"P4"

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 58802/2011

7/9/16

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

2 September 2016
DATE

SIGNATURE

7/9/2016

In the matter between:-

MORGADO VIEIRA DA COSTA, RENATO HERNANI — Plaintiff

and

DE KLERK, ANDRÉ — Defendant

Consolidated with Case No.: 16660/2012

In re:

MORGADO VIEIRA DA COSTA, RENATO HERNANI — Plaintiff

and

DEKSNY TRADING CC — First Defendant

DE KLERK, ANDRÉ — Second Defendant

DE KLERK, DEON N.O. — Third Defendant

JUDGMENT

SHAKOANE, AJ

[1] The Plaintiff is an 82 year old businessman who is an Angolan national of Portuguese descent. As also appears from the citation in this judgment he has instituted two sets of actions on the matter. The first action and claim under case number: 58802/2011 is against Mr André de Klerk as the only Defendant and comprising a Claim A for payment of an amount of US$200 000,00 (two hundred thousand US dollars) and a Claim B for payment of an amount of US$84 000,00 (eighty-four thousand US dollars) with interest and costs.[1]

[2] The second action and claim under case number: 16660/2012 is against three defendants being a close corporation known as Deksny Trading CC, Mr André de Klerk and his brother Mr Deon de Klerk in their capacities as trustees of an entity known as André de Klerk Family Trust and in their personal capacities having regard to the provisions of Section 64 of the Close Corporations Act, No. 69 of 1984 ("Close Corporations Act") as First, Second and Third Defendants and for the same amounts as in the first action or claim. It however comprises of Claims 1 to 4 and is conditional upon this Court upholding the defence of Mr André de Klerk in the first action or claim.[2]

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[1] Pleadings Bundle, pp 3 to 10
[2] *Ibid*, pp 20 to 31; Particulars of claim, pp 24 to 25, para 14

[3] It appears from the face of each of the summonses in the two actions or claims that the first was issued and/or instituted on 12 October 2011[3], whilst the second action or claim was instituted on 23 March 2012.[4] All the defendants are South African nationals of Persequor Park and Wapadrand in the Pretoria East.[5]

[4] Insofar as concerns the first action the Plaintiff's cause of action in Claim A is based on an oral agreement of May 2009 in terms of which the Plaintiff agreed to purchase from the Defendant, Mr André de Klerk ⅓ of the member's share interest in the close corporation in an amount of US$200 000,00 and which the Plaintiff alleges the Defendant, Mr André de Klerk had repudiated and that such repudiation was accepted by him.[6]

[5] As part of such claim, the Plaintiff sought consequential damages he allegedly suffered in an amount of US$300 000,00 (three hundred thousand US dollars).[7] However, during oral argument[8] Mr Keyter for the Plaintiff conceded that no evidence in support of the damages aspect of the claim was presented before Court by the Plaintiff and thus that the Plaintiff abandons that aspect of his Claim A.

[6] It had been common cause during the evidence presented before Court by both parties that the Plaintiff had indeed paid the amount of

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[3] Pleadings Bundle, Summons, p 1
[4] Pleadings Bundle, Combined Summons, p 20, especially the Registrar's date stamp therein
[5] Pleadings Bundle, p 3, para 1.2 and p 22, paras 2 to 4
[6] Pleadings Bundle, p 3, para 2.1 to p 5, para 9.2
[7] *Ibid*, p 5, para 10.1 to p 7, paras 13, 14.3 & 14.4
[8] On 5 June 2015

US$220 000,00 as alleged in the particulars of claim and that the US$20 000,00 portion thereof was for purposes of purchasing a motor vehicle by the Plaintiff from the Defendant, Mr André de Klerk.[9] It had also been common cause that both Mr André de Klerk and Mr Willem Jacobus Snyman ("Mr Snyman") are members of the close corporation in equal shares of 50% each.[10]

[7] It had further become common cause during the evidence of Mr Snyman[11] in chief that the discussions between him and Mr André de Klerk on the one hand and the Plaintiff on the other hand about the close corporation and the Plaintiff's express interest to be involved in same and to purchase the car which then resulted in the payment of the amount of US$220 000,00, occurred in May 2009.[12] Thus, the Defendant, Mr André de Klerk's denial in his plea in respect of the first action of the Plaintiff's allegation in paragraph 2.1[13] is untenable.

[8] Regarding the Plaintiff's Claim B in the first action the Plaintiff claims the amount of US$84 000,00 from Mr André de Klerk as the Defendant and in respect of which he alleges the cause of action to have been a further oral agreement of 20 December 2010 in terms of which the close corporation was to use the said money "*to acquire a shareholding in Bushmanland*", but which agreement the Defendant, Mr André de Klerk

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[9] Pleadings Bundle, particulars of claim, p 5, para 8.1; Plaintiff's oral evidence; Mr André de Klerk's oral evidence & Mr Willem Jacobus Snyman's oral evidence
[10] Oral evidence of both Messrs André de Klerk & Snyman
[11] On 5 June 2015
[12] Pleadings Bundle, p 3, para 2.1 and p 5, para 8.1; Mr Snyman's evidence in chief
[13] Pleadings Bundle, Defendant's plea, p 12, para 4

repudiated and that the Plaintiff accepted such repudiation, hence his claim for the payment of the amount of US$84 000,00.[14]

[9] In his plea, Mr André de Klerk did not dispute the fact that the amount of US$84 000,00 had been paid by the Plaintiff, but only denied that same was paid to him in his personal capacity. He alleged that such money was paid to the close corporation in terms of an agreement for the purchase of steel ordered by the Plaintiff from the close corporation concluded on 30 December 2010.[15] He alleged that the acquisition of shareholding by the close corporation in Bushmanland was only mentioned during the negotiation process between the close corporation and Bushmanland but no agreement came into existence.[16]

[10] It is the aforementioned plea by the Defendant, Mr André de Klerk that led to the institution of the second action or claim by the Plaintiff.[17] Of course it had been common cause before me that the said plea by Mr André de Klerk was preceded by an application by the Plaintiff for summary judgment which was opposed by Mr André de Klerk.[18] The Defendant, Mr André de Klerk's allegations and defence in that affidavit foreshadowed the content of his plea referred to above.[19]

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[14] *Ibid*, p 8, para 16.1 to p 9, para 19.1
[15] Pleadings Bundle, Plea, p 14, paras 6.2.1 to 6.2.2 and p 16, paras 6.2.10 to 6.2.12
[16] *Ibid*, p 16, paras 16.2.13 to 16.2.16
[17] Paras [1] & [2], *supra*
[18] Amended and updated index to formal notices – first proceedings and second proceedings, Respondent's opposing affidavit, pp 4 to 11
[19] Para [9], *supra*

[11] Following receipt of Mr André de Klerk's plea, the Plaintiff instituted the second action under case number: 16660/2012. On 16 January 2013 the Plaintiff brought an application for the two actions to be consolidated.[20] That application came before Bertelsman J on the said date of 16 January 2013 and an order was granted consolidating the two actions and also "*that there is no need to file and serve consolidated particulars of claim, in that, the pleadings in the first proceedings to be paginated first, followed by the pleadings in the second proceedings, in sequence, shall be sufficient*".[21]

[12] When the trial commenced before me on 3 June 2015, Mr Keyter for the Plaintiff went on record stating that the two actions have been consolidated as also borne out by the Court order, and that the Defendants abandoned their special plea's as well as the fact that the documents entitled "*summary of Plaintiff's case*" in the court file is in fact the Defendant's document in which the Defendants state their view of what the Plaintiff's case should be – it is not the Plaintiff's document. Mr Barnardt for the Defendants confirmed the recordal by Mr Keyter.

[13] The hearing then commenced with the Plaintiff getting into the witness box to testify in support of his case, of course with the assistance of an accredited interpreter from Portuguese to English and vice versa. He was the only witness in his case.

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[20] Amended and updated index to formal notices – first proceedings and second proceedings, notice of motion, pp 45 to 47; founding affidavit, pp 48 to 61

[21] *Ibid*, Court order, pp 62 to 63

[14] As for the Defendants they called two witnesses, being Messrs André de Klerk and Snyman. Each of the parties presented a bundle of documents before Court over and above the amended and updated index to formal notices – first proceedings and second proceedings. The Plaintiff's bundle was marked "Bundle A", whereas the Defendants' bundle was marked "Bundle B". Extensive references were made by the witnesses including the Plaintiff during their testimony before me and to the extent necessary, I make reference to the contents of same in the course of this judgment.

[15] With reference to the second action or proceedings under case number: 16660/2012, the Plaintiff's claim is, as stated earlier above, conditional[22] but for the same amounts of US$200 000,00 and US$84 000,00 as in the first action.[23] As mentioned earlier above[24] the second action comprises of Claims 1 to Claim 4 and is structured in the manner set out in the succeeding paragraph.

[16] Claim 1 is based on unjustified enrichment as a cause of action against the close corporation as the First Defendant in that the Plaintiff made the payment of the amount of US$200 000,00 into its bank account *sine causa* but with the *bona fide* and reasonable belief that in agreement for the acquisition of ⅓ of the share interest in the close corporation had been concluded between him and Mr André de Klerk, being the Second Defendant and that the close corporation had nevertheless appropriated

[22] Para [2], *supra*
[23] Para [1], *supra*
[24] Para [2], *supra*

the payment knowing that it had been made *sine causa*[25] and had become enriched at the expense of the Plaintiff.[26] For convenience and ease of reference I will continue to refer to the First Defendant as the close corporation and the Second and Third Defendants in their full names as they are brothers and share a surname.

[17] Then in Claim 2 the Plaintiff based his cause of action for his claim in respect of the amount of US$200 000,00 on the ground that Messrs André de Klerk and Deon de Klerk had in their personal and/or representative capacities as trustees of the André de Klerk Family Trust and members of the close corporation conducted the business of the close corporation recklessly, alternatively with gross negligence, further alternatively with the intention to defraud the Plaintiff when regard is had to the version as pleaded by Mr André de Klerk in the first and main action under case number: 58802/2011[27] and accordingly that they are jointly and severally liable with the close corporation for the payment of the amount of US$200 000,00.[28]

[18] Further, in Claim 3 the Plaintiff's claim is for the amount of US$84 000,00 from the close corporation in that in terms of the version pleaded by Mr André de Klerk the payment made by the Plaintiff into the close corporation's account on 30 December 2010 together with interest, would have been repayable on a pro rata basis as and when

[25] Pleadings Bundle, Plaintiff's particulars of claim, p 24, para 14 to p 26, para 14.5
[26] *Ibid*, p 26, para 14.6
[27] *Ibid*, pp 26 to 27, para 15.1
[28] *Ibid*, p 27, para 15.2

Bushmanland repaid the loan in twelve equal instalments.[29] Thereafter, there is Claim 4 for the same amount of US$84 000,00 and seems to me to be actually an alternative to Claim 3 and which is founded and framed on the same basis and cause of action as that in Claim 2.[30]

[19] From the two actions and pleadings as they stand, the issues that I am required to adjudicate upon appear to me to be the following:-

19.1 first, whether Mr André de Klerk is personally liable to pay to the Plaintiff the amounts of US$200 000,00 and US$84 000,00 as in Claims A and B in the first action;

19.2 secondly, whether the close corporation had been unjustifiably enriched in respect of the amount of US$200 000,00 as alleged and claimed by the Plaintiff in terms of Claim 1 in the second action;

19.3 thirdly and alternatively to paragraph 19.2, whether the Defendants, being Messrs André and Deon de Klerk and the close corporation are jointly and severally liable for the said amount in terms of Claim 2 in the said action on the grounds that the de Klerks had conducted the business of the close corporation in one of the impugned alternative bases referred to in paragraph [17] above;

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[29] *Ibid*, pp 28 to 29, para 16.7
[30] *Ibid*, p 29, para 17.1; para [17], *supra*

19.4 fourthly, whether the close corporation, having regard to the version pleaded by Mr André de Klerk in the main action, is liable to pay to the Plaintiff the amount of US$84 000,00 on the basis referred to in paragraph [18] above;

19.5 fifthly, and ostensibly in the alternative to the Claim 3, whether Messrs André and Deon de Klerk could be jointly and severally liable with the close corporation for payment of the lastmentioned amount on the grounds mentioned in paragraph [18] above;

19.6 lastly, the issue of costs and the scale thereof.[31]

[20] It is trite law that the factual issues as set out in the preceding paragraph are required to be decided by the Court in terms of the test or primary standard of a balance of probabilities.[32] Further, when a Plaintiff's case rests upon a contract he must prove the existence and relevant provisions of the contract. They are an essential part of his cause of action.[33] The Plaintiff has to prove not only the existence of the legal act upon which he relies, but also (if it is in issue) any fact which is a prerequisite for the Defendant's liability. These include the fact that the Plaintiff performed his own contractual obligations[34] or that he suffered

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[31] Pleadings Bundle, Plaintiff's particulars of claim, p 10, para 19.4; plea, p 16, particularly the un-numbered ultimate paragraph therein; Plaintiff's particulars of claim, p 30, prayer 4; plea, p 45, especially the prayer therein

[32] CWH Schmidt *et* H Rademeyer: "Law of Evidence", [Issue 10], pp 3 – 16, para 3 1 2 1

[33] *Ibid*, [Issue 6], pp 2 – 14, para 2 2 1 2(2)

[34] **Sifris v Vermeulen Broers** 1974(2) SA 218 (T) 223; **BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk** 1979(1) SA 391 (A) at 419 H

damages.[35] However, if the Plaintiff in setting out his cause of action alleges that the Defendant had failed to perform under the contract, or had performed defectively (which he has to allege because it is part of his cause of action), then the Defendant nevertheless has to prove due performance.[36] If the Defendant has put in issue a fact preventing the enforceability of the Plaintiff's claim, such as his own lack of contractual capacity, the Defendant will have to prove his allegation. These are seen as facts relied upon by the Defendant and falling outside the Plaintiff's cause of action. Similarly, if the Defendant puts in issue a fact that renders the Plaintiff's claim unenforceable *ex post facto*, then he has the burden of proving such fact.[37]

[21] It stands to reason that the issue insofar as concerns the main or first action is one which involves the proper and correct interpretation of the transaction between the Plaintiff and Mr André de Klerk and/or the close corporation insofar as same constituted agreements or contracts between them and whether Mr André de Klerk could be personally liable for same. In recent times the Supreme Court of Appeal ("SCA") had to deal with questions of law relating to the interpretation of contracts and documents, such as in the present case. In that regard the SCA has opined that the approach to interpretation of contracts and/or documents in

[35] **Lampakis v Dimitri** 1937 (TPD) 138; **Hazis v Transvaal & Delagoa Bay Investment Co Ltd** 1939 AD 372 at 388 to 389; **De Pinto v Rensea Investments (Pty) Ltd** 1977(2) SA 1000 (A) at 1006

[36] **Pillay v Krishna** 1946 AD 946 at 955; **Hoffend v Elgeti** 1949(3) SA 91 (A) at 104

[37] "Law of Evidence", *supra* [Issue 5], pp 2 - 16

present times is one of '*a shift from text to context*'[38] and this was expressed by the SCA per Wallis JA as follows[39]:-

> "*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to ...a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*
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> *[19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible*

[38] **Endumeni** case, *infra* at 603E & footnote 13 therein
[39] **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012(4) SA 593 at 603 F to 604 E; Also **Bato Star** case, *supra* at para [90]

approaches mentioned by Schreiner JA in Jaga v Dönges N.O. & Another; Bhana v Dönges N.O. & Another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow ...".

[22] That statement expressing the present state of the law on interpretation of documents, including contracts and statutes was later reiterated by the SCA again per Wallis JA, in a second of the cases relevant to the present matter, as follows:[40]

> *"Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being ... interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'".*

[23] The well-known and much cited summary of the earlier approach to the interpretation of contracts in **Coopers & Lybrand & Others v Bryant**,[41] the SCA held, is no longer helpful and has fallen away.[42]

[24] Insofar as the remainder of the issues pertaining to the second action are concerned, including the evaluation of the evidence presented by the

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[40] **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** 2014(2) SA 494 (SCA) at 499 G to 500 A
[41] 1995(3) SA 761 (A) / [1995] 2 All SA 635 (A) at 768 A-E
[42] **Endumeni** case, *supra* at 604 E-F; **Bothma-Batho** case, *supra* at 499 B-G and 500 A

Plaintiff on the one hand and Messrs André de Klerk and Willem Snyman on the other hand, Mr Barnardt for the Defendants referred me to the law as set out in relevant case law authorities in his written heads of argument.[43] As mentioned earlier, Mr Keyter only made oral submissions at the end of the trial and without reference to any authorities except as relied on in the particulars of claim.[44]

[25] Concerning the Plaintiff's conditional second action I have to take into account the law pertaining to unjustified enrichment as well as the provisions of Section 64 of the Close Corporations Act[45] as also acknowledged by Mr Barnardt for the Defendants in his written heads of argument.[46] The section in its terms provides as follows:-

> "*64. Liability for reckless or fraudulent carrying-on of business of corporation:-*
>
> *(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying-on of the business in any such manner, shall be personally*

[43] Defendants' heads of argument dated 9 June 2015, pp 15 to 16, para 8 and p 28, para 14.1 to p 31, para 14.7

[44] Para [5], *supra*; Pleadings Bundle, Plaintiff's particulars of claim, pp 26 to 27, para 15; p 29, para 17 and p 30, prayer 1; Defendants' heads of argument, pp 28 to 29, para 14.1; Close Corporations Act, No. 69 of 1984, Section 64

[45] No. 69 of 1984

[46] Pages 28 to 29, para 14.1; see also, Pleadings Bundle, *supra*, p 30, prayer 1

liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.

(2) If any business of a corporation is carried on in any manner contemplated in sub-section (1), every person who is knowingly a party to the carrying-on of the business in any such manner, shall be guilty of an offence".

[26] The test for recklessness is objective because the Defendants' conduct is measured against the standard of conduct of a notional reasonable person. The test, however, also has a subjective element because the notional reasonable person is placed in the same group or class as the Defendant and endowed with his or her knowledge, experience and qualifications.[47] Regard must also be had to knowledge or guidance that was available to the person.[48]

[27] Further, in the application of the test for recklessness the Court also takes into account factors such as the scope of operation of the corporation, the role, function and powers of its members as well as the financial position of the corporation.[49] In **L & P Plant Hire Bk v Bosch**[50] the Plaintiffs, who lease plant and equipment to a close corporation, brought an application in terms of Section 64 of the Close Corporations

[47] **Philotex (Pty) Ltd v Snyman**; **Braitex (Pty) Ltd v Snyman** 1998(2) SA 138 (SCA)
[48] *Ibid*, at 148 F-J
[49] *Ibid*, at 144 B; see also **MA Vleis Agentskap CC v Shaw** 2003(6) SA 714 (C)
[50] 2002(2) SA 662 (SCA)

Act against the sole member of the corporation as well as the manager of the corporation. They alleged that the Defendants were party to the reckless carrying-on of the business of the corporation and that the corporation carried on business recklessly because it failed to take reasonable care of the plant and equipment that it rented.

[28] The SCA held that the reckless handling of such plant and equipment would generally not be equated with reckless or fraudulent trading. However, the SCA was prepared to accept, without finally deciding the matter, that the reckless handling of such goods would fall within the ambit of Section 64 if the hiring of such equipment is part of the business of the corporation.[51] In addition, the SCA held that the aim of Section 64 is to protect creditors against possible prejudice created by the reckless conduct of the business of a close corporation. Section 64 therefore has, as far as creditors are concerned, to be applied restrictively to the reckless conduct of a business of a corporation which has a negative effect on the creditor's claim against that corporation. Where the close corporation can, in spite of the reckless trading, still meet the creditor's claim, the creditor cannot proceed in terms of Section 64. It would seem to require a causal link between the reckless and fraudulent conduct and the corporation's inability to pay the debt.

[51] At 677 B-C

[29] The question of causality between the company or corporation's inability to pay its debt and the members' conduct has recently been considered on two occasions by the SCA, namely in **Fourie v Firstrand Bank Ltd**[52] and **Tsung v Industrial Development Corporation of South Africa Ltd**[53]. In **Fourie v Firstrand Bank** Brand J opined that the judgment in **L & P Plant Hire**, in the context that the close corporation was in that instance able to pay its debt, should simply be understood to mean that "*If, despite the reckless conduct of the company's business, it is nevertheless able to pay its debt to a particular creditor, that creditor has no cause of action under Section 64 – or Section 424 – against those responsible for the reckless conduct*".[54] This is because the fundamental purpose of Section 64 – and therefore Section 424[55] - is to protect creditors from suffering prejudice as a result of the manner in which the business is carried on. The main purpose is not primarily the creation of joint and several liability.[56]

[30] The judgment in **L & P Plant Hire** therefore finds no application in cases where the company or close corporation is insolvent and unable to meet its obligations. This was confirmed by the SCA in **Tsung v Industrial Development Corporation**.[57]

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[52] 2013(1) SA 204 (SCA)
[53] 2013(3) SA 468 (SCA) // [2013] 2 All SA 556 (SCA)
[54] At 215 B-C
[55] Of the Old Companies Act, No. 61 of 1973, which contains materially the same provisions as in Section 64 of the Close Corporations Act
[56] At 215 D
[57] *Supra*, at 476 C-G

[31] Pertaining to the determination of the factual issues between the parties, and the evaluation of the evidence presented by their respective witnesses before me, my attention was, in addition to the principles set out above,[58] drawn to the *dictum* in **Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie & Others**[59] by Mr Barnardt for the Defendants. There, the SCA expressed the principle thus "*The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a), (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question*

[58] Paras [26] to [30], *supra*
[59] 2003(1) SA 11 (SCA) at para [5]; Defendants' heads of argument, pp 15 to 16, para 8

and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it".

[32] I have to now apply the law as adumbrated in the preceding paragraphs to the facts of the present case before me. It is common cause from the evidence of Messrs André de Klerk and Willem Snyman that the close corporation had subsequent to the disputed agreements (herein referred to as "contracts") and payments by the Plaintiff, converted into being a Pty Ltd company in terms of the New Companies Act[60] in terms of the recordal by the Plaintiff's Counsel and which is confirmed by the Defendants' Counsel above, no dispute or special plea has been raised or pursued by the Defendants on this score.[61]

[33] As part of the background to the dispute and claims in this matter the Plaintiff testified that he is a graduate in geometry and began to work in the petroleum industry in Angola. He said he runs activities as an industrialist and conducts business in mattress factory, coils, pillows and other derivatives of sponge. He began his activities in Angola, Lubango in 1970 and had been a businessman since then. He manufactures sheets and sells same in Angola – he does not export.

[60] No. 71 of 2008; Oral evidence of Messrs André de Klerk and Willem Snyman under cross-examination by Plaintiff's Counsel; para [51], *supra*
[61] Para [12], *supra*

[35] He further testified that he has property in South Africa in the form of a house at 969 Disselboom Road, 59.1 Bateleur Bastion, Wapadrand, Pretoria East.[62] Messrs André de Klerk and Willem Snyman also live there and it is the reason why he acquired the property.[63]

[35] He was asked in chief as to whether he knows the meaning of the name Deksny and his answer was that it is the abbreviation of the surnames of Messrs André de Klerk and Willem Snyman who are the shareholders thereof. That was confirmed by Mr André de Klerk in his evidence under cross-examination.

[36] The Plaintiff further testified that he was introduced to Mr André de Klerk by Mr Snyman and that he had always regarded Mr Snyman as his son. His first meeting with the two of them was at the condominium in Pretoria East where the two have houses and which is where he also later bought the house referred to earlier above. That was during 2008/2009. He had a great friendship with them and his trust of Mr André de Klerk came about through Mr Snyman.

[37] Furthermore, the Plaintiff testified that the agreement which I referred to herein as the contract, in respect of the payment of the US$200 000,00 was discussed, entered into and concluded at Mr Snyman's house. Asked as to what the terms thereof were, the Plaintiff testified that there was a co-existence in Deksny and that the two of them were partners. He mentioned that the proposal to him was that the close corporation

[62] Footnote 5, Pleadings Bundle, *supra*, p 3, para 1.1 & p 22, para 1
[63] Mr Snyman has since left and now lives at Mulbarton; see also, para [53], *infra*

(Deksny) belonged to Messrs André de Klerk and Willem Snyman and that he was invited to join in the close corporation. For that purpose the Plaintiff was required to put up US$200 000,00 being equivalent to ⅓ of the members share interest in the business of the corporation. The agreement had been concluded when he left for Angola.

[38] In substantiation of his evidence in this regard, the Plaintiff referred to the relevant CK2 documents duly signed by him, Mr André de Klerk and Mr Willem Snyman pursuant to the contract[64] as well as a letter he was required and advised by the Defendants to write to the Companies and Intellectual Property Registration Office ("CIPRO") pursuant to the contract.[65] The Plaintiff's evidence in this regard was not disputed by either Mr André de Klerk or Mr Willem Snyman.

[39] Moreover, the Plaintiff testified that his understanding was that he was buying the ⅓ of the members share interest in the business from Mr André de Klerk and that it was the latter who instructed him to make payment into the close corporation's bank account, the details of which were also furnished to him by Mr André de Klerk and that that was done with the agreement of Mr Willem Snyman. This was also not disputed by either Mr André de Klerk or Mr Willem Snyman in their evidence.

[40] Also, the Plaintiff testified that it was never his purpose in paying the money into the close corporation's account that it be used to provide loans to other entities such as Bushmanland. He testified also that there

[64] Bundle "A", pp 3 & 4
[65] *Ibid*, p 6

was never reference to the André de Klerk Family Trust when the contract was concluded. He said that months later after signing the documents regarding his acquisition of the ⅓ of the members share interest in the corporation he started noting that things were dragging regarding formalisation of the transaction to reflect him as one of the shareholders and member. When Mr Willem Snyman came to him in Angola, he continued, he said to the Plaintiff that he is beginning to have doubts as regards "*the mind and posture of Mr [André] de Klerk*" – he said that Mr André de Klerk's commitment to the agreement was doubtful.

[41] That, the Plaintiff further testified, made him realise that he had not been registered as a member of the corporation. This, he furthermore testified, was so because it was always said to him that Mr André de Klerk is the leader of the corporation – "*he was the big boss in the management of Deksny*". I hasten to point out that it was acknowledged in the evidence of both Messrs André de Klerk and Mr Willem Snyman that the former is indeed the managing director of Deksny.

[42] The Plaintiff then went on to testify that when Mr Willem Snyman came to him in Angola he said to him that he, Mr Snyman, had not been able to fulfil his part in respect of the payment of the capital for his respective members share interest in the corporation as he had been waiting for money to be paid to him to be able to contribute.

[43] Regarding the payment of the amount of US$84 000,00, the Plaintiff testified that, that was for the purchase by him of raw material from Deksny, being the corporation. However, he did not receive delivery of the raw material and he thereafter learnt that that money was diverted by Mr André de Klerk who asked the Plaintiff "*put the money into Bushmanland because the company was going through financial problems*". He said that he knew about Bushmanland at the time "*because Mr André de Klerk was preparing me to knowing the idea of Deksny buying shares in Bushmanland*". He then requested information about Bushmanland, but received none. Instead, Messrs André de Klerk and Mr Willem Snyman took the Plaintiff to view the property or premises at Bushmanland to convince him to buy into the idea. He ultimately did not buy into the idea "*because they were so many good things and advantages being offered and mentioned which I found to be too good to be true*".

[44] At that time, the Plaintiff said, Mr Willem Snyman was not present as he was on holiday in Mozambique. A week later, Mr Willem Snyman came to the Plaintiff to say that the Plaintiff is not a member of Deksny and also that Bushmanland was bankrupt. He denied the version put to him by Mr Barnardt for the Defendants that he paid the money to the corporation in order for Messrs André de Klerk and Mr Willem Snyman to use and promote the success of the company, stating that as far as he is concerned he "*was investing*". He also denied the Defendants' version put by Mr Barnardt to him that he agreed that the Defendants

could borrow the money to Biz Africa 3 (Pty) Ltd t/a Business Solutions Africa ("BSA").

[45] It was further put to the Plaintiff that in his particulars of claim he alleges that he had an agreement with Mr André de Klerk to use the money to purchase shares in Bushmanland. In answer, the Plaintiff stated "*Yes, but I needed Willie's agreement, but he was not there, he was in Mozambique*".[66] He denied that he gave permission for the money to be transferred into BSA's account, stating that "*I have nothing to do with this transfer*".

[46] On behalf of the Defendants it was further put to the Plaintiff by Mr Barnardt that the Defendants will say that the money paid to the close corporation remained in the corporation's foreign currency account and that after a period of about one year, an amount of R673 850,00 was transferred by the Defendants from the foreign currency account into their current account.[67] Further, it was put to the Plaintiff that a further amount of R673 000,00 was paid to BSA as a loan and which loan amounted to US$100 000,00.[68] The Plaintiff denied he had authorised such loan.

[46] Further, it was put to the Plaintiff that BSA repaid about R300 000,00 of the money loaned to it and that the close corporation has issued summons against BSA to recover the outstanding loan amount. The

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[66] "Willie" is Mr Willem Snyman; see also, para 44, *supra*
[67] See also, Bundle "B", p 1
[68] *Ibid*

Plaintiff replied that he has not been informed about the money or the issuing of summons against BSA. He denied that payment of the amount of R300 000,00 had been offered to him by the Defendants. He asked "*Where's the money?*"

[48] Insofar as concerns the Defendants' version and case, the Defendants two witnesses, being Messrs André de Klerk and Willem Snyman were not able to give satisfactory answers in some instances and were not consistent and could not corroborate each other in a number of material respects. An instance where a satisfactory answer could not be given was when Mr André de Klerk was asked by Mr Keyter for the Plaintiff as to why did he and Mr Willem Snyman also sign the CK2 documents signed by the Plaintiff.[69] Further, Mr André de Klerk was asked if he had requested Mr Riaan Swart to sign surety for the loan to BSA and he answered "yes". When asked as to where the surety signed by Mr Swart is, he answered that it is in Bundle "A" (p 10).

[49] However, a reference to the said content in Bundle "A" could not support the statement by Mr André de Klerk because such document is in fact a resolution in terms of which the board of directors of BSA resolved on 4 January 2011 to authorise one Clinton Mellet to sign documents relating to the alleged loan agreement on behalf of BSA.[70] Then when asked as to where is the resolution from Deksny to authorise the loan to BSA or

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[69] Para [38], *supra*
[70] Bundle "A", p 10

Bushmanland, Mr André de Klerk answered "*There is none because the agreement is mainly not intended to be a loan*".

[50] I hasten to point out that these answers on the part of Mr André de Klerk probably smack of dishonesty. The unreliability of Mr André de Klerk's testimony was further exposed when Counsel for the Plaintiff asked him why he did not require surety from the other directors of BSA and he answered that "*The other directors were not in a position to sign for the amount and also asking from Riaan it was sufficient for the loan*". In a follow-up question it was then put to him by the Plaintiff's Counsel that the Plaintiff's claim is that this was a fraudulent scam to take his money and never to return the money to him, and to which Mr André de Klerk answered "*No, that's not true. Biz Africa had assets worth R124 million at the time*". In my observation, all these answers by Mr André de Klerk did not only smack of inconsistency and dishonesty, but were also clearly and/or inherently incoherent.

[51] It was put to Mr André de Klerk that after the issue of summons in this matter he changed the name of the corporation to Pty Ltd and he answered "yes". He was then referred to page 19 of Bundle "A" and it was put to him that there is no reference there insofar as the membership of the corporation is concerned, to a trust entity or trustee, and in answer he agreed that that is so. That in my view, corroborated the Plaintiff's evidence and version as explained earlier above.

[52] Then in re-examination he was asked by Mr Barnardt as to what happened to the other US$100 000,00 and he answered "*It was used for the costs in the litigation against Biz Africa*". When asked as to how much has he used in respect of the costs so far, he answered "*About R700 000,00*". He could not say why if that is so the balance of the amount of the US$100 000,00 after payment of the amount of R700 000,00 could not be refunded to the Plaintiff as well as the other amount of R300 000,00 referred to earlier above.[71] In my observation this is but yet another indication of dishonesty on the part of the Defendants.

[53] Turning to Mr Snyman as a witness, he testified that he had known the Plaintiff for about 15 years and that he had indeed regarded him as his son. He confirmed that there were discussions in May 2009 about the corporation and in which discussions he informed the Plaintiff that he and Mr André de Klerk wanted to start the company but had no money to do so, whereupon the Plaintiff said that he wanted to be involved. He confirmed that he and Mr André de Klerk are friends and shareholders in the corporation and that they lived close to each other in Pretoria East, about 200 meters away from each other, until in the year 2013 when he moved to Mulbarton. He stated that he was a member of BSA when the loan was made to BSA by Deksny.

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[71] Para [47], *supra*

[54] Then when asked as to the fact that the payment of the amount of US$200 000,00 by the Plaintiff was for purchase of membership interest in the corporation, he answered "*No, it was to grow the company. We only decided on the shares in beginning of 2010*". This answer, in my assessment is inconsistent with Mr Willem Snyman's earlier answer in chief as explained above.[72] Further, when asked by Mr Keyter for the Plaintiff as to whether the money was kept in the corporation's bank account for more than a year, he gave what I found to be an inconsistent answer with what was stated by Mr André de Klerk in his evidence as he said "*No, we used it in June 2010 for de Klerk's salary*". In answer to the next question, he repeated and confirmed the same answer. In a follow-up and ultimate question he added "*And we also bought furniture*". This answer, is in my observation, also inconsistent with the evidence given by Mr André de Klerk as to the use to which the money was allegedly put.[73]

[55] Against the backdrop of the aforegoing I turn now to deal with and answer to the questions or issues raised in this matter.[74] In his oral argument Counsel for the Plaintiff urged me to bear in mind certain of the contradictions between the Defendants two witnesses, Messrs André de Klerk and Willem Snyman. In that regard, he referred to the fact that the former testified that he and Mr Swart are not friends, whereas the latter in his testimony under cross-examination he stated the contrary.

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[72] Para [53], *supra*
[73] Para [52], *supra*
[74] Para [19], *supra*

He also drew attention to the contradictions I discussed in the preceding paragraph. He argued that the CK2 documents signed by the parties point to the fact that the Plaintiff paid the US$200 000,00 for the ⅓ of shares in a members interest in the corporation and that on the probabilities nothing else points to any contrary or different agreement. Counsel for the Defendants argued the contrary and that therefore the Plaintiff's claim in respect of the first action stands to fail.[75]

[56] To my mind, there is merit in the argument advanced by Counsel for the Plaintiff. From the facts and evidence as set out above the Plaintiff's version is consistent and sufficiently corroborated including by the documentary evidence. It is also so that the contradictions between Messrs André de Klerk and Mr Willem Snyman regarding whether or not the former had been friends with Mr Swart points to further dishonesty on the part of Mr André de Klerk.

[57] Applying the approach and method of evaluation in the **Stellenbosch Farmers Winery** case[76] and the SCA's approach to interpretation of contracts as explained earlier above,[77] it is my view that the Plaintiff, the Plaintiff had, on the probabilities, credibly and reliably proven that the contract he alleged and its terms existed and that he had indeed performed his own contractual obligations and suffered financial loss in respect of the amounts mentioned earlier above and further that the Defendants as also represented by Mr André de Klerk have failed to

[75] Defendants' heads of argument, pp 31 to 33, para 15
[76] Para [31], *supra*
[77] Paras [21] and [22], *supra*

perform. As also mentioned earlier above, Messrs André de Klerk and Willem Snyman did not impress as witnesses including in their candour and demeanour in the witness box as well as the inconsistencies or contradictions between them.

[58] Further, the allegations by Mr André de Klerk as a Defendant in respect of the first action that the contract was entered into and concluded between the Plaintiff and the Trust on behalf of the corporation could not be proved by the Defendants and also the CK documents above sufficiently confirmed that the trust is not stated as a member. It seems to me that when regard is had to the totality of the evidence as set out above, Mr André de Klerk had at all material times been acting in his capacity as the managing member or director of the corporation, or at least that he held himself out as such. It is therefore common cause that the allegation that Mr Deon de Klerk had been involved in his capacity as trustee of the Trust entity is unfounded and untenable, and indeed Mr Deon de Klerk was not called as a witness by the Defendants.

[59] I am also satisfied that the Defendants were not able to prove that the Plaintiff has authorised them to appropriate and use the money he paid to them in the manner they did. I would therefore, on this basis, be inclined to also find, if I were to be wrong in finding as I did that there is merit in the Plaintiff's first action, that a case for unjustified enrichment as in Claim 1 in the conditional second action has been made out by the Plaintiff.

[60] If I were also to be wrong in finding as aforesaid, I would still find insofar as concerns the third to fifth issue above[78] that the Plaintiff has on a balance of probabilities succeeded in proving that Messrs André de Klerk and Willem Snyman as members or directors of the corporation or company as it currently is have not only been dishonest, but indeed reckless and probably fraudulent in their handling of the transactions in issue and conduct of the business of the corporation, being the First Defendant in the second action. That I am sufficiently satisfied and persuaded is so when regard is had to the applicable test for recklessness and fraud in terms of Section 64 of the Close Corporations Act and the relevant case law authority as set out above.[79] In my view there can hardly be any doubt on the facts and probabilities that the Plaintiff as a creditor to the Defendants has been prejudiced in his interest and finances consequent upon the Defendants' impugned actions or conduct.

[61] Mr Barnardt for the Defendants contended in the written heads of argument that I should find that Messrs André de Klerk and Willem Snyman (and/or Deon de Klerk) cannot be jointly and severally liable with the corporation or company in that, based on the case law authority also referred to in this judgment,[80] the corporation or company, being the First Defendant would be able to pay.

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[78] Paras 19.3 to 19.5, *supra*
[79] Paras [25] to [30], *supra*
[80] Para [24] & [27] to [30], *supra*

[62] At face value, the submission by Mr Barnardt is tempting, however on a closer look and consideration, I am not persuaded that the Defendants have been able to place before me any sufficient and reliable evidence in support of the argument. That I say for the reasons following. It is evident from Mr Snyman's evidence as explained earlier above that he and Mr André de Klerk had stated to the Plaintiff in the discussions of May 2009 that they had no money.[81] Further, in spite of their version and evidence above that BSA had paid to them an amount of R300 000,00 and that in respect of the one half of the amount of US$200 000,00 only R700 000,00 has been used, such monies have not been refunded to the Plaintiff nor is there a tender by the corporation to that effect. Furthermore, the evidence of Mr André de Klerk is that the money is being used for the litigation in the BSA dispute, whilst Mr Snyman's testimony is that it is being used to pay the salary of Mr André de Klerk. There was also no evidence from both Messrs André de Klerk and Willem Snyman that the First Defendant, being the corporation or company is able to pay.

[63] Having regard to all the aforegoing, I am not satisfied that the Plaintiff, as creditor, would be sufficiently protected or at all if the members of the corporation or directors of the company were not to be held jointly and severally liable with the corporation or company. I find accordingly.

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[81] Para [53], *supra*

[64] In his particulars of claim, the Plaintiff seeks payment in foreign currency, being the US Dollars or payment in South African Rands converted at the rate prevailing on the date of final payment, together with interest at the rate which prevailed when the debt occurred or summons was issued, being 15,5% per annum[82]. Mr Barnardt for the Defendants argued that it will be completely outrageous to grant judgment in US Dollars together with interest at 15,5% per annum. He instead suggested that consideration be made for the amount to be converted to South African Rands at the exchange rate of R7,72 as at the time when the money was transferred to the close corporation or the exchange rate of R12,50 as at the time when the trial in the matter ensued.[83] He has not referred to any case law authority in support of his argument in this regard.

[65] Our Courts have held that a Court in this province[84] can indeed give judgment for an amount expressed in foreign currency or the equivalent in Rands at the time of payment[85], not at the time of the debt or trial as suggested by Mr Barnardt. It is the function of the Court to determine the rate of exchange on which the Sheriff is to rely when executing the Court's judgment. However, for practical purposes, that can be left to the Plaintiff, provided that the Defendant is given an opportunity to challenge the rate claimed by the Plaintiff and to have it replaced by

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[82] Pleadings Bundle, p 9, para 17 to p 10, para 19 and p 30, paras 2 and 3
[83] Defendants' written heads of argument, p 27, para 13
[84] At the time known as Transvaal (now Gauteng Province)
[85] **Barclays Bank of Swaziland Ltd v Mnyeketi** 1992(3) SA (W) at 436 B

such rate as the Court may hold to have been proved.[86] Nonetheless, a Court may in granting its order give a direction which will serve the practical needs of the case.

[66] In that regard a Court may require the Plaintiff, when suing out a writ of execution, to provide an affidavit sworn by someone who identifies himself or herself as an authorised dealer in foreign exchange, stating the relevant rate of exchange immediately prior to suing out of the writ and such rate of exchange must then be used by the Plaintiff for calculating the sum in South African Rands which the Sheriff is to be directed in terms of the writ to realise by attachment and sale of the Defendants' movable goods. A copy of the affidavit is to accompany the writ.[87]

[67] It follows therefore from the aforegoing that the argument by Mr Barnardt is incorrect and cannot be acceded to by this Court. In that regard I propose to grant an order in favour of the Plaintiff based on the approach set out in the **Barclays & Friedrich** decisions above.[88]

[68] That then brings me to the issue of costs. Mr Keyter for the Plaintiff argued that the Defendants be ordered to pay the costs on the attorney and client scale, having regard to the entire account regarding their conduct or actions in the matter. Mr Barnardt for the Defendants argued the contrary, and that the Defendants have already been made to pay

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[86] *Ibid*, at 437 B
[87] *Ibid*, at 437 H-I; see also, **Friedrich Kling GmbH v Continental Jewellery Manufacturers** 1993(3) SA at 86 F to 88 A-B
[88] Footnotes 84 to 87, *supra*

for the costs in respect of the interlocutory proceedings and postponements in the matter and that the costs be not on attorney and client scale.

[69] I do not agree with the argument by the Defendants' Counsel and I am inclined to agree with that of the Plaintiff's Counsel. Having regard to my assessment and observations made on the evidence presented before me above, I accept the argument by the Plaintiff's Counsel that the actions or conduct of the Defendants is reprehensible and requiring to be frowned upon by this Court by way of an order on the attorney and client scale.[89] There is no sound or fair reason, in my view, why the Plaintiff should be put in a place wherein he would be left out of pocket.

[70] In the event, I find that the Plaintiff is entitled to succeed in respect of his conditional claim, particularly Claim 2 and Claim 4 therein, and I therefore make an order in the terms following:

1. The Second and Third Defendants in their personal capacities and/or in their capacities as trustees of the André de Klerk Family Trust are declared to be jointly and severally liable with the corporation or company (as it currently is), being the First Defendant for the First Defendant's debts to the Plaintiff in terms of the provisions of Section 64 of the Close Corporations Act.

[89] **Mudzimu v Chinhoyi Municipality & Another** 1986(3) SA 140 (ZH) at 143D to 144I; **Nel v Waterberg Landbouwers Ko-operatiewe Vereniging** 1946 AD 597

2. That the First, Second and Third Defendants jointly and severally, the one defendant paying the other defendants to be absolved, pay to the Plaintiff the amount of US$200 000,00, or the equivalent thereof in South African Rands as at the time or date of payment, together with interest thereon at the rate of 15,5% per annum from 30 August 2009 to date of payment.

3. That the First, Second and Third Defendants jointly and severally, the one defendant paying the other defendants to be absolved, pay to the Plaintiff the further amount of US$84 000,00, or the equivalent thereof in South African Rands as at the time or date of payment, together with interest thereon at the rate of 15,5% per annum, calculated from 30 December 2010 to date of payment.

4. The Plaintiff is directed to file with the Registrar, an affidavit sworn to by an authorised dealer in foreign exchange, stating the rate of exchange between the US Dollar and South African Rand ruling as at the time or date of the swearing of such affidavit.

5. A copy of such affidavit is to accompany any writ or warrant of execution issued by the Plaintiff in terms of the Rules of Court, pursuant to this order.

6. That the First, Second and Third Defendants are to pay the Plaintiff's costs, including the costs of the affidavit in paragraphs 4 and 5 above, jointly and severally, and on the scale as between attorney

and client, the one Defendant paying the other Defendants to be absolved.

G SHAKOANE
Acting Judge of the High Court,
Gauteng Division,
Pretoria

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