



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON EXCEPTION

I 2376/2015

In the matter between:

TONATENI HEBEI CONSTRUCTION CC

PLAINTIFF

and

THE UNIVERSITY OF NAMIBIA

FIRST DEFENDANT

OMATUNGO PROPERTY DEVELOPERS CC

SECOND DEFENDANT

ABSAI MUNENGUNI

THIRD DEFENDANT

ANDJAMBA CONSTRUCTION CC

FOURTH DEFENDANT

JOHANNES T. ANDJAMBA

FIFTH DEFENDANT

Neutral citation: Tonateni Hebei Construction CC v The University of Namibia (I 2376/2015) [2017] NAHCMD 146 (19 May 2017)

CORAM : MASUKU J

Heard: 14 March and 4 April 2017

Delivered: 19 May 2017

Flynote: LAW OF CESSION – Validity of a cession and the extent of the interest ceded to enable action proceedings based thereon - Effect of invalid cession on instituted proceedings. **COMPANY LAW** – Law of partnership and joint ventures – the right of a party to a joint venture to bring proceedings for the benefit of the joint venture before the dissolution of the joint venture – the applicability of the *actio pro socio* - **CIVIL PROCEDURE** – Exception – effect on the proceedings of the plaintiff not having a cause of action when the action was first lodged.

Summary: The plaintiff instituted an action against the defendants on the basis of an agreement of cession executed in its favour. The claim was based on a joint venture agreement between the 2nd and 4th defendants regarding construction works tendered to the joint venture by the 1st defendant in terms of which any monies paid in respect of the works were to be paid into an account opened for the joint venture. The plaintiff instituted a claim *to wit* that the money due in respect of such works was unlawfully converted into the account of the 3rd defendant. Various exceptions were taken on behalf of the 2nd and 3rd defendants to the effect that the plaintiff had no right in law to lay the claim based on an agreement of cession; that the partnership (joint venture) had not been brought to an end therefore resulting in the plaintiff not being entitled at law to bring the claim as it purported to.

Held – that the agreement of cession was invalid for the reason that it was entered into after the initial proceedings had been commenced and that the plaintiff could not have *ex post facto* rights to continue proceedings it had no right to institute at inception.

Held – that regarding the cession, the plaintiff could only have the right to claim the rights and interests of the cessionary and no more. To the extent that the plaintiff claimed the entire amount allegedly due to the joint venture, it was found that the claim was incompetent therefor.

Held further – that in the law applicable to partnerships would, for purposes of the judgment be assumed to apply to the joint venture as well, without stating decisively that that position is correct.

Held further – that to the extent that the law applicable to partnerships applied to a joint venture, the argument that the plaintiff could not sue for the amount in question before the settlement of the accounts between the parties was incorrect.

Held – the *actio pro socio* applied in the circumstances of this case and which enabled a partner to sue for property belonging to the joint venture even before the settlement of accounts by the parties to the joint venture agreement.

The exception was upheld with costs consequent upon the employment of one instructing and one instructed counsel and the plaintiff was granted leave, in relation to those matters in terms of which it had the right to sue, to amend its particulars of claim accordingly.

ORDER

1. The 2nd and 3rd defendants' exception to the plaintiffs' amended particulars of claim is upheld with costs consequent upon the employment of one instructing and one instructed counsel, less 20% thereof.
2. The plaintiff is granted leave, if so advised, to file amended particulars of claim in respect of the first alternative claim within then (10) days from the date of this judgment.
3. The relevant defendants are granted leave to file their respective amended pleas to the said amended particulars of claim within seven (7) days from the filing of the amended particulars of claim.

4. The plaintiff is to file its replication, if any, to the said amended plea within seven (7) days from the filing of the amended plea, if any.
5. The matter is postponed to 5 July 2017 at 15:15 for a status hearing.
6. The parties are ordered to file a joint status report three (3) days before the date mentioned in para 3 above.

RULING

MASUKU J.:

Introduction

[1] Serving before court is an exception launched by the 2nd and 3rd defendants to the plaintiff's particulars of claim. The basis for the exception is that the particulars of claim lack averments necessary to sustain an action against the said defendants. Needless to say, the said defendants deny that the particulars of claim are excipiable in the manner alleged or at all.

Background

[2] In order to place the issue in proper perspective, it is necessary that I indulge a little into the historical background that gives rise to the question submitted for determination. I summarise the background facts below:

The parties

[3] The plaintiff is a close corporation duly incorporated in terms of the Close Corporation laws of this Republic. Its principal place of business is situated at no. 39 Bowker Street, Klein Windhoek. The 1st defendant, on the other hand, is the University of Namibia (UNAM), a body corporate established in terms of the provisions of s. 2 and 3 of the University of

Namibia Act. ¹ Its place of business is situated at No. 340 Mandume Ndemufayo Avenue, Pionierspark, Windhoek.

[4] The 2nd defendant is Omatungo Property Developers CC, a Close Corporation duly incorporated in terms of this Republic's Close Corporation laws. Its principal place of business is situated at Erf. 1935 Santa Clara Street, Otjomuise, Windhoek. The 3rd defendant is Mr. Absai Munenguni, an adult male Namibian businessman, who also serves as the sole member of the 2nd defendant, described below.

[5] The 4th defendant is Andjamba Construction CC, another close corporation also incorporated in terms of this country's close corporation laws. Its place of business is situated at 2nd Floor, BRB Building, Dr. Bernard May Street Windhoek. The 5th defendant is Mr. Johannes T. Andjamba, an adult male business man and sole member of the 4th defendant.

The cause of action

[6] The plaintiff claims that in or about 27 February 2013, at Windhoek, the 2nd defendant and the 4th defendant, duly represented by the 3rd and 5th defendants respectively, entered into a joint venture (partnership) agreement for the design and supervision of civil installation of lecture halls and offices of the 1st defendant's Rundu Campus. It is averred that a tender for the works was awarded jointly to the 2nd and 4th defendants.

Alleged terms and conditions

[7] The plaintiff further alleges that the terms of the aforesaid joint venture agreement included the following express, alternatively tacit terms, namely that:

- (a) 'the 2nd and 4th defendant would trade under the style Andjamba Construction & Omutungo Property Development CC Joint Venture for the purpose of

¹ Act No. 18 of 1992.

completing the design and supervision of the said works, pursuant to the tender.

- (b) all the processes and release of all certified payments to be made and paid by the 1st defendant for the aforesaid works, were to be paid for the benefit of the joint venture partnership into a special account in the name of the joint venture, opened with First National Bank, Namibia.'

[8] It is further alleged that on 27 February 2013, a written sub-contractor agreement was signed in Windhoek between the plaintiff and the joint venture. The latter was represented by 3rd and 5th defendants. In this regard, it is further averred, a power of attorney in favour of the plaintiff was executed. Following below were some of the material terms:

- (a) The plaintiff was nominated by the 2nd and 4th defendants and granted power of substitution to be the true and lawful agent of the joint venture and to generally manage and transact all its business affairs and would in this regard -
 - (i) Ask, demand, sue, and recover from all persons sums of money due which shall become due;
 - (ii) Settle and adjust accounts as the joint venture deems fit and necessary and to compound same and accept from the whole;
 - (iii) To grant receipts, acquaintances, and releases for any payment, delivery or other settlement, and to consent to the cancellation of any bond, obligation, or other deed whatsoever; and
 - (iv) To commence, prosecute or defend and at pleasure, to relinquish any actions, suits or other proceedings at law or equity in any of the courts of Namibia.'

[9] It is further alleged that on or about 24 July 2013, the 3rd defendant, duly authorised thereto, and acting on behalf of the joint venture, instructed the 1st defendant in writing to process and release all certified payments due by the said 1st defendant into the joint venture's account. To this end, the joint venture account was registered with the Receiver of Revenue.

[10] The plaintiff avers that contrary to the agreement referred to in the immediately preceding paragraph, the 3rd defendant, unbeknown to it, and without its approval, nor the knowledge of the joint venture, unlawfully and fraudulently caused money due to the joint venture from the 1st defendant, to be deposited into its account and not into the joint venture account as per the agreement. The amounts paid into this account, unlawfully, as claimed by the plaintiff amount to N\$3, 496, 833.15. These are the amounts claimed by the plaintiff against the 1st, 2nd and 3rd defendants.

[11] In an alternative claim, the plaintiff sues the 2nd defendant on the basis of its fiduciary relationship to the 4th defendant and that as such, it had a duty not to place its interests above those of the joint venture and was under a duty to act in good faith regarding partnership assets. In this alternative claim, the same amount is sought from the 2nd defendant.

[12] A further alternative claim is laid against the 1st defendant in respect of a similar amount. In this regard, it is alleged that the 1st defendant was presented with certificates for payment in respect of the work done and that such payments were to be made into the joint venture account referred to earlier. It is averred that despite being so presented with the certificates, the 1st defendant refuses or fails to pay the said amounts into the joint venture account. A further alternative claim for the same amount based on negligence is made against the 1st defendant.

The exception

[13] In this regard, it must be mentioned that the 1st defendant pleaded over and in this regard filed its plea, whose contents it is not necessary at this stage to traverse, save to state that it denies liability to the plaintiff's claim. It is to the 2nd and 3rd defendants' exception that the court's attention turns in this regard.

[14] Stripped to the bare bones, the aforesaid defendants' exception is based on the cession alleged in the particulars of claim. In particular, the

contentions of the said defendants are three. First, it is averred that the cession by the 5th defendant is invalid for the reason that the 5th defendant does not have rights to the claim which he could have ceded as he is not a partner in the context of the partnership agreement, and does not derive any rights to claim by virtue of the fact that he is the 5th defendant's sole member.

[15] Second, it is averred that the cession by the 4th defendant is also invalid as it purports to cede the partnership's entire alleged claim for damages sustained as a result of the alleged wrongful actions of the 3rd defendant. It is further averred that is so for the reason that if there are any damages that may have been sustained thereby, these are due to the partnership and not to the 4th defendant.

[16] Last, but by no means least, it contended that the said cession is also invalid for the reason that the share of the 4th defendant, if any, to the damages, could be computed only once the settlement of the partnership accounts between the 2nd and 4th defendant had taken place.

[17] From a close consideration of the pleadings, together with the notice of exception, two things are apparent. First, the exception is directed and predicated on the claim based on the cession. In this regard, it is common cause that there is the main claim launched against the 1st, 2nd and 3rd defendants, jointly and severally. It is based on allegations of fraud.

[18] The claim that is based on the agreement of cession and which accordingly forms the basis of the exception, from my reading, is the first alternative claim, which is against the 2nd defendant Omatungo Property Developers CC. It is claimed, in that regard, that the 2nd defendant is a partner in the joint venture and therefor stood in a fiduciary relationship to the 4th defendant. The plaintiff's alternative claim, as averred, is based on a cession in terms of which the 4th defendant ceded its rights in writing to the plaintiff and it is the validity of that cession that is being challenged in the exception.

Validity of Cession

[19] The first challenge is that the plaintiff has no right to claim based on the cession for three primary reasons. First, it is alleged that the deed of cession was only concluded after the summons had been issued. It is contended in this regard that the combined summons cannot be sustained by or be predicated on the deed of cession for that reason.

[20] The second basis for the exception is that the damages sustained as a result of the alleged payment, were not sustained by the 4th defendant, which purported to cede its rights to the plaintiff, but the damages, if proved, were sustained by the partnership. The last basis is that the 4th defendant, even if it could cede its claim, could properly do so only once the partnership accounts had been settled between it and the 2nd defendant. It is accordingly alleged that this has not taken place and for that reason, the particulars of claim do not disclose a cause of action therefor. I intend to deal with the first ground first.

The summons pre-dating the cession

[21] It is clear, from the pleadings and the attachments thereto that the deed of cession was concluded and signed on 3 August 2016. The summons, it is common cause, is dated 21 July 2016. It is accordingly clear that the deed of cession was signed after the combined summons had already been issued.

[22] The question crying out for an answer in the circumstances is this – what is the effect of the deed of cession and upon which the first alternative claim is predicated, not being in existence at the time the claim was instituted? The excipients argue, and quite strenuously too, that that fact renders the claim excipiable. The plaintiff avers that the claim in the original summons was not based on the cession and that no exception had been moved in that regard. It is argued by the plaintiff that this court has a discretion to allow the claim notwithstanding that the claim predates the cession relied on.

[23] The excipients, in their heads of argument, relied for the proposition that the alternative claim is bad, based on the reasoning employed in *Philotex (Pty) Ltd and Others v Snyman and Others; Textilaties (Pty) Ltd and others v Snyman and Others*.² In that case, the court found that the plaintiff's cause of action did not exist at the time the claims were instituted and this was because the cessions had not been signed at that time.

[24] Van Dijkhorst J, who dealt with matter had the following to say at p. 715:

'The general approach in this Division has for many decades been that a cause of action should exist at the time of the institution of the action. This has also been the approach in other Divisions and in the Appellate Division. . . The question which arose in some of those cases was whether an amendment should be granted which attempted to cure a defect in a summons *ex post facto*. This was done in the *African Diamond Exporters'* case at 97H, where it was laid down that the Court would exercise its discretion to allow an amendment to complete the cause of action where none existed at the time the summons was issued only in exceptional or special circumstances, to discourage persons instituting action when they have no cause of action.'

[25] For her part, Ms. Garbers, for the plaintiff, also relied on this judgment and submitted that there were special circumstances in this case which should enable the court to uphold the claim, as it were, though it did not exist when the claim was instituted for the first time. In addition, Ms. Garbers referred the court to the case of *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd*,³ where the court also dealt with the effect of an amendment being moved in a bid to complete a cause of action that did not exist when the cause of action was initially moved.

[26] In that case, the court held that it could only depart from the general position stated earlier for practical considerations and where the amendment

² 1994 (2) SA 710 (T).

³ 1976 (1) SA 93 (W).

would be allowed without causing prejudice to the other party, which prejudice cannot be effectively dealt with by a balancing order as costs.

[27] In view of the foregoing, the question that has to be answered is whether there are, in this case, those exceptional or special circumstances that would render the departure from the general position proper. What I should mention, is that the courts, in the foregoing matters, did not draw a *numerus clausus* regarding what these exceptional or special circumstances must be. This decision resides in the court's discretion depending on the circumstances of the case at hand. I may add that such discretion should always be exercised in a manner that is not capricious or whimsical, but on proper considerations.

[28] I am of the view that it is the duty of the applicant in order to trigger the court to use its discretion, to state what those special or exceptional circumstances are. Merely repeating that the circumstances are exceptional or special alone without disclosing what is special or exceptional in that particular case, will not do. These must, in my view, be dealt with from the understanding of the very strong general position that a party that initiates a claim must have a basis in law for doing so. They may not easily require and get the court to sanction the addition of a cause of action that was not in existence when the summons was first issued.

[29] In that regard, the special or exceptional circumstances must be established and once they have been, only then may the court move on, to what I consider to be the second leg of the enquiry, namely, whether or not the applicant for the said order has shown that there is no prejudice that will enure to the detriment of the other party.

[30] In the *Barclays Bank International Ltd* case, (*supra*), the court was confronted with a situation where the question touched upon provisions of the Exchange Control Regulations, the application of which the plaintiff had not alleged compliance with in the particulars of claim. It was contended that the particulars of claim were bad for the reason that the plaintiff had made no

allegation that at the issue of the summons, that permission had been obtained for payment to be made to it as the plaintiff was a foreigner and permission required in terms of the regulations.

[31] In holding that there were no exceptional or special circumstances extant in that matter, the court was of the view that the issue of the permission referred to cropped up at a late stage and was not part of the dispute between the parties as they were ready to go for trial without that issue in the mix, as it were. The court further held that the issue of the permission required had nothing to do with the question of liability but had to do merely with the payment processes pursuant to the delivery of a judgment that would be in the plaintiff's favour.

[32] In lending its imprimatur to disallowing the exception in that case, the court reasoned as follows:⁴

'If I were to uphold the exception on the ground I am now considering, I would be lending the court's approval to the merest technicality, at substantial waste of costs to the parties, without thereby redressing any prejudice suffered by the defendant, as I shall show later.'

[33] This would, to my mind, pass as a special but not exceptional circumstance. What is clear is that the cause of action in that case existed and was ready to be submitted to the court's machinery for resolution, until it was discovered that the issue of permission, which in any event applied at the stage of execution, after judgment would already have been obtained (if the plaintiff was successful), had not been obtained nor pleaded.

[34] It would, of course have been an exercise in sterile formalism to uphold such a highly technical point which really had nothing to do with the cause of action, properly so-called and more importantly, the issue of liability, which was, on all accounts, ready to be determined, with the court's engine running

⁴ *Ibid* at p.104.

and ready to go full throttle as it were. I fully agree with the court's decision in that regard.

[35] The present case, in my view, is a totally different kettle of fish as it is clear that the cause of action did not exist at the time of the issue of summons. It was only after the summons had been issued when the amendment was sought that the new claim was introduced. This was after the deed of cession had been signed.

[36] I am of the view that the excipients should have objected to the proposed amendment on the grounds that same would have been excipiable in any event and which objection would have possibly stopped the plaintiff dead in its tracks well before this stage.⁵ I will take this issue into account to the extent necessary and possible when I determine the issue of costs.

[37] In the circumstances, I am of the considered view that there was no special or exceptional circumstance that would have justified a departure from the general position, considering that to sanction a departure is not made lightly. Clearly, there was no cause of action based on the cession at the time the summons was issued and it would be odious for the court to depart from the general rule for what may be described as trifling reasons.

[38] I say so particularly in view of the operative position as correctly expounded in the *Philotex (supra)*,⁶ where the court, described the operation of the key principle in graphic terms and said, 'There is nothing exceptional in a plaintiff who jumps on the bandwagon without his trumpet, even though it might be classified as unusual.' I am of the considered view that the plaintiff, without having the cession in place at the commencement of the action proceedings, clearly had no cause of action based thereon at the inception of the proceedings.

⁵ *D. B. Thermal (Pty) Ltd v Quality Products* Case No. SA 33/2010 at para 38.

⁶ *Ibid* at p. 717.

[39] To this extent, it can be safely said that the plaintiff jumped on the bandwagon without any instrument in its hands. A voice alone, in joining a band is of no use and does not pass for an instrument in any event. The plaintiff cannot be allowed, in the absence of special or exceptional circumstances, to benefit from an amendment to enable it to pursue a claim that simply did not exist at the time of issue of the combined summons. If this type of litigation culture was to be allowed, parties would concoct new causes of action in an incremental fashion as the trial engages new gears and this is not, in my view, acceptable, certain nor fair to the court and the other side. This exception is therefore good and must be upheld as I hereby do.

Disclaimer

[40] I must preface this portion of the judgment by stating that having reserved judgment, the Court subsequently posed a major question to the parties regarding whether a partnership and a joint venture mean the same thing and as such, whether principles applicable to the one also apply to the other.

[41] The parties, in their further heads of argument came to the conclusion that partnerships and joint ventures generally mean the same thing, although in the latter it is companies rather than individuals who form joint ventures. In this regard it was argued that where the essential elements of a partnership are met in a joint venture, the principles applicable to a partnership apply.

[42] I was unable to lay my hands on authority conclusively dealing with this issue. My reservations particularly stem from the judgment of *Botha v Coetzee*⁷, where the Court, without investigating the matter further appeared to conclude that there is a distinction between a partnership and a joint venture.

[43] For purposes of this judgment however, I will proceed on the assumption that the position advocated by the parties that the principles

⁷ (459/09) [2010] ZASCA 90 (31 May 2010).

applicable to a partnership also apply to a joint venture. In this regard, and for the purposes of this judgment, I will use the two words interchangeably in order to determine the question at hand. An occasion may present itself in the future for this court to make a conclusive ruling in this regard. It is in the light of the foregoing disclaimer that this judgment must be read and understood.

The effect of the accounts not having been settled before institution of proceedings

[44] The excipients also argued that the proceedings should be set aside for the reason that neither at the time of issue of the combined summons, nor at any stage thereafter, the plaintiff did not allege or show that the accounts between the partners had been settled. In this regard, the plaintiff relied on a few cases and to which reference shall be made below.

[45] In *Morewear Industries Ltd v Exporters Ltd*,⁸ the court was seized with the question of cession of a debt where there had been no settlement of accounts between the partners. The court held that the cession was, for that reason, bad. In dealing with this very question, the court, per Hathorn J, held as follows at p218:

‘In the light of all these allegations, the question whether or not there has been a final settlement of accounts is clearly a matter still in dispute between the parent company and the respondent. The fact that such a dispute exists – and it appears to be a genuine dispute – can only mean that there is yet no finality in the settlement of the affairs of the partnership. I therefore reject the alternative contention and I come to the conclusion that the parent company had no right of action against the respondent and therefore that the purported cession is bad.’

[46] Earlier on in the judgment, the learned Judge had reasoned as follows:⁹

⁸ 1954 (4) SA 213 (SR).

⁹ *Ibid* at p.217 G-H.

'I reject this contention because of the nature and purpose of the final accounts of a partnership. Such accounts, as I see it, are designed to and would reflect the result of the dealings of the partnership by converting each transaction into the money. By these means and by taking into account any assets of the partnership, a final adjustment takes place showing the indebtedness or otherwise of the partners *inter se*.'

In this regard, it would appear that the legal position is that before partners can sue each other for whatever debts they may legitimately claim from each other, the partnership must have been dissolved and only then can it be known what is due to each partner from the other.

[47] Ms. Garbers argued that the legal position propounded by the excipients does not always apply. In this regard, she referred the court to the claim called the *actio pro socio*, which allows a partner to sue another during the subsistence of the partnership without the need to dissolve the partnership before a suit can be claim instituted. The *pro socio* is defined in the following terms by the learned author Harms:¹⁰

'The rules of the action between partners are as follows:

- (a) During the existence of the partnership, action may be instituted by a partner against a co-partner for specific performance in terms of the partnership agreement and the fulfilment of obligations arising out of the partnership agreement and business.
- (b) When the partnership agreement provides for or the parties subsequently agree to the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound up, specific performance in those terms may be claimed.
- (c) When the partnership agreement nor the subsequent agreement between the partners provides for the dissolution of the partnership and the manner in which the partnership is to be liquidated and would up, this action may in general and subject to any stipulation for the duration of the partnership or any other relevant stipulation be brought by a partner to have the partnership

¹⁰ Amler's Precedent of Pleadings, 8th edition at p.279.

liquidated and wound up. The court may appoint a liquidator to realise the partnership assets for the purpose of liquidating partnership debts and to distribute the balance of the assets or their proceeds among the partners.

- (d) When a partnership has been dissolved, a partner may claim, against a co-partner, distribution of any undistributed partnership assets.'

[48] The plaintiff accordingly argues that in the instant case, the amount of money claimed by the plaintiff was wrongfully and fraudulently paid into the account of the 2nd defendant as arranged by its member. It is submitted that in the circumstances, the other partner has a remedy based on the *actio pro socio* flowing from the fact that partners owe a fiduciary duty to each other, which it is alleged the 2nd defendant violated in this case. Is the argument of the plaintiff in this case sustainable?

[49] I have availed to myself some writings on the *actio* during the preparation of the judgment. One of the latest cases which deals with the application of the *actio* is *Morar N.O. v Akoo*.¹¹ In that judgment, the Full Bench of the Republic of South Africa said the following on the *actio*:¹²

'1. This action may be instituted by a partner against a co-partner during the existence of the partnership for specific performance in terms of the partnership agreement and/or fulfilment of personal obligations (*praestationes personales*) arising out of the partnership agreement and business.

2. Where the partnership agreement provides for (or the parties subsequently agree upon) the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound-up specific performance thereof may be claimed by means of this action.

3. Where neither the partnership agreement nor a subsequent agreement between the parties provides for dissolution of the partnership and the manner in which the partnership is to be liquidated and wound-up, this action may in general (subject to any stipulation for the duration of the partnership or any other relevant stipulations) be brought by a partner to have the partnership liquidated and wound-up. The Court

¹¹ (498/10) [2011] ZASCA 130 (15 September 2011).

¹² *Ibid* at para [10] and [11].

in the exercise of its wide equitable discretion may appoint a liquidator to realise the partnership assets for the purpose of liquidating partnership debts and to distribute the balance of the partnership assets or their proceeds among the partners. *Pothier, op cit.*, sec. 136.

4. Where a partnership has been dissolved a partner may avail himself of this action against his co-partners to claim distribution of any undistributed asset or assets. *Pothier, op cit.*, sec 162:

“Each of the former partners can alone demand a distribution of the effects which remain in common after the dissolution of the partnership.”

This obviously covers the situation where, after the dissolution of a partnership asset which has not been included in a distribution of the partnership assets. Hence a retiring partner may institute this action against the continuing partner to claim a distribution of the partnership asset in question.

5. A court has a wide equitable discretion in respect of the mode of distribution of the partnership assets, having regard, *inter alia*, to the particulars circumstances, what is most to the advantage of the partners and what they prefer. . .

[11] Two points are noteworthy about this exposition of the general principles of the *actio pro socios*. The first is that according to the authorities the action is one that lies at the instance of one of the partners for relief against another partner, either during the subsistence of the partnership or after its dissolution. A detailed discussion is to be found in *Voet* 17.2.9 and 17.2.10 where it is said that the action is one in terms of which one partner may claim against another:

- (a) an account and a debatement thereof, either during the subsistence of the partnership or after it has been terminated;
- (b) delivery of a partnership asset to the partnership;
- (c) the appointment of a liquidator to the partnership.’ (Emphasis added). See also *Nair v Chandler*.¹³

[50] From the foregoing authorities, it becomes clear that the *actio* is available both before and after the dissolution of the partnership but for specific types of claims. In this regard, I therefor do not agree with Mr. Jacobs’ argument, as I understood him, that a partner cannot institute an action until

¹³ (13650/06) [2006] ZAGPHC 68; 2007 (1) SA 44 (T) (19 July 2006).

such time that the partnership has been dissolved and wound up in every case.

[51] The question that remains for determination in this case is whether the claim by the plaintiff is available to it and forms those types of actions that can be moved by a partner during the life of the partnership i.e. even before it is dissolved and the accounts have been settled. I say so because it appears common cause that the partnership in this matter has not been dissolved and there is no prayer for same in this or other action that has been moved that I am aware of. Nor, I may add, is there any prayer sought for dissolution in this case, which from the authorities, may be allowed by the court, resulting in the court, in its wisdom, appointing a liquidator, as part of the relief it may grant.

[52] It is clear that the claim is for money that according to the plaintiff, belongs to the partnership but which the 2nd defendant has allegedly fraudulently appropriated to itself. In this regard, it would appear that one of the incidents of a partnership, is the duty of utmost good faith, which in part requires partners to disclose profits made, which should accrue to the partnership. Ms. Garbers argued that this is the basis upon which the claim is brought during the life of the partnership.

[53] I am of the considered view that Ms. Garbers is eminently correct in this instance that the *actio* applies. It would appear to me that the duty to pay profits due to the partnership forms part of the terms of a partnership agreement or business. This being the case, it seems to me that a partner should be entitled to claim specific performance in that regard from a partner who it is alleged has reneged from his or her responsibility in that regard. A partner has a personal obligation arising from the partnership agreement, to disclose and make available to the partnership, money or other assets that come into his or her hands by virtue of the partnership, which belong to the partnership. This is what is alleged against the 2nd defendant in this case.

[54] In its judgment, the Supreme Court of Appeal, in the *Morar* case at para [11], quoted above, citing the learned author Voet, states that the said

action is available to a partner during the life of the partnership or after dissolution to sue another, 'delivery of a partnership asset to the partnership.' I am of the considered view that a claim for money allegedly wrongly appropriated by a partner that is alleged to belong to the partnership, clearly and unmistakably falls within the rubric of partnership assets. This further reinforces my view in this regard.

[55] It must be mentioned that the cases relied on by the excipients of *Pataka v Keefe and Another*¹⁴ and the *Moreware Industries* case (*supra*) are distinguishable for the reason that the money sought to be recovered as damages, were claimed not for the benefit of the partnership but the partners themselves. It thus made sense that the requirement that the partnership had to first be dissolved as the partners could only ascertain the share due to them after the settlement of the accounts. I am accordingly of the view that the two cases do not preclude this court from entertaining the current claim as it squarely falls within the *actio* as stated earlier.

[56] In view of the foregoing, I am of the considered view that the action instituted by the plaintiff in this regard is competent and the excipients' exception in this regard, challenging the competency of the action brought because of the fact that the partnership remains alive is misplaced in the peculiar circumstances of this case. I would, for that reason, dismiss this part of the exception.

Did the 4th defendant have the right to cede the claim to the plaintiff?

[57] The last question in need of an answer is whether the 4th defendant had the right, which it purported to exercise, to cede the debt to the plaintiff as it did. What is plain from the cession agreement is that the cedent was the 4th defendant, Andjamba Construction CC, which was represented by its managing member, the 5th defendant. The plaintiff, on the other hand, was the cessionary.

¹⁴ 1947 (2) SA 962 (A).

[58] It is clear that from the particulars of claim¹⁵ that it is alleged that 2nd defendant and the 4th defendant entered into a joint venture agreement in connection with the tender awarded by the 1st defendant. In that connection, it is averred that the parties opened an account into which any monies received in relation to the said tender were to be deposited into and would be the property of and for the benefit of the joint venture.

[59] In that regard, it becomes apparent that the money claimed in this action, particularly in the alternative claim in question, belonged to the joint venture. The question that arises, in the circumstances, is whether the 4th defendant had the right to cede the debt in question to the plaintiff as it purported to. It could only do so if it was the owner or had any other rights thereto at law.

[60] In my considered opinion, in view of the existence of the joint venture agreement, the money generated from the tender belonged not to any of the parties but exclusively to the joint venture and would have had to be paid into the special account opened, to keep it separate, I would venture to add, from any money that any of the parties may have had in their accounts.

[61] At para 1.3 of the agreement of cession, it is recorded that, 'Whereas the cedent has a claim for its proportional partnership interest from the amount of N\$ 3 496,833.15.'

Furthermore, at para 2.1, the parties agreed as follows: 'That the cedent hereby cedes, transfers and makes over to the cessionary all its rights, title and interest in and to all monies due and payable to the joint venture known as Andjamba Construction and or Omatungo Property Development CC'.

[62] What is clear from the portions quoted above, is that the cedent in the agreement ceded its interest in the joint venture. In the circumstances, it did not purport to cede the entire claim to the cessionary, but what would have been due to it in terms of the agreement from the proceeds of the tender relating to the work performed by the joint venture.

¹⁵ Para 7, 8, 8.1 and 8.2 of the plaintiff's amended particulars of claim.

[63] One of the well-known legal maxims is, '*nemo dat quod non habet*', which simply put, means you cannot give a better right to another person than that which you have in a thing. In my view, this maxim applies and leads me to the ineluctable conclusion that the cedent ceded only the extent of its right and interests in the money to be paid by the 1st defendant and no more. It should be noted that the plaintiff, in this case, purported to claim the entire amount, something that is impermissible in the circumstances. For that reason, it appears to me that this exception is bad and must be dismissed, as I hereby do.

Conclusion

[64] In the premises, I am of the considered view that the exception taken by the excipients to the effect that the plaintiff's amended particulars of claim, in so far as they pertain to the first alternative claim, do not disclose a cause of action is good.

[65] I had intimated in the body of the judgment that I would consider the effect of the excipients' failure to object to the proposed amendment in relation to the first part of the exception, namely that the plaintiff had no claim when the proceedings were first launched. I am of the considered view that had the defendants objected to the amendment, which they were entitled to do at law at the appropriate time, the matter would not have developed to the present stage.

[66] I am of the view that it would be proper and just to sanction the excipients for their failure to object as mentioned above. In the circumstances, I find it proper, to disentitle them to 20% of the costs they would otherwise have been entitled to.

Order

[67] In the premises, the following order hereby issues:

1. The 2nd and 3rd defendants' exception to the plaintiffs' amended particulars of claim is upheld with costs consequent upon the employment of one instructing and one instructed counsel, less 20% thereof.
2. The plaintiff is granted leave, if so advised, to file amended particulars of claim in respect of the first alternative claim within then (10) days from the date of this judgment.
3. The relevant defendants are granted leave to file their respective amended pleas to the said amended particulars of claim within seven (7) days from the filing of the amended particulars of claim.
4. The plaintiff is to file its replication, if any, to the said amended plea within seven (7) days from the filing of the amended plea, if any.
5. The matter is postponed to 5 July 2017 at 15:15 for a status hearing.
6. The parties are ordered to file a joint status report three (3) days before the date mentioned in para 3 above.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF: H. Garbers - Kirsten
Instructed by: Chris Brandt Attorneys

EXCIPIENTS: J.S JACOBS
Instructed by: Nixon Marcus Public Law Office