IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Coram: LE GRANGE, J

CASE NO: 9564/2006

In the matter between:

DR J W BERGMAN	**First Plaintiff**
DR H SYMINGTON	**Second Plaintiff**
DR J BASSON	**Third Plaintiff**
DR J ROSS	**Fourth Plaintiff**
DR B COTTON	**Fifth Plaintiff**
DR J BEKKER	**Sixth Plaintiff**

And

DR S VAN DER WESTHUIZEN	**Defendant**

JUDGMENT DELIVERED ON 26 FEBRUARY 2010

LE GRANGE, J:-

[1] In this matter, the Plaintiffs claim payment in the sum of R 484 844.00 plus interest from the Defendant, allegedly due and owing in terms of a partnership dissolution account ("the dissolution account").

[2] The Defendant disputes the correctness of the dissolution account and instituted a counterclaim against the Plaintiffs for the rendering and debatement of a fresh dissolution account, alternatively the appointment of a liquidator to seize the partnerships assets, liquidate and distribute them, and payment of damages in the amount of R 24 000.00, alternatively loss of income in the amount of R 570 000.00.

[3] Adv. J G Dickerson, SC assisted by Adv. N De Jager appeared for the Plaintiffs. Adv. D L van der Merwe appeared for the Defendant.

[4] The Plaintiffs called four witnesses to testify in their case. The Defendant elected to remain silent and no other evidence was adduced. The Defendant, after closing its case, abandoned its counterclaim for damages and the alternative claim for loss of income.

[5] In the Plaintiffs' case, the following persons testified: Drs. Berman and Bekker, who were partners in the partnership, Charl du Toit ("du Toit") and Paul Koski formerly Smerkowitz ("Koski") who are both chartered accountants and testified as expert witnesses. Koski was the accountant of the Symington & Partners practices since mid-2003, and also gave evidence of a factual nature.

[6] The dispute between the parties centers mainly around the terms of the partnership as alleged in the pleadings and the consequences of the dissolution of the fifth partnership.

[7] Mr. Dickerson's submissions, briefly stated, were the following: the witnesses who testified in the Plaintiffs' case were credible and reliable and a significant portion of their evidence remained unchallenged during cross-examination which were disputed or denied in the Defendant's pleadings; the Plaintiffs' version as to the terms of the partnership stands unchallenged and did the Defendant not prove an agreement which changed the basis on which the partnerships were to be conducted or dealt with. Furthermore, the defence to the Plaintiffs' claim that the liquidation of the partnership is a prerequisite to any accounting or monetary claim, is without substance. Moreover, the Defendant's complaint regarding the sufficiency of the dissolution account, are ill-founded. Mr. Dickerson also contended that the manner in which the Defendant in this matter conducted himself, should be visited with a punitive costs order.

[8] The principal contention by Mr. van der Merwe is that the Plaintiffs failed to prove on a balance of probabilities the terms of the partnership agreement. Moreover, even if the Plaintiffs are successful in discharging the onus, they failed to prove their entitlement to payment of the Defendant's *pro rata* share of the Capital Account at the time of the final liquidation of the partnership.

[9] The material facts underpinning both parties' claims, in summary, are the following: Symington & Partners, a partnership of radiologists ("the Practice") at all material times comprised of a Cape division and a Pretoria division. The Cape division consists of radiological practices conducted at a number of medical centers in the greater Cape Town area, but with its principal place of business at N1 City, Goodwood, Cape Town. The Pretoria division consisted of a magnetic resonance imaging unit ("MRI") at the Pretoria East Hospital, Tshwane, with its principal place of business at that address.

[10] The practice comprised of a series of successive partnerships, each of which was created and dissolved upon the introduction and or departure of a partner. Prior to March 2002, the original partnership comprised of the First Plaintiff ("Bergman"), Second Plaintiff ("Symington") and Fourth Plaintiff ("Ross").

[11] The original partnership was dissolved in March 2002, when a new partnership consisting of Berman, Symington, Ross and the Defendant came into being in terms of an oral agreement, known as the second partnership. In May 2003 the second partnership was dissolved, and a new partnership came into being in which Bergman, Symington, Ross, Defendant and Fifth Plaintiff ("Cotton") were the partners, known as the third partnership.

[12] In February 2004 the third partnership was dissolved, and a new partnership came into being with Bergman, Symington, Ross, Defendant, Cotton and Sixth Plaintiff ("Bekker") as partners ("the fourth partnership"). With effect from 1 September 2005, the fourth partnership was dissolved, and a new partnership came into being with Bergman, Symington, Ross, Defendant, Cotton, Bekker and Third Plaintiff ("Basson") as partners ("the fifth partnership"). The fifth partnership was dissolved on 20 December 2005, from which date Defendant received no benefit from or made no contribution to the practice.

[13] The sixth partnership from 20 December 2005 came into being in which the Defendant was not a partner.

[14] The respective claims and counterclaims concerning the fifth partnership came into being in September 2005 and were terminated on 20 December 2005.

[15] The main areas of dispute are firstly, the terms of the partnerships in general, and whether the fifth partnership in particular was required to be liquidated before any party would have a claim arising from its dissolution. Secondly, whether goodwill or *"klandisiewaarde"* was to be valued as a joint partnership asset on dissolution, and that the Defendant would share therein and thirdly, whether the dissolution account accords with the terms as pleaded by the Plaintiffs.

[16] The evidence of Bekker and Bergman about the terms of the successive partnerships, and in particular of the fifth partnership, stands uncontradicted. Their evidence in this regard, briefly stated, are as follows:- The Defendant and the other partners would, during the duration of the partnership, receive drawings which would in due course be offset against their respective shares in the profits and losses; the partners would share the profits and losses of the Cape division in agreed proportions, and the Defendant's share would be confined to the Cape division; save for Bekker and Basson, the remaining partners would share equally in the profits and losses of the Cape division; and Bekker would receive a fixed income until February 2006 and would only thereafter share as an equal partner in the profits and losses of the Cape division; and Basson would receive a fixed profit share equal to 9,5% of the profits (or share in 9,5% of the losses) until 29 February 2008, and would thereafter share as an equal partner in the profits and losses of the Cape division. None of the parties, including the Defendant, were required to pay or paid any amount to buy into the partnership or to acquire any "*klandisiewaarde*" or goodwill in the fifth partnership or any of its predecessors. The partners would act in good faith, place the interest of the partnership above their personal interests, and would do nothing to harm each other's professional status. In determining the amounts payable and/or receivable by the Defendant as a result of the dissolution of the fifth partnership, financial accounts were produced for the period 1 March 2005 to 20 December 2005, and these were reviewed by a firm of accountants and auditors, I J Smith & Co. A copy of the accounts is annexed to the particulars of claim marked "POC1" ("the

dissolution account"). According to these accounts the Defendant owed the Partnership an amount of R 484 844.00. The Defendant was invited *inter alia* to indicate whether he disputed any aspect thereof and, if so, to identify the same and debate the account. It is common cause that the Defendant did not respond to this invitation.

[17] Dr Bergman in particular also testified about the Syms Trust ("Trust") and how it came into existence. He also testified how certain agreements with Netcare came about and the Netcare loan account. Bergman also denied that there was an agreement between Netcare and Symington and Partners that half of their profits must be paid to Netcare, as an agreement would amount to professional misconduct. According to Bekker and Bergman, the Defendant regularly questioned certain business decisions taken by the original partners. Furthermore, the Defendant continuously made assertions that the Symington & Partners are involved in businesses that are not conducive to profitability and are involved with various other entities that may have preferentially allowed the original partners to profit at the expense of the other partners. In order to allay the concerns of the Defendant, a decision was taken to audit the books of the partnership by an independent firm of auditors. The Defendant then instructed a firm of auditors, who were also auditing the books of a firm of radiologists that are in direct competition with the Plaintiffs, to audit the books of the practice. When this became known to the other partners, the audit was immediately stopped in fear that business information may leak to the

opposition. It also transpired that the rest of the partners were unaware that an audit will commence on the date of 6 December 2005. The Defendant, on the same day, forwarded an e-mail to members of the Radiological Society of South Africa. These members are partners in firms who are also in competition with the Plaintiffs. The following is recorded in the e-mail:-

"I have, during the last week, been in constant negotiation with both Jack Bergman and Paul Smerkowitz via email regarding Symington & Partners. Henry Symington could not be reached due to the fact that he is overseas at present.

The audit team today started with their investigation. From the onset there has been fierce resistance to any kind of audit. The accountant, Paul Smerkowitz phoned me and asked me if I knew what the relationship between Symington & Partners and Netcare was and that he was not happy to comply with providing free access to our accounts. I have on 2 occasions in practice meetings specifically asked Henry Symington if we are profit sharing with Netcare. His response has been that we are not. I emailed Smerkowitz last week with the same question and the same response i.e. we are not. With the preliminary report of the auditors it is my contention that Jack Bergman and Henry Symington are in fact in a relationship with Netcare where profit sharing is conducted under the guise of floor space rental, equipment rental and other underhand methods. I would like to bring this under the attention of the Radiological society of South Africa in order to request a formal investigation by the Health Professionals Council of South Africa.

I am prepared to appear in a court of law to verify the contents of this email.

It should be made clear from the start that:
1) Judy Ross
2) Bronwen Cotton
3) Johann Bekker

4) Jacques Basson

Have been totally supportive of this initiative and that they are, without question, not part of the Henry Symington/Jack Bergman/Netcare alliance.

Yours sincerely
Stephan van der Westhuizen."

[18] Bekker confirmed that he became a full profit and loss sharing partner in February 2006. He further testified that there was no resistance by the partners to an audit being undertaken at the partnership. He stated that Bergman and Koski never had any objections in obtaining an opinion from an independent audit firm regarding the accounting status of the partnership. Bekker denied that a preliminary audit report was compiled by the auditors. He also had no knowledge of a business relationship between Bergman, Symington and Netcare where profit-sharing was or is conducted under questionable methods. He expressed his displeasure in the manner the Defendant filed a complaint with the Radiological society of South Africa and distanced himself from it. This, according to Bekker, is also the view of Drs. Ross, Cotton and Basson.

[19] Bergman also expressed his dismay with the conduct of the Defendant. According to him, it was far from exemplary and the Defendant also resorted to malicious personal attacks by phoning his girlfriend (now his wife) with the allegation that he had an affair. The conclusion was reached by the rest of the partners that the Defendant had ulterior motives and his partnership was terminated.

[20] The evidence of Du Toit and Koski with regard to the financial statements and how Symington and Partners financially operated, is largely undisputed.

[21] The Plaintiffs' witnesses impressed me as credible and reliable in the manner they testified. Drs Bergman, Bekker and Mr Koski who worked in a professional environment with the Defendant, did not try to amplify their evidence against the Defendant. They were also consistent with their versions during cross-examination.

[22] The submission that the Plaintiffs failed to prove the material terms of the partnerships, is in my view unconvincing. In paragraph 8.5 of the Plaintiffs' pleadings the following is recorded:-

> " *8.5 the partnership would be reconstituted when the partners joined, or existing partners left, on the same terms and conditions referred to in paragraph 8.2 to 8.4 as applied to the immediately pre-existing partnership; and the newly reconstituted partnership would succeed to the rights and assets of its predecessor."*

[23] On the undisputed evidence of the Plaintiffs, it is evident that upon the dissolution and reconstitution of each successive partnership, the underlying radiological practice continued with the same staff, assets, and premises and that the dissolution was dealt with purely as an accounting exercise.

[24] The contention that the liquidation of the Fifth partnership was never agreed upon by the partners because the particular circumstances in which the Defendant was requested to withdraw as a partner was never discussed amongst them prior to 5 December 2005, is in my view contrived. The same applies to the argument that the Defendant never explicitly accepted the policy *"you come in with nothing, you go out with nothing"*.

[25] The evidence in the Plaintiffs' case clearly demonstrates that a material term of the original, second, third and fourth partnerships was that on dissolution thereof its assets and liabilities would pass to the reconstituted successor partnership. The Plaintiffs' evidence also establishes the following: Contrary to the Defendant's pleadings, Dr. Mienert was never a partner in the practice; the Defendant in the first year of his partnership was relieved of liability for losses; the established basis of dissolution of the partnerships was that it would be conducted as an accounting exercise; upon the dissolution of each partnership, and the reconstitution of a new partnership, the assets and liabilities of the former passed to the latter; the basis on which the second to fourth partnerships were terminated, all the relevant accounts pertaining thereto, and the transfer of assets from the one partnership to the other, were all accepted by the Defendant without protest; the only partners in the fifth partnership or any of its predecessors who bore liability in respect of the so-called Syms Trust loan were Bergman, Ross and Symington and that the dissolution accounts attributed no liability in respect thereof to the Defendant; the Netcare loan

liability of R4 532 101,00 reflected in the dissolution account was taken over by the sixth partnership, and no portion thereof was attributed to the Defendant.

[26] Furthermore, in August 2005 Koski, at the Defendant's request, e-mailed him the practice management accounts for March to July 2005. The Defendant allegedly thereafter altered these accounts by changing certain entries relating to Netcare and it's associated companies, and adding entries at the end, which created the impression that the practice was sharing profits with Netcare. These falsified accounts were then utilized and presented by the Defendant, *inter alia* to the Health Professions Counsel of South Africa as evidence of his profit-sharing allegations. These falsified accounts were apparently also used by the Defendant to avoid summary judgment.

[27] In the absence of any gainsay evidence, the probabilities overwhelmingly favour the Plaintiffs' version that the fifth partnership's assets and liabilities would pass to the reconstituted successor partnership. Moreover, the Plaintiffs' version that there was no asset comprising of goodwill in the partnerships and the basis of all the partnerships, including the fifth partnership, that the partners would pay nothing to join and receive nothing upon leaving, save for amounts standing to the credit of their capital accounts is in my view more plausible.

[28] The evidence of Koski also lends credence to the Plaintiffs' version that no goodwill existed. Koski testified that on 11 August 2005, the then partners mooted for the first time the introduction of benefits for a partner retiring at age 65 and after 15 years of service. This was apparently done on the basis that the partners would otherwise receive nothing upon leaving and the Defendant accepted this. On a conspectus of the evidence in this matter, I am satisfied that a formal liquidation of the Fifth Partnership was not required and that the dissolution of the partnership by way of an accounting exercise was the correct and appropriate step taken by the Plaintiffs.

[29] The argument that the Plaintiff's dissolution account, relied upon in evidence to prove its claim, is premature and insufficient, is without merit. A Court may in appropriate circumstances if it appears from the pleadings that a party has already received an account which he avers is insufficient, enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account. In these circumstances a measure of flexibility is required. In this regard see Doyle and Another v Fleet Motors PE (Pty) Ltd 1971(3) SA 760(A) at 763 B – D and LAWSA at paragraph 317 and the cases cited therein.

[30] In view of the peculiar circumstances in this matter, I am satisfied that it will be just and equitable to enquire and determine the issue of sufficiency of the dissolution account and to settle it.

[31] The Plaintiff has established in evidence the consensual basis on which the partnership came into being was conducted, and falls to be dissolved. Moreover, goodwill was not established and correctly not included. The bad debt as provided for, in my view, is appropriate. Furthermore, the Netcare and Syms Trust loans reflected in the balance sheet have not been included in the calculation of the Defendant's capital account or the determination of his liability.

[32] The dissolution accounts were also prepared some three years ago. The Plaintiffs invited the Defendant to engage in a debatement thereof and to identify any items therein which he disputed. This invitation was rejected by the Defendant. Moreover, the probity of the dissolution accounts which du Toit, an independent expert, testified to be fair and correct is borne out by the Defendant's own acknowledgement in his tax returns and declarations to SARS that he owes the practice R497,933.00. I am therefore satisfied that the Plaintiffs' dissolution account is correct and the amount of R 484 844.00 correctly reflects the amount due and payable by the Defendant to the Partnership.

[33] It follows that the Plaintiffs claim should succeed and the Defendant's counterclaims fall to be dismissed.

[34] Mr. Dickerson also argued for a punitive costs order against the Defendant. The main complaints against the Defendant are the following: The central pillar of

both the Defendant's defence to Plaintiffs' claims and his Counterclaim, was his allegation of improper profit-sharing with the Netcare Group of companies. This allegation and accusation was viewed by the Plaintiffs very seriously because, if proved, this accusation carries the risk that the Plaintiffs may be disbarred form practicing as radiologist. A considerable amount of the Plaintiffs' trial preparation was therefore devoted towards dealing with this issue. In particular the Plaintiffs made discovery of numerous agreements, documentation, invoices and other source documents pertaining to the dealings between Netcare and the partnership, to the extent that they were able to do so; The majority of the documentation discovered by the Plaintiffs related to this issue; the Plaintiffs conducted consultations with witnesses and others in preparation to deal with this aspect of the case. Moreover, it was only on the fourth day of the trial that the Defendant abandoned this pillar of his case together with the allegation of an improper purchase of the Mews property by First Plaintiff.

[35] According to Mr Dickerson the abandonment only ensued after it had become patently clear that the various allegations and complaints made by the Defendant were not only without foundation, but had been mendacious.

[36] In awarding costs, it is trite that the Court has a discretion to be exercised judicially on a consideration of the facts of each case. In essence, the decision is a matter of fairness to both sides.

[37] The complaint by Mr. Dickerson in this instance is not without substance. Apart from the obvious and unnecessary escalation of costs caused by the Defendant, there are three clear and unchallenged instances where certain spurious allegations were advanced. First, the untruthful attempts to create a false impression regarding the Defendant's signature of partnership cheques. Secondly, the creation of the falsified management accounts and the subsequent deployment thereof to engineer a complaint to the HPCSA and in his affidavit opposing summary judgment and thirdly the unjustified denial of his drawings and liability to the partnership. A copy of the Defendant's tax return for the tax year ended February 2006, the year in which he ceased to be a member of the partnership, and the Defendant's personal balance clearly stipulated to SARS that he had a liability to the partnership of R497,933.00.

[38] In other words, and notwithstanding the Defendant's denial of his indebtedness and allegations that the dissolution accounts are incomplete and incorrect in a number of respects, the Defendant has personally represented and admitted that he is in fact indebted to the Plaintiffs in an amount in excess of what they are now claiming in these proceedings.

[39] Moreover, in the preparation of bundles for purposes of trial, the Defendant insisted on preparing his own trial bundle instead of cooperating with the Plaintiffs in the preparation of a single, consolidated trial bundle. Additional costs were incurred

by the Plaintiffs in copying and perusing the Defendant's trial bundle consisting of three lever-arch files. It was only in completing this exercise that it appeared that there was substantial duplication of the documents already contained in the Plaintiffs' bundle. The Defendant rarely relied on his trial bundle during the 7 days of evidence in this matter. When the Defendant's counsel did rely on the bundle, he referred to a document already contained in the Plaintiffs' bundle. The Defendant's trial bundle was therefore entirely unnecessary. The dictum of Gardiner JP in In *re* Alluvial Creek Ltd 1929 CPD 532 is in my view, apposite in this case. At 535 the learned Judge held: "*...There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.*" The Defendant's conduct in these proceedings has put the Plaintiffs to unnecessary trouble and expense which they ought not to bear. An adverse costs order in my view, is therefore justified.

[40] In the result, the following order is made.

a) The Defendant is ordered to pay the Plaintiffs the sum of R484 844,00 with interest from 20 December 2005 to date of payment with costs, which costs to be paid on the scale as between Attorney and own client and to include the costs attended upon the appointment of two counsel.

b) The Defendant is further ordered to pay the costs of the summary judgment proceedings, the costs in respect of the application to compel trial particulars and the costs of the application to compel certain other particulars.

LE GRANGE, J