

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

CASE NO: 18901/2023

In the matter between:

DANGEROUS GOODS INTERNATIONAL SA (PTY) LTD Applicant

and

JAG FREIGHT (PTY) LTD First Respondent

JASON ADRIAN GEYSMAN Second Respondent

Before: The Hon. Ms Acting Justice Mahomed

Heard: 15 May 2024

Delivered: 30 May 2024

JUDGMENT

MAHOMED, AJ:

[1] This is an application to place the first respondent into provisional liquidation on the ground that it is “*just and equitable*” to do so in terms of section 344(h) of the Companies Act, 61 of 1973 (hereafter “*the Companies Act, 1973*”), alternatively in

terms of section 81(1)(c)(ii) of the Companies Act, 71 of 2008 (hereafter “***The Companies Act, 2008***”).

- [2] The applicant seeks to wind-up the first respondent on the basis that the first respondent is an alleged unlawful competitor of the applicant.
- [3] The applicant seeks no relief from the second respondent, who was an employee of the applicant from April 2015 to 9 October 2023.
- [4] The respondents opposed the application and instituted a counter-application in which they claimed a declarator that the application is an abuse of the court’s procedure and/or is malicious and vexatious as contemplated in section 347(1A) of the Companies Act, 1973. During the hearing of the application, the respondents withdrew the counter-application and tendered the applicant’s costs in respect thereof.
- [5] The respondents persist with a claim for a punitive costs order against the applicant should the application be dismissed.

THE ISSUES RAISED IN THE APPLICATION

- [6] The issues raised in the application are as follows:
 - [6.1] Is unlawful competition a legal ground for a provisional winding-up order?
 - [6.2] Does the applicant have *locus standi* to bring the application?
 - [6.3] Has the applicant satisfied the requirements for a provisional winding-up order?
- [7] The question whether the applicant had complied with the procedural requirements for a winding-up order was also an issue, but was resolved at the commencement of the hearing when the respondents indicated that they had no objection to the late filing of the Master’s report.

RELEVANT PROVISIONS OF THE COMPANIES ACT, 1973 AND THE COMPANIES ACT, 2008:

[8] The following statutory provisions are relevant to the application:

[8.1] **The Companies Act, 1973:**

“344. *Circumstances in which company may be wound up by Court* A company may be wound up by the Court if-

...

(h) *it appears to the Court that it is just and equitable that the company should be wound up.”*

[8.2] **The Companies Act, 2008:**

“20. *Validity of company actions:*

...

(9) *If, on application by an interested party or in any proceedings in which a company is involved, a court finds that the incorporation of a company, any use of the company, or any act by which or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –*

(a) *declare that the company is deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declarator; and*

(b) *make any further order that the court considers appropriate to give effect to a declaration contemplated in paragraph (a).*

...

81. *Winding up of a solvent company by court order:*

(1) *A court may order a solvent company to be wound up if—*

...

(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—*

...

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

[8.3] **Schedule 5 of the Companies Act, 2008**, which states the following:

- “9. Continued application of previous Act to winding-up and liquidations:
- (1) *Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of the Act continues to apply with respect to the winding-up and liquidations of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).*
 - (2) *Despite sub-item (1), sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the Provision of Part G of Chapter 2.”*

MATERIAL FACTS:

- [9] The applicant conducts business as a global logistics company specialising in the transportation of hazardous goods worldwide and focusing on nine classes of dangerous goods.
- [10] The applicant proved in evidence a copy of the first respondent’s website page, wherein the first respondent advertises itself as a “*Specialist in the Logistics Industry*” which includes:
- “1. *National Road Freight;*
 2. *Air Freight;*
 3. *Sea Freight; and*
 4. *Packing dangerous goods.”*
- [11] Despite this webpage, in the first respondent’s answering affidavit (deposed to by the second respondent), the first respondent contends that it “*operates only as a broker, also called a freight forwarder, does not handle or carry out the shipment itself, and with its core focus on general cargo*”.
- [12] Somewhat confusingly, the first respondent has admitted that the second respondent’s telephone number appeared on its aforesaid website page, but has baldly denied the applicant’s general allegations relating to the first respondent’s website page and the purported business of the first respondent as described therein as aforesaid.

- [13] The respondents have provided no positive proof that the first respondent's business is that of a broker/freight forwarder and, save for the aforesaid bald denial which contradicts its website page, have not positively refuted the existence of and the contents of the first respondent's aforesaid website page.
- [14] The applicant alleges that the second respondent utilised the first respondent as a vehicle to compete unlawfully with the applicant, and the respondents have responded that the first respondent does not operate in the same fields of "*service rendering*" as the applicant but, again, have provided no positive proof of this.
- [15] Based on the foregoing, I reject the respondents' bald denials and unsupported allegation that it is only a broker/freight forwarder not in direct competition with the applicant to the extent that these conflict with the allegations of the applicant, and accept the applicant's allegations to the contrary that the first respondent is a logistics company as described on its website page, and is a direct competitor of the applicant.
- [16] The "*Disclosure Certificate: Companies and Close Corporations*" from the Companies and Intellectual Property Commission ("*CIPC*") dated 11 October 2023 as well as the first respondent's financial statement for the year ending February 2022 both reflect that the second respondent is the sole director of the first respondent. There is also no mention of a board of directors or other shareholders.
- [17] The respondents have alleged that the first respondent is a "*joint venture*" with one Lizette Andrew Miller ("*Ms Miller*") but, again, have provided no positive proof of this to discredit the aforesaid CIPC official documents.
- [18] Based on the foregoing, I accept that the second respondent is the sole director and sole shareholder of the first respondent.
- [19] The following are common cause facts regarding the relationship between the applicant and the second respondent:

[19.1] Prior to the applicant suspending him on 9 October 2023, the second respondent had been in the employ of the applicant since 7 April 2015 and, since 16 May 2019, as the Branch Manager of its Cape Town operations.

[19.2] The second respondent's contract of employment with the applicant contains the following clauses:

[19.2.1] **Clause 4.1:** As an employee of the company the employee shall:

- (1) **Clause 4.1.3:** abide by *bona fide* work practices in his relationship with the company and/or its clients;
- (2) **Clause 4.1.4:** devote the whole of his time, attention and abilities during business hours to the discharge of his duties under this agreement;
- (3) **Clause 4.1.5:** use his best endeavours properly to conduct, improve, extend, develop, promote, protect and preserve the business interests, reputation and goodwill of the company and carry out his duties in a proper, loyal and efficient manner.

[19.2.2] **Clause 4.2:** The applicant shall not be entitled to be directly or indirectly employed by any other person or business concern whatsoever without the knowledge and prior written consent of the company.

[19.2.3] **Clause 13. Disclosure:**

Clause 13.1: The employee is required to disclose and declare all outside or other interests which are or may be in conflict with the interest of the company. The company may require the employee to refrain from the activities, which request he is obliged to observe.

[19.3] As an employee of the applicant, the second respondent bore a fiduciary duty towards the applicant, as his employer.

[19.4] The second respondent breached the terms of his employment contract, in that:

[19.4.1] He never disclosed his interests in the first respondent to the applicant, particularly his role as the sole director of the first respondent.

[19.4.2] The applicant never approved the second respondent's use of the first respondent's services as a broker or intermediary on behalf of the applicant

[20] It is trite that when an employee joins a company, the employee has an obligation to the employer to behave in a trustworthy manner and, specifically, may not:

[20.1] Put himself in a position where his interests conflict with those of the employer;

[20.2] Make a secret profit at the expense of the employer.

[20.3] Misuse the employer's trade secrets and confidential information; and

[20.4] Tell lies to the employer.

[21] According to the applicant:

[21.1] On or about 25 September 2023, one Mr Jared Barnes, informed the applicant that the second respondent had been conducting himself dishonestly and in breach of his employment contract and common law duties to the applicant by promoting the interests of the first respondent above those of the applicant.

[21.2] The applicant then launched an investigation into the first and second respondents (hereafter "***the investigation***") and discovered that for some time the second respondent, as an employee of the applicant, had been enabling the first respondent to unlawfully compete with the applicant in the following two ways (hereafter collectively referred to as "***the alleged unlawful competition***"):

[21.2.1] Firstly, the second respondent had unlawfully referred queries which the applicant had received from its customers (and from potential customers) to the first respondent, which enabled the first respondent to potentially service those customers and potential customers in the place and stead of the applicant, to whom those queries had initially been directed; and had thereby effectively and unlawfully abused his position as an employee of the applicant to misappropriate the applicant's corporate opportunities. For ease of reference, this first form of alleged unlawful competition on the part of the first and second respondents is referred to hereafter as "***the unlawful appropriation of the applicant's business opportunities***".

[21.2.2] Secondly, the second respondent had unlawfully interposed the first respondent as a broker or intermediary between the applicant and its service providers without the knowledge or authority of the applicant, which resulted in the applicant making a series of unnecessary payments of secret commissions to the first respondent which, for the period from July 2019 to date, amounted to R1 049 662.60 in total. For ease of reference, this second form of alleged unlawful competition on the part of the first and second respondents is referred to hereafter as "***the unlawful payment of secret commissions to the first respondent***".

[22] On or about 9 October 2023, and pursuant to the investigation the applicant suspended the second respondent pending an investigation into his conduct and also suspended the following two further employees whom, the applicant suspected, had either acted unlawfully in concert with the second respondent or had been negligent in the discharge of their duties to the applicant:

[22.1] Reva Symons, the applicant's business development executive; and

- [22.2] Jasper Petrus Cornelius van der Westhuizen, a director of the applicant and also its country manager.
- [23] During argument the respondents' counsel conceded that the second respondent owed the applicant a fiduciary duty and intimated that the second respondent may have breached these fiduciary duties.
- [24] As proof of the aforesaid alleged unlawful competition, the applicant attached to the founding affidavit certain emails transmitted during the period from 2019 to February 2022, which it had unearthed during the investigation (and which it buttressed with invoices in the replying affidavit).
- [25] These e-mails contained *inter alia* the following examples of what the applicant described as the unlawful appropriation of the applicant's business opportunities by the respondents (which examples were not exhaustive):
- [25.1] On 17 April 2019, Sea Freight Import Controller, an existing client of the applicant, addressed an e-mail to one Mr Alric Jacobs at the applicant requesting an estimate for a shipment of stainless-steel cleaner to be shipped from Durban to Dar Es Salaam. On 10 May 2019, the second respondent forwarded that request for an estimate to the first respondent.
- [25.2] On 2 March 2020, the applicant received a request for a quote from an existing client, Globe Flight and on 6 March 2020, the second respondent forwarded that request for a quote to the first respondent.
- [25.3] On 9 March 2020, a prospective client of the applicant, Lumière Technologies, addressed a request for a quote to the second respondent at the applicant for services to be provided by the applicant. On the same day, the second respondent forwarded that request for a quote to Ms Miller at the first respondent.

- [25.4] On 18 March 2020, another prospective client of the applicant, Cat Walk Cosmetics, requested a quote from the applicant for the transport of a palette of aerosols and oil to Medsure Pharmaceuticals in Zimbabwe. On the same day, the second respondent forwarded that request for a quote to the first respondent.
- [25.5] On 17 April 2020, an existing client of the applicant for whom the applicant had historically rendered services, Skyline Global Logistics, requested a quote from the applicant to move a container of firearms and ammunition from Cape Town Port to 57 Bamboesvlei, Ottery. On the same day, the second respondent replied to that request for a quotation by stating “*Please see below from jay@[...] [the email address of Ms Miller’s address at the first respondent] she is cc you can take it from there*”, and also copied such reply to sales@[...].
- [25.6] On 17 July 2020, the applicant received a request from an existing client, ACT Logistics (Pty) Ltd for a quote to transport 30 x 1000 litres flowbins of hand sanitiser from Gingindlovu to Postmasburg Municipality. On the same day, the second respondent forwarded this request for a quote to Ms Miller at the first respondent.
- [25.7] On 3 November 2021, the applicant received an instruction from AME Administrative Support to collect a consignment of promotional items and hand sanitiser from Africanos Country Estate and to deliver same to Corteva Agriscience. On the same day, the second respondent forwarded this instruction to the first respondent to arrange collection.
- [26] These e-mails also contained what the applicant described as an example of the second respondent unlawfully interposing the first respondent as a broker or intermediary between the applicant and its service providers without the knowledge or authority of the applicant, which resulted in the unlawful payment of secret commissions to the first respondent. This was an e-mail dated 23 February 2022

which the second respondent sent to various employees of the applicant in which he instructed such employees to address requests for quotations to Althea Arendse and Ronelle Walker, both representatives of Blue Line Express. In this e-mail, the second respondent also advised the applicant's employees that: "*DGI [the applicant] do [sic] not have an account, this account belongs to Jag Freight, as always cc info@[...] when booking collections.*"

[27] During the investigation, the applicant also found documents of the second respondent at its premises, which included invoices which the first respondent had issued to Titan Helicopters (Pty) Ltd. The applicant prepared a schedule of these invoices, which reflect that the first respondent had billed Titan Helicopters a total amount of R32 391 460.62. The applicant made the following further allegations regarding the Titan Helicopters invoices captured on its aforesaid schedule (in its replying affidavit):

[27.1] These Titan Helicopters invoices related to dangerous goods as well as the transport of spares required for the repairs/maintenance of aircraft, all of which form part of the applicant's business, being business which the applicant had allegedly lost as a result of the alleged unlawful competition of the respondents.

[27.2] The invoices which the first respondent had issued (by the second respondent as its sole director) were also fraudulent in that the second respondent had used the address of the applicant on these invoices as well as the applicant's stationery.

[28] The respondents' responses to the investigation and the findings thereof included the following:

[28.1] The queries which the applicant had received from its customers (and from potential customers) and which the second respondent forwarded to Ms Miller of the first respondent were forwarded so that Ms Miller could provide him

with assistance. In that regard, I note that the respondents failed to explain why they failed to attach any positive proof of any alleged assistance provided by Ms Miller.

[28.2] The second respondent alleged that he could not recall certain of the shipments and stated that he was therefore unable to confirm or elaborate.

[28.3] The second respondent denied that a particular client, who wanted to have solar panels moved, was a prospective client of the applicant for two reasons; firstly, that these were not “*dangerous goods*” and, secondly, as no client would pay a 60% mark-up fee; and stated that he had therefore diverted that work to the first respondent.

[28.4] The first respondent had quoted the applicant on certain shipments, allegedly in order to save the applicant and its clients’ money, thereby preventing a souring of the relationship between the applicant and its client.

[28.5] Some of the requests for quotes were received during the Covid-19 period when the applicant had minimal resources, so he had diverted these to the first respondent.

[28.6] The first respondent stepped in where the applicant’s agents were not readily available and where shipments had to be sent off due to extreme urgency.

[28.7] The second respondent admitted that he instructed the employees of the applicant, a Ms Leona Reddy, Mr Mahan Govender, Mr Gerrit Steyn and Mr Mothusi Mokae to use the first respondent’s account because they negotiated below/market-related rates.

[29] The applicant alleged that the second respondent breached the fiduciary duties which he owed the applicant while employed by it (which fiduciary duties were admitted by the respondents) by utilising the first respondent to unlawfully compete with the applicant in the two ways mentioned in paragraph 21.2 above.

[30] Regarding the second respondent's unlawful interposition of the first respondent as a broker or intermediary between the applicant and its service providers without the knowledge or authority of the applicant, the applicant elaborated that this had resulted in the applicant making a series of unnecessary payments of secret commissions to the first respondent totalling R1 049 662.00 during the period from July 2019 to 9 October 2023. The applicant alleges that as a result, the first respondent is indebted to the applicant in at least this amount.

[31] The applicant alleges further that it is apparent from the foregoing that:

[31.1] The business of the first respondent is unlawful, and the first respondent's only purpose and *raison d'etre* is to compete unlawfully with the applicant, and it serves no other purpose.

[31.2] The second respondent utilises the first respondent to compete unlawfully with the applicant.

[31.3] The business of the first respondent is constituted solely by the business of the applicant being unlawfully diverted to it by the second respondent.

[31.4] The applicant is a creditor of the first respondent on the basis that whatever profits the first respondent has made belong to the applicant and the first respondent is obliged in law to disgorge these profits and pay them over to the applicant.

[31.5] The first respondent is also obliged to repay the applicant the aforesaid amount of R1 049 662.60 as money which it was fraudulently induced to pay the first respondent as secret commissions.

[31.6] Once a liquidator is appointed to wind-up the affairs of the first respondent, the applicant will be able to establish the amount of the losses it has suffered and pursue the appropriate action against the second respondent and/or any

other entities and/or individuals who acted unlawfully with the second respondent.

- [32] The respondents admitted that the second respondent from time to time caused the applicant to make use of the services of the first respondent but alleged that was limited and for the benefit of the applicant, and that as a result the applicant did not suffer any loss but in fact saved money.
- [33] The respondents neither admitted nor denied that they were a competitor of the applicant but denied that the first respondent's business was ever fraudulently conducted. In addition, and based on the first respondent's financial statements for the year ending February 2022, they alleged that only one-tenth of the first respondent's business was generated from business done with the applicant.
- [34] When the respondents' counsel was pressed as to why the first respondent was involved at all in offering any services to the applicant, his response was that the first respondent saved the applicant money on courier services.

IS UNLAWFUL COMPETITION A LEGAL GROUND FOR A PROVISIONAL WINDING-UP ORDER?

- [35] The legal basis which the applicant relies upon for the provisional winding-up application is the alleged unlawful competition by the first respondent with the applicant, instigated by the second respondent¹.
- [36] The applicant seeks to wind up the first respondent on the basis that the first respondent was formed with the specific fraudulent intention of unlawfully competing with the applicant and that it is therefore just and equitable to wind-up the first respondent.

¹ See the following pages and paragraphs in the record, where this is common cause: p. 7 paras 9 & 11; p. 13 para 25.1 & 26; p. 145 para 23.

[37] The question which arises is whether the applicant is entitled, in law, to a provisional winding-up order against the first respondent solely on the basis that the first respondent is unlawfully competing with it?

[38] In this regard, the respondents submitted that:

[38.1] It is puzzling what the applicant's motive was for applying to wind-up the first respondent.

[38.2] The process for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt²; and

[38.3] As a general proposition, interdict proceedings would have been more appropriate in these circumstances, for which they relied on **Atlas Organic Fertilizers v Pikkewyn Ghwano**³.

[39] The court, in **Atlas Organic Fertilizers** (*supra*) stated that:

"...our law has ... been firmly set on the path of recognition of a general action for unlawful competition based on the lex Aquilia." [emphasis added]

[40] It is settled law that unlawful competition gives rise to two causes of action, namely a delictual claim for damages and/or a claim for interdictory relief; and the applicant is obviously at large to pursue those remedies against the respondents if so minded. In this regard, the *locus classicus* on the remedies available in cases of unlawful competition is **Dun and Bradstreet (Pty) Ltd v S.A Merchants Combined Credit Bureau**⁴, where the court stated the following:

*"Reverting to the position in our law and **without attempting to define generally the limits of lawful competition**, it seems to me that where, as in this case, a trader has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis (i.e. upon the basis that the information should not be disclosed to others), a rival trader who is not a client but in some manner obtains this information and, well knowing its nature and the basis upon which it was distributed, uses it in his competing business and thereby injuring the first mentioned trader in his business, commits a wrongful act vis-à-vis the latter **and will be liable to him in***

² Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (AD) at 98

³ 1981 (2) SA 173 (TPD)

⁴ 1968 (1) SA 209 (C) at 221C-E

damages. In an appropriate case, the plaintiff trader would also be entitled to claim an interdict against the continuation of such wrongful conduct.” [emphasis added]

[41] To the best of my knowledge, South African law has, to date, not recognised unlawful competition as a ground for the granting of a winding-up order on the just and equitable ground. I am of the view that a proven debt owed to an applicant arising from the delict of unlawful competition might conceivably form a basis for such a winding-up order provided, of course, that the just and equitable ground is satisfied and that all other established requirements for a winding-up application are also satisfied.

[42] I now turn to consider those requirements.

DOES THE APPLICANT HAVE LOCUS STANDI TO BRING THE APPLICATION?

[43] I now consider whether, on the facts of the matter, the applicant has the necessary *locus standi* to bring the application.

[44] The legal principles applicable to *locus standi* are all well established and are set out below:

[44.1] In **Gross & Others v Pentz**⁵, Harms JA said that:

“The question of locus standi is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as a litigating party.”

[44.2] The SCA in **Public Protector v Mail & Guardian**⁶, held that:

“The common law has no fixed rule that determines whether a party has standing to bring litigation, and the courts have always taken a flexible and practical approach. The right to bring litigation before the courts is restricted for various reasons: the courts are not there to pronounce upon academic issues; they are not there to pronounce upon matters that have no significant consequences for the initiating party; they are not there for the benefit of busybodies who wish to harass others; and so on. Thus the courts have always required that an initiating litigant should have an interest in the matter. The interest that is required has been expressed in various forms that are collected in Cabinet of the Transitional Government for the Territory of South West Africa v Eins. It has been expressed as ‘an interest in the subject matter of the dispute [that] must be a direct interest’, and as ‘an interest that is not too remote’, and as ‘some direct interest in the subject-matter of the litigation or some grievance

⁵ 1996 (4) SA 617 (A) at 632C

⁶ 2011 (4) SA 420 (SCA) at para [29]

special to himself, and as 'a direct interest in the matter and not merely the interest which all citizens have'. ..."

[44.3] In **Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another**⁷, the SCA held that:

"Locus standi in iudicio is an access mechanism controlled by the court itself. Generally, the requirements for locus standi are these: the applicant must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant's interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant." [footnotes omitted].

[45] It is common cause that the applicant is neither a director nor a shareholder of the first respondent, and that to qualify as having the necessary *locus standi* to bring the application the applicant must establish that it is a "creditor" of the first respondent.

[46] The applicant has accepted this both in the papers and in argument and has alleged (in its founding and replying affidavits) and has contended (in its heads of argument) that the applicant is a contingent or prospective creditor and that it therefore has the necessary *locus standi* to wind up the first respondent. The authority it relies upon for the terms "contingent or prospective creditor" is **Rogal Holdings (Pty) Ltd v Victor Turnkey Projects (Pty) Ltd**⁸.

[47] I did not understand the respondents to argue that section 81(1)(c)(ii) of the Companies Act, 2008 should be read expansively, so as to exclude contingent or prospective creditors, even though this section, unlike section 346(1)(b) of the Companies Act, 1973, does not expressly refer to prospective and contingent creditors.

[48] In **Gillis-Mason Construction Company v Overvaal Crushes**⁹, Trengove, J stated the following regarding contingent or prospective creditors:

⁷ (483/22) [2023] ZASCA 107 (27 June 2023) at para [6]

⁸ 2022 JDR 1031 (GP) at paras [12] to [20]

⁹ 1971 (1) SA 524 (TPD) at 528C-C

*“It seems to me, in light of these authorities, that a contingent or prospective creditor may be defined as one who by reason of **some existing vinculum iuris** has a claim against a company which may ripen into an enforceable debt on the happening of some future event or on some future date.”*

[49] In the absence of a direct debtor-creditor relationship between the applicant and the first respondent arising from a contract or otherwise, the question arises whether there is a sufficient existing **vinculum iuris** (legal tie that binds one person to another, creating an obligation or legal bond) between the applicant and the first respondent to clothe the applicant with the necessary *locus standi* to wind up the first respondent.

[50] In this regard, the applicant relies on the following two grounds to establish the necessary **vinculum iuris** between itself and the first respondent:

[50.1] The law of attribution; or

[50.2] Vicarious liability of the first respondent for the wrongs of the second respondent.

The law of attribution:

[51] In summary, the applicant submits that the aforesaid alleged unlawful competition of the second respondent, which caused it to suffer loss, can be attributed to the first respondent for the following reasons:

[51.1] The second respondent’s fraudulent and unlawful conduct, in breach of his contractual and common law fiduciary duties to the applicant, and in favour of the first respondent, included the following:

51.1.1 He fraudulently interposed the first respondent between the applicant and Blue Line Express (Pty) Ltd, one of the applicant's courier service providers.

51.1.2 He fraudulently forwarded details of the applicant's clients and prospective clients to the first respondent and thereby stole, and

conspired with others to steal, corporate opportunities belonging to the applicant.

51.1.3 He fraudulently used the applicant's premises, address and stationery in its unlawful transactions with Titan Helicopters.

[51.2] All revenues and profits which the first respondent earned as a consequence of the aforesaid unlawful conduct of the second respondent were earned as a direct result of such unlawful conduct as the second respondent was obliged, by virtue of his employment as the applicant's branch manager, to retain and/or procure such revenue and profits for the benefit of his employer, the applicant.

[51.3] The second respondent is personally liable to the applicant for any loss he caused the applicant as a result of such unlawful conduct, and the first respondent is also liable to the applicant for such loss on the basis that the unlawful conduct of the second respondent can be attributed to the first respondent.

[52] In that regard, the applicant submitted that when the second respondent unlawfully diverted the applicant's corporate opportunities to the first respondent and caused the applicant to pay the first respondent so-called secret commissions, he did so as an employee of the applicant (its branch manager) and while he was also the sole director and sole shareholder of the first respondent and, as such, the controlling will and mind, or alter ego, of the first respondent. On this basis, the applicant alleges that the wrongful conduct of the second respondent can be attributed to the first respondent.

[53] In my view, the applicant has established the following on the probabilities, and I find accordingly:

[53.1] The first and second respondents competed unlawfully with the applicant in the two ways set out in paragraph 21.2 above.

[53.2] The unlawful conduct on the part of the second respondent, in diverting corporate opportunities of the applicant to the first respondent and in causing it to allegedly pay so-called secret commissions to the first respondent, in direct competition with his employer, can be attributed to the first respondent.

[53.3] In that regard, there is a direct *vinculum iuris* between the applicant and the second respondent as the second respondent was an employee of the applicant when he conducted himself in this way.

[53.4] Insofar as the second respondent was the sole director and sole shareholder of the first respondent when he conducted himself in this way, I accept that this wrongful conduct of the second respondent can be attributed to the first respondent and that it was clearly his alter ego.

[54] In amplification of my aforesaid findings, I state the following:

[54.1] I am of the view that the following principles enunciated by the SCA in **Consolidated News Agency (Pty) Ltd (in liquidation) v Mobile Telephone Network (Pty) Ltd**¹⁰ are applicable to this matter, in which the second respondent held a senior position at the applicant, namely branch manager of the applicant's Cape Town operations, and was also simultaneously the sole director, sole shareholder and controlling mind of the first respondent:

“[31] *The authorities relied upon by the parties are not in conflict. Each must of course be read in context. In each case the court strives to determine whether it is the company which has spoken or acted to a particular effect through the voice or conduct of a human agency and is thereby to be held to the consequences, or whether that agency was engaged in an activity which cannot fairly be attributed to the company. Each case raises different facts and the eventual conclusion must depend upon inference and probability in the absence of express evidence of adoption of the statements or conduct as the company's own. Respondents' counsel referred us to the following dictum from Re Bank of Credit and Commerce International SA (in liquidation) (No 15): Morris v Bank of India [2005] 2 BCLC 328 (CA) as to the kind of factors that a court would look at in determining whether a particular natural person is the directing mind of the company for a particular act or state of mind. The rules of attribution would-*

typically depend on factors such as these: the agent's importance as seniority in the hierarchy of the company: the more senior he is, the easier it is to attribute. His

¹⁰ [2010] 2 All SA 9 (SCA) at para [31]

significance and freedom to act in the context of a particular transaction: the more it is “his” transaction, the more he is effectively left to get on with it by the board, the easier it is to attribute. The degree to which the board is informed, and the extent to which it was, in the broadest sense, put upon enquiry: the greater the grounds for suspicion or even concern or questioning, the easier it is to attribute, if questions were not raised or answers were too readily accepted by the board.”

[54.2] I also consider the following dicta of the (then) Appellate Division in **Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd**¹¹ to be directly in point in attributing the intention of the second respondent to the first respondent:

“A company is an artificial person with no body to kick and no soul to damn and the only way of ascertaining its intention is to find out what its directors acting as such intended. Their formal acts in the form of resolutions constitute evidence as to the intentions of the company of which they are directors...where a company has only one director, who is also the managing director and the sole beneficial owner of all its shares, I see no reason in principle why it should be incompetent for him to give evidence as to what was the intention of the company at any given time”.

[54.3] In arriving at my aforesaid findings, I have drawn the following inferences from the facts:

54.3.1 The second respondent is the sole director of the first respondent, which implies that there was no board of directors to play any role in the decision-making of the first respondent, which in turn implies that the actions of the second respondent can be attributed to the first respondent.

54.3.2 The second respondent is the sole shareholder of the first respondent and therefore, presumably, the sole beneficiary of the proceeds of any dividends or other benefits earned by the first respondent consequent upon the unlawful competition. In that regard, I have not accepted that the first respondent is a joint venture with Ms Miller as this allegation is contrary to its CIPC documents and has not been established by positive evidence.

¹¹ 1956 (1) SA 602 (AD) at 606G-H

54.3.3 As such, the first respondent was aware of the second respondent's unlawful conduct and participated therein with unlawful intent; and its employees (Ms Miller and the like) acted in accordance with his instructions.

[54.4] At least eight requests for quotations were directed to the applicant by its customers or potential customers, constituting business opportunities of the applicant, which were unlawfully diverted by the second respondent to the first respondent and appropriated by the first respondent. This caused or had the potential to cause the applicant to suffer loss or harm to its business.

[54.5] The respondents at no stage directly denied that the first respondent is the alter ego of the second respondent. They alleged that if the applicant was of the opinion that the first respondent was the alter ego of the second respondent, the applicant should have made use of section 20(9) of the Companies Act, 2008.

[54.6] The applicant's response was that section 20(9) of the Companies Act, 2008 will result in a declaration that the first respondent is deemed not to be a separate juristic person, and that is not the applicant's case.

[54.7] The respondents did not address this issue in argument.

[54.8] In applying the principles laid out in **Consolidated News Agency** (*supra*), I find that the only reasonable inferences to be drawn are the following:

53.8.1 The first respondent was formed as a direct and unlawful competitor of the applicant.

53.8.2 The first respondent is, in fact, the alter ego of the second respondent, an allegation that was not pertinently denied by the respondents.

53.8.3 The second respondent is responsible for directing the will and mind of the first respondent in respect of the unlawful conduct perpetrated against the applicant; and

53.8.4 The actions of the second respondent can therefore be directly attributed to the first respondent.

[55] Based on the foregoing findings, I am satisfied that the wrongful conduct of the second respondent can be attributed to the first respondent and that the applicant has, accordingly, established a *vinculum iuris* or legal tie to the first respondent. I therefore find that the applicant has *locus standi* to bring the application.

[56] Given this finding, it is unnecessary to address the second legal ground, being that of vicarious liability.

HAS THE APPLICANT SATISFIED THE REQUIREMENTS FOR A PROVISIONAL WINDING-UP ORDER?

The so-called “Badenhorst Rule”

[57] In **Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd**¹² the court stated the following regarding the so-called ‘Badenhorst Rule’:¹³

“[8] Even if the applicant establishes its claim on a prima facie basis, a court will ordinarily refuse an application if the claim is bona fide disputed on reasonable grounds. The rule that winding up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of the broader principle that the court’s processes should not be abused. In the context of liquidation proceedings the rule is generally known as the Badenhorst Rule, from the leading eponymous case on the subject, Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H-348C, and is generally now treated as an independent rule, not dependant on proof of actual abuse of the process... a distinction must thus be drawn between the factual disputes relating to the respondents liability to the applicant and the disputes to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant’s claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim is bona fide disputed on reasonable grounds. A court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicants claim has been made out (Payslip Investment Holdings CC v Y2K Tec Ltd 2001 (4) SA 781 (C) at 783G-I). However, where the applicant at the provisional

¹² 2015 (4) SA 449 (WCC)

¹³ At para [8]

stage shows that the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds_ (Hulser-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C) at 218D-219C.” [emphasis added]

[58] In brief summary, the Badenhorst Rule states that even if the applicant establishes its claim on a *prima facie* basis, a court will ordinarily refuse an application for the winding-up of a company if the company *bona fide* disputes the existence of the alleged debt on which the applicant’s claim is based on reasonable grounds.

The test at the provisional stage of a liquidation application

[59] The test for provisional liquidation applications is set out in **Orestisolve** (*supra*)¹⁴, where Rogers J (as he then was) made reference to the case of **Kalil v Decotex** (*supra*), and stated that, in an opposed application for provisional liquidation, the applicant must establish an entitlement to an order (for the provisional liquidation of the first respondent) on a *prima facie* basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour and that this would include the existence of the applicant’s claim where such is disputed.

[60] For this purpose, the applicant alleges that the first respondent owes it the following two alleged debts:

[60.1] Firstly, and **arising from the unlawful appropriation of the applicant’s business opportunities**, it alleges that it has a claim against the first respondent for damages which it has allegedly suffered as a result of the unlawful theft/appropriation of such opportunities, being the revenue which the first respondent earned from such business opportunities and which the applicant ought to have earned. During argument, counsel for the applicant clarified that this constitutes a claim for damages suffered as a result of the diversion of the applicant’s business to the first respondent and the potential lost corporate opportunities. It is apparent from **Atlas Organic Fertilizers** (*supra*) that this would be a claim for delictual damages based on the delict of unfair competition.

¹⁴ 2015 (4) SA 449 (WCC) at para [7]

[60.2] Secondly, and **arising from the unlawful payment of secret commissions to the first respondent**, it alleges that it has a claim against the first respondent for the repayment of such secret commissions in the aforesaid amount of R1 049 662.60. During argument, counsel for the applicant clarified that this constitutes a claim for the disgorgement of so-called “*secret profits*”.

[61] It bears mentioning that in the applicant’s affidavits and heads of argument, the concepts of damages and disgorgement of profits were conflated. The above exposition of the two alleged debts which the applicant relies upon is the exposition thereof as clarified by the applicant’s counsel during argument.

[62] The respondents deny that either of these claims is cognisable as a debt or claim for the purposes of granting a provisional winding-up order against the first respondent.

The claim against the first respondent to disgorge so-called “secret profits”

[63] As set out above, it is alleged that the first respondent interposed itself between the applicant and its service providers and allegedly earned secret profits from the applicant in the aforesaid amount of R1 049 662.60; and the applicant contends that it enjoys a claim against the first respondent in this amount for the disgorgement of secret profits.

[64] As stated, the respondents deny that this claim is cognisable as a debt or claim for the purposes of granting a provisional winding-up order against the first respondent. They contend that any claim which the applicant may or may not have for disgorgement of secret profits, lies against the second respondent in his personal capacity and not against the first respondent

[65] In this regard, it is clear on the facts that the second respondent, in his capacity as the applicant’s branch manager for the applicant’s Cape Town operations, is the person who interposed his company, the first respondent, between the applicant and its service providers for the apparent purpose of making a secret profit at the expense of the applicant.

[66] Although the respondents admit the allegation of interposing, one of their grounds of dispute is that such interposing saved the applicant and its clients' money on courier costs, and they have accordingly denied that any secret profit was made. Furthermore, the respondents submitted, if the first respondent earned these alleged secret profits, that any claim which the applicant enjoys for the disgorgement of such profits lies against the second respondent in his personal capacity and not against the first respondent.

[67] As authority for this contention, the respondents referred to the judgment of Bozalek, J in this division in the case of **Sime Darby Hudson and Knight (Pty) Ltd v Lerena**¹⁵ which dealt with the issue of disgorgement of profits and where Bozalek, J set out the principles applicable to claims for disgorgement of profits as follows:

“[95] *In order to succeed in its claim for a disgorgement of profits the plaintiff must establish that the defendant owed it a fiduciary obligation; that in breach of that obligation the defendant placed himself in a position where his duty and his personal interest were in conflict and, finally that the defendant made a secret profit out of corporate opportunities belonging to the plaintiff.*”

[68] Applying these principles to the facts of this case, it is common cause that the second respondent owed the applicant a fiduciary duty in his capacity as its employee; that he breached such duty; and, that he placed himself in a position where his duty and personal interests conflicted. It follows that he is the person who would be liable to the applicant in a claim to disgorge the alleged secret profits.

[69] The applicant, therefore, cannot pursue a claim to disgorge these alleged secret profits against the first respondent as it is clear on the facts that the first respondent did not owe the applicant any fiduciary duty.

[70] The authorities are clear on this point, the applicant's claim for disgorgement of profits lies against the second respondent personally.

¹⁵ [2018] 4 All SA 446 (WCC) at para [95]

[71] I, therefore, find that the dispute raised by the respondents in relation to a claim against the first respondent for the disgorgement of secret profits is both *bona fide* and based on reasonable grounds.

The claim against the first respondent for damages

[72] As set out above, the applicant's second claim arises from the second respondent having unlawfully referred queries which the applicant had received from its customers (and from potential customers) to the first respondent, which enabled the first respondent to potentially service those customers and potential customers in the place and stead of the applicant, to whom those queries had initially been directed; and had thereby effectively and unlawfully abused his position as an employee of the applicant to misappropriate the applicant's corporate opportunities.

[73] It is a claim for such delictual damages which the applicant may have suffered, as a consequence of the unlawful appropriation by the first and second respondents of its business opportunities, that forms the basis of the applicant's second claim.

[74] As stated, the respondents deny that this claim is cognisable as a debt or claim for the purposes of granting a provisional winding-up order against the first respondent. They contend that the applicant's claim for damages against the first respondent is an illiquid claim for damages based in delict and that the applicant cannot rely on such an unliquidated claim for the purposes of winding-up the first respondent.

[75] In that regard, the respondents have pointed out that in the founding affidavit the applicant simply alleges that once a liquidator is appointed to wind up the affairs of the first respondent, the applicant will be in a position to establish the amount of the losses it has suffered and to pursue appropriate action. They contend that this is insufficient for the purposes of establishing a debt and an entitlement to the order sought.

[76] To counter this argument, the applicant's counsel referred me to the following further passage in **Gillis-Mason** (*supra*):

*“Similarly, a person who has a valid claim for damages for breach of contract against a company also has a claim which arises from an existing **vinculum iuris** if this claim is prospective or contingent in the sense that the exact extent of the loss still has to be determined. The mere fact that the claim may still be unliquidated at the time of the filing of a winding up petition, should not in itself disqualify such an applicant from petitioning for winding up. Thus, in the instant case, if it is clear that the applicant has suffered damages as a result of the respondent’s breach of contract, the objection to the applicant’s locus standi must fail. It becomes necessary therefore, to consider whether the applicant has established that it has suffered damages as a result of the respondents admitted breach of contract.”¹⁶*

[77] The applicant’s counsel also referred to **Irvin and Johnson Ltd v Basson**¹⁷, where Trengove J held as follows:

*“However the evidence in the instant case establishes prima facie that the applicant has a claim of at least R103 925.49 against the respondent. This is an amount which the applicant can claim immediately and its right to do so is not conditional in the sense in which that expression is ordinarily understood. 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 it is accepted, establishes a liability of not less than the amount to which I have referred.** Then, there is also the evidence that **the respondent confessed or admitted to having misappropriated a fixed sum of R16 000.00.** On that basis, and without expressing any views as to the conclusion to which a court might come to when all the affidavits are eventually considered, I am satisfied that, for the present purposes, the applicant has established that it has locus standi”. (emphasis added)*

[78] In response, the respondents’ counsel pointed out, however, that the aforesaid passage from **Irvin & Johnson** (*supra*) is distinguishable from the present case as the court there was addressing the issue of damages that had become sufficiently liquid by the time of the insolvency proceedings to constitute a debt. In that regard, I was referred to **Kleynhans v Van der Westhuisen**¹⁸, where one of the questions for consideration was whether a claim for damages, based on theft of monies could be regarded as a liquidated claim and Wessels JA stated the following:

*“Ek behandel vervolgens ’n alternatiewe betoog wat namens die appellant ter oorweging gegee is nl., dat volgens gevestigde praktyk sekere kategorie van vorderings, waaronder een vir skadevergoeding as ongelikwiderde vorderings beskou word. Die aangehaalde gewysdes staaf nie die betoog nie. Dat die vordering vir skadevergoeding, waar die bedrag nie bepaal is nie, ’n ongelikwiderde vorderings is, behoef geen betoog nie. **Meerendeels sou vorderings vir skadevergoeding uiteraard ongelikwiderde vorderings wees, ongeag of dit uit kontrakbreuk of in delik voortspruit.** In hierdie verband is verwys na S.A. Fire and Accident Insurance Co. Ltd v Hickman 1955 (2) SA 131 (C), waar ’n aansoek op vonnis by verstek afgewys is omdat die vordering vir betaling van sodanige bedrag as wat na debattering van a rekening betaalbaar sou blyk te wees, nie as ’n gelikwiderde vordering geag is nie. In die uitspraak se Regter OGILVIE THOMPSON die volgende op bl. 133A:*

‘In the present case, the amount of the claim in issue manifestly cannot be calculated today: it will only emerge after debate of the account has been

¹⁶ At 528G-H

¹⁷ 1977 (3) SA 1067 (TPD) at 1071H to 1072B

¹⁸ 1970 (2) SA 742 AD at 749

concluded. It is true that the claim itself is specific enough: but then so is a claim for damages, which, by common consent, constitutes an unliquidated claim.'

Na my mening staaf die aangehalde passasie nie appellans se betoog nie. Dit blyk uit die samehang dat die geleerde Regter 'n vordering van die skadevergoeding, waarvan die bedrag nog nie betaal is nie, in gedagte gehad het." [emphasis added]

- [79] As I understand the respondents' argument, it is that the applicant is required, in terms of the case law, to quantify its damages claim against the first respondent which it has failed to do. The applicant needs to show that it, in fact, suffered such damages in a quantified amount in order to establish the debt owed to it by the first respondent.
- [80] The applicant, on the other hand, contends that there is no difference, in principle, between an unliquidated claim for breach of contract and the unliquidated claim for damages upon which the applicant relies in this application to establish its *locus standi*. Based on the case law referred to above, I am of the view that this contention is not correct.
- [81] During argument in reply, and arising from the applicant's replying affidavit, the applicant's counsel pointed out that in order to bring liquidation proceedings, one needs to show that there is a potential debt that exceeds R100.00. He further contended that in light of the invoices issued by the first respondent to Titan Helicopters, which was a potential client of the applicant, which were in the region of R32 million, the applicant has, at the very least, established a claim for damages which exceeds R100.00.
- [82] However, in neither the founding nor replying affidavits, does the applicant refer specifically to the R32 million earned by the first respondent from Titan Helicopters as damages (or potential damages) suffered by the applicant. This is mentioned in the context of what the applicant discovered during the course of its investigation.
- [83] The applicant, in its replying affidavit, and in response to the respondents' allegation that it has not quantified its claim for damages, seems to rely on the amount of R1 049 662.60 as liquidated damages.

[84] However, on the applicant's own version, this amount reflects the "*secret profits*" earned as a result of the interposing of the first respondent between the applicant and its service providers and for which the applicant's claim for disgorgement of profits lies against the second respondent.

[85] The claim for damages, as I understand it, arises from the diverting of the applicant's work to the first respondent and usurping of the applicant's contracts in favour of the first respondent. As such, the applicant cannot rely on the amount of R1 049 662.60 to prove that it has a liquid claim for damages arising from the unlawful diverting of work from the applicant to the first respondent.

[86] Based on what is set out above, I am of the view that that the applicant's claim for unliquidated damages was disputed *bona fide* on reasonable grounds by the respondents.

[87] Even though the applicant established its entitlement to claim damages on a *prima facie* basis, these claims against the first respondent (disgorgement of profits and an unliquidated claim for damages), were both disputed *bona fide* on reasonable grounds.

[88] In these circumstances, based on the *Badenhorst Rule*, a court will ordinarily refuse a provisional liquidation application, and I intend to do so.

THE JUST AND EQUITABLE REQUIREMENT:

[89] Given that I intend to dismiss the application, it is not necessary for me to go further and consider the just and equitable requirement in this case.

CONCLUSION:

[90] In the circumstances, I conclude that the application should be refused.

[91] Regarding the issue of costs, the respondents referred to the SCA case of **Imobrite (Pty) Ltd v DTL Boerdery CC**¹⁹, where the SCA held as follows:

¹⁹ (1007/20) [2022] ZASCA 67 (13 May 2022)

“[14] It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debts. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court’s processes should not be abused.

[15] A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company’s liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights.” (Footnotes omitted).

[92] After evaluating the facts and, particularly, the conduct of the first and second respondents in their dealings with the applicant, I am of the view that the respondents are not entitled to any kind of punitive cost order against the applicant.

[93] I accordingly make the following order:

- (a) The applicant’s application to place the first respondent under provisional liquidation is refused.
- (b) The applicant shall pay the respondents’ party and party costs of such application on Scale B.
- (c) The respondents shall pay the applicant’s cost of their counter-application on Scale B, which counter-application was withdrawn during the course of argument.

**The Hon. Ms Acting Justice Mahomed
of the Western Cape High Court**

APPEARANCES:

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