IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 6704 / 2016

In the matter between:

DANIEL GERHARDUS TRUTER	First Plaintiff
DANIEL GERHARDUS TRUTER N.O	
as Trustee of the Onderkloof Trust	Second Plaintiff
and	
BEAT FELIX MUNSFELD	First Defendant
BEAT FELIX MUNSFELD N.O	
As Trustee of the Onderkloof Trust	Second Defendant
ONDERKLOOF ESTATE (PTY) LTD	Third Defendant

JUDGMENT DELIVERED ON 26 OCTOBER 2016

GAMBLE, J:

[1] On 22 April 2016 the First Plaintiff (a local farmer) issued summons against the First Defendant (a Swiss national and local investor) claiming an order for

the appointment of a liquidator to liquidate the alleged partnership of which those two parties are said to be partners, the realisation of the such partnership assets, the preparation of a final account, the payment of that which is allegedly due to each partner and costs of suit. On 23 June 2016 the first defendant filed a plea and counterclaim to the particulars of claim as also a notice of exception that the particulars of claim are bad in law and lack averments necessary to sustain the first plaintiff's cause of action. The exception was then set down for argument.

[2] Notwithstanding the filing of the plea and counterclaim, it is common cause that the court must decide the exception on the basis of the allegations contained in the particulars of claim alone, assuming the facts stated therein to be true and correct, and without having regard to any facts extraneous thereto.[1] In order to succeed with the exception, the first defendant must, in such circumstances, persuade the court that upon every possible interpretation, the pleading in question and, in particular, the document(s) upon which it is based, disclose no cause of action.[2]

[3] The anomaly in this matter is, however, that the first defendant has filed a detailed plea to the particulars of claim and a lengthy and substantial counterclaim. How, in such circumstances, can a complaint be raised that the particulars of claim disclose no cause of action? After all, the first defendant has dealt therewith, seemingly without any difficulty. When the matter commenced I put this conundrum to counsel for the excipient, Mr RGL Stelzner SC, and enquired whether the points of

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[1] Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others 2014(2) SA 157 (GNP) at [19].

[2] Francis v Sharp and Others 2004(3) SA 230 (C) at 237 F-G

law raised by way of exception could not effectively be dealt with at trial as either points *in limine* or during argument at the conclusion of the evidence. Counsel's reply was that the first defendant might then be penalised with an adverse costs order for failing to note an exception. He went on to point out that, given the substantial counterclaim preferred by the first defendant against the first plaintiff, there would in all likelihood be a trial between the parties. Before that trial commenced, said counsel, it was necessary to determine whether there was a case for the first defendant to answer, or whether the trial would proceed only in respect of the claim in reconvention.

[4] Counsel for the first plaintiff, Mr CJ Grobler, was prepared to argue the matter on exception and it was on that basis that argument continued. Both parties accepted that if the exception was upheld, the first plaintiff should be afforded an opportunity to amend the particulars of claim, if so advised. Given that it is generally not the role of the court to raise issues which the parties do not want argued[3], argument on the exception went ahead.

[5] At the heart of the parties dispute is some 65 ha of agricultural land nestling at the foot of Sir Lowry's Pass in the Hottentots Holland Basin near Somerset West. A farm known as "Onderkloof" is owned by the Onderkloof Trust ("the trust") of which the first plaintiff and the first defendant are the trustees.[4] The commercial acitivities on Onderkloof, comprising a wine farm and a guest house, are conducted by the third defendant, Onderkloof Estate (Pty) Ltd ("the company"). The shares in the

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[3] Fischer v Ramahlele and Others 2014 (4) SA 614 (SCA) at [13]

[4] They are before the court in this capacity as second plaintiff and second defendant respectively.

company are held by the first plaintiff (as to 20%) and the first defendant (as to 80%), both of whom are directors thereof. Judging from the allegations made in the particulars of claim, it would appear that the first plaintiff was the party charged with the day-to-day running of the farming activities on the farm.

[6] In the particulars of claim the first plaintiff claims that during the period 1997 -1998 he and the first defendant concluded a partnership agreement which was terminated during December 2011. The terms of the partnership agreement so pleaded contain all the necessary averments to sustain a claim that a partnership was concluded between them *viz* that each of the parties brought something into the partnership (or bound himself to bring something into it), that the business of the partnership would be carried on for the joint benefit of both parties and that the object thereof was to make a profit.[5] So far so good.

[7] The first defendant, with reliance on ***Hughes***[6] argues that on a proper construction of the particulars of claim the first plaintiff has not alleged a cause of action which can give rise to the relief that he claims i.e. the appointment of a liquidator. It is contended that the first plaintiff has not succeeded in alleging that a partnership agreement properly so called came into being between him and the first defendant in their personal capacities. Rather, it is said that the first plaintiff's allegations are consistent with an initial understanding between the 2 parties interested in running the farming business to form a company and a trust, with the company carrying on the farming activities as an entity independent of the 2

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[5] Joubert v Tarry & Co 1915 TPD 277; Purdon v Gilmour 1961 (2) SA 211 (A)

[6] Hughes v Ridley 2010(1) SA 381 (KZP)

individuals in their personal capacities, and further, independent of the trust which holds the agricultural land in trust for the benefit of the beneficiaries in terms of, and subject to, the trust deed.

[8] Effectively the argument is that whatever the initial understanding between the parties may have been in the process of setting up these two separate legal entities, any such agreement has been overtaken by the subsequent establishment of the trust and the company. In other words, says the first defendant, the parties' business affairs, *inter se,* and the payment of that which is due to any or either of them, must be unbundled in terms of company law and trust law. The appointment of a liquidator as claimed in the particulars of claim in terms of the law applicable to the dissolution of a partnership with the powers sought to be granted to such liquidator, cannot legally address the dissolution of either the company or the trust: each such entity must be dissolved in terms of the relevant legal prescripts applicable to the appropriate branch of the law.

[9] In argument Mr Grobler accepted the approach advanced in ***Hughes*** but went on to argue that the establishment of the trust and the company in the present case did not *per se* preclude the existence of a prior oral agreement of partnership. He contended that there may be room for residual legal obligations between the first plaintiff and first defendant flowing from such oral agreement, and to this end it was submitted that the hearing of oral evidence would be necessary to establish exactly how these 2 individuals intended to regulate their rights and obligations *inter se.* I am prepared, for present purposes, to assume that oral evidence may establish such a residual agreement.

[10] Nevertheless, it appears that at the core of the argument for the first defendant lies the form of relief to which the first plaintiff is entitled should he succed in his claims as presently formulated. If he can successfully persuade the trial court that there was an oral agreement of partnership he is entitled to relief flowing from the general principles applicable to the *actio pro socio*[7]*.* But even if the first plaintiff is able to establish that there was an agreement of partnership as pleaded, the liquidator whom he seeks to have appointed will be able to do no more than dissolve that partnership. That liquidator will not be empowered to wind up the company nor will s/he be empowered to act as the trustee charged with the dissolution of the trust. For, as the Supreme Court of Appeal pointed out in *Morar N.O.,* there is a clear distinction to be drawn between the powers to be exercised by a person charged with the dissolution of a partnership on the one hand and a legal entity such as a private company on the other, which, while it may have many of the characteristics of a partnership, is a fundamentally different legal creature with its status sourced in legislation and not the common law.[8]

[11] The applicant in *Morar N.O.* had been appointed to dissolve a partnership. In the process he ran into some difficulties in fulfilling his mandate and he accordingly approached the court for wider powers, including powers of subpoena and interrogation akin to those available to liquidators under the winding-up provisions of the 1973 Companies Act. He also sought an order compelling the parties to the litigation to contribute towards the cost of the litigation and the dissolution process. Mr Morar's application was dismissed by the High Court in Pietermaritzburg which

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[7] Morar NO v Akoo 2011 (6) SA 311 (SCA) at [9] *et seq.*

[8] Ebrahimi v Westbourne Galleries Ltd and Others [1972] 2 All ER 492 (HL) at 500

granted him leave to appeal to the SCA. In that court, the judgment of the court *a quo* was upheld, with the court making the following comments which are of relevance here :

> *"[18] When the court appoints a liquidator for a partnership it is remedying the failure of the partners to attend to the liquidation of the partnership by agreement. Such failure may arise from disagreement over the need to appoint a liquidator, or over the identity of the liquidator or over the powers that the liquidator should enjoy. That being so it is logical to take as one's starting point the powers that the partners could themselves confer by agreement, if they were not in a state of hostilities. The court is then asked to do no more than resolve a dispute between the partners over the appointment of the liquidator or over the liquidator's powers. It does so in a way that the parties themselves could have done. The disagreement arises in consequence of the one partner refusing to agree to the liquidator being appointed or the liquidator having a particular power and that can be characterised as a breach of the obligations of co-operation and good faith that are central to all partnerships. The court is then merely enforcing the contractual obligations of the partners themselves…..*
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> *[20] In argument it was submitted that the appointment and functions of the liquidator of a partnership are largely equivalent to those of the liquidator of a company under the old Companies Act. However the analogy is false. Unlike partnerships, companies only exist under the*

legislation under which they are constituted, which governs their creation, operation and liquidation. Although in some jurisdictions partnerships are regulated by statute that is not the case in South Africa. In our law the general approach to partnerships is that the creation, operation and dissolution depends upon the terms of the agreement concluded by the parties. If there are disputes at any stage of the relationship those are resolved by the courts under the general rules governing contracts and in terms of the actio pro socio. Whatever policy reasons might exist for bringing about some degree of equivalence between partnerships and companies, the legislature has not done so."

[12] In consequence of this *dictum,* it is clear that the liquidator sought to be appointed by the plaintiff will only be empowered to dissolve the alleged partnership under the *action pro socio*. Regardless as to whether the evidence to be adduced by the first plaintiff establishes that partnership, further appointments will be necessary for someone to attend to the winding up of the company and the sequestration of the trust. To that end the relief sought in the particulars of claim is defective in that it does not make provision for the appointment of any person other than a liquidator of the partnership. To the extent that it is argued that there may be residual obligations of partnership outside of the formation of the company and the trust, the appointment of a liquidator to dissolve the partnership is correctly sought in the prayers in the particulars of claim as currently drawn.

[13] However, insofar as the company and the trust must perforce be wound up or sequestrated, as the case may be, it will be necessary for the appointment of such further person(s) in due course to handle these functions. Notionally, I suppose, the liquidator of the partnership could approach the court at that stage for an order appointing such person(s) but it seems to me that that would be an unnecessary waste of costs in circumstances where such appointment can (and properly should) be made by the trial court. That court will be called upon to decide, firstly, whether there is room for a residual agreement of partnership, or whether the situation is similar to that in ***Hughes*** in consequence whereof the company and the trust will be found to be the embodiment of the parties' agreement of association. Either way, the appointment of additional stewards to attend to the dissolution of those entities will be required to give effect to the termination of those vehicles of joint endeavour. To the extent that the particulars of claim do not cover that eventuality, they are deficient and do not disclose a cause of action in relation to either the dissolution of the company or the trust, legal steps which are essential to enable the parties to then go their separate ways.

[14] In the circumstances, I am of the view that the exception is properly taken and that it should be upheld with costs.

ORDER OF COURT

1. The exception to the particulars of claim is upheld with costs.

2. The first, second and third plaintiffs are afforded one month within which to amend their particulars of claim.

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GAMBLE J