IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

31/5/2016.

CASE NO:10943/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

31/5/2016 .....
DATE

.....
SIGNATURE

In the matter between:

HENNING JEREMIAS PRINGLE DE JAGER FIRST APPLICANT
SILVERSTARS TRADING 87 CC SECOND APPLICANT

and

THE NGUNI GRILL –ELLISRAS PARTNERSHIP
FIRST RESPONDENT
ARVOCAP (PTY) LTD SECOND RESPONDENT
(REG NO: 2012/116377/07)
ETTIENE GEORGE VICTOR THIRD RESPONDENT
HANNELIE VICTOR FOURTH RESPONDENT

JUDGMENT

RANCHOD J:

[1] The crisp issues to be determined in this application are first, who are the two parties to an admitted partnership and second, whether the shareholding in the partnership between them was on a 50-50 or 30-70 percentage basis. Two *points-in-limine* raised by the respondents at the hearing without having raised them substantially in the papers were dismissed with costs in the cause.

Background

[2] The first applicant (De Jager) says he developed the concept of the Nguni Grill which is a unique restaurant group in Limpopo with a traditional tribal theme against the background of the Nguni breed of cattle. The first of these was developed in Polokwane in about 2009. He had since sold his shares in the Polokwane Nguni Grill. He has or soon will be opening Nguni Grill restaurants in Thabazimbi and in Musina. Mr De Jager says he has also obtained provisional registration of the trade mark Nguni Grill in the name of the second applicant of which he is the sole member.

[3] Mr De Jager says in about August 2012, the third respondent (Victor) approached him and proposed that they form a partnership and establish a Nguni Grill in Lephalale. He says they formed an equal partnership for this purpose. Mr Victor had told him that he intended to purchase a corporate entity which would reflect the equal shares. De Jager says the second respondent (Arvocap) was incorporated (apparently by Victor) but none of its shares were transferred to him. He contributed about R550 000.00 to the partnership for the costs of setting up the restaurant in Lephalale while Victor contributed about R500 000.00. De Jager would be the 'silent partner' while Victor would manage the business on a day-to-day basis for which he would be remunerated monthly. Victor would be entitled to 70% and he (De Jager) to 30% of the net profit of the business. Furthermore, the

second applicant (Silverstar) would be entitled to royalty payments of 3% of the monthly turnover of Lephalale Nguni Grill for the use by the latter of the Nguni Grill trade mark. No royalties were to be paid for the first 12 months in order for the restaurant to become a fully operational and successful enterprise.

[4] Victor denies that the partnership is between De Jager and himself. He avers that the partnership is between De Jager and Arvocap and is willing to acknowledge that De Jager has a 30% shareholding in the first respondent (The Nguni Grill – Ellisras partnership) while Arvocap has a 70% shareholding. Victor says Arvocap was represented by himself when the partnership was 'tacitly' concluded.

The Law

[5] It is trite law that a partnership is a consensual contract between two or more persons to place their property, money, labour and skill, or some other of these into some lawful venture for the purpose of profit sharing resulting therefrom in accordance with their individual participation quotas. It is further trite law that a contract of partnership can be express or implied.

Discussion

[6] It is common cause that the parties did not enter into a written partnership agreement.

[7] In a letter dated 13 October 2014 addressed to applicant's attorneys, the respondents' attorneys initially denied the existence of any partnership at all. Nor did they allege that a partnership in fact existed between De Jager and Arvocap. It was alleged in the letter that De Jager had lent monies to Arvocap. A material term of the loan

agreement, so it was alleged, was that 30% of the 'uitgekeerde rente/wins maandeliks aan u kliënt oorbetaal sou word na berekening van die netto wins van die voorafgaande maand.'

[8] However, in the answering affidavit Victor admits the existence of a partnership but that it was between De Jager and Arvocap. The respondents have failed to submit any material evidence in support of this allegation. Victor says he represented Arvocap so at the very least he (or the other respondents) should have provided proof of a resolution passed by the board of directors authorising Victor to act for and on behalf of Arvocap in concluding the partnership agreement with De Jager and a resolution of Arvocap's directors confirming the partnership with De Jager. The respondents could have, but failed to provide any audited financial statements or management statements of Arvocap reflecting the income generated by the partnership for the benefit of Arvocap.

[9] Instead, the respondent's rely on several documents purporting to show that the partnership was between De Jager and Arvocap. One is a Standard Bank Revolving Credit Plan Agreement. However, this application makes no mention of any partnership whatsoever and appears to be an application for finance in the name of Arvocap to acquire certain equipment. Another one is a 'New Customer Application' by Arvocap to Ciro Beverage Solutions. Once again this document relates to Arvocap alone; there is no mention made of any partnership at all. Yet another is an affidavit by Mr JJ Willemse filed in support of the answering affidavit. However, in paragraph 4.4 thereto, Willemse says 'During or about December 2012 Mr De Jager opened a steakhouse together with Mr Ettiene Victor under the name Nguni Grill in Ellisras.' None of these documents show that De Jager was

introduced to any third party as a partner of Arvocap. Mr Willemse's affidavit seems to reflect the contrary.

[10] De Jager and Victor applied for 'keyman' and 'buy and sell' insurance policies in terms of which their respective lives are covered. Nowhere in these applications is reference made to Arvocap although they each say in their respective applications that they are 'mede direkteure' (co-directors). In my view, it is highly improbable that individuals would take out buy and sell policies to the full value of the business if they were not partners in the business. It would be expected that the company (Arvocap) would enter into such an arrangement with its partner if that had been the case.

[11] Arvocap was registered as such on 5 July 2012. Victor and his wife (the fourth respondent) were not the appointed directors of the company at that stage. They were appointed as directors only on 25 January 2013. On the respondents' version Arvocap (represented by Victor) and De Jager entered into a partnership in November 2012. Yet Victor was appointed as a director, as I said, only in January 2013.

[12] I find that the partnership agreement was concluded between De Jager and Victor.

[13] I turn then to the second issue.

[14] De Jager avers that he and Victor were equal shareholders in the first respondent whereas Victor avers that De Jager had only 30% shareholding.

[15] In *Bellingan v Clive Ferreira & Associates CC and Others 1998(4) SA 382 WLD* at 406 E-F it was held:

> 'The applicant cannot escape the contractual consequences of the partnership agreement, which provided expressly for the proportions in which the partners were to share profits and losses...'.

[16] As I said, it is common cause that there is no written agreement relating to the partnership. In Law of South Africa (LAWSA) (Lexis Nexis Butterworths, 2nd Edition) Volume 19, p242 at para 293 it is stated that:

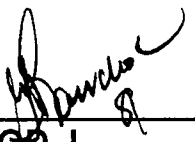
> 'As long as it is clear that each partner receives a share of the profits, it does not matter if the formula which is used for the determination of the respective shares is complex or unusual. In the absence of an agreement in this respect, profits are shared in proportion to the partners' respective contributions to the firm.' [Footnotes omitted].

[17] It therefore follows that the financial contributions made by each partner should determine the percentage of participation. On Victor's own version he made a contribution of approximately R500 000.00 and De Jager contributed about R550 000.00. It is therefore highly probable in my view, that De Jager and Victor had agreed to a partnership in equal shares.

[18] Victor's allegation that it was a 70-30 shareholding because the profit sharing by De Jager on a monthly basis was 30% is improbable. De Jager avers that despite the almost equal financial contributions of R550 000.00 and R500 000.00 it was agreed for purposes of the monthly income sharing that Victor would be entitled to 70% of the monthly profits as he was actively involved in the day to day running of the business whilst he (De Jager) was a silent partner. I find De Jager's version to be the more probable state of affairs.

[19] The parties, as I said, agreed at the commencement of the hearing that these were the only two issues I had to determine. It was also mentioned by applicant's counsel that the applicants were no longer pursuing prayers 2, 4.1.5, 4.1.10 and prayer 5.

[20] An order is granted in accordance with prayers 1; 3; 4 (including the sub-prayers except 4.1.5 and 4.1.10) and 6.



RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicants	: Adv J.A Klopper
Instructed by	:Thomas Grobler Attorneys
Counsel on behalf of Respondents	: Adv B. Bergenthuin
Instructed by	: Lewies and Associates
Date heard	: 22 March 2016
Date delivered	: 31 May 2016