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

(APPÈL) Provincial Division)
Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

ELIZABETH KEET & ANDER *Appellant,*

versus

MARAISDRIFT (EDMS.) BPK *Respondent*

Appellant's Attorney Jacobs, Gous & Vennote *Respondent's Attorney* Symmington, Louw & de Kock
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate J. Pienaar Blignaut *Respondent's Advocate* H.M.L. Combrinck
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op

Coram: Van Blerk, W.N.N.B., Hartman, Jansen
Rabie et Hefer-A.R.R.

(K.P.A.) 9.45 vm ——— 10.00 vm
11.15 vm ——— 11.30 vm
C.A.V.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPÈLAFDELING)

In die saak tussen:

ELIZABETH LEE.....Eerste Appellant

en

CAESARY JONES.....Tweede Appellant

en

MARAISDRIFT (EIENDOMS) BEPERK.Respondent

Coram: Van Blerk, Wnd. HR., Holmes, Jansen, Rabie et Hofmeyr ARR.

Verhoordatum:	Leweringsdatum:
10 November 1975.	26 Februarie 1976.

U I T S P R A A K.

RABIE, AR.:

Hierdie appèl gaan om die regsgeldigheid al dan nie van die verweer wat die twee appellante in die hof a quo geopper het, nl. dat hulle, as lede van 'n vennootskap - 'n

gewone...../2

gewone handelsvennootskap - wat ontbind is maar waarvan die likwidasie nog nie afgehandel is nie, nie afsonderlik om betaling van n vennootskapskuld aangespreek kan word nie, maar dat die vennootskap as sodanig aangespreek moet word.

Die appellante het saam met hulle suster, n mev. Snyman, in die distrik Rawsonville in vennootskap geboer. Die vennootskap is op 13 Oktober 1971 ingevolge n ooreenkoms tussen die drie vennote ontbind. Dit het op daardie datum R2 711-49 aan die respondent geskuld en mev. Snyman het kort daarna een-derde van hierdie bedrag, nl. R903-83, aan die respondent betaal. Die appellante is op 1 Maart 1972 aangemaan om die oorblywende gedeelte van die skuld, nl. R1 807-66, te betaal, maar hulle het geweier om dit te doen en in Mei 1972 is hulle in die Kaapse Provinsiale Afdeling gedagvaar om gesamentlik en afsonderlik, die een vrygestel te word indien die ander een betaal, die bedrag van R1 807-66, met rente daarop vanaf 1 Maart 1972

(geen...../3

(geen rentekoers word vermeld nie), aan die respondent te betaal. Die verweer waarop die appellante by die verhoor gesteun het, word soos volg in hulle verweerskrif uiteengesit:

> "4. Dit word ontken dat die gemelde vennootskap ontbind is en Verweerderesse beweer dat die gemelde vennootskap nog altyd bestaan vir die doeleindes om die besigheid te likwideer.....
>
> 5. Uit hoofde van die voorafgaande word ontken dat Verweerderesse enige bedrag aan Eiser verskuldig is."

By die aanvang van die verhoor het die partye se advokate aan die verhoorregter gesê dat dit die saak sou verkort indien hy bereid sou wees om eers 'n beslissing te gee oor die regsgeldigheid al dan nie van die appellante se standpunt dat, aangesien die likwidasie van die vennootskap nog nie afgehandel was nie en aangesien die vennootskap vir die doel van sy likwidasie bly voortbestaan het, die

respondent...../4

respondent nie geregtig was om, soos hy gedoen het, die appellante om betaling van n vennootskapskuld aan te spreek nie, maar dat hy die vennootskap self moes aangespreek het. Die verhoorregter het ingestem om so n prosedure te volg en nadat kortliks getuienis gelewer is om te bewys dat die vennote op 13 Oktober 1971 op die ontbinding van die vennootskap ooreengekom het maar dat die vennootskap nog nie gelikwideer was en dat daar nog geen verrekening tussen die vennote plaasgevind het nie, het die geleerde regter, ná aanhoor van die advokate, sy beslissing oor die gemelde vraag voorbehou. Sy uitspraak is op 1 Augustus 1974 gegee en dit is daarna in die Suid-Afrikaanse hofverslae opgeneem: kyk Maraisdrif (Edms) Bpk v. Lee en n ander 1974(4) S.A. 696 (K.).

Die laaste twee paragrawe van die uitspraak van die hof a quo lui soos volg (bl. 703 B-E van die verslag):

"Die dagvaarding het die verweerderesse aangespreek vir betaling, gesamentlik of afsonderlik...../5

sonderlik, van twee-derdes van die hele vennootskapskuld. Indien een van die verweerderesse in gebreke sou wees om haar deel te betaal kan die ander verweerderesse eis dat die onbetaalde deel tussen haar en mev. Snyman verdeel moet word. Die bede gaan dus verder as waarop eiser sonder byvoeging van mev. Snyman geregtig is. Die verweerderesse se verweer was egter dat hulle nie eers vir hulle pro rata aandeel gedagvaar kan word nie. Soos reeds aangedui, slaag dit nie.

Die bevinding van die Hof is derhalwe dat die vennootskap Breëland Boerdery op 13 Oktober 1971 ontbind is en dat die eisermaatskappy geregtig is om die verweerderesse vir die pro rata deel van hul verpligting aan te spreek nieteenstaande dat daar ten tyde van die verhoor nog ongeveer R15 000 aan vennootskapfonds in die bank was. Indien die bewering dat mev. Snyman haar pro rata aandeel van die vennootskapskuld betaal het korrek is, is die Hof se bevinding dat sy nie hoef bygevoeg te word nie mits die verweerderesse elk alleen gedagvaar word om hulle pro rata aandeel te betaal".

As gevolg van wat in die pas aangehaalde paragrawe

gesê...../6

gesê is, het die respondent sy uiteensetting van eis gewysig deur te beweer dat elk van die appellante n bedrag van R903-83, "synde elkeen se pro rata aandeel van die verskuldigde bedrag van R1 807-66", aan hom verskuldig was en deur R903-83 van elkeen te eis. In hul verweerskrif in antwoord op hierdie wysigings het die appellante ontken "dat die gemelde vennootskap ontbind is" en beweer dat dit "inderdaad nog voortbestaan vir die afhandeling van bestaande transaksies en vir die doeleindes van sy likwidasie". By die voortsetting van die verhoor op 12 Desember 1974 het die verhoorhof, nadat sekere erkennings betreffende die feite van die saak namens die appellant gemaak is, elk van die appellante gelas om R903-83, met rente daarop vanaf 1 Maart 1972 (geen rentekoers word vermeld nie), aan die respondent te betaal. Die appellante is ook beveel om die respondent se koste te betaal, insluitende die koste van die "preliminêre punt", maar uitgeslote "die koste veroorsaak deur die

wysiging...../7

wysiging van die deklarasie ....., watter koste deur die eiser betaal sal moet word".

Die appellante het teen die "gehele uitspraak en bevel" van 1 Augustus 1974 en 12 Desember 1974 appèl aangeteken. Daar is geen teenappèl deur die respondent nie.

Namens die appellante is voor ons betoog dat die vennootskap ná die gemelde ooreenkoms van 13 Oktober 1971 nog vir die doel van sy likwidasie - o.m. om die vennootskap se skulde te betaal - bly voortbestaan het en dat, tot tyd en wyl daardie likwidasieproses afgehandel is, die respondent slegs die vennootskap as sodanig kan aanspreek en nie die individuele lede daarvan nie. Dit is die enigste betoog wat namens die respondent voorgedra is, en daar is aan ons gesê dat as dit nie slaag nie, die appèl ook nie kan slaag nie. Ter ondersteuning van hierdie betoog het die appellante se advokaat hom op 'n aantal beslissings van ons howe beroep, maar slegs een hiervan (Du Toit v. African Dairies Ltd. 1922 T.P.D. 245) bied

steun...../8

steun vir sy betoog: die ander beslissings het nie betrekking op die vraag van die aanspreeklikheid van die individuele lede van n vennootskap ná die ontbinding van die vennootskap nie en verwys slegs na die reël dat, vir solank as wat n vennootskap bestaan - d.w.s., tot tyd en wyl dit ontbind is, bv. deur ooreenkoms - slegs die vennootskap as sodanig vir die betaling van vennootskapskulde aangespreek kan word, en nie die individuele lede van die vennootskap nie. Dit is n ou en erkende reël van ons praktyk (kyk bv. De Wet en Yeats, Kontraktereg en Handelsreg, 3de uitg., bls. 577-578), hoewel miskien bygevoeg moet word dat hierdie hof hom skynbaar nog nooit pertinent daaroor uitgespreek het nie. In Du Toit v. African Dairies Ltd. is n lid van n vennootskap vir n vennootskapskuld aangespreek. Mason, R., het in n ex tempore uitspraak beslis dat die vennootskap nog bestaan het "for the purpose of liquidating the business", dat dit derhalwe nog nie "entirely dissolved" was nie, en dat

die...../8(a)

die vennootskap self (en nie n individuele lid daarvan nie) dus aangespreek moes gewees het. De Waal, R., het met Mason, R., saamgestem en het in n kort uitspraak van sy eie o.m. gesê: "As long as there are partnership assets in existence the partnership is still in existence, and as the partnership, therefore, was still in existence when the action was brought, the party to be sued was the partnership and not an individual member thereof". Soos sal blyk uit wat later in hierdie uitspraak gesê word, is hierdie menings nie in ooreenstemming met ander beslissings van ons howe nie en hulle moet as onjuis beskou word.

Die reël van ons praktyk, hierbo genoem, is nie in ooreenstemming met wat deur ons ou skrywers oor die aangeleentheid gesê word nie, en namens die respondent is o.m. aangevoer dat dit om daardie rede uit ons praktyk geweer moet word. Dit is nie nodig om enigsins op die geldigheid van hierdie betoog in te gaan nie, maar ek wil nietemin...../9

temin kortliks verwys na die opvattings van sommige van ons ou skrywers oor die vraag van aanspreeklikheid vir vennootskapskulde omdat dit lig werp op ons huidige reg met betrekking tot die aanspreeklikheid van vennote vir die skulde van 'n vennootskap nadat die vennootskap ontbind is.

Volgens ons ou skrywers kon die lede van 'n vennootskap gedurende die bestaan van die vennootskap individueel deur 'n skuldeiser van die vennootskap aangespreek word. Hieroor skyn daar nie twyfel te bestaan nie. 'n Vraag waaroor daar wel onsekerheid bestaan het en waaroor teenstrydige menings by ons ou skrywers gevind word, is of 'n vennoot vir die geheel van die vennootskapskuld aanspreeklik was of net vir sy pro rata gedeelte daarvan. In die uitspraak van die hof a quo (bl. 698 A-C van die verslag) word verwys na die stelling van De Wet en Yeats (op. cit., bl. 577, voetnoot (a)) dat "volgens ons skrywers" 'n individuele vennoot vir sy pro rata gedeelte van die

vennootskap...../10

vennootskap se skuld aangespreek kon word. Die ou skrywers na wie verwys word, is Voet 17.2. 13 en 16; Van Leeuwen, R.H.R., 5.3.11; Leyser, Meditationes ad Pandectas, Vol. III, Sp. CLXXXV; Glück, Pandekten, § 970,1. 'n Mens sou ook kon verwys na De Groot, wat in sy Inleiding (3.1.31) sê dat 'n handelaar-vennoot slegs vir sy pro rata gedeelte van die vennootskap se skuld aanspreeklik gehou kan word omdat die Romeinsregtelike reël van solidêre aanspreeklikheid as skadelik vir die handel beskou is. Daar was egter ook 'n ander mening. Van der Keessel, Theses Selectae, DCCIII, verklaar dat, volgens die menings van regsgeleerdes en handelaars, dit die gewoonte in Amsterdam geword het om 'n vennoot vir die geheel van die vennootskap se skuld aanspreeklik te hou. Hy bespreek die aangeleentheid ook in sy Praelectiones. In Boek III, Tweede Helfte, Deel 21 ("Van Maatschap") van hierdie werk word gesê dat die reg van Antwerpen - dit was 'n wetteregtelike reëling - waarvolgens handelaar-vennote

elk...../11

elk vir die geheel van die vennootskap se skuld aanspreeklik was, met verloop van tyd as gebruiksregsreël in Amsterdam aanvaar is. Hy sê o.m. in hierdie verband (vertaling van Dr. H.L. Gonin, Band V, bl. 103):

> "....in dié verband bestaan daar 'n advies van 23 Junie 1708 oor die geval waar die vennote onder die naam en titel van die vennootskap gekontrakteer het; in hierdie geval het 'n beroemde regsgeleerde wat 40 jaar ondervinding in die hof gehad het, die leer verkondig dat dit volgens algemeen bekende gewoonte die erkende reël was dat die handelaar-vennote afsonderlik vir die volle bedrag aanspreeklik gehou is; in die getuienis van 16 Febr. 1707 (in die vorige voetnoot) stel die persone wat geraadpleeg is, dit só dat (1) uit hoofde van alle kontrakte wat een vennoot namens die vennootskap gesluit het, alle vennote en elkeen afsonderlik vir die geheel verbind word; (2) dat ook een van hulle namens die hele vennootskap sonder sessie of lasgewing die skulde kan vorder; (3) dat ook enige vennoot in regshandelinge wat hy namens die vennootskap verrig, die titel en ondertekening van die hele vennootskap kan gebruik. 'n

Paar...../12

> Paar jaar later het 'n hele aantal advokate en prokureurs van Amsterdam by 'n verhoor getuienis oor hierdie aangeleentheid gelewer en op 29 Jan. 1710 verklaar dat dit te Amsterdam die erkende gebruik was dat indien twee of meer handelaar-vennote namens die vennootskap koop, hulle dan elkeen afsonderlik vir die geheel uit hoofde van daardie oorsaak aanspreeklik gehou word".

(Wat die advies van 23 Junie 1708 en die getuienis van 16 Februarie 1707 betref, kyk Barels, Advysen Over Den Koophandel en Zeevaart, 2de deel, LXI en LX). Van der Keessel sê ook dat beroemde Amsterdamse regsgeleerdes (celebres jurisconsulti Amstelodamenses) "in verband met die gemene reg wat allerweë onder die handelaars erken is" die advies gegee het dat, net soos in Amsterdam, "handelaar-vennote wat die titel en handtekening van die vennootskap gebruik, elkeen vir die geheel aanspreeklik gehou word" (Dr. Gonin se vertaling, Band V, bl. 105). Van der Linden, Institute, 4.1.13, sê dat vennote wat as 'n firma handel dryf elkeen vir die geheel van die ven-

nootskap...../13

nootskap se skuld aanspreeklik is. In sy vertaling van Pothier se werk oor die kontraktereg sê Van der Linden (Verhandeling Van Contracten, En Andere Verbintenissen, Tweede Deel, Derde Hoofstuk, Art. VIII, par. 2), waar Pothier verklaar dat vennote in solidum aanspreeklik is, in n aantekening dat "Naar ons hedendaagsch recht is de vraag meer of min bedenkelijk" en, nadat hy na gesag vir albei standpunte verwys het, verklaar hy dat die mening dat n vennoot in solidum aanspreeklik is op die beste gronde berus en "ook meer algemeen aangenomen" is. Kyk in hierdie verband ook die artikel van A.J. McGregor, "The case of Simpson & Co. v. Fleck (3 Menz. 213)", in die South African Law Journal van 1909, bls. 15-33, waar o.m. die vraag van die aanspreeklikheid van vennote ná die ontbinding van die vennootskap behandel word.

Die solidêre aanspreeklikheid van individuele vennote, soos genoem deur Van der Keessel en Van der

Linden...../14

Linden, is in ons reg aanvaar met betrekking tot die aanspreeklikheid van vennote ná die ontbinding van die vennootskap. In die heel vroeë saak In re Chabaud (1831) 1 M. 531 is uitgegaan van die standpunt dat n individuele vennoot ná ontbinding van die vennootskap slegs vir sy pro rata gedeelte van die vennootskap se skuld aangespreek kan word en in Haarhoff v. Cape of Good Hope Bank (1887) 4 H.C.G. 304 is daar dicta wat van n dergelike mening skyn te getuig - dit is nie baie duidelik nie: kyk bls. 311 e.v. Hierdie mening geld nie meer nie. In alle ander sake waarin die aangeleentheid ter sprake gekom het, is uitgegaan van die opvatting dat vennote ná ontbinding van n vennootskap gesamentlik en afsonderlik vir die geheel van die skuld van die vennootskap aanspreeklik is: kyk bv. Simpson & Co. v. Fleck (1833) 3 M. 213 op bl. 217; Stoltenhoff's Estate v. Howard 24 S.C. 693; Solomon & Bradley v. Millhouse 1903 T.S. 607; Pienaar v. Suttner Bros. &

Hirschfeld...../15

Hirschfeld 1914 E.D.L. 416 op bl. 419; en Mahomed v. Karp Bros. 1938 T.P.D. 112 op bl. 113. In Walker v. Syfret, N.O. 1911 A.D. 141, op bl. 165, word in die uitspraak van Innes, A.R., met betrekking tot 'n lid van 'n vennootskap wat ontbind is, gesê dat hy "liable in solidum for all debts, and responsible for all its promises" is. In Bester v. Van Niekerk 1960(2) S.A. 779 (A.) het hierdie hof (per Holmes, A.R.) met betrekking tot die aanspreeklikheid van vennote ná ontbinding van die vennootskap gesê dat "on dissolution, the enforceable liability of partners is joint and several in the absence of a contrary express or implied agreement with the creditor" (bl. 783 F-G; kyk ook bl. 785 A-B).

Uit die voorgaande is dit duidelik dat volgens ons reg die lede van 'n vennootskap ná die ontbinding daarvan solidêr aanspreeklik is vir die skuld van die vennootskap. Die appellante se advokaat het egter aangevoer dat so-

danige...../16

danige aanspreeklikheid eers ontstaan wanneer die vennootskap ontbind is in die sin dat die likwidasie daarvan afgehandel is, en hy het ons na beslissings verwys waarin gesê word dat 'n vennootskap ná sy ontbinding (bv. ingevolge ooreenkoms) vir die doel van sy likwidasie bly voortbestaan. Slegs Du Toit v. African Dairies Ltd. 1922 T.P.D. 245 steun die advokaat se betoog dat die aanspreeklikheid van 'n individuele lid van 'n vennootskap eers by die afhandeling van die likwidasie van die vennootskap ontstaan, maar, soos hierbo gesê is, hierdie beslissing moet as verkeerd beskou word. Die oorweging dat 'n vennootskap ná sy ontbinding vir die doel van sy likwidasie bly voortbestaan, bring nie mee dat die individuele aanspreeklikheid van vennote tot ná die likwidasie van die vennootskap uitgestel word nie. Dit ontstaan sodra die vennootskap ontbind word. Kyk bv. Simpson & Co. v. Fleck 3 M. 213, waar op bl. 217 gesê word: "..... immediately on the dissolution of the firm, each partner individually became instantly and directly liable, and might immediately be sued individually for all debts contracted by the firm prior to its dissolution", en Pienaar v. Suttner Bros. &

Hirschfeld 1914 E.D.L. 416, op bl. 419, waar die gemelde stelling in Simpson & Co. v. Fleck goedgekeur is. In Bester v. Van Niekerk 1960(2) S.A. 779(A.) is beslis dat die vennote aanspreeklik geword het toe die vennootskap tot 'n einde gekom het ("had terminated"): daar is nie verwys na 'n vereiste dat daar eers 'n likwidasie van die vennootskap moes gewees het nie, en daar kon in daardie saak in ieder geval ook nie 'n likwidasie gewees het nie aangesien die appellant in die saak deurgaans ontken het dat hy lid van die vennootskap was, terwyl die ander vennoot eers by die verhoor toegegee het dat daar 'n vennootskap was.

Soos uit al die voorgaande blyk, moet dit bevind word dat in die onderhawige geval die lede van die vennootskap elkeen vir die geheel van die vennootskap se skuld aanspreeklik geword het toe die vennootskap op 13 Oktober 1971 ontbind is. Hiermee is die appèl eintlik

afgehandel...../18

afgehandel, maar dit is miskien wenslik om kortliks te verwys na die bevinding van die hof a quo in die laaste twee paragrawe van sy uitspraak (hierbo aangehaal), asook na die bevel wat uitgereik is nadat die respondent sy uiteensetting van eis en sy bedes gewysig het om dit in ooreenstemming met die bevinding van die hof te bring. Die regsposisie is, soos reeds gesê, dat n lid van n vennootskap vir die geheel van die vennootskap se skuld aanspreeklik word sodra die vennootskap ontbind is, en dit volg dus dat die respondent ná 13 Oktober 1971 enigeen van die vennote vir die vennootskap se skuld kon aangespreek het. In beginsel kan daar geen rede wees waarom hy verplig sou gewees het om al drie vennote saam aan te spreek nie. Kyk bv. Solomon & Bradley v. Millhouse 1903 T.S. 607, waar een van die twee lede van n vennootskap wat ontbind is, gedagvaar is en deur die hof op appèl beveel is om die geheel van die ven-

nootskap...../19

nootskap se skuld te betaal; Simpson & Co. v. Fleck 3 M. 213 op bl. 217; Pienaar v. Suttner Bros. & Hirschfeld 1914 E.D.L. 416 op bl. 419, en die gemelde artikel van A.J. McGregor in die South African Law Journal van 1909, op bls. 29-30 en 33. Nadat mev. Snyman een-derde van die vennootskap se skuld betaal het, het die respondent, soos te begryp is, net die oorblywende twee-derdes van die skuld van die appellante geëis. Sy aanvanklike bede was dat hulle die betrokke bedrag gesamentlik of afsonderlik moet betaal, en hy was geregtig om hulle so aan te spreek. Die sienswyse van die verhoorhof, nl. "die bede gaan dus verder as waarop Eiser sonder byvoeging van mev. Snyman geregtig is", moet, in die lig van wat hierbo gesê is, as ongegrond beskou word. Die hof a quo het elk van die appellante beveel om R903-83 aan die respondent te betaal. Indien dit nou bv. sou blyk dat een van die appellante niks kan betaal nie, sou die respondent kon skade ly omdat hy, weens die aard van die hof se bevel, niks meer as R903-83 van die ander appellant

kan...../20

kan verhaal nie, terwyl hy regtens geregtig was om betaling van die volle skuld van laasgenoemde te eis. Dit is nie nodig om meer oor hierdie aangeleentheid te sê nie, want die respondent sou hom nouliks nou daaroor kon bekla: hy was immers party tot die prosedure wat daar in die hof a quo gevolg is om eers 'n bevinding oor die vraag van die aanspreeklikheid van die appellante te verkry, en hy het na aanleiding van daardie bevinding sy bedes gewysig om slegs R903-83 van elk van die appellante te eis. Daar is buitendien ook geen teenappèl nie.

Die appèl word met koste afgewys.

P.J. Rabie

Appèlregter.

Van Blerk, Wnd. HR.)
Holmes, AR.)
Jansen, AR.)
Hofmeyr, AR.)

Stem saam.

RECORD

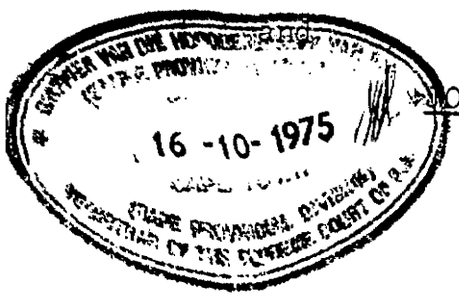
M.900/63. IH.

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the matter between:

R.G. NIEMOLLER (PTY.) LTD.

Applicant



JOHAN DANIEL WILHELM HUMAN VAN DE VIJVER

First Respondent

and

ABEL SHABAN

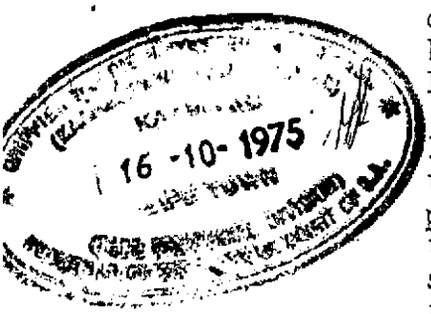
Second Respondent

Judgment delivered this 29th day of November, 1963.

CORBETT, J. : On the 19th April, 1963, and at Cape Town the Petitioner and one Hugh Jenner-Clarke, as sellers, entered into a written deed of sale with First Respondent, acting as agent and trustee for a private company to be formed, as purchaser, in terms whereof the sellers sold, ceded and made over to the purchaser all their rights, title and interests in and to certain prospecting agreements, which gave the right to prospect for diamonds and precious stones over various farms situated in the Cape Province and listed in a schedule annexed to the deed of sale. This deed of sale forms Annexure "A" to the petition and for convenience I shall hereinafter refer to it as "Annexure A". The relevant provisions of Annexure "A" relating to the consideration to be paid by the purchaser for the purchase of those prospecting rights read as follows:

> "1) In consideration of the said cession the Purchaser undertakes to pay to the Sellers the sum of R86,000 (eight-six thousand Rand) payment to be effected in eight equal instalments of R10,750 (ten thousand seven hundred and fifty Rand) each, the first to be paid on the 31st July 1963 and thereafter at the end

/of .....



of each third month, all such instalments to be paid at the Pofadder Branch of Standard Bank for the credit of the said Niemoller.

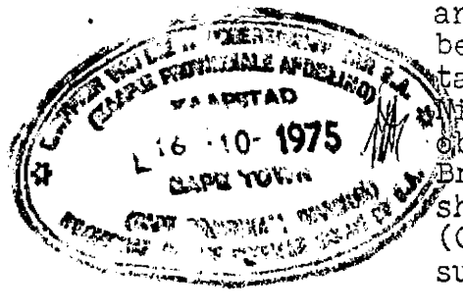
In further consideration of the said cession the Sellers will be entitled to receive ten per centum of any Vendor's consideration which the Purchaser may receive in respect of any sale of disposal of these rights or any portion thereof to any person or Company whatsoever. The Trustee hereby warrants in his personal capacity that the total of such consideration or considerations accruing to the Sellers, payable during the period of one year from the date of this Agreement will not amount to less than R20,000 (twenty thousand Rand) in cash or shares whichever the Purchaser receives.

In addition the Sellers will be entitled to subscribe for and to receive upon payment at par ten per centum of the issued capital of any Company that may be formed to take over all or any of the prospecting contracts hereby acquired by the Purchaser, such rights to be taken up by the Sellers within sixty days of notice being served upon them on behalf of such new Company so to do. In the event of their failing to take up such rights, or any portion thereof, the said Trustee will be entitled to take up such rights. In the event of the Purchaser itself undertaking the mining of any diamondiforous property, the Sellers shall be entitled to the immediate issue of shares in the Purchaser, equal to ten per centum of the total capital already issued by the Purchaser as a vendor's consideration in addition to the right to receive ten per centum of any further vendor's consideration subsequently received by the Purchaser."

It is clear from the preamble to the contract that in this clause the term "the Purchaser" refers to the private company to be formed, that the term "the said Niemoller" refers to Petitioner and that the term "the Trustee" refers to First Respondent. Although the purchaser of the prospecting rights was thus the company to be formed, First Respondent undertook certain personal obligations under the contract in the following terms:

"2) As security for the due fulfilment of all the obligations of the Purchaser towards the Seller the Trustee hereby binds himself, his heirs or successors in title and executors to meet all such obligations personally under renunciation of the legal benefits de

/duobus .....



duobus vel pluribus reis debendi et divisionos et excussionis, the meaning and effect whereof he hereby declares to be conversant with. He further undertakes to pledge as security to the said Niemoller for the due fulfilment of such obligations and to deposit with the Pofadder Branch of Standard Bank of South Africa shares of a par value of at least R100,000 (One hundred thousand Rand) in the Purchaser subject to the following conditions ;

(a) The said Bank is hereby authorised to release upon payment of any portion of the debt payable to Niemoller a portion of such shares in the same ratio as the portion of the debt bears to the total thereof.

(b) In the event of the Purchaser failing to make any payment on due date, and the Trustee himself failing to make good such payment within thirty days after demand in writing upon him by the said Niemoller so to do, the said Niemoller shall be entitled to realize all such shares in the hands of the said Bank to the best advantage for his own benefit and without prejudice to any other right of action he may have.

(c) The said Bank shall be entitled and is hereby authorised to substitute for the pledged shares in the event of the Purchaser making over any of its prospecting rights hereby acquired to another Company, shares in the new Company according to proportion of the issued capital of each company."

Other relevant terms of Annexure "A" are clauses (4), (10) and (11) which read as follows:

"4) The Purchaser further agrees to purchase from the said Niemoller all the equipment and machinery used in prospecting operations, according to the second schedule hereto, for the sum of Ten thousand Rand (R10,000-00), the said sum to be paid within ninety days after payment of the final installment in terms of paragraph One hereof.

The personal guarantee of the Trustee already set out shall also cover this debt. The said Niemoller, shall notwithstanding have the option to utilise the said amount, or any other amount owing to him in terms of this Agreement in the acquisition of the subscription shares referred to in Paragraph One hereof, and in that event the Trustee personally

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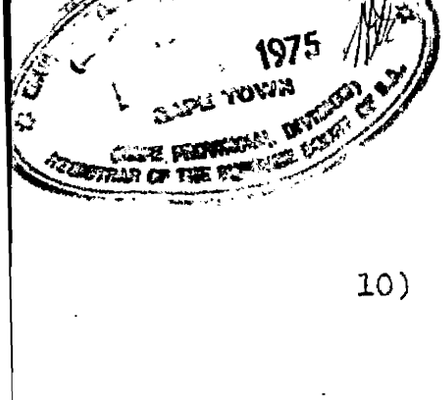

guarantees the issue of such shares to him. Upon such issue the debt due to him will be reduced accordingly. The Sellers give no warranty as to the condition of any of the articles sold in terms of this paragraph and such articles are sold voetstoots. All such articles are deemed to be delivered to the Purchaser with immediate effect and the risk passes upon the signing of this Agreement.

.....

10) The Parties hereto agree to sign all such documents as are required to give effect to this Agreement within thirty days after being called to do so.

11) The Sellers undertake to deliver the originals of all prospecting contracts or notarially certified copies thereof to the Purchaser within thirty days of the date hereof together with the individual cessions of each separate contract."

On the same day as that upon which Annexure "A" was signed by the parties thereto, i.e. on the 19th April, 1963, Second Respondent executed a deed of suretyship in terms whereof he bound himself jointly and severally as surety and co-principal debtor for the due fulfilment by First Respondent (J.D.W.H. van de Vijver) of -

"all the obligations of the said van de Vijver (the said trustee) arising out of the aforegoing agreement."

Subsequently disputes arose between the parties in regard to the implementation of Annexure "A" and negotiations took place between them. It is not necessary at this stage to traverse the details of these matters. Eventually on the 3rd October, 1963, Petitioner filed a petition citing First and Second Respondents as respondents. The petition alleges that at all material times a partnership existed between Petitioner and Jenner-Clarke, a geologist, with regard to the prospecting for diamonds on various farms situated in the Namaqualand and Van Rhynsdorp areas of the Cape Province. Upon some of these farms diamonds had in fact been found

/but .....

but all the farms had been chosen by Jenner-Clarke, who in most instances had been assisted by another geologist, one Baxter Brown, because of indications of the presence of diamonds. The Petitioner had spent altogether an amount of R152,042 on this enterprise. The petition then proceeds to refer to the conclusion of the contract, Annexure "A", in terms of which prospecting rights over certain farms were sold to the purchaser, and to the main provisions thereof. It is further averred that it was common cause that the purchasing company would be incorporated within 14 days after the conclusion of the contract and that the shares therein should be deposited, in terms of clause 2 of Annexure "A", as soon as possible thereafter; that, at any rate, it was certainly the intention that the shares should be deposited before the first instalment became due and payable under the contract on the 31st July, 1963. The petition also refers to the execution of the deed of suretyship by Second Respondent and the terms thereof. It is then alleged that the purchaser wrongfully and unlawfully failed to perform the obligations imposed upon it by the contract, more particularly in the following respects (see para. 10 of the petition):-

> "(a) Die koper het nagelaat om die eerste paaiement van R10,750-00 verskuldig ingevolge paragraaf 1 van die gesegde koopkontrak op 31 JULIE 1963 of tot op datum hiervan te betaal;
>
> (b) Die koper het nagelaat om aandele teen 'n pariwaarde van minstens R100,000-00 of hoegenaamd te deponeer ooreenkomstig die bepalings van paragraaf 2 van die gesegde koopkontrak."

This paragraph displays some confusion of thought since it is clear that under Annexure "A" it is the company-to-be-formed which is the purchaser and, while the obligation to pay the instalment is imposed primarily on the purchaser,

/the .....

the obligation to provide and deposit the shares is imposed upon First Respondent, the trustee, alone. The petition also makes reference to the provisions of clause 11 of Annexure "A", quoted above, and alleges, both generally and specifically in relation to clause 11, that the sellers have duly performed all their obligations under the contract. With regard to the formation of the company, on whose behalf First Respondent acted as trustee in the conclusion of the contract, the petition states:

> "31. Dat dit nie binne my kennis is of 'n privaat maatskappy soos in die voormelde koopkontrak in die vooruitsig gestel, gestig en geregistreer is.
>
> 32. Dat ek verder betoog dat daar aansienlike twyfel bestaan of sodanige maatskappy gestig is of gestig sal word."

The remainder of the petition is taken up mainly with an account of various communications, discussions and negotiations between the parties subsequent to the conclusion of the contract; with certain personal allegations concerning the First Respondent; and with a statement as to why the application is an urgent one. The relief sought against both respondents, jointly and severally, is the following:

> "(a) 'n Bevel om aandele met 'n pari waarde van R100,000-00 in die Maatskappy namens wie Eerste Respondent as trustee opgetree het, te deponeer tot u Petisionaris se rekening by die Pofadder-tak van die Standard Bank van Suid-Afrika;
>
> (b) In die alternatief, 'n Bevel om R100,000-00 in kontant te depenoor tot u Petisionaris se rekening by die Pofadder-tak van die Standard Bank van Suid-Afrika;
>
> (c) 'n Bevel om die koste van hierdie aansoek te betaal;
>
> (d) Sodanige alternatiewe regshulp wat dit u Edelagbares mag behaag om toe te staan."

/In .....

In response to this application the respondents deposed to opposing affidavits, dated the 8th October, 1963, which were handed in from the bar at the first hearing of this matter on the 9th October. In these affidavits a number of issues and defences are raised. For present purposes it is sufficient to refer merely to two matters. The first is that it is admitted by the respondents that a partnership exists between the Petitioner and Jenner-Clarke and it is averred that the sellers under the agreement, Annexure "A", are this partnership. For this reason it is submitted that Petitioner had no right to bring the application without having joined Jenner-Clarke. Secondly, it is alleged that upon the 14th May, 1963, and in pursuance of Annexure "A" a private company known as Litella Finance (Proprietary) Limited (hereinafter referred to as "Litella") was incorporated with a view to adopting the agreement, Annexure "A", and assuming the obligations of purchaser thereunder. It is further alleged that Annexure "A" was novated by a new verbal agreement concluded on the 9th August, 1963. It is admitted that prior to such novation Litella had to make certain payments in terms of Annexure "A" but it is contended that such payments had only to be effected by Litella upon the sellers complying with the obligations imposed upon them by clause 11 of Annexure "A", viz. delivery of the original prospecting contracts, or notarially certified copies thereof, together with individual cessions of each separate contract. These obligations, the respondents allege, had not been performed by the sellers and, accordingly, no payments had become due. The opposing affidavits proceed to state that the obligation imposed upon First Respondent to deliver shares in Litella to a par value of at least R100,000 was also conditional upon the fulfilment by the sellers of the obligations imposed by clause 11 of Annexure "A" and that by reason of the sellers'

/failure .....

failure to fulfil these obligations, the duty to deliver shares had also not become due under Annexure "A" prior to its novation on the 9th August, 1963.

At the hearing on the 9th October, 1963, the Court postponed the matter to the 15th October, 1963, to enable the Petitioner to reply to those opposing affidavits. It did so by means of an affidavit by one Rudolf Gerhard Niemoller, the only director of Petitioner, dated the 9th October, 1963. In reply to the point concerning the non-joinder of Jenner-Clarke it is stated that the partnership agreement between Petitioner and Jenner-Clarke was dissolved upon the same day as that upon which Annexure "A" was signed, viz. the 19th April, 1963. A written deed of dissolution, Annexure "R", is annexed. It is further alleged that First Respondent was fully aware of this dissolution agreement and that a copy thereof was handed to him upon the same date. The averment is made that it was at all times within First Respondent's knowledge that the aforesaid Niemoller was entitled to the amount of R86,000, portion of the purchase price under Annexure "A", and further that the shares to a par value of R100,000, referred to in that agreement, were intended for Niemoller personally. The need to join Jenner-Clarke is accordingly denied but it is alleged that Jenner-Clarke was fully aware of the application and was served with a copy of the petition on the 3rd October, 1963. In addition Petitioner filed an affidavit by Jenner-Clarke himself (dated the 12th October, 1963) in which he states that he has read the petition, the opposing affidavits and the replying affidavits. He affirms that he has at all material times been aware of the institution of the proceedings and had been advised that it was not necessary for him to join therein. In so far as it may be necessary he waives any right to be joined in the proceedings and abides the judgment of the Court. The allegations in

/regard .....

regard to Litella are not dealt with specifically in Petitioner's replying affidavit and must, therefore, be regarded as having been met by the general denial contained in paragraph 12 thereof.

When this matter came before me for the first time on 15th October, 1963, application was made on behalf of respondents for leave for a further set of affidavits to be filed by either or both of them. On the following day and for reasons which I gave then I granted respondents leave to file further affidavits in reply to certain new matter raised in Petitioner's replying affidavit and to include in these affidavits information in regard to the capital structure of Litella. The case was postponed to the 18th October to permit this to be done. In this fourth set of affidavits the point about non-joinder is reiterated and it is denied that the partnership was dissolved. In regard to the capital structure of Litella it is stated that this company which was duly registered on the 14th May, 1963, and which duly and lawfully adopted the agreement, Annexure "A", was incorporated with a share capital of R200-00 and that this capital structure has remained unchanged ever since. It is stated that neither respondent is a shareholder or director of this company and that by reason thereof it is physically impossible for respondents to deliver R100,000 worth of shares in Litella.

When the case was called before me on the 18th October, 1963, Mr. Steyn, on behalf of the Petitioner, pointed out that the point raised by respondents in regard to impossibility of performance and based upon the information as to the capital structure of Litella contained in the fourth set of affidavits, was a new matter with which Petitioner had not had an opportunity to deal. I shall refer to this aspect of the case again later. Thereafter Mr. Dison, on behalf of

/respondents .....

respondents, took two points in limine, upon which the Court, having heard full argument, reserved judgment.

Mr. Dison's first point was that because of the non-joinder of Jenner-Clarke the application was procedurally defective and should be dismissed with costs. Subsequent to the hearing on the 18th October and in fact on the 22nd October, 1963, an application was filed on behalf of Jenner-Clarke for leave to intervene and be joined as a co-petitioner in this matter. Assuming that the application is granted, the point about non-joinder has really become academic, save in regard to the question of costs. Inasmuch, however, as argument upon these two points in limine, principally on the non-joinder point, consumed the whole of the hearing on the 18th October, the question of costs is an important one. It is accordingly necessary for me to decide this issue.

The right of a defendant (or, as in this case, a respondent) to object to proceedings on the ground that other persons have not been joined as parties thereto is a very limited one and is generally confined to the case where the third person and the plaintiff are joint owners, joint contractors or partners or where the third person has a direct and substantial interest of a legal nature in the subject matter of the action (See Morgan and Another v. Salisbury Municipality, 1935 A.D. 167; Henri Viljoen (Pty.) Ltd. v. Awerbuch Bros., 1958 (2) S.A. 151; Koch & Schmidt v. Alma Modehuis (Edms.) Bpk., 1959 (3) S.A. 308, at p. 318). Thus where an action is brought to enforce an obligation owing to a partnership the normal rule is that all the partners must join, or be joined, in the action (Peacock v. Marley, 1934 A.D. 1; Uys v. Le Roux, 1906 T.S. 429).

Mr. Dison contended that in the present case the papers established that the Petitioner and Jenner-Clarke had

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carried out prospecting operations in partnership and that the prospecting rights sold in terms of Annexure "A" were partnership assets. Mr. Steyn conceded this to be the case - rightly so, in my view. Upon this foundation Mr. Dison argued further that Annexure "A", although not expressly stated to be such, was a partnership contract and the obligations incurred by First Respondent in terms of the contract were owed primarily to the partnership; with the result that in any action to enforce performance of such obligations both partners would have to be joined. Mr. Steyn sought to counter this by contending that there was no need to join Jenner-Clarke in this instance because (i) the partnership had been dissolved prior to the institution of these proceedings; (ii) the obligation which the proceedings aimed at enforcing was a severable one owed to Petitioner personally; and (iii) in any event, Jenner-Clarke had waived the right to be joined and had submitted to the judgment of the Court.

As proof of the dissolution of the partnership Petitioner, and its counsel, relied upon the written deed of dissolution, Annexure "R". This document refers, in its preamble, to an anticipation that an agreement of sale of the partnership's property rights would be concluded with First Respondent and then provides as follows:

> "Now therefore it is agreed between the partners the said R.G. Niemoller (Pty) Ltd herein represented by Rudolf Gerhard Niemoller in his capacity as sole director and hereinafter referred to as the said Niemoller and Hugh Jenner-Clarke (hereinafter referred to as the said Clarke, that in the event of the sale being concluded as envisaged in the preamble hereto that the partners will divide the proceeds of the sale as set out hereinafter and that the partnership will thereupon be dissolved subject to the following terms and conditions".

These terms and conditions prescribe, inter alia, that, subject to its assuming liability for certain partnership

/obligations .....

obligations, Petitioner is to receive the amount of R86,000; that Petitioner is entitled to retain for his own account all machinery and equipment used by the partnership; and that the vendor's consideration and right to participate in the taking up of 10 per centum of the issued share capital in any company formed to take over the prospecting contracts (see clause 1 of Annexure "A") be divided in a certain manner.

I do not think that Annexure "R" provides a sufficient answer to the point of non-joinder. As I read the operative part of the deed of dissolution, it appears to contemplate dissolution only after the division of the proceeds of the sale of the prospecting rights. Upon that basis the dissolution, as agreed to by the parties, has not yet occurred. In any event, a debt due to a partnership must be claimed by the partnership, notwithstanding the fact that an agreement to dissolve partnership has been concluded, because in law the partnership continues for the purpose of liquidating its affairs (Ferreira v. Fouche, 1949(1) S.A. 67; McCreadie v. Dodgson, 1962(3) S.A. 333). Thus, even if the time agreed upon for dissolution had arrived prior to the institution of proceedings, the partnership would have continued for the purpose of liquidating its affairs, including the enforcement of the contract of sale (Annexure "A") and the recovery and division of the proceeds thereof.

Turning to Mr. Steyn's second point, it is quite true that, as presently formulated, Petitioner's claim is merely for the enforcement of First Respondent's obligation under Annexure "A" to deposit shares in the company, for which First Respondent acted as trustee, to the par value of R100,000-00 (together with certain alternative and ancillary relief); and that this obligation is one undertaken in terms of Annexure "A" towards Petitioner individually. It may be that, where an obligation undertaken by a person in terms of a

/contract .....

contract with a partnership is wholly severable from the remainder of the contract and is expressed to be owing solely to one individual partner, that partner is entitled to sue in his own name upon that obligation - I pronounce no positive view on this point - but it does not seem to me that this is such a case. The First Respondent's obligation to deposit the shares and pledge them is designed as security to Petitioner for the due fulfilment "of all the obligations of the purchaser to the seller". These obligations include not only the obligation to pay the amounts of R86,000 (for the cession of prospecting rights) and R20,000 (for the equipment and machinery) to Petitioner individually, but also the obligation to pay 10 per centum of any vendor's consideration, warranted to be not less than R20,000, and the obligation in regard to participating shares in the new company referred to in clause 1 of Annexure "A", which are owed to the sellers collectively. In view of the partnership between the sellers and the nature and circumstances of the deed of sale (Annexure "A"), those latter obligations would be owed to the sellers in partnership. Furthermore the consideration for the undertaking of these obligations and, indirectly, for the provision of this security is the sale and delivery by the sellers of the prospecting rights held by them in terms of the various agreements. This is a counter-obligation owed by the sellers, in their capacity as partners, to the purchaser. Non-fulfilment by the sellers of this objection would probably justify refusal by the purchaser and First Respondent to implement their obligations - or most of them - under the deed of sale. It does not seem to me, therefore, that the obligation which the Petitioner seeks to enforce is wholly severable from the remainder of the contract and I accordingly hold that Mr. Steyn's second point fails.

There are other circumstances too, which, in my view,

/point .....

point to this being a proper case for demanding the joinder of the Petitioner's partner. It appears from the papers that one of the main disputes between the parties is whether or not the contract of the 19th April, 1963, was novated by a later verbal agreement concluded on the 9th August, 1963; another important dispute relates to the question as to whether the sellers have implemented their obligations under the contract. I refrain from commenting upon the genuineness of these disputes because that question does not arise at this stage. Jenner-Clarke is entitled to receive various benefits under Annexure "A" and, to my mind therefore, he clearly has a direct and substantial interest in these disputes. Moreover, one of the objects of the rule as to joinder is to save multiplicity of actions. In the event of Jenner-Clarke not being joined in this action any judgment given by this Court would not be binding upon him. Assuming, therefore, that upon the present application, i.e. without Jenner-Clarke having been joined, this Court were, for instance, to uphold the defence based upon novation, such judgment would, or, at any rate, should, be no bar to Jenner-Clarke taking action upon the contract. Thus in that event there would be the possibility of the Court being called upon to decide the same issues twice. Of course, action taken by Jenner-Clarke alone might precipitate an objection based on the non-joinder of Petitioner against whom judgment would already have been pronounced. The problems inherent in such a situation demonstrate, in my view, the desirability of both parties joining in the present application.

Mr. Steyn's final point was that based upon the waiver by Jenner-Clarke of the right to be joined. In Amalgamated Engineering Union v. Minister of Labour (1949(3) S.A. 637) Fagan, A.J.A. (as he then was) stated (at pp.659-60):

/"Indeed .....

> "Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may also, of course, be cases in which the Court can be satisfied with the third party's waiver of his right to be joined, e.g. if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both."

I do not think that the second sentence in this passage should be read to mean that in all cases a waiver by a party of his right to be joined will obviate the need for his joinder. On the contrary, it will be observed that the learned Judge has couched his statement in tentative language by saying that there "may" be cases in which the Court is prepared "under all the circumstances of the case" to accept an intimation from that party that he disclaims all interest or submits to judgment. This matter, i.e. the waiver of the right to be joined, was further considered in Brink, N.O. and Others v. Gain, N.O. and Others (1958(3) S.A. 503). In this case Van Winsen, J. pointed out that -

> "Where no other considerations arise than the protection of the interests of a person not cited as a party, there is no reason why he cannot of course waive his rights to undertake the protection of his own interests, provided of course such waiver is established to the satisfaction of the Court."

The learned Judge went on, however, to point out that there are other considerations which may make it necessary to have a person who has a direct interest in a suit joined as a party therein. In this connection are mentioned the

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consideration that the order may be a brutum fulmen because of the refusal by some person not joined as a party to co-operate in the carrying out of the Court's order; the desirability of achieving finality in regard to the disputed issue involved in any particular litigation; and the consideration that the non-joinder of a party could lead to multiplicity of actions and further to the possibility of different decisions by different Courts upon the same issues. It seems to me that, for the reasons elaborated earlier in this judgment, many of those considerations are present in the instant case and for that reason I do not think that this is the sort of case where it is appropriate for the Court to be satisfied with the waiver by Jenner-Clarke of his right to be joined. I hold, therefore, that the waiver by Jenner-Clarke is no answer to the objection in limine regarding non-joinder.

For these reasons I have come to the conclusion that Mr. Dison's objection in limine to the application on the ground that Jenner-Clarke should have been joined as a party thereto must be upheld. The normal relief granted in such circumstances is a stay of the proceedings until such time as the necessary party is joined in the proceedings (Peacock v. Marley, 1934 A.D. 1, at p. 9). Mr. Dison has nevertheless asked that the application be dismissed with costs on the ground that, as elaborated in argument upon the second point in limine, the petition did not disclose a valid cause of action. This brings me to a consideration of the second objection in limine.

In this connection Mr. Dison submitted, in the first place, that, where an objection is taken in limine to a petition on the ground that it discloses no cause of action, this is analogous to an exception and the Court should look at the petition alone, despite the fact that

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opposing affidavits may have been filed. There seems to be some authority for this view (see Hoffman v. Black, 21 S.C. 23; Taylor v. Welkom Theatres (Ptv.) Ltd. and Others, 1954 (3) S.A. 339) and I shall proceed on the assumption that it is sound. Upon this basis Mr. Dison pointed out that, while the relief sought in the petition was primarily for an order for the deposit of shares in the company, on behalf of which First Respondent had acted as trustee, in paragraphs 31 and 32 of the petition the probability was advanced that no such company had been formed. If no company had been formed, then, so it was contended, no order for the deposit of shares in such company, in essence an order for specific performance of portion of the contract, would be granted by the Court and, therefore, the petition did not make out a case for the relief sought.

It is perfectly true that the relief primarily sought in the petition, viz. the deposit of shares, is in effect an order for specific performance of one of the obligations undertaken by First Respondent under the deed of sale, Annexure "A". It is also correct to say that the Court will not grant a mandatory order, such as an order for the specific performance of a contractual obligation, where it appears that the order cannot be carried out by the debtor; in such a case the creditor must be content with a claim for damages (see Farmers' Co-operative Society v. Berry, 1912 A.D. 343, 350). However, the onus of establishing that it is impossible to perform the contractual obligation rests upon the debtor (see Shill v. Milner, 1937 A.D. 101, at p. 106). In the present case the respondents seek to discharge this onus by reference only to the petition and they rely in this regard upon the statements contained in paragraphs 31 and 32 of the petition, which have been quoted earlier in this judgment. These paragraphs simply state (in paragraph 31) that it is not within the petitioner's knowledge whether or not a private company, such as that

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contemplated under the deed of sale, has been formed and registered and proceed (in paragraph 32) to submit that considerable doubt exists as to whether such company has been or will be formed. No indication is given of the grounds for this doubt, unless the allegations in paragraph 33 be construed as furnishing the grounds - but this is by no means clear. In view of the petitioner's statement that it has no knowledge of the true position, I do not think that much weight can be attached to the doubts voiced in paragraph 32. Furthermore it must be borne in mind that this objection is in the nature of an interlocutory application and that my decision thereon will not be a final one. If I refuse to uphold the objection in limine, it will always be open to Respondents to raise the same argument upon all the information placed before the Court in regard to the company and its share structure. For these reasons Mr. Dison's second objection in limine is overruled.

In view of the failure of this second objection the proper order to be made in terms of the first objection is one staying the application. As far as costs are concerned, the respondents have been successful with one objection in limine and unsuccessful with the other. The first objection was the main one and consumed the greater portion of the day's hearing. I do not think, therefore, that the hearing of argument upon the second objection added materially to the costs or that an apportionment of the day's costs is either practicable or desirable. In the circumstances the petitioner must pay the costs of the hearing.

It is apparent from my summary of the content of the petition and affidavits that there are a number of issues of fact which the Court would probably be unable to decide without recourse to the hearing of oral evidence.

/Indeed .....

Indeed this aspect of the matter was canvassed during argument. It is also clear from the application for leave to intervene and be joined as co-petitioner, which has been filed on behalf of Hugh Jenner-Clarke, that the defect of non-joinder will in due course probably be cured. I did, therefore, think at one stage that, in the interests of the parties and in order to expedite the determination of this matter, I should now make an order providing for the hearing of oral evidence. Upon reconsideration, however, it seemed to me that there were too many difficulties in this path and I have thus decided to confine my order to a ruling upon the two points in limine.

I referred earlier in this judgment to Mr. Steyn's submission that the information contained in the Respondents' fourth set of affidavits in regard to Litella and its capital structure raised new matter with which he had not had an opportunity to deal. At that stage, i.e. when argument was heard on the objections in limine, petitioner and its attorneys had also not had an opportunity to investigate the facts in regard to Litella. By the time that this judgment is delivered they will have had this opportunity to investigate and, should Petitioner still feel prejudiced by not having been able to deal with the matter on affidavit, then no doubt it could make an appropriate application to place such an affidavit before the Court. Nothing that I have said here must, however, be construed as an expression of opinion favouring the granting of such an application. In any event, on the 24th October, 1963, Petitioner filed notice of an application to amend its petition by the insertion of an additional and alternative prayer for relief. This amendment, if granted, might obviate Petitioner's aforementioned difficulties.

/It .....

It is accordingly ordered that the further hearing of the application is stayed until Hugh Jenner-Clarke has been joined as a party thereto and that Petitioner is to pay the costs of the hearing on the 18th October, 1963.

W. M. Berlis
