


IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES/NO. (2) OF INTEREST TO OTHERS: YES/NO. (3) REVISED. 11-08-2014 DATE  SIGNATURE
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CASE NO. 61253/2012

Date: 11 AUGUST 2014

11/8/2014

In the matter between:

MICHIE DANIEL OOSTHUIZEN

PLAINTIFF

and

HENDRIK CORNELIUS DEETLIFS

DEFENDANT

JUDGMENT

BREDENKAMP AJ:

INTRODUCTION.

[1] In this matter the Plaintiff claims the following relief namely:

- [i] That the first defendant renders a full account (supported by vouchers) in respect of the partnership business
- [ii] debatement of the said account;
- [iii] Payment by the First and/or Second Defendant's to the Plaintiff of the

amount due to Plaintiff after debatement of the accounts;

[iv] That the first and second defendants are jointly liable for any amounts due pursuant to the statement and debatement claimed herein and

[iiv] Interest on any amount the court may find to be owed to the Plaintiffs at the rate of 15,5% per annum calculated from the 1st of March 2011, alternatively from date of summons herein until date of final payment for cost on a scale between attorney and client.

[2] Before commencement of the trial, the Defendants' indicated that it has filed an application in terms of Rule 33(4) and requested that it be argued before evidence is lead. An answering affidavit was filed on the morning of the first day of the trial. And this was followed by a replying affidavit the following day.

[3] The Rule 33(4) application has the substance of a stated case, as a declaratory is sought in the following terms:

Whether a partner is entitled in law to institute action against another partner for rendering of an account, debatement and payment of money before the partnership is finally liquidated and/or settlement of the accounts,

Whether the Plaintiff, in light if above question is entitled in law to institute an action against the first and second Defendant's to render an account of the affairs of the partnership before final settlement of the accounts and/or liquidation of the partnership

And whether the Plaintiff has waived its right to the rendering of accounts as prayed for.

[4] The argument on behalf of the defendant was in essence that the plaintiff is

premature with its action. The partnership has not been legally terminated and it is clear that the court can not liquidate a partnership. The argument goes further, namely that there should have been an averment in the particulars of claim, stating that the partnerships have been dissolved. It was also further argued, that the plaintiff can only resort to court action after discussion between the parties have taken place regarding the accounts and the documents of the partnership. It has to be said at this stage, that during the first morning of the trial, the defendant conceded that a partnership was in existence between him and the plaintiff. In the plea the existence of the partnership was denied.

- [5] Counsel on behalf of the Respondents also referred to a statement of the plaintiff which boils down to the fact that the partnership can easily be decided on the discovered documents. The court must therefore take into account that the respondents have tendered the necessary documents. The argument was also advanced on behalf of the respondents, that the plaintiff's action is, in essence the *actio pro socio*. Given this situation, the procedure set out in the case of Robson Vs Theron 1978(2) All SA 264 should have been followed. This was not done.

- [6] Counsel for the Respondents' concluded the argument by stating that the court should also find that the plaintiff waived its rights in regard to the relief claimed. This is evident from the fact that the plaintiff clearly stated in the papers that he informed the first defendant that he can do as he likes, as he

(the plaintiff) is not interested in what the defendant is doing.

- [7] Counsel for the Plaintiff , argued that plaintiff's action is essence based on a fiduciary relationship between the parties, which obliges the person in the fiduciary position to provide an account and a partnership is an example of such a relationship.
- [8] The Fiduciary relationship, it is argued, appears from the pleadings as amplified by the particulars provided for purposes of trial. This indicates that the first respondent was the sole member of the second respondent and controlled the actions of the second respondents. There is no dispute between the parties regarding the fact that the second respondent was used as a vehicle to buy properties which was later sold by the first respondent through the second respondent. Counsel for the plaintiff directed the court's to attention to Annexure "AA1" attached to its answering affidavit, being an email dated 2009/10/05. In this email the plaintiff asked a number of questions regarding the management and the finances of the joint venture on which he and the first and second defendant's embarked. According to Mr Davies, this is another indication of a fiduciary relationship that existed between the parties.
- [9] It was pointed out in the heads of argument on behalf of the applicant that a partner is in fact entitled in law to institute an action against another partner for rendering an account, debatement and payment of moneys before the

partnership is finally liquidated. This appears from the case of Doyle and another vs Fleet motors (PTY)Ltd 1971(3) SA 676(a) and 670(b).

- [10] It was emphasized on behalf of the respondents, that a right of action, for payment only originates after final settlement of the disputed accounts. In the matter of Schoeman vs Rockeby Farming Co (Pty) Ltd 1972(4) SA Z01(N), Milne J stated on page 204: "ORDINARILY, parties should first debate their account between themselves. However, "A partner may in certain circumstances, sue his former partner for a balance allegedly due or otherwise without claiming the appointment of a liquidator or a statement of account or debatement thereof".

[10.1] I agree with the contention that a fiduciary relationship existed between the parties if regard is had to the answers supplied in the further particulars, the admissions in the plea, as well as the correspondence attached to the pleadings and the affidavits in this particular matter.

- [11] The fact of a fiduciary relationship between the parties obliges the person in the fiduciary position more specifically the first respondent, to provide an account to his partner. (See Phillips vs Stone Africa (Pty) Ltd 2004 (3) SA 465 SCA at 479(b) to (c)).

11.1 Whether the documents discovered is adequate to facilitate an accounting process, was specifically denied by counsel on behalf of the Plaintiff. He stressed that what the plaintiff needs, are statements of

accounts plus supporting documents under oath. Only if this is been supplied can a realistic debatement, and settlement of the accounts between the parties take place.

- [12] As far as the arguments of a waiver by plaintiff of its rights to have accounts debated pursuant to an order of court is concerned, it has to be borne in mind, that the factual presumption that the party is deemed to have waived his/her right, is not easily made. Clear evidence of a waiver is required. (Compare Finestein Vs Migley 1981(2) SA 684 (a)).
- [13] I am not convinced that waiver took place. There is to my mind, no proof that the plaintiff decided to abandon the right being asserted against the plaintiff. He after all issued summons against the defendants for the rendering of accounts and the debatement thereof.
- [14] As far as costs concerned it was argued on behalf of the plaintiff, that costs should be awarded on a punitive scale. The basis for that is that respondents only conceded on the first morning of the trial that partnership have in fact existed and no explanation was given why this concession was made at a late stage. Furthermore, no explanation was given why the Rule 33(4) application filed by the respondents, was only brought 8 days before the trial. Furthermore no condonation is sought for the curtailment of the period prescribed in the rules.

[15] Respondents did in fact tender some documents and provided, in the plaintiffs own words, "A fair share of documents before commencement of the trial. It should also be noted, that as far as a Rule 33 application concerned, an oral application may be made to the trial court at the beginning of the hearing or during its course. Furthermore, the court may *mero muto* order separation of issues without an application from any of parties.

[16] Bearing this in mind I do not believe that a punitive costs order is justified.

The following order is made:

[16.1] A partnership existed between the parties in which the second defendant was used as a corporate vehicle for the partnership business,

[16.2] The defendants are ordered to furnish a statement of account based on the principles of partnership in which the profit and loss of the plaintiff on the one hand and the defendants on the other hand is shared equally;

[16.3] This statement of accounts shall be under oath and shall include all relevant invoices in possession of the defendant in support thereof. These invoices should include all sources of income of the second defendant and also include the purchase and sale prices of each of the properties acquired or dealt with in terms of

the said partnership.

[16.4] Where such invoices are not presently in the possession or under control of the defendants, they are directed to approach the relevant suppliers in order to obtain the same.

[16.5] The statement of accounts shall include the reference of tax liabilities and payments including copies of submitted vat 201 returns from October 2005 until 31 march 2011 and any documents submitted to SARS containing capital gains.

[16.6] Copies of submitted EMP returns from 18 October 2005 up to 31March 2011.

[16.7] A detailed summary of the loan account transactions of HC Deetlefs and/or HCD Construction from 18 October 2005 up to 31 March 2011.

[16.8] all purchase of sale agreements in respect of properties sold as described in paragraph 15 of Plaintiffs particulars of claim. If these agreements are not in the possession of the Defendants, then they are ordered to approach the transfer attorneys who dealt with the transfer of these properties in order to obtain copies.

[16.9] The parties are directed to hold a further pre-trial within two months of the rendering of the abovementioned account, The later must be supplied to the plaintiff within two (2) months of this order.

[16.10]The parties are authorized and directed to apply to the Deputy

Judge President Ledwaba for an expedited trial date in the event that the final statement of account cannot be agreed upon.

[16.11] This matter is then postponed sine die.

[16.12] Defendants are ordered to pay the wasted costs of plaintiff occasioned by the postponement.

A handwritten signature in black ink, appearing to read 'M Bredenkamp', is written over a horizontal line.

**BREDENKAMP IM
ACTING JUDGE OF THE HIGH COURT.**