



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 10679/2012

**YAKUB EBRAHIM PARUK, N.O.
& OTHERS**

FIRST to SEVENTY THIRD PLAINTIFFS

and

THE COMMERCIAL PROPERTIES (PTY) LTD

DEFENDANT

Order

The following order is made:

The defendant's exception to the plaintiffs' replication is dismissed with costs, including the costs of two counsel.

JUDGMENT

OLSEN J

[1] This case has a long history in more than one sense. The factual matrix which brings the plaintiffs to court has as its foundation a contract concluded in 1924. The action instituted by the plaintiffs commenced in 2012. This is the third time that this court has been asked to deliver a judgment in this case. The trial in the action has yet to commence.

[2] At issue at present is an exception taken to the plaintiffs' replication. The two judgments which preceded this one concerned

- (a) an opposed application for the joinder of additional plaintiffs, which was granted; and
- (b) a subsequent exception to the particulars of claim which was not upheld.

[3] A full account of the identity of the parties is more likely to obfuscate than elucidate the issues which must be decided now. It is enough to say that the plaintiffs in this matter constitute the Paruk family. The defendant may be a company, but it is one under the *de facto* control of the Lockhat family. In essence this case is about a dispute between the Paruk family and the Lockhat family.

[4] In brief, the plaintiffs present their case as follows in their amended particulars of claim.

- (a) In about 1924 the late E M Paruk and the late A M Lockhat concluded an agreement of partnership or joint venture (which has been referred to as the "Newlands Partnership") for the purpose of their joint investment for profit in

immovable properties. It was agreed that they would jointly contribute to the purchase price of property and would profit equally from the development or resale of property. (A number of pieces of property in the Sea Cow Lake area were involved.).

- (b) The purchased property would be registered in the name of the defendant, a company of which A M Lockhat was the sole shareholder and director, but the accounting and administrative functions of the Newlands Partnership would be performed in the offices of E M Paruk.
- (c) The properties were purchased and the two men complied with their obligations in terms of their partnership agreement.
- (d) During about 1942 E M Paruk and A M Lockhat died within three days of each other. Following that the Newlands Partnership was in effect reconstituted between their respective estates (with the defendant as a party to that arrangement).
- (e) In August 1953 the Newland Partnership was again reconstituted so that a Mr M M Paruk would have a 12.5% share, resulting in a reduction in the shareholding of the estate late E M Paruk to 37.5%.
- (f) In June 1960 Mr M M Paruk died. Again the partnership was reconstituted, so that it was held by three deceased estates, namely that of A M Lockhat as to 50%, that of E M Paruk as to 37.5%, and that of N M Paruk as to 12.5%.
- (g) The affairs of the Newlands Partnership continued to be administered as contemplated by the agreement until 2006, up to which year the administrative and accounting functions had been performed in the offices of the late E M Paruk. At that stage the defendant took over the administrative functions. Until that time profits and losses were shared amongst the partners according to their proportionate shareholdings.
- (h) There has been no accounting to the plaintiffs by the defendant for its management of the properties and/or the proceeds thereof since 2006. The

link between that conduct and the alleged decision made or disclosed in June 2012 by the defendant to refuse to acknowledge the existence of the contract, is not spelt out in the pleadings.

[5] On that basis the plaintiffs seek an order declaring the existence of the Newlands Partnership and that the properties which remain registered in the name of the defendant vest in the partnership. An account from the defendant is also claimed.

[6] An alternative basis for the claim, and other and alternative prayers, are not material to the issues to be dealt with at this stage.

[7] The first 54 paragraphs of the defendant's amended plea to the plaintiffs' particulars of claim raise six so-called special pleas. Two paragraphs of the plea comprise the defendant's answer to what the defendant calls the "individual paragraphs in the particulars of claim". One contains four admissions and the other states that everything else is denied.

[8] The principal of purpose of the replication is to address the first special plea made by the defendant. The essence of the first special plea is contained in paragraphs 5 and 6 of the plea which read as follows.

'5. The plaintiffs' main claim is based upon two foundational premises: (1) that the death of a partner/joint venturer does not automatically terminate the partnership/joint venture; and (2) that executors of deceased estates may conduct long-term partnerships/joint ventures (the plaintiffs refer to the partnerships/joint ventures as "*the Newlands Partnership*").

6. Both of these premises are wrong, as a matter of law, which means that there is no lawful foundation for the main claim.'

The plea goes on to point out that an alternative claim, which I have not described above, rests upon the second of these allegedly false propositions of law. On that basis the defendant pleads that the plaintiffs can have no relief in the action.

[9] The correctness or otherwise of the two foundational premises identified by the defendant has already been debated in the proceedings culminating in the two judgments of this court to which I referred earlier. The effect of those judgments is as follows.

- (a) These issues of law raised by the defendant have not been decided.
- (b) However, what has been decided is that the action should go to trial for the purpose of establishing the facts before determining whether, on those facts, the (contested) legal principles determine the outcome of the case.

During the course of argument before me I put it to Mr *Harpur SC*, who represented the defendant/excipient, that it was not open to him to argue that in these proceedings, an exception to the replication, I could now decide the legal principles raised in paragraphs 5 and 6 of the plea; and thereby overturn the decisions already made in the earlier judgments that a decision on those legal principles must await the trial. As I understood it Mr *Harpur SC* accepted that I had a correct understanding of the position.

[10] Only the bare bones of the facts of this case are revealed in the pleadings. The defendant's approach is that the conduct of trade in partnership by an executor in his or her representative capacity is absolutely forbidden in our law; as a result of which there is no need to go to trial in order to establish exactly what happened over the long history of the business relationship between the Paruk and Lockhat families in order to apply the law to the facts. However, I take the view that the common law applicable to partnerships involving deceased estates is not necessarily as clear as the defendant would have it. (See, for instance, *Torbet v Executors of Attwell* (1879) 9 Buch 195.) As pointed out by Mngadi J in the first of the two judgments I have referred to earlier, the parties in this matter "have had a unique relationship based on trust which has endured for close to a century". The learned Judge went on to point to the fact that the legal issues are complex. I do not regard myself as compromised in any way as a result of being bound, in effect, by the earlier rulings, to hold that the legal issues which are the cornerstone of the defendant's case must be decided at trial.

[11] For present purposes the plaintiffs' replication may conveniently be regarded as comprising two parts, bearing the headings identified by the defendant in its notice of exception. The first part is a plea of estoppel and the second a plea for the development of the common law. These must be dealt with separately.

Estoppel

[12] In brief, the plea of estoppel rests upon allegations of fact detailed in the replication, to the effect that at all material times from 1942 to 2012 the defendant recognised and was actively involved in what the replication calls the "*de facto* partnership or joint venture" described in the particulars of claim, and thereby represented to the plaintiffs that the relationship of partnership relied upon the plaintiffs existed throughout that period. It is said that the plaintiffs acted on the correctness of that representation and in doing so acted to their detriment if in fact, as it now contends, the defendant can repudiate the existence of that partnership relationship. As a result, say the plaintiffs, the defendant is estopped from asserting as against the plaintiffs either that the *de facto* partnership did not exist, or that, if it did in *de facto* form, that it did not exist because its existence was contrary to law. (In describing the replication of estoppel I have chosen my own language to simplify matters, and confine the account to what is relevant to the exception taken to the replication of estoppel.)

[13] The notice of exception on the estoppel question is brief. It reads as follows.

'1. The plaintiffs cannot invoke estoppel to create a cause of action where none existed before, as they seek to do in their replication. "*Estoppel may only be used as a shield and not a sword.*" Hence it cannot be used to establish a partnership or joint venture where none existed.

2. Even if estoppel could be used for this purpose (which is denied) the replication introduces estoppel as a fresh cause of action which is a departure, is bad, and is excipiable."

[14] A succinct answer to this exception is to be found in the text under the heading "Estoppel raised by a plaintiff" in Amler's Precedents of Pleadings, 8 ed, (LTC Harms). Omitting references to authorities it reads as follows.

'Estoppel is not a cause of action. Therefore, a plaintiff may not rely on it in the claim, nor may a defendant rely on it in a counterclaim. A plaintiff wishing to rely on estoppel must plead it in the replication in reply to the defendant's plea where reliance is placed on the true facts.

If the plaintiff is aware at the inception of the litigation of the true facts he or she must base the case in the particulars of claim on the facts as represented to him or her. If the defendant pleads the true facts, the plaintiff may rely on estoppel in the replication.'

That is what has happened here, certainly in so far as the defendant seeks to deny the factual averments that the Newlands Partnership was in operation at least until 2012.

[15] In their heads of argument counsel for the defendant sought to expand somewhat on the grounds of exception by contending that estoppel may not be used "to make legal what would otherwise be illegal, or to give effect to what was not permitted or recognised by law". That argument does not fall within the ambit of the exception taken. Entertaining it would involve deciding the very legal questions which I have identified above, and which are to be decided not now, but at trial.

Development of the Common Law

[16] The second and alternative reply made by the plaintiffs to the defendant's plea rests upon the proposition that the contracts relied upon in the particulars of claim are found to be unlawful and invalid under existing law. On that premise the plaintiffs plead that the applicable law offends the spirit, purport and objectives of the Bill of Rights and that the common law should be developed to permit and recognise the lawfulness and validity of the contracts upon which the plaintiffs' claim is based. It is pleaded that the law sought to be applied by the defendant is unfair, unreasonable and unduly harsh. The plaintiffs plead that where a partnership relationship is continued after the death of a partner through the estate of the deceased partner, and the parties, being unaware of the common law principle that such a partnership relationship is not recognised, continue with the partnership enterprise, and the remaining partner or partners remain in possession of the partnership assets, the

common law should in fact recognise the validity of the partnership following the death of one or more partners. Not to recognise the validity of such an arrangement, plead the plaintiffs, is to offend the right to equality and equal protection and benefit of the law, the right to dignity of the heirs and beneficiaries of the estates, property rights and the right of access to court to have any disputes arising from the partnership resolved by application of law.

[17] The exception under this heading reads as follows.

'3. The plaintiffs have failed to meet the requirements for the development of the common law, in particular, those set out in *Mighty Solutions [CC v Engen Petroleum Limited and Another 2016 (1) SA 621 (CC)]* for at least the following reasons:

- (a) The plaintiffs do not specify adequately or at all the common law position that the plaintiffs contend needs to be "developed", and as to why it is bad or deficient and needs development;
- (b) There is no analysis in respect of the underlying reasons for the common law position;
- (c) There is no allegation that the common law principle in question offends the spirit, purpose and object of the Bill of Rights and thus requires development;
- (d) The plaintiffs fail adequately or at all to plead as [to] how the common law could and/or should be developed and amended; and
- (e) There is no engagement with wider consequences of the proposed change on that area of law.

(4) Even if the replication does meet the requirements for development of the common law (which is denied) the replication introduces the development of the common law as a fresh cause of action which is a departure, is bad, and is excipiable.'

[18] Dealing with paragraph 4 of the exception first, I am in respectful disagreement with the submissions made in support of it. There is no new cause of action introduced by the replication. The cause of action is the original one. The replication is designed merely to advance the proposition that the common law could and should be

developed in order to recognise the legal validity of the original claim. There is no new debt or cause of action involved.

[19] As to paragraph 3 of the exception, I make the general comment that the defendant is looking for more in the pleadings than it is entitled to expect.

[20] The wording of paragraph 3 of the exception seems to be derived from paragraph 39 of the judgment in *Mighty Solutions*. That paragraph reads as follows.

'Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.'

[21] Taking the five grounds of complaint contained in paragraph 3 of the exception in turn, my view of the matter is as follows.

- (a) The common law position has been properly identified by the plaintiffs. It is the alleged invalidity of contracts of the type they contend for. As to why it is bad or deficient and needs development, the plaintiffs could have been more explicit. But everything is there. The parties dealt with one another, according to the plaintiffs, on trust and apparently *bona fide* for about 70 years before the foundation of their relationship was challenged with a contention that at common law it was all invalid. That challenges the underlying notion of good faith in contract law.
- (b) It is correct that the pleadings do not canvass the subject of the rationale for the rule relied upon by the defendant. That subject will clearly have to be considered by the trial court, but it will nevertheless remain a legal question. There was no need to raise it in the pleading.

- (c) There clearly is an allegation that the common law principle in question offends the spirit, purpose and object of the Bill of Rights and that it requires development for that reason.
- (d) Here the complaint is that the plaintiffs fail adequately to plead how the common law could or should be developed. There is some merit in that, but I think it requires too much of the pleader. It is enough, in my view, that the pleading asserts the proposition that the common law should recognise the validity of transactions of the type which have given rise to this litigation, and which are clearly identified in both the particulars of claim and the replication.
- (e) It is correct that there is no “engagement” with the wider consequences of the proposed change in that area of law. Again that is a matter to be considered in legal argument. It has no place in a pleading such as the replication in question.

[22] I of course express no view on the quality of the claim to a development of the common law. That is to be decided at trial, once the scenario the plaintiffs contend for has been adequately defined. In my view the pleading is adequate and not susceptible to exception as contended for by the defendant.

[23] In approaching the issues as I have above, I have considered and applied the following principles extracted from paragraphs 31 to 34 inclusive of the judgment in *Wilkinson and Another v Crawford N.O. and Others* (CCT 130/19) [2021] ZACC 8 (16 April 2021).

- (a) The development of the common law is manifestly a legal issue as opposed to a factual one.
- (b) What needs to be considered is whether the point (ie the development of the common law) is foreshadowed in the pleaded case.
- (c) Is sufficient said so that it cannot be contended that the question of the development of the common law will be raised for the first time in argument? Put otherwise, is there sufficient notice to the party of the case it will have to

meet so that it has the opportunity to “present facts and material and legal argument to meet that case”?

In my view the replication on the issue of the development of the common law does not fall at any of the hurdles set out above. It should not be overlooked, either, that when the issue between the parties is a legal one, the mere assertion of the legal principle relied upon is normally sufficient. The argument in support of the principle follows later.

I make the following order.

The defendant’s exception to the plaintiffs’ replication is dismissed with costs, including the costs of two counsel.

OLSEN J

Date of Hearing:	Wednesday, 21 April 2021
Date of Judgment:	Friday, 18 June 2021
For the Plaintiffs:	Mr VI Gajoo SC with Mr GD Goddard SC
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