REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 18976/2019

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

Date: 26 April 2024 E van der Schyff

JOHANNA MAGRIETA SUSANNA BOTHA APPLICANT

and

4D HEALTH (PTY) LTD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] In this matter, the applicant, Ms. Botha, seeks the winding-up of the respondent, 4D Health (Pty) Ltd (4D Health), a solvent company, in terms of section 81 of the Companies Act 71 of 2008. The question to be decided is whether Ms. Botha has *locus standi* to bring this application. Ms. Botha is neither a director nor a shareholder of the company. It is common cause that if Ms. Botha qualifies as a

person with *locus standi*, it can only be on the ground that she was 'a creditor' of 4D Health when the application was issued. Ms. Botha alleges that she was such a creditor, but this is disputed by the respondents.

[2] I pause to note that although the respondent disputes Ms. Botha's status as a contingent creditor, it did not submit that the meaning of the term creditor, as it is used in sections 79 and 81 of the Companies Act 71 of 2008, should not be read expansively to exclude contingent creditors. I will thus confine the discussion to the question as to whether Ms. Botha made out a case on a balance of probabilities that she is indeed a contingent creditor of 4D Health.

[3] Before I turn to the facts of this case, I deem it necessary to consider the requirements a legal entity needs to meet to be regarded as a contingent creditor with the necessary *locus standi* to apply for the winding up of a respondent company.

The law

[4] The context within which meaning is to be attributed to the term 'contingent creditor' is that it is well established that winding-up proceedings should not be resorted to as a means to enforce the payment of a debt whose existence is *bona fide* disputed by the company concerned. The winding-up procedure is not designed to resolve disputes about the existence or non-existence of a debt.[1] Where an alleged debt is genuinely disputed on reasonable grounds, our courts hold that it would be wrong to allow such a dispute to be resolved by utilising the machinery designed for winding-up proceedings rather than ordinary litigation.[2]

[5] Defining the term 'contingent creditor' is in itself difficult. Having regard to the variety of contingent claims that may properly be the subject of proof, an attempt to

[1] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 345 (T).
[2] *Kalil v Decotex (Pty) ltd and Another* 1988 (1) SA 943 (A).

formulate a universally applicable definition of a contingent creditor is difficult, and even undesirable. The determination need to be made on the totality of unique facts in each individual case.

[6] It is well established that a contingent creditor is one which is linked to the company concerned by a *vinculum iuris*, which may ripen into an enforceable debt on the happening of some event on some future date.[3] Trengrove J held in *Gillis-Mason Construction Co (Pty) v Overvaal Crushers (Pty) Ltd*[4] that it follows that an applicant who has a valid claim against a company for damages for breach of contract is a contingent creditor, irrespective of the fact that the claim is unliquidated. In *Du Plessis v Protea Inryteater (Edms) Beperk,*[5] the court held that it would be absurd to hold that the question of whether anyone would at some future date qualify as a creditor were to be dependent solely on the happening of some future event which, by itself and for no other reason, would bring into being a *vinculum juris* not previously existing. Before a person can qualify as a contingent creditor with *locus* to apply to wind up a company, his claim must be more than a mere 'spes' depending on a third person's unfettered discretion.

[7] In *Gillis-Mason* (*supra*), it was not disputed that a breach of contract occurred. What was disputed, was whether the applicant suffered damages as a result thereof.[6] Trengrove J held that he was not satisfied that the applicant's claim to have suffered damages is being disputed on *bona fide* and substantial grounds, and found the applicant to be a contingent creditor. The conceded breach of contract constituted the *vinculum iuris* that created a right enforceable in a court of law.

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[3] *Gille-Mason Construction Co (Pty) v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T), *Choice Holdings Ltd and Others v Yabeng Investment Holding Company Ltd* 2001 (3) SA 1350 (W) at para [21].
[4] 1971 (1) SA 524 (T)
[5] 1965 (3) SA 319 at 320.
[6] At 525E – 'The respondent's attitude is … and it contends that even though there has been a breach of contract, the applicant will not suffer any damages whatsoever, as a result thereof.'

[8] Having regard to the principle enunciated and contextualized by the decisions in *Du* Plessis and *Gillis-Mason,* an applicant contending that it is a contingent creditor with the necessary locus to apply for the winding up of a respondent company, must prove on a balance of probabilities that the company has a presently existing obligation to pay it a sum of money, which need not be ascertained, on the happening of a contingent event. The contingent event cannot give rise to the existing obligation or *vinculum iuris*, the latter must be pre-existing. A person who has merely commenced litigation against a company should not be deemed a contingent creditor of the company on the basis of the pending litigation. To put it differently, the contingent liability is premised on the independent existing obligation, and the mere institution of action proceedings is not proof, *prima facie* or on a balance of probabilities, of the existence of a *vinculum iuris.*

[9] Ms. Botha contends that the existence of a *vinculum iuris* is clearly demonstrated, by the facts averred in the founding affidavit. The respondent, 4D Health, at all times disputed Ms. Botha's *locus standi* to bring the liquidation application. Counsel for 4D Health submits that the amended particulars of claim do not constitute evidence of an underlying monetary claim in Ms. Botha's hands that is required to endowe her with the necessary *locus standi*.

***Plascon-Evance* principle**

[10] The lengthy affidavits reveal material disputes of fact on the issue of Ms. Botha's *locus standi*. The well-established approach, where disputes of fact arise in motion proceedings, is that final relief will be granted if the facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[11] It is common cause that the parties requested the issue of Ms. Botha's *locus standi* to be considered separately. 4D Health subsequently filed an application requesting that the *locus standi* issue be referred to oral evidence. This application

is premised on an obiter remark made by me in a judgment dealing with the issue as to whether Ms. Botha could file a supplementary affidavit to supplement the liquidation application with the recently amended particulars of claim in case number 80758/2018.

[12] Particulars of claim in case number 80758/2018 was previously annexed to the founding affidavit of the liquidation application. The particulars of claim were, however, amended several times with the final amendment thereof effected on 24 February 2022. Ms. Botha wanted to introduce the final amended particulars of claim as new evidence to the winding-up application. 4D Health opposed the application, but on 21 August 2023, leave was granted to Ms. Botha to file a supplementary affidavit with the amended particulars of claim as an annexure. The respondent, 4D Health, was granted leave to file a response to the supplementary affidavit, which it did, and Ms. Botha then filed a reply. In the judgment allowing filing of a supplementary affidavit with the amended particulrs of claim, I remarked:

> 'As for the submission that the new evidence that the Applicant wants to introduce did not exist when the liquidation application was instituted, I am of the view that the question is not whether the particulars of claim existed at the time the liquidation application was instituted, but whether the cause of action, that renders the Applicant a contingent or prospective creditor of the Respondent, existed. The particulars of claim are nothing more and nothing less than an exposition of the Applicant's claim against the Respondent. The first set of particulars of claim might have fallen short because it did not make out a case against the Respondent, but the Respondent was cited as Defendant. The intention to include the Defendant as a defendant is clear although the execution of the intention was defective. This is, seemingly, now rectified.'[7]

[7] See para [12] of the written judgment.

[13] 4D Health submits that permitting the filing of the amended particulars of claim and remarking that Ms. Botha seemingly cured the defect that existed in the previous pleading, albeit obiter, indicates that I was assured that the introduction of the amended particulars of claim would bolster Ms. Botha's *locus standi*.

[14] I clearly stated in the paragraph cited above from the written judgment handed down on 21 August 2023, that the particulars of claim are nothing more and nothing less than an exposition of the applicant's claim against the respondent. Where the applicant did not, in the previous particulars of the claim, lay a basis in the action proceedings for a claim against 4D Health, the position was now amended in that she introduced the basis for a monetary claim against 4D Health in the particulars of the claim. Whether that claim is excipiable was of no concern in deciding whether to allow Ms. Botha to supplement her papers by adding the most recent amended particulars of the claim.

[15] The introduction of the amended particulars of claim did not afford any magical evidentiary benefit to Ms. Botha. The summons and amended particulars of claim are evidence that an action was instituted by Ms. Botha against 4D Health. The action is, however, a separate legal procedure, and the summons and amended particulars of claim are, at most, evidence of pending legal proceedings. The court accepted from the commencement of the proceedings that litigation was instituted in which 4D Health was cited as a defendant. The question is whether Ms. Botha placed sufficient facts before the court in this liquidation application to prove the existence of a *vinculum iuris*, that transcends a mere 'spes' that a court may in future find that 4D Health is liable to her on the basis of breach of contract. In considering the issue of the applicant's *locus standi*, regard is to be had to the case made out under oath on the papers before the court in this application. Since a final determination needs to be made on the papers filed of record, the Plascon-Evans principle applies.

[16] It becomes necessary then to consider the nature of Ms. Botha's claim, and whether on the facts set out in the affidavits, she has the necessary *locus standi* to bring an application for the winding up of 4D Health.

Is a case made out on the papers for the applicant's *locus standi*?

The parties' contentions

[17] Ms. Botha, claims that she has *locus standi* to seek 4D Health's winding-up pursuant to the provisions of section 79 of the 2008 Companies Act in her capacity as a prospective alternatively contingent creditor of 4D Health. She avers that her *locus standi* as a contingent or prospective creditor emanates from a claim, alternatively, a prospective claim for damages against 4D Health, which may become an enforceable debt in the future.

[18] Ms. Botha avers in the founding affidavit that Messrs Lombard and Van Rooyen, acting in their capacity as directors of 4D Health, made material misrepresentations to her regarding (i) the true value of her shareholding in 4D Health, (ii) the misappropriation of company funds channeled to 'sister companies' for tax evasion purposes and (iii) the manipulation and redirection of company profits to avoid having to pay any share dividend income with the minority shareholders of the 4D Health, the latter being herself and Mr. Williams, the third respondent in this application and the third defendant in the action. She states that Messrs. Van Rooyen and Lombard adopted a management style that kept the minority shareholders ignorant of the company's financial position, which ultimately led to her shareholding in the company being undervalued.

[19] Ms. Botha elaborates that she was an employee and shareholder of 4D Health, employed as human resources officer and corporate account manager since 4D Health's inception in 1999 until her resignation in 2018. She initially held 11.11% shareholding until Messrs Van Rooyen and Lombard "*forced*" her in 2009 to relinquish 2.81% of her shareholding to Mr. Williams, purportedly as part of 4D

Health's Broad-Based Black Economic Empowerment initiative. Messrs. Lombard and Van Rooyen each sold 11.14% of their shareholding to Mr. Williams. This resulted in Mr. Williams acquiring the minimum empowerment threshold of 25.1% shareholding in 4D Health.

[20] In terms of the Sale of Shares Agreement entered into by and between herself, Messrs. Lombard, Van Rooyen and Williams, the purchase consideration in respect of Mr. Williams's 25.1% shareholding was R 3 765 000.00 payable by Mr. Williams to the sellers by way of dividend income on the purchased shares and through such other means as Mr. Williams may have available from time to time. The agreement further provided that the outstanding amount due by Mr. Williams would be interest-free for a period of three years. Accordingly, Williams was indebted to Ms. Botha for an initial amount of R417 915.00 and to Messrs. Lombard and Van Rooyen for an initial amount of R1 673 542.50.

[21] Because it was evident to all parties that Mr. Williams did not have the resources to purchase the subject shares unless he received financial assistance from the existing shareholders, Messrs. Lombard and Van Rooyen demanded that the transaction be structured on the basis that the current shareholders rendered such financial assistance pro-rate to their shareholding. Ms. Botha avers that she was led to believe by Messrs. Lombard and Van Rooyen that repayment of the purchase consideration would be effected by Mr. Williams within a period between 3 and 5 years as the projected dividend income would be enough to cover the purchase consideration, including interest. She was further given the assurance by Messrs. Lombard and Van Rooyen that a dividend policy would be adopted with immediate effect to ensure maximum dividend income during the period of three to five years to ensure that the ownership entitlement of 4D Health's BBBEE initiative through a sale of shares achieved maximum recognition in accordance with the Code Series 100 of the Code of Good Practice. Ms. Botha contends that she agreed to participate in the initiative for the greater good of the company, 4D Health, on the mistaken belief that Messrs. Lombard and Van Rooyen would honour their agreement relating to the dividend policy to be adopted.

[22] Since the effective date of the agreement Mr. Williams only managed to affect seven payments towards the purchase consideration. Messrs. Lombard and Van Rooyen failed to provide a reasonable explanation as to why 4D Health failed to achieve the financial returns as presented to Ms. Botha at the time the agreement was concluded. Ms. Botha contends that it later became apparent that Messrs. Lombard and Van Rooyen applied different formulas for purposes of evaluating 4D Health's shares, depending on whether they were buying or selling shares.

[23] During March 2016, a material breach of trust occurred between Ms. Botha and Messrs. Lombard and Van Rooyen because of their decision to grant her a salary increase of only 5.96% despite her outstanding performance. This caused her to conduct her own investigation into 4D Health's financial affairs to determine the cause of the low profit margin. Ms. Botha alleges that she discovered that Messrs. Lombard and Van Rooyen devised a scheme redirecting 4D Health's profits to, *inter alia*, the 'sister company' Dumont Healthcare. Ms. Botha subsequently resigned on 7 September 2016 without selling her shares in 4D Health. She no longer trusted Messers. Lombard and Van Rooyen and realised that they were engaged in irregular and reckless conduct relating to the financial affairs of the Respondent to the detriment of all the shareholders and the employees of the company.

[24] Messrs. Lombard and Van Rooyen approached her and requested her to reconsider her resignation. They offered to buy the remaining shareholding and undertook to instruct the auditors to conduct an objective valuation of her shareholding to ensure that they offer her a fair market related price for shares. She agreed to the arrangement in the *bona fide* belief that the auditors of the company would be objective in valuing the shareholding. Messrs. Lombard and Van Rooyen purchased Ms. Botha's remaining 8.3% shareholding for R850 000.00. She later discovered that Messrs. Lombard and Van Rooyen undervalued her shares by at least 50%, and she consequently instituted action against them under case number 80758/18. The case is still pending.

[25] Ms. Botha retracted her resignation. During October 2017, Mr. Williams approached Ms. Botha and disclosed his discomfort with certain suspicious transactions conducted by Messrs. Lombard and Van Rooyen on behalf of 4D Health. Ms. Botha was denied access to 4D Health's financial statements and information regarding transactions concluded between 4D Health and her 'sister companies'. Ms. Botha again resigned on 25 January 2018.

[26] Ms. Botha appointed Dr. WAA Gouws and Mr. Justice Van Wyk to conduct forensic audits into the financial affairs of 4D Health. She attached Mr. Van Wyk's report and confirmatory affidavit. Mr. Van Wyk reported, *inter alia,* that (i) Dumont Health is merely a vehicle that was required for tax purposes and it is not feasible if the administration fees from 4D Health are discarded, (ii) the movement of the administration fees from 4D Health to Dumont reduced the profit of 4D Health leaving inadequate funds for the declaration of dividends, (iii) the valuation of Ms. Botha's shares and in particular the valuation of the shares sold to Messrs. Lombard and Van Rooyen during October 2016 appears to be incorrect.

[27] Ms. Botha contends that Messrs. Lombard and Van Rooyen, in their capacity as directors of 4D Health, conducted 4D Health's affairs recklessly and fraudulently for their own financial benefit to the detriment of herself, Mr. Williams, and 4D Health. Messrs. Lombard and Van Rooyen, in their capacity as directors of 4D Health, are also in contravention of the provisions of section 22(1) and sections 76(2) and 76(3) of the 2008-Companies Act. This conduct resulted in severe financial losses to 4D Health and the minority shareholders. Ms. Botha submits that in accordance with sections 77(3) and 218 of the 2008-Companies Act, Messrs. Lombard and Van Rooyen may also be held responsible towards 4D Health and any other person for any loss or damages suffered as a result of their fraudulent and reckless conduct. She avers that fraudulent conduct on the part of 4D Health, through either its directors or staff members, constitutes sufficient grounds for 4D Health's winding up on the basis that it is just and equitable to do so.

[28] An answering affidavit deposed to by Mr. van Rooyen was filed on behalf of 4D Health. Mr. Van Rooyen denies that 4D Health is either commercially or factually insolvent, that it would be just and equitable for 4D Health to be wound up and that Ms. Botha has the requisite *locus standi* in this application.

[29] Mr. Van Rooyen submits that Ms. Botha relies on the High Court action instituted under case number 80758/18 as affording her *locus standi* in the liquidation application. He contends, however, that the High Court action is "problematic, tenuous and in all probability devoid of any merit". He avers that the respondents already alluded Ms. Botha to errors and incorrect assumptions contained in Dr. Gouw's report. He states that Ms. Botha, after being informed of these errors, amended the particulars of claim in the High Court action. She then obtained Mr. Van Wyk's report to the liquidation application. The respondents, in turn, and in answer thereto, filed their own expert report by Guillarmod-MacPhail.

[30] Mr. Van Rooyen states that Ms. Botha's claim, as set out in the founding affidavit consists of three parts: (i) an unpaid portion of a sale of shares to Mr. Williams; (ii) dividends not paid due to transfer of administration fees and (iii) variance in the amount paid for shares in terms of a written agreement and the value placed on those shares by the applicant after having received full payment of the purchase price. The first claim is a contractual claim against Williams and not against 4D Health. In addition, the sale of shares agreement provides for any dispute between the parties thereto to be referred to arbitration. As for the second claim, being dividends not paid due to the alleged transfer of administration fees, Mr. Van Rooyen contends the claim is ill-conceived. In law, a shareholder is only entitled to a distribution after it has been declared by a board of directors and then only to the extent that it has been declared. Mr. Van Rooyen denies that he, or Mr. Lombard made any representations with a view of inducing her to enter into any sale of shares. She at all times had access to 4D Health's financial systems – as she herself states in an affidavit filed by her in CCMA proceedings instituted by her. Mr. Van Rooyen attached a letter written by Ms. Botha to the answering affidavit. In

this letter, dated 7 September 2016, she herself placed a value of R1.2 million on her 8.3% shareholding in the respondent, and the agreed price of R850 000.00 was a result of negotiations. He contends that minority shares are not valued in the same manner as the total shareholding of a company for BEE or any other purpose, among others, because shareholders with minority shares have no actual control over the company and the marketability of a minority shareholding in a private company is generally poor.

[31] Mr. Van Rooyen claims that Ms. Botha has not come to court with clean hands 'but instead has devised a stratagem and arranged her affairs in a calculated way to obtain as much benefit as she possibly could from the respondent, whilst in reality conniving with her current employer and competitor of the respondent.' He claims that Ms. Botha was the corporate consultant on 4D Health's two largest accounts, UP and NMMU. She was earmarked to play a strategic role had the NMMU tender been awarded again to 4D Health, but she tendered her resignation three days after the tender closed. During the meeting where Ms. Botha continued to demand a salary increase, she was asked what would make her withdraw her resignation. She informed Mr. Van Rooyen that they should buy out her shares. He undertook to discuss this with Mr. Lombard but reiterated that they would not be able to increase her salary.

[32] Just after 4D Health was informed that it made the shortlist on the NMMU tender, on 7 September 2016, Ms. Botha again requested a meeting with Mr Van Rooyen. She presented him with a signed letter indicating her desire to sell her shares in 4D Health for R1.2 million, and an unsigned letter of resignation. She also confirmed that she intended to join Securitas Health Care, a competitor in the industry. Mr. Van Rooyen informed her that he and Mr. Lombard would not consider buying out her shares if she persisted with her intention to resign. She withdrew the resignation. It was, however, discovered after she left in January 2018 that she communicated with the CEO of Securitas Health Care during August and September 2016, November 2017 and December 2017, and January 2018. She

provided Securitas with a copy of her salary advice and 4D Health's Memorandum of Incorporation.

[33] After Ms. Botha withdrew her resignation, Messrs. Lombard and Van Rooyen agreed to buy her shares and the sale of shares agreement was concluded. After Ms. Botha received the final instalment for her shares, she requested a meeting with Messrs. Lombard, Van Rooyen and Williams regarding the outstanding amount due by Mr. Williams. She requested that Messrs. Lombard and Van Rooyen should assist Mr. Williams to pay off her portion of the outstanding amount due to her. They were not amendable to the proposal as they were owed substantially more, but would consider assisting Mr. Williams depending on the outcome of the UP tender. On 5 December 2017, UP informed 4D Health that its tender was unsuccessful and that its contract with 4D Health would terminate on 31 March 2018.

[34] The respondents submit that it is 'a very undesirable position where the pleadings in a pending action is used as a basis for a prospective claim. The court should not be asked to rule on a matter where a *bona fide* and clear factual dispute exists and where the outcome of the action has profound implications for the respondent's case.' The 'debt' on which Ms. Botha relies is *bona fide* disputed on reasonable grounds. Mr. Van Rooyen denied the allegations of fraud and that a 'tax evasion strategy' existed. Explained the service rendered by Dumont. He denied any wrongdoing in the dealings between 4D Health and Dumont and referred to the content of the Guillarmod-MacPhail report.

[35] In reply, Ms. Botha avers that it is clear that 'on a balance of probabilities' she is a prospective creditor as a consequence of which she has the necessary *locus standi* to bring the liquidation application.

The amended particulars of claim

[36] Since much is made of the amended particulars of claim in case number 80758/2018, it is necessary to have regard to Ms. Botha's claim against 4D Health as set out therein.

[37] The summons was originally issued on 6 November 2018. The action comprises two claims. Claim 1 is based on an Agreement of Sale of Shares concluded between Ms. Botha and Messrs. Lombard and Van Rooyen cited as the first and second defendants in the action, respectively. Messrs. Lombard and Van Rooyen are directors of 4D Health and hold 74.9% of 4D Health's shares. The agreement was concluded on 4 October 2016.

[38] Ms. Botha was a shareholder who held 8.3% shares in 4D Health. She wanted to sell her shares. She avers that during the course of negotiations, Messrs. Lombard and Van Rooyen represented to her that the value of the company, 4D Health, and, as such, the total issued shares, amounted to R10 246 964.00. This brought the value of her 83 ordinary shares to R850 000.00. However, this representation, she avers, made with the object of inducing her to enter into the Sale of Shares Agreement with Messrs. Lombard and Van Rooyen to sell her shares for R850 000, was false. When the agreement was concluded, the true value of 4D Health was R23 120 577.00. The first and second defendants were allegedly aware of the falsity of their representation when the agreement was concluded. As a result, Ms. Botha claims that she suffered damages in the amount of R1 069 007.89.

[39] Claim 2 relates to a Sale of Shares Agreement concluded on or about 1 July 2009 in terms whereof Mr. Williams, the third defendant in the action, bought 25.1% of 4D Health's shareholding from Ms. Botha, and Messrs. Lombard and Van Rooyen. The shares were sold for R3 765 000.00. In the amended particulars of claim, Ms. Botha introduces a claim against 4D Health. Ms. Botha avers, among others:

> '[10.1] On or about 1 July 2009, the parties concluded a Sale of Shares Agreement in terms of which Third Defendant purchased 25.1% of the Company's shareholding from Plaintiff, First and Second Defendants,

[10.2] The purchase consideration in respect of the 25.1% shares amounted R3 765 000.00. A copy of the Agreement is annexed hereto marked annexure ‘B’.

[10.3] The Sale of Shares Agreement entered by and between the parties as referred to in paragraph 10.1 above was concluded at the special instance and request of Fourth Defendant [4D Health], duly represented by First and Second Defendants, for the primary purpose of enhancing Fourth Defendant’s broad-based economic empowerment status to maximise anticipated economic benefits emanating from Fourth Defendant’s purported ownership participation in Broad-Based Black Economic Empowerment.

[10.4] Plaintiff [Ms. Botha] and First and Second Defendants [Messrs. Lombard and Van Rooyen] sold the 25.1% of the Company’s [4D Health] issued shares to the Third Defendant [Mr. Williams] pro rata to their respective percentage shareholding in Fourth Defendant.

[10.5] Fourth Defendant’s persistence and representation in respect of the financial benefits in favour of the Company, induced Plaintiff to enter into the Sale of Shares Agreement referred to in paragraph 10.1 above.

[10.6] Accordingly, Plaintiff and First and Second Defendant sold the following percentages of their respective shareholding in Fourth Defendant to Third Defendant:

Plaintiff: 2.81%
First Defendant: 11.14%
Second Defendant: 11,14%.

[10.7] At Fourth Defendant’s special instance and request, the payment of the purchase consideration for the sale of shares by Plaintiff and First and

Second Defendants to Third Defendant, was specifically structured to afford Fourth Defendant's immediate recognition as a Broad-Based Black Economic Empowerment Company having 25.1% of its ownership in the hands of a black person, as defined in the Broad Based Black Economic Empowerment Act, 53 of 2003 (as amended), by affecting transfer of the subject shares in favour of Third Defendant prior to payment of the purchase consideration by Third Defendant.

[10.8] At all relevant times, it was within the parties' contemplation that Third Defendant did not have the financial means to perform in terms of the Sale of Shares Agreement, without financial assistance from Fourth Defendant.

[10.9] Premised on parties' contemplation referred to in paragraph 10.6 above, and at the special instance and request of Fourth Defendant, duly represented by First and Second Defendants, the parties agreed to payment of the purchase consideration by Third Defendant to Plaintiff and First and Second Defendants by way of dividend income to be derived from the subject shares.

[10.10] Fourth Defendant duly represented by First and Second Defendants further represented to Plaintiff that repayment through dividend income as referred to in paragraph 10.9 above, would be affected within the pursuing three years calculated from the effective date of sale of the shares to Third Defendant.

[10.11] The representation referred to in paragraph 10.10 above, induced Plaintiff to agree to an interest free period of three years on the outstanding balance from time to time as set out in clause 4.2 of the agreement.

[10.12] During negotiations of the Sale of Shares Agreement referred to in paragraph 10.1 above, Fourth Defendant, duly represented by First and Second Defendants, agreed to adopt and implement a dividend policy, which allows for maximum dividends to be declared during each relevant financial year following the Sale of Shares Agreement until payment of the purchase consideration, have been paid by Third Defendant in full.

[10.13] – [10.14] …

[40] The respondents submit that Claim 1 is a claim against two directors of 4D Health and not against 4D Health and that Claim 2 is excipiable in that the claim is not competent in law. They submit that the agreement relied upon by Ms. Botha, to wit that the respondent agreed to adopt and implement a dividend policy, which allows for maximum dividends to be declared during each relevant financial year following the sale of shares agreement, until payment of the purchase consideration has been paid by the third defendant in full, is *contra bonos mores*. The agreement is also void as it is contrary to the provisions of the company's Memorandum of Incorporation. The respondents, in any event, dispute the existence of the debt, and submit that Ms. Botha has to prove the agreement relied on by her in paragraph 10.12 of the amended particulars of claim before the liquidation application could be adjudicated. The respondents deny the alleged agreement.

Discussion

[41] In the affidavits filed by her in this application, Ms. Botha does not present the court with evidence from which it can be inferred that 4D Health was either a party to the Sales of Share Agreement or an agreement that was a precursor to the Sales of Share Agreement, that the said agreement was concluded at the special instance and request of 4D Health, or that any representation whatsoever was persistently made by 4D Health. Ms. Botha was a minority shareholder of 4D Health at the time that the Sales of Shares Agreement was concluded. She would have been apprised of the fact whether a company decision was taken authorising

the directors to amend the MOI. This aspect is not addressed in any of the affidavits filed by her, and its absence is relevant in light of the fact that the respondent contends that the provisions of 4D Health's MOI militate against the case pleaded in the amended particulars of claim.

[42] Ms. Botha's case, as set out under oath in the affidavits filed, is that Messrs. Lombard and Van Rooyen, in their capacity as directors, made material misrepresentations to her. She takes issue with Messrs. Lombard and Van Rooyen's conduct in their capacity as directors and claim that they conducted 4D Health's affairs in reckless and fraudulent fashion for their own financial benefit. She claims that their conduct, in their capacity as directors, is in breach of their fiduciary duties towards 4D Health, which includes, amongst others, the duty not to act illegally or *ultra vires*, the duty to disclose to 4D Health secret profits made and their duty not to compete with 4D Health.

[43] Ms. Botha states in the founding affidavit:

> 'It is further respectfully submitted that at all relevant times and in particular during the period 2014 to 2017, it was within the contemplation of Lombard and Van Rooyen that any fraudulent and/reckless and/or unauthorized conduct by any of them in their capacity as directors of the Respondent will undoubtedly result in sever financial loss to the Respondent and its minority shareholders.'

She goes on to state that she was advised that Messrs. Lombard and Van Rooyen, the directors of 4D Health, may be held liable towards 4D Health and other persons for any loss or damage suffered as a result of their fraudulent and/or reckless conduct.

[44] Ms. Botha's case, as made out in the founding papers, does not correspond with, or support Claim 2 of the amended particulars of claim. On the one hand, she

claims that Messrs. Lombard and Van Rooyen, in their capacity as directors, acted *ultra vires* to the detriment of the company; on the other hand, she claims that actions were undertaken at the company's request and insistence. Ms. Botha might have the necessary evidence to prove that Messrs. Lombard and Van Rooyen were not (only) delinquent directors acting fraudulently and recklessly but, in fact, acted at the insistence of the company, but such evidence, if it exists, is not currently before the court.

Conclusion

[45] In summary, Ms. Botha purports to rely on a claim against 4D Health as an unliquidated claim for the damages for breach of contract. I use the term 'purports' because, as indicated, this is the basis of a claim in the action instituted against 4D Health and its directors under case number 80758/2018 in pending litigation. Ms. Botha did not present any evidence in the affidavits before this court that any agreement was concluded between herself and 4D Health at 4D Health's insistence that was breached by 4D Health. The case, as it materialised in the founding affidavit, is that the two directors of 4D Health acted fraudulently to the detriment of herself and 4D Health. The belated amendment of the particulars of claim under case number 80758/2018 does not establish on a balance of probabilities, or even *prima facie*, that a contract was concluded to which 4D Health was a party, or at 4D Health's insistence, which contract was subsequently breached by 4D Health.

[46] The question as to whether an agreement was concluded between Ms. Botha and 4D Health and subsequently breached, is disputed. This matter is clearly distinguishable from *Gillis-Mason Construction Co (Pty) Ltd* (supra), where it was common cause that a breach of contract occurred that established the *vinculum iuris* or 'existing obligation' between the parties.

[47] A *bona fide* dispute of fact exists as to whether any agreement, whether at 4D Health's insistence or otherwise, was concluded that preceded the Sale of Shares Agreement entered into between Ms. Botha and Messrs. Lombard, Van Wyk, and Williams. 4D Health also contests the validity of an agreement of this nature. If it existed as a valid agreement, such an agreement would have constituted a *vinculum iuris* between Ms. Botha and 4D Health.

[48] Despite the amended particulars of claim indicating that Ms. Botha instituted legal action against 4D Health, Ms. Botha did not provide sufficient facts in the affidavits supporting this application, establishing that a *vinculum iuris* exists between herself and 4D Health. The existence of the relied-upon agreement is contested on *bona fide* grounds.

[49] Corbet JA explained in *Kalil v Decotex (Pty) Ltd and Another*[8] that where a 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 the 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.

[50] That a court has the discretion to refer a liquidation application to trial on, among others, the issue of *locus standi*, if a dispute of facts exists, was affirmed in *Kalil v Decotex.* In *casu*, the contentious issue is already a point of contention in pending litigation. It would be an unnecessary duplication of proceedings if an issue that must be determine by the trial court in pending action proceedings, be referred to oral evidence. In addition, the parties have already indicated that, if the liquidation application proceeds, another issue, namely whether Messrs. Lombard and Van Rooyen indeed made fraudulent or negligent representations regarding, amongst others, the value of Ms. Botha's shares when it was sold, need to be referred to oral evidence. It is not desirable to determine issues between parties in piecemeal

[8] 1988 (1) SA 943 (A).

fashion, even more so when the parties, or one of the parties, seems to be set on having the same issues be decided in both action and motion proceedings.

[51] Ms. Botha decided to approach the court for the winding up of the respondent company on the basis that she is a contingent creditor. 4D Health disputed her *locus standi* from the commencement of the application. Having regard to the nature of Ms. Botha's claim against 4D Health she did not make out a case on a balance of probabilities that she is to be regarded as a contingent creditor of 4D Health for the purpose of winding up 4D Health on the basis that it is just and equitable to do so. As a result, she does not have the necessary *locus* to apply for 4D Health's winding-up. In the event that a trial court does find that a valid agreement existed that was breached by 4D Health, the existing of a *vinculum iuris* will be establishend on a balance of probabilities and she will be able to approach the court again, if she was inclined to do so.

Costs

[52] The principle that costs follow success applies.

ORDER

In the result, the following order is granted:

1. **The application is dismissed with costs, including costs reserved in prior hearings.**

_____

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	Adv. EC Labuschagne SC
With:	Adv. NC Maritz
Instructed by:	Van der Merwe & Bester Inc.
For the respondent:	Adv. JA Klopper
Instructed by:	Cavanagh & Richards Attorneys
Date of the hearing:	29 February 2024
Date of judgment:	26 April 2024