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N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GUGLIELMO PEZZUTTO	Appellant
and	
CORNELIUS JOHANNES BURGER DREYER	First Respondent
BRIAN G WYLIE	Second Respondent
MINERAL & EXPLORATION CORPORATION (PTY) LIMITED	Third Respondent

CORAM: JOUBERT, EM GROSSKOPF, SMALBERGER, VAN DEN HEEVER, JJA, et VAN COLLER, AJA

HEARD: 17 FEBRUARY 1992

DELIVERED: 27 MARCH 1992

J U D G M E N T

SMALBERGER, JA :

The appellant and one De Polo instituted action against the three respondents in the Witwatersrand Local Division. (For the sake of

convenience, and in order to facilitate the reading of this judgment, the appellant will be referred to as "Pezzutto"; the three respondents will be referred to individually as "Dreyer", "Wylie" and "Mincorp" respectively, and collectively as "the respondents".) Appellant and De Polo's action was based on an oral agreement allegedly concluded between themselves, Dreyer and Wylie in September 1987. The nature and details of the agreement relied upon, and the relief sought consequent thereon, will appear in more detail below. The institution of the action was preceded by a successful interdict application by Pezzutto and De Polo restraining the respondents from dealing in five million ordinary shares in Knights Gold Mining Company Limited ("Knights"). There followed a number of preliminary skirmishes between De Polo and the respondents, the details of which need not detain us.

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This eventually led to Pezzutto applying to separate his trial action from that of De Polo. The application was granted despite the respondents' opposition. The judgment on the application is reported - see 1990(2) SA 290 (W). Pezzutto's separated trial eventually came before FLEMMING J. Pezzutto himself gave evidence and in addition called two witnesses, a Mr Laing and a Miss Wegener. A large number of documentary exhibits were handed in during the trial. The respondents closed their case without calling any evidence. After the hearing the learned judge a quo granted an order of absolution from the instance, with costs, against Pezzutto. However, he disallowed a limited portion of the respondents' costs to mark his disapproval of their opposition to his having sight of certain documents which, although before the Court, had not

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been admitted or proved in evidence. In a subsequent application Pezzutto was granted leave to appeal to this Court by FLEMMING J against the whole of his judgment and order; he however refused the respondents leave to cross-appeal against the adverse order of costs made against them. The respondents were later granted the necessary leave by this Court. It is perhaps appropriate to mention at this stage, without going into unnecessary detail, that the attitude adopted by the respondents, which was censured by the trial judge, was perfectly legitimate and in keeping with a prior agreement between the parties with regard to the production and proof of documents. The adverse order as to costs amounted to an improper exercise of the trial judge's discretion, and was not justified. Mr Grbich, for Pezzutto, did not contend to the contrary. It follows that if the appeal were to

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fail, the cross-appeal must succeed. If the appeal succeeds, the cross-appeal would fall away, as the respondents would in any event be liable for all the costs in the court a quo.

From the uncontradicted (and in many respects unchallenged) evidence of Pezzutto and his witnesses, as well as the relevant documentation, the following picture emerges. Pezutto was 70 years of age at the time of the trial. A former Italian prisoner of war in South Africa, he stayed on in this country when the war ended. He is by occupation a prospector, and was involved over the years, in apparent pursuit of his dreams of wealth, in numerous prospecting ventures in a variety of minerals, including gold. With the passage of time he acquired some measure of expertise in the prospecting for, and identification and exploitation of, minerals. Many years ago he met a

certain Mia, a wealthy, influential and astute businessman who directly or indirectly controlled various mining rights and institutions. One such was the Witwatersrand Gold Mining Company Limited ("Wit G M") of which Mia at all relevant times was the chief executive. As a result of their dealings with each other a healthy relationship was established between them. In September 1986 Pezzutto was granted permission by Mia to prospect a defunct gold mine called the "Joker and Jackpot" which Pezzutto hoped to start up again with one Tuininge. Samples taken from the mine by Pezzutto were assayed for him by De Polo who worked as a chemist in the assay laboratory at Rand Leases Gold Mine ("Rand Leases"), and with whom he had previously been associated in certain gold recovery ventures. (It would seem, although at the relevant time Pezzutto was unaware thereof, that De Polo had

neither a matriculation certificate nor any technical qualifications and had perpetrated frauds on this score on a number of people; he appears none the less to have been capable of doing the laboratory work which he did.) The samples taken proved unpromis= ing and in the end nothing came of the venture. Pezzutto reported the unsatisfactory nature of the samples to Mia. In the course of the ensuing discussion Pezzutto was given the right by Mia to investigate an old mine dump near Germiston known as the Jesus dump. Their understanding was that if the initial investigation of the dump demonstrated a basic potential Pezzutto would report back to Mia with a view to the matter being taken further. At this stage Tuininge dropped out of the picture and it was left to Pezzutto and De Polo to proceed with the initial investigation. Pezzutto first went on his own to

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take samples. He took these to De Polo at Rand Leases for analysis and testing. This was done, but it was considered necessary to take further samples. Pezzutto and De Polo went together to take these. In the meantime Mia was being kept abreast of developments. From De Polo's results it became apparent that cheap "heap leaching" of the dump was out of the question and that the much more expensive "carbon-in-pulp" process would have to be employed if the dump was to be exploited. This was reported to Mia. It was apparent that any project would involve the exploitation of more than just the Jesus dump. Other dumps, the rights to which Mia controlled, would also be involved. Mia required the removal of these dumps as he wished to develop the underlying land for industrial purposes. Pezzutto arranged for Mia and one Karrim, Mia's right hand man, to meet De Polo

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at Rand Leases, where De Polo explained to them, inter alia, the difference between "heap leaching" and "carbon-in-pulp" gold recoveries, both of which processes were in use at Rand Leases. At the conclusion of this meeting Mia authorized a more extensive investigation of the Jesus and other dumps. The cost of the further investigation was to be for Pezzutto's account. As he was unable to fund these costs alone, he entered into an agreement with De Polo whereby the latter would assume responsibility for the further investigation and they would share equally in the proceeds of any successfully concluded operation. In this way they became partners in the venture they had embarked upon. (At that stage Pezzutto had no right to recover any gold found in the Jesus and other dumps - he merely had Mia's permission to investigate them. Their agreement was therefore in anticipation

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of obtaining the necessary rights in due course.) This agreement was later recorded in a document which forms part of the record. De Polo engaged the services of a surveyor, one Ashman, to take certain sand samples and to prepare certain maps and plans. The results were promising, but Pezzutto and De Polo realised that they would not be able to take the project much further on their own. Pezzutto had in mind to approach Rand Leases for assistance, but De Polo persuaded him to meet Dreyer. He (Dreyer) was known to De Polo and Pezzutto was impressed by what De Polo had told him about Dreyer.

The meeting between Pezzutto and Dreyer took place in September 1987 at House 5 at Rand Leases. De Polo was also present. The discussion and events that occurred are critical to the outcome of the appeal, and for this reason I set out verbatim Pezzutto's evidence in chief in relation to the

meeting:

"Would you tell his lordship what happened? -- Well, we sat down at the table and Dr Dreyer said to me, he said, 'I heard via Mr De Polo that you got the right to investigate the Jesus Dump by Mr Mia?' I said, 'Yes, that is correct.' I said, 'We have already done a lot of work towards the investigation.' He said, 'Have you got this right, or this permission - whatever - in writing from Mr Mia?' I said, 'No, I haven't got it in writing. But as far as I am concerned, Mr Mia's word is good enough for me.' So, 'All right,' he said, 'now I presume that you would like to know who I am and what I am doing, and what I can do for you should we agree to go further together?' So I said, 'Sure, I would like to hear.' So he told me that he had a lot to do with Rand Leases plant, and he was busy with East Rand alluvial gold recovery. He also consulted for Rand Barlows. He was consulting - or he did consult - for Anglo American. And he was due to go to Germany for the purchase of a plant to mine ferro-chrome, or to process ferro-chrome in Botswana. Well, you know, to me it was more than wonderful what I heard from him, and I was very, very pleased.

Did he mention Mr Glenn Laing at any time? --- Yes. Somewhere along the line he said, 'Look, if we join forces, and we've got

to take this project further', he said, 'I know a Mr Glenn Laing.' And he said, 'The reason that I am saying that is that I have got in mind using Glenn Laing for the establishment of the plant required there, which is the exact duplicate of what we need. So naturally,' he said, 'Glenn Laing hasn't got to start finding out - asking left, right and centre. He just knows exactly what to do because he has got one operating exactly the same.' So I said, 'Well, I am quite happy with that.'

Did he mention any stockbrokers? --- Yes, he went on saying that he was a very good friend with a firm of stockbrokers, Anderson Wilson & Partners, through his previous dealings that he had with them. And so, therefore you know, he could tackle this whole project. And he had everything at his fingertips to speed it up because he was - he kept saying, he was in a hurry to go to Germany.

Did he mention Mr Wylie in any connection? --- Yes. He said that whatever the outcome of this meeting is, he has got a partner in a company called Mincorp, and they are on a fifty/fifty basis, and he said he cannot be present here. But, he said, 'Whatever we discuss and agree on,' he said 'I guarantee for his acceptance.'

Was there anything Mr Wylie could do to contribute to this project? --- Yes, he said although Mr Wylie wasn't a mining man, as such, that he had great knowledge of computer documentation, agreements, and so on, which, if we did take the project to the final stage, we would need a lot of that documentation and planning, and so on.

And did he mention what Mincorp might contribute? --- Yes, he said that - you know - due to the fact that I didn't have a name - nobody had a name - so he said we can use Mincorp on approaching different channels to find out what we need and what we require to discuss, whatever we had to discuss. He said we can say, you know, we represent Mincorp.

Now, what was the upshot of all of this, after you had heard him give you what he said could be done? --- Well, he said to me, 'Right, now if we take this project, if we continue with this project,' he said, 'what do you expect out of this project?' So I said, 'Dr Dreyer, I want R50 000 000.' So he smiled, and he said, 'Well, R50 000 000 is a lot of money.' He said, 'Money doesn't grow on trees.' So I said, 'No, sure, I know it.' Anyway, I said that is what I had in mind. He said, 'Mr Pezzutto' - or 'Memo' he called me anyway - he said, 'Can I make a suggestion?' I said, 'By all means.' So he said, 'Look, if I join you,

> I will undertake to do whatever is necessary further to do on the best of my ability, and whatever we may get as far as shares are concerned, or money, or whatever', he said he suggests that we split equally 25% between himself, Mr Wylie, myself and Mr De Polo. So I looked at Mr De Polo, and Mr De Polo, sort of, didn't say anything, so I said, 'Dr Dreyer, I agree and I accept your suggestion.' And I said, 'As far as I am concerned I would like to close this deal with a handshake, and we got a deal.' So I shook hands with Dr Dreyer and I said, 'Right, as far as I am concerned we have got the deal, there is nothing more to say. We have got a deal.'
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> So, did he make any mention of his attorney? ---- Yes, he said to me before we left, he said, 'Look, if you don't mind I would like my attorney to record the outcome of this meeting.' I said, 'By all means,' I said, 'I have got [no] objection at all. You can record it.'"

(The outcome of the meeting was not recorded by Dreyer's attorney. The gist of the agreement was roughly noted by De Polo in a document signed by himself and Pezzutto in December 1987, but dated 30 September 1987.) The agreement reached between

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Pezzutto and Dreyer in the presence of De Polo and sealed with a handshake was referred to in evidence and argument before us as the "handshake agreement", and it will be convenient to continue to refer to it as such. At the conclusion of the handshake agreement Pezzutto told Dreyer that he would arrange for him (Dreyer) to meet Mia.

Pezzutto duly contacted Mia and highly recommended Dreyer's involvement in the project. He set up a meeting between Mia and Dreyer. De Polo and Karrim were also present at the meeting. Pezzutto introduced Dreyer to Mia. Dreyer proceeded to tell Mia about himself, what his credentials were and how he could contribute to the project. Mia expressed his satisfaction with the outcome of the meeting and the way things were being handled. He told Pezzutto to carry on and take the project further. Immediately

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after the meeting Pezzutto and Dreyer had lunch together at a restaurant called Rugantino's. From the slip that he retained Pezzutto (who generally was extremely vague as to dates) was able to establish the date as 25 September. Dreyer was effusive in his gratitude to Pezzutto for giving himself and Wylie an opportunity to join forces with Pezzutto and De Polo and stated that he wished to move ahead with the project as quickly as possible.

From then on Dreyer took control and began to direct and co-ordinate the whole project. He specifically asked Pezzutto not to return to his home in White River but to be available in case he was needed. In the meantime the samples that had been taken by Ashman had been handed to Miss Wegener. She was a laboratory assistant at Rand Leases. She confirmed in evidence that she had supervised the

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assaying of the samples along with De Polo; and that the results had been tabulated in the laboratory book. Results were furnished to Dreyer from time to time and Dreyer and De Polo paid for the work done.

According to Laing it was round about this time that he was introduced to Dreyer by Dr Jacobson of the stockbrokers firm Anderson Wilson and Partners ("Anderson Wilson"). The purpose of the meeting was to interest and involve Laing and Jacobson in the Jesus dump project (which later became known as the Orgers project and still later the Knights project). Laing, it should be mentioned, was involved in the running of a number of mining companies and had experience in the development, construction and operation of gold metallurgical plants. Dreyer informed them that "his side" had the right to investigate and promote the Jesus and other dumps and that they hoped, if the project proved feasible, to acquire the rights to

exploit them. Dreyer told Laing that "his side" consisted of himself, his partner Wylie, Pezzutto and De Polo, and that they would be sharing equally in the benefits from the project.

Subsequently Dreyer called upon Pezzutto in Boksburg where Pezzutto was staying with his son. He brought with him a copy of a document headed "Envisaged Company Structure". The document contemplated a public company to be floated on the Johannesburg Stock Exchange with 60 million authorised shares of which 9 million were earmarked for the "initiators" (whose names were reflected as Dreyer, Wylie, De Polo and Pezzutto), to be shared equally amongst them. (A similar copy was given by Dreyer to Laing. It was apparently based on a hand-drawn company structure which had been prepared by Laing.) Dreyer proposed a variation which would allow Pezzutto a greater number

of shares than the others. Nothing came of this, however, as at a meeting at the offices of Dreyer's attorney later that day De Polo refused to agree to the variation. On that occasion Dreyer produced a document of his own making reflecting the relationship of various groups within a structure. In one grouping, under the heading "Partnership", appears the legend "A B C and D". It is not disputed that these letters were intended to refer to Pezzutto, De Polo, Dreyer and Wylie. Dreyer also expressed his gratitude to Pezzutto for having involved him in "the best project that has ever come my way in my life".

On about 2 October 1987 Pezzutto delivered to Mia a letter written by Dreyer. To the letter was attached a draft agreement. The letter stressed the need for approval of the agreement so that the Jesus dump project could be initiated. It then

proceeded to set out the further steps which it proposed should be taken in the following terms:

> "We would like to commence with a detailed drilling, bulk sampling and technical assessment of the dumps on Monday 5th October. For us to be able to adhere to the time-table (see Appendix 2) we would have to have the feasibility study completed by the end of December 1987. Appendix 2 provides a summary timetable of the proposed developments.
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> Appendix 3 indicates the Management team and outside consultants who would be responsible for bringing this venture to the Stock Market. The date of the listing has provisionally been set for Wednesday, 23rd March 1988."

The management team referred to listed Anderson Wilson as its sponsoring broker and featured amongst the proposed directors Dreyer, Pezzutto and Laing. Paragraph 1 of the draft agreement provided that "a formal agreement will be entered into between the Witwatersrand Gold Mining Company Ltd and Mr Guglielmo Pezzutto assisted by Mineral and Exploration

Corporation (Pty) Ltd (Mincorp) to initiate and commence with the dump treatment and gold recovery operation by acquiring the rights to the 'Jesus Dump' and other surrounding dump and slime material situated in the Germiston area and utilising service rights." (It was essential to acquire Wit G M's rights in the dumps. The whole project centred on them. Other parties were also interested in obtaining such rights.) Dreyer requested Pezzutto to arrange for Mia and Karrim to attend a meeting at the offices of Anderson Wilson. At the meeting, which Pezzutto also attended, Dreyer introduced Jacobson and Laing to Mia and Karrim. What transpired at the meeting appears from the following passage in the evidence of Laing:

> "What was the purpose of the meeting? --- It was to present an outline of our proposals, and that was proposals between myself, Dr Dreyer, Dr Jacobson, to Mr Mia and Mr Karrim representing Wit G M of how we intended going about the investigation of the

Wit G M dumps, and how we would then conduct a feasibility study, and if that proved successful we would go ahead and obtain a listing of the company on the Johannesburg Stock Exchange to raise the funds to develop the project.

What was your role in the meeting? --- Well, I gave the outline of what I would do on the technical and financial side of the project.

And what was that going to be? --- Well, that was to initiate the drilling of the dumps to take the samples, and then to enlist the support of LTA Process Engineering, who would be the main contractors to the feasibility study, to direct and guide that feasibility study for the test work by Mintek and then the accumulation of the information, and eventually putting it all together to form a feasibility study which would be a bankable document on which we could raise funds. I would co-ordinate and put all that together and then see to the putting together with the stockbrokers - you know - for the listing of the company.

Yes, what was the role to be of the stockbrokers, Anderson Wilson? --- Well, they were to take the thing to the Johannesburg Stock Exchange, to prepare the documentation in the right form, and to do the financial and investment promotion for

the project.

And what was Dr Dreyer's role to be? --- Dr Dreyer was going to negotiate the rights with Wit G M. He had the main job of getting the agreement with Wit G M for the project, and that agreement would have been based on the feasibility study."

Thereafter Pezzutto returned to White River. De Polo resigned from his employment with Rand Leases to join Dreyer and Wylie, taking up employment in a company, Resgoud, controlled by them. On a number of occasions thereafter Dreyer contacted Pezzutto telephonically to ask him to use his good offices with Mia to expedite the conclusion of the necessary agreement with Wit G M. Pezzutto acceded to these requests. (Wit G M had granted Waverley Gold Mining Company a right of first refusal over its mineral rights in the Jesus and other dumps. This right of first refusal was purchased by Primrose Gold Mining Company Ltd from Waverley. Wit G M required

cession of Primrose's rights before it in turn could dispose of the rights in the dumps. It acquired those rights on 14 January 1987 for the sum of R250 000. The way was now open for Wit G M to sell its rights to Dreyer's consortium.) Before Christmas Dreyer telephoned Pezzutto to tell him that "the deal is through". He asked Pezzutto to thank Mia on their behalf and agreed to advance an amount of R10 000 to Pezzutto.

Shortly after Christmas Dreyer asked Pezzutto to come and see him at his home, but told him not to bring De Polo with him. After telling Pezzutto that "this is the worst deal that I have ever done in my life" Dreyer proceeded to account for the proceeds of the project. He listed various extraordinary expenses which had to be taken into account. At Pezzutto's request he reduced these to writing. The handwritten

document featured as an exhibit at the trial. He further told Pezzutto (and reduced this to writing as well) that his and De Polo's allocations would each amount to 250 000 shares at 1c each, a private placing of 150 000 shares and R120 000 cash. When asked by Pezzutto what he and Wylie would receive Dreyer replied "exactly what you two get, we get".

At a meeting held on 19 January 1988 at the offices of Mincorp, Dreyer, Wylie, De Polo and Pezzutto met, ostensibly to share formally in the benefits that had accrued to them from the project. It is not necessary to enter into the full details of the meeting. According to Pezzutto it was extremely unpleasant and acrimonious. Various accusations were made against De Polo causing him to leave the meeting. Pezzutto claims he was browbeaten and intimidated into eventually signing a document which

recorded that he would be allocated as "an agent's commission" 150 000 ordinary shares at par value, the right to privately place 50 000 shares at the issue price and a cash payment of R60 000. Before signing Pezzutto was again given the assurance that Dreyer and Wylie would be receiving exactly the same as he and De Polo. (Significantly the respondents never sought to rely on this document to found any defence.) Because Dreyer suggested that Mia was to blame for the poor allocation, Pezzutto and De Polo went to see Mia who informed them that he had had nothing to do with it.

On the same day (19 January) Dreyer and Laing, as directors of Knights (which had been incorporated on 14 January) approved the allotment of shares in Knights. 5 000 000 shares were allotted to Mincorp and effectively 2 400 000 each to Dreyer and

Wylie. According to Laing he enquired from Dreyer how he had dealt with Pezzutto and De Polo and was told that the net proceeds of the venture would be shared "between the parties".

As appears from an agreement entered into on 20 January 1988 between Mincorp, Orgers and Anderson Wilson, Knights was formed with the specific objective of acquiring the title and permits owned by Wit G M to certain sand and slime dumps (including the Jesus dump). The objective of Knights was to exploit these dumps. To raise the necessary capital to erect a recovery plant to exploit these dumps a listing of Knights was to be sought on the Johannesburg Stock Exchange. On the same date Knights and Wit G M entered into an agreement in terms of which Knights acquired Wit G M's title and permits to the dumps in question. This brought the Jesus dump project to a

successful conclusion. (If a partnership existed on 20 January 1988 that would have been the date of its effective dissolution, as the purpose of the joint venture had been achieved.) Knights was eventually listed on the Johannesburg Stock Exchange on 5 May 1988.

When eventually Pezzutto and De Polo went to collect their share certificates at the offices of the auditor who had attended to the issuing of the shares, certain events occurred which led to their demanding to see the share register. They then discovered for the first time that there was a vast discrepancy between the few thousand Knights' shares allocated to them, and the some 10 000 000 shares which had directly or indirectly (through Mincorp) been allocated to Dreyer and Wylie. They thereafter consulted their attorney, a letter of demand was written, and

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DEFENDANTS through the project, whether directly or indirectly, would be shared on the basis of:

FIRST PLAINTIFF	25%
SECOND PLAINTIFF	25%
FIRST DEFENDANT	25%
SECOND DEFENDANT	25%"

The relief sought by Pezzutto (apart from costs) was dissolution of the partnership; the appointment of a liquidator to realise the benefits and liquidate the liabilities of the partnership; and payment to him of his share of the net benefits. Although various defences were raised by the respondents in their plea, the sole issue at the trial (as well as on appeal) was whether Pezzutto had proved a partnership agreement as alleged. The onus of proving such agreement rested on Pezzutto. The respondents do not contest Pezzutto's right to the relief sought in the event of his discharging such onus.

For a partnership to come about there must be an agreement to that effect between the contracting parties. In determining whether or not an agreement creates a partnership a court will have regard, inter alia, to the substance of the agreement, the circumstances in which it was made and the subsequent conduct of the parties. The fact that parties regard themselves as partners, or referred to themselves as such, is an important, though not necessarily decisive, consideration. What is necessary to create a partnership agreement is that the essentialia of a partnership should be present. Our courts have accepted Pothier's formulation of such essentialia as a correct statement of the law (Joubert v Tarry & Co 1915 TPD 277 at 280/1; Bester v Van Niekerk 1960(2) SA 779 (A) at 783 H - 784 A; Purdon v Muller 1961(2) SA 211 (A) at 218 B - D). The three

essentials are (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit (Pothier: A Treatise on the Contract of Partnership (Tudor's Translation) 1.3.8). A fourth requirement mentioned by Pothier is that the contract should be a legitimate one. However, as has been pointed out previously, this requirement is one common to all contracts and is therefore not a particular essential of a partnership (see Bester v Van Niekerk (supra) at 784 A - B). Where Pothier's four requirements are found to be present the court will find a partnership established "unless such a conclusion is negatived by a contrary intention disclosed on a correct construction of the agreement between the parties" Purdon v

Muller (supra) at 218 E - F). In essence, therefore, a partnership is the carrying on of a business (to which each of the partners contributes) in common for the joint benefit of the parties with a view to making a profit. In this context a business is "anything which occupies the time and attention and labour of a man for the purpose of profit" (Standard General Insurance Co v Hennop 1954(4) SA 560 (A) at 565 A). The business need not be a continuous one; a joint venture in respect of a single undertaking can amount to a partnership provided the essentialia of a partnership are present (Bester v Van Niekerk (supra) at 783 F - 784 F). (This is the ad hoc type of partnership relied upon by Pezzutto.) Finally, it should be noted that the contribution to be made by each partner need not be of the same character, quantity or value (Pothier: 1.3.9). However, each

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partner must contribute something "appreciable", i e something of commercial value, although such contribution need not be capable of exact pecuniary assessment as, eg, where a partner contributes his labour or skill (Pothier: 1.3.9 and 10; B v The Commissioner of Taxes 1958(1) PH T4 (SR)). The above principles must be applied to the facts of the present matter to determine whether a partnership between Pezzutto, De Polo, Dreyer and Wylie came into being, more particularly, whether the essentialia of a partnership are to be found in the handshake agreement.

The relevant facts appear from the evidence of Pezzutto as supported by Laing and the documentary exhibits. The judge a quo had reservations about Pezzutto's evidence. He found him to be an unconvincing witness whose evidence was unacceptable in certain respects. He approached Pezzutto's evidence

on the basis that he "moet rekening hou met 'n streep van oneerlikheid wat onder die vernis mag lê". In regard to these findings I would make the following observations. Certain of the trial judge's findings were premised on inferences not justified by the evidence. While Pezzutto's evidence was not without blemish, there is no reason to label him a dishonest witness. In his affidavit in the interdict application he repeatedly stated that the handshake agreement had been concluded on 29 September. This was clearly wrong. The fact that he did so repeatedly does not call for greater criticism or censure than if he had only done so once, for he was obviously not trying to deliberately mislead anyone. He was, throughout his evidence, extremely vague as to dates. It was presumably only when he discovered that he had had lunch with Dreyer at Rugantino's on 25 September

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that he realised that the handshake agreement could not have been concluded on 29 September. This gave rise to a change in his evidence. Such change is perfectly consistent with an honest mistake on his part - a mistake no less honest because what he had said previously was said under oath. The back-dating of the written memorandum prepared by De Polo and the false dating of the cancelled revenue stamp on it admittedly does not do Pezzutto any credit. In mitigation it can be said that he neither drew up the memorandum nor cancelled the stamp. But what was done must be seen in its proper perspective. It was an attempt to record certain events that had in fact occurred rather than a deliberate attempt to fabricate false evidence. As such it cannot seriously detract from his credibility. Furthermore, as the judge a quo himself recognised, there is no justification for

doubting Pezzutto's evidence in respects in which it went completely unchallenged by the respondents. In this regard it must be borne in mind that Pezzutto's version of the handshake agreement as set out above was never seriously challenged. Mr Henning, for the respondents, in fact accepted such version for the purposes of his argument, but contended that it did not satisfy the requirements for a partnership. Whatever the shortcomings in Pezzutto's evidence, there is no reason to doubt his chronology of the relevant events; to the extent that the judge a quo did not accept such chronology he erred. In addition his evidence stands uncontradicted. It is true that it does not follow merely from the fact that a witness's evidence is uncontradicted that it must be accepted. It may be so lacking in probability as to justify its rejection. But where a witness's evidence is uncontradicted,

plausible and unchallenged in any major respect there is no justification for submitting it to an unduly critical analysis, which is what the trial judge seems to have done.

Pezzutto's evidence reads reasonably well, and while this Court will not lightly go behind the findings of a trial judge on issues of credibility, in the circumstances of the present matter there is no reason for not accepting Pezzutto's evidence at face value - more particularly when regard is had to the fact that his evidence is materially confirmed in a number of important respects. The same is true of Laing. He was an independent witness who consulted with both sides. The respondents had even given notice of their intention to call him as an expert witness. No challenge was directed at his evidence, and the insinuation of bias on his part by the trial

judge was not justified. There is therefore no reason for not accepting his evidence.

A further matter that needs to be addressed at this stage is the finding by the judge a quo that at least four different versions of the handshake agreement were put forward by or on behalf of Pezzutto. They were, according to him, (1) that deposed to by Pezzutto in evidence; (2) that contained in the pleadings; (3) that contained in the letter of demand from Pezzutto's attorney; and (4) that contained in the memorandum of the handshake agreement prepared by De Polo. The respondents contend that there were even more versions than that and seek to rely on the alleged differences as indicative of the fact that no partnership agreement was concluded or proved. I do not intend to traverse the judge a quo's reasons for so finding, or the respondent's contentions in this

regard. On a common sense approach, and having regard to substance rather than form, there do not appear to me to be any significant differences between the various versions. They all have as their central theme the creation of a partnership agreement between four equal partners. Whatever differences there may be, they are not sufficiently material or substantial to detract from the acceptability of the uncontradicted and largely unchallenged evidence of Pezzutto.

I turn to consider whether Pezzutto's version of the handshake agreement established an ad hoc partnership agreement in the terms pleaded. All the parties to the alleged partnership were either present or represented at the meeting. De Polo signified his assent to the terms of the handshake agreement by his failure to demur. Dreyer's authority to represent his partner Wylie was never disputed. Any agreement

reached was therefore binding on all four parties. Mr Henning contended that the existence of a partnership agreement was not proved; that the parties were lacking in consensus and doing no more than "feeling their way towards a more precise and comprehensive agreement" (Cf Pitout v North Cape Livestock Co-operative Ltd 1977(4) SA 842 (A) at 850 D); and that at best for Pezzutto the handshake agreement amounted to no more than an agreement to enter into some future agreement. It was further contended that in any event the agreement was inchoate and void for vagueness. I do not agree with any of these submissions, for reasons that follow.

As appears from Pezzutto's version of the handshake agreement as set out above, Dreyer did at one stage say "if I join you I will undertake to do whatever is necessary further". Whatever

reservations Dreyer may have had at that stage, these had clearly been dispelled when Pezzutto said "we have got a deal" and they shook hands. Colloquially these words signified the existence of a binding agreement on the terms proposed by Dreyer - a situation acquiesced in by Dreyer as evidenced by the shaking of hands which symbolically sealed the agreement. Mr Henning referred to a host of matters on which parties to a partnership agreement involving a project of the magnitude of the one contemplated would have been expected to negotiate and agree. He argued that the lack of consensus on these matters was indicative of the agreement being incomplete. I do not propose to detail the matters mentioned. Suffice it to say that the rights and obligations of the parties inter se would, if there was a partnership agreement, largely be regulated by the legal consequences that flow from

such a relationship. Any other matters were not material. It was not essential for the formation of a partnership agreement that they be specifically agreed upon at the time of the handshake agreement. The handshake agreement clearly envisaged Dreyer's having authority to take decisions on behalf and in the interests of the partnership; which included authority to do all things necessary to result in the rights being exploited with public money via the vehicle of a public company. That was a matter beyond the competence of Pezzutto and De Polo, who contemplated it as being a necessity already when they first concluded their own partnership. See LAWSA vol 19, par 403, pp 296-7 and the authorities referred to in nn 8 and 14. To the extent that it may have been necessary to agree on other matters, they could have been agreed upon later within the partnership framework

(Cf Delyannis v Kapousousoglu 1942(2) PH A40). Nor were there any material terms contemplated but not finalised, thus rendering the agreement inchoate (Cf McWilliams v First Consolidated Holdings (Pty) Ltd 1982(2) SA 1 (A) at 8 H - 9 A). The parties immediately acted on their agreement; they themselves never regarded it as incomplete. The suggestion by Dreyer, agreed to by Pezzutto, that the outcome of the meeting be recorded by Dreyer's attorney, did not mean that the parties contemplated that the agreement would only come into effect once it was reduced to writing. The onus would have rested on the respondents to allege and prove this (Woods v Walters 1921 AD 303) - a defence they never raised on the pleadings and an onus they never even remotely sought to discharge. Provided therefore the essentials of a partnership were present the agreement was complete. This brings me

again to the content of the handshake agreement.

In terms of the handshake agreement the parties were to carry on business jointly. The business would involve exploitation of the Jesus and other dumps. (This was conditional upon the rights to do so being obtained from Wit GM - which they were fairly confident of obtaining and which they ultimately did obtain.) Pezzutto and De Polo would contribute to the business the right (albeit in the nature of a precarium) given to Pezzutto by Mia to investigate the Jesus dump and the benefit of the investigations, sampling and analysis done by them or on their behalf. Dreyer and Wylie, with their knowledge, expertise and contacts would then take the matter further in order eventually to bring the project to fruition. Furthermore Pezzutto (and, one assumes, De Polo) were prepared to be of further assistance and to do whatever

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was required of them within their means and ability. In particular Pezzutto's good relationship with Mia could enure for the benefit of the project. There was clarity among them in regard to the nature of each party's contribution - the fact that the exact extent of such contribution and the precise role each party would play in future was not spelt out does not make the agreement void for vagueness. The essence of the handshake agreement in relation to what would be done in future was embodied in the proposals made to Mia at the meeting at the offices of Anderson Wilson.

Despite Mr Henning's submission to the contrary, I am satisfied that what Pezzutto and De Polo had to contribute had a commercial value even though it might be difficult to place a precise monetary value on it. This is borne out to some extent by a letter written by Metorex (Pty) Limited to Mia on 15 June

1987. The letter contains "a summary outline of the cost and time estimate to carry out a preliminary evaluation of the Jesus dump". The evaluation involved, inter alia, the taking and assaying of samples, and the estimated cost of the whole evaluation was given as between R20 000 and R25 000. Although the investigation done by Pezzutto and De Polo was on a significantly smaller scale, it had produced worthwhile results which had been relied upon by Dreyer (and Wylie) to join the project and get it off the ground. As such it had served a very real purpose and there can be no denying that it had a sufficiently significant commercial value to amount to a contribution towards the envisaged partnership. The parties themselves regarded Pezzutto's contribution as appreciable. This is evident not only from Dreyer's expressions of gratitude but also from the fact that he sought, in

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recognition thereof, to give Pezzutto a higher percentage share in the venture than the others. The parties themselves were the best judges of each other's ability to contribute towards the partnership and the adequacy of such contributions; they were quite clearly satisfied with what each contributed. The fact that Laing later commissioned a feasibility study to serve as a "bankable document" and did not rely upon De Polo's test results does not detract from such results having served an important purpose initially. The fact that neither Pezzutto nor De Polo (particularly the former because of his impecunious state) was in a position to make a financial contribution towards the partnership was of no consequence. There was no need for them to do so, as no financial contribution was expected from any of the parties. The project was essentially to be

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funded from public money raised on the Stock Exchange. Finally, that the envisaged project was to be for the joint benefit of all the parties, and that their intention was to make a profit, is unquestionable. The essentials of a partnership were therefore present in the handshake agreement. In the absence of evidence to the contrary the presence of such essentials gives rise to the inference that the parties intended to enter into a partnership arrangement.

Dreyer's later conduct is only consistent with the existence of a partnership agreement. Dreyer immediately set about promoting and advancing the project. He brought in Laing and Anderson Wilson whose expertise and knowledge were required to bring the project to fruition. His statements to Laing and the company structures he produced (which either reflect a partnership or show Dreyer, Wylie, Pezzutto

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and De Polo as sharing equally) confirm that a partnership existed. Furthermore he purported to account to Pezzutto on both 27 December and 19 January, while steadfastly maintaining that they were all sharing equally in the proceeds of the project. Not only was his accounting shown to be false in a number of respects, but his claim that they were sharing equally was a blatant untruth. There was no need to have accounted to Pezzutto or to have lied if, as is now contended, there never was a partnership agreement. His conduct was not consistent with that belief; it is consistent only with a partnership. In fact throughout the whole period of their association Dreyer never denied the existence of a partnership to Pezzutto.

Pezzutto's case, as pleaded, is not at variance with the terms of the handshake agreement.

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Dreyer and Wylie were brought into the project because of the inability of Pezzutto and De Polo to take the matter further on their own. In that sense they were to assist Pezzutto and De Polo in taking the project to fruition; and it is this arrangement that was the nub of the partnership agreement. What was pleaded therefore reflects the substance of the handshake agreement.

To sum up. Dreyer never sought to contradict the evidence of Pezzutto and Laing or to explain his conduct. There is no reason why the evidence of Pezzutto in general, and that relating to the handshake agreement in particular, should not be accepted. The same holds true of Laing's evidence. The ad hoc partnership agreement pleaded corresponds in substance to Pezzutto's evidence. The essentials of a partnership agreement have been established.

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Dreyer's conduct supports the existence of such an agreement. The intention to form an ad hoc partnership is to be inferred from all the circumstances. In the result a partnership between Pezzutto, De Polo, Dreyer and Wylie in relation to the Jesus project was proved.

It is common cause that with the floating of Knights and the acquisition of Wit G M's rights the Jesus project was successfully concluded. In terms of their agreement Pezzutto was entitled to share equally with the others in the benefits of the partnership. Dreyer and Wylie have denied Pezzutto those benefits. In the result Pezzutto was entitled to the relief sought in the court a quo. It follows that the appeal must succeed.

The order to be made will allow the parties an opportunity to themselves agree on the distribution

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of the net benefits of the partnership. Failing such agreement provision will be made for the appointment of a liquidator. Mr Grbich has argued that the costs, both on appeal and in respect of the trial, should be awarded on an attorney and client scale. I am unpersuaded that such an order is justified, and see no sound reason to depart from the usual order as to costs.

The following order is made:

1) The appeal is allowed, with costs.

2) There is substituted for the order of the court a quo the following order:

"(a) The partnership between the plaintiff (Pezzutto), De Polo and the first and second defendants with regard to the exploitation of the mine dumps referred to in the written agreement dated 20 January 1988 between the Witwatersrand Gold Mining Company Limited and the Knights Gold Mining Company is declared to have come to an end on 20 January 1988;

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(b) Failing agreement being reached between the parties within a period of two months (or such longer period as the parties may agree upon) on the net benefits accruing to the plaintiff from the partnership, and the delivery or payment of such benefits to the plaintiff by the defendants, the Master of the Supreme Court, Pretoria, is directed, after consultation with the parties, to appoint a liquidator to

(i) determine and liquidate the benefits which accrued to or were obtained by the partnership;

(ii) liquidate any liabilities of the partnership;

(iii) prepare a final account and deliver or pay to the plaintiff the benefits still due to him under the partnership.

(c) The defendants are ordered to pay the plaintiff's costs of suit, including any costs reserved for the decision of the trial court."

3) The cross-appeal is dismissed, with costs.

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J W SMALBERGER

JUDGE OF APPEAL

JOUBERT, JA)
EM GROSSKOPF, JA) CONCUR
VAN DEN HEEVER, JA)
VAN COLLER, AJA)