13-5-71

174/70

G.P.-S.43575—1969-70—2,000 Petition Unopposed J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division)
(Provinsiale Afdeling)

Condonation of late lodging of Record and

Appeal in Civil Case
Appèl in Siviele Saak

1. GEORGE MILEHAM DOYLE
2. LESLIE WILLIAM DOYLE *Appellant,*

versus

FLEET MOTORS (P.E.)(PTY) LIMITED *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Symington & De Kok
Respondent's Attorney / *Prokureur vir Respondent* Ramdorff & Venter

Appellant's Advocate / *Advokaat vir Appellant* M.E. Kumleben S.C.
Respondent's Advocate / *Advokaat vir Respondent* S. Rees

Set down for hearing on
Op die rol geplaas vir verhoor op 13-5-1971

4.5.6.9.10

Holmes, Jansen, Trollip, J.J.A. et Corbett, Kotzé, A.J.A.

ECD Condonation granted

9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 3.00 pm

Holmes J.A. 1. The appeal is allowed with costs.

2. The order of the Court a quo is set aside.

3. The case is remitted to the Court a quo for the purpose of trying the issues raised in the pleadings, and of making an appropriate order as to costs, including the reserved costs.

REGISTRAR.
21.5.71

Bills Taxed—Kosterekenings Getaksee

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

GEORGE MILEHAM DOYLE

LESLIE WILLIAM DOYLE ..... Appellants

AND

FLEET MOTORS P.E. (PTY) LTD. ..... Respondent

Coram: Holmes, Jansen, Trollip, JJ.A., et Corbett,

Kotzé, A.JJ.A.

Heard: 13 May 1971.

Delivered: 21 May 1971.

J U D G M E N T

HOLMES, J.A.:

In the Court a quo the appellants unsuccessfully sued the respondent for (a) an account, (b) debate thereof, and (c) payment of the amount found to be due. (For the moment I am expressing the claim in its barest simplicity).

Such a cause of action was known to the Roman Dutch Law. See Van der Linden's Institutes of Holland, (Juta's

2/... translation

translation) page 344. It has also been recognised in this country. See, for example, Buchanan's Precedents in Pleading (published in Cape Town in 1878) page 57; Van Zyl's Judicial Practice of South Africa, third edition, Vol. 1, page 139; Krige v. Van Dijk's Executors, 1918 A.D. 110; Mia v. Cachalia, 1934 A.D. 102; Willemse's Curators v. Leliveld, 1931 O.P.D. 129; Auerbach v. Sunbeam Neon Light Co., 1938 C.P.D. 471 at 475; and Afrimeric Distributors (Pty) Ltd. v. E.I. Rogoff (Pty) Ltd., 1948 (1) S.A. 569 (W.L.D.). Moreover, the cause of action is statutorily recognised in the Magistrates' Courts; see section 46 (1) (c) (i) of Act 32 of 1944, and Ruiters v. Clarke, 1922 E.D.L. 303.

In England, as a matter of interest, a detailed procedure has been laid down for obtaining this relief; see Odgers on Pleading and Practice (17th edition) pages 42 to 45, and The Supreme Court Practice, 1970, Vol. 1, Part 1, Order 43, Rules 1 - 5 (pages 578 to 585). But no such procedure has been prescribed in South Africa. What then should be the practice, for example, as to what either side must prove, what degree of accounting is required, and whether the debate of an ordered account must in the first instance take place between the parties? In the absence of Rules, the following general observations might be helpful:

1. The plaintiff should aver -

   (a) his right to receive an account, and the basis of such right,

3/... whether

whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought;

(c) the defendant's failure to render an account.

2. On proof of the foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account.

3. The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach it for further directions if need be. Ordinarily the parties should first debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues.

4/... These

These could be set down for debate in Court. Judgment would be according to the Court's finding on the facts.

4. The Court may, with the consent of both parties, refer the debate to a referee in terms of section 19 bis (1) (b) of the Supreme Court Act, No. 59 of 1959.

5. If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account.

6. Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any).

7. In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require.

5/... With

With that prelude I turn more fully to the facts of the present case. The appellants' declaration averred in the main (a) that a partnership existed between the parties, in a panel beating and spray painting business, from 15 January 1968 until its cancellation by the respondent in March 1969; (b) that one of the terms, amongst others, was that the appellants would be credited with R3000 in a loan account in the books of the partnership; and (c) that the respondent had failed to account to them for the conduct of the partnership business. The latter averment was made in paragraph 8. The prayer was for the rendering of an account of all the partnership transactions in respect of their partnership, a debate thereof, and payment of the amount found to be due.

The respondent's request for further particulars included the following, in relation to paragraph 8:

> "(a) Have Plaintiffs demanded from Defendant that it account to them for the conduct of the alleged

partnership business?

(b) If so, then, if the demand was in writing, a true copy thereof is requested; if verbal, then full particulars are required.

(c) Is it intended to allege that Defendant has never accounted to the Plaintiffs for the conduct of the said business? If there has been some accounting, then full particulars are required."

The appellants' replies to the foregoing questions were -

"(a) Yes.

(b) A copy of the letter of demand marked Annexure "A" is annexed hereto.

(c) The Plaintiffs' contentions are set out in paragraph 8 with sufficient clarity and detail to enable the Defendant to plead thereto or to make an offer of settlement."

As to (b), the annexed letter was dated 9 June 1969 and read as follows -

7/... "In

"In regard to your letter of the 28th May, 1969, and your statement of income and expenditure for the period 1st May, 1968, to 31st. March, 1969, I am instructed to refer my client's shock at the inclusion in the statement of a number of items that appear there, and also at the cost of other items, for example, the following -

1. Provision for all debts could never be as high as this as all these accounts have been collected and in any event no credit was given unless first approved of by you, so that this item should not appear at all;

2. Clerical salaries - My client was told that the services of Reeds Clerical staff would be provided free of charge and in any event the lady concerned who did the books did not work only for client - most of the time was spent on your work;

3. The audit fees of R195-00 for business of my client's size is ridiculous in the extreme. A figure of R25-00 is more than sufficient;

4. Maintenance charges - This item is not understood. My client queried this and was told that this was the charge made by your Directors.

8/... Surely

Surely this is nothing to do with my client.

Finally, I am instructed that my client's own car was used for over 2000 miles and no provision has been made therefor. In addition thereto there is still the capital, an amount of R3000-00 in regard to goodwill that does not appear in these accounts.

My instructions are that unless the items referred to are adjusted, and in addition thereto my client, unless my client has payment of the amount of R3000-00 within seven (7) days from the receipt of this letter by you, action in the Supreme Court will be taken.

Furthermore, I wish to point out to you that parts are being charged at full retail prices whereas they should have been charged at a price of less 25 per cent.

My client states that it was agreed that this would be done and in any event this was always the position whenever he purchased parts from Reeds or any of the other suppliers.

Please give the matter your urgent attention."

I pause here to observe that that letter plainly challenges the sufficiency and accuracy of an account rendered to

the appellants. It does not, however, purport to be a letter of demand, save in respect of the sum of R3000 which it claims should have been credited to the appellants' capital account. As appeared at the trial, the letter of demand claiming an account in respect of the partnership was dated 30 April 1969. It would have been more appropriate to annex the latter letter when furnishing further particulars to the declaration. However, the letter of 9 June 1969, which was in fact annexed, stands as part of the declaration.

Continuing with the pleadings, the respondent's plea denied the existence of any partnership; averred that there was a certain business agreement which, from the particulars, seems to include the relationship of master and servant; denied any cancellation thereof and any failure to account; and pleaded that all amounts owing to the appellants had been paid, indeed overpaid.

To this plea the appellants called for further particulars inter alia as to (i) when and how the respondent

had accounted; (ii) what amounts it had paid; and (iii) how the alleged overpayment was made up. Replying to (i), the respondent annexed a balance sheet relating to the panel shop, with an income and expenditure account. Answering (ii), it furnished the figure of R3880-16. In reply to (iii), it annexed a statement headed "Account George Doyle".

I pause here to observe, with regard to the two documents referred to in the foregoing further particulars, that (a) neither of them purports to relate to a partnership; (b) neither of them deals with the R3000 which, according to the declaration, was to be credited to the appellants' loan account in the partnership books; and (c) both of them relate to the period 1 February 1968 (not 15 January 1968) to 31 March 1969.

The appellants' replication reaffirmed the existence of a partnership; denied that the respondent had "accounted" to them; and denied that the amounts owing to them had been either paid or overpaid.

The pleadings having been closed, the appellants called on the respondent to produce for inspection the books, statements and vouchers for the period 1 February 1968 to 31 March 1969, specified in the respondent's discovery affidavit. Subsequently, the appellants notified the respondent in terms of Rule 36 (9) (a) that at the trial they would call an expert witness, to wit, a chartered accountant. A copy of his report was attached, in which he stated that he had inspected the respondent's books and records relating to the panel beating and spray painting shop. His report criticised several items in the statement of income and expenditure (i.e. to say, the one annexed to the further particulars to the respondent's plea). In the result he was of the opinion that the figure for gross profit should be increased by R1361; that the figure for depreciation should be reduced by R122; and that the entries relating to rent and managerial charges might require reconsideration in the light of further information.

12/... And

And so to trial. In limine the appellants' counsel outlined his case. He said that evidence would be led as to the terms of the partnership, including the term that the goodwill of the appellants' business would be credited in their loan account in the partnership books at R3000. He said that this item did not appear in the account attached to the plea; and that evidence by a chartered accountant would be led criticising the account. He stressed that the account was not a true and proper one.

At this point counsel for the respondent intervened. He agreed that one of the issues in the case was whether the agreement between the parties was one of partnership. He said that it was one of master and servant. He went on to submit that the appellants' basic claim was for an account; that it now appeared that they had been furnished with an account; that the appellants wished to debate it in court; that a debate was not open to them since such relief was merely ancillary to the claim for an account; that, having received an account, their proper remedy was to

13/... sue

sue for a specific sum of money; and that the proposed evidence of the chartered accountant was inadmissible in the present proceedings.

After hearing argument on this point, the trial Court ruled that the evidence of the chartered accountant would be irrelevant and inadmissible. The learned Judge was of the opinion that (a) the issue (apart from that of partnership) was whether the appellants had been furnished with an account at all; (b) the issue was not the sufficiency of an account which had been furnished; therefore (c) any evidence relating to (b) was irrelevant. As I shall indicate later, this view flowed from an erroneous interpretation of the pleadings.

Thereupon counsel for the appellants called one of his clients to give evidence. The witness testified to the existence of a partnership business between the parties from 15 January 1968 to the end of March 1969. One of the terms of the partnership agreement related to the amount of R3000 to be credited to capital account. He

He went on to describe how the partnership came to an end. He admitted having received the accounts annexed to the further particulars to the plea. He said he received them after he had consulted his attorney. This was obviously before the issue of summons, since the accounts are referred to in the letter from the appellants' attorney dated 9 June 1969. Summons was issued in July 1969. When the witness was led to deal with "Account George Doyle" which was annexed to the further particulars to the plea, counsel for the respondent intervened again. After further discussion, he asked the Court to decide the following point under Rule 33 (4) -

> "This Honourable Court is respectfully requested to determine the question whether Plaintiff, having admitted receiving prior to the issue of the summons, the balance sheet and statement of income and expenditure (as requested by Plaintiffs' Attorney by letter dated

the 30th April, 1969) is entitled to any relief whatsoever on the pleadings as framed."

After hearing further argument, the trial Court delivered a judgment holding that Rule 33 (4) was properly invoked, and concluding as follows:

"The answer to the question posed is in the negative, and I accordingly rule that the Plaintiffs are not entitled to any relief on the pleadings as they are framed. It seems to me that the effect of this ruling is equivalent to a judgment of absolution. The Defendant is clearly entitled to its costs and I accordingly order the Plaintiffs to pay the Defendant's costs of the action to date.

Finally, having regard to the form of the pleadings and to the ruling just given, I see no purpose in granting leave to amend. The Plaintiffs are at liberty, if so advised, to institute fresh proceedings based upon a proper cause of action."

Against the whole of that judgment the appellants appeal to this Court.

16/... The

The basis of the learned Judge's ratio was that, on the pleadings, the appellants sued for an account; that it now appeared that they had received one before issue of summons; and that, if they were dissatisfied with it, they should have brought an action sounding in money for what they claimed was due to them.

In deciding the appeal, it is first necessary to construe the pleadings. Counsel for the respondent relied on the facts that the declaration did not aver, in terms, that an account had been received but that it was defective; that, when asked in a request for further particulars whether an account had been rendered, the appellants replied that the cause of action sufficiently appeared from the declaration; and that the replication re-affirmed that the respondent had not "accounted" to the appellants.

In my view the foregoing factors must not be considered in isolation, but must be viewed in the light of the pleadings as a whole. On that approach, the following issues clearly emerge -

17/... 1. The

1. The appellants claimed that the relationship between the parties was one of partnership. The respondent denied this and pleaded a business agreement savouring of master and servant.

2. The respondent pleaded that they had rendered an account. The appellants' attitude, as reflected in the pleadings, was this was not a proper and sufficient accounting, being defective in both form and content. As to form, it did not relate to partnership, and made no reference to one of the terms of the partnership, namely the crediting of the appellants' loan account in the sum of R3000, As to content, several material items in the account were challenged.

My reasons for the foregoing conclusion are as follows:

(a) The declaration avers a partnership, and failure by the respondent to account "for the conduct of the said partnership business". The prayer is for the rendering of an account "of all partnership transactions".

18/... (b) The

(b) The letter of 11 June 1969 forms part of the declaration by way of further particulars. It is plain therefrom that the appellants admit having received an account but they contend that it was not a proper and sufficient one. The letter asks for certain items to be "adjusted".

(c) The plea denies that the relationship between the parties was that of partnership. Consistent therewith, the further particulars to the plea annex a balance sheet unrelated to partnership. And some of the items therein are those criticised in the appellants' letter of 11 June 1969, supra.

(d) In the result, it is clear that both the form and the details of the account rendered were in issue on the pleadings.

I would add that the conduct of the appellants' case after close of pleadings was consistent with the foregoing. I refer to (i) the fact that there was sent to the respondent's attor-

neys, in terms of the Rules, a copy of the report by an accountant criticising the balance sheet annexed to the further particulars to the plea; and (ii) the opening address by counsel for the appellants, summarised earlier herein.

In my view, on the pleadings the appellants were entitled to the Court's adjudication on the following issues -

(i) Was the relationship between the parties one of partnership?

(ii) What were the terms thereof?

(iii) Was the balance sheet, which the respondent had furnished, a proper and adequate one?

The question of any further relief to which the appellants were entitled would depend upon the Court 's findings on those basic issues. The learned trial Judge, in deciding that a plaintiff who has received an account is limited to a claim sounding in money, was influenced by some dicta in the case

of Zabow v. Mauerberger Ltd., 1936 C.P.D. 205. At page 208 Jones, J. said:

> "It seems to me when the Plaintiff received all this available information it no longer was proper and right for him to say 'now let us go to Court, let us examine these accounts, let us examine all these books, and after an examination let us see whether the Court can determine when, if at any time, this factory was running on a paying basis and when the Court has so determined let it fix a date and let us determine what is due'. It seems to me that this is not a proper procedure to adopt. Plaintiff's duty, when he had all the available information and books placed before him, was to make a full examination of them with his accountant and determine if at any time there was a change in the running of this factory which made him entitled to an increase of salary, and to formulate a definite claim accordingly."

Those remarks cannot be regarded as applicable in the present case. The relationship between the parties in that case was held to be not such as to entitle the plaintiff to an account.

21/... Furthermore,

Furthermore, the principle to be applied is that a plaintiff, who is entitled to an account and receives one which he avers is inadequate, is entitled to press his claim for a due and proper account. That is what happened in Krige v. Van Dijk's Executors, 1918 A.D. 110, and Mia v. Cachalia, 1934 A.D. 102; see the headnotes. In the present case the averred partnership, giving rise to the obligation to render an account, was denied; but the appellants were entitled to AN opportunity to prove it, and on that footing to have the sufficiency of the account adjudicated, as a prelude to an order for the furnishing of a true and proper account.

It follows from what I have said that the decision of the learned trial Judge on the question posed under Rule 33 (4) cannot be upheld. Indeed, on the issues raised in the pleadings as explained in this judgment, the invocation of that Rule was perhaps unfortunate. The case will have to be remitted for adjudication on the lines indicated in this judgment. In view of the fact that (a) the issue of the adequacy of the account and (b) the element of debate, appear to

be closely correlated, in the particular circumstances of this case the learned Judge might find it convenient, and conducive to celerity, to try out those issues at one hearing, admitting the evidence of the chartered accountant, inter alios, and awarding such amount, if any, as may be found to be due. This would dispose of the whole case. But such procedure will be a matter for the learned Judge's discretion, as also any question of a referee under section 19 bis (1) (b) of the Supreme Court Act.

In the result -

1. The appeal is allowed with costs.
2. The order of the Court a quo is set aside.
3. The case is remitted to the Court a quo for the purpose of trying the issues raised in the pleadings, and of making an appropriate order as to costs, including the wasted costs.

G.N. HOLMES

JUDGE OF APPEAL.

Jansen, J.A.)
Trollip, J.A.)
Corbett, A.J.A.) CONCUR.
Kotzé, A.J.A.)