



**NOT REPORTABLE**

CASE NO: SA 79/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**WOLFGANG HANS FISCHER**

**Appellant**

and

**HENNING ASMUS SEELNBINDER**

**First Respondent**

**FISCHER SEELNBINDER ASSOCIATES CC**

**Second Respondent**

**WIKUS ALBERTS**

**Third Respondent**

**Coram:** SHIVUTE CJ, FRANK AJA and ANGULA AJA

**Heard:** 20 October 2021

**Delivered:** 12 November 2021

**Summary:** This appeal concerns the establishment of the value of the loan account of the first respondent (Seelenbinder) and the value of Fischer Seelenbinder Associates CC (FSA). The appellant (Fischer) and Seelenbinder each held 50 per cent membership interest in FSA. When Seelenbinder was in his seventies, Fischer demanded that he resigns. This demand was premised on two agreements that Fischer alleges he concluded with Seelenbinder (ie an agreement Fischer alleged was entered into on 23 January 2015 and alternatively an association agreement in

terms of which Fischer could compel Seelenbinder to retire on six months' notice). Seelenbinder disputed these alleged agreements and refused to resign. This led Fischer to bring an application in the High Court to compel Seelenbinder's resignation or retirement.

The High Court on 10 November 2017 (in the retirement judgment) rejected Fischer's case based on the agreement of 23 January 2015. It did however accept that the association agreement granted Fischer the right to compel Seelenbinder to retire from FSA on six months' notice. The court made an order to the effect that Seelenbinder 'must retire from the close corporation by 31 March 2016' and, among others, also ordered that a 'referee' be appointed to 'determine the value of the close corporation and each party's loan account' and once this has been done, Fischer 'must pay to (Seelenbinder) 50% of the value of the close corporation and the value of (Seelenbinder's) loan account'. As a result, steps were taken to establish the value of the loan account of Seelenbinder and the value of FSA. Once these values were established, Seelenbinder had a writ of execution issued against Fischer based on the figures established. Fischer, becoming aware of the writ, brought two applications: one attacking the issuing of the writ and the other, attacking the valuation of FSA. These applications were heard together and both were dismissed with costs (the judgment *a quo*). This appeal is against the judgment *a quo*.

In these applications, Fischer contended that the referee/third respondent (Alberts) should have excluded the goodwill when he determined the value of FSA (this would make a huge difference in respect of what is due to Seelenbinder). At the hearing before the court *a quo*, Fischer further raised the point (in his heads of argument) that the court acted outside its jurisdiction when it appointed a referee and that appointment amounted to a nullity. The court *a quo* dismissed this point and found that ss 36 and 49 of the Close Corporation Act 26 of 1988 confers a broad discretion on the court to appoint a 'referee who is qualified in accounting and auditing' to determine the value of a corporation and the loan accounts of its members. The court *a quo* found that the court which heard the retirement application was entitled to do

so. Fischer, although disputing the agreement between the legal practitioners as alleged on behalf of Seelenbinder, submitted that even if such an agreement was in place, the court in the retirement judgment still did not have the jurisdiction to grant the order in respect of the referee.

*Held that*, when legal points are raised after the pleadings have closed and all the evidence has been placed before the court, a party may advance any further legal basis that may arise from the stated facts and the court may decide an application on any point of law that arises out of the alleged facts even if this was not relied upon in the application and if it will not be unfair to the other party.

*Held that*, a court can grant an order for separation either pursuant to the Close Corporation Act (s 36 or s 49) or pursuant to the common law (*actio pro socio* or *actio communi dividundo*). In this matter, no unfairness could arise as the termination of the relationship between the parties was sought on a broad equitable basis (s 36 of the Close Corporation Act) which also applies in respect of the common law remedies referred to by the court.

*Held that*, it is only the nature of the relief claimed that is relevant to the submission by Fischer and the court *a quo* was correct to dismiss the jurisdiction point raised as the attack is not one of jurisdiction but one of wrong application of the facts to exercise the jurisdiction that it undoubtedly would have had under the *actio communi dividundo* had the parties been joint owners.

On the issue of valuation, this court finds that goodwill is a form of property as accepted under English law and in terms of our common law. As is contained in the retirement judgment and the order, it is abundantly clear that the value inclusive of goodwill is payable. The order to value is unqualified and goodwill as an asset would be included in the valuation as a rule.

*Held that*, the court *a quo* was correct to find that Fischer did not discharge the onus on him to establish that the valuation done by Alberts was fatally flawed and that it led to an obvious unfairness towards him.

*Held that*, Fischer's submissions that the valuation must consider events subsequent to 31 March 2016 cannot be accepted. The retirement judgment determined that the value of the loan account had to be determined as at 31 March 2016 and that is the amount that would be paid, once determined, by Fischer to Seelenbinder.

The appeal is dismissed with costs.

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## APPEAL JUDGMENT

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FRANK AJA (SHIVUTE CJ and ANGULA AJA concurring):

### Introduction

[1] Appellant (Fischer) and first respondent (Seelenbinder) conducted business as civil engineers through second respondent, Fischer Seelenbinder Associates CC (FSA) on the basis of each holding a 50 per cent membership interest in FSA. The two members had a harmonious relationship until Fischer, when Seelenbinder was in his seventies, demanded that Seelenbinder resign.

[2] Fischer premised his demand for the resignation of Seelenbinder on two agreements he alleged he concluded with Seelenbinder. When Seelenbinder disputed these agreements and refused to resign, Fischer brought an application in

the High Court to compel the resignation or retirement of Seelenbinder in the following terms:

- '2. Confirming the agreement concluded between the applicant and the first respondent on 23 January 2015, that the first respondent shall retire/resign from the second respondent by 30 June 2015 against the payment to him of any amount outstanding and due to him on his loan account in the second respondent and declaring such agreement to be fully enforceable at the behest of applicant.
3. In the alternative to the above confirming and declaring that the applicant was entitled, in terms of the association agreement between the parties, to insist on the retirement or resignation of the first respondent from the second respondent upon six months' notice, and confirming and declaring that, such notice having been given on 23 January 2015, first respondent ceased to be a member of the second respondent on 23 January 2015, and in any event, by no later than 31 July 2015.
4. In the further alternative to the above ordering and directing that first respondent shall cease to be a member of the second respondent, with immediate effect, against the payment to him of the balance (sic) his loan account in the second respondent in the amount of N\$27 503.00, on any one or more of the grounds recognised by s 36(1)(a), (b), (c) and/or (d) of the Close Corporation Act 26 of 1988.'

[3] As is evident from the relief sought, Fischer relied in the alternative on two alleged agreements namely one concluded on 23 January 2015 and alternatively an association agreement in terms whereof he could compel Seelenbinder to resign or retire on six months' notice. Furthermore, as is evident from the alternative relief pursuant to s 36 of the Close Corporation Act 26 of 1988, by the time the application was launched Fischer was of the view that the relationship between him and

Seelenbinder had soured to the extent that it could not be expected of them to remain together as members in FSA.

[4] As is further evident from the alternatives, when it comes to the relief sought, payment to Seelenbinder is only contemplated in respect of the relief set out in paragraphs 2 and 4 quoted above and that in these instances it is limited to the payment of the loan account of Seelenbinder in FSA. As far as the relief sought is based on the association agreement (para 3) no payment to Seelenbinder is envisaged.

[5] The High Court in a judgment delivered on 10 November 2017<sup>1</sup> rejected the case of Fischer based on the agreement of 23 January 2015. It however accepted that the association agreement granted Fischer the right to compel Seelenbinder to retire from FSA on six months' notice and hence that Seelenbinder 'must retire from the close corporation by 31 March 2016' and, among others, also ordered that a 'referee' be appointed to 'determine the value of the close corporation and each party's loan account' and once this has been done, Fischer 'must pay to (Seelenbinder) 50% of the value of the close corporation and the value of (Seelenbinder's) loan account'.

[6] The retirement judgment was not appealed against by either Fischer or Seelenbinder and forms the backdrop to this appeal as will become apparent as I deal in more detail with it herein below.

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<sup>1</sup> *Fischer v Seelenbinder & another* 2017 (4) NR 1214 (HC) (the retirement judgment).

[7] As a result of the judgment steps were taken to establish the value of the loan account of Seelenbinder and the value of FSA. These values were thus established and Seelenbinder had a writ of execution issued against Fischer based on the figures established in this regard. Fischer, becoming aware of the writ brought two applications: one to attack the issuing of the writ and the other to attack the valuation of FSA. These applications were heard together and both were dismissed with costs (the judgment *a quo*). The current appeal lies against the judgment *a quo*.

#### Attack on valuation and ensuing writ

[8] In the application to attack the valuation by third respondent (Alberts), the main issue raised is that Alberts should have excluded the goodwill when determining the value of FSA. This would make a huge difference in respect of what is due to Seelenbinder. The value of FSA is determined by Alberts to be N\$2,9 million and this is qualified as follows:

‘Since there is no significant assets held by FSA, and the net asset value is only N\$76 134, the valuation mainly represents goodwill that would be paid for the purchase of FSA. This is on the assumption that FSA will attract clients based on its reputation build (*sic*) over years.’

Thus, if goodwill is to be excluded from what needs to be paid to Seelenbinder, he would only be entitled to half of N\$76 134, ie N\$38 067 instead of half of N\$2,9 million, ie N\$1 450 000.

[9] Apart from the question of the goodwill, certain other issues are also raised which it is averred would have materially affected the valuation such as the fact that FSA could not obtain a certificate of good standing from the Receiver of Revenue as its annual financial statements had not been approved which disqualifies it from government work, that the assumptions relating to a perpetual income flow were over-optimistic, that the depressed economic state in Namibia was not sufficiently factored into the valuation and certain other matters along the same lines.

[10] In argument *a quo* a further point was raised, namely that the court acted outside its jurisdiction when it appointed a referee and hence such an appointment amounted to a nullity which should be ignored. It was submitted on behalf of Fischer that as this portion of the retirement judgment was a nullity there was no need to appeal the retirement judgment and Fischer was at liberty to wait and resist any attempt to enforce this part of the order when it became necessary. This point according to the counsel for Fischer is a legal point and one that he could raise at the hearing despite not being raised in the papers on behalf of Fischer to attack the valuation and, consequently, to set aside the writ.

[11] The court *a quo* held that the retirement judgment did not exclude goodwill from the valuation, that Fischer did not prove that the valuation differed materially from what a fair valuation would have been and hence that a case was not made out to set aside the valuation.



[12] As far as the jurisdiction of the court to appoint a referee is concerned, the court *a quo* held that as ss 36 and 49 of the Close Corporation Act confer a broad discretion on the court to appoint a 'referee who is qualified in accounting and auditing' to determine the value of a corporation and the loan accounts of its members the court hearing the retirement application was entitled to do so. The point that the court lacked jurisdiction to appoint a referee was accordingly dismissed.

#### Appointment of a referee

[13] In neither the writ application nor the valuation application was the point taken that the court that gave judgment in the retirement application lacked the jurisdiction to appoint a referee to determine the value of FSA and the loan account in FSA of Fischer and Seelenbinder. This point was raised in the heads of argument on behalf of Fischer *a quo* as a legal point. As indicated above the court *a quo* in its judgment dealt with this point and dismissed it.

[14] The fact that the point raised was purely a legal one as submitted on behalf of Fischer was disputed by the legal practitioners acting for Seelenbinder in their heads of argument as follows:

'It is not purely a legal point and necessitates the consideration of facts not before Court. For example, before Ueitele J made the order in the main application judgment, he called the parties' legal teams into his chambers and discussions were held pertaining to the form of certain orders possibly to be made. In fact, if senior counsel for Seelenbinder recalls correctly, the parties made different proposals. However, the parties could not agree on the terms within which the valuation should take place. Both parties however, suggested the appointment of a referee. Had this point been raised squarely in the

founding papers, Seelenbinder would have been entitled to put up the detailed facts, to submit that the parties in fact agreed that a referee should be appointed.’

[15] The judgment of the court *a quo* does not deal with this aspect at all, probably because of the determination that the point was, in any event, without merit.

[16] When legal points are raised after pleadings have been closed and all the evidence have already been placed before the court, a party may advance any further legal basis that may arise from the stated facts and the court may decide an application on any point of law that arises out of the alleged facts even if this was not relied upon in the application.<sup>2</sup> This principle is however qualified to the extent that it does not apply if its application would be unfair to the other party.<sup>3</sup>

[17] To ensure no unfairness to a party the principle applies only where the point that is sought to be taken is covered by the pleadings and evidence. In other words, the legal point must raise no new factual issues.<sup>4</sup> This is so because it is important to ‘. . . acknowledge the salutary principle that unless there has been a full investigation of a matter falling outside the pleadings and there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the parties are held to the issues pleaded. In the absence of certainty that such dispute has been properly investigated and ventilated, injustice might easily follow if this rule is not strictly adhered to.’<sup>5</sup>

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<sup>2</sup> *Black Range Mining (Pty) Ltd v Minister of Mines and Energy & another* 2009 (1) NR 140 (HC) paras 10 and 19 and *Bruni NO & others v Minister of Finance & others* 2021 (2) NR 552 (SC) para 51 (*Bruni*).

<sup>3</sup> *Bruni* para 52.

<sup>4</sup> *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) paras 43 and 44 quoted with approval in *Bruni* para 54.

<sup>5</sup> *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) at 521.

[18] Counsel for Fischer, although disputing the agreement between the legal practitioners as alleged on behalf of Seelenbinder, submits that even if such an agreement was in place, the court in the retirement judgment still did not have the jurisdiction to grant the order in respect of the referee that it did. I thus briefly deal with this aspect relating to the jurisdiction of the court in the retirement judgment. Whether a court has the jurisdiction or the power to hear and determine an issue brought before it depends on a number of factors. As the High Court has jurisdiction over all persons in Namibia and in respect of all causes arising within Namibia<sup>6</sup> no issue arose in this regard in respect of the parties to the litigation or in respect of the nature of the proceedings. The only question that arises is whether the High Court had the jurisdiction within the context of the case to grant the relief sought, ie was the High Court's jurisdiction limited by the nature of the relief sought. In other words could the High Court, in light of the relief sought, direct the termination of the relationship between the parties on the basis that the one party had to buy-out the other based on valuations determined by a referee. The jurisdiction of the High Court is determined on:

' . . . (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases, both (a) and (b).'<sup>7</sup>

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<sup>6</sup> Section 16 of the High Court Act 16 of 1990.

<sup>7</sup> *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1063F-G.

[19] In the present matter it is only the nature of the relief claimed that is relevant to the submission on behalf of Fischer that the relief granted fell outside the jurisdiction of the court giving the retirement judgment.

[20] Cut to the bone, the relief claimed by Fischer can be summarised as follows: The relationship between him and Seelenbinder had deteriorated to such an extent that it was unfair to expect them to remain in that relationship. In these circumstances he requested the court to terminate the relationship and make an order as to the modalities of such termination. For this relief he relied on s 36 of the Close Corporation Act.

[21] The court found that Fischer and Seelenbinder 'cannot be expected to remain co-members of (FSA)<sup>8</sup> and Seelenbinder had to retire. It further found that on the facts, Fischer and Seelenbinder 'are for all intent and purposes in the same position as partners or co-owners in undivided shares of immovable property who are no longer able to work amicably together'.<sup>9</sup> As the law recognised an ' . . . underlying equitable principle that no co-owner, no partner, no shareholder and no member is normally obliged to remain (in such a relationship) against his will in circumstances where this is unfair or oppressive to him'<sup>10</sup> it would fashion an order to give effect to such separation.

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<sup>8</sup> Retirement judgment para 46.

<sup>9</sup> *Supra* para 48.

<sup>10</sup> *Supra* para 49.

[22] It follows from the facts found that the court could grant an order for separation either pursuant to the Close Corporation Act (s 36 or s 49) or pursuant to the common law (*actio pro socio* or *actio communi dividundo*) and this is what it did. It could do so based on the principle relied upon on behalf of Fischer to raise the jurisdiction point, namely, that a court may decide an application on any point of law that arises out of the facts before it provided that it involves no unfairness to a party to such matter. In this matter, no unfairness could arise as the termination of relationship between Fischer and Seelenbinder was sought on a broad equitable basis (s 36 of the Close Corporation Act) which also applies in respect of the common law remedies referred to by the court. This would be even more so where the parties agreed that a referee be appointed to effect the separation.<sup>11</sup> If the court was wrong to find that Fischer and Seelenbinder were for all intent and purposes partners and joint owners then this should have been addressed on appeal or review. Once this was not done it is not now open to Fischer to attack this finding.

[23] The court *a quo* was thus correct to dismiss the jurisdiction point raised on behalf of Fischer as the attack raised on his behalf is not the one of jurisdiction but one of wrong application of the facts to exercise the jurisdiction that it undoubtedly would have had under the *actio communi dividundo* had the parties been joint owners.

### Valuation

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<sup>11</sup> *Badenhorst v Marks* 1911 TPD 144 and *Robson v Theron* 1978 (1) SA 841 (A) at 855.

[24] As is evident from the order in the retirement judgment, Alberts had to determine the value of FSA at 31 March 2016 (I deal with the loan accounts separately below).

[25] That goodwill is a form of property is accepted in English law. Thus, in *R.J. Reuter Coy. Ld. v Mulhens*<sup>12</sup> it is referred to as follows:

'The nature of goodwill has been many times stated; it represents, in connection with any business or business product the value of the attraction to customers which the name and reputation possesses. However difficult of identification, an English goodwill appears to be a species of English property . . .'<sup>13</sup>

[26] That goodwill is also regarded as property in terms of our common law cannot be doubted:

' . . . goodwill is an intangible asset pertaining to an established and profitable business, for which a purchaser of the business may be expected to pay, because it is an asset which generates, or helps to generate, turnover and, consequently, profits.'<sup>14</sup>

[27] The order did not qualify the valuation in any manner and Alberts executed it. The valuation enables one to distinguish the value of FSA inclusive of goodwill and exclusive of goodwill and as pointed out above, this takes care of the criticism of Alberts in this regard. According to Fischer it was up to Alberts to seek directions from the court as to whether the valuation had to include or exclude goodwill. What would the point of this be as the valuation includes both these values? Then it is simply a

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<sup>12</sup> *Reports of Patent, Design and Trade Mark Cases*, Volume 70, Issue 6, published 29 April 1953 pages 102-122, <https://doi.org/10.1093/rpc/70.6102> accessed on 1 November 2021.

<sup>13</sup> Also see G C Webster, N S Page, C E Webster and G E Moley *South African Law of Trade Marks* 3 ed p 243.

<sup>14</sup> *Jacobs v Minister of Agriculture* 1972 (4) SA 608 (W) at 621A.

question of interpretation of the order to establish whether half the value inclusive of goodwill was payable or half the value exclusive of goodwill (net asset value) was payable.

[28] From the judgment and the order, it is abundantly clear that the value inclusive of goodwill was payable. As mentioned, the order to value is unqualified and goodwill as an asset would be included in a valuation as a rule. Furthermore, the issue that goodwill was excluded per the original association agreement (which also refers to the fact that loan accounts were repayable over a two year period) was clearly held by implication not to apply to cases of forced separation between the members of FSA. This is so because the court held that it was 'unable to find that the parties had agreed to the terms on which (Seelenbinder) must retire when called upon to retire'. This is the end of any submission that goodwill was not payable by agreement between the parties.

[29] With the goodwill issue out of the way the valuation of Alberts is attacked on various other grounds. As pointed out by the court *a quo* the onus was on Fischer to establish that Alberts' valuation was materially flawed with reference to the test enunciated in *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia & another*<sup>15</sup> where the principle is stated as follows:

' . . . the relevant principle is that the valuation should be one of a reasonable man and can be rectified on the grounds of fairness when it is so unreasonable, improper, irregular or wrong that it may lead to obvious unfairness.'

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<sup>15</sup> 1993 NR 274 (HC) at 280G-J.

[30] The valuation process is not one of exact science and it is thus inevitable that valuations will differ from person to person. Where a number of experts in this field are engaged these valuations should be in a certain range and none of such valuations will necessarily be unreasonable. In the present matter, Alberts was engaged to determine a market value of FSA and in their written mandate signed off by both Fischer and Seelenbinder it was agreed that the value to be determined was the market value of FSA which was defined as the 'value applied between a hypothetical willing vendor and a hypothetical willing prudent buyer in an open market and with access to all relevant information'. The mandate also accepted that Alberts can determine the market value by applying one or more recognised valuation methodologies, namely discounted cash-flow, dividend discount model, capitalised earnings, relative valuation using multiples and net asset value and that is for the purposes of the valuation certain factors relevant to the business of FSA would play a role, eg risk for the business, sustainability of earnings, market and industry related specific factors etc.

[31] When regard is had to the valuation it is obvious that Alberts did the valuation as per mandate given to him by Fischer and Seelenbinder. Thus the factors considered in the valuation are listed by Alberts as follows:

- 'The past performance and results of FSA;
- Actual results available subsequent to 31 March 2016;
- A relevant effective tax rate of 32%;



- Sustainability of the income stream;
- Expected net profit margins of a professional services corporation;
- The risk pertaining to the industry;
- WACC of 24,73%;
- Risk fee rate of 8,73%;
- Capitalisation rate of 25%.’

I interpose here to mention WACC indicates the Weighted Average Cost of Capital.

[32] Fischer in the valuation application launches attacks against the valuation of Alberts which he suggests is fatally flawed. He does not state what he suggests a reasonable valuation would be so no obvious unfairness between his valuation and Alberts’ arise on the papers. Apart from the attack on the inclusion of the goodwill, he raises a further attack that can be classified as mere carping because the valuation was not to his liking. He asserts that as the financial statements were not yet signed off by both him and Seelenbinder, FSA cannot obtain a certificate of good standing from Inland Revenue which makes it impossible for FSA to obtain government work. According to him, these are two fatal flaws in the issuing of the writ. The fact that the court order did not state that payment to Seelenbinder would only be done once the financials were signed is ignored by him and so is the fact that once Fischer paid Seelenbinder the obstacle relating to the certificate of good standing will fall away as he would then, as sole member of FSA, be able to sign the financials alone.

[33] According to Fischer, the loan accounts have not yet been valued by Alberts. The fact is that Fischer and Seelenbinder with the help of their bookkeepers agreed on the amounts of the respective loan accounts. This meant the valuers or referees in respect of the loan accounts were the bookkeepers. Furthermore, what need was there to value the loan accounts if Fischer and Seelenbinder agreed on their values. It escapes me how Alberts' failure to value the loan accounts in these circumstances constitutes a serious flaw in his valuation which was premised, among others, on the agreed value of the loan accounts.

[34] A further criticism relating to the value of the loan accounts was that Alberts did not take into account transactions on the loan account of Seelenbinder subsequent to the valuation date of 31 March 2016. I deal with this aspect below when I deal with the loan accounts but as will become apparent there is no merit in this criticism of Alberts. Lastly, Fischer criticises the fact that Alberts does not refer to comparable transactions for enterprises such as FSA and the assumption as to the revenue flows are based on past revenues and hence over-optimistic. He however does not state to what extent these flaws, if indeed they are flaws, would affect the valuation and it is simply not possible to conclude these alleged flaws lead to obvious unfairness.

[35] In the light of the foregoing, the court *a quo* was correct in its finding that Fischer did not discharge the onus on him to establish that the valuation done by Alberts was not that of a reasonable man and that it led to an obvious unfairness towards him.

### Loan accounts

[36] As mentioned above the amount of the parties' loan accounts was agreed to for the purpose of the 31 March 2016 accounts. The agreement and the nature of the dispute in this regard is evident from a letter that Fischer's legal practitioners wrote to Seelenbinder's legal practitioner. The relevant part of the letter reads as follows:

	‘2. My client confirms that Mr Seelenbinder’s loan account with FSA as at 31 March 2016 was N\$1 008 286,00. Since then your client became indebted to FSA as follows:	
	a) Your client's 50% of running costs from April 16 to November 17	N\$593
329,83		
	b) Your client's direct private expenses from April 16 to November 17	N\$269
889,60		
	c) Your clients portion of running costs after November 17	N\$190
685,11		

Mr. Seelenbinder's generated project income (after tax) for the period April 16 to November 2017 amounted to N\$285 235,29.

Having regard to the aforesaid, his loan account currently stands at N\$239 616,78.

3. The appointed referee valued the close corporation at N\$2,9 Million of which N\$76 134,00 represents the nett asset value and the balance goodwill. In its judgment the court held in regard to the "written minutes of a meeting that the evidence demonstrated that the parties intended concluding contract, contract

therefor valid". These minutes included an agreement that no goodwill is payable as between the founding members of the close corporation.

4. Having regard to the aforesaid, the value of your client's 50% members interest is an amount of N\$38 067,00.
  
5. My client, having regard to what is stated herein before and having regard to the taxed legal costs of N\$170 033,32, herewith tenders payment of an amount of N\$107 650,43 against transfer of the member's interest. The Financial Statements for March 2016 are still not signed by your client. This resulted in FSA having not having (*sic*) any good standing with the Receiver of Revenue since and was not able to participate in any tenders since.'

[37] As is evident from the letter, Fischer does not accept that the valuation as at 31 March 2016 is the relevant one in respect of the loan account but wishes to take events subsequent to that date into account. Upon a question from the court, counsel for Fischer pointed out that the date of valuation of the loan accounts is not stipulated in the court order, unlike the date for valuation for FSA which is expressly stated in that order to be 31 March 2016.

[38] Purely from a practical point of view, there is merit in the stance adopted on behalf of Fischer. Seelenbinder simply refused to acknowledge the notice to him to retire. He continued to act as a member of FSA long after the notice to retire and also continued to use his office and the infrastructure of FSA as if he was still entitled to do so. This while the retirement judgment ordered him to retire from 31 March 2016. This judgment was only handed down on 10 November 2017. This meant that for the period from 31 March 2016 to 10 November 2017 when the retirement judgment was handed down he acted as if he was still an active member of FSA with all the concomitant rights and obligations attaching to his membership. Despite not getting

his monthly remuneration or drawings, he continued to do work from his office at FSA as if he was still a member of FSA subsequent to the retirement judgment and when he was locked out of the office, he successfully brought a spoliation application against Fischer based on his use of the office and infrastructure of FSA. Seelenbinder also resisted an eviction application by Fischer in the High Court. Exactly when Seelenbinder vacated the office and stopped acting as an active member is not apparent from the papers, but suffice to say he continued to act as an active member of FSA on the basis that the retirement judgment had no effect on him until he was paid what was due to him in terms of this judgment.

[39] Although I cannot comment on the correctness of the costs Fischer claims in this letter that must be deducted from Seelenbinder's loan account as it stood at 31 March 2016 it is clear that there are probably costs that would be for his account in this regard. In fact, it should be a fairly simple exercise for the accountants to calculate these costs as they would have to do the calculation on the same basis as it was done for the March 2016 financial statements as Seelenbinder operated on the basis that he was still an active member of FSA.

[40] If counsel for Fischer is correct and Alberts had to value the loan accounts as he found them and not as at 31 March 2016, the task of the valuation of such accounts have not yet been completed and still needs to be done. This will obviously, seeing that there are further entries on the loan account subsequent to 31 March 2016, affect the amount owing to Seelenbinder under this heading.

[41] If Seelenbinder is correct and the order is to the effect that Fischer must pay him the amount of his loan account as at 31 March 2016 then the position is as follows: (For this purpose, I assume that the amounts that Fischer's legal practitioners want to charge to the loan account of Seelenbinder is correct), then Fischer must pay Seelenbinder N\$1 008 286 and Seelenbinder will owe FSA N\$768 669,25 (the amounts stipulated in (a) + (b) + (c) less project money as stipulated in the letter quoted above) leaving Seelenbinder with N\$239 616,78 in his pocket. From an accounting perspective, Fischer will then take over the loan from Seelenbinder to the tune of N\$1 008 286 and the balance of the loan account will be wiped out by the payment of N\$768 669,25 to FSA by Seelenbinder. The point I am making is that if the parties act reasonably, they should be able to resolve how to deal with the loan account in view of developments subsequent to the retirement date instead of being involved in yet another round of litigation between FSA and Seelenbinder in respect of the latter's liability to FSA for that portion of Seelenbinder's loan account not taken over by Fischer.

[42] The question that arises is what was the order of the court in the retirement judgment and did it stipulate a date for the valuation of the loan account or not. In terms of the mandate to the referee the order reads as follows:

- '6.5 Must prepare the financial statements of the close corporation and determine the value of the close corporation as at 31 March 2016, not later than three months from the date of his or her appointment.'

As is evident from the above para 6.5 of the order, it does not state that the loan account had to be determined as at 31 March 2016 but only refers to the value of FSA to be determined as at that date.

[43] Paragraph 7 of the order which is the order directing payment to Seelenbinder by Fischer reads as follows:

‘Once the referee has determined the value of the close corporation and has determined the loan account of each of the parties, the applicant (Fischer) must pay to the first respondent (Seelenbinder) 50% of the value of the close corporation and the value of the first respondent’s (Seelenbinder’s) loan account.’

[44] If regard is had to the above two paragraphs in the retirement judgment only, counsel for Fischer’s submission is undoubtedly correct and also makes sense in the specific circumstances of this matter as pointed out above. This is however not the end of the matter and the order must be interpreted in its context which means the body of the judgment must be considered in this regard before coming to a final conclusion.<sup>16</sup>

[45] The only portion of the judgment containing a cut-off date in relation to the value of the loan accounts appears in para 50 of the retirement judgment which reads as follows:

[50] I am therefore of the view that the practical and equitable solution in the circumstances, according to the substantive principles of law governing the *actio communi dividundo*, is for the court to order that the terms on which the first respondent must resign or retire from the close corporation, is for the parties to

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<sup>16</sup> *Fischer v Seelenbinder* 2021 (1) NR 35 (SC) paras 27 and 38.

appoint a referee who will determine the value of the close corporation and each member's loan account as at 31 March 2016. . . . Once the value of the close corporation and each member's loan account is determined the applicant must then pay to the first respondent 50% of the value of the close corporation and the value of his loan account.'

(my underlining)

[46] It is clear from the underlined portion from the judgment quoted above that the value of the loan account had to be determined as at 31 March 2016 and that this amount would be payable, once determined, by Fischer to Seelenbinder. The unfortunate consequence for Fischer is that the submissions in this regard by his counsel can therefore not be accepted.

[47] Counsel for Fischer also submitted that the retirement judgment does not mean that he personally must pay Seelenbinder the amount of the loan account but that he must pay it as agent of FSA. As is evident from the quotations from the retirement judgment above, there is no basis for this submission. Both the judgment and the order expressly states that Fischer, and not FSA, must pay Seelenbinder his loan account. As also already indicated from the accounting perspective, it means that the portion of the loan account of Seelenbinder that Fischer pays will simply be taken over by Fischer having the effect in this matter that the amount of Fischer's loan account will be increased. The balance of the loan account of Seelenbinder, if any, in respect of events or transactions subsequent to 31 March 2016 between Seelenbinder and FSA will be payable by whom, between the two of them, is the debtor of the other.



[48] It thus follows that the amount due by Fischer to Seelenbinder representing the value of the loan account in FSA was correctly determined at N\$1 008 286 for the purposes of the writ application.

#### Costs

[49] As the court *a quo* correctly dismissed the valuation application and the writ application, the appeal must be dismissed and the only issue left is to determine who shall be liable for the costs on appeal.

[50] Counsel for appellant submits that Seelenbinder's answering papers are overly voluminous as many matters not relevant to the issues raised in the two applications were included in the answering papers. I agree. Apart from duplication of documents such as the retirement judgment which appears four or five times in a full or truncated form, lots of irrelevant documentation were included such as the member's register of FSA and letters exchanged in relation to the spoliation and eviction applications, the pleadings in respect of an intended rule 103(1)(c) of the Rules of the High Court application which was not persisted with, extracts from the record in respect of a case management hearing where the judge who wrote the retirement judgment allegedly expressed his views as to the interpretation of his order in that judgment, heads of argument in the High Court and correspondence in the run-up to the appointment of Alberts which were not relevant to the dispute at hand.

[51] Counsel for Seelenbinder sought to justify the above approach to the documentation by submitting that it was the safe way to proceed as they simply did not know what point the legal practitioner of Fischer would come up with next. This cannot be accepted. The respondent only had to deal fully with the facts and contentions in the founding papers. If something then arises thereafter which does not flow from the founding papers it can be asked to be struck out or that leave be granted to respondent to file further papers to deal with such new or unexpected matter.

[52] From a perusal of the record I am of the view, assuming that where documents are duplicated the costs thereof will only be allowed once on taxation, that the respondent should only be allowed the costs in respect of the record to the extent of two thirds of such costs and I shall make such an order.

#### Conclusion

[53] In the result, the appeal is dismissed with costs inclusive of the costs of one instructing and two instructed legal practitioners provided the costs in respect of the record shall be limited to two thirds thereof.

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**FRANK AJA**

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SHIVUTE CJ

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ANGULA AJA

APPEARANCES

APPELLANT:

T A Barnard

Instructed by Behrens & Pfeiffer

FIRST RESPONDENT:

R Heathcote (with him S J Jacobs)

Instructed by Van der Merwe-Greeff

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