

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 43236/17**

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|-----|---|
| (1) | REPORTABLE: YES/NO                      |
| (2) | OF INTEREST TO OTHER JUDGES:<br>YES/ NO |
| (3) | REVISED.                                |

KEIGHLEY J  
SIGNATURE

19/11/2020  
DATE

In the matter between:

Plaintiff

**FORUM EXPORTERS INTERNATIONAL (PTY) LTD**

And

**PARK VILLAGE AUCTIONERS (PTY) LTD**

First Defendant

**CLIVE LAZARUS**

Second Defendant

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**J U D G M E N T**

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**KEIGHTLEY, J:**

## INTRODUCTION

1. This case involves a dispute arising out of the importation of a large consignment of household furniture and similar effects and the subsequent sale of these items in South Africa. The plaintiff, Forum Exporters International (Pty) Ltd (Forum), sourced the goods through a contact in the United Kingdom, procured them and imported them into South Africa. In all, over 100 containers of goods were involved. However, Forum was not in the business of selling bulk consignments of household goods, and it needed a partner that could do so. It initially entered into an arrangement with Goodrich Auctioneers (Goodrich) for this purpose. Goodrich, in turn, brought Park Village Auctioneers (Pty) Ltd (PVA) into the relationship.
2. Sadly, as the facts demonstrate, the relationship between the three parties involved in this commercial enterprise soured. In fact, it is safe to say from the evidence I heard at trial, that none of the parties came out of the deal feeling as though it had been a good experience. Be that as it may, the breakdown in the commercial relationship led to Forum instituting a claim against PVA, as well as a separate claim against one of the Directors of PVA, Mr Clive Lazarus.
3. Goodrich is not a party to the litigation, although its role in the commercial relationship between the parties looms large in the case. A central issue of the dispute is what the respective roles and functions of PVA and Goodrich were in relation to Forum. Forum's case is that it was PVA's obligation under the agreement to pay the amounts due to Forum once the goods were sold.

Hence, it sues PVA for the amounts it says are due to it. PVA, on the other hand, disputes its liability, claiming that Goodrich was the party bearing the relevant obligations to Forum.

## PLAINTIFF'S CLAIMS

4. As to the nature of Forum's claims, it is simplest to start with the particulars of claim as they stood at the time of trial. As against PVA (claim A) Forum avers that:

*“5. During March 2016, the Plaintiff concluded an agreement with Valitus LLC in the United Kingdom for the purchase of household furniture and accessories witch (sic) Valitus had sourced from Maisons du Monde in France.*

*6. The Plaintiff anticipated importing 185 containers of household furniture and goods from France pursuant to this agreement (the goods).*

*7. On or about 15 May 2016 at Johannesburg, the Plaintiff, represented by Dave Buda acting personally and the First Defendant represented by its director, the Second Defendant and one RAYMOND TERBLANCHE t/a GOODRICH AUTIONEERS, acting personally, entered into an oral joint venture agreement.*

*8. The Material express, alternatively tacit, alternatively implied terms of the joint venture agreement were as follows:*

*8.1 The Plaintiff would import the goods into South Africa through Durban harbour and remain the owner thereof until they were sold in accordance with the agreement;*

*8.2 The Plaintiff would clear the goods and transport it to warehousing in Gauteng belonging to or under the control of the First Defendant;*

*8.3 Goodrich Auctioneers would unpack the goods at the warehouses and prepare inventories;*

*8.4 The First Defendant would enter the goods onto their systems and attend to all aspects of the sale of the goods including advertising and marketing, sales, delivery, invoicing and collections;*

*8.5 The Plaintiff would be paid a sum of money (in South African Rand) by the First Defendant equal to the Maisons du Monde retail price ('the MDM price') of the goods nominated in pounds sterling multiplied by a factor of 6;*

*8.6 Whatever was received by the First Defendant in excess of that sum would be divided between the First Defendant and Goodrich Auctioneers in shares agreed between them, after expenses were settled. The parties envisioned that the goods would be sold with a 30% markup and that the said 30% would therefore constitute the excess. The parties envisioned further that a third of*

*the 30% would go towards expenses, a third to the First Defendant and a third to Goodrich Auctioneers.*

*9. Between May and June 2016, 128 containers of goods were delivered to the said warehouses, all of which were processed and 98 of which were sold by the First Defendant and the Plaintiff complied with all of its obligations under the agreement.*

*9A. On or about 4 July 2016, and at OR Tambo Airport, Johannesburg, at the request of Raymond Terreblanche t/a Goodrich Auctioneers, whose request the Plaintiff was informed was supported by the First Defendant, represented by the Second Defendant and the Second Defendant personally, the Plaintiff, represented by Dave Buda acting personally, orally agreed to reduce the factor of 6 referred to in paragraph 8.5. above to a factor of 4.9.”*

5. In essence, Forum contends that there was what may be described as a joint venture agreement between all three parties. Under this agreement, the parties each had certain roles and obligations. Forum says that PVA had the obligation ultimately to pay over to Forum the amount due to it (Forum) flowing from the sale of the goods in South Africa. This amount was based on what is referred to in paragraph 8.5 of the particulars of claim as the retail price of the goods set by Maisons du Monde (the MDM price), multiplied by 6. I will refer to this as “the factor” or “the factor equation”. Forum contends that the factor was initially agreed to be 6, but was later reduced to 4.9 by further agreement between the parties.
6. According to Forum, under the agreement, the factor acted as the baseline for the calculation of the selling price of the goods. To this baseline, the parties agreed that a 30% mark-up would be applied. Forum would be entitled to payment based on the factor equation, regardless of the ultimate selling price. PVA and Goodrich Auctioneers (Goodrich) would each get 10% of the mark-up,

with the remaining 10% being allocated for the expenses involved in warehousing, marketing and selling the goods.

7. Forum's complaint against PVA under Claim A in a nutshell is that PVA has failed to comply with its obligation to pay over to Forum the amount due to it under the agreement. Forum's case is as follows:

- 7.1. The MDM price for the goods in the containers that were imported was £4 300 800.00. This amount was subsequently revised downwards at trial, as I will explain later.

- 7.2. Based on the lowest common denominator of factor 4.9 on the MDM price, Forum was entitled to payment from PVA of R 21 073 920. 00, which amount was also revised downwards at trial.

- 7.3. Despite this, Forum says that it received payment from PVA of only R2 324 051. 68 between August and December 2016.

- 7.4. Forum has elected to forgo the amounts due to it from the final "fire sale" of goods that took place on 8 December 2016, which it estimates to be an amount of R151 900. 00. In effect, once the factor is taken into account, Forum has elected to forgo approximately R800 000. 00 of its total claim on account of the fire sale.

- 7.5. Further, Forum says that it received an amount of some R7,3 million directly from a third party, Unicorn, as a result of a sale Forum arranged

with Unicorn. Forum accepts that this amount must be subtracted from the total amount it claims from PVA.

7.6. The final (as amended) value of Forum's claim against PVA under claim A is R6,5 million.

8. Forum's claim against Mr Lazarus (claim B) is stated as follows in the particulars of claim:

*"11.1 During June to September 2016 the Second Defendant, operating on the wrong premise that the First Defendant's expenses stood to be deducted from the income received from the sales of the goods rather than from the excess referred to in paragraph 8.6. above:*

*11.1.1 Inflated certain expenses and administrative costs and invented others;*  
*11.1.2 Under-declared sales and manipulated sales invoices in order to reflect lesser amounts;*

*11.1.3 Failed to declare certain sales of goods;*

*11.1.4 Presented the Plaintiff with false reconciliations reflecting the under-declarations;*

*11.1.5 Sold some of the goods privately, for his own account;*

*11.1.6 Allowed the Second Defendant to deal with and sell various of the goods for his own account;*

*11.2 In so acting the Second Defendant:*

*11.2.1 intended to defraud the Plaintiff;*

*11.2.2 Used the position of director of the First Defendant to gain an advantage for himself;*

*11.2.3 Failed, in his capacity of director, to act in good faith, for a proper purpose and in the best interests of the First Defendant."*

9. Forum relies on the common law and on s76(3), read with s218(2) of the Companies Act, 2008 in seeking to hold Mr Lazarus personally liable for the damages allegedly suffered by Forum in being induced by Mr Lazarus' alleged unlawful conduct into agreeing to drop Forum's factor from 6 to 4.9. Section 76(3) obliges a director of a company to perform her functions in good faith and for a proper purpose, and s218(2) renders liable a person who causes loss to another as a result of any contravention of the Act.

## DEFENDANTS' PLEA

10. The defendants initially filed three special pleas. The first two were abandoned before the trial commenced. The third special plea was raised by Mr Lazarus in respect of claim B. It was abandoned by him in the heads of argument filed on his behalf. I deal no further with it.
11. In paragraph 6.4 of their plea, the defendants admit that on or about 15 May 2016 at Johannesburg:

*“Terreblanche, trading as Goodrich Auctioneers, entered into an oral agreement in terms whereof the parties agreed that goods delivered to the warehouse of the First Defendant would be sold and that all three parties would contribute towards the venture.”*
12. It should be noted that although the defendants also admit that PVA was represented by Mr Lazarus at the meeting, they do not admit that he entered into the oral agreement on behalf of PVA. However, there is an admission that all three parties would contribute towards the venture.
13. The defendants admit paragraphs 8.2 and 8.3 of the particulars of claim. It is therefore common cause that Forum would clear the goods through customs and transport them to warehousing in in Gauteng belonging to or under the control of PVA; and that Goodrich would unpack the goods and prepare inventories.
14. As to the averments contained in paragraph 8.4 of the particulars of claim, the defendants plead that PVA would enter the goods onto its system based on the inventories to be supplied by Goodrich. It says it complied with this obligation.

The defendants dispute that it was to attend to all aspects of the sale of the goods, including advertising and marketing, sales, delivery invoicing and collections. They plead that it was Goodrich's obligation to do so, save for the advertising, which was a joint obligation with Goodrich. The defendants say that they complied with this obligation. They plead further that PVA would prepare invoices based on the sales figures supplied to PVA by Goodrich, and that PVA complied with this information.

15. Insofar as the averments concerning PVA's alleged obligation to pay to Forum as contained in paragraphs 8.5 and 8.6 of the particulars are concerned, the defendants plead as follows:

*"11.1 The Defendants deny the contents of these sub-paragraphs.*

*11.2 Although the Defendants admit the initial agreement was that the Plaintiff would receive an amount equal to six times the British pound sterling value of the goods, the Defendants specifically plead that due to the Plaintiff misrepresenting the quality and value of the goods, it was no longer entitled to receive the original agreed amount.*

*11.3 The Defendants further specifically plead that upon inspection of the goods and after the first unsuccessful attempt to sell these goods, that the intended entitlement for the Plaintiff to receive a sum of six times worth the British pound of the depicted price of the item in South African Rands from the sale of goods was cancelled as it was clear that the goods will not realize a price if the factor was to be 6.*

*11.4 The Defendants specifically plead that as a result that (sic) Goodrich Auctioneers determined the sales price, it was agreed that the Plaintiff would receive a net amount from the sale of goods, that is the sale price of goods, from which the following would be deducted;*

*11.4.1 Commission of 20% on the sale price, which would equally be divided between the First Defendant and Goodrich Auctioneers;*

*11.4.2 An amount equal to 30% of the expenses related to the sale of the goods, except for advertising and marketing costs, which would in totality be deducted from the sale price."*

16. The defendants plead further that:



- 16.1. Only 104 containers were delivered;
  - 16.2. Not all containers were processed;
  - 16.3. They deny that 98 containers were sold by PVA;
  - 16.4. They deny that Goodrich supplied inventory lists for all the containers.
  - 16.5. The sales were undertaken by Goodrich.
  - 16.6. PVA received lists of sales and figures of sales from Goodrich and complied with its obligations under the amended agreement.
17. As to the alleged agreement at OR Tambo in terms of which the parties agreed that Forum would reduce its factor to 4.9, the defendants plead that: "*Raymond Terreblanche (representative of Goodrich) unilaterally negotiated with (Forum) in this respect.*"
18. The defendants admit that PVA made payment to Forum in the amount of R2 324 051. 68. However, the defendants deny that PVA is liable to pay Forum the sum claimed.
19. As to claim B, the averments in support of the claim are simply denied.

#### THE REDUCED QUANTUM OF THE CLAIMS

20. As I indicated earlier, at trial Forum presented its case on the basis of a reduced quantum: it no longer claimed payment from PVA in the amount of some R23 million under claim A, but only an amount of R6,5 million. This meant that the

particulars of claim were not in sync with the case presented and evidence led by Forum. After considering the parties heads of argument, I requested further submissions on the question of whether a formal amendment was necessary so as to align the particulars with the case presented.

21. Forum submitted that a formal amendment was not necessary, as the real issues, and basis for the reduced claim, were fully canvassed in the evidence led at trial. However, out of caution, Forum formally requested the court for leave to amend its particulars to bring them in line with the case it had argued. It filed an amendment to its particulars of claim together with its submissions on the issue.
22. In their responding submissions, the defendants took issue with Forum. They discussed various calculations based on a comparison of the original particulars of claim with the proposed amended particulars of claim and submitted that this comparison showed that the proposed amendment left more questions than answers. They submitted further that the basis for the reduced claim, i.e. the master spreadsheet (which I will discuss in more detail below) had not been confirmed by Forum's witnesses. The nub of the defendant's submissions was that Forum's calculation of its claim is based on mere conjecture and not evidence.
23. It will be clear from my discussion and analysis of the evidence and the issues in dispute that follows that I do not share the defendants' complaints about the proposed amendments. I am satisfied that the issues raised by the

amendments were canvassed in the evidence led at trial. Accordingly, leave is granted to Forum to amend its particulars of claim.

#### THE ISSUES IN DISPUTE: CLAIM A

24. The following disputed issues appear from the pleadings and the evidence led:

24.1. What goods were delivered and dealt with under the agreement?

24.2. What were the terms of the agreement between the parties? In particular, what were the respective roles and obligations of PVA and Goodrich to Forum? In this regard, the gist of the defendants' case is that PVA was a side-player in the enterprise, and that Goodrich was Forum's primary partner. Accordingly, PVA's case is that Forum should be looking to Goodrich, and not to PVA for fulfilment of any obligations owed to it.

24.3. A related issue is the status of the alleged agreement struck at OTR Tambo on 4 July 2016, when Forum says it agreed to drop its factor to 4.9. Allied to this, is PVA's claim that due to the quantity of damaged goods the financial structure of the deal changed fundamentally, such that the factor no longer played a role and Forum was only entitled to a net amount, as set out in the defendants' paragraph 11.4 of their plea.

24.4. Whether PVA complied with its obligations to Forum under the agreement.

- 24.5. The quantification of the claim (in the event that Forum establishes that PVC is liable to it).

## THE GOODS DELIVERED

25. It is common cause that the goods that formed the basis of the commercial relationship between the parties were sourced and imported into South Africa by Forum. It is also common cause that the goods were packed into containers which had to be unpacked. Mr David Buda represented Forum at all relevant times. He testified that he engaged the services of African Compass International Cargo (Pty) Ltd (Compass) as Forum's clearing agents. Compass was also responsible for delivering the containers to the PVA warehouses where the goods were to be stored.
26. Forum pleaded that 128 containers were delivered and unpacked. PVA disputes this in its plea, contending that there were only 104 containers. It is obviously important for this issue to be resolved. Forum must satisfy the court that its claim for payment from PVA is based on a proper calculation of the quantity of goods sold. The starting point of the inquiry is thus what quantity of goods was delivered.
27. Ms Rosekilly is a director of Compass, and she oversaw the delivery and unpacking of the containers at PVA's premises. She testified about the procedure that was followed. The containers were sealed on delivery. After checking the seal on each container, Compass prepared an unpacking sheet for

that container. It would be opened and unpacked, with each item marked off and checked against the unpacking sheets.

28. The information as to what was in each container was supplied by Valitus, the UK supplier of the goods. This was used as a basis for the unpacking sheets. The unpacking sheets were entered into evidence, and Ms Rosekilly was taken through a sample of them in her evidence in chief. The unpacking sheets showed handwritten annotations. Ms Rosekilly explained that the ticks against each item on the unpacking sheet corresponded with the number of those items actually unpacked from the container. So, if the unpacking sheet indicated that there should be 10 bar stools, and only 5 ticks appeared alongside that item, it meant that only 5 were actually unpacked from the relevant container. If a listed item was not found, this too would be marked on the sheet.
29. According to Ms Rosekilly, there were some variables as to why an item was not ticked off. In some cases, although the item was in the container, its identifying sticker had fallen off. In this case, the item would nonetheless not be marked off. In other cases, the item would be in a different container. In all cases, it seems plain from Ms Rosekilly's evidence that the annotations on the unpacking sheets provided an accurate, albeit conservative, record as to the items that were delivered. If anything, the unpacking sheets underestimated the number of items that were delivered and unpacked.
30. Ms Rosekilly's evidence was not materially challenged under cross-examination. She admitted that she had not overseen the unpacking of each

container, but this is of no matter. She gave good and clear evidence about the process involved and the scheme used to accurately capture the items that were unpacked. I have no reason to reject any aspect of her evidence.

31. Mr Buda testified that on the basis of the inventory supplied by Valitus, cross-checked against the information contained in the unpacking sheets, Forum compiled what was referred to at the trial as the master spreadsheet. This was prepared for purposes of the trial. It was shared with the defendants in the pre-trial proceedings, and they made some adjustments to it. While the defendants did not oppose Forum's use of the master spreadsheet at the trial, this was with the proviso that it be understood that it was Forum's document, and not that of the defendants.
32. The master spreadsheet is a lengthy Excel document, comprising approximately 9000 lines of information. Counsel for Forum did not take Mr Buda through all 9000 lines. This would have taken up a considerable amount of court time. Instead, he led Mr Buda in evidence as to the convention used to compile the master spreadsheet, with reference to some sample lines.
33. The headings of the columns in the spreadsheet captured the stock code of each item; the quantity of each item meant to be delivered; a description of the item in words; the container number in which the item was contained; the seal number for the container; the shipment date of the container; the date the container was received; the warehouse it was delivered to; the MDM price of

each item; the number of items actually unpacked, and the price; and then the factor 4.9 value.

34. The pricing columns were included in the master spreadsheet, as Forum presented the spreadsheet not only to establish the actual items that were delivered, but in addition to sustain the quantification of its claim against PVA. I will deal with the latter aspect later. For purposes of establishing the stock that was delivered, Mr Buda confirmed that the master spreadsheet recognised only the actual number of items that had been marked off on the unpacking sheets. He testified further that in cases of uncertainty, for example, uncertainty as to whether one tick represented the full 25 items under one stock code, or only 1 of those items, Forum relied on and counted only the latter, rather than the former. This is consistent with the conservative approach adopted in the unpacking sheets. In my view, it establishes that at least the number of items on the master spreadsheet were delivered, although in all probability the stock pool that was ultimately dealt with was larger than that reflected in the master spreadsheet.

35. I am satisfied that based on the evidence of Mr Buda and Ms Rosekilly, the master spreadsheet may be accepted as establishing the items, and the numbers of those items, that were delivered, and thus which formed the basis of the inventory of stock that was to be dealt with by the parties.

## THE TERMS OF THE AGREEMENT

36. As I have indicated, from the pleadings filed, certain aspects of the agreement between the three parties are common cause. In the first place, PVA admits that it entered into an agreement with Forum and Goodrich. It also admits that in terms of this agreement, the goods would be transported to and unpacked at premises belonging to, or under PVA's control. It admits that the goods would be entered onto its inventory, although it says it relied on Goodrich to supply the relevant information. It also admits that it issued invoices, although it says that these were based, once again, on information supplied by Goodrich.
37. Significantly, PVA admits that under the agreement Forum initially was entitled to receive payment on the factor 6 basis, i.e. Forum was entitled to receive out of the deal six times the MDM price for the items sold. PVA contends however, that this term of the agreement was later changed such that Forum would only be entitled to the balance remaining from sales after the deduction of a 20% commission of the sale price (to be split between Goodrich and PVA), and 30% of the expenses relating to the sale (excluding advertising costs). If this is correct, it would drastically reduce what Forum was entitled to under the agreement. Instead of receiving a guaranteed factor 6 on the goods sold, Forum would only be entitled to a much smaller sum, dependent on the actual price received for goods, and significant upfront deductions.
38. Despite this being the case on the pleadings, when Mr Lazarus testified on behalf of PVA, he appeared to take the position that there never was an agreement between PVA and Forum. He also dismissed as "*pie in the sky*" Forum's case that under the agreement, Forum was entitled to receive the



MDM price multiplied by six. I will return to Mr Lazarus' evidence later. But it is worth noting at this stage that the basis of the defence as pleaded, and as supported by Mr Lazarus' evidence were not always in sync.

39. From the pleadings and the evidence two issues relating to the terms of the agreement can be identified: first, what was the nature of the agreement and, in particular, what were PVA's obligations under the agreement; and second, what were Forum's payment terms and more specifically were these subsequently amended as PVA claims in its plea. I refer to these issues as the "nature of the agreement issue" and the "factor issue" respectively.

*The evidence on the nature of the agreement issue*

40. Three witnesses were called to testify on behalf of Forum in respect of the terms of the agreement: Mr Buda; Mr Terreblanche (who was a director of Goodrich at the time); and Ms Heather Upsdell (who was also a director of Goodrich).
41. Mr Buda is a trader and the guiding mind of Forum. He gave the background as to how the deal came about. He was initially approached at the end of 2015 by Valitus, a UK based company, to sell goods that Valitus had sourced from Maison du Monde in France. The goods had to be sold outside the European Union. After he had done some research, Mr Buda decided in about February or March that he would do the deal with Valitus. At this stage, some of the goods were already in a warehouse in South Africa.

42. Mr Buda, on behalf of Forum, first entered into an agreement concerning the goods with Goodrich, represented by Mr Terreblanche and Ms Upsdell. This was at the end of April 2016. Shortly after this, Mr Terreblanche and Mr Lazarus held discussions in Johannesburg. From Ms Upsdell's evidence it appears that this was because the first warehouse that Mr Terreblanche had in mind proved to be too small to house the stock. Bigger premises had to be found. Mr Terreblanche thus approached Mr Lazarus. What transpired was an agreement between Goodrich and PVA. The terms of this agreement were transmitted to Mr Buda by Ms Upsdell in an email dated 6 May 2016.
43. The salient terms of this email were as follows:
- 43.1. *"It was agreed (in discussions held between Mr Terreblanche and Mr Lazarus) that Park Village Auctioneers and Goodrich will work together to sell your furniture."*
- 43.2. *"We all the same end goal - maximum sales in the shortest space of time; Timelines are very tight and you would like to see approx 30% sold by end of June".*
- 43.3. *"PVA have a huge data base of clients and have enormous exposure in the market place".*
- 43.4. *"We will run major advertising together as PVA/Goodrich".*
- 43.5. *"Space and cost per (square metre) is no longer a variable factor. We (Goodrich only) will share profit with PVA".*

44. The email went on to say that Mr Lazarus had met with them later that day “to get to grips with how things will work so we could all get on the same page and understand who was doing what and how we could best represent you and work as a strong team”. To this end, Ms Upsdell recorded that Mr Lazarus’ input, which was “very straight and to the point,” as to PVA’s role, was that:

44.1. PVA would: “(g)ive us the space required”.

44.2. PVA would “(e)nsure lighting and security”.

44.3. “PVA/Goodrich/Eugene etc will be selling the goods”.

44.4. “We will jointly work with stock lists/codes/descriptions from Ollie to capture our data base for invoicing”.

44.5. “Pricing on the system will be cost (your reserve) plus 30%. We can give 5% discount. For bulk ie UFO we can discuss better prices STC”. [words in brackets in this extract appear in the original]

44.6. “They (PVA) brought in two team members - Grant who will create the invoicing system and be based on site from Tuesday and Elaine. Elaine and I will do the invoicing of goods together.”

44.7. “One central data base, complete visibility and transparency, no one may move / sell any stock without an invoice”.

44.8. “Overhead costs ie rent, advertising, staffing etc are for Goodrich a/c only. This will in no way affect yourself or Eugene’s pocket”.

44.9. *“Every Thursday a report and reconciliation will be done and copied to everyone. This will be sales for the week and stock sold, balances”.*

44.10. *“Every Friday payment will be made to the relevant accounts”.*

44.11. *“He (Mr Lazarus) assured us of his commitment to the project and was happy to answer all and all questions.”*

45. It is common cause that Grant is Grant Cameron, who was a PVA employee. His role was to administer the invoicing and accounting aspects of the arrangement. Elaine was also a PVA employee. By all accounts, she played a less central role in events. Eugene was Eugene Swanepoel. He was one of Mr Buda's acquaintances. It was he who put Mr Buda in touch with Mr Terreblanche. He does not loom large in the critical cast of characters.

46. It is common cause that at the time that the email from Ms Upsdell was sent to Mr Buda, Forum was not yet a party to the terms agreed on between Goodrich and PVA. On 13 May 2016, Mr Cameron emailed Mr Buda asking him to supply certain details, including costings, so that he could upload the stock onto PVA's system. These were provided to Mr Cameron on an excel spreadsheet with the information originating from the Valitus documents accompanying the containers.

47. Forum's case is that the joint venture agreement between all three parties was struck when Mr Buda visited Johannesburg on 15 May 2016 and met with Mr Lazarus, Mr Terreblanche and Ms Upsdell. In his testimony, Mr Buda was

asked to comment on PVA's plea, to the effect that PVA's only responsibility was to do advertising (jointly with Goodrich) and invoicing. Mr Buda responded that:

*"I did not see it like that at all. One of the things that was attractive to me about the introduction of Park Village in the early part of May by Mr Terreblanche, or Goodrich, was the fact that he was coming along with a heavy hitter Auctioneer who had a database who was participating in the selling process. He was offering the storage and the administrative strength to be able to support an undertaking of this size."*

48. Mr Buda was also asked whether, when they met on 15 May, Mr Lazarus was as firm on what the role of PVA would be as was recorded in Ms Upsdell's email of 6 May. He replied: *"Very much so"*. He said that Mr Lazarus:

*"... was very clear that he wanted to make sure that all the money, all the administration was done by PVA, his team. The role of Raymond, and Goodrich, and Heather, and all of that would be on an administrative level but nonetheless still through his team. That is where Elaine and Grant came in. It was very much a PVA operation as it were."*

In answer to a question under cross-examination, he said that Mr Lazarus' position was that: *"there only could be one company running the administration... There was only one way to be doing the stock control and I think that the role of Goodrich was to be able to support that with the information that they needed to share with them and what that was I was not clear."*

49. Under cross-examination, when asked to explain what he understood the respective roles of PVA and Goodrich to be under the agreement, he reiterated that while Goodrich had a role to play, based on whatever terms were agreed

between Goodrich and PVA: *"What was represented to me was Clive (Mr Lazarus) was running with this it was his business this is how they do it that is how it is"*. He said that Mr Lazarus had indicated that PVA was *"in the driving seat"*. He pointed to the 6 May 2016 email from Ms Upsdell as capturing what the role of PVA would be, following the meeting between all three parties on 15 May 2016.

50. He was also asked under cross-examination whether PVA was his agent under the agreement. His response in this regard was: *"I... I suppose you could say that yes, I did not see it like that... [intervene]."* Later under cross-examination he was shown an email that he had sent to Mr Terreblanche on 22 November 2016. This was shortly before the whole project came to an end. Mr Buda expressed his displeasure to Mr Terreblanche about how things had worked out. In the email, he wrote: *"As you are aware PVA is not my agent. Goodrich or you are."*
51. It was pointed out to Mr Buda that this contradicted his earlier statement to the effect that it could be said that PVA was Forum's agent. Mr Buda's response was that he could not remember why he had made this statement. However, he said that he was very upset at the time as things had gone horribly wrong. *"I was looking for an avenue through to Clive and ... Clive was unapproachable at the time. He was being bizarre so I went that route okay. It does not necessarily make it true that that is what I said to Raymond."*

52. The defendants rely on this email and this exchange to undermine Forum's case that PVA was liable to it under the agreement. I will deal with this issue later, when assessing the evidence.
53. Ms Upsdell testified on behalf of Forum. As the author of the 5 May email she confirmed its contents. She was taken through what it said. Ms Upsdell was asked what she had meant in saying that: "*(p)ricing on the system will be cost (your reserve) plus 30%.*" She confirmed that this was a reference to the factor that Mr Buda worked on and what he wanted in his pocket. She said: "*We agreed to put on the 30% that were then split between Goodridge, Park Village and their expenses.*"
54. Ms Upsdell was part of the meeting between the parties on 15 May in Johannesburg. She was asked what had been agreed between the parties as to who would take charge of the operation and how it would work in terms of the unpacking, invoicing and selling. Ms Upsdell confirmed that she was largely responsible for the unpacking of the containers. She said the agreement was that all of them would do the selling. She relocated to the PVA premises for this reasons, and Mr Lazarus appointed a few of his staff to assist with the selling.
55. As to the role of PVA as outlined by Mr Lazarus in the meeting, Ms Upsdell said:

*"Clive was very specific that we were not to handle money. We were not to invoice. That he had brought Grant in who was their bookkeeper. They had the system in place 10 because they had the accounts package. They would do all the invoicing. And they would control security, because they had, obviously they had security guys at the exits. They would sign people in and out. Nothing was to*

*leave the premises without Clive's knowledge. And if it did leave the premises, it had to be on a Park Village Auctioneer's invoice. And everything had to be checked when it left."*

And:

*"Clive was very, very clear on the point. He had brought Grant across from their Randburg offices to run this on their side, on the bookkeeping side. He was going to do all the invoicing. We did mention Elaine and I were going to do it, but we never did. It stayed purely with Grant. He worked on the (bookkeeping) package, only he had access to it."*

And:

*"And they would also, Park Village also insisted they had full control over the stock. All stock leaving had to be on an invoice. Had to be signed in and out ... When they sold any stock, it had to be on an invoice, a Park Village Auctioneers invoice. That was done by Grant. And it had to be signed out at their security."*

56. Under cross-examination, Ms Upsdell was asked about the 15 May meeting and why it was held. She said:

*"I am trying to remember, but I believe that was when Dave Buda flew up from Cape Town to see his stock and check what was happening. And that was when we sat around the boardroom table and went through the various different, who would be doing what and how."*

57. She was asked whether any arrangement was made that differed from what was recorded in her email of 6 May. She responded: "No". She confirmed that the email was a handy summary of what had been agreed. She was asked whether Mr Lazarus had said at the meeting that: *"...he is from now on fully responsible for everything in that warehouse no matter what happens to it?"* Ms Upsdell replied: *"I do not remember him using that term, 'whatever happens to it'. But he was very specific that he would handle the security, the safety of the stock, the security, the selling, invoicing, and the money."*



58. She was asked who Mr Buda looked to in order to ensure that things ran smoothly. She answered that he looked to both Mr Lazarus and Mr Terreblanche for feedback. Ms Upsdell was also asked to comment on what Mr Buda may have meant in his email to Mr Terreblanche on 22 November. She responded, that she did not know, other than that Mr Buda had initially done the deal with Mr Terreblanche. Ms Upsdell was also questioned about a later email from Mr Buda to Mr Terreblanche dated 6 December 2016, in which Mr Buda said that he was awaiting a full worksheet from Ms Upsdell for all the inventories sold from or by PVA. She was asked why Mr Buda had requested this information from her if PVA was in charge. She responded that neither she nor Mr Terreblanche had the information and she had told Mr Terreblanche that she could not do it: *"I did not have the full sales figures from Park Village, how could I do an inventory?"* In his evidence, Mr Buda had indicated that he had asked Ms Upsdell to do this task as he thought he might get more joy out of her than Mr Lazarus.
59. Ms Upsdell was also cross-examined on how the sales process worked, and to what extent PVA employees were actually involved in the sales. For reasons that appear later it is not necessary for me to go into this aspect of her evidence in any detail.
60. Mr Terreblanche also testified on behalf of Forum. He said he did not know Mr Buda and became involved through Mr Swanepoel, who knew Mr Buda. He confirmed that when he started negotiating with Mr Buda, PVA was not yet involved. However, when he saw the number of containers involved, he

realised that Goodrich needed more space. It was then that he approached Mr Lazarus.

61. Mr Terreblanche testified that Goodrich did most of the sales. However, PVA staff also did a certain amount. He said that all the stock was in PVA warehousing and the security was supplied by PVA. All sales had to be processed through Mr Cameron. PVA controlled all the invoicing and payment was made into PVA's bank account. This evidence accords with Ms Upsdell's evidence on the sales, invoicing and payment process, save for the fact that Ms Upsdell said that PVA did most of the sales.

62. Mr Terreblanche said that PVA took responsibility for the stock and security. This was at the insistence of Mr Lazarus. Asked to describe Mr Lazarus' approach to the venture, Mr Terreblanche responded:

*"It was his premises, his warehouses, etcetera. So, obviously he had you know, previous to our deal, he obviously has security in place. It is his premises, so everybody listen to what Clive Lazarus says. There was not a third party, a mutual beneficial security company employed you know, it was all under the roof and under the instruction of Mr Lazarus."*

63. Under cross-examination, Mr Terreblanche confirmed that a three-party agreement had been entered into at the meeting on 15 May 2016. According to Mr Terreblanche, when he realised he needed more space to house the goods in the containers, and after the Wynberg warehouse he had in mind had fallen through, he approached Mr Lazarus. When he originally approached Mr Lazarus, he had wanted to pay him rental. But Mr Lazarus came back to him

with the proposal that he (Mr Lazarus) get involved in the venture instead of simply renting Goodrich space. He said they agreed to split the commission on a 10% each basis, with a further 10% for expenses. He then approached Mr Buda and told him he was going to go into a joint venture with PVA. Mr Buda was happy with that, and so was Mr Lazarus. Mr Terreblanche confirmed that at the stage of the 6 May email, the agreement was still between Goodrich and PVA.

64. He was taken to an email written by Ms Upsdell to Mr Buda dated 2 May 2016. The email set out what Goodrich's responsibilities would be, and how the proceeds would be split. The terms set out in this email are different from those contained in the later email of 6 May 2016. Mr Terreblanche said that this email was written at the start of negotiations with Mr Buda. It is clear from the email that at that stage it was envisaged that Mr Swanepoel would be involved and would take a share in the deal. Mr Terreblanche explained in this regard that: *"The initial concept when we started the negotiations for this contract up until where we ended it changed dramatically, okay. At the time of this letter Mr Lazarus from Park Village was not yet involved."*
65. It was put to Mr Terreblanche in cross-examination that under the envisaged terms in the 2 May email, Goodrich was *"basically responsible for everything"*. Mr Terreblanche responded: *"... yes if we are going according to this letter because before anybody else was involved in the contract. If everything went according to this letter on 2 May, correct."*

66. Mr Terreblanche was asked about the meeting on 15 May. He responded:

*"All right, so the end result you know from that meeting was that you know Mr Cameron, Clive would do the, or Park Village would do the invoicing. They would collect the purse basically the whole structure of the deal. So we would sell, and they would raise the invoice, they would collect the money. That was basically you know...the advertising was going to be decided with all of us. It was just basically the outline of how the things were going to go forward."*

67. Mr Terreblanche was requested to explain why Mr Buda had asked him and Ms Upsdell, and not Mr Lazarus, for an inventory of all goods sold at or by PVA, if PVA was indeed in control of the inventory. He said:

*"At no time, at no time in the entirety of the contract were we ever given access into that inventory to see what the invoice amounts were, who was being invoiced, what was sold on auction to the true figures. All of us only Clive (Mr Lazarus) had control over that".*

68. He was asked whether, when they left the table to adjourn for lunch after the meeting on 15 May, had anything changed from the terms set out in the 6 May email. He said:

*"You know it was more clarity on the way forward, and reconfirming the joint venture and the way that we were going to work. I cannot tell you honestly it is so long ago I cannot tell you exactly what was discussed at that lunch, because then I would be lying. But it was a general lunch with everybody going forward. Clive Lazarus invited Dave and myself to lunch at the Butcher Shop, and it was more on a friendly footing."*

69. Mr Lazarus' version was put to Mr Terreblanche:

*"Mr Lazarus will say no new deal was struck on 15. Mr Buda merely came up to meet him, and to see where the warehouses are and just to confirm what was informed to him on 6 May."*

70. Mr Terreblanche responded: *“Correct, Mr du Plooy”*.
71. So much for the plaintiff’s evidence on the terms of the agreement. What of that of the defendants? Mr Lazarus was the only witness called on their behalf.
72. In his evidence in chief, he was asked about the roles of PVA and Goodrich he responded that Goodrich would compile the inventory and send these to Mr Campbell. Goodrich was responsible for the sales of the items and PVA would invoice and account to Forum on the financial aspects. He said that PVA would pay Forum via electronic transfer.
73. Mr Lazarus was asked whether the extent of PVA’s involvement was discussed during the meeting with Mr Buda on 15 May. He was also asked whether he had concluded an agreement of some sort with Forum at the meeting. His respective responses to these questions was:

*“Not really I think that particular first meeting was really for Mr Buda to look at the facilities, and he briefly went through what was going to take place in terms of responsibilities.”*

And:

*“Not at all.”*

74. He testified that at some point he wanted to exercise a landlord’s tacit hypothec and lock the doors of the warehouses, but he did not do so as Mr Terreblanche promised him that there was the prospect of a bulk sale to UFO. Mr Lazarus was very critical of the project. He said he had been *“led up the garden path”*, that most of the goods were Chinese and Indian items, suitable

for small people, not for the South African market. He said that there were a lot of Chinese umbrellas. He said the prospective customers he approached all just shook their heads. There were damaged legs, and stained furniture. He said there were lots of cases of refunds: *"I would say 90 percent of the time the money was refunded"*.

75. It should be noted that these details were never put to any of the plaintiff's witnesses. While all agreed that there was some damage to the goods, and that this might have been more than was to be expected, they were never told that the defendants' case was that 90% of the sales required refunds. Nor where they asked about whether the furniture was suitable for the South African market. On the contrary, Ms Upsdell testified that the furniture was A grade quality. Furthermore, Mr Lazarus stated in his evidence in chief that he did not spend much time at the sale premises.
76. Mr Lazarus said that he did a final reconciliation to close the books and to *"move on from a bad chapter"*. This was after the fire sale on 8 December 2016. He was asked by his counsel whether he owed Forum money after the final reconciliation. He said that he had, but that he had paid it over to Forum.
77. Under cross-examination, Mr Lazarus confirmed that his version was that he was never part of any agreement with Forum. Counsel for the plaintiff took Mr Lazarus through the defendants' plea. He was directed to the plea in response to the terms of the three-way joint venture alleged by the plaintiff in paragraphs 7 and 8 of the particulars of claim. In the plea, PVA admitted that it had certain

obligations consequential on the alleged agreement, and that it had complied with those obligations. He was asked why the defendants had pleaded that they acquired obligations and complied with them when Mr Lazarus' case at trial was that PVA was never part of the three-party agreement. He had difficulty answering the question, responding:

*"M'lady I am not an attorney there was a... agreements of different companies functions but I am not qualified enough to discuss the legal point on a [indistinct]. My knowledge of being an attorney is not... is not sufficient."*

78. When pressed as to what the functions of the different parties were he again said:

*"There was... I... I am not denying that there was an agreement of people to do different functions in dispersing the office furniture but in terms of a legal agreement I am not an attorney M'lady and I cannot quantify on the terms of the legality of clause 10.5. I am not qualified enough to... answer your question."*

79. And finally, when asked whether he accepted that the three parties came together and agreed to undertake various obligations between each other, he responded:

*"There was... yes there was an agreement to do certain functions for disposing of the furniture."*

80. Mr Lazarus confirmed that the defendants' case was that PVA's only function under the agreement was to do advertising and marketing in conjunction with Goodrich, and to issue invoices based on information provided by Goodrich. He said that the plaintiff's evidence, which placed PVA at the centre of operations

was wrong. He was taken to Ms Upsdell's email of 6 May. When asked to comment on the accuracy of what she had recorded in it, Mr Lazarus said that this could have been Ms Upsdell's perception. But he could not comment on the content of the email putting PVA at the centre of things. He could not recall having said that he wanted complete control of the stock.

81. Mr Lazarus was asked about the defendants' version that Goodrich was solely responsible for sales. He was told about the sales process testified to by Ms Upsdell and Mr Terreblanche. When told that Ms Upsdell had testified that the PVA logo was on the slips that customers took to Mr Cameron to generate invoices and to make payments, he said he did not know about that. Eventually, he told the court that he did not contend that PVA had not done any sales.

*Analysis of the evidence and submissions on the nature of the agreement issue*

82. On the plaintiff's case, the outcome of the meeting between the parties on 15 May 2016 was an agreement between the three parties as to how the goods would be sold and on what basis there would be accountability to Forum. Its case is that PVA ultimately was responsible to account to Forum for the stock disposed of and to pay to Forum its agreed cut. PVA's case was presented on the basis that there was no agreement with Forum, and that PVA only had limited obligations, which it performed.
83. As far as the witnesses for the plaintiff are concerned, they were generally consistent in their versions of the agreement and its terms insofar as the role of



PVA is concerned. Mr Buda was a good witness. He answered questions directly, and did not prevaricate. He was clear in what he understood PVA's role to be. Although he accepted that PVA and Goodrich may have made arrangements between themselves, Mr Lazarus' stance was that Mr Terreblanche and Ms Upsdell would operate through the PVA team. I have no reason to reject Mr Buda's evidence in this regard.

84. Ms Upsdell was an excellent witness. She was able to give clear and detailed responses to answers put to her. She was at the two critical meetings when Mr Lazarus outlined what he understood PVA's role to be. Her recollection was recorded in the contemporaneous email of 6 May 2016. She was also on the ground at PVA's premises throughout the period and had hands-on knowledge of how things worked. I have no reason to reject her evidence to the effect that PVA was an integral part of the three-party agreement, and, indeed, that PVA had overall control of the money, the invoicing, and the security of the stock.
85. Overall, Mr Terreblanche was not an ideal witness. He had to be reminded to answer questions. My sense is that he is more of a talker than a listener. He gave long answers, often not on point and had to be told to return to the question and to answer it. However, I have no reason to find that he was not a credible witness on this aspect of the case. His evidence was consistent with that of Ms Upsdell to the effect that PVA, through Mr Lazarus, was in the driving seat of the operations in Johannesburg.

86. What of the sole witness for PVA, Mr Lazarus? If a defendant is to have only one witness in its corner, it should not be a witness like Mr Lazarus. Mr Terreblanche's meanderings in his evidence paled into insignificance when Mr Lazarus took the stand, particularly when he was under cross-examination. His default position was to avoid answering questions, or to give wholly irrelevant answers. He hid behind not understanding the law. He was difficult to pin down on facts. Indeed, it was difficult to understand what his case was from the evidence he gave.
87. Mr Lazarus ultimately accepted under cross-examination that there was an agreement between the three parties. Indeed, it would have been difficult for him to avoid this given the plea that was filed. His initial stance when he took the stand, viz. that PVA and Goodrich were parties to an agreement that excluded Forum, could not be sustained. This is so on Mr Lazarus' own admission.
88. There is ample other evidence to confirm that there was an agreement between the three parties. The evidence also points to the controlling hand of PVA over the operation. Much evidence was led on who sold items on the showroom floor and whether PVA had a role to play here at all. I have not gone through this evidence in any detail, as I do not consider it to be a determinative factor on the issue of PVA's accountability to Forum under the agreement. It is quite clear on the evidence that there was joint working relationship between Goodrich and PVA in terms of sales. Even if Goodrich did most of the sales (as

Mr Terreblanche said), PVA also did sales (on Mr Lazarus' own admission), and Mr Lazarus was responsible for the final auction on 8 December 2016.

89. More importantly, in my view, is the common cause fact that all sales were processed by PVA. Invoices were issued on a PVA letterhead. Mr Cameron of PVA was located at the premises to process and capture the sales. He kept the books, so to speak. Both Ms Upsdell and Mr Terreblanche were consistent in their evidence that Mr Cameron reported to PVA and not to Goodrich on the status of sales and the income received. In fact, evidence was led in relation to claim B, which I deal with later, to the effect that Mr Cameron prepared the accounts for PVA for purposes of reporting back to Mr Buda as to the amounts due to Forum under the agreement. Goodrich had no hand in this. On Mr Lazarus' own admission, he did a reconciliation and paid over to Forum what he considered to be due to them. Ms Upsdell and Mr Terreblanche confirmed that they had not control over the inventory once it had been uploaded. It lay within PVA's control.
90. All of this evidence supports the plaintiff's averments that there was an agreement concluded between Forum, Goodrich and PVA on 15 May 2016. In terms of this agreement, it was PVA, and not Goodrich that was responsible to account to Forum for the sales, and to pay to Forum the amount due to it under the agreement.
91. The defendants submitted that the 15 May agreement was a fabrication by Forum. The evidence does not support this submission. It is so, as the

defendants pointed out, that Mr Buda said in his testimony that PVA and Goodrich had reached terms of agreement between themselves. However, this does not contradict his evidence that there was a three-party agreement as suggested by the defendants. I understood Mr Buda's evidence to be that however the other two parties arranged things between themselves, as between the three parties, PVA would take the lead and would be accountable to Forum for whatever was due to it from the sale of the goods.

92. Criticism was also levelled at Ms Upsdell's and Mr Terreblanche's evidence, and the answers they gave under cross-examination. They were both asked whether anything further was agreed at the 15 May meeting other than what was set out in the email of 6 May. The latter email was sent at a time when, it is common cause, PVA and Forum had not yet made an agreement. The defendants submitted that as Mr Terreblanche had answered that nothing further was agreed, this meant that there was in fact no agreement between Forum, PVA and Goodrich at the 15 May meeting. The answer given by Mr Terreblanche should be considered within the context of his entire evidence, and of the other evidence led. It cannot be seen in isolation. If one has regard to whole conspectus of evidence, Mr Terreblanche simply cannot be understood to have confirmed, as the defendants would have it, that there was no agreement between the parties.

93. In any event, as I have pointed out, even Mr Lazarus eventually said that there was an agreement regarding the roles of the parties. It was Mr Lazarus who offered in his testimony that he had paid all the money due to Forum. Not only

is this consistent with the evidence led on behalf of the plaintiff, but it is confirmation by the defendants that it was PVA who had to account to Forum, and not Goodrich.

94. For all the above reasons, I find that Forum has established that the three parties entered into an agreement as averred in the particulars of claim. I find that in terms of that agreement, PVA was obliged to pay to Forum what was due to it from the sale of the goods. The next question is what was Forum entitled to receive under the agreement? This brings me to the next leg of the case, viz. the factor issue.

*The factor issue*

95. It is the plaintiff's case that under the agreement reached on 15 May, Forum was entitled to be paid on the basis of the factor 6 equation. This was the case until 4 July 2016, when Mr Buda, on behalf of Forum, agreed to reduce its factor to 4.9.
96. The defendants admitted in the plea that the original agreement was that Forum would receive payment on the factor 6 basis. However, they pleaded that because of a misrepresentation about the quality of the goods, it was no longer entitled to receive this. Instead, it was agreed that Forum would receive the net amount left over after a deduction of 20% commission and 30% expenses.
97. In his evidence Mr Buda confirmed the factor 6 arrangement. He denied that there was ever an agreement to alter this is the terms pleaded by the

defendants, save for the final fire sale which, it is common cause, proceeded on a non-factor basis. In fact, he said that this was never even discussed. The first he heard of it, he said, was when it was raised by the defendants in the case.

98. Mr Buda was referred to two emails in his evidence in chief. The first was one from Mr Lazarus to Mr Buda, dated 9 June 2016. It read:

*"Hi Dave*

*Thanks for mail. From the outset I have always planned in being transparent, and have worked on a open book policy with regard to the figures relating to sales and expenses. I have not gone through the actual figures as is being worked on at present and cannot determine If there is room to reduce commissions as have not received all of the expenses invoices such as advertising set up overtime staff printing packing etc .A detailed list will be available for you once completed . I also may suggest some of these expenses are discussed and maybe even shared as the suggested 10% costs are being exceeded and the costs are eating deeply into the expected profits and as stated yesterday the exercise is proving uneconomical to administer .I do not yet know the actual profit from the last sale if any but once finished the collection of money refunds etc we provide a full list of income & expenses and determine the net profit if any and discuss if there is any leeway to negotiate, and recommended a meeting is held and matter discussed*

*Regards*

*CLIVE" (sic)*

99. He was referred to another email, dated 2 July 2016. This one was from Mr Buda to Mr Lazarus. It said:

*"Hi Clive*

*I suggest we reduce the prices so significantly that the goods should fly out.*

*To that end I suggest the following.*

- 1. The goods at PVA (shipments 1-7) have a retail value of UKP 5,7m*
- 2. I suggest each item is sold by PVA at a ratio of 7.3 including VAT this means that Forum will get a ratio of 5. 615 including VAT, that's a discount of 20% on current levels.*

3. *The above returns you 30% as agreed.*
4. *All sales will be calculated by dividing by 130 multiplied by 100 to arrive at the fair distribution of funds*
5. *Hopefully this will inspire you to aggressively market the goods.*
6. *Let's work closely together to achieve the desired result.*

*Call me with your comments*  
*Dave" (sic)*

100. Mr Buda explained that the ratio 5.615 referred to in paragraph 2, if VAT was excluded, would come to 4.9. In other words, his evidence in this regard is that he was suggesting a reduction by Forum of the factor 6 equation to factor 4.9. He could not recall whether Mr Lazarus ever called him to discuss the matter as suggested in the email.
101. However, on the previous day, being 1 July, Mr Terreblanche messaged Mr Lazarus by WhatsApp (this was confirmed by Mr Terreblanche in his evidence). It said: *"Seeing Dave (o)n Sunday, at airport. Will tell him the bad and ugly. There no good (sic) until he drops the price as discussed."*
102. Mr Buda confirmed that he met Mr Terreblanche at OR Tambo International Airport on Sunday, 4 July. He said that PVA and Goodrich were moaning about the fact that they were not able to make the sort of returns they were looking for. Mr Lazarus had previously said that his overheads were high and that they needed a better return. He confirmed that at the meeting with Mr Terreblanche he agreed to reduce his price to factor 4.9.
103. His evidence is consistent with a message from Mr Terreblanche to Mr Lazarus at 12.21 on 4 July, saying: *"Dave new amount we pay him is 4.9 excl vat (sic)".*

And at 12.22 Mr Lazarus responded: “K”. I understand that “K” is short for “OK” on messaging platforms.

104. Ms Upsdell confirmed Mr Buda’s version as to his having agreed to reduce his share to factor 4.9. She said this happened when they saw things were not going so smoothly, and they were not making money they thought they would make. She said that this was due to stock damage and “*various reasons*”. She was asked by counsel for the plaintiff whether the defendants’ case was correct, i.e. that a new deal was struck, in terms of which Forum would only receive the net amount after the deduction of 20% commission and a further 30% for expenses from the sales price. She said:

*"That never happened. The factor for Dave Buda remained unchanged and the only concession Dave ever made to that, when we were struggling with the sales and both Park Village and Goodrich said we are not making money and the expense are not being covered, he offered to contribute towards ... Sorry. Okay. Dave Buda offered to contribute towards a major radio campaign that we had suggested we do. He never changed his factor. Nothing was ever agreed on to the contrary.*

And, asked for clarity on what she meant by saying Mr Buda’s factor had never changed, she said:

*"Sorry, my apologies. Never changed the structure of the deal. His factor reduced, but he still got his factor in his pocket."*

105. Mr Terreblanche confirmed Mr Buda’s version as well. He confirmed his messages to Mr Lazarus, referred to earlier. As to the defendants’ version, he said:



*“That is not true. There was always that, the factor, because originally we had started at nine, then it came down to seven, and then it came to six and then basically 4.9. So there was always a factor. And the agreement never changed. The only thing that ever changed in the agreement, was in terms of the amount paid to Mr Buda, okay, in terms of the factors.”*

106. Mr Terreblanche was questioned under cross-examination about him having said that the factor was originally 9, then 7, then 6 and then 4.9. He was asked when the figure 9 was on the table. To this he responded: *“Right in the beginning of the contract when we started negotiating you know when I asked about values. What is the value of this contract?”* He said that this was what Mr Buda envisaged. However, it went down to 7 later, when the parties had agreed on the joint venture.
107. The defendants rely on this evidence from Mr Terreblanche to advance their submission that, as stated in their heads of argument Mr Buda’s price *“was always a pie in the sky and never based on any realistic foundation.”*
108. The difficulty, of course, for the defendants is that in paragraph 11.2 of their plea they admit that the original agreement was that Forum would receive payment based on the factor 6 equation. He was not asked to explain this in his evidence in chief. However, he was cross-examined on it. Mr Lazarus said that the factor was an *“aim”*; a *“goal which was not achievable”*; and not a *“fixed price”*. He was unable to give a proper explanation for the messages exchanged between him and Mr Terreblanche on 1 and 4 July 2016. He avoided answering questions, or gave irrelevant answers. He was not a satisfactory witness on this score.

109. I have no reason to doubt the credibility of the plaintiff's witnesses on the factor issue. It is so that Mr Terreblanche rambled on to some extent on the factor shifting from 9 down to 4.9. However, I do not regard this to be a material issue for the plaintiff's case. Mr Buda testified that he thought that a price of factor 9 might be achievable, but at the end of the day the parties settled on a factor of 6. It is clear from his evidence that the parties did discuss the possibilities of various factors, including a possibly achievable factor 9. However, on the whole the evidence supports the plaintiff's case that what was originally agreed upon by the parties was that Forum would be paid on the basis of the factor 6 equation.
110. As I have noted, this is confirmed in the plea itself. Mr Lazarus' attempt to avoid the case pleaded by the defendants by saying that the factor was nothing more than a non-binding goal is wholly unsupported by the pleadings and the evidence. The evidence clearly establishes that the original factor was 6, and that this was reduced to 4.9 by agreement between the parties on 4 July 2016.
111. As to the defendants' case that Forum would be paid a net amount after the deduction of 20% commission and 30% for expenses, there is nothing to support a finding that this formulation was agreed between the parties as a general basis for payment to Forum. It was only for purposes of the final fire sale in December 2016 that a non-factor based payment basis was agreed. This was pleaded by the plaintiff in its particulars of claim and was admitted by the defendants.

112. For these reasons, I find that the plaintiff has established that under the agreement between the parties, Forum was entitled to payment based on the factor 6 equation. I find further that on 4 July 2016, and by agreement between the parties, the factor was reduced to 4.9.

#### DID PVA COMPLY WITH ITS OBLIGATIONS?

113. I have found that it was PVA's obligation under the agreement to account to, and to pay Forum the amounts due to it. It is common cause that PVA paid Forum an amount of R2 324 051. 68. Forum's case is that there was a shortfall in what it was entitled to be paid under the agreement. Accordingly, PVA did not comply with its payment obligation.

114. Based on the master spread sheet, which I have accepted as being an accurate basis on which to determine the goods delivered, the value of the goods was £3 495 310,35. On a factor equation of 4.9, Forum says that it was entitled to be paid at least R17 127 020,71, plus VAT by PVA. This is on the basis that all the goods were sold.

115. As I indicated earlier, this is less than the original amount claimed. In the original particulars of claim Forum based its claim on the value of the 98 containers of goods sold by PVA, and pleaded that this value was an £4 300 800. 00. In its amended particulars of claim, Forum uses as its starting basis the value of the goods delivered, and pleads that this was £3 495 310. 35. The reduction in value is based on the calculations done based on the master spread sheet. On the evidence presented, the spreadsheet only captured

goods actually unpacked and accounted for. This accounts for the reduction in value, despite the claim being based on a larger pool of goods, i.e. goods delivered as opposed to goods sold. On the calculation in the amended particulars of claim, the basic value of the claim, calculated on the factor 4.9 equation, is reduced from R23 073 920. 00 to R17 127 020. 71.

116. The amount paid by PVA falls far short of this. The defendants did not present evidence to establish how it calculated the amount it actually paid to Forum. Nor did the defendants present evidence to contradict the value of the goods entered on the master spread sheet. The evidence thus establishes, based on the value of the identified goods, and applying a factor of 4.9, that there was an underpayment by PVA, meaning that PVA did not comply with its obligations to Forum.
117. The defendants raised certain issues to dispute Forum's case in this regard. In the first place, they say that it is common cause that there was damage to the goods, meaning that the full price could never have been achieved. The defendants point out that in the letter of demand sent by Forum's attorneys they said that Forum would be willing to write off the value of 50% based on damage. For whatever reason, the plaintiff did not proceed with that suggestion, as borne out by the particulars of claim. The defendants did not lead evidence to show the value of the damage they claim was material. There is certainly no evidence that the damages were so extensive that it absolved PVA from its obligation to pay and more to Forum than the R2,3 million that it did pay. The damages

issue is not a basis for finding that PVA met its payment obligations under the agreement.

118. The second issue the defendants raise is the common cause fact that in about September 2016 Goodrich issued invoices in its own name, and received for its own account, payment of over R300 000. 00 for goods sold without PVA's knowledge. I will refer to this issue again when I deal with the quantum. However, for reasons similar to those advanced regarding the damages issue, this would not absolve PVA of its obligation to make full payment to Forum. The amount of some R300 000. 00 even if taken into account, falls far short of the total amount due.

119. What the evidence does establish is that the R2.3 million paid by PVA to Forum was substantially less than what Forum was entitled to be paid under the agreement. I accordingly find that PVA failed to comply with its payment obligation to Forum.

#### THE QUANTUM OF THE CLAIM

120. Where damages are difficult to estimate, the fact that they cannot be assessed with precision will not relieve a wrongdoer of the necessity of paying.<sup>1</sup> It has been held that:

*“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is*

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<sup>1</sup> *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964(A) at 969H-970A

*bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.”<sup>2</sup>*

121. In this case it is so that I cannot determine with mathematical accuracy how much more PVA ought to have paid Forum over and above the R2.3 million that was paid. However, Forum has pleaded its case on quantum on a basis that permits me to arrive at a conclusion on the evidence available.
122. It is common cause that PVA produced only some 134 invoices by way of discovery. PVA does not say that these were the only invoices that were ever issued. In view of the quantity of goods involved, quite clearly far more invoices were issued than those discovered. Consequently, Forum cannot rely on PVA’s discovered records for purposes of quantifying its claim.
123. Forum’s case is that according to the master spreadsheet, the total value of the goods delivered was £3 495 310. 35. Its case further is that all of these goods were sold. In its particulars of claim, Forum avers that the sale held on 8 December 2016 was a final sale aimed at clearing the goods then remaining in the warehouse. The defendants admit this averment. It was not suggested to any of the plaintiff’s witnesses that goods remained unsold after the final sale.
124. As I have indicated already, I accept that the master spreadsheet is a conservatively accurate record of the goods that were delivered. PVA has not

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<sup>2</sup> *Herman v Shapiro & Co* 1926 TPD 367 at 379, cited with approval in *Esso Standard*, above at 970E-G

led evidence to dispute the values attached to the items of goods in the master spreadsheet. I accordingly accept that the value attached to the goods as contended for by Forum in the master spreadsheet.

125. It follows that on the evidence I have before me, a calculation may be made of the amount Forum ought to have been paid based on the factor equation. In its pleadings, Forum relies only on a factor 4.9 calculation. This is because, as Forum explained, without a proper accounting from PVA it is impossible to calculate what goods were sold on a factor 6 basis prior to 4 July 2016, and what goods were sold on a factor 4.9 basis post the 4 July, when the factor was reduced. There can be no prejudice to PVA on this score, as it is the lower of the two factors I have found to have been agreed on under the agreement. On this basis, Forum says it was entitled to R17 127 020. 17 plus VAT (the spreadsheet MDM total). This is calculated on the basis of the MDM price of £3 495 310. 35 multiplied by the factor 4.9.
126. However, Forum does not claim the full amount of the spreadsheet MDM total. It concedes that what must be subtracted from this amount is what it was entitled to be paid based on the factor equation in respect of goods that were sold by Forum separately to Unicorn in November 2016 (the Unicorn deal). In addition, it says that the value of the estimated percentage of goods sold at the final sale must be subtracted from the spreadsheet MDM total. Finally, it accepts that the amount already paid by PVA to it must also be subtracted.

127. As regards the Unicorn deal, Mr Buda testified that as the months were going by and sales had slowed he told Mr Terreblanche and Mr Lazarus in a meeting that he was going to try to sell some of the remaining inventory himself. He said he made a deal with Unicorn, an auctioneering company in Rustenburg. He produced a spreadsheet showing the codes for all the items that were collected by Unicorn under the deal. The Rand value equivalent of all of these goods was some R32 million. What remained after Unicorn had removed the items was sold at the final sale.
128. Mr Buda estimated that Unicorn had taken delivery of 30 containers. He was questioned about the accuracy of this under cross-examination. Mr Buda pointed out that the estimate of containers was not relevant, as there was an accurate list of the actual items that were sold and uplifted by Unicorn. Mr Terreblanche testified that Unicorn worked on an inventory when they loaded the stock, and that someone else whom Mr Buda had arranged was present.
129. In their heads of argument, the defendants made submissions to the effect that there was no evidence as to who had compiled the Unicorn inventory and whether it was accurate. They submitted that it was possible that Unicorn had taken more stock than was on the inventory list, or that Unicorn had actually taken higher value stock than that reflected and relied on by Forum. The inventory list was the best evidence available as to the goods sold and uplifted by Unicorn. It was not put to Mr Buda that Unicorn had taken more stock that reflected on the Unicorn inventory, or that it had taken higher value items than was reflected there. In the circumstances, I accept the plaintiff's calculation in



terms of how much should be deducted from the spreadsheet MDM total as representing the factor 4.9 value of the goods taken by Unicorn. On Forum's calculation, the amount to be deducted from the spreadsheet MDM total on this score is R7 398 031. 76.

130. As to the issue of the deduction in respect of the fire sale, Forum bases its calculation on Mr Terreblanche's evidence that the items that were sold on 8 December 2016 represented no more than 5% of the total goods inventory. Forum accepts it must deduct the MDM value of these goods, as the final sale was not based on the factor equation. In the absence of invoices for these goods, or other evidence, it is appropriate in this case for the court to work off this estimate. The least prejudicial percentage to work off is 5%, as this will provide a higher deduction in favor of PVA. On this basis, Forum has calculated that an amount of R856 351. 03 should be deducted from the spreadsheet MDM total.
131. It is common cause that the amount paid to Forum by PVA was R2 324 051. 68, and this amount must also be deducted.
132. Finally, as regards quantum, I need to deal with what the parties referred to as the "Goodrich issue". It is common cause that Goodrich removed certain items from the inventory and sold them for its own account under its own invoices. Mr Terreblanche testified that he had done so early on in the project as Mr Lazarus had not paid Goodrich for its out of pocket expenses.

133. Mr Terreblanche did not fare too well on this under cross-examination. The invoices in question were dated September, not May or June, as he had first indicated. However, it seems to be common cause that Mr Lazarus did come to know about Goodrich's actions, and that some sort of reconciliation was done. The defendants submit that there was a "Goodrich pillage" and that Goodrich was stealing stock left, right and centre. However, there is no evidence to support this submission. Indeed, Mr Terreblanche also gave evidence that Mr Lazarus set aside goods for his own account. As far as free-for-alls are concerned, it seems to me that if it was going on at all, both Goodrich and PVA were engaged in that activity.
134. What the evidence does show is that Goodrich issued invoices in its own name to the value of R336 729. 00. Forum submitted that as PVA had overall control of the goods and their security, it should not be excused of its accountability to Forum in this regard. In other words, this amount should not be deducted from the value of the goods on the master spreadsheet. Forum submitted further that this was really an issue between Goodrich and PVA.
135. The evidence on the Goodrich invoices was murky. While there is some merit in the submission by Forum that this is really an issue between the other two parties, the fact is that at least R336 729. 00 of goods included in the master spreadsheet were not sold by PVA. In my view, this amount ought properly to be deducted from the value of the goods on the master spreadsheet for purposes of the calculation of damages.

136. In conclusion, on the question of quantum under claim A, I find that Forum is entitled to damages calculated on the basis of the spreadsheet MDM total, less the amount already paid to Forum by PVA, less the MDM value of the goods sold to Unicorn, less the MDM value of the final sale, less the amount of R R336 729. 00. In figures, the calculation is as follows:

Spreadsheet MDM total due to Forum: R17 127 020,71

Less MDM value on Unicorn deal: R7 398 031. 76

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Sub-total: R9 728 988. 94

Less MDM value of fire sale: R856 351. 03

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New subtotal: R8 872 637

Less payment made by PVA: R2 324 051. 68

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New subtotal: R6548 586. 27

Less goods sold by Goodrich: R336 729. 00

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**TOTAL DUE: R6 212 157. 23**

#### CLAIM B

137. As indicated earlier, claim B is against Mr Lazarus in his personal capacity. At trial, Forum sought damages against Mr Lazarus on the basis that he induced

Forum to lower its factor from 6 to 4.9, and that he did so fraudulently and against the provisions of the Companies Act. Forum relies on the common law, and on s76(3), read with s218(2) of the Companies Act to establish its claim. It says that by his conduct, Mr Lazarus used his position as director of PVA to benefit himself and that he failed to act in good faith and for a proper purpose. In so doing he breached his statutory duties. He also committed fraud under the common law.

138. Forum's case is that Mr Lazarus inflated expenses and invented other expenses, he presented Forum with false reconciliations, based on under declarations of sales, and he sold some goods for his own account. Through this conduct Forum was led to believe that the projected margins upon which the parties originally agreed that Forum would be entitled to a factor of 6, were not being achieved. Consequently, when faced with this alleged false picture, Mr Buda, on behalf of Forum, agreed to reduce Forum's margin to 4.9.
139. These allegations are denied by Mr Lazarus.
140. Mr Terreblanche was the main witness in support of Forum's case against Mr Lazarus. He testified that on Mr Lazarus' instructions, he, Mr Terreblanche obtained two invoices from a company involved in securing radio advertisements for the project. The first invoice was in the amount of R160 183.68. The second, for exactly the same services, was inflated to R388 000.00. Forum had agreed to contribute to the cost of the advertising campaign. The two invoices were entered into evidence. Clearly, some explanation was

required from Mr Lazarus. He sought to avoid pointed questions directed at him under cross-examination. He said he did receive the invoices, and that he did not deal with invoices or quotes. His responses did not instill any confidence in the court that there was indeed a benign explanation for two invoices for the same services but for vastly different amounts. In all probability, the inflated invoice was produced, as Mr Terreblanche said, to ensure that Forum paid more than it ought to have paid for the advertising. As the person at the helm of PVA, and in control of the Johannesburg operations of the commercial venture between the parties, it is probable that Mr Lazarus was behind the scheme to present Forum with an inflated invoice.

141. The second issue explored was Mr Terreblanche's evidence that Mr Lazarus ensured that PVA kept two sets of books, and that he fabricated expenses. Mr Terreblanche was not a model witness in this regard. He tended to make general statements, such as:

*"Let me, let me try and put this just as a layman and you professionals will know exactly how to interpret it. But from the start of the contract, right up until the end of the contract, no matter, so Clive would say to me, you need to bring the equation down, the rate okay. Because we need to sell the goods faster or whatever the case is. So he would tell me that. I would then negotiate with Mr Buda and get the price, the equation down. That is why it started at nine, and we finished at 4.9. Okay.*

*So I would do that. And no matter what, what, no matter even though the rate came down every time and Mr Buda came down on his equation, no matter what, Clive was never happy and every time we would come to the weekly sales meetings, or figures, there would be a whole another story that Clive has done, you know. Like the figure, the manipulating of the figures and manipulating of cost that did not exist."*

142. When asked to pinpoint what expenses Mr Lazarus manipulated, Mr Terreblanche identified cleaning costs. He said that Mr Lazarus charged for cleaning the warehouses when in fact it was Goodrich that did so. It is also common cause that at one stage Mr Lazarus unilaterally decided to charge his fellow partners rental, when this had never been part of the agreement. He also threatened to exercise a landlord's tacit hypothec and, in his words: "*lock the doors*". On the advice of his lawyer, he credited Forum with the amount he had deducted for rental and he did not lock the doors.
143. Mr Terreblanche also testified that Mr Lazarus had taken goods off the floor to sell for his own account. His evidence in this regard was the following:

*"Mr Lazarus, uhm, came and spoke to me and he said to me listen, we are not going to make any money out of this contract whatsoever. And I am going to take you know, a whole lot of goods for myself so I can at least make a, you know, I can sell it off and make you know, make some money.*

*...*

*I know where we were. We were walking around the warehouses, looking at stock and talking. And I speak under correction, I really, it is so long ago but I think it must have been, it must have been around September maybe.*

*...*

*So he just said to me, we are not going to make any money out of this and you know, I am taking a whole lot of stock for myself, so I can sell it off and you know, make some money and I suggest that you do the same. You know, take some of the stock for yourself. Because you know, the costs are running so high, etcetera, etcetera. And that was, that was his suggestion and instruction. And then I, obviously I heard what he said. And then a few days later, it could have been the next day, it might have been two days later, you know, I walked in, came into, I went into the warehouse and these, his staff were removing a whole, was removing stock off the, off the warehouse floor and taking it into containers, into wooden containers and sealing them. And I asked the staff you know, what are you doing? And he said no, Mister, Boss Clive said they must take this stuff and put it in the containers and seal the containers."*

144. Ms Upsdell confirmed Mr Terreblanche's version that Mr Lazarus put goods aside to sell for his own account, although she dated this as being before the fire sale in December. She said:

*"Clive had made a big stash of stock behind containers to ensure he made some extra money after the fire sale, after the auction in case there was a shortfall."*

She said she had seen this first hand.

145. As against this alleged conduct of Mr Lazarus, there is the common cause fact that Goodrich, too, made sales for its own account. Mr Terreblanche also testified that he took up Mr Lazarus' invitation to set aside some goods for his own account. Mr Lazarus denied that he had ever hidden goods to sell later for himself, although he seemed to say in his evidence in chief that there was some agreement between him and Goodrich that they would jointly sell some goods.
146. There is no doubt that Mr Lazarus was not happy with the way in which the project had turned out. He realised he had made a bad bargain. He tried to claw back what he could, for example, by charging rental unilaterally. It would make sense, in this atmosphere, that both Mr Lazarus and Goodrich decided to set aside goods to sell for themselves.
147. However, the contrary versions of Mr Terreblanche and Mr Lazarus are complicated by the fact that neither of them were good witnesses on this issue. It would be difficult to make a credibility finding between the two witnesses. Happily, I do not have to make a specific finding in this regard.

148. This is because on the allegation about PVA keeping two sets of books there is concrete evidence to Mr Terreblanche's testimony. Mr Terreblanche testified that

*"Well, uhm, there were always two figures when we used to get together for our weekly meeting, sales figures, etcetera. Where Grant Cameron, the Park Village accountant who did the invoices and handled the money, would always ... So he would make up two sets of numbers. One would be the actual figures, so real figures. And a second set would be fake figures which Clive from Park Village would then disclose those fake figures to Mr Buda."*

149. Mr Lazarus was taken to two customer invoice reports. Each covered the same transactions for the same period of time. In the first, the total was recorded as being R141 000 less than in the second report. The second report, showed extra columns, being "*actual*" and "*GP*". The "*actual*" column reflected an added R141 000. Mr Lazarus said he did not draw up the reports and could not explain the difference between the two. He did not know whether "*GP*" meant gross profit.

150. Then Mr Lazarus was taken to an email, sent by Mr Cameron to a number of people, including Mr Lazarus. There was a spreadsheet attached to the email. Mr Cameron wrote:

*"Hi all.*

*These are the ACTUAL FIGURES (Dave does not see) of where we are plus I have included yesterday's invoicing. ...*

*Please note I have written the Actual Sales back by 67%, giving you the Cost due to Dave, then added a 30% markup and that is the Figure I show to Dave as Total Sales. ... This then gives you an overall 40% GP."* (Words in brackets appear in the original, but underlining is added)



151. When asked to explain what strongly appears to be evidence that PVA indeed kept two sets of books, and under-declared sales to Forum, Mr Lazarus once again deflected. He said that he: “.. *did not understand the email*”. When it was put to him that he received an overall 40% gross profit, he said: “*I disagree. I never raised the invoice.*” He said that Mr Cameron’s figures are “*completely wrong*”, and “*I did not even read the percentage. I did not understand the situation.*” Mr Lazarus said that he had handed everything over to Claudia Carreira to do a complete audit. However, she was not called as a witness, despite a pre-trial minute indicating that she was expected to be called to testify on behalf of the defendants. Mr Cameron was also not called as a witness to explain his alleged “errors”, despite him also being listed as a witness.
152. This evidence, and Mr Lazarus’ wholly unsatisfactory answers, clearly establishes that PVA indeed kept two sets of books with a view to misleading Forum as to the actual sales. Consequently, the amounts due to Forum were reduced accordingly. It is not plausible that Mr Lazarus, who by all accounts was in control at PVA, did not know of this scheme. Mr Cameron reported to him and the other directors. It beggars belief that Mr Lazarus did not know exactly what was going on and, indeed, that he had not given instructions to Mr Cameron to draw up the accounts on the basis that he did.
153. Such conduct would certainly be unlawful and may well constitute a basis for action against him either under the common law or under the Companies Act. However, what I need to determine for purposes of claim B, is whether this

unlawful conduct on the part of Mr Lazarus induced Mr Buda, on behalf of Forum, to reduce his factor to 4.9.

154. In this regard, I am not satisfied that the evidence establishes the link. It is common cause that there was a higher rate of damage to the goods than any of the parties expected. This hampered sales. It is also clear on the evidence that sales were not as abundant and fast-paced as the parties had expected. Whether this was because of poor advertising and stock management, as Mr Buda suggested in his evidence, or because of damages, as Mr Lazarus said, the evidence shows that a number of factors probably led to the compromise on the part of Mr Buda to reduce his factor to 4.9.
155. Ms Upsdell explained in her evidence in chief that Mr Buda agreed to reduce Forum's factor: *"When we realised this was not going to be achieved due to the damage and various reasons."*
156. Mr Terreblanche testified that Mr Lazarus told him to put pressure on Mr Buda to reduce his factor because Mr Lazarus said the expenses were higher than the 10% set aside for them in the agreement. However, later in his testimony I asked him to clarify whether his version was that when he went to Mr Buda to renegotiate the factor, this was because the expenses were exceeding 10%. Mr Terreblanche answered that this is not what he told Mr Buda. He said that: *"Bringing down the factor negotiating the factor, or bringing prices down on the goods is normal course of business."* He also said that he told Mr Buda that he

needed to bring his factor down in order: “.. *to make the goods cheaper in order to sell the stock quicker.*”

157. Even if it could be found that Mr Lazarus’ conduct amounted to fraud and a breach of his obligation under s76(3) of the Companies Act to exercise his powers in good faith and a proper purpose, I find that Forum has failed to establish, on the evidence, that this conduct caused Mr Buda to reduce his factor. The evidence shows that all three parties went into the agreement with certain expectations. They envisaged that with a factor of 6 the project would meet their expectations. However, their expectations were not met. Mr Buda may have been misled as to the exact sales figures, but the evidence establishes that there were many other reasons why he agreed to reduce his factor relatively early on in the project. The agreement to reduce was not solely or primarily because he was misled by Mr Lazarus.

158. For these reasons, Forum’s claim B falls to be dismissed.

## CONCLUSION AND ORDER

159. I find that Forum has made out a case under claim A, but not under claim B. There is no reason why costs should not follow the result.

160. I make the following order:

### Claim A

1. Plaintiff is granted leave to amend its particulars of claim.

2. The First Defendant is directed to pay to the Plaintiff:

2.1 The sum of R6 212 157. 23 (Plus VAT);

2.2 Interest on this amount at the rate of 10.5% per annum from date of summons to date of final payment;

2.3 Costs of suit.

Claim B

1. The claim is dismissed with costs.

**KEIGHTLEY J**

**JUDGE OF THE  
HIGH COURT  
GAUTENG LOCAL DIVISION**

**Electronically submitted therefore unsigned**

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 November 2020.

Date Heard (by videolink): 9<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> JUNE 2020

Date of Judgment: 19 NOVEMBER 2020

On behalf of the Plaintiff: Mr DW BAGULEY

Instructed by: OOSTHUIZEN & CO

On behalf of the First & Second Defendant: Mr. AJJ DU PLOY

Instructed by: A LE ROUX ATTORNEYS

