

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

 **CASE NUMBER: 14801/2020**

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

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 DATE 07 October 2022 SIGNATURE

In the matter between:

**DALMAR KONSTRUKSIE (PTY) LTD FIRST APPLICANT**

**ALTO KITCHENS (PTY) LTD SECOND APPLICANT**

and

**MIKAIA BOERDERY (PTY) LTD RESPONDENT**

**EMBONDEIRO SA (PTY) LTD INTERVENING PARTY**

 **JUDGMENT**

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 **TLHAPI J**

**INTRODUCTION**

[1] The applicants seek an order finally winding up the respondent and costs to

be in the winding up. Embondeiro SA (PTY) LTD, was a 50% co-shareholder in the

respondent and it launched an application to intervene. The latter application was not

opposed and an order was granted. The intervening party filed a further application

in order to address new matter arising in the replying affidavit.

[2] The Dalmar Trust is the sole shareholder in the first applicant. Mr Conrad

Swart (C Swart) who deposed to the founding affidavit is a director in the first

applicant, which holds a 67% shareholding in the second applicant and the first

applicant is also a creditor of the respondent. Mr Leon Grobler (L Grobler) is a

director in the second applicant which holds a 50% shareholding in the respondent

and he controls a trust which holds the remaining of the shares in the second

applicant. Mr Jaap Lee (J Lee) is a director in the Intervening Party which holds a

50% shareholding in respondent. The respondent holds shares on behalf of its

members and L Grobler and J Lee are its directors. The respondent is also a 100%

shareholder in a company registered in Mozambique known as Fazenda Micaia

Criacao Limitanda (Micaia Mozambique). The respondent “Mikaia…” although a

South African company derives its name from a farm acquired in Mozambique. The

Intervening Party also engages in business under the name ‘Embondeiro’ in

Mozambique. Although the applicant and intervening party use different spellings

Mikaia and Micaia refer to the same farm in Mozambique.

[3] The second applicant supports the application on grounds that there existed

an irresoluble deadlock and breach of trust between the Dalmar and Lee groups

concerning a cattle farming enterprise engaged in Mozambique. The applicants

contend that in the circumstances it was just and equitable that the respondent be

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

1. by providing security;
2. although the respondent does not have employees notices to them and

Trade Unions shall be given at the respondent’s principal place of

 business;

 (iii) the application will be served on SARS and the Master.

[4] The intervening party denies that the first applicant was entitled to issue a

section 345 notice in terms of the old Companies Act. It was not the Lee Group that

was responsible for the lack of a positive return on the investment by the Dalmar

Group. According to the intervening party the latter group had deviated from the

initial business plan the parties had agreed to and, a partnership meeting needed to

be held to resolve the problems. The intervening party also raised certain

points *in limine.* For convenience the intervening party shall be referred to as

Embondeiro

**BACKGROUND**

**The Applicants**

[5] J Lee and L Grobler were friends and the latter was the brother -in -law to J

Swart and his brother Andries Swart. During 2014 the Swarts, in particular J Swart

were invited to join a business venture in Mozambique, after L Grobler had on a

visit observed the potential of engaging in a similar farming enterprise to what J Lee

and his father had established at Embondeiro and which was running for a number

of years.

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

farming in conjunction with Embondeiro. What remained was for the parties to agree

on the logistics which entailed the acquisition of the farm, to provide working capital

for things like the erection of boundary fences, roads and such improvements as

shall have been necessary to conduct the business. The main object was to avoid

the feedlot system; but to breed with cattle; to procure predominantly young male

cattle (calves) which would be fed on natural grass on veld at Mikaia and to be kept

for three years, whereafter they would be slaughtered and marketed for their meat.

[7] It was after a presentation by J Lee of the business model, that the partners

without considering a funding model agreed that funding for the project would be

provided for by the Dalmar Group through the first applicant. Again, during March

2014 J Lee availed a document which described a forecast of expenses to be

incurred over a period of 4 years. The ‘samewerkings ooreenkoms’ which was

prepared, is attached to the papers as annexure ‘E’.

[8] Another ‘samewerkings ooreenkoms’, annexure ‘F’ was prepared and this

was signed only by members of the Lee Group on 28 October 2014. None of the

applicants, that is members of the Dalmar Group signed but they accepted the

contents of the document. The applicants contended that the agreement provided

for the following that:

 ‘-Mikaia was in the final stages of procurement for use for a period of 60 years

 for purposes of cattle farming with an option for further use for another 40

 years; the agreement would endure for 99 years;

-the right to use is recorded in the DUAT which is an official document issued

by the Mozambique Government being a right to use 8, 100 hectares for cattle

farming on Mikaia; that the Lee Group would provide Weinar bulls to Mikaia

for the duration of the agreement. The right of use would be part of the

existing right of the Embondeiro farm. The Lee Group would be responsible

 for procuring the document;

-the final DUAT would record that the shareholding be divided 50/50.

-the Dalmar group would provide funding to stock 6000 hectares of the 8,1

hectares with cattle, development to be done in tranches of 2000 hectares

over a period of four years’

-the banking account of Embondeiro would be used to receive money for

Makaia and, money would be generated after the existing cattle are

slaughtered. The money so generated would be used to procure new

cattle, by first subtracting running expenses which would include fatalities;

-thereafter the division of the money would occur 50/50 among the partners;

-none of the partners may for a minimum period of 8 years dispose of its

interests in the project; and pre-emptive rights were recorded;

-when the agreement is terminated all original investment capital would be

repaid to the Delmar Group;

-any growth in the investment capital would be shared 50/50.’

[9] The cattle for Mikaia were obtained from Embonderio in Mozambique and on

one occasion from another operation in South Africa operated by the Lee Group.

Although Dalmar advanced a total amount of R9 083 928,23, in the development the

amount of R8 417 788.00 mentioned in the section 345 demand, made in terms of

the old Company’s Act was taken from the 2018 financial statements of the

respondent. In as far as accounting to each other on the operations and expenses

incurred by the Lee group at Mikaia were concerned, the Lee group would send

invoices to the Dalmar group which would be paid by them. On advice to the Lee

group because of tax problems the auditor stopped issuing invoices and issued a

document reflecting a loan to Mikaia. The said invoices would further report on cattle

that had died in a single month. It was never mentioned during the development

stage that the forecasts presented in the earlier stages were wrong and during May

2014 to November 2016 no irregularities were observed by the Dalmar group on the

visits to Mikaia

[10] During March of 2016 at a recorded meeting it was mentioned that due to the

drought situation in South Africa certain cattle of Mr K Lee’s would be moved from

the Free State to Mikaia. Mikaia would then by the end of 2016 have about 441

cattle on the Mikaia farm. It was recorded that K Lee might have intentions of

investing in other projects, it was decided then that the development at Makaia

should be prioritized and that the Dalmar group would limit their investment

contribution to R9 million. Priority had to be given to stocking Mikaia with cattle and

that there would be approximately 800 cattle on the farm. Further that in order to

bring up the number of cattle and to ensure that Mikaia would have 1200 cattle and,

to stock up the 8,1 hectares as agreed, an additional 400 cattle would be jointly

purchased from the profits which would have been divided 50/50.

[11] The R9 million was reached by May 2018 and, in that month the partners

further agreed relying on a document prepared by the Lee group to contribute 50%

each towards running expenses. Dalmar continued to pay its share of monthly

expenditures as invoiced by the Lee group in the amount of R39 675.00 till October

2019 and, it is contended that despite Dalmar paying there was no proof that the Lee

group had paid its share, Despite this. members of the Dalmar group who visited

Makaia before June 2018 and from their observations were pleased with the

progress made.

[12] On the financial side Dalmar received reports from Grobler who was in

frequent communication with K Lee and J Lee and, from the reports that were presented

to them on the number of slaughtered cattle and, income generated from the

process, he was in position to assess Dalmar’s investment. Grobler during April/

May 2019 having regard to the reports and, relying on his calculations from the

reports, also made enquiries on the status of the bank statements of Mikaia and

sought conformation of the amounts standing. On Dalmar’s analysis an amount of

R1 700 000.00 should have been in the account. No answers were forthcoming and

no straight statements were given. However, Grobler met with J Lee and the figure

was adjusted to R1 022 000.00 which could be used to purchase replacement cattle

for Makaia at Embondeiro.

[13] A new manager by the name Mr Gustav Roux ( “Roux” )was appointed during

the middle of 2019 after K Lee suffered ill health. On being informed that Roux had

been offered 10% stake in Embondeiro, then Dalmar consisting of C Swart and

Grobler seeing a potential conflict of interest arising decided to visit Mozambique.

Their inspection of Mikaia revealed the following:

-no progress had been made of a road which was under construction during 2018

and which was critical to the development of the infrastructure of Mikaia; he located

and traced this road with the help of the GPS he had used during June 2018 and

arrived at the same spot where constructions had ended in 2018;

-during 2018, 4000 hectares had been developed he noticed that there was no sign

of further development of the area after that time;

-during 2018 a borehole had to be drilled in that area, although a claim had been

made for the costs of the borehole in 2017, during the 2019 visit the borehole had

still not been drilled. This led them to believe that money had been misappropriated;

-the TLB tractor/loader/back tractor used for developing that terrain was damaged

and no longer in use; in discussions with Roux and K Lee it seems it was

exposed to excessive use to develop 2000 hectares at Embondeiro, furthering its

interests and not those of Mikaia which should have been expanded by at least 2000

hectares;

-they had expected to see a fully developed farm stocked with cattle and they found

an undeveloped Mikaia with no significant number of cattle;

-there was lack of proper management like leaving the gate open at the boundary

raising the possibility of cattle escaping;

[14] C Swart and Grobler revisited their reports and confronted K Lee and Roux

about their concerns. The number of cattle according to their expectations and

calculations had to be 457. They were informed that the calves were still too young

to be moved to Mikaia. Then the expenses were discussed and K Lee informed them

that Dalmar was not making sufficient contributions. It was pointed out to the lee

group that Dalmar had been making its monthly contributions of R39, 000 per month.

It appeared on a breakdown of expenditure that there was a procurement of lick for

the cattle as it was an item listed. They were told that no lick was purchased for the

cattle. On examination and discussions, it seemed that the expenses sent to Dalmar

were inflated. On further engagement it appeared as if Embondeiro’s expenses were

paid by the proceeds of the slaughtered cattle of Mikaia.

[15] It was contended that a massive fraud had been perpetrated against Dalmar

as Mikaia was a separate business. Dalmar had no interest in Emboneiro.

[16] On their return to South Africa letters were exchanged between Grobler and J

Lee and the applicants contend that further concerns were raised by them which

resulted in them consulting their attorney. Among the issues raised with the

respondent was the loan recorded in the financial statements which had no fixed

repayment terms and was repayable on demand.

[17] The second applicant called for a shareholder’s meeting as contemplated in

section 61 (3) of the Companies Act 71/ 2008, on 21 August 2019. It was confirmed

that the respondent’s attorneys would attend. It was also denied that at that time the

respondent immediately owed any monies to the first applicant and, it was

contended that the Mozambique project was subject to a 99 years lease and it was

doubtful whether the loan was repayable.

[18] Another meeting followed on 28 August 2019. The day before, J Lee withdrew

all monies in Makaia’s bank account without informing the applicants. At the meeting

it was announced on behalf of Embondeiro that no discussions would be entered

into, that they wanted to cast a vote. They voted against the adoption of a resolution,

that the South African company call upon the Mozambique company to repay the

loan which the respondent had made available to the Mozambique company. The

minutes of the meeting prepared for the applicant were also not signed by the

respondent, because it was stated on behalf of the respondent that they did not

reflect what occurred at the meeting.

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

 -17 September 2019 a letter to the first applicant from Embondeiro SA (Pty)

Ltd that failure to make payments would result in a loss or damages;

-18 September 2019 a reply from the first applicant pointing our that income

from the slaughtering of 178 cattle which yielded approximately R1,6 million

was not utilized to pay for the expenses;

-25 September 2019 a reply from Embondeiro SA that the income so

generated had been used for further development at Mikaia and, to repay

outstanding monies owing to them. The first applicant contended that they

were not aware of any improvements at Mikaia or that monies were owing

and that income generated would be used to repay monies allegedly owing

were not discussed with first applicant;

-4 November 2019 the applicants having examined Mikaia’s bank statements

sought an explanation on what seemed to be suspicious transactions which

were listed;

-15 September 2019 an explanation was given that some of the monthly

payments by Dalmar for monthly expenses were used to repay a loan account

to Mikaia; Dalmar was hearing this for the first time was not informed of the

creation of a loan account; It was not clear whether the loan account was

created in favour of a South African company or the project in Mozambique

and it was alleged that the loan account was an attempt to cover up a

misappropriation of money.

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

respondent in respect a substantial loan as reflected in the respondent’s financial

statements. The second applicant as shareholder of the respondent also had *locus*

*standi* to bring an application for the winding up of the respondent.

[21] The existence of the debt was not disputed and the issue was whether it was

now payable or not. Although a long-term engagement was envisaged it is denied

that such was without qualifications. The breach was not one that could be remedied

by a demand. Furthermore, there being a fundamental breach, the Dalmar Group

was entitled to cancel the agreement immediately and was also entitled to a claim for

restitution.

[22] It is contended that it was just an equitable that the respondent be liquidated

on three grounds (i) an irreconcilable deadlock; (ii) there were grounds analogous to

the dissolution of a partnership; (iii) the disappearance of the substratum.

The Intervening Party (“Embondeiro”)

[23] J Lee deposed to the answering affidavit on behalf of Embondeiro. He averred

that an oral partnership was concluded in mid-April 2014 for purposes of acquiring

rights from the Mozambican Government to develop untamed land in Mozambique,

for purpose of cattle farming over a period of 99 years. Mr Grobler in the Dalmar

group was the driving force behind the Dalmar groups interest in cattle farming in

Mozambique. He had intimate knowledge regarding cattle farming in that region

prior to the formulation of the ‘partnership’ with the Lee and Dalmar groups, in that

he held interest in the Mozgabo Group which was part of the Lee Group in the cattle

breeding project on Embondeiro Mozambique

[24] He contended that Mikaia farm enterprise belonged to a ‘partnership’ which

was subject to a written agreement annexure ‘F’ and mainly oral agreements.

Annexure ‘F’ was not the sole source of the agreement between the parties and did

not include the terms of the first agreement ‘E’ The partners interests in the

enterprise were held ‘directly or through corporate entities used to warehouse some

of the interests’ and in this regard the respondent’s only assets were its shareholding

in Mikaia Mozambique. The partners interests were in the following percentages, the

Dalmar Group (C Swart (17%), L Grobler (16.5%) and A Swart (16.5%) and the Lee

Group ( JP Lee (10%), JF Lee (10%), D Gustafson (10%), C Lee (10%) and G du

Plooy (10%), the latter partners in the Lee Group were signatories to the annexure

“F”, the ‘samewerkings ooreenkoms ‘F’).

[25] The respondent was registered a considerable time after the operations at

Mikaia commenced and a bank account in Mozambique was opened almost two

years after the development on Mikaia commenced. He further contended that the

second applicant only came into the picture after it was nominated to warehouse the

Delmar Group’s rights as partners in the respondent and indirectly in Mikaia

Mozambique. Reference to the Dalmar and Lee Groups also included the individual

members in the group. Presently the respondent is directly controlled by the second

applicant and the intervening party and indirectly by the partners in the Dalmar and

Lee Groups.

[26] It was contended the partnership agreement prohibited the partners from

disposing of their interests before the expiry of eight years calculated from when the

delivery of the first batch of 300 oxen was purchased. The Dalmar Group were in

breach of the partnership agreement in that it had no right to instruct the applicant to

launch the application. It was contended that it first had to be established whether

the partnership should be terminated and, for a Receiver to be appointed to take

care of the assets and liabilities in Mikaia Mozambique and, to make a determination

in the best interests of the partners. It was denied that monies earmarked for

development at Mikaia were stolen. The intervening party wished to raise certain

points *in limine* and it was contended that these stood in the way of the grant of the

relief prayed for.

[27] It is contended that the application was premature and that the Dalmar group

having tacitly agreed, be directed to return to the negotiating table to engage in

discussions to resolve their differences as far as it was reasonably possible. Further,

it was contended that there were misrepresentations and defects in the founding

affidavit:

1. The partners had specifically agreed that Embondeiro and Mikaia farming

enterprises would share equipment and infrastructure to keep the

development costs at Mikaia low;

1. An incorrect impression was created by alleging that Embondeiro farm had

benefitted more in using Mikaia’s land for its cattle to graze on and that the

TLB machine was used to develop 2000 hectare on Embondeiro without

showing advantage to Mikaia. It was denied that 2000 hectares on

Embondeiro were developed, save for the drilling of a borehole, which was

still the existing position. It was contended that over the years more benefit

was enjoyed by Mikaia. The TLB was used to develop 80% of Mikaia and

as reported by Mr Roux in May 2019. Although the TLB broke down in July

2019 there was acknowledgement even before by L Grobler that the TLB

was not in good condition as far back as 2017

1. The perception that Dalmar partners were awarded 50% interest in the partnership because of their initial undertaking was incorrect. Dalmar initially undertook to provide all the capital to develop the farm and to make an interest free 99 year loan towards the purchase of 1200 oxen for the enterprise. This undertaking was estimated to cost around R12 million which amount could have increased due to rising costs. On 7 March 2016 Dalmar limited their contribution to R9 million due to rising costs;
2. Instead of financing the purchase of 300 oxen before May 2015 Dalmar financed the acquisition of 102 oxen and, in May 2016 instead of financing 600 oxen only 255 were purchased; the purchase price was not paid in full but paid off in instalments over a period of 10 months and the remaining 94 were to be purchased in May 2016. It is misconceived that they would have expected a fully developed farm stocked with cattle when the Dalmar group knew that only 38% namely 1200 oxen represented ‘the farm stocked with cattle”.
3. It was also disputed that the substratum had been lost because no DUAT rights had been given to Mikaia Mozambique. The DUAT had not been granted when the partners commenced with the enterprise at Mikaia and, when the Dalmar group had contributed more that R9 million. No concern was raised regarding the DUAT rights or threat, that the rights would not be granted or that they had been disturbed in their possession of the farm. The DUAT had been authorised by the Mozambique Government on 27 February 2018 and it was only signed on 13 April 2020,
4. It was contended that the under-performance of Dalmar on initial undertakings had a major influence on the development of Mikaia as a whole. Expectations of the Lee group that profits would have been distributed May/ June of 2018 had not yet materialised. By 8 July 2019

80 % of Mikaia had progressed towards completion, and it is denied that only 4000 hectares of the 8,1 hectares at Mikaia were developed by 6 July 2019;

1. It was contended that there was no merit in calling up the “so-called” loan account when there was an obligation on Dalmar to pay the approximate contributions of R40 000.00 per month towards running costs, and the capital advance could not be reclaimed as incorrectly stated in the financial statements. There was no right to demand payment unless the “samewerkings ooreenkons” was cancelled. It was contended that the application was premature in that no attempt was made to engage the Lee group in discussions around the feasibility of terminating the agreement.

[28] Other issues not settled in ‘F’ were the manner in which the legal entities

created would conduct and structure the business of the enterprise. Further, was

how the business of the enterprise would be reflected in the books of account which

would entail (i) tax considerations including Mikaia in Mozambique (ii) although

shareholding was agreed upon there was no accompanying formal agreement (iii)in

preparing the financial statements, the accountant lumped together without

distinguishing the three categories of advances (monies advanced before the

respondent was contemplated to purchase the original stock of oxen; monies

advanced for the development of Mikaia; for advances from June 2018 on a monthly

basis and which did not provide terms of repayment). The reflection of these

monies as loan account were inaccurate.

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

Points *in limine*

[30] According to the intervening party, at the heart of the applicants’ complaint

was their perception that 4000 hectares on Mikaia had not been developed since

2018, which misconceptions had never been discussed by the partners. Points *in*

*limine* were consequently raised. Firstly, it was contended that the applicants as

members in a partnership, had breached an obligation to *bona fide* negotiate

perceived problems, before prematurely resorting to a hostile action to liquidate the

respondent. Secondly, it was contended that the respondent and Mikaia

Mozambique were just instruments of and for the persons who were party to the

‘samewerkings oppreeenkoms’ and, since the case of the applicants was that the

Dalmar Group be entitled to cancel the agreement, the applicants had failed to join

all the other members of the Dalmar Group and Lee Group to the application.

Thirdly, it was contended that the relief claimed was not suitable, that even if the

partnership could not function, the correct process to follow was for a Receiver to be

appointed.

[31] It was contended that the Dalmar group laboured under a number of

misperceptions about the extent to the development at Mikaia between June 2018

and July 2019.

* 80% of the farm had been developed by the July 2019 visit as supported

by statements of K Lee and Mr Roux annexures ‘JL-B’ JL-C’ and reports

prior to the visit availed to the Dalmar group and commented upon by C

Swart and L Grobler. The letter, annexure ‘N’ did not mention the

complaint that only 50% (4000 hectares) had been developed, which was

different from what was discussed with K Lee during the visit, of the

expectation that development should have been completed by July 2019.

K Lee had explained that progress had been made with the last 2000

hectares which confirmed information communicated to L Grobler in March

2019 and in Mr Roux’s report annexure ‘JL-HH’ and ;JL-OO’. The

spreadsheet relied upon by L Grobler ‘JL-J’ that 5,500 hectares had been

developed contradicted what was asserted in the affidavit. An invitation

was extended, which was not taken up, by J Lee to conduct a physical

inspection as the version of C Swart as to what his observations were in

the presence of K Lee and L Grobler, of the development which

contradicted what was later communicated to him by K Lee. Further, the

assertion that the GPS readings taken at a prior visit by L Grobler support

the version that no development had taken place since that time was

incorrect, and the GPS evidence was not availed, The applicants are

challenged to avail and to demonstrate and explain his device. The

understanding before the July 2019 visit was that the development would

be completed by the end of 2019. Presently Mikaia was 97% developed

and can be stocked with 1200 cattle.

* It was denied that Emdondeiro had developed 2000 of its hectares instead

of developing Mikaia. The 2000 hectares related to the additional hectares

known as Ganskuil which was obtained from a neighbour and on which

only borehole had been drilled;

* No funds belonging to Mikaia were used to develop the 2000 ha at

Embondeiro and this could be verified by forensic audit; monies paid to

one Mr Engelbrecht for the borehole Embondeiro July 2019 was not paid

from Mikaia’s funds because, around the same time he was supposed to

drill a borehole at Mikaia, he was called out on an emergency on another

emergency contract and only drilled the borehole in November 2019.

* It was not possible that it was expected that Mikaia should have been fully

stocked by the July 2019 visit. There was an acknowledgement that there

was a problem over the availability of young oxen and that the business

model was not working out. L Grobler had suggested that a change of

mixed cattle and ox farming model be adopted. The issue was not about

the DUAT but it related to development costs and the refusal by Dalmar to

verify the costs of development against documents provided to it during

October 2019

* An examination of the bank statements of Mikaia and Embondeiro given to

the Dalmar partners during July 2019 could have revealed that it was not

possible that an amount of about R1,6 million was expected to be in

Mikaia’s bank account. Money generated from earlier sales of cattle in

20/17 and 2018 had generated about R600 000.00. At the time there was

an understanding in October of 2017 that about R80 000.00 was needed

for additional funding for the farming project. The sale of 15 cattle in April

2019 brought in a little over R1 million and at this time a little over

R10 000.00 was left in the account.

* Dalmar partners were aware of the advances made by the Lee Group from

funds of Embondeiro in Mozambique to sustain the development and

purchase of cattle at Mikaia, The Dalmar Group was furnished documents

to show the extent of the loans before and after 7 October 2019. This

occurred when at times there were problems experienced in transferring

monies to Mozambique. Also for example there was an instance where the

Dalmar group had to pay-off in instalments for the purchase of cattle from

the Lee group and this was treated as a loan account against Mikaia in

Mozambique. A loan account was also created because Embondeiro

Mozambique was not always paid in full for the purchase of cattle. It is

contended when Dalmar declared war during August 2019 and ceased to

pay its monthly contributions, it became necessary to calculate what was

due to the Lee Group which was in the amount of R560 000.00 which was

withdrawn from the Mikaia account and a balance in the amount of

R370 000.00 remained.

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* The TLB was used to develop 80% of Mikaia; it was never in good

condition referring to reports as far back as 2017; also evident from the

reports availed to Dalmar was the usage schedule of the TLB and reports

sent to Mr C Swart on completion of camp Wille 6; opening way for

erection of fences along border with Mr Burger, Elias 6 being the fourth

camp of the third section; a report that the Shestatsa camp was 100%

operational

* It is disputed that Mr Roux does not attend enough to Mikaia. In the past

the Lee group had availed the services of its manager and the deponent’s

father. The Dalmar group had during 2017 agreed to pay half the salary of

the managers amounting to about R7 500.00 together with other

expenses. The engagement of an expert farm manager like Mr Roux was

necessary. There was not merit in terminating the partnership on grounds

that Mr Roux was given opportunity to purchase an interest in

Embondereiro which would result in conflict and this could be a mater for

discussion by the partners

[32] It was contended that there had been no obligation on Embondeiro to

guarantee that it would provide a specific number of young oxen, The initial plan was

that these had to be imported by Mikaia from South Africa at R1000 per head.

Annexure “F” did not provide for the manner of stocking cattle the 2000h on Mikaia. It

provided that the profits would only be shared when the cattle sold had been

replaced and running costs deducted. Instead, it was then agreed with Mr Grobler to

stock cattle from the profits of those cattle which were sold. The stocking of Mikaia

with the 600 cattle as envisaged had its own challenges and it is contended that not

everything went according to the business plan. This ranged from the delay by

Dalmar to purche the cattle; the initial stock purchased from Embondeiro

Mozambique which had to graze on Embondeiro land and later the 94 oxen imported

from SA.

[33] It was not provided for in annexure “F” that the capital investment the “so-

called loan account” of the Dalmar Group “would be repaid”on early termination,

therefore reflection that such loan account as held by Dalmar for the first applicant,

since the respondent was made part of the partnership structure was not correctly

reflected in the financial statements. Any suggestion that same was payable in the

event of termination is an issue to be agreed upon and, in the event of a partner

being unreasonable, the court could be approached to force the said partner to do or

accept.

[34] It is contended that the loan account should reflect three categories, namely

“developmental capital; a 99 year interest free loan for purchase of oxen and

amounts advanced as from June 2018 on a monthly basis for running expenses.”

[35] Embondeiro disputed the interpretation by the applicants regarding the roles

played by the different partners being the applicants, the respondent and itself

(Embondeiro SA). It is contended that when annexure “F” was formulated and signed

it was not envisaged that the respondent would be created or that the applicants and

Embondeiro would be part of the formal structure of the partnership. Initially when

Annexure “F” was signed the individual partners were interest holders in the Mikaia

Company in Mozambique. Mikaia SA and the Mozambican Micaia were two different

entities serving some functions in the partnership. The warehousing of the individual

interests in corporate entities in the first and second applicant, the respondent and

Embondeiro SA came as a result of administrative challenges.

[36] It is contended certain narrations pertaining to the loan accounts in the

financial statements are incorrect, that is, where amounts paid were reflected as

loans by Dalmar to Mikaia SA; that for a proper accounting reality demanded that

the corporate entities and the partnership should be considered together, in view of

the transactions that exchanged hands and, passed between partners for the

business of the partnership and, these included transactions engaged on behalf of

the Dalmar and Lee Groups which included oral agreements which did not strictly

comply with the agreements as initially entered into and which created problems.

[37] These transactions are recorded in annexures annexed by the parties. In

order to avoid stating the entire explanations of the difference in understanding of

what some of the annexures related to, only a few as outlined in the opposing

affidavit will be referred to. They included payments made by the first applicant to the

respondent where an invoice was issued reflecting it as a loan when it was not as

contended by the intervening party; it is contended that not all invoices issued by

Embondeiro related to expenses already incurred such as Annexure “G”, to which

was an explanatory email annexed “ JL-AA” which was copied to all members.

Annexure “G” described the amount R39 850 as wages sold by Embondeiro

Mozambique to the first Applicant In certain instances the invoices related to

expenses to be incurred although not the precise amount was given for the needs of

Mikaia in Mozambique where monies were deposited into Embondeiro Mozambique

before a Mikaia account was opened; sometimes money transferred for the purpose

of purchasing oxen was used for development of Mikaia “JL-RR”.

[38] It is contended that invoices were structured according to the needs of the

Dalmar Group, for example where there was a request by Mr Grobler to have Alto

Kitchens invoiced instead of Dalmar Konstruksie, which could have caused problems

with the South African Receiver of Revenue (SARS). Furthermore, the parties knew

that the invoices to the first applicant were not for goods delivered

[39] In reply the applicants contended that the answering affidavit was verbose

and was intended to blur the relationship between the parties and the true purpose of

the application sought to address certain questions namely (i) whether there was a

partnership (ii) whether there are grounds for liquidation (iii) does Embondeiro offer a

better solution than the winding up of the respondent (iv) whether the project in

Mozambique is a success or a disaster (v) what the current position regarding the

project and what is the current relationship between the persons and entities

involved in the project.

[40] The applicants averred that the first time they heard of a partnership was in

the answering affidavit and contended that the version of the Embondeiro regarding

the alleged partnership did not come close to complying with the *essentialia* of a

partnership. The alleged partnership did not have a name; those named as the

Dalmar partners, as confirmed by Mr A Swart and Mr Grobler, deny ever having had

an intention to be involved in the business venture as partners, which also entailed a

serious risk to the alleged partners of personal liability for the debts of the project in

terms of South African Law. The applicants deny there was an oral agreement.

There was not a single paper generated in the 6 years, 2014 –2020 to suggest or

which gave credence to the existence of a partnership. There was no partnership

business model, no attempt to draft partnership financial statements, registration as

a VAT vendor or PAYE liability for the employees, no attempt to draft financial

statements regarding the partners individual tax liability relating to the alleged

partnership,

[41] Furthermore, there was no need for a partnership to be considered because

there are identifiable individuals and legal persona in the relationship structure

between the parties. In particular, the respondent, a registered company in South

Africa has two shareholders being the second applicant and Embondeiro SA. The

respondent also holds 100% shares in Mikaia Mozambique which as holder of the

DUAT rights, functions as the operator of the project in Mozambique. Recognition of

the respondent and Mikaia Mozambique is demonstrated by the trail of monies which

were advanced towards the project in Mozambique by the first applicant, and which

monies were deposited first into the respondent’s bank account in South Africa and

transferred to Mikaia Mozambique. Therefore, in as far as the sale of the oxen was

concerned the proceeds of the sale were payable to Mikaia Mozambique, and it is

Mikaia which had to issue invoices for the disposal of the oxen

[42] The applicants contended that they have no knowledge of and dispute the

distribution of the ‘partnership’ interest stated by Embondeiro in the he ratio 17% (Mr

C Swart), 16.5% (Mr A Swart),16.5% (Mr Grobler) as representing the 50% interest in

the ‘partnership’ of the Dalmar Group. They contended that this attempt by

Embondeiro ignored the following (i) the fact that the second applicant owned 50%

shareholding in the respondent and that the shareholding in the second applicant is

held by Delmar Trust (66.6 shares) which had as trustees Mr C Swart, Mr A Swart snr,

Mr AB Swart and an accountant Mr Erlank; and in the Grobler 1000 Trust (33.3%)

which had as trustees Mr Grobler, his spouse and an accountant Mr Erlank; (ii) Also

ignored were the interests of the Trusts in the respondent. On the side of the Lee

Group mention was made of a Dr Charles Lee whom Mr C Swart alleges he had never

met and one Mr Gustafson who had an interest in a butchery in the Vaal Triangle. (iii)

According to the applicants an important factor was that Embondeiro’s distribution on

the partnership interests ignored the point that the first applicant within the Dalmar

Group made exclusive financial “contribution” (the loan funding) for the “partnership”

towards the project in Mikaia Mozambique.

[43] In denying that Mikaia was a partnership, in reply to the involvement of Mr

Grobler with Mosgado the applicants sought an explanation from Mr Grobler and

sourced information in the public domain, on how Mosgado was initiated; its funding

model, that it was not conducted in the form of a partnership but finally as a corporate

structure. This being reason why Mikaia followed the corporate structure and corporate

model of Embondeiro which was ‘ a properly registered company in Mozambique in

which the shares are held by a South African company and the loan funding properly

advanced through loan accounts.’

[40] According to the applicants it was unlikely that it was an oversight that two

“highly qualified professionals” in the accounting field would record the flow of money

in the financial statements of the respondent, prepared by (Mr HJ Coetzee (accountant

and /or auditor) and signed off by ( Mr J Lee who holds a BCom degree), both who

gave full recognition to the liability owed to the first applicant, of the monies which were

recorded in the financial statements as an “unsecured interest free loan which has no

fixed term of repayment” to the value of R 8 427 788.00 and a loan to Mikaia

Mozambique for an amount of R8 108 381.00. Furthermore, there was a document

received from Embondeiro which recorded an income tax profit /loss of Mt30 000.00

and a cumulative loss of Mt31 253 650.10 which were not dealt with in the income tax

return of the partners

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

winding-up of the respondent for inability to pay its debts or on just and equitable

grounds having regard to the following:

* The debt and terms upon which it is repayable are not disputed on *bona fide*

and upon reasonable grounds;

* The respondent has to show upon reasonable grounds that the highly

qualified accounting professionals were wrong in compiling the financial

statements;

* The shareholders meeting convened for purposes of taking a vote on the

recoverability of the of the loan resulted in a deadlock, where the applicants

voted for the recovery and Embondeiro voting against it even where it had

not alleged that there was no such loan or even on its version that part of

the loan used for purchase of the oxen was payable over 99years

* The *locus standi* of the first applicant has not been challenged *bona fide* and

upon reasonable grounds; that the applicants had made out;

* The respondent shares are valueless given the fact that the Mozambique

project is running at a loss determined from the sparse documents provided

by Embondeiro and that it is not trading and has accumulated a huge loss.

* Apart from an inability to pay the debt it was just and equitable to liquidate

having regard to the reasons for launching of and the application regarding

the conduct of Embondeiro commencing August 2019 point towards a

deterioration in the relationship mainly being a loss of trust the applicants

had in Embondeiro Mozambique;

* the request during September 2019 that the applicant continue to make its

monthly contributions, that TLB needed to be fixed, that grazing had been

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

* the deadlock;
* The inability of Mr Erlank to conduct a proper forensic audit from bank

statements received in October 2019 because descriptions were in

Portuguese and that he was able to identify suspicious payments

* the alleged stealthy creation of a loan account in favour of Embondeiro

Mozambique; the attitude of Embondeiro in response to a request in

January 2020 on reports on activities in and developments at Mikaia

Mozambique and correspondence that exchanged hands before and after

the launch of the application and filing of the answering affidavit.

* Having been initially in July 2020 refused any information on the status

quo as a result of what was alleged to be applicants; repudiation, an email

dated 18 August 2020 received from Mr Lee (attaching various schedules

without the necessary supporting documents) on the status quo between

Embondeiro and Mikaia on the oxen, prospects of sales of oxen during

2021, further development, report on the TLB, a report on the low profit

derived from the purchase of the weaner oxen from Embondeiro after a

holding period of 3 years was further proof that Embondeiro Mozambique

was running at a loss. This was also confirmed by its gross income

(Mt1 064 570.11) as against its total expenditure (Mt 6 049 408.77); report

on the total cost of the project and income derived;

[42] The applicants contend that having regard to what is stated above and the fact

that they are not prepared to fund the Mikaia project in Mozambique there is no

solution other than a liquidation; that the ‘natural persons behind the corporate

structures have lost respect for each other’; that there appeared to be no point in the

project being turned around; a comparison of the prices reached at the stage of

slaughter per head of cattle in Mozambique (R6 800.00) and South Africa (R8000.00)

show that the project will never make money, already the project has accumulated

losses in the region of Mt31 million (R6 200 000.00). There is no prospect whatsoever

of the parties resolving these problems around a negotiating table. Furthermore, they

contended that the project is a disaster

[43] Although it was agreed that the first applicant would fund the entire project, it is

denied it reneged on its undertaking. What was initially budgeted for was to fund the

project consisting of 6000 hectares at R3million over a period of 3 years. When the

size increased to 8000 hectares it was agreed to give development priority. However,

the applicants deny that it was to blame for the purchase of only 102 oxen during 2015.

It was not due to a lack of funding but due the fact that Embondeiro was not in a

position to supply smaller weaner oxen as seen from a report by Mr J Nel.

Furthermore, regarding the GPS recording on a plotted map of the trip undertaken in

July 2017 “REP10” the applicants contended that the plotted map of the trip in 2019

“REP11” showed that they did not drive any further in 2019 on the previous visit. 2017.

**WERE THE PARTIES CONDUCTING A PARTNERSHIP OR NOT**

[44] It is important to determine firstly whether or not a partnership agreement /

relationship subsists and, whether same was envisaged by the Dalmar and Lee

Groups at inception of the project in Mozambique, and carried through up to the

circumstances that led to the launch of this application. It is also important to determine

whether or not the respondent retains its identity as a company even where it is said

that the company, though controlled by a group of people, conducted its business as

a partnership or was created as a vehicle through which cash was moved from South

Africa of Mozambique. It is common cause that the assertion by Embondeiro SA that

a partnership relationship subsists is vehemently denied by the applicants, who

contend that it was a partnership disclosed for the first time in the answering affidavit

and that no recognition had ever been given between 2014 -2020, in the trading of the

companies in the Mikaia project to a structure of a partnership. The applicants

contended in reply that the relationship did not come close to satisfying the

*essentialia* of a partnership as required by law.

[45] The applicants submit the following:

 -that legal recognition was given to the corporate structures that controlled the

project in Mozambique and that the law directed how these corporate structures

should function through its directors and shareholders; The corporate

structures and directors attract responsibilities and obligations in terms of the

Companies Act 71 of 2008, and the law created specific remedies for

shareholders and creditors to act against delinquent directors. In this instance

the corporate structures were Mikaia Mozambique which was a limited

company; the respondent which had 100% shares in Mikaia Mozambique; and

the second applicant Alto Kitchens and Embondeiro SA which held 50/50

shares in the respondent;

-the attempt to conjure allocation of the ‘partnership’s’ interest to ‘multiple

persons’, e.g. to a person the applicants have never met before or to loose sight

of the interests of shareholders which are two trusts in the second applicant

was a fallacy; further that the distribution of such interests to various persons

lost sight of the aspect of ‘contribution’ from the shareholders for the alleged

partnership.

-the unequivocal acknowledgement by Mr Lee’s signature in the financial

`statements that the respondent has an asset being a loan to Mikaia

Mozambique, owed to the first applicant and described as an ‘unsecured’

interest free loan with no fixed term of repayment in the amount of

R8 427 788.00 was proof that this was not a partnership.

[46] In their submissions Embondeiro (the intervening party) charted the origins of

the relationship with the Dalmar Group which was initiated by Mr Grobler and Mr J

Lee. It submitted that crucial to it was the binding nature of the contract, which was

partly oral and partly written and entered into by the Lee Group with every member of

the Dalmar Group, Annexure ‘F’, which resulted in each group holding 50% shares in

a new venture, the Mikaia project. It contended that there was a long-term

commitment, a partnership agreement, to remain in the Mikaia oxen-farming project

for 99years or that shareholders could exit if they chose to do so only after 8 years

after a particular date and if such shares are sold first option to sell to members in the

group .

[47] It was contended that three members of the Dalmar Group were 50%

shareholders of Mikaia Mozambique as noted in a government publication. When this

partnership was concluded the respondent did not exist and it was incorporated to

simplify transactions like the flow of funds. Furthermore, the land in question did not

exist as a separate piece of land and they awaited the grant of the DUAT which

application was made when the Lee group were the only shareholders of Mikaia

Mozambique. The agreement provided that the original investment with regard to the

cattle only would be paid back to the first respondent and not the contributions related

to development which were not refundable. It was submitted that similarly the Lee

Group would not have recourse after 99 years to expenses engaged in obtaining the

DUAT rights and their skilled inputs and physical labour in developing Mikaia into a

cattle farm

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

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

it is in the form of money or labour or skill, not necessarily of the same

‘character, quantity or value’; (my underlining)

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

3)The object should be to make a profit;

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

contracts;

[49] These essentials were confirmed in Pezzuto v Dreyer[[1]](#footnote-1):

“Our Courts have accepted Pothier’s formulation of such essentials as a

correct statement of the law ( Joubert v Tarry & Co 1915 TPD 277 at

280; Bester v van Niekerk 1960 (2) SA 779(A) at 783H-784 A; Purdon v

Muller 1961(2) SA 211 (A) at 218B-D.”

 The nature of the relationship is not determined by how the parties define it, but

it is the Court, having regard to the essentialia, which must determine whether or not

the parties’ business relationship is that of a partnership, Bester v an Niekerk *supra.*

As I see it, the conduct of the parties also plays a pivotal role in the process of

determination.

[50] The difficulty in this application is that the existence of the alleged partnership

is not based on a simple written contract from which could easily be extracted the

essentialia of a partnership nor, could it be easily determined how what is alleged to

be a mixture of oral agreements form part of a partnership agreement. While the

beginnings of project Mikaia were in my view easily determinable, the manner in which

the business was conducted and the lengthy answering affidavit which brought up

many facts before and after Annexure “F” was reduced to writing, make it a laborious

exercise to extricate what the relationship between the parties was. It could have been

easier to amend annexure “F” as often as it was alleged a fresh agreement or

innovation came into being, which either added or changed the intentions of the parties

on how the Mikaia project was to be run. The applicants deny the existence of a

partnership and contend that the intervening party bears the onus to prove such

relationship, also contending that the alleged oral agreements relied upon were not

permissible in terms of the parole evidence rule, although this was not fully motivated,

and argued.

[51] As I see it, the Lee Group had long before engaging with the Dalmar Group had

its eye on expanding and sought to establish a cattle farming project at Mikaia which

was not far from the Embondeiro cattle farm. Embondeiro Mozambique was a

registered company already. In pursuance of establishing Mikaia. Embondeiro

Mozambique or the Lee Group registered Mikaia as a company and proceeded to

apply for business rights, the DUAT, which were granted. It is contended that

negotiations with the Dalmar Group resulted in a partnership agreement between the

Dalmar and Lee Groups from about April 2014. There were eight partners, five in the

Lee Group (K Lee; JF Lee; C Lee; D Gustafson; G du Plooy) and three in the Dalmar

Group (C Swart; A Swart; L Grobler). Notably, none of the corporate structures played

a role.

[52] It is contended by Embondeiro that before the project agreement, annexure “F”

was concluded the Dalmar Group through the first applicant had already advanced

monies towards development of land at Mikaia and for the procurement of cattle.

However, it is not clear whether at this stage any form of partnership conforming with

the essentialia was envisaged.

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

“F” dated 24 October 2014, the description and reference to the Groups (A and B),

does not refer to the corporate entities (applicants, respondent, Embondeiro

Mozambique, and Mikaia Mozambique) but to the individuals, (the natural persons)

who were shareholders or directors in some of the corporate entities or intended

shareholders in a company to be registered. Annexure “F” was signed by the five

individuals of the Lee Group. The applicants made a concession that the document is

binding which would mean that the three individuals in the Dalmar Group, not having

appended their signatures, considered the document binding on them indirectly

endorsing the oral agreements entered into. On the other hand, Embondeiro

Mozambique was a separate entity, registered in Mozambique, which according to

annexure “F” would pursue or finalize the acquisition of the DUAT rights in Mikaia in

its name and that when granted the business rights in the Mikaia shall be divided on

equal basis 50/50 among Groups A and B. In annexure “F” Embondeiro is referred to

as the entity which would supply cattle to Mikaia Mozambique.

[54] Notification of the intended registration of the Dalmar Group as shareholders

Of a 50% share in the Mikaia Mozambique company was published in the Official

Mozambique Gazette (Boletim da Republica dated 16 September 2014) identifying the

eight shareholders and stating the allocated share capital as represented by quotas

as stated in annexure “JLF”. As I see it, the amounts reflected do not equate to a

contribution by the eight to a partnership and that since it pertains to the registration

of a company in Mozambique the percentages so reflected refer to the shareholding

in the company and not in the alleged partnership.

[55] The respondent was registered as a private company on 5 May 2015 and it is

creditor of the first applicant. Embondeiro contended that on a proper understanding

of the agreement, the loan account the applicant is relying upon would probably for

the greater part not be repayable. The applicants dispute the contention that the

respondent was a nominee holding the interests of the partners in Mikaia Mozambique

[56] It is common cause that the applicants dispute Embondeiro’s stance, the

existence of a clear partnership but, conceded that the respondent’s business model,

although a cooperate entity, was operated akin to that of a partnership. I ask, what

role do the corporate entities identified in this business model play, and which law is

applicable when one of them demands payment of a debt or alleges that the

relationship such as theirs has broken down due to a lack of trust and a prevailing

deadlock. Can the parties in these circumstances be forced by a court to negotiate

with each other;

[57] An analysis of annexure “F” and the conduct of the parties is necessary.

It is an essential that for a partnership to exist the contribution requirement must be

fulfilled as provided for by the law. Bearing in mind that I have already found that the

corporate entities, the applicants, the respondent were not a part of or mentioned as

participants in the Mikaia project in annexure “F” except for an obligation by

Embrodeiro to provide oxen to Mikaia.

Party A, Dalmar Group: (i) “ sal die investerings kostes voorsien vir di ontwikkeling van die

grond; (ii) sal die fondse voorsien om die nodige beeste aan te koop vir die boerdery.(iii) Party

A is verantwoordelik om 3 jaar beeste te koop. MAW om 6000 ha van beeste to voorsien.”

Although not particularly mentioned in annexure “F”, it is common cause that in

addition a TLB machine was provided to be used in the construction of the camps,

clearing of bushes and construction of roads on Mikaia. Furthermore, there was an

agreement that the investment, that is, the capital limit on the acquisition of cattle

would be limited to R9 million, which amount had been reached by May 2018. This

despite the contention by Embondeiro that properly construed an interest free loan of

R12million was required over a period of 99 years. It was also agreed that a

contribution be made towards the monthly running expenses at Mikaia be split in equal

amounts between the two groups (the 11 October 2017 agreement on additional

contribution); Although the Lee Group gives a different version of what these amounts

were for, the applicant was invoiced from May 2018 till October 2019 in the amount

R39 675.00 as per spread sheet annexure “K”. The applicant contends that nowhere

has the Lee Group furnished information that it contributed financially to the expenses.

The activities at Mikaia relate to; (i) “Die ontwikkeling sal in fases van 2000 HA per jaar

gedoen word. Die investering behels die oprig van kampe,en water on ‘n os boerdery te kan

bedryf. Party B sal als in hul vermoe doen om die investerings kostes so lag as moontlik te

hou

[58] The question that remains is to determine whether Embondeiro has proved that

each of the eight individuals have made their contribution towards a partnership,

alternatively, has the first applicant indicated anywhere that the monies it pays to the

respondent represents the contribution to finance its shareholders, in their individual

capacities, the Dalmar Group in compliance with Annexure “F” or any prior or

subsequent alleged oral agreement. Can the participation of Mr J Lee, Mr K Lee and

the Embondeiro manager (the development and management of the farm Mikaia and

providing for cattle for Mikaia) be construed as a contribution by the Lee Group in the

partnership. In my view the answer should be in the negative.

[59] Was the object to carry on business in common for the joint benefits of the

parties achieved at any point? In Pezzuto v Dreyer[[2]](#footnote-2):

“In essence…..a partnership is the carrying on of a business (to which each of

the partners contributes) in common for the joint benefit of the parties with a

view to making a profit”

Annexure “F” provides the following:

“Wins Deling

Die gelde wat verkryword nadat die beeste geslag is, sal as gevolg aangewend word in

chronologies volgorde:

1. Vervang die beeste wat geslag is met nuwe jong beeste;
2. Trek alle bedryfkostes af;
3. Verdeel die gelde wat oorbly tussen party A(50%) en party B (50%)

Apart from doubt that each of the eight individuals made a contribution, the facts reveal

that this objective “for the benefit of the parties” was never implemented or achieved

even at the time when it simply should have occurred, that consequent upon the

slaughtering of the oxen. Instead, it is contended by Embondeiro that the profit was

used for other purposes at the instance of the Dalmar Group which was for the

purchase of additional oxen, so, Annexure “F” was not amended to provide for this

eventuality which was contrary to the original provision that the Dalmar Group would

solely be responsible for the purchase of the oxen.

[60] Having regard to the facts as a whole I am of the view that the Dalmar and Lee

Groups are subject to the agreement entered into and terms of which are captured in

annexure “F” which was drafted by the Dalmar Group (even though not signed by

them) but which was signed by the Lee Group. It can also be deduced from the facts

that there were other agreements which regulated the management of the Mikaia

project which recorded in either minutes or correspondence without amending the core

agreement annexure “F”. That these agreements were entered into do not make the

relationship a partnership.

[61] The facts point to a contract entered into by the Dalmar and Lee Groups which

supports the contention by Embondeiro that the terms were partly written and partly

oral. As I see it, this arrangement does not deviate from the decision by the directors

and shareholders in corporate entities created by the two groups on how the cattle

farming project at Mikaia should be managed. Furthermore, it does not also mean that

parties can choose to abdicate their responsibility to have this application decided on

the relevant company law if applicable, in spite of the subsistence and I return to this

later. Afterall the agreement is that their contract will be regulated by South African

law.

[62] It is trite that the *Pacta sunt servanda* principle while not the only important

principle to consider in this constitutional era still remains part of our law. In Beadica

231CC and Others v Trustees, Oregon Trust and Others[[3]](#footnote-3) the following was stated:

“[83] The first is the principle that “[p]ublic policy demands that contracts freely

and consciously entered into must be honoured “. This court has

emphasised that the principle of *pacta sunt servanda* gives effect to the

central constitutional “values of freedom and dignity”. It has further

recognised that *in general*  public policy requires that contracting parties

honour obligations that have been freely and voluntarily undertaken.

*Pacta sunt servanda* is thus not a relic of our pre-constitutional common

law. It continues to play a role in the judicial control of contracts through

the instrument of public policy, as it gives expression to central

constitutional values.”

 [84] Moreover, contractual relations are the bedrock of economic activity and

our economic development is dependent, to a large extent, on the

willingness of parties to enter into contractual relationships. If parties are

confident that contracts that they enter into will be upheld, then they will

be incentivised to contract with other parties for their mutual gain.

Without this confidence, the very motivation for social coordination is

diminished. It is indeed crucial to economic development that individual

should be able to trust that all contracting parties will be bound by

obligations willingly assumed.”

[63] The above applies to annexure “F” and other related documents as a whole.

Embondeiro contends that the parties to the agreement, the Dalmar and Lee Group

were bound by their undertakings, therefore the launching and prosecution of this

application constituted a breach of contract.

[64] The other terms of the agreement have been mentioned and according to

Embondiero, the clause dealing with termination was of specific importance, in that

it states that the contract shall endure for a period of 99 years, that none of the

members may dispose of their shares before a period of 8 years has passed,

calculated from the date on which the first batch of oxen are offloaded. The contract

further gives conditions under which the members may sell, giving the option to buy

first to any member within the groups before availing them for sale to third parties. The

applicants contend that there were far-fetched and unbusinesslike clauses in annexure

“F”, like the 99 years duration of the contract which required the Dalmar Group to make

an interest free loan of R12 million to the Mikaia project and the absurdity of

expectation by the Lee Group that funding would endure for that long in a project that

was running at a loss.

[65] Although the duration and efficacy of the 99 lease year term is lamented,

Embondeiro, contended that acquisition of the DUAT rights were a pre-requisite for

the Dalmar Group as South African Investors, to conduct a farming project on State

land in Mozambique. The duration was structured in view of the fact that the land still

remained that of the government of Mozambique and the Dalmar Group understood

that the DUAT rights were given for that duration. In my view, there is not merit in the

applicants questioning these terms because the applicants, that is the corporate

structures, were not party to the agreement. Given the fact that the first applicant had

provided the loan for the Mikaia project no evidence is provided by the Dalmar Group

that the issue of the duration or that no interest was provided for was a matter for

concern for the applicant.

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

**RESPONDENT**

[66] It is common cause that the launch of this application was prompted after

a visit to Mikaia by Mr Grobler and Mr Swart. They alleged discovery of impropriety

on the part of Embondeiro Mozambique, that is, as a result of the activities of Mr

Koos Lee of the Lee Group and the manager Mr Gustav in their management of

Mikaia. The concerns raised and denials shall not be repeated in detail, save to state

that they related to how Mikaia was managed and developed, the procurement of

the oxen to stock Mikaia. and how the finances provided by the applicants were

utilized, a suspicion that monies provided by the applicants were used to fund

Embondeiro Mozambique. They suspected a massive fraud and alleged that a

breach of trust had manifested itself. Letters were exchanged, annexures “N” and

“O”.

[67] In terms of section 61(3) of the Companies Act a shareholders meeting was

convened on 28 August 2019, the purpose being to secure the adoption of a proposal

by the second applicant that the respondent (Mikaia SA) call up a loan made to Mikaia

Mozambique. It is common cause that a deadlock resulted with the refusal by

Embondeiro SA to support the resolution, the result being that shareholders in the

respondent voted 50% for 50% against. The Dalamr Group cancelled its agreement in

the Mikaia project on grounds of gross misconduct. The applicants contended that

once cancellation had occurred the ‘respondent could not be linked to an agreement

which had been cancelled. On 13 September a Notice in terms of section 345 (1) of

the Companies Act 71 of 2008 was delivered to the respondent. A further complaint

was that J Lee without consulting the Dalmar Group, caused an amount equivalent to

R500 000 to the transferred from the bank Account of Mikaia Mozambique to

Embondeiro Mozambique.

 [68] It is important to note that Embondeiro SA denies or disputed that the

respondent is indebted to the applicants in respect of monies advanced for the Makaia

project. The contention being made that in all the agreements concluded inclusive of

annexure “F”, between the Dalmar and Lee Groups attention was never given to how

the financial statements would be prepared reflecting the business model so engaged

and, in particular that the entries in such statements reflecting the monies advanced

as a loan were incorrect.

[69] Winding -up proceedings are usually launched by way of application, where,

the principles espoused in the *locus classicus,* the Plascon Evan Rule[[4]](#footnote-4) remain the test

to be applied. Again, in winding-up proceedings the Badenhorst Rule[[5]](#footnote-5) has been

consistently applied by our courts which reiterates that these proceedings were not to

be resorted to in order to enforce payment of a debt, which would result in an abuse

of the court proceedings. The Rule provides that where the applicant has *prima facie*

established indebtedness, then the onus rests on the respondent to prove on a

balance of probabilities that the indebtedness is disputed on *bona fide* and reasonable

grounds. Furthermore, the discretion exercised not to grant a winding up application

is a narrow one and should be exercised judicially.[[6]](#footnote-6)

[70] The main question in my view, is to determine whether the intervening party

had shown that the indebtedness has been *bona fide* and on reasonable grounds

disputed. As I see it the financial statements for the year ended 28 February 2018 as

contended by the applicants should be the starting point. It has not been disputed that

these were prepared Mr H J Coetzee (accountant) on behalf of the respondent and its

directors JF Lee and L Grobler, and signed for by Mr J Lee who is also the deponent

to the answering affidavit . Under the heading “ Notes to the Financial Statements” 5.1

which reflects loan to group company comprising the following balances for the year

2018 in the amount of R 8,108,381, with notes stating: “Fazenda Micaia Criacao

Limitada: The loan is unsecured, interest free, and has no fixed terms of repayment”.

Incidentally the financial statements also reflect what the amount of the loan was the

previous year. There has been no evidence that the loan was disputed and even in

this instance where Embondeiro contends that only part of the loan is payable,

suggests that there was an understanding that the loan was payable.

[71] It is my view, Embondeiro has not discharged it onus that that the indebtedness

is dispute on *bona fide* and reasonable grounds. The disputes of fact raised especially

regarding the ‘loan account’, where it is disputed and it is contended that there were

mistakes or a misunderstanding, or that the loan be split into funding that related to

acquisition of oxen and development of the land on the part of the Dalmar Group, are

not genuine disputes of fact.

[72] The conduct of Mr Lee of emptying the bank account of Mikaia after the

statutory demand was made further exacerbated the distrust the Dalmar Group had.

The applicants contend that there are further just and equitable grounds for the

winding up of the respondent. The contract has been cancelled; a deadlock exists;

there is no likelihood of funding, that the project in Mozambique was on the brink of

collapse, the relationship between the two groups had broken down. I am of the view

that a final order would be appropriate.

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

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

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**V.V. TLHAPI**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

**APPEARANCE**

**HEARD AND RESERVED ON : 15 – 17 NOVEMBER 2022**

**FOR THE FIRST APPLICANT : Adv. VAN DER MERWE SC**

**INSTRUCTED BY : DELPORT VAN DEN BERG INC**

**FOR THE RESPONDENT AND**

**INTERVENING PARTY : Adv. JL (MAC) VAN DER MERWE SC**

**INSTRUCTED BY : SANET DE LANGE ATTORNEYS**

**DATE OF JUDGMENT : 07 OCTOBER 2022**

1. 1992 (3)SA 379 (A) at 390. [↑](#footnote-ref-1)
2. Supra at 390 D-E [↑](#footnote-ref-2)
3. 2020 (5) SA 247 (CC) at para 83 [↑](#footnote-ref-3)
4. Agri Operations Ltd v Hamba fleet Management (Pty)Ltd (542/16) [2017] ZASCA 24 (24 March 2017) para [9]:”It may bear repeating that Plascon Evans is the locus classicus as the test in the factual enquiry before a final order can be made in motion proceedings” [↑](#footnote-ref-4)
5. Badenhiorst v Northern Construction Enterprise (Pty) Ltd 1956 (2) SA 346 (T); Freshvest v Marabeng (Pty)Ltd (1030/2015) [2016] ZASCA (15 November 2016); Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) 980 [↑](#footnote-ref-5)
6. Agri Operations *supra* [13] [↑](#footnote-ref-6)