REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

19/12/2014

(1)	REPORTABLE: **No**
(2)	OF INTEREST TO OTHER JUDGES: **No**

CASE NO: 32488/2012

In the matter between:

JOHAN NICOLAAS DU PREEZ **PLAINTIFF**

and

BEDROCK DRILLING BK **DEFENDANT**

JUDGMENT

KUBUSHI, J

[1] The plaintiff instituted action against the defendant based upon an alleged agreement of partnership between the plaintiff and the defendant during April 2010. In terms of the partnership as alleged by the plaintiff:

a. The plaintiff had to contribute, and indeed contributed, an amount of R700 000 as funding for the operation of the partnership.

b. The defendant conducted the business of the partnership, being drilling for water, exploration, and blasting holes at various places including Nkomati and Middelburg.

c. The plaintiff had a 25% share in the partnership.

d. The defendant was the only manager of the business of the partnership and as such managed all the affairs of the partnership. The defendant was in sole control of the business activities of the partnership.

e. The plaintiff had no share in the management and control of the business, operation, transactions or assets of the partnership.

[2] The defendant is a close corporation registered in terms of the laws of South Africa. Its sole member is Abram Carl Meintjies (Meintjies). According to the evidence of the plaintiff the defendant conducts the business of drilling for water, exploration and bore holes. It carries such business in the Democratic Republic of Congo (the "DRC") and in the country.

[3] The defendant is in its plea denying the alleged partnership agreement. It appears from the trial bundle that the defendant had initially admitted the partnership, but such admission was withdrawn with leave of the court. I am as a result not prepared to consider the contention by the plaintiff's counsel that I should take a dim view against such amendment. It is trite that a pleading which is amended by an order of court must be regarded as if the amendment had been in it when it was originally filed. If that were not so, it would be futile for the courts to allow, as they commonly do, the amendment of declarations and summonses which are defective for want of vital allegations. What is required to cure such defective declaration or summons is an averment of the missing fact as a fact which existed at the time when the pleading was filed; the incorporation of an averment which, truly interpreted, meant that the vital fact had come into existence at a later date would, on the authorities, serve no purpose. [1]

[4] As the papers stand now, the defendant is placing the existence of the partnership in dispute and specifically pleaded as follows:

a. The plaintiff purchased a 25 % share in a drill personally from Meintjies at an amount of R700 000;

b. The plaintiff would receive 25% of the income generated from the drill machine by Meintjies;

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1 *Dinath v Breedt* 1966 (3) SA 712 (T) at 717B

[5] The relief sought by the plaintiff in his particulars of claim was for (a) an order directing the defendant to provide him with statement of account of the transactions and business carried out by the defendant from 30 April 2010 to date hereof duly supported by documentation to prove such transactions; (b) the debatement of the accounts; and (c) payment of all the amounts found to be due and owing to the plaintiff by the defendant. At the commencement of the trial and *per* agreement between the parties I ordered separation of issues in terms of uniform rule 33 (4). The relief sought in prayer (a) of the particulars of claim was in respect of the separation order I granted, separated from prayers (b) and (c). The matter before me proceeded in respect of prayer (a), and prayers (b) and (c), were postponed *sine die*.

[6] The defendant had during the pleading stage filed its plea out of time and applied at the commencement of the trial that the late filing of the plea be condoned. There was no objection from the plaintiff as no prejudice would be suffered and I granted an order allowing for the late filing of the plea.

[7] Most of the issues between the parties were common cause. As a result the parties were agreed at the pre-trial conference held on 5 November 2014 that the only issues which required determination by this court were

a. whether a partnership as alleged by the plaintiff was entered into between the parties, and if so,

b. what was the nature of the partnership.

[8] The issues were further curtailed at the commencement of the trial when the defendant's counsel handed in the following admissions made by the defendant, namely:

"1. With reference to pg 112 of the bundle, being an email, the following admissions by the defendant are recorded:

1.1 That Michelle Teesen, being the author of the said document, and being the owner of Silversolutions, was responsible for the office administration of Defendant, during about April 2010.

1.2 That the said Michelle drafted and sent the email in such capacity.

1.3 The content of the email referred to is also admitted.

2. The Defendant admits that the payments referred to in the Plaintiff's Particulars of Claim in par 3.5 thereof on 28, 29, 30 April 2010 in the total sum of R700 000 were made by the Plaintiff into the bank account of the Defendant.

3. All relevant payments received by the Plaintiff, from after April 2010 was paid from the account of the Defendant, except for one payment."

[9] The admissions put to bed the issue of whether or not the plaintiff paid an amount of R700 000 to the defendant. The issue which remained, that the plaintiff had to prove, was whether there was a partnership agreement entered into between the parties or not.

[10] Although two witnesses were called by the plaintiff, the evidence of the second witness was disallowed as irrelevant. The only evidence that requires consideration is that of the plaintiff personally. The defendant on the other hand, closed its case without calling any evidence.

[11] There is no written agreement between the parties. The plaintiff relies in his claim on an oral agreement which he termed a 'handshake agreement'. This is so, according to the plaintiff, because he regarded Meintjies as his big buddy and house friend. They visited each other regularly. They had the same experience in that both their fathers left their farms in Rhodesia and came to South Africa to start a new life. They knew of each other's difficulties and dreams. In short they were good friends and very close to each other.

[12] The plaintiff's evidence is that, at all material times hereto, the defendant had a drilling business in the DRC. Meintjies informed him about an opportunity that was available to the defendant to expand its business in the DRC. The expansion required that the defendant purchase a drill rig and the defendant did not have the required resources. The amount required for the purchase of such a drill rig was $150 000.

[13] The plaintiff's interest in the drilling business was started when the defendant encouraged the plaintiff to purchase the drill rig. The arrangement was that the plaintiff would buy the drill rig and the defendant, who had the necessary technical expertise to operate it, would operate that drill rig at a percentage of the income. However, the transaction stopped when the plaintiff could not source the amount sought for the venture. The amount he could source at the time was only R850 000 as a loan from his pension fund. When the DRC deal fell through, so it is alleged, the defendant made the plaintiff an offer to buy into the defendant's business, as far as the operation of the yellow drilling rig is concerned. At all material times the negotiations were carried out between the plaintiff and Meintjies, who it has been said, is the sole member of the defendant. The amount of R700 000 was paid in three instalments. The terms of the partnership were as stated in paragraph [1] of this judgment.

[14] It is also alleged that at all material times hereto the plaintiff was made to believe that the defendant was the owner of the yellow drill rig. He did not have the technical skills and the agreement was that the defendant will operate, manage and conduct the whole business of the drill rig. His understanding was that the income would be generated by the drill rig and he would receive 25% of that business. He was never offered to purchase 25% of the drill rig as averred by the defendant in its plea. In fact, he was never interested in buying that drill rig and had he been expressly informed that he was buying a percentage of the drill rig he would not have gone into the business.

[15] Due to the fact that the plaintiff had to service the pension fund loan he expected to receive money from the defendant. He had to service the loan himself, for six months before he could receive any money from the defendant. The first payment he received was R7 000. In August 2011 he expected, as promised by the defendant, to receive an amount of R400 000 but received only R10 000. He, as a result, arranged a meeting with Meintjies, which meeting was held on 11 August 2011. The plaintiff, without the consent of Meintjies, recorded the conversation he held with Meintjies on his cell phone. The conversation was transcribed and formed part of the record. The defendant's counsel objected to the use of the transcription unless the author thereof was called as a witness. The plaintiff did not have a formal document recording the agreement with the defendant and he was not getting any income expected or feedback from the defendant. He organised the meeting of 11 August 2011 to formalise the agreement, to clear out the bad blood between them and to revive communication, so he testified.

[16] As at the time of the hearing of this matter, the plaintiff had received an amount of R524 000 and except for one such payment, all the payments were received from the defendant. The plaintiff referred to these payments as "tussentydse trekkings @ wins" (interim drawings against profit).

[17] A partnership is a legal relationship based on a contract between at least two persons, in which the parties agree to carry on a lawful enterprise in common, to which each contributes something of commercial value, with the object of making and sharing profits. [2]

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2 *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 783 – 4 and *Pezzutto v Dreyer* 1992 (3) SA379 (A) at 390

[18] The formation of a close corporation establishes an independent legal person, an entity that possesses the same essential abilities as an individual for engaging in business transactions of all types. Individuals as well as other legal entities, a close corporation being one, can enter into a partnership. A close corporation can, therefore, become a partner in a partnership. It can also enter into a partnership with an individual.

[19] Even though the defendant has placed the partnership agreement between it and the plaintiff in dispute, from the reading of the pleadings it is apparent that a partnership agreement did come into existence. According to the plaintiff in his particulars of claim, the partnership was between him and the defendant. On the other hand, the defendant pleads that the partnership agreement was between Meintjies and the plaintiff.

[20] The issue, therefore, in my view, is not whether there is a partnership agreement between the parties but whether the plaintiff entered into the partnership agreement with the defendant or with Meintjies in his personal capacity.

[21] For a partnership to come about there must be an agreement to that effect between the contracting parties. And in determining whether or not an agreement creates a partnership a court will have regard, *inter alia*, to the substance of the agreement, the circumstances in which it was made and the subsequent conduct of the parties. The fact that parties regard themselves as partners, or referred to themselves as such, is an important, though not necessarily decisive, consideration. [3]

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[3] *Pezzutto v Dreyer and Others* 1992 (3) SA 379 (A) at 389I – J

[22] The plaintiff's counsel, understandably so, referred me to the Pezzutto-judgment in support of his contention that the plaintiff was successful in proving that there was a partnership agreement entered into between the plaintiff and the defendant. In the approach that I have taken, the Pezzutto-judgment is of no assistance, simply because the issue that was determined in that judgment is distinguishable from the issue I have to determine in the current judgment. In that judgment what was in issue was whether the partnership agreement came into being or not; whereas in this instance what is in issue, as I have already indicated, is whether the partnership agreement is between the plaintiff and the defendant or the plaintiff and Meintjies in his personal capacity.

[23] It is thus not necessary, as was the case in the Pezzutto-judgment, to enquire into the *essentialia* of the partnership agreement because that agreement is common cause – the defendant in its amended plea confirms the existence of the partnership agreement. It follows, therefore, that should I find that the plaintiff entered into the partnership agreement with the defendant, the plaintiff must succeed in the relief he seeks in prayer (a) of the particulars of claim. If not, it would mean that the agreement was entered into with Meintjies in his personal capacity.

[24] Sight should not be lost that, in the circumstances of this case, Meintjies possesses dual capacities. He could have entered into the agreement with the plaintiff either in his personal capacity or in his capacity as a member of the defendant. If he was acting in his capacity as a member, then in that sense, the party that entered into the partnership agreement would be the defendant and not Meintjies. The different capacities of Meintjies, that is, his capacity as a member of the defendant and his personal capacity are distinct.

[25] It is a principle of our common law that, a close corporation being a legal *persona,* cannot contract in person but must do so through a person acting under its authority. In this instance, it goes without saying that Mentjies being the sole member of the defendant would act on behalf of the defendant. It is the plaintiff's contention that at all times material he negotiated with Meintjies and that Meintjies was acting on behalf of the defendant. This allegation has not been out rightly disputed. It is trite that the denial of the authority of an agent is a special defence and must be specifically and unambiguously pleaded, and not left to be inferred from the general traverse of the allegations in the declaration or plea. [4] In this instance, Meintjies' lack of authority to act on behalf of the defendant has not been specifically and unambiguously pleaded and the defendant having not testified, this allegation by the plaintiff remains unchallenged. I as a result have to conclude that Meintjies acted on behalf of the defendant and was duly authorised to do so.

[26] It is true that it does not follow merely from the fact that if a witness' evidence is not contradicted that it must be accepted. It may be lacking in probability as to justify its rejection. But where a witness' evidence is not contradicted, plausible and unchallenged in any major respect there is no justification for submitting it to unduly critical analysis. [5]

[27] In this instance, the plaintiff testified very well. I found him to be an honest witness. He tried his best to tell the story as he remembered it. I did not get an impression that he was trying to make up his story or was not telling the truth. There is no reason not to accept his evidence at face value –

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4 *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082

5 *Pezzutto v Dreyer & Others* above at 391E – F

more particularly because most of the evidence is common cause between the parties.

[28] The plaintiff's evidence is simply that he was approached by the defendant and enticed to buy and/or to invest into the defendant as far as the yellow drill rig is concerned. He also testified that he would receive 25% of the income generated by the drill by the defendant. It is obvious that these negotiations would not have been carried out by the defendant personally, but were carried out by Meintjies in his capacity as a member of the defendant and it would have been on behalf of the defendant.

[29] The contradiction in the plaintiff's evidence raised by the defendant's counsel that the plaintiff contradicted himself as to whether the intention was to enter into a partnership or to buy into the close corporation, are without substance. My view is that such contradiction, if any, was cured by the admission of the defendant in his plea that there was a partnership agreement in place. Besides, there is, to me, no significant variation between what the plaintiff averred in his particulars of claim and his evidence in court. What is pleaded corresponds in substance to the plaintiff's oral evidence and seeks to convey the intention to enter into an agreement with the defendant and that agreement, as also confirmed by the defendant in his plea, was a partnership agreement. In essence, the partnership having been admitted, there was no duty on the plaintiff to prove it. What was required of the plaintiff was to prove that he entered into that agreement with the defendant. And, that, in my view, he succeeded to do.

[30] On the plaintiff's version, the defendant, I would assume Meintjies in this respect, represented to him that the yellow drill rig belonged to the defendant and it is upon this representation that he entered into the agreement with the defendant.

[31] The plaintiff's further evidence that at all material time he was under the impression that the yellow drill rig belonged to the defendant and that no one made him aware that the yellow drill rig belonged to a third party, should be accepted. In this regard the plaintiff in replication to the defendant's amended plea, that the drill rig belonged to Meintjies, alleged that the defendant must be estopped from claiming that the drill rig is not its property.

[32] The essence of the doctrine of estoppel by representation is that a person is precluded, that is, estopped, from denying the truth of a representation previously made by him or her to another person if the latter, believing in the truth of the representation, acted thereon to his or her prejudice. [6]

[33] There is no evidence on record to counter the plaintiff's evidence that the yellow drill rig belongs to the defendant. This being the case, there is no reason why I should not accept the plaintiff's evidence that the defendant should be estopped from alleging that the yellow drill rig is not its property.

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6 *Aris Enterprises (Finance) v Protea Assurance* 1981 (3) SA 274 (AD)

[34] The plaintiff's evidence that he was negotiating with Meintjies on behalf of the defendant and that he entered into the partnership agreement with the defendant is fortified by the payment of the contribution into the defendant's banking account and the fact that he received 'withdrawals' from the defendant.

[35] My view is that this later conduct by the defendant is consistent with the existence of a partnership between the plaintiff and the defendant. This is so because of the flow of money between the parties, that is, from the plaintiff to the defendant and from the defendant to the plaintiff, which occurred after the agreement had been concluded.

[36] Firstly, it is not in dispute that in terms of the alleged 'handshake agreement' the plaintiff was, and did, contribute an amount of R700 000 to the partnership. It is also common cause that the contribution was deposited in the defendant's bank account. I have, as a result, to infer that the defendant accepted that money since there is no evidence that the money was returned.

[37] Secondly, it is common cause that during the cause of the association the defendant paid certain amounts to the plaintiff. The plaintiff's evidence is that, as from September 2011, he continuously received payments of R12 000 *per* month, with minor variation during other months, from the defendant. The unchallenged evidence of the plaintiff is that these payments were interim drawings from the profit. There is no evidence from the defendant that explains why the defendant was paying that money to the plaintiff and I have to accept the plaintiff's evidence in his respect as the truth.

[38] Even though it was suggested in cross examination that evidence will be tendered to show that the flow of the money into and from the defendant's bank account was a matter of convenience, such evidence was never proffered and the plaintiff's evidence stands without any contradiction.

[39] The defendant opted not to lead any evidence. This it did at its own peril. The only evidence that I have to consider is that of the plaintiff. There is no justification for doubting the plaintiff's evidence in respect in which it went completely unchallenged by the defendant. There is also no reason not to accept the plaintiff's evidence in general and in particular his evidence that he entered into the agreement with the defendant. The defendant's later conduct supports the plaintiff's contention that he entered into the partnership agreement with the defendant. The intention to contract with the defendant can be inferred from all the circumstances.

[40] Consequently, the partnership with the defendant was proved and the plaintiff is entitled to the relief sought in prayer (a) of his particulars of claim.

[41] I was informed at the hearing that the costs of the application for amendment were reserved for adjudication by this court in order to determine whether that application was *bona fide* or not. There were other reserved costs in respect of another interlocutory application. It was suggested by the defendant's counsel that all these costs be awarded to the successful party. It is my view that the costs must indeed follow the successful party.

[42] I do not find it necessary to accede to the contention by the plaintiff's counsel that the costs should be awarded on an attorney and client scale as it is my opinion that the circumstances of this case do not justify such a cost order.

[43] The pleadings in this matter are in Afrikaans. I was informed by counsel that all the preparations were done in Afrikaans. I was also informed in advance (in chambers) and also at the commencement of trial that as the parties' language of preference is Afrikaans they prefer to testify in Afrikaans. I informed counsel that the parties are entitled to testify in the language of their choice and that there being no interpreter available I would most probably require counsel's assistance where I do not understand. I reiterated this stance again in court. The plaintiff chose to testify in English. Although the plaintiff was examined and cross examined in a language which he was fairly uncomfortable and in which he was not familiar, it did not appear to me during his testimony that he struggled with the language. There were some words, not really a lot, which he was not able to translate into English. He was allowed to say the word in Afrikaans and an English word would be provided to him. His evidence was to me fluent and understandable and in my opinion he conveyed what he intended to say.

[43] In the premises, I make the following order:

(a) The defendant is ordered to provide the plaintiff with the statement of account of the transactions and business carried out by the defendant from 30 April 2010 to date hereof duly supported by documentation to prove such transactions.

(b) The accounting to be done within two (2) months of this order.

(c) The defendant is ordered to pay the costs of suit including the reserved costs of 18 December 2013 and 27 May 2014.

EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE:	05 DECEMBER 2014
DATE OF JUDGMENT:	19 DECEMBER 2014
FOR PLAINTIFF:	MR BEN McDONALD, of BEN McDONALD ATTORNEYS
FOR DEFENDANT:	ADV S J MYBURGH, instructed by COMBRICK & JANECK ATTORNEYS