

SOUTH AFRICA / JUDGMENT

Nair v Chandler (13650/06) [2006] ZAGPHC 68; 2007 (1) SA 44 (T) (19 July 2006) [2006] ZAGPHC 68

COURT

High Courts - Gauteng

BEFORE

Mavundla

CASE / FILE NUMBER

13650/06

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IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) CASE

NO:13650/2006 DATE: 2/8/2006 REPORTABLE In the matter between: S

J NAIR PLAINTIFF AND J W CHANDLER DEFENDANT JUDGMENT MAVUNDLA, J1. This is an

opposed application for a summary judgment against the defendant. I consider it necessary to chronicle the particulars of claim before embarking on dealing with the summary judgment application. 2. In his particulars of claim the plaintiff avers in paragraph 3 that on or about 2 October 2003 and at Johannesburg the parties entered into a written agreement. He attached as annexure B, a copy of the relevant agreement. 3. The plaintiff further avers in the particulars of claim that: 3.1. the express alternatively implied, further alternatively tacit terms of the partnership agreement were that the parties formed a partnership to be known as Tip Top Productions Company to conduct and carry on business of public relations, advertising, marketing communications, consulting, event planning and celebrity management; 3.2. the partnership was formed for the express purposes for event as Summer Vibes South Africa; 3.3. The partnership commenced on 1 October 2003 and would continue until terminated; 3.4. The initial capital contributions of the partners to the partnership would be as follows: 3.4.1. The plaintiff—goodwill, business experience, work product and all event planning, promotions of movies and concerts; 3.4.2. The defendant—initial capital contribution and payment of all reasonable costs of the event known as Summer Vibes South Africa

including but not limited to all cost related to the artist and promotion of the said event 3.5. in the event of the plaintiff incurring liability, alternatively in the event that the plaintiff expended money for the benefit of the partnership, the defendant would forthwith reimburse the plaintiff. 3.6. Pursuant to the conclusion of the partnership agreement the parties proceeded with the planning of the event known as Summer Vibes South Africa, which event would include three concerts to be held in Johannesburg, Durban and Cape Town during December 2003. 3.7. On or about 14 November 2003 and at the Defendant's instance, the Plaintiff utilised Cachet Communications (Pty) Limited (now in

liquidation) of which the plaintiff was the sole director, to conclude a written agreement with Gearhouse South Africa (Pty) Limited (hereinafter referred to as Gearhouse) to provide inter alia the lights, audio, rigging, structures, crowd control, camera, etc for the Summer Vibes South Africa events and Gear House required of the Plaintiff to stand personal surety. 3.8. The services of Gearhouse were duly utilised for the benefit of the partnership, utilising Cachet as aforementioned and payment of the sum of R2 109 000,00 became due to Gear House. 3.9. Pursuant to the Defendant's obligation in favour of the Plaintiff in terms of clause 3 of the partnership agreement the defendant made payment in favour of Gearhouse in the sum of approximately R1 031 732,00. 3.10. In order to liquidate the balance outstanding in favour of Gear House and in terms of the Defendant's express obligations in terms of clause 3 of the partnership agreement in favour of the Plaintiff, the Defendant furnished, upon presentation by the Plaintiff to the Defendant of the invoices from Gearhouse addressed to Cachet, as payment, two further cheques of R550 018, 08 and R527 250,00 on 10 December 2003 and 11 December 2003 respectively in favour of Gearhouse. The said cheques were both referred to drawer; 3.11. During March 2004 under case no. 6894/2004 (WLD) Gearhouse sought payment from Plaintiff qua surety in the sum of R1 054 000, 00. The matter was opposed but the Court found in favour of Gear House. 3.12. The Defendant breached the terms of the partnership agreement by failing to pay the plaintiff notwithstanding demand. 3.13. On the 31 January 2006 the Plaintiff, as he was entitled to, terminated the partnership agreement alternatively hereby cancels same. 3.14. The Plaintiff has complied with all his obligations in terms of the partnership agreement, and consequently he claims from the Defendant payment of the amount of R1 054 000, 00 which sum has become due and payable. 4. The defendant duly entered an appearance to defend, whereupon the Plaintiff brought this application for summary judgment. 5. The Plaintiff in support of the application for summary judgment has filed an affidavit deposed to by himself wherein he verifies the cause of action. He further states that in his opinion the defendant does not have a bona fide defence to the action, and that the notice to defend has been entered solely for the purposes of delay. 6. The defendant has filed an affidavit deposed to by himself in terms of which he resists the summary judgment. 7. In the matter of Evelyn Haddon & Co Ltd v Leo Janko (Pty) Ltd SA 662 (OPD) at 666A the court cited the matter of Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959 (3) SA 362 (W) at 366 where Marias J said that: "The proper approach appears to me to be one which keeps important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the Court to the defendant. (See the case of Symon & Co., supra). That can only be done if there is no doubt but that the plaintiff has an unanswerable case.", vide also Breitenbach v Fiat S.A. (EDMS) Bpk 1976 (2) SA 226 at 229 where the Court referred to the Mowschenson case supra and proceeded to cite from Shepstone v Shepstone 1974 (2) SA 462 (N) at 467E-H where Miller J said that: "The Court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case" and that "...a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial." In the Evelyn Haddon & Co. matter (supra) the Court at 667 G said that: "By die oordeling van die posisie sal ek ook ingedagte hou dat ek nie op oorwig van waarskynlikhede moet oordeel of die verweer

suksesvolsal wees nie".⁸In the matter of *Tesven CC and Another v South African Bank of Athens* 2001 (1) SA 268 SCA at 275 H the Court said:² "It has to be remembered that the relief sought by the plaintiff in this matter is summary judgment. In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418(A) at 423 F – G, Corbett J A referred to the 'extraordinary and drastic nature' of the remedy of summary judgment and said that ' (t) he grant of the remedy is based upon the supposition that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad in law. Later (at 426 A – 426 E) Corbett J A said the following: 'One of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in his summons, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the party or the other. All that the Court enquires into is '(a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded; (b) Whether on the facts so disclosed the defendant appears to have, as to the whole or part of claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence (see, generally, *herb Dyers (Pty) Ltd v Another* 1965 (2) SA 914(N) , *Arend and another v Astra Furnishers (Pty) Ltd* [1974 (1) SA 298(C) at 303 – 4 ; *Shepstone v Shepstone* 1974 (2) SA 462(N). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea, nor does the Court examine it by the standards of pleading (*Estate Potgieter v Elliot* 1948(1) SA 1084(C) at 1089, *Herb Dyers* case supra at 32.9. Mr. C. J. C. Nel on behalf of the plaintiff contended that that the defendant breached the terms of the partnership agreement by failing to pay the plaintiff on demand the amount of R1 054 000,00 which the plaintiff was ordered to pay to Gear House as the result of the cheques the defendant had issued and which cheques were subsequently dishonoured. He says that the plaintiff exposed himself via Cachet for a debt, at the instance of the defendant for which the defendant was contractually expressly liable inter se the parties. He says that it was the defendant's reciprocal obligation to refund the plaintiff and that the extent of the liability of the defendant to the plaintiff is to pay that sum which the defendant ought to have paid himself in the first instance and that therefore the defendant remains a debtor to the plaintiff.¹⁰ Mr Nel further contends that the defendant has raised two defences: 10.1. A technical defence; and 10.2. On the merits, the defendant avers that the partnership agreement was never implemented and that two oral agreements thereafter were concluded.¹¹ The defendant in his affidavit denies that he is indebted to the plaintiff in the amount claimed or at all, as he has a bona

fide defence to the claim of the plaintiff. He further denies that he has caused an appearance to defend the action to be filed solely to delay. He says that he has been advised that the plaintiff's particulars of claim does not disclose a cause of action alternatively lacks sufficient averments to disclose a cause of action in that: (a) it is not alleged that the partnership, which the plaintiff alleges existed pursuant to annexure B to the plaintiff's particulars of claim, was wound-up (all that is alleged is that he alleged partnership was terminated) (b) partners as a matter of law, are not, as regards partnership dealings, considered debtor and creditor inter se until such time as the partnership is wound-up; (c) The Plaintiff, as surety for the company, discharged the debt of such company. It was the company which had a claim, on the plaintiff's version, against the partnership. The plaintiff, as surety of such company which contracted with the partnership, has no claim against the partnership but only a right of recourse against the company as the principal debtor. Only the company could have a claim against the partnership. In the absence of a cession of such claim (which is no longer possible as the company has been liquidated) the plaintiff has no cause of action against the partnership or himself, the defendant as a partner.

12. Mr. Nel has submitted that the plaintiff as a partner does have the right to claim from the defendant through the pro socio actio and that it is not necessary for the partnership to be wound up nor for an account of the partnership to be prepared especially sine the amount is readily determinable. In this regard he has cited from the matter of *Robson v Theron* 1978 (1) 843 at 849 G the following passage: "The actio pro socio was a personal action which arose from the partnership agreement. In the first place it could be used while the partnership still existed by a partner against a co-partner to enforce fulfillment of personal obligations (praestationes personales) arising out of the partnership agreement and business without the object of dissolving the partnership. Secondly the actio pro socio could also be brought by a partner against this co-partner for the settlement or adjustment of accounts inter se including the fulfilment of personal obligations (praestationes personales) arising out of the partnership agreement and business with the object of dissolving the partnership." He further contends that it is not necessary under the circumstances of this case to have the partnership wound up in order for the plaintiff to have the relief he seeks. In this regard he relies on the case of *Loots v Nieuwenhuizen and Another* 1997 (1) SA 361 (T). He has further submitted that one partner may sue the other partner for reimbursement of money spent on behalf of the partnership. In this regard he refers to the matter of *Pataka v Keef and Another* 1947 (2) SA 962 (AD) as well as *JE Celliers v C F Ziervoegel* 1893 H 225. He has the partnership.

13. Mr. Nel further submits that the defendant does not have a bona fide defence. In this regard he says that the defendant has stated in paragraph 5.3 of his affidavit that the agreement was never implemented. However, against this alleged non implementation the defendant is still prepared to advance money to the plaintiff whilst denying existence of an agreement.

14. On the other hand Mr. South has submitted that the Court must first decide whether there was any agreement between the parties and whether it was implemented. He says there was no such agreement because there is nowhere averred that there was a banking account opened for the alleged partnership. He says that there was a second oral agreement that the parties entered into which was a joint venture agreement for the sharing of profit. He further submits that it is common cause that the agreement was terminated. He further contends that Cachet had a claim against the partnership and that the plaintiff had stood surety in his personal capacity for Cachet. He further contends that the pro socio actio had to be employed during the existence of the partnership and it was common cause that the partnership had already been terminated, on the

version of the plaintiff.¹⁵In the *Robson v Theron* matter, *supra*, at page 855H-856G Joubert J.A. says that:“(A)the principles of common law underlying the *actio pro socio* may be conveniently summarised as follows:1.This action may be instituted by a partner against a co-partner during the existence of the partnership for specific performance in terms of the partnership agreement and/ or fulfilment of personal obligation (*praestationes personales*) arising out of partnership agreement business;.2.Where the partnership agreement provides for (or the parties subsequently agree upon) the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound – up specific performance thereof may be claimed by means of this action.3Where neither the partnership agreement nor a subsequent agreement between the partners provides for the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound – up this action may in general (subject to any stipulation for the duration of the partnership or any other relevant stipulations) be brought by a partner to have the partnership liquidated and wound – up. The Court in the exercise of its wide equitable discretion may appoint a liquidator to realize the partnership assets for the purpose of liquidating partnership debts and to distribute the balance of the partnership assets or their proceeds among the partners. Pothier, *op. cit.* sec 162.4Where a partnership has been dissolved a partner may avail himself of this action against his co-partners to claim distribution of any undistributed partnership asset or assets :“Each of the former partners can alone demand a distribution of the effects which remain in common after the dissolution of the partnership”.This obviously covers the situation where, after dissolution of a partnership, a continuing partner retains possession of partnership assets which has not been included in a distribution of the partnership assets. Hence a retiring partner may institute this action against the continuing partner to claim a distribution of the partnership asset in question.5.A Court has a wide equitable discretion in respect of the mode of distribution of partnership assets, having regard, *inter alia*, to the particular circumstances, what is most to the advantage of the partners and what they prefer.6.The various modes of distribution of partnership assets are fully dealt with by Pothier , *op. cit.*, secs 161 -178.”¹⁶.In the case of *Shingadia v Shingadia* 1957 (3) SA 195, where the partnership that consisted of four brothers, had let its immovable property to one of the partners at an amount of R100,00 per month and the said partner having been in arrears in the amount of R800,00 was sued by the three remaining partners in the name of the partnership, the Court held that the defendant partner was also one of the plaintiffs and that therefore the three plaintiffs cannot in the name of the partnership maintain the action. The Court at 197 H quoted what Warrington said, namely:“ A partner cannot be a creditor of or a debtor to his firm or sue his firm or be sued by it, in as much as the English law does not recognise the existence of a firm as distinct from the members of it; and further in an action by one or more partners, whether using the name of the firm under Order 48 A or not, against a co-partner alleging that that money is due from the defendant to the plaintiffs in connection with the affairs of the firm, whether the claim arises in respect of transactions during the continuance of the partnership, or in the course of the winding-up of its affairs after dissolution, the only relief which the plaintiff could obtain would be an account of the dealings and transactions of the partners”

The Court said that these observations are identical with the principles of our law.¹⁷ In the present case, on the version of the plaintiff, the partnership has been terminated. This then means that his case does not fall within the first point mentioned by Joubert, J.A. in the *Robson v Theron* case since it is not brought during the existence of the partnership, (see paragraph 15 *supra* under (A)1).¹⁸ The agreement attached by the plaintiff as annexure B provides for the winding up and termination of the partnership through clause 14. This clause provides, inter alia, that the assets of the partnership business shall be used and distributed in the following order: "(a) To pay and provide for the payment of all partnership liabilities and liquidating expenses and obligations; (b) ... (c) to make the income accounts of the partners proportionate to their respective shares in partnership profits; (d) To discharge the balance of the income accounts of the partners; (e) To distribute to the partners in proportion to their interest in the capital of the partnership;" The second point articulated by Joubert is through this *pro socio* to claim for specific performance of what is tabulated in the winding up and termination clause 14 of the agreement. The plaintiff's claim does not fall within this point since he is not claiming for specific performance of what is contained in the winding up clause 14. Neither does the plaintiff's claim fall under point 3 since there is provision for winding up in the agreement. Under point 4, according to Joubert AJ, this action is available to a partner where the partnership has been dissolved, to claim distribution of any undistributed partnership assets. In this regard it is apposite to refer to the matter of *Olivier v Stoop* 1978 (1) SA 119 at 203 G where the Court said that although the partnership is dissolved, but concerning accounting between them and the world at large, the partnership still remains in force until it has been finally liquidated. Before the partnership is liquidated there must first be accounting by each partner to the partnership. If the parties cannot agree, then there must be a liquidator appointed who, once the assets of the partnership have been made liquid, will first pay the debts of the partnership and if there is anything remaining then divide this proportionately to their respective shares. In the *Robson v Theron* matter (*supra*) at 853 D it is stated that for purposes of distribution of the partnership assets an account must first be framed of what each partner owes the partnership and of what is due to each partner by the partnership. The amount of the sum for which a partner is a debtor to the partnership should be set off against those for which he is a creditor.²⁰ Mr. South has pointed out, quite correctly so, that in the *Pataka v Keefe* and another matter (*supra*) the Appellate Division left undecided the question whether a partner can during the existence of the partnership sue his partner for reimbursement of money spent by the other partner for the affairs or business of the partnership. He contends that after the dissolution of the partnership there must first be accounting. In *De Wet and Yeats Kontraktereg en Handelsreg* 4th edition at page 414-415 it is stated inter alia that at the termination of a partnership the partners must all together institute action in regard to the collection of the debts of the partnership, unless there has been a cession of the rights of the partnership to the other partner. At page 399 the learned authors say that sometimes the *actio pro socio* can be used by one partner to claim something else either than money from the other partners arising from the partnership agreement. However, if it is payment of money that is claimed from the other partners, then there must first be accounting.²¹ In the matter of *Turkstra v Goldberg and Another* 1960 (1) SA 512 (T) at 513 H-514 the Court said that in the event the plaintiff had intended to sue two individuals as the members of a partnership which had been dissolved, it would be essential to allege that the partnership has been dissolved. "In the absence of such an allegation, the summons is also bad on that basis.... any amendment can be allowed by which an allegation of dissolution is inserted. A claim against one partner on a partnership obligation contained in a written document on the ground that the partnership has been dissolved is not, ... a

liquid claim capable of supporting a claim for provisional sentence. Dissolution of partnership is not a "simple condition" upon which a claim arises within the meaning of that term in *Union Share Agency and Investment Ltd v Spain*, 1928 A.D. 74 at 78 to 79. Further, this is not a case of payment of an obligation specified in a written document being subject to the fulfilment of a simple condition. The obligation itself to pay the whole debt as an ex-partner in a dissolved partnership was subject to a condition that the partnership had been fully dissolved; for the importance of this distinction see *Inglestone v Pereira* 1939 W.L.D. 55 at 62.22. In the light of the above authority, I am of the view that there is merit in the contention that the plaintiff must not only allege in his particulars of claim that the partnership has terminated, he must also allege that the partnership has since been wound up. This essential averment has not been done in the instant case. I am of the view that it is inappropriate to grant summary judgment under such circumstances as in *casu*.²³ In the light of the above authorities, I am therefore of the view that it cannot be said that the defence raised by the defendant is not bona fide raised nor are there no triable issues. I am of the view that it is not necessary for me to deal with the rest of the issues that have been raised in this matter. If there is a singular defence that that is capable of being adjudicated upon on trial, and which has the potential of striking at the fundamental of the plaintiff's case, then summary judgment cannot be granted.²⁴ Mr South has submitted that the plaintiff has been unreasonable in insisting to continue with this application in the light of the defences raised in the defendant's affidavit and that the Court should show its displeasure and mulct the plaintiff with the cost of day of the arguing the application and that the rest of the cost in the cause. Mr. Nel has on the contrary submitted that it is customary that in such matters the Courts will order that the costs be the cost in the cause and that there is no special reason to mulct the plaintiff. I see no reason that the plaintiff should be punished in not having merely agreed to having leave to defend granted to the defendant. I am of the view that the issues that have been raised in this matter are not the common issues that are encountered every day where one can say that the plaintiff should have known better. However,²⁵ in the premises the following order is made: (a) Summary judgment is refused; (b) Leave to defend the action is granted to the defendant. (c) The cost shall be cost in the cause. N.M. MAVUNDLA JUDGE OF THE HIGH COURT HEARD ON THE: 20/06/2006 DATE OF JUDGMENT: 19/07/06 APPLICANT'S ADV: CJC NEL instructed by: - APPLICANT'S ATT: ITZIKOWITZ & ASSOCIATED c/o JACOBSON & LEVY INC, PRETORIA DEFENDANT'S ADV: instructed by: - DEFENDANT'S ATT: ROUTLEDGE MODISE MOSS, PRETORIA IN THE HIGH COURT OF SOUTH AFRICA

(
TRANSVAAL
PROVINCIAL DIVISION)

CASE NO: 13650/2006 DATE: 2/8/2006

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DATE: 2/8/2006
REPORTABLE

In the matter between: S J
NAIR
PLAINTIFF
AND
J
W
CHANDLER
DEFENDANT

JUDGMENT

MAVUNDLA, J

1.

This is an opposed application for a summary judgment against the defendant. I consider it necessary to chronicle the particulars of claim before embarking on dealing with the summary judgment application.

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application for a summary judgment against the defendant.

I consider it necessary to chronicle the particulars of claim before embarking on dealing with the summary judgment application.

2.

In his particulars of claim the plaintiff avers in paragraph 3 that on or about 2 October 2003 and at Johannesburg the parties entered into a written agreement. He attached as annexure B, a copy of the relevant agreement.

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3.

The plaintiff further avers in the particulars of claim that:

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that

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3.1. the express alternatively implied, further alternatively tacit terms of the partnership agreement were that the parties formed a partnership to be known as Tip Top Productions Company to conduct and carry on business of public relations, advertising, marketing communications, consulting, event planning and celebrity management;

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.1

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management;

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3.2. the partnership was formed for the express purposes for event as Summer Vibes South Africa;

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3.3.

The partnership commenced on 1 October 2003 and would continue until terminated;

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The plaintiff—goodwill, business experience, work product and all event planning, promotions of movies and concerts;

The plaintiff—goodwill, business experience, work product and all event planning, promotions of movies and concerts;

3.4.2.

The defendant—initial capital contribution and payment of all reasonable costs of the event known as Summer Vibes South Africa including but not limited to all cost related to the artist and promotion of the said event

3.5.

in the event of the plaintiff incurring liability, alternatively in the event that the plaintiff expended money for the benefit of the partnership, the defendant would forthwith reimburse the plaintiff.

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3.6.

Pursuant to the conclusion of the partnership agreement the parties proceeded with the planning of the event known as Summer Vibes South Africa, which event would include three concerts to be held in Johannesburg, Durban and Cape Town during December 2003.

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3.7.

On or about 14 November 2003 and at the Defendant's instance, the Plaintiff utilised Cachet Communications (Pty) Limited (now in liquidation) of which the plaintiff was the sole director, to conclude a written agreement with Gearhouse South Africa (Pty) Limited (hereinafter referred to as Gearhouse) to provide inter alia the lights, audio, rigging, structures, crowd control, camera, etc for the Summer Vibes South Africa events and Gear House required of the Plaintiff to stand personal surety.

On

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the Summer Vibes South Africa events and

Gear House

required of the Plaintiff to stand personal surety.

3.8.

The services of Gearhouse were duly utilised for the benefit of the partnership, utilising Catchet as aforementioned and payment of the sum of R2 109 000,00 became due to Gear House.

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3.9.

Pursuant to the Defendant's obligation in favour of the Plaintiff in terms of clause 3 of the partnership agreement the defendant made payment in favour of Gearhouse in the sum of approximately R1 031 732,00.

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3.10.

In order to liquidate the balance outstanding in favour of Gear House and in terms of the Defendant's express obligations in terms of clause 3 of the partnership agreement in favour of the Plaintiff, the Defendant furnished, upon presentation by the Plaintiff to the Defendant of the invoices from Gearhouse addressed to Cachet, as payment, two further cheques of R550 018, 08 and R527 250,00 on 10 December 2003 and 11 December 2003 respectively in favour of Gearhouse. The said cheques were both referred to drawer;

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3.11.

During March 2004 under case no.

6894/2004 (WLD)

Gear

ouse sought

payment from Plaintiff qua surety in the sum of

R1 054 000

, 00

. The matter was opposed but the Court found in favour of GearHouse.

3.12.

The Defendant breached the terms of the partnership agreement by failing to pay the plaintiff notwithstanding demand.

The Defendant breached the terms of the partnership agreement by failing to pay the plaintiff notwithstanding demand

3.13.

On the 31 January 2006 the Plaintiff, as he was entitled to, terminated the partnership agreement alternatively hereby cancels same.

3.14.

The Plaintiff has complied with all his obligations in terms of the partnership agreement, and consequently he claims from the Defendant payment of the amount of R1 054 000, 00 which sum has become due and payable.

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7.

In the matter of Evelyn Haddon & Co Ltd v Leo janko (Pty) Ltd SA 662(OPD) at 666A the court cited the matter of Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959(3)SA 362 (W) at 366 where Marias J said that:

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“The proper approach appears to me to be one which keeps important fact in view that the remedy for summary judgment is an extraordinary remedy,

and a

very stringent one, in

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hat it permits a judgment to be given without trial. It closes the doors of the Court to the defendant. (See the case of Symon & Co., supra). That can only be done if there is no doubt but that the plaintiff has an unanswerable case.”, v

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Breitenbach v Fiat S.A. (

EDMS) Bpk1976 (2) SA 226at 229

1976 (2) SA 226

where the Court referred to the Moswschenson case supra and proceeded to cite from

Shepstone v

Shepstone1974 (2) SA 462(N) at 467E-H where Miller J

1974 (2) SA 462

“The Court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case” and that “...a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial.”In the Evelyn Haddon & Co. matter (supra) the Court at 667 G said that;

“The Court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case” and that “...a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the de

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nce he has advanced may succeed on trial.”

In the Evelyn Haddon & Co. matter (supra) the Court at 667 G said that;

“By die oordeling van die posisie sal ek ook ingedagte hou dat ek nie op oorwig van waarskynlikhede moet oordeel of die verweer suksesvolsal wees nie”.8.

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8.

In the matter of Tesven CC and Another v South African Bank of Athens 2001 (1) SA 268 SCA at 275 H the Court said:

Tesven CC and Another v South African Bank of

Athens

2001 (1)

SA 268 SCA at 275 H

the Court said:

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“ It has to be remembered that the relief sought by the plaintiff in this matter is summary judgment. In Maharaj v Barclays National Bank Ltd 1976 (1) SA 418(A) at 423 F – G, Corbett JA referred to the ‘extraordinary and drastic nature’ of the remedy of summary judgment and said that ‘ (t) he grant of the remedy is based upon the supposition that the plaintiff’s case is unimpeachable and that the defendant’s defence is bogus or bad in law. Later (at 426 A – 426 E) Corbett JA said the following:

“

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referred to the ‘extraordinary and drastic nature’ of the remedy of summary judgment and said that ‘ (t) he grant of the remedy is based upon the supposition that the plaintiff’s case is unimpeachable and that the defendant’s defence is bogus or bad in law. Later

(at 426 A – 426 E) Corbett JA

said the following:

‘One of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in his summons, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the party or the other. All that the Court enquires into is ‘: (a)

‘One of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in his summons, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the party or the other. All that the Court enquires into is ‘;

(a)

whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded;

(b)

Whether on the facts so disclosed the defendant appears to have, as to the whole or part of claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word “fully”, as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence (see, generally, *Herb Dyers (Pty) Ltd v Another* 1965 (2) SA 914(N) , *Arend and another v Astra Furnishers (Pty) Ltd* [1974 (1) SA 298(C) at 303 – 4 ; *Shepstone v Shepstone* 1974 (2) SA 462(N). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea, nor does the Court examine it by the standards of pleading (*Estate Potgieter v Elliot* 1948(1) SA 1084(C) at 1089, *Herb Dyers* case supra at 32.

Whether on the facts so disclosed the defendant appears to have, as to the whole or part of claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word “fully” ,

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Estate Potgieter v Elliot 1948

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(1) SA 1084(C) at 1089, *Herb Dyers* case supra at 32

9. Mr. C. J. C. Nel on behalf of the plaintiff contended that that the defendant breached the terms of the partnership agreement by failing to pay the plaintiff on demand the amount of R1 054 000,00 which the plaintiff was ordered to pay to GearHouse as the result of the cheques the defendant had issued and which cheques were subsequently dishonoured. He says that the plaintiff exposed himself via Cachet for a debt, at the instance of the defendant for which the defendant was contractually expressly liable inter se the parties. He says that it was the defendant's reciprocal obligation to refund the plaintiff and that the extent of the liability of the defendant to the plaintiff is to pay that sum which the defendant ought to have paid himself in the first instance and that therefore the defendant remains a debtor to the plaintiff. 10. Mr Nel further contends that the defendant has raised two defences: 10.1. A technical defence; and 10.2. On the merits, the defendant avers that the partnership agreement was never implemented and that two oral agreements thereafter were concluded. 11. The defendant in his affidavit denies that he is indebted to the plaintiff in the amount claimed or at all, as he has a bona fide defence to the claim of the plaintiff. He further denies that he has caused an appearance to defend the action to be filed solely to delay. He says that he has been advised that the plaintiff's particulars of claim does not disclose a cause of action alternatively lacks sufficient averments to disclose a cause of action in that: (a)

9.

Mr. C. J. C. Nel on behalf of the plaintiff contended that that the defendant breached the terms of the partnership agreement by failing to pay the plaintiff on demand the amount of R1 054 000,00 which the plaintiff was

ordered to pay to GearHouse

as the result of the cheques the defendant

had issued and which cheques were subsequently dishonoured. He says

that the p

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the defendant for which the defendant was contractually expressly liable

inter se the parties. He says that it was the defendant's reciprocal

obligation to refund the plaintiff and that the extent of the liability of the

defendant to the plaintiff is to pay that sum which the defendant ought to

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remains a debtor to the plaintiff.

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Mr Nel further contends that the defendant has raised two defences:

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close a cause of action in

that:

it is not alleged that the partnership, which the plaintiff alleges existed pursuant to annexure B to the plaintiff's particulars of claim, was wound-up (all that is alleged is that the alleged partnership was terminated)

partners as a matter of law, are not, as regards partnership dealings, considered debtor and creditor inter se until such time as the partnership is wound-up;

(c)

The Plaintiff, as surety for the company, discharged the debt of such company. It was the company which had a claim, on the plaintiff's version, against the partnership. The plaintiff, as surety of such company which contracted with the partnership, has no claim against the partnership but only a right of recourse against the company as the principal debtor. Only the company could have a claim against the partnership. In the absence of a cession of such claim (which is no longer possible as the company has been liquidated) the plaintiff has no cause of action against the partnership or himself, the defendant as a partner.

Plaintiff, as surety for the company, discharged the debt of such company. It was the company which had a claim, on the plaintiff's version, against the partnership. The plaintiff, as surety of such company which contracted with the partnership, has no claim against the partnership but only a right of recourse against the

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the partnership

. In the absence of a cession of such claim (which is no longer possible as the company has been liquidated) the plaintiff has no cause of action against the partnership or himself, the defendant as a partner.

12. Mr. Nel has submitted that the plaintiff as a partner does have the right to claim from the defendant through the pro socio actio and that it is not necessary for the partnership to be wound up nor for an account of the partnership to be prepared especially since the amount is readily determinable. In this regard he has cited from the matter of *Robson v Theron* 1978 (1) 843 at 849 the following passage:

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1978 (1)

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following passage:

“The actio pro socio was a personal action which arose from the partnership agreement. In the first place it could be used while the partnership still existed by a partner against a co-partner to enforce fulfillment of personal obligations (praestationes personales) arising out of the partnership agreement and business without the object of dissolving the partnership. Secondly the actio pro socio could also be brought by a partner against this co-partner for the settlement or adjustment of accounts inter se including the fulfilment of personal obligations (praestationes personales) arising out of the partnership agreement and business with the object of dissolving the partnership.” He further contends that it is not necessary under the circumstances of this case to have the partnership wound up in order for the plaintiff to have the relief he seeks. In this regard he relies on the case of Loots v Niewenhuizen and Another 1997 (1)

SA 361(T) He has further submitted that one partner may sue the other partner for reimbursement of money spent on behalf of the partnership. In this regard he refers to the matter of Pataka v Keef and Another 1947 (2) SA 962(AD) as well as JE Celliers v C F Ziervoegel 1893 H 225. On the partnership.

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13. Mr Nel further submits that the defendant does not have a bona fide defence. In this regard he says that the defendant has stated in paragraph 5.3 of his affidavit that the agreement was never implemented. However, against this alleged non implementation the defendant is still prepared to advance money to the plaintiff whilst denying existence of an agreement. 14. On the other hand Mr. South has submitted that the Court must first decide whether there was any agreement between the parties and whether it was implemented. He says there was no such agreement because there is nowhere averred that there was a banking account opened for the alleged partnership. He says that there was a second oral agreement that the parties entered into which was a joint venture agreement for the sharing of profit. He further submits that it is common cause that the agreement was terminated. He further contends that Cachet had a claim against the partnership and that the plaintiff had stood surety in his personal capacity for Cachet. He further contends that the *pro socio actio* had to be employed during the existence of the partnership and it was common cause that the partnership had already been terminated, on the version of the plaintiff. 15. In the *Robson v Theron* matter, *supra*, at page 855H-856G Joubert J.A. says that:

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In the Robson v Theron matter, supra, at page

855H-856G Joubert J.A.

says that:

“(A) the principles of common law underlying the actio pro socio may be conveniently summarised as follows: 1.

“(A)

principles of common law underlying the

may be conveniently summarised as follows:

This action may be instituted by a partner against a co-partner during the existence of the partnership for specific performance in terms of the partnership agreement and/ or fulfilment of personal obligation (praestationes personales) arising out of partnership agreement business;

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.2.

Where the partnership agreement provides for (or the parties subsequently agree upon) the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound – up specific performance thereof may be claimed by means of this action.

Where neither the partnership agreement nor a subsequent agreement between the partners provides for the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound – up this action may in general (subject to any stipulation for the duration of the partnership or any other relevant stipulations) be brought by a partner to have the partnership liquidated and wound – up. The Court in the exercise of its wide equitable discretion may appoint a liquidator to realize the partnership assets for the purpose of liquidating partnership debts and to distribute the balance of the partnership assets or their proceeds among the partners. Potheir, op, cit sec, cit sec 162.

Where a partnership has been dissolved a partner may avail himself of this action against his co-partners to claim distribution of any undistributed partnership asset or assets :

“Each of the former partners can alone demand a distribution of the effects which remain in common after the dissolution of the partnership”.

This obviously covers the situation where, after dissolution of a partnership, a continuing partner retains possession of partnership assets which has not been included in a distribution of the partnership assets. Hence a retiring partner may institute this action against the continuing partner to claim a distribution of the partnership asset in question.

5.A Court has a wide equitable discretion in respect of the mode of distribution of partnership assets, having regard, inter alia, to the particular circumstances, what is most to the advantage of the partners and what they prefer.

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has a wide equitable discretion in respect of the mode of distribution of partnership assets, having regard, inter alia, to the particular circumstances, what is most to the advantage of the partners and what they prefer.

The various modes of distribution of partnership assets are fully dealt with by Pothier , op cit., secs 161 -178.”

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with by Pothier , op cit., secs 161 -178.

16. In the case of *Shingadia v Shingadia* 1957 (3) SA 195, where the partnership that consisted of four brothers, had let its immovable property to one of the partners at an amount of R100,00 per month and the said partner having been in arrears in the amount of R800,00 was sued by the three remaining partners in the name of the partnership, the Court held that the defendant partner was also one of the plaintiffs and that therefore the three plaintiffs cannot in the name of the partnership maintain the action. The Court at 197 H quoted what Warrington said, namely:

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“ A partner cannot be a creditor of or a debtor to his firm or sue his firm or be sued by it, in as much as the English law does not recognise the existence of a firm as distinct from the members of it; and further in an action by one or more partners, whether using the name of the firm under Order 48 A or not, against a co-partner alleging that that money is due from the defendant to the plaintiffs in connection with the affairs of the firm, whether the claim arises in respect of transactions during the continuance of the partnership, or in the course of the winding-up of its affairs after dissolution, the only relief which the plaintiff could obtain would be an account of the dealings and transactions of the partners ”

The Court said that these observations are identical with the principles of our law.

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aid that these observations are identical with the principles of our law.

17. In the present case, on the version of the plaintiff, the partnership has been terminated. This then means that his case does not fall within the first point mentioned by Joubert, J.A in the *Robson v Theron* case since it is not brought during the existence of the partnership, (see paragraph 15 *supra* under (A)1). 18. The agreement attached by the plaintiff as annexure B provides for the winding up and termination of the partnership through clause 14. This clause provides, *inter alia*, that the assets of the partnership business shall be used and distributed in the following order:“(a) To pay and provide for the payment of all partnership liabilities and liquidating expenses and obligations;(b)...(c) to make the income accounts of the partners proportionate to their respective shares in partnership profits;(d) To discharge the balance of the income accounts of the partners;(e) To distribute to the partners in proportion to their interest in the capital of the partnership;”

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supra under (A)1)

18.

The agreement attached by the plaintiff as annexure B provides for the

winding up and termination of the par

nership

through clause 14. This

clause provides, inter alia, that the assets of the partnership business shall

be used and distributed in the following order:

‘(a)

To pay and provide for the payment of all partnership liabilities and

liquidating expenses and obligations;

(b).

..

to make the income accounts of the partners proportionate to their

respective shares in partnership profits;

(d)

To discharge the balance of the income accounts of the partners;

(e)

To distribute to the partners in proportion to their interest in the capital of

the partnership;”

The second point articulated by Joubert is through this pro socio to claim for specific performance of what is tabulated in the winding up and termination clause 14 of the agreement.

The plaintiff's claim does not fall within this point since he is not claiming for specific performance of what is contained in the winding up clause 14. Neither does the plaintiff's claim

fall under point 3 since there is provision for winding up in the agreement. Under point point 4, according to Joubert AJ, this action is available to a partner where the partnership has been

dissolved, to claim distribution of any undistributed partnership assets. In this regard it apposite to refer to the matter of *Olivier v Stoop* 1978 (1) SA 119 at 203 G where the Court said that although the partnership is dissolved, but concerning accounting between them and the world at large, the

partnership still remains in force until it has been finally liquidated. Before the partnership is liquidated there must first be accounting by each partner to the partnership. If the parties cannot agree, then there must be a liquidator appointed who, once the assets of the partnership have been made liquid, will first pay the debts of the partnership and if there is anything remaining then divide this proportionately to their respective shares. In the *Robson v Theron* matter (supra) at 853D it is stated that for purposes of distribution of the partnership assets an account must first be framed of what each partner owes the partnership and of what is due to each partner by the partnership. The amount of the sum for which a partner is a debtor to the partnership should be set off against those for which he is a creditor.

The second point articulated by Joubert is through this pro socio to claim for specific performance of what is tabulated in the winding up and termination clause 14 of the agreement. The plaintiff's claim does not fall within this point since he is not claiming for specific performance of what is contained in the winding up clause 14. Neither does the plaintiff's claim fall under point 3 since there is provision for winding up in the agreement.

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20. Mr. South has pointed out, quite correctly so, that in the *Pataka v Keefe* and another matter (supra) the Appellate Division left undecided the question whether a partner can during the existence of the partnership sue his partner for reimbursement of money spent by the other partner for the affairs or business of the partnership. He contends that after the dissolution of the partnership there must first be accounting. In *De Wet and Yeats v Kontraktereg en Handelsreg* 4th edition at page 414-415 it is stated inter alia that at the termination of a partnership the partners must all together institute action in regard to the collection of the debts of the partnership, unless there has been a cession of the rights of the partnership to the other partner. At page 399 the learned authors say that sometimes the *actio pro socio* can be used by one partner to claim something else either than money from the other partners arising from the partnership agreement. However, if it is payment of money that is claimed from the other partners, then there must first be accounting.²¹ In the matter of *Turkstra v Goldberg and Another* 1960 (1) SA 512 (T) at 513H-514 the Court said that in the event the plaintiff had intended to sue two individuals as the members of a partnership which had been dissolved, it would be essential to allege that the partnership has been dissolved. "In the absence of such an allegation the summons is also bad on that basis."

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...any amendment can be allowed by which an allegation of dissolution is inserted. A claim against one partner on a partnership obligation contained in a written document on the ground that the partnership has been dissolved is not, ...a liquid claim capable of supporting a claim for provisional sentence. Dissolution of partnership is not a "simple condition" upon which a claim arises within the meaning of that term in *Union Share Agency and Investment Ltd v Spain*, 1928 A.D. 74 at 78 to 79. Further, this is not a case of payment of an obligation specified in a written document being subject to the fulfilment of a simple condition. The obligation itself to pay the whole debt as an ex-partner in a dissolved partnership was subject to a condition that the partnership had been fully dissolved; for the importance of this distinction see *Inglestone v Pereira* 1939 W.L.D. 55 at 62.22.

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1939 W.L.D. 55

22.

In the light of the above authority, I am of the view that there is merit in the contention that the plaintiff must not only allege in his particulars of claim that the partnership has terminated, he must also allege that the partnership has since been wound up. This essential averment has not been done in the instant case. I am of the view that it is inappropriate to grant summary judgment under such circumstances as in *casu*.

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contention that the plaintiff must not only allege in his particulars of claim that the partnership has terminated, he must also allege that the partnership has since been wound up. This essential averment has not been done in the instant case.

I am of the view that it is inappropriate to grant summary judgment under such circumstances as in *casu*.
23.

In the light of the above authorities, I am therefore of the view that it cannot be said that the defence raised by the defendant is not bona fide raised nor are there no triable issues. I am of the view that it is not necessary for me to deal with the rest of the issues that have been raised in this matter. If there is a singular defence that that is capable of being adjudicated upon on trial, and which has the potential of striking at the fundamental of the plaintiff's case, the summary judgment cannot be granted.²⁴.

In the light of the above authorities, I am therefore of the view that it cannot be said that the defence raised by the defendant is not bona fide raised nor are there no triable issues. I am of the view that it is not necessary for me to deal with the rest of the issues that have been raised in this matter. If there is a singular defence that that is capable of being adjudicated upon on trial, and which has the potential of striking at the fundamental of the plaintiff's case, the summary judgment cannot be granted.

24.

Mr South has submitted that the plaintiff has been unreasonable in insisting to continue with this application in the light of the defences raised in the defendant's affidavit and that the Court should show its displeasure and mulct the plaintiff with the cost of day of the arguing the application and that the rest of the cost in the cause. Mr. Nel has on the contrary submitted that it is customary that in such matters the Courts will order that the costs be the cost in the cause and that there is no special reason to mulct the plaintiff. I see no reason that the plaintiff should be punished in not having merely agreed to having leave to defend granted to the defendant. I am of the view that the issues that have been raised in this matter are not the common issues that are encountered every day where one can say that the plaintiff should have known better. However,

Mr South has submitted that the plaintiff has been unreasonable in insisting to continue with this application in the light of the defences raised in the defendant's affidavit and that the Court should show its displeasure and mulct the plaintiff with the cost of day of the arguing the application and that the rest of the cost in the cause. Mr. Nel has on the contrary submitted that it is customary that in such matters the Courts will order that the costs be the cost in the cause and that there is no special reason to mulct the plaintiff. I see no reason that the plaintiff should be punished in not having merely agreed to having leave to defend granted to the defendant. I am of the view that the issues that have been raised in this matter are not the common issues that are encountered every day where one can say that the plaintiff should have known better. However, 25.

In the premises the following order is made:

Summary judgment is refused;

Leave to defend the action is granted to the defendant.

Leave

to defend the action is granted to the defendant.

The cost shall be cost in the cause.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE: 20/06/2006 DATE OF JUDGMENT: 19/07/06

HEARD ON THE:

20/06/2006

DATE OF JUDGMENT: 19/07/06

APPLICANT'S ADV: CJC NEL instructed by: -

APPLICANT`

S ADV

CJC NEL instructed by: -

APPLICANT`S ATT:ITZIKOWITZ & ASSOCIATED c/o JACOBSON & LEVY INC,PRETORIA

APPLICANT`S ATT:

ITZIKOWITZ & ASSOCIATED c/o JACOBSON & LEVY INC,
PRETORIA

DEFENDANT`S ADV: instructed by: -

DEFENDANT`

: instructed by: -

DEFENDANT`S ATT:ROUTLEDGE MODISE MOSS,PRETORIA

DEFENDANT`S ATT:

ROUTLEDGE MODISE MOSS,

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Prepared on 11 October 2026 · Esheria