evidence are not observed. But this should make the magistrate all the more careful in dealing with the case when it is remitted to him for trial. Cases in the magistrate's court cannot be conducted otherwise than in accordance with the strict rules of evidence on which cases are conducted in the Supreme Court. To allow evidence which is inadmissible to be used at the trial, simply because it was admitted in the preparatory examination, would be in many cases to do a great injustice to the accused. I do not say that, in reading the evidence at the trial, the magistrate should have read part of it and omitted the rest. But, seeing that the record of the preparatory examination contained inadmissible evidence of a very important character, he should not have read the evidence at all. He should have taken it afresh, as he had power to do. It is a matter entirely in the magistrate's discretion whether he will read the evidence given at the preparatory examination at the trial, or whether he will hear the evidence afresh. If the evidence at the preparatory examination contains matters which ought not to have been admitted and which are seriously prejudicial to the accused, in my opinion the duty of the magistrate is to hear the evidence over again. I quite agree with what the JUDGE-PRESIDENT has said, that the practice with regard to proof of previous convictions at a preparatory examination, and with regard to the conduct of preparatory examinations, is one which ought to be very carefully considered, and which is capable of being used prejudicially to the accused.

[Reported by *Gey van Pittius*, Esq., Advocate.]

68(1)SA. 297(C)
53 CJ SA 314. 316. 68(2)... 202. 202 CA)

POTCHEFSTROOM DAIRIES AND INDUSTRIES CO., LTD. v. STANDARD FRESH MILK SUPPLY CO.

1913. *August* 19, 20 and 22. DE VILLIERS, J.P., and BRISTOWE, J.

Sale.—Sale of land.—Partnership.—Contract not signed by all Partners.—Authority of one partner to bind another.—Agent. —Proc. 8 *of* 1902, *sec.* 30.

Sec. 30 of Proclamation 8 of 1902 provides that contracts for the sale of fixed property must be in writing and signed by the parties thereto, or by their agents duly authorized in writing, *Held*, that the word *agents* does not include partners, and no written authority is therefore necessary in order to enable one partner to bind another in a sale of land belonging to the partnership.

Action for payment of money and an interdict.

The plaintiffs in this action sued A. Jacobsohn, M. Widman and K. Tatz, trading as the Standard Fresh Milk Supply Co. (a) for payment of £230 19s. 9d., arrear instalments and interest under a written agreement of sale dated January 25, 1912, of the assets including land and plant of a dairy and creamery business at Potchefstroom; (b) for an interdict restraining the defendants from disposing of the assets so sold until completion of the payment of the purchase price thereof. The defendant Tatz, denied that he was ever a partner of the other two defendants. The defendant Widman pleaded that the partnership between him and Jacobsohn was dissolved in August, 1912, and that thereafter the plaintiffs accepted Jacobsohn as their sole debtor.

B. A. Tindall, for the plaintiff company: All three defendants were partners in the purchase of, and shared in the profits from the Potchefstroom business. The signature "Widman and Tatz" on the deed of dissolution must be assumed to have been authorized by Tatz, who acted on the dissolution and thereby, having regard to its terms, ratified the purchase of the Potchefstroom business by the partnership.

The notice published in July last under the Registration of Businesses Act recognises that the Potchefstroom business was a portion of the assets of the partnership, see secs. 4 and 8 of Act 36 of 1909.

The absence of Tatz's name from the deed of sale does not relieve him of liability. "Agent" in sec. 30 Pro. 8 of 1902 means an ordinary agent, i.e., a stranger having no interest in the transaction but acting under a special general mandate. It does not include a partner. Here Jacobsohn as partner acted not only as an agent but also as a principal. As to power to contract on behalf of a company, see sec. 74 of Act 31 of 1909. According to Scots law a partnership is a *persona*, see Clark's *Law of Partnership*, p. 31; Nathan's *Common Law of S.A.*, vol. 2 p. 530.

F. E. T. Krause, K.C. (with him *Manfred Nathan*), for the defendants: With regard to the defendant Tatz, this action is based on the agreement annexed to the declaration, and the plaintiffs must prove privity of contract between him and them. Tatz's name does not appear on the agreement and Widman and Jacobsohn signed in their individual capacities. If, as is recited in the agreement, they signed for the defendant firm, plaintiffs must prove that they were authorized to do so by Tatz.

Tatz's evidence shows that he did not agree to the purchase, but refused to have anything to do with it. The purchase was not within the scope of the deed of partnership. But even assuming that the partners verbally agreed to the purchase that does not satisfy sec. 30 of Proclamation 8 of 1902. The transaction was void *ab initio*, see *Wilkin* v. *Kohler* (1913, A.D. 135). The relation of partners *inter se* is one of agency and the power of a partner to bind the firm is one of agency, see Lindley on *Partnership*, pp. 145 and 146; Maasdorp's *Institutes Cape Law*, vol. 3 p. 330. Tatz was only a partner *en commandite*, and was therefore not liable with Widman and Jacobsohn: *Sellar Bros.* v. *Clark* (10 S.C. 168). He took no part in the conduct of the business, see *Guardian Assurance Co.* v. *Lovemore's Exors.* (5 S.C. 212); *Anderson* v. *Royce* (2 O.R. 266); *Watermeyer* v. *Kerdel's Trustees* (3 M. at p. 432).

After August, 1912, plaintiffs looked to Jacobsohn as their sole debtor and therefore Widman is not liable, see *In re Family Endowment Society* (5 Ch. A.C. at p. 132). If the Court finds in favour of Tatz he should get the costs.

Tindall replied: On the construction of sec. 30 of Proclamation 8 of 1902, see *Van der Hoven* v. *Cutting* (1903, T.S. 299). Pothier does not treat partners as agents: Pothier on *Obligations*, sec. 83. See also Morice, *English and R.D. Law*, 2 ed., pp. 194 and 196. Express proof of authority to partners is not necessary. Moreover the action of Widman and Jacobsohn was ratified by Tatz, on ratification see Halsbury's *Laws of England*, vol. 22 p. 33 sec. 60. On the question of costs see *Pretorius* v. *Neft* (1908, T.S. 854).

Cur. adv. vult.

Postea (August 22nd).

DE VILLIERS, J.P.: The plaintiff, a limited liability company, asks for judgment against the defendants, who are alleged to form a partnership, for £230 19s. 9d. under an agreement of hire purchase, an interdict restraining the defendant Jacobsohn from removing certain property sold under the agreement, and costs.

The facts are shortly these. The plaintiff company had been carrying on a dairy business in Potchefstroom. On the 25th January, 1912, they entered into a written agreement with two of the defendants, Jacobsohn and Widman (purporting to act on behalf of the Standard Fresh Milk Supply Co.), whereby the plaintiffs sold to the defendants the land on which the dairy was situated,

and certain assets connected with the business, specified in the schedule attached to the agreement. The purchase price, £2,400, was payable in monthly instalments, first of £10, and afterwards £25 and £40. Instalments were duly paid up to the end of last year, after which they fell in arrear. The present action is for recovery of the instalments which have since become due under the agreement. There is no defence to the action so far as the defendant Jacobsohn is concerned; he is in default, and therefore judgment must be given against him in terms of the declaration.

The other defendants, Widman and Tatz, have each raised different defences. Tatz denies that he was a partner in the Standard Fresh Milk Supply Co., or that he authorised or ratified the purchase of the Potchefstroom business. Widman alleges that on a certain date in August, 1912, the partnership between himself and Jacobsohn was dissolved; that Jacobsohn took over the whole of the Potchefstroom assets, and the liabilities, and that the plaintiffs acquiesced in this arrangement and thereafter agreed to look to Jacobsohn alone. With regard to this latter plea, Dr. *Krause*, on behalf of the defendant Widman, has not pressed it, and there is no evidence whatsoever to support it. On the contrary, the evidence is all the other way—that when the plaintiff company's directors became cognisant that Jacobsohn had taken over the business they not only did not discharge the other partner or partners but insisted upon the liability of all of them.

With regard to the position of the defendant Tatz, the first point raised by Dr. *Krause* on his behalf was that the agreement of sale was signed by Jacobsohn and Widman on behalf of the Standard Fresh Milk Supply Company, and therefore, if they acted at all for Tatz, they must have been acting in the capacity of agents for him; that such agency is covered by the provisions of sec. 30 of the Transfer Duty Proclamation 8 of 1902; and that, seeing that there is no written authority from Tatz to his co-partners to execute the contract of sale, it is, at all events so far as Tatz is concerned, null and void. Counsel further argues that according to the true construction of the partnership deed executed between the three defendants in 1909 the buying of the business was not within the scope of the partnership, and that there is no proof that Tatz authorised the purchase of the business. Further, he denies that there was any ratification on the part of Tatz.

It will be convenient to deal shortly with the facts as they appear to me to have been proved. I agree with the contention that the

purchase of the business does not fall within the scope of the partnership. The four parties—Widman and Tatz on the one hand, and Jacobsohn and his wife on the other—agreed to enter into partnership for the purpose of carrying on a certain dairy business at Booysen's Reserve, and to carry on similar business at any other place which might from time to time be agreed upon. It follows that in the absence of specific agreement they could not carry on business anywhere else; and the deed certainly does not imply the right to incur liabilities in the purchase of any other dairy business.

Greater difficulty arises with regard to the question whether Tatz authorised the purchase of the business at Potchefstroom. The directors of the plaintiff company cannot state definitely that Tatz was represented to them, when the purchase was entered into, as being a partner. Dr. Dyer could not put it any higher than that he thinks he must have asked whether Tatz was a partner; and this is only an inference. On the other hand, the persons who could best give information on the point—namely, the three defendants, Tatz, Widman and Jacobsohn—are entirely unreliable. The Court cannot attach any weight to their denial. We have therefore to look at the circumstances, and to the facts as they are proved, in order to enable us to arrive at a conclusion.

[His Lordship then examined the evidence in detail and continued.]

Now it makes no difference in law whether Tatz originally authorised the purchase, or whether he ratified it afterwards. I have gone somewhat at length into the facts, because it seems to me there is sufficient evidence before the Court, in spite of the denial of the three defendants, to justify the Court in coming to the conclusion that Tatz must have known of, and must have authorised, the purchase of the Potchefstroom business. But even if this be not so, the evidence is abundant that by his subsequent conduct he ratified what had been done by the other two defendants.

The only question which remains to be considered is whether sec. 30 of the Transfer Duty Proclamation is applicable to the present case. The section reads as follows: "No contract of sale of fixed property shall be of any force or effect, unless it be in writing and signed by the parties thereto, or by their agents duly authorised in writing." It seems to me clear what the intention of the legislature was. In matters of the sale of fixed property—which are very important transactions—the legislature wished to render quite

certain that the terms of such an agreement should be reduced to writing, as also who are the parties bound by the terms of the agreement; and that, if the parties to the agreement did not themselves sign the agreement, there should be no doubt as to the authority of the agent who signed it on their behalf, for the authority of the agent should equally be contained in a written document. It is a maxim of our law that everybody must know the condition of the person with whom he contracts, and it seems to me that this section, insofar as it deals with agents, is directed towards that end. The question then is whether the legislature, in using the term "agents," intended to embrace partners. Now there is no doubt that partners are very often styled agents of each other. Whether they are actually agents or not (the law of agency as we understand it was developed much later than the law of partnership), they certainly have the powers of agents, and the broad principles of the law which are applicable to agents apply to this extent to partners. But it is a very different proposition to say that whenever there is a provision in a statute with reference to agents, that must equally apply to partners. We must not forget that this is a section which is embodied in a fiscal law; and I do not think the Court would be justified in extending the language used by the legislature beyond what it actually warrants. The matter is not free from difficulty, but it seems to me, upon a proper construction of the section, that the legislature did not intend to include partners under it. For although partners may have the powers of agents, they are much more than agents. The character sustained by a partner is much more complex than merely that of agent. A partner has not only the powers of an agent, but he may also be said to be a surety for his fellow partners, for they are all liable *singuli et in solidum*. And it could hardly be maintained, if there were a provision with regard to sureties, that that must necessarily be extended to partners. And not only is a partner an agent, but he sustains the double character of agent and principal in one and the same transaction, and that not for a share only but in each capacity for the whole. In the absence of clear language indicating that the legislature intended a provision of this nature to apply to partners, in my opinion we should confine it to what are usually known as agents in law—that is, a person who acts for another who was perfectly competent to act for himself. A *mandatarius* sustains a very different character from a *socius*.

I do not wish to base my decision entirely upon what I am about to say. But I must point out the peculiar character which is borne by partners. It has never been held in this Province that a partnership is a *persona* in the eyes of the law. But in the recent case of *Silbert & Co.* v. *Evans & Co.* (1912, T.P.D. 425) the question was considered, by this Court, how far a partnership can be considered to have a separate entity. I will not repeat what was said in that case by my brother WESSELS and myself; but for certain very important purposes in our law—for purposes of insolvency, for example—a partnership is given a separate entity. The partnership estate, for example, is sequestrated apart from the separate estates of the partners. The reason of the decision in *Silbert & Co.'s* case makes possible the proof of a partner in one firm against another partnership in which he is also a partner. It recognises that at all events for certain purposes a partnership may be considered as a *quasi-persona*. For this reason, too, when we find the term "agents" used in a legislative provision, it is not possible simply to apply that to partners, and to say that the legislature must have intended to apply the provision to partners because a partner may also sustain the character of agent. I come to the conclusion that sec. 30 does not cover the case of a partner, and therefore there was no necessity for any written authority of Tatz to the other partners. The reason of the rule embodied in the section is against its application to partners, for once it has been shown that several persons are partners, so far as they act within the scope of their authority the one, *ex lege*, binds the other. No written authority is requisite, and the reason for the rule therefore ceases. The defence therefore fails, and Tatz is liable equally with the other defendants. There must be judgment for the plaintiff against the three defendants, Jacobsohn, Widman and Tatz, for the amount claimed, with interest *a tempore morae*, and costs. The interdict against Jacobsohn is confirmed.

BRISTOWE, J.: I agree with the judgment which has just been delivered, but I wish to add a few words with regard to sec. 30 of Proclamation 8 of 1902.

Under that section a contract of sale, if not signed by the principal, must be signed by his agent "duly authorised in writing." That must, I think, mean "authorised in writing by the principal." The principal must therefore be capable of giving the agent the

power which he is appointed to exercise. And for this purpose he must be capable of exercising those powers himself. Moreover the use of the word "authorised" points I think to an express authorisation as distinct from one arising by implication of law. So that it seems to me that the agency contemplated by the section is one expressly created by a person who could himself have exercised the delegated power had he chosen to do so.

In this view tutors, curators, corporations and partnerships are all excluded. Tutors and curators are excluded because the acts which they are appointed to perform are *ex hypothesi* acts which their wards cannot perform. Corporations are excluded because having neither minds nor hands of their own they cannot themselves do what their agents do for them. And partnerships are excluded because the agency of a partner for his co-partner is not expressly created but arises by implication of law as soon as the partnership relation is constituted. Not only is this in my opinion the effect of the section properly construed, but it seems to me to be a reasonable interpretation and one which accords with the true facts of the case. Tutors and curators are really not agents at all. They are principals, though with limited powers. And if they enter into a contract of sale they do so by virtue of a faculty incidental to their office and not of any power derived from the ward. So although the seal of a corporation is affixed by an agent, the seal once affixed is the signature of the corporation. And quite apart from the special provisions of the Companies Act it would not be true to say that a document properly sealed with the corporation's seal is executed by an agent. Similarly in the case of a partnership. By the partnership contract a relation is established between the parties which persists during the continuance of the partnership and for all partnership purposes by virtue of which each partner becomes *primâ facie* capable of signing the firm's name. The name so signed is really the signature of the firm, though written by one partner; just as the seal of a company is the signature of the company though affixed by an agent.

To state the position in this way may seem to be conceding to a firm an individuality of its own. I do not think however that it makes much difference whether we regard a partnership as a *persona* or whether we regard it as a contractual compound of several *personae*. In the one case the firm name if properly signed is the signature of the *persona*, in the other case it is the signature of the

contractual compound. And the distinction between the two seems more academic than substantial. I am however prepared to go to the extent of holding that a partnership though not a corporate individual is so far analogous to a *persona* that it may be called a *quasi-persona*. This indeed seems to me to be an accurate statement of the law as deducible from recent cases. For many purposes it has or is treated as having a *persona* of its own; and particularly in relation to commercial transactions is this a convenient and succinct way of regarding its position. A partner is often said to be the agent of the firm. In England this expression is inaccurate, but I am not prepared to say that it is inaccurate here.

For these reasons I come to the conclusion that the contract in question in this case is not avoided by the operation of the Transfer Duty Proclamation.

Attorneys for Plaintiff: *Findlay, MacRobert & Niemeyer;* Attorneys for Defendant: *Wagner & Klagsbrun.*

[Reported by *Adolf Davis*, Esq., Advocate.]

REX v. CRANSTON LIDDELL AND OTHERS.

1913. *August* 11 and 25. DE VILLIERS, J.P., and GREGOROWSKI, J.

Lottery.—Bond.—Repayment according to system of Geometrical Progression.—Chance.—No bona fide *business.—Law 7 of* 1890.

In order to ascertain whether a scheme is a lottery the substantial object of the whole scheme will be looked at. Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot will not vitiate it.

A company issued £45 bonds to bearer numbered consecutively from 1 upwards, on which the bondholder had to pay 10s. per month until 60 instalments had been paid when the whole £45 became payable. Of the 10s. subscribed monthly, 6s. went to a reserve fund for payment of matured bonds, and 4s. to a redemption fund for payment of bonds which had not reached maturity. Prior to maturity the bonds were redeemable out of the redemption fund, on

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Sec. 6 of Law 7 of 1890 reads: *Lottery* signifies every lottery in the general and accepted meaning of the word, where subscription takes place and more especially every scheme institution, system plan or design by means of which a prize or prizes are or may be won, drawn, or thrown for by lot, dice or other method of selection by chance whether or not the happening of any other accidental occurrence other than the result of the application or use of such dice or other method of chance should have to be considered.