

SOUTH AFRICA / JUDGMENT

De Wet and Another v Gambeno and Another (434/2022) [2022] ZAECELLC 32 (22 November 2022)

[2022] ZAECELLC 32

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Laing

CASE / FILE NUMBER

434/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT

CASE

NO. 434/2022

In

the matter between:

GREGORY

DE WET First

applicant

ENRICO

BLIGNAUT Second

applicant

and

PHILIP

GAMBENO First

respondent

BISE

ENGINEERING (PTY) LIMITED Second

respondent

JUDGMENT

LAING J

- [1] This is an application for an interdict against the first respondent in relation to a business that supplies flexographic labelling and trades as PEG Labels, alternatively PEG Labelling.[1]
- [2] Pending the finalisation of separate action proceedings, the applicants seek to interdict the first respondent from: instructing suppliers to suspend the operation of any accounts that the business may hold with such suppliers; preventing the applicants from using such accounts to place orders for stock and materials; and directing suppliers not to accept such orders and not to deliver any stock or materials in accordance therewith. The applicants stipulate that their prior written consent would first be required.
- [3] Furthermore, the applicants seek an order directing the first respondent to reinstate all accounts held by the business with the suppliers in question.
- [4] The applicants brought the application on an urgent basis, instituting proceedings on 23 March 2022 and requesting interim relief. The first respondent opposed the matter on 24 March 2022 and delivered his answering affidavit on 28 March 2022. At the same time, he delivered an undertaking to the effect that he would refrain from the activities that the applicants sought to interdict, provided that all orders for stock and materials were of a formal, written nature; the first respondent also insisted on his authority to cancel excessive or unnecessary orders.
- [5] The application was postponed, permitting the first respondent to file a further affidavit. Subsequently, the applicants brought a successful joinder application on 14 June 2022 to address the first respondent's point in limine that the second respondent had not been joined. The main application was argued on 25 August 2022.

The applicant's case

- [6] The parties entered into a partnership agreement on 23 March 2011 to conduct the business of flexographic labelling, which entailed certain production, sales and management roles. The partnership would conduct the business under the name of 'PEG Labels'. The first respondent was responsible for the management of the business and was required to account to the applicants for its financial affairs. The applicants allege that the first respondent failed to render a proper account during the existence of the partnership inasmuch as business income was unlawfully appropriated and used to settle third party business expenses.
- [7] It had been the first respondent's task to open and manage accounts with various suppliers. The relationship between the partnership and its suppliers over the past decade had proved to be mutually beneficial.

- [8] On 7 March 2021, the first respondent's attorneys notified the applicants' attorneys that he had decided to terminate the partnership. The applicants accepted this. However, upon the first respondent's refusal to render a proper account of the financial affairs of the partnership, the applicants instituted action proceedings for such an account, as well as the debatement thereof, and the payment to them of whatever amount was due.
- [9] The applicants allege that, notwithstanding the above action, the business of PEG Labels has continued unabated. Orders have been placed, sales have been concluded, and PEG Labels has made a profit, despite strained relations between the parties.
- [10] On 17 March 2022, it came to the attention of the applicants that the first respondent had instructed an employee to inform suppliers that all accounts held with them by PEG Labels were to be suspended with immediate effect, until further notice. This had resulted in numerous queries from the suppliers concerned, placing at risk the good relations that PEG Labels enjoyed with them. The applicants feared that the first respondent would resort to similar tactics in the future.
- [11] Consequently, the applicants instructed their attorneys to demand from the first respondent's attorneys, on 18 March 2022, that the accounts be reinstated, failing which urgent proceedings would commence. The applicants rely on the partnership agreement to assert that they have a right to good faith from the first respondent and have a right to ensure that PEG Labels continues to run smoothly, notwithstanding the first respondent's having left the partnership. The suspension of the accounts would cause irreparable harm to the business. At the time, the value of orders placed by clients with PEG Labels for the production and delivery of products was just under R1,5 million, which the business stood to lose if the situation was not rectified. The applicants argue that the balance of convenience favours the reversion to the status quo ante, pending the outcome of the action instituted against the first respondent.

Answering allegations

- [12] The first respondent is the sole director of the second respondent. The basis for the first respondent's point in limine was that the applicants sought, to all intent and purposes, the reinstatement of accounts held with various suppliers by the second

respondent, which traded as 'PEG Labelling' (not 'PEG Labels'). The applicants had failed to join the second

respondent. As already discussed, the applicants subsequently remedied this.

- [13] Turning to the merits, the first respondent contends that the applicants are employed by the second respondent as a sales manager and production manager, respectively, and attaches copies of salary slips in support thereof. He denies that a partnership was ever created, mentioning several conditions that were never fulfilled. The business of the purported partnership, he says, ran at a loss and was taken over by the second respondent.

- [14] The first respondent states that, as the sole director of the second respondent, he is responsible for its financial affairs, including the management of accounts held with suppliers. He refutes the assertion that he is obliged to render an account of the second respondent's financial affairs to its employees, i.e. the applicants. The second respondent's income was used to settle the second respondent's expenses.
- [15] The partnership, contends the first respondent, was indeed terminated. This occurred when the conditions attached to the partnership agreement were never fulfilled; his attorneys merely confirmed the position when they notified the applicants' attorneys on 7 March 2021.
- [16] In relation to the suspension of the accounts, the first respondent says that it was brought to his attention that the orders for stock and materials that had been placed with suppliers far exceeded the needs of the second respondent. He mentions that the second respondent had previously incurred debt with suppliers, placing the second respondent in financial difficulty and necessitating arrangements for repayment. Accordingly, in keeping with his fiduciary responsibilities, the first respondent had instructed that the accounts be suspended.
- [17] The first respondent emphasises that he does not have any partnership interest in 'PEG Labels'. He is the shareholder and sole director of the second respondent, which trades as 'PEG Labelling'.
- [18] The accounts have indeed been reinstated, says the first respondent. However, this was done subject to the requirement that formal orders were to be placed in future, rather than informal orders (made by email or telephone), so as to avoid the unnecessary incurring of further debt. There was adequate stock on hand to meet the demands of existing clients and business had carried on as usual.

Replying allegations

- [19] The applicants explain that when the business of the partnership first commenced, it was agreed that it would use the second respondent's facilities and resources, such as factory floor space, administrative staff, and the second respondent's bank account. Transactions with partnership clients would be conducted via the bank account in question. The partnership traded as either 'PEG Labels' or 'PEG Labelling', using the names interchangeably.
- [20] The reinstatement of the accounts held with suppliers for the partnership is all that the applicants seek. It is the applicants' contention that the first respondent cannot suspend the accounts unless a partnership decision has been taken to that effect and that he has failed to appreciate that the core business of the partnership is entirely separate to that of the second respondent. The accusation is made that the first respondent mismanaged the partnership's financial affairs and used its income to pay the second respondent's expenses.

- [21] The applicants deny that they are employed by the second respondent. They assert that they have always been full partners in the partnership trading as PEG Labels; they receive monthly drawings, an annual bonus, and a share of the profits. Moreover, insurance was previously secured on the lives of the partners (so-called 'key person' agreements) and the applicants were previously required to enter into deeds of suretyship for purposes of the partnership's securing credit facilities with one of its suppliers, H & M Rollers. The applicants point out that even the first respondent has referred to himself as a partner, as evident from a recent email addressed to them.
- [22] It is the contention of the applicants that the partnership has been in existence since 23 March 2011. Despite the first respondent's termination thereof, the partnership remains in existence, pending the liquidation and distribution of its assets. The applicants strongly refute the first respondent's allegation that the business of the partnership was taken over by the second respondent, saying that there was never any decision to that effect.
- [23] Regarding the salary slips, the applicants assert that these reflect monthly drawings paid to them via the second respondent's bank account in relation to the business of the partnership, 'PEG Labelling'. They are not employees of the second respondent; they never entered into any written contracts of employment, in contrast to what was required of the second respondent's employees.

Issues

to be decided

- [24] The matter is characterised by a dispute about whether the partnership ever came into existence. It is common cause, however, that the first respondent decided to 'terminate' the partnership on 21 March 2021, via his attorneys, and that such 'termination' was accepted by the applicants. The legal ramifications of this will be explored further in the paragraphs that follow.
- [25] However, it is important not to lose sight of the key issue: whether the applicants are entitled to the relief sought in their notice of motion, excluding an order directing the first respondent to reinstate the accounts held by PEG Labels with various suppliers.[2] The applicants seek no relief against the second respondent.
- [26] Essentially, the court is required to decide: (a) whether the applicants are entitled to interdictory relief against the first respondent; and (b) whether the applicants are entitled to the costs of the application.[3]
- [27] The law in relation to the dissolution of a partnership is pertinent. This serves as a useful starting point for a discussion of the applicable legal framework.

Legal framework

[28] A partnership can be dissolved as a result of several causes. These include effluxion of time, where a fixed term partnership reaches its agreed time of duration. The partners can, nevertheless, expressly or impliedly agree to continue the partnership, in which event there is a presumption that the partnership endures without any fixed term but subject to dissolution by any of the partners at his or her own discretion.[4] A further cause is a notice of dissolution, where one of the partners gives notice to the others that he or she no longer intends to continue the partnership[5]. This more commonly applies to a partnership at will, of indefinite duration, rather than a fixed term partnership.

[29] The dissolution of a partnership means that the implied authority or mutual mandate of the partners comes to an end. As a result, any new transactions conducted by a partner, not connected with the liquidation and distribution of the partnership assets, are solely for his or her account and do not bind his or her former partners.[6]

[30] The writers, Lee and Honoré, discuss the dissolution of a partnership as follows:

‘The immediate consequences of a dissolution of a partnership is that the agency which existed between the partners ceases, and the partnership continues merely for the purpose of completing current transactions, winding up the business and adjusting the rights of the partners... Unless otherwise provided in the dissolution agreement, no provision of the partnership agreement is binding after dissolution (*Beiles v Glazer* 1947 (2) PH A79 (W)). All rights and duties acquired by a former partner after dissolution, even if contracted on behalf of the

partnership, are binding on him alone (*Van der Linden* 4.1.14; *Western Province Bank v Du Toit, Smith & Co*

(1850) 1 Searle 39). The former partners, however, will be liable where they accept the acts of their ex-partner, or where he has been authorised to act on their behalf (*Birkenruth v Shaw, Hoole & Co*

(1850) 1 Searle 39).’[7]

[31] Generally, it appears to be an accepted principle that after dissolution, the partnership continues but only for purposes of the liquidation and distribution of its assets.[8] Henning remarks that:

‘In most civil and common-law jurisdictions dissolution puts an end to the partnership, but only as regards new operations. In nearly all cases dissolution does not result ipso facto in the disappearance of the partnership. This “extension” of the partnership for purposes of liquidation and winding-up is considered to be further proof that it is not possible to reduce the institution to a simple contract even in those countries where the existence of the partnership as a legal entity is not recognised.’[9]

[32] The above principles must be applied to the facts of the present matter, but not before dealing with the requirements for interdictory relief. The requirements for an interlocutory interdict are trite: a prima facie right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually

granted; a balance of convenience in favour of the granting of the interim relief; and the absence of any other satisfactory remedy.[10] A final interdict requires: a clear right on the part of the applicant; an injury actually committed or reasonably apprehended;

and the absence of any other satisfactory remedy available to the applicant.[11]

[33] During argument, there was some debate about whether the applicants sought interim or final interdictory relief. This aspect will be addressed shortly but the matter appears to turn on whether the applicants have demonstrated any right at all to the relief sought, either of a prima facie or a clear nature, depending on what has actually been sought.

Application of the law to the facts

[34] The partnership agreement concluded by the parties on 23 March 2011 was for the stated purpose of forming a subsidiary company to

the second respondent, to trade as 'PEG Labels'. At the same time, the parties agreed, seemingly in contradiction to the stated purpose, that the partnership (not the company) would be conducted under the name of 'PEG Labels'. There was also a provision to the effect that the terms of the partnership agreement would endure for a period of nine months, whereupon a 'partnership contract' would be drawn up by a practising attorney. If, furthermore, a partner withdrew or retired from the partnership, then the remaining partners were permitted to continue operating 'the company' under the same name. Overall, the partnership agreement was not a model of clarity and was riddled with contradictions and ambiguities.

[35] The applicants rely on the original partnership for the relief sought. In contrast, the first respondent asserts that no partnership

ever came into existence.

[36] The classic approach to a situation where the material facts are in dispute and where no request has been made for the matter to be referred for oral evidence was set out in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*, [12] where the court held that:

'where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.' [13]

[37] The proviso to the above principle, however, is that a court may reject the respondent's version when his or her allegations are patently implausible. The entrenched authority for this is the seminal decision in *Plascon-Evans Paints v Van Riebeeck Paints*,^[14] where the court held as follows:

'...In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...'[15]

[38] Here, it is clear from the evidence that the parties conducted themselves as partners for the better part of a decade; the expiry of the nine-month period of duration and the absence of a 'partnership contract' to have been drawn up by a practising attorney appeared to have had no effect whatsoever on the relationship amongst the parties. This was demonstrated, at the very least, by the assertions of the applicants in reply, supported by documentation pertaining to the conclusion of a copy of a deed of suretyship and (more importantly) a thread of email correspondence to the effect that the first respondent appeared to have regarded himself very much as a partner of the business trading as PEG Labels. An email from the first respondent to the applicants, dated 15 December 2020 (just under three months before the 'termination' of the partnership), reveals the following:

'Yes you right have done nothing for the last 3 months, but until you and Greg pay me for my part of the business I remain a partner regardless whether I work for the company or not. But with regard to the staff bonuses you still are responsible for them receiving or not. I made a call why don't you the office staff still have to receive theirs.'[16]

[sic]

[39] From the above, the first respondent's contention that a partnership never came into existence does not ring true. Notwithstanding the shortcomings of the partnership agreement and the question of whether it came to an end by the effluxion of time at the expiry of the nine-month period of duration, the parties impliedly agreed to continue the partnership.

[40] The picture changed, however, when the first respondent instructed his attorneys, on 7 March 2021, to inform the applicants that he had decided to 'terminate' the partnership. This amounted to no less than a notice of dissolution. What is more, the applicants admit that they accepted the 'termination'. The effect thereof, at the very least, was to have brought the partnership to an end. In the absence of a formal dissolution agreement that might have provided otherwise, the dissolution rendered the partnership agreement non-binding. The

implied authority or mutual mandate of the parties ended and PEG Labels, as a partnership, would only have continued for purposes of completing current transactions, winding up its business, and adjusting the rights of the parties where necessary.[17] The business of the partnership could not simply have continued unabated, as alleged by the applicants.

- [41] Consequently, the applicants cannot rely on the original partnership agreement to contend that they have either a prima facie or a clear right in relation to the relief sought. The original partnership agreement is no longer binding. Insofar as they may enjoy residual rights that have survived the dissolution of the partnership, these pertain only to the liquidation and distribution

of partnership assets. Such residual rights do not pertain to the ongoing business of PEG Labels, which the applicants now seek to protect by means of the present application.

- [42] The questions that arise, of course, are what has become of PEG Labels- and who now owns and controls the business. These, on the available evidence, are difficult questions to answer. It appears that the business is now being conducted by the second respondent, trading as PEG Labelling, but whether (and to what extent) the assets and liabilities of the partnership were taken over by the second respondent is simply not apparent from the papers.

- [43] Importantly, the applicants have not asserted that, after the dissolution of the partnership, they formed a new partnership and carried on trading. They have also not asserted that the parties reached any agreement at the time of the first respondent's 'termination' of the partnership that they would remain bound by any of the provisions of the original partnership agreement. In contrast, the first respondent avers that the applicants are employees of the second respondent, employed as a sales manager and production manager, respectively. The numerous copies of salary slips attached to the answering affidavit seem to support such an averment. The applicants' contention that these merely reflect monthly drawings is implausible; it cannot be denied that the partnership has come to an end. Furthermore, the absence of written contracts of employment for the applicants takes their case no further; it is probable that tacit contracts of employment emerged after the dissolution of the partnership and that the second respondent (not the first respondent) deals with the applicants, in law, as employees and pays them accordingly.

- [44] There was, accordingly, considerable merit in the first respondent's point in limine about non-joinder. The test for joinder has been distilled to the following: any person is a necessary party and should be joined if such person has a direct and substantial interest in any order that the court might make; alternatively, if such an order cannot be sustained or carried into effect without prejudicing such person, unless he or she has waived the right to be joined.[18] Quite clearly, the second respondent, insofar as it now seems to conduct the business previously carried out by the partnership, has a direct and substantial interest in the order sought by the applicants.

Relief and order

[45] The court is not satisfied that the applicants have demonstrated either a prima facie or a clear right to the relief sought. The original partnership agreement upon which the applicants rely is no longer binding. The relief sought pertains to the ongoing business of PEG Labelling, i.e. the suspension or otherwise of accounts held with various suppliers, the placing of orders with such suppliers for stock and materials, and the cancellation or otherwise of existing

orders.

These must be distinguished from the completion of transactions that were in progress at the time that the partnership came to an end, the winding up of partnership business, and the adjustment of the rights of the parties, in relation to the business previously carried out by the partnership under the name of PEG Labels. To all intent and purposes, the applicants are now employees of the second respondent and have relied upon the incorrect basis in law to assert a right to interdict the first respondent.

[46] It is not necessary to deal with the remaining requirements for either interlocutory or final relief. Notwithstanding, insofar as the applicants seek to protect their rights as partners of the erstwhile partnership in relation to the liquidation and distribution of its assets, it can well be argued that an alternative remedy is available. The applicants, to that effect, have instituted action proceedings against the first respondent, claiming a full account of the financial affairs of PEG Labels, the debatement thereof, and payment of whatever is due.

[47] Overall, the court is not persuaded that either interlocutory or final relief can be granted to the applicants. They have not satisfied the relevant requirements.

[48] The only remaining issue is that of costs. The first respondent's immediate reinstatement of the accounts after service of the application and his subsequent undertaking (subject to certain conditions), do not have an impact on the findings made above. The applicants, at the time of such reinstatement and undertaking, were not entitled to the relief sought. There was indeed a basis for the first respondent's decision to oppose the proceedings.

[49] The costs of the application were reserved by Mjali J at the hearing on 28 March 2022. No argument was led by either the applicants or the respondents in this regard. In relation to the joinder application, Gqamana J ordered on 14 June 2022 that the costs thereof be costs in the cause.

[50] In the circumstances, the following order is made:

- (a) the application is dismissed; and
- (b) the applicants are directed to pay the costs of the application, including the costs of the hearing on 28 March 2022 and the costs of the joinder application.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE:

For the applicant(s): Adv

Cole SC, instructed by

Allams Attorneys, East London.

For the respondent(s): Adv

Whitaker, instructed by

Bate Chubb & Dickson Inc., East

London.

Date of hearing: 25

August 2022.

Date of delivery of judgment: 22 November 2022.

- [1] The reason for the difference between the trading names will become apparent in the paragraphs that follow.
- [2] The applicants abandoned such relief during argument.
- [3] The question of liability for costs of the hearing on 28 March 2022, reserved at the time, must also be decided.
- [4] Henning, 'Partnership', in LAWSA (vol 31, 3ed, LexisNexis, 2022), at paragraph 488. See, too, *Wegner v Surgeson* 1910 TPD 571; *Fortune v Versluis* [1962] 1 All SA 414 (A).
- [5] *Wegner v Surgeson* (n 3, supra); also see *Kelly Group Ltd v Solly Tshiki & Associates (SA) (Pty) Ltd* [2010] JOL 25265 (GSJ).
- [6] Henning, op cit, at paragraph 491. See, too, *Davis & Son v McDonald & Sutherland* (1833) 1 M 86; *Bosman v Registrar of Deeds and The Master* 1942 CPD 302; *R v Levitan* [1958] 2 All SA 140 (T).
- [7] Lee and Honoré, *The South African Law of Obligations* (2ed, Butterworths, 1978), at paragraph 409.
- [8] Henning, op cit, at paragraph 490. Also see *Haarhof v Cape of Good Hope Bank*

[1887] 4 HCG 304; and, more recently, *Lee v Maraisdrif* (Edms) Bpk

[1976] 3 All SA 53 (A).

[9] Ibid.

[10] *Setlogelo v Setlogelo* 1914 AD 221, at 227; see, more recently, *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC), at 235D-E.

[11] *Setlogelo* (n 9, supra); also see *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA), at 496G-H, 496I, and 497G-H. The requirements for interdictory relief are well-established.

[12] 1957

(4) SA 234 (C).

[13] At 235.

[14] 1984 (3) SA 623 (A).

[15] At 634F-635C.

[16] Emphasis added.

[17] *Lee and Honoré*, op cit.

[18] *DE van Loggerenberg, Erasmus: Superior Court Practice* (Jutatstat, RS 16, 2021), at D1-124. See, too, *Kethel v Kethel's Estate* 1949 (3) SA 598 (A), at 610; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) 637 (A), at 659; and, more recently, *Watson NO v Ngonyama* 2021 (5) SA 559 (SCA), at paragraph [52].

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