

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 799/2010

In the matter between:

ARTHUR ROLF PREUSS

PLAINTIFF

and

ERIKA PREUSS (born FEIL)

DEFENDANT

Neutral citation: *Preuss v Preuss* (I 799/2010) [2013] NAHCMD 355 (26 November 2013)

Coram: MILLER AJ

Heard: 08 November 2013

Delivered: 26 November 2013

ORDER

The application is dismissed with costs which will include the costs of one instructing and two instructed counsel.

JUDGMENT

MILLER AJ : [1] This is an application brought by the plaintiff to firstly amend his particulars of claim, and secondly to join two close corporations, HAW Retailers CC and Claudia Properties CC as the second and third defendants to the action. A further entity Ark Trading (Pty) Ltd was also to be joined. The plaintiff no longer seeks to join that entity which had ceased to exist.

[2] In its present form, the particulars of claim read as follows:

1.

The plaintiff is ARTHUR ROLF PREUSS, an adult businessman C/O HAW RETAILERS CC T/A ARK TRADING, WINDHOEK.

2.

The defendant is ERIKA PREUSS (born FEIL), an adult female businesswoman C/O HAW RETAILERS CC T/A ARK TRADING, WINDHOEK.

3.

The parties were married to each other out of community of property by antenuptial contract at Windhoek on 20 March 1969 which marriage still subsists.

4.

In/or about 1980 the plaintiff started a Builders Hardware business under the name ARK TRADING in partnership with KARL MICHEL and COBUS VAN WYNGAARDEN. The plaintiff bought the other partners out and since 1983 he was the sole owner of the business.

5.

The plaintiff appointed the defendant as financial director of the business and the business was thereafter conducted for the joint benefit of the parties and a tacit partnership agreement was entered into between the parties.

6.

The plaintiff started the business with an initial share of one third of the total shares and in 1983 paid an amount of N\$250 000.00 for the shares of the other two partners. The defendant initially contributed a house as collateral for the one third share of the plaintiff in

the business and after she joined the business the parties contributed in equal shares their labour, services and skill to the business. Neither party received a salary from the said business, but from time to time, each one, by agreement drew money from the profits of the business for his or her benefit and for purposes of the common household.

7.

Money was also drawn from the profits of the business from time to time to expand the business to *inter alia* all branches of the construction industry and property market.

8.

No express agreement as to the division of the profits of the business as extended was arrived at between the parties, but the plaintiff avers that in the premises it was tacitly agreed that the profits would be divided in equal shares.

9.

The defendant denies that a partnership agreement exists with regard to the closed corporation HAW RETAILERS CC T/A ARK TRADING and allege she is the sole owner thereof.

10.

At all material times the books and accounts of the partnership is in the possession and control of the defendant, but she denies the plaintiff access thereto.

WHEREFORE THE PLAINTIFF CLAIMS:

1. An order declaring that a partnership exists between the plaintiff and defendant in equal shares in respect of all the assets of HAW RETAILERS CC T/A ARK TRADING and all other business enterprises owned by the partners.
2. An order that the defendant must make the books and accounts of the partnership available to the plaintiff at all relevant times.
3. That all costs of this application be borne by the partnership estate.'

[3] It is apparent from the papers that by seeking to amend the particulars of claim, the plaintiff seeks to cast his net considerably wider.

[4] At the risk of burdening this judgment I set out the proposed amendments as they appear in the Notice of Amendment:

‘1.

AD PARAGRAPH 1:

Insert the words “6 RIDVAN AVENUE” between the words “trading” and “WINDHOEK”.

2.

AD PARAGRAPH 2:

2.1 Insert the word “First” before “Defendant” in the first line.

2.2 Insert the words “6 RIDVAN AVENUE” between the words “trading” and “Windhoek”.

3.

Insert a new paragraph 3 to read as follows:

“The second defendant is ARK TRADING (PTY) LIMITED, a company with limited liability registered in terms of the Company Laws of the Republic of Namibia with main place of business at 6 RIDVAN AVENUE. The second defendant is cited in view of its interest in this matter and no order as to costs is requested against it”.

4.

Insert a new paragraph 4 to read as follows:

“The third defendant is HAW RETAILERS CC t/a ARK TRADING, a close corporation registered as such in terms of the applicable Close Corporation Laws of the Republic of Namibia with its principal place of business at 6 RIDVAN AVENUE, PIONIERSPARK, WINDHOEK. This defendant is cited for its interest in the matter and no order for costs is requested against it”.

5.

Insert a new paragraph 5 to read as follows:

“The Fourth defendant is CLAUDIA PROPERTIES CC, a Close Corporation registered as such in terms of the applicable Close Corporation Laws of the Republic of Namibia with its

registered address at INDIGO CONSULTING (PTY) LTD, 20 VON FALKENHAUSEN STREET, PIONIERSPARK, WINDHOEK. This defendant is cited for its interest in the matter and no order for costs is requested against it.

6.

AD PARAGRAPH 3:

- 6.1 Renumber as paragraph “6”.
- 6.2 Delete the word “parties” in the first line and replace with the following words: “The plaintiff and the first defendant”.

7.

AD PARAGRAPHS 4, 5, 6 AND 7:

- 7.1 Delete paragraphs 4, 5, 6 and 7.
- 7.2 Insert the following new paragraphs 7 8, 9, 10, 11, 12, 13, 14 and 15 to read as follows:

- “7. From April 1969 and thereafter during the subsistence of the marriage, the plaintiff and the first defendant commenced for their joint benefit a number of businesses, inter alia the second, third and fourth defendants, acquired properties and were engaged in various undertakings, and in so doing entered into a tacit universal partnership quae ex quaestu.
- 8. The plaintiff contributed to the various businesses, properties and undertakings substantial sums of money and both the plaintiff and first defendant contributed in equal shares their labour, services and skills.
- 9. Profits from the various businesses and undertakings were utilized to expand the various businesses and undertakings forming part of the universal partnership, inter alia, to establish further branches in relation to the construction industry and also in relation to the property market.
- 10. Neither the plaintiff nor the first defendant received a salary from the said businesses, but, from time to time, each one by mutual agreement, drew funds from the profits of the business for his or her benefit and for the purpose of the common household.

11. At all relevant times during the currency of the universal partnership the first defendant acted as the sole manager of the partnership's business, conducted all of the partnership's administration and finances and was in sole control thereof.
12. The plaintiff had not share in the management and control of the partnership's business, undertakings, its transactions or assets.
13. Since or about 1994 the first defendant excluded the plaintiff from the financial affairs of the universal partnership.
14. The plaintiff is unable to accurately determine the manner in which the first defendant has dealt with the assets and funds of the universal partnership since 1994.
15. Despite the obligation to do so, the first defendant has to date failed to render to the plaintiff an account of the partnership's transactions, finances and assets."

8.

AD PARAGRAPH 8:

8.1 Delete paragraph 8.

8.2 Insert the following new paragraph 16 to read as follows:

- "16. There was no express agreement between the plaintiff and first defendant as to the division of the profits of the various businesses, but the plaintiff pleads that in the premises it was tacitly agreed that the profits of the various businesses would be divided in equal shares."

9.

AD PARAGRAPH 9:

9.1 Delete paragraph 9.

9.2 Insert the following paragraphs 17, 18 and 19 to read as follows:

- "17. During or about 1996 the first defendant sought to cancel the universal partnership unilaterally but the plaintiff never agreed thereto, and accordingly the universal partnership was not dissolved and still subsists.
18. In conflict with the universal partnership agreement between the plaintiff and the first defendant, the first defendant engaged in certain conduct, inter alia:

- 18.1 Without the consent of the plaintiff the first defendant utilized funds of the partnership to acquire for herself membership interest in various close corporations and/or shares in other corporate entities, the particulars of which are unknown to the plaintiff; accordingly misappropriated in the plaintiff's 50% (fifty per centum) share in the universal partnership assets;
- 18.2 She also registered various properties which she has acquired with the funds of the universal partnership in her own name or in the name of the corporate entities referred to in paragraph 18.1 above and with the intent to misappropriate the plaintiff's 50% (fifty per centum) share in the universal partnership assets;
- 18.3 Without the consent of the plaintiff and without lawful cause during 1996 the first defendant instructed the then accountant for the second defendant to draw financial statements for the second defendant wherein the first defendant was reflected as the sole owner of the second defendant and its assets, whilst all the liabilities were transferred into the name of the plaintiff; and
- 18.4 During 1996 and thereafter the first defendant fraudulently claimed that she was the sole owner of the second defendant, whilst attempting to misappropriate the plaintiff's 50% (fifty per centum) share in such assets.
- 18.5 The partnership also acquired an immovable property which is intended to be used as business premises for the partnership. The said property was registered in the name of the fourth respondent and is currently being used as the business premises of the third respondent and thus the partnership.
19. The plaintiff pleads that at all relevant times, the universal partnership between the plaintiff and the first defendant was never dissolved and still subsists."

10.

AD PARAGRAPH 10:

- 10.1 Delete paragraph 10.
- 10.2 Insert the following new paragraphs 20 and 21 to read as follows:
- "20. At all material times, the first defendant was and still is in possession of all the books of account of the universal partnership;
21. The first defendant denies the existence of the universal partnership and has refused to render to the plaintiff an account of the businesses as aforesaid."

11.

AD PRAYERS 1 TO 4:

11.1 Delete prayers 1, 2, 3 and 4.

11.2 Insert new prayers 1, 2, 3, 4 and 5 to read as follows:

- “1. An order directing that a universal partnership exists between the plaintiff and the first defendant and the plaintiff and the first defendant each have a 50% (fifty per centum) share in such partnership.
2. An order directing that the said partnership be dissolved with effect from the date of the decree of divorce granted in respect of the plaintiff and the first defendant.
3. Failing an agreement between the parties within a period of 2 (two) months (or such longer period as the plaintiff and the first defendant may in writing agree upon) on a net benefit accruing to the plaintiff from the partnership and the manner and date of delivery or payment or such benefit to the plaintiff:
 - 3.1 It is ordered that a liquidator be appointed to liquidate the said partnership;
 - 3.2 Unless the plaintiff and first defendant within 1 (one) month after the termination of the period stated in the introductory part of prayer 3 above, agree in writing on the appointment of a liquidator, the liquidator shall be appointed at the request of either the plaintiff or the first defendant by the Chairperson of the Law Society of Namibia;
 - 3.3 The plaintiff and first defendant shall within 1 (one) month of the appointment of a liquidator deliver to the liquidator and to each other a statement of his/her assets and liabilities as at a date to be determined by the Court duly supported by such available documents and records as are necessary to establish the extent of such assets and liabilities;
 - 3.4 The liquidator may call on either the plaintiff or the first defendant *mero motu* or at the request of one of them to deliver further documents or records to the liquidator and the other party;
 - 3.5 The liquidator shall determine a date for the debatement of the statements referred to in paragraph 3.3 and shall preside over such debatement;
 - 3.6 The liquidator shall within 1 (one) month of the conclusion of the debatement make an award in writing determining the assets and liabilities of the partnership and dividing 50% (fifty per centum) to the first defendant;
 - 3.7 The plaintiff and the first defendant shall give effect to any award made by the liquidator within such period as he or she may direct in writing; and

3.8 The costs of the liquidator shall be borne by the parties in proportion to their shares in the partnership estate.

4. That the first defendant be ordered to pay the costs of the action;'

[5] The first respondent in this application who is the defendant in the main application and to whom I will refer to as the defendant opposes the application. Firstly the defendant contends that she and the plaintiff/applicant were married out of community of property at the relevant time. This is common cause.

[6] In law persons married out of community of property cannot alter or vary the antenuptial contract, it is contended. That is trite.

[7] The defendant contends that the proposed amendments seek to introduce allegations that the antenuptial contract was varied, which in law is not sustainable.

[8] Secondly the defendant alleges that the proposed amendments, and more particularly the new intended paragraphs 7 and 18 are vague and embarrassing.

[9] Mr. Vermeulen represents the plaintiff and Mr. Heathcote SC, who was assisted by Ms. van der Westhuizen, appear for the defendant.

[10] I will now deal with the first objection.

[11] There is ample authority in our case law for the proposition that parties who are married to one another out of community of property can enter into partnership agreements to conduct business enterprises for profit. In *Möhlmann v Möhlmann* 1984 (3) SA 102 (A), for instance it was stated at p. 123 G:

'Where a business is started and built up through the joint endeavours of a man and his wife, married out of community of property, the elements of a partnership may be present although there is no express agreement to that effect.'

[12] Mr. Heathcote did not refer me to any authority to the contrary. He was content to submit only that the point raised now, that such a partnership, will alter the antenuptial contract had not been raised and debated on before.

[13] I do not think that there is any merit in the submission. The mere fact that parties who are married out of community of property, set up a business venture in partnership, does not in my view, alter the terms of the antenuptial contract. Each retains his own estate. The profits from the business venture once distributed in accordance with the terms of the partnership agreement accrue to the individual estate of each of the parties. They are for the purposes of the partnership in the same position as unrelated parties to a partnership.

[14] By entering into such an agreement of partnership neither of the spouses relinquishes the control of the separate estate of each one of them.

[15] What is prohibited is a partnership universorum bonorum, that is one by which the parties agree to put in common all their property.

[16] I did not understand Mr. Vermeulen to contend otherwise. He did stress in argument that the plaintiff does not seek to allege a partnership universarum bonorum.

[17] Mr. Vermeulen drew my attention to the concluding phrase of the proposed paragraph 7 which reads... and in so doing entered into a tacit universal partnership quae ex quaestu. That is the type of partnership where the parties engage in business ventures.

[18] Whether on the proposed amended particulars as a whole, such is the case, is of course another matter.

[19] The difficulty I have though with the proposed amendments is that they are vague to the point where they become embarrassing in the sense that it will prejudice the defendant in seeking to answer the case, the plaintiff seeks to make.

[20] The use of the phrase “inter alia” coupled with other phrases such as “a number of businesses”, “various undertakings”, “various close corporations” and “other corporate entities” are virtually limitless apart from being vague in the extreme.

[21] How, one may ask, is the defendant to know what it is that the plaintiff lays claim to.

[22] If there are “close corporations” and “corporate entities” in the mix, they will have to be joined as interested parties. Until they can be identified on the pleadings that exercise cannot be undertaken.

[23] Mr. Vermeulen stated in argument that the plaintiff does not know who these close corporations, corporate entities and undertakings are in which he seeks to allege he is a partner. To that he added that, if I understood him correctly that all will or may be revealed on that score as the trial unfolds.

[24] I cannot, in the exercise of my discretion allow such a situation to develop. It will no longer be a trial but proceedings reminiscent of a commission of enquiry.

[25] I will for these reasons dismiss the application.

[26] As far as the joinder of the other respondents are concerned, that issue may or may not arise in future. There is no need to consider those now.

[27] The application is dismissed with costs which will include the costs of one instructing and two instructed counsel.

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P J MILLER

Judge

APPEARANCES

PLAINTIFF:

PJ Vermeulen

Instructed by Grobler & Company, Windhoek

DEFENDANT: R Heathcote SC (with him C van der Westhuizen)
Instructed by Theunissen, Louw & Partners, Windhoek