prima facie* exists, the *onus* is on the first respondent to show that it is *bona fide* disputed on reasonable grounds.¹⁵
14. In *Hülse-Reutter and another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)*,¹⁶ the following was stated in relation to the *onus* on the first respondent:

"I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants' claims, and do so bona fide, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company's defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their

¹¹ *Orestisolve supra* at para [8].

¹² *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) 346 (T) at 347H-348C. See also *GAP Merchant Recycling CC v Goal Reach Trading* 55 CC 2016 (1) SA 261 (WCC) at paras [20]-[29].

¹³ See the discussion in *Orestisolve supra* at para [12].

¹⁴ *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783G-I.

¹⁵ *Orestisolve supra* at para [8].

¹⁶ 1998 (2) SA 208 (C) at 219F-220B. Emphasis added.

and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such a trial....

It seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide,... to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the company...."

15. The background to this application and the first respondent's defences are considered in this context.

The factual context

16. The applicant has established its claim on the papers, relying as it does on the judgment debt arising from the April 2024 order. In what follows I set out the bases upon which the first respondent disputes its obligation to make payment of the remainder of that debt. I am of the view that the first respondent's allegations do indicate that the grounds upon which the first respondent resists the liquidation application are not unreasonable, and that the first respondent is *bona fide* doing so.

The payment agreement

17. The first respondent was at the relevant time registered as a service provider with the Financial Sector Conduct Authority ("the FSCA"), established in terms of section 56 of the Financial Sector Regulation Act 9 of 2017, conducting the business of a crypto exchange.
18. It is common cause that around 22 and 23 February 2024 the applicant and the first respondent into an agreement, which has been referred to in the papers as the "payment agreement". The first respondent was represented at the conclusion of the payment agreement by Kenneth Finneran ("Finneran"), and the applicant was represented by Jonathan Lancaster ("Lancaster") and Byron Wilson ("Wilson").

19. The first respondent states that the following facts were represented to Finneran by Lancaster and Wilson when the payment agreement was concluded: The applicant had entered into a joint venture ("JV") agreement with Global Energy Corporation ("GEC"), a company registered and purportedly trading as an importer of oil in Hong Kong, in the People's Republic of China. In terms of the JV agreement the applicant had bound itself to make payment of USD 3,5 million on behalf of GEC to the Chinese authorities. The money represented the cost of upfront import fees levied against GEC by the Chinese authorities in respect of shipments of sweet light crude oil purchased by GEC from Shell Brazil Petroleum LTDA ("Shell") and imported into China, which oil was on the point of being discharged in Hong Kong from an oil tanker, the Motorship MIT Dominica. The applicant had undertaken in terms of the JV agreement to defray that cost on behalf of GEC.
20. The applicant required the first respondent to undertake the transfer of USD 3,5 million from the applicant, which held the funds in its South African bank accounts, to GEC in Hong Kong, by way of a once-off over-the-counter ("OTC") transaction. In other words, the first respondent was required to transfer money from one of the joint venturers to and on behalf of the other.
21. Notably, it is now common cause that the facts represented to Finneran in concluding the payment agreement were not true. GEC was a hollow entity and the JV agreement was a sham document, fraudulently created for the sole purpose of establishing a plausible basis for the payment by USD 3,5 million by CEZ to GEC. None of the allegations made by the first respondent in this respect has been disputed.
22. The first respondent, upon what had been represented to Finneran by Lancaster and Wilson, entered into the payment agreement. It is useful to set out what is alleged in the first respondent's particulars of claim in the action¹⁷ as regards the express, tacit, or implied terms of the payment agreement:

¹⁷ The first respondent as plaintiff, and the applicant as defendant.

- "4.1 The plaintiff would, by way of an OTC transaction, in discharge of the defendant's obligations under a joint venture agreement ("the JV agreement") mentioned below, make payment of USO 3,5 million for the defendant to and on behalf of an entity known as Global Energy Corporation ("GEC"), a company registered and purportedly trading in Hong Kong, in the People's Republic of China, more particularly by procuring the payment of that money into an account held by GEC at Shanghai Bank in Hong Kong.
- 4.2 The cause of the payment was a JV agreement between the defendant and GEC, in terms of which the defendant would on behalf of GEC pay certain upfront import fees levied against it by the Chinese authorities in respect of shipments of sweet light crude oil purchased by GEC from Shell Brazil Petroleum LTDA ("Shell") and imported into China, which oil was on the point of being discharged in Hong Kong from an oil tanker, the Motorship MIT Dominica.
- 4.3 The defendant would deposit the ZAR equivalent of the USD to be transferred, as aforesaid, into a bank account held by the plaintiff at Capitec Bank, Cape Town.
- 4.4 The plaintiff would use its transactional skills, resources and business connections with associates to convert the ZAR deposited by the defendant into USD and thereafter to convert the USD into cryptocurrency readily re-convertible in Hong Kong to USD, namely, USDT (a form of stable cryptocurrency, the value of which is tethered to the USD).
- 4.5 The plaintiff would channel the funds to GEC through a payment associate in the cryptocurrency market, which had at its disposal a sufficient supply of USD in Hong Kong to re-convert USDT into USD.
- 4.6 The plaintiff would itself pay a commission of 3.5% in respect of the overall value of the ZAR deposited by the defendant for the purposes of the OTC transaction, ie, on the conversions of such ZAR into USD, and the plaintiff would generate a profit of 2% on

such conversion by recovering a commission of 5.5% from the defendant in respect thereof.

- 4.7 *The plaintiff would itself pay a commission of 3.5% in respect of conversions of USD into USDT (and conversely on conversions of USDT into ZAR), and would recoup such payments by charging a commission of 3.5% to the defendant in respect of such conversions.*
- 4.8 *The defendant might in terms of Part 1 of Chapter 3 of the Financial Intelligence Centre Act 38 of 2001 ("FICA") (or a similar law in any other country) be obliged to provide information and documentation (described in the cryptocurrency market as "Know Your Client" data or "KYC") to the plaintiff and/or to any payment associate of the plaintiff, in order to verify the identity of GEC, thereby, as far as practicable, ensuring that the OTC transaction was not a transaction which contravened any relevant prohibition in the Prevention of Organised Crime Act 121 of 1998 ("POCA") (or a similar law in any other country).*
- 4.9 *The defendant would provide KYC to the plaintiff and/or to any payment associate of the plaintiff when called upon to do so, failing which the plaintiff's payment of the funds of the defendant on behalf of GEC, as contemplated in the OTC transaction, would not, in terms of the legislation contemplated in the preceding sub-paragraph, be lawfully permissible."*

"Know Your Client"

23. The obtaining of "Know Your Client" data ("KYC"), mentioned in the particulars of claim, is one of the obligations imposed under FICA upon accounting institutions,¹⁸ essentially to combat contraventions of the Prevention of Organised Crime Act 121 of 1998 ("POCA") by identifying and obstructing suspicious or unusual transactions at their inception.

¹⁸

Within the definition of which the first respondent has fallen since 2022.

24. In terms of section 21(1)(b)(i) of Financial Intelligence Centre Act 38 of 2001 ("FICA") an accountable institution must, in instances where a client acts on behalf of another person, including in a "*single transaction*", obtain information to establish and verify the identity of that other person. Such information is what has commonly come to be referred to as KYC. If the required KYC cannot be obtained, the institution is prohibited, in terms of section 21E(ii) of FICA, *inter alia* from performing "*any act to give effect to a single transaction*". In the present matter the payment agreement was on the face of it a single transaction as defined in FICA, that is, "*a transaction (a) other than a transaction concluded in the course of a business relationship; and (b) where the value of the transaction is not less than the amount prescribed, except in the case of section 20A*".¹⁹
25. There is no dispute between the parties that KYC was in fact required in respect of GEC.
26. The applicant partially performed its obligations under the payment agreement by transferring the ZAR equivalent of USD 2 million (R38 780 000,00) into the first respondent's Capitec Bank account in two tranches on 23 and 28 February 2024. The balance of USD 1,5 million was never transferred to the first respondent.
27. It was initially considered that the transfer of the applicant's funds to Shanghai Bank would be undertaken through Openpayd, a European payment associate of the first respondent. Openpayd was set up to achieve a conversion of cryptocurrency in Hong Kong to Euros or GBP. However, Wilson thereafter indicated that GEC required payment in Hong Kong in USD. It was thus agreed to utilise Agile Ventures Ltd ("Agile"), one of the first respondent's payment service providers, to make the onward payment of USD to GEC in Hong Kong. According to the first respondent, the most efficient way of

¹⁹ According to regulation 1A(1) of the FICA regulations published in GN R1595 in *Government Gazette* 24176 of 20 December 2002, the prescribed value of a transaction is an amount not less than R5 000,00.

procuring this outcome was to effect the transfer through Agile in fiat currency (USD) rather than in cryptocurrency.

28. The first respondent started discharging its obligations under the payment agreement by making transfers to the Shanghai Bank account of GEC through the account of Agile held at FNB Zambia. It made a test transfer of USD 1 000,00 on 25 February 2024. When that proved to be successful, made a further transfer of USD 200 000,00 on 27 February 2024.
29. On 4 March 2024 FNB Zambia notified Agile that it had placed a compliance hold on the onward transfer of USD 200 000, because it required KYC to verify the identity of GEC. From that day onwards, the first respondent made repeated demands to the applicant to furnish KYC in respect of GEC. The first respondent says that none of the demands were complied with.
30. On 4 March 2024 Wilson requested Finneran, in an effort to bypass the obstacle created by FNB Zambia to the onward transfer of funds to GEC, to procure that the funds of the applicant remaining in the first respondent's hands (having been converted into USDT) would not be transferred through Agile. Instead these would be transferred directly from a wallet created for the applicant on the first respondent's trading platform, into a wallet which had been created on the trading platform of a crypto exchange in Poland ("the Polish wallet"). The funds would be channelled via the Polish wallet to GEC. The payment agreement was varied accordingly. On 5 March 2024 the first respondent created a crypto wallet for the applicant and made a nominal test payment of USDT 10 from that wallet into the Polish wallet.
31. The first respondent did not know the holder of the Polish wallet. Thus, again, KYC was required to verify the identity of the holder of that wallet (and again of GEC, on whose behalf the payments were to be made into the Polish wallet). On 6 March 2024 Finneran asked Wilson how much he wanted to transfer to the Polish wallet and requested him to send the necessary KYC. Wilson answered that he wanted to transfer USD 500 000 (which ought to have been a reference to USDT). Wilson said that he was "*getting the KYC*

pack from them". The KYC pack did not arrive, and when Wilson himself attempted to transfer USDT 200 from the applicant's wallet on the first respondents trading platform, a compliance hold was placed on that wallet.

32. There is some dispute between the parties as to who was responsible for obtaining the KYC, but it seems to me that it cannot be denied that it had to be done.

The cancellation of the payment agreement and the arising of the first respondent's claim for contractual damages

33. The first respondent avers that it was at all material times willing and able, upon provision of the KYC demanded by it from the applicant, to perform its obligations under the payment agreement. It argues that by failing to provide the KYC demanded and promised on 6 March 2024 in respect of the Polish wallet, the applicant withheld the co-operation that was essential for the first respondent to discharge its obligations under the payment agreement. The applicant thus breached the agreement by committing *mora creditoris*.²⁰ The applicant denies that this is the case, and this is no doubt a central issue in the action pending between the parties.
34. The main effect of *mora creditoris* is to shift the responsibility for further delay or non-performance onto the creditor. As a result of its *mora creditoris* the applicant was not entitled thereafter to rely on the delay in performance or the nonperformance by the first respondent of the payment agreement, as a foundation for cancelling the payment agreement or to claim damages or restitution from the first respondent.²¹
35. On 8 March 2024 the applicant purported to cancel the payment agreement on the basis that the first respondent had, despite repeated demands by the applicant, delayed in performing its obligations under the payment agreement,

²⁰ See the discussion in Christie's *Law of Contract in South Africa* (7ed, LexisNexis) at pp 605-606.

²¹ *Ibid.*

more particularly by delaying the transfer of funds from its trading platform to the Polish wallet. This was followed, during the period from 8 March 2024 to 14 March 2024, by repeated demands that the first respondent should immediately restore to the applicant the funds the latter had paid to the first respondent.

36. The first respondent contends that, because the applicant was not entitled to rely on the alleged delay in performance of the payment agreement by the first respondent as a ground for cancelling the payment agreement, its purported cancellation of the agreement on 8 March 2024 constituted a repudiation of the agreement. As a result of such repudiation, the first respondent suffered liquidated contractual damages, being a loss of the commission it would have earned under the payment agreement.
37. In addition, the first respondent's case is that it is entitled to recoup commission in respect of the conversion of funds from USD to USDT. This loss came about because, as indicated, on 4 March 2024 at Wilson's request the parties agreed to channel funds in USDT through the Polish wallet. The first respondent thus had to undertake an intermediate conversion of its funds holdings in USD to USDT, at a commission payable by it (the first respondent) of 3,5%. The first respondent had already acquired USDT with the first payment to it of R10 million by the applicant, and no intermediate conversion of those funds was required.
38. The first respondent used the second payment of R28 780 000,00 from the applicant to acquire USD, pursuant to the decision to transfer the funds in USD to Agile. It was therefore necessary to undertake an intermediate conversion of USD, equivalent to R28 780 000,00, into USDT, to give effect to the transfer into the Polish wallet. This conversion exposed the first respondent itself to a commission of 3,5% on the USD equivalent of R28 780 000,00. This is recoverable from the applicant in terms of the payment agreement.
39. The first respondent's claims are quantified as follows in the particulars of

claim in the action against the applicant:²²

- "24 *Prior to the defendant's purported cancellation of the OTC transaction, the plaintiff had converted ZAR 38 780 000 into USD, in respect of which conversion the plaintiff became entitled as against the defendant to 5,5% commission, ie, an amount of ZAR 2 132 900.*
25. *Prior to the defendant's purported cancellation of the OTC transaction, the plaintiff had converted USD 1 698 155,90 (the balance after deduction of its aforesaid commission, the transfer of USD 200 000 to Agile and certain smaller payments made for the defendant) into USDT, in respect of which conversion the plaintiff became entitled as against the defendant to 3,5% commission, ie, an amount of ZAR 1 145 581,85.*
26. *Because it was commercially imprudent to hold USDT in readiness for a transaction which had become subject to potential delay, the plaintiff converted the USDT then held by it (USDT 1 665 892,83) back into ZAR, in respect of which conversion the plaintiff became entitled as against the defendant to 3,5% commission, ie, an amount of ZAR 1 096 156,94.*
27. *In the premises, the plaintiff became entitled to the payment of commission by the defendant in the amounts of (a) ZAR 2 132 900, (b) ZAR 1 145 581,85, and (c) ZAR 1 096 156,94, that is, an aggregate amount of ZAR 4 374 632,79.*
- ...
30. *But for its purported cancellation of the OTC transaction, the defendant was obliged to deposit a further amount of ZAR 29 085 000 (equivalent to USD 1 500 000) into the plaintiff's Capitec Bank account, in final and complete performance of its obligations under the OTC transaction.*
31. *The profit component of the commission which the plaintiff*

would have earned on the conversion of the further amount of ZAR 29 085 000 into USD would have been 2%, ie, an amount of ZAR 581 700.

32. *As a result of the defendant's breach of the OTC transaction, the plaintiff was precluded from earning the aforesaid profit component of ZAR 581 700 of the commission which the plaintiff would have earned, and thereby suffered damage in this sum."*

40. The first respondent accordingly claims R4 956 332,79 from the applicant by way of liquidated contractual damages.²³

The ex parte application

41. Reference has already been made to the applicant's *ex parte* application. When the first respondent had not by 14 March 2024 returned the applicant's funds, the applicant instituted the *ex parte* application, freezing (under a rule *nisi*) the first respondent's assets in its bank accounts and crypto wallets by way of the March 2024 order. The return day of the rule *nisi* was anticipated, and the April 2024 order was granted by agreement between the parties.

42. The April 2024 order provided that the first respondent would make a payment of R29 897 520,69 to the applicant. The amount of USD 200 000,00, which the first respondent had attempted to transfer to Hong Kong through Agile, remained subject to a compliance hold by FNB Zambia. Accordingly, the April 2024 order also provided that the first respondent would pay the ZAR equivalent of USD 200 000,00 within 24 hours of those funds being received by the first respondent. The applicant's claim for the balance of the R38 780 000,00 paid to the first respondent was postponed for hearing on a later date.

²³ The first respondent argues that the claim made in paras 30 to 32 of the particulars of claim may be overly generous to the applicant. It is premised on the view that the first respondent is entitled to recover only the profit component (2%) of its stipulated commission of 5,5% in respect of the amount of USD 1,5 million (R29 085 000,00) that the applicant was obliged to, but did not, pay to the first respondent. It is arguable that the first respondent ought to be entitled to recover the full commission of 5,5% stipulated for which, in relation to the balance of USD 1,5 million never paid by the applicant, amounts to R1 599 675,00 (instead of the R581 700,00 claimed at present).

43. It is common cause that the first respondent has discharged the judgment debt of R29 897 520,69 30. The applicant contends that such payment was delayed to the extent that *mora* interest of R102 410,84 has since accrued.
44. It is also common cause that the first respondent has received the amount of USD 200 000,00, but that it has not paid that amount to the applicant. This is the amount of R3 688 70,31 owing under the April 2024 order, upon which the applicant relies for the purposes of the liquidation application, and upon which it founds its *locus standi*. With interest, the amount outstanding is R3 791 110,84.

The extinction of the judgment debt by set-off

45. The first respondent submits that the applicant's judgment debt was extinguished by set-off.²⁴ Set-off occurs when two parties are mutually indebted to each other, and both debts are liquidated and due. It occurs automatically.²⁵
46. The applicant criticizes the first respondent for raising this defence several months after agreeing to the terms of the April 2024 order. I have mentioned, however, that that order contained a provision safeguarding the parties' rights to "*claim or reclaim any amounts, in respect of any cause [of] action between the parties concerning the subject matter of the ex parte application*". The first respondent is accordingly not barred from raising its claim, presumable on the advice of its newly appointed legal representatives, after the grant of the April 2024 order. There was nothing in the first respondent's attorney's letters after the grant of the April 2024 order to indicate that the first respondent abandoned reliance on the safeguard contained in the order.
47. One of issues which arise from the first respondent's reliance on its contractual claim for damages is whether the first respondent is entitled to

²⁴ *Bannister Print (Pty) Ltd v D&A Calendars CC and another* 2018 (6) SA 77 (GJ) at para [10].
²⁵ See *Western Cape Housing Development Board v Parker* 2005 (1) SA 462 (C) at para [18].

claim damages at all.

Damages caused by the termination of a mandate which has already commenced

48. In its replying affidavit the applicant for the first time characterises the payment agreement as a "mandate". The first respondent argues that this is done to enable the applicant to rely the common law rule that a mandator may terminate his mandate at will; therefore, the applicant's cancellation of the payment agreement could not have amounted to repudiation, and no damages could arise from the termination of the mandate.
49. There is authority for the proposition that a mandate may be terminated by the mandator at will. LAWSA²⁶ states as follows in this respect:

"69 Factors terminating the mandate *The contract of mandate is terminated in the same way as other obligations come to an end, namely by: performance; set-off; merger impossibility of performance; novation; compromise; waiver or discharge; and prescription or rescission. In the case of mandate, however, there are certain special cases which bear consideration.*

...(g) The mandator may revoke the mandate at any time before its performance or completion (footnote 16). Since such revocation may have the effect of depriving the mandatary of his or her anticipated remuneration, it can be argued that a contract of mandate should be subject to an implied term that it will not be revoked except on good cause shown (footnote 17)."

50. In footnote 16 in the extract the authors rely *inter alia* on Huber HR 3.12.39 and Voet 17.1.17. The authors add in footnote 17: *"This might be the case where the mandate closely resembles a contract of service or employment."*²⁷
51. The Roman-Dutch authority referred to in footnote 16 supports what is said in

²⁶ Joubert et al (eds) LAWSA (3ed) "Mandate" Vol. 28(1) at para 69. Emphasis added.

²⁷ A contract of service is *locatio conductio operis*, and a contract of employment is *locatio conductio operarum*.

the main LAWSA text. Voet 17.1.17²⁸ states that a mandate can be revoked *“with impunity on both sides if the matter is still in its entirety, If the matter is not in its entirety, damages caused by the renunciation or revocation having taken place simultaneously must be made good”*.

52. Huber HR 3.12.39²⁹ is to similar effect: “39. Notice may be freely given by both sides, so long as the matter is still entire. That is to say, the principal may revoke his mandate and the mandatary may renounce it, so long as the one or the other suffers no damage thereby; for if that happens, then the person giving notice is obliged to make the damage good, unless it was given for weighty reasons”³⁰
53. The first respondent argues that the upshot of these authorities is that a mandate may be terminated “*before the mandatary has acted upon the mandate*”.³¹ The proposition advanced by the applicant, namely that when a mandator terminates his mandate at will the mandatary cannot suffer contractual damages, is thus an oversimplification. The true common law rule is that a mandate may be terminated at the will of the mandator before the mandatary acts upon it, but that if it is revoked after the mandatary has already started to act upon it, the mandatary is entitled to damages suffered as a result of the termination thereafter of the mandate. In the present matter the first respondent had already partly performed under the payment agreement when it was terminated on 8 March 2024. The first respondent is thus entitled to claim damages.

Was the payment agreement a contract of locatio conductio operis?

54. In footnote 17 to the quoted passage from LAWSA (at paragraph 49 above) the authors remark that a contract of mandate might be subject to an implied term that it will not be revoked except on good cause shown, if it closely

²⁸ Ganes translation Vol. 3 at p 211. Emphasis added.

²⁹ Gane's translation Vol. 1 at p 464. Emphasis added.

³⁰ See also Grotius *Introduction to Dutch Jurisprudence* 3.12.12 (Maasdorp's translation at p 238).

³¹ Kerr *Law of Agency* (4ed, Lexisnexis) at p 195.

resembles a contract of *locatio conductio operis*.

55. The first respondent was obliged in terms of the payment agreement to undertake and complete a specific task on behalf of the applicant, namely to make a payment on its behalf. The payment agreement may therefore be described as a contract of *locatio conductio operis*:³²

“1....The object of the contract of work is the performance of a certain specified work or the production of a certain specified result. It is the product or the result of the labour which is the object of the contract.

2....By way of contrast the conductor operis stands in a more independent position vis-à-vis the locator operis. The former is not obliged to perform the work himself or produce the result himself (unless otherwise agreed upon). He may accordingly avail himself of the labour or services of other workmen as assistants or employees to perform the work or to assist him in the performance thereof.

3....The conductor operis is bound to perform a certain specified work or produce a certain specified result within the time fixed by the contract of work or within reasonable time where no time has been specified.

4....The conductor operis, however, is on a footing of equality with the locator operis. The former is bound by his contract of work, not by the orders of the latter. He is not under the supervision or control of the locator operis. Nor is he under any obligation to obey any orders of the locator operis in regard to the manner in which the work is to be performed. The conductor operis is his own master being in a position of independence vis-à-vis the locator operis. The work has normally to be completed subject to the approval of a third party or the locator operis.”

56. If that is the case, the characterisation of the payment agreement as a mandate is inaccurate, and the proposition that the applicant was entitled to terminate the payment agreement at will is not correct.

³² On the test set out in *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 A at 61A-G. See Kerr *op cit* at pp 14-15.

Distinction between a contract of mandate and the authority granted thereunder

57. The first respondent raised a further argument, with reference to various authorities,³³ to the effect that even if the payment agreement was a contract of mandate, a distinction should be made between the existence of such contract and the authority granted thereunder.³⁴
58. An agreement which embodies an instruction (a mandate properly so called) and which also confers authority authorising the mandatory to bind the mandator, is a "composite contract".³⁵ The mandatory under such a composite agreement, that is, which not only embodies an instruction to him but also authorises him to act at the mandator's agent, is known as an "empowered mandatory", while a mandatory under an agreement which embodies an instruction only, without authorising him to act as the mandator's agent, is known as an "unempowered mandatory".³⁶
59. It is often said that a principal may at will revoke his agent's authority, even if he is an empowered mandatory under a composite contract of mandate.³⁷ However, the fact that the authority of an empowered mandatory may be revoked at will does not mean that the contract of mandate itself, which conferred the authority, is revocable at will. As to a contract of mandate, it has been established that even if the authority conferred thereunder is revoked, the contract itself may continue in existence.
60. It is not for present purposes necessary to debate this in any detail. The payment agreement did not confer upon the first respondent authority, as agent, to bind the applicant. The first respondent was a neutral payment functionary,³⁸ and thus an unempowered mandatory. The question whether

³³ Including *De Wet & Yeats Kontraktereg en Handelsreg* (4ed, Butterworths) at p 343; *Glover v Bothma* 1948 (1) SA 611 (W); *Ward v Barrett* 1962 (4) SA 732 (N); *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C); and *Consolidated Frame Cotton Corporation Ltd v Sithole* 1985 (2) SA 18 (N). See LAWSA "Agency and Representation" (3ed) Vol. 1 at para 149; *Kerr op cit* at p 12.

³⁴ *Kerr op cit* at p 17.

³⁵ *Kerr op cit* at p 12.

³⁶ See *Consolidated Frame Cotton Corporation Ltd v Sithole* 1985 2 SA 18 (N) at 22G.

³⁷ *Keyhealth Medical Scheme v Glopini (Pty) Ltd* [2021] ZAGPPHC 446 (14 April 2021) at para [11].

the applicant could at will revoke the first respondent's authority therefore does not arise.

61. The true question is whether, properly construed, the payment agreement envisaged that the applicant might terminate it at will. If, as postulated earlier, the payment agreement was a contract of *locatio conductio operis*, the answer to that question is in the negative. The first respondent argues that even if the payment agreement is regarded as a mandate there are clear indications that it was not envisaged that it would be unilaterally revoked by the applicant. The parties intended that the payment agreement would be implemented swiftly. The first respondent contends that this would have occurred, were it not for the applicant's *mora creditoris*. Given the very short time-frame within which the payment agreement was intended to be implemented, as a single task, it was probably a tacit or implied term of the payment agreement that it would not be terminated by the applicant within that time-frame, and certainly not after the first respondent had started implementing it.
62. The applicant denies that this is the case, but it does appear from the relevant timeline that, after conclusion of the payment agreement on 22 and 23 February 2024, the decision that the funds would be sent via Agile in fiat currency were made swiftly thereafter. The initial concept after the conclusion of the agreement was a conversion from ZAR to USD and then to USDT, to be sent to Hong Kong via Openpayd. Openpayd was, however, set up to convert cryptocurrency in Hong Kong in GBP or Euro. As Wilson wanted payment on Hong Kong in USD, the decision was made to transfer funds in fiat currency via Agile. On 23 February 2024 the applicant paid R10 million to the first respondent, and on 28 February 2024 it paid another R28 780 000,00. The first respondent started virtually immediately with its attempts to transfer USD through Agile, because on 23 February 2023 already the test transmission of USD 1 000,00 was made. The further transmission of USD 200 000,00 was attempted on 27 February 2024. The decision to use Agile was thus virtually contemporaneous with, or very shortly after, the conclusion of the payment agreement.

63. On the first respondent's argument it follows, given the urgency with which the payment agreement was to be implemented, that the applicant had already committed *mora creditoris*, by withholding co-operation essential to enable the first respondent to implement the payment agreement, when it purported to cancel the agreement on 8 March 2024. It is a matter that will have to be determined by a trial court in due course. I do not regard it as an unreasonable proposition for present purposes.

Termination under the FAIS Code of Conduct

64. The applicant contends that, apart from cancellation under the common law, it was entitled to terminate the payment agreement. in terms of section 20(a)(i) of the *General Code of Conduct for Authorised Financial Service Providers and Representatives* published under the FAIS Act.³⁹ That section provides that "a provider must, subject to any contractual obligations, give immediate effect to a request of a client who voluntarily seeks to terminate any agreement with the provider or relating to a financial product or advice".⁴⁰
65. The first respondent submits that the underlined phrase means "subject to any contractual obligations of the provider or of the client". Thus, the right of termination conferred by section 20(a)(i) is not calculated to vary the provider's or the client's contractual obligations (and correlative rights), whether at common law or otherwise, as they otherwise exist in or arise from the contract between them. The right of termination under the Code is thus subordinate those rights and obligations.

Is the first respondent's claim liquid?

66. The applicant denies that the alleged contractual claim constitutes a liquidated debt, given the disputes on the papers as to the terms of the payment agreement and the *quantum* of the amount claimed in the action.

³⁹ Under BN 80 in *Government Gazette* 25299 of 8 August 2003.
⁴⁰ Emphasis added.

67. It seems to me, however, that the claims set out in the particulars of claim are at least capable of prompt ascertainment “*by proof in court ... for commission for an agreed amount, or upon an agreed basis*”.⁴¹
68. The existence of the payment agreement is common cause. If one accepts that its termination after the first respondent had started implementing it gave rise to a claim for liquidated contractual damages against the applicant, a dispute about the terms of the agreement need not be entertained in these proceedings. It is a matter for the court determining the action, and the terms of the agreed need to be established there depending on where the *onus* lies in relation to the allegations on the pleadings.⁴²
69. As to the dispute in relation to the *quantum* of the first respondent’s claim, it seems that even on the applicant’s version the first respondent was entitled to a commission of 5,5% on the amount of USD 3,5 million to be transferred under the payment agreement. Without allowing for the 3,5% commission recoupment recoveries in respect of intermediate conversions of currencies and cryptocurrencies, as alleged in the first respondent’s version of the terms of the payment agreement, that comes to USD 192 500,00, which virtually extinguishes the judgment debt relied upon by the applicant. This, however, should be left to the trial court for determination.
70. The applicant knew, when it launched the liquidation application in early August 2024, that the first respondent was of the view that the applicant had breached the payment agreement by committing *mora creditoris* followed by repudiation, and that it was contractually entitled to its commission. This was done in the first respondent’s answering affidavit in the *ex parte* application, delivered in July 2024. Although the first respondent’s claim was not quantified at that stage, it was nevertheless readily determinable that the asserted claim was in the order of USD 1 925 000,00.

The illegality of the payment agreement

⁴¹ See Wille’s *Principles of South African Law* (9ed) at p 833.

⁴² *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A).

71. The other defence upon which the first respondent relies to resist the liquidation application is its contention that the payment agreement was an illegal contract.
72. I have earlier referred to the representations made to the first respondent when the payment agreement was concluded. The first respondent alleges in its answering affidavit that the true position was as follows:
- 72.1. GEC, although registered and incorporated in Hong Kong, was a hollow entity, without known beneficial owners, directors, or other controlling officers, which did not engage in the importation of sweet light crude oil.
- 72.2. The JV agreement was a sham contract, fraudulently created for the sole purpose of establishing a plausible basis for the payment by the applicant to and on behalf of GEC of an amount of USD 3,5 million.
- 72.3. The GEC invoice was a sham document, fraudulently created for the sole purpose of establishing a plausible basis for the payment by the applicant to and on behalf of GEC of an amount of USD 3,5 million.
- 72.4. GEC had not purchased sweet light crude oil from Shell, and was not a cleared counterparty on the Shell Trading and Supply System.
- 72.5. The Motorship MIT Dominica which was not an oil tanker registered to carry sweet light crude oil, and was not then lying off Hong Kong in readiness to discharge a cargo of sweet light crude oil.
73. The applicant denies that it made any misrepresentations to the first respondent, but does not deny the allegations referred to above. Wilson's response is simply that the applicant "*believed the transaction with GEC to be a genuine, legitimate business opportunity*"; that it "*believed that the facts regarding the business opportunity presented to it by Mr Lancaster were*

genuine", and that, with the benefit of hindsight, the applicant "*indeed became suspicious of the whole transaction*". He states that the applicant "*may possibly have fallen victim to a scam perpetrated by international crime syndicates*".

74. It is therefore effectively common cause that the first respondent, at least, was duped into concluding the payment agreement with the applicant. The entire factual substratum of the payment agreement was a fabrication. The first respondent suggests that the payment agreement was concluded as part of an illegal scheme to accomplish one or another of the transactions forbidden by POCA. No innocent explanation has been suggested, and no other plausible inference is consistent with what the first respondent labels the numerous "*co-ordinated steps*" taken to convince it to conclude the payment agreement.
75. The applicant states that it was not a party to the fraud. It does not know how the situation came about, but it regards itself a victim as well.
76. In the papers, the first respondent examines the content of the JV agreement, a dubious invoice from GEC, and the relationships and interactions between the parties and various other persons involved in the process, and comes to the conclusion that the applicant knew about the falsity of the payment agreement. It says that, *prima facie*, that the applicant and the other persons collaborated in attempting to bring to fruition the illegal scheme embodied in the payment agreement. The applicant has not been able to explain how the situation came about.
77. It is impossible to reach a conclusion on the papers, and it is not necessary to do so at this juncture. For present purposes the first respondent contends that, the payment agreement, having been concluded in furtherance of an illegal scheme or for an illegal purpose, was at common law an illegal contract. The primary result of the illegality of a contract is that it is unenforceable, which is expressed in the rule that *ex turpi causa non oritur*

actio.⁴³ On the first respondent's version, if the applicant was knowingly a party to the illegal agreement, the was never entitled to enforce the agreement.

78. It is common cause that the applicant no longer seeks to enforce the payment agreement, but that it has cancelled the agreement and seeks restitution of the funds paid to the first respondent.
79. One of the further consequences of the *ex turpi causa* rule is that a party who has performed under an illegal contract cannot recover from the other party what he had performed, save possibly by virtue of certain *condictiones*, which were much disputed in the old authorities. This outcome is expressed in instances where turpitude attaches to both parties to the illegal contract by the rule that *in pari delicto potior est conditio defendentis*. This means that a claim for restitution by a party who performed under the illegal contract should typically not succeed against the party who received the performance, the position of the latter being stronger ("*potior*").
80. Although often raised in the same context, the *ex turpi causa* rule and the *par delictum* rule are distinct. The *par delictum* rule may have harsh consequences; for example, the party who received performance is enriched at the expense of the performing party. To prevent this, the *par delictum* rule may in certain circumstances be relaxed by allowing the performing party to recover his performance from the receiving party. Such relaxation depends in each case on the Court's assessment of public policy.⁴⁴
81. Thus, had turpitude attached to both parties in relation to the illegality of the payment agreement, the applicant would in principle have been precluded by the *ex turpi cause* rule from recovering its money from the first respondent, unless a Court could be persuaded that public policy justified the relaxation of the *par delictum* rule.

⁴³ Christie *op cit* at p 454.

⁴⁴ See the discussion in *Jajbhay v Cassim* 1939 AD 537.

82. The first respondent was not aware of the illegality of the payment agreement which, on the face of it, was perfectly regular. Where one party concludes a contract for an illegal purpose but the other knows nothing of that purpose, and is innocent, the innocent party can enforce the contract but the guilty party cannot.⁴⁵ It also follows from the first respondent's ignorance of the illegality of the payment agreement that it was not *in pari delicto* at all.⁴⁶ Accordingly, the *par delictum* rule is not triggered, and the question whether it should be relaxed in favour of the applicant does not arise.
83. The first respondent accordingly argues that, if the applicant was a party to the fraud, it is not entitled to claim the funds paid to the first respondent.

The first respondent's illiquid counterclaim for delictual damages

84. The first respondent contends, lastly, that it has an unliquidated claim for delictual damages against the applicant. This claim is not based on the alleged breach of the payment agreement, but on the discrete ground that the applicant wrongfully obtained the March 2024 order in the *ex parte* application, causing the first respondent to suffer damages because of an interruption to its business operations.
85. The first respondent alleges that the March 2024 order was wrongfully obtained as a result of material factual non-disclosures in the founding affidavit in the *ex parte* application.⁴⁷ Had the court hearing the *ex parte* application known of these facts, it would not have granted the March 2024 order. The first respondent argues that the non-disclosure of the relevant facts, and its consequences, ought properly to be determined by the Court which tries the first respondent's action against the applicant.
86. The first respondent has not quantified this delictual claim. It argues that it must be accepted "*as a matter of common sense*" that such damages, for an

⁴⁵ Christie *Law of Contract in South Africa* (7th Ed) at 454

⁴⁶ *Van Staden v Prinsloo* 1947(4) SA 842 (T) at 846.

⁴⁷ The allegedly undisclosed facts are listed in one of the first respondent's answering affidavits in the *ex parte* application.

entity which conducts the business in which the first respondent engages, will not be insubstantial.

87. In *GAP Merchant Recycling*⁴⁸ the Court considered whether the Badenhorst rule applied to illiquid counterclaims:

“[30] I have thus far been considering the case where the petitioning creditor’s claim is disputed. Although that is one of the matters which arises in the present case, there is also an allegation by the respondent that it has a substantial claim for damages against the applicant. Counsel appear to have assumed that essentially the same test applied, namely that the court would ordinarily dismiss a liquidation application if the respondent company bona fide asserts a counterclaim for damages on reasonable grounds, at least where such counterclaim exceeds the amount of the applicant’s claim. That does not appear to be the legal position.

[31] In Ter Beek v United Resources CC and Another 1997 (3) SA 315 (C) Van Reenen J considered that South Africa should follow the English practice, which he understood to be that the court has a general discretion to refuse a liquidation order where the respondent asserts a genuine and serious counterclaim equal to or exceeding the amount of the applicant’s claim. ...

[32] ..., in Erf 1252 Marine Drive supra Binns-Ward J subjected Ter Beek to trenchant criticism. He pointed out that the English cases did not appear to confer the wide discretion assumed by Van Reenen J. The English cases in effect applied our Badenhorst rule ... by holding that, save in exceptional circumstances, a liquidation application should be refused where the respondent bona fide asserts on reasonable grounds a counterclaim for damages equal to or exceeding the applicant’s claim. Binns-Ward J considered that there was no reason to adopt this approach in South Africa. He concluded that the Badenhorst rule did not apply to an illiquid counterclaim. He held that a respondent is not entitled to have a liquidation application dismissed merely because it bona fide asserts on reasonable grounds a counterclaim for damages exceeding the amount of the applicant’s

⁴⁸

Supra at paras [30]-[32]. Emphasis added.

claim ..."

88. In *GAP Merchant Recycling*,⁴⁹ the Court did not decide the issue, but assumed in favour of the respondent that the application for liquidation should be dismissed if it found on an assessment of all the affidavits that the respondent was *bona fide* asserting on reasonable grounds a counterclaim for damages which exceeded the amount of the applicant's claim. I follow the same approach in the present matter.
89. On consideration, I agree with the submission of counsel for the applicant that the first respondent's reliance on the alleged unliquidated counterclaim is flawed.
90. As indicated, the claim is unquantified, and the alleged damages are unsubstantiated. There is a glaring dearth of evidence in relation thereto on affidavit, even considering the *dictum* in *Hülse-Reutter*⁵⁰ to the effect that the first respondent does not have to prove its defence (or claim, in this instance) in these proceedings. The absence of evidence is demonstrated by the first respondent's statement in its answering affidavit that it would deliver a supplementary affidavit elaborating on this claim "as soon as *the above evidence has come to hand*". The respondent fails to identify the evidence which is to be forthcoming, or to explain why it is not "*to hand*" yet and why no supporting affidavits, deposed to by representatives of the seven parties referred to in its particulars of claim in connection with this claim, were delivered. The promised supplementary affidavit was never delivered.
91. There are other troubling aspects to this claim. The applicant points out that it attempted, with little success, to contact the parties referred to in the particulars of claim as having terminated their relationships with the first respondent. However, in a letter from attorneys representing Prime Circle Finance (Pty) Ltd ("Prime Circle"), one of the parties referred to, it is indicated that Prime Circle terminated its relationship with the first respondent in mid-

⁴⁹ *GAP Merchant Recycling supra* at para [33].

⁵⁰ *Hülse-Reutter supra* at 219F-220B.

March 2024 for reasons which were unrelated to the applicant's conduct in obtaining the March 2024 order. On the contrary, the attorneys for Prime Circle state that *"any damages Finneran complains of was engineered under his own hand"*.

92. It is alleged in the particulars of claim that damages were suffered resulting from lost income from a business relationship between the first respondent and Praxis Corporation CT SA (Pty) Ltd ("Praxis"). The applicant's investigations show that Mr Van Rooyen, the sole director of the first respondent, is also a director of Praxis.
93. The applicant points out, further, that the only assets of the first respondent that were successfully safeguarded in terms of the March 2024 order was approximately R10,000,000.00, made up of crypto-currency and some cash held in the first respondent's bank accounts. This, the applicant submits, shows the untenability of the first respondent's contention that the preservation order resulted in *"massive business and financial damage"*.
94. In the circumstances, and given the skeletal nature of the alleged illiquid counterclaim, I am not satisfied that the first respondent's reliance thereon qualifies as a *bona fide* dispute, on reasonable grounds, of the applicant's claim.

Conclusion on the section 344(f) ground for winding-up

95. In all of the circumstances set out above in relation to the first respondent's liquid contractual claim and the undeniable illegality of the payment agreement, I am of the view that the first respondent has demonstrated that it *bona fide* challenges the applicant's claim on reasonable grounds. The first respondent's allegations were not bald, and it had previously informed the applicant of its intention as regards its contractual claim. The claim has been instituted, and it being pursued. As indicated in the relevant authorities, the first respondent does not have to establish, even on the probabilities, that it will as a matter of fact succeed in its action against the applicant. All it has to

satisfy this Court of is that the grounds which it advances for its disputing the applicant's claim are not unreasonable. It is unnecessary, and undesirable, for this Court to resolve the disputes between the parties in relation to the defences raised by the first respondent that, on the discussion above, meet the *Badenhorst* standard. They are to be determined in the appropriate proceedings.

96. I regard the matter of *Afgri Operations Ltd v Hambs Fleet (Pty) Ltd*,⁵¹ upon which the applicant places reliance, as distinguishable from the present matter on the facts. In *Afgri Operations*, the Supreme Court of Appeal upheld an appeal against the dismissal of an application for a final liquidation order. The appellant had previously obtained a judgment for costs against the respondent. Those costs were subsequently taxed, but the respondent failed to pay them. The appellant then brought an application to wind up the respondent on the basis that the respondent was unable to pay its debts within the meaning of s 345(1)(a), read with s 344(f), of the 1973 Companies Act. The respondent relied on a counterclaim against the appellant to resist the winding-up application.
97. It is clear from *Afgri* that the respondent's case in that matter was bald: "Other than to present a bald denial that it is insolvent, the respondent did not dispute the underlying debt and that it had failed to pay it. In addition, the issues of whether demand had been given by the appellant to the respondent in terms of s 345 of the old Companies Act and the failure of the respondent to satisfy that demand were not in dispute".⁵² In the present matter, the first respondent's case, at least in relation to its contractual counterclaim, cannot be described as bald
98. In addition, the counterclaim in *Afgri* was illiquid, and no version thereof was attached to the answering papers in the liquidation application.⁵³ Although the action had been instituted in March 2009, the respondent never pursued it. It

⁵¹ 2022 (1) SA 91 (SCA).

⁵² *Afgri supra* at para [2].

⁵³ *Afgri supra* at para [3], read with para [13].

may be mentioned, in this respect, that the Supreme Court of Appeal dealt with the appeal during March 2017, eight years after the institution of the claim. In the present matter, the first respondent instituted action in August 2024, four months after the April 2024 order, and is actively pursuing it.

99. There were other discretionary factors that weighed with the Supreme Court of Appeal in *Afgri*, including the fact that the respondent in that case had no longer been trading or conducting business at the time of the application for its winding-up.⁵⁴ In addition, the respondent's considerable delay cast in prosecuting its action doubt on its *bona fides*:

"[18] As mentioned earlier, in this particular case the inertia of the respondent in pursuing its right of action alleged in the counterclaim generates a considerable sense of unease about the genuineness of its contestation. There are other relevant factors too: the illiquidity of the claim, the failure even to attach the summons, the failure to respond to the s 345 demand, the lack of any indication that the respondent may be solvent and the fact that the respondent does not appear to be trading. It has therefore failed to discharge the onus of demonstrating that its indebtedness to the appellant has indeed been disputed on bona fide and reasonable grounds."

100. These factors are not present in the application before this Court. The first respondent is trading, and it does not appear from the papers that other creditors, apart from the applicant, stand to benefit from the first respondent's liquidation.

101. I am of course mindful of the fact that the discretion to refuse a liquidation application where an unpaid creditor applies therefor is a narrow one. As stated in *Afgri*:⁵⁵

"[7] The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order is not, in

⁵⁴ *Afgri supra* at para [4].

⁵⁵ *Supra* at para [7], read with paras [12]-[13].

itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not

...

[12] ..., generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt. ... The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and then in special or unusual circumstances only.

*[13] As mentioned above, mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. Moreover, as set out above, the discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one.... the onus is not discharged by the respondent merely by claiming the existence of a counterclaim. 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."*

102. For the reasons set out above, as well as the troubling circumstances in which the applicant's claim arose, I am nevertheless not inclined to exercise my discretion in favour of granting a provisional liquidation order.

The just and equitable ground for winding-up: section 344(h) of the 1973 Companies Act

103. In terms of s 344(h) of the 1973 Companies Act a company may be wound up by the Court if it appears to the Court that it is just and equitable that it should be wound up.

104. A finding that a company should be wound up on the grounds that it is just and equitable to do so, *"does not postulate facts but a broad conclusion of law, justice and equity, as a ground for winding-up. The reaching of the conclusion by the court that winding-up would be just and equitable involves the exercise , not of a discretion, but of a judgment on the facts found by the Court to be relevant. Once, however, such conclusion is reached, the making of the order for the winding-up does involve the exercise of a discretion"*.⁵⁶
105. The applicant's reliance on section 344(h) is, however, intrinsically linked to the claim advanced for the purposes of this application, and the circumstances in which it arose. As such, the first respondent's dispute regarding the claim forms the basis for its opposition to winding up under section 344(h). Given the conclusion to which I have come in relation to the first respondent's defences to the applicant's claim, it is not necessary to consider the winding-up of the first respondent on the section 344(h) ground.

THE APPLICATION FOR THE SUSPENSION OF THE ATTACHMENT OF THE FIRST RESPONDENT'S CLAIM AGAINST THE APPLICANT

106. These proceedings have an additional, somewhat unusual, feature.
107. As indicated, the applicant asserts *locus standi* in its liquidation application upon the basis of a judgment debt (arising from the April 2024 order) due to it by the first respondent in an amount of R3 791 110,84. The first respondent resists the winding-up application on the various bases discussed earlier in this judgment, amongst others that it that it has a claim for liquidated contractual damages against the applicant in the amount of at least R4 956 332,79, which (so the first respondent's contends) by set-off extinguished the judgment debt.
108. The determination of the first respondent alleged liability for the balance of the

⁵⁶ *Grenco Projects and Construction CC v Hermanus Esplanade Dev Co (Pty) Ltd* [2024] 3 All SA 504 (WCC) at para [10], with reference to *Apco Africa (Pty) Ltd and another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA) at para [16].

money paid to it by the applicant, sought in Part B of its notice of motion in the *ex parte* application, was postponed for hearing to a later date.

109. The first respondent instituted its claim against the applicant on 12 August 2024. The applicant had previously, on 26 June 2024, obtained a warrant of execution against the first respondent pursuant to the judgment debt of R3 791 110,84. On 29 August 2024, in terms of the warrant, the applicant attached the first respondent's right, title and interest in and to its action against the applicant.
110. The first respondent feared that this attachment was calculated to sustain a submission that its claim for liquidated contractual damages no longer existed in its hands, and therefore could not operate as a basis for the set-off alleged in opposition in the winding-up application.⁵⁷ The first respondent therefore sought, as a matter of urgency (to be heard together with the liquidation application), the suspension of the attachment, pending the hearing of Part B of the applicant's *ex parte* application.
111. Uniform Rule 45A provides that this Court may suspend the execution of any order granted by it for such period as it may deem fit. The Court also has the inherent discretion to suspend the execution of any order granted by it, where real and substantial justice requires a stay.⁵⁸
112. As it happened, the applicant did not in its replying affidavit or in argument rely on the proposition that the first respondent's claim for liquidated contractual damages against the applicant no longer exists in the first respondent's hands. The applicant's counsel has assured the Court and the first respondent that this proposition would not be relied upon in the action instituted by the first respondent.

⁵⁷ See *Brunner v Gorfil Brothers Investments (Pty) Ltd and others* 1999 (3) SA 389 (SCA) at 417G-H, where the Supreme Court of Appeal found that (depending on the particular circumstances of the matter) a defendant who used a statutory procedure, namely the attachment and sale on the open market of a claim, to bring to an end an action against him which he regarded as vexatious, did not have an objectionable or improper intention.

⁵⁸ See the discussion in Herbstein & Van Winsen's *Civil Practice of the High Courts of South Africa* (5ed) Vol. 2 at 1087ff.

113. I agree with the applicant that the suspension application has no merit.
114. First, there is no urgency to the matter. The debt in terms of which the warrant of execution was issued, emanates from the order granted by agreement on 9 April 2024, almost six months before this application was launched in September 2024. The first respondent had knowledge of the facts underlying its counterclaim by 9 April 2024.
115. The applicant obtained a warrant of execution on 26 June 2024. The first respondent did nothing to have it stayed or set aside, even when the Sheriff made various attachments of *inter alia* the first respondent's bank accounts and office equipment⁵⁹ during early July 2024. On 29 August 2024, and in terms of the warrant, the applicant attached the first respondent's right, title and interest in its action against the applicant. The suspension application was only launched on 23 September 2024.
116. In these circumstances, the first respondent has failed to make out a case for urgency. Even if there were urgency, it would have been self-created.
117. Second, no case is made out for interim relief. I deal with this briefly.
118. As to a *prima facie* (or clear) right, the first respondent does not seek the setting aside of the order by agreement granted on 9 April 2024. The warrant of execution was issued for purposes of giving effect to that order, and the first respondent does not rely on any irregularity in the process of obtaining the warrant of execution. The attachment, moreover, does not affect its *locus standi* in the pending litigation between the parties.⁶⁰ No *prima facie* right has therefore been shown.
119. There is no irreparable harm to the first respondent. Whether or not set-off is

⁵⁹ The first respondent furnished security under Rule 45(5) to prevent the removal of the equipment from its offices.

⁶⁰ See the discussion in *Mackenzie v HCI (1987) Pension* [1997] 3 All SA 497 (W).

applied, the first respondent still needs to pursue its pending action to prove its claim against the applicant. If the first respondent is successful with the action, it will suffer no harm if set-off has not been applied. In the meantime, if the first respondent wishes to avoid execution steps resulting from the April 2024 order agreed to by it, *"it should simply comply with the court order"*.⁶¹

120. The balance of convenience lies with the applicant. Whilst the first respondent will suffer no harm, the applicant will be prevented from giving effect to an order obtained by agreement.
121. Finally, the pending action is the first respondent's obvious remedy.
122. Given these circumstances, I exercised my discretion against granting the interim relief sought.

COSTS

123. There was no reason why costs should not follow the event. Counsel for both parties submitted that counsel's fees should be taxed on Scale C.
124. In the exercise of my discretion on the available facts as a whole, and particularly with regard to the complexity of the matters (which were interlinked), I regarded an award of counsel's fees on Scale C as warranted in each case, without differentiating between senior and junior counsel.⁶²

ORDERS

125. In the circumstances, I delivered the orders referred to at the outset of these reasons.

⁶¹ *Exclusive Access Trading 73 (Pty) Ltd v Bouwer* 2011 JDR 0318 (ECG) at p 5.
⁶² See Uniform Rule 67A(3).

P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the applicant:

Mr R. van Rooyen SC (with him Mr M. van Staden), instructed by Mostert & Bosman Attorneys

For the first respondent:

Mr R. Goodman SC (with him Mr T. Tyler), instructed by Lamprecht Attorneys