CASE NO. I 2154/97

IN THE HIGH COURT OF NAMIBIA

In the matter between

TOTAL NAMIBIA (PTY) LTD PLAINTIFF

and

RUBEN VAN DER MERWE t/a AMPIES MOTORS DEFENDANT

CORAM: STRYDOM, J.P.

Heard on: 1998.09.15

Delivered on: 1998.09.29

JUDGMENT:

STRYDOM, J.P.: The plaintiff sued the defendant for payment of an amount of N$42 313,20 in respect of goods sold and delivered as well as interest and costs. Defendant filed a notice to defend. After the plaintiff had filed its declaration the defendant took exception on the basis that no cause of action was made out against him.

The exception filed by the defendant reads as follows:

"Defendant excepts to plaintiffs combined summons and particulars of claim because it does not disclose a cause of action against the defendant on the grounds that:

1. Plaintiff claims payment of the respective amounts of N$23 926,10, N$4 818,15 and N$ 13,569,04 pursuant to a written "Sale Agreement" dated 27 November 1995 annexed to

its declaration.

2. *Ex facie* the "Sale Agreement" relied upon by Plaintiff it appears that the defendant signed the said agreement as a member of a partnership and not in his personal capacity.

3. Defendant is in the circumstances non-suited as a party."

The Sales Agreement on which the plaintiff relies, and which was attached to its declaration, is clearly an agreement entered into by the plaintiff and a partnership consisting of defendant and his son, Ruben van der Merwe jnr. This is stated in the heading of the agreement which was then signed by both van der Merwes.

In plaintiffs summons the defendant is cited as "Ruben van der Merwe t/a Ampies Motors a major male whose full and further particulars are unknown to the Plaintiff trading as Ampies Motors Erf 162, Main Street, Koes, Republic of Namibia." This description was repeated in the plaintiffs declaration where, in the end, relief was claimed against the defendant so cited.

It was correctly conceded by Mr Mouton, for the plaintiff, that in the summons and the declaration an individual, namely Ruben van der Merwe, was cited and not a partnership. In this regard Ms van Niekerk, for the defendant, correctly pointed out that during the existence of a partnership a creditor must sue the partnership for a debt contracted by the partnership and not the individual partners. Once the partnership is dissolved action for the full debt may then be instituted against anyone or more of the partners. See Vrystaatse Lewendehawe Ko-operasie Bpk v van Jaarsveld en Andere, 1970(4) SA 292 (NC), Standard Bank of South Africa v Lombard 1977 (2) SA 808 (WLD) and Lee v Maraisdrif (Edms) Bpk, 1976 (2) SA 536(A) and Herbst en 'n Ander v Solo Boumateriaal en 'n Ander, 1993 (1) SA 397 (T).

Mr Mouton also conceded that this was a correct exposition of the law. It followed therefore that it was not possible to sue an individual partner unless the partnership was dissolved. There is however no allegation in the

summons or declaration that this was the case. Mr Mouton, at least in his heads of argument, submitted that the defendant should in the circumstances not have excepted but should have filed a special plea or plea in abatement.

In this regard reliance was placed on Herbstein and van Winsen: The Civil Practice of the Superior Courts in South Africa, Third Ed. p328; Pillay v Harry & Others, 1966 (1) SA 801 and Edwards v Woodnutt N.O. 1968 (4) SA 184.

However Ms van Niekerk was able to show that the learned authors of Herbstein and v Winsen, supra, stated in the 4th Edition of their authoritative work, supra, that an objection may be taken by way of an exception in the case of a non-joinder or misjoinder or lack of locus standi. This would be the case where the non-joinder or misjoinder is apparent *ex facie* the pleadings. See Herbstein and van Winsen, supra, 4th Ed, p478 and footnote 103 on page 478. See also Anirudh v Samdei & Others 1975 (2) SA 706 (N), Marnev v Watson & Another, 1978 (4) SA 140 C and Smith v Conelect 1987 (3) SA 689 (WLD).

Mr Mouton however submitted that evidence was still necessary to establish whether the partnership was in existence or whether it had been dissolved prior to the institution of the action. Consequently the non-joinder was not apparent ex facie the pleadings and it was therefore wrong to object by way of an exception. I do not agree. The plaintiff could only sue individual partners once the partnership was dissolved. In the absence of such an allegation in the summons or declaration the pleadings lack an averment necessary to sustain an action against the defendant. At this stage of the proceedings a plaintiff cannot fail to make the necessary allegations in the hope that once evidence is lead the uncertainty whether the partnership is still in existence or dissolved will be cleared up. If there were any uncertainty the plaintiff could have availed itself of the provisions of Rule 14 of the Court Rules. In my opinion, and if this is an issue of non-joinder of a party, then it is apparent *ex facie* the pleadings and the defendant was entitled to object by way of an exception.

Mr Mouton also strenuously criticised the wording of the exception. Some of the criticism levelled at the exception is no doubt valid. Exception is taken against plaintiffs combined summons and particulars of claim whereas it should have been against the summons and declaration. Mr Mouton also submitted that it was wrong

to state that the pleadings did not disclose a cause of action and the exception should rather have been that the allegations were vague and embarrassing. I do not agree. The fact is that in the absence of an allegation that the partnership was dissolved the declaration and summons did not disclose a cause of action against the defendant who was sued as an individual for the debt of a partnership.

Lastly Mr Mouton submitted that the words in para 3 of the exception, namely that the defendant is in the circumstances non-suited as a party, does not raise the issue of non-joinder but rather mis-joinder and that the issue of non-joinder was therefore not raised. See Collin v Toffie. 1944 AD 456 at 466.

I must agree with Mr Mouton that para 3 of the exception does not make much sense. The word "suit" means a law suit. The words "non-suit" is an English legal term meaning absolution of the instance. See "Trilingual Legal Dictionary by Hiemstra & Gonin; Stround's Judicial Dictionary 5th Ed. and Words and Phrases Legally Defined, Vol. 3. 2nd Ed. How the defendant can be non-suited without a suit instituted by him is, to say the least, not clear. All that I can think is that the use of the word defendant was a mistake and that it should have been plaintiff. It was plaintiff which was nonsuited either because his declaration did not contain the necessary allegation to make out a suit against defendant, namely that the partnership was dissolved, or because he cited the wrong party, an individual party in stead of the partnership.

Bearing in mind the meaning of the words "non-suited" it seems to me that Mr Mouton cannot be correct when he said that para 3 of the exception complained about a misjoinder of the defendant.

I think however that paras 1 and 2 of the exception, read with the pleadings, sufficiently spelled out the complaint against the plaintiffs declaration. (See Standard Carriers and Packers Ltd v Bezuidenhout, 1955 (1) SA 601 (T)) The exception stated that plaintiff claimed a debt from defendant personally which debt is a partnership debt and that the declaration does not disclose a cause of action for this claim. This is how everybody understood it and which also formed the basis of argument by counsel. Mr Mouton's complaint was against the procedure that was adopted by defendant to file an exception instead of a special plea or a plea in abatement. Mr Mouton further

submitted that if defendant wanted,to except he should have done so on the basis that the declaration was vague and embarrassing which would have afforded the plaintiff the opportunity to amend his pleadings. I have already dealt with the procedural aspect and rejected Mr Mouton's submission. I am further satisfied that, for the reasons stated before, the exception was correctly taken namely that the declaration did not disclose a cause of action against the defendant. Why the plaintiff did not amend its pleadings the moment the exception was filed is a mystery to me especially where counsel conceded that the law was as previously set out herein. In my opinion the exception must succeed.

Defendant prayed that the plaintiffs action be dismissed with costs.. That would mean that the plaintiff would have to start *de novo* with proceedings either against the partnership or against individual partners if the partnership was dissolved. In the latter instance the declaration and summons would disclose a cause of action against the defendant if the partnership was dissolved at the time when the proceedings were instituted and if such an allegation is made.

In recent decisions by the South African Appeal Court the principle was laid down that in exceptions on the basis that the pleadings do not disclose a cause of action the Court should set aside the pleadings and not dismiss the action. See Group Five Building Ltd v Government of the R.S.A., 1993 (2) SA 593 (AD); Thorpe and Others v SA Reserve Bank. 1993 (3) SA 264 (AD) and Rowe v Rowe. 1997 (4) 160 (AD). I intend to follow these decisions.

In the result the following order is made: *i*

The exception succeeds and the plaintiffs declaration and summons are set aside with costs and the plaintiff is given leave, if so advised, to file an amended summons and declaration within 15 days from the delivery of this judgment.

ON BEHALF OF THE PLAINTIFF Instructed by:

ADV C J MOUTON Stern and Barnard

ON BEHALF OF	Instructed by: V K VAN NIEKERK Weder, AD Kruger & Hartmann
THE DEFENDANT	