



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

Jehani

DATE 07 October 2022

SIGNATURE

CASE NUMBER: 14801/2020

In the matter between:

DALMAR KONSTRUKSIE (PTY) LTD

FIRST APPLICANT

ALTO KITCHENS (PTY) LTD

SECOND APPLICANT

and

MIKAIA BOERDERY (PTY) LTD

RESPONDENT

EMBONDEIRO SA (PTY) LTD

INTERVENING PARTY

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The applicants seek an order finally winding up the respondent and costs to be in the winding up. Embondeiro SA (PTY) LTD, was a 50% co-shareholder in the respondent and it launched an application to intervene. The latter application was not opposed and an order was granted. The intervening party filed a further application in order to address new matter arising in the replying affidavit.

[2] The Dalmar Trust is the sole shareholder in the first applicant. Mr Conrad Swart (C Swart) who deposed to the founding affidavit is a director in the first applicant, which holds a 67% shareholding in the second applicant and the first applicant is also a creditor of the respondent. Mr Leon Grobler (L Grobler) is a director in the second applicant which holds a 50% shareholding in the respondent and he controls a trust which holds the remaining of the shares in the second applicant. Mr Jaap Lee (J Lee) is a director in the Intervening Party which holds a 50% shareholding in respondent. The respondent holds shares on behalf of its members and L Grobler and J Lee are its directors. The respondent is also a 100% shareholder in a company registered in Mozambique known as Fazenda Micaia Criacao Limitanda (Micaia Mozambique). The respondent "Mikaia..." although a South African company derives its name from a farm acquired in Mozambique. The Intervening Party also engages in business under the name 'Embondeiro' in Mozambique. Although the applicant and intervening party use different spellings Mikaia and Micaia refer to the same farm in Mozambique.

[3] The second applicant supports the application on grounds that there existed an irresolvable deadlock and breach of trust between the Dalmar and Lee groups concerning a cattle farming enterprise engaged in Mozambique. The applicants contend that in the circumstances it was just and equitable that the respondent be

wound up. It shall comply with the formal requirements for launching the application:

- (i) by providing security;
- (ii) although the respondent does not have employees notices to them and Trade Unions shall be given at the respondent's principal place of business;
- (iii) the application will be served on SARS and the Master.

[4] The intervening party denies that the first applicant was entitled to issue a section 345 notice in terms of the old Companies Act. It was not the Lee Group that was responsible for the lack of a positive return on the investment by the Dalmar Group. According to the intervening party the latter group had deviated from the initial business plan the parties had agreed to and, a partnership meeting needed to be held to resolve the problems. The intervening party also raised certain points *in limine*. For convenience the intervening party shall be referred to as Embondeiro

BACKGROUND

The Applicants

[5] J Lee and L Grobler were friends and the latter was the brother -in -law to J Swart and his brother Andries Swart. During 2014 the Swarts, in particular J Swart were invited to join a business venture in Mozambique, after L Grobler had on a visit observed the potential of engaging in a similar farming enterprise to what J Lee and his father had established at Embondeiro and which was running for a number of years.

[6] A farm Mikaia was identified and procurable for purpose of operating cattle

farming in conjunction with Embondeiro. What remained was for the parties to agree on the logistics which entailed the acquisition of the farm, to provide working capital for things like the erection of boundary fences, roads and such improvements as shall have been necessary to conduct the business. The main object was to avoid the feedlot system; but to breed with cattle; to procure predominantly young male cattle (calves) which would be fed on natural grass on veld at Mikaia and to be kept for three years, whereafter they would be slaughtered and marketed for their meat.

[7] It was after a presentation by J Lee of the business model, that the partners without considering a funding model agreed that funding for the project would be provided for by the Dalmar Group through the first applicant. Again, during March 2014 J Lee availed a document which described a forecast of expenses to be incurred over a period of 4 years. The 'samewerkings ooreenkoms' which was prepared, is attached to the papers as annexure 'E'.

[8] Another 'samewerkings ooreenkoms', annexure 'F' was prepared and this was signed only by members of the Lee Group on 28 October 2014. None of the applicants, that is members of the Dalmar Group signed but they accepted the contents of the document. The applicants contended that the agreement provided for the following that:

- '-Mikaia was in the final stages of procurement for use for a period of 60 years for purposes of cattle farming with an option for further use for another 40 years; the agreement would endure for 99 years;
- the right to use is recorded in the DUAT which is an official document issued by the Mozambique Government being a right to use 8, 100 hectares for cattle farming on Mikaia; that the Lee Group would provide Weiner bulls to Mikaia for the duration of the agreement. The right of use would be part of the existing right of the Embondeiro farm. The Lee Group would be responsible for procuring the document;

- the final DUAT would record that the shareholding be divided 50/50.
- the Dalmar group would provide funding to stock 6000 hectares of the 8,1 hectares with cattle, development to be done in tranches of 2000 hectares over a period of four years'
- the banking account of Embondeiro would be used to receive money for Makaia and, money would be generated after the existing cattle are slaughtered. The money so generated would be used to procure new cattle, by first subtracting running expenses which would include fatalities;
- thereafter the division of the money would occur 50/50 among the partners;
- none of the partners may for a minimum period of 8 years dispose of its interests in the project; and pre-emptive rights were recorded;
- when the agreement is terminated all original investment capital would be repaid to the Delmar Group;
- any growth in the investment capital would be shared 50/50.'

[9] The cattle for Mikaia were obtained from Embonderio in Mozambique and on one occasion from another operation in South Africa operated by the Lee Group. Although Dalmar advanced a total amount of R9 083 928,23, in the development the amount of R8 417 788.00 mentioned in the section 345 demand, made in terms of the old Company's Act was taken from the 2018 financial statements of the respondent. In as far as accounting to each other on the operations and expenses incurred by the Lee group at Mikaia were concerned, the Lee group would send invoices to the Dalmar group which would be paid by them. On advice to the Lee group because of tax problems the auditor stopped issuing invoices and issued a document reflecting a loan to Mikaia. The said invoices would further report on cattle that had died in a single month. It was never mentioned during the development stage that the forecasts presented in the earlier stages were wrong and during May 2014 to November 2016 no irregularities were observed by the Dalmar group on the visits to Mikaia

[10] During March of 2016 at a recorded meeting it was mentioned that due to the drought situation in South Africa certain cattle of Mr K Lee's would be moved from the Free State to Mikaia. Mikaia would then by the end of 2016 have about 441 cattle on the Mikaia farm. It was recorded that K Lee might have intentions of investing in other projects, it was decided then that the development at Makaia should be prioritized and that the Dalmar group would limit their investment contribution to R9 million. Priority had to be given to stocking Mikaia with cattle and that there would be approximately 800 cattle on the farm. Further that in order to bring up the number of cattle and to ensure that Mikaia would have 1200 cattle and, to stock up the 8,1 hectares as agreed, an additional 400 cattle would be jointly purchased from the profits which would have been divided 50/50.

[11] The R9 million was reached by May 2018 and, in that month the partners further agreed relying on a document prepared by the Lee group to contribute 50% each towards running expenses. Dalmar continued to pay its share of monthly expenditures as invoiced by the Lee group in the amount of R39 675.00 till October 2019 and, it is contended that despite Dalmar paying there was no proof that the Lee group had paid its share, Despite this. members of the Dalmar group who visited Makaia before June 2018 and from their observations were pleased with the progress made.

[12] On the financial side Dalmar received reports from Grobler who was in frequent communication with K Lee and J Lee and, from the reports that were presented to them on the number of slaughtered cattle and, income generated from the process, he was in position to assess Dalmar's investment. Grobler during April/ May 2019 having regard to the reports and, relying on his calculations from the reports, also made enquiries on the status of the bank statements of Mikaia and sought conformation of the amounts standing. On Dalmar's analysis an amount of R1 700 000.00 should have been in the account. No answers were forthcoming and no straight statements were given. However, Grobler met with J Lee and the figure

was adjusted to R1 022 000.00 which could be used to purchase replacement cattle for Makaia at Embondeiro.

[13] A new manager by the name Mr Gustav Roux ("Roux") was appointed during the middle of 2019 after K Lee suffered ill health. On being informed that Roux had been offered 10% stake in Embondeiro, then Dalmar consisting of C Swart and Grobler seeing a potential conflict of interest arising decided to visit Mozambique. Their inspection of Mikaia revealed the following:

- no progress had been made of a road which was under construction during 2018 and which was critical to the development of the infrastructure of Mikaia; he located and traced this road with the help of the GPS he had used during June 2018 and arrived at the same spot where constructions had ended in 2018;
- during 2018, 4000 hectares had been developed he noticed that there was no sign of further development of the area after that time;
- during 2018 a borehole had to be drilled in that area, although a claim had been made for the costs of the borehole in 2017, during the 2019 visit the borehole had still not been drilled. This led them to believe that money had been misappropriated;
- the TLB tractor/loader/back tractor used for developing that terrain was damaged and no longer in use; in discussions with Roux and K Lee it seems it was exposed to excessive use to develop 2000 hectares at Embondeiro, furthering its interests and not those of Mikaia which should have been expanded by at least 2000 hectares;
- they had expected to see a fully developed farm stocked with cattle and they found an undeveloped Mikaia with no significant number of cattle;
- there was lack of proper management like leaving the gate open at the boundary raising the possibility of cattle escaping;

[14] C Swart and Grobler revisited their reports and confronted K Lee and Roux about their concerns. The number of cattle according to their expectations and

calculations had to be 457. They were informed that the calves were still too young to be moved to Mikaia. Then the expenses were discussed and K Lee informed them that Dalmar was not making sufficient contributions. It was pointed out to the lee group that Dalmar had been making its monthly contributions of R39, 000 per month. It appeared on a breakdown of expenditure that there was a procurement of lick for the cattle as it was an item listed. They were told that no lick was purchased for the cattle. On examination and discussions, it seemed that the expenses sent to Dalmar were inflated. On further engagement it appeared as if Embondeiro's expenses were paid by the proceeds of the slaughtered cattle of Mikaia.

[15] It was contended that a massive fraud had been perpetrated against Dalmar as Mikaia was a separate business. Dalmar had no interest in Emboneiro.

[16] On their return to South Africa letters were exchanged between Grobler and J Lee and the applicants contend that further concerns were raised by them which resulted in them consulting their attorney. Among the issues raised with the respondent was the loan recorded in the financial statements which had no fixed repayment terms and was repayable on demand.

[17] The second applicant called for a shareholder's meeting as contemplated in section 61 (3) of the Companies Act 71/ 2008, on 21 August 2019. It was confirmed that the respondent's attorneys would attend. It was also denied that at that time the respondent immediately owed any monies to the first applicant and, it was contended that the Mozambique project was subject to a 99 years lease and it was doubtful whether the loan was repayable.

[18] Another meeting followed on 28 August 2019. The day before, J Lee withdrew all monies in Makaia's bank account without informing the applicants. At the meeting it was announced on behalf of Embondeiro that no discussions would be entered into, that they wanted to cast a vote. They voted against the adoption of a resolution,

that the South African company call upon the Mozambique company to repay the loan which the respondent had made available to the Mozambique company. The minutes of the meeting prepared for the applicant were also not signed by the respondent, because it was stated on behalf of the respondent that they did not reflect what occurred at the meeting.

[19] Letters were exchanged between the applicants and the respondents:

- 17 September 2019 a letter to the first applicant from Embondeiro SA (Pty) Ltd that failure to make payments would result in a loss or damages;

- 18 September 2019 a reply from the first applicant pointing out that income from the slaughtering of 178 cattle which yielded approximately R1,6 million was not utilized to pay for the expenses;

- 25 September 2019 a reply from Embondeiro SA that the income so generated had been used for further development at Mikaia and, to repay outstanding monies owing to them. The first applicant contended that they were not aware of any improvements at Mikaia or that monies were owing and that income generated would be used to repay monies allegedly owing were not discussed with first applicant;

- 4 November 2019 the applicants having examined Mikaia's bank statements sought an explanation on what seemed to be suspicious transactions which were listed;

- 15 September 2019 an explanation was given that some of the monthly payments by Dalmar for monthly expenses were used to repay a loan account to Mikaia; Dalmar was hearing this for the first time was not informed of the creation of a loan account; It was not clear whether the loan account was created in favour of a South African company or the project in Mozambique and it was alleged that the loan account was an attempt to cover up a misappropriation of money.

[20] The first applicant contended that it had *locus standi* and, was a creditor of the

respondent in respect a substantial loan as reflected in the respondent's financial statements. The second applicant as shareholder of the respondent also had *locus standi* to bring an application for the winding up of the respondent.

[21] The existence of the debt was not disputed and the issue was whether it was now payable or not. Although a long-term engagement was envisaged it is denied that such was without qualifications. The breach was not one that could be remedied by a demand. Furthermore, there being a fundamental breach, the Dalmar Group was entitled to cancel the agreement immediately and was also entitled to a claim for restitution.

[22] It is contended that it was just an equitable that the respondent be liquidated on three grounds (i) an irreconcilable deadlock; (ii) there were grounds analogous to the dissolution of a partnership; (iii) the disappearance of the substratum.

The Intervening Party ("Embondeiro")

[23] J Lee deposed to the answering affidavit on behalf of Embondeiro. He averred that an oral partnership was concluded in mid-April 2014 for purposes of acquiring rights from the Mozambican Government to develop untamed land in Mozambique, for purpose of cattle farming over a period of 99 years. Mr Grobler in the Dalmar group was the driving force behind the Dalmar groups interest in cattle farming in Mozambique. He had intimate knowledge regarding cattle farming in that region prior to the formulation of the 'partnership' with the Lee and Dalmar groups, in that he held interest in the Mozgabo Group which was part of the Lee Group in the cattle breeding project on Embondeiro Mozambique

[24] He contended that Mikaia farm enterprise belonged to a 'partnership' which was subject to a written agreement annexure 'F' and mainly oral agreements. Annexure 'F' was not the sole source of the agreement between the parties and did

not include the terms of the first agreement 'E' The partners interests in the enterprise were held 'directly or through corporate entities used to warehouse some of the interests' and in this regard the respondent's only assets were its shareholding in Mikaia Mozambique. The partners interests were in the following percentages, the Dalmar Group (C Swart (17%), L Grobler (16.5%) and A Swart (16.5%) and the Lee Group (JP Lee (10%), JF Lee (10%), D Gustafson (10%), C Lee (10%) and G du Plooy (10%), the latter partners in the Lee Group were signatories to the annexure "F", the 'samewerkings ooreenkoms 'F').

[25] The respondent was registered a considerable time after the operations at Mikaia commenced and a bank account in Mozambique was opened almost two years after the development on Mikaia commenced. He further contended that the second applicant only came into the picture after it was nominated to warehouse the Dalmar Group's rights as partners in the respondent and indirectly in Mikaia Mozambique. Reference to the Dalmar and Lee Groups also included the individual members in the group. Presently the respondent is directly controlled by the second applicant and the intervening party and indirectly by the partners in the Dalmar and Lee Groups.

[26] It was contended the partnership agreement prohibited the partners from disposing of their interests before the expiry of eight years calculated from when the delivery of the first batch of 300 oxen was purchased. The Dalmar Group were in breach of the partnership agreement in that it had no right to instruct the applicant to launch the application. It was contended that it first had to be established whether the partnership should be terminated and, for a Receiver to be appointed to take care of the assets and liabilities in Mikaia Mozambique and, to make a determination in the best interests of the partners. It was denied that monies earmarked for development at Mikaia were stolen. The intervening party wished to raise certain points *in limine* and it was contended that these stood in the way of the grant of the relief prayed for.

[27] It is contended that the application was premature and that the Dalmar group having tacitly agreed, be directed to return to the negotiating table to engage in discussions to resolve their differences as far as it was reasonably possible. Further, it was contended that there were misrepresentations and defects in the founding affidavit:

- (i) The partners had specifically agreed that Embondeiro and Mikaia farming enterprises would share equipment and infrastructure to keep the development costs at Mikaia low;
- (ii) An incorrect impression was created by alleging that Embondeiro farm had benefitted more in using Mikaia's land for its cattle to graze on and that the TLB machine was used to develop 2000 hectare on Embondeiro without showing advantage to Mikaia. It was denied that 2000 hectares on Embondeiro were developed, save for the drilling of a borehole, which was still the existing position. It was contended that over the years more benefit was enjoyed by Mikaia. The TLB was used to develop 80% of Mikaia and as reported by Mr Roux in May 2019. Although the TLB broke down in July 2019 there was acknowledgement even before by L Grobler that the TLB was not in good condition as far back as 2017
- (iii) The perception that Dalmar partners were awarded 50% interest in the partnership because of their initial undertaking was incorrect. Dalmar initially undertook to provide all the capital to develop the farm and to make an interest free 99 year loan towards the purchase of 1200 oxen for the enterprise. This undertaking was estimated to cost around R12 million

which amount could have increased due to rising costs. On 7 March 2016 Dalmar limited their contribution to R9 million due to rising costs;

- (iv) Instead of financing the purchase of 300 oxen before May 2015 Dalmar financed the acquisition of 102 oxen and, in May 2016 instead of financing 600 oxen only 255 were purchased; the purchase price was not paid in full but paid off in instalments over a period of 10 months and the remaining 94 were to be purchased in May 2016. It is misconceived that they would have expected a fully developed farm stocked with cattle when the Dalmar group knew that only 38% namely 1200 oxen represented 'the farm stocked with cattle'.
- (v) It was also disputed that the substratum had been lost because no DUAT rights had been given to Mikaia Mozambique. The DUAT had not been granted when the partners commenced with the enterprise at Mikaia and, when the Dalmar group had contributed more than R9 million. No concern was raised regarding the DUAT rights or threat, that the rights would not be granted or that they had been disturbed in their possession of the farm. The DUAT had been authorised by the Mozambique Government on 27 February 2018 and it was only signed on 13 April 2020,
- (vi) It was contended that the under-performance of Dalmar on initial undertakings had a major influence on the development of Mikaia as a whole. Expectations of the Lee group that profits would have been distributed May/ June of 2018 had not yet materialised. By 8 July 2019 80 % of Mikaia had progressed towards completion, and it is denied that only 4000 hectares of the 8,1 hectares at Mikaia were developed by 6 July 2019;
- (vii) It was contended that there was no merit in calling up the "so-called" loan account when there was an obligation on Dalmar to pay the approximate contributions of R40 000.00 per month towards running costs, and the capital advance could not be reclaimed as incorrectly stated in the financial statements. There was no right to demand payment unless the

“samewerkings ooreenkoms” was cancelled. It was contended that the application was premature in that no attempt was made to engage the Lee group in discussions around the feasibility of terminating the agreement.

[28] Other issues not settled in ‘F’ were the manner in which the legal entities created would conduct and structure the business of the enterprise. Further, was how the business of the enterprise would be reflected in the books of account which would entail (i) tax considerations including Mikaia in Mozambique (ii) although shareholding was agreed upon there was no accompanying formal agreement (iii) in preparing the financial statements, the accountant lumped together without distinguishing the three categories of advances (monies advanced before the respondent was contemplated to purchase the original stock of oxen; monies advanced for the development of Mikaia; for advances from June 2018 on a monthly basis and which did not provide terms of repayment). The reflection of these monies as loan account were inaccurate.

[29] It is contended that before the July visit to the Mikaia farm there was a tacit understanding between the partners that problems and concerns would be *bona fide* discussed and reasonable solutions be engaged to either amend or supplement the terms of the agreement. This duty to negotiate is echoed in the applicant’s letter of 10 July 2019 even where there were suspicions of improper conduct on the part of Embondeiro and, also by the continued contribution towards costs made on 31 July 2019. In this regard Dalmar should be ordered to observed its obligation to negotiate before engaging in hostilities.

Points *in limine*

[30] According to the intervening party, at the heart of the applicants’ complaint was their perception that 4000 hectares on Mikaia had not been developed since 2018, which misconceptions had never been discussed by the partners. Points *in limine* were consequently raised. Firstly, it was contended that the applicants as

members in a partnership, had breached an obligation to *bona fide* negotiate perceived problems, before prematurely resorting to a hostile action to liquidate the respondent. Secondly, it was contended that the respondent and Mikaia Mozambique were just instruments of and for the persons who were party to the 'samewerkings oppreenkoms' and, since the case of the applicants was that the Dalmar Group be entitled to cancel the agreement, the applicants had failed to join all the other members of the Dalmar Group and Lee Group to the application. Thirdly, it was contended that the relief claimed was not suitable, that even if the partnership could not function, the correct process to follow was for a Receiver to be appointed.

[31] It was contended that the Dalmar group laboured under a number of misperceptions about the extent to the development at Mikaia between June 2018 and July 2019.

- 80% of the farm had been developed by the July 2019 visit as supported by statements of K Lee and Mr Roux annexures 'JL-B' JL-C' and reports prior to the visit availed to the Dalmar group and commented upon by C Swart and L Grobler. The letter, annexure 'N' did not mention the complaint that only 50% (4000 hectares) had been developed, which was different from what was discussed with K Lee during the visit, of the expectation that development should have been completed by July 2019. K Lee had explained that progress had been made with the last 2000 hectares which confirmed information communicated to L Grobler in March 2019 and in Mr Roux's report annexure 'JL-HH' and 'JL-OO'. The spreadsheet relied upon by L Grobler 'JL-J' that 5,500 hectares had been developed contradicted what was asserted in the affidavit. An invitation

was extended, which was not taken up, by J Lee to conduct a physical inspection as the version of C Swart as to what his observations were in the presence of K Lee and L Grobler, of the development which contradicted what was later communicated to him by K Lee. Further, the assertion that the GPS readings taken at a prior visit by L Grobler support the version that no development had taken place since that time was incorrect, and the GPS evidence was not availed, The applicants are challenged to avail and to demonstrate and explain his device. The understanding before the July 2019 visit was that the development would be completed by the end of 2019. Presently Mikaia was 97% developed and can be stocked with 1200 cattle.

- It was denied that Emdondeiro had developed 2000 of its hectares instead of developing Mikaia. The 2000 hectares related to the additional hectares known as Ganskuil which was obtained from a neighbour and on which only borehole had been drilled;
- No funds belonging to Mikaia were used to develop the 2000 ha at Embondeiro and this could be verified by forensic audit; monies paid to one Mr Engelbrecht for the borehole Embondeiro July 2019 was not paid from Mikaia's funds because, around the same time he was supposed to drill a borehole at Mikaia, he was called out on an emergency on another emergency contract and only drilled the borehole in November 2019.
- It was not possible that it was expected that Mikaia should have been fully

stocked by the July 2019 visit. There was an acknowledgement that there was a problem over the availability of young oxen and that the business model was not working out. L Grobler had suggested that a change of mixed cattle and ox farming model be adopted. The issue was not about the DUAT but it related to development costs and the refusal by Dalmar to verify the costs of development against documents provided to it during October 2019

- An examination of the bank statements of Mikaia and Embondeiro given to the Dalmar partners during July 2019 could have revealed that it was not possible that an amount of about R1,6 million was expected to be in Mikaia's bank account. Money generated from earlier sales of cattle in 20/17 and 2018 had generated about R600 000.00. At the time there was an understanding in October of 2017 that about R80 000.00 was needed for additional funding for the farming project. The sale of 15 cattle in April 2019 brought in a little over R1 million and at this time a little over R10 000.00 was left in the account.
- Dalmar partners were aware of the advances made by the Lee Group from funds of Embondeiro in Mozambique to sustain the development and purchase of cattle at Mikaia, The Dalmar Group was furnished documents to show the extent of the loans before and after 7 October 2019. This occurred when at times there were problems experienced in transferring monies to Mozambique. Also for example there was an instance where the Dalmar group had to pay-off in instalments for the purchase of cattle from

the Lee group and this was treated as a loan account against Mikaia in Mozambique. A loan account was also created because Embondeiro Mozambique was not always paid in full for the purchase of cattle. It is contended when Dalmar declared war during August 2019 and ceased to pay its monthly contributions, it became necessary to calculate what was due to the Lee Group which was in the amount of R560 000.00 which was withdrawn from the Mikaia account and a balance in the amount of R370 000.00 remained.

- The TLB was used to develop 80% of Mikaia; it was never in good condition referring to reports as far back as 2017; also evident from the reports availed to Dalmar was the usage schedule of the TLB and reports sent to Mr C Swart on completion of camp Wille 6; opening way for erection of fences along border with Mr Burger, Elias 6 being the fourth camp of the third section; a report that the Shestatsa camp was 100% operational
- It is disputed that Mr Roux does not attend enough to Mikaia. In the past the Lee group had availed the services of its manager and the deponent's father. The Dalmar group had during 2017 agreed to pay half the salary of the managers amounting to about R7 500.00 together with other expenses. The engagement of an expert farm manager like Mr Roux was necessary. There was not merit in terminating the partnership on grounds that Mr Roux was given opportunity to purchase an interest in

Embondereiro which would result in conflict and this could be a matter for discussion by the partners

[32] It was contended that there had been no obligation on Embondeiro to guarantee that it would provide a specific number of young oxen, The initial plan was that these had to be imported by Mikaia from South Africa at R1000 per head. Annexure “F” did not provide for the manner of stocking cattle the 2000h on Mikaia. It provided that the profits would only be shared when the cattle sold had been replaced and running costs deducted. Instead, it was then agreed with Mr Grobler to stock cattle from the profits of those cattle which were sold. The stocking of Mikaia with the 600 cattle as envisaged had its own challenges and it is contended that not everything went according to the business plan. This ranged from the delay by Dalmar to purchase the cattle; the initial stock purchased from Embondeiro Mozambique which had to graze on Embondeiro land and later the 94 oxen imported from SA.

[33] It was not provided for in annexure “F” that the capital investment the “so-called loan account” of the Dalmar Group “would be repaid” on early termination, therefore reflection that such loan account as held by Dalmar for the first applicant, since the respondent was made part of the partnership structure was not correctly reflected in the financial statements. Any suggestion that same was payable in the event of termination is an issue to be agreed upon and, in the event of a partner being unreasonable, the court could be approached to force the said partner to do or accept.

[34] It is contended that the loan account should reflect three categories, namely “developmental capital; a 99 year interest free loan for purchase of oxen and amounts advanced as from June 2018 on a monthly basis for running expenses.”

[35] Embondeiro disputed the interpretation by the applicants regarding the roles played by the different partners being the applicants, the respondent and itself (Embondeiro SA). It is contended that when annexure “F” was formulated and signed it was not envisaged that the respondent would be created or that the applicants and Embondeiro would be part of the formal structure of the partnership. Initially when Annexure “F” was signed the individual partners were interest holders in the Mikaia Company in Mozambique. Mikaia SA and the Mozambican Micaia were two different entities serving some functions in the partnership. The warehousing of the individual interests in corporate entities in the first and second applicant, the respondent and Embondeiro SA came as a result of administrative challenges.

[36] It is contended certain narrations pertaining to the loan accounts in the financial statements are incorrect, that is, where amounts paid were reflected as loans by Dalmar to Mikaia SA; that for a proper accounting reality demanded that the corporate entities and the partnership should be considered together, in view of the transactions that exchanged hands and, passed between partners for the business of the partnership and, these included transactions engaged on behalf of the Dalmar and Lee Groups which included oral agreements which did not strictly comply with the agreements as initially entered into and which created problems.

[37] These transactions are recorded in annexures annexed by the parties. In order to avoid stating the entire explanations of the difference in understanding of what some of the annexures related to, only a few as outlined in the opposing affidavit will be referred to. They included payments made by the first applicant to the respondent where an invoice was issued reflecting it as a loan when it was not as contended by the intervening party; it is contended that not all invoices issued by Embondeiro related to expenses already incurred such as Annexure “G”, to which was an explanatory email annexed “ JL-AA” which was copied to all members. Annexure “G” described the amount R39 850 as wages sold by Embondeiro

Mozambique to the first Applicant. In certain instances the invoices related to expenses to be incurred although not the precise amount was given for the needs of Mikaia in Mozambique where monies were deposited into Embondeiro Mozambique before a Mikaia account was opened; sometimes money transferred for the purpose of purchasing oxen was used for development of Mikaia "JL-RR".

[38] It is contended that invoices were structured according to the needs of the Dalmar Group, for example where there was a request by Mr Grobler to have Alto Kitchens invoiced instead of Dalmar Konstruksie, which could have caused problems with the South African Receiver of Revenue (SARS). Furthermore, the parties knew that the invoices to the first applicant were not for goods delivered

[39] In reply the applicants contended that the answering affidavit was verbose and was intended to blur the relationship between the parties and the true purpose of the application sought to address certain questions namely (i) whether there was a partnership (ii) whether there are grounds for liquidation (iii) does Embondeiro offer a better solution than the winding up of the respondent (iv) whether the project in Mozambique is a success or a disaster (v) what the current position regarding the project and what is the current relationship between the persons and entities involved in the project.

[40] The applicants averred that the first time they heard of a partnership was in the answering affidavit and contended that the version of the Embondeiro regarding the alleged partnership did not come close to complying with the *essentialia* of a partnership. The alleged partnership did not have a name; those named as the Dalmar partners, as confirmed by Mr A Swart and Mr Grobler, deny ever having had an intention to be involved in the business venture as partners, which also entailed a serious risk to the alleged partners of personal liability for the debts of the project in terms of South African Law. The applicants deny there was an oral agreement.

There was not a single paper generated in the 6 years, 2014 –2020 to suggest or which gave credence to the existence of a partnership. There was no partnership business model, no attempt to draft partnership financial statements, registration as a VAT vendor or PAYE liability for the employees, no attempt to draft financial statements regarding the partners individual tax liability relating to the alleged partnership,

[41] Furthermore, there was no need for a partnership to be considered because there are identifiable individuals and legal persona in the relationship structure between the parties. In particular, the respondent, a registered company in South Africa has two shareholders being the second applicant and Embondeiro SA. The respondent also holds 100% shares in Mikaia Mozambique which as holder of the DUAT rights, functions as the operator of the project in Mozambique. Recognition of the respondent and Mikaia Mozambique is demonstrated by the trail of monies which were advanced towards the project in Mozambique by the first applicant, and which monies were deposited first into the respondent's bank account in South Africa and transferred to Mikaia Mozambique. Therefore, in as far as the sale of the oxen was concerned the proceeds of the sale were payable to Mikaia Mozambique, and it is Mikaia which had to issue invoices for the disposal of the oxen

[42] The applicants contended that they have no knowledge of and dispute the distribution of the 'partnership' interest stated by Embondeiro in the he ratio 17% (Mr C Swart), 16.5% (Mr A Swart), 16.5% (Mr Grobler) as representing the 50% interest in the 'partnership' of the Dalmar Group. They contended that this attempt by Embondeiro ignored the following (i) the fact that the second applicant owned 50% shareholding in the respondent and that the shareholding in the second applicant is held by Delmar Trust (66.6 shares) which had as trustees Mr C Swart, Mr A Swart snr, Mr AB Swart and an accountant Mr Erlank; and in the Grobler 1000 Trust (33.3%) which had as trustees Mr Grobler, his spouse and an accountant Mr Erlank; (ii) Also

ignored were the interests of the Trusts in the respondent. On the side of the Lee Group mention was made of a Dr Charles Lee whom Mr C Swart alleges he had never met and one Mr Gustafson who had an interest in a butchery in the Vaal Triangle. (iii) According to the applicants an important factor was that Embondeiro's distribution on the partnership interests ignored the point that the first applicant within the Dalmar Group made exclusive financial "contribution" (the loan funding) for the "partnership" towards the project in Mikaia Mozambique.

[43] In denying that Mikaia was a partnership, in reply to the involvement of Mr Grobler with Mosgado the applicants sought an explanation from Mr Grobler and sourced information in the public domain, on how Mosgado was initiated; its funding model, that it was not conducted in the form of a partnership but finally as a corporate structure. This being reason why Mikaia followed the corporate structure and corporate model of Embondeiro which was ' a properly registered company in Mozambique in which the shares are held by a South African company and the loan funding properly advanced through loan accounts.'

[40] According to the applicants it was unlikely that it was an oversight that two "highly qualified professionals" in the accounting field would record the flow of money in the financial statements of the respondent, prepared by (Mr HJ Coetzee (accountant and /or auditor) and signed off by (Mr J Lee who holds a BCom degree), both who gave full recognition to the liability owed to the first applicant, of the monies which were recorded in the financial statements as an "unsecured interest free loan which has no fixed term of repayment" to the value of R 8 427 788.00 and a loan to Mikaia Mozambique for an amount of R8 108 381.00. Furthermore, there was a document received from Embondeiro which recorded an income tax profit /loss of Mt30 000.00 and a cumulative loss of Mt31 253 650.10 which were not dealt with in the income tax return of the partners

[41] Furthermore, the applicants contend that a case has been made up for the

winding-up of the respondent for inability to pay its debts or on just and equitable grounds having regard to the following:

- The debt and terms upon which it is repayable are not disputed on *bona fide* and upon reasonable grounds;
- The respondent has to show upon reasonable grounds that the highly qualified accounting professionals were wrong in compiling the financial statements;
- The shareholders meeting convened for purposes of taking a vote on the recoverability of the of the loan resulted in a deadlock, where the applicants voted for the recovery and Embondeiro voting against it even where it had not alleged that there was no such loan or even on its version that part of the loan used for purchase of the oxen was payable over 99years
- The *locus standi* of the first applicant has not been challenged *bona fide* and upon reasonable grounds; that the applicants had made out;
- The respondent shares are valueless given the fact that the Mozambique project is running at a loss determined from the sparse documents provided by Embondeiro and that it is not trading and has accumulated a huge loss.
- Apart from an inability to pay the debt it was just and equitable to liquidate having regard to the reasons for launching of and the application regarding the conduct of Embondeiro commencing August 2019 point towards a deterioration in the relationship mainly being a loss of trust the applicants had in Embondeiro Mozambique;
- the request during September 2019 that the applicant continue to make its monthly contributions, that TLB needed to be fixed, that grazing had been

destroyed by veld fires and the Mikaia as a business enterprise was at risk;

- the deadlock;
- The inability of Mr Erlank to conduct a proper forensic audit from bank statements received in October 2019 because descriptions were in Portuguese and that he was able to identify suspicious payments
- the alleged stealthy creation of a loan account in favour of Embondeiro Mozambique; the attitude of Embondeiro in response to a request in January 2020 on reports on activities in and developments at Mikaia Mozambique and correspondence that exchanged hands before and after the launch of the application and filing of the answering affidavit.
- Having been initially in July 2020 refused any information on the status quo as a result of what was alleged to be applicants; repudiation, an email dated 18 August 2020 received from Mr Lee (attaching various schedules without the necessary supporting documents) on the status quo between Embondeiro and Mikaia on the oxen, prospects of sales of oxen during 2021, further development, report on the TLB, a report on the low profit derived from the purchase of the weaner oxen from Embondeiro after a holding period of 3 years was further proof that Embondeiro Mozambique was running at a loss. This was also confirmed by its gross income (Mt1 064 570.11) as against its total expenditure (Mt 6 049 408.77); report on the total cost of the project and income derived;

[42] The applicants contend that having regard to what is stated above and the fact that they are not prepared to fund the Mikaia project in Mozambique there is no solution other than a liquidation; that the 'natural persons behind the corporate

structures have lost respect for each other'; that there appeared to be no point in the project being turned around; a comparison of the prices reached at the stage of slaughter per head of cattle in Mozambique (R6 800.00) and South Africa (R8000.00) show that the project will never make money, already the project has accumulated losses in the region of Mt31 million (R6 200 000.00). There is no prospect whatsoever of the parties resolving these problems around a negotiating table. Furthermore, they contended that the project is a disaster

[43] Although it was agreed that the first applicant would fund the entire project, it is denied it reneged on its undertaking. What was initially budgeted for was to fund the project consisting of 6000 hectares at R3million over a period of 3 years. When the size increased to 8000 hectares it was agreed to give development priority. However, the applicants deny that it was to blame for the purchase of only 102 oxen during 2015. It was not due to a lack of funding but due the fact that Embondeiro was not in a position to supply smaller weaner oxen as seen from a report by Mr J Nel. Furthermore, regarding the GPS recording on a plotted map of the trip undertaken in July 2017 "REP10" the applicants contended that the plotted map of the trip in 2019 "REP11" showed that they did not drive any further in 2019 on the previous visit. 2017.

WERE THE PARTIES CONDUCTING A PARTNERSHIP OR NOT

[44] It is important to determine firstly whether or not a partnership agreement / relationship subsists and, whether same was envisaged by the Dalmar and Lee Groups at inception of the project in Mozambique, and carried through up to the circumstances that led to the launch of this application. It is also important to determine whether or not the respondent retains its identity as a company even where it is said that the company, though controlled by a group of people, conducted its business as a partnership or was created as a vehicle through which cash was moved from South Africa of Mozambique. It is common cause that the assertion by Embondeiro SA that

a partnership relationship subsists is vehemently denied by the applicants, who contend that it was a partnership disclosed for the first time in the answering affidavit and that no recognition had ever been given between 2014 -2020, in the trading of the companies in the Mikaia project to a structure of a partnership. The applicants contended in reply that the relationship did not come close to satisfying the *essentialia* of a partnership as required by law.

[45] The applicants submit the following:

- that legal recognition was given to the corporate structures that controlled the project in Mozambique and that the law directed how these corporate structures should function through its directors and shareholders; The corporate structures and directors attract responsibilities and obligations in terms of the Companies Act 71 of 2008, and the law created specific remedies for shareholders and creditors to act against delinquent directors. In this instance the corporate structures were Mikaia Mozambique which was a limited company; the respondent which had 100% shares in Mikaia Mozambique; and the second applicant Alto Kitchens and Embondeiro SA which held 50/50 shares in the respondent;

- the attempt to conjure allocation of the 'partnership's' interest to 'multiple persons', e.g. to a person the applicants have never met before or to loose sight of the interests of shareholders which are two trusts in the second applicant was a fallacy; further that the distribution of such interests to various persons lost sight of the aspect of 'contribution' from the shareholders for the alleged partnership.

- the unequivocal acknowledgement by Mr Lee's signature in the financial statements that the respondent has an asset being a loan to Mikaia Mozambique, owed to the first applicant and described as an 'unsecured'

interest free loan with no fixed term of repayment in the amount of R8 427 788.00 was proof that this was not a partnership.

[46] In their submissions Embondeiro (the intervening party) charted the origins of the relationship with the Dalmar Group which was initiated by Mr Grobler and Mr J Lee. It submitted that crucial to it was the binding nature of the contract, which was partly oral and partly written and entered into by the Lee Group with every member of the Dalmar Group, Annexure 'F', which resulted in each group holding 50% shares in a new venture, the Mikaia project. It contended that there was a long-term commitment, a partnership agreement, to remain in the Mikaia oxen-farming project for 99 years or that shareholders could exit if they chose to do so only after 8 years after a particular date and if such shares are sold first option to sell to members in the group .

[47] It was contended that three members of the Dalmar Group were 50% shareholders of Mikaia Mozambique as noted in a government publication. When this partnership was concluded the respondent did not exist and it was incorporated to simplify transactions like the flow of funds. Furthermore, the land in question did not exist as a separate piece of land and they awaited the grant of the DUAT which application was made when the Lee group were the only shareholders of Mikaia Mozambique. The agreement provided that the original investment with regard to the cattle only would be paid back to the first respondent and not the contributions related to development which were not refundable. It was submitted that similarly the Lee Group would not have recourse after 99 years to expenses engaged in obtaining the DUAT rights and their skilled inputs and physical labour in developing Mikaia into a cattle farm

[48] Our courts have recognized the essentials of a partnership as the following:

1) Each of the partners must contribute something into the partnership whether

it is in the form of money or labour or skill, not necessarily of the same 'character, quantity or value'; (my underlining)

2)The business should be carried on for the joint benefit of the partners;

3)The object should be to make a profit;

4)The contract should be legitimate (legitimacy being a feature of all contracts;

[49] These essentials were confirmed in *Pezzuto v Dreyer*¹:

“Our Courts have accepted Pothier’s formulation of such essentials as a correct statement of the law (*Joubert v Tarry & Co* 1915 TPD 277 at 280; *Bester v van Niekerk* 1960 (2) SA 779(A) at 783H-784 A; *Purdon v Muller* 1961(2) SA 211 (A) at 218B-D.”

The nature of the relationship is not determined by how the parties define it, but it is the Court, having regard to the essentialia, which must determine whether or not the parties’ business relationship is that of a partnership, *Bester v an Niekerk supra*. As I see it, the conduct of the parties also plays a pivotal role in the process of determination.

[50] The difficulty in this application is that the existence of the alleged partnership is not based on a simple written contract from which could easily be extracted the essentialia of a partnership nor, could it be easily determined how what is alleged to be a mixture of oral agreements form part of a partnership agreement. While the beginnings of project Mikaia were in my view easily determinable, the manner in which

¹ 1992 (3)SA 379 (A) at 390.

the business was conducted and the lengthy answering affidavit which brought up many facts before and after Annexure “F” was reduced to writing, make it a laborious exercise to extricate what the relationship between the parties was. It could have been easier to amend annexure “F” as often as it was alleged a fresh agreement or innovation came into being, which either added or changed the intentions of the parties on how the Mikaia project was to be run. The applicants deny the existence of a partnership and contend that the intervening party bears the onus to prove such relationship, also contending that the alleged oral agreements relied upon were not permissible in terms of the parole evidence rule, although this was not fully motivated, and argued.

[51] As I see it, the Lee Group had long before engaging with the Dalmar Group had its eye on expanding and sought to establish a cattle farming project at Mikaia which was not far from the Embondeiro cattle farm. Embondeiro Mozambique was a registered company already. In pursuance of establishing Mikaia. Embondeiro Mozambique or the Lee Group registered Mikaia as a company and proceeded to apply for business rights, the DUAT, which were granted. It is contended that negotiations with the Dalmar Group resulted in a partnership agreement between the Dalmar and Lee Groups from about April 2014. There were eight partners, five in the Lee Group (K Lee; JF Lee; C Lee; D Gustafson; G du Plooy) and three in the Dalmar Group (C Swart; A Swart; L Grobler). Notably, none of the corporate structures played a role.

[52] It is contended by Embondeiro that before the project agreement, annexure “F” was concluded the Dalmar Group through the first applicant had already advanced monies towards development of land at Mikaia and for the procurement of cattle. However, it is not clear whether at this stage any form of partnership conforming with the essentialia was envisaged.

[53] In my view, although referred to as the Dalmar and Lee Groups, in annexure

“F” dated 24 October 2014, the description and reference to the Groups (A and B), does not refer to the corporate entities (applicants, respondent, Embondeiro Mozambique, and Mikaia Mozambique) but to the individuals, (the natural persons) who were shareholders or directors in some of the corporate entities or intended shareholders in a company to be registered. Annexure “F” was signed by the five individuals of the Lee Group. The applicants made a concession that the document is binding which would mean that the three individuals in the Dalmar Group, not having appended their signatures, considered the document binding on them indirectly endorsing the oral agreements entered into. On the other hand, Embondeiro Mozambique was a separate entity, registered in Mozambique, which according to annexure “F” would pursue or finalize the acquisition of the DUAT rights in Mikaia in its name and that when granted the business rights in the Mikaia shall be divided on equal basis 50/50 among Groups A and B. In annexure “F” Embondeiro is referred to as the entity which would supply cattle to Mikaia Mozambique.

[54] Notification of the intended registration of the Dalmar Group as shareholders Of a 50% share in the Mikaia Mozambique company was published in the Official Mozambique Gazette (Boletim da Republica dated 16 September 2014) identifying the eight shareholders and stating the allocated share capital as represented by quotas as stated in annexure “JLF”. As I see it, the amounts reflected do not equate to a contribution by the eight to a partnership and that since it pertains to the registration of a company in Mozambique the percentages so reflected refer to the shareholding in the company and not in the alleged partnership.

[55] The respondent was registered as a private company on 5 May 2015 and it is creditor of the first applicant. Embondeiro contended that on a proper understanding of the agreement, the loan account the applicant is relying upon would probably for the greater part not be repayable. The applicants dispute the contention that the respondent was a nominee holding the interests of the partners in Mikaia Mozambique

[56] It is common cause that the applicants dispute Embondeiro's stance, the existence of a clear partnership but, conceded that the respondent's business model, although a cooperate entity, was operated akin to that of a partnership. I ask, what role do the corporate entities identified in this business model play, and which law is applicable when one of them demands payment of a debt or alleges that the relationship such as theirs has broken down due to a lack of trust and a prevailing deadlock. Can the parties in these circumstances be forced by a court to negotiate with each other;

[57] An analysis of annexure "F" and the conduct of the parties is necessary. It is an essential that for a partnership to exist the contribution requirement must be fulfilled as provided for by the law. Bearing in mind that I have already found that the corporate entities, the applicants, the respondent were not a part of or mentioned as participants in the Mikaia project in annexure "F" except for an obligation by Embrodeiro to provide oxen to Mikaia.

Party A, Dalmar Group: (i) " sal die investerings kostes voorsien vir di ontwikkeling van die grond; (ii) sal die fondse voorsien om die nodige beeste aan te koop vir die boerdery.(iii) Party A is verantwoordelik om 3 jaar beeste te koop. MAW om 6000 ha van beeste te voorsien."

Although not particularly mentioned in annexure "F", it is common cause that in addition a TLB machine was provided to be used in the construction of the camps, clearing of bushes and construction of roads on Mikaia. Furthermore, there was an agreement that the investment, that is, the capital limit on the acquisition of cattle would be limited to R9 million, which amount had been reached by May 2018. This despite the contention by Embondeiro that properly construed an interest free loan of R12million was required over a period of 99 years. It was also agreed that a contribution be made towards the monthly running expenses at Mikaia be split in equal amounts between the two groups (the 11 October 2017 agreement on additional contribution); Although the Lee Group gives a different version of what these amounts

were for, the applicant was invoiced from May 2018 till October 2019 in the amount R39 675.00 as per spread sheet annexure “K”. The applicant contends that nowhere has the Lee Group furnished information that it contributed financially to the expenses.

The activities at Mikaia relate to; (i) “Die ontwikkeling sal in fases van 2000 HA per jaar gedoen word. Die investering behels die oprig van kampe, en water on ‘n os boerdery te kan bedryf. Party B sal als in hul vermoë doen om die investerings kostes so laag as moontlik te hou

[58] The question that remains is to determine whether Embondeiro has proved that each of the eight individuals have made their contribution towards a partnership, alternatively, has the first applicant indicated anywhere that the monies it pays to the respondent represents the contribution to finance its shareholders, in their individual capacities, the Dalmar Group in compliance with Annexure “F” or any prior or subsequent alleged oral agreement. Can the participation of Mr J Lee, Mr K Lee and the Embondeiro manager (the development and management of the farm Mikaia and providing for cattle for Mikaia) be construed as a contribution by the Lee Group in the partnership. In my view the answer should be in the negative.

[59] Was the object to carry on business in common for the joint benefits of the parties achieved at any point? In *Pezzuto v Dreyer*²:

“In essence.....a partnership is the carrying on of a business (to which each of the partners contributes) in common for the joint benefit of the parties with a view to making a profit”

Annexure “F” provides the following:

“Wins Deling

² Supra at 390 D-E

Die gelde wat verkry word nadat die beeste geslag is, sal as gevolg aangewend word in chronologies volgorde:

- a) Vervang die beeste wat geslag is met nuwe jong beeste;
- b) Trek alle bedryfkostes af;
- c) Verdeel die gelde wat oorbly tussen party A(50%) en party B (50%)

Apart from doubt that each of the eight individuals made a contribution, the facts reveal that this objective “for the benefit of the parties” was never implemented or achieved even at the time when it simply should have occurred, that consequent upon the slaughtering of the oxen. Instead, it is contended by Embondeiro that the profit was used for other purposes at the instance of the Dalmar Group which was for the purchase of additional oxen, so, Annexure “F” was not amended to provide for this eventuality which was contrary to the original provision that the Dalmar Group would solely be responsible for the purchase of the oxen.

[60] Having regard to the facts as a whole I am of the view that the Dalmar and Lee Groups are subject to the agreement entered into and terms of which are captured in annexure “F” which was drafted by the Dalmar Group (even though not signed by them) but which was signed by the Lee Group. It can also be deduced from the facts that there were other agreements which regulated the management of the Mikaia project which recorded in either minutes or correspondence without amending the core agreement annexure “F”. That these agreements were entered into do not make the relationship a partnership.

[61] The facts point to a contract entered into by the Dalmar and Lee Groups which supports the contention by Embondeiro that the terms were partly written and partly oral. As I see it, this arrangement does not deviate from the decision by the directors and shareholders in corporate entities created by the two groups on how the cattle farming project at Mikaia should be managed. Furthermore, it does not also mean that

parties can choose to abdicate their responsibility to have this application decided on the relevant company law if applicable, in spite of the subsistence and I return to this later. After all the agreement is that their contract will be regulated by South African law.

[62] It is trite that the *Pacta sunt servanda* principle while not the only important principle to consider in this constitutional era still remains part of our law. In *Beadica 231CC and Others v Trustees, Oregon Trust and Others*³ the following was stated:

“[83] The first is the principle that “[p]ublic policy demands that contracts freely and consciously entered into must be honoured “. This court has emphasised that the principle of *pacta sunt servanda* gives effect to the central constitutional “values of freedom and dignity”. It has further recognised that *in general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* is thus not a relic of our pre-constitutional common law. It continues to play a role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.”

[84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individual should be able to trust that all contracting parties will be bound by obligations willingly assumed.”

³ 2020 (5) SA 247 (CC) at para 83

[63] The above applies to annexure “F” and other related documents as a whole. Embondeiro contends that the parties to the agreement, the Dalmar and Lee Group were bound by their undertakings, therefore the launching and prosecution of this application constituted a breach of contract.

[64] The other terms of the agreement have been mentioned and according to Embondiero, the clause dealing with termination was of specific importance, in that it states that the contract shall endure for a period of 99 years, that none of the members may dispose of their shares before a period of 8 years has passed, calculated from the date on which the first batch of oxen are offloaded. The contract further gives conditions under which the members may sell, giving the option to buy first to any member within the groups before availing them for sale to third parties. The applicants contend that there were far-fetched and unbusinesslike clauses in annexure “F”, like the 99 years duration of the contract which required the Dalmar Group to make an interest free loan of R12 million to the Mikaia project and the absurdity of expectation by the Lee Group that funding would endure for that long in a project that was running at a loss.

[65] Although the duration and efficacy of the 99 lease year term is lamented, Embondeiro, contended that acquisition of the DUAT rights were a pre-requisite for the Dalmar Group as South African Investors, to conduct a farming project on State land in Mozambique. The duration was structured in view of the fact that the land still remained that of the government of Mozambique and the Dalmar Group understood that the DUAT rights were given for that duration. In my view, there is not merit in the applicants questioning these terms because the applicants, that is the corporate structures, were not party to the agreement. Given the fact that the first applicant had provided the loan for the Mikaia project no evidence is provided by the Dalmar Group that the issue of the duration or that no interest was provided for was a matter for concern for the applicant.

HAVE THE APPLICANTS MADE OUT A CASE FOR THE WINDING UP OF THE RESPONDENT

[66] It is common cause that the launch of this application was prompted after a visit to Mikaia by Mr Grobler and Mr Swart. They alleged discovery of impropriety on the part of Embondeiro Mozambique, that is, as a result of the activities of Mr Koos Lee of the Lee Group and the manager Mr Gustav in their management of Mikaia. The concerns raised and denials shall not be repeated in detail, save to state that they related to how Mikaia was managed and developed, the procurement of the oxen to stock Mikaia. and how the finances provided by the applicants were utilized, a suspicion that monies provided by the applicants were used to fund Embondeiro Mozambique. They suspected a massive fraud and alleged that a breach of trust had manifested itself. Letters were exchanged, annexures “N” and “O”.

[67] In terms of section 61(3) of the Companies Act a shareholders meeting was convened on 28 August 2019, the purpose being to secure the adoption of a proposal by the second applicant that the respondent (Mikaia SA) call up a loan made to Mikaia Mozambique. It is common cause that a deadlock resulted with the refusal by Embondeiro SA to support the resolution, the result being that shareholders in the respondent voted 50% for 50% against. The Dalamr Group cancelled its agreement in the Mikaia project on grounds of gross misconduct. The applicants contended that once cancellation had occurred the ‘respondent could not be linked to an agreement which had been cancelled. On 13 September a Notice in terms of section 345 (1) of the Companies Act 71 of 2008 was delivered to the respondent. A further complaint was that J Lee without consulting the Dalmar Group, caused an amount equivalent to R500 000 to be transferred from the bank Account of Mikaia Mozambique to Embondeiro Mozambique.

[68] It is important to note that Embondeiro SA denies or disputed that the respondent is indebted to the applicants in respect of monies advanced for the Makaia project. The contention being made that in all the agreements concluded inclusive of annexure “F”, between the Dalmar and Lee Groups attention was never given to how the financial statements would be prepared reflecting the business model so engaged and, in particular that the entries in such statements reflecting the monies advanced as a loan were incorrect.

[69] Winding -up proceedings are usually launched by way of application, where, the principles espoused in the *locus classicus*, the Plascon Evan Rule⁴ remain the test to be applied. Again, in winding-up proceedings the Badenhorst Rule⁵ has been consistently applied by our courts which reiterates that these proceedings were not to be resorted to in order to enforce payment of a debt, which would result in an abuse of the court proceedings. The Rule provides that where the applicant has *prima facie* established indebtedness, then the onus rests on the respondent to prove on a balance of probabilities that the indebtedness is disputed on *bona fide* and reasonable grounds. Furthermore, the discretion exercised not to grant a winding up application is a narrow one and should be exercised judicially.⁶

[70] The main question in my view, is to determine whether the intervening party had shown that the indebtedness has been *bona fide* and on reasonable grounds disputed. As I see it the financial statements for the year ended 28 February 2018 as contended by the applicants should be the starting point. It has not been disputed that these were prepared Mr H J Coetzee (accountant) on behalf of the respondent and its directors JF Lee and L Grobler, and signed for by Mr J Lee who is also the deponent to the answering affidavit . Under the heading “ Notes to the Financial Statements” 5.1

⁴ Agri Operations Ltd v Hamba fleet Management (Pty)Ltd (542/16) [2017] ZASCA 24 (24 March 2017) para [9]:“It may bear repeating that Plascon Evans is the locus classicus as the test in the factual enquiry before a final order can be made in motion proceedings”

⁵ Badenhorst v Northern Construction Enterprise (Pty) Ltd 1956 (2) SA 346 (T); Freshvest v Marabeng (Pty)Ltd (1030/2015) [2016] ZASCA (15 November 2016); Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) 980

⁶ Agri Operations *supra* [13]

which reflects loan to group company comprising the following balances for the year 2018 in the amount of R 8,108,381, with notes stating: “Fazenda Micaia Criacao Limitada: The loan is unsecured, interest free, and has no fixed terms of repayment”. Incidentally the financial statements also reflect what the amount of the loan was the previous year. There has been no evidence that the loan was disputed and even in this instance where Embondeiro contends that only part of the loan is payable, suggests that there was an understanding that the loan was payable.

[71] It is my view, Embondeiro has not discharged its onus that the indebtedness is disputed on *bona fide* and reasonable grounds. The disputes of fact raised especially regarding the ‘loan account’, where it is disputed and it is contended that there were mistakes or a misunderstanding, or that the loan be split into funding that related to acquisition of oxen and development of the land on the part of the Dalmar Group, are not genuine disputes of fact.

[72] The conduct of Mr Lee of emptying the bank account of Micaia after the statutory demand was made further exacerbated the distrust the Dalmar Group had. The applicants contend that there are further just and equitable grounds for the winding up of the respondent. The contract has been cancelled; a deadlock exists; there is no likelihood of funding, that the project in Mozambique was on the brink of collapse, the relationship between the two groups had broken down. I am of the view that a final order would be appropriate.

[73] In the result the following order is granted:

- 1) That the respondent be finally wound-up;
- 2) That the costs of this application be costs in the winding up;



V.V. TLHAPI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCE

HEARD AND RESERVED ON : 15 – 17 NOVEMBER 2022
FOR THE FIRST APPLICANT : Adv. VAN DER MERWE SC
INSTRUCTED BY : DELPORT VAN DEN BERG INC

FOR THE RESPONDENT AND
INTERVENING PARTY : Adv. JL (MAC) VAN DER MERWE SC
INSTRUCTED BY : SANET DE LANGE ATTORNEYS
DATE OF JUDGMENT : 07 OCTOBER 2022