



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 459/09

In the matter between:

ALFONSO OVERBEECK BOTHA

Appellant

and

DANIEL JOHANNES COETZEE

1ST Respondent

URBAN OCEAN PROPERTY DEVELOPMENT (PTY) LTD)

2ND Respondent

JAZZ SPIRIT 101 (PTY) LTD

3RD Respondent

SADDLE PATH PROPS 23 (PTY) LTD

4TH Respondent

SHAKESPEARE PRECINCT (PTY) LTD

(formerly TANIN TRADING 138 (PTY) LTD)

5TH Respondent

Neutral citation: *Botha v Coetzee* (459/09) [2010] ZASCA 90 (31 May 2010)

Coram: HARMS DP, CLOETE, HEHER, MHLANTLA AND TSHIQI JJA

Heard: 4 May 2010

Delivered: 31 May 2010

Updated:

Summary: Civil procedure – referral to trial – dispute about agreement – applicant naming agreement partnership – relief not available if agreement partnership – true nature of agreement prima facie joint venture

ORDER

On appeal from: Western Cape High Court (Cape Town) (Le Grange J sitting as court of first instance):

- 1 The appeal is upheld without a costs order.
- 2 The order of the court a quo is set aside and substituted with the following:
 - '(a) The application is referred to trial.
 - (b) The Notice of Motion is to serve as a simple summons and the applicant must file a declaration within 20 days from the date of this order, after which the usual Uniform High Court rules will apply.
 - (c) Each party is to pay his own costs.'

JUDGMENT

TSHIQI JA (HARMS DP, CLOETE, HEHER AND MHLANTLA JJA concurring):

[1] The issue in this appeal has its origin in an application by the appellant, Mr A O Botha, for an order declaring him to be the beneficial owner of 50 percent of the shares in the second respondent, Urban Ocean Property Development (Pty) Ltd, for transfer of the shares and ancillary relief. All the shares in the company are registered in the name of the first respondent, Mr D J Coetzee. The relief was apparently based on a contention that Botha was the beneficial owner of 50 percent of the shares by virtue of a partnership between him and Coetzee. Coetzee opposed the application, disputing the existence of a partnership between them and contending in any event that the relief sought was not competent because a partner is not entitled to claim partnership assets during the existence of the partnership.

[2] Because of the factual dispute about the existence of the partnership, Botha

sought an order referring that issue (and some related questions) to oral evidence or trial. Counsel for Coetzee, in opposing the referral, argued *in limine* that Botha's application did not disclose a cause of action and that the relief sought in the notice of motion was legally unfounded.

[3] The Western Cape High Court upheld the point *in limine* and dismissed the application on the basis that it disclosed no cause of action and that a referral to evidence could not alter the result. The appellant now appeals to this Court with the leave of the court below.

[4] The procedural approach adopted by the court a quo cannot be faulted and was described *Valentino Globe BV v Phillips & another*¹ as follows:

'There are a number of cases which recognise the right of a respondent, in spite of having filed an answering affidavit, to argue at the outset that the founding affidavit does not make out a *prima facie* case for the relief claimed. They for two reasons suggest that the procedure is akin to an exception based on the ground that a summons or similar initiating process does not disclose a cause of action. The founding affidavit alone falls to be considered, and the averments contained therein must be accepted as true. An important difference with an exception is, however, that the application contains evidence and not only allegations of fact, and what might be sufficient in a summons may be insufficient in a founding affidavit. . . . The usual object of the procedure is to enable a respondent to meet an application for referral to evidence or the like and relieve the Court of considering the conflicting allegations of fact.'

[5] The legal approach of the court below was also correct. Partnership assets are held by partners as co-owners in undivided shares. This is so because a partnership does not have an existence apart from the individuals constituting it. The relief sought by Botha was not competent during the subsistence of a partnership. At best he could

1 1998 (3) SA 775 (SCA) at 779F-I. Citations omitted.

only be entitled to an order declaring him a partner and no more. In 19 *Lawsa* 2 ed para 285 it is stated:

‘Before realisation and distribution of the partnership assets amongst the partners, a partner is not entitled to treat any particular partnership asset as being his own, nor is any partner entitled to any specific portion of the partnership assets as a whole. Regardless of the question who the owner of the partnership assets is, every partner is contractually bound towards his co-partner not to appropriate partnership assets for his own purposes or to regard them as part of his private assets.’²

[6] On appeal the question arose whether Botha had correctly identified the agreement relied on by him as a partnership and whether it would not have been more correct to call it a joint venture. If it was a joint venture, the relief sought by Botha was competent and a referral to trial or evidence of the dispute about the existence of the agreement, irrespective of its label, should have been granted.

[7] On a close analysis of the evidence it is evident that the description of the relationship as a ‘partnership’ was ill-founded and that the court a quo was misled, not only by the nomenclature used in the founding affidavit, but also by the questions posed by Botha for referral to evidence. The question is not whether the agreement was correctly called a partnership, but what the terms of the agreement were and whether those terms could provide a cause of action. In order to answer the question one has to consider what the parties agreed to do. For present purposes, the test is the test that applies at the exception stage. Regard is primarily had to the founding

² See also *Robson v Theron* (1) SA 841 (A) at 850C-D; *Sacks v Commissioner for Inland Revenue* 1946 AD 31 at 40; *Van Heerden v Pienaar* 1987 (1) SA 96 (A).

affidavit.

[8] Botha, incidentally, on occasion referred to the partnership in his founding affidavit in inverted commas. The terms of the agreement between the parties as set out in the founding affidavit were these. Coetzee and Botha would acquire properties; they would use a company as a vehicle for that business; Coetzee would initially hold all the shares in the company as a matter of convenience; and Coetzee would on request transfer to Botha his 50 percent. Botha's evidence was supported by Hoffmann (the financial adviser) and Stanton (an auditor) in confirmatory affidavits.

[9] It follows from this summary of the terms of the agreement that it was not a partnership in the legal sense but rather something akin to one – probably a joint venture if a label is necessary. In any event, the terms of the agreement, if established in due course, provide a cause of action, albeit not one based on partnership. It cannot be doubted that if the matter had been argued along these lines the court below would have referred the matter to trial. Such an order would have enabled Botha to formulate his case with precision. Whether that case will be excipiable or capable of proof is another matter that does not concern this Court.

[10] The manner in which the application was conducted in the high court is relevant to the determination of an appropriate costs order. The application was brought on the basis that the cause of action was a partnership agreement. The application for referral of the matter to trial was also premised on the basis that the factual dispute pertained to the existence of a partnership agreement. This approach was persisted in even on appeal to this Court. It seems that both the appellant and the respondent concentrated on the form and not the substance of the matter. Neither party therefore should get the benefit of costs in this regard.

[11] The following order is consequently made:

1 The appeal is upheld without a costs order.

2 The order of the court a quo is set aside and substituted with the following:

(a) The application is referred to trial.

(b) The Notice of Motion is to serve as a simple summons and the applicant must file a declaration within 20 days from the date of this order, after which the usual Uniform High Court rules will apply.

(c) Each party is to pay his own costs.

Z L L Tshiqi

Judge of Appeal

APPEARANCES:

APPELLANT: P Coetsee SC and G Walters

Instructed by Saunders Attorneys, Cape Town;
Webbers, Bloemfontein

RESPONDENTS: Z F Joubert SC and J D de Vries

Instructed by Honey Attorneys, Tyger Valley

Honey Attorneys, Bloemfontein