

SOUTH AFRICA / JUDGMENT

# M-B.F.M v H.P.N.P (5182/2022P)

## [2024] ZAKZPHC 8 (8 February 2024)

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## COURT

Kwazulu-Natal High Court, Pietermaritzburg

## BEFORE

Pitman

## CASE / FILE NUMBER

5182/2022P

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no:5182/2022P

In the matter between

M[...]-B[...] F[...] M[...]

Plaintiff/Applicant

and

H[...] P[...] N[...] P[...]

Defendant/Respondent

JUDGMENT IN AN AMENDMENT APPLICATION

PITMAN AJ

- [1] In this action the plaintiff brings an application for the amendment to the particulars of claim by the substitution of those that accompanied the summons with those set out attached to her notice of amendment dated 16 May 2023. A copy of which can be found on pages 29
- 43 of these papers. The defendant objected to the proposed amendment resulting in this application. The defendant's objections are to be found on pages 44 – 49.

- [2] The papers are substantial, comprising 205 pages. This is because the applicant has included in the papers the history of earlier attempts by the applicant to amend and the various notices and objections involved therein. None of that, in my view, is of any relevance to the merits of the proposed amendment and ought not to have been included as part of this record. Applicant argues that they are relevant to the punitive costs order sought. That may be so, but simple and short reference to them in the founding affidavit would have been suffice.
- [3] The particulars of claim attached to the initial summons in summary alleged that the parties had lived together despite never being married for about six and half years pursuant to an alleged agreement that they would do so and would, inter alia, share in all of their assets. In the event of their relationship terminating, they would equally share the assets they had started with plus those that had been accumulated. It was pleaded that in the circumstances what is referred to as a Universal Partnership was created. It was pleaded that that relationship was terminated on 18 November 2021 and that as a consequence the plaintiff was entitled to Orders declaring the universal partnership to have existed, the valuation of the estate at its termination and a number of further claims for Orders for the payment of specified sums of money.
- [4] The pleadings are still in their infancy despite the summons having been issued in April 2022. There has been no plea to the initial particulars of claim because of the objections to it by the defendant from the outset.
- [5] The proposed new particulars of claim (“the particulars”) also plead, but in a different manner and form, for a universal partnership coming into existence between the parties and sets out the facts upon which it will be alleged that lead to that conclusion. It also alleges that that partnership terminated on 18 November 2021

and sets out the reasons for that conclusion. The Orders now sought follow from those allegations, being the declaration of the universal partnership and its termination, together with ancillary Orders as a consequence thereof.

- [6] The defendant’s objections, and the argument before me, can be summarised as follows:
- a) Whilst pleading that during the existence of the universal partnership various assets were either brought into the universal partnership or established or acquired during its existence and thereafter used in the business of the universal partnership, no particulars are provided as to exact identity of these alleged assets and accordingly the pleadings are vague and embarrassing.
  - b) The claim for the appointment of a receiver or liquidator without identifying the said assets renders the particulars vague and embarrassing.

- c) The claim that the parties deliver to the receiver or liquidator a statement of each's "assets and liabilities as at 18 November 2021" is contradictory to the allegation in paragraph 7.7 of the particulars.
  - d) In the answering affidavit, and in argument, a further new objection was raised being that the plaintiff had failed to plead an essential element of a universal partnership, namely the allegation that it was established to make a profit. That objection had not been included in the Notice of Objection.
  - e) In argument only the defendant also raised an additional objection being that the failure to join the various "entities" referred to in the particulars rendered them excipiable on the basis of non-joinder.
  - f) I also note that in the answering affidavit, the defendant alleged that the particulars did not introduce triable issues on the basis that it needed allegations of the evidence that would be led to prove the universal partnership. That objection was not pursued in argument before me nor in the defendant's heads. It was ignored. I have no doubt that that is because that objection, at this early stage of the litigation is meritless in my view. I therefore do not propose to deal with it any further.
- [7] The plaintiff argued that the particulars were not excipiable on any basis. All that needed to be pleaded were the *facta probanda* and that had been done. There could be no prejudice to the defendant for purposes of a plea and the particulars could be pleaded to. Joinder was not an excipiable issue but could be taken by way of a special plea if necessary. The alleged failure to plead the requirement of the making of a profit had not been raised in the Notice of Objection and despite being raised in the answering

affidavit, this Court should, and could, not consider it as the Court was bound by the Objections set out in the Notice. It was argued that in any event, the particulars, if read as a whole, clearly provided allegations that the alleged partnership was for profit. I was referred to, for example, paragraphs 5.11, the thereafter repeated allegation that the aim was to "accumulate wealth", the thereafter repeated allegation as in paragraph 7.6 that the parties would "support themselves and the joint household from the income and the profits from the aforesaid business enterprises...".

- [8] The plaintiff's counsel also referred me to the judgment of Southwood J in *Manyatshe v South African Post Office*, 2008. She handed me a copy. I have found it in the Jutastat library where it is cited as *Manyatshe v South African Post Office Ltd*, 2008 JDR 0999 (T). In paragraph [2] thereof, being a matter of an opposed application for an amendment, Southwood J said: "The defendant opposes the application on the grounds that the particulars of claim will be excipiable, either because they will lack averments necessary to sustain an action or because they will be vague and embarrassing. The grounds of objection are appropriate to an exception and accordingly the application will be dealt with as if it were an exception. This is preferable to allowing the amendment in the sure knowledge that the defendant will immediately note an exception – *De Klerk & Another v Du Plessis & Others* 1995 (2) SA 40 (T) at 43I – 44B".

In the De Klerk matter referred to therein, Van Dijkhorst J said the following: “The application for amendment was opposed on the ground that the incorporated part of the plea would then be excipiable for a number

of I reasons. An amendment which would render a pleading excipiable should not be allowed. Whether a pleading would or would not become excipiable is a matter of law which should be decided by the Court hearing the application for amendment. It would be incorrect, in my view, to hold that it is arguable that the amendment would not render the pleading excipiable, allow it, and send the parties away to prepare for another battle on exception on the same point.” (Supra) at 43I – 44B.

- [9] I am in entire agreement with the view of Southwood J and Van Dijkhorst J on that issue. The approach is applicable to the facts in casu, particularly where there may prima facie be an intention by the defendant to further delay the conclusion of this matter, as is argued by the plaintiff. Accordingly, my decision is premised on that legal position.
- [10] As long ago as Moolman v Estate Moolman 1927 CPD 27 at 29, the general approach to be applied in opposed applications for amendments was that the “practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to be amend was filed”.
- [11] In my view, a rational and sensible reading of the proposed particulars reveals that the required elements of an alleged universal partnership (The facta probanda) are adequately pleaded. I do not consider that it is necessary for the plaintiff, at the stage of her particulars of claim, to set out a more precise identity of each and every entity or business she alleges was brought into the partnership or created or established during the partnership. The essentials to be pleaded in relation to such a partnership contract are:

*“(a) That each of the partners brings something into the partnership or binds*

himself/herself to bring something into it, whether it be money or labour or skill.

- (b) That the business should be carried on for the joint benefit of both parties.
- (c) That the object should be to make profit; and
- (d) That the contract between the parties should be a legitimate contract.”

See for example the judgment of Hugo J in Zulu v Zulu and Others 2008 (4) SA 12 (D) at page 15, H – J

- [12] That being said, the proposed particulars of claim in fact describe in detail what the plaintiff alleges the parties did in furtherance of the partnership businesses and entities acquired by it together with the businesses traded in by the partnership during its subsistence in paragraph 8 (over 9 pages). In my view more than sufficient particularity is pleaded to which the defendant can plead. The pleadings are not vague and/or embarrassing in my view.
- [13] The objection that the element of “profit” is not alleged was raised late. As set out above, it does not appear in the Objection. I do not need to decide whether it is permissible to determine it as a consequence because I consider it to be meritless in any event. “Profit” in regards the requirement for this alleged universal partnership need not be purely financial. See for example *Ally v Dinath* 1984 (2) SA 451 (T) where at page 455, Eloff J said: “I turn to the second point raised in the exception, namely that the pleading is excipiable for want of an averment that the object of the enterprise was to make a profit. It is at once necessary to state what is meant by the requirement that the object of a partnership should be to earn a profit. What is required is not a pure pecuniary profit motive; the achievement of another material gain, such as a joint exercise for the purpose of saving costs, will suffice. De Groot 3.12.1 requires no more than that the aim should be “gemene baat te trekken”. And in Isaac’s case supra at 956 an object “to

provide for the livelihood and comfort of the parties, and their children, including the proper education and upbringing of the

latter” was held to be equivalent to making a profit and thus sufficient for partnership purposes. In the present case the objective of the accumulation of an appreciating joint estate is alleged, and, at least for pleading purposes, that is in my estimation sufficient”.

- [14] On that basis, in addition to what I have said above as regards the pleaded allegations of “profit” and “wealth” being a purpose of the partnership, the plaintiff alleges in, for example, paragraph 8 that it was agreed that she would assist the defendant with administrative tasks in the businesses, would assume the responsibility of running the joint household and looking after the children in order to provide him the opportunity to “accumulate assets” for the benefit of the partnership.
- [15] In the circumstances I am of the view that the element of “for profit” is sufficiently pleaded and that the belated objection as to the lack of all elements of the cause of action is meritless and has not been bona fide raised by the defendant.
- [16] As to non-joinder, the second belated Objection, the plaintiff’s Counsel argued that the point had not been raised in the Notice of Objection, nor as a directly relevant point in the answering affidavit. She argued that in any event it was not an excipiable issue and should be raised as a special plea. I asked the defendant’s counsel for any authority that non-joinder could be raised at the exception stage. She could provide none notwithstanding that her heads of argument spent at least a page on that submission. I therefore directed that the parties could both provide supplementary written heads by 16h00 on Monday 5 February 2024 by emailing them to my registrar. The defendant’s Counsel took up the offer and

provided such supplementary head, as did the plaintiff's Counsel. In her supplementary heads the defendant's Counsel refers to judgements which confirm the basic principle that misjoinder or non-joinder may be raised at exception stage. However,

in *Smith v Conelect* 1987 (3) SA 689 (W) at page 693, the following was set out, "...I consider that on the authority stated and on the wording of Rule 23(1) that the Rule has not in any way curtailed the right of a party in an appropriate case to raise the question of non-joinder by way of exception, provided, of course, as was stated in Toffie's case, that the exception mentions that ground. See again *Anderson v Gordik Organisation* (supra)". (My underlining). Plaintiff's Counsel argued that despite the apparent general principle, it is only to be applied in "appropriate

cases" and then only if the allegations in the summons clearly indicate that a necessary party has not been joined. In casu, the objection of non-joinder is not raised in the Notice of Objection, and the fact of non-joinder is only fleetingly raised in the answering affidavit herein at the end of paragraph 47.2 where the actual complaint is the plaintiff's alleged failure to fully describe the businesses or commercial enterprises allegedly conducted by the partnership. As a result, the issue did not form the basis of the Objection until belated being raised only in argument before me. As a result, it cannot therefore succeed and it is not necessary for me to consider whether, even if it had, such objection was sustainable. Even if I were wrong in this regard, I am of the view that it could not succeed. I refer to the judgment of the Supreme Court of Appeal in *Judicial Service Commission and Another v Cape Bar Council and Another* 2013

(1) SA 170 (SCA), where at paragraph [12], the test is restated as follows:

*"It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC and Another 2007"*

(5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."

In my view the proposed particulars, read with the relief sought, does not directly affect any of those entities or businesses. It is not strictly necessary to join them. The point is therefore not susceptible to a successful exception.

[17] I therefore intend granting the plaintiff leave to amend. Before I do so it is necessary that I deal with the plaintiff's Counsel's patent failure to comply with the Practice Directives of this Court in respect of her Heads of Argument and Practice Note arising out of the following:

a) The Heads of Argument ran to twenty-nine pages. The Practice Directives of this Division applicable at the time they were prepared and delivered, read as follows:

*“9.4 The following practice direction is in force in regard to opposed motions both in Pietermaritzburg and Durban:*

9.4.1 The applicant, excipient or plaintiff in opposed motions, exceptions and provisional sentence proceedings shall not less than ten clear court days before the day of the hearing deliver concise heads of argument (which shall be no longer than five pages ("the short heads")) and not less than seven clear court days before the hearing the respondent or defendant shall do likewise. The heads should indicate the issues, the essence of the party's contention on each point and the authorities sought to be relied upon. The parties may deliver fuller, more comprehensive heads of argument provided these are delivered simultaneously with the short heads. Except in exceptional circumstances, and on good cause shown, the parties will not be permitted to deliver additional heads of argument.

The heads of argument shall be delivered under cover of a typed note indicating:

- (a) the name and number of the matter;
- (b) the nature of the relief sought.
- (c) the issue or issues that require determination.
- (d) the incidence of the onus of proof.
- (e) a brief summary (not more than 100 words) of the facts that are common cause or not in dispute.
- (f) whether any material dispute of fact exists and list of such disputed facts.
- (g) a list reflecting those parts of the papers, in the opinion of counsel, are necessary for the determination of the matter.
- (h) a brief summary (not more than 100 words) of the argument.
- (i) a list of those authorities to which particular reference will be made;
- (j) in appropriate cases the applicant, excipient or plaintiff must annex to the note a chronology table, duly cross-referenced, without argument.
- (k) if the respondent or defendant disputes the correctness of the chronology table in a material respect, the respondent's or defendant's heads of argument must have annexed thereto the respondent's or defendant's version of the chronology table.”

Twenty-nine pages are grossly in excess of the five required pages. In as much as “long heads” are permitted, if necessary (and I do not accept that an application for amendment such as this one needed long heads), no “concise” heads were delivered accompanying the only set submitted.

- b) The Practice Note also bore no resemblance to that which is required in this Court as set out above.

- [18] I noted in preparation that the plaintiff's Practice Note, where it did comply, stated that the Court was required to read all 205 pages of the papers. I refer to this further below.
- [19] Counsel for the defendant delivered eight pages of Heads of Argument. That also exceeds the Practice Directive requirement, but some discretion is permissible for minor infringements which I conclude this was. Her Practice Note complied with the directive's requirements and included indicating that the Court only needed to read 63 of the pages as identified by her.
- [20] Counsel for the plaintiff conceded, when questioned on these issues, that she had not read the Practice Directions for this Division prior when preparing her Heads and Practice note. She persisted, however, that the Court needed to read all the papers. In my view reading all 205 pages in this matter was entirely unnecessary and a waste of time. I agree with the defendant's counsel that the pages she referred to were sufficient. It seems that once again legal representatives who appear for opposed matters need reminding that it is essential, where required, to properly and sensibly consider the question of which pages actually need reading to determine the matter and indicate accordingly.
- [21] Practice Directives constitute procedures carefully weighed and prepared by each Division to ensure its effective and smooth running. It would surprise me to hear any Advocate say that they are not aware of this, or that they do not know that different Divisions have different practice Directives. I am well aware of how intensive and comprehensive the advocacy pupillage programme for aspirant advocates is, and that it covers such topics. Counsel for the plaintiff conceded she knew as much and apologised "profusely" and stated she had "learned her lesson". Whilst I accept her apology as being sincere and genuine, it is necessary in my view to voice the displeasure of the Court in a salutary manner, which I do in the costs Order I make.
- [22] As to costs, plaintiff sought punitive costs and the defendant argues that in the event of the application being successful they should be reserved for later decision by the trial Court or any other Court dispensing with the matter before then. Because I have decided the matter effectively, as an exception, I cannot foresee any other Court being in any better position than me to make the costs decision herein. The amendment was opposed, and the plaintiff was obliged to approach the Court for this relief. The cost should follow the result save for those in relation to the plaintiff's Counsel's

costs in respect of her Heads of Argument and Practice Note for the reasons I have set out above. The plaintiff is not entitled to punitive costs.

[23] In the result I make the following Orders:

1. The plaintiff is granted leave to amend her particulars of claim in accordance with the plaintiff's notice of intention to amend dated 16 May 2023.

2. The plaintiff is directed to deliver her amended particulars of claim within 5 days of the granting of this Order.
3. The defendant is directed to pay the costs of the application save for two-thirds of the costs charged by the plaintiff's Counsel in respect of her heads of argument, which two-thirds are disallowed.

PITMAN AJ

Date reserved:

2 February 2024

Date delivered:

8 February 2024

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