



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

DATE: 28 JULY 2021

SIGNATURE OF JUDGE

Case number: 20/33234

In the matter between:

ISTMAK EMPIRE (PTY) LTD

Plaintiff /Respondent

and

JEANETTE RAPALALANE T/A WANGA'S PROJECTS

Defendant/Excipient

JUDGMENT

SLON AJ

1. The excipient (defendant) in this matter excepted to the respondent's (plaintiff's) particulars of claim on the basis that the latter is vague and embarrassing, *alternatively*, does not disclose a cause of action and is bad in law. The former grounds are not relied upon in the excipient/defendant's heads of argument. For the sake of convenience, I shall refer to the parties as they are cited in the action.
2. The plaintiff's cause of action is one based on an acknowledgement of debt ('the AoD') dated 3 August 2020. The plaintiff pleads that the AoD was concluded by virtue of an indebtedness in an amount of some R2.3 million owed to it by the defendant, and flowing from alleged breaches by the defendant of certain provisions of a joint venture agreement concluded between the parties, about a year earlier, on 23 September 2019.
3. The parties have agreed that this matter be determined on the papers, without the need of an oral hearing. Heads of argument were filed by Mr Zwane for the defendant and by Mr de Villiers for the plaintiff.
4. The defendant has implicitly assumed, and has based its contentions on the assumption, that the joint venture with which this action is concerned is the same creature, at law, as a partnership. There seems little doubt of this, but I

need not decide that point specifically, and make the same assumption – since that it is the basis on which the exception is brought.

5. Mr Zwane submits that, as a matter of law, one partner may not sue another during the subsistence of a partnership; and, since the plaintiff fails to allege that the joint venture created by the agreement of 23 September 2019 has been terminated, the plaintiff's particulars of claim fail to disclose a cause of action.
6. Mr de Villiers contends, on the other hand, that the AoD has nothing at law to do with the joint venture in the sense that it is a separate and self-contained agreement, enforceable by the plaintiff against the defendant regardless thereof.
7. Mr Zwane relies for his contention on ***Shingadia Brothers v Shingadia*** 1957 (3) SA 195 (SR). The headnote of that matter, which will suffice for present purposes, reads:

‘In the case of a lease by a partnership to one of the partners, the partners cannot in the name of the partnership sue such individual partner for a breach of the lease, e.g. an action for arrear rent.’

8. At 197H of the report, Morton J quoted with approval a passage from ***Meyer & Co v Faber (No 2)*** 1923 (2) Ch 421 in which Warrington LJ stated (at 439):

‘A partner cannot be a creditor of or a debtor to his firm or sue his firm or be sued by it, inasmuch as the English law does not recognize the

existence of a firm as distinct from the members of it; and further in any action by one or more partners, whether using the name of the firm ... or not, against a co-partner alleging that money is due from the defendant to the plaintiffs in connection with the affairs of the firm, whether the claim arises in respect of transactions during the continuance of the partnership, or in the course of the winding-up of its affairs after dissolution, the only relief which the plaintiff could obtain would be an account of the dealings and transactions of the partners.'

9. The obstacle with which the *Shingadia Brothers*' case was concerned arises in circumstances where a partnership purports to sue one of its own partners. It is precluded from doing so since a partnership is not a legal entity separate from its partners, as a company is separate from its members, and the law does not permit a person to sue himself or herself, with or without other parties who may be joined to the suit. Mr Zwane's point in this regard is that, by the same logic, a partner is not entitled to sue the partnership of which he or she is a partner.
10. In this action, however, the claim is pursued by one member of a joint venture in its own name against the other, the latter also being cited in her own name. There is nothing in the AoD as read with the joint venture agreement to suggest that it was the joint venture which was intended to be either debtor or creditor. This is not, therefore, an action by or against the joint venture itself. According to the joint venture agreement, incidentally, the joint venture was to be housed by a company to be registered by the name of 'WangaMak Properties', which appears to be a portmanteau of the names of the plaintiff ('Istmak') and the defendant's trading name ('Wanga's Projects').

11. Whether or not such company was ever formed or, if it was, whether or not the business of the joint venture was ultimately housed in it, is not disclosed on the pleadings, and would not in any event, in the view I take of the matter, have made any difference, since this action is based, as I have said, on an alleged liability between the members of the joint venture *inter se*. The principle enunciated in the **Shingadia Brothers**' case is plainly not applicable.
12. The action, it seems to me, is of a type conforming to the *actio pro socio*. It was held by Joubert JA in **Robson v Theron** 1978 (1) SA 841 (A) at 855H-856A that one of the principles of the common law underlying the *actio pro socio* is that an action –

'may be instituted by a partner against a co-partner during the existence of the partnership for specific performance in terms of the partnership agreement and/or fulfilment of personal obligations (*praestationes personales*) arising out of the partnership agreement and business.'
13. The AoD undoubtedly arises, broadly speaking, out of the joint venture 'agreement and business'. It seems to me to be an ancillary instrument in the form of a liquid document by means of which certain financial obligations of the defendant, allegedly based on the joint venture agreement (or upon alleged breached thereof), were sought to be concretized and codified by the parties, and which the plaintiff may now seek to enforce independently of its genesis.

14. That being so, the plaintiff is entitled to sue on it regardless of the continued subsistence, or not, of the joint venture agreement.
15. The exception is accordingly dismissed with costs.



B M SLON

Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was prepared and authored by Acting Judge Slon. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

HEARD ON: By agreement, matter decided without a hearing

DECIDED ON: 28 July 2021

For the Plaintiff:

C de Villiers

Instructed by Delport van den Berg Attorneys

For the Defendant:

N Zwane

Instructed by Dube Lesley Attorneys