

SOUTH AFRICA / JUDGMENT

Liebman v Liebman and Others (22282/19) [2019] ZAGPPHC 227 (6 June 2019) [2019] ZAGPPHC 227

COURT

North Gauteng High Court, Pretoria

BEFORE

PM Mabuse

CASE / FILE NUMBER

22282/19

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IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA
CASE
NUMBER: 22282/19

DATE: 6 June 2019
ATHOLL
DAVID VICTOR LIEBMAN
Applicant
V
BRADLEY
BRETT LIEBMAN
First Respondent
BRADLEY
BREIT LIEBMAN N.O.
Second Respondent
ALFREDO
FIGUEIREDO PEREIRA CAMPOS
Third Respondent
ALFREDO
FIGUEIREDO PEREIRA CAMPOS N.O.
Fourth Respondent
CAMPOS
ATIORNEYS
Sixth Respondent
POLLICK
PROPERTIES (PTY) LTD

Seventh Respondent
GOLDEN
WEDGE PROPERTIES (PTY) LTD
Eighth Respondent
KEN
LIEBMAN PROPERTIES (PTY) LTD
Ninth Respondent
ATHERB
INVESTMENTS (PTY) LTD
Tenth Respondent
VILLA
RIVAGE (PTY) LTD
Eleventh Respondent
NYAKAZA PROPERTY DEVELOPMENT
(PTY) LTD
Twelfth Respondent
PANAWAY PROPERTY DEVELOPMENT
(PTY) LTD
Thirteenth
Respondent
GREAT SPACE TRADING (PTY) LTD
Fourteenth Respondent
OUR GARDEN PROPERTIES (PTY) LTD
Fifteenth
Respondent
SWEET LOFT PROPERTIES (PTY) LTD
Sixteenth
Respondent
GOLD ALIAS INVESTMENTS (PTY)
LTD
Seventeenth
Respondent
ABSA BANK LIMITED
Eighteenth Respondent
STANDARD BANK LIMITED
Nineteenth
Respondent
NEDBANK LIMITED
Twentieth
Respondent
MERCANTILE BANK
LIMITED
Twenty First Respondent
INVESTEC
BANK LIMITED
a division of FIRST RAND BANK
LIMITED
Twenty Second
Respondent

JUDGMENT

MABUSE J:

[1] In this matter the Court is required to decide the following issues:

1.1 whether a partnership, as alleged by the applicant, does exist between the applicant and the first respondent;

1.2 whether the applicant has shown that he is entitled to an order dissolving the partnership;

1.3 whether the relief ancillary to the dissolution as formulated is appropriate.

On the basis of the principle of the law as set out in *Pillay v Krishna and Another* 1946 AD 946, that:

"He who asserts, proves and not he who denies since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that a denial is absolute." [p. 952], the duty rests on the Applicant to prove the existence of a Partnership.

[2] Having obtained an interim order against the Respondents on 8 March 2019 the Applicant, in this matter, Mr Atholl David Victor Liebman, a major male businessman who resides at 207 Walton Heith, 20 Jacobs, Illovo, Johannesburg, seeks the following relief against, in particular, the First Respondent, Bradley Brett Liebman, a major male businessman who resides at 17 Windsor-On-Vaal, Lock Vaal, Van Der Bijl Park:

2.1 "(a) an order that the partnership between the Applicant and the First Respondent in relation to the purchase, holding, selling and/or letting of immovable property (as more fully described in the founding affidavit) (the partnership) be dissolved,·

(b) that the liquidator be appointed with authority

(i) to realise the assets of the partnership·,

(ii) to liquidate the liabilities of the partnership;

(iii) to prepare a final account of the partnership business·, and,

(iv) to pay to the Applicant half the net assets of the partnership."

[3] To crystallise the issues in dispute it is the Applicant's case that there exists between him and the First Respondent a Partnership. On the other hand the First Respondent denies that there is any Partnership between him and the Applicant.

[4] The affray in this application is, strictly speaking and despite the citation of numerous Respondents, between the Applicant and the First Respondent. Sad as it is, it is between a father and his son. The Applicant is the First Respondent's father.

- [5] The major reason for seeking the current relief is, according to the Applicant, that the relationship between him and the First Respondent has deteriorated to such an extent that they are unable to cooperate with each other in any meaningful way. Because of the fraught relationship between them, they are unable to advance the affairs of the partnership.
- [6] The Applicant has one serious grievance against the First Respondent. That grievance is, as he puts it, that the First Respondent, who is his partner, transferred millions of rand out of various business bank accounts in the circumstances where this was against his, the Applicant's, wishes and against his legal interests. These transfers took place shortly before 8 March 2019.
- [7] The Applicant calls the relationship between him and the First Respondent, the relationship that has deteriorated, a partnership. He claims that he has, since 1996 or 1997, when he gave the First Respondent a full half share in the business known as Liebman Group and its constituent parts, and made him his partner. He claims furthermore that since then, he and the First Respondent have been having a tacit partnership. It is common cause between the Applicant and the First Respondent that they did not conclude any written agreement of partnership.
- [8] The Applicant testified that to the best of his knowledge the Joking Trust, the JRSM Trust, the Libvic Trust, the Randace Trust, the Renaissance Trust, the Seajon Trust, the Spilvic Trust, the Vicmail Trust and the K&RL Trust, as well as the Sixth to the Sixteenth Respondents ("the companies"), all of them private companies with limited liabilities, are still among the business entities that comprise the Liebman Group. He testified furthermore that he does not presently know exactly what business entities comprise the Liebman Group and whether there are also other such business entities or not. He says the persons who know what entities comprise the Liebman Group are the First Respondent and the Third Respondent.
- [9] According to him some of the companies that form part of the business entities that comprise the Liebman Group are the owners of immovable properties. These immovable properties are let to the tenants. It is through letting of these immovable properties to tenants that a profit is generated. The Eighth Respondent functions as the operating company which exercises control and administration over the letting of these immovable properties. A major part of the partnership consists of the business of fulfilling leasing tenders that are advertised in the Government Gazette. In that manner, quite a number of commercial properties are occupied by State entities such as the Department of Home Affairs and the Municipality.

[10] According to the Applicant the business entities that comprise the Liebman Group are also the owners of the bank accounts with various commercial banks in the Republic. These commercial banks are the Seventeenth to Twenty Second Respondents herein. As indicated above, the Applicant does not presently know exactly what other bank accounts may exist. According to him the persons who know what bank accounts exist are the First Respondent and the Second Respondent.

[11] The First Respondent disputes the Applicant's version. He denies that any partnership exists between him and the Applicant. He testifies that he and the Applicant have chosen to regulate their business affairs by electing corporate structures of the same and the manner in which such corporate structures would be controlled. According to the First Respondent he and the Applicant elected to become directors of the companies, and for such companies' shareholding to be held in equal shares by the following trusts:

11.1 50% of the shareholding in the companies, (save for Atherb and Nyakaza) are held by K&RL Trust. The trustees of the K&RL Trust are the Applicant, Jaqueline and Dianne Jennifer Prager. The beneficiaries of this trust are the Applicant, Jaqueline, Dianne;

11.2 The other 50% shareholding in the companies, (save for Atherb and Nyakaza) are held by the Brett Bradley Liebman Trust ("the BBL Trust"). The trustees of this trust are the First Respondent, his wife and Andrea Liebman and the Third Respondent, attorney AFP Campos. The beneficiaries of this trust are the First Respondent, his wife and the children.

The Applicant does not deny this statement by the First Respondent. He actually makes it even clearer. According to him, the corporate structure that the First Respondent referred to is a loose grouping of property holding companies, shareholding trusts and operating companies. He confirms that the business entities constitute the business entities that comprise the partnership between him and the First Respondent. He contends furthermore that the only thing that binds this loose grouping of property holding companies, shareholding trusts and the operating company is the partnership between him and the First Respondent.

[12] According to the First Respondent, in respect of Nyakaza, both the K&RL Trust and the BBL Trust own 19% of the shares each. The remainder of the shares are held by two BEE partners, a Mr J Ndwandwe and a Mr JH Mkhabela. The shareholding of Atherb is owned by a close corporation, OVH Unit 12 CC. The members' interests of the close corporation are held by the Applicant and the First Respondent in equal shares in their personal capacities.

[13] The Applicant has not attempted to dispute the First Respondent's evidence relating to the structures of the companies and trusts. In the premises it is inevitable that this Court will, and does, accept that the Applicant admits the evidence of the First Respondent in regard to the shareholding, the companies and the trusts structures.

[14] The Applicant states that notwithstanding the corporate structures involved he insists that the First Respondent and him have been de facto equal partners in the Liebman Group, since the First Respondent joined him as his partner. He relies, in this regard, on, inter alia, a copy of an email dated 26 November 2007 annexed as Annexure 'ADVL4' to his founding affidavit. This is an email that the First Respondent wrote to the Applicant in which he stated:

"Mom is not my business partner, you are, and she will not accept this. "

Furthermore he relies on the following circumstances:

14.1 he and the First Respondent have never concluded a formal written partnership agreement with each other and have not considered it necessary to do so;

14.2 he and the First Respondent have over the years conducted all partnership business with each other orally and on handshakes and

never reduced their partnership decisions to writing;

14.3 he and the First Respondent have always acknowledged each other in the conduct of the partnership business and looked after each other's interests therein;

14.4 the business of the partnership, according to him, was always conducted in concert between the First Respondent and him to the benefit of both of them as partners and with each one of them sharing equally in the profits and/or losses;

14.5 as they are family and as they had a strong trust relationship they never checked up on each other. They both trusted that what the other was doing was in the best interests of the partnership;

14.6 as partners the First Respondent and him always acknowledged each other's right to take part in all management decisions concerning the partnership;

14.7 both the First Respondent and him were always signatories on all the relevant bank accounts of the business entities that comprise the Liebman Group. Either of them could conduct a banking transaction without express approval or authorisation of the other.

[15] He submits, on the strength of the foregoing, that a tacit partnership agreement came into existence during or about 1996 or 1997 between him and the First Respondent with the following material terms:

15.1 the First Respondent and him would be equal partners in the Liebman Group;

15.2 the First Respondent and him would contribute equally to the management of the business of the partnership which entails the purchasing,

holding, selling and/or letting of property;

15.3 the purpose of the partnership would be to carry on a business for the joint benefit of both parties, with joint object of making profit; and

15.4 the First Respondent and him would be entitled to an equal share of the profits generated by the partnership and an equal share of the net assets of the partnership upon dissolution.

[16] He testified furthermore that the entity that holds his half share of the Partnership is the K&RL Trust. He acknowledges furthermore

that the entity that holds the First Respondent's half share of the Partnership is the BBL Trust.

[17] It is quite clear that the Applicant relies on a tacit contract of partnership. Relying on the case of Minister of Human Settlements,

Western Cape Provincial Government v Penhill Residents Small Farmers Cooperative Ltd and Others [2016] JOL 36052 (SCA) paras [25] to [27], counsel for the Applicant argued that:

"A Court may hold that a tacit contract is established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence. "

[18] Now what are those facts and circumstances, according to the Applicant, upon which an inference falls to be drawn that a tacit Partnership was concluded between the Applicant and the First Respondent? These facts and circumstances are, as argued by counsel for the Applicant, inter alia, that:

18.1 a failure to deny the Partnership in a letter emanating from the Respondent's attorneys;

18.2 the First Respondent's own statement that he is the Applicant's partner;

18.3 the First Respondent's continued reference to the business entities comprising the partnership collectively a group or the Liebman Group or simply "the business" and not individually;

18.4 the absence of a formal corporate structure overarching the business entities comprising the partnership other than the partnership;

18.5 the absence of holding and subsidiary companies which with cross shareholding and group financial reporting, as one would ordinary find in a company groupings;

18.6 the fact that all control was exercised by the Applicant and the First Respondent;

18.7 the fact that the Applicant's and the First Respondent's decisions as directors and trustees of the business entities comprising the partnership were always guided by, and determined by, their decisions as partners;

18.8 the fact that the Applicant and the First Respondent did not conduct the affairs of the business entities comprising the partnership in a strictly formal manner, it was rather with a lax attitude towards the separate corporate personalities or identities of these entities;

18.9 the First Respondent's own conduct towards the partnership bank accounts;

18.10 the opinion of attorney David Kotze who was the group attorney for more than ten years and who had ample opportunity to observe the workings between the Applicant and the First Respondent that formed what he observed the Applicant and the First Respondent to behave towards each other in relation to the business as if they were partners;

18.11 the First Respondent disputes the testimony of the Applicant that the First Respondent and him have been de facto equal partners in the Liebman Group since the First Respondent joined him as a partner; that the First Respondent joined the Liebman Group because he, the Applicant, had invited him to join and furthermore that the interest that the First Respondent obtained in the Liebman Group was given to him by the Applicant when he joined. Firstly, he testified that the Applicant's quotation of the word "partner" in the email dated 26 November 2007 is out of context and shows signs of desperation on the part of the Applicant to establish a partnership. In particular the First Respondent testified that these allegations by the Applicant are not true. He says that prior to consolidating the efforts with the Applicant he owned a number of properties in his own name. He was, inter alia, the sole shareholder of or member of Larney Town CC and Brandy Properties (Pty) Ltd. Furthermore he had a 50% share in OVH Unit 4 CC and OVH Unit 11 CC with one Ivo Kaye. He was the sole trustee of Bradley Trust, another property owning trust. Accordingly the Applicant contends that the Respondent cannot simply ignore the corporate structure of the companies and the trusts put in place since 1999. He reiterates once more that no partnership exists between him and the Applicant;

18.12 the First Respondent admits that it is correct that both the Applicant and him retained the power to do banking independently from each other until the order of 8 March 2019.

[19] The First Respondent states that during his years at university he worked part time for KLP. In 1983 he was employed by the company on a full-time basis. In 1985 the Applicant left to the USA and only returned to South Africa in 1992. In 1986 he left to the USA to study but returned to South Africa in 1987. During the period 1987 and 1992 the Applicant had asked him to manage the affairs of KLP and his other business interests. During the period 1987 until 1992 he conducted his own business specialising in property development. By 1992 he had a number of own separate property owning companies, close corporations and trusts. After 1992 the Applicant and him went into a series of new developments through various companies and trusts. In or around 1999 both the Applicant and him sold a few of these properties. He also sold many of his own separate interests. On this basis he is convinced that the Applicant's version regarding an alleged partnership between the two of them is contrived. He is adamant that the Applicant and him are not partners and never have been.

[20] He admits that it is correct that he provided the Applicant with the powers of attorney to act in his name with regard to the aforesaid juristic entities in which he was involved with the Applicant at the time, as well as his own separate interests as aforementioned, while he was away in San Diego, USA. When he returned to South Africa he once again became involved in the aforesaid businesses but not as the Applicant's partner. It is correct that he revoked

the said powers of attorney that he had given to the Applicant in 2007. He relies also on a copy of a letter dated 3 August 2007 Annexure 'ADVL3' and contends that it confirms that no partnership existed as alleged or at all. That letter reads, inter alia , as follows:

"3. A revocation of all powers of all trust companies, close corporations that were granted in the past by Bradley Brett Liebman.

I wish to thank you for taking care of my affairs to date since I was in the United States. Since I am now back in South Africa I will assume full control of all my own affairs and in the business trusts and companies of which we are involved ... "

In the said letter no mention is made whatsoever of any alleged partnership between the Applicant and the First Respondent.

[21] In regard to the structure that the First Respondent has mentioned relating to the companies and trusts, he concluded that it is clear that the Applicant and him are either directors and/or trustees of the relevant juristic entities and are not partners. The First Respondent complains that the Applicant omitted to include a reference to K&RL Trust and BBL Trust when he referred to "business entities that comprise the partnership". He submits that this is significant as the shareholdings of the companies are owned by the K&RL Trust and BBL Trust, as already

indicated.

[22] Adv A Bester SC, counsel for the First Respondent pointed out, quite correctly so, that it is common cause between the parties that the Applicant has to prove a contract of partnership which means that he has to prove a contract in terms of which:

22.1 each of the parties undertook to bring into the partnership money, labour or skill;

22.2 the parties agreed to carry on a business for the joint benefit of the partners and;

22.3 the common object on carrying on such business is to make a profit.

Then he quoted the following paragraph from *Cooke v Morrison and Another* (131912017) [2019] ZASCA 08 (8 March 2019):

"I accept that a replication may be unnecessary where the facts given rise to the delay in completion of prescription are sufficiently alleged in the creditors' particulars of claim. That was not the case here. In the light of the allegations in his particulars of claim I do not think Cooke could have filed a non-excusable replication based on s 13(1)(d). In order for that provision to apply the relationship between the creditor and the debtor must be one of "partners" and the debt must be one arising of the partnership relationship. The words "partners" and "partnership" have their ordinary common law meaning. The legal relationship of partnership arises from a contract between two or more persons by which each agrees to make a contribution "whether in money, property or service" to a venture to be carried on Jointly by them with a view to making a profit and on a basis of sharing the profits and losses." In other words, it is for a party claiming

partnership to prove the existence of such partnership.

[23] In support of the First Respondent's statement that he and the Applicant were either directors and/or trustees of the relevant juristic entities and are not partners and in addition in support of the statement that before the Applicant obtained the order of 8 March 2019 the Applicant and the First Respondent were working together, Mr Bester quoted the following paragraph [20] from the same case of Cooke:

"Where persons agree to conduct a venture through a company and become co- shareholders the company is not a partnership and the shareholders are not partners. " See in this regard also *Ebrahim v West Bond Galleries Ltd* [1973] AC 360 (HL) at 379 H- 3808. *APCO Africa (Pty) Ltd and Another v APCO Red White Inc* [2008] ZASCA 64; 2008 (5) SA 615 (C) paras 17 to 18.

[24] It will be recalled that the Applicant stated that the business of the partnership consists of at least the business of the Sixth to Sixteenth Respondents as well as a number of trusts. Arguing that the application cannot succeed Mr Bester relied, in this regard, again on Cooke paragraphs (21) and (22) where the Court had the following to say:

"[21] Cooke's pleaded allegations concerning the Joined venture agreement' concluded in February 2003 and implemented over the period 2003 to 2007 do not cover the essentialia of partnership. These allegations are in fact irreconcilable with such essentialia. He alleges that the line comprising of the reserve continue to belong to the three existing registered owners, that the game, vehicles, and equipment were owned by Salisbury; and the Eco Tourism business by SGRL. The expenses and profits of the Eco Tourism business were those of SGRL. The expenses and profits of the game farming business were those of Salisbury. To the extent that there were expenses and profits from landownership, they were incurred and made by the individual landowning companies. Cooke, Morrison and the Fox parties might have benefited indirectly through the dividends received as shareholders in one or more of the companies but there is no pleaded arrangement in terms of which the companies and/or shareholders inter se were to conduct a single venture in which they would share profits and losses.

[22] The Joint venture' was thus a mixture of relationships. Save in relation to the land, the parties were associated as shareholders of companies. The particulars of claim make no allegations regarding the relationship between SGRL, Salisbury and the various persons who own the portions of land making up a reserve. Parties may cooperate with each other to advance their individual businesses. Such cooperation does not mean they are partners.,,

[25] That there is no partnership in this current case is as clear as crystal. The shareholders of the various companies are trusts. The Applicant and First Respondent are not shareholders of such companies. The "Daniel in a lion's cage statement" by the Applicant that the parties could choose to hold their partnership business in one or more companies, close corporations or business trusts for whatever reasons but notwithstanding this they remain partners towards each other, does not enjoy the support of the facts stated in evidence or the law. This is so for the following reasons. The trusts to which the Applicant has referred are all registered in terms of the Trust Property Act 57 of 1988. They are therefore trusts within

the meaning of the Act: ""Trusts" means the arrangements through which the ownership and property of one person is by virtue of a trust instrument made over or bequeathed -

- (a) to another person, the trustee in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument, or
- (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or the class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.
- (c) but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 36 of 1965)."

[26] Mr Wesley contended that the companies and the trusts were the assets of the partnership in other words, the companies in which the Applicant and the First Respondent were directors and the trust in which they were trustees, were, according to his argument, assets of the partnership which started in 1996 when the Applicant gave the First Respondent his shares. This argument, in my view, is skewed. As proof that the companies and trust could not in law be the assets of the partnership, Adv Bester SC referred this

Court to the case of Braun v Blann and Botha NNO [1984] ZASCA 19; 1984 (2) SA 850 A at 859 F-H where Joubert JA, as he then was, stated the following:

'[t]he trustee is the owner of the trust company for purposes of administration of the Trust but qua trustee he has no beneficially interest therein . . . in a private trust, i.e., a trust not for an impersonal purpose, the beneficial interest pertain to the trust beneficiaries either as income beneficiaries or as capital beneficiaries."

On the basis of the foregoing paragraph the partnership could not in law be the owner of the trusts referred to in this matter. Trustees are bound to deal with the trust property and any income generated thereby in terms of the Trust Property Control Act, the common law principles regarding their conduct and the terms of the Trust Deed. Section 12 of the Trust Property Act expressly provides that:

"Trust property shall not form part of the personal estate of the trustee except insofar as he, as trust beneficiary, is entitled to the trust property. "

[27] Mr Wesley's contention that the partnership is the owner of the companies involved in this matter is also without merit. A company is a legal entity distinct from its shareholders. It owns its assets. See in this regard *City Capital SA Property Holdings (Pty) Ltd v Chavonnes Badenhorst St Claire Cooper N.O.* 98512017) [2017] ZA SCA 177 (1 December 2017) at paragraph 27 where the Court had the following to say:

"It is trite that a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own, separate from those of its shareholders. Its property is its own and not that of its shareholders. See in this regard *Salomon v A Salomon and Co* [1891] AC 22 at 51 which was followed in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550. This follows from the separate legal existence with which a company is by statutes endowed. Thus, in *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* [1993] ZA SCA 167, 1994 (1) SA 550 A at paragraphs 566 C - F Cobert CJ, as he then was, had the following to say:

"It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those by its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law or occurs in those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I don't find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice to say that they would generally have to include an element of broad or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words "device": "stratagem": "cloak": and "sham " have been used "

On the other hand, under common law a partnership is not a persona or a separate legal entity distinct from the individuals who constitute the partnership. See in this regard *Ehrig and Weyer v Trust Atlantic Insurance Co* 1905 TS 560 in which Innes CJ had the following to say:

"Clearly the two persons were making the proposal as a firm, and the policy was subsequently issued in favour of the firm. I do not mean to say that a firm has a separate persona. Both by English law and our own a firm has no separate persona apart from the partners. Although a firm may for some purposes be treated as having a separate identity, the fact that a firm has no persona cannot be disputed. "

The partnership cannot therefore own property. If property is owned jointly by the partners, they become co-owners. It is quite clear that a company has rights and liabilities of its own separate from those of its shareholders. Its property is its own and not that of its shareholders. Accordingly, the argument by Mr Wesley that the assets of the partnership are the companies and trusts cannot hold any water. Furthermore in view of the fact that the Applicant has not brought any application for an order in terms of which to pierce the corporate veil I will not be detained by this aspect.

[28] Finally, it was argued by Mr Bester that the absence of a formal corporate structure overarching the business entities and the absence of holding or subsidiary companies with cross shareholding and group financial reporting is not indicative of the existence of a partnership. According to him, and I agree with him, there are no requirements in the Companies Act that indicate that such an overarching business entity or subsidiary companies must be established.

[29] In his heads of argument Mr Bester stated that the Applicant does not envisage a liquidation of the alleged partnership which, he alleges to be “the only thing that binds these loose grouping of property holding companies, shareholding trust and operating company together” but, in fact a liquidation of the companies and a sequestration of the trust, as the Applicant states:

"If the application should succeed then the duly appointed liquidators will have access to the funds of the various entities and trusts. "

The foregoing statement stands in direct contradiction to a statement by the Applicant who in his replying affidavit states that he is not trying to liquidate any of the companies. In paragraph 27 of his replying affidavit the applicant states as follows:

"The prescripts of the old Companies Act and the new Companies Act regarding the winding-up of companies do not apply because I am not trying to liquidate any of the companies."

According to Mr Bester, this statement illustrates the difficulty with which the Applicant is faced. The Applicant concedes that, through an order dissolving the partnership, he will inevitably require the undoing of several corporate entities and trusts. The Applicant will therefore not achieve the results of liquidating the companies by dissolving a partnership. In terms of the provisions of s 79, 80 and 81 of the Companies Act 71 of 2005, there are recognised grounds in terms of which companies may in law be wound- up. It is not anyone of such grounds that a company may be wound-up by dissolving a partnership. The relief that the Applicant seeks of wounding-up the companies in this matter is not possible in law. Equally, one cannot terminate a trust by dissolving a partnership. A trust, like a company, exists on its own. Its lifespan does not depend on the lifespan of a partnership.

[30] Mr Bester concluded that in the circumstances relied upon by the Applicant a partnership does not exist. Looked at from a different

angle, given the pre-eminence given to the separate legal entity of companies and the peculiar and specific rules relating to trusts, the inference sought by the Applicant cannot be drawn because it quite patently contradicts such legal positions with which he has not shown could be or have been unseated.

[31] Now, in the final analysis, there is no evidence by the Applicant to show that:

31.1 the aforesaid partnership has any name. The Court asked Mr Wesley what the name of the partnership was and he expressly stated that the partnership has no name;

31.2 the partnership has any assets or liabilities. I have pointed out in the judgment that the assets of the company belong to it and that the assets of the trust belong to such trust. The assets of a trust cannot in law be the assets of a partnership nor can the assets of a company be the assets of a partnership;

31.3 the partnership carries on legal business or undertaking. The word "business" means any activity which occupies the time,

attention and labour of the partners for the purpose of making profit. It is consequently wrong for the Applicant to state that the purpose of the partnership would be to carry on a business for the joint benefit of both parties with joint objects of making profit. The said partnership carried on no lawful business or undertaking.

31.4 the Applicant is unable to produce any tender document or any document filled in and submitted to a government department e.g. tax returns filed with the Receiver of Revenue or lease agreements or agreements of purchase and sale of any landed property or documents reflecting any commercial transaction which reflects the existence of a partnership between him and the Applicant.

It is correct that a partnership may be formed, without any agreement, by the facts and conduct of the persons in carrying out transactions together and sharing on profit and loss. In *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 A the Court in dealing with tacit contracts in general had the following to say at 292 8-C:

"In order to establish a tacit contract it is necessary to show, by preponderance of probabilities, an unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended two, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem."

It is consequently of paramount importance for the Applicant to prove, among others, that he and the First Respondent carried out some transactions together and more importantly that he and the First Respondent shared profits and losses. Apart from alleging that "the business of the partnership, according to him, was always conducted in consent between the First Respondent and him to the benefit of both of them as partners and with one of them sharing equally in the profits and/or losses"; the Applicant has failed to satisfy the Court that he and the First Respondent carried out transactions together and secondly, that he and the First Respondent shared the profit and loss together.

[32] In conclusion I am satisfied that the Applicant has failed to satisfy this Court that any partnership between him and the First Respondent exists as claimed. Accordingly the following order is made:

1. The interim order obtained by the Applicant on 8 March 2019 is hereby discharged.
2. The Applicant's application is hereby dismissed with costs, which costs shall include the costs consequent upon the employment of two counsel.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv CP Wesley

Adv K van Zyl

Instructed by:

JHS Attorneys

c/o Paul Du Plessis Attorneys

Counsel for the First Respondent: Adv A Bester (SC)

Adv L Franck

Instructed by:

Aaron Stanger & Associates

c/o Jacques Classen Attorneys

Date heard:

30 May 2019

Date of Judgment:

6 June 2019

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