

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 746/2014

In the matter between:

GERT WILHELM KARL BEHRENBECK
PLAINTIFF

And

HARALD GUNNAR VOIGTS

DEFENDANT

Neutral citation: *Behrenbeck v Voigts* (I 746/2014) [2015] NAHCMD 72 (23 March 2015)

Coram: MILLER AJ

Heard: 18 March 2015

Delivered: 23 March 2015

Flynote: Absolution from the instance – when to be granted.
Partnership – what plaintiff must allege and establish.

ORDER

I accordingly make the following orders:

- 1) I grant absolution from the instance.
- 2) The plaintiff is ordered to pay the defendant's costs which will include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER, AJ:

[1] The plaintiff who is a German national instituted action against the defendant based upon the existence of a partnership agreement, which the plaintiff alleges he concluded with the defendant in January 2000.

[2] The plaintiff further alleges that the relationship between the parties has become strained to the extent that the contractual relationship can no longer continue. He blames the defendant for that state of affairs and now seeks the following relief:

- 1) An order dissolving the partnership.
- 2) An order directing defendant to render to the plaintiff an account of all game kills since 2000 up to date duly supported by proper vouchers.
- 3) A debate of such vouchers/accounts.
- 4) Payment to plaintiff of an amount found to be owing to plaintiff.
- 5) Repayment of 50 000 Euro or equivalent in Namibia Dollars plus interest.

- 6) An order appointing a liquidator with authority to realize all game and to prepare a final account and to pay plaintiff the net profits.
- 7) Costs of the action.
- 8) Further and/or alternative relief.

[3] The trial has reached the stage where the plaintiff closed its case. Two witnesses were called being the plaintiff and the former wife of the defendant.

[4] Ms Campbell who appeared for the defendant thereupon lodged an application for absolution from the instance. This application, which forms the subject of this judgment, is opposed by Mr Brandt, who appears for the plaintiff.

[5] Ms Campbell contends that the plaintiff had failed to prove even on a *prima facie* basis, the existence of any agreement between himself and the defendant. Moreover she submits that in any event, and if on the existence of some kind of agreement was established, it lacks the essentials for an agreement of partnership.

[6] Mr Brandt, during the course of his argument concedes that the case for the plaintiff stands on falls on the proof of a partnership agreement.

[7] Before I proceed to deal with the facts and the merits of this application, the approach to the application for absolution needs to be considered. Levy AJ in the matter of *Bidoli v Ellistron t/a Ellistron Truck and Plant* 2002 NR 451 (HC) cited with approval the dictum in *Claude Neon Lights (SA) Ltd vs Daniel* 1976 (4) SA 403 (A). The relevant passage from the judgment of Levy AJ appears on p.453 and reads as follows:

“In *Claude Neon Lights (SA) Ltd vs Daniel* 1976 (4) (SA) 403 (A) the Court of Appeal held that when absolution is sought at the end of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be

established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. The phrase applying its mind reasonably acquires the Court not to consider the evidence in vacue but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.” (See also *Absolut Corporate Services (Pty) Ltd v Tsumeb Municipal Council* 2008 (i) NR 372; *Stier v Henke* 2012 (i) NR 370.

[8] As was pointed out in *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (i) SA 88 (SCA) absolution from the instance will be granted sparingly but when the occasion arises a court should order it in the interest of justice.

[9] The plaintiff who relies on the existence of a partnership agreement bears the onus to establish that the terms of the agreement conform to what is in law required to establish a partnership agreement. These requirements are the following:

- a) An undertaking by each party to bring into the partnership money, labour or skill.
- b) The object must be to carry on a business for the joint benefit of all the parties.
- c) The common object must be to make profit, (Amlers Precedents of Pleadings; 7th Edition at page 308)

[10] In addition the parties to the agreement must share in the profits and the losses.

[11] As is apparent from *Cormet Trading Co Ltd v Commissioner, SA Revenue Service* [2008] 2 A11 SA 125, a partner or former partner has no claim to any partnership property. The only possible claim is a proportionate share of the proceeds after a liquidation of the assets.

[12] It is common cause on the evidence tendered by the plaintiff that the defendant at all times conducted, *inter alia*, a hunting farm on his farm which is situated in the Okahandja district. Over time the plaintiff, who visited Namibia from time to time became friends with the defendant.

[13] The plaintiff testifies that a need was perceived to stock the farm with a wider variety of game to attract more business. These would include waterbuck, blue wildebeest, black wildebeest, blesbuck and springbuck. The plaintiff testified further that since the defendant had no money to buy these additional species, he agreed to assist the defendant and that he concluded on oral agreement with the defendant which the plaintiff refers to as the partnership agreement. From the evidence as a whole the relevant terms of this agreement were the following:

- 1) The plaintiff will advance an amount of 100,000.00 German Mark to the defendant;
- 2) The funds so advanced would be used by the plaintiff to acquire the additional required game species;
- 3) The money advance constituted a debt which the defendant was obliged to repay.
- 4) The ownership in the game purchased with the money would for the time being at least, vest in the plaintiff as the sole owner.
- 5) All the proceeds derived from the hunting of these animals would be for the sole account of the plaintiff. I pause to indicate that from the year 2004 the plaintiff became entitled to 60 percent of the proceeds; 40 percent accrued to the defendant as compensation for the grazing consumed by the plaintiff's animals.
- 6) The proceeds from the hunting of game other than the plaintiff's game would be for the sole account of the defendant. This would also include additional

income derived from the accommodation of hunters, hunting guide fees and so forth which was for the sole account of the plaintiff.

- 7) The plaintiff undertook to canvass for trophy hunters in respect of which the plaintiff was not entitled to any commission.
- 8) In the event of a termination of the agreement, the plaintiff's animals with their offspring had to be counted and the proceeds of the sold had to be paid to the plaintiff or to the plaintiff's son in the event of the death of the plaintiff.

[14] Ms Campbell, as I indicated earlier submitted that the plaintiff did not prove the existence of this alleged agreement. She correctly points out that the plaintiff and his witness testified that the parties had consulted the defendant's bookkeeper, Mr Stier, about the formation of the anticipated business relationship. They had in mind the formation of a Close Corporation. Mr Stier advised against this and suggested the formation of a partnership. He advised the parties to go away, discuss the idea, and to return to him at a later stage. The parties did not return to Mr Stier.

[15] That, however is not the end of the matter.

[16] There is evidence before me that the plaintiff did advance the amount of DM 100,000.00 to the defendant. There is evidence that the defendant on different occasions purchased additional game of the kind I had mentioned. The defendant's wife also testified that it was well known by everyone on the farm that if the plaintiff's game was hunted, the income derived accrued to the plaintiff. Upon consideration of the evidence I conclude that there is prima facie evidence that some kind of agreement came into existence. The question now arises whether the agreement is an agreement of partnership which could or might ultimately entitle the plaintiff to the relief he claims.

[17] As indicated earlier I must not consider the evidence in *vacuo*, but I must have regard also to the legal principles applicable to the case. These will include the essentials required by our law for a valid agreement of partnership.

[18] Firstly it is apparent that the contribution of the plaintiff was not a contribution to a partnership. Instead it was a loan by the defendant which had to be repaid. The game purchased with the money advanced did not become assets of the partnership but remained the sole property of the plaintiff as did the income derived from the proceeds of the hunting of these animals. Any business carried on was not carried on for the joint benefit of all the parties. Rather it would appear that two separate ventures were conducted for the benefit of either the plaintiff alone or the defendant alone as the case may be. There was no inkling of a sharing of profits and losses.

[19] In my view the agreement alleged by the plaintiff does not meet any of the legal requirements of a partnership agreement, and a continuation of the trial will not alter that fact. It is not in the instant case in the interest of justice to refuse absolution.

[20] I accordingly make the following orders:

- 1) I grant absolution from the instance.
- 2) The plaintiff is ordered to pay the defendant's costs which will include the costs of one instructing and one instructed counsel.

P J MILLER

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Acting Judge

APPEARANCES

PLAINTIFF: Mr C Brandt
of Chris Brandt Attorneys

DEFENDANT: Ms Y Campbell
Instructed by: Behrens & Pfeiffer