IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case no: 82122/2023

(1) REPORTABLE: ~~Yes~~ / (No)
(2) OF INTEREST TO OTHER JUDGES: ~~Yes~~ / (No)
(3) ~~REVISED.~~

21/6/2024
DATE

[redacted]
SIGNATURE

In the matter between:

ALBERT WEIGLHOFER	First Applicant
WAYNE KRAMBECK	Second Applicant
ONICAFLEX (PTY) LTD	Third Applicant

and

LYCONET SOUTH AFRICA (PTY) LTD (in provisional liquidation)	Respondent
LYCONET AUSTRIA GmbH	Interested Party

Coram: Van Vuuren AJ

Heard: 16 May 2024

Delivered: 21 June 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, uploaded to *Case Lines*, and released to SAFLII. The date and time for hand-down is deemed to be 14:00 on 21 June 2024

JUDGMENT

Van Vuuren AJ

Introduction

[1] The applicants, Mr Albert Weiglhofer, Mr Wayne Krambeck and Onicaflex (Pty) Limited brought urgent winding-up proceedings against Lyconet South Africa (Pty) Limited (Lyconet SA), principally upon the basis of a debt owed to them by Lyconet SA. An order finally winding up Lyconet SA was granted in the urgent court by Van Nieuwenhuizen AJ on 12 September 2023. An application was brought by its sole shareholder, Lyconet Austria GmbH (Lyconet Austria), to set aside the final liquidation order. Lyconet Austria brought the recission application before Moorcroft AJ on the basis of a raft of section 346[1] service related complaints. Moorcroft AJ, on 20 October 2023, set the Van Nieuwenhuizen AJ final order aside and placed Lyconet SA in provisional liquidation with comprehensive instructions for service with a comprehensive rationale for the latter.

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1 Section 346 of the Companies Act 61 of 1973

[2] The Van Nieuwenhuizen AJ final winding-up order was granted in the urgent court. No judgment has been made available to this court. The Moorcroft AJ judgment extensively narrated the rationale for the procedural and service orders. Although it was not expanded upon, Moorcroft AJ purposely did not upset the then extant *concursus creditorum* and it is accepted that he ordered the provisional winding-up of Lyconet SA having considered the available facts and arguments through the lens of the *Badenhorst* rule.[2]

[3] The *rule nisi* accompanying the provisional winding-up order issued by Moorcroft AJ was subsequently extended by Wright J on 31 January 2024.

[4] In the interim the joint provisional liquidators sought an extension of their powers before Carrim AJ on 23 January 2024. The powers granted included leave to convene a commission of inquiry into the trade, dealings, affairs and property of Lyconet SA in terms of section 417 read with section 418 of the Companies Act.[3]

[5] On the return day of the extended *rule nisi* before me, the applicants persisted in seeking confirmation of the *rule* for an order finally winding-up Lyconet SA.

[6] Lyconet Austria sought to resist the final relief as shareholder.

Background facts

[7] *Lyoness*, *Lyconet* and *myWorld* are core to the naming conventions and businesses of an international conglomerate of associated companies, which include South African entities, cooperating to advance the common purpose of

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2 *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348B

3 Companies Act 61 of 1973

marketing and availing shopping points and like incentives through a vast network of marketers, and those who rank in lines below them, called *Lifelines.* The applicants are such marketers who have obligations to the marketers in their *Lifelines*. The applicants, in turn, seemingly rank somewhere below the founder of the scheme, Mr Hubert Freidl.

[8] The associated South African entities comprise Lyconet SA, myWorld South Africa (Pty) Ltd, Eliteclub South Africa (Pty) Ltd, and Lyoness Cashback Programme (Pty) Ltd. (myWorld SA, Eliteclub SA and Lyoness SA)

[9] The shareholding in Lyconet SA, is wholly held by Lyconet Austria. Mr Peter Gruber is the sole director of Lyconet Austria whilst Mr Radovan Vitoshevich is its CEO. The board of Lyconet Austria mandated Mr Vitoshevich to represent the interests of Lyconet Austria in South Africa on 24 August 2023.

[10] Although, as will be referred to below, Mr Vitoshevich considered any reference to the Lyoness Group as irrelevant and misplaced. Reference to the Lyoness Group stems from a promise made to the applicants and others by Mr Freidl, founder.

[11] Moreover, Mr Vitoshevich himself described the origin of Lyconet and myWorld as follows:

> "*Both* [Lyconet Austria] and [Lyconet SA] *form part of a large multinational conglomerate of companies operating in 56 countries worldwide. It has its origins in a company known as Lyoness, which in 2018 unbundled in two main businesses – Lyconet and my World.*"

[12] Mr Vitoshevich described the businesses, respectively of Lyconet and my World as follows:

> *"Lyconet is a multi-level marketing agency which affords individual marketers the opportunity to generate income by utilising their own networks of family and friends by promoting the use of everyday and regular fast-moving consumer goods and services to be purchased from affiliated and registered stores, service providers and retailers.*
>
> *myWorld on the other hand constitutes the shopping community of consumers that offers cashback benefits to consumers and loyalty programmes to stores, service providers and retailers. All of this are conducted on expansive online platforms, and manifests primarily as an application on a smart phone or computer."*

[13] The applicants' claim asserts a due and payable indebtedness on the part of Lyconet SA arising from its obligation to make good on a significant marketing Promise made by Mr Freidl, flowing from which the applicants in turn have obligations to hundreds of marketers within the Lifelines that resort under them. Lyconet SA assumed the obligation upon its incorporation in 2019.

[14] Growth of the business within the scheme was incentivised by promises to marketers such as the applicants, at international conferences of significant bonuses and incentives if certain levels are achieved. Levels such as Vice-President and President attained by marketers signify that they accomplished certain defined marketing targets which in turn rendered them entitled to significant bonuses.

[15] Mr Freidl, on all accounts, is the central figure as founder of Lyoness, and thus of the divested Lyconet and myWorld entities.

[16] The significance of Mr Freidl's influence as founder becomes relevant in the present context. Mr Freidl made what is referred to as the Project X Promise (the Promise) and subsequent variations to its terms, which Promise subsequently became the liability of Lyconet SA in South Africa. The bonuses under the Promise were earnable during a first period in 2018 whereafter the requirements were adapted by Mr Freidl, requiring a subsequent re-achieving of the Promise targets within an extended period. The applicants achieved various marketing targets under the Promise which entitled them to Project X Payments. Mr Weiglhofer for example achieved career level 8, earning him the title of President and entitling him to receive a Project X Payment of €2,500,000.00. The other applicant respectively became entitled to Project X Payments of €1,000,000.00 and €500,000.00.

[17] Of relevance for present purposes, and Lyconet Austria's argument on prescription, is the time when such bonuses arising from the Promise become claimable - and thus due, owing and payable. Although the bonuses are earned within the said periods, the time of performance in terms of the Promise was conditional upon the happening of a further event, being a determination by Mr Freidl. The applicants in the answering affidavit to the rescission application deposed to by Mr Krambeck, supported *inter alia* by Mr Allan and Mr Grobler, explained that the benefits arising from the Promise would become due and payable at a later time. Payment under the Promise was "*deferred to a time to be determined by* [Mr] *Freidl*".

[18] Although there is no evidence of when such determination of the time to pay was first made, it is known that the Promise became payable and thus enforceable.

In 2022, a Ms Jianliu Lin instituted proceedings to enforce her rights which in turn related to the rights of several marketers in her trailing Lifeline. Ms Lin's claim based upon the Project X Promise was settled by Lyconet SA on the instruction of Mr Freidl in the sum of R76,000,000.00 in October 2022. It can thus reasonably be deduced that Mr Freidl made the necessary determination rendering claims arising from the Project X Promise due and payable.

The pivotal question

[19] Although various issues arose on the papers and during argument, counsel for the parties were *ad idem* that the central question related to the existence of the R82 million (€4,000,000.00) debt. If the debt is shown, an order for final liquidation should follow and, if it is not shown to be due and payable, the provisional liquidation order should be discharged.

[20] The central question in turn calls for an assessment of the evidence, and in particular the evidence of Mr Radovan Vitoshevich, the chief executive officer of Lyconet Austria. Mr Radovan Vitoshevich was the lone deponent advancing Lyconet Austria's resistance to a final winding-up order. Lyconet principally disputed the existence of any Project X Promise debt and that it would in any event have become prescribed.

[21] A further issue raised by the applicants related to assertions regarding the legitimacy of the business conducted by Lyconet SA and its associated entities, myWorld SA, Eliteclub SA and Lyoness SA.

[22] Procedural complaints were voiced on the entitlement on the part of the applicants to rely upon allegations and evidence contained in several subsequent

affidavits exchanged between the parties in the litigation history leading up to consideration of the return day of the *rule nisi*. These complaints do not warrant any further consideration in view thereof that each of the parties had ample opportunity to answer each other's assertions and evidence, and availed themselves thereof.

[23] Counsel were also *ad idem* that no residual service-related disputes remained following the Moorcroft AJ order. They agreed that the reserved costs in the proceedings before Moorcroft AJ and Wright AJ would be costs in the cause.

The joint liquidators' report

[24] The joint liquidators reported that they had several engagements with Mr Allan, the director at the time of Lyconet SA, and Mr Grobler, a director of the related entities. The joint liquidators proceeded to appoint a forensic auditor and investigator and sought to gain access to documents and data stored on the intranet system controlled by Lyconet Austria upon which Lyconet SA operated. They explained that investigations are afoot to establish whether the business of Lyconet SA constituted an illegal scheme. The joint liquidators reported that Lyconet Austria remained uncooperative, stifling their attempts at complying with their obligations.

[25] In an affidavit deposed to by Mr Lutchman on behalf of the joint liquidators, he expressed the view that the refusal by Lyconet Austria to provide the documents and data called for, led him to conclude that Lyconet Austria did not want the liquidators to have access to such documents. He said that "[i]*t has been incredibly difficult for the provisional liquidators to obtain documentation to*

completely understand the business of Lyconet. All documentation relating to the company's affairs were located and stored on the company's intranet which is wholly controlled by the shareholder, being the intervening party in this application. We have reached a dead end with the shareholder who is uncooperative to say the least."

The deponents and other persons of interest

[26] Lyconet Austria, as interested party and shareholder of Lyconet SA, is represented by Mr Radovan Vitoshevich. He was in turn mandated to represent Lyconet Austria by Mr Peter Gruber, its sole director.

[27] In support of the application for liquidation, the applicants obtained the evidence of Mr John Allan, the sole director of Lyconet SA at the time, as well as that of Mr Wim Grobler, a director of myWorld SA and Lyoness SA.

[28] During a period where the South African authorities were calling for information regarding the business and structure of Lyconet and its associated entities, information and responses were called for from Mr Friedl as founder of the scheme. Whilst Mr Friedl was previously involved in the resolution of the Lin dispute, he did not respond to the enquiries made by Lyconet SA's then attorney, Mr Small-Smith, or involve himself in the present proceedings.

[29] The applicants further presented evidence of the then chief financial officer of Lyconet SA, Mr Ettiene Stander who confirmed the factual insolvency of Lyconet SA.

[30] In summary thus, the applicants, in addition to their own evidence, obtained supporting and corroborative evidence of Lyconet SA, Lyoness SA and myWorld SA directors, being Mr Wim Grobler and Mr John Allan, as well as the CFO of Lyconet SA, Mr Stander.

[31] In contrast, Lyconet Austria only put forward the evidence and assertions of Mr Vitoshevich, as CEO of Lyconet Austria. It is apparent from a consideration of the available evidence that Mr Vitoshevich was not involved with the operations of Lyconet SA. Furthermore, a mandate empowering Mr Vitoshevich to represent Lyconet Austria as shareholder of Lyconet SA was only given on 24 August 2023. As will be referred to below, Mr Vitoshevich distanced himself from the manner in which the Lyconet SA board conducted Lyconet SA's business.

[32] It is necessary to consider the evidence, arguments and assertions put forward by Mr Vitoshevich on Lyconet Austria's behalf in more detail.

The evidence and assertions of Mr Vitoshevich, CEO of Lyconet Austria

[33] Mr Vitoshevich, as mentioned, is the representative of Lyconet Austria mandated to represent it in the present proceedings. Mr Vitoshevich, in addition, sought to advance arguments and assertions aimed at resisting the relief sought by the applicants.

[34] I have mentioned, for purposes of context, that Mr Vitoshevich was not involved in the day-to-day running or business affairs of Lyconet SA. He is employed as chief executive officer of Lyconet Austria in Graz, in Austria, and was seemingly

mandated by the sole director of Lyconet Austria to represent its interests in South Africa on 24 August 2023.

[35] In Mr Vitoshevich's affidavit seeking the setting aside of the Van Nieuwenhuizen AJ order, he states that the facts deposed to by him are within his personal knowledge, unless he states otherwise or "*where the context indicates otherwise*".

[36] It is through the lens of the latter that certain important parts of Mr Vitoshevich's evidence should be viewed. From his evidence, there are several instances where it is clear that he has no personal knowledge of the matters he comments on, but instead of stating so, he leaves it to the reader to analyse whether what he says stems from personal knowledge or from mere supposition, speculation or assertions unfounded on facts.

[37] In this regard, I deal with the evidence of Mr Vitoshevich in respect of the following topics:

[37.1] Mr Small-Smith represented Lyconet SA prior to it first being wound up;

[37.2] Mr Vitoshevich's accusations levelled at Mr Allan and Mr Grobler;

[37.3] The raising of funds from marketers;

[37.4] Mr Vitoshevich's denial regarding knowledge of the Lin application; and

[37.5] Denial and speculation regarding the Project X Promise and the applicants' claim.

Mr Small-Smith represented Lyconet SA prior to it first being wound-up

[38] Mr Vitoshevich says that Mr Grobler and Mr Allan did everything in their power to construct the downfall of Lyconet SA (along with myWorld, EliteClub SA and Lyoness), *inter alia*, so he says, by transferring R70 million to "*their attorneys' trust account*". Elsewhere, Mr Vitoshevich refers to Mr Ian Small-Smith as Mr Allan's and Mr Grobler's "*personal attorney*".

[39] Mr Vitoshevich made the latter unfounded assertion without personal knowledge of facts to sustain his assertions. Mr Small-Smith was at all relevant times prior to it being placed in final liquidation by Van Nieuwenhuizen AJ, the attorney for Lyconet SA (and the associated South African entities) and held the funds paid into his trust account on behalf of Lyconet SA. An example of Mr Small-Smith's representation of Lyconet SA *inter alia* appears from his correspondence to Mr Freidl as early as 26 April 2023. In the latter email from Mr Small-Smith to Mr Freidl he, on behalf of Lyconet SA, called for further information in order to respond to the investigation at the time conducted by the Financial Services Conduct Authority (FSCA) and which had previously been the subject of criminal investigation by the National Prosecuting Authority (NPA).

[40] In a further letter by Mr Small-Smith addressed to Mr Vitoshevich, it was made plain that Mr Small-Smith acted as attorney and representative of Lyconet SA. Mr Small-Smith recounted his approach to Mr Freidl for further information with reference to the investigations conducted by the FSCA and the South African Police Services (SAPS) to which no response was received from Mr Freidl then, or upon follow-up correspondence to him. Having acted on behalf of Lyconet SA at the time, Mr Small-Smith advised Mr Vitoshevich of the urgent liquidation

proceedings brought against Lyconet and the decision of Lyconet SA, acting through its board, not to resist the application for liquidation, having themselves previously considered approaching a court for voluntary winding up.

[41] It is further evident that Mr Small-Smith represented Lyconet SA in the Lin application. The Lin application was an application similarly brought on the basis of the Promise made in respect of the Project X commission earnable by marketers such as Ms Lin and the applicants. In representing Lyconet SA, Mr Small-Smith was mandated, on its behalf and on instructions of Mr Freidl, to settle Ms Lin's claim which at the time amounted to R76 million. The supporting affidavits of Mr Allan and Mr Grobler corroborate the position.

[42] As previously mentioned, Mr Small-Smith was engaged by Mr Allan and Mr Grobler to represent Lyconet SA and the other associated South African entities to engage with the relevant South African authorities in consequence of the investigations launched into their South African businesses.

[43] As mentioned, Mr Freidl was non-responsive to any questions and queries posed by Mr Small-Smith, and to his call for cooperation by providing information to the South African authorities.

[44] In his correspondence, Mr Small-Smith specifically mentioned to Mr Freidl that "*According to the authorities you are the creator, shareholder, controlling mind and ultimate beneficiary of the South African entities. It also appears to be so that many millions of rands have been moved out of South Africa to entities under your control over the last decade.*"

[45] No response was forthcoming from Mr Freidl.

[46] It is telling that, by 13 September 2023, Mr Vitoshevich saw fit to ask whether or not Mr Small-Smith was representing Lyconet SA. He wrote to Mr Small-Smith to ask whether he represented Lyconet SA or whether he represented Mr Grobler and Mr Allan personally.

[47] Consistent with his prior conduct, Mr Small-Smith indicated to Mr Vitoshevich that he initially represented Lyconet SA, Mr Grobler, Mr Stander and Mr Allan in the criminal complaint and ancillary matters. He stated that upon the placement of Lyconet in final winding up, Lyconet was of course represented by the joint liquidators and their legal team, whereas he remained on brief for the respective individuals.

[48] In the further response (referred to above) Mr Small-Smith advised Mr Vitoshevich, representing Lyconet Austria, that Lyconet SA had considered its position (acting through its board) when it elected not to oppose the liquidation application.

[49] The applicants served the liquidation application on Lyconet SA's registered offices and furthermore emailed a link to the application to Mr Allan who acknowledged receipt.

Mr Vitoshevich's accusations levelled at Mr Allan and Mr Grobler

[50] When it suits his narrative, Mr Vitoshevich recognised the role of Lyconet SA's and the other South African entities' directors.

[51] An example of the latter is, when the topic of possible unlawful conduct on the part of the Lyconet business operations is at play, Mr Vitoshevich stated that "*If there were unlawful actions or conduct in the business the proverbial buck would stop with* [Mr] *Grobler and* [Mr] *Allan. They were the only directors in charge of these companies. As explained earlier, there is nothing unlawful or untoward in the business model and any possible unlawful conduct can only be imputed to* [Mr] *Grobler and* [Mr] *Allan*".

[52] Mr Vitoshevich added that "[Mr] *Grobler and* [Mr] *Allan was previously never concerned about the business model and were more than happy to receive and accept their handsome remunerations. It is therefore highly improbable that this sudden concern could arose* [sic] *from the fundamental methodology of the business.*"

The raising of funds from marketers

[53] Mr Vitoshevich, clearly without having any personal knowledge, says "*It is not true that the companies raised money from thousands of members*." He said that nothing could be further from the truth.

[54] Elsewhere, he stated more specifically that there are no subscription fees payable by marketers.

[55] The applicants however stated, as supported on oath by Mr Allan and Mr Grobler, that Mr Vitoshevich has no knowledge of the South African trade, dealings and affairs of Lyconet SA. He is not in a position to speak to either the solvency of Lyconet SA or the legitimacy of its South African operations.

[56] In Mr Small-Smith's letter of 13 September 2023, he made the statement to Mr Vitoshevich that "*Over and above the claims made in respect of the Debt owing by Lyconet to the applicants, further concerning allegations were made that the liquidation of Lyconet was just and equitable in order to safeguard consumers in South Africa from having to continue paying subscription fees to Lyconet and/or the other myWorld related entities.*"

[57] In their founding affidavit, the applicants asserted that a minimum monthly subscription fee of R735 is payable by marketers to enable them to become "*income entitled*" and to use the Lyconet "*back office*". They explained that further fees were thus payable to remain marketers of the company's products.

[58] As corroboration, the applicants referred to a screengrab from the Lyconet.com site showing a total, at the time, of 648 such active marketers as well as a total number of more than 15 000 marketers resorting under the applicants.

[59] Mr Vitoshevich denied these allegations, but his knowledge remains questionable in circumstances where no basis has been set out upon which he could assert knowledge of the South African operations, especially in circumstances where he participated neither on the board nor management of Lyconet SA.

Mr Vitoshevich's denial regarding knowledge of the Lin application

[60] A further example of the content of Mr Vitoshevich's affidavits resisting the relief sought by the applicants is an instance where Mr Vitoshevich indeed had knowledge of a particular fact, yet denied it in his affidavit. The following serves as an example.

[61] Mr Vitoshevich denied any knowledge of the Lin application in respect of which Lyconet ultimately paid Ms Lin in respect of Project X in relation to which the Promise was made. In denying knowledge of the Lin application, Mr Vitoshevich put it thus:

> "... *Neither* [Mr] *Grobler nor* [Mr] *Allan has been able to provide a single iota of evidence that they disclosed the contents of the Lin application or the eventual settlement agreement reached with Lin to anybody outside of themselves, Stander and the attorney* [Mr] *Small-Smith supports the sole and unavoidable conclusion that* [Mr] *Grobler and* [Mr] *Allan had conducted themselves in a manner deserving of censure by the law.*"

[62] Subsequently, however, Mr Grobler in an affidavit deposed to by him showed through a series of messages and letters that Mr Vitoshevich knew of the Lin application and in particular the freezing of myWorld SA's Standard Bank account in an application brought *ex parte* for that purpose.

[63] Mr Vitoshevich's denial of the Lin application finds its relevance, amongst several others, in the fact that Lyconet SA settled that claim which similarly arose from Lyconet SA's taking on of the Project X Promise liability in South Africa. It is the latter consistency that resonates with Lyconet SA and its board's conviction that the sums claimed by the applicants are due to them.

[64] The Lin claim and Lyconet SA's settling thereof find further relevance in the following respects: Mr Vitoshevich knew of the Lin claim, but asserted that he did not know about it; the Lin claim was brought and settled on the basis of the Promise which Lyconet Austria and Mr Vitoshevich now seek to avoid by denial, speculation and surmise, without grappling with the transcribed evidence of itself;

and Lyconet SA remained consistent in its acceptance that it is liable and undertook to fulfil the Promise to the applicants, as it did in the case of Lin.

Denial and speculation regarding the Project X Promise and the applicants' claim

[65] The applicants put up evidence of the Promise made as part of Project X, notably founded on the same basis as the claim in the Lin application.

[66] The applicants further availed a flash drive containing a recording of the presentation during which the Promise was made.

[67] The Promise made by Mr Freidl during the presentation as transcribed by the applicants in relevant part from a recording *inter alia* included the following:

> "*If you achieve the Career Level of 'Vice President' within Lyoness Group by the end of June 2018, and this level is maintained, you will be awarded €1 000 000.00 in addition to a Career Bonus by December 2018;*
>
> *If you attain the Career Level of 'President' within the Lyoness Group by the end of June 2018 and maintain this level, you will be granted a sum of €2 500 000.00 in addition to various Career Bonuses and Career Benefits by December 2018; and*
>
> *If by the end of June 2018, you achieve the Career Level of 'President' within the Lyoness Group as a Marketer, and maintain this level, you will be awarded a total of €7 500 000.00 along with additional Career Bonuses by December 2018.*" (the Promise)

[68] Two immediate observations arise from the Promise.

[69] First, is the use by Mr Freidl and the applicants of *Lyoness* and the *Lyoness Group*.

[70] As mentioned, Mr Vitoshevich denies the appropriateness of any reference to a "*Lyoness Group*". He said there is no such thing.

[71] However, when Mr Freidl used the *Lyoness Group* description for the conglomerate of entities comprising Lyoness, it is plainly apparent that it fits the history put up by Mr Vitoshevich himself when he said that "*Both the intervening applicant and the sixth respondent form part of a large multinational conglomerate of companies operating in 56 countries worldwide. It had its origins in a company known as Lyoness, which in 2018 unbundled in two main businesses - Lyconet and myWorld*". It also fits the apparent cooperation between the associated entities and the residual use of the name "Lyoness" in South Africa and international entities bearing the Lyoness name within their naming conventions, of which Lyoness SA is an example.

[72] The fact that the South African entities seem financially intertwined according to the evidence put up by the applicants, lends further support to such entities, in unison or otherwise, continuing the business once named Lyoness.

[73] Second, Mr Vitoshevich denies the Promise itself.

[74] In an affidavit deposed to by him Mr Vitoshevich states that "*I have not seen or heard the exact presentation … given during 2017 … but can with certainty confirm that they are wrong in what they are alleging.*" This is a reference to the transcribed Promise. Mr Vitoshevich continued and elsewhere stated "*I reiterate. I have not seen or heard the specific presentation … but can confirm that they have completely misrepresented that which would have been said.*"

[75] Mr Vitoshevich disputed the Promise and suggested that the applicants misrepresented what would have been said by Mr Freidl. Mr Vitoshevich made

these statements with specific reference to the paragraphs referencing the recording and transcription of the Promise.

[76] A party, when dealing with evidence of fact, and in this instance, where further corroborative evidence of the facts under consideration is given in support by other means, such as the recording, such evidence should be considered before an answer is ventured by such party. It does not assist a witness to shut his eyes or ears to the evidence presented.

[77] Affidavits in motion proceedings, as is well known, constitute both the pleadings and the evidence. A litigant should plead to such allegations and its witnesses should engage therewith on an evidentiary level.

[78] Here, Lyconet Austria denied the Promise and effectively pleaded no knowledge of it, whereas Mr Vitoshevich, as witness, gave no evidence capable of displacing the applicants' evidence relating to the existence of the Promise.

[79] It did not assist Lyconet Austria that Mr Vitoshevich, who admittedly did not consider the corroborative evidence of a recording of the Promise, considered it fit to advance his own speculative narrative without having considered the evidence upon which he seeks to pass comment. A witness and litigant would be best guided to deal with and engage earnestly, meaningfully and adequately with all relevant evidence being put up – lest it be said that the witness purposely looked away in an attempt to avoid having to deal with relevant evidence, only to pass speculative comment on that which he elected not to see.

[80] In *Wightman*[4], the Supreme Court of Appeal held as follows with reference to disputes of fact and the obligations resting upon parties, their deponents and representatives:

> "*When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts, which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.*"

[81] In my view, the latter passage applies equally, in relevant part, to the present instance. The denial by Mr Vitoshevich of the Promise does not create any genuine dispute. An attempt at putting up a denial without first considering the fact sought to be denied is of no assistance to the court.

[82] In the result, Lyconet Austria has not demonstrated a *bona fide* dispute regarding the Project X Promise, Lyconet SA's taking on of the liability, and the applicants' consequent rights arising therefrom.

[83] What remains to be considered is whether Lyconet Austria's prescription assertions find any traction.

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4 *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* (2008) 3 SA 371 (SCA) at [13]

The prescription assertions

[84] It is lastly necessary, in the aforegoing context and history of the litigation, to consider the argument of prescription advanced by Lyconet Austria through Mr Vitoshevich.

[85] It is important that Lyconet Austria is but a shareholder of Lyconet SA. It does not represent Lyconet SA. Lyconet Austria is furthermore not in the position of a party with a direct and substantial interest in a defence of prescription, other than, perhaps its aim at averting liquidation of Lyconet SA, which may in turn hold some unquantified benefit to it as shareholder. It is however trite that the right to invoke prescription is not the sole prerogative of a defendant. In *Lipschitz*[5] the court held that prescription may be raised by a party with a real interest in the matter, such as a surety. In view of the conclusion reached, it is not necessary to consider whether a defence of prescription can be raised by a shareholder in circumstances where neither the company nor its board member sought to introduce such a defence.

[86] An important observation is that Lyconet SA did not raise a defence of prescription to the applicants' claims. To the contrary, it accepted and acknowledged its liability through Mr Allan, who at all relevant times constituted its board. Lyconet Austria's prescription argument thus runs counter to Lyconet SA's position.

[87] Lyconet SA, as mentioned, took over the obligation to pay marketers such as the applicants and Ms Lin in terms of the Promise. The obligation taken on by

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5 *Lipschitz v Dechamps Textiles GmbH* 1978 (4) SA 427 (C) 431A-F

Lyconet SA, although acknowledged, was specifically made subject to a time for performance to be determined by Mr Freidl. In their answering affidavit to the rescission application the applicants, supported by Mr Allan, stated that payment was "*deferred to a time to be determined by* (Mr) *Freidl*". The commencement of the running of any prescription was thus deferred and delayed.

[88] What is known from the papers is that the Lin claim was considered payable and settled during 2022. It can thus be inferred that the period of deferment of payability of the Project X Promise debts had come to an end by latest October 2022. The exact date is not known from the papers. What is known is that Mr Freidl instructed the settlement of Ms Lin's claim. The Lin settlement agreement in the sum of R76,000,000.00 was concluded in two parts on 7 and 20 October 2022. The settling of the Lin claim further accords with the timing of pressure exerted upon the applicants by marketers in their Lifelines for payment of the sums due to them arising from the applicants' claim under the Project. Lyconet SA however responded by admitting to its inability to pay the applicants' Project X Promise claims.

[89] A party wishing to put up a defence of prescription is saddled with the onus of proving it. Not only must the party raising a plea of prescription prove it, it is also saddled with the onus of proving the date of inception of the running of prescription. In *Gericke*[6] the Appellate Division held that the party wishing to raise prescription has to prove "*both the date of the inception and the date of the*

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6 *Gericke v Sack* 1978 (1) SA 821 (A)

completion of the period of prescription".[7] This, despite much argument on the issue, Lyconet Austria failed to do.

[90] The applicants' uncontroverted evidence of deferment of the onset of prescription taken with the absence of evidence of the inception and completion dates of the alleged period of prescription is fatal to Lyconet Austria's untenable argument on prescription.

[91] In the result Lyconet Austria has failed, irrespective of whether the *Badenhorst*[8] or *Plascon Evans*[9] thresholds are applied,[10] to raise a defence to the R82 million[11] due and payable debt established by the applicants.

Illegality of Lyconet SA's business?

[92] A further argument advanced and developed during the hearing of the matter related to assertions of illegality in breach by Lyconet SA of provisions of the Banks Act. However, given the limited facts at my disposal, I regrettably cannot express any view on the legitimacy of the business affairs of Lyconet SA.

[93] It is similarly not possible to express a view on the commercial sustainability of the bonuses payable in terms of the Promise and the obligation to pay such

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7 *Gericke* at 827 *in fin* – 828A

8 *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347I to 348C

9 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635C

10 In *Orestisolve (Pty) Ltd t/a Essa Inv v NDFT Inv Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC) Rogers J (as he then was) at [7] to [22] drew a distinction between the application of the *Badenhorst* rule and *Plascon-Evans* principle at the provisional and final liquidation stages.

In subsequent decisions reemphasis was placed on application of the *Badenhorst* rule at both the provisional and final stages.

See: *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016) at [5] and *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at [9] and [17] to [18]

11 R82,884,700.52

bonuses by Lyconet SA from its South African earnings. It would in my view be imprudent to attempt any conclusion that winding-up of Lyconet SA is justified on just and equitable grounds. These considerations have not been fully developed on the papers and will require further inquiry for which the insolvency machinery is suitably geared.

Conclusion and Costs

[94] Lyconet SA's commercial insolvency has been asserted and confirmed by Mr Allan, and in particular by Mr Stander, the financial manager at the time of Lyconet SA.

[95] Accordingly, and for the reasons set out above, Lyconet SA should finally be wound up on the basis that it is commercially insolvent having an inability to pay its debts as and when they fell due.

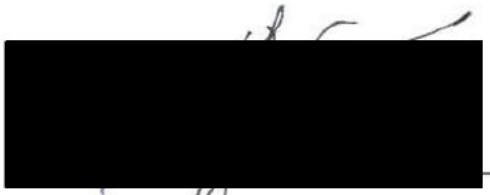
[96] I was advised by Mr Theron SC and Mr Bothma SC that the reserved costs of the Moorcroft AJ and Wright J proceedings should, by agreement, be costs in the cause.

Order

[97] In the result, the following order is made:

1. The *rule nisi* issued by Moorcroft AJ on 20 October 2023 is hereby confirmed and Lyconet South Africa (Pty) Limited is placed in final winding-up.

2. The costs of this application, together with the costs of the proceedings before Moorcroft AJ and Wright J shall be costs in the administration of Lyconet South Africa (Pty) Limited (in liquidation) on a party and party scale with the costs of two counsel taxable on scale C.



Van Vuuren AJ

Acting Judge of the High Court

21 June 2024

For the Applicant:	E Theron SC
	L Acker
Instructed by:	M Kets and L Botha of Magda Kets Attorneys
For the Intervening Party:	HC Bothma SC
	WJ Bezuidenhout
	S Mathe
Instructed by:	P Smith and G Meyer of SKV Attorneys Inc