REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 2607/10

In the matter between:

KONSULT ONE CC Applicant

and

STRATEGY PARTNERS (PTY) LIMITED Respondent

JUDGMENT DELIVERED ON 19 MARCH 2013

DAVIS AJ:

[1] In this application the applicant asks for a declaration that a partnership was established between the applicant and the respondent in relation to seven initiatives undertaken during June 2004 to February 2007and identified in the notice of motion as 'the Pioneer project, the NWK project, the SWOV project, the Capespan project, the NewFarmers project, the Citrifruit project and the

Agrifund project'. The applicant describes these endeavoursas 'the joint venture projects', but I prefer to refer to them in more neutral language as 'the agricultural projects', since they involved activity within the agricultural sector.

[2] The applicant also seeks orders directing the respondent to render to the applicant a statement of account reflecting certain details, to debate such account with the applicant, and to pay to the applicant whatever amount may be found to be due to the applicant upon debatement.

[3] Finally, the applicant seeks leave to reset the matter down for hearing on the same papers for the purpose of relief aimed at determination of any disputed issues, including the appropriate *pro rata* division of the parties' respective interests in the partnership insofar as it relates to the Agrifund project, and payment of all amounts found to be due to the applicant.

[4] It is common cause that there is no direct evidence that the parties entered into a partnership agreement. The applicant does not rely on an express written or oral agreement, but rather on a tacit partnership contract which it contends should be inferred from the conduct of, and the written and oral communications between, the parties' representatives,[1] namely, Melt Doedès (aka Dès) van der Spuy('Van der Spuy') acting as the sole member of the applicant, andHermanus Coenraad (aka Herman) Marais ('Marais') acting as the managing director of the respondent.

[1] Founding Affidavit para 12, Record p 12.

[5] The applicant argues that all the *essentialia* of a partnership were present in relation to each of the agricultural projects, and maintains that a partnership therefore came into being in relation thereto.Various correspondence and other documents spanning the period June 2004 to February 2007 (‘the relevant period’)were annexed to the founding affidavit and relied upon in support of the applicant’s assertion that a partnership existed between the parties.

[6] Marais, who deposed to the answering affidavit on behalf of the respondent, repeatedly denies that there was ever any intention to enter into a partnership with the applicant, or that a partnership agreement was at any stagein fact concluded between the parties. Respondent maintains that the applicant, in the person of Van der Spuy, was engaged by respondent on a project by projectbasis as one of many *ad hoc*associates, who collaborated on projects undertaken by respondent. Such associates rendered services for remuneration paid in accordance with the respondent’s general guidelines for reward-sharing with its associates.According to the respondent the parties worked together on the basis of an associate relationship,both in relation to the agricultural projects and on other initiatives which are not referred to by the applicantand are not included in the alleged partnership.

[7] It is not in dispute that, in the case of theAgrifund project, extensive discussions were held regarding the possible formation of a joint venture company which would house the anticipated benefits from the Agrifund project and in which both parties would be shareholders. Ultimately, however, these

negotiations failed as no agreement could be reached on the allocation of the shareholding in the proposed company.

[8] It is also common cause that none of the projects, with the exception of the Agrifund project, moved beyond an initial conceptual phase, and that none of them yielded any income except the NewFarmers and Agrifund projects. In the case of the NewFarmers project, certain fees were earned which were of a one-off nature.The Agrifund project, however, came to fruition and with it the prospect of significant, on-going financial benefits. The relief sought by the applicant is directed in the main at the Agrifund project.

[9] In order to succeed in this application the applicant bears the onus of establishing that a partnership contract was entered into by the parties which included the Agrifund project.

[10] A curious feature of this matter is that, having launched the present application on 9 February 2010, the applicant saw fit to institute action against the respondent and twelve other parties on 12 February 2010 under case number 2887/10, in which it claims damages based, *inter alia*, on a breach of the alleged partnership contended for in this application. This action is still pending and awaiting a trial date. One cannot help but wonder at what appears, on the face of it, to be an unnecessary duplication of proceedings - and a perilous course given the known dispute regarding the existence of the partnership.

[11] I was told from the bar by Mr Nelson, who appeared for the applicant together with Mr Van Dorste, thatbecause of the poor state of health of Van der Spuy and the expense attendant on a lengthy trial, it was considered preferable to proceed on motion for the particular relief sought in this application. I was also told that the applicant had requested the respondent and the other defendants in the action to agree to a consolidation of this application and the action. This request was, not surprisingly, refused.

[12] Be all that as it may, it is clear that the applicant made a conscious choice to proceed in this fashion, and it must abide the consequences of the well-established rules governing the granting of final relief in motion proceedings where the facts are disputed.[2]The so-called Plascon-Evans rule dictates that the matter must be decided on the basis of the facts as stated by the respondent, together with the facts set out in the applicant's affidavit which are admitted, or cannot be reasonably denied, by the applicant. [3]

The Evidence

[13] The history and context of the relationship between the parties appears in the main from the answering affidavit deposed to by Marais. The founding affidavit, deposed to by Van der Spuy, contains details of oral and written communications between the parties during the relevant period. These communications mainly consist of email correspondence, letters and other

[2] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635B.

[3] *Ibid.*

documents pertaining to the agricultural projects, which are annexed to the founding affidavit. There is no dispute regarding the authenticity of the correspondence and documents, or that they correctly reflect what the authorsthereof wrote. What is vigorously disputed, however, is the correct interpretation thereof.

[14] I intend to deal with the evidence in accordance with the following structure:

14.1 paragraphs 15 to 18containbackground facts which are not in dispute;

14.2 paragraphs 19 to 28 set out the respondent's version of the nature and history of the relationship between the parties;

14.3 paragraphs 29 to 112deal chronologically withthe various agricultural projects and the correspondence exchanged between Van der Spuy and Marais in regard thereto.

Background

[15] Van der Spuy holds the B.Compt (Hons) and LLB degrees from the University of Stellenbosch. After obtaining his law degree and qualifying as a chartered accountant, he worked for various corporations, including Somchem, Federale Volksbeleggings and Sankorp, where he gained experience in the fields of financial management, strategic planning and investment management. In 1990 he joined Senbank, the merchant-banking arm of Bankorp, where he started investment banking as a new division and was responsible for

strategic and risk investments and leveraged buy-outs. Following the take-over of Bankorp by Volkskas and the subsequent formation of Absa Corporate and Merchant Bank ('ACMB') in 1992, Van der Spuy worked for ACMB as part of its corporate finance team and advised on mergers and acquisitions, disposals and rights issues. In 1993 Van der Spuy resigned from ACMB to form the applicant, a consulting firm specialising in value-based strategic management.[4]

[16] The business of the applicant is the provision of 'management consulting services, focussing on business valuations, value-based advice for top management and the identification and funding of investment opportunities for private equity.'[5]

[17] Marais holds the B Comm LLB Hons degrees.[6]A former Deloitte partner,[7]in 1996 he established a consulting firm named Strategy Partners, which rendered management consulting services for remuneration, principally on the basis of professional time spent on client projects. In 2000 Marais reoriented his business so as to become involved in projects where value could be created and profits earned which were not restricted to the hours spent on a project. In 2002 Marais expanded his firm and converted it into the respondent company, of which he became a shareholder and the managing director. The

[4] Annexure VDS 111, Record p 335 read with annexure D to Annexure VDS 5, Record p 115 – 116.

[5] Founding Affidavit para 1.3, Record p 8.

[6] Annexure HM 32, Record p 429, at p 433.

[7] *Ibid.*

goal of the respondent was to unlock value in projects which was not limited exclusively to time-based earnings.[8]

[18] While no indication is given of the size of respondent when it was formed, one sees from a letterhead of respondent as at 12 February 2007 that its directorate at that time comprised ten directors in addition to Marais, the Managing Director, and one J M Pieterse ('Pieterse'), the Executive Chairman.[9]

Respondent's version

[19] During 2003 the directors of respondent came to the realisation that one of the best ways to achieve the goal of unlocking value in projects, was to bring about a private equity fund. With this in mind, representatives of the respondent liaised extensively with fund managers and institutions over a period of two years in order to research the possibility of respondent obtaining a mandate to manage a private equity fund.[10] It was recognised, however, that the respondent did not have an adequate track record in the equity fund area, and that it was necessary to build up the respondent's profile in the transaction servicesfieldin order to achieve the necessary credibility as a prospective fund manager. To this end the respondent's directors decidedto focus their involvement on projects where transaction services could be rendered, for instance in relation to takeovers, mergers and acquisitions. Such

[8] Answering Affidavit para 5 – 7, Record p 344.

[9] Annexure VDS 105, Record p 298.

[10] Answering Affidavit para 9 – 10, Record p 345.

services were then rendered to a variety of institutions, including Sanlam Private Equity ('SPE'), Absa, Nedbank and Rand Merchant Bank, to name but a few.[11]

[20] On 24 January 2003 the respondent's directors resolved to identify individuals with specific expertisewho would be able to assist respondent in implementing its aforesaid strategy by rendering *ad hoc*serviceson projects involving transaction services. The relationship with such individuals would be handled on the basis of an association.[12] The relevant resolution was minuted as follows:[13]

> 'In terms of future SP associates, general endorsement of expanding SP through associations was received and it was decided to activate further. It was agreed that associates would be SP card-carrying persons with whom SP would enter into formalised agreements. Profile-wise, associates were indicated to be persons with expertise that would be available on short notice to become involved in projects; a possible category being ex-CEO's. It was agreed that associates would not necessarily be shareholders (in SP). It was stressed that the mechanism and criteria by which potential associates would be identified needed to be well-defined.'(Emphasis added.)

[21] Associates were to be remunerated for services rendered in connection with respondent's projects. A draft letter of invitation ('the invitation letter') was formulated to be sent to prospective associates, which set out the respondent's intentions for the associate-relationship in the following terms:[14]

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[11] Answering Affidavit para 10, Record p 345.

[12] Answering Affidavit para 12 - 13, Record p 345 – 346.

[13]Answering Affidavit para 13, Record p 346.

[14] Answering Affidavit para 15, Record p 346; Annexure HM 1, Record p 387.

'Against the background of our recent discussions on areas of mutual interest, the directors of Strategy Partners would like to extend an invitation to you to enter into a formal association with our firm. Subject to mutual agreement, we would envisage such an arrangement to involve the following:

- Co-operation in the formulation and execution of business plans as well as the active joint development of individual business opportunities in the fields of corporate restructuring, turnaround and direct investment;
- An SP business card be made available to you;
- Our association be included in the firm's profile…;
- Support from our office infrastructure to be available to you, when this is required in support of joint work.
- Establishing a routine of sufficiently frequent meetings of directors and associates … to keep track of direction in the business and in our association.

We are hoping that this kind of relationship could provide a viable platform for mutually beneficial business co-operation while not encroaching unduly on the independence and autonomy of the respective parties. For purposes of sound housekeeping and safe-guarding of respective interests, we would suggest a discussion of arrangements towards:

- Reasonable exclusivity around our association in this field of business - naturally such an arrangement should not interfere with either party's involvement in business or associations in other areas of endeavour;
- A confidentiality undertaking;
- Circulation of correspondence of mutual interest.

As far as the sharing of rewards is concerned, our proposal would be to follow a 'deal-by-deal' approach. Our philosophy is that the parties involved in the referral, selling and execution of assignments should all be rewarded for their respective contributions by mutual agreement. This would apply to both revenue as well as capital gains. I attach for your information the guidelines that we currently apply in this regard.

We would like to see the kind of relationship proposed here as a starting point for a more structured business relationship which could be taken to further levels of integration when regarded opportune by both parties.

Should you favour the proposed 'spirit' of the association as outlined in this letter on an in principle basis, we would be happy to finetune a suitable arrangement with you.'(Emphasis added.)

[22] Annexed to the invitation letter were certain guidelines, styled 'Guidelines for Distribution of Project Based Rewards' ('the guidelines'), which were to serve as the basis for agreement between respondent and its associates regarding remuneration for work on respondent's projects.[15] The guidelines set out various alternative bases for remuneration, and concluded with the words, 'The above are guidelines to be considered and applied by the parties involved in the context of the project concerned.' [16]

[23] The basis on which respondent involved associates in its business was not to enter into partnership agreements with them. They were remunerated on a project by project basis in accordance with the guidelines. The nature of the project, and therefore the manner in which Respondent would be remunerated by the client, determined the manner in which the associate would be remunerated.[17] Over the years the respondent formed associations with many individuals on terms such as those set out in the invitation letter.[18]

[24] Marais met Van der Spuy in 2001. Van der Spuy later approached Marais and offered his services in order to become involved in projects. From their conversations Marais identified him as a possible associate within the context of respondent's stated objectives of involving experts in projects on an *ad hoc* basis.Thereafter respondent liaised with Van der Spuy in regard to projects in

[15] Answering Affidavit para 15, Record p 346; Annexure HM 1, Record p 387.

[16] Annexure HM 1, Record p 387 at p 389.

[17] Answering Affidavit para 17, Record p 347.

[18] Answering Affidavit para 18, Record p 348.

the same manner and on the same basis as it dealt with its other associates. Van der Spuy was given a Strategy Partners business card which proclaimed his identity as a 'SP Associate'.[19]

[25] During 2004 the Respondent's directors saw an opportunity, based *inter alia* on Respondent'sexisting involvement in projects in the agricultural sector,[20] to initiate investment projects in the broader agricultural sector. They therefore proceeded to identify individuals from amongst various shareholders and associates of respondent to form a focus group, which would consider and investigate opportunities which might exist for respondent in this sphere ('the focus group'). Marais asked Van der Spuy to form part or the focus group because he had an interest in and previous exposure in the agricultural sector.[21]It was in the context of the focus group that the idea of an equity fund within the agricultural sector came up for discussion.[22]

[26] During the period 2005 to 2006 the respondent engaged the applicant as an associate to render services in regard to a number of projects other than the agricultural projects, in respect whereof the applicant does not claim a partnership existed,and which it claims are irrelevant to this application.[23]

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[19] Answering Affidavit para 19 - 20, Record p 348; Annexure HM 2, Record p 390.

[20] As at 2004 these included work on the agricultural portfolio of the Ohlthaver & List Group in Namibia, advising the Tuinroete Agri Co-Op and work in the wine industry: Answering Affidavit para 26, Record p 249 – 350 and Annexure VDS.

[21] Answering Affidavit para 21 – 22, Record p 348 – 349.

[22] Answering Affidavit para 23, Record p 349.

[23] Answering Affidavit para 30, Record p 353; Founding Affidavit para 14, Record p 12 – 13.

I shall refer to these other projects as 'the non-agricultural projects' to distinguish them from the agricultural projects.

[27] The applicant rendered invoices to the respondent in respect of its services in relation to the non-agricultural projectsand was paid for these services in accordance with the guidelines.[24]In these invoices applicant referred to respondent as its 'client'.[25]In the case of the NewFarmers Project, the only agricultural project beside the Agrifund Project which yielded any income, the fees generated were paid by the clients concerned, ie, NewFarmers and SPE, to the respondent. Applicant invoiced respondent for the work which it performed in respect of the NewFarmers and SPE mandates, and was duly paid by the respondent.[26]

[28] The basis on which the applicant worked with the respondent on all the projects, both agricultural and non-agricultural, was the same, namely, that of an associate for remuneration in terms of the guidelines. No partnership agreement was ever entered into between the parties.[27] The respondent at no stage intended to conclude a partnership contract with the applicant.[28]

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[24] Answering Affidavit para 34, Record p 354.

[25] Annexures HM 13, Record p 403; HM 23, Record p 419.

[26]Answering Affidavitpara 33, Record p 354; para 35 – 40, Record pages 357 – 359; Annexures HM 27 to HM34, Record pages 423 – 438.

[27] Answering Affidavit para 31, Record p 353.

[28] Answering Affidavit para 46, Record p 360.

The Relevant Period

[29] According to the applicant the parties collaborated on the agricultural projects during the following periods:[29]

Projects	**Periods of collaboration**
Pioneer Foods	June – December 2004
NWK	August 2004 – May 2005
SWOV	October 2004 – May 2005
Capespan	May 2005 – November 2006
NewFarmers	June 2005 – April 2006
Agrifund	October 2005 – February 2007
Citrifruit	August 2006 to February 2007

The Pioneer Project

[30] During 2004, in the course of discussions within the focus group, Van der Spuy raised the possibility of unlocking value in Pioneer Foods Limited ('Pioneer') by means of a leveraged buy-out ('LBO') in Pioneer ('the Pioneer project'). This was an idea which he had previously investigated. He was then asked to formulate a proposal for presentation to the focus group in this regard, which he duly did.[30] On 11 June 2004 Van der Spuy, on behalf of the applicant, made a presentation to the respondent's executive committee ('Exco') regarding the proposed LBO. The written portion of the presentation

[29] Founding Affidavit para 15, Record p 13.

[30] Answering Affidavit para 54, Record p 362.

shows that Van der Spuy contemplated that co-operation between the applicant and the respondentwould be along the following lines: [31]

> ‘Samewerking met Strategy Partners
>
> Konsult One benodig die volgende:
>
> - Maandelikse ondersteuningsfooi om proposisie to ondersoek
> - Fondse om uitgawes tov onderskoek to dra
> - Kapitaal vir belegging in Newco (voorkeuraandele teen 70% van prima / 15% van consortium)
> - Deel van fooi / finansieringsinkomste (op basis van aandeelhouding)
>
> Strategy Partners se rol
>
> - Verkyging van mandaat
> - Finansiering van
> - Ondersteuningsfooi / koste
> - Hulp met evaluasie van LBO proposisie
> - Finansiering
>
> Samewerkingsbasis
>
> - Bespreek te word’ (Emphasis added.)

[31] On 21 June 2004 Marais had a telephone conversation with Van der Spuy in which he confirmed that the respondent wished to co-operate with the applicant in regard to the Pioneer project.Marais and Van der Spuy met on the same day to discuss the basis of co-operation. At this meeting Marais told Van der Spuy that the applicant had internal guidelines regarding profit sharing in relation to projects, and explained that the system essentially provided for 40% of the profits to be reserved for the applicant and the remaining 60% of the profits to be divided amongst the participants, either by agreement or in accordance with an *ex post facto* peer review system.[32]Van

[31] Annexed as VDS 1, Record p 85 at p 90.

[32] Founding Affidavit para 25, Record p 17; Answering Affidavit para 55, Record p 363.

der Spuy was not happy with this arrangement and immediately informed Marais that this was not acceptable to the applicant. No agreement was reached on 21 June 2004 regarding thesharing of rewards from the Pioneer project.[33]

[32] Notwithstanding their failure to agree on a basis for reward sharing, the parties continued to work together on the Pioneer project. On 23 June 2004 Van der Spuy emailed Marais and asked him what their fee ('ons fooi') would be for the proposed LBO. Marais replied as follows:

> 'Ek kom terug op die fooie-vraag. Bottom line bly dat ons saam projek moet struktureer met verdeling van voordele waarmee almal kan saamleef.' [34]

[33] On 30 July 2004 the parties made a joint presentation to two major Pioneer shareholders regarding a proposed restructure of Pioneer by means of an LBO.Van der Spuy followed up on this presentation by addressing a letter, dated 11 August 2004, to the two major Pioneer shareholders, in which he referred to the presentation and outlined the services offered by the applicant and the respondent and the fees which would be charged in connection with the proposed LBO.

[34] This letter, which was written on the applicant's letterhead, was written with the knowledge of Marais, who approved the contents thereof.[35]Marais and

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[33] Founding Affidavit para 26, Record p 17; Answering Affidavit para 56, Record p 363.

[34] Annexure VDS 2, Record p 91.

[35] Founding Affidavit para 35, Record p 20; Answering Affidavit para 62, Record p 364.

Van der Spuy discussed the fees quoted in the letter, which were based on the standard fees levied by respondent in similar projects.[36]In the letter it was explained that both Konsult One and Strategy Partners, defined as 'KOSP', had a vision for working with top corporate management in order to create value for shareholders. The proposed plan of action contemplated that 'KOSP' would a) perform a valuation of Pioneer (for R 100 000.00 plus Vat and travel costs), b) identify and evaluate Pioneer's strategic alternatives (for R 100 000.00 plus Vat and travel costs), and c) identify the best alternative (for R 50 000.00 plus Vat and travel costs). The letter concluded with a request that a mandate be given to 'KOSP' to perform these services and implement any transaction flowing therefrom at market related tariffs.

[35] The requested mandate was not forthcoming, however, and in December 2004 the major shareholders of Pioneer decided not to implement the suggested restructure of Pioneer.[37] No further work was done on the Pioneer project after 11 August 2004, and no income was derived therefrom.[38]

The NWK Project

[36] Van der Spuy had an idea for unlocking value for shareholders in NWK Limited ("NWK") by raising funds against the security of NWK's R 400 million worth of book debts, thereby allowing it to distribute the greater part of its

[36] Answering Affidavit para 60, Record page 364.

[37] Founding Affidavit para 36, Record p 20.

[38]Answering Affidavit para 63, Record page 365.

distributable reserves to its shareholders in the form of a special dividend.The applicant had on a number of occasions previously approached the management of NWK with proposals in this regard, but had not met with success.[39]During the period December 2003 to February 2004 a so-called 'consortium partnership' consisting of the applicant and ACMB had also made proposals to the management of NWK along these lines, but their proposals were ultimately rejected by the management of NWK in March 2004.[40]

[37] As happened in the case of the Pioneer project, Van der Spuy mentioned his ideas regarding NWK within the focus group and was asked to prepare a memorandum for presentation to the respondent. This he duly did, using an adaptation of a document which he had used in previous presentations regarding NWK.[41]

[38] Essentially the proposal contemplated the acquisition of a significant number of shares in NWK by a consortium consisting of the applicant, the respondent and another investor who would provide the necessary capital to buy the shares, as neither the applicant nor the respondent was possessed of the necessary funds.[42] The idea was that the consortium, as the holder of a significant block of NWK shares, would be in a position to bring about the contemplated securitization of the NWK book and distribution of the special

[39] Annexure VDS 5, Record p 102 at para 5.4 – 5.5, page 105.

[40] Annexure VDS 5, Record p102 at para 5.7, page 105 and para 5.11, page 106.

[41] Answering Affidavit para 65, p 365.

[42] Annexure VDS 5, Record p 102 at para.

dividend. It was envisaged that this consortium would own 85% of the NWK shares acquired, and that 15% thereof would be owned by Shareco, a company to be established by applicant and respondent. The memorandum records the following regarding the proposed investment arrangement:

> '9.2 KOSP (defined earlier in the document as 'a consortium consisting of Konsult One and Strategy Partners') will establish a consortium that would be willing to fund the purchase of all the NWK shares with 85% of the shares purchased being registered in the name of the consortium and the other 15% in name of Shareco, a company to be established by KOSP.
>
> 9.3 Consortium will fund Shareco's acquisition of the NWK shares by means of participating preference shares at the prime rate of interest.
>
> 9.4 Shareco will each year pay a preference dividend to Consortium equal to the ordinary dividends received from NWK.
>
> …
>
> 9.7 The arrangement between the parties with regard to Shareco will be terminated either on the date that the capital invested by the Consortium has been recovered, or 5 years after the acquisition of the NWK ordinary shares, whichever is earlier.
>
> 9.8 Strategy Partners and Konsult One will be equal partners in Sharecoand will share all other income on an equal basis.' (Emphasis added.)

[39] Various emails exchanged between Marais and Van der Spuy show that the parties worked together in an effort to find a sponsor to invest in the NWK scheme. One potential investor found by the respondent was Actis.[43]Nothing

[43] Founding Affidavit para 42, Record p 22.

materialised, however, and on 4 February 2005 Van der Spuy wrote the following to Marais in an email:

> 'Ons moet asb ons posisie tov NWK evalueer.
> Actis se aandring op 'n meerderheidsaandeelhouding skakel hulle uit wat NWK betref – tensy hulle bereid is om 'n vyandige aanbod te maak en met minderhedi [*sic*] te sit.
> KBN is dalk 'n beter opsie …. Ek verneem graag of daar dalk vordering was met hulle en wanneer ons uitsluitsel sal kan kry.
> Tensy daar 'n duidelike positiewe wending kom wat bogenoemde twee betref, dink ek dit is nodig om ook met ander partye te gesels. Ek weet nie of SP (Strategy Partners) in so 'n geval nog aptyt sou hè vir so iets nie. Indien nie, sou ek graag selfander potensiale beleggers wil nader.'[44] (Emphasis added.)

[40] Marais responded in an email dated 7 February 2005, in which he wrote:

> 'Na RBN einde verlede jaar heel geinteresseerd was om te ontmoet, kom die afsrpaak [*sic*] nie deur die afgelope 3 weke nie. Ek stel voor jy gee my tot einde volgende week hiervoor en dan kan jy gerus voortgaan. As ons 'n SP Associaat-reeling met jou sou aangaan – wil jy nie in elk geval oorweeg om dit dan "in samewerking met SP" verder to ontwikkel nie? Ek stuur die Associaat-raamwerk vir jou deur.'[45] (Emphasis added.)

[41] It does not appear from the record whether Van der Spuy replied to this email, and if so, how he responded. We do know, however, that the parties continued their combined efforts to try to find an investor for the NWK project, for in May 2005 the applicant and the respondent made a joint presentation to the Royal Bafokeng Nation in a further attempt to find such an investor.[46] Again, the attempt was unsuccessful.

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[44] Annexure VDS 8, Record p 124 (Email dated 4 February 2005).

[45] Annexure VDS 8, Record p 124 (Email dated 7 February 2005).

[46] Founding Affidavit para 49, Record p 25; Answering Affidavit para 70, Record p 368.

[42] The parties did not ultimately manage to find a suitable investor to participate in the NWK scheme. The contemplated consortium was never established, Shareco was never formed and nothing came of the concept. The NWK project simply came to a standstill. [47]

The Swartland Overberg ("SWOV") Project

[43] Van der Spuy had an idea for the merger of a number of agricultural businesses in the Swartland and Overberg into a new company called Swartland-Overberg ('SWOV'), and investment in the equity of SWOV and Pioneer ('the SWOV proposal').

[44] In January 2004, the applicant, acting in a consortium with ACMB called 'ACKO', had presented this idea to various businesses targeted for the merger. ACKO was not successful, however, in obtaining a mandate to investigate and develop the SWOVproposal.[48]

[45] Since ACMB had indicated that it was no longer interested in pursuing the SWOV proposal, the applicantapproached the respondent to assist in finding a suitable investor to invest in the scheme.On 7 October 2004 Van der Spuy sent Marais a memorandum containing his ideas for the creation of SWOV and how the parties would co-operate on the project ('the SWOV memorandum').

[47] Answering Affidavit para 68.3, Record p 367.

[48] Annexure VDS 11, Record p 128 at p 129.

[46] It appears from paragraph 6 of the SWOV memorandum[49] under the heading 'Proposal to Sponsor' that the SWOV proposal contemplated the formation of aninvestors' consortium comprising the applicant, the respondent and a 'sponsor' who would be prepared to fund the investment in SWOV shares and give 15% of the shares acquired to the applicant and the respondent as a so-called 'carried interest', ie, an interest funded by means of a loan from the principal investor or sponsor rather than a capital contribution. Paragraph 6.3 of the SWOV memorandum records that:

> 'Strategy Partners / Konsult One require a merchant/investment banking partner that would be willing to participate in the project on a risk basis and share in a percentage of the income to be generated by the project in exchange for the following:
>
> - provision of legal and structuring advice …;
> - assistance with the implementation of the scheme;
> - carrying the direct costs of the scheme; and
> - payment of a support fee to Strategy Partners / Konsult One
>
> Strategy Partners / Konsult One proposes the following arrangement:
>
> - Sponsor will, subject to a projected after-tax IRR on investment of 15%, provide or source the funds for investment with a 15% carry to Strategy Partners / Konsult One funded via preference shares at 70% of prime;
> - Sponsor will provide legal and structuring advice in respect of the proposed scheme, strategy and procedures; and
> - Sponsor will carry the direct costs of the scheme but be entitled to recover it from fees earned.' [50]

[47] Applicant and respondent collaborated in an attempt to find a suitable sponsor to implement the SWOV proposal. They made a joint presentation of the

[49] Record p 136.

[50] Annexure VDS 11, Record p 128 at p 136.

SWOV proposal to the chairman of BolandAgri ('BOL') on 15 December 2004, approached the chief executive officer of Actis and wrote to KaapAgri in regard thereto.Marais involved attorneys Jan S De Villiers with the aim that they would form part of the task team which would implement the merger transaction.

[48] Ultimately, however, the required investment partner or sponsor was never found, the SWOV proposal was never implemented and the SWOV project died a natural death without yielding any income.

The Email of 7 March 2005

[49] On Friday 4 March 2005, a discussion took place between Marais and Van der Spuy, the contents whereof are not dealt with in either of the parties' affidavits.However, it is clear that this discussion precipitated an email from Van der Spuy to Marais dated 7 March 2005, regarding 'SWOV en ander', in which he dealt with theprojects on which they had hitherto collaborated and the question of reward-sharing. The letter is instructive regarding the state of affairs between the parties at that stage:

> 'Ek verwys na ons gesprek van Vrydag.
> Ek glo beide SP en KO het gefouteer deur nie die samewerkingsbasis reg van die begin of vas te maak nie. Ons het elk ons eie verwagtinge gehad. KO het 'n ondersteuningsfooi gesoek en 'n kapitaalvennoot. SP het sekere verwagtinge gehad mbt winsdeling.
>
> Ek dink die enigste manier om goeie trou te behou is om te aanvaar ons is 50:50 vennote in kapitaalwins/beleggingsgeleenthede en ook suksefooie (na aftrekking vir insette). …

Die betrokkenheid tot datum verskil insoverre dit SWOV, Pioneer en NWK aangaan.

(1) SWOV

Die volgende stap wat SWOV betref is die formalisering van ’n aanbod struktuur en die beliggaming daarvan met syfers ten einde waardes en potentiale opbrengste. Jan S sal hier seker beginsel uitklaring moet gee. Meeste van die werk gaan syfers behels en moet deur KO gedoen word. Jan S se insette relatief tot KO en SP sal dus min wees.

…

Wat die carry betrefis dit my gevoel dat Jan S nie op iets meer aanspraak kan maak as hulle pro-rata gedeelte van insette nie – tensy hul kapitaal bydra. CN se gedagte dat Jan S iets in die pot gooi om die ondersoek en die bestuur van die aksie te befonds, maak vir my sin en sal hul geregtig maak op ’n groter winsdeel.

(2) Pioneer

Die basis waarop SP genader is was dat SP die ondersoek befonds in ruil vir ’n winsdeel. Dit het nie so geraliseer nie en ons het hier ook niks vasgemaak nie.

SP se bydra tot dusver is beperk tot die bywoning deur Frank Kilbourne van ’n vergadering met WPK en BOL. Bloot op insette geoordeel glo ek nie SP kan tans hier aanspraak maak op ’n 50:50 verdeling nie. Ek aanvaar egter dat ’n Pioneer mandaat uitendelik kan voortvloei uit ’n SWOV betrokkenheid.

My voorstel sou dus wees dat alle kapitaalwins asook suksesfooie (na aftrekking van vergoeding vir insets) hier 50:50 verdeel word. Op hierdie stadium sal KO meer aan insetkoste verhaal maar dit kan wissel namate SP meer betrokke raak.

(3) NWK

Die basis waarop SP genader is was dat SP die ondersoek befonds in ruil vir ’n winsdeel. Dit het nie so geraliseer nie en ons het hier ook niks vasgemaak nie.

My voorstel sou dus ook hier wees dat alle kapitaalwinste asook suksefooie (na aftrekking van vergoeding vir insette) hier 50:50 verdeel word. Op hierdie stadium sal KO meer aan insetkoste verhaal maar dit kan wissel namate SP

meer betrokke sou raak. Hierdie reeling sal egter net geld ten opsigte van kapitaalvennote wat deur SP na die tafel gebring word.
Wat die verkryging van kapitaalvennote betref glo ek ons moet 'n tydsbeperking stel. Indien SP nie binne die volgende twee maande met Actis of KNB kan regkom nie, sal ek graag wil voortgaan om self potensiele vennote te vind.

(4) VBK
Hierdie een was nog nie werklik op die tafel nie maar ek het dit wel genoem as 'n moontlikheid. Ek will dit graag probeer ontwikkel maar nie op risiko nie maw ek soek 'n sponsor wat bereid is om die ondersoek to befonds (soos wat ek met bg drie ook beoog het).
Ek beoog om na 'n akspebank te gaan op dieselfde basis as wat ek met ACMB en NWK gedoen het. As SP belangstel om betrokke te raak en dit te befonds sal ek dit so verkies maar weet ek julle kontanvloei is beperk.' [51]
(Emphasis added.)

[50] There is no evidence in the record that Marais replied to Van der Spuy's email of 7 March 2005 and responded to the proposals contained therein. This notwithstanding, the applicant continued to work on the agricultural projects with the respondent.

The NewFarmers Project

[51] Van der Spuy was aware of SPE's affinity for the agricultural sector and on 12 May 2005 he suggested to Marais that they approach Pieter Kriel, the CEO of SPE ("Kriel"), to see whether they could interest SPE in making investments in agricultural businesses such as NWK, SWOV, Senwes and VBK.[52]

[51] Annexure VDS 9, Record p 125.

[52] Annexure VDS 10, Record p 127.

[52] On 17 June 2005 Van der Spuy and Marais met with Kriel to discuss the possible involvement of SPE in agricultural undertakings with the specific aim of securing SPE as afinancier for the NWK and SWOV projects.[53]Kriel suggested that these proposals should be advanced via NewFarmers Development Company Limited (NewFarmers), an investment company in which Sanlam was a major shareholder and which focussed on agricultural investments with a black economic empowerment (BEE) mandate.

[53] Marais and Van der Spuy held various meetings with representatives of NewFarmers, as a result whereof the directors of NewFarmers appointed the respondenton 28 September 2005 to investigate the restructuring of NewFarmers. (I shall refer to this mandate as the 'NewFarmers mandate'.) This work was done jointly by applicant and respondent,[54] and resulted in the presentation of a memorandum, 'the Restructure Memorandum' to the NewFarmers directoratein which recommendations were made forthe restructuring and recapitalisation of NewFarmers.

[54] Following this presentation,the NewFarmers board of directorsmandated the respondent to proceed only with the recommendation for the rationalisation of NewFarmers, and not with the suggested recapitalisation of the company. The work in this regard was undertaken by the applicant and the respondent.[55]The New Farmers directors were not interested in granting a wider mandate for the recapitalisation of the company.

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[53] Founding Affidavit para 63, Record p 30; Answering Affidavit para 74.3, Record p 370.

[54] Founding Affidavit para 70, Record p 31.

[55] Founding Affidavit para 72 – 74, Record p 32.

[55] In the wake of these events, a consortium of institutional shareholders, which included SPE, was interested in acquiring a large stake in NewFarmers.[56] SPE therefore mandated the respondent in November 2005 to review the values of the underlying NewFarmers investments and to formulate an investment proposal in regard thereto, drawing on the recommendations made in the Restructure Memorandum.[57](I shall refer to this mandate as 'the SPE mandate'.)Again, the work done in execution of the mandate was performed by the applicant and the respondent.

[56] Fees were earned in respect of the work done on the NewFarmers SPE mandates. The record show that the respondent rendered invoices to NewFarmers and SPE for professional services rendered, and that the applicantin turn invoiced the respondent for the work which it had done in respect of that particular mandate.

[57] In October and December 2005 respondent invoiced NewFarmers for fees totalling R 117 250.00 (excluding VAT and disbursements) for 'professional restructuring services'.[58]The applicant, at the same time,rendered invoices to the respondent, and was duly paid, for fees totalling R 50 000.00 in respect of the NewFarmers mandate.[59] Thus the applicant received approximately 42% of the total fee of R 117 250.00.

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[56] Annexure HM 32, Record p 429 at p 430.

[57] Annexure VDS 22, Record p 157, read with Annexure HM 32, Record p 429 at p 431 – 432.

[58] Un-numbered Annexure, Record p 423, read with Annexure HM 28, Record p 424.

[59] Annexure HM 30, Record p 427; Annexure HM 31, Record p 428.

[58] The total fee which respondent agreed with SPE in respect of the SPE mandate was an amount of R 96 000.00, excluding Vat and disbursements).[60]Respondent invoiced SPE for R 96 000.00 plus VAT and disbursements[61] and Marais initially made provision for a fee of R 40 000.00 for the applicant.[62] Van der Spuy was not happy with this division and he and Marais then agreed on a fee of R 48 000.00 for the applicant, i.e., 50 % of the total fee received by the respondent.[63] Applicant rendered an invoice to respondent for an amount of R 56 681.00 in respect of the SPE mandate (which comprised the fee of R 48 000.00 and VAT and disbursements), and was duly paid the amount of R 56 681.00.[64]

[59] It is instructive to have regard to the contents of the last paragraph of an email which Marais sent to Van der Spuy on 16 January 2006, in which he informed him of the amounts which he had provisionally allocated to applicant in respect of the NewFarmers and SPE mandates, and went on to say the following:[65]

> 'Bostaande is nie in graniet nie as ons verstellings moet aanbring. Verder wil ons aan SP kant voortaan ons rekonsiliering tussen ons klient en subkontrakfakture verbeter. In jou geval wil ek vra dat jy jou fakture voortaan in proforma vorm aan my deurstuur – dit word dan hirdie kant 'gematch' met klientfakture en ons gee vir jou 'n verwysingsnommer wat jy op jou finale

[60] Annexure VDS 22, Record p 157.

[61] Annexure HM 33, Record p 437.

[62] Annexure VDSR 1, Record p 469.

[63] Replying Affidavit para 98 – 101, Record p 466 – 467.

[64] Annexure VDS 22, Record p 157 and Annexure VDSR 2, Record p 470.

[65] Annexure VDSR 1, Record p 469.

faktuur kan aanbring en aan SP se kantoor kan deurgee. Hierdie is net adminreelings vir die huidige en affekteer nie onsander gesprek oor ons moontlike gesamentlike bedeling vorentoe nie.' (Emphasis added.)

The Capespan Project

[60] Van der Spuy had an idea for the restructuring of Capespan. In July 2005 He proposed that the applicant, the respondent and Gawie Niewoudt ('Niewoudt'), an Orange River fruit farmer, work together on the project. As with previous projects, the idea was to get the shareholders of Capespan to furnish a mandate to investigate and make recommendations, which would potentially result in a restructuring of the entity with a concomitant investment opportunity. Van der Spuy proposed that the prospective rewards be shared between applicant, respondent and Niewoudt in accordance with contributions made during three phases of the project. The contribution envisaged by the respondent was that the project would be done under its name and that that it would be responsible for finding the investor or 'kapitaal/strategiese venoot' who would fund the investment.[66]

[61] Emails were exchanged between Marais and Van der Spuy in July 2005 regarding the proposed reward-sharing in respect of the Capespan project, but no firm agreement was reached.[67]

[66] Annexure VDS 23, Record p 159 at p 162.

[67] Annexure VDS 23, Record p 159 – 162.

[62] The record shows no further work being done on the Capespan project until June 2006, when Van der Spuy and Marais met with a representative of Venfin to discuss a potential investment by Venfin in Capespan. It would appear that nothing came of this meeting.

[63] The record shows that during October to November 2006 Van der Spuy corresponded with Kennett Sinclair ('Sinclair') of SPE in an attempt to interest SPE in becoming involved in the Capespan project. On 7 November 2006 Sinclair indicated that SPE was not interested in doing so. This correspondence between applicant and Sinclair was not copied to Marais.

[64] On 8 December 2006 Marais notified Van der Spuy in an email that the respondent was withdrawing from the Capespan project and that the applicant should proceed in its own name in regard thereto, without the involvement of the respondent.[68]

The Citrifruit Project

[65] Van der Spuy had an idea involving Citrifruit. No detail is provided in the papers regarding the nature of the project. What does appear is that Van der Spuy sent an email on 3 August 2006 to Marais and to Hannes le Roux of NewFarmers in which he proposed that applicant, respondent and NewFarmers work together on the project. He wrote that:[69]

[68] Annexure VDS 26, Record p 172.

[69] Annexure VDS 27, Record p.173.

'Wat die samewerking tussen SP, NB en KO betref stelek die volgende voor:

1. Elke party ontvang 15% van aandele en/of suksesfooie wat uitdie transaksie mag voortvloei.
2. Die balans, na vergoeding van risiko-insette, word verdeel op grond van risiko-insette.
3. Risiko-insette word gedefinieer as (a) tyd gespandeer waarvoor 'n markverwante vergoeding nie ontvang word nie en (b) kapitaal uitgelê ten einde uitgawes te befonds.'

[66] NewFarmers was not interested in participating in the project, and on 4 September 2006, Van der Spuy sent a letter, written on the applicant's letterhead, to the CEO of Afgri Products, in which he requested that a mandate be furnished to 'Strategy Partners en Konsult One' to investigate the proposal in regard to Citrifruit.[70]

[67] Evidently nothing came of this request. There is no indication that any further work was done with regard to the Citrifruit project, and it is common cause that no income was derived therefrom.

The Agrifund Project

[68] The idea behind the Agrifund project was to bring about the establishment of a dedicated private equity fundfor investing in agriculture. This involved the formation of an investment vehicle equipped to make large scale investments in the agricultural sector and a management company, which would manage the Agrifund in terms of a management contract in exchange for an annual

[70] Annexure VDS 28, Record p 174.

management fee and a carried interest. I shall refer to the contemplated Agrifund management company as 'Manco'.What was required to realise the Agrifund concept was a financially strong sponsor willing to participate in the project, and through a process of negotiation SPE was ultimately persuaded to fulfil this role.

[69] Where this idea originated and who was responsible for initiating the project was fiercely disputed on the papers. It is neither possible nor necessary to resolve this dispute in motion proceedings. It is both appropriate and sufficient, for present purposes, to accept the contemporaneous statement by Marais that it was a project which came about through collaboration between the applicant and the respondent, '(*D)it is 'n projek wat in samewerking tussen ons tot stand gekom het.'*[71]

[70] As I have mentioned, during May 2005, when the parties had had no success in finding an investor for the SWOV and NWK projects, Van der Spuy suggested that they meet with Kriel, to discuss the possible involvement of SPE in agricultural undertakings. This meeting, held on 17 June 2005, led to contact with NewFarmers and to the NewFarmers mandate referred to above.

[71] In September 2005, in the context of discussions regarding a possible recapitalisation of NewFarmers, Van der Spuy attempted to interest NewFarmers in the idea of becoming a vehicle for investing in agricultural businesses. The attitude of NewFarmers, however, was that it was not

[71] Annexure VDS 80, Record p 255 at para 1.3, p 257.

suitable to operate as a 'hoër vlak voertuig' for agricultural investments, as had been proposed in discussions. [72]

[72] On Tuesday 25 October 2005 and at Van der Spuy's request, Marais met with Van der Spuy in Durbanville to discuss the parties' continued co-operation in the context of agriculture.

[73] At that time Van der Spuy was busy preparing a presentation which he intended to make in his own name to SPE and Sanlam Capital Markets regarding opportunities in agriculture.[73] Respondent was at that time also working on a project in which the applicant was not involved, 'Die Grootene', which involved a broad fund management proposal which respondent intended presenting to Sanlam.

[74] It appears from the contents of an email written by Van der Spuy to Marais on 27 October 2005, in which reference is made to their meeting on 25 October 2005, that the parties discussed the possible formation of a joint venture in regard to projects involving agriculture. This email, which dealt with the subject of 'Landbou en samewerking', read as follows:[74]

[72] Founding Affidavit para 94 – 96, p 37 – 38.

[73] There is a dispute on the papers regarding the nature of this presentation. Van der Spuy alleges that it involved the setting up of a fund to make investments in agricultural. Marais alleges that it involved funding of a type of 'agribank' which would provide debt financing for agricultural corporations. He denies that it involved the establishment of a private equity fund. Nothing turns on this dispute, however.

[74] Annexure VDS 35, Record p 183.

'Verwys ons gesprek van Dinsdag oor die stigting van 'n JV asook die voorlegging aan Pieter Kriel en SP se volgende gesprek met Johan van der Merwe.

Ek is besig om iets voor te berei vir SPE en Sanlam Capital Markets. Ek wil egter versoek datons asseblief vooraf die samewerkingsbasis tussen SP en Konsult One vasmaak voordat ons verder gaan en julle landbou ook betrek in die groter mandaat by Sanlam. As agtergrond verwys ek na my epos van 7 Maart 2005.

Ek stel graag die volgende voor:

1. Alle transaksies wat Konsult One na SP verwys het of verwys en ook NuweBoere, word deur 'n JV hanteer waarin SP en Konsult One 55:45 vennote is.
2. Die JV dra 'n SP gekoppelde naam (bv Strategy Partners Investments ("SPI")) sodat SP die naamblootstelling kry en ek die gewone SP visitekaartjie kan gebruik (na buite tree ons dus as SP op maar kontrakte sal in naam wees van SPI).
3. Alle besluite word in 'n aandeelhouersooreenkoms gedek en verg goedkeruing van beide partye.
4. Alle daaropvolgende geleentheede word deur SPI gekanaliseer.
5. Alle mandate is in naam van SPI.
6. Alle fooie en inskomste vloei deur SPI.
7. Insette wat op my en jou vlak deur Konsult One en Strategy Partners aan SPI gelewer word word verreken teen R 1000 per uur. Ander vlakke word onderhandel.
8. Kostes en insette waar betaling nie gewaarborg is nie, word as risiko insette beskou en word deur SPI verged teen drie maal die bedrag.
9. Al SPI se winste word as dividend of fooie uitgekeer tensy die partye anders ooreeenkom.
10. Uur insette word maandeliks gerekonsilieer.

Ek verneem graag van jou.' (Emphasis added.)

[75] Marais responded to Van der Spuy's proposal in an email dated 3 November 2005[75], in which he suggested that a 'master JV agreement' dealing with principles and procedures for co-operation would go down better with Exco than a permanent corporate structure, which could be seen as problematic. Marais also set out his vision for remuneration and reward-sharing, which was based on the guidelines. The email concluded with the words, 'Maak bostaande enige sin? Kan ons bespreek.'

[76] On 24 November 2005, Van der Spuy informed Marais by email that he was reviewing the basis of co-operation between the applicant and the respondent. He requested a copy of respondent's standard associate agreement in order to better evaluate Marais's proposed reward model and also to formalise the basis on which the applicant had been sub-contracting for respondent on certain of its projects (i.e., the non-agricultural projects).[76]

[77] On 28 November 2005, Marais sent Van der Spuy an email to which he attached copies of the standard invitation letter sent to associates and the guidelines. He acknowledged that the conversations and correspondence between himself and Van der Spuy had revealed deficiencies in the guidelines, and he proposed that they continue negotiating in this regard. He also pointed out that the respondent was busy reviewing its reward-sharing structure, and that this might result in a satisfactory model for the parties in due course.[77]

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[75] Annexure VDS 36, Record p 184.

[76] Founding Affidavit para 103, Record p 40.

[77] Annexure VDS 37, Record p 185.

[78] On 24 January 2006, Marais informed Van der Spuy in an email that the respondent's presentation of Die Grootene at Sanlam had not met with success and that they must now proceed in earnest with the Agrifund project, 'Ons moet nou voluit gaan vir die Agrifonds.'[78]

[79] Marais and Van der Spuy subsequently agreed that Marais would assume responsibility for facilitating appointments and meetings relating to the Agrifund project and that Van der Spuy would be responsible for the documentation and technical aspects, and also for investigating potential investments which came to light during the course of the Agrifund project.[79]

[80] It is evident from the contents of email correspondence between Marais and Van der Spuy in May 2006 that communication was underway between Marais and Kriel regarding the possible involvement of SPE in the Agrifund project, and the preparation of a memorandum of understanding with SPE.[80] Both Marais and Van der Spuy considered that it was necessary at this time to formalise the basis of co-operation between the applicant and the respondent. Marais wrote on 12 May 2006 that, 'Ons moet seker mettertyd iets dergeliks tussen ons optrek?'[81] and Van der Spuy replied on 13 May 2006 that:[82]

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[78] Annexure VDS 38, Record p 186.

[79] Founding Affidavit para 106, Record p 41.

[80] Annexure VDS 39, Record p 187. (Email dated 12 May 2006 from Marais to Van der Spuy.)

[81] *Ibid.*

[82] Annexure VDS 39, Record p 187. (Email dated 13 May 2006 from Van der Spuy to Marais.)

> 'Die MoU moet in gedagte hou dat dit nie SP self sal wees wat as Manco optree nie maar 'n JV tussen SP en Konsult One. Dit is dus dringend noodsaaklik dat ons ook ons samewerkingsbasis uitsorteer.'

[81] On 19 May 2006 Van der Spuy sent Marais an email which contained proposals regarding the future basis of co-operation in respect of the agricultural projects other than the Agrifund project.[83] To this email was attached a letter, written on the applicant's letterhead and dated 18 May 2006, which dealt specifically with the Agrifund project.[84] The relevant portions of the letter of 18 May 2006 read as follows:

> 'Konsult One ("KO") and Strategy Partners ("SP") together ("KOSP") have, in close cooperation with Sanlam Private Equity ("SPE"), been involved in the process of creating a private equity fund for agriculture ("AgriFund"). It has been tentatively agreed with SPE that KOSP will be entitled to a 50% shareholding in the management company of Agrifund ("Manco") and that KOSP will be entitled to manage Manco in terms of a management agreement to be concluded between KOSP and Manco.
>
> This letter serves to outline the basis for cooperation between KO and SP as partners in KOSP (the "parties").
>
> 1) KOSP will be formed as a private company in which shareholding will be split 60:40 in favour of SP.
> 2) The name to be selected will recognise the existence of a partnership between the parties and will not favour any of the parties.
> 3) A shareholders agreement will be drafted to incorporate the points mentioned below and also, inter alia, provide for joint decision making and pre-emptive rights together with come-along/take-along clauses.
>
> …
>
> 8) KOSP will have a maximum of five board members and each party will be entitled to nominate a board member for every 20% shareholding.

[83] Annexure VDS 42, Reord p 190.

[84] Annexure VDS 40, Record p 188.

…

Kindly return a signed copy of this letter as acknowledgement of your acceptance of this arrangement.' (Emphasis added.)

[82] As regards the other agricultural projects, Van der Spuy expressed dissatisfaction at the manner in which these projects had hitherto been conducted, which he felt was prejudicial to the applicant as respondent was getting all the exposure while applicant's role was not publicly acknowledged. For this reason he proposed that, in future, the applicant and the respondent should tackle projects together in a consortium where both parties would be fully recognized and where the respective shares would differ from project to project on the basis of contributions made. The following comments made by Van der Spuy are instructiveas regards the basis on which they had hitherto worked together on the agricultural projects(exluding the Agrifund):[85]

'Ek het weer besin oor ons samewerking en maak graag die volgende opmerkings as agtergrond:

1) Ek het groot respek vir jou as professionele person en die wyse waarop ons tot dusver saamgewerk het. Terselfdertyd het ek weinig skakeling met en belang by die ander deelnemers in SP asook sy assosiate en sien ek myself nie as lid van SP nie. Wat my betref lê die waarde wat SP vir KO inhou dus grootliks in jou persoonlike betrokkenheid en sal ek graag op ons verhouding wil voortbou.
2) Tot dusver het ek en Konsult One grootliks 'n agtergrondrol gespeel in van die projekte wat ek na die tafel gebring het deurdat dit onder Strategy Partners se vlag gedoen is (bv Pioneer, KaapAgri, NWK en Capespan.) Hierdie werkwyse benadeel egter vir Konsult One en sal ek dus verkies dat waar ons vorentoe saamwerk die klem deurgaans sal val op 'nkonsortium bestaande uit Strategy Partners en Konsult One (waarvan die aandeelhouding mag verskil van projek to projek.) Dit is die rede

[85] Annexure VDS 41, Record p 190.

waarom ek voorstel dat die JV in die geval van die Agrifonds 'n naam drawat nie vir KO benadeel nie.

…

7) In wese kom my voorstelle dus daarop neer dat beide consortium vennote volle erkenning geniet en dat SP bereid sal weeks om in seker gevalle die minderheidsparty te wees. Die reeling waar ons saamwerk en dan uiteindelik "uitgelewer" word aan die genade van SP se Exco is dus nie aanvaarbaar nie.
8) Ons sal dus wat elke projek betref vooraf moet bepaal hoe insette vergoed gaan word. …
9) Jy het genoem dat SP besig is om sy besigheidsmodel to heroorweeg en sal ek verheug wees indien SP sy weg oopsien vir so 'n samewerkingbasis. Ek verneem dus graag van jou.' (Emphasis added.)

[83] On 6 June 2006 Marais and Van der Spuy met at Old Mutual to discuss the contents of the letter of 18 May 2006 and the email of 19 May 2006. At Marais' request he and Van der Spuy evaluated the respective contributions made by the applicant and the respondent in respect of the Agrifund Project as at that stage. The result of the joint evaluation was a weighting of 56:44 in favour of the respondent.[86]According to Marais he initiated this evaluation exercise in terms of the guidelines because the co-operation arrangements between the applicant and the respondent were under discussion and it was therefore necessary to assess the relative contributions made by the parties towards the first part of the development phase of the Agrifund Project.[87]

[84] Marais states that the purpose of the exercise was to provide a basis for assessing the relative contributions of the applicant and the respondent towards the development of the Agrifund Project. When the evaluation was

[86]Founding Affidavit para 112, Record p 44.

[87]Answering Affidavit para 81.6, Record p 377 - 378.

later discussed by Exco, it came to the conclusion that Marais had underestimated the contribution made by the respondent and other individuals in regard to the development of the Agrifund.[88] After discussing the matter with Exco, Marais informed Van der Spuy on 10 June 2006 that there would have to be further discussions regarding the division of the shareholding in Manco. [89] On 12 July 2006, Marais wrote an email to Van der Spuy in which he stated, *inter alia*, that:[90]

> 'Gedink ons moet 'stock vat' oor waar ons staan met Agri1 en aksieplanne vorentoe. Hoe lyk jy Maandagmiddag 17/7 of Dinsdag 18/7?
>
> Wat die SP/KO samewerkingsmodel betref is daar gemaklikheid by SP oor al die beginselpunte. Wat toepassing op Agri1 betref is daar punte om deur te praat oor die verspreiding van aandeelhouding in Manco se carried interest. Sal ons hanteer saam met bg gesprek?' (Emphasis added.)

[85] Van der Spuy and Marais met on 18 July 2006 to discuss the matter of how profits derived from Manco would be divided between the applicant and the respondent, but no agreement could be reached in this regard.[91] Van der Spuy's point of departure was that the applicant should have 40% of the shares in the joint venture company which the applicant and respondent intended to form to hold shares in Manco ('the envisaged JV Company'), whereas the respondent was only prepared to offer applicant 10 % - 15% of the shares in the envisaged JV Company.[92]

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[88] Answering Affidavit para 81.7, Record p 378.

[89] Annexure VDS 80, Record p 256 at para 1.5, Record p 257.

[90] Annexure VDS 43, Record p 192 (Email dated 12 July 2006 from Marais to Van der Spuy).

[91] Founding Affidavit para 115, Record p 44; Answering Affidavit para 81.10, Record p 379.

[92] Answering Affidavit para 81.8, Record p 378 – 379; Annexure VDS 89, Record p 276.

[86] Further emails were exchanged between Marais and Van der Spuy between 19 and 31 July 2006, from which their differing perspectives and negotiating positions are apparent. The contents of the following two paragraphs in a letter written by Van der Spuy on the applicant's letterhead, dated 20 July 2006, are revealing:[93]

> ' 2) Wat SP se "rustigheid' oor die transaksie betref, het ek reeds lank gelede aangedui dat SP se benadering mbt bestuur na die transaksie nie aanvaarbaar is nie en dat ek voortgaan op die verstandhouding datons met 'n JV eindig waar die enisgte groot veranderlike die uiteindelike aandeelhouding is. Jy was bewus hiervan en ek het 'n paar keer versoek datons ons vehouding formaliseer. Ek glo nie ander SP lede kan nou op so 'n laat stadium verwag dat 'n ander reeling in plek geplaas word nie.
>
> 3) Ekself beskou KO nie as 'n "gemiddelde SP aandeelhouer" nie maar as vennoot in 'n besigheid waarvan die uiteindelike sukses vir my net so belangrik is as vir SP. Ek het aanvaar ons verhouding het sy beslag in 'n 60:40 vennootskap gevind. SP se jongste voorstel sal beteken dat KO afgeskaal word van 'n 40% vennoot tot 'n indiwidu wat dalk 10% kan kry – afhangende doe onbekende toekomstige derdepartye eendag daaroor sal voel.'(Emphasis added.)

[87] Marais acknowledged receipt of the letter of 20 July 2006 on the same day, and indicated that he would have to study the contents before discussing it further.[94]On 31 July 2006 Marais and Van der Spuy met to discuss, *inter alia,* the question of sharing the anticipated profits in the Agrifund project and preparation of a memorandum of understanding between the applicant and the respondent and the envisaged JV Company. It is apparent from an email sent by Van der Spuy to Marais on 3 August 2006, which served as a minute

[93] Annexure VDS 46, Record p 196.

[94]Annexure VDS 47, Record p 201.

of this meeting, that the parties intended to enter into a written shareholders' agreement in regard to their relationship within the envisaged JV Company:[95]

> '16. MOU tussen KO en SP en JV – Ons moet op naam besluit en aandeelhouersooreenkoms teken. Ek sal konsepooreenkoms deurgee vir jou kommentaar.' (Emphasis added.)

[88] The negotiations conducted by respondent, in the person of Marais, with SPE progressed well, and on 11 September 2006 a memorandum of understanding was signed by SPE and Marais, ostensibly on behalf of the respondent ('the SPE MOU'). The salient parts of the SPE MOU read as follows:[96]

> '1. Background:
> - SPE, and SP are in advanced discussions about the establishment of a new Agribusiness Investment Fund…
> - The provisional name of the new fund is "AgriOne"/"Agri1".
> - The establishment of AgriOne is to co-incide with the restructuring of NewFarmers Development Co. SP is the designated manager (meaning that it will have the day-to-day responsibility) of Manco, the management company which is envisaged to manage the new fund.
> - SPE (25%), SP(50%) and a BEE partner are the prospective shareholders in Manco. SPE is prepared to take up a lesser shareholding provided SPE remains entitled to 25% of gross management fees and 25% of the carried interest received by Manco.

[95] Annexure VDS 49, Record p 205.

[96] Annexure VDS 52, Record p 207.

> 2. SPE confirms its commitment to contribute 25% of the capital of AgriOne, …, subject to a successful raising of the balance of the funds from other parties. …
> 3. SP will, on the basis of SPE's capital commitment and with the active support of SPE, undertake a fundraising process with the objective of procuring the balance of the capital required. …'

[89] On 12 September 2006 Van der Spuy asked Marais for written confirmation that he signed the SPE MOU 'namens JV'.[97] On 25 September 2006 Marais wrote to the applicant on a Strategy Partners letterhead enclosing a copy of the SPE MOU and confirming that the SPE MOU had been signed on behalf of a joint undertaking between the applicant and the respondent. He wrote as follows in this regard:[98]

> 'Ek bevestig ook hiermee dat ek die betrokke Memorandum met Sanlam Private Kapitaal mede-onderteken het namens die gesamentlike onderneming tussen Strategy Partners (Edms) Bpk en Konsult One BK met betrekking waartoe 'n verdere Memorandum van Verstandhouding tans tussen ons gefinaliseer word.' (Emphasis added.)

[90] Marais says that he sent this letter in an effort to placate Van der Spuy who was anxious because the parties had not yet reached consensus regarding the basis of their co-operation.[99] He states that:[100]

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[97] Annexure VDS 52, Record p 209.

[98] Annexure VDS 55, Record p 212.

[99] Answering Affidavit para 83, Record p 380.

[100] *Ibid.*

> 'Ek was deurlopend van mening dat Van der Spuy 'n waardevolle rol soukon speel wat betreff die Agrifonds en wou ek hom dus gerusstel met woormelde skrywe. Die doel was nie om daarmee 'n einde to bring aan die onderhandelinge tussen die partye nie aangesien die grondslag vir samewerking nog ooreengekom moes word soos dan ook aangedui in voormelde skrywe.' (Emphasis added.)

[91] Work on the Agrifund Project continued apace, with both Marais and Van der Spuy actively involved in the matter. Negotiations also continued with regard to the basis of co-operation between the applicant and the respondent. On 2 October 2006, Marais sent Van der Spuy a draft memorandum of understanding between applicant and respondent regarding the establishment and management of AgriOne.[101]The following paragraphs in this document are relevant:[102]

> 'Background
> …
>
> 1.2 SP and KO have developed an opportunity to lead the management of an agri-investment fund ("AgriOne") to a stage where a MoU has been signed with Sanlam Private Equity ("SPE"), the sponsoring investor, in this regard. In terms of this MoU, SP and KO will together hold 50% of the shares in the management company of AgriOne.
>
> 1.3 SP and KO now wish to record their mutual understanding of how their cooperation in the specific context of AgriOne will take place. This Memorandum will be superseded by Heads of Agreement and / or a shareholders agreement giving legal effect to the parties' intentions.

[101]Annexure VDS 58, p 217.

[102]*Ibid.*

Creation of AgriOne Management Holding Company (Pty) Ltd ("Manholdco")

2.1 The parties will create Manholdco for the purpose of housing SP and KO's joint shareholding in the management company of AgriOne ("AgriOne Manco").

2.2 The parties' respective shareholding in Manholdco will be as follows:

2.2.1 SPX%
2.2.2 KO Y%
…

3.3 SP and KO will share in the net operating profits of Manco according to their respective shareholdings in Manholdco.

3.4 Carried interest accruing to Manholdco as shareholder in Manco, after allocation of Manco Management and directors' share in the carried interest, which is anticipated to be 50 – 60%, will accrue to SP and KO in accordance with their relative shareholdings in Manholdco. Representatives of KO and SP are entitled to share in the management and directors' share of the carried interest to the extent that they fulfil related roles over and above their roles as shareholders in Manholdco.'

[92] On Tuesday 3 October 2006, Marais and Van der Spuy met at Cape Town airport and the question of the parties' prospective shareholding in the envisaged JV company was discussed. Marais informed Van der Spuy that an allocation of a 40% shareholding to the applicant was not acceptable to the respondent and that he would try and secure the approval of the respondent for a 25% shareholding for applicant.[103]

[103] Founding Affidavit para 132, Record p 51- 52; Answering Affidavit para 85, Record p 361.

[93] On 5 October 2005 Van der Spuy fired off anangry email in which he rejected the idea of a 25% shareholding and set out his views in no uncertain terms:[104]

> 'Die hele landoudryf kom van Konsult One af.
> Dit is 'n Konsult One voorstel waarop SP ingekom het. (Ek het julle te goeder trou steeds betrek ondanks die feit dat SP tot op daardie stadium niks kon bydra op enige van die landboutransaksies – NWK, Pioneer, KaapAgri – nie).
> SP was goed bewus van my uitgangspunt.
> SP het welander sienings gehad.
> EK het verskeie versoeke gerig datons dit uitklaar. SP het doelbewus die issue vermy.
> Ek kan geen ander afleiding maak as dat SP himself doelbewus so probeer posisioneer het ten einde sy eie posisie te probeer versterk nie.
> By gebrek aan 'n ooreenkoms is die enigste logiese uiteinde 'n 50:50 verhouding tussen KO en SP.
> As dit nie SP pas nie, moet SP onttrek en aan Konsult One die geleentheid gee om aan te gaan met die projek.'
>
> Ek wil graag aanvaar dat SP se "versoek" en hantering van hierdie samewerkingsbasis 'n "fout" is en nie verteenwoordigend is van SP se besigheidsbenadering nie.
> Dit laat egter 'nongemaklikheid by my en verkies ek om my aanbod om vir Johann te help met SP Capital terug te trek. Ek sal hom afsonderlik so inlig. Ek wil ook versoek dat Johann geen verdere rol speel tov van Capespan nie. (Emphasis added.)

[94] Marais responded in an email dated 5 October 2006 in which he stated that:[105]

[104] Annexure VDS 59, Record p 222 at p 223

[105] Annexure VDS 60, Record p 224.

> 'Ek voel ek moet darem net op record stel dat in my laaste tentatiewe voorstel aan jou ek 'n verdelingsmodel voorgehou het waardeur jy baie naby indien nie verder as jou 40% verwagting van effektiewe aandeel in die carry sou kom.'

[95] Van der Spuy's reply to this email, dated 6 October 2006, shows that, from Van der Spuy's perspective, there was more at stake for him in the percentage shareholding in Manco than mere reward-sharing: he was also concerned about issues of control:[106]

> 'Dit gaan nie net oor verdeling nie maar ook oor beheer en bestuur en die vermoë om ander in te trek. Net so graag soos julle SP wil bou wil ek ook KO bou. Die 40% belang in die JV gee KO ook die geleentheid om te omskep in 'n maatskappy waarin ek 'n belang aan 'n bemagtigingsgroep (kan) afstaan en ander ouens betrek. Dit bied ook die geleentheid om binne JV te verwater en steeds 'n wesenlike belang te behou.
>
> Ek ket die aktiewe uitbou van KO agterwee gelaat omdat daar op 'n stadium sprake was van 'n nouer betrokkenheid by SP. Dit het nie so uitgewerk nie en is ek besig om KO te omvorm in 'n firma met 'n baie groter basis. As julle virmy destyds gesê het dat ek met 25% moet eindig sou ek julle toe reeds versoek het om te onttrek sodat ek my eie span kan vorm.
>
> Ek glo werklik SP het die kat aan die stert beet. Dit gaan nie hier oor SP vs 'n individu nie. Dit gaan oor twee firmas waarin SP, by gebrek aan 'n ander besluit, slegs op 50% geregtig is. Ek het egter reeds te kenne gegee dat julle 60% kan neem.
> Ek is bereid om te aanvaar dat jy dalk nie jou vennote behoorlik ingelig het nie en dalk by hulle valse verwagtinge gewek het maar dit is 'n interne SP aangeleentheid en julle kan nie verwag datek die gelag moet betaal nie.
>
> Ek wil dus weer versoek dat one hierdie aangeleentheid in die bed sit der te bly by 60:40 en dat jy en ek gaan sit en die bestuur van Manco en JY in detail gaan uitwerk.' (Emphasis added.)

[106] Annexure VDS 61, Record p 225.

[96] On Friday 13 October 2006 Van der Spuy attended a meeting with Marais and Pieterse at the offices of the respondent. At this meeting Van der Spuy repeated his threat that respondent would either have to accept a joint venture on a 50:50 basis or else withdraw from the Agrifund project.[107]Neither of the parties dealt fully in their affidavits with what was said at this meeting, and the contents of the discussion therefore have to be gleaned from the correspondence which makes oblique reference thereto. On 13 October 2006 Marais wrote an email to Van der Spuy in which he said the following:[108]

> 'Des – dankie dat jy vanoggend ingekom het vir 'n moeilike gesprek. Ek hoop datons'n uitweg kan vind. Ek sal soos bespreek oor die naweek begin met deurwerk van illustrasie van toepassing van SP vergoedingsmodel. Ek wil ook teen middle van volgende week 'n brief met JP probeer uitklaar om formeel reelings aan jou voor te stel wat 'n basis vir sekerheid kan bied.' (Emphasis added.)

[97] Van der Spuy responded in an email dated 14 October 2006 in which he requested Marais not to proceed with the preparation of this letter as he, Van der Spuy, wished to first formulate and present another proposal to the respondent in the light of their discussion on 13 October 2006. He stated that:

> 'Ek is nie bereid om die JV op te gee nie maar sal 'n laer aandeelhouding oorweeg, onderhewig aan sekere voorwaardes. Ek sal volgende week vir jou 'n konsep deurgee.'[109]

[107]Founding Affidavit para 137, Record p 54; Answering Affidavit para 87, Record p 361.

[108]Annexure VDS 62, Record p 226 (Email dated 13 October 2006 from Marais to Van der Spuy).

[109]Annexure VDS 62, Record p 226. (Email dated 14 October 2006 from Van der Spuy to Marais.)

[98] In the interim, work on the Agrifund project continued despite the unresolved question relating to the allocation of shares in the envisaged JV Company. Van der Spuy was copied in on all correspondence pertaining to the Agrifund and continued to be actively involved in the work on the project.

[99] On 11 November 2006 Van der Spuy put forward the proposal which he undertaken on 14 October 2006 to make. He sent Marais an email, to which was attached a detailed chronology of the interaction between the parties, in which he commenced with the following recordal of his interpretation of events, and concluded with a proposal aimed at 'sav(ing) the situation':[110]

> 'My interpretasie van die gebeure tot op datum is die volgende:
>
> 1) Die aksie wat aanleiding gegee het tot sowel die Nuweboere herstrukturering as die landboufonds is deur Konsult One geinisieer.
> 2) SP het besluit om op 'n venootskapsbasis saam met KO te werk, wel wetende wat KO se voorwaardes vir samewerking was.
> 3) Die Agrifonds is 'n KO projek en SP het die risiko geloop dat die uiteindelike wins- en aandeleverdeling dalk nie vir SP mag pas nie.
> 4) Die versuim om betyds tot 'n aanvaarbare vergelyking te kom, kan nie voor KO se deur gelê word nie.
> 5) SP se optrede en korrespondensie bevestig die bestaan van 'n JV tussen KO. *(sic)*
> 6) By gebrek aan enige ooreengekome samewerkingsbasis is die enigste logiese reeling 'n 50:50 JV. (Emphasis added.)
>
> …
>
> Ten einde die situasie te beredder, stelek die volgende voor (weereens sonder benadeling van regte):

[110] Annexure VDS 72, Record p 242.

1) KO en SP vorm 'n JV wat die naam van geen of beide partye reflekteer …
2) Winste word 65:35 verdeel ten gunste van SP … en indien JV 'n afsonderlike maatskappy is, sal die aandeelhouding 65: 35 ten gunste van SP wees.
3) Gesamentlike besluitneming plus alle normale voorwaardes van toepassing op JV's sal geld.

…

Indien 'n formele skriftelike ooreenkoms nie voor 31 Desember 2006 deur beide partye onderteken word nie, sal 'n JV met 'n 50:50 verdeling veronderstel word.'

[100] On 17 November 2006, Van der Spuy met with Marais, who told him that no agreement would be reached between the parties unless this was done in accordance with the respondent's framework for reward-sharing. As this was not acceptable to Van der Spuy, the meeting terminated without the issue being resolved.[111]

[101] On 30 November 2006 Marais responded to Van der Spuy's proposal contained in his letter dated 11 November 2006. The response consisted of a covering email dated 30 November 2006[112], to which was attached a letter dated 27 November 2006.[113] The relevant parts of the letter read as follows:

'Ter verdere inleiding wil ek graag herhaal dat ek skryf in 'n konteks van wesenlike waardering deur myself en SP vir die <u>waardevolle bydraes was jy as sakegenoot maak</u> in die algemeen en specifiek met betrekking tot die Agrifonds.

1. Wat betref jou interpretasie van die historiese verloop van gebeure betref *(sic)*, is ons kommentaar as volg:

[111]Founding Affidavit paragraph 149, Record p 57.
[112]Annexure VDS 80, Record p 255 (Email dated 30 November 2006).
[113]Annexure VDS 80, Record p 256 – 258 (Letter dated 27 November 2006).

1.1 Jou toetrede tot die SP groep het ongetwyfeld bygedra tot die momentum en focus van ons bedrywighede in die agri-sektor. Ek moet jou egter daarop wys dat, *voor* jou toetrede, SP reed 'n ver pad gestap het in die agri-sektor, bv: …

1.2 SP het verhoudinge gebou met instansies soos Sanlam Private Equity (SPE) en NuweBoere onafhanklik en voor jou toetrede tot die SP groep. SPE het ook reeds planne rondom 'n agrifonds gehad selfs voor enigeen van ons dit teenoor hul geooper het.

1.3 Ek kan dus nie saamstem met jou stelling dat die Agrifonds "'n KonsultOne projek" is nie – dit is 'n projek wat in samewerking tussen ons tot stand gekom het. Deur die consensus wat ons bereik het op 6 Junie 2006 rondom die 60-40 beoordeling van 'stigtings'-bydraes tot op daardie stadium, het ons saamgestem dat, op balans, SP die meerdere bydrae gemaak het om die fonds te kry tot op die huidige voor-oprigtingstand.

1.4 Ek kan nie saamstem dat SP of ek self versuim het om met jou tot 'n vergelyking te probeer kom oor ons samewerkingsbasis nie. Soos uit jou kronologie van gebeure blyk, het SP jou reeds in die eerste helfte van 2005 ingelig oor ons beleidsraamwerk wat betref die deel van kapitaalwinste wanneer daar nie risikokapitaal deur die bevoordeeldes bele word nie. Die kronologie wys ook 'n aantal interaksies tussen onsuit waar ons onderhandel het oor mootlike reelings met betrekking tot die Agrifonds. Dat ons nog nie tot 'n vergelyk kon kom nie, is 'n onderhandelingsfeit.

1.5 Ek erken my en SP se intensie om met jou in 'n sakevenootskap te gaan rondom die Agrifonds en ander projekte. Dit is ook hoe ek ons samewerking tot datum ervaar het. SP het nooit egter laat blyk dat die firma inskliklik is tot 'n gelyke aandeelhouersbelang met jou / Konsult One nie. Nadat ek by ons 6 June 2006 vergadering die indruk mag laat onstaan het dat 'n 60-40 verdeling van aandeelhouding vir SP aanvaarbaar mag wees, het ek na raadpleging met die SP exco reeds op 10 Junie laat blyk dat daar weer hieroor gepraat moet word.

2. SP se beginselstandpunt mbt die verdeling van kapitaalwinste waar daar nie risikokapitaal deur die bevoordeeldes bele word nie, bly in oorstemming met die aangehegte uiteensetting wat reeds by meer as een geleentheid met jou gedeel is. …

3. Teen bostande agtergrond is SP se voorstel in ooreenstemming met die tweede aanhangsel tot hierdie brief. Dit sal aan KO 'n juridiese aandeel in ons gesamentlike maatskappy besorg en 'n effektiewe ekonomiese belang van 15% op stigting van die fonds. …. Uit die aard van die saak en ons onderlinge bestuurstyl, stel ons voor dat die aandeelhouersooreenkoms van ons gesamentlike maatskappy voorsiening maak vir behoorlike minoriteitsbeskerming.

Ek en die SP bestuur en direksie hoop dat bostaande 'n werkbare basis kan bied om ons gewaardeerde samewerking voort te sit.' (Emphasis added.)

[102] On 30 November 2006 Van der Spuy responded with an email in which he informed Marais that the offer of a share of 15 % was not acceptable to the applicant.[114]

[103] On 1 December 2006 Marais sent a draft AgriOne Information Document to SPE for comment. In this document he recorded that the shares in AgriOne Manco would be held by SPE (25%), a BEE Consortium (25%) and Newco (50%). It was recorded further that the respondent would be the 'principal shareholder' in Newco, and that the applicant would also be a shareholder in Newco.[115]In this regard it was stated that, '(t)hrough the Newco structure,

[114]Annexure VDS 81, Record p 266.

[115] Annexure VDS 83, Record p 268.

Strategy Partners has joined hands with additional entities and individuals with specialist expertise relevant to the task of managing AgriOne.'[116]

[104] During December 2006 further email correspondence was exchanged between Marais and Van der Spuy which served only to entrench their different negotiating positions. Van der Spuy was adamant that, unless the parties could reach agreement otherwise before 31 December 2006, the position would be that there would be a 50:50 JV between the applicant and the respondent in respect of the Agrifund. Marais was equally adamant that there was no agreement that there would be a 50:50 JV between the parties.[117] The respondent's attitude was succinctly conveyed in an email from Marais to Van der Spuy dated 8 December 2006, wherein the following was stated:[118]

> 'SP het die situasie oorweeg en bly tans by die volgende posisie:
>
> a. Die stigting van 'n gesamentlike maatskappy waarin SP en KO se belange in die AgriOne bestuursmaatskappy gehuisves word.
> b. Dat KO se juridiese aandeelhouding in die gesamentlike maatskappy 15% sal wees en SP s'n 85%.
> c. Dat jy in 'n posisie geplaas word om 'n bestuursrol in die beoogde bestuursmaatskappy op te neem …
> d. Dat daar 'n aandeelhouersooreenkoms tussen SP en KO aangegaan word wat voorsiening maak vir behoorlik deelnemende besluitneming en 'n meganisme vir dispuutresolusie, maar met behoud van finale beheer by SP.' (Emphasis added.)

[116] *Ibid.*

[117] Annexure VDS 90, Record p 277.

[118] Annexure VDS 89, Record p 276.

[105] On 7 January 2007, Van der Spuy wrote to Marais and suggested that, regardless of the final shareholder structure - which remained unresolved - they should meet urgently to discuss the composition of the management team who would manage the Agrifund.[119] Marais responded in an email dated 15 January 2007 that they should rather wait until SPE had made the final decision on whether or not the Agrifund was going to come into existence at all.[120]

[106] On 15 January 2007 Marais sent SPE the final AgriOne Information Document in which he recorded, once again, that the principal shareholder in Newco (the 50% shareholder in Manco) was the respondent, and that the 'second designated shareholder in Newco is Konsult One CC'.[121]In the answering affidavit Marais states that applicant was included in this document as 'the second designated shareholder' as it had always been foreseen that the applicant would be a shareholder and there was still the hope that agreement would be reached in this regard. [122]

[107] On 26 January 2007 Sanlam's Investment Committee approved an investment of R 300 million in the AgriOne Fund, to be managed by Manco.[123]

[108] On 1 February 2007 Van der Spuy sent Marais an email in which he reiterated his stance that the respondent negotiated the Agrifund deal with SPE on

[119]Annexure VDS 95, Record p 283.

[120]Annexure VDS 96, Record p 284.

[121]Annexure VDS 98, Record p 286 – 287.

[122]Answering Affidavit para 101, Record p 383.

[123]Founding Affidavit para 179, Record p 68.

behalf of a JV between applicant and respondent, and that in the absence of agreement on shareholding in the JV the shareholding was 50:50 with equal control. He indicated, however, that applicant was prepared to accept a shareholding of 33% in the JV, subject to equal control in regard to strategic and operational decisions.[124] Marais responded to this email on 2 February 2007 and rejected Van der Spuy's proposal, stating that the respondent stood by the offer made to applicant in its letter of 27 November 2006, and requesting the applicant to reconsider this offer. He concluded with the statement that, 'Dit is noodsaaklik datons nou hierdie saak afhandel sodat die fonds se operasionalisering op gefokusde wyse kan voortbeweeg.'[125]

[109] Marais summed up the situation as follows in an email dated 5 February 2007:[126]

> 'Ek dink ons mis mekaar op 'n fundamentele punt nl of daar 'n gesamentlike onderneming in plek is waar die aandeelhouding 50-50 is by gebrek aan 'n alternatiewe ooreenkoms. Dit is duidelik jou standpunt, maar SP se siening is dat daar onderhandel word oor die relatiewe aandeelhouding in Newco en dat daar nog nie ooreenkoms hieroor bereik is nie.'

[110] On 7 February 2007 Van der Spuy met with Kriel and handed him a letter, dated 7 February, in which he documented the dispute between the applicant and the respondent over shareholding in Newco. At this meeting Kriel told Van der Spuy that he had not been aware that a joint venture existed between

[124] Annexure VDS 100, Record p 292.

[125] Annexure VDS 101, Record p 293.

[126] Annexure VDS 102, Record p 294.

Konsult One and Strategy Partners.[127]On 8 February 2007 a meeting was held at SPE's offices, which was attended by Kriel, Marais and Van der Spuy. Kriel asked who SPE had been negotiating with in regard to AgriOne and Marais confirmed that it was Strategy Partners and Konsult One.[128]

[111] On 12 February 2007 Marais addressed a letter to the applicant on a Strategy Partners letterhead in which he responded to the points raised by Van der Spuy in his letter to Kriel dated 7 February 2007, and concluded with the statement that the respondent could no longer continue the protracted negotiations with applicant and was withdrawing from the understanding between them. The relevant portions of the letter read as follows:[129]

> '1. Om voor te gee dat SP en Konsult One (KO) in 'n gesamentlike onderneming is, kom ons voor as te sterk gestel. Wat SP betref, was daar oor 'n tydperk van twee jaar waardeerde samewerking om projekte te ontwikkel. Wanneer sulke projekte gerealiseer het, is dit uitgevoer met SP as prinsipaal en KO as subkontrakteur. One het by geleenthede gesprekke gevoer oor die stigting van 'n gesamentlike onderneming en daar was 'n konsep Memorandum van Verstandhouding onder bespreking, maar nooit gefinaliseer of in 'n ooreenkoms gefinaliseer nie.
>
> 2. Die bostaande posisie is ook op die AgriOne inisiatief van toepassing. Daar was 'n verstandhouding met betrekking tot voorgenome gesamentlike deelname in die implementering van die fonds en dat onderhandel sal word oor die strukturering hiervan. Hierdie verstandhouding het ingesluit die oprigting van 'n gesamentlike struktuur waarbinne ons belange in die Agrione Manco gehuisves sou word (Newco).Ten spyte van aktiewe onderhandelings sedert mid 2006 kon

[127]Founding Affidavit para 183, Record p 70; Annexure VDS 105, Record p 298.

[128]Founding Affidavit para 185, Record p 70; Answering Affidavit para 103, Record p 383.

[129]Annexure VDS 105, Record p 298.

ons ongelukkig nie eenstemigheid bereik oor sekere fundamentele sake nie. Hierdie sake het ingesluit:

- KO se aandrang op 'n vetoreg of konsensuele bestuur … teenoor SP se voorkeur vir finale besluitnemingsmagte…
- KO se aandrang op 40% juridiese aandeelhouding (later 33%) in Newco teenoor Sp se aanbod van 10% (later 15%) teen die agtergrond dat geen ander individu betrokke die vooruitsig van aandeelhouding van hierdie ordegroootte sou he nie;
- KO se voorkeur vir die insentivisering van fondsbestuursinsette dmv deelname in die "carried interest" op grond van 'n formule wat deelnamevlakke voor gelewerde prestasie sou bepaal teenoor SP se voorkeur vir 'n formule wat sodanige deelname onderhewig sou maak aan prestasie deur bestuurslede oor die lewensduur van die fonds.

3. Die punt dat die gebrek aan suksesvolle finale onderhandelinge tussen jouself en SP 'n belemmernis plaas op KO om addisionele aanstellings te maak, is nie vir ons duidelik nie. Geen van die partye betrokke in hierdie sake het al in KO se pad gestaan on sulke stappe te neem nie.

   …

SP en ek persoonlik het al by verskeie geleenthede ons waardering uitgespreek vir die waardevolle samewerking wat ons 'n periode van bykns twee jaar met jou kon beleef. Daarom is ons des te meer spyt dat hierdie situasie nou ontwikkel het. Soos jy weet het die Agrifonds-inisiatief egter nou 'n werklikheid geword en is dit gebiedend noodsaaklik dat daar nou op 'n gefokusde basis voortgegaan word met die suksesvolle sluiting en operasionalisering van die fonds. So 'n gefokusde benadering kan net op basis van ooreenstemming oor fundamentele vertrekpunte en onderlinge vertroue realiser.

Teen bostaande agtergrond is dit vir SP nie langer moontlik om die sesmaandelange onderhandelings met jou verder to voer nie en tree ons terug uit die bogenoemde verstandhoudings met jou. Ons staak nou verdere korrepondensie oor die saak. Ons sal besin oor 'n billike aanbod aan jou ter erkenning van bydraes tot op datum gelewer tot die stigting van AgriOne en met voorbehoud dat die fonds inderdaad suksesvol gestig word.' (Emphasis added.)

[112] On 15 February 2007 Van der Spuy replied to this letter in the following terms:

> 'Wat my aanbetref was daar 'n gesamentlike onderneming tussen Konsult One en Strategy Partners en jou skrywe kom neer op 'n verdere repudiering. Konsult One aanvaar hierdie repudiering en gevolglik is die kontraktuele verhouding tussen Konsult One en Strategy Partners nou gekanselleer. Ek doen voorgaande met volle voorbehoud van Konsult One se regte.
> …
> Dit is jammer dat ons gesamentlike droom so moes eindig.'

The Relevant Legal Principles

[113] The legal principles which have bearing on this case are those pertaining to partnership agreements and the proof of tacit contracts.

[114] The Courts have consistently accepted Pothier's formulation of the essential elements of a partnership as a correct statement of our law.[130] The three *essentialia* of a partnership agreement are:[131]

114.1 first, that each of the parties brings, or binds himself to bring, something into the partnership, whether it be money, labour or skill;

114.2 second, that the business should be carried on for the joint benefit of the parties; and

[130] See eg *Joubert v Tarry & Co* 1915 TPD 277; *Bester v Van Niekerk* 1960(2) SA 779 (A) at 783 H – 784 A; *Purdon v Muller*1961 (2) SA 211 (A) at 218 B – D; *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634 C – F; *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 390 A – C; *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at para [19]; *Butters v Mncora* 2012 94) SA 1 (SCA) at para [11].

[131] *Ibid.*

114.3 third, that the object should be to make a profit.[132]

[115] Where these three essentials are found to be present in an agreement, the Court will find a partnership established 'unless such a conclusion is negatived by a contrary intention disclosed on a correct construction of the agreement between the parties.'[133] Thus, the presence of the three *essentialia* of partnership in an agreement serves as *prima facie* proof of an intention to create a partnership.[134]

[116] The mere presence of the *essentialia* of a partnership in an agreement is not, however, sufficient to establish a partnership if the parties did not in fact intend to create a partnership; there must be a clear intention to establish a partnership.[135] In *De Villiers v Smith*[136] Watermeyer dealt as follows with an argument that because a document contained all the elements of a partnership agreement, it must be construed as a partnership agreement:[137]

> '(E)ven if (the document) contains all the essentials of a partnership agreement as laid down in *Joubert v Tarry & Co* it does not follow that the Court is bound to construe it as a partnership agreement. It was pointed out

[132] A fourth requirement referred to by Pothier, namely, that the contract should be a legitimate one, has been discounted by the courts for being common to all contracts. (See eg *Bester v Van Niekerk supra* n 4 at 784 A; *Butters v Mncorasupra* n 130 at p 5 F – G).

[133] *Purdon v Muller supra* 130 4 at p 218 E – F; *Pezzutto v Dreyer supra* 130 at p 390 C – D.

[134] J J Henning 19 *LAWSA* 2ed para 264, 265

[135] J J Henning *Op.Cit.* para 263, 265.

[136] 1930 CPD 219.

[137] At p 221 - 211.

> by Wessels, J.P., in the case of *Blumberg & Sulski v Brown & Freitas* (1922, T.P.D. 130) that the Court was not bound to draw such a conclusion. He said at p. 136: "If the case (Joubert v Tarry & Co) had laid it down as a rule of law that whenever these four essentials are found in a contract it must be a partnership contract and nothing else, then no doubt there would be a great deal in this contention. The case, however, lays down no such proposition. …The Court came to the conclusion that it was in fact a partnership not only because it contained all the elements of a *prima facie* partnership, but because the parties intended a partnership …. If the four essentials of a partnership are found in a contract then *prima facie* a partnership exists, but other facts may show that in fact no partnership was intended and no partnership exists." ' (Emphasis added.)

[117] The requirement that the object should be to make a profit requires particular attention in this case.This entails that the making of a profit should be the immediate aim of the parties to the agreement.[138] In *Poppe, Russouw & Co v Kitching,*[139] the Court found that a partnership agreement was not concluded where the immediate aim of the parties was not to make a profit, but to fund the testing of the quality of ore produced by a mine, with the object of forming a company to exploit the mine if the results of the tests proved positive. De Viliers CJ stated as follow in this regard:[140]

> 'Partnership is a consensual contract between two or more persons, to place their money, food, labour, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. A subscription by two or more persons towards a common object does not constitute them partners, unless that object be, in whole or in part, the making of profit and the division of the profit between subscribers. The object of the subscription in the present case was to provide funds for the purpose of

[138] J J Henning *Op. Cit.* para 261 and authorities cited at footnote 39.

[139] (1888) 6 SC 307

[140] At p 314.

> assisting the old syndicate in developing the mine, and in testing the quality of the ores produced by the mine. The intention of the subscribers undoubtedly was to form a company for the purpose of making a profit out of the mine. But that company was not to be formed, and consequently no profit was anticipated, unless the result of the test should be satisfactory to the subscribers. The tests proved unsatisfactory, the company was never formed, and no partnership ever came into existence.' (Emphasis added.)

[118] In *Hughes v Ridley*[141] the Court was similarly concerned with a situation where the indications were that the parties intended to conduct business through the medium of a company.The plaintiff in that case alleged that the parties had agreed to conduct business jointly in the form of a limited liability company. When the first defendant caused plaintiff to be dismissed as the operations manager of the company, he contended that this amounted to a repudiation of the partnership which existed between him and the first defendant, and claimed consequential relief. An exception was taken to the plaintiff's particulars of claim on the grounds that the allegations proclaimed that the business would be conducted incompany, not a partnership.

[119] Levinsohn AJP referred to the different legal consequences attendant on carrying on business in a company as opposed to a partnership,[142] and went on to hold that an intention to form a limited liability company is inconsistent with an intention to form partnership.[143] His reasoning in this regard appears from the following passage in the judgment:[144]

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[141] 2010 (1) SA 381 (KZP).

[142] Para [22].

[143] Para [30].

[144] Para [23].

> 'If two persons agree that they wish to form a company, that each is to become a shareholder, each is to make a specific contribution to the company and the company is to carry on business, that agreement is, in my view, not consistent with a partnership. The formation of a limited liability company presupposes an agreement by the individuals concerned to submit to the articles of association of such limited liability company. If they so wish, they may conclude a separate shareholders' agreement which will regulate their relationship *inter se*. Thus, viewing the above definition of partnership and also the specific principles of company law, it is not two individuals carrying on a business jointly and for profit. What we find rather is a company which is wholly separate from the individuals who operate it which carries on the business, owns the assets, incurs liabilities to its creditors, makes profits or losses and is able to declare such profits as dividends to be distributed to its shareholders. Thus, it is company law which regulates and determines the respective rights and obligations.' (Emphasis added.)

[120] This is not to say that partners may not legitimately decide to convert an existing partnership into a company by transferring the assets of the partnership to a company and henceforth operating the business formerly conducted in the name of the partnership in that of the company.

[121] Furthermore, a partnership agreement may come about in circumstances where parties who had initially intended to form a company change their mind and agree to continue their operations without being incorporated. In such a case the question whether or not a partnership came into being would depend on whether the parties abolished the intention to form a company and agreed to carry on business without being associated in company form.[145]

[145] *Ford v Abercrombie* 1904 TS 878.

[122] It is well established that a partnership contract need not be express; like any other contract, it can come into being by tacit agreement, that is, by an agreement derived from the conduct of the parties.[146] The only difference between an express and a tacit agreement is that the former is proved by evidence of verbal declarations or a written instrument, whereas the latter is proved by inference from the conduct of the parties.[147]

[123] As the proof of a tacit contract involves the drawing of inferences, itis governed by the two cardinal rules for the proper drawing of inferences in civil cases, namely, that the inference sought to be drawn must be (a) consistent with all the proved facts and (b) the more natural or plausible conclusion from amongst several conceivable ones.[148]

[124] For some years there existed in our law two conflicting tests for inferring the existence of a tacit contract. The stricter of these tests, the 'no other reasonable interpretation' test, was stated thus in *Standard Bank of South Africa v Ocean Commodities Inc:*[149]

> 'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation that than the parties intended to, and did in

[146] *Butters v Mncora supra* n 130 at 7 E – F.

[147] R H Christie and G B Bradfield *The Law of Contract in South Africa* 6 ed p 86 (referring to the *dictum* of Wessels JA in *Bremer Meulens (Edms) Bpk v Floros* 1966 1 PH A 36 (A)).

[148] CWH Smith and DT Zeffert 9 *LAWSA* 2 ed para 847; R H Christie and G B Bradfield, *op.cit.* p 87, referring to *R v Blom* 1939 AD 188 at 202 – 203 and *Govan v Skidmore* 1952 (1) SA 732 N) at 734.

[149] 1983 (1) SA 276 (A) at p 292.

> fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem.*' (Emphasis added.)

[125] The more lenient test, the 'preponderance of probabilities' test, was formulated as follows by Corbett JA in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd: ('Joel Melamed')*[150]

> 'In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence.' (Emphasis added.)

[126] The 'most plausible probable conclusion' test is consistent with the rules for drawing inferences in civil cases, whereas the 'no other reasonable interpretation test' is not. The latter is more in line with the second rule for drawing inferences in criminal cases, namely that the proved facts must exclude every reasonable inference save the one sought to be drawn.

[127] This conflict was apparently settled in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*[151]where the Constitutional Court referred to the above-quoted passage in *Joel Melamed*and expressed its preference for the preponderance of probabilities test.[152]

[128] The preponderance of probabilities test, as formulated in Joel Melamed, does not refer to unequivocal conduct which indicates *consensus ad idem*. This

[150] 1984 (3) SA 155 (A) at p 165 B - C

[151] 2010 (3) SA 455 (CC).

[152] At para [58].

omission should not, in my view,be allowed to obscure the fact that tacit contracts, like any other, require proof of an unequivocal offer and acceptance, and that the parties reached consensus. This appears clearly from the following pithy summary by Heher JA of the Court's task in determining whether or not a tacit contract has been proved, which neatly synthesizes and encapsulates both tests:[153]

> 'This appeal is about an alleged tacit agreement. As in all such cases, the court searches for the evidence of manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, per contram, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence,that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement. Despite the different formulations of the onus that exist (see the discussion in (*Joel Melamed)* at 164 G – 165G; and RH Christie & V McFarlane *The Law of Contract in South Africa* 6 ed at 88 – 9) this is the essence of the matter.'

Analysis

[129] In my view the applicant's case isflawed in a number of respects.

[130] First, it rests on an apparent misconception of the role and significance of contractual *essentialia*. The main thrust of the founding affidavit and oral argument was aimed at showing the presence of the three partnership essentials in the working relationship between the parties. It seems to have

[153] *Butters v Mncora supra* n 130 at para [34].

been erroneously assumedthat that this was sufficient to establish that a partnership had come into being.

[131] The presence of certain contractual *essentialia* in a*de facto* arrangement does not serve to prove that the parties involved have entered into a contract. That is a factual question which involves an enquiry into whether or not the parties reached consensus regarding the creation and contents of legally binding obligations between them. It is only once a contracthas been found to exist that the presence or absence of certain essential termsplays a role in classifying the type of contract in question, for example, as one of sale as opposed to lease, employment as opposed to partnership, and so on.In this case scant attention was paidto the primary question of whether the parties intended to enter into a partnership agreement. I deal further with this aspect below.

[132] Second, the applicant omitted in the founding affidavit to 'plead' the agreement upon which it relies. The fact that reliance is placed on a tacit agreement does not derogate from the requirement to allege when, where, by whom and on what terms agreement was reached. A party who alleges a tacit contract must both catalogue the conduct and circumstances from which the contract is to be inferred, and must also allege the terms of the contract.[154]

[154] See *Bezuidenhout v Otto and Others* 1996 (3) SA 339 (WLD); *First National Bank of SA Ltd v Richards Bay Taxi Centre (Pty) Ltd* [1999] 2 All SA 533 (N) 542 a; LTC Harms *Amler's Precedents of Pleadings* 6 ed p 95.

[133] One searches in vain in the founding affidavit for any indication as to precisely when the parties allegedly reached agreement and exactly what terms they supposedly agreed. One is left in the dark as to how a partnership agreement, which could only have included the Pioneer project in June 2004, came to embrace seven projects over a period spanningover two and a half years. The situation seems tosuggest reliance on a developing agreement, but Van der Spuy is silent in this regard. Instead all one finds is a catalogue of facts aimed at demonstrating that the essentials of a partnership were present in each of the seven agricultural projects, coupled with the assertion that a partnership therefore came into being. The latter is a legal conclusion. The facts on which this conclusion must rest have not have not, to my mind, been adequately set out. The following remarks of Miller J in *Hart v Pinetown Drive-In Cinema (Pty) Ltd*[155]are apposite in this regard:[156]

> '(W)here proceedings are brought by way of application … (t)he petition takes the place not only of a declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

[134] The applicant'slack of clarity regarding what was allegedly agreed between the parties is reflected in a vague and ambivalent formulation of the declaratory relief sought. In the notice of motion and founding affidavit what is apparently sought is a declaration that a single partnership, 'the KOSP Partnership', was established between the parties in relation to the seven

[155] 1972(1) S A 464 (D).

[156] At 469 C – E.

agricultural projects conducted during the relevant period.[157] However, certain submissions made in the heads of argument filed on behalf of the applicant seem to indicate that the contention is that separate partnership agreements were entered into in respect of the seven agricultural projects, as opposed to one overarching partnership which embraced all seven projects:

> '…the essentialia of a partnership were present in respect of each of the joint venture projects.… given the absence of evidence to the contrary, it may be inferred from the presence of the essentialia that <u>each joint venture amounted to a partnership</u>'[158]

> 'a proper case has been made out …<u>to find and declare that a partnership was established between Konsult One and Strategy Partners in relation to each of the joint venture projects, and in particular the AgriFund Project</u>…'.[159](Emphasis added.)

[135] Van der Spuy makes the submission that it is immaterial whether one refers to a partnership which covers all of the agricultural projects or to joint ventures in relation to each one.[160] He states that:[161]

> 'The only reason that our partnership relationship appears to be continuous is because chronologically the relevant joint venture projects that were embarked upon tended to overlap and / or run into one another and / or to flow from previous ones.'

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[157] Founding Affidavit para 7.1, Record p 9; para 15, Record p 13.

[158] Applicant's Heads of Argument, para 48, Record p 525; para 49; Record p 526.

[159] Applicant's Heads of Argument, para 51, Record p 526 – 527.

[160] Replying Affidavit para 56, Record p 455.

[161] *Ibid.*

[136] I do not agree that it is immaterial whether one is talking about one single partnership or seven separate partnerships. The question is whether there was one contract, or seven.In my judgment the failure on the part of the applicant to set out precisely what the alleged agreement between the parties was, and to frame the declaratory relief accordingly, stems from and is indicative of the fact that there was no consensus between the parties.This brings me to the next difficulty with the applicant's case.

[137] Third, there are letters annexed to the founding affidavit, most of them written by Van der Spuy himself, which demonstrate quite clearly, in my view, that Van der Spuy and Marais did not at any stage reach *consensus ad idem* that a partnership - properly so called - be formed between the applicant and the respondent.

137.1 Van der Spuy's email of 7 March 2005[162] (quoted above at paragraph 49) shows that no agreement had been reached between the parties regarding the basis of their co-operation at a stage when, on the applicant's own version[163], the periods of collaboration on the Pioneer, NWK and SWOV projects had already run their course. In this regard I am unable to accept the submission advanced by applicant's counsel that the words ' … ons het hier ook niks vas gemaak nie' should be interpreted to mean only that the parties had failed to reach agreement on the question

[162]Annexure VDS 9, Record p 125.

[163] Founding Affidavit, para 15, Record p 13.

of profit sharing,[164] and not that no agreement at all had been reached. To my mind this interpretation is strained and offends against the plain meaning of the words used. Moreover, this argument fails to take into account the fact that the question of profit sharing was of paramount significance to these parties, and it is difficult to credit that they would conclude an agreement which left out the most important element of the deal. In my view the words 'beide SP en KO het gefouteer deur nie die samewerkingsbasis reg van die begin of vas te maak nie' and 'ons het hier ook niks vas gemaak nie', properly construed in the context of the letter read as a whole, can only be taken to mean that the parties had not reached any agreement regarding the basis of their co-operation.

137.2 Van der Spuy's email dated 27 October 2005[165] (quoted above at paragraph 74) shows that the basis of co-operation between the applicant and the respondent had still not been formalised at that stage, hence Van der Spuy's request that they firm things up before respondent included agriculture in the 'Grootene' presentation which respondent was making to Sanlam.It is significant that Van der Spuy referred, in this regard, to his letter of 7 March 2005, wherein he first stated that the parties had erred by not formalising the basis of their working relationship right from the start. This

[164] This is a *naturalia* of a partnership and it is not essential that there be agreement in this regard for a partnership to come into being, provided that the parties intend to enter into a legally binding partnership and are content to leave the aspect of profit sharing for later negotiation and determination.

[165] Annexure VDS 35, Record p 183.

shows, to my mind, that Van der Spuy was well aware, as at 27 October 2005, that there was no agreement in place between the parties regarding the basis of their collaboration. It is clear from the letter that he was unhappy about this situation and wanted to baton things down, as is evident from his proposal that a joint venture be formed between the applicant and the respondent to handle all projects referred by applicant to respondent. Marais' response[166] to this email shows that the proposal was not accepted. Marais expressed a preference for the conclusion of a 'master JV agreement' which would regulate principles and procedures for co-operation, rather than the formation of a permanent corporate structure.

137.3 Van der Spuy's letter of 18 May 2006,[167](quoted above at paragraph 81), in which he proposed that the parties form a private company called KOSP to hold shares in Manco, and that the parties split the shares in KOSP 60:40 in favour of respondent, concluded with the words, 'Kindly return a signed copy of this letter as acknowledgment of you acceptance of this arrangement.' It is not in dispute that this never occurred.

137.4 Marais response to this proposal, contained in his email of 12 July 2006[168] (quoted above at paragraph 84), in which he indicated that

[166]Annexure VDS 36, Record p 184.

[167]Annexure VDS 40, Record p 188.

[168]Annexure VDS 43, Record p 192.

respondent was comfortable in principle with the model for co-operation which had been proposed by Van der Spuy, but that there would have to be further discussion about the allocation of shares in Manco, cannot, in my view, be taken as an indication that the parties had reached a binding agreement in regard to all the matters mentioned in the letter of 18 May 2006, and that they were content to leave the issue of shareholding in Manco over for further negotiation. Given the obvious importance which the parties attached to the division of the shares in Manco, I consider it more likely that the parties intended that there should be agreement on this issue before a binding contract between them would come into being.[169]The evidence also shows, in my view, that the parties intended to enter into a formal, written agreement to give legal effect to their intentions. I deal further with this aspect below.

137.5 Marais' letter dated 12 September 2006[170] in which he confirmed that he signed the SPE MOU on behalf of a joint undertaking between the applicant and the respondent, includes the words, 'met betrekking waartoe 'n verdere Memorandum van Verstandhouding tans tussen ons gefinaliseer word'. This shows, to my mind, that the parties were still in the process of finalising their agreement and had not yet reached consensus regarding the basis for their co-operation.

[169] See *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v S A Post Office Ltd* [2012] ZASCA 160 (16 November 2012) at Para [12] – [13]
[170]Annexure VDS 52, Record p 209.

137.6 Van der Spuy's letter dated 5 October 2005[171] (quoted above at paragraph 93), refers to the 'gebrek aan 'n ooreeenkoms', making it clear that there was no agreement between the parties at that stage. I consider that this letter reveals Van der Spuy's real complaint, namely that, in his view, the respondent had, knowing full well that the parties had differing expectations, 'strung him along' and avoided firming up their arrangement. Needless to say, this view is inconsistent with the allegation that the parties had reached agreement to form a partnership.

137.7 In Van der Spuy's letter of 6 October 2006[172] (quoted above at paragraph 95) he states in terms that there was, at one stage, talk of a closer co-operation between the applicant and the respondent, but that it did not materialise: 'Dit het nie so uitgewerk nie….' His request that he and Marais should 'put the matter to bed' and sit down and work out the details of the management of Manco and the JV clearly shows, to my mind, that no agreement had yet been reached between the parties.

137.8 The correspondence exchanged between the parties during November 2006 to February 2007 shows, in my view, that although the parties negotiated intensely, they were ultimately unable to

[171]Annexure VDS ???, Record p ???

[172]Anexure VDS 61, Record p 225.

reach agreement regarding the allocation of shares in Manco, and that no contract was concluded between them. The envisaged joint venture company was never formed as a result of the failure of these negotiations.

[138] Having regard to the contents of this correspondence - which forms part of the applicant's own case - I cannot begin to be satisfied that it is more probable than not that the parties reached agreement and that a partnership came into being in consequence of that agreement. Indeed, in my view, the inference is irresistible that no partnership agreement was ever concluded between the parties.

[139] Fourth, and on a related note, there are numerous indications in the correspondence and documents annexed to the affidavits which are, in my view, destructive of the notion that the parties intended to form a partnership, as opposed to some other arrangement of their affairs.

[140] The evidence shows, to my mind, that the collaboration between the parties to develop and exploit business opportunities was in the nature of a fluid association which is at odds with the permanent sort of structure contemplated by a partnership. One sees, for instance, that:

140.1 in the case of the NWK project, Van der Spuy wanted to put a time limit on the participation of the respondent, whereafter he wanted to 'go it alone' if the respondent had not yet achieved a result by

producing a suitable investor (See email of 7 March 2005, quoted above at paragraph 49.);

140.2 in the case of the Capespan project, when the relationship between the applicant and the respondent became strained due to the standoff in the negotiations, Van der Spuy 'removed the Capespan opportunity from the table' by asking that the respondent play no further role in the project (See email of 8 October 2005, quoted above at paragraph 93.);

140.3 Van der Spuy had previously collaborated with ACMB on the NWK project and was at liberty to approach the respondent to work on the project once ACMB indicated that it was no longer interested in pursuing this particular opportunity.[173]

[141] The allegation that a tacit partnership came into being between the applicant and the respondent does not square with the evidence, which shows that it was frequently contemplated that third parties would be involved together with applicant and respondent in working on a particular agricultural project and sharing the rewards if it came to fruition. One sees that:

141.1 in the case of the SWOV project, Van der Spuy's letter of 7 March 2004,[174] (quoted above at paragraph 49) shows that Attorneys Jan S

[173] Annexure VDS 7, Record p 121.

[174] Annexure VDS 9, Record p 125.

De Villiers were involved and that there was talk of them doing work on risk and possibly contributing capital and sharing in the carry.

141.2 in the case of Capespan project, the email correspondence between Van der Spuy, Gawie Niewoudt and Marais shows that the intention was that Gawie Niewoudt would be involved in the project and would share in the rewards if the project was successful;[175]

141.3 in the case of the Citrifruit project, Van der Spuy's email of 3 August 2006[176] shows that he contemplated that NewFarmers would be involved in the initiative, together with applicant and respondent, and that NewFarmers would share in any rewards which might materialise.

[142] The correspondence and documentation annexed to the founding affidavit shows, to my mind, that Van der Spuy at all times contemplated that a company would be formed to house the rewards to be derived in the event that any of the opportunities involved in the agricultural projects materialised and 'paid off'. For example:

142.1 in the Pioneer project, the applicant was hoping to acquire 15% of the consortium which would invest in 'Newco,' the corporate vehicle through which the proposed LBO would be conducted;[177]

[175] Annexure VDS 23, Record p 159.

[176] Annexure VDS 27, Record p 173.

[177] Annexure VDS 1, Record p 85 at p 90.

142.2 in the NWK Project what was contemplated was that the applicant and the respondent would form 'Shareco', a company which would hold 15% of all the NWK shares acquired by an investors' consortium consisting of applicant, respondent and a third party sponsor with the necessary capital to fund the NWK share purchase;

142.3 the SWOV project envisaged that an investors consortium would acquire shares in the newly formed SWOV, and that applicant and respondent would form part of the investors' consortium, together with a capital sponsor, and be afforded a 15% 'carried interest' in the investment in SWOV shares, funded via 'preference shares at 70% of prime'.[178]This shows that the intention was that the consortium would form a company to hold the SWOV shares;

142.4 in the case of the Agrifund Project, both the applicant and the respondent intended to form a company to house the respective interests of the applicant and the respondent in Manco.

[143] In the light of what was held in *Hughes v Ridley*,[179] I consider that the manifest intention to form a company to house the benefits derived from the projects, if and when they materialised, negates any conclusion that the intention was to enter into a partnership.

[178] Annexure VDS 11, Record p128 at p 136; Annexure VDS 13, Record p 138 at p 142.

[179] *Supra* n 141

[144] Fifth, the applicant makes no attempt deal with the obvious question of why parties such as these would choose to conclude a contract tacitly instead of in writing. Marais and Van der Spuy are both highly educated, sophisticated men of commerce with legal degrees to boot. The correspondence annexed to the founding affidavit reveals that they were methodical and precise people who paid meticulous attention to detail. In sum, they were 'i-dotters and t-crossers'. Furthermore, as I shall elaborate below, the evidence shows that both Marais and Van der Spuy were aware that final approval for any deal negotiated by Marais would have to be obtained from Exco. I consider it inconceivable, in these circumstances, that the applicant and the respondent would have been content to conclude tacitly a contract with such important consequences as a partnership. Mr Newdigate, who appeared for the respondent together with Mr Joubert, summed up the situation crisply: 'If the parties intended to enter into a partnership agreement, why didn't they just say so?'

[145] The evidence shows, in my view, that the parties in fact intended to enter into a written agreement regarding their future co-operation, particularly in regard to the Agrifund Project. On 12 May 2006, at a stage when the AgriFund Project was gaining momentum, Marais wrote to Van der Spuy that, '(o)ns moet seker mettertyd iets dergeliks tussen ons optrek.'[180] On 19 May 2006, Van der Spuy sent Marais a written proposal for co-operation between the parties which concluded with a request that he 'return a signed copy of this

[180] Annexure VDS 39, Record p 187 (Email from Marais to Van der Spuy).

letter as acknowledgement of your acceptance of this arrangement.'[181] When Marais wrote to Van der Spuy confirming that he had signed the MoU with SPE on behalf of a joint undertaking between the applicant and the respondent, he referred pertinently to the fact that a memorandum of understanding between the applicant and the respondent was still in the process of being finalised.[182]

[146] To my mind the absence of a written partnership agreement in circumstances where a written agreement was contemplated by the parties, is destructive of the notion that a tacit partnership agreement was concluded.

[147] Sixth, the applicant has failed to deal with the question of whether Marais was duly authorised to bind the respondent in entering into the partnership agreement for which it contends. In this regard the evidence shows that Van der Spuy was at all times made aware that any arrangements made by Marais had to be approved by Exco.

147.1 On 2 July 2005, Marais wrote to Van der Spuy regarding his proposals for the Capespan project and stated that:

'Ek voel ek kan die basis van verdeling van suksesgede motiveer by SP Exco soos voorgestel maar moet Exco die finale se laat he.'*[sic]* [183]

[181] Annexure VDS 40, Record p 188.

[182] Annexure VDS 55, Record p 212.

[183] Annexure VDS 23, Record p 159 at p 161.

Van der Spuy responded as follows:

'Ek aanvaar jy sal jou Exco toets sodra jy, Gawie en ek saamstem. Ons sal egter nie kan aangaan alvorens on sweet of SP voertuig is of nie,'

to which Marais replied:

'Reg so, soos ek sê ek verwag nie problem nie, maar is dit uit governance oogpunt verskulding om af te teken.'[184] (Emphasis added.)

147.2 On 3 November 2005, Marais responded as follows to Van der Spuy's proposal of 27 October 2005 that the parties form a joint venture company to handle all transactions referred by the applicant with the with the statement:

'E)k kan onderstaande verby die Exco kollegas neem in hierdie vorm. My aanvoeling is dat ons beter suksesskanse het met die volgende benadering (ek bly oop vir bespreking').[185] (Emphasis added.)

147.3 On 19 July 2006, the day after Marais and Van der Spuy met to discuss the basis for dividing profits in Manco, Marais wrote to Van der Spuy and made certain proposals for division of the Manco carried interest. In this email he wrote:[186]

[184] Annexure VDS 23, Record p 159 at p 159.

[185] Annexure VDS 36, Record p 184.

[186] Annexure VDS 45, Record p 154.

> 'Ons kon nie gister klaar praat nie en ek sal graag hierdie saak tot 'n punt wil kry waarmee ons albei kan saamleef en waar ons die ander partye met ons kan saamneem … Ek toets die volgende met jou (nog nie so bespreek met SP Exco nie maar het Vrydagoggend geleentheid om dit to doen):' (Emphasis added.)

[148] The above quoted passages make it clear that while Marais was the 'face' of the respondent in negotiations with Van der Spuy, the latter was under no illusion that final authority for all transactions lay with Exco.

[149] Indeed the evidence, to my mind, shows that Van der Spuy was well aware of this fact and that it was a bone of contention for him. He was angered by what he perceived as deceitful conduct when Marais, after provisionally agreeing on 6 June 2006 that the applicant's contribution to the first phase of the AgriFund project be valued at 40%, informed him on 3 October 2006 that the respondent was not prepared to allocate the applicant a 40% shareholding in Manco. As is evident from his letter of 6 October 2006,[187] (quoted above at para 95) Van der Spuy was of the view that Marais had given Exco false expectations regarding the Agrifund project. He considered this to be an internal issue within the respondent, the intimation being that Exco was bound by what Marais had apparently agreed *vis a vis* the 60:40 division in respect of the Agrifund.

[150] Van der Spuy's view of the legal position is not correct. In circumstances where Marais had at all times made it clear that final approval by Exco was

[187] Annexure VDS 61, Record p 225.

required for all transactions, and where Van der Spuy was clearly aware of this fact, there can be no question of Marais having ostensible authority to bind the respondent. [188]

[151] I consider that in the absence of an allegation, let alone proof, that the alleged partnership agreement contended for by the applicant was authorised by the respondent, the application must fail on this ground alone.

[152] Seventh,the applicant's case is based on a distinction between the non-agricultural projects, where the applicant was engaged as an associate of the respondent and was paid for services rendered, and the agricultural projects, which it contends were conducted in partnership with the respondent. The evidence reveals, however, that in the case of the NewFarmers Project, the applicant submitted invoices to the respondent (who it described as its 'client') for fees based on time spent, and was paid accordingly. The rendering of invoices for services rendered in connection with the NewFarmers Project is, to my mind, destructive of the notion that this project was conducted in partnership between the parties. It tends to support Marais' version that the applicant, through Van der Spuy, was engaged as an associate of the respondent and remunerated for services in accordance with the guidelines. Thus the pivotal distinction between the agricultural and non-agricultural projects, on which the applicant's entire case turns, is unsustainable, and so also the applicant's case.

[188] *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C).

[153] Last, and by no means least, Marais' denial that the respondent ever intended to enter into a partnership with the applicant raises a dispute of fact which brings into play the application of the rule in Plascon Evans. I consider that it can by no stretch be said that Marais' allegations regarding the basis on which applicant and respondent collaborated, and his denial that the parties entered into a partnership, are so far-fetched or clearly untenable that they may be rejected merely on the papers. On the contrary, Marais version is consistent with and borne out by the contents of the correspondence and the documents annexed to both the founding and answering affidavits.It follows that I am bound to decide the application on the basis of the respondent's version, and that the declaration sought cannot be granted.

Estoppel and quasi mutual assent.

[154] The applicant advanced alternative arguments based on the doctrine of quasi-mutual assent and estoppel.It was contended that the respondent had, through the correspondence and communications between Marais and Van der Spuy, represented that its intention was to enter into a partnership[189] and that respondent was estopped from denying that it had entered into joint venture partnership arrangements with the applicant in relation to each of the agricultural projects.[190]

[189] Applicant's Heads of Argument para 50 – 56.

[190] Applicant's Heads of Argument para 111, Record p 558.

[155] In my view these arguments are unsustainable on the facts of this case.Having regard to the totality of the evidence, I can find no indicationthat the respondent represented that it intended to enter into a partnership contract with the applicant.

[156] It seems to me that in the case of all the agricultural projects other than the Agrifund project, the true nature of the agreement between the parties is that they were collaborating loosely in the pursuit of speculative opportunities on the understanding that if and when they 'struck gold', they would reach agreement on exactly how the rewards were to be shared and what sort of commercial structure would be set up to house those rewards. In the case of the Agrifund project, both parties agreed from the outset that a company should be formed to house the shares in Manco.

[157] Nor can it be said, given the contents of the lengthy, on-going negotiations between the parties to which I have referred, that the applicant's belief that respondent had entered into a partnership, was reasonable.

Request for oral evidence

[158] Applicant submitted that, in the event of it being found that the application could not properly be decided on motion, it would be appropriate to make an order in terms of Rule 6(5)(g) directing that Marais be cross examined regarding his assertion that the respondent did not enter into a partnership with the applicant in regard to the agricultural projects.

[159] There is no need for such a course, as I consider that the application, which is largely based on documentary evidence, is capable of being decided on motion.

[160] I might add that I would have had grave doubts about the propriety of referring the matter for oral evidence in the particular circumstances of this case, where the applicant chose to proceed by way of motion, knowing full well that the existence of the partnership was disputed, and then proceeded to institute an action, which involves determination of the very same question.

Conclusion

[161] In the result the first prayer for declaratory relief fails and the second prayer for a debatement of account does not arise to be considered.

[162] I therefore make the following order:

(i) The application is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

D M DAVIS AJ

Acting High Court Judge

FOR APPLICANT: Adv. A J Nelson SC et Adv. J L van Dorsten

FOR FIRST RESPONDENT: J Newdigate SC et Adv C Joubert