



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

Reportable

Case no. 6802/2013

In the matter between:

JOHAN DURR

Excipient /Plaintiff

and

LE NOE

First Respondent / Defendant

NEELS BARNARDT

Second Respondent / Defendant

CHARLES DICKINSON

Third Respondent / Defendant

JUDGMENT DELIVERED 08 SEPTEMBER 2017

Andrews AJ

Introduction

[1] This is an opposed exception brought Plaintiff in relation to Second and Third Defendant's conditional counterclaim. The exception was argued on 22 August 2017.

Adv JL van Dorsten appeared on behalf of Plaintiff/ Excipient and Adv P MacKenzie appeared on behalf of the Defendants.

Background Facts

[2] Plaintiff's claim against the Defendants is based on a verbal agreement entered into in or about July 2011. It is averred that the essential terms of the agreement between Plaintiff, Second and Third Defendants were that a partnership business would be conducted under the name and style of First Defendant, pursuant whereunto the parties co-operated to establish and develop a business venture to sell and/or distribute wine. Plaintiff seeks declaratory relief as to the existence of a partnership (alternatively joint venture agreement alternatively commercial agreement); termination of the agreement and / or statement and debatement of the agreement. Plaintiff's claim is therefore, insofar as he alleges the existence of a partnership, at least partly founded upon the *actio pro socio*.

[3] Defendants contend that in the event that the court finds that the partnership agreement existed and is terminated, that Plaintiff is liable to Defendants, also on the basis of the *actio pro socio*, for damages flowing from the former's breach of the partnership agreement in the amount of R2 799 363.60 being the amount specified in their conditional claim in reconvention against Plaintiff.

Grounds of Exception

[4] Plaintiff took exception to the Defendants' conditional claim in reconvention on the ground that it does not disclose a cause of action and / or lack averments necessary to sustain a cause of action.

[5] The grounds of exception include that:

- (a) the partnership is deemed to remain in existence as far as the partners are concerned for purposed of the liquidation and distribution of the partnership assets;
- (b) partners are not, as regard partnership dealings, considered as debtor and creditor *inter se* until the partnership has been wound up or until the partners have agreed on a binding settlement of the accounts;
- (c) damages for loss allegedly caused by a partner to the partnership cannot be claimed before the partnership accounts have been settled between the partners and the partnership have been wound up;
- (d) in this case, the Defendants are not entitled to claim damages from the Plaintiff for the alleged loss caused to the partnership as:
 - (i) the partnership account have not been settled by the partners; and
 - (ii) the partnership has not been wound up or liquidated
- (e) the Defendants do not allege a winding up or a settlement of accounts in their conditional claim in reconvention.

Excipient's Principal Submissions

[6] Plaintiff raised an exception to Defendants Counterclaim on the basis that it is without legal merit. Plaintiff submits that Defendants are not entitled, on the facts pleaded, to claim damages from Plaintiff for the alleged loss caused to the partnership as there is no allegation that the partnership accounts have been settled by the partners and/ or the partnership has been wound up. It is further submitted that Defendant's conditional claim in reconvention does not disclose a cause of action and / or lacks averments necessary to sustain a cause of action for the relief claimed.

[7] It is also submitted that Defendants cannot rely on the *action pro socio* to claim payment directly to themselves of any amount due to the partnership as they may only avail themselves of this action against their co-partners after the partnership claims and assets have been realised. It was contended that Defendants should first request the rendering and debatement of an account and as such, the amount owing, that could be claimed because it is easily determinable, is the amount due to a partner after the partnership has been wound up and liquidated.¹

[8] Plaintiff also submits that the effect of the order sought by the Defendants for payment of the sum of R2 799 363.60 constitutes damages payable directly to the Defendants and not to the partnership; payments cannot be made directly to individual partners while the partnership is still in existence; the partnership has to be wound up

¹ *Loots v Nieuwenhuizen en 'n Ander* 1997 (1) SA 361 (T).

first. It was therefore contended that the amount of damages remains a partnership asset and as a result would be funds due to the partnership.

[9] Plaintiffs submit that the three partners would be entitled to share equally in the distribution of the partnership assets, which would include the alleged damages claim purportedly caused by the Plaintiff's breach of the partnership agreement. It was argued that there is no legal basis for the Defendants' contention that the Plaintiff is liable to pay the full sum of R2 799 363.60 and consequently the counterclaim is open to exception. It is on these grounds that the Plaintiff prays that the Court upholds the exception with costs.

Defendants Principle Submissions

[10] Defendants contend that, in the event that the court makes a finding that a partnership agreement existed and is subsequently terminated, the Plaintiff is liable to the Defendants on the basis of the *actio pro socio*, for damages flowing from the breach of the partnership agreement in a specified amount.

[11] It was submitted that a claim against a partner *in lieu* of statement and debatement is still possible in instances where the claim is readily ascertainable. In this regard, Defendants avers that the counterclaim pertains to a single transaction in relation to the sale of wine. Defendants aver that the counterclaim is specific to a single transaction and is conditional upon Plaintiff proving the existence and termination of a partnership agreement. Because it is implicit in the counterclaim, Defendants aver that the counterclaim does disclose a cause of action. Furthermore, was that the effect of

the order sought by Plaintiff is in any event to confirm the existence of a partnership agreement and amount claimed. Once a finding in this regard is made, such amount would still need to be included in the rendering of accounts; this is on the premise that Plaintiff is successful in its claim for statement and debatement.

[12] Defendants submit that the counterclaim is premised on the finding of the court to the effect that the partnership agreement has terminated and accordingly argued that the exception stands to be dismissed with costs.

Legal Principles

Exception

[13] It is trite that an exception provides a useful mechanism for weeding out cases without legal merit.² Exceptions are raised in an attempt to avoid the leading of unnecessary evidence at the hearing of the action. It is well established that an exception can be taken where pleadings are vague and embarrassing or lacks averments which are necessary to sustain an action or defence.³ In ***Baliso v FirstRand Bank Ltd t/a Wesbank***⁴, it was held that *'[w]here an exception is taken a court looks only to the pleadings excepted to as it stands, not to facts outside those stated in it'*. Therefore, based on the general principles the veracity of the allegations made in the impugned pleading is to be accepted.

² *Erasmus Superior Court Practice*, Second Edition (Juta), D1-294 [SERVICE 4, 2017], *H v Fetal Assessment Centre* 2015 (2) SA 193 at 1998B.

³ Rule 23 of Uniform Rules of Court, See also *Children's Resource Centre Trust and Others v Pioneer Food Pty Ltd and Others* 2013 (2) SA 213 (SCA) at para 36.

⁴ *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at para 33, See also Van Loggerenberg *'Erasmus Superior Court Practice'* Volume 2 (Juta), D1-293 [SERVICE 4, 2017], *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 199.

Partnerships

[14] A partnership is established by means of a valid agreement which embodies a basic *essentialia* of a partnership and which is entered into with the true intention of creating a partnership.⁵ It is trite that a partnership remains in existence after its dissolution until it is finally liquidated.⁶ Partners, as a matter of law are not considered as debtor or creditor *inter se* until such time as the partnership is wound up.⁷

[15] It is trite that a partner is not entitled to claim payment in his personal capacity for damages caused to the partnership and that such claims are excipiable. The matter of ***Pataka v Keefe and Another***⁸ is instructive on this point, where Tindall JA stated: ‘...Here the defendant counter-claims for payment to himself of damages suffered by him through loss caused to the partnership. This he is not entitled to do....On this view of the matter the counter-claim, so far as it relates to claims for damages arising out of the alleged acts of the plaintiff in breach of the terms of the original partnership agreement and the supplementary agreement in regard to the water supply, is open to exception.’⁹

[16] Defendants submit that ***Pataka*** is distinguishable for the following reasons:

⁵ Joubert WA ‘*The Law of South Africa*’ Establishment of Partnership (vol19) 268 at p203.

⁶ See *Ferreira v Fouche* 1949 (1) SA 67 (T) at para 70, *Van Der Merwe v Sekretaris van Binnelandse Inkomste* 1977 (1) SA 462 (A) at 472H and 473F and *Beira v Raphaely-Weiner and Others* 1997 (4) SA 332 (SCA) at para 337.

⁷ *Nair v Chandler* 2007 (1) SA 44 (T).

⁸ 1947 (2) SA 962 (A) at 968-969.

⁹ See also *Beira v Raphaely-Weiner and Others* 1997 (4) SA 332 (SCA) at 337.

- (a) The Defendant had counterclaimed against the Plaintiff for prospective damages that the partnership would suffer as a result of the Plaintiff's repudiation (anticipatory breach) of the partnership agreement;
- (b) The Defendant had denied that the partnership agreement had been cancelled. The counterclaim was premised on the continued existence of the partnership agreement.
- (c) The court held that the Defendant was precluded from counterclaiming in the absence of alleging either a winding-up or settlement of accounts as between partners.¹⁰

Actio Pro Socio

[17] In ***Robson v Theron***¹¹ the principles of the common law underlying the *actio pro socio* are succinctly summarised as follows:

- (a) *This action may be instituted by a partner against a co-partner during the existence of the partnership for specific performance in terms of the partnership agreement and / or fulfilment of personal obligations (praestationes personales) arising out of the partnership agreement and business.*
- (b) *Where the partnership agreement provides for (or the parties subsequently agree upon) the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound-up specific performance thereof may be claimed by means of this action.*

¹⁰ Defendant's Heads of Argument pages 5-6 para 17.

¹¹ 1978 (1) SA 855H-856G.

- (c) *Where neither the partnership agreement nor a subsequent agreement between the parties provides for the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound-up this action may in general (subject to any stipulation for the duration of the partnership or any other relevant stipulations) be brought by a partner to have the partnership liquidated and wound-up. The Court in the exercise of its wide equitable discretion may appoint a liquidator to realise the partnership assets for the purpose of liquidating partnership debts and to distribute the balance of the partnership assets or their proceeds among the partners...*
- (d) *Where a partnership has been dissolved a partner may avail himself of this action against his co-partners to claim distribution of any undistributed partnership asset or assets...*
- (e) *A court has a wide equitable discretion in respect of the mode of distribution of partnership assets, having regard inter alia, to the particular circumstances, what is most to the advantage of the partners and what they prefer...'*¹²

[18] It is trite that any claim brought by one partner against another pursuant to the *actio pro socio* is only enforceable when there is either a winding-up of a partnership; or rendering of financial statements.¹³ I therefore agree with the Defendants contention that the rights and duties of the partners *inter se* are determined in the first instance by the terms of their partnership agreement. In the absence of

¹² See also *Brighton v Clift* (2) 1971 (2) SA 191 (R) at 193B-D; *Morar NO v Akoo* (498/10) [2011] ZASCA 130 (15 September 2011).

¹³ *Nair v Chandler* 2007 (1) SA 44 (T).

express terms, their relationship is regulated by terms implied by law. Their rights inter se are enforced by the action pro socio.¹⁴

Conclusion

[19] In applying the general principles to the present matter it is clear that one partner has no right of action against another for the balance owing to him or her until after final settlement of accounts. A partner must therefore allege a winding up or a settlement of accounts before suing for money due.

[20] Although it is accepted that Defendants are not entitled to claim damages for the alleged loss caused to the partnership until the partnership accounts have been settled and the partnership wound up, I am of the view that the a finding is still to be made that a partnership agreement has been concluded between the parties. The relief which Plaintiff seeks is for the court to declare the existence of a partnership, alternatively joint venture alternatively commercial agreement. The Plaintiff further claims termination of the agreement as well as a statement and debatement of the agreement. It must be borne in mind that the Defendants have raised a conditional counter-claim. The counter-claim is conditional upon the court finding that a partnership agreement exists. Defendants are alleging that no partnership agreement, tacit or express, between the Plaintiff, the Second Defendant and / or Third Defendant was ever concluded or existed. It is further evident from the averments in the pleadings that the cause of the joint venture agreement was limited to a certain transaction.

¹⁴ Wille's Principles of South African Law, Ninth Edition, p 1010.

[21] In the circumstances, it would be premature for this court to make a finding as to the existence or termination or terms of the partnership agreement, joint venture or commercial agreement. These are issues that should be ventilated in the main action. It is trite that an excipient must convince a court that upon every interpretation which the pleading in question, in particular the document on which it is based, can reasonably bear, no cause of action is disclosed; failing which the exception ought not to be upheld.¹⁵ Based on the averments of the Defendants, I cannot, at this stage, find that there is no cause of action as same would depend on the pronouncement which the trial court will make regarding the agreement concluded between the parties. In this regard, it should be further borne in mind that this exception lies against a conditional counterclaim (my emphasis) on the premise of Plaintiff succeeding in proving the existence and termination of a partnership agreement. It is trite that a dismissal of an exception does not finally dispose of the issue raised by the exception.¹⁶ The point can be re-argued at the trial in the event of the exception being dismissed.

Order

[22] In the result the following order is made:

1. The exception is dismissed with costs.

P ANDREWS, AJ

¹⁵ Erasmus Superior Court Practice Vol 2 at D1-293-294; *H Fetal Assessment Centre (Supra)* at 199.

¹⁶ *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at para 31 'Even if the exception is upheld, the respondent will have the opportunity to amend its particulars of claim.'

Exception –conditional counterclaim – *actio pro socio*

JUDGE : Andrews AJ

JUDGMENT DELIVERED BY : Andrews AJ

FOR APPLICANT : Adv. JL Dorsten

INSTRUCTED BY : Michalowsky, Geldenhuys & Humphries Attorneys

FOR RESPONDENT : Adv. P MacKenzie

INSTRUCTED BY : Raymond McCreath Inc.

DATES OF HEARING : 22 August 2017

DATE OF JUDGMENT : 08 September 2017