IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: 29538/2013
Date: 28 February 2014

In the matter between:

R[…] G[…] D[…] **Applicant/Plaintiff**

and

T[…] E[…] D[…] **Respondent/Defendant**

JUDGMENT

DE KLERK AJ

[1] This is an exception brought by the Plaintiff in terms of Rule 23 (1) of the Uniform Rules of Court on the basis that the Defendant's Counterclaim lacks averments required to disclose a cause of action.

[2] The crux of the exception, as is evident from the grounds upon which the exception is founded, is that the Defendant's allegation of a universal partnership constitutes an attempt

to postulate an amendment to the parties' Antenuptial Contract, which is legally untenable.

[3] It is common cause that the parties were married to each other on 2[…], out of community of property, and with the exclusion of the accrual system.

[4] It is further common cause that the parties' Antenuptial Contract excludes community of profit and loss.

[5] The Defendant counterclaims, for amongst others, a declarator that a universal partnership came into existence between the parties.

[6] This claim was premised on an alleged verbal, alternatively *tacit*, further alternatively implied agreement entered into between the parties during or about January 2012 in respect of a "business venture being a fish farming business."

[7] It is further common cause that the essence of a partnership agreement is the intention to share in the profits generated by the activities thereof.

[8] The relevant grounds upon which the exception is founded are set out as follows in the Plaintiff's Notice of Exception:

1. " In paragraph 3 of the Counterclaim, the Defendant repeats the contents of paragraph 4 of the Plaintiff's Particulars of Claim as if part thereof and thus allege that the parties were married out of community of property.

2. Clause 5 of the parties' Antenuptial Contract provides that there shall be no community of profit and loss between the parties, but that each of them shall respectively retain the profits made by or accruing to him or her, and shall in like manner separately and solely bear and sustain the losses happening to him or her during the subsistence of the marriage.
3. It is well-established in law that parties may not post- nuptially amend an Antenuptial Contract, save as provided for in Section 21 of the Matrimonial Property Act, 1984.
4. There are no allegations that the provisions of Section 21 of the Matrimonial Property Act, 1984 were complied with regarding the amendment of the parties' Antenuptial Contract.
5. The Defendant's allegations of an oral alternatively tacit, alternatively implied universal partnership agreement regarding the assets and liabilities of the fish farming business contained in paragraphs 5, 6, 7 and 8 of the Counterclaim, and the relief sought in prayer 2, constitute an attempt to postulate an oral, alternatively tacit, alternatively implied amendment of the parties' Antenuptial Contract, which is bad in law..."

[9] It was contended by Mr Wagener on behalf of the Plaintiff that the fundamental contention underlying the exception was that the provisions of the Antenuptial Contract precluded the existence of the alleged partnership.

[10] In urging same, Mr Wagener pointed out that the parties in their Antenuptial Contract expressly agreed to not share in profit and loss. The Defendant's Counterclaim alleging the existence of a partnership that includes the profit generated by the fish farming business is thus directly at variance with the express terms of the Antenuptial Contract.

[11] In support of same Mr Wagener referred to the case of *Pezzutto v Dreyer* /992 *(3) SA 379 A at 390* where it was held that the three essentialia of a partnership are "(1) that each of the partners brings something into the partnership whether it is money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit."

Consequently so the argument correctly runs the very essence of a partnership agreement is the intension to share in the profits generated by the activities thereof.

[12] Mr Wagener further referred to the cases of *JW v CW 2012 (2) SA 529 NCK as well as E: AL* v *E: CE* the unreported Judgment of the South Gauteng High Court, Johannesburg under case number 09/25924 dated 25 October 2012, in support of the contention that the provisions of the Antenuptial Contract precludes the existence of the alleged partnership.

[13] I do not agree with the contention by Mr Wagener that the provisions of the Antenuptial contract precluded the existence of the alleged partnership.

[14] I also do not agree that the two cases referred to by Mr Wagener support such a contention.

[15] In my view a distinction should be drawn between the two kinds of universal partnerships, to wit *societas universorum bonorum* and a *societas universorum quae* ex *quaestu veniunt.*

[16] In the case of *Butters v Mncora 2012 (4) SA* / *SCA* it was held in this regard that:

> "It appears to be uncontroversial that, apart from particular partnerships entered into for the purpose of a particular enterprise, Roman and Roman - Dutch law also recognised universal partnerships.
>
> Within the latter category, a distinction was drawn between two kinds. The first was the *societas universorum bonorum* - also referred to as the *societas omnium bonorum* by which the parties agree to put in common all their property, present and future. The second type consisted of the *societas universorum quae ex quaestu veniunt*, where the parties agree that all they may acquire during the existence of the partnership, from every kind of commercial undertaking, shall be partnership property."

[17] I am of the view that the partnership agreement alleged by the Defendant is a *societos universorum quae ex quaestu veniunt.*

[18] In the cases of JW v CW *supra* as well as *E: AL v E: EC supra* the alleged universal partnerships were classified as *societas universorum bonorum.*

[19] It seems to me that Mr Wagener's contention holds true in respect of a *societas universorum bonorum* but not necessarily in respect of a *societas universorum quae ex quaestu veniunt.*

[20] It was contended by Mr van Niekerk on behalf of the Defendant that the Court in the case of *JW v CW supra* did not hold as a general proposition that the existence of an Antenuptial Contract excludes the existence of a universal partnership, but that the terms of a particular Antenuptial Contract may exclude a future partnership if the terms of the particular partnership would contradict the terms of the Antenuptial Contract.

[21] It was further contended by Mr van Niekerk that in the case of *Ponelot v Schrepfer 2012 (1)*

SA 206 SC A, specific reference was made to the judgment of Muhlmann v Muhlmann *1984* (3) *SA 102 A,* where the Court found that a universal partnership existed between parties who were married to each other out of community of property.

[22] Mention needs to be made of the fact that in the case of Muh/mann v Muh/mann supra the universal partnership was in respect of certain commercial enterprises (*societas universorum quae ex quaestu veniunt).*

[23] It was further contended by Mr van Niekerk that whereas the Antenuptial Contract of the parties excludes community of profit and loss, it does not exclude the liberty of the parties to enter into a joint undertaking for their joint profit.

[24] It was further contended by Mr van Niekerk that the terms of the Antenuptial Contract in its plain grammatical meaning simply means that there will not be a merger (confusion) of profit and loss of the parties during the course of their marriage, or, in other words, it excludes a *universorum bonorum.*

[25] It was lastly contended by Mr van Niekerk that in the very nature of a partnership the joint profit is divided between the partners and each partner then retains his share of the profit for his own account.

[26] I agree with these contentions by Mr van Niekerk.

Legal principles:

[27] In the case of *Pezzutto v Dreyer and Others supra* at 390 it was held that: "What is necessary to create a partnership agreement is that the essentialia of a partnership should be present. Our Courts have accepted Pothier's formulation of such essentialia as a correct statement of the law...

The three essentials are (1) that each of the partners brings something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit...

In essence, therefore, a partnership is the carrying on of the business (to which each of the partners contributes) in common for the joint benefit of the parties with a view to making a profit..."

[28] In the case of *Fink v Fink and Another 1945 WLD 226*, Mrs Fink in her claim in

reconvention alleged that in or about the year 1928 she and her husband (to whom she was married out of community of property) commenced for their joint benefit a joint venture or partnership whereby they sold milk on a small scale. She alleged that the parties had contributed money, property, labour, services and skill to the joint venture or partnership and had pooled their joint efforts and resources, with the result that at the time of the divorce it constituted a very substantial milk producing business known as Glenhazel Dairy. Mrs Fink alleged that the business, its goodwill and all other assets and all the proceeds and profits therefrom were the outcome of the joint efforts of the parties and their contributions to it.

The parties' Antenuptial Contract excluded community of property, profit and loss.

The Court found that Mrs Fink was entitled to a declaration that a partnership existed between the parties in respect of the dairy business.

Conclusion:

[29] The question in *casu* is therefore whether the terms of the alleged universal partnership agreement to share in the profit generated by the "fish farming business" is directly at variance with the express term of the Antenuptial Contract, excluding community of profit and loss.

[30] In considering same 1 take the following into account:

1. The partnership agreement alleged by the Defendant had been concluded more than two years after the date of the marriage.

2. The agreement, as alleged, applied to a commercial enterprise and to particular assets (*societas universorum quae ex quaestu veniunt*).

3. The main purpose of the parties' Antenuptial Contract is to regulate their marriage regime.

4. The partnership envisaged in the Counterclaim constitutes a "legal entity" separate from the matrimonial property regime applicable to the parties.

5. The net benefits derived from the partnership will be divided between the parties and accrue to their separate estates.

6. The parties accordingly are business partners like any other two individual partners, each having his or her separate estate.

7. The facts in this case accords with the facts in the Fink case where the Court found that a universal partnership (*sosietas universorum quae ex quaestu veniunt*) existed between the parties.

8.The case of JW v CW supra is distinguishable from this case in that:

1.The agreement alleged by the Defendant in that case had been concluded at the time of the marriage or very shortly thereafter.

2.The alleged universal partnership between the parties was in respect of all the parties' movable and immovable assets, both then existing (including the assets of the parties as at the date of their marriage) and future.

[31] I am of the view that it is clear from the aforesaid that where spouses who are married to each other out of community of property, with the exclusion of community of property, profit and loss, carry on a bona fide business and the essentialia to create a partnership agreement are present, a partnership exist.

[32] I accordingly hold that the Counterclaim discloses a cause of action, and the exception is dismissed with costs.

Signed at PRETORIA on this 5th day of March 2014.