IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO.: 4880/2024

In the matter between:

PREMIER FMCG (PTY) LTD Applicant

and

ZITIXO TRADING (PTY) LTD

(Registration number: K 20 2015043655/07a

For its liquidation) Respondent

JUDGEMENT

NOBATANA AJ:

[1] The applicant is a private company which specializes in fast moving consumer goods, wholesaler and merchandising in the Republic, the example given by the applicant of fast-moving consumer goods are packaged foods, beverages, toiletries, candles cosmetic's, over the counter drugs and other consumables. It was originally a milling and bakery business.

[2] The applicant employs over 7000 employees, it operates 14 bakeries, 7 wheat mills and 3 maize mills and various manufacturing plants. One of such employees of

the applicant who is among the two that are at the centre of this application is Charl de Lange *"De Lange"* and the other is Enrico Windwaai *"Windwaai""*

[3] De Lange was appointed as the applicant's sales manager on the 27th of June 2016, he was reporting to the depot manager at the applicant's depot in Gqeberha, his annual salary was R380, 000, 00, which increased annually at 6%. He was promoted, and as a consequence of his promotion his salary increased to R 650, 000,00, also increasing annually at 6%. On the 2nd of August 2022 he was appointed as depot manager at the Gqeberha depot and his salary increased to R800 000, 00 which also increased annually at 6%. He resigned from the applicant in November 2024, after being confronted with allegations of fraud by the applicant, which allegations lie at the heart of the present proceedings, and are dealt with more fully below.

[4] Windwaai was first employed by the applicant as a production superintendent on the 1st of January 2022, he was promoted to depot manager at the applicant's depot in Gqeberha. He was further promoted to Bakery Manager at the applicant's bakery, Aeroton (Near Alberton Gauteng). He held that position until he resigned from the employment of the applicant in November 2024, also pursuant with being confronted with fraud, in the manner as set out below. De Lange replaced Windwaai as production superintendent at the applicant's Gqeberha depot after his promotion to the position in Gauteng.

[5] Windwaai's duties also included approving and submitting invoices for payment, whilst he was still in Gqeberha. The applicant alleges that Windwaai was part of a scheme, in terms of which excessive and undue amounts were paid to the respondent, substantial amounts according to the applicant ended up in his personal banking accounts and were also paid to accounts operated by his spouse. This happened when Windwaai was employed by the applicant in Gqeberha, and he continued to receive these amounts even when he was transferred to Gauteng, as aforesaid. The amounts paid to De Lange and Windwaai originated from the sole director of the respondent, who is Shane Keys "*Keys"* according to the applicant.

[6] The applicant makes similar allegations in respect of De Lange. The applicant further states that it launched an urgent sequestration applications against the estates of Windwaai and De Lange, provisional orders were granted on the 26th of

November 2024. The applicant further alleges that, pursuant to both sequestration orders being granted, it interviewed Windwaai and De Lange, who both confessed to being part of a scheme in terms of which they allocated large quantities of sub-contract work to the respondent, in return for monthly kickbacks (corrupt payments). The applicant states that Windwaai in particular, provided detailed information regarding the *modus operandi* of the scheme resulting in the corrupt payments.

[7] As pointed out above, the respondent only has one director, Keys. During November 2019, the respondent ,was registered on the applicant's financial system as a supplier. According to the applicant, its suppliers can only be paid for services rendered, if they are registered as such. A supplier when applying for the said registration must complete a creditor vetting form.

[8] The services that the respondent was to provide was to provide painting and signage for the applicant's enterprise development program "*the program*". The program was aimed for assisting schools and general trading stores operated by previously disadvantaged individuals and communities. The applicant involved general trading stores and/or pre-schools for painting work to be undertaken and signage to be installed at the stores and pre-schools. The applicant covers the direct costs on behalf of the store owners and preschools up to a certain value. The program was initially focused in Gqeberha, but was later expanded to Queenstown and East London

[9] A supplier agreement was concluded between the applicant represented by De Lange and the respondent represented by Keys. The applicant further alleges that the respondent managed by Keys, was directly involved in the fraud perpetrated by De Lange and Windwaai, as stated above. The applicant is of the view that the respondents,affairs in this regard must be investigated by a liquidator. The applicant further alleges that in September 2024, Mark Niemaan-Liversage, who is the group risk and procurement manager of the applicant based in Midrand, Gauteng, and a deponent to the founding affidavit "*the deponent"*, was approached by Danny Simpson "*Simpson",* who is applicant's bakery managing executive raising concerns regarding suppliers that had grown substantially over time and to whom large payments were made.

[10] The respondent was indicated as one of such suppliers. Simpson obtained some of the respondent's invoices from the applicant's finance department, which he shared with the deponent. These invoices reflected large payments to the respondent. On the 1st of October the deponent was requested by Simpson to undertake a further investigation, the deponent requested further information relating to the respondent on the same day.

[11] The information that was provided to the deponent included a selection of emails collected from Windwaai's email mailbox, which is administered by the applicant, and invoices relating to the respondent. When the deponent realized that the information received was incomplete, he requested access to Windwaai's and De Lange's emails from the applicant's information technology department "*IT department"*. The IT department has access to Windwaai's and De Lange's email addresses. The deponent also received all emails to and from Windwaai's email address. In terms of the applicant's IT policy the applicant may access and view all emails sent and received by its employees from the applicant's email account.

[12] The deponent further states that the process of the investigation took a while, as the investigation was conducted by the deponent in addition to his normal functions, which he performed as an employee of the applicant. The deponent analyzed the emails over the period from 21 October to 12th November 2024. He discovered various bank statements, which De Lange previously emailed to himself from his personal email address, these bank statements showed that De Lange received various payments into a Nedbank account held in his name, amounting to R190 620.00. The deponent searched in De Lange's communication with Keys as he had identified that the payments were originating from him. He noticed that on the 20th of July 2020, Keys sent a signed letter on the respondent's letterhead to De Lange's personal email address , in this letter the respondent purported to confirm that De Lange was an associate of the respondent and was earning a monthly salary of R37 000.00. This email was forwarded by De Lange to his work email address on the 21st of July. In addition to the above, the deponent found an unsigned letter on the respondent's letterhead which De Lange had sent from his personal email address to his work email address dated 7th August 2023, and this letter indicated that, De Lange was an employee of the respondent, it also confirmed that the unemployment insurance fund deductions reflected on De Lange's respondent's

payslips were correct. None of these payments nor the reasons thereof were ever disclosed to the applicant by De Lange. They only came to applicant's attention as a result of the investigations conducted by the deponent in the manner as aforesaid.

[13] According to the deponent, the applicant considers these payments to be '*gratification'* as defined in section 3 of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004 "*PRECCA"*, and that it intends to lay criminal charges against De Lange and the respondent, in addition, De Lange did not disclose any private interest he might have had in relation to the contract entered into between the applicant and the respondent, as he was required to do so in terms of the applicant's policy. The deponent further states that even if De Lange requested such a permission, it would have been refused, as it amounted to a conflict of interest between De Lange as an employee of the applicant and the respondent, who is a service provider to the applicant.

[14] The deponent requested further a invoice and payment history relating to the respondent from the applicant's finance department. The deponent received reconciliations over the period from 23 October to 6th November 2024. The history reflects that between December 2019 and August 2024 the applicant processed and made payments to the respondent amounting to R12 915 123.00. The investigation further revealed that there was a discrepancy between the work undertaken in respect of the program that had been recorded for BBBEE purposes, and the total amount paid to the respondent in respect of its invoices. The deponent thereafter undertook an invoice analysis, and discovered that not all the invoices rendered by the respondent for work allegedly done by it were supported by data captured at the applicant's Gqeberha depot for BBBEE purposes, as is usually the case. He concluded the analysis on the 6th of November 2024.

[15] The deponent further states that from the initial invoice analysis for the value of the work that was invoiced by the respondent to the applicant, for which the applicant had paid for, there was no proof of work that was submitted, at the applicant's Gqeberha depot. The value of the work that was invoiced was R2 708 000.00. It appeared that the respondent charged the applicant for work not done, or overcharged the applicant to facilitate payment of the kickbacks to De Lange and Windwaai. This, according to the deponent, explains the significant

increase in the annual payment made to the respondent from 2019 to 2024. As a result of these discrepancies, the applicant requested forensic auditors to investigate the suspected fraud. As part of their investigations the forensic auditors interviewed De Lange and Windwaai and with their consent scrutinized their bank accounts with respect of the period between January 2019 and November 2024. The deponent states at the time of him deposing to this affidavit the Nedbank statements of Windwaai were still outstanding.

[16] The investigation into available statements revealed that fraud was committed against the applicant through the respondent in the amount of R3 295 860.00. This amount is expected to increase to approximately R4 000 000.00 once all the bank statements have all been scrutinized. An invoice reconciliation completed by the applicant's finance department also reflects that most of these invoices submitted by the respondent over the period from 2019 to the date of the deposition of the founding affidavit were approved by either De Lange or Windwaai. De Lange as Gqeberha depot manager signed most invoices between July 2022 to August 2024, before July 2022, invoices were approved by Windwaai.

[17] The deponent further conducted investigations on Windwaai's accounts and he discovered an email dated 15th April 2020, which Windwaai sent to himself, from the email address of his wife. The email contained a bank statement in respect of a bank account of Windwaai. The bank statement revealed statements to Windwaai, which were made between the 7th of February 2020 to 23 March 2020, amounting to R44 800.00, all with the reference "*Shane*", which is the first name of Keys. On the 15th of April, there was an email on respondent's letterhead, which confirmed similarly that Windwaai was an associate of the respondent and was earning an amount of R20 000.00. He also discovered an email which contained a bank statement of Windwaai's wife, in which she received an amount of R32 000.00 with the reference "*Zitixo Trading*" (the respondent). The deponent drew an inference that the said an amount of R32 000.00 were kickbacks paid by the respondent through Keys *via* Windwaai's wife's bank account. From this information the deponent also concluded that Windwaai was also receiving payments from Keys every month from 2019 to the date of the deposition of the founding affidavit, as was with the case of De Lange.

[18] According to the applicant, this too amounts to '*gratification'* as defined in section 3 of PRECCA, as the payments were made to Windwaai by a registered supplier of the applicant. The applicant intends to lay criminal charges against Windwaai and the respondent.

[19] As was the case with De Lange, Windwaai did not disclose the relationship between himself and the respondent, who was the supplier of the applicant, and even if he had disclosed such an interest, the applicant would not have approved of such a relationship as it amounted to a conflict of interest between Windwaai as an employee of the applicant and the respondent who was a service provider to the applicant.

[20] The deponent further states that at the date of the deposition of the founding affidavit, he did not have the full amounts paid by the respondent to Windwaai's account, as they were paid in Windwaai's Nedbank account, as the applicant at the date of the deposition of the founding affidavit had not have access to Windwaai's Nedbank account , and even if it had the details of the banking transactions in Windwaai's Nedbank account, such details had not yet been analyzed.

[21] The applicant further reiterates that both Windwaai and De Lange admitted their involvement in the fraudulent scheme involving the respondent and keys during the investigations referred to above, and further that after the estates of Windwaai and De Lange's were provisionally sequestrated they both resigned as employees of the applicant on the 29th of November 2024 with immediate effect.

[22] The applicant further states that payments to the respondent *per annum* from the commencement of the contract until 2024, which was the first 10 months of the contract, increased from R44 000.00 to R3 913 998.00. This increase, according to the applicant, was in order to enable the respondent to earn sufficient income to afford the unlawful kickbacks to De Lange and Windwaai, with whom it had a corrupt relationship.

[23] The applicant contends that the respondent must be wound-up by a court in terms of section 344(h) of the 1973 Act also in terms of section 81 of the 2008 Act. The applicant contends that,it is an innocent victim of fraud perpetrated by the respondent over a long period of time. The fraud was committed whilst the respondent knew that it prejudiced the applicant. The secretive manner in which the

fraud was perpetrated indicated that the respondent understood that its conduct was unlawful and criminal.

[24] The applicant contends that the manner in which Keys used the respondent to overcharge the applicant to facilitate the payment of kickbacks to De Lange and Windwaai constitutes a contravention of the common law and a statutory prohibition contained in section 22(1) of the Companies Act 2008, (Act No. 71 of 2008), that a company must not carry on its business to defraud any person or for any fraudulent purpose as the respondent is a vehicle to perpetrate fraud, it would be just and equitable to liquidate it so that a liquidator could investigate the fraud and recover from Keys and any other person who benefited from the fraud the fruits of their unlawful gains.

[25] The applicant intends to request the respondent's liquidators to convene a commission of enquiry into the trade dealings and affairs of the respondent in terms of section 417 of the Companies Act 1973 to enable the liquidators to recover monies paid to Keys and others, which the respondent would not be able to pay but for the fraud on the applicant. The applicant accordingly submits that it is just and equitable for the respondent to be wound-up in terms of both the 1973 and as well as the 2008 Companies Act. The applicant further contends that in addition to the just and equitable ground, it would also be appropriate to liquidate the respondent as it was unable to pay its debts owed to the applicant. The respondent is indebted to the applicant for an amount of R12 915 123.00 alternatively, R3 295 860.00, excluding interest and costs. The debt is immediately due and payable.

[26] The respondent owns no immovable property and during the interview with Windwaai on the 27th of November 2024, Windwaai indicated that Keys only owns a bakkie, he could not indicate that the respondent owned any fixed property. The applicant further challenged the respondent to disclose the balance sheet of its unencumbered assets, should it oppose this application.

[27] The respondent has opposed this application, in its answering affidavit it states that it notes that the applicant seeks its winding-up on the basis of 334(f) of the 1973 Act, in that the applicant alleges that it is not able to pay a debt that it allegedly owes the applicant, alternatively, on the basis of section of 344(h) of the 1973 Act, and/or section 81 (i)(c)(ii) of the 2008 Act in that it is just and equitable

that the respondent be liquidated. The respondent contends that before the applicant can pursue and seek its winding-up in terms of section 344(f) of the 1974 Act, it should first demonstrate that there is an existent debt that is owed by the respondent, in support of the alternative ground, the applicant must set out grounds upon which the court will be satisfied that it is just and equitable for the court to grant relief sought by the applicant.

[28] Regarding the primary ground on which the applicant relies on, the respondent states that the applicant, has set out an extensive account of its internal investigation in respect of its former employees De Lange and Windwaai, and according to the applicant, the manager of its investigation confirmed that the two had committed acts of fraud against the applicant, and that both De Lange and Windwaai confessed as being part of the scheme. The respondent states that the applicant has failed to annex a copy of the said confessions by Windwaai and De Lange or any confirmatory affidavits, and accordingly the allegations by the applicant in this regard are unsubstantiated and bald.

[29] The respondent further disputes the authenticity of the two letters emanating from it confirming that Windwaai and De Lange were its associates and were receiving payments from it. The respondent further states that the applicant does not state in its founding affidavit that the respondent has ever been advised of the fraudulent conduct, secondly that it has never been approached by any law enforcement agency regarding the allegation of fraud, thirdly that no demand has been made by the applicant to the respondent for the payment of the money that is the basis of the debt allegedly owed by the respondent to the applicant , which forms the basis of the relief sought by the applicant in this application. Fourthly, the existence of fraud is a mere suspicion.

[30] The respondent further contends that it is not open to the applicant to seek the present order that it is now seeking, especially in view of the fact that the applicant, on its own version, is still investigating the fraud. The respondent accordingly concludes that the applicant has failed to meet the requirements stipulated in both section 344(h) of the 1973 Act read with section 81(1)(c)(i) of the 2008 Act. The allegations made in support of this basis are speculative, as they are

based on an untested allegation of fraud that the respondent was never informed of and are made without any demand made to the respondent in respect thereof.

[31] The respondent further contends that the applicant alleges that the respondent is unable to pay its debt, whereas it has not demanded payment to the respondent. The respondent accordingly contends that opposes this application on the following grounds:

(1) That the application is premature as no demand has been made, and/or that no evidence exist that the respondent committed the fraud

(2) That the attorneys of record for the applicant have not filed any power of attorney confirming its authority to act on behalf of the applicant. The applicant simply relies on the bald allegation made in the deponent's affidavit that he is authorized to conduct the matter on behalf of the applicant. The respondent states that it was not in the position to file a notice in terms of Rule 7(1) as it did not have funds to instruct its attorneys to do so, and at the time when it could do so, the 10 day period prescribed in terms of the rule had lapsed and asks for condonation in this regard as it had provided good cause for the delay

(3) The deponent to the founding affidavit has failed to file any confirmatory affidavit confirming that this application had been authorized by the applicant

(4) The respondent further states that it opposes this application on the above mentioned grounds, and accordingly does not propose to deal with the allegations made by the applicant against De Lange and Windwaai , which it does not have knowledge of. The respondent accordingly does not admit or deny the allegations, secondly the applicant has not informed the respondent of the allegations of fraud against it, therefore it is not in a position to deal with these allegations accordingly does not admit the said allegations.

[32] In relation to costs, the respondent contends that the respondent is not entitled to costs, including costs of two counsel for the reasons that it has not explained to the court the reason why it is seeking such a court order. This application is a straightforward application that does not involve intricate principles of

law or complicated facts warranting the engagement of two counsel. The respondent accordingly asks the court to dismiss this application on a punitive scale of attorney and client.

[33] In reply, the applicant states that in motion proceedings a respondent must engage with factual allegations that fall within its personal knowledge, failure to do so will ordinarily result in the applicant's factual evidence being admitted as uncontested.

[34] The respondent states that the applicant has not disputed that it paid kickbacks to De Lange and Windwaai, instead of dealing with the allegations, the respondent only stated that the source of the bank statements reflecting the fraudulent payments has not been verified, this is not an answer to the allegation according to the applicant. The applicant further contends that the founding affidavit clearly explains that the respondent is indebted to the applicant for an amount not exceeding R12 900 000.00 or at least R3 200 000.00. The respondent does not dispute receiving R12 900 000.00 from the applicant and does not deny that it did have a corrupt relationship with De Lange and Windwaai. In addition the founding affidavit made it clear that it would be just and equitable to liquidate the respondent as it is used as a vehicle through which fraud was committed.

[35] The applicant further states that the respondent in its answering affidavit has not denied making payments to Windwaai. The applicant in this regard further annexed the affidavit of Windwaai where he admits payment from Keys and/or the respondent. Similarly, the respondent denies the source of the two letters which confirm that Windwaai and De Lange are associates of the respondent entitled to be paid certain sums of money.

[36] It is clear on the letters themselves that the origin of the letters are from the email address of Keys, who is the sole director of the respondent, as the email address from which the letters came from is *s[...]*. This is not denied by the respondent, and Keys does not deny that it is his signature which appears on the letters.

[37] The applicant further states that a full investigation on the role of the respondent will be revealed in the criminal proceedings that will ensue. The applicant denies that a demand for payment is a prerequisite for a liquidation application. The

applicant further reiterates that it will demand a commission of enquiry to be instituted by a liquidator in terms of section 417 f the Companies Act after the order in this application is granted. The applicant further states that the respondent was invited to file a balance sheet reflecting its assets and liability, it has failed and/or ignored the challenge. The applicant further states that the deponent of an affidavit in a liquidation application is in the position of a witness and does not need any authority to depose to the affidavit, this is a trite legal principle. The applicant in any event, annexed an authority to institute the legal proceedings in the form of a resolution of the company, which authorizes and rectifies all steps that have been taken in these proceedings, to the extent that this is necessary.

[38] The applicant states that the bare denial of the allegations concerning De Lange and Windwaai is inadequate. It notes that the respondent has failed or made no attempts to expressly deny its involvement in the fraud. The applicant further states that although there are further investigations that are being conducted in relation to the fraud, the founding affidavit has provided a detailed exposition of the fraud already uncovered. There is accordingly no basis that what is contained in the affidavit is a suspicion. A proper perusal of the affidavit makes it plain to see that the involvement of the respondent in the fraud is beyond any doubt. The response of the respondent when confronted with the express allegation concerning its role in the fraud is unconvincing and suggests that it is unable to deal with the allegation of fraud on a factual level.

[39] In respect to the issue of costs, the applicant is of the view that the discretion to award an appropriate cost order lies with the court and at the hearing of the application, it will deal with the appropriate scale of costs to be awarded.

[40] During argument Mr. Voster SC, on behalf of the applicant stated that the applicant and the respondent had a contractual relationship, which commenced in November 2019 and terminated late 2024, when the applicant discovered that the respondent was in a corrupt relationship with 2 of its employees, and had defrauded it. The respondent received undue payments to facilitate payment of kickbacks to applicant’s employees De Lange and Windwaai. The amounts paid by the applicant to the respondent for services rendered had increased dramatically in the first 10 months of the contract from the initial amount of R44 000.00 to R3 913 998.00. The

volume of orders placed with the respondent also increased, this increase according to the applicant was aimed in order for the respondent to earn sufficient income to pay unlawful kickbacks to Windwaai and De Lange.

[41] Windwaai and De Lange have admitted their involvement in the fraudulent scheme involving the respondent and its sole director Keys. After the provisional sequestration of their estates, Windwaai and De Lange resigned from their employment with the applicant on the 24th of November 2024 with immediate effect. The present application is for the winding-up of the respondent in terms of 334(f) of the 1973 Companies Act, 61 of 1973 on the basis that the respondent is unable to pay the debts owed to the applicant *alternatively,* in terms of section 334(h) of the 1973 Act, on the basis that it is just and equitable that the respondent should be wound-up.

[42] In view of the fact that the termination of the contractual relationship had its origins in bribery and fraud, the applicant was entitled to void the agreement and claim repayment of the amounts paid to the respondent in terms of the agreement. In addition, the applicant is entitled to claim repayment of the amounts paid to the respondent without the respondent performing any work to justify the payment. In the light of the fact that the respondent (i) the respondent owns no assets; and (ii) an investigation into its commercial affairs is justified to determine the full extent of the benefits it derived from the fraud; an order for its liquidation is justified. The test which the applicant must satisfy to be entitled to a provisional winding-up order was set out in **Kalil v Decotex (Pty) Ltd and Another**[1]

> "*Where on the affidavits there is a prima facie case (i.e. a balance of probabilities) in favour of the applicant, them, in my view, a provisional order of winding up should normally be granted and, save exceptional circumstances, the Court should not accede to an application by the respondent that the matter be referred to the hearing of viva voce evidence"*

[43] This test was reformulated by the Supreme Court of Appeal in **Afgri Operations Ltd v Hambs Fleet (Pty) Ltd**[2]**.** In order to resist the application, the respondent in terms of the principles set out in **Kalil** was stated as follows:

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[1] (158/87) [1987] ZASCA 156; [1988] 2 All SA 159 (A) (3 December 1987).
[2] (542/16) [2017] ZASCA 24; 2022 (1) SA 91 (SCA) (24 March 2017).

"*Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse a winding up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds."*

[44] In **Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd[3],** the Supreme Court of Appeal held that the enquiry into whether the indebtedness was disputed on *bona fide* and reasonable grounds required scrutiny of the respondent's case:

"[33] The next question is whether the appellant had made out a case for the liquidation of the respondent. It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds. The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt.

[34] Where, however, the respondent's indebtedness gas prima facie been established, the onus is on it to show that this indebtedness is indeed disputed in bona fide and reasonable grounds, In addition to its statutory discretion, the court has an inherent jurisdiction to prevent abuse of its process and, therefore, even where a good ground for winding-up is established, the court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the bona fide bringing of the company's liquidation for its own sake

[37] The question which arises is whether the respondent has established that it has reasonable grounds for disputing the existence of the appellant's claims. This calls for scrutiny of the allegations forming the basis of the respondent's defenses."

[45] In essence a respondent in a liquidation application must dispute a debt on a *bona fide* basis that the respondent subjectively believes to be true. The court must then determine objectively whether the respondent's subjective belief is reasonable.

[46] In response to the respondent's challenge on the authority of the deponent to depose to the founding affidavit, the applicant submitted that, the challenge of authority of the applicant in an affidavit in the manner that it is done by the respondent is inappropriate in that it is trite that a deponent to affidavit is in a position of a witness, and his authority to represent a litigating party is irrelevant, in this

[3] (326/2021) [2022] ZASCA 143 (24 October 2022).

regard the applicant referred the court to the decision in *Ganes v Telecon Namibia Limited*[4]

> *"In my view, it is irrelevant whether Hanke has been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the parties concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent "*

The applicant accordingly submitted that there was no merit to the objection.

[47] In response to the second objection, by the respondent, that the investigations of the applicant in relation to the allegation of fraud are incomplete the applicant referred the court to the decision in *VBS Mutual Bank (in liquidation) v Mudzonga*[5]*,* and submitted that although decision was a sequestration application, the principle that can be extracted from the decision in relation incompleteness of the investigation is applicable to a liquidation application in that decision it was held in relation to the incompleteness of an investigation:

> "*In Irvin and Johnson (Pty) Ltd v Basson…the investigation was not yet complete, and Basson had admitted misappropriation in the amount of R16 000….The court held that as the investigation had established liability over R100, the applicant had established that it had the locus standi. The court stated as follows:*
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> *'for the present purposes, it is of no consequence, in my view, that the full extent of the respondent's liability may eventually prove to be in excess of the amount of R103 925, 49. The evidence as it stands, if accepted, established a liability of not less that the amount to which I have referred. Then there is also evidence that the respondent confessed or admitted to having misappropriated a fixed sum of R16 000. On that basis, and without expressing any views as to the conclusion to which a court might come when all the affidavits are eventually considered. I am satisfied that, for the present purposes the applicant has established that it has locus standi"*

[48] It was further submitted on behalf of the applicant that in investigation as it currently stands it was established that the applicant has been defrauded by the respondent for the amount of at least R3. 295. 860, 00, which has not been disputed by the respondent, the total amount paid by the applicant to the respondent arising from the contract was R12 915 123,00.

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[4] 2004(3) SA 615 (SCA) at 624 [19].
[5] (25057/208) [2019] ZAGP JHC 273 (23 August 2019) at [46] and [47].

[49] It was further submitted that it is trite that an agreement established as a result of bribery, is voidable at the instance of the innocent party[6] and accordingly in view of the fact that the supplier contract between the applicant and the respondent to was intended to defraud the applicant who was an innocent party, it was open to the applicant to have the agreement set aside as void, and that the applicant has elected to void the agreement, and the applicant is accordingly entitled to restitution, and in this regard be refunded by the applicant the entire amount of R12 915 123, 00 which was paid by the applicant to the respondent in respect of a void contract, the respondent was accordingly liable to the applicant for the entire amount of R12 915 123,00, and accordingly also on this ground the applicant has the requisite *locus standi* to institute the present action against the respondent and to seek the relief that it seeks in these proceedings.

[50] Finally the applicant submits that the respondent owns no immovable property, and that this allegation has not been disputed on the papers, the respondent has failed to file its balance sheet despite being challenged to do so by the applicant in its founding affidavit, the applicant accordingly contends that it is entitled to the order in terms of section 334(f) of the 1973 Act, winding up the respondent. The applicant in this regard referred to the decision in **Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others**[7] in which it was held that:

> "*Section 344(h) of the 1973 Act provides that a company may be wound up by the court when it is 'just and equitable' to do so. A winding up on this basis 'postulated not facts but only a broad conclusion of the law, justice and equity, as a ground for winding-up'….There is no fixed category of circumstance which may provide a basis for winding-up on the just and equitable ground…*
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> *…some of the categories that have been identified are the disappearance of a company's substratum; illegality of the objects of the company* ***and fraud in relation to it****….* ***No doubt these categories remain under the new Act and may be extended****"*

[51] It was submitted on behalf of the applicant that the applicant was used as a vehicle through which fraud was committed. It is therefore just and equitable that it be wound up so that a liquidator can investigate its affairs. Such an investigation will

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[6] See Extel Industrial Ltd and another v Crown Mills (Pty) Ltd 1999 (2) SA 719 (A), and also North West Provincial Government v Tswaing Consulting CC 2007 (4) SA 452 (SCA) at 460B-D.

[7] 2014 (5) SA 1 (SCA).

enable the liquidator to set aside impeachable transactions and to at least attempt to undo the harm caused by the fraudulent scheme.

[52] In relation to the approach adopted by the respondent in its affidavit in opposition to this application, it was submitted on behalf of the applicant that, in motion proceedings the affidavit take the place of both the pleadings and the supported facts, the answering affidavit of the respondent avoided dealing with almost all the relevant factual allegations.

[53] The applicant referred the court the following dicta of the Supreme Court of Appeal dealing with the interpretation of affidavits in an opposed application where there are disputes of fact;

> "*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.*
>
> *A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles and answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."*

[54] The founding affidavit according to the applicant makes allegations of fraud against the respondent. The deponent to the answering affidavit, is the respondent's sole director, he ought to have knowledge of the allegations against the respondent.

He decided not to deal with the allegations. The applicant lists the serious allegations that were made against the respondent and the response that was given by the respondent to those allegations, which are *inter alia* as follows:

1. Kickbacks paid by the respondent through its sole director, Keys, to De Lange and Windwaai. The response of the respondent to this allegation is that it merely disputes the source of the bank statement reflecting the payment, as not being verified. The fact of the payment of the kickbacks is not disputed
2. The second serious allegation is that an investigation reveals that the applicant was overcharged by the respondent to facilitate the payment of kickbacks, which is the *modus operandi* of the fraud amounting to R3 295 860.00. The respondent does not deny the fraud, it merely states that it was not advised about the alleged fraudulent conduct, or was not questioned by the applicant or any law enforcement agency, no demand has been made. The existence of the fraud is a suspicion, and the fraud is still being investigated.
3. The third serious allegation according to the applicant is that the respondent is unable to pay the debt owed to the applicant, the respondent's response to this allegation only states that no demand has been made, it does not dispute that it is unable to pay its debts and does not place anything to court that it is able to pay its debts.

[55] Accordingly, it is the submission of the applicant that the allegations made by it against the respondent remain unanswered. The answering affidavit according to the applicant does not raise any dispute of fact, as to the existence of a debt owed to the applicant, it merely raises technical points and the respondent's sole director, Keys, avoided engaging head on the factual allegation, that fall within his personal knowledge, such as the payments made by him to De Lange and Windwaai and the two letters signed by him. Accordingly, the applicant contends that it is an unpaid creditor who has a right to a winding-up order against the respondent, and that under the circumstances, a final order must be granted.

[56] Ms. Msizi on behalf of the respondent submitted that the assertion of the applicant that the respondent is indebted to it, is founded upon the outcome of

internal investigations conducted by the applicant. The applicant states that the outcome of the investigation established that the respondent was in cahoots with Windwaai and De Lange to defraud the applicant, as a result of the fraud, the applicant is owed by the respondent an amount which is still under investigation.

[57] It is further submitted on behalf of the respondent that the allegations made by the applicant against the respondent are bald and further that the applicant sought to supplement its founding affidavit in reply, which in doing so it was unsuccessful. The second basis on which the respondent opposes applicant's application is that the applicant relies on the evidence of third parties, which is untested and that no claim has been made by the respondent and no criminal case has been opened against it.

[58] The respondent accordingly contends that the application is premature, in other words the applicant has filed to satisfy the court that it meets the requirements of sections 334 (f), 334(h) or 81(1)(c)(ii) of the Companies Act. With regards to costs, the respondent submits that there is no justification for the Court Order sought by the applicant in respect of the scale of costs (attorney and client) and the cost of two counsel. The respondent accordingly contends that in the event that the court grants the order sought by the applicant in this application, it should grant a normal order on the party and party scale, and that the applicant must not be awarded the costs of two counsel as this is a simple application.

[59] It is trite that in an opposed application the order can be granted in favour of the applicant where there are disputes of fact if there is no application for the referral of disputes of facts to oral evidence based on the undisputed facts. This test was set out in the well-known decision of **Plascon-Evans Paints Ltd v Van Riebeeck Pains (Pty) Ltd**[8]**,** and according to Harams[9] "*If, notwithstanding that there are facts in dispute on the papers, the court is satisfied that the applicant is entitled to relief in view of the facts stated by the respondent together with the facts in the applicant's affidavits which are admitted or have not been denied, it will make an order giving effect to such finding"* In respect to how a dispute of fact arises this was discussed in

[8] 1984 3 SA l23 (A) 634.
[9] Harams: Civil Procedure in the Superior Court, B -59.

the well-known decision of **Room Hire Co (Pty) Ltd v Jeppe Street Mansions**[10] in summarizing what was stated in the decision , Harams[11] states as follows:

> "*1. The respondent may deny one or more of the material allegations made on the applicant's behalf and produce evidence to the contrary, or apply for the leading of oral evidence of witnesses who are not presently available or who, though averse to making an affidavit , would give evidence of subpoenaed.*
>
> *2. The respondent may admit the applicant's affidavit evidence but allege other facts, which the applicant disputes.*
>
> *3. The respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant may deny them and put the applicant to the proof , and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable , or that certain facts upon which the applicant relies to prove the main facts are untrue. The absence of positive evidence directly contradicting applicant's main allegations, does not render a case such as this free of a real dispute of fact."*

The learned author[12] further states that:

> *"On the other hand, a real dispute of fact does not arise where the respondent:*
>
> *1. states that he can lead no evidence himself or by others to dispute the truth of the applicant's statements, but puts the applicant to the proof or truth of the applicant's statements, but puts the applicant to the proof, or*
>
> *2. relies on a bare denial of allegations in the applicant's affidavits."*

[60] In my view, when applying these principles, there are no disputes of fact between the version of the applicant and that of the respondent and accordingly the application can be dealt with or to be granted on the version of the applicant, I say so for the following reasons:

60.1 applicant's application is for a final order of sequestration against the respondent . It is common cause that the application is based on the provisions of sections 344(f), and/or 345(h) of the old Companies Act read with section 81(1)(c)(ii) of the 2008 Act

60.2 Section 344(f) provides that a company may be liquidated if:

"*(a) …*

[10] 1949 3 SA 1155 (T).
[11]*Op sit* at page B -58.
[12] Harams: *opsit* I at page B-58.

(b) …

(c) …

(d) …

(e) …

(f) the company is unable to pay its debts as described in section 345;"

Section 345 (h) also provides that a company may be liquidated if:

(h) it appears to the court that it is just and equitable that the company should be wound up

Section 81(1)(c) of the new Companies Act provides as follows:

"(1) A court may order a solvent company should be wound up if-

(a) …

(b)

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that:

(i) …

(ii) it is otherwise just and equitable for the company to be *wound up;"*

60.3 It is clear from the reading of the three sections, and applicant's founding affidavit that the application is based on one of the two grounds, the first ground is that the applicant is unable to pay its debts (section 344(f) of the companies act 1973, and the second ground is that it is just and equitable that the respondent be wound up 344(h) of the 1973 companies act, read with section 81(1)(c)(ii) of the companies act 2008. Section 344 is one of the sections of the 1973 act that has survived the repeal of the 1973 companies act by the companies act 2008, this is in terms of schedule 5 item 8 (1) of the 2008 Act**.**

60.4 In this regard, the applicant has made the following allegations in support of the relief sought, which are uncontested, that the respondent is unable to pay its debts. The applicant states that an internal investigation within the applicant finance department and in the e-mail correspondence between two of the applicants employees, De Lange and Windwaai and the respondent, has revealed that the applicant was overcharged by the respondent to facilitate the payment of kickbacks, by the respondent to De Lange and Windwaai and accordingly the applicant was defrauded by the said employees and the respondent for the amount R3 295 860.00.

60.5 The investigation further revealed that the applicant has between December 2019 to August 2024 paid the respondent an amount of R12 915 123 00 for services that were not rendered by the respondent to the applicant, and accordingly the respondent must pay back the these amounts back to the applicant.

60.6 The investigations were conducted by the applicant's group procurement manager, who is a deponent to the founding affidavit, and were latter confirmed by a firm of forensic auditors O' Sullivan Brosnan & Associates. A confirmatory affidavit of Ashley Brosnan is attached to the applicants founding affidavit which confirms that:

> *"3.1 OBAA (sic) (O' Sullivan Brosnan & Associates) undertook investigations and forensic audits into the suspected fraud committed against (sic) (the applicant) through the respondent…*
>
> *3.2 OBAA interviewed Enrico Windwaai and Charl De Lange and, during those interviews, both of them confessed to being part a scheme in terms of which they allocated large quantities of sub-contracted work to (sic) (the respondent), in return for monthly kick-back payment (i.e. corrupt payments), as detailed in paragraph 26 of the founding affidavit; and*
>
> *3.3 Paragraph 53 of the founding affidavit correctly records OBAA's involvement in uncovering the fraudulent scheme involving (sic)(the respondent)"*

60.7 The applicant further alleges that it is a creditor to the respondent, and has the requisite locus standing prosecute the liquidation application against the respondent. The applicant further alleged that the respondent is indebted to the applicant for the amount of R12 915 123, 00 alternatively R3 295, 860, 00, the respondent own no immovable properties. This was confirmed by a deed's search, a copy of which was annexed to the applicant's founding affidavit, the applicant also invited the respondent to disclose its balance sheet and list of it unencumbered assets.

60.8 In relation to the second alternative ground that it is just and equitable that the respondent should be wound up the applicant the in terms of section 344(h) of the 1973 Act read with section 81(1)(c)(ii) of the 2008 Act, the applicant details the fraud perpetrated against it, through the second respondent, which in summary is that two of the applicants employees De Lange and Windwaai, *allocated large quantities of sub-contracted work to the respondent, in return for monthly kick-back payment (i.e. corrupt payments).* applicant was overcharged by the respondent to facilitate the payment of kickbacks, by the respondent to De Lange and Windwaai and accordingly the applicant was defrauded by the said employees for the amount R3 295 860.00. The investigation further revealed that the applicant has between December 2019 to August 2024 paid the respondent an amount of R 12 915 123 00 for services that were not rendered by the respondent to the applicant,

60.9 In addition, the forensic auditor (Ashley Brosnan) appointed by the applicant to investigate the fraud that was discovered in the preliminary investigation conducted by the applicant's Group Risk and procurement Manager, who is a deponent to the founding affidavit, states as follows in relation to the respondent's involvement in the fraudulent scheme in his confirmatory affidavit, which was filed in support of this application:

"*3.3 Paragraph 53 of the founding affidavit correctly records OBAA's involvement in uncovering the fraudulent scheme involving Zitixo and the findings of its investigation."*

[61] The respondent failed to deal with these specific allegations against it. In its answering affidavit it merely states that:

"11. The large part of the founding affidavit is concerned with particulars relating to the alleged fraudulent conduct of De Lange and Windwaai and their responses which led to their respective resignations and the granting of provisional sequestration of their estates.

12. It is worth nothing that:

12.1 There is no allegation that the respondent has been advised of this alleged fraudulent conduct;

12.2 The respondent has not been questioned by the applicant or any law enforcement agency regarding the allegations of fraud;

12.3 No demand has been made by the applicant to the respondent for the payment of the money that forms the debt allegedly owed by the respondent which is the basis for the relief now sought;

12.4 According to the applicant, the existence of the fraud is a suspicion as it has clearly stated in its founding affidavit.

13. Given what is stated in paragraph 12 above, I am advised that it is not open to the applicant to seek the order it is now pursuing when it has not made any demand to me. Not only that, a clear reading of the founding affidavit confirms that the applicant is still investigating the alleged fraud in respect of which the respondent has not been informed.

14. I am also advised that the facts relied on by the applicant are equally inadequate for the applicant to secure the relief it seeks as there is no case of fraud established against me. For all the reasons given above, the applicant is equally not entitled to the relief it seeks as it has failed to demonstrate that there are any just and equitable grounds to justify the grant of the provisional winding up of the respondent. Therefore, the applicant has equally failed to meet the requirements stipulated in both section 344(h) of the 1973 Companies Act read with section 81 of the 2008 Companies Act. The allegation s made in support of this basis are speculative as they are based on an untested allegation of fraud that the respondent was never informed of and are made without any demand made to it in respect thereof.

15. The applicant also proceeds boldly to allege that the respondent is unable to pay its debt, yet no demand has been made to the respondent in this regard. I am advised that proceeding to lodge this application in these circumstances us fatal to the case of the applicant as the Companies Act is quite clear in this regard."

[62] It is clear from the paragraphs referred to above that the respondent's defense to the allegations made against it by the applicant is that in respect of the relief sought by the applicant that the respondent is unable to pay its debt in terms of section 344(f) of the 1973 Companies Act, is that no demand has been made by the applicant for the payment of the money that forms the debt owed by the respondent, which is the basis of the relief sought in these proceedings.

[63] There is no basis for this contention by the respondent in law, there is no peremptory requirement in terms of section 344(f) of the Companies Act 1973, that before an applicant can proceed with an application in terms of section 344(f) it must have made demand of the amount that forms the basis of the debt referred to in 344(f). Section 345, which is a deeming provision, also does not require that such a demand should be made, in terms of 345(1)(c) a company shall be deemed unable to pay its debts if *"(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."* .The applicant has made all the essential allegations to prove that the respondent is unable to pay its debts in this regard, the applicant has stated that in paragraph 86 of its founding affidavit

> "*For the reasons explained earlier herein, Zitixo is indebted to Premier in the amount of R12 915 123.00 alternatively, R3 295 860.000, excluding interest and cots. The debt is immediately due and payable.*

[64] In addition, the applicant invited the respondent to file its balance sheet reflecting its unencumbered assets, at paragraph 88 of its founding affidavit, the respondent has not responded to any of these allegations. It is important to note that the conclusion reached by the applicant in paragraph 86 of its founding affidavit is reached after a thorough investigation by the applicant's Group Risk and Procurement Manager, who is the deponent of the founding affidavit and is conformed by the forensic auditors appointed by the applicant.

[65] In respect of the allegation of fraud, the defense of the respondent is that the existence of fraud is a suspicion, this is not correct , for the same reasons as stated above , that on applicant's version, that has not been contradicted by the respondent, applicant's Group Risk and Procurement Manager conducted an investigation which revealed that respondent has been involved in fraud against the applicant and as a result, the applicant was defrauded for the amount R3 295

860.00. The investigation further revealed that the applicant has between December 2019 to August 2024 paid the respondent an amount of R 12 915 123 00 for services that were not rendered by the respondent.

[66] In **Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others**[13] it was held that:

> "*Section 344(h) of the 1973 Act provides that a company may be wound up by the court when it is 'just and equitable' to do so. A winding up on this basis 'postulated not facts but only a broad conclusion of the law, justice and equity, as a ground for winding-up'….There is no fixed category of circumstance which may provide a basis for winding-up on the just and equitable ground…*
>
> *…some of the categories that have been identified are the disappearance of a company's substratum; illegality of the objects of the company* ***and fraud in relation to it****….* ***No doubt these categories remain under the new Act and may be extended****"* (emphasis added)

[67] I am accordingly satisfied that the applicant has made out a case for the relief sought in terms of section 344(h) read with section 81(1)(c) of the 2008 act , especially in view of the fact that the fraud against the applicant in terms of the investigations conducted by the group risk and procurement manager and confirmed by the forensic audit and the facts of this case which are not disputed by the respondent, the fraud commenced immediately after the registration of the respondent as a service provider to the applicant. It is accordingly clear that the respondent formed the relationship with the applicant with the intention to defraud the applicant, and accordingly inline with the principles as set out in **Thunder Cats Investments 92 (Pty) Ltd and another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others[14].** It is just and equitable that the respondent should be wound-up (emphasis added).

[68] During argument, Mr. Voster SC sought the final order of liquidation against the respondent, Ms. Msizi correctly made no submissions to the contrary. I am also of the view that this matter has been fully ventilated before this court and it would serve no purpose to issue and interim order. In respect to costs, I see no reason why a usual order in liquidation should not be made, and I am also of the view that this

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[13] 2014 (5) SA 1 (SCA).
[14] Supra para 66 of this judgment

matter is sufficiently complex, especially taking into account the facts and the quantum involved, which ranges from R4 000 000.00 to R12 000 000.000.

[69] Accordingly, the following order shall issue:

1. **ZITIXO TRADING (PTY) LTD** (registration number: 2015/043655/07) is placed in final liquidation
2. The costs occasioned by this application is costs in the liquidation, to be paid on a scale as between attorney -and -client, including the costs occasioned by the employment of the two counsel.

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M NOBATANA

ACTING JUDGE OF THE HIGH COURT

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Matter heard on	**:**	**19 JUNE 2025**
Judgment delivered on	**:**	**16 OCTOBER 2025**