IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

In the matter between: **CASE NO.: 35391/14**

2/2/2017

BJ DE KLERK Plaintiff

DELETE WHICHEVER IS NOT APPLICABLE

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

2/2/2017 [redacted]

DATE SIGNATURE

and

MJ FERREIRA First Defendant
PLANTSAAM BESTUURSDIENSTE CC Second Defendant
BENJO EIENDOMME (PTY) LTD Third Defendant

JUDGMENT

Murphy J

1. The plaintiff, Dr BJ de Klerk, ("De Klerk") and the first defendant, Mr MJ Ferreira ("Ferreira"), hold equal membership in the second defendant, Plantsaam

Bestuurdienste CC, ("Plantsaam"), a close corporation, and equal shares in the third defendant, Benjo Eiendomme (Pty) Ltd, ("Benjo"), a private limited company. They are the only members of Plantsaam and the only shareholders and directors of Benjo. The relationship between De Klerk and Ferreira has broken down and is irreconcilable.

2. Benjo is the owner of a farm known as Portion 14 of the farm Vluytjeskraal 272, District Orania, Northern Cape Province ("the farm"). The farm is located on the banks of the Orange River in the Northern Cape, near the town Orania. It is 49,4 hectares in extent and forms part of a larger irrigation scheme. Approximately 42 hectares of pecan nut orchards have been established on the farm. The remaining 7 hectares have been used for maize and wheat. The pecan nut trees have now reached the stage where they are close to full production. The farming operations are conducted through Plantsaam, which also provides agricultural services to other farmers in the area. The precise relationship between the two entities is an issue of some significance.

3. The present proceedings are the culmination of litigation between De Klerk and Ferreira commenced by motion proceedings in 2014 and subsequently referred to trial in view of various disputes of fact. De Klerk seeks orders, in terms of section 163 of the Companies Act[1] ("the Companies Act") and section 49 or section 36 of the Close Corporations Act[2] ("the CC Act"), compelling Ferreira to transfer his membership interest in Plantsaam and his shares in Benjo to him against payment of the amount representing the value of such interests. De Klerk claims to be entitled to subtract from any amount so payable to Ferreira amounts which should have been debited against Ferreira's loan account in Plantsaam. De Klerk pleaded in the declaration that it will be just and equitable for Ferreira's membership interest and shares in Plantsaam and Benjo to be transferred to him upon the payment of the sum of R429 727. This figure was arrived at on the basis that Ferreira's membership interest and shares were valued at R4 617 272. From this he deducted two amounts: R2 987 545 being the amount by which he maintained Ferreira's loan account was understated; and R1 200 000 being the unpaid amount owed to De Klerk by Ferreira

[1] Act 71 of 2008
[2] Act 69 of 1984

for his acquisition in 2001 of the shares and membership interest in the two companies, including interest. The figures in the declaration changed during the course of the trial as concessions and adjustments were made in the light of the fuller disclosure of information. The essential principle of calculation, however, remains the same. De Klerk seeks a transfer of the shares and interest to him against payment of their value less amounts understated or not included in the loan account and the unpaid purchase price for the shares and interest.

4. De Klerk instituted action for payment of the amounts owing for the acquisition of the shares and member's interest in the Northern Cape High Court, Kimberley, under case number 934/14 ("the Kimberley proceedings"). By agreement between the parties, at the commencement of the trial, I granted an order consolidating the Kimberley proceedings with these proceedings.

5. Ferreira denies that De Klerk is entitled to the relief he seeks. He nonetheless concedes that the relationship has broken down and accordingly in the plea seeks orders for the winding-up of Plantsaam and Benjo as contemplated in section 344(f) of Act 61 of 1973 ("the previous Companies Act"), read with Item 9 of Schedule 5 of the Companies Act and section 66(1) of the CC Act. He also filed a counterclaim (conditional upon a finding that the winding-up of Plantsaam and Benjo is not appropriate) requesting an order directing De Klerk to transfer his members' interest in Plantsaam and his shares in the Benjo to him, against payment of the fair and reasonable value of the members' interest and shares.

Legislative framework

6. Section 163(1) of the Companies Act reads as follows:

> "A shareholder or a director of a company may apply to a court for relief if –
>
> (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."

7. Upon considering an application under section 163(1), the court, in terms of section 163(2), may make any interim or final order it considers fit, including an order directing an exchange of shares[3] and an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation.[4]

8. Thus, before De Klerk can succeed in his claim for an order compelling Ferreira to transfer his shares in Benjo to him, he is obliged to establish that: i) an act or omission of Benjo, or a related person, (possibly Ferreira or Plantsaam), has had a result that is oppressive or unfairly prejudicial to him; ii) an act or omission of Benjo or a related person has unfairly disregarded his interests; iii) the business of Benjo or a related person is being or has been carried out or conducted in a manner that is oppressive or unfairly prejudicial to him; iv) the business of Benjo or a related person is being or has been carried out or conducted in a manner that unfairly disregards his interests; v) the powers of a director of Benjo, or a person related to the company, (Ferreira), are being or have been exercised in a manner that is oppressive or unfairly prejudicial to him; or vi) the powers of a director of Benjo, or a person related to the company are being or have been exercised in a manner that unfairly disregards his interests.

9. The term "related person" in section 163, and its application to the relationship between Plantsaam and Benjo, in my opinion, is of importance in the determination of relief in this case. It is defined in section 1 and 2 of the Companies Act. The word "related" is defined in section 1 to mean "persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c)". The relevant part of section 2 provides:

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[3] Section 163(2)(e) of the Companies Act
[4] Section 163(2)(j) of the Companies Act

"(1) For all purposes of this Act

(a).....

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person as determined in accordance with subsection (2);

(c) a juristic person is related to another juristic person if –

(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);

(ii) either is a subsidiary of the other; or

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).

(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if

(a) in the case of a juristic person that is a company –

(i) that juristic person is a subsidiary of that first person...

(ii) that first person together with any related or inter-related person, is

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(bb) has the right to appoint or elect or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;

(b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;

(c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or

(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).

10. The question of whether Plantsaam is a person related to Benjo for the purposes of section 163 of the Companies Act and the relevance of that question will become

clearer after reviewing the evidence of the conduct of the various role players. The resolution of the issue depends on whether Ferreira directly or indirectly controls the companies or their businesses as contemplated in section 2(1)(c)(iii) read with section 2(2)(d) of the Companies Act by having the ability to materially influence the policy of the companies in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control as contemplated in section 2(2)(a) to (c) – a matter I will address fully later.

11. Substantially similar remedies to those in section 163 of the Companies Act are available in respect of close corporations in the CC Act. The relevant part of section 36 of the CC Act reads as follows:

> (1) On application by any member of a corporation a court may on any of the following grounds order that any member shall cease to be a member of the corporation:
>
> (a)....
>
> (b) that the member has been guilty of such conduct as, taking into account the nature of the corporation's business, is likely to have a prejudicial effect on the carrying on of the business;
>
> (c) that the member so conducts himself or herself in matters relating to the corporation's business that it is not reasonably practicable for the other member or members to carry on the business of the corporation with him or her; or
>
> (d) that circumstances have arisen which render it just and equitable that such member should cease to be a member of the corporation:
>
> (2) A court granting an order in terms of subsection (1) may make such further orders as it deems fit in regard to:
>
> (a) the acquisition of the member's interest concerned by the corporation or by members other than the member concerned; or
>
> (b) the amounts (if any) to be paid in respect of the members' interest concerned or the claims against the corporation of that member, the manner and times of such payments and the persons to whom they shall be made; or
>
> (c) any other matter regarding the cessation of membership which the court deems fit."

12. Hence, insofar as De Klerk seeks an order in terms of section 36(1) of the CC Act that Ferreira shall cease to be a member of Plantsaam, and a further order in terms of section 36(2) of the CC Act acquiring his member's interest against

payment of an amount, he is obliged to establish that: i) Ferreira is guilty of such conduct as is likely to have a prejudicial effect on the carrying on of the business; ii) Ferreira has conducted himself in matters related to Plantsaam's business that it is now not reasonably practicable for De Klerk to carry on the business of Plantsaam with him; or iii) circumstances have arisen which render it just and equitable that Ferreira should cease to be a member of Plantsaam.

13. Section 49 of the CC Act augments section 36 as follows:

> "(1) Any member of a corporation who alleges that any particular act or omission of the corporation or of one or more other members is unfairly prejudicial, unjust or inequitable to him or her, or to some members including her or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a court for an order under this section.
>
> (2) If on any such application it appears to the court that the particular act or omission is unfairly prejudicial, unjust or inequitable as contemplated in subsection (1), or that the corporation's affairs are being conducted as so contemplated, and if the court considers it just and equitable, the court may with a view to settling the dispute, make such order as it thinks fit, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation."

14. Thus, if it appears to the court that particular acts or omissions by Ferreira in relation to Plantsaam are unfairly prejudicial, unjust or inequitable or that Plantsaam's affairs have been conducted prejudicially, unjustly or inequitably, the court may make such order as it thinks fit, including an order compelling the sale of his membership interest, provided the court considers it just and equitable to do so.

15. The onus on De Klerk, as just described, will apply *mutatis mutandis* to Ferreira under the counterclaim.

16. The common thread running through all these provisions, section 163 of the Companies Act, and sections 36 and 49 of the CC Act, is that they confer on the court a wide discretion to compel a transfer of shares or interests in order to deal

with prejudicial, oppressive, unjust and inequitable conduct by a company, director, shareholder or member against other members etc.

The factual background

17. The relationship between De Klerk and Ferreira commenced in 1994. De Klerk then lived in Dendron in Limpopo, where he practised as a medical doctor. He wanted to farm in Orania and had the means to do so. He acquired the land now owned by Benjo for that purpose, but as he did not want to farm himself at that stage he preferred to appoint a farm manager. He therefore concluded a written employment agreement with Ferreira with effect from 1 March 1994 in terms of which the latter was paid a salary and enjoyed additional benefits. Ferreira in exchange undertook to establish and commence with farming activities. The land making up the farm was an undeveloped piece of land initially leased and later purchased by Benjo for R582 654 in 1997. It is now fully developed to the point where it is valued at R25 700 000.

18. De Klerk's interest in farming pecan nuts was kindled by an article in an agricultural magazine. He consulted an expert from Brazil and sought advice about the feasibility of establishing pecan nut orchards under irrigation in Orania. The trees from which the pecan nuts grow are on the farm owned by Benjo. Plantsaam harvests the pecan nut crops and runs a nursery situated upon the farm. In order to conduct its nursery business Plantsaam procures from the trees on the farm the seed to grow seedlings and the wood to inoculate the small plants. Other persons also acquired land in the area and established, or wanted to establish, pecan nut orchards. Many of these other persons were not full time farmers who thus needed help to establish and manage their pecan nut orchards. Plantsaam renders such a service for which it earns fees.

19. De Klerk put up the initial capital and in the beginning held all the equity in Plantsaam and Benjo. He was therefore the sole director and shareholder of Benjo and held all the members' interest in Plantsaam from 1997, when the farm was purchased, until 2001 when Ferreira acquired equity in the two companies. Clause

12 of the contract of employment between De Klerk and Ferreira gave Ferreira an option to purchase a 50% interest as a partner in the farming business against payment of R1.00, but only once the farming operation had become profitable and De Klerk was first repaid the capital invested to fund the establishment, the extension and operation of the farming enterprise.

20. The first 7 years of farming were difficult. In the early years the operations encountered set-backs. Some doubt existed about the feasibility of pecan nut farming: the trees grew slowly and farmers in the area expressed pessimistic views on the economic viability of pecan nut farming. De Klerk continued to consult experts and explored other options to earn income, such as farming with tomatoes, onions and melons.

21. By 2001 Ferreira had become pessimistic about the prospects of the enterprise. He began to think about terminating his involvement in the venture. De Klerk saw Ferreira as a very good farmer and he wanted to keep him in service. He thus wanted to find incentives to satisfy Ferreira who had not been able to exercise the option in his employment contract as it had not been possible to repay De Klerk's capital investment. The parties then met with a firm of agricultural consultants - Proper Boer - in Bloemfontein, who recommended that Ferreira be given a 50% interest in the operation in order to motivate him. De Klerk agreed and three agreements were entered into on 7 November 2001 to give effect to the proposed new arrangement.

22. The first agreement consisted of an acknowledgment of debt signed by Ferreira - Annexure C to the particulars of claim – in which he acknowledged liability in favour of De Klerk for a capital amount of R633 000.00 being the debt owing for the acquisition of half of the interests in Plantsaam and Benjo. The capital amount accrued interest at the prime rate charged by ABSA Bank, minus 3%, with effect from 1 March 2001. The debt had to be repaid by annual payments of 20%, with the first instalment to be made on 28 February 2004 and thereafter annually on or before the last day of February. It is common cause that Ferreira has not made any payments in terms of this agreement. He disputes his liability to do so. De Klerk thus has not received consideration for the sale of the 50% interest in Plantsaam and

Benjo to Ferreira. This agreement formed the subject matter of the Kimberley proceedings now consolidated with the present proceedings.

23. Secondly, a co-operation agreement (samewerkingooreenkoms) was entered into in order to regulate the affairs and dealings of Plantsaam - Annexure D to the particulars of claim. This agreement dealt with the governance of Plantsaam. Clause 9.1 provided that for as long as Plantsaam had only two members the affairs of the corporation would be managed on the basis of consensus. In the event that membership increased beyond two members, then a meeting of members would be required to appoint a managing member. The membership of Plantsaam at all times has remained De Klerk and Ferreira and hence no managing member has ever been appointed.

24. Clause 12 of the co-operation agreement governs loans by members to the corporation. Clause 12.2 provides that amounts loaned to the corporation by members will be credited to their respective loan accounts and shall bear interest and be calculated against such a rate as may be determined by the managing member from time to time and credited to the loan accounts. The clause does not expressly deal with the determination of a rate of interest where no managing member has been appointed.

25. The third agreement is a shareholders agreement relating to Benjo - Annexure E to the particulars of claim.

26. Over the years of farming, Ferreira lived in Orania, Van der Kloof, Bloemfontein and on the farm. The operation struggled to become profitable. In addition to the pecan nuts, Plantsaam grew other crops such as spanspek and vegetables. In approximately 2008 Ferreira decided to lease nearby farms for his exclusive benefit at which he established maize and wheat under irrigation. He farmed two farms in the vicinity – Sanddraai and Uitsoek. De Klerk initially thought that this enterprise would be part of the joint venture. However, Ferreira wanted to do the farming of the cash crops for his own benefit in order to increase his income. De Klerk maintains that he reluctantly agreed to Ferreira farming the cash crops for his own account and

to utilise Plantsaam's farming equipment for this purpose. Plantsaam acquired much of its farming equipment from the estate of De Klerk's deceased father.

27. There is a centre pivot irrigation system on land of the farm of approximately 7 hectares. Cash crops, maize and wheat are currently established by Plantsaam on this land. Ferreira maintained that during the financial years from 2010 to 2014 he also leased this land from Plantsaam as part of his personal farming enterprise. De Klerk disputed this and contended that the irrigation land had to be farmed by Plantsaam. Ferreira claimed to have paid rental in an amount of R35 000.00 per annum to utilise the irrigation land. There is accordingly a dispute about whether Ferreira in fact leased this land or simply utilised it for his own personal benefit without a lease. The relevant financial statements do not reflect any rent for the utilisation of the land for the financial years 2010, 2011, 2013 and 2014. There is merely a journal entry for R17 500, half of the alleged rent, in the books of Plantsaam for the 2012 financial year. I will revert to this issue and consider its significance more fully later.

28. De Klerk works part of the year as a medical practitioner in Canada and is often out of the country. He visited the farm occasionally but left the day to day running of the farm to Ferreira, who therefore exclusively managed Plantsaam and Benjo. They nonetheless maintained regular telephonic contact, initially speaking almost daily. Ferreira eventually became bothered by the frequent long telephonic discussions and requested De Klerk to phone less. De Klerk felt excluded as time progressed, especially when he realised that Ferreira had made a number of important business decisions in relation to the farming operation without first consulting him. Over the years the yield produced by the pecan nut trees began to increase and the farm was on path to make profits.

29. Ferreira conceded in cross-examination that he had the responsibility to ensure that accurate books and financial records were kept in respect of Plantsaam and Benjo and to keep and preserve the source documents necessary for accounting purposes. The services of a bookkeeper in Bloemfontein were utilised to maintain the accounts. The bookkeeper was initially a Mrs De Vries. Later Mr Alexis du Preez became the bookkeeper.

30. The relationship of trust between the parties began to deteriorate in 2011. Pecan nuts are harvested annually during July and August. After the 2011 harvest Ferreira reported to De Klerk that Swiss Pekanhoek CC, a close corporation that purchased nuts from Plantsaam, had failed to make full payment to Plantsaam in respect of pecan nuts delivered. As will become apparent later, the manner in which Ferreira dealt with the financial aspects of the transactions with Swiss Pekanhoek contributed significantly to a breakdown in trust between de Klerk and Ferreira.

31. With a view to litigating against Swiss Pekanhoek, De Klerk and Ferreira took legal advice and jointly attended a consultation at the chambers of counsel in Bloemfontein. Ferreira prepared a bundle of documents for counsel to consider. He testified that he gave a copy of the set of documents to De Klerk. This was not put to De Klerk when he testified and as I discuss later there may be some doubt about its truth. Counsel advised that the contemplated litigation against Swiss Pekanhoek lacked prospects of success. The evidence Mr Werner Erasmus, the CEO of Swiss Pekanhoek, was that the nuts did not meet with the contractual requirements.

32. De Klerk testified that either during 2012 or 2013 he refused to sign the financial statements in respect of Plantsaam because he had concerns about certain items. There was, in comparison with the previous financial year, an unusually sharp increase in expenses, in particular fertiliser, fuel and the purchase of crops. He suspected wrongdoing on the part of the Ferreira and feared that Ferreira was funding his own private farming activities through Plantsaam. It was shown ultimately that his concerns related to the financial statements of 2013.

33. At more or less the same time, Ferreira decided that he wanted to purchase a neighbouring farm. In order to do so he had to furnish security. Despite not having paid for them in terms of the acknowledgment of debt, Ferreira regarded his interests in Plantsaam and Benjo as good security. He accordingly asked De Klerk to give his consent for his interests in the two companies to be used as security for the proposed purchase of the farm. De Klerk refused. De Klerk was also dissatisfied with the manner in which the nursery was being run and insisted on the appointment of a dedicated manager for the nursery. He was uneasy about Ferreira spending too

much time on his private farming activities and neglecting the nursery. He then at his own expense appointed Mr Faan Erasmus to run the nursery and to safeguard his interests in the farming enterprise. These issues, according to De Klerk, annoyed Ferreira and led to negotiations for a possible buy-out. The parties could not reach agreement.

34. In late 2013 De Klerk and Ferreira reached a deadlock and the relationship broke down. In March 2014, after he coincidentally met Werner Erasmus from Swiss Pekanhoek at an agricultural event, Faan Erasmus contacted De Klerk and suggested that he phone Werner Erasmus who had important information in relation to the dealings regarding the 2011 pecan nut crop. De Klerk then contacted Werner Erasmus who told him that substantial payments were made to Ferreira's personal bank account by Swiss Pekanhoek during 2011. The information reinforced De Klerk's suspicions arising from the 2013 financial statements. He decided at that point to engage the services of attorneys and a forensic auditor, Mr Johan Ferreira ("the auditor").

35. With this De Klerk requested Ferreira, through his attorneys, to furnish him with relevant financial documents including the bank accounts of the companies. Ferreira refused to comply with the request. This prompted De Klerk on 16 May 2014 to bring, as a matter of urgency, a two-pronged application, referred to in the evidence as the first application. It was divided in two parts. Part A sought urgent relief to force Ferreira to make available the documents and other information required for the forensic audit. Part B of the application sought the cessation of Ferreira's membership of the companies and an exchange of shares in terms of section 163 of the Companies Act and was to be postponed *sine die* pending the conclusion of the forensic audit. Prayer 5 of the notice of motion sought an order putting interim arrangements in place for the governance of Plantsaam pending the finalisation of Part B. These permitted Ferreira to continue the day to day running of Plantsaam, but significantly restricted his authority. Ferreira henceforward would be required to obtain the consent of either De Klerk or Faan Erasmus to withdraw funds from any bank account of Plantsaam, to purchase goods in excess of R50 000, to harvest, supply and dispose of all agricultural products produced by Plantsaam and to utilise

any proceeds or income derived from the sale of products by Plantsaam. Ferreira opposed the urgent application.

36. The matter came before Vorster AJ who granted the interim relief. Ferreira filed a notice of intention to make application for leave to appeal. De Klerk in response brought an implementation application, based upon the now repealed provisions of rule 49(11). On 25 August 2014 Vorster AJ dismissed the application for leave to appeal and granted the implementation order. Ferreira did not comply with the order on the ground that the documents required in terms of the court order were not in his possession as they were with Alexis du Preez, the bookkeeper. De Klerk made repeated requests to both Ferreira and du Preez for the production of the documents and information required in order to do the forensic investigation. During September 2014, Du Preez gave the auditor what later came to be referred to as "the first set of books". These documents were insufficient and unhelpful to the auditor. Numerous repeated requests were made to Du Preez for the production of a complete set of books. He failed to provide what was asked of him.

37. This impelled De Klerk to bring an application against Du Preez, referred to in the evidence as the second urgent application, in the Free State High Court, Bloemfontein. On 25 November 2014 an order was granted compelling Du Preez to provide the documents and books referred to in that application. Du Preez took time in complying with the order and provided the auditor with a second set of books on 5 January 2015, which differed markedly from those provided in September 2014. The auditor testified that numerous adjustments were made in the second set of books, produced on 5 January 2015. These adjustments had the effect of sharply reducing the value of Ferreira's liability to Plantsaam as reflected in his loan account.

38. On 29 January 2015 a meeting was held in Bloemfontein between De Klerk, assisted by his auditor, Ferreira and the bookkeeper, Du Preez. During this meeting the auditor expressed the opinion that the financial dealings and affairs of Ferreira and Plantsaam were intertwined to the extent that it was difficult to separate Plantsaam's farming expenses from those incurred by Ferreira for his own farming operations. Ferreira then suggested that the auditor employ the figures used in a guide published by the Griekwaland Wes Koöperasie ("GWK"), which standardises

the costs of particular farming activities. Using the guide it was possible to proportion expenses between Ferreira and Plantsaam on an averaging basis for the different kinds of farming activity.

39. The auditor thereafter prepared his report on this basis. The report was furnished to Ferreira and he was invited to comment on what was contained in it. When no meaningful response was received from Ferreira, De Klerk filed supplementary papers on 23 April 2015 and proceeded with Part B of the application alleging wrongdoing and misappropriation on the part of Ferreira.

40. In May 2015 De Klerk registered Plantsaam as a member of the Afrikaanse Handelsinstituut Employers Organisation. This organisation set up a disciplinary hearing into the conduct of Ferreira which commenced on 14 May 2015. Following the hearing, Ferreira was dismissed from his employment with Plantsaam on 19 May 2015. Ferreira disputed the regularity of his dismissal on the basis that De Klerk could not by himself have registered Plantsaam at the AHI. He carried on running the farm. A third urgent application was necessary in September 2015 to prevent him exceeding the spending limits imposed by the order of Vorster AJ.

41. In June 2015 the Ferreira filed an answering affidavit. He disputed the allegations of misappropriation of company funds and sought to explain and justify his actions. He also engaged a firm of auditors to assist him, namely Mazars in Bloemfontein. Although his auditors did not file a comprehensive report, they filed a short written response commenting upon the report of De Klerk's auditor, and criticising it in various respects.

42. In view of potential factual disputes, De Klerk proposed that the matter be referred to trial, or for the hearing of oral evidence. Ferreira refused to agree with that proposal. Arrangements were accordingly made for the set-down of the application in the special motion court, the so-called third court. When the matter came before Thlapi J, she urged the parties to agree, in light of the many factual disputes, to refer the matter to trial. The parties did so. This resulted ultimately in the trial before me.

43. Shortly before the commencement of the trial, Ferreira, through du Preez, produced a third set of books. In this third set of books the deductions made in Ferreira's loan account in the second set of books were reversed, altering and reducing the amount of his debt.

44. De Klerk averred in the declaration that the forensic investigation had ascertained that Ferreira had acted unfairly prejudicially towards him, Plantsaam and Benjo and had unfairly disregarded their interests. The declaration makes various claims in this regard, alleging *inter alia* that Ferreira: i) paid himself a double salary in June 2014; ii) withdrew funds from the bank account of Plantsaam and utilised a portion of the funds to pay his own private and domestic expenses; iii) bought goods on account at GWK and OVK for his private use; iv) caused the proceeds of produce produced by the farming enterprise to be "siphoned off" to his personal bank account instead of paying such amounts into Plantsaam's bank account; v) utilised the credit facilities of Plantsaam to purchase goods and services for his own private farming enterprise; vi) utilised assets of Plantsaam to conduct a transport business for his own benefit; vii) sold saplings from the nursery before they had reached an appropriate age and misappropriated the proceeds; viii) sold scrap metal belonging to Plantsaam and misappropriated the proceeds; and ix) abused the insurance policy of Plantsaam by adding his personal and private assets onto the insurance schedule resulting in an increase in the premium payable. In what follows I will focus on the more serious allegations with a view to determining if there has been unfairly prejudicial, oppressive or inequitable conduct justifying the relief sought by De Klerk against Ferreira.

The evidence of alleged irregularity

45. Detailed evidence was given in court about alleged irregularities in the bookkeeping and financial statements of Plantsaam. The purpose of the evidence was twofold. It sought firstly to establish that the affairs of Plantsaam had been conducted by Ferreira in a manner unfairly prejudicial, unjust or inequitable to De Klerk; and secondly it aimed at setting the basis for determining the value of the loan account of Ferreira for the purposes of valuing Plantsaam and his interest in it.

46. Mr Johan Ferreira, the auditor, testified with regard to the forensic audit he conducted. After receiving the second set of financial statements and source documents, he carried out a financial statement overview, an income and expenditure reconciliation and analytical procedures. He did not carry out a full audit in accordance with generally accepted auditing standards as there was no need to do so. He later, after receiving a third set of books in May 2016, made various additional adjustments.

47. Both auditors (Mr Johan Ferreira and Mr G Oberholster of Mazars, appointed by Ferreira) accepted that it would be correct to regard the different financial records for the relevant years as three different sets of books. The various versions required a number of amendments to be effected to the loan account of Ferreira, most notably the entries in relation to the Swiss Pekanshoek transaction and certain others reflected in paragraph 8 (iii) and (iv) in the joint minute of the auditors prepared for trial ("the joint minute").

48. Ferreira conceded during his testimony that the intervention by De Klerk, to appoint an auditor and to request a re-examination of the books, brought clarification and accuracy in relation to the books. It is therefore undisputed that proper books were not in fact kept and that, before De Klerk's intervention, the books of Plantsaam did not accurately reflect its affairs. Ferreira attempted to attribute the mistakes to the bookkeeper, Du Preez. What follows will demonstrate that not to be entirely factual.

49. Ferreira could give no explanation why, coincidentally, all the many mistakes in the books benefitted him and not De Klerk. There is only a single mistaken entry in the books which benefitted De Klerk. The auditor contended that this alone leads to a legitimate inference that the books were manipulated to the advantage of Ferreira. A closer examination of some of the auditor's misgivings supports that conclusion.

50. The forensic audit identified serious problems, including misstatements or misrepresentation of financial information. The general ledger was unreliable in a number of respects. It is not necessary to review each irregularity or misrepresentation. A few of the more serious examples will suffice.

51. In the original version of the 2012 financial statements revenue was recorded as R682 514. In the second version of the 2012 financial statements prepared by Du Preez in 2014-2015, handed to the auditor after enquiries were made about the apparent irregularities, the revenue figure was adjusted to R 2 888 094. The original financial statements had not recorded R2 216 580 pecan nut sales. The adjustment was made in January 2015 after the court order compelling disclosure was obtained by De Klerk. The incorrect statements of 2012 thus constituted a significant misrepresentation. This irregularity, together with others, casts light upon the concerted refusal by Ferreira in 2014 to disclose and make available the relevant financial information to De Klerk, resulting in the urgent application to obtain it.

52. Moreover, the investigation confirmed that Swiss Pekanhoek CC (referred to in evidence as "Swiss Gourmet"), on the instruction of Ferreira, had in June-July 2011 paid an amount of R1 745 202 into the personal bank account of Ferreira instead of the bank account of Plantsaam. According to De Klerk he only became aware of this when he spoke to Werner Erasmus in March 2014 three years after the payments were made.

53. Ferreira maintains that De Klerk would have been aware of the payments into his personal bank account by reason of the documents handed to him in the consultation with counsel in Bloemfontein when Plantsaam was considering taking action against Swiss Pekanhoek. As mentioned earlier, this was never put to De Klerk in cross examination. Moreover, De Klerk's lack of knowledge is corroborated by the evidence of Werner Erasmus who confirmed that he had told Faan Erasmus of the payments at the agricultural event in March 2014 and that De Klerk had then contacted him. De Klerk responded to this information by taking action, resulting ultimately in the present litigation. I am accordingly persuaded on the probabilities that De Klerk only became aware that payments were made by Swiss Pekanhoek into the personal bank account of Ferreira almost three years after they were in fact made, when he spoke to Werner Erasmus. Werner Erasmus confirmed in his testimony that he had no relationship with De Klerk and had dealt mainly with Ferreira who had at all times conducted business with Swiss Pekanhoek on behalf of Plantsaam. Moreover, as will appear presently, a portion of those payments were

retained by Ferreira and contributed to the significant understatement of revenue from pecan nut sales in the 2012 financial statements.

54. Swiss Pekanhoek made three payments into Ferreira's personal bank account, which are reflected in the forensic report against specified dates: R798 000 on 14 June 2011; R447 202 on 18 July 2011; and R500 000 on 25 July 2011. These total R1 745 202. In the period between 8 July 2011 to 12 August 2011, Ferreira made six payments from his bank account to the bank account of Plantsaam totally R828 500. On the assumption that these payments were made from the funds received from Swiss Pekanhoek, the auditor concluded that Ferreira owed Plantsaam R916 702 from the proceeds of pecan nut sales, which amount he had not disclosed and was not reflected in his loan account.

55. In his testimony, Ferreira admitted that the funds had been transferred into his account but offered an unconvincing explanation for doing that. He claimed that he had entered into an arrangement with Swiss Pekanhoek to supply it with additional pecan nuts sourced from other farmers in his area. He claimed the monies paid into his account were to be used to pay the farmers from whom he acquired the nuts. Fluctuations in the market price of pecan nuts resulted in the enterprise becoming less attractive. There was also a dispute about the quality of the nuts and the relationship with Swiss Pekanhoek ended in 2011. According to Ferreira, Werner Erasmus then instructed him to use any balance in his account which had not been used to source nuts from other farmers to pay Plantsaam for deliveries from Plantsaam. I was referred to no source documentation that confirmed this arrangement.

56. Werner Erasmus cast significant doubt upon Ferreira's version. He testified that in 2009-2010 he had purchased pecan nuts from Plantsaam and usually paid one week after delivery. In 2011 Ferreira approached him for an advance payment in order to buy a tractor because De Klerk had put a restriction on Plantsaam's co-op account. He agreed to make an advance payment into Ferreira's personal account. Although the contract referred to Plantsaam, De Klerk and Ferreira, Erasmus understood the contract for delivery of nuts to have been between Swiss Pekanhoek and Plantsaam. He denied that he made an arrangement for Ferreira to use the

money to pay farmers or that he instructed him to use the balance to pay off Swiss Pekanhoek's debt to Plantsaam. In his view, he paid the money, some of it in advance, for the total amount of pecan nuts he would receive from Plantsaam after harvesting in July-August, regardless of the source of the nuts. Plantsaam was invoiced for the nuts.

57. Shortly before the commencement of the trial, as mentioned, Ferreira, through Du Preez, produced the third set of books. In this third set of books the deductions made on the Ferreira's loan account in the second set of books were reversed resulting in his loan account again having a substantial credit value. Mr Johan Ferreira, the auditor, testified that he then analysed the second and third sets of books, electronically and identified in what respects the third set of books contained adjustments. He discovered that the reversals made in Ferreira's loan account in the second set of books (to correctly reflect his true liability to Plantsaam) had been removed and the original position in the first set of books reinstated, giving the loan account a greater credit value against Plantsaam. The two auditors (Johan Ferreira and Mr G Oberholster) then corrected the third set of books by reversing the reversals made in the third set. Paragraph 8(iii) of the joint minute deals with transactions incorrectly done in the third set of accounts by Du Preez. The auditors agreed to reverse what they described as a *"batch of deleted transactions"* in the amount of R1 180 211.

58. How the amount of R1 180 211 was arrived at is explained in the expert summary of the auditor, which indicates that the amount of R 1 745 202 received from Swiss Pekanhoek (excluded in the third set of books) was again credited for the benefit of Plantsaam in the general ledger. This amount was added to other excluded amounts from which were deducted other legitimate amounts favouring Ferreira to give the total of R1 180 211. An analysis of the items clearly indicates that the amounts paid into Ferreira's personal bank account by Swiss Pekanhoek were utilised as the starting point and from those amounts were then subtracted the amounts paid from Ferreira's account into Plantsaam's account.

59. Ferreira's own auditor, Oberholster, conceded in his testimony that the amounts ought not to have been paid into Ferreira's personal bank account, but should have

been paid into Plantsaam's bank account. He was thus also forced to admit in cross-examination that Ferreira was responsible for the financial affairs and bookkeeping matters of Plantsaam and had failed in his duty. Ferreira himself accepted that it was his obligation to ensure that correct and accurate financial records be kept. The manner in which the Swiss Pekanhoek transaction was handled, if not a breach of the fiduciary duty to act in good faith and in the best interests of Plantsaam, was at the very least a breach of the duty to ensure proper financial disclosure and to maintain accurate accounts.

60. A further instance of doubtful accounting involved a payment for the benefit of Ferreira in July 2012. The auditor testified that on the instruction of Ferreira, GWK paid an amount of R897 670 incorrectly in the GWK account of Ferreira, instead of into the bank account of Plantsaam. Of this amount R647 912 was paid into the personal bank account of Ferreira, and R249 758 remained to the credit of Ferreira's GWK account. An amount of R149 000 was deducted from this, presumably for Ferreira's personal farming operations, and the remaining approximately R100 000 was transferred into Ferreira's personal bank account. In other words, an amount of R897 670 payable to Plantsaam was utilised to pay R149 000 of Ferreira's personal expenses, with the balance of approximately R750 000 being transferred to Ferreira's bank account. During July 2012 and January 2013 Ferreira transferred R450 000 in three payments to Plantsaam. In the result, Ferreira owed Plantsaam R447 670. The auditor adjusted his loan account accordingly. Had the forensic audit not been instigated by De Klerk, Ferreira would have illegitimately benefited by this amount. It was also necessary to adjust the loan account to account for the VAT on this transaction for which Plantsaam would have been liable in the amount of R110 240.

61. There were various other instances of payments of smaller amounts due to Plantsaam into the bank account of Ferreira which have been adjusted by agreement between the auditors to reflect properly in Ferreira's loan account. These adjustments would not have occurred and would have prejudiced De Klerk had he not approached the court to obtain the relevant financial information and the forensic report not been conducted.

62. The auditor further testified that there was considerable entanglement of the expenses incurred by Ferreira in his own farming activities (on Sanddraai, Uitsoek or on the 7 hectares of the farm he claimed to have leased from Benjo) with those of Plantsaam. By failing to maintain proper books that accurately separated expenses for the two enterprises Ferreira was probably unfairly advantaged. In addition, it will be re-called, De Klerk disputed that he had agreed to a lease of part of the farm to Ferreira and thus maintained that the profit for that farming should be for the account of Plantsaam.

63. Ferreira's testimony about his use of the 7 hectares of the farm where maize and wheat were cultivated raises further questions of propriety in his financial dealings and his fiduciary relationship with Plantsaam and De Klerk. The credibility of his evidence, in addition to determining the probabilities, has bearing upon the question of fairness and the practicability of a continued association. He initially maintained that he leased the land for the period covered by the financial years 2010 to 2013. In the answering affidavit opposing the first application, he stated that he paid rent and in particular that he paid rent of R35 000.00 for 2013. The financial statements revealed that no rent was in fact paid for 2010 and 2011. In fact the only entry for rent in the books is an amount of R17 500 for 2012. This figure equates to rent for half the year. When asked in cross-examination about this, Ferreira explained that he had only leased the land for a period of that year, as his farming operations ceased. Under further cross examination it became apparent that this explanation was false in that he in fact had utilised the land for the full period of 2012 and also for the full period covered by the 2013 financial year.

64. The truth therefore is that Ferreira used the land for his own benefit in the financial years of 2010 to 2013 and paid no rent. The only item resembling the payment of rent was the journal entry for half the value of the rent in the financial statements of 2012. The absence of any rental payment in the accounts suggests that Ferreira had inappropriately farmed the area for his own benefit to the detriment of Plantsaam. The unfairness of the situation, disregarding the interests of De Klerk, is exacerbated by the probabilities that the expenses of this enterprise were partly subsidised by Plantsaam. The failure of Ferreira to pay the rent which he himself accepted he owed, if his version of a lease was true, coupled with his earlier false

allegations that he paid for all the rent, casts doubt upon his integrity to the extent that the continuation of a relationship with De Klerk will be difficult, if not intolerable. His actions clearly disregarded the interests of De Klerk, are unfairly prejudicial and an abuse of his position of trust.

65. I pause to interpose an accounting issue at this point. If one were to accept that there was no lease and that the farming on the 7 hectares for the relevant period should accrue to the benefit of Plantsaam, then the profits should be debited to Ferreira's loan account. The auditors have provided for such an eventuality using the GWK tables. These profit calculations are open to some doubt. Accordingly, it may be fairer and less complicated to simply charge Ferreira rent for the relevant period.

66. Ferreira failed to properly separate the farming expenses of Plantsaam from those attributable to his farming operations on Sanddraai, Uitsoek and the 7 hectares of land "leased" from the farm. In the meeting between all the role players in Bloemfontein in January 2015 it was agreed that the auditor would use the GWK tables to do a cost analysis. He commenced his calculation by taking the hectares of all the operations farmed by Ferreira in 2012 and 2013, including those on the farm. At that time there were 96,15 hectares of pecan nuts (which figure includes the 42 hectares of the farm and more than 50 hectares of Plantsaam's external clients) and 71 hectares of grain (wheat and maize farmed exclusively by Ferreira). According to the GWK analysis, the cost of farming pecan nuts per hectare was R19 876 and the cost of farming grain was R35 565. The cost of farming 96,5 hectares of pecan nuts was therefore R1 911 050 and the cost of farming 71 hectares of grain was R 2 525 109, giving a total cost of R4 436 159, of which total cost the cost of farming the pecan nuts represented 43.08% and the cost of grain 56.92%. The auditor then applied those percentages to the total costs incurred in the separate farming operations by Plantsaam and by Ferreira in 2012 and 2013 and concluded that Plantsaam overspent and Ferreira under spent R138 438 for 2012 and R533 036 in 2013. These figures were adjusted in the joint minute to be R188 159 for 2012 and R557 890 for 2013 respectively. The parties remain in dispute about whether the expenses were in fact entangled, and accordingly could not reach agreement about whether these figures should be debited to Ferreira's loan account – a matter to

which I will return in due course. The problem nonetheless, at the very least, remains indicative of the poor management of the affairs of Plantsaam.

67. One expense item was particularly contentious and Ferreira's testimony in relation to it once again raised questions about his integrity. De Klerk in his evidence produced invoices from the OVK (Exhibit B) which indicated that Plantsaam had been debited with electricity payments made to Eskom, whereas in fact Plantsaam was supplied with electricity by the Orania municipality. Eskom supplied electricity to Sanddraai where Ferreira farmed for his own account. De Klerk thus believed that such payments should have been for Ferreira's personal account. When the issue was raised with Ferreira during cross-examination he was adamant that the payments by OVK were for Plantsaam's consumption and in respect of a property occupied by one of the farmworkers in Orania. He added that OVK itemised and described payments to the Orania municipality for electricity as payments to Eskom. He denied that Plantsaam had paid the electricity bills owed by him to Eskom in respect of his farming operations, except on one occasion in August 2011 which he had done with the permission of De Klerk.

68. Ferreira was then asked whether he could produce the actual Eskom accounts. He intimated that he would do so. The following day he failed to produce the accounts, but presented extracts of a general ledger, which took the matter no further. He was asked why he did not bring the Eskom accounts themselves. He could give no acceptable explanation. Meanwhile the legal representatives of De Klerk had procured the actual accounts (Exhibit F) which unambiguously verified that Sanddraai accounts were sent to Ferreira by Eskom and that OVK had paid them and debited Plantsaam. When confronted with these accounts Ferreira was compelled to concede that his earlier evidence was false and that he had actually used the Plantsaam OVK account to pay Eskom in respect of Sanddraai's electricity.

69. It thus became apparent that Ferreira had been dishonest and had attempted to mislead the court by claiming that the reference to Eskom in the OVK account was intended to be a reference to electricity supplied by the municipality. He avoided the questions put to him by counsel regarding this misrepresentation and sought to

rationalise his falsehoods. Counsel urged him to desist in justifying his blatantly false evidence and to apologise to the court. He then did so, effectively admitting his dishonesty. His performance in court on this issue left no doubt that he is willing to lie, prevaricate and mislead in order to advance his own financial interests. His conduct attests to a proclivity for deceit in his dealings generally, not only with the court, but also with De Klerk and their associated companies.

70. De Klerk also called Mrs Mariaan Ferreira as a witness. She is the previous spouse of Ferreira. She testified that she had assisted in the business by selling some of the pecan nuts harvested to a retired judge in Bloemfontein, who paid cash. No VAT invoice was issued for these cash transactions; nor was VAT charged, despite Plantsaam being registered as a VAT vendor. In the majority of instances she returned the cash to Ferreira, but on occasion he told her to utilise the cash to purchase groceries and personal necessities. In cross-examination it was put to her that the Ferreira did not deny that the cash was so utilised to acquire goods for the household, but that the amounts were then debited to her salary. She denied ever receiving a salary from Plantsaam. When Ferreira was questioned in cross-examination about these irregularities he contradicted the version which was put on his behalf to Mrs Ferreira. He explained that the cash utilised by Mrs Ferreira was accounted for as part of the petty cash. No supporting documents were tendered to support this new version. Yet again these sales were for the benefit of Ferreira and unfairly prejudiced De Klerk in that they were not brought into account in the revenue of Plantsaam.

71. Other complaints of unfairly prejudicial conduct include allegations that Ferreira drew a double salary during June 2014; made several cash withdrawals out of Plantsaam's banking account; paid the cell phone account of his fiancée with Plantsaam funds; bought dog food, funky boots, car tyres, diesel through Plantsaam's co-op accounts; used a Nissan truck belonging to Plantsaam to conduct a transport business; sold saplings and paid the proceeds into his own bank account; sold assets, in particular scrap metal, of Plantsaam; and abused Plantsaam's insurance policy by adding personal items to the policy. In light of my earlier findings it is unnecessary to decide the validity of them all. Suffice it to say that Ferreira

offered explanations of varying degrees of credibility for these expenditures.

The application of section 49 of the Close Corporations Act and section 163 of the Companies Act

72. In the premises, I am persuaded that the actions of Ferreira in relation to Plantsaam were unfairly prejudicial and that he conducted the affairs of Plantsaam in a manner unfairly prejudicial to De Klerk as contemplated in section 49 of the CC Act, permitting me to make any order I think fit, if I consider it just and equitable to do so. Moreover, given the fundamental breach of trust and confidence by Ferreira, it is no longer reasonably practicable for De Klerk to carry on the business of Plantsaam with Ferreira in the sense envisaged in section 36(1)(c) of the CC Act. It is thus appropriate to make an order that Ferreira shall cease to be a member of Plantsaam in terms of section 36 of the CC Act and a further order for the acquisition of his interest in terms of either section 36(2)(a) or 49(2) of the CC Act.

73. It appears from the preceding analysis that the questionable conduct of Ferreira was mainly in relation to the affairs of Plantsaam. None of the complaints relate directly to Benjo. This is not surprising considering it is a property holding company. Mr Rossouw SC, who appeared for Ferreira, accordingly submitted that no case had been made out in terms of section 163 of the Companies Act justifying an order compelling the acquisition of Ferreira's shares in Benjo. Ferreira, he contended, is not a person related to Benjo as contemplated in section 163(1) read with section 2 of the Companies Act because Ferreira does not control Benjo as contemplated in section 2(2). He argued further that De Klerk failed to show any act or omission by Benjo that had a result that was oppressive or unfairly prejudicial to or unfairly disregarded the interests of De Klerk; nor was the business Benjo carried on or conducted in a manner that was oppressive or unfairly prejudicial to or unfairly disregarded the interests of De Klerk. Nor, he asserted, were the powers of a director or prescribed officer of Benjo exercised in a manner that was oppressive or unfairly prejudicial to or unfairly disregarded the interests of De Klerk.

74. In my view, Mr Rossouw initially stated the jurisdictional requirements of section

163(1) of the Companies Act too narrowly. A shareholder of Benjo (De Klerk) may apply for relief under section 163(1) of the Companies Act if any act or omission of Benjo, *or a related person*, has a result that is oppressive, unfairly prejudicial or unfairly disregards the interests of De Klerk. Alternatively, relief may be sought where the business of Benjo, *or a related person*, has been carried out or conducted in a manner that is oppressive, unfairly prejudicial or unfairly disregarded the interests of De Klerk. In determining whether the jurisdictional requirements have been met it need not necessarily be shown that Ferreira is a person related to Benjo. It will be sufficient if Plantsaam is a person related to Benjo. If Plantsaam is a related person, once it is established that its business (rather than Benjo's) was carried out in a manner that was unfairly prejudicial or unfairly disregarded De Klerk's interests that alone will permit an order directing an exchange of Benjo's shares under section 163(2)(e) of the Companies Act.

75. Mr van der Merwe SC, who appeared for De Klerk, presented detailed submissions arguing that the affairs of the two companies are so inextricably intertwined that any conduct of Ferreira in relation to Plantsaam, falling within the ambit of section 49 of the CC Act, leads ineludibly to such conduct being hit under section 163 of the Companies Act in relation to Benjo. Such an approach, he submitted, will advance the remedy that section 163 provides rather than limit it. He contended that it is clear from the evidence that the affairs of Plantsaam and Benjo were inextricably intertwined and, although registered as two companies, they effectively functioned as one unit.

76. The argument is unsustainable because it proceeds from the false premise that an intertwined relationship between the two companies will be sufficient for the application of section 163. The jurisdictional requirements for the application of section 163 are clearly set out in the section. The correct enquiry, as will become more evident presently, is whether Plantsaam is a "related person", and that ultimately depends on whether Ferreira had the ability to materially influence the policy of both Plantsaam and Benjo in a manner comparable to a person who could exercise control through a majority vote at a board or general meeting. That said, some of the factual elements upon which Mr van der Merwe relied to advance his

argument have relevance to the factual determination of whether Ferreira could indeed materially influence the policy of the two companies.

77. Mr van der Merwe further submitted that the power of the court in section 49 of the CC to make any order it deems fit, on finding that Plantsaam has acted unfairly, is so wide and unconstrained that it can be invoked to order Ferreira to sell his shares in Benjo to De Klerk. This proposition is also not sustainable. The CC Act applies to close corporations only and not to companies. More particularly, the wording of section 49 read as a whole makes it clear that the legislature refers in this section only to corporations and members, not to companies and shareholders. I therefore agree with Mr Rossouw that there is no basis to stretch the ordinary, grammatical meaning of the words in the CC Act to make the remedies there applicable available also to the shareholders of private companies, especially where the Companies Act has its own provisions dealing with unfairly prejudicial and oppressive conduct in the form of section 163 read with section 2.

78. The provisions of section 1 and 2 of the Companies Act (set out in paragraph 9 above) include within the ambit of a "related person" juristic persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c) of the Companies Act. In terms of section 2(1)(c)(iii) a juristic person (Benjo) is related to another juristic person (Plantsaam) if a person (Ferreira) directly or indirectly controls each of them, or the business of each of them, as determined in accordance with section 2(2) of the Companies Act. Section 2(2)(d) provides that a person (Ferreira) controls a juristic person (Benjo and Plantsaam), or its business, if that first person (Ferreira) has the ability to materially influence the policy of Benjo and Plantsaam in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control as contemplated in section 2(2)(a) to (c) of the Companies Act.

79. What the situations referred to in section 2(2)(a) to (c) have in common is that the controlling person is able to exercise the majority of votes in the controlled juristic person such as where the controlling person: i) is a holding company (section 2(2)(a)(i)); ii) has a majority of the voting rights pursuant to a shareholder agreement or controls the appointment of directors with the majority of voting rights of the board

(section 2(2)(a)(ii)); iii) owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in a close corporation(section 2(2)(b)); or iv) in the case a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust (section 2(2)(c)).

80. The question for determination under section 2(2)(d), therefore, is whether in the present case Ferreira had the ability to materially influence the policy of Benjo and Plantsaam in a manner comparable to a person who would be able to exercise the element of control in the majoritarian situations envisaged in the other sub-paragraphs of section 2(2). The provision takes "control" beyond the ordinary corporate law principles of voting control. The purpose of the provision is to provide *inter alia* for a circumstance where the controlling person does not have majority voting power but has an element of control comparable to a person who would. Whether a person has control will depend on the circumstances. The question is unavoidably a factual one. It can include the situation where the controlling person, a minority or equal shareholder, has *de facto* control to materially influence the policy of the company, akin to a person who has *de jure* majority control. Thus, it is possible for a person to control a juristic person despite not having *de jure* control or the majority of controlling votes in the company.[5]

81. In short, and to recap, if Ferreira had the ability to materially influence the policy of Benjo and Plantsaam in a manner similar to a controlling shareholder, despite not being a controlling shareholder, it may be concluded that Plantsaam is a person related to Benjo; with the result that the conduct of Plantsaam's business in a manner unfairly prejudicial or unfairly disregarding of De Klerk's interests will permit De Klerk to seek relief against Benjo in terms of section 163(1)(a) or (b) of the Companies Act.

82. The key relevant words in the phrase "the ability to materially influence the policy of the juristic person" used in section 2(2)(d) of the Companies Act are not defined in the statute. They should therefore be given their ordinary meanings. The "policy" of a

[5] See Delport et al: *Henochsberg on the Companies Act 71 of 2008* at 30(3) regarding the interpretation of similar language used in section 12(2)(g) of the Competition Act 89 of 1998.

company is the general plan or course of action it adopts and follows. To "materially influence" denotes a capacity or power to effect the development or execution of the policy substantially or in an important degree.

83. With regard to the factual question of whether Plantsaam is a related person in the meaning of that phrase as used in section 163 of the Companies Act, it can be accepted that Plantsaam could not have functioned and conducted its business without Benjo. There is a lease agreement between Plantsaam and Benjo, in terms of which Plantsaam rented the immovable property from Benjo. The rent payable under the lease agreement is not market related and has not increased since 2012, notwithstanding the fact that there was in that period a very substantial increase in the value of the immovable property. In his management of the financial affairs of both companies Ferreira considered it to be in the best interests of Plantsaam not to pay a market related rental for the land. He was thus able to materially influence the policy of Benjo. The business of Benjo was impacted negatively while Plantsaam gained in profitability. This is a clear indication that Ferreira controlled the business of both companies and was able to assert material influence on the policy of both.

84. It is common cause that over the years Ferreira had exclusive control of the financial affairs, the management and day to day running of the two companies. The history of the dispute between De Klerk and Ferreira places it beyond doubt that De Klerk had minimal access to the financial records, source documents and correspondence of both companies and played a limited role in their functioning and performance. He invested capital and gave advice and direction, but control of the daily operations of both companies was vested primarily in Ferreira over a period of years. While both De Klerk and Ferreira had equal *de jure* control, it is evident that Ferreira had *de facto* control and the greater capacity to materially influence the policy of both companies.

85. Moreover, the nursery business of Plantsaam is conducted upon the land of Benjo. Employees of Plantsaam also render services for Benjo, in that the trees planted on Benjo's property are nurtured, cared for and fertilised by Plantsaam employees. Plantsaam procures from the trees the necessary wood to do the inoculation of small plants in the nursery, for which no separate compensation is paid

to Benjo. And finally Ferreira resides in a house on the land of the farm without paying rent.

86. In the final analysis, I am satisfied that Plantsaam is indeed a "related person" as contemplated in section 163(1) of the Companies Act with the consequence that De Klerk is entitled to relief in terms of section 163(2)(e) in relation to Benjo.

Appropriate relief

87. In his plea and conditional counterclaim Ferreira pleaded that by virtue of the deadlock between the parties, the appropriate relief would be the liquidation of Plantsaam and Benjo in terms of section 344(f) of the Companies Act 61 of 1963, read with item 9 of Schedule 5 of the Companies Act and section 66(1) of the CC Act. The reference to section 344(f) is mistaken. That provision applies only when the company is unable to pay its debts. There is no evidence that either company is unable to pay its debts. The correct provision is section 344(h) which permits a court to grant an order of liquidation where it appears to the court that it is just and equitable that the company should be wound-up.

88. In the event that liquidation is considered inappropriate, Ferreira requested an order in terms of section 49 of the CC Act and section 163 of the Companies Act directing De Klerk to transfer his member's interest and shares to him against payment of the fair and reasonable value of such, on the grounds that de Klerk had acted and exercised his powers in a manner that is oppressive or unfairly prejudicial.

89. Ferreira did not pursue the claim for liquidation with any vigour during argument, and specifically abandoned it in relation to Benjo. The application is in any event defective because various peremptory requirements, contained in Chapter 14 of the now partially repealed Companies Act,[6] have not been complied with. Section 346(3) requires that an application to the court for the winding-up of a company shall be accompanied by a certificate by the Master to the effect that sufficient security has been given for the payment of all fees and charges as contemplated in the

[6] Act 61 of 1973

subsection. No such certificate has been produced. Furthermore, section 346(4A) of the Companies Act provides that an application for winding-up must be served on the Master, the employees of the entity to be liquidated, SARS, and if the employees are represented by trade unions, then also trade unions. There is no evidence that this has occurred. The provision also requires an applicant for liquidation to furnish to the court an affidavit prior to or at the hearing in order to prove that the application was in fact delivered to the entities and parties to whom delivery of the application must be made. No affidavit has been filed. The requirements of section 346(3) and section 346(4A) are peremptory.[7] Hence, the application for liquidation in the plea and the counterclaim is fatally defective.

90. It is therefore not necessary to consider the winding-up application on its merits. Suffice it to mention that De Klerk wishes to continue with the farming activities. Where there is a satisfactory alternative to winding-up available, it should usually be followed. The mismanagement by Ferreira, in my assessment, is the cause of the deadlock and his interests can equitably, justly and effectively be addressed under section 163 of the Companies Act, and sections 36 and 49 of the CC Act. Furthermore, the company and the close corporation are not factually insolvent, and can pay their debts. Were a winding-up order to be granted, the liquidators would simply realise the assets. The farm has a high value and the liquidators would be generously remunerated in accordance with a tariff calculated at a percentage of the kind of assets realised. An auctioneer also would need to be appointed to sell the assets. He too would charge commission or fees for the sale of the assets. Accordingly, substantial unnecessary administration costs will be incurred in a winding-up. Finally, there will be practical difficulties in giving effect to a winding up order. The liquidators will struggle to get instructions from a meeting of the two members who are deadlocked. The request for winding-up is therefore inappropriate and ill conceived.

91. As regards Ferreira's claim for relief under section 49 of the CC Act and section 163 of the Companies Act, I am not persuaded that De Klerk acted in a manner

[7] *EB Steam Company (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA) at par.9 and 23

unfairly prejudicial or oppressively towards Ferreira, nor did he conduct the business of the companies in a manner unfairly disregarding the interests of Ferreira. It is true that after learning in 2014 of the manner in which the amounts paid by Swiss Pekanhoek had been appropriated by Ferreira in 2011, De Klerk acted aggressively to protect his interests, and more so when Ferreira stymied his legitimate attempts to obtain the relevant financial information. In my view, he did no more than any reasonable person similarly situated would do. But even were one to conclude that both parties had acted unfairly or oppressively it would not follow that the transfer of equity in both companies to Ferreira (pursuant to the court's power to make an order it considers fit) would be the appropriate means of breaking the deadlock. There are practical considerations that militate against that result.

92. I agree with Mr Rossouw that one should not lose sight of the big picture. The capital amount of De Klerk's contribution is principally the R 3 332 938 credit balance of his loan account (his investment plus interest) in Plantsaam and the capital employed to acquire the farm. Ferreira by contrast has to date never paid for his equity in the companies, despite having concluded an acknowledgment of debt. He refuses to make the payment, as will appear later, on the grounds that the debt in respect of the shares and member's interest has prescribed.

93. Ferreira continues to manage the farming operation, notwithstanding the attempts to have him dismissed and evicted. He has managed the farming business for at least 15 years. And when one considers that the latest pecan harvest produced a crop worth more than R6 million, it must be said that he has done so successfully. Plantsaam also owns the nursery worth R2 million and assets of R2,5 million. In terms of the big picture, therefore, it is indisputable that Ferreira has made a huge contribution. However, it is unlikely he could have done so without the capital and vision of De Klerk.

94. There are furthermore two sound moral and practical reasons why the conditional counterclaim cannot succeed. As I have explained, and as appears from the foregoing analysis of the evidence, the deadlock was caused principally by Ferreira and not De Klerk. He has mismanaged the financial affairs of Plantsaam and breached his fiduciary duties to act in good faith and to make full and proper

financial disclosure to De Klerk. The continuation of the relationship of the members of the companies has become unworkable and intolerable because of the manner in which Ferreira conducted their affairs. Undeniably, it takes two to tango. De Klerk admitted as much. But any transgression on the part of De Klerk, or any harm caused by him to the relationship, is far outweighed by the gravity of Ferreira's misconduct. It would be inequitable and unjust to allow Ferreira to benefit from his wrongdoing at the expense of De Klerk.

95. Secondly, Ferreira simply does not have the financial means to purchase De Klerk's interests. It is common cause that Ferreira does not earn an income other than what he might earn at the farm. During his re-examination Ferreira produced a letter from a bank in order to prove that he had applied for funding to enable him to buy De Klerk's interest and shares. The bank assessed his credit application and standing by regarding the two companies as a single unit. The letter of the bank quite evidently does not establish that Ferreira has the financial means to perform in terms of a buy-out. Firstly, it does not confirm that the facility has been granted. Secondly, it contains numerous conditions, including an evaluation by a credit committee. The application for finance is still under consideration.

96. Furthermore, any contemplated possible future finance, envisaged in the bank's letter, is not for Ferreira but for a joint enterprise described in the letter as "a group of companies". The agreement of both companies to provide security will be required before finance can be procured. The property of both companies, in particular the farm of Benjo, would have to serve as security for any possible loan. It is doubtful whether the bank has full appreciation of the interests and claims of De Klerk. Given that he only has half of the interests in the companies, Ferreira cannot validly bind them as co-applicants in the application for finance to the bank.

97. The success of Ferreira's application for finance thus looks more than doubtful. In the result Ferreira has not proved that he has the means to finance a buy-out or an exchange of shares and interest. The conditional counterclaim accordingly cannot succeed. By contrast, De Klerk earns a substantial income as a medical doctor in Canada. His evidence that he has procured the necessary finance for a buy-out is undisputed. A transfer of Ferreira's shares and interest to De Klerk is in fact the only

practical means of resolving the deadlock between the members and will be in the best interests of both companies in the continuation of their business operations. The relief should and will be granted on that basis.

Valuation of Plantsaam, Benjo and the parties' interests

98. Much of the evidence was taken up with the valuation of the companies for the purpose of calculating the compensation payable in the event of an exchange of shares and interests. After negotiations and discussions, the experts agreed that the value of Benjo is R17 243 998. The valuation of Plantsaam was more contentious as there are numerous disputes about what should be debited and credited to the parties' loan accounts. The evidence in this regard was presented to the court in an at times incoherent and confusing manner, as concessions and adjustments were made as the trial progressed. The heads of argument in relation to these matters are also wholly insufficient, lacking both clarity and intelligible presentation. Be that as it may, it is necessary to hazard an attempt at computation.

99. In the amended calculations handed up during argument ("the amended calculations"), the agreed value of Plantsaam, excluding the current crops and Ferreira's loan account, is stated to be R280 406. The assets of Plantsaam, taken into account in this calculation, amount to R6 141 322. They include the net fixed assets, the nursery, the loan account in Benjo, cash and cash equivalents, trade receivables, suppliers and investments. During the trial the parties reached an agreement as to the value of the current crop, which was placed on record. Plantsaam has been paid an amount in excess of R6 million for the pecan crop, which amount is not included in the valuation. The parties agreed that the proceeds of the crop must be split equally and paid to them after the deduction of the harvesting costs and the relevant taxes. The calculation will be done by the parties' accountants. The liabilities, including De Klerk's loan account, accounts payable to OVK and various tax liabilities payable to SARS, amount to R5 860 917. The difference of R280 406, as said, is the value of Plantsaam excluding the loan account of Ferreira and the current crops.

100. It has always been common cause between the parties that the capital amount of De Klerk's loan account in Plantsaam was R1 821 437. His auditor calculated interest at the *mora* rate for the years 2012-2016 and restated the balance as at 29 February 2016 as R3 332 938. There was a dispute between the parties about whether interest was payable on loan account balances. The amended calculations handed up during argument record this latter figure as the "agreed "credit balance on De Klerk's loan account. If that is correct the dispute about interest falls away. However, that was not my recollection. The heads of argument are cryptic on the issue. Be that as it may, I am persuaded on the evidence that interest is indeed payable. Such is clearly stated in the relevant agreements governing the loan accounts. Insofar as inadequate provision is made in the agreements for an applicable rate, the prescribed rate should apply. Ferreira's reliance on two documents suggesting to the contrary provide an insufficient factual basis. In an email in 2013 De Klerk referred to his investment being "rentevry" (interest free). I accept his explanation that he was in fact complaining that he had invested capital and had to date, after 20 years, received no return on it. The second document, a handwritten note to Proper Boer in 2001, mentioned that historically the initial capital had been invested interest free. I accept that such changed with the conclusion of the agreements to transfer of the shares and interest in the companies to Ferreira in 2001. The interest calculation is only in relation to the balance from 2012.

101. In the initial expert report, De Klerk's auditor stated Ferreira's loan account as having a debit balance of R2 234 621, while his own auditor gave it a credit balance of R20 301. In the amended calculations, I was asked to commence determining the value of Ferreira's loan account with the closing balance as per the financial statements of 29 February 2016, being a credit balance of R1 491 577. The auditors agreed that this figure had to be reduced by two debits (paragraph 8(iii) of the joint minute) in respect of transactions incorrectly done in the records of Plantsaam by Du Preez. These amounts are R1 180 211 described as "batch of deleted transactions reversed" and R32 180 described as "wages journal reversed". These debits leave the loan account with a credit balance of R279 186. The auditors further agreed that additional debits in the amount of R258 885 were required in terms of paragraph 8(iv) of the joint minute in respect of other irregular or mistaken payments or credits. These include a reversal of VAT, deposits of revenue from pecan nut sales

deposited in Ferreira's personal bank account, wages and other credits recorded twice. These adjustments result in a credit balance of R20 301, being the amount Ferreira's auditor stated as the correct balance.

102. The opening credit balance of R1 491 577 includes an amount of R523 479 (paragraph 8(i) of the joint minute) being amounts Ferreira claims he was entitled to credit to his loan account in respect mainly of medical expenses for the period 1999 to 2015. No documents were produced to support these expenses. Ferreira claimed he was entitled to such as part of his employment benefits. His claim is not credible, if only because he did not claim such until he came into dispute with De Klerk. They amount to an *ex post facto* adjustment in an illegitimate attempt to inflate the credit value of his loan account. I agree with De Klerk's auditor that a debit should be passed to reverse them. This gives a debit balance on the loan account of R503 178.

103. Initially there was dispute about whether payments in the amount of R102 000 from the OSK Bank, included as a reversal in the opening balance, were for the account of Plantsaam or Ferreira. In the amended calculations, the auditors reflect that only R10 000 remained in dispute in respect of a payment Ferreira made to "Kambro" for a tractor for his personal use. I am satisfied that the evidence supports a debit in this amount, giving a debit balance of R513 178.

104. In paragraph 8(v) of the joint minute, De Klerk's auditor reversed transactions included in the opening balance, being payments allegedly made by Ferreira, on the grounds that Ferreira was unable to produce source documents indicating that they were made on behalf of Plantsaam. They total an amount of R183 675. De Klerk was prepared to concede that two of the payments to Peltzer and Boschoff, totalling R84 589, were for pecan nuts received by Plantsaam. Ferreira has produced no documentation or sufficient evidence supporting the other payments. Hence, a debit in the amount of R99 086 is justified, giving a debit balance of R612 264.

105. One may add to that an amount of R122 500 for rental of the 7 hectares of the farm by Ferreira which was never debited to his loan account over the period in which he supposedly leased the farm or enjoyed its benefit for his personal profit – paragraph 8(vi) of the amended calculations. This gives a debit balance of

R734 764. The evidence confirms that Ferreira stopped his farming operation in mid-2013, yet the income from that was still credited to him. The profit from the operation for 2014, after expenses, was R196 468 paragraph 8(vii) of the amended calculations. That amount must accordingly be debited to the loan account giving a total of R931 468.

106. Ferreira adjusted his salary for 2015 and 2016 in the amount of R49 200 (paragraph 8(xi) of the joint minute) without authorisation, in that De Klerk did not agree to the increase. It too must be reversed, giving a total of R980 432.

107. Paragraph 8(viii) of the joint minute provides for an amount of R169 183. This was income recorded in the personal account of Ferreira which De Klerk believes was truly income for the account of Plantsaam. It is made up of six sub-items: sale of scrap metal; insurance, sale of bins; sale of "skedulerings buise"; sale of planter units; and the sale of diesel. The total amount received in respect of these items was R148 406; with VAT the total is the R169 183 which De Klerk claims should be debited to Ferreira's loan account. De Klerk gave limited evidence in relation to these amounts. The auditor was also not able to offer much clarity about the precise nature of these items and could say only that their nature suggested that they were items rightly belonging to Plantsaam. Ferreira provided photographic evidence which showed that the scrap metal which De Klerk claimed was his had not been sold and remained on the farm. He testified that the scrap he sold came from defective equipment he had used on Uitsoek. The insurance item he testified was reimbursement for a premium he had paid out of his personal account at OVK for hail insurance on behalf of Plantsaam. He was not questioned further on the other items, nor was he cross examined in relation to them. Neither counsel addressed these amounts in their written or oral submissions. Although legitimate questions might be raised about Ferreira's credibility in general, I have no basis for rejecting his evidence about this income. De Klerk has not discharged the onus to prove that these entries in Ferreira's accounts justify a debit to his loan account in Plantsaam.

108. Paragraph 8(ix) of the joint minute deals with the amounts for entangled farming expenses for the 2012 and 2013 financial years. As explained earlier, the auditor testified that Ferreira had failed to properly separate the expenses of his farming

operations from those of Plantsaam. At the meeting in Bloemfontein with Du Preez it was agreed that the auditor should use the GWK guide provided to him by Du Preez to do a proper matching and allocation. I have set out the methodology applied by the auditor earlier in this judgment. I accept that the methodology is legitimate and it was, initially at least, agreed to by the parties. The method was not challenged by Ferreira in any meaningful way which would justify not debiting his loan account with the expenses carried by Plantsaam. Ferreira's loan account must accordingly be debited with R188 159 for 2012 and R557 890 for 2103, being R746 049.

109. After adding the debit for entangled expenses the total to be debited to the loan account is the amount of R1 726 481. To that total figure may be added interest for the period 2012 to 2016 which has been calculated by the auditor in the amended calculations to be R1 013 815, giving a final balance of R2 740 296.

110. De Klerk further submitted that Ferreira's loan account should be adjusted with a debit repaying the salary (R320 000) he withdrew for the 8 month period between July 2015 and 29 February 2016. The basis of this claim is that Ferreira was dismissed by AHI in May 2015 and was thus not entitled to a salary. I agree with Mr Rossouw that the purported dismissal of Ferreira was a nullity. Neither De Klerk nor AHI had the capacity to dismiss Ferreira; only Plantsaam could do so, and that was practically impossible because of the deadlock. Moreover, Ferreira has continued working on the farm and has produced a substantial crop for the benefit of all concerned. It would be unjust and illegal to deny him his salary.

111. In conclusion then, Ferreira's loan account is an asset in Plantsaam valued at R2 740 296, to which must be added the R280 407 (the net asset value of Plantsaam excluding Ferreira's loan account and the current crops). The value of Plantsaam at 29 February 2016 is then R3 020 703. The parties agree that this figure must be reduced by a provision for dividends tax, calculated in the amended calculations to be an amount of R411 044, giving a total value for Plantsaam of R2 609 658.

112. Ferreira's shares and interest in the two companies are thus valued at: Benjo – R8 621 994 (half of R17 243 988) and Plantsaam – R1 304 829 (half of R2 609 658).

His total interest in the two companies is accordingly R9 926 823, from which may be deducted his debit loan account in Plantsaam, R2 740 296, leaving R7 186 527. De Klerk requires this to be further reduced by R1 266 000 being the amount payable (as capital and *in duplum* interest) under the acknowledgement of debt in respect of the purchase price for the shares and interest in the two companies which De Klerk has never paid. Before this amount can be deducted, I am required to determine the Kimberley action which was consolidated with the main action.

The Kimberley action

113. The action in the Kimberley High Court was instituted on 10 June 2014. De Klerk's claim arises out of the acknowledgement of debt signed by Ferreira on 7 November 2001. Ferreira initially raised substantive defences to the claim, but before this court he relied only on the defence of extinctive prescription.

114. In terms of the acknowledgement of debt the full amount of R633 000 together with interest calculated at ABSA Bank's prime rate minus 3%, calculated annually in arrears, was due and payable on or before the last day of February 2009. The acknowledgement of debt provides clearly that the last payment, to extinguish any balance of capital and interest then still outstanding had to be made, "*voor of op die laaste dag van Februarie 2009*".

115. The applicable prescription period in terms of section 11(d) of the Prescription Act[8] is three years. Ferreira contended that the debt would normally have prescribed on the last day of February 2012, three years after that due date stipulated in the acknowledgment of debt. *Prima facie,* therefore, the claim had already prescribed by 10 June 2014 when the action was instituted.

116. De Klerk submitted that prescription was interrupted by an acknowledgement of liability before the expiry of the prescription period. In terms of section 14(1) of the Prescription Act the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor. If the running of prescription is

[8] Act 68 of 1969

interrupted, prescription commences to run afresh from the day on which the interruption takes place.[9]

117. De Klerk pleaded in paragraph 7.2 of the particulars of claim:

> "On the 6th of November 2013, the Defendant, in an e-mail sent to the Plaintiff, acknowledged his indebtedness to the Plaintiff. A copy of the e-mail is attached hereto as annexure B, and the Plaintiff pleads that the contents thereof be incorporated herein as if specifically pleaded."

118. The relevant part of Annexure B, the email, reads:

> "Die betaling van my aandeel het ons al ook in die verlede bespreek en my antwoord aan jou was dat ek dit alleenlik kan betaal uit die winste wat uit die boedery gegenereer word".

119. In his plea Ferreira denied that Annexure B constituted an acknowledgement of liability for the unpaid debt. However, even if it were, he submitted that since the acknowledgement was made after the prescription period had expired, the acknowledgement was of no effect and did not interrupt the running of prescription in terms of s 14(1) of the Act.[10]

120. In his replication, De Klerk pleaded that the debt had arisen out of a partnership relationship, that the partnership was only dissolved during 2015, that there was consequently a delay in the completion of prescription by virtue of the provisions of section 13(1)(d) of the Prescription Act, which provides that if the creditor and debtors are partners and the debt is a debt which arose out of the partnership relationship, and the relevant period of prescription would be completed before or within a year of the partnership being dissolved, the period of prescription shall not be completed before a year has elapsed after the dissolution of the partnership. If this is true, then the debt would not have prescribed before summons was issued on 10 June 2014, which in turn would have interrupted prescription in terms of section

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[9] Section 14(2) of the Prescription Act

[10] *Miracle Mile Investments 67 (Pty) Ltd and Another v. Standard Bank of SA Ltd* 2016 (2) SA 153 (GJ); *Lipschitz v. Dechamps Textiles GMBH and Another* 1978 (4) SA 427 (C), at 430F-G; *and Standard General Insurance Co Ltd v. Verdun Estates (Pty) Ltd and Another* 1990 (2) SA 693 (A), at 699F-J.

15(1) of the Prescription Act. It was pleaded further in the replication that the Ferreira expressly or tacitly had acknowledged the debt by virtue of the contents of annexure "B". The replication thus relies on two grounds: delay of completion under section 13(1)(d) of the Prescription Act and an interruption of prescription by virtue of an acknowledgement of liability in Annexure B.

121. The onus to allege and prove a delay in the completion of prescription and/or interruption of prescription is on De Klerk.[11]

122. It was alleged in the declaration in the main action that through the structures of the two companies De Klerk and Ferreira "conducted a farming enterprise akin to that of a partnership from 1994 until 2015". The allegation is incorrect. Plantsaam is a close corporation conducting the farming operations and hires the land from Benjo, a property owning company, for that purpose. Ferreira was employed by De Klerk and later Plantsaam as farm manager until November 2001. They thereafter became equal shareholders and members in the two companies. It is true that in their capacity as members of Plantsaam they might be thought to be akin to partners but in fact and in law no partnership was ever constituted between them through which they conducted the "combined business". Their business relationship in respect of the two companies was regulated initially by a contract of employment and later by the association agreement in Plantsaam and the shareholders' agreement in Benjo.

123. A partnership is a legal relationship between two or more persons, who carry on a lawful business or undertaking to which each contributes something with the object of making a profit and of sharing it between them. The term "business" means any activity for the purpose of making a profit and there must be continuity in the exercise of these activities. In an ordinary partnership each member of the partnership is liable *in solidum* for the debts and obligations of the partnership.[12] De Klerk and Ferreira are not liable *in solidum* for the debts of the Plantsaam or Benjo. There is no partnership between De Klerk and Ferreira, nor has there ever been. Consequently, section 13(1)(d) of the Prescription Act finds no application and the completion of

[11] *ABSA Bank Bpk v. De Villiers* 2001 (1) SA 481 (SCA), at 486G-487D
[12] *Rhodesia Railways and Others v. Commissioner of Taxes* 1925 AD 438, at 465

prescription was not delayed.

124. With regard to the fact that Ferreira had acknowledged liability for the debt, thus interrupting prescription, De Klerk testified that he and Ferreira had discussed the debt annually when they considered and signed the financial statements of that particular year. On each occasion Ferreira acknowledged the debt but intimated that he was not in a position to repay it.

125. Ferreira under cross examination conceded that De Klerk's version was true after he had been referred to the sentence in Annexure B (his email of 6 November 2013) which appeared to confirm that there had been prior acknowledgement of the debt. In Annexure B Ferreira stated: "Die betaling van my aandeel het ons al ook in die verlede bespreek." Mr van der Merwe asked him what it was that was so discussed ("bespreek") and it was put to him that it was in fact the acknowledgment of the debt, upon which Ferreira conceded by answering in the affirmative. He was then reminded about Dr De Klerk's evidence that the debt had been discussed annually, to which he replied: "Ek kan nie my daarop, maar ons het dit bespreek." He then acknowledged that during these discussions he had informed De Klerk that he was unable to pay the debt. It was then put to him that by necessary implication he admitted the debt. He agreed with that proposition.

126. On the basis of this evidence it was submitted on behalf of De Klerk that the debt had not prescribed by the time Ferreira acknowledged liability in writing on 6 November 2013 in Annexure B or when the summons was issued in June 2014. The difficulty facing De Klerk though is that this version was not pleaded. The replication was limited to a claim of a delay of completion under section 13(1)(d) of the Prescription and an alleged interruption under section 14(1) by means of Annexure B. De Klerk did not seek to amend his pleadings to introduce any other express or tacit acknowledgements of liability interrupting the running of prescription. Mr Rossouw accordingly argued that De Klerk was restricted to relying upon Annexure B, insofar as reliance upon section 14(1) of the Prescription Act is concerned. Absent earlier acknowledgments of liability the one in Annexure B came

too late. He submitted that in the circumstances the special plea of prescription should be upheld and the action should be dismissed with costs.

127. Although the factual basis of Mr Rossouw's argument is correct, in the final analysis it is formalistic. It is trite that the object of pleading is to define the issues; and the parties normally should be kept strictly to their pleadings, especially where any departure would cause prejudice or deny the other party a fair enquiry. But the court has a wide discretion to make findings on the evidence in relation to issues not fully foreshadowed in the pleadings. For pleadings are made for the court, not the court for the pleadings.[13] Both parties had a full opportunity to place the facts before the court in this case. The case of De Klerk on prescription became clear during his evidence and was reiterated in cross examination, where Ferreira had an opportunity to deal with it, which he did by conceding it to be correct; which concession he might have qualified in re-examination, something he did not do. In the premises, I am satisfied on the evidence that prescription was indeed interrupted annually and thus commenced running afresh on each occasion, with the consequence that the debt had not prescribed when summons was issued. It follows that the special plea of prescription must be dismissed and Ferreira remains indebted to De Klerk in the amount of R1 266 000 for the purchase of the shares and interest in the companies and that this amount may be set-off against any compensation payable for the exchange of shares and interest which I propose order. The final amount payable by De Klerk to Ferreira therefore is R5 920 527 (R7 186 527 minus R1 266 000). De Klerk has made proposals regarding the modalities of payment, some of which I take into account in the order I will issue.

Costs

128. The costs of various proceedings in the litigation between the parties need to be addressed. De Klerk is entitled to the costs reserved by Vorster AJ on 10 June 2014 when he granted part A of the first application. The application succeeded and the documentation disclosed pursuant to the order was necessary for the audit.

[13] *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173; and *Shill v Milner* 1937 AD 101

129. The costs reserved (which include the costs of the third urgent application interdicting the bank from allowing Ferreira to withdraw money) in respect of part B of the first application, enrolled for hearing in the third motion court must also be awarded to De Klerk. Ferreira argued that the factual disputes were foreseeable, and that in the prevailing circumstances the De Klerk ought not to have launched an application. However, in the initial founding affidavit De Klerk intimated that after relief had been granted under Part A, Part B should perhaps be referred for the hearing of oral evidence or to trial. Ferreira filed an opposing affidavit only in June 2015 for the first time engaging with the merits and the forensic report. Before De Klerk filed a replying affidavit, he intimated to Ferreira that given what was stated in the answering affidavit, factual disputes may arise. He proposed that the matter be referred for trial or for the hearing of oral evidence. Ferreira refused that reasonable request and insisted that the matter be dealt with on application. In the result De Klerk had no choice but to file a reply. In the circumstances De Klerk's conduct of the application was reasonable and the reserved costs relating to part B of the first application, which would then include the costs of the third urgent application, ought to be part of the costs in the trial.

130. De Klerk is also entitled to the costs of the Kimberley proceedings including the costs in the summary judgment application and the application opposed by Ferreira to transfer of the action to this court.

131. There is no reason to deviate from the normal rule that costs should follow the result in respect of the trial, including the costs consequent upon the employment of senior counsel. The matter's complexity justified the employment of senior counsel.

The orders

132. The following orders are made:

132.1 The membership of the First Defendant in the Second Defendant (Plantsaam) is ordered to cease or terminate with immediate effect.

132.2 The shareholding and membership of the First Defendant in the Third Defendant (Benjo) is ordered to cease or terminate with immediate effect.

132.3 The First Defendant is removed as a director of the Third Defendant.

132.4 The First Defendant is ordered to transfer his member's interest in the Second Defendant and his shares in the Third Defendant to the Plaintiff.

132.5 The First Defendant is ordered to sign all documents and to take all steps necessary to effect transfer of the aforementioned member's interest and shares. Should he fail or refuse to do so within 10 days of this order, the Sheriff for the district of Pretoria East is authorised to do what is necessary to give full effect to the order in paragraph 132.4.

132.6 Judgment is entered in favour of the Plaintiff in case no 934/2014 of the High Court, Northern Cape Division Kimberley, which was consolidated in these proceedings, in the amount of R1 266 000. This amount is set-off against the amounts due by the Plaintiff to the First Defendant in respect of the compensation payable for the transfer of his member's interest and shares as provided in this order.

132.7 The Plaintiff is directed to pay an amount of R5 920 527 to the First Defendant upon and as consideration for the transfer of his member's interest and shares as provided in this order.

132.8 The Plaintiff is entitled to take full charge of all the affairs and business of the Second and Third Defendants with immediate effect.

132.9 The First Defendant is ordered to surrender and deliver all movable assets of the Second and Third Defendants to the Plaintiff within three days of this order.

132.10 The First Defendant is ordered to pay the Plaintiff's costs of this action instituted under case no, 35391/2014, such costs to include the costs of senior counsel and the following:

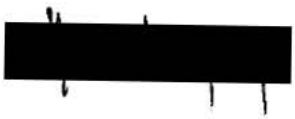
132.10.1 the costs reserved by Vorster AJ on 10 June 2014;

132.10.2 the costs pertaining to the third urgent application reserved on 30 September 2015;

132.10.3 the costs reserved on 24 November 2015 by Thlapi J;

132.10.4 the costs of the action instituted in the High Court, Northern Cape, Kimberley under case no. 934/2014, consolidated with these proceeedings, including the costs of the opposed summary judgment application and the opposed application to transfer the matter to this court; and

132.10.5 the qualifying, preparation and attendance fees of the Plaintiff's expert witness, Mr Johan Ferreira, as well as the qualify and preparation fees of the valuators in respect of whom the Plaintiff had given expert notices.



JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	8-25 August 2016; 9 September 2016; 9 November 2016 and 28 November 2016
For the Plaintiff:	Adv MP van der Merwe SC
Instructed By:	Stemela & Lubbe Inc.
For the First Defendant:	Adv PF Rossouw SC
Instructed By:	Honey Attorneys
Date of judgment:	2/2/2017