THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No:19893/2012

In the matter between:

DEBORAH VIRGINIA HEINRICH **Plaintiff**

And

ALAN CHARLES DE CERFF **Defendant**

Hearing dates: 8-10 February 2021; 24 May 2021; 2-5 August 2021; 30 August 2021; 8-9 November 2021; 16-19 November 2021; 28 March 2022; 23 May 2022 (heads of argument)
Date of judgment: 13 September 2022

JUDGMENT (delivered electronically on 13 September 2022)

Introduction

1. This 13-year old dispute between a brother and sister has its roots in a buy and sell agreement of shareholders which was concluded in December 2003 between the defendant and his late business partner and brother in law, Kevin Alexander Heinrich. The protracted civil action has been characterized by the

defendant's various changes in legal representation, his numerous applications for postponements and the unfortunate disintegration of the relationship between the siblings.

2. The plaintiff's case is based on the evidence of a subpoenaed witness, Mr Coert Jacobus Knoetze, Mr Gustav Geyer and herself. The defendant's defence rests on his evidence and that of his expert, Mr Alan Keet. The late Kevin Heinrich is referred to as *"the deceased"* and Expertool Manufacturing Pty Limited as *"the company"*. Furthermore, unless otherwise indicated, the buy and sell agreement of shareholders is also referred to as *"the agreement".*

The pleadings as amended

3. The plaintiff issued Summons in October 2012 and amended her Particulars of Claim twice, on the last occasion in August 2021. It is necessary to set out the pleadings with some particularity in this judgment. The Particulars of Claim, as amended in August 2021, is summarized as follows[1]:

3.1 On or about 12 December 2003 at Cape Town, the defendant and the deceased concluded a written buy and sell agreement of shareholders[2]. The agreement provided for the sale of the shares in Expertool Manufacturing Pty Limited in the event of the death or disability of the shareholders. When either of the shareholders died, the deceased's representative was required to sell and the surviving shareholder was required to purchase the shares in the company which were registered in the deceased's name at the date of death[3].

3.2 The price at which the deceased's shares were to be purchased in accordance with the agreement would be equal to the value of the deceased's

[1] As far as possible, the wording of the summary follows that of the Amended Particulars of Claim follows the
[2] H1 to Amended Particulars of Claim
[3] Clause 1, H1

shares at the date of death as determined in the agreement[4] which would be determined as at the date of the deceased's death, based on a value agreed to by the shareholders jointly, such value to be undertaken annually at the financial year-end of the company[5].

3.3 To ensure that all or a substantial part of the purchase price of the shares would be available immediately on the death or disability of a shareholder, the shareholders effected certain life insurance policies as described in the attached schedule to the agreement[6]. Upon the first dying of the shareholders, the proceeds of the policies on such deceased shareholder's life would be paid to the surviving shareholder, and on appointment of the deceased's representatives, the surviving shareholder would pay such proceeds to the deceased's representative in respect of the purchase price of the deceased's shareholding in the company[7].

3.4 According to clause 11 of the agreement, if the amount paid to the deceased's representative under clause 9 was less than the price established under clause 4, then the surviving shareholder would pay the balance due in 60 equal monthly instalments, the first monthly payment being due three months after the date of death, and thereafter monthly payments would be made at the end of each succeeding month, together with interest calculated at the bank loan rates ruling at the time each payment falls due. It was an express, alternatively tacit, alternatively implied term of the agreement that the surviving shareholder to whom the shares were sold, would also purchase the deceased's credit loan account or pay the deceased's debit loan account in the company at the value thereof as at the date of the deceased's death.

3.5 Mr Heinrich died on 17 January 2009 and Mr Knoetze was appointed as executor of his deceased estate on 21 April 2009[8]. As at the date of his death, the deceased had a debit loan account in the company of R2 358 000, thus in terms of the buy and sell agreement, the defendant, as the surviving shareholder, became

[4] Clause 3, H1
[5] Clause 4, H1
[6] Clause 5, H1
[7] Clause 9, H1
[8] H2, Pleadings, p18

liable to pay the value of the deceased's debit loan account to the company at date of his death, alternatively, simultaneously with the deceased's shares being transferred to the defendant. The amount of R2 358 000 was thus deductible from the purchase price of the shares.

3.6 On 29 May 2009, the defendant paid R5 000 000 to the deceased estate as part payment towards the purchase price of the deceased's shares in the company. On or about 25 June 2009 at Cape Town, the defendant and Mr Knoetze, the latter acting in his capacity as executor, concluded an oral agreement whereby all amounts owing by the defendant to the deceased estate, would be paid directly to the plaintiff as heir of her late husband's estate.

3.7 In September/October 2009 at Cape Town, the defendant and Mr Knoetze (in their capacities as described in the preceding paragraphs) concluded an oral agreement that the value and therefore the purchase price of the deceased's shares in the company was R13 205 000. On or about 5 November 2009, at Cape Town, a further partly oral and partly written agreement was concluded between the defendant and Mr Knoetze, acting in their capacities as aforesaid. It was agreed as follows: that the deceased's shares in the company would be transferred to the defendant; that payment of the balance of the purchase price of R8 205 000, less the value of the deceased's loan account in the company and any amounts paid by the defendant directly to or on behalf of the plaintiff, would be made in 60 monthly instalments of not less than R127 128 per month directly to the plaintiff; furthermore, that the defendant would be liable for interest at the prime rate applicable from time to time from 1 October 2012 on the outstanding balance capitalized monthly[9].

3.8 In the alternative, and should the Court find that the defendant and Mr Knoetze did not agree that payment would be made on or before the transfer date of the shares, then the plaintiff alleges that payment of the balance of the purchase price less the deceased's debit loan account in the company and direct payments to or on behalf of the plaintiff, would be paid in terms of clause 11 of the buy and sell

[9] H3, Pleadings, p19-20 – this is a reference to the amortisation agreement

agreement[10]. The deceased's shares in the company were transferred to the ADC Family Trust as the defendant's nominee on 22 September 2009, and to the defendant on 15 February 2010[11].

3.9 On 22 February 2012, Mr Knoetze was removed as executor of the deceased estate and replaced by the plaintiff as executrix. On 13 March 2011 the plaintiff took cession of all the deceased estate's claims against the defendant[12]. It is pleaded further that the defendant paid R1 821 547, 40 to the plaintiff between January 2009 to February 2012 as set out in the schedules H7 and H8. The plaintiff's claim as amended in August 2021 is thus calculated as follows:

Purchase price of deceased's shares	R13 205 000
Less deceased's loan account	R 2 358 000
Less payment made on 29 May 2009	R 5 000 000
Balance due as at 29 May 2009	R5 847 000
Less direct payments to plaintiff (H7 and H8)	R1 821 547, 40
Total	R4 025 452

4. The plaintiff pleads in the alternative that as at 1 October 2012, the balance of R2 755 060, 60 is due. This amount is calculated as follows:

R127 128 per month x 36 months (from October 2009 to September 2012)	R4 576 608
Less direct payments to plaintiff (H7 and H8)	R1 821 547, 40
Total	R2 755 060, 60

[10] In other words, in instalments
[11] See H4, Register of Members Share Accounts
[12] H6, Pleadings

5. It is further pleaded that the defendant is liable to pay R127 128 per month, alternatively, such amount calculated to be paid monthly in terms of clause 11 of the buy and sell agreement, to the plaintiff in respect of the monthly instalments and interest on the balance of the purchase price of the deceased's shares in the company, still owing by the defendant to the plaintiff.

6. The plaintiff thus claims R5 847 000 payable as at 1 October 2009 plus interest as specified in prayer (a) of the Amended Particulars of Claim, less payments made by the defendant in terms of H7 and H8. Alternatively, she claims R2 755 060, 60 and R127 128 per month from 1 October 2012 to date of final payment; in addition, interest on the capital amounts and costs of suit.

7. Until five days before the trial commenced on 8 February 2021, the defendant's Plea remained a bare denial of the plaintiff's averments in her Amended Particulars of Claim. In his Amended Plea delivered on 3 February 2021, the defendant admits the buy and sell agreement and its terms, that he settled the deceased's loan account in the company, that he paid R5 000 000 in May 2009 to the deceased estate, and that he concluded an agreement on 25 June 2009 with Mr Knoetze that all amounts owing to the deceased estate would be paid directly to the plaintiff.

8. The defendant's defense according to the Amended Plea is the following:

8.1 He denies concluding an oral agreement in September/October 2009 with Mr Knoetze in respect of the value and purchase price of the shares at R13 205 000. He pleads that in terms of the buy and sell agreement and in order to determine the value of the shares for purposes of enforcing the agreement[13], he and the deceased were obliged to undertake a joint annual valuation of the shares at the end of the financial year and agree to a valuation of the shares. This valuation would apply to

[13] Clause 4, H1

the ensuing 12 month period until the following financial year, when a new valuation would be done[14].

8.2 Neither the defendant nor the deceased undertook a valuation of shares of the company for the financial years ending 2004 to 2008, and consequently, there was no valuation of the shares in terms of the buy and sell agreement at the date of the deceased' death.

8.3 In August 2009, the defendant informed Mr Knoetze that he had paid a total of R7 358 000 to the deceased estate, that he considered this to be a reasonable amount for the deceased's shares and in full and final payment of the purchase price for the deceased's 57 shares. It is pleaded that Mr Knoetze expressly, alternatively tacitly, alternatively, by implication, agreed that the defendant had paid the full value for the deceased's shares.

8.4 The defendant admits that on 22 September 2009, Mr Knoetze transferred 57 shares to the ADC Family Trust erroneously, and subsequently on 15 February 2010, the former, realizing his mistake, transferred the 57 shares from the Trust to the defendant. The defendant was entitled to the 57 shares in August/September 2009. Furthermore, the defendant denies concluding an agreement with Mr Knoetze regarding payment of the balance of the purchase price for the shares in instalments since the full purchase price had been paid. He asserts that the document which the plaintiff relies on in respect of the averment related to payment in instalments, H3, is confirmation of receipt of an email and not an acknowledgement of or an agreement to the content thereof, or the attachments thereto.

8.5 The defendant admits that he made the payments in H7 and H8 but denies the remaining allegations related to these schedules.

9. In her Amended Replication, the plaintiff pleads that in February 2009 the defendant received R11 136 610, 77 from the proceeds of the deceased's life

[14] Par 8.3, Pleadings, p39c-d

policies in terms of the buy and sell agreement. In terms of clause 9 read with clauses 10 and 11 of the agreement, the full amount of the paid out life policies was due and payable by the defendant to the deceased estate against transfer of the deceased's 57 shares. As at the signature of the buy and sell agreement[15], the agreed value of the collective shareholding in the company was R30 000 000. The plaintiff pleads that the proper construction of clause 4 of the agreement is that in the absence of an agreement by the deceased (as referred to in the agreement), then the agreed R30 million would apply until determined by an expert appointed by them[16].

10. The plaintiff pleads that given that the defendant held 57 shares in the company, and that at the date of his death the agreed R30 million applied to the collective shares of the company, this therefore translated to R250 000 per share, and a cumulative value of R14 250 000 for the 57 shares[17]. Absent any further agreement regarding the shares value, the defendant's obligation to the deceased estate against transfer of the 57 shares, was as follows:

Proceeds of the life policies	R11 136 610, 77
Difference between the shares value and policy	R3 113 389, 23[18]
Less the R7 358 000[19] paid by the defendant	
Defendant's total indebtedness to the deceased estate	R6 892 000[20]

11. In September 2009, by agreement between the defendant and Mr Knoetze, CAP was appointed to determine the value of the 120 shares and on or about 16 September 2009, CAP valued the 120 shares (total shareholding) at R27 800 000. This valuation as accepted by the defendant and Mr Knoetze. Given the CAP

[15] 12 December 2003
[16] Par 2.1.2, Pleadings, p39l
[17] 57 x R250 000 = R14 250 000
[18] R14 250 000 – R11 136 510, 77 = R3 113 489, 30
[19] R5 000 000 paid on 29 May 2009 + R2 358 000 debit loan account = R7 358 000 paid to deceased estate
[20] R14 250 000 – R7 358 000 = R6 892 000

valuation, R5 847 000 was due and payable by the defendant at 1 October 2009 plus interest and less payments made by the defendant in terms of H7 and H8. In addition, the plaintiff pleads that the defendant is estopped from relying on the non-compliance with clause 4 of the buy and sell agreement, and for the further bases pleaded at paragraph 2 of the Amended Replication.

Common cause, admitted and/or undisputed facts

12. The common cause and/or admitted facts from the evidence and pleadings are as follows:

12.1 The defendant and deceased were joint shareholders and directors in the company, Expertool Pty Limited and Sheerprops 123 CC, which was the property entity of the company.

12.2 The cumulative shareholding in the company was 120 shares, of which the deceased held 57 shares.

12.3 On 12 December 2003 at Cape Town, the deceased and the defendant entered into the written buy and sell agreement for shareholders which provided for the sale of the shares in the company in the event of the death or disability of a shareholder. The terms of the agreement are not in dispute.

12.4 In accordance with clause 5 of the agreement, the shareholders effected certain life assurance policies in order to ensure that all or a substantial part of the purchase price of the shares will be available immediately on the death or disability of a shareholder.

12.5 On 17 January 2009, Mr Heinrich passed away. The plaintiff was the sole heir in terms of his Last Will and Testament[21].

[21] Exhibit A, p2

12.6 For several years, Mr Knoetze, a chartered accountant and auditor of BKV Knoetze and Associates Chartered Accountants, was the company's auditor, accounting officer of Sheerprops and accountant of the defendant and the deceased personally and of their respective Family Trusts.

12.7 In February 2009, and in accordance with the buy and sell agreement, the defendant received payment of R11 136 610, 77 paid from the proceeds on the life of the deceased as shareholder in the company[22].

12.8 On 21 April 2009, Mr Knoetze was appointed as executor of Mr Heinrich's deceased estate[23]. He was subsequently removed by the Master of the High Court on 31 March 2011[24].

12.9 On 29 May 2009, the defendant paid R5 000 000 to the deceased estate as part payment for the deceased's 57 shares in the company[25].

12.10 The deceased had a debit loan account in the company and at his death, this stood at R2 358 000. Mr Knoetze passed an accounting entry in terms of which this amount was allocated to the defendant. It is accepted between the parties and Mr Knoetze as executor at the time, that the defendant then extinguished the deceased's debt to the company and thus R2 358 000 was allocated as a payment towards the defendant's indebtedness to the deceased estate in relation to the purchase of the 57 shares.

12.11 On 25 June 2009, the defendant and Mr Knoetze orally agreed that all amounts which the defendant owed to the deceased estate would be paid directly to the plaintiff as the sole heir.

12.12 On 22 September 2009, Mr Knoetze transferred the 57 shares to the defendant's ADC Family Trust and on 15 February 2010, these shares were

[22] Exhibit A, p29
[23] H2, Pleadings, p18
[24] Exhibit A, p81
[25] See Exhibit B, p1

transferred from the ADC Family Trust to the defendant[26]. It is undisputed that the defendant signed the Share Certificate indicating registration of ownership of the 57 shares in his name[27].

12.13 Between January 2009 and February 2012 the defendant made direct ad hoc payments, as reflected on schedules H7 and H8, to the plaintiff and her family. These payments totalled R1 821 547, 40[28] and were made either directly by the defendant or by Expertool or Sheerprops.

12.14 While the defendant disputes knowledge and receipt thereof in or about September 2009, it is not disputed that CAP Chartered Accountants in its final report of 16 September 2009, prepared by Mr Geyer, valued the shareholding in the company at R24. 4 million as at the deceased's death, and at R27. 8 million as at 1 October 2009[29].

12.15 On 22 February 2012, the plaintiff was appointed as executrix of the deceased estate of her late husband[30].

12. 16 The plaintiff took cession of the deceased estate's claims against the defendant on 13 March 2012[31].

12.17 In September/October 2009, the defendant, as director of the company, was involved in communication with the National Empowerment Fund (NEF) with a view to securing funding for the company. The NEF deal eventually did not materialize.

12.18 Expertool and Sheerporps were liquidated in 2012.

12.19 The defendant's last payment to the plaintiff occurred in or during February 2012.

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[26] Exhibit A, p70-71
[27] Exhibit A, p78
[28] H7 and H8 to the plaintiff's pleadings are also duplicated as Exhibit A, p82-84
[29] Final CAP Report, Exhibit A
[30] H5, Pleadings, p23
[31] Exhibit A, p49-50

Issues to determine

13. The following issues require determination:

13.1 The terms of the buy and sell agreement in relation to the valuation of shareholding where one of the shareholders died. In addition, a finding is required regarding the applicability of the R30 million valuation and whether it applied at the date of Mr Heinrich's death on 17 January 2009.

13.2 Dependent on the finding in 13.1 above, whether Mr Knoetze could request an external valuation of the shareholding of the company as he did in August/September 2009.

13.3 Whether the defendant bore knowledge of the CAP Report and valuation and whether he had accepted it.

13.4 Whether Mr Knoetze and the defendant agreed orally in September/October 2009 that the value and purchase price of the deceased's 57 shares in the company was R13 205 000.

13.5 In the event that I find that such an agreement was indeed reached, the balance of the amount due and owing by the defendant to the plaintiff should be determined.

13.6 Whether, as alleged by the defendant, he informed Mr Knoetze in or during August 2009, that his cumulative payment of R7 358 000 was a reasonable amount for the 57 shares, that it constituted full and final payment thereof and whether the latter agreed that the Defendant had indeed paid the full value for the 57 shares.

13.7 With reference to 13.4 above, and only in the event that I do not find that the plaintiff proved that there was an agreement on the purchase price of R13 205 000: whether an agreement was concluded between the defendant and Mr Knoetze on 4 November 2009 regarding payment of the outstanding balance of the purchase price of the shares in monthly instalments of R127 128 per month plus interest – this is the

reference to the amortisation agreement[32].

13.8 In the event that the plaintiff proves her main claim, whether the total of the ad hoc payments of R1 821 547, 40 made to her and her family, should be deducted from the outstanding balance due.

13.9 Interest and costs in the event that the plaintiff's claim is upheld.

14. The plaintiff bears the onus to prove all the issues as set out above on a balance of probabilities, with the exception that the defendant is required to prove the alleged agreement concluded by him and Mr Knoetze regarding the payment of R7 358 000 as a reasonable amount for the 57 shares in full and final settlement thereof, as referred to in paragraph 13 above.

Summary and evaluation of evidence

Mr Knoetze, the plaintiff's subpoenaed witness

15. Mr Knoetze was subpoenaed by the plaintiff and provided the documents contained in Exhibit B. His role in relation to the company, Sheerprops, the deceased, the defendant and their Family Trusts is described above, and in respect of the dispute between the parties, it serves to emphasise that he was the executor of Mr Heinrich's estate until March 2011. The witness's evidence is crucial to the plaintiff's case and the parties' dispute, and he was subjected to excruciatingly lengthy cross examination by the defendant in August 2021. In summarizing his evidence, it is necessary to refer to the relevant email exchanges which underpin the parties' dispute regarding payment for the 57 shares.

16. Mr Knoetze was familiar with the buy and sell agreement concluded between the deceased and the defendant and had knowledge that they had life assurance policies in terms of the agreement. He received correspondence from Intasure

[32] H3, Pleadings

Financial Planners in February 2009 that R11 136 610, 77 was paid personally to the defendant as result of various life assurance policies referred to in the attachment to the buy and sell agreement[33].

17. On 29 May 2009, the defendant paid R5 000 000 to the deceased estate from the monies received as a pay out of the assurance policies to the deceased estate. Furthermore, the witness passed an accounting entry, reallocating the deceased's debit loan account in the company of R2 358 000 to the defendant. The witness also confirmed that on his advice and that of his sister Leticia, an attorney, a cession agreement was concluded between the plaintiff as heir and in her capacity as executrix of her late husband's estate, that all claims against the defendant in terms of the buy and sell and the oral agreement of 25 June 2009, were ceded to the plaintiff[34].

18. On 25 June 2009, Mr Knoetze and the defendant agreed that the latter would make direct payments to the plaintiff and not to the deceased estate because of administrative issues and because it would take longer for the plaintiff to receive the money. The company's financial year-end was in December. On 22 June 2009, Mr Knoetze approached Mr Reyneke of CAP Chartered Accountants per email requesting a valuation of the company's shareholding as he did not feel comfortable doing the valuation because as its auditor and executor of the deceased estate, he had a conflict of interest and would be wearing too many hats[35]. CAP accepted the instruction and Mr Reyneke passed on the mandate for a valuation of Expertool to his colleague, Mr Geyer.

19. The mandate to CAP and Mr Geyer was for a comprehensive valuation. Mr Geyer requested financial documents, business plan and the company's financial

[33] Exhibit A, p24; H1, Pleadings, p17
[34] H6, Pleadings, P24-25
[35] Exhibit B, p8-9

statements for the year ending 31 December 2008[36] and input from the management of the company, all of which were provided in August 2009. The witness explained that the necessity for a full valuation of the company after the deceased's death was for the Master's Office, for the Receiver of Revenue as there was Capital Gains Tax implications, for the sale of the 57 shares to the defendant and in order to calculate the executor's fees percentage due.

20. Mr Geyer required input from Mr Knoetze as financial management of the company and the defendant as the sole director in order to prepare the valuation report. Mr Knoetze explained with reference to the series of emails and documents at pages 57 to 60 of Exhibit B, that he pertinently informed the defendant that Mr Geyer requested the latter's input as to the unsystematic risk premium of the company in order to compile his report. Mr Knoetze persisted that he forwarded his input *("my syfers")*[37] and the defendant's input in an email described as *"Expertool waardasie – Director's evaluation"*[38] to Mr Geyer. In a telephonic conversation with the defendant, it was agreed that CAP's fees for the valuation report would be shared equally between the deceased estate and the company.

21. Mr Geyer's draft CAP valuation report was emailed to the defendant and subsequently the final CAP report dated 16 September 2009 was received on 11 September 2009[39]. Mr Knoetze informed Mr Geyer that he first wished to discuss the final report with the defendant before it was finalised[40]. He conceded that given the lapse of more than 13 years, he had no independent recollection of discussing the final CAP Report with the defendant but the emails exchanged indicate his expressed intention to discuss it with the defendant[41].

[36] Exhibit B, p61 and financial statements starting at p62
[37] Exhibit B, p57
[38] Exhibit B, p55-56
[39] Exhibit B, p38-51
[40] Exhibit B, p16
[41] Exhibit B, p16

22. The final CAP report values 100% of the shares in Expertool as at 17 January 2009 at a fair and market related price of R24.4 million and at R27. 8 million should the sale of shares deal be concluded on 1 October 2009[42], which refers to the new month after Mr Geyer signed the report. Mr Knoetze's testified as to the calculation of the purchase price of the shares as follows:

> Total shares in Expertool = 120
> Shares owned by deceased at date of death 17 January 2009 = 57
> $57 \div 120 \times R27\,800\,000 \div 1 = R13\,205\,000$

23. If the value of the 57 shares is to be determined at the date of the deceased's death, then the calculation would use R24 400 000[43].

24. The company was in talks with the NEF to finance the buy-out of shares. On 16 September 2009, the defendant informed the NEF representative that the valuation awaited could be concluded on that day and he would forward to her the outcome[44]. In his email of 18 September 2009 to the defendant headed *"Sale of shares"[45],* Mr Knoetze refers to the valuation completed the day before and confirms that in his capacity as executor, his intention was to enforce the buy and sell agreement and he envisaged that the deal would be concluded on 1 October 2009. Significantly, Mr Knoetze confirms that based on the valuation, the defendant was indebted to the deceased estate in the amount of R13 205 000 and payment was awaited, less the R5 000 000 already received[46].

25. The defendant's reply on the same day reminds Mr Knoetze that he had already paid approximately R7.5 million which comprised the loan account and other

[42] The final CAP Report, Exhibit A; the original final report is also in the Expert Bundle
[43] On my calculation, the share value for 57 shares would be R11 590 000
[44] Exhibit B, p17
[45] Exhibit B, p18
[46] The remaining content of this email is not in my ultimate findings in the matter, relevant for purposes of the judgment

payments[47]. On 22 September 2009, Mr Knoetze in his email to the defendant regarding the sale of shares, wrote:

> *"Further to our discussion of earlier today, I confirm that the estate will sell its shares to you (or your nominee) as per the valuation.*
> *The valuation of R27.8 m puts a value of R13.205m on the 57 shares.*
> *Should I deduct the +- R7.5 m already received from yourselves, that leaves a balance of +- R5.70m.*
> *I await your confirmation of the above and a proposed date to finalise the above".*
>
> *Regards*
> *Kobus Knoteze"*[48]

26. On 1 October 2009, the defendant forwarded to Mr Knoetze, email correspondence received from the NEF. The NEF referred to a discussion between its representative Ms Rantseli and the defendant, and enquired as to details of the purchase price of the deceased's shares, the effective date of transfer of the shares, deposits made and whether the plaintiff accepted the offer[49].

27. Mr Knoetze's email to Ms Rantseli, which included the defendant, on 2 October 2009[50], refers unequivocally to an independent external valuation of shares being done, that he had met with the defendant informing him of the outcome of a discussion with the plaintiff and that the defendant had *"agreed to do the deal at that value"* – he also confirmed that there was no uncertainty that the deal would go through and share transfer documentation were completed. Importantly, this email was sent to the NEF at the defendant's request.

[47] Exhibit B, p20
[48] Exhibit B, p23
[49] Exhibit A, p56-57
[50] Exhibit A, p56

28. Mr Knoetze furthermore supplied the NEF with the requested information in a letter dated 5 October 2009, which he emailed to Ms Rantseli[51]. He recorded the purchase price of the deceased's shares as R13 205 million, the effective date as 1 October 2009, the paid deposits of R5 000 000 and R2 358 000, and the balance of the purchase price outstanding as R5 847 000. In an email dated 8 October 2009 to the NEF, Mr Knoetze confirmed that the agreement regarding the sale of shares between himself as executor and the defendant, was a verbal agreement and in terms of the buy and sell[52].

29. Mr Knoetze was insistent that the share transfer documents were prepared by his office on 22 September 2009, and the defendant requested that the shares be transferred to his nominee, the ADC Family Trust because the defendant was concerned that he had stood surety for loans from Standard Bank in the name of the company. Subsequently, the defendant then changed his mind in early 2010 and instructed Mr Knoetze to register the shares in his name and not in the name of his family Trust[53]. In an email to the defendant dated 28 October 2009, the NEF noted that according to the buy and sell agreement, the deceased's shares could be transferred to the defendant as he had made partial payment towards the equity stake, but it required an undertaking that the balance would be paid in instalments over 60 months[54].

30. On 30 October 2009 in an email to Ms Rantseli and including the defendant, an understandably irritated Mr Knoetze reiterates and refers to the previous emails, his agreement with the defendant on 22 September 2009 regarding the sale of the 57 shares, and his confirmation sent in the earlier October emails. He then reiterates that as executor, he would proceed to effect the transaction even if the financing issue was outstanding. The defendant on the same day confirmed to Mr Knoetze that he signed share certificates the day before and takes his financial team to task

[51] Exhibit A, p59-61
[52] Exhibit B, p27-28
[53] Exhibit A, p75-78
[54] Exhibit A, p64

for dragging their feet[55].

31. Significantly, and as reminded by Mr Knoetze, the defendant did not take issue with the content and understanding of the NEF, nor the content of Mr Knoetze's emails regarding the R13 205 000 purchase price and effective date of transaction nor the outstanding balance.

32. Mr Knoetze testified that the sale of shares remained outstanding and he physically had a meeting on 4 November 2009 with the defendant wherein he informed him that the outstanding balance was to be paid in monthly instalments of R127 128 plus interest from 1 October 2009 over a period of 60 months[56]. Mr Knoetze insisted that the transfer of shares had to be finalized and that the defendant had to continue to pay the plaintiff. The witness stated that the defendant was sheepish as he realized that instead of paying the more than R11 million received from the pay out of the policies in terms of the buy and sell, he had spent most of the money.

33. Shortly after the meeting of 4 November 2009, an Excel document, the amortisation schedule, was emailed to the defendant. It was provisional because the interest rate would fluctuate and the defendant could pay more than scheduled which would affect the interest rate. Mr Knoetze accepted the defendant's email saying *"Thanks Kobus"* as constituting acceptance of the amortization schedule[57].

34. The defendant was also making ad hoc payments to the plaintiff and her children as set out in H7 and H8 which Mr Knoetze received from the plaintiff. The NEF eventually indicated that they would not be financing the company. In December 2009, the company paid Mr Knoetze's firm security transfer tax of

[55] Exhibit A, p62
[56] Exhibit A, p79 – 80
[57] Exhibit A, p80

R33 012, 50 on the transaction, and the accountants were required to pay this over to SARS[58]. The witness's evidence is that this payment could only have been made on the authorization of the defendant as the sole director of the company and the amount was calculated on the purchase price of R13 205 000. As far as the Final Liquidation and Distribution Account of the deceased was concerned, it reflected R13 205 000 for 57 shares in the company and the claim for R5 847 000 awarded and ceded to the plaintiff[59].

35. With reference to a document presented during the February 2021 session of the trial, Mr Knoetze explained the amended interest-rate which he took into account from March 2012 (when the defendant had stopped payments) to February 2021[60].

36. As to the defense in the Amended Plea that Mr Knoetze and the defendant agreed in August 2009 that the defendant's payment of R7 358 000 was reasonable and in settlement of the purchase of the shares, Mr Knoetze vehemently denied the existence of such an alleged agreement and reminded the Court that the email chain between the NEF, defendant and himself indicates that no objection was ever raised by the defendant to the R13 205 000, that the transfer documents were already prepared in September 2009 and that it was clear that Mr Knoetze had made up his mind to enforce the buy and sell and transfer of shares but because the execution of the transfer action was delayed, the transfer only occurred in October 2009. He at all times acted on the defendant's instruction when transferring the 57 shares to the ADC Trust. He was quite adamant that he would not make a mistake or act erroneously by transferring the shares to the ADC Trust of his own volition.

37. The defendant was unrepresented when he conducted the cross examination of Mr Knoetze. The record reflects that the defendant was patiently and repeatedly explained of the cross examination process and assisted to a degree. Questions

[58] Exhibit B, p30a
[59] Exhibit A, from p39
[60] Exhibit A, p208-210

which he had regarding the process and objections were explained at length.

38. Mr Knoetze explained that there were two financial statements for 2009 due to the mistake on the Pastel system regarding a 13th accounting period. He painstakingly explained that in 2008/2009 there was a change in international accounting practice and that the International Financial Reporting Standard was applied to the second version of the financials and that this was set out in note 21 thereof[61]. It is evident that the IFRS was applied and the defendant's attempt to attribute a suspicious or ulterior reason to the need to do a second set of financials came to nothing.

39. Mr Knoetze never wavered that the valuation of shareholding in the company was needed for the Master's office, SARS and the sale of shares to the defendant. Similarly, he remained consistent that he could not conduct the valuation himself as he had a conflict of interest. He denies being a party to the buy and sell and emphasized that he represented the deceased estate and had to enforce compliance with the agreement. He explained that he had to hold the defendant liable for purchase of the shares of the deceased shareholder.

40. Mr Knoetze admitted that there were no valuations in relation to the company between 2003 to 2008 and admitted that as executor, he was not bound by the R30 million valuation at the time of conclusion of the agreement. While the defendant attempted to obtain a concession from Mr Knoetze by questioning the capacity in which the witness acted in relation to the buy and sell, Mr Knoetze remained steadfast and consistent in his version that he had approached an independent accounting firm in June 2009 as executor to value the shareholding of a company which had been his client for 20 years. He also confirmed his evidence in chief that the appointment of CAP was a joint appointment and that costs would be shared.

[61] Exhibit A, p201

41. Mr Knoetze testified that he did not recall a meeting in August 2009 with the defendant to discuss the value of the company. More importantly, the witness remained adamant that he had never been informed by the defendant in August 2009 that the R7 358 000 which the defendant had already paid, was a reasonable amount and in full and final settlement of payment for the 57 shares, and he denied ever agreeing to this at any stage. In addition, Mr Knoetze was clear that to agree to such a state of affairs, would make no sense because at that stage[62], he was awaiting the CAP valuation, and to give an off-the-cuff valuation at such a meeting would have been irresponsible. Mr Knoetze was unshakeable on this aspect and referred to the paper trail of emails which he testified about which support his version of a denial of such an alleged agreement. Mr Knoetze also put paid to the defendant's version of an alleged agreement as he reminded the latter that in reality, the defendant had continued to pay the plaintiff for more than two years after 2009.

42. As far as the amortisation schedule of November 2009 was concerned, Mr Knoetze maintained his version: while payment of the balance due to the plaintiff was still outstanding, he visited the defendant on 4 November 2009 at the company in order to enquire how the defendant would pay the balance. The defendant indicated that the balance would be paid in instalments and it was agreed that interest would be charged at the prime rate. An agreement was reached on instalments over 60 months. He denied the defendant's statement that the email of 4 November 2009 saying *"Thanks Kobus"* was only an acknowledgment of receipt of the email and maintained that it was confirmation of the earlier oral agreement concluded between the defendant and himself and confirmation of receipt of the amortization.

43. Mr Knoetze questions why, if the defendant had informed him that he had paid enough money for the shares (the R7 358 000), they would still agree to an amortisation schedule in November 2009. He is certain that the defendant would have set him straight as he was the kind of person that would rectify or chastise him

[62] In August 2009

in an email if there was a misunderstanding and this did not transpire.

44. Mr Knoetze's version that there was no need for an explanatory email given that they had discussed the matter and the defendant responded shortly after Mr Knoetze sent the amortisation schedule was not attacked. As executor, he had no issue that amounts were paid on an ad hoc basis to the plaintiff and not audited. Mr Knoetze considered the email of 4 November 2009 as a written undertaking in terms of paragraph 11 and 11.1 of the buy and sell agreement to pay the balance in monthly instalments over a period of 60 months.

45. The defendant's complaint regarding the CAP report was met with Mr Knoetze's evidence that no agreement to the Report was needed as it was not an agreement but a valuation and the defendant had been invited to comment and had not objected thereto, thus leading to the conclusion that the defendant accepted that it was correct. Despite lengthy cross examination, Mr Knoetze maintained with reference to the documentary evidence, that the defendant provided the requested input and he had forwarded it to Mr Geyer.

46. The defendant sought to cast doubt yet again on Mr Knoetze's role in the share transfer process by alleging that he had erroneously transferred the 57 shares to the ADC Trust. The witness maintained that the defendant had chosen his Family Trust as his nominee and he had acted on the defendant's instructions when he did so. The further questioning regarding the transfer of shares was irrelevant given that the defendant admits the transfer of shares in his Amended Plea. Mr Knoetze testified that the agreement regarding the value and purchase price of the shares was an oral agreement, but the November 2009 agreement was in person.

47. In re-examination, Mr Knoetze stated that the defendant never stated that he was unhappy nor dissatisfied with the value of the shares nor with the amortisation schedule. Furthermore, the agreement regarding the R13 205 000 for the shares

occurred on 22 September 2009, but the calculation of the interest was from 1 October 2009, the effective date.

48. On the whole, Mr Knoetze presented as a very good witness, who withstood very lengthy questioning over several days, and the defendant's many declarations during cross examination. He came across clearly, made concessions where necessary, and where he could not remember a discussion due to the passage of 13 years, he stated so. He remained consistent and steadfast regarding the important aspects in this lengthy dispute, and inasmuch as the defendant sought to cast doubt on his bona fides because he *"wore too many hats"*, he explained his conflict of interest in relation to himself doing a valuation of the shareholding of the company, clearly and objectively.

Mr Geyer and the CAP Valuation

49. Mr Geyer is a qualified chartered accountant and the compiler of the CAP Valuation Report in September 2009. His credentials and curriculum vitae were not placed in issue. He had 25 years' experience of conducting valuations of small businesses such as Expertool. He confirmed that he was contacted in June 2009 and received a mandate passed on by his colleague to conduct a full valuation and not a *quick and dirty* number crunch, and in this regard, his evidence is in line with Mr Knoetze's.

50. Mr Geyer compiled his draft report dated 10 September 2009. The 100&^% shareholding as at 17 January 2009 was found to be R24,4 million and R27,8 million at 1 October 2009[63]. The acceptance letter[64] was returned to him signed but he could not identify who had signed it. His mandate was to determine a valuation of 100% of the shares in the company as at 17 January 2009. Mr Geyer's evidence regarding the scope of his mandate coincides with Mr Knoetze's evidence in this

[63] See Final CAP Valuation
[64] Exhibit B, p52-53

regard. Mr Geyer's methodology in determining the valuation was the Discounted Cash Flow (DCF) method which was a complex calculation, considering the company's situation at the time of the shareholder's death and the future of the company[65].

51. In order to apply the DCF method, Mr Geyer testified that he needed to determine the unsystematic risk premium of the company and in this regard he required information from the company's management. He was supplied with Mr Knoetze and the remaining director's information. He impressed on the Court that he was an independent person, did not know the industry in which Expertool was carrying on business and therefore he could not apply his own risk, hence requiring input from the management. He confirms that he received the input from Mr Knoetze and the defendant and used it to input in his report. He found that 20,3% was a fair rate of return which is the percentage that a potential investor would expect over a period of time.

52. Mr Geyer proceeded to testify about his consideration of the various methodologies as a basis for his valuation and why he selected the DCF method[66]. The objective of the valuation of 100% of the shares in the company was in order to determine the value of the company for purposes of estate duty and to assist the defendant in the process of ascertaining the value in order to purchase the deceased's shares. The witness had no knowledge of the buy and sell agreement and was aware that his report had been criticized by the defendant's expert Mr Keet.

53. Mr Geyer made it abundantly clear that he was guided by the International Valuation Standards (IVS)[67] which are internationally accepted guidelines and

[65] See final CAP Report, Expert Bundle, p60-72
[66] The Dividend Yield, Price Earnings Yield, Net Asset Value (NAV) and Discount Cash Flow (DCF) approaches – see par 4, CAP Report
[67] Copy of IVS 2013 and 2017 provided in Expert Bundle but not specifically referred to by either Mr Geyr or Mr Keet during their testimonies

principles applicable for valuation of assets[68]. He justified the use of the DCF method *"as it determines the value of company by discounting future cash flows to the company by the expected rate of return of equity holders"*[69]. Mr Geyer stated that Mr Keet was privy to and used information[70] which he (Mr Geyer) did not have when preparing the valuation in 2009 such as the business plan and furthermore, that Mr Keet did not have input from the management of the company. Mr Geyer considered the financial statements of the company, the input from management and not its business plan.

54. Furthermore, Mr Geyer did not have a mandate to perform a due diligence on the projections received nor was he required to establish the reliability of the information from the sources which he had received it from. He also takes issue with Mr Keet's failure to apply the principle of prudence which assesses the market at the valuation date and not at a later date[71]. In addition to his address regarding Mr Keet's reports and summaries[72], Mr Geyer's criticism is that Mr Keet was aware that the company had subsequently been liquidated in 2016. Mr Geyer confirmed after considering Mr Keet's criticism of the use of the DCF method, his report and summary.

55. In cross-examination, Mr Geyer was questioned about the engagement letter, which he agreed was sent to Mr Knoetze and returned to him signed. He also confirmed that the signed copy was provided to the plaintiff's attorney and offered to make it available during the trial. This offer was never taken up by the defendant's legal representatives. He explained further that it happens that he receives a verbal go-ahead and mandate, and thereafter a letter of engagement. In this instance he had accepted the appointment verbally from Mr Knoetze and while he admitted that he never had a conversation nor correspondence from the defendant himself, he had acted on an instruction from the executor of the deceased estate. He was adamant

[68] Expert Bundle, p45
[69] Par 1.3.2, Expert Bundle, p43
[70] For example, the company's business plan
[71] Par 3.3.8, Expert Bundle, p53
[72] Expert Bundle, p20-35

that he would never put a letter of appointment in place after signing a final valuation report and certainly did not do so in this instance. In my view, this indeed seems to be the case as the final CAP Report was signed on 16 September 2009 and the letter of engagement was sent to the executor on 11 September 2009[73].

56. The defendant's counsel sought to elicit an admission from Mr Geyer that the defendant was excluded from providing input in respect of the valuation and that there was no reference to the defendant being included in the communication between Mr Knoetze and Mr Geyer. Mr Geyer referred to email correspondence in September 2009 wherein it was evident that Mr Knoetze had communicated with the defendant seeking his input as per CAP's request[74]. Mr Geyer, similarly as with Mr Knoetze's version, confirmed with reference to the series of emails that not only was the defendant requested to provide input to Mr Geyer, but he indeed did so and the information was forwarded to the latter in order for him to compile his report[75].

57. Mr Geyer made it abundantly clear that he accepted Mr Knoetze's bona fides as executor and never considered him as being conflicted. He understood that he valuation was due for estate duty purposes. He also emphasized that he was not mandated to do a forensic audit and referred counsel to the relevant parts of his report and summary. He was not mandated to consider the reasonableness of the source of the figures provided to him by the company's management nor to do a due diligence on the information. No forecasts or future predictions were made by CAP[76].

58. In re-examination, Mr Geyer explained that cash flow projections were not part of the mandate in the matter. He considered Mr Knoetze as part of the financial management as Mr Knoetze was involved intimately in the financial affairs of the company as its auditor. In his view therefore, Mr Knoetze was the responsible person in respect of the company's finances.

[73] Exhibit B, p52-53
[74] Exhibit B, p55 and the series of emails and attachments to p60
[75] Exhibit B, p55-60
[76] Par 3.3.3, Expert Bundle, p52-53

59. Mr Geyer was an excellent witness who calmly and efficiently dealt with his report, the mandate and its scope and was able to motivate why the DCF method was preferable to the Net Asset Value (NAV) method proposed by Mr Keet. It is insightful to note that the defendant's counsel did not cross examine Mr Geyer on Mr Keet's reports filed in March 2021, yet the witness was able to address all the points of criticism levelled at his methodology and CAP valuation. His cross examination was limited only to questions related to his understanding of the company's management, the suggested exclusion of the defendant in relation to the CAP valuation and the engagement letter.

The plaintiff

60. The plaintiff's evidence was of a formal nature. She confirmed that she knew of the buy and sell agreement and confirmed the common cause facts referred to earlier in the judgment related to the appointment of Mr Knoetze as executor and his subsequent removal, and the cession. She denied being involved in obtaining the CAP valuation.

61. The plaintiff came to know of the R13 205 000 price for the deceased's shares from Mr Knoetze. She does not dispute that the defendant paid R5 000 000, R2 358 000 in respect of the loan account in the company and certain ad hoc payments to her in respect of her family's expenses[77]. The plaintiff's evidence regarding the amortisation schedule corroborates Mr Knoetze's evidence: he drafted the schedule and the minimum monthly payments would be R127 128 per month plus interest. After February 2012, the defendant stopped making payment to the plaintiff.

62. The plaintiff testified that when the payments stopped, she started selling the assets of the deceased, including various motor vehicles, the Stonehurst plot and

[77] Exhibit A, p82-83 (H7 and H8 to the Pleadings)

Constantia property in order to cover her children's educational needs. The non-payment was reported to the executor and the plaintiff received legal advice from an attorney to consider taking the legal route against her brother. A subsequent family meeting between the siblings with the aim of obtaining the balance due to her proved fruitless.

63. The plaintiff, who became emotional during her testimony, explained that she thought very long and hard before embarking on issuing Summons. She never approached the defendant regarding non-payment and he never discussed the financial issues with her. She furthermore points out that the defendant had never informed her that in his view, he had paid enough in respect of the deceased estate and her late husband's shares in the company and she knew nothing of an alleged agreement which he concluded with Mr Knoetze in August 2009 that he had paid a reasonable amount for the 57 shares.

64. In cross examination, the plaintiff stated that at the time that she decided to sell assets, she knew that the defendant was indebted to her in an amount over R5 000 000. It is at this stage of the proceedings that the plaintiff was questioned about an affidavit that she had deposed to which seemingly facilitated the liquidation proceedings of the company and Sheerprops and that it contributed to the NEF getting cold feet to fund the company. Having regard to the evidence presented in this trial, the pleadings and issues in dispute, the issue regarding this affidavit and any connection to the eventual liquidation of the company, is wholly irrelevant and I agree with the plaintiff's attorney's submissions on this point. In 2012, according to the plaintiff, she and the defendant still had a normal relationship.

Mr Keet, the defendant's expert

65. The closure of the plaintiff's case was followed by the evidence of Mr Keet, a chartered accountant. He was approached by a colleague in February 2021 to do a valuation of the company as at January 2009. The witness had experience in

medium-sized auditing practices of entrepreneurial business and private companies. He confirmed the content of his reports[78].

66. Mr Keet explained that he received the audited financial statements of the company as at 31 December 2008, historical financial information, the income statement and balance sheet of the company dated 1995, the company's business plan and the *"quick and dirty"* valuation[79]. He considered the appropriateness of some of the assumptions made and his opinion was that he Net Asset Value (NAV) approach was the most appropriate approach for a valuation when the company was making losses. In his report, he refers to Mr Geyer's application of the DCF approach to the valuation which he views as being applicable in circumstances where one wished to establish what the most likely outcome of the assumptions were. He considered the future cash flows, the fact that in 2009 the company experienced a decrease in cash flow, historical information as well as the prevailing global economic crisis and the business plan in order to determine what the most likely outcome would be.

67. Mr Keet referred to the company's loss of a major client prior to the deceased's death and he assessed the net asset value of the company to be between R6.4 million and R9.3 million with an average of R7.9 million at 31 December 2008[80]. He was of the view that a value closer to R9.3 million was fair. Mr Keet criticized the DCF methodology applied by Mr Geyer in reaching the valuation in the CAP Report. He applied the NAV methodology and did not feel that the company was able to produce profits based on the assessment of the reasonableness of the assumptions made in the business plan. He did not obtain information from the director and took cognizance that the CAP valuation was done at the time of the global financial crisis.

68. In persistent cross examination, it came to light that Mr Keet did not refer to

[78] Expert Bundle, p20-31
[79] Mr Keet's evidence was to the effect that he had never heard the term
[80] Par 18, Expert Bundle, p14

the International Valuation Standards (IVS) applicable to valuations of businesses though he agreed with Mr Geyer that all chartered accountants must adhere to these guidelines and requirements. His explanation for failing to refer to the IVS is that he does not refer to every bit of literature in a multitude of work done. It also became apparent that Mr Keet was provided with information and documents which Mr Geyer had not received and/or not considered. For example, Mr. Keet received historical spreadsheets of the company going back to 1995, which Mr Geyer did not. Mr Keet also considered the company's business plan which Mr Geyer pertinently did not consider for purposes of valuing the shareholding.

69. Another problematic feature is that when questioned about the principle of prudence in accounting, the witness testified that it is a widely used term in accounting practice that the chartered accountant had to apply his or her mind to the information they received. In cross examination, Mr Keet was referred to paragraph 3.3.8 of Mr Geyer's comments on Mr Keet's report and the reference that *"Prudence is assessed by referring to the state of the market at the valuation date, not with the benefit of hindsight"*[81]. The witness contended that his definition of applying his mind would indeed encapsulate such definition but on further cross-examination it became clear that his definition did not include any reference to *"without the benefit of hindsight"*. Eventually Mr Keet agreed with the plaintiff's attorney that his critique of Mr Geyer's report was with the benefit of hindsight.

70. Mr Keet had no problem with calculations made by Mr Geyer in determining the value of the company at 17 January 2009 but in his view, the NAV method should have been used and not the DCF method as done by Mr Geyer but he admitted that he had the benefit of hindsight. He disagreed with the calculation of future income and had taken into account the business plan and projections. In his opinion, Mr Geyer should have taken into account the financial position of the economy in January 2009 when the director passed away and there were flags in the financials in that the company was trying to negotiate prices with a big client.

[81] Par 3.3.8, Expert Bundle, p53 - Mr Geyer's reference is to par 30(h) of the International Valuation Standards, p19, 2013 (copy attached in Expert Bundle)

71. Importantly, in respect of Mr Geyer's valuation and opinion as to his methodology, in accordance with the IVS guidelines, the NAV method was suitable where no reasonable projections were available and NAV applied when valuing a loss-making business that had no prospect of returning to profitability. Mr Keet could also not dispute that on the strength of the projections provided to him by Mr Knoetze and the defendant, Mr Geyer then drafted his report and considered the projections to be reasonable.

72. Mr Keet's further criticism of Mr Geyer was that he would have considered the reasonableness of the information provided by the management and interviewed them to determine whether the information was indeed accurate[82]. The criticism is that had he received financials which Mr Geyer did at the time, he would have interviewed the source of the information and interrogated it. He would have conducted a reasonableness test in order to determine whether the financial information provided by the management of the company was reasonable. The plaintiff's attorney referred the witness to Mr Geyer's mandate in 2009 in conducting a valuation and that the latter was not privy to the company's business plan. It was put, with reference to Mr Geyer's mandate, that he accepted or assumed that the future projections proposed by management were reliable and it was not part of his mandate to perform due diligence on the projections nor to establish the reliability of the sources and information he received[83].

73. When he viewed the mandate, Mr Keet conceded that if that indeed was the scope of the mandate Mr Geyer had received, then he could accept that the information was reasonable if indeed it was. However, his view was that the projections by management were not reasonable because the company was already insolvent based on the financial statements received. However, he admitted that if Mr Geyer was informed that the projections and information received were reasonable then the latter was entitled to rely on it at the time in 2009. He agreed

[82] My understanding of this evidence is that it was Mr Keet's view that at the applicable time in September 2009 when compiling his valuation, Mr Geyer should have interviewed Mr Knoetze and the defendant
[83] See Exhibit B, p53-54; Expert Bundle, p53

with Mr Geyer that the income-producing ability of the asset was a critical element affecting the valuation of the company[84].

The defendant, surviving shareholder of Expertool

74. The defendant confirms the terms of the buy and sell agreement, that the deceased had 57 shares in the company at the time of his death, that he had purchased the deceased's loan account in accordance with the buy and sell and that he and Mr Knoetze agreed on 25 June 2009 that he would make direct payments to the plaintiff in respect of the purchase of the 57 shares.

75. The defence rests firstly on the denial that the value of the 57 shares was an agreed R13 205 000 and he did not agree on an external valuation for the company's valuation of shares. He alleges that the appointment of CAP (and therefore Mr Geyer) was not discussed with him. Insofar as the figures depicted on page 58 of Exhibit B are concerned[85], the defendant denied knowledge of the document and figures contained thereon and had no recollection of Mr Knoetze's email[86] allegedly requesting his input to Mr Geyer.

76. As for the CAP Report, the defendant testified that his first sight thereof was when the Summons was served on him in 2012. As far as he was concerned, he and the deceased as shareholders should have valued the company at the end of each of the financial years subsequent to the buy and sell agreement and agreed on the 100% shareholders' valuation and then included it as an addendum to the buy and sell as required by the agreement. However, neither of them attended to a valuation and there was no valuation of the company since 2003.

[84] This is a reference to the DCF method applied by Mr Geyer
[85] The unsystematic risk premium
[86] Exhibit B, p59

77. He denies knowing of the transfer of shares to the ADC Family Trust and confirms that he had received transfer of the 57 shares in early 2010. The defendant denies that an agreement was concluded with Mr Knoetze in November 2009 or at any stage that the balance of the purchase price for the 57 shares would be paid over 60 equal monthly instalments. The email which the defendant sent to Mr Knoetze on 4 November 2009[87] stating *"Thanks Kobus"* was not an acknowledgment of an agreement but an acknowledgment of receipt of an email. In addition, the defendant denies seeing the amortisation schedule in November 2009 and that he owed anything on the purchase price of the deceased's shares.

78. The defendant testified at length regarding the state of the company in 2008 and 2009 and indicated that he would call a further witness, Mr Albert Kruger. His evidence regarding the negotiations with the NEF for funding was that the NEF was of the view that the business was worth between R9 to R11 million in January 2009.

79. He described his relationship with his sister after the deceased's death as being very supportive and this role continued into 2013, after the Summons was served. However, he attributes her affidavit as causing or contributing to the eventual liquidation of Sheerprops and Expertool. He confirms the plaintiff's version that she never approached him regarding outstanding payments of R127 128 per month.

80. The cross examination of the defendant was unfortunately characterized by his statements and declarations to the Court regarding his dissatisfaction and discomfort that he would be cross examined by the plaintiff's attorney, Mr Ulyate, to whom he ascribed partial blame for the role the attorney allegedly played in the downward spiral of the company and Sheerprops. The record is replete with my countless explanations of the other party's right to cross examination, the process, trial procedure and having to repeat the attorney's questions when the defendant clearly did everything but answer the question. To this end, the attorney's

[87] H3, Pleadings

submission in his heads of argument that I interjected during the defendant's evidence on 17 November 2021 is correct. I also explained to the defendant that any issue he believed he had with the plaintiff's attorney would have to be raised with his attorney and counsel after conclusion of cross examination.

81. On the question as to whether the defendant and Mr Knoetze had a discussion regarding an external valuation, the defendant's evidence is found to be vague. On the one hand his evidence that the NEF allegedly valued or indicated that the company was valued at between R9 and R11 million was never put to Mr Knoetze in cross examination. Secondly, his version that he had a discussion prior to August 2009 with Mr Knoetze regarding the valuation of the company when the financials were to be signed was eventually contradicted by his later version that he did not recall a specific discussion around a valuation.

82. Insofar as the payment of R1 821 547, 40 in terms of H7 and H8 is concerned, the defendant was evasive as to whether these amounts should be deducted from the price for shares. The record[88] reflects that the attorney asked the question repeatedly and in different ways and resorted to pointedly referring the defendant to the calculation in the Amended Particulars of Claim[89]. The defendant's version ranged from not recalling his evidence in chief to being unsure whether the R1 821 547, 40 should be deducted from the purchase price of the sale of the shares, to stating that he needed time to consider his answer. At some stage, the defendant stated that he regarded these as ad hoc payments to his sister and her children and that he was unsure that deducting the payments on H7 and H8 would be correct. Eventually, he stated that only certain payments as reflected on H7 and H8 were to be taken into account as payment toward the shares. When the attorney revisited this issue later in cross examination, the defendant testified that the payments on H7 and H8 do not form part of the payment toward the purchase of the deceased's 57 shares.

[88] See for example, Transcript, p283, vol 2
[89] Pleadings, p10

83. According to the defendant, an agreement or discussion occurred in August 2009 that the company was valued at R14 million and the defendant informed Mr Knoetze that the R7 358 000[90] was more than reasonable for the 57 shares. He did not take issue with the fact that (in his view) he had paid more than the value of the purchase price of the shares. He agreed that his share would have been in the region of R6.6 million on a company valuation of R14 million. It is notable that the defendant never put to Mr Knoetze that there was a discussion and/or agreement that the company was valued at R14 million and that the purchase price for the shares was R6.6 million nor is this averment made in his amended Plea.

84. When pressed on his failure to put this very important aspect to Mr Knoetze in cross examination, the defendant fell back on the refrain that he was an unrepresented litigant who had been denied a postponement and who was not well at the time of cross examining Mr Knoetze. He furthermore blamed Mr Ulyate for wanting to catch him out in a lie and proceeded to lament that his erstwhile attorneys had focused more on the fact that he had paid in excess of the purchase price for the shares. This long-winded explanation where he blamed his former legal representatives[91] was nothing but a new version which arose during cross examination when he was pinned in a corner. The defendant's prevaricating eventually led to a further version that Mr Knoetze was happy to accept that he had paid more than the R6.6 million for the 57 shares.

85. When asked why he would pay R7 358 000 for the shares when he relied on his version under cross examination that there existed an agreement that he would pay R6.6 million for the 57 shares, the defendant bizarrely disagreed with the attorney's summation of exactly what he had already stated in cross examination.

86. When asked about the figures and input to Mr Knoetze as requested by

[90] This amount has been generally referred to as the R7.5 million, but it is common cause that the amount is R7 358 000

[91] Riley Incorporated were the defendant's attorneys at he commencement of the trial in February 2021 and had drafted the Amended Plea

CAP/Mr Geyer[92], the defendant admitted that these amounts were obtained from him. If one has regard to the email chain in Exhibit B[93] taken with the defendant's admission that he provided the figures regarding unsystematic risk premiums, it follows that a conclusion may be reached that a discussion between Mr Knoetze and the defendant regarding the external valuation must have occurred. Yet later in cross examination, and with reference to the input to Mr Geyer regarding unsystematic risk premiums,[94] the defendant contradicted his earlier version by stating that he could not confirm the document as being his response to Mr Knoetze.

87. The defendant was questioned as to what would occur when, in terms of the buy and sell, no valuations occurred annually or for the preceding 12 months prior to the deceased's death and one of the shareholders had died. The defendant confirmed that the buy and sell agreement does not cater for such a situation. His explanation was that if Mr Heinrich had been alive, they together with Mr Knoetze would have considered the company's annual financial statements, and reach agreement in consultation with Mr Knoetze as auditor regarding the value of the company. In circumstances where Mr Heinrich had died, the meeting would have been between him and Mr Knoetze as auditor and executor of Mr Heinrich's estate but the valuation would have been informal. In my view, this indeed amounts to a concession that the executor and he would agree to a valuation of the company and shares of the deceased.

88. In respect of the R14 million valuation which the defendant testified to, he admitted that there was no documentary evidence in respect of such an alleged agreement. He admits receiving the draft CAP Valuation and yet again in a long-winded explanation stated that he never had the opportunity to take issue with the report because he was at the time under severe pressure and did not read every email which he received after Mr Heinrich's death. The defendant's evidence is that he first became aware of the CAP Valuation in correspondence between Mr Knoetze

[92] Exhibit B, p56-60
[93] See Exhibit B, p59
[94] Exhibit B, p56

and the NEF in October 2009. When asked whether he read the email attaching the draft CAP report on 11 September 2009, the defendant was once again evasive. He was reluctant to admit that he had or had not read the email even though he had admitted receiving the email. This version then changed to him having no recollection of the email and then stating that he could not discount that he could have seen and read the email.

89. On the question surrounding the email dated 18 September 2009[95] whereby Mr Knoetze sought to enforce the buy and sell agreement and referred to the valuation completed the previous day, the defendant was not prepared to admit that he received the email even though it was clearly sent to his email address. Only when pressed on this issue, did he then admit that the email was sent to him. He failed to explain why, if there was an agreement according to him that the company was valued at R14 million, he did not raise this when the emails indicate a valuation of R13 205 000 for the 57 shares. The defendant yet again prevaricated and could not provide a reasonable explanation for his failure to object to the CAP valuation and R13 205 000 purchase price for the shares. The evidence points to the defendant having received the various emails and given his later communications with the NEF, he took no objection to the purchase price of R13 205 000.

90. Yet again at the commencement of proceedings on 18 November 2021, the defendant (duly represented) proceeded to address me from the witness box and declare that he was made to feel as if he was a robot and he took issue with the atmosphere in the building and with questions asked regarding email correspondence. Presumably the atmosphere was a reference to the atmosphere in the Court room where he was under constant cross examination from Mr Ulyate. I point out that at no stage (barring an objection) had his counsel interrupted the cross examination, yet the defendant saw fit to make declarations to the Court and seek its guidance. He was once more referred to the plaintiff's right to cross examine him and test his version.

[95] Exhibit B, p18

91. The evidence which followed was that there were no further valuations aside from those by CAP. The defendant was of the view that there was no need for an external valuation of the company but that Mr Knoetze wished to formalize his position in August 2009. While he admitted to having heard about the external evaluation, his evidence constantly changed as to when this occurred. When the defendant was referred to Exhibit B[96], he was not prepared to confirm when he became aware of the valuation, notwithstanding that that he had himself referred the NEF and Mr Knoetze who was included, to a valuation concluded on the same day, 16 September 2009[97]. The defendant stubbornly refused to admit or concede that from his email on page 17 of Exhibit B, he had at the very least by 16 September 2009, known of an external valuation of the company: he testified that the email does not refer to an external valuation. The picture he wished to paint is that there was no agreement and he had no knowledge of an external valuation.

92. On later questions put by the attorney, the defendant at length referred to aspects not asked about or not pertinent to the issues in dispute on the pleadings and facts of the matter. Later in cross examination, the defendant eventually conceded that he had responded to Mr Knoetze's email of 18 September 2009[98] on the same day[99] and he admitted that he had taken notice of Mr Knoetze's email and that he knew of the purchase price of R13 205 000.

93. Despite the above admissions, the defendant then proceeded to distance himself from the content of his email of 18 September 2020. I am left with a view that the defendant's evidence on this aspect makes no sense and is wholly contradictory and unsatisfactory. He followed a similar trend when questioned about Mr Knoetze's email of 22 September 2009[100], and could not confirm receiving the email and then denied that there was a telephonic discussion with Mr Knoetze as referred to in the

[96] See Exhibit B, p17 and 23
[97] Exhibit B, p17
[98] In summary, the email refers to the valuation, the plaintiff's acceptance of the valuation, the defendant's indebtedness in the amount of R13 205 000 less R5 000 000, and the effective date of 1 October 2009
[99] Exhibit B, p20
[100] Exhibit B, p23

email and the latter's evidence. The plaintiff's attorney's summation at paragraph 4.2.24 of his heads of argument regarding this aspect is correct.

94. The email exchanges which were either directly to or from the defendant or included him, depict that the defendant must have been fully aware of what was transpiring with regard to the valuation, the price for the shares, the requested information from the NEF and Mr Knoetze's provision of such details[101]. The defendant's version that he did not follow up with Mr Knoetze and simply went along with the flow of things, is not borne out by the documentary evidence which include his responses to Mr Knoetze and direction to the executor to provide the NEF with the information sought regarding the purchase price, outstanding balance, effective date and the like[102]. It is clear that the defendant was included in the email of 2 October 2009 referring to the external valuation and the deal reached with the defendant regarding the 57 shares.

95. As has been the case, when cornered, the defendant sought to blame someone else and Mr Knoetze was not spared the finger-pointing, this time alleging that the latter had his own agenda and that he knew that the NEF financing talks would collapse. When it was put to him that he then alleges that he and Mr Knoetze then allegedly embarked upon a course to defraud or misrepresent the circumstances to the NEF, the defendant denied this. The suggested alternative or new price (whether R6.6 million or some other figure), on the defendant's version, was never communicated to the NEF and there is no documentary evidence to this effect. On the contrary, the fact that the defendant communicated on 30 October 2009[103] that he had signed the share certificates, is in my view a further significant fact leading to the conclusion that the defendant was aware of and accepted the CAP valuation of the company and more importantly, had agreed to the R13 205 000 for the 57 shares. He was also aware that the NEF required that the balance be paid

[101] Exhibit B, p24-28; Exhibit A, p61
[102] See Exhibit B, p24
[103] Exhibit A, p62

in instalment over 60 months[104] in terms of the buy and sell.

96. The defendant confirmed that the total paid to him in February 2009 terms of the buy-out from assurance policies was R11 136 610, 77[105]. When it was put to the defendant that his Amended Plea does not state that certain payments after August 2009 were gifts or a salary that would have been paid to Mr Heinrich, and not in payment of the purchase price for the 57 shares, the defendant's response was yet again to point a finger in the direction of his erstwhile attorneys. On his version, he had informed the attorneys that the amounts on H7 and H8 were not payments in lieu of the purchase of the deceased's shares.

97. In my view and in light of the findings herein, I need not address nor evaluate the evidence related to the amortization schedule except to make the following points: Mr Knoetze's evidence as to the meeting at Expertool on 4 November 2009 I find to be preferred above the improbable version and denial of the defendant. The version that the email on page 79 of Exhibit A was simply an acknowledgement of receipt is rejected. The probabilities and consistent version of Mr Knoetze support a view that an agreement on 4 November 2009 regarding the amortisation schedule indeed occurred.

The buy and sell agreement and the R30 million valuation

98. This matter is ultimately a factual and not a legal dispute. The starting point of this 13 year old sibling dispute may be found in the buy and sell agreement, H1. The terms are not in dispute and from the evidence of Mr Knoetze and the defendant, it is common cause that the defendant and the deceased never determined valuations as envisaged in clause 4 thereof. I accordingly accept that subsequent to the conclusion of the agreement in December 2003, no agreements regarding a valuation were concluded for 2004 to December 2008. In addition, there existed no valuation for the

[104] Exhibit A, p64
[105] See clause 9, Buy and Sell Agreement, H1

12 month period prior to the deceased's death in January 2009.

99. The question is whether the R30 million valuation for the collective shareholding of the company as set out in clause 4.1 applied at the date of Mr Heinrich's death? In my view, the answer must be No. I say this because in determining the answer, regard must be had to the language of the agreement as a whole but more specifically, to clause 4.1. In ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[106] , Wallis JA in addressing interpretation of documents and legislation, stated at paragraph 18 of the judgment that:

> *'consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision occurs; the apparent purpose to which it is directed and the material known to those responsible for its production'*

100. Having regard then to the ordinary grammatical rules for purposes of interpretation, one sees that the R30 million valuation is referred to as the *"present value"* which can only mean the value on 12 December 2003 when the agreement was concluded. While Mr Knoetze was initially cross examined regarding the R30 million valuation when the trial commenced in February 2021, he was clear that he did not consider the R30 million valuation to be applicable in January 2009 and so too the defendant. What was supposed to occur from December 2003 was that clause 4's provisions were to be put into operation. However, it is common cause that it was not strictly complied with and that there were no valuations.

The life assurance pay-out and the external valuation of the company shareholding

101. The buy and sell makes no provision for the eventuality where none of the provisions of clause 4 were complied with and there was then no valuation of

[106] 2012 (4) SA 593 (SCA)

shareholding at the date of the deceased shareholder's death and this as much was eventually conceded by the defendant in cross examination. As stated above, the R30 million also did not apply to the company's valuation.

102. The parties agree that clauses 1 to 3, read with the rest of the agreement, applied on Mr Heinrich's death and had to be given effect to. As the representative of his deceased estate, the only person other than the defendant who could reach agreement so as to give effect to the terms of the buy and sell was the executor, Mr Knoetze. To the extent that the defendant and his legal representatives, past and present, sought to suggest that Mr Knoetze's evidence should be considered with circumspect because he was conflicted, I do not agree,. I have already evaluated his evidence above and do not do so again, but wish to emphasise that he was a very good witness, who remained steadfast in his version regarding agreements and the valuation. The *"conflict"* which he had and which he expressed should be seen in the context of his role as executor and auditor and financial manager of the company.

103. What comes to light in the evidence of Mr Knoetze and the numerous email correspondence is that Mr Knoetze knew and was aware of the terms of the buy and sell and intended to enforce it as representative of the deceased shareholder. He intended to carry out the wishes of the deceased in relation to his Last Will and the buy and sell. Thus, in the absence of a preceding 12 month agreed valuation between the defendant and the deceased, and in the absence of a clause dealing with such a scenario, it follows that the only recourse was for the defendant and Mr Knoetze was to agree to a valuation of the shareholding. Ultimately, and after lengthy cross examination, the defendant was forced to concede that a discussion between Mr Knoetze and himself to determine a valuation is what would have needed to be done. On the evidence, this is indeed what occurred, whether it was in person, per email or telephonic.

104. Mr Knoetze's version that a valuation of the company was necessary for estate duty, the Master and to determine the value of the deceased's shareholding,

remained unchallenged and I accept the evidence as such. To the extent that the defendant sought to persist that the valuation had to be done by Mr Knoetze, the insistence flies in the face of his refrain throughout the trial and his submissions, that Mr Knoetze was conflicted and wearing too many hats. The evidence indicates that it was Mr Knoetze's call to seek an external valuation and in my view, there is no doubt that given Mr Knoetze's relation to the company and its directors, and his capacity as executor, that he could not do the company valuation himself. The defendant's resistance to this fact by questioning the shared fees to CAP is simply one of many red herrings thrown by the defendant.

105. There is another important aspect which requires a comment: by February 2010, the defendant had received the life assurance pay-out totalling R11 136 610, 77[107] in terms of clauses 5 to 9 of the agreement. Yet, the evidence is that from the R11 136 610, 77, he only paid R5 000 000 to the deceased estate by May 2009. This, in my view, was clearly not what clause 9[108] of the buy and sell envisaged nor required of him as the surviving shareholder. Clause 9 required that on the deceased shareholder's death, the proceeds of the policies on Mr Heinrich's life would be paid to the defendant (as surviving shareholder) and on the appointment of the deceased's representatives, *"the surviving shareholder shall pay such proceeds to the deceased's representatives in respect of the purchase price of the deceased's shareholding in the (Pty) Ltd"*[109].

106. My understanding, and certainly Mr Knoetze's and the plaintiff's attorney's, is that the defendant was required to pay the entire R11 136 610, 77 to the deceased estate towards the purchase price of the shares of the deceased on the appointment of the deceased's representative. Any balance then remaining pursuant to a valuation of the shares, was due to be paid over to the deceased estate, or as matters transpired, to the plaintiff. The defendant failed to comply fully with clause 9 and Mr Knoetze's further conduct in repeated calls for payment of the balance due to

[107] H1, Pleadings, p17
[108] Read with clauses 5 to 8
[109] Clause 9, H1

the estate/plaintiff as seen from the various emails cannot be faulted.

107. I find from the accepted facts that Mr Knoetze's request made to CAP for an external full valuation of company shareholding must thus have been pursuant to a discussion with the defendant. It is evident from clauses 1 and 2 of the buy and sell agreement that the defendant and deceased contemplated a situation where the deceased shareholder's representative was obliged to sell the deceased's shares in the company to the surviving shareholder, and unless otherwise agreed to, the surviving shareholder *"shall purchase"* the deceased's shares in the company[110]. There was no other agreement thus there had to be a purchase and sale of the deceased's 57 shares to the defendant. Furthermore, upon receipt of the purchase price in cash, transfer of the 57 shares into the name of the defendant was to occur[111]; in the circumstances of this matter, transfer of the deceased's 57 shareholding in the company indeed occurred, at the earliest in September/October 2009 and the latest February 2010, but the full purchase price was not paid to the plaintiff and as the facts have shown, a balance remains outstanding.

108. That the defendant was aware that CAP was approached for a valuation, that he provided input as requested by Mr Geyer and that he was sent a copy of the CAP report, of this there is no doubt. Mr Knoetze's consistent version is backed up by the email exchanges in September 2009[112] and to an extent, by Mr Geyer's evidence regarding the information which he received. This is in contrast to the contradictory and evasive version provided by the defendant. In any event, the defendant on one of the numerous occasions where he changed his version on material aspects, confirmed that he had provided the information requested of Mr Geyer.

109. As to the CAP Report, I have set out the evidence at length above. Mr Geyer was certainly independent and he motivated and justified his approach and use of

[110] Clause 2, H1
[111] See clause 11.1, H1
[112] Exhibit B, p55-60

the Discount Cash Flow as opposed to the NAV method in 2009. His expertise was not in dispute. He was a credible witness who convinced that the methodology he used to determine the company valuation in 2009 was appropriate, justified and in accordance with international valuation standards.

110. To the extent necessary, Mr Keet's evidence and reports do not sway me from accepting Mr Geyer's evidence and his valuation. It was clear that Mr Keet was provided with additional information and documents which Mr Geyer was not privy to, had not had regard to, that he made a concession regarding the principle of prudence and that ultimately, Mr Geyer had acted within the scope of his mandate and that the DCF methodology was appropriate in the circumstances. In the result, I find that the valuation of the company as set out in the CAP Valuation of 16 September 2009 is acceptable: R24.4 million at 17 January 2009 and R27.8 million at 1 October 2009. The effective date for the purchase of the shares is thus 1 October 2009.

Was there an agreement to purchase the 57 shares for R13 205 000?

111. The CAP Valuation was necessary, inter alia, to obtain a determination of the purchase price for the deceased's 57 shares. My references and findings above relating to the correspondence between the defendant, the NEF and Mr Knoetze refer. It is abundantly clear from the emails referred to in this trial that the defendant applied to the NEF to finance the company. In the emails, there are constant references to the valuation which was awaited and this certainly ties in with my view that the defendant knew of the valuation[113] and took no issue with it.

112. The defendant's alleged dispute and denial of an agreement between himself and Mr Knoetze that the 57 shares would be sold for R13 205 000 is rejected. It is

[113] Exhibit B, p17, 18, 23 and 25

not borne out by the oral and documentary evidence[114] and the consistent version of Mr Knoetze that there was an agreement in September 2009 regarding the R13 205 000 purchase price. This is certainly supported by Mr Knoetze's reference on 22 September 2009 to an earlier discussion on that day that the shares would be sold as per the valuation and with the estate valued at R27.8 million at 1 October 2009, the purchase price was thus R13 205 000.

113. The absence of any objection recorded in these emails or any further documentary proof indicating that a different price was agreed on, leads me to conclude that there was no objection. The defendant certainly acted in accordance with the agreement in that he reminded Mr Knoetze that aside from the R5 000 000 paid, he had also paid R2 358 000. Certainly, this is not conduct of someone who had an issue with the purchase price of the 57 shares. The later correspondence with the NEF also supports my view that the defendant had indeed agreed to the abovementioned purchase price and acted in accordance with such an agreement. His evidence of simply going with the flow, that his computer (and not him) had received countless emails and he had not read many, is simply an attempt to distance himself from the content and timing of the emails. Having regard to all the accepted evidence, I am thus satisfied that the plaintiff has proved the existence of an agreement concluded in or during September 2009 between the defendant and Mr Knoetze that the purchase price for the deceased's 57 shares in the company was R13 205 000.

Was an agreement concluded that the R7 358 000 was a reasonable amount for the 57 shares?

114. The second defence is that the defendant informed Mr Knoetze in August 2009, and it was agreed between them, that the defendant had paid the full value for the 57 shares in the amount of R7 358 000. This version is rejected for the following reasons: Mr Knoetze consistently denied the version and remained steadfast on this

[114] Exhibit B, p18,-20, 22

aspect throughout the trial; the defendant could not provide any substantive evidence of this version of events; the plaintiff knew nothing of such an alleged agreement and would have been informed by Mr Knoetze had such an agreement ever existed; in August 2009, the executor was awaiting the CAP Valuation of the total shareholding of the company which would form the basis for the calculation of the purchase price for the 57 shares, and it would make no sense to have agreed on another amount; and, subsequent to August 2009, the defendant was still making ad hoc payments to the plaintiff.

115. There is a further reason: if, on the defendant's version, he and Mr Knoetze agreed in August 2009 that the company was valued at R14 million, then he was only required to pay R6.6 million for the shares, but he paid R7 358 000. The defendant had no explanation for this clearly contrived version when he was pressed for an answer in cross examination. Given the accepted facts in this matter, the consistent version of the plaintiff and Mr Knoetze, juxtaposed against the inherently poor and contradictory evidence of the defendant, I reject the defendant's version as it is not supported by the accepted facts and probabilities. In addition, the defendant's evidence regarding alleged agreements on the value of the company also changed during the trial to suit his narrative or purpose.

The amount due by the defendant

116. I duly addressed the evidence surrounding the question whether the payments made by the defendant reflected on H7 and H8 should be taken into account. After playing the proverbial musical chairs on this question posed during cross examination, and after changing his version more than once, the defendant eventually declared near the latter stages of his cross examination that the payments on the abovementioned schedules H7 and H8 were not made toward the purchase price of the shares. These are to be regarded as ad hoc or salary payments to the plaintiff.

117. On closer scrutiny of the defendant's Amended Plea[115] and his response to paragraph 18 of the Amended Particulars of Claim which contains a calculation of the outstanding balance of R5 847 000 ***less the R1 821 547, 40***[116], the defendant admits making payments on H7 and H8 but denies the remaining allegations in the corresponding paragraph. This certainly in my view puts paid to any uncertainty: the defendant did not regard the payment on H7 and H8 as being payment toward the outstanding balance on the purchase price for the 57 shares. Thus, in calculating what the defendant's liability is in terms of the claim, the R1 821 547, 40 cannot or should not be considered in the calculation.

118. With reference to the evidence, the admitted facts that R5 000 000 and R2 358 000 were paid toward the R13 205 000 purchase price for the 57 shares, the outstanding balance due by the defendant is **R5 847 000** as at 1 October 2009, the effective date of the sale of shares agreement[117].

119. The submissions by the defendant's counsel focuses on the fact that Mr Knoetze transferred shares to the ADC Family Trust instead of to the defendant. It is common cause that this occurred but the evidence of Mr Knoetze on this was consistent: he was instructed by the defendant that his nominee was the ADC Family Trust and he carried out the instruction. The reasoning for this decision of the defendant was to avoid Standard Bank coming after him as a surety for loans taken out in favour of the company. Ultimately, this was not a material issue in view of the defendant having signed the share certificates but I must point out that Mr Knoetze remained adamant that he would not, of his own volition, transfer shares to the Trust and this version is certainly more believable than the defendant's.

120. In view of the above findings, there is no need to make further findings regarding the amortisation agreement which relates to the alternative prayer in the

[115] Par 15, Pleadings, p39g
[116] The total of H7 and H8 – my emphasis
[117] See Exhibit A, p61 and emails referred to above

Amended Particulars of Claim. I am satisfied in view of the evidence as a whole that the plaintiff has discharged the onus on her in relation to her Amended Particulars of Claim and the prayers sought therein. The defendant, who was evasive, vague, adjusted his version several times and blamed everyone for his dilemma, unfortunately lacked credibility on the important disputed issues, which he wished to cloud with irrelevant matter. The defendant has failed to prove the existence of a defence(s) as pleaded in his Amended Plea.

Costs and interest

121. I have considered the plaintiff's attorneys' submissions and reference to the *in duplum* rule as discussed in detail by the Constitutional Court in ***Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd***[118] and accept the argument.

122. The plaintiff motivates in paragraph 7 for a costs order on a punitive scale on the basis that the defendant has unnecessarily delayed the action, has raised spurious defences when for many years until a few days before the trial, his defence was a bare denial; and he has caused immeasurable emotional stress and hardship for the plaintiff and her children after the death of Mr Heinrich, the sole breadwinner of the Heinrich family.

123. This matter has certainly dragged on for 10 years after Summons was instituted and in total, the plaintiff has waited 13 years for what is owed to her. The submissions regarding a punitive costs order has not been addressed by the defendant but in the exercise of my discretion I take cognizance that all the postponements during the trial were at the behest of the defendant, and several hours were spent hearing submissions regarding the applications but must point out that these were decided on the day and costs awards made at the relevant time; the only exception is the 30 August 2021 postponement. In addition, I take note of the submissions regarding the application to compel a reply to the request for trial

[118] 2015 [ZACC] 5

particulars and the rule 30 application argued on 30 August 2021.

124. There is the not so insignificant issue of the application to recall Mr Knoetze and to call Mr Francois Jacobs. This was conveyed during the proceedings at the conclusion of the November 2021 session, and the application to recall, which was opposed, was to be heard on 28 March 2022. The entire week was set aside for the defendant's case to continue during the first week of recess. Yet, dramatically and without prior notice, at 10h00 on 28 March 2022, when proceedings commenced, counsel informed me that he and his attorney had been informed in chambers shortly before 10h00, that the defendant wished to withdraw the application to recall Mr Knoetze and tender costs, that he was not intending to call Mr Jacobs and that he closed his case.

125. Needless to say, the plaintiff and her attorney were none the wiser and put out by the sudden turn of events. The attorney's lengthy submission for a punitive costs order was properly motivated. An entire week was set aside, and despite a period of almost four months to give notice of his change of heart to withdraw the application, the defendant kept everyone in the dark, including his legal representatives and the Court. Judicial time was wasted in circumstances where an entire week was set aside only for the defendant to suddenly change course. The plaintiff was put to great expense yet again and the tender of costs does not remedy the financial burden in those circumstances. Clearly, the defendant failed to take the Court into his confidence and seemingly, not his legal representatives either.

126. In my view and in the exercise of my discretion having regard to the entire history of litigation, a punitive costs order is warranted in respect of certain of the reserved costs addressed above. However, I am not convinced by the submissions that an award of attorney and own client costs is appropriate in respect of the entire action.

Order

127. In the result, the following orders are granted:

a. The plaintiff's claim is upheld.

b. The defendant is ordered to pay R5 847 000 as at 1 October 2009;

c. Interest is payable on the above capital amount at the prime rate of interest prevailing from time to time from 1 October 2009, capitalised monthly in arrears until date of judgment and limited to the capital amount (R5 847 000);

d. Interest is payable on the capital amount and interest as per prayers (b) and (c) above at the prime rate of interest prevailing from time to time, capitalized monthly in arrears from date of judgment to date of final payment;

e. Costs of suit, which shall include costs of the rule 30 hearing on 30 August 2021. Costs are awarded on an attorney and own client scale to be taxed in respect of the reserved costs of the plaintiff's application to compel a reply to trial particulars, the postponement on 30 August 2021 and the withdrawn application to recall the witness Mr Kobus Knoetze on 28 March 2022.

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M PANGARKER
Acting Judge of the High Court

For Plaintiff: Vaughan Ulyate De Jager
Mr V Ulyate

For Defendant: Advocate D Filand
Instructed by: Sitzer and Associates