



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

**Case number: A150/18**

**High Court No: 6802/2013**

In the matter between:

**Johan Durr**

**Appellant**

And

**Le Noe**

**First Respondent**

**Neels Barnardt**

**Second Respondent**

**Charles Dickinson**

**Third Respondent**

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**JUDGMENT DELIVERED ON 15 FEBRUARY 2019**

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**BAARTMAN, J**

- [1] On 8 September 2017, this court, per Andrews AJ, dismissed with costs the appellant's exception to the respondents' conditional counter claim. This is an appeal against that costs order, with leave of the Supreme Court of Appeal.

- [2] The appellant, the plaintiff in the main action, instituted action in which he alleged that a partnership existed between himself and the respondents. He sought the following relief:
- (a) A declaration 'that a partnership was established between the parties [the respondents and the appellant] in relation to the joint venture wine distribution conducted by them;' ...
  - (b) Termination of the partnership;
  - (c) Statement and debatement of the accounts.
- [3] The second and third respondents (**the respondents**) defended the action and denied that a partnership had ever come into existence; instead, they alleged a joint venture. They further denied that the first respondent was a legal entity – it was merely the name of a wine. The respondents counterclaimed as follows:
- (a) 'In the event that [the court] finds that a partnership agreement was concluded and then dissolved...[the respondents] have a claim for damages against the [the appellant], ...
  - (b) The [appellant] breached the partnership agreement by failing to comply with his responsibilities: ...
  - (c) The [respondents] suffered damages in the sum of R2 799 363.60...
  - (d) In the premises, the [appellant] is liable to pay the sum of R2 799 363.60 to the [respondents].
- [4] The appellant took exception to the conditional counter claim on the basis that it did not disclose a cause of action. This was so as the alleged damages are due to the partnership. In their personal

capacity, the respondents had no claim for damages<sup>1</sup>. The trial court accepted that proposition and held:

*'Although it is accepted that [respondents] 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 a finding is still to be made that a partnership agreement has been concluded between the parties.'*

- [5] 'The test on exception is whether on all possible readings of the facts no cause of action may be made out...'<sup>2</sup>. The court *a quo* correctly accepted that the respondents had not made out a cause of action. Instead of dealing with the exception in accordance with that finding, it held that 'it would be premature for [it] to make a finding as to the existence or termination or terms of the partnership agreement...' At exception stage, no such determination is called for; instead, the court must assume the correctness of the pleaded facts<sup>3</sup>. It follows that the court *a quo* erred in the application of the applicable test.

- [6] In terms of section 16(2) of the Superior Courts Act 10 of 2013, the appellant has to show that there are exceptional circumstances that warrant this court to entertain the appeal against costs. The section provides:

*'16(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*

*(ii) Save under exceptional circumstances, the question whether the decision would have any practical effect or result is to be determined without reference to any consideration of costs.'*

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<sup>1</sup> *Pataka v Keefe and Another* 1947 (2) SA 962 (A) at 967–969.

<sup>2</sup> *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 199B.

<sup>3</sup> *Belet Cellular v MTN Service Provider* (936/2013) [2014] ZASCA 181 (24 November 2014) at para 2.

[7] The appellant submits that the court *a quo*'s erroneous application of the applicable principle relevant to exceptions 'coloured' the exercise of its discretion because the costs order 'was made in line with the principle that costs follow success'. I agree. It is apparent that the erroneous application led to costs granted in line with the principle that costs follow success<sup>4</sup>. In the circumstances of this matter, that constitutes an exceptional circumstance within the meaning of section 16. The costs order stands to be set aside.

[8] I, for the reasons stated above, propose the following order.

- (a) The appeal is upheld with costs.
- (b) The costs order made by the court *a quo* in the exception application, in terms of section 19(d) of the Superior Courts Act 10 of 2013, is set aside.
- (c) The first and second respondents are to pay the appellant's costs of the two applications for leave to appeal in the court *a quo* and in the Supreme Court of Appeal.

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<sup>4</sup> *Jansen van Rensburg v City of Tshwane Metropolitan Municipality* (A58/2012) [2013] ZAGPPHC 186; [2013] 4 All SA 141 (GNP) (5 July 2013).



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BAARTMAN J

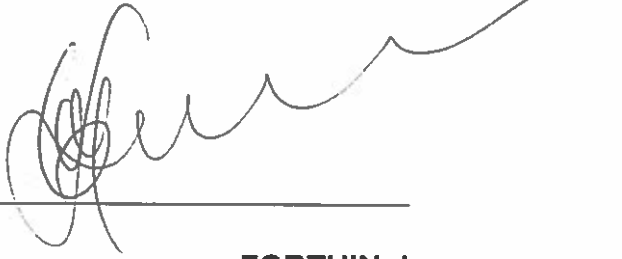
I agree, it is so ordered.



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DESAI ADJP

I concur.



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FORTUIN J