IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION BLOEMFONTEIN

Case no: 5081/2014

In the matter between:

JDJ KNIPE	First Applicant
ABJ KNIPE	Second Applicant
JMD VIGNE	Third Applicant

and

CAROL JESSIE KATHLEEN LOTZ	First Respondent
ROBERT PETRUS JANSEN KNIPE	Second Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Third Respondent
OA NOORDMAN NO	Fourth Respondent
CB ST CLAIR COOPER NO	Fifth Respondent
SM RAMPORORO NO	Sixth Respondent
(in their capacity as provisional liquidators of Kameelhoek (Pty) Ltd)	
OA NOORDMAN NO	Seventh Respondent
CB ST CLAIR COOPER NO	Eighth Respondent
SM RAMPORORO NO	Ninth Respondent
(in their capacity as provisional liquidators of Schaapplaatz 978 (Pty) Ltd)	

JUDGMENT BY: G. J. M. WRIGHT, AJ

HEARD ON: 19 MARCH 2015

DELIVERED ON: 25 JUNE 2015

INTRODUCTION

[1] These proceedings focus on two questions, namely (i) the identities of the shareholders of two companies, Kameelhoek (Pty) Ltd and Schaapplaatz 978 (Pty) Ltd ("the companies") and (ii) in what ratio the shareholders are holding their shares. Both companies are in liquidation. The alleged shareholders are siblings, the children of the late Mr Henry Bazzett Louis John Knipe ("the deceased") and Mrs Moira Elizabeth Knipe ("Mrs Knipe"). For the sake of convenience I will refer to the siblings by the names Johnny, Andre, Jackie, Carol and Pieter (these are the names that have been used throughout earlier litigation as well).

[2] During 1979 ten separate trusts were created in terms of two master trust deeds. Each separate trust had one of the siblings as its beneficiary. It is common cause that the ten trusts were separate and distinct, each with its own beneficiary and its own assets. The shares in the companies were initially held equally by the ten trusts. The deceased was for all intents and purposes the sole director of the companies. He and Mrs Knipe were the trustees of all the trusts. The deceased passed away in

2007 where after Mrs Knipe remained as the sole director of both companies, the executrix of the deceased estate and the sole remaining trustee of all the trusts.

[3] During 2009 Mrs Knipe terminated the trusts and allocated the shares in the two companies to all five siblings in equal proportions. At that time the relevant share certificates as well as the Registers of Members could not be found. Mrs Knipe instructed an attorney, Loftus Viljoen, to issue share certificates on the basis of her allocation. He did so and these are the certificates attached to the First Respondent's Opposing Affidavit.

[4] On 25 August 2010 a general meeting of the two companies was held, organized by Andre, Johnny and Jackie. Mrs Knipe's position as director of the companies was terminated and these three siblings were appointed as the new directors. Following the meeting the new directors instructed an auditor to reconstitute the Registers of Members and share certificates of the two companies. These are the registers attached to the founding papers. The registers and certificates indicated an unequal shareholding ratio, with Pieter holding no shares in either company.

[5] The siblings Andre, Johnny and Jackie now want a declaratory order as to the shareholding ratio, and specifically that Andre and Johnny each hold 42% of the shares in each company, Jackie and Carol 8% each and Pieter 0%. These are the percentages used in the reconstituted Registers of Members. Pieter and Carol (First and Second Respondents) are opposing the application and contend that the siblings all hold equal shares (as allocated by Mrs Knipe). Pieter merely claims that the application should

be dismissed with costs. Carol went further and issued a counter-application for an order that the equal allocation of the shares by Mrs Knipe be declared lawful, valid and binding. The other Respondents have been cited only as interested parties. The Third Respondent is the Companies and Intellectual Property Commission ("CIPRO"). Fourth to Ninth Respondents are the provisional liquidators of the two companies, cited in their official capacities as such.

[6] The original Registers of Members and the share certificates of the two companies have seemingly "disappeared". It has not been explained how this happened. No clear and unequivocal evidence exists of the actual holding ratio of the shares prior to the deceased's death. The siblings themselves appear not to know the exact ratio. At least no one made a specific allegation as to their own personal knowledge. For quite some time however all the siblings (including the Applicants) acted on the belief that their respective trusts, and later themselves, held the shares in equal proportions, similar to the factual situation at the inception of the trusts.

[7] Prior to issuing this application, the Applicants launched a business rescue application based on the contention that the shareholding in the two companies is as now contended for by the Applicants. In that application they further contend that such a shareholding ratio will negate the need for liquidation as it will be possible to rescue the companies and continue with the business of the companies. That application is opposed by Pieter and Carol, as well as the provisional liquidators of the two companies.

APPLICANTS' REPLYING AFFIDAVIT

[8] Before the merits of the present application and counter-application are dealt with, it is unfortunately necessary to deal with the Applicants' various replying affidavits (each replying affidavit responds to an opposing affidavit of a different Respondent). The first issue to be addressed is the late filing of the affidavits. The second issue relates to the contents of one of the replying affidavits against which the First Respondent had launched an application to strike out.

[9] Following the applicable time periods provided for by the rules of court, the Applicants should have filed their replying affidavits on or before 9 January 2015. Instead the affidavits were only filed on 23 February 2015, several weeks out of time. It was not accompanied by a condonation application. In fact, no reference was made to the late filing at all, neither in the affidavits themselves nor in the Heads of Argument filed on behalf of the Applicants. The First Respondent objected to the late filing of the replying affidavits.

[10] I raised the issue with Mr Newton, who represented the Applicants in this application, at the start of the hearing of this matter. He submitted that he was under the impression that his instructing attorney had addressed the issue with the attorney for the Respondents and that they had come to an arrangement regarding the late filing of the replying affidavits. This explanation is of course not under oath and does not fit in with the objections of the First Respondent.

[11] The legal representatives for the First Respondent strenuously denied any suggestion that they consented to the late filing of the replying affidavits. This is evidenced through the contentions in the replying affidavit of Carol in the counter-application as well as correspondence annexed to her Heads of Argument. The same was repeated at the hearing of the application.

[12] Mr Newton also contended that, because of the sheer volume of the court papers in this application and the related business rescue application, the legal representatives for the Applicants were unable to prepare the replying affidavits within the prescribed time. It was accordingly submitted that the late filing is understandable and should for that reason be excused. Mr Newton is quite correct in as far as the volume of the papers in this application goes. The numbers are indeed staggering. The indexed and paginated papers in the current application run to more than 1000 pages. The same holds true for the business rescue application.

[13] The amount of work involved in preparing the Applicants' reply in itself does not however justify the late filing of the affidavits. This was foreseeable and should have been anticipated by the legal representatives. Legal representatives are accustomed to dealing with huge amount of paper and the pressure that goes with the preparation of court papers. When confronted with an application of this magnitude, the necessary arrangements are to be made in advance.

[14] It is at this point necessary to evaluate the attitude of the Applicants and their legal representatives. Firstly, they did not grace this Court with a simple condonation application explaining their difficulties and/or the reason for the delay in filing. Secondly, when the Respondents requested additional time to prepare the answering papers (also because of the volume of paper and work involved), no mercy was shown and the Applicants threatened to set the matter down as an unopposed motion. Thirdly and most alarmingly, the matter is not even addressed in the Applicants' heads of argument, even if it was only by means of a reference to the alleged agreement between the two sets of attorneys. This despite the fact that it is dealt with in the heads of argument prepared on behalf of Carol. The Applicants' initial heads of argument did not deal with the merits of the matter in a detailed manner. During the afternoon preceding the day of argument, more detailed written arguments were filed. But even this belated heads of argument did not deal with the late filing of the replying affidavits or the Respondents' objection thereto.

[15] Fortunately for the Applicants, the manner in which their legal representatives dealt with the issue is such that I cannot stretch the blame to also blemish the Applicants themselves. I further take into account that one of the replying affidavits doubled as an answer to the counter-application. In responding to the counter-application, that replying affidavit serves more than one purpose. And this shareholding application can only be dealt with properly if all issues have been canvassed fully under oath – appropriately and within the rules relating to the contents of affidavits.

[16] I therefore exercise my discretion to condone the late filing of the replying affidavits. This does not mean however that the rules relating to the contents of a replying affidavit are hereby relaxed. It is necessary to point this out as, unfortunately for the Applicants, allowing their replying affidavits is not where their obstacles end. The actual contents of the replying affidavit in response to the opposing affidavit of the First Respondent are attacked by means of an application to strike out. This interlocutory matter was comprehensively argued by means of written submissions on behalf of the Applicants and the First Respondent.

[17] The essence of the attacks on the Replying Affidavit can be more appropriately dealt with after the merits of the matter itself have been adjudicated. The manner in which I intend to deal with the merits of the application itself will form a proper background to an adjudication of the application to strike out and the issues relevant to such interlocutory application. I now proceed to deal with the merits of this matter.

CASE FOR THE APPLICANTS

[18] The Applicants do not contest the validity of Mrs Knipe's termination of the trusts. They do however vehemently contest her allocation of the shares in equal proportion. In this regard the Applicants contend that:

(i) At the time of the deceased's death the trusts did not hold the same assets and especially did not hold equal shares in the companies. That would also have been the situation at the time when Mrs Knipe terminated the trusts.

(ii) The shares that were held by the respective trusts had already vested in each respective trust.

(iii) The trust deeds did not afford Mrs Knipe a discretion to reallocate the trust assets amongst the beneficiaries.

(iv) Mrs Knipe should have identified the actual assets held by each trust and proceeded to transfer such actual assets to each respective beneficiary.

[19] The core of the Applicants' case and representation thereof is then summarized in the Founding Affidavit, deposed to by the First Respondent, Johnny, as follows:

> *"The original Registers of Members for both companies unfortunately disappeared shortly after my late father (Mr HBLJ Knipe) passed on 28 June 2007 and the applicants were accordingly left with no alternative other than to instruct Messrs Willem Lodewyk Pretorius (the auditor for both companies during or about the early 1990's) and Mr Andre De Jager (the auditor for both companies at the date of the liquidation) to reconstitute the Registers of Members for both companies and to re-issue the share certificates in both Companies using the best available evidence*."

[20] The quoted passage creates the impression that the Applicants were unaware of the shareholding ratio that they are now contending for and that they only found out what the ratio was after the so-called "best available evidence" was produced.

[21] I find it strange that the Applicants are able to specifically aver that the registers disappeared shortly after the deceased's death. This invites the

inference that the whereabouts of the registers were known to them earlier and that, only when they wanted to retrieve it after the deceased's death, they discovered its disappearance. This would then lead to the further inference that the Applicants would have known what the contents of the registers were. But none of the Applicants are alleging that they have any knowledge of the actual contents of the registers. It begs the question whether the deceased and Mrs Knipe as trustees ever discussed the workings of the companies, such as the shareholding, with their children, especially after the children reached the age of majority. They surely must have done, even if it was only to comment on the payment of dividends to the trusts (the then shareholders of the two companies). The Applicants are however not relying on personal knowledge and no cogent reason is advanced for this state of affairs.

[22] The so-called best available evidence referred to by the Applicants is dealt with in the reports of two auditors (with annexures thereto). The auditors, Andre De Jager and Willem Lodewyk Pretorius, also deposed to affidavits, confirming the correctness of their respective reports. Their affidavits are attached to the founding papers.

PRETORIUS

[23] The "report" of Pretorius is dated 24 October 2014 and is contained in a letter to the First Applicant. In this letter / report Pretorius does more than merely present documents and conclusions. He gives advice to the First Applicant and appears to also present a chronology of the actions of

the Applicants in connection with the companies after the trusts were terminated by Mrs Knipe and the shares allocated to the siblings.

[24] In his affidavit Pretorius refers to "*the methodology and reasoning employed*" in compiling his report. He does not however explain what methods of reasoning he actually employed in order to formulate his conclusions and opinions. The report itself refers to historical documents ("*argiefrekords*"; "*historiese dokumente*"). These documents are then listed as follows:

> "- *'n Inwydingsvergaderingsnotule van Schaapplaatz 978 (Edms) Bpk gedateer 1 Oktober 1979*;
> - *'n Skrywe gedateer 15 Augustus 1984 van Arthur Young and Company aan Landbank;*
> - *Uplands Saaiery (Edms) Bpk se maatskappyregister wat die korrektheid van Arthur Young and Company se skrywe gedateer 15 Augustus 1984 bevestig;*
> - *Landbank se gekanselleerde borgakte gedateer 30 Januarie 1985;*
> - *Die verklaring deur my, gedateer 14 Oktober 1994, aan Standard Bank;*
> - *Standard Bank se borgskapvorms met aanhangsels gedateer 9 Desember 1994;*
> - *'n Skrywe van Darryl Preece and Associates gedateer 7 Desember 2004;*
> - *Finansiële state van Trusts Knipe Kinders (geskep deur RL Knipe) vir die jaar geëindig 29 Februarie 1984;*
> - *Finansiële state van Jansen Knipe Trusts (geskep deur PG Jansen) vir die jaar geëindig 29 Februarie 1984; en*
> - *'n Skrywe gedateer 14 November 1984 aan Landbank deur jou vader in sy eie handskrif."*

[25] In the founding papers the documents listed above are attached to the report of Pretorius. None of the documents so attached are original documents. Pretorius states specifically that he used all the historical documents that he could find ("*alle historiese dokumente waarop ek my hande kon lê*"). As will be seen later this bold assertion cannot be correct as there appear to be more available documents.

[26] Pretorius seems to have done little more than present certain documents and then relate what is stated in the documents. He does not explain where the documents were found or how he went about in searching for relevant documents. He mentions that his own files had already been destroyed previously. According to Pretorius, after he found the "historical documents", he then remembered that the trusts did not hold equal shares in the companies. By mentioning that the documents made him "remember", Pretorius presents a picture of a person who did not have an independent memory of the relevant state of affairs and need to rely on documentation. This is in contrast to an earlier paragraph in his report which reads: "*Weens my betrokkenheid by u vader, het ek nog presies geweet hoe dat hy die trusts en maatskappye in sy sakestruktuur gebruik het. Ek het presies onthou van die trusts . . .*"

[27] When Pretorius comments on the shareholding of Pieter's trusts he does so in the following manner:

> "*Volgens die historiese inligting kon RPJ Knipe geen aandele ontvang het nie, want sy trusts se aandele is al in 1983 aan die JDJ Knipe Trusts en die ABJ Knipe Trusts verkoop*."

[28] None of the documents that Pretorius attached to his report, confirm any sale in the specific detail that Pretorius alleges in the quoted passage. The information presented by Pretorius does not explain the alleged decrease in the shareholding of Jackie and Carol. Pretorius clearly appears not to have an independent memory of the exact ratio in which the shares were held by the various trusts, but has to rely on the contents of documents. This is understandable as Pretorius was the deceased's auditor in the early nineties, almost two decades before he was requested to comment on the shareholding issue. The request was made by the "new" directors of the two companies and was made to Pretorius as the newly appointed company secretary of the companies.

[29] In the circumstances I do not consider the report of Pretorius as an authorative answer to the vexing question regarding the correct shareholding ratio at the time of the termination of the trusts. My view in this regard is bolstered by the application of principles regarding opinions expressed in affidavits. In the case of **Die Dros (Pty) Ltd and Another v Telfon Beverages CC and Others** 2003 (4) SA 207 (CPD) it is stated at 217 B – D that:

> "*[I]t is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the Court (see* Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others *1999 (2) SA 279 (W) at 323G) . . . . The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as*

to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See Wilcox and Others v Commissioner for Inland Revenue *1960 (4) SA 599 (1) at 602A; R*eynolds NO v Mecklenberg (Pty) Ltd *1996 (1) SA 75 (W) at 78I.) Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see* Radebe and Others v Eastern Transvaal Development Board *1988 (2) SA 785 (A) at 793C – E) and accordingly do not constitute evidential material capable of supporting a cause of action*."

[30] In **Minister of Land Affairs and Agriculture v D and F Wevell Trust** 2008 (2) SA 184 (SCA) at 200 Cloete JA observed:

"*It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. . . .*"

[31] Pretorius does not discuss all the documents attached to his report. His report does not even indicate that the documents that he listed were in fact attached to the report at the time that it was presented to the Applicants. His affidavit does not assist in this regard. Pretorius concludes his report by merely stating that he agrees with the contents of De Jager's report ("*Andre De Jager se aangehegte verslag*").

[32] The manner in which the opinions of Pretorius have been presented leaves me no choice other than to deal with each of the documents forming part of Pretorius's report separately and to then use them to come to my own conclusions, if possible.

HISTORICAL DOCUMENTS

[33] Arthur Young & Company are chartered accountants who appear to have assisted the deceased over a period of time. In a letter dated 15 August 1984 someone on behalf of Arthur Young & Co. purportedly informed the manager of Landbank of the identities of the directors and shareholders of three companies, being Kameelhoek (Edms) Bpk, Schaapplaatz 978 (Edms) Bpk and Uplands Saaiery (Edms) Bpk. In this letter the trusts of all the siblings, except for those of the Second Respondent, Pieter, were listed as shareholders. The Applicants did not place the original of this letter before the court. It has not been authenticated by either the author thereof or any person connected to Landbank. The Applicants attempted to do so belatedly by means of an affidavit by one Van de Venter attached to the Replying Affidavit. I will deal with this affidavit later and at the stage when the application to strike out is considered. Suffice to say here that one would have expected the Applicants to use Van de Venter, and any corroboration that he may be able to provide, in the founding papers.

[34] Carol also relies on a letter by Arthur Young & Co. It presents as a letter written after the one of 15 August (even though it is dated 14 August 1984). This letter lists all ten trusts as being shareholders of Schaapplaatz and Kameelhoek. This subsequent letter has of course also not been authenticated. Unlike the letter that the Applicants rely on, it does not carry the letter head of Arthur Young. But it cannot be denied that such a document exists and no one has argued that this letter is a forgery.

[35] The two contradictory letters are a clear manifestation of the difficulty and danger inherent in having to make conclusive findings (and come to conclusions) based purely on unauthenticated copies of historical documents, unsubstantiated by the evidence of a person with an independent memory of the facts canvassed in the documents. The contents of the two letters are at odds. The Applicants however carry the onus to prove their version if they want to succeed with the relief that they are praying for. Out of context and without more, the unauthenticated letter of 15 August 1984 is not enough to discharge that onus; especially when considered together with other available documentation.

[36] The Applicants themselves annexed a further letter, dated 4 September 1985, to their founding papers. This letter also appears to have been written on behalf of Arthur Young & Company and is addressed to the Receiver of Revenue. The letter serves to confirm that the tax returns of all ten trusts were submitted. This invites the question as to what the contents of the tax returns (which are not attached) were. Did it indicate that the trusts of Pieter indeed held no shares at the time? And what was the situation with the trusts of Carol and Jackie? Did they each hold only 8% of the shares as the Applicants allege? This letter is consequently also of no assistance in the present dispute.

[37] The Applicants urged this court to read documents dealing with the shareholding in another of the deceased's companies, Uplands Saaiery (Edms) Bpk, as indicating that on 30 March 1983 the shareholding ratio of the various trusts in *this* company was amended. From the documents

it appears as if the Uplands shares of one of Andre's trusts were increased from 200 to 300, those of one of Johnny's trusts were increased from 200 to 300 and that those of one of Pieter's trusts were decreased, first from 200 to 100 and then to zero. On the basis of this information it was then argued that, in the same way as the shares held by Pieter's trust in Uplands Saaiery were transferred to the trusts of Andre and Johnny, the shares that Pieter's trusts held in Kameelhoek and Schaapplaatz were also transferred to the trusts of Andre and Johnny. Without specific references to the other two companies, this again seems to be a jump too far. There is nothing to indicate that the deceased ever dealt with Kameelhoek and Schaapplaatz in exactly the same manner as Uplands. The registers of Uplands Saaiery contain no reference to either Schaapplaatz or Kameelhoek. No reasons have been advanced as to why the Uplands share ratio was adjusted or why the shares in the other companies would have been treated in a similar manner.

[38] A Landbank deed of surety dated 30 January 1985 lists only the trusts of Andre, Johnny, Jackie and Carol as shareholders of Kameelhoek and Schaapplaatz. Only these trusts were then bound as sureties to Landbank for debt of the two companies. The trusts of Pieter were not mentioned. The Applicants argue that this is proof that Pieter's trusts no longer held shares in the two companies. The deed of surety in itself does not explain that this was indeed the situation. Pieter provides an explanation as to why his trusts were not bound as sureties. He avers that "his" shares were pledged to Landbank for debt which he himself had occurred. No documentation was presented to corroborate this

explanation for why Pieter's trusts are not referred to in the deed of surety. The failure to provide corroboration for this specific allegation does not however assist the Applicants in discharging their onus. The mere fact that only eight trusts were presented to Landbank as sureties does not provide proof of the shareholding ratio, especially not the ratio that the Applicants claim.

[39] A deed of surety dated 9 December 1994 bound the shareholders of Schaapplaatz as sureties to Standard Bank for a loan of the company. Only the trusts of the Applicants and Carol are listed as shareholders of the companies. In the "*Consent*" portion of the document the trusts are listed and then referred to as "*being all the members of SCHAAPPLAATZ 978 (PROPRIETARY) LIMITED*". Pieter's trusts are not mentioned. The same facts are applicable to a suretyship binding the shareholders of Kameelhoek as sureties to Standard Bank for debt incurred by the company Kameelhoek. The clear wording of these two deeds of surety supports the argument that Pieter's trusts at that stage were no longer holding any shares in the two companies. It does however not indicate the ratio in which the trusts of the other siblings held their shares.

[40] A letter prepared by one D. Preece, dated 7 December 2004 and directed to the Standard Bank Business Centre, lists the shareholders of Kameelhoek (Pty) Ltd as:

- "*Knipe Children's Trusts – 2 000 shares*"
- "*Jansen Knipe Trusts – 2 000 shares*"

The shareholders of Schaapplaatz 978 (Pty) Ltd are listed in the same letter as:

- "*Knipe Children's Trusts – 50 shares*"
- "*Jansen Knipe Trusts – 50 shares*"

This letter in itself does not exclude the trusts of Pieter as shareholders of the two companies. Furthermore, it does not identify the shareholding ratio.

[41] Unsigned financial statements of the trusts for the financial year ending 29 February 1984 refer to the "***TRUSTS KNIPE KINDERS***" as "*a joint venture in equal shares between the five trusts*". In similar fashion the "***JANSEN KNIPE TRUSTS***" is also referred to as "*a joint venture in equal shares between the five trusts*". The headings for both sets of financial statements is indicative thereof that the trusts of all five children were treated as **equal** shareholders. These statements were prepared after the alleged change in shareholding and while the deceased was still the director of the companies and trustee of the trusts. It should be remembered that the deceased himself was a qualified chartered accountant who is expected to have been diligent when dealing with business affairs. The financial statements indicate a difference in the manner in which the nett income of each trust is distributed. Pieter's trusts received smaller amounts than the others. The financial statements provide no reason for this difference. The difference in itself however does not provide proof that the shares held by Pieter's two trusts were sold in its entirety to the trusts of Johnny and Andre.

[42] Both sets of financial statements contain the following note: "*Adjustment with internal Sale of Shares – 1 MARCH 1983*". The notes however do not explain how the internal sale was concluded – they do not explain who the buyer(s) and seller(s) were, and they do not explain in what manner the seller(s) was compensated (if at all). More importantly, it is not explained which company's shares were so sold. It is common cause that the trusts held shares in various companies, amongst others Uplands Saaiery. And as set out above, it appears common cause that the shareholding in Uplands Saaiery was adjusted. The notes in the financial statements could therefore just as well refer to the internal sale of Uplands Saaiery shares. The notes in the unsigned financial statements do not substantiate the Applicants' version, *i.e.* that an internal sale took place which caused the shareholding of Andre and Johnny to increase to 42% each, that of Carol and Jackie to decrease to 8% each and that of Pieter to 0%.

[43] A sale of Robert's shares to Johnny and Andre would not explain why the number of shares held by the trusts of Jackie and Carol were decreased. The financial statements do not assist the Applicants in proving their version of events to be the correct one. Even of it is accepted that the notes relate to the internal sale of the shares in Kameelhoek and Schaapplaatz, it does not indicate that the shareholding ratio was amended in the manner that the Applicants contend for.

DE JAGER

[44] Andre De Jager, an auditor, compiled a report dated 27 October 2010. In his confirmatory affidavit De Jager confirms the correctness of his report. As was the case with Pretorius, De Jager also does not explain what methodology he used in preparing his report. De Jager was the person requested by the new directors of the companies (the Applicants) to provide an updated register of shares for each company. He did this by using certain "*rekords, boeke en skrywes*". I infer that he used the documents that Pretorius lists. At the time of this "investigation" into the shareholdingissue, De Jager had already been appointed as the auditor of the companies by the Applicants.

[45] Just like Pretorius, De Jager does not explain whether the documents that he relied on are the only relevant and available documents. Nor does he explain how the documents came to be in his possession. De Jager gives a summary of his findings and opinions, without explaining how he went about in coming to these findings or opinions. Some of the documents referred to in the report are attached to the report itself, such as the original Certificate of Incorporation and Memorandum and Articles of Association of each of the two companies. Those that are not attached appear to be the documents already annexed to the report of Pretorius.

[46] De Jager boldly states that the shareholding ratio was amended on 30 March 1983. He does not provide proof for this statement. He also presents the following so-called conclusion without providing any proof to substantiate it:

> "*Tot op daardie stadium is daar voldoende bewyse van die oordragte in die onderskeie verhoudings. RPJ Knipe, CJK Knipe and JMD Knipe is vergoed vir die aandele wat hulle verloor het in die finansiële state in die 1984 finansiële jaar. (internal sale of shares)*"

De Jager provides no explanation as to how he came to this conclusion. The so-called proof is not detailed or attached. Without corroboration this conclusion cannot be afforded any weight and it does not assist the Applicants in proving their case.

[47] Just as this court cannot rely on the conclusions reached by Pretorius, De Jager's findings also present problems and in similar vein leads to a situation where his views should be disregarded and the sources he used investigated independently. It is significant that when the paucity and vagueness of the reports of De Jager and Pretorius was attacked by the First and Second Respondents, the two experts chose not to file further affidavits in reply. The Applicants attempt to explain the conduct of De Jager and Pretorius (see for example paragraph 64.1 of the Replying Affidavit), but these attempts are not confirmed by either De Jager or Pretorius themselves. I will later address this when dealing with the application to strike out.

[48] Both De Jager and Pretorius appear to have been elective about the documents they used. They make no reference to the documents that Carol attaches to her opposing affidavit, such as the minutes of meetings held at Kimberley by the sole director of the companies at the time (the deceased), dated 27 July 1985. There the deceased recorded that all ten

sub-trusts held shares in the two companies. This is in sharp contrast to the documentation that the Applicants prefer to rely on.

[49] The Applicants boldly state in paragraph 54.1 of their Replying Affidavit that*". .. all of the available documentary evidence indicates that the actual share allocation at the time when the Trusts were determined, is that contended for by the Applicants. There is not one shred of objective, documentary evidence to support the equal allocation contended for by the Respondents . . .*" This statement is clearly incorrect as there is indeed documentation that presents a different picture. Clearly De Jager and Pretorius did not use the other available documentation.

DOREEN BARLOW

[50] Separate to the reports of the auditors, the Applicants also rely on an affidavit by a certain Ms Doreen Barlow, the deceased's former receptionist, head of his Secretarial Division and tax clerk during the period 1 January 1978 to 28 February 1991. She deposed to her affidavit on 30 September 2014 (23 years after she last had anything to do with the business affairs of the companies). Barlow explains that the inscriptions in the registers of Uplands Saaiery referred to earlier, were made by her. She then alleges that she can "*clearly remember*" that on the same date of these inscriptions, inscriptions were also made in the registers of Schaapplaatz and Kameelhoek, effecting changes in the shareholding. She alleges that she remembers that she provided a Mr Ian Tucker of Arthur Young & Co. with the shareholding ratio during 1984

when he required same for purposes of a Landbank loan. Barlow does not state what the ratio was that she so provided.

[51] Barlow concludes her affidavit with the following significant sentence:

> "*Ek sou nie die aandeelhouding uit my kop kon onthou nie, wat ek wel van seker is, is die feit dat RPJ Knipe se aandeelhouding destyds na nul verminder is en die twee dogters, Carol en Jackie s'n ook verminder het*."

[52] It is significant that Barlow cannot remember the specific changes that were made to the shareholding of the trusts of Jackie and Carol. She does not remember that the shareholding of the trusts of Johnny and Andre were significantly increased. Inexplicably she only remembers that Pieter's shares were reduced to zero. Even if this court should choose to rely on the sketchy memory of Barlow, her information does not present with a clear picture as to the shareholding ratio, especially not the ratio that the Applicants promulgate.

[53] The Applicants were unable to present the evidence of a person who can say with any real (and reliable) conviction if there was indeed an internal sale of the shares of Kameelhoek and Schaapplaatz, and if there was such a sale, what the terms thereof were. There is always the possibility that the deceased reallocated shares without an actual sale. Should that have been the case, he acted in the exact same manner as Mrs Knipe did (and for which she is blamed by the Applicants). Later documents also then present that the deceased may have re-adjusted the ratio at a later stage.

CASE FOR FIRST AND SECOND RESPONDENTS

[54] The First and Second Respondents both oppose the application. They do this based on the argument that Mrs Knipe was entitled to allocate the shares as she pleased as she had an absolute and unfettered discretion in terms of the trust deeds. The First Respondent launched a counter-application for an order declaring that Mrs Knipe acted correctly in the way that she allocated the shares in the two companies amongst the siblings. The Second Respondent appears not to join in that application.

[55] The First Respondent presented documents in conflict with those relied on by the Applicants. Some of these documents have already been referred to earlier in this judgment. In relying on these documents, the First Respondent struggles with the same difficulties that the Applicants have. None of the documents have been authenticated and no person with an independent (and more importantly) reliable memory is available to present their version of the facts.

[56] The documents relied on by the various parties are inconsistent and contradictory. Factual disputes and / or lacunae abound. I will come back to the issue of factual disputes after I have dealt with further arguments presented by Carol and Pieter.

[57] The Respondents' strongest argument in opposition to the Applicants' claims is based on the judgments of the various courts that dealt with disputes between the siblings (and other parties) and the court documents relied on in such litigation, the most important of which are

the liquidation proceedings of the companies. Carol and Pieter argue that the court already made factual findings regarding the shareholding ratio in the various judgments delivered during the winding-up proceedings. It is specifically contended that the Full Bench of this Division (who issued the provisional liquidation orders) as well as Daffue J (who issued the final orders of liquidation) had found that the shareholding was equal. This argument brings the principles relevant to *res iudicata* into play.

RES IUDICATA

[58] I find it convenient to give a short summary of the general principles traditionally applicable to *res iudicata*. Firstly, the earlier judgment relied on must be a final or definitive decision, in other words a decision which put an end to the dispute (*lis*) between the parties. See for example: **S v Moodie** 1962 (1) SA 587 (A) at 596 E – F; **Custom Credit Corporation (Pty) Ltd v Shembe** 1972 (3) SA 462 (A) at 472 A – B. In order to qualify as a final or definitive judgment, the judgment must be on the merits of the cause of action which is sought to be litigated afresh (**Custom Credit** *supra* at 472 A; **African Farms & Townships Ltd v Cape Town Municipality** 1963 (2) SA 555 (A) at 562 C – D). Secondly, it is a further requisite of the *exceptio rei iudicatae* that the cause of action or cause of claiming (*causa petendi*) in the proceedings in which the defence is raised must be the same as that on which final judgment was given in earlier proceedings. Here it is not the form of the proceedings which determines the sameness of the *causa petendi*, but the identity of the question raised in the earlier and subsequent proceedings (**African Farms** *supra* at 562 C – D). In order to determine whether the question which is pleaded

as *res iudicata* has already been decided in an earlier case between the parties, one must have regard to the pleadings and judgment in the earlier case (**Van Niewenhuizen v Richards** 1959 (2) SA 686 (T) at 687 F).

[59] In the liquidation proceedings there were 18 applicants. Mrs Knipe was cited as applicant in various capacities, namely in her personal capacity, in her capacity as executrix of the deceased's estate and in her official capacities as director of the two companies and trustee of the ten trusts. Carol took part in the applications as the fourteenth applicant. The fifteenth to eighteenth applicants were Carol's children. Andre, Johnny, Jackie and Pieter themselves were not parties to the liquidation proceedings. However their trusts were parties as represented by Mrs Knipe in her capacity as trustee of the various trusts.

[60] In the present application the provisional liquidators have been cited as interested and necessary parties. They were of course not parties to the liquidation proceedings. All the siblings are parties to the present application in their personal capacities (as alleged shareholders of the two companies). As such the siblings merely stepped into the shoes of their respective trusts which previously were shareholders. Accordingly the parties in the present matter correspond sufficiently with those in the liquidation proceedings.

[61] It is necessary to compare the issues in the current application with those in the liquidation proceedings in order to decide to what extent they are similar. The strict requirements of the *exceptio res iudicata*, especially relating to the requirements of "same relief" and "same cause

of action" may be relaxed in appropriate cases. In such an event the term "**issue estoppel**" is used. In the matter of **Caesarstone Sdot-Yam Ltd v The World Of Marble And Granite CC And Others** 2014 (5) SA 499 (SCA) it was stated that "*the requirement of the same cause of action is satisfied if the proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative if the outcome of that latter case*." [own underlining and emphasis]

[62] In the matter of **Smith v Porritt** 2008 (6) SA 303 (SCA) the principle was worded as involving an enquiry "*whether an issue of fact or law was an essential element of the judgment on which reliance is placed*". The circumstances of a specific case may justify a relaxation of the traditional strict rules. Each case will depend on its own facts. The requirements that remain are that the parties must be the same and that the same issue must arise. When considering whether the same issue arises, the enquiry focuses on whether an issue of fact or law was "*an essential element of the judgment on which reliance is placed*". Considerations such as equity and fairness to the parties themselves as well as to others are to be considered.

[63] In order to properly consider whether issue estoppel is applicable in the present matter, it will of necessity require a careful analysis of the factual and legal questions dealt with in the previous litigation as compared to those in the present application. The various judgments in the liquidation proceedings were all attached to the Respondents' opposing papers. The judgment of Daffue J granting a final order of liquidation has also been reported as **Knipe and Others v Kameelhoek (Pty) Ltd and Another** 2014 (1) SA 52 (FB).

APPLICATION FOR PROVISIONAL LIQUIDATION: JORDAAN J

[64] The initial applications to have the two companies provisionally liquidated were heard by Jordaan J. He dismissed the applications. The following extracts from his judgment are relevant for purposes of considering the applicability of issue estoppel:

> "*. . . it is common cause that the trusts have been dissolved and the question whether they [the trusts themselves] are still shareholders is in dispute. It is in dispute whether the shares have been legally transferred to the children, but as it stands at the moment it appears that the transfer of the shares has been registered and the trusts are therefore not shareholders anymore*."

[65] This *dictum* forms part of the portion of the judgment where the *locus standi* of the various trusts to launch liquidation proceedings were considered. As such it does not directly assist in adjudicating the question regarding whether the shareholding ratio has been **decided**. Jordaan J was however alive to the fact that there are disputes relating to the transfer of the shares by Mrs Knipe to the siblings. The same holds true for the following *dictum* from the same judgment:

> "*. . . the deceased meant to transfer the shares to his children. That was what actually happened in the meantime, although the legality of that is now disputed*."

[66] Jordaan J directly dealt with the issue regarding shareholding only in as far as it was relevant to the parties' *locus standi* to either launch the liquidation application or to oppose it. He did not decide any question

regarding the shareholding ratio as such, but rather concerned himself with whether it is the trusts or the beneficiaries of the trust that are or were shareholders. As a result this judgment is not helpful in the current application.

PROVISIONAL LIQUIDATION: FULL BENCH

[67] An appeal against the dismissal of the provisional liquidation application was heard by a Full Bench of this Division on 23 July 2012. I quote the following relevant portions of the judgment (own underlining and emphasis):

> *"[4] At the time of his death [that is in 2007] the deceased was the sole director of both Kameelhoek and Schaapplaatz (the companies). The shares in the companies were held by family trusts of which the deceased and Mrs Knipe were the trustees. Their five children were the equal beneficiaries of the trusts*."

> *"[6] . . . counsel for the appellants [...] correctly accepted that the appeal should be decided on the basis that each of the five Knipe children holds 20% of the shareholding in each of the companies. It must be added that even on the evidence of Mrs Knipe in this regard, which is not necessary to discuss in detail, it is clear that it is intended that the shares in the company will eventually at least be transferred to Carol, Jacqueline, John and André*."

> *"[18] I am satisfied also that the companies were intended by the deceased to be family companies wherein all his children would be entitled to participate equally on the basis of mutual trust and confidence.*"

[68] In this judgment the relationship between the siblings and thus the shareholders of the companies was referred to in the context of the question whether it would be just and equitable to dissolve the companies. The relationship between the shareholders was also referred to in order to come to the conclusion that there is no reasonable possibility of the shareholders working together within the structures of the company. As such, the question of the actual shareholding **ratio** was not **decided**. It was however, for purposes of considering the basis for the liquidation application, accepted that there are disputes between the siblings, some of which disputes relate to shareholding.

FINAL LIQUIDATION: DAFFUE J

[69] The final orders of liquidation were granted by Daffue J on 27 June 2013. I quote a relevant portion of his judgment:

> *"[12] It is also common cause that prior to the provisional winding-up order, André, Johnny and Jackie managed the affairs of the companies to the exclusion of Carol and Pieter and to be able to do so, they had to remove the sole director, Mrs Knipe, and the one person who as trustee of the various trusts dissolved those trusts and allocated the shares to her five children in equal proportions*." [own emphasis]

This portion of the judgment does not **decide** the shareholding issue and does not even consider the correctness of Mrs Knipe's allocation of shares. It does however reflect on the manner in which the issue has been dealt with by the siblings in affidavits, being an acceptance of Mrs

Knipe's allocation. Daffue J lists several facts which are [according to him] not in issue. I quote some of the relevant "facts" so listed:

> "*15.5 On 15 April 2008 it was accepted that* [sic] *by all and sundry that the five children of the deceased and Mrs Knipe would equally share in the proceeds of the two farms . . .*"

> "*15.6 Mrs Knipe, in her capacity as sole trustee, terminated all the trusts and thereafter transferred the shares in the two companies to the five children in equal proportions and this equal allocation was accepted by all. . . . the three newly appointed directors obtained so-called evidence that André and Johnny are each entitled to 42% shareholding in each company and Carol and Jackie 8% each. These "facts"were suppressed from the court a quo and the Full Bench. This is now their case notwithstanding their earlier acceptance of equal shareholding*."

[70] What is then clear from these quoted passages are that Daffue J was alive to the fact that Andre and Johnny in their affidavits accepted that the shareholding ratio declared by Mrs Knipe was correct and that it was only at a very late stage in the liquidation proceedings that they attempted to amend their stance and asserted that they each are in fact holders of 42% of the shares in each company.

[71] The evidence that Andre and John wished to introduce was none other than the reports of De Jager and Pretorius and the historical data referred to in the reports. Daffue J deals with these reports and historical data by stating:

"*These letters and reports are not under oath, but notwithstanding this, all beneficiaries in the presence of their respective attorneys accepted at the offices of Duncan and Rothman attorneys in Kimberley on 15 April 2008 that the five children should be regarded as equal beneficiaries of the farms owned by the two companies. Everyone also accepted the equal allocation of shares when Mrs Knipe dissolved the trusts in 2009. It is also strange that notwithstanding the information allegedly obtained from the auditors as long ago as October 2010 pertaining to what their shareholding in the companies should be, these facts were suppressed and not conveyed to the court in the initial opposing affidavits. Therefore the Full Bench accepted that the five children are equal shareholders in the two companies*."

[Daffue J here touched on an event which took place during April 2008. I will deal with that event later in this judgment.]

[72] Daffue J does not then proceed to ***decide*** the shareholding ratio, but continue to **accept** equal shareholding on the same basis as it was accepted by the Full Bench. He used the sudden emergence of the "new" facts as indicative of the various disputes between the shareholders and the discord within the companies. To quote: "*The insistence by André, Johnny and Jackie that the twins are entitled to 42% shareholding each in both companies is a major cause for concern which must have contributed to the distrust*." This distrust (or dispute) between the shareholders of the companies is then used as basis for a finding that it would be just and equitable to liquidate the two companies.

[73] It is therefore not the shareholding <u>ratio</u> as such which formed an essential element of Daffue's judgment, but the fact that there is a

dispute regarding the shareholding (or put differently, that there are disputes between the siblings regarding their shares).

[74] Daffue J considered alternatives to liquidation such as business rescue. He comes to the conclusion that such alternatives are not viable in the light of the disputes regarding the shareholding ratio. In as far as it may play an important role in alternatives to liquidation Daffue J then specifically remarks that "*it is not possible to adjudicate the issue of the shareholding ratio on the papers. . .* ." (at paragraph 47 of his judgment). The way in which this remark is worded, makes it clear that Daffue J did not decide the shareholding ratio but dealt with the liquidation application in the absence of a clear decision on that point, or rather in the presence of a dispute regarding the matter.

[75] In the premises I do not agree with the Respondents' contention that the Full Bench and Daffue J definitively pronounced on and decided the shareholding ratio. The exact ratio in itself was not an essential element of the judgments, but rather the disputes surrounding the issues. The comments made in the various judgments do however assist the Respondents as it throws a spotlight on the manner in which the Applicants have previously approached the question of the shareholding ratio.

ACCEPTANCE OF SHAREHOLDING RATIO

[76] Averments made by the Applicants in earlier affidavits and other pleadings form the basis of an argument that may better assist Pieter

and Carol in opposing the claims by the Applicants. The averments also open up questions regarding the Applicants' *bona fides* and intention with the current application.

[77] Daffue J's judgment is important in that it highlights the fact that the Applicants at various times accepted that the Knipe children are equal shareholders. This "acceptance" should now be considered in order to see whether it does not put an end to the Applicants' case.

[78] In their Replying Affidavit in the current application the Applicants alarmingly attack even the factual findings of Daffue J. They allege that Daffue J "*did not have all facts at his disposal*" (a situation for which the Applicants only have themselves to blame). They allege in paragraph 58.1 that "*had he been appraised of the information contained in the Applicants papers in this application, as well as of the fact that the First and Second Respondents clearly have no answer thereto, he would no doubt have expressed a different view*." The entire appeal procedure has been exhausted. By attacking Daffue J's judgment and the findings he made, the Applicants appear to attempt to circumvent portions of his judgment. Such an approach is of course inappropriate and unacceptable.

[79] The Applicants attempt to explain their reason for not placing the shareholding ratio in issue in the previous litigation in the following manner:

> "*The reason why the true position was not placed before the court from the outset is that when the issue first raised its head during the course of the*

removal application, Adv Willie Steyn (our counsel in that matter) advised us not to include our version regarding the shares held by the various trusts in the papers . . ."

"*As a result of the aforementioned advice, the removal application was dealt with on the basis that each of the deceased's children was an equal beneficiary (and accordingly an equal shareholder post termination of the trusts), despite the fact that this was not the true position. Unfortunately this "assumed position" also permeated the papers in the liquidation application . . .*"

[The removal application referred to in the quoted passages refer to an application by Pieter, Jackie and Andre for Mrs Knipe's removal as trustee of the trusts and executrix of the deceased's estate. That application was brought under case number 1568/2007 in the Kimberley High Court.]

[80] The judgment of Daffue J explains how the matter was canvassed by the Applicants throughout the liquidation proceedings. The Applicants' explanation now as to how they merely acted on legal advice issued to them, do not convince and are at odds with the various other instances where they indicated their acceptance of Mrs Knipe's equal allocation.

[81] First and Second Applicants issued separate summonses out of the Northern Cape High Court against Mrs Knipe. In the summonses the Applicants aver that they are entitled to 20% of the nett assets of the Jansen Knipe Trust and the Knipe Kinder Trust (*i.e.* the two master trusts). They do this by referring to the notice of dissolution issued by

Mrs Knipe and use that as their cause of action. The summonses followed letters of demand wherein the First, Second and Third Applicants insisted that they are entitled to 20% of the assets of the trusts. First and Second Applicants specifically did not insist that they are entitled to *at least* 20% (as one might have expected based on their current view of the matter).

[82] In their opposing affidavits the First and Second Respondents also refer to other litigation in the Northern Cape Division where one or more of the Applicants dealt with the shareholding ratio as being equal. Portions of the various affidavits filed in that litigation were attached to the papers. I do not find it necessary to refer to each and every one of these affidavits as they are merely further instances where the Applicants chose (under oath) not to present their assertions as to the shareholding ratio. The Applicants' explanation for these is also that they acted on legal advice that was given to them.

[83] The Applicants further showed acceptance of the ratio in which the shares were allocated by Mrs. Knipe through conduct other than litigation. On 23 July 2010, in a letter by De Jager, notice is given of a shareholders' meeting to be held in respect of the two companies. A copy of the agenda of the proposed meeting was attached to the letter. The Notice of Annual General Meeting of the companies was signed by the three Applicants referring to themselves as being 20% shareholders ("*aandeelhouer 20%*"). De Jager acted as chairperson of the shareholders' meeting. At the meeting Pieter was referred to as a shareholder with the right to vote ("*aandeelhouer met stemreg*"). The minutes of the meeting was kept by De Jager, who now wants the court to rely on his report wherein

he indicates that Pieter is no longer a shareholder of the companies and that he (that is De Jager) at all times knew that this is not the case. From the available minutes it indeed appears as if no one at the meeting mentioned that they are of the view that Pieter is not a shareholder at all. It was at this meeting where Andre, Johnny and Jackie fired Mrs Knipe as director of the two companies, voted that the three of them be appointed as directors and appointed a new company secretary (De Jager) and auditor (Pretorius). All of this was done on the basis of each sibling holding 20% shares in each company.

[84] In the Replying Affidavit the Applicants explain that "*the Applicants had no option but to rely on the "shares" so "issued" to them by Mr. Viljoen since this was the only evidence they had, at the time, that they possessed any shares whatsoever . . .*" The question presents itself as to why the Applicants would think that any person may have questioned whether they are shareholders or not. Why did the Applicants find it necessary to present proof of their shareholding?

[85] On 27 August 2010 De Jager wrote a letter to CIPRO requesting that the deregistered company Schaapplaatz be restored as a company with **five** shareholders. No indication was then given that the shareholding ratio was being disputed or that investigations were underway.

[86] During April 2008 a meeting was held at the offices of Duncan & Rothman Attorneys in Kimberley concerning the estate of the deceased. At the meeting an agreement was reached concerning the two companies and the shareholders. Andre and Johnny undertook to make

an offer for the shares held by the trusts of Jackie, Carol and Pieter. Such an offer does not make sense if Pieter's trusts at the time no longer possessed any shares. In their Replying Affidavit the Applicants admit (in paragraph 55.3 thereof) that "*on 15 April 2008 all the Knipe children believed they would share equally in the proceeds of the two farms*." The farms are the only assets of the two companies.

[87] At all relevant times before the launching of the present application, the Applicants accepted that the siblings hold equal shares, or they at least acted as if they do not dispute it. This not only colours the credibility of the Applicants in a negative way, but is also not assisting the Applicants in discharging their onus of proving that they are entitled to the relief claimed in their Notice of Motion.

[88] The present application was issued about two weeks after the Applicants brought an application to convert the liquidation proceedings concerning the two companies into business rescue proceedings. The timing of the business rescue application is significant. The shareholding ratio as contended for by the Applicants is crucial for their business rescue application. The Applicants accept as much, as is evident from paragraph 10.3 of the Replying Affidavit:

> "*. . . the applicant's* [sic] *are of the view that the outcome of this application will have a material impact on the determination of the business rescue application and that this application should therefore be heard first*."

[89] In an earlier paragraph the Applicants provides reasons as to why the business rescue application as well as the current application was brought. One of these reasons is worded as follows:

> "*. . . in order to ensure that various beneficiaries of the trusts are allocated (and receive) the correct shareholding in the companies that is due to them in terms of the provisions of the respective trust deeds*."

One would therefore have expected the shareholding application to have been launched first or at least simultaneously with the application for business rescue. It could also have been expected of the Applicants to have launched the present application much earlier.

[90] The Applicants' real motive with the business rescue application has been placed under suspicion by the Respondents who contend that it is merely a method of frustrating the winding-up processes. By the mere issuing of the business rescue application the Applicants did in fact manage to halt the liquidation proceedings and the activities of the provisional liquidators. However, if it was the Applicants' intention to use the business rescue application merely to prevent the liquidation processes from proceeding properly one would have expected them to have launched that application much sooner.

[91] It seems that especially the First and Second Applicants are overwhelmingly concerned with receiving what they feel they deserve, namely 42% of the shares of each company each. If this is indeed the case, it is even more incomprehensible why the Applicants in previous

litigation chose not to attack the equal shareholding scenario (at least not until it was too late). The explanation as to the advice they received from counsel does not exempt the Applicants from the fact that they previously deliberately chose not to rely on the ratio they now vehemently try to assert (and their decision was reflected under oath).

[92] It is not that the Applicants only learned of the possibility that the shares may not be held in equal proportions after the trusts had already been terminated. In fact, they blame Mrs Knipe's actions in terminating the trust on the fact that she knew that Johnny, Andre and Jackie were asserting a different share ratio. In paragraph 6.8 of his affidavit, the First Applicant deals with Mrs Knipe's decision to terminate the trusts and avers:

> "*Her decision to do* [sic] *was prompted by the fact that Pieter, Jackie and Andre had brought the removal application* [to remove her as trustee of the trusts] *against her, coupled to the fact that we were asserting at the time (as we still do) that the trust's* [sic] *created for my and Andre's benefit held 84% of the shares in the companies between them . . . .*"

[93] The Applicants' past acceptance of an equal shareholding ratio brings the principles of estoppel proper into play. As a consequence of their previous words and conduct the Applicants now stand to be precluded from denying that the various individual trusts held the shares in the companies in equal proportions.

[94] It was argued that the **probabilities** lean more in favour of the Respondents' contentions regarding the shareholding ratio. The companies were initially designed to eventually be run and managed by all the children who were to hold the shares in the companies in equal proportions. The deceased attempted to treat his children equally. Nothing was placed before any court this far to indicate that some significant event took place to change this, at least not to the benefit of Andre and Johnny. If the deceased did indeed favour one of his children, it appears to be Carol. The deceased appointed her as manager of both farms and gave her exclusive hunting rights. It has not been explained why the First and Second Applicants would have been treated so much more beneficially than their siblings (as the Applicants allege) or why Carol's shares would be decreased dramatically. It has been held that a court should, in deciding disputed facts in application proceedings, always be cautious about deciding probabilities in the face of conflicts of facts in the affidavits (**Buffalo Freight Systems v Crestleigh Trading** 2011 (1) SA 8 (SCA) at 14 D – F). In **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) it was held at 290 E - F that, unless the circumstances are special, motion proceedings "*cannot be used to resolve factual issues because they are not designed to determine probabilities*". As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied (i) that there is no real and genuine dispute on the facts in question, or (ii) that the one party's allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or (iii) that *viva voce* evidence

would not disturb the balance of probabilities appearing from the affidavits.

DISCRETION TO ALLOCATE SHARES

[95] On behalf of the Applicants it was argued that an adjudication of the declaratory relief claimed by the Applicants necessarily involve the determination of the question whether or not the trust deeds in fact conferred on Mrs Knipe the discretion to allocate the assets of the trusts as she wished. Unfortunately for the Applicants, and as can be seen from the aspects already dealt with, their case meets with obstacles before it is even necessary to consider whether Mrs Knipe had the necessary power to allocate the shares in the matter that she did. In adjudicating the Applicants' application it makes no sense to first adjudicate whether Mrs Knipe had the necessary discretion and only then to consider what the correct shareholding ratio was.

[96] The powers of Mrs Knipe come into play when the counter-application is considered. The parties differ in their interpretation of the powers and duties that Mrs Knipe (as trustee of the various trusts) possessed at the time that she terminated the trusts. The Applicants submit that as trustee she was obliged to hold the capital of the trust assets in respect of each of the ten trusts for the benefit of the specific beneficiary of each trust and that she was further obliged, upon termination of every such trust, to pay out the capital or income held by each trust for the benefit of the specific beneficiary. Mrs Knipe was therefore not at liberty to redistribute the issued share capital amongst the siblings in the manner

that she did. She had to follow the ratio in which the shares were held by each trust, being 42% each for the First and Second Applicants, 8% each for the Third Applicant and First Respondent, and 0% for the Second Respondent.

[97] The First and Second Respondents on the other hand contend that the trust deeds provided for the trusts to be discretionary trusts and that Mrs Knipe was therefore at liberty to distribute the trust assets as she saw fit. The First and Second Respondents assert that Mrs Knipe was entitled to allocate the shares as she pleased as she had an absolute and unfettered discretion in terms of the trust deeds. The First Respondent launched a counter-application for an order declaring that Mrs Knipe acted correctly in the way that she allocated the shares in the two companies amongst the siblings. The Second Respondent appears not to join in that application.

[98] The Respondents do not primarily rely on the contention that Mrs Knipe happened to allocate the shares in the correct ratio. The Applicants bitingly point this out in their reply to the Respondents' opposition:

> "*A stark feature of the Respondent's papers is that they contain no objective evidence of any probative value in support of the contention that the "allocation" made by Mrs. Knipe corresponds in the slightest with the shareholdings actually held by the various trusts at the time of the deceased's death and at the time when she made the "allocation". Rather, their contention appears to be that Mrs Knipe was at liberty to allocate the shares at will without any reference or regard to the actual allocation of the shares at the time of the deceased's death*."

[99] On the Applicants' suggestion, Mrs Knipe should have made enquiries of her own before allocating the trust assets. There is no information before this court as to what extent she may have attempted to do so. Should Mrs Knipe indeed have investigated the situation at the time, she would presumably have been confronted with little more than the documents, opinions and half-forgotten memories currently before this court. She too would have had difficulty in penetrating through the quagmire of contradictory information.

[100] The Applicants do not specifically claim that the decisions made by Mrs Knipe in regard to the allocation of the assets of the trusts should be set aside. This may however be inferred from the relief that they do claim. Significantly the Applicants do not complain about the allocation of any other assets held by the trusts at the time of termination. In fact no information has been provided as to the totality of actual assets held by each trust at the time of determination.

[101] The Applicants attempted to undo Mrs Knipe's actions by issuing instructions for the reconstitution of the Registers of Members. They now need declaratory relief that would effectively ratify their actions. One would have expected this application to have followed immediately upon the majority shareholders' instruction to De Jager to investigate the matter and prepare reconstituted Registers of Members. They arranged for new Registers of Members and share certificates contrary to the allocation by the sole trustee of the trusts at the time of its termination and proceeded to act as if Mrs Knipe did not allocate the shares in the ratio she did. At the very latest, the Applicants should

have approached the court during the applications for the winding-up of the companies as they must have realized then that the shareholding ratio were to come into play during the liquidation and distribution processes carried out by the liquidators.

[102] The First Respondent requests specifically that the resolution of Mrs Knipe as to the allocation of the trust assets (specifically the shares) be declared lawful, valid and binding. It follows that she wishes this court to do so on the basis of the evidence and legal arguments presented in the application papers. The arguments used in opposition to the Applicants' application are also used as basis for the relief claimed in the counter-application.

DISPUTES OF FACT

[103] There are serious factual disputes between the Applicants on the one hand and the First and Second Respondents on the other regarding (*inter alia*) the shareholding ratio and whether this had changed during or around 1983. This much was clear even before the application for declaratory relief was launched. Daffue J was already alive to this fact and commented thereon. Still the Applicants insisted on approaching this court on affidavit. They did this despite their appreciation of the fact that the matter should be adjudicated through action procedures.

[104] In a letter addressed to the First Respondent's attorney, the attorneys representing the Applicants included the following paragraph:

"*Ons is van mening dat die Hof genader moet word om 'n verklarende bevel te gee rakende die onderskeie persentasie aandeelhouding in die maatskappye. Uit die aard van die saak is daar voorsienbare feite dispute wat ons insiens nie by wyse van 'n aansoek opgelos kan word nie en dat daar derhalwe dagvaarding uitgereik sal moet word*."

In the same letter alternative methods of dispute resolution is discussed, such as an inquiry by the liquidators in terms of sections 417 and 418 of the Companies Act and arbitration.

[105] The Applicants explain their decision to issue application proceedings in paragraphs 6.1 and 6.2 of their affidavit in reply to the Second Respondent's opposition. This explanation should best be dealt with in the Applicants' own words:

"*6.1 It is indeed so that the Applicants realized that the shareholding ratio in the companies may be placed into dispute. It is further correct that the Applicants declined the invitation to address such dispute through the mechanisms created by Sections 417 and 418 of the Companies' Act, 61 of 1973 and suggested that the matter be dealt with by way of Arbitration. The Respondents, however, failed to consent to Arbitration.*

6.2 Pursuant to having sought further legal advice in the wake of the Respondent's failure to consent to Arbitration it was brought to the Applicants' attention that the shareholding dispute would, no doubt, be capable (at least a large extent) of resolution on the basis of the historical documents relied on by the Applicants thus of resolution by means of application proceedings. The Applicants still respectfully hold this view."

[106] An application may be dismissed with costs when an applicant should have realised when launching the application that a serious dispute of fact was bound to develop (See: **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1162). Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order (See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634 H – I).

[107] In the matter of **SH v GF** 2013 (6) SA 621 (SCA) at 626 G – H the principles relevant to disputes of fact in motion proceedings were aptly summarized as follows:

> "*It is trite that in the case of factual disputes in motion proceedings the version of the respondent must be accepted for purposes of determination thereof, irrespective of where the onus lies, unless that version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers*."

[108] No party has requested me to refer the matter for oral evidence. All insisted that the matter be adjudicated on affidavit, despite the existence of various factual disputes. I have seriously considered whether the time has not arrived for these parties to face off against each other by means of oral testimony. At first blush it presents as a practical solution to dealing with the various factual disputes and issues

of credibility. The reality however dictates that the leading of oral evidence may not assist at all. The deceased would have been the primary witness as to what transpired and how the shareholding issue was dealt with during the seemingly crucial period of 1983. His version will unfortunately never be heard. The various historical documents will not assist without the oral evidence of persons who can authenticate the various documents or who has independent memories of the exact events. That leaves us with "after the fact" witnesses such as De Jager and Pretorius who base their opinions primarily on some, and not all, of the historical documents. Doreen Barlow already made it clear that she has a very limited independent memory of events during the relevant period.

[109] It is furthermore undesirable that a court *mero motu* orders a referral to oral evidence. This much is clear from cases such as **Joh-Air (Pty) Ltd v Rudman** 1980 (2) SA 420 (T) at 197 A – B and **Buffalo Freight Systems v Crestleigh Trading** 2011 (1) SA 8 (SCA) at 14 E.

[110] The facts alleged by the First and Second Respondent, together with the few allegations made by the Applicants that the Respondents actually admit, are not such that an order can be granted in favour of the Applicants. The documents presented by both parties are contradictory. This conflict does not assist the Applicants in discharging their onus. The application stands to be dismissed. Furthermore, by virtue of the Applicants own words and actions in the past they are estopped from asserting an unequal ratio.

COUNTER-APPLICATION

[111] In the counter-application the First Respondent is confronted with the same difficulties regarding factual disputes when dealing with the shareholding ratio relying on documents. The First Respondent's case in the counter-application is bolstered by the principles of estoppel (as set out above). Adjudication of the counter-application however specifically involves the question as to whether Mrs Knipe acted correctly and properly in accordance with the trust deeds when she reallocated the shares amongst the siblings. This necessarily involves an interpretation of the two trust deeds.

[112] In general the rules relating to the interpretation of written contracts are applicable to interpreting a trust deed (See **Worman V Hughes and Others** 1948 (3) SA 495 (A) at 505; **Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A)** at 453). The relevant principles have been reiterated in the matter of **Sea Plant Products Ltd and Others v Watt** 2000 (4) SA 711 (C) at 720 D to 721 C:

> "*Applied particularly to a trust deed, the exercise in interpretation involves determining the intention of the settlers of the trust as expressed by them in the trust deed . . . where there is an ambiguity in the document, an interpretation favouring the basic purpose and scope of the trust deed must be preferred. . . . The trust deed speaks from the time of its execution. . . .*
>
> *As with the interpretation of a written contract, the point of departure in interpreting a trust deed is therefore the grammatical or ordinary meaning of the words used, read within the context of the trust deed as a whole*."

[113] In **Coopers & Lybrand and Others v Bryant** 1995 (3) SA 761 (A) the traditional technique of interpreting written contracts was summarized at 767 E – 768 E:

"*According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. . . .The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:*

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract . . .;

(2) to the background circumstances which explain the genesis and purpose of the contract. . .;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."

[114] In the present matter the trust deeds are clear on who the beneficiary of each trust was to be. Each trust had one of the siblings as a beneficiary. It is common cause that the trusts were created to benefit the Knipe siblings. In paragraph B of the preamble it is recorded that the trusts were create "*in consideration of the natural love and affection*" which the donors (the siblings' grandfathers) had for the siblings. Clause 2 provides a clue as to what the trust assets were meant to be.

"*The Donor hereby donates unto and in favour of the Trustee, in his capacity as such, the sum of R500,00 in respect of each one of the Donees which, together with any other assets which the Trusts may at any time hereafter acquire, either by donation from the Donor or by donation from any other person or by acquisition with the assets of the Trusts, are all hereinafter referred to as "the Trust Assets"."* [own underlining and emphasis]

Through prudent business dealings and financial acumen the deceased did increase the assets of the trusts to include shares in various companies.

[115] The trust deeds contain numerous clauses elaborating on the powers of the trustees in dealing with the trust assets. So clause 5 of the deeds bestows on the trustee(s) an "*absolute and unfettered discretion*" to invest and deal with the trust assets for the **purpose** of the trusts. The words "*absolute and unfettered discretion*" are used on a number of occasions throughout the trust deeds, always with reference to dealings with trust assets. The trust deeds do not contain any specific provision that limits the powers of the trustees in dealing with trust assets other than to achieve the purpose of the trusts. The trusts are clearly discretionary trusts in that the trustee was at liberty to deal with the trust assets in any way that would further advance the purpose for which the trusts were created.

[116] The **purpose** of the trusts was clearly to benefit the siblings (donees) equally. Such purpose provides the background against which the trustee was to exercise his or her 'absolute and unfettered' discretion. From the wording of the trust deeds it appears clear that the creators of

the trusts never intended that any beneficiary was to be treated differently than the others. The trusts formed part of two sets of trusts, the PG JANSEN TRUSTS and the R.L. KNIPE TRUSTS. The very fact that each set of trusts was governed by a master deed reinforces the idea that the trusts were for all intents and purposes to be treated in similar fashion. There is no reason to suspect that the same principle would not have been applicable at the termination of the trusts.

[117] Clause 7 of the trust deeds states that the trustee(s) shall hold the capital of the trust assets for the benefit and advantage of the donees. It was envisioned that the trust of each sibling will terminate when the specific done reached the age of 40 years. It was also provided that "*if the trustee is of the opinion that circumstances have arisen or might arise to warrant his doing so, he shall be empowered in his sole, absolute and unfettered discretion, either to terminate the trusts in whole or in part at a time or times prior to the aforementioned date of determination and to pay out to the donees the Trust Assets . . .*" Clause 8 deals with a situation where one of the beneficiaries died prior to the determination of his or her trust. In such circumstances the trust assets held by his or her trusts were to devolve in equal shares upon "*his or her lawful surviving issue or, failing such lawful surviving issue – the surviving Donees . . .*"

[118] The wording of the trusts deeds all point towards equal treatment of the trusts. The powers of the trustee(s) were discretionary so as to ensure that all available means could be used to further the purpose for which the trusts had been created. Through her actions when terminating the trusts and allocating the assets held by the trusts, Mrs Knipe happened to give proper effect to the intention and purpose with which the trusts

were created in 1979. She treated the trusts (and its beneficiaries) equally. It mimics the manner in which the deceased dealt with the trusts.

[119] Even if the trusts were not discretionary trusts, it is clear from what has already been discussed that it was not known at the time of termination of the trusts what the exact assets of each trust were (at least as far as the shares in Kameelhoek and Schaapplaatz go). On determination of the trusts, Mrs Knipe had to distribute the assets in line with the purpose of the trusts. She had to do this on the basis of the information available at the time. On the papers before me it cannot be found that Mrs Knipe acted incorrectly in the manner in which she allocated the trust assets. In the result, the notice of termination ("Kennisgewing van Ontbinding van Trusts") by Mrs Knipe is to be declared valid and binding. The same goes for her resolution dated 20 August 2009.

[120] Section 115 of the Companies Act, 61 of 1973, deals with the rectification of the register of members of a company. Subsection 115(1)(a) provides that:

> "*If the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company . . . the person concerned or the company or any member of the company, may apply to the Court for rectification of the register*."

Essentially an application under section 115 is concerned with title to be on the register and not with ownership of shares (See **Verrin Trust &**

Finance v Zeeland House and Others 1973 (4) SA 1 (CPD) at 9 G - H). "*A Court hearing such an application may, therefore, quite properly confine itself to the minor and direct dispute as to whether the register should be rectified or not and leave it to the parties thereafter to debate the question of ownership in a trial action*." (**Verrin** ***supra*** at 9 H)

[121] The relief claimed by the First Respondent in prayer 3 of the Notice of Motion in the Counter-Application deals with the contents of the register of members and with the question as to which persons should be registered as members. As a result of Mrs Knipe's determination, all the siblings should appear as members on the Registers of Members for Kameelhoek and Schaapplaatz.

[122] Prayers 5 and 6 of the First Respondent's counter-application relates to the alleged unethical conduct of the two auditors, Pretorius and De Jager. No arguments were presented in regard to these prayers. Although the manner in which Pretorius and especially De Jager dealt with the matter may raise eyebrows, their conduct was not such to necessitate drastic action. Accordingly, I do not deem it necessary to further deal with the relief claimed in these prayers.

COSTS

[123] There is no reason why the general rule relating to costs should not be applicable. As the losing parties, the Applicants should bear the costs of their own application jointly and severally, the one paying the other to be absolved. These costs should include the costs of the First and

Second Respondents' opposition. It was argued on behalf of the Applicants that the manner in which the Respondents opposed the application merits a cost order against them. I do not agree with that submission. The opposition was dealt with in a responsible manner and was both necessary and reasonable. Furthermore the Applicants knew beforehand that the adjudication of the relief they claimed would elicit serious factual disputes that cannot be adjudicated on affidavit. The Respondents had no choice other than to deal with all such disputes.

[124] The First Respondent engaged the services of two counsel. It was not argued that the First Respondent would not be entitled to the costs of two counsel. The Respondents submitted that the Applicants should be ordered to pay the costs of opposition on a punitive scale. Following through on the various comments made above regarding the manner in which the Applicants chose to deal with issues relating to the shareholding ratio, I agree that this is a proper case for a punitive cost order.

[125] The counter-application launched by the First Respondent is closely intertwined with her opposition to the main application itself. The Applicants appreciated this close link and used their replying affidavit in response to the First Respondent's opposition also as opposing affidavit in the counter-application. The Applicants should also be held responsible for the costs incurred as a result of the First Respondent's counter-application.

APPLICATION TO STRIKE OUT

[126] The application by the First Respondent to strike out certain portions of the Replying Affidavit will now be considered. The application is opposed by the Applicants. By arrangement between the relevant legal representatives and me the arguments regarding this application were presented by means of written submissions filed after the hearing of the main application. In order to prevent possible later confusion I pause to point out that the Applicants in fact filed two replying affidavits. One carries the heading of "*Applicants' Replying Affidavit (to Second Respondent's Answering Affidavit)*". The other is merely titled "*Applicants' Replying Affidavit*". The application to strike out is levelled at this last mentioned replying affidavit and I will henceforth only refer to this one as the replying affidavit. The replying affidavit is deposed to by the First Applicant. Neither the Second nor the Third Applicant deposed to confirmatory affidavits.

[127] The First Respondent primarily contends that the replying affidavit contains new matter that should have been dealt with in the founding papers, as well as hearsay evidence. The various paragraphs objected to, are detailed in the application to strike out.

(a) New material

[128] The general rule is that an applicant must stand or fall by the founding affidavit and the facts alleged in it and that, although sometimes it is permissible to supplement the allegations contained in that affidavit,

still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon to either affirm or to deny. If the applicant merely sets out a skeleton case in supporting affidavits, any fortifying paragraphs in the replying affidavit will be struck out. If facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant, the court will allow the applicant in a replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up an additional ground for relief arising from the answering affidavit. See: **Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger** 1976 (2) SA 701 (D).

[129] A letter purportedly written on behalf of Arthur Young & Co. is attached as annexure "**RA6**" to the replying affidavit. The Applicants do not explain where, by whom, and more importantly when this letter was discovered. The letter is not dealt with in the reports of De Jager or Pretorius, despite the fact that both gentlemen intended to convey that they made use of all available historical documentation in compiling their reports. One would therefore have expected this letter to have been dealt with by either Pretorius or De Jager and as such the letter should have been attached to the founding papers. The Applicants do not explain why this was not done. In the result the letter and the reference thereto in paragraph 20.1.10.2.1 of the Replying Affidavit amount to new material and should be struck out.

[130] Annexure "**RA7**" is an affidavit by Abraham Frederick Van de Venter who is employed at Standard Bank. He attempts to explain the loans made by the two companies during 1984 and the reason behind the letter of 15 August 1984. Such letter was comprehensively dealt with in the founding papers, especially through the reports of De Jager and Pretorius. By using the affidavit of Van de Venter in reply, the Applicants attempt to bolster the difficulties that the unauthenticated letter and the opinions of their experts on the letter, present. There is no explanation as to why the Applicants did not obtain the corroboration that Van de Venter may be providing when launching the application. They should have expected an attack on the veracity of the letter and the reports of De Jager and Pretorius. If they wanted to corroborate it, such corroboration should have formed part of the founding papers. The affidavit and the reference thereto in paragraph 20.1.10.2.2 of the Replying Affidavit is new material that should be struck out. Van de Venter's affidavit also contains inadmissible hearsay evidence that provides an additional ground for it to be struck out.

[131] The First Respondent attacks paragraph 22.2 of the Replying Affidavit as well as the two annexures referred to in that paragraph as being new material. The allegations contained in the paragraph and the annexures attempt to refute the allegations by the Respondents that the Applicants at all relevant times previously accepted the allocation made by Mrs Knipe. Those allegations form the cornerstones of not only the First Respondent's opposition to the application but also her counter-application. As such the paragraph under attack and especially annexure "**RA10**" serve as opposition to the counter-application and

function as more than a mere reply. I therefore find this "new material" to be admissible and deny the First Respondent's request to have it struck out.

[132] The First Applicant also attacks paragraphs 67.2.3 and 67.2.4 as being new material. These paragraphs deal with the contents of the letter of Arthur Young & Co. which was attached to the founding papers as part of the report by Pretorius. The contents of the paragraphs are nothing more than further arguments based on the contents of the letter itself. I see no reason to strike out these paragraphs. The same argument is advanced against paragraph 71.2 which present as argument and/or comment on the suretyships in favour of Standard Bank. These suretyships were attached to Pretorius's report which formed part of the founding papers. As such it does not amount to new material. Again I see no reason to strike out this paragraph.

(a) Hearsay evidence

[133] As a general rule, subject to the provisions of the Law of Evidence Amendment Act, Act 45 of 1988, hearsay evidence is not permitted in affidavits. In various paragraphs in the Replying Affidavit the First Applicant attempts to protect De Jager and Pretorius against attacks made by the Respondents. The First Applicant on more than one occasion avers that both De Jager and Pretorius carefully read through the founding affidavit before deposing to their own affidavits. Neither De Jager nor Pretorius deposed to affidavits confirming these averments. The averments made by the First Applicant therefore

amount to unsubstantiated hearsay. In the result paragraphs 34 and 41.1 stand to be struck out.

[134] Hearsay is also contained in paragraph 56.2. Here the First Applicant deals with knowledge that his erstwhile advocate is suppose to have. Again this is not supported by any confirmatory affidavit. This paragraph should also be struck out.

(c) Irrelevant material

[135] Paragraphs 59.2 to 59.4 deal with the alleged good relationship that the First Applicant had with the deceased. The First Respondent argues that these paragraphs should be struck out as consisting of new and irrelevant material. The paragraphs under attack are a direct response to paragraph 188 of the First Respondent's Opposing Affidavit where the First Respondent chose to "*bring to the Court's attention that the deceased did not speak to Johnny for many years prior to his death*." It is therefore the First Respondent herself who invited a response. The same of course then goes for the annexures referred to in the paragraphs. The First Applicant's request to have these paragraphs and annexures struck out is denied.

(d) Privileged documentation

[136] The Applicants attached documentation containing privileged material to the Replying Affidavit. Allegations surrounding the privileged documentation was then included in the affidavit itself. Annexures

"**RA11**" to "**RA14**"are letters clearly carrying the note "*Sonder Benadeling van Regte*". The Applicants' insistence in referring to the contents of these documents leaves a bad taste. The annexures, as well as the paragraphs referring to them, stand to be struck out from the Replying Affidavit.

[137] Paragraphs 26.7 to 26.11 deal with a memorandum dictated by Loftus Viljoen (the attorney who assisted Mrs Knipe when the trusts were terminated). The memorandum itself is attached as annexure "**RA15**". This is clearly privileged communications between attorney and client and should never even have found its way into the hands of the Applicants, much less be presented in court papers. The same goes for annexure "**RA17**", read together with paragraph 26.12 of the Replying Affidavit which deal with file notes made by Loftus Viljoen. These paragraphs and annexures are to be struck out.

[138] "**RA18**" is another letter by Loftus Viljoen. This letter does not have an indication that it was written without prejudice. The letter in itself, as well as paragraph 26.13 that deals with it, does not take the matter further. I decline the First Respondent's request to strike out the references to this letter.

[139] "**RA19**" is a letter written by Mrs Knipe to Loftus Viljoen and it contains certain instructions to him regarding the shareholding issue. This is another document that inexplicably found its way into the hands of the Applicants. It is clearly a document that was only meant for the eyes of Loftus Viljoen. This annexure, as well as paragraphs 26.14 to 26.16 that

deal with the letter, should be struck out. "**RA20**" is once again a file note by Loftus Viljoen. This annexure, together with paragraph 26.17 that refers to it, should be also struck out.

[140] A mathematical examination of the First Respondent's application to strike out indicates that about 23 paragraphs and 11 annexures are struck from the Replying Affidavit. This is a substantial success for the First Respondent. She will therefore be entitled to an order of costs in her favour.

ORDER

[141] In the result the following orders are made:

1. The late filing of the Applicants' Replying Affidavits is condoned;

2. The following paragraphs are struck from the Replying Affidavit filed in response to the First Respondent's Opposing Affidavit: paragraphs 20.1.10.2.1, 20.1.10.2.2, 26.1 to 26.12, 26.14 to 26.17, 34, 41.1 and 56.2;

3. The following annexures are struck from the Replying Affidavit filed in response to the First Respondent's Opposing Affidavit: "RA6", "RA7" and "RA11" to "RA20";

4. The Applicants are ordered to pay the costs occasioned by the application to strike out, jointly and severally, the one paying the other to be absolved;

5. The Applicants' application for declaratory relief is dismissed;

6. The Applicants, jointly and severally, are to pay the costs of the application, including the costs of the First and Second Respondents' opposition thereto, on the scale as between attorney and client;

7. The counter-application succeeds in that prayers 1, 2 and 3 of the Notice of Motion in the Counter-Application are granted;

8. The Applicants, jointly and severally, are to pay the costs of the First Respondent's counter-application, on the scale as between attorney and client;

9. All costs orders in favour of the First Respondent shall include the costs of two counsel.

_____

G. J. M. WRIGHT, AJ

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