THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 356/07

No precedential value

WYNAND WILLEM ELS Appellant

and

SUSARA CAROLINA SMIT First Respondent

THE REGISTRAR OF DEEDS, PRETORIA Second Respondent

Neutral citation: *Els v Smit* (356/07) [2008] ZASCA 119 (26 September 2008)

Coram: HARMS ADP, SCOTT, LEWIS JJA, LEACH and MHLANTLA AJJA

Heard: 1 September 2008

Delivered: 26 September 2008

Corrected:

Summary: Partnership ─ dissolution of partnership agreement ─ effect.

ORDER

On appeal from: High Court, Pretoria (Mavundla J sitting as court of first instance).

1 The appeal is upheld to the extent set out in para 2 of this order.

2 The order of the court below is altered to read as follows:

'(a) The claim succeeds to the following extent:

(i) It is declared that Erf 2075 Kempton Park, Gauteng '20 Aster Street' is owned by the plaintiff and the defendant in equal shares.

(ii) It is declared that Plot 21 Caro Nome Agricultural Holding (21 Atlas) and Erf 504 Croydon, Kempton Park (6 Brabazon), are partnership assets.

(iii) The plaintiff is entitled to share in the net proceeds of these properties as and when they are sold.

(iv) In the event the parties cannot agree on the calculation and/or division of the profit after the properties have been sold, the plaintiff is entitled to the appointment of a liquidator, who, in the event of disagreement, must be nominated by the President of the Law Society of the Northern Provinces.

(b) The counterclaim succeeds to the extent that the plaintiff is ordered to pay the defendant the sum of R17 541.81.

(c) The defendant is ordered to pay the costs of suit including the costs of two counsel.'

3 The appellant (the defendant) is to pay the costs of the appeal, such costs to include the costs of two counsel.

JUDGMENT

MHLANTLA AJA (HARMS ADP, SCOTT, LEWIS JJA and LEACH AJA concurring):

[1] This is an appeal, with the leave of the court below, against an order of the Pretoria High Court (Mavundla J). Mrs Smit, the first respondent, instituted an action against Mr Els, the appellant, for declaratory relief in relation to certain immovable properties which she claimed were assets of a dissolved partnership between her and the appellant. (The second respondent has been cited as an interested party but takes no part in the appeal and I shall henceforth refer to Mrs Smit as the respondent.)

[2] The appellant denied the existence of the partnership and, in addition, filed a claim in reconvention in terms of which he claimed an account relating to the proceeds of certain properties sold by the respondent; and a debate of an account and payment of any amount due to him. He relied in this regard on an agreement that was for all intents and purposes a partnership agreement.

[3] Unsurprisingly, at the commencement of the trial the appellant conceded the existence of a partnership and the parties prepared an agreed statement setting out the terms of the partnership, namely:

(a) That the respondent would search for and identify properties to be purchased;
(b) That they would jointly decide on the purchase price;

(c) That the appellant would provide the capital for the deposit for the property, the sheriff's cost and commission;

(d) That the arrear rates and taxes would be furnished by the appellant in the event of the property not being sold before registration;

(e) That the appellant would be entitled to charge interest on the respondent's half share of the amount provided, at a rate similar to the one he could have earned on his ABSA money market account;

(f) That the net proceeds of the property would be divided between the parties;

(g) That property purchased would be marketed and sold before registration;

(h) In the event of the property not being sold before registration, same would be used for letting and the proceeds thereof would be used towards the bond settlement;

(i) That any shortfall, having regard to any other expenses in connection with the property, would be borne in equal shares.

[4] They also agreed that the partnership had been terminated but disagreed as to the date and cause of dissolution. They then prepared a list of issues to be decided separately and the court agreed to do so. The issues were these (freely translated):

(a) whether it was a term of the agreement that the respondent would earn commission in the event the properties were sold by her estate agency;

(b) whether the respondent and/or her estate agent were at all relevant times in possession of a valid fidelity fund certificate;

(c) whether the respondent was obliged to contribute towards the other expenses after transfer had been taken as and when they were incurred;

(d) which party had repudiated the agreement and the effect thereof on the dissolution of the partnership;

(e) whether the appellant was entitled to share in the proceeds of the Woodlake properties;

(f) whether the respondent was entitled to share in the net proceeds of

the sale of the properties procured by the appellant or registered in his name, that is, 6 Brabazon Street, 20 Aster Street and Plot 21 Atlas Road; and

(g) whether the respondent was entitled to request the appointment of a liquidator in the event that the parties are unable to agree on the computation or calculation and/or division of profits after the properties have been sold.

[5] Mavundla J decided most of the issues in favour of the respondent in these terms:

(a) that it was a contract term that the plaintiff, in the event the property should be sold by her estate agency, will earn a commission from the transaction;
(b) that the plaintiff or her estate agency at all relevant times was in possession of a fidelity fund certificate;
(c) that the plaintiff's estate agent company was entitled to the estate agency commission paid and set out in the contract attached as annexure A;
(d) that the plaintiff is obliged to contribute towards the other expenses (excluding the Bond repayment) after transfer of the property has been taken;
(e) that the plaintiff is entitled to share in the proceeds of the property listed in prayer 1.3 of the particulars of claim;
(f) that in the event the parties cannot agree on the calculation and/or division of the profit after the property listed in prayer 1.3 of the particulars of claim have been sold:
(i) the plaintiff is entitled to the appointment of a liquidator (as stated in prayer 1.4 of the particulars of claim);
(ii) the parties must approach the President of the Law Society of Gauteng for the appointment of a liquidator;
(g) That:
(i) It is irrelevant, for the purposes of this matter whether or not the repudiation is by the plaintiff or the first defendant; and
(ii) that both parties are entitled to share equally in the proceeds of the property listed in prayer 1.3 of the particulars of claim.
(h) that the transactions 18 Woodlake, Glen Marais and 35 Woodlake, Glen Marais were within the scope and ambit of the partnership;
(i) that the first defendant is entitled to share in the profit of the transaction 18 Woodlake and 35 Woodlake;

(j) that the defendant pays the costs of suit on party and party scale which costs shall include the costs of two counsel.

[6] Benevolently interpreted the order was declaratory, although it was not framed as such. Instead it followed in exact terms the formulation of the issues as identified by the parties at the beginning of the trial. The order is defective as it is in parts vague and incapable of being enforced. Nor does it in express terms declare the rights of the parties.

[7] In spite of the separation of issues the respondent's counsel conducted the proceedings as if all the issues were before the court. However, although all the issues were ventilated, the parties failed to approach the court below, before applying for leave to appeal, for a consequential order that would have brought the matter to an end. The correct procedure where a court has made this type of order is for the parties to request the court to convert the ruling into a proper order. And a court ought not to grant leave to appeal before a proper order has been formulated, simply because rulings are not appealable: only orders are.

[8] In deciding whether what appears to be a ruling is in fact an appealable order, this court in *SA Eagle Versekeringsmaatskappy Bpk v Harford*[1] held that the decisive question which had to be answered was what the parties sought to achieve with the litigation and what effect the court had intended its judgment to have. It went on to say that the trial court in that case had intended, despite the awkward way in which it was worded, to make a final decision regarding the liability of the appellant ─ it had not been the court's intention to come to a provisional conclusion which could be altered or amended. The judgment therefore constituted

[1] 1992 (2) SA 786 (A) at 792.

an appealable judgment or order in that it had a final and decisive effect on the litigation in which the parties were engaged.

[9] The same can be said in relation to the rulings in this case. In practical terms the rulings that have any practical effect amount to an order in more or less these terms:

(a) The claim succeeds to the following extent:

(i) It is declared that the three properties are partnership assets;

(ii) The plaintiff is entitled to share in the net proceeds of these properties as and when they are sold;

(iii) that in the event the parties cannot agree on the calculation and/or division of the profit after the properties have been sold, the plaintiff is entitled to the appointment of a liquidator.

(b) The counterclaim succeeds to the extent that the plaintiff is to pay the defendant his net share of the profit on the Woodlake properties.

(c) The defendant is ordered to pay the costs of suit including the costs of two counsel.

[10] I now turn to a consideration of the facts relevant to the appeal. The appellant met the respondent during 2000 when they became neighbours. He assisted her and her husband with their income tax affairs and completed a business proposal for her. The respondent subsequently employed the appellant as a part-time agent selling properties after-hours. As a result of these dealings the parties concluded the oral partnership

agreement during March 2001. The object of the partnership was to buy immovable properties, especially at public auctions or from insolvent estates or properties repossessed by banks. They would later sell such properties for profit and share the proceeds on an equal basis.

[11] The appellant, a chartered accountant, was initially employed by ABSA Bank but later resigned to join the respondent in the partnership business. He was in charge of the financial affairs of the partnership. The respondent was an estate agent with her own agency trading as Saartjie East Rand Repo Properties.

[12] The partnership bought and sold approximately 18 properties without any dispute arising between the partners. The following facts, though, gave rise to the respondent's claim in convention:

(a) Two properties, described as Erf 504 Croydon, Kempton Park ('6 Brabazon') and Plot 21, Caro Nome Agricultural Holding ('21 Atlas') were registered in the name of the appellant who declared himself to be the sole owner thereof.

(b) Another property, Erf 2075 Kempton Park ('20 Aster'), was also acquired by the parties and the appellant laid a similar claim thereto.

[13] The respondent sought a declaratory order that she was entitled to share equally in the net profit of those properties upon their sale. The appellant resisted the claim mainly on the ground that the properties were not part of the partnership assets and, to the extent that they were, she had forfeited any right to the properties because of the termination of the partnership. I shall deal with the detail of each property later.

[14] The counterclaim in essence related to two matters:

(a) The respondent had received R78 831 by way of commission in respect of seven properties sold through her agency. The appellant sought to reclaim this amount. This issue is reflected in rulings (a), (b) and (c).

(b) The respondent had purchased and sold two properties described as 18 and 35 Woodlake, Glen Marais without the knowledge of the appellant and did not account to him in regard thereto. He sought payment of the net profit on the two transactions. This issue is reflected in ruling (h) and (i).

[15] It is convenient first to consider the commission issue raised by the counterclaim. This dispute arose after the appellant had resigned from the bank when he refused to pay further commission to the respondent on future transactions, having realised that she was earning more money than he did. He contended that the commission should be shared by them equally. The respondent in response refused to market the properties without any remuneration. This dispute eventually led to the dissolution of the partnership agreement.

[16] Counsel for the appellant contended that the court below had erred in holding that the respondent was, in terms of the partnership agreement, entitled to the estate agent's commission. There is no substance in this contention. The respondent expressly and unequivocally testified that the parties had agreed that she would earn commission when she or her agency sold the property. The appellant signed all the contracts which provided that commission would be paid to her agency. It was not put to the respondent that such an agreement was never concluded. There is clear evidence regarding the agreement between the parties consistent with the manner in which they conducted themselves towards each other.

The appellant did not testify to refute the respondent's evidence. The evidence of the respondent remains uncontradicted and there is no reason to doubt it. In my view, the appellant has not provided any reason why this court should interfere with the ruling of the court below 'that it was a contract term that the plaintiff, in the event the property should be sold by her estate agency, will earn a commission from the transaction.'

[17] Part of the appellant's case relating to the commission issue was that, even if it was a term of the agreement that the respondent was entitled to commission, she was not entitled to it because she either did not have the necessary fidelity fund certificate or, if she had one, it had been incorrectly issued. The court below held that she did have the necessary certificate (finding (b)) but the respondent on appeal abandoned the factual finding in her favour.

[18] This leaves for consideration the appellant's argument that in the absence of a fidelity fund certificate the commission has to be repaid. Counsel did not persist in the argument in the light of the judgment of this Court in *J J Taljaard v T L Botha Properties,*[2] which held that commission paid to an agent who did not possess the necessary fidelity fund certificate could not be reclaimed by virtue of s 34A of the Estate Agency Affairs Act 112 of 1976. In the result the ruling issued by the court below in para (c) was correct to the extent that it held that the respondent was entitled to retain the commission received, although on an incorrect basis, namely the existence of a certificate. The effect of this is that the counterclaim, to the extent that it related to the commission paid, was correctly dismissed.

[2] [2008] ZASCA 38.

[19] With regard to the transactions in respect of the Woodlake properties, the high court held that that the transactions fell within the scope and ambit of the partnership and that the appellant was entitled to share in the profit of the transactions. The respondent did not cross-appeal and the issue is accordingly moot. What remains was a determination of the quantum which, strictly speaking, fell outside the scope of the issues the court below was called upon to adjudicate. However, the parties agreed that this court should, on the information available, determine the quantum. According to appellant's counsel it amounted to R53 836.61.

[20] The calculation was based on the assumption that the respondent should forfeit her share as she had made secret profits; thus, the appellant was entitled to the entire profit generated. There is no basis for the argument. Our law does not recognise such a penalty: compare *Schoeman v Constantia Insurance Co Ltd*.[3] Furthermore, in view of the fact that the appellant had repudiated the partnership agreement by denying the respondent's right to commission, he is hardly in a position to insist on forfeiture. In *Purdon v Muller*[4] Ogilvie Thompson JA (dealing with a forfeiture clause in a partnership agreement) held:

'Partnership is a contract *uberrima fidei* and, in my view, that connotes that a partner wishing to invoke against his co-partner the stringent provisions of a summary cancellation and forfeiture clause contained in the partnership agreement must at least himself be honouring the terms of that agreement. In my judgment the equitable principles of our law do not permit a partner, who is himself repudiating his partnership obligations towards his co-partner, to enforce against that co-partner a forfeiture clause. . . .'

The reasoning applies *a fortiori* in a case where there is no forfeiture clause.

---

[3] [2003] 2 All SA 642, 2003 (6) SA 313 (SCA).
[4] 1961 (2) SA 211 (A) at 230G-H.

[21] The calculation was also based on the assumption that the respondent was not entitled to commission, something already disposed of. A recalculation shows that after deduction of the commission the appellant's half share in the profit that arose from these properties amounts to R17 541.81.

[22] The final issue relates to the relief claimed by the respondent in regard to the three properties mentioned in her particulars of claim viz, 20 Aster, 6 Brabazon and Plot 21. Her case was uncomplicated: she alleged that the three properties were partnership assets; the partnership had been terminated; and she was entitled to her share in the profits from any sale of these properties. Secondly, she asked (absent an agreement between the parties) for the liquidation of the partnership assets by a liquidator.

[23] In so far as these properties are concerned, it is necessary to deal with them separately. I propose to commence with the property that was acquired by the parties allegedly in terms of a different agreement and thereafter deal with the circumstances relating to the two properties that are registered in the appellant's name.

[24] 20 Aster Street: It is common cause that the parties are joint owners of this property. The parties could not sell same as there was a usufruct registered over it. The respondent as joint owner is entitled to her half share if and when the property is sold. It is in this context that the respondent said that the property fell outside the partnership. Her evidence is probably wrong but it is in any event irrelevant whether this property was acquired in terms of the partnership or in joint ownership. The property ought to be dealt with in the same manner. The respondent as co-owner of the property has a right to institute the *actio communi*

dividundo to claim a division of the property. In *Robson v Theron*,[5] the court summarised the principles of the common law applicable to *actio communi dividundo* where the partners cannot agree on the method of dividing a particular jointly owned asset. All that is required in this case, is a declaratory order to the effect that the appellant and the first respondent are co-owners of 20 Aster and that the net proceeds thereof are to be shared equally by the parties as and when the property is sold.

[25] 21 Atlas Road: The parties purchased three properties on 29 March 2001, including this one. They signed the agreement of sale. The mortgage bond was granted in their favour whereafter they signed the documents for registration of transfer. They subsequently discovered an endorsement on the title deed to the effect that the holding may not be held by two persons jointly. The respondent as a result signed a waiver renouncing her rights to facilitate registration of transfer. The parties decided to not to sell the plot immediately but wait for appropriate offers.

[26] 6 Brabazon Street: The parties agreed that the property be purchased by the appellant as the bank refused to pay commission where the estate agent purchased the property. The respondent placed the offer. They received the commission because the property was registered in the appellant's name only. The parties agreed to renovate the property and thereafter sell it. The respondent marketed the property. A dispute arose between the parties whereupon the appellant declared himself the sole owner of the property and sold it for R550 000.

[27] Counsel for the appellant conceded that these properties, 6 Brabazon and 21 Atlas, were acquired in pursuance of the partnership

[5] 1978 (1) SA 841 (A) at 856H-857C.

agreement. He argued, however, that since these properties were registered in the appellant's name, the respondent was not entitled to share in the net proceeds thereof. He contended that the claim by the respondent was a personal right as opposed to a real right and that the partnership asset was not the property but the profit in respect of the property sold.

[28] In my opinion this argument is ill-conceived. The cardinal point is that the properties were purchased in pursuance of a partnership and are thus partnership assets. It is evident that the partnership purchased the properties with the intention to later sell them at a profit. The fact that they were registered in the name of one party is irrelevant. In the result the two parties have a right to share the net proceeds thereof once the properties are sold.[6]

[29] Counsel also argued that the respondent could not claim any profits since the partnership had been dissolved and that her claim amounts to a claim for specific performance in respect of a cancelled contract. Counsel, I fear, failed to distinguish between specific performance and the natural consequences of the dissolution of a partnership. Although there is a difference in law, there may be no practical difference. On dissolution of a partnership accounting must take place, and the idea that the one partner, who by chance was in possession of a partnership asset at the date of dissolution, is on liquidation entitled to the increase in value of the article after the date of dissolution is simply nonsense. A partner has an accrued right to claim profits not only during the existence of the partnership, but also after its dissolution. A partner does not forfeit his

[6] *Van Heerden v Pienaar* 1987 (1) SA 96 (A) at 107D-E; *Cussons v Kroon* 2001 (4) SA 833 (SCA) at 838E-I.

right vis-à-vis a partnership asset due to him, and is entitled to a distribution of all assets. In *Korb v Roos*[7] the court held that the termination of a partnership marked the beginning of a dissolution, liquidation and settling of accounts. It did not extinguish the claims of the partner who 'terminated' the agreement and concurrently entitle the other partner to regard the entire partnership assets as his exclusive property.

[30] In the result, since the properties described as 6 Brabazon and 21 Atlas Road are partnership assets, the respondent is entitled to share in the proceeds derived from their sale, whenever that takes place.

[31] To give effect to the aforegoing I intend to reformulate the order of the high court but, as indicated, it does not change its practical effect. The mere alteration of the order to give practical effect to it, does not mean that the appellant had any success which entitles it to the costs of the appeal. In so far as the trial costs are concerned, there is no basis to interfere with the exercise of the court a quo's discretion.

[32] In the result I make the following order:

1 The appeal is upheld to the extent set out in para 2 of this order.

2 The order of the court below is altered to read as follows:

'(a) The claim succeeds to the following extent:

(i) It is declared that Erf 2075 Kempton Park, Gauteng '20 Aster Street' is owned by the plaintiff and the defendant in equal shares.

(ii) It is declared that Plot 21 Caro Nome Agricultural Holding '21 Atlas' and Erf 504 Croydon, Kempton Park '6 Brabazon', are partnership assets.

[7] 1948 (3) SA 1219 (T).

(iii) The plaintiff is entitled to share in the net proceeds of these properties as and when they are sold.

(iv) In the event the parties cannot agree on the calculation and/or division of the profit after the properties have been sold, the plaintiff is entitled to the appointment of a liquidator, which, in the event of disagreement must be nominated by the President of the Law Society of the Northern Provinces.

(b) The counterclaim succeeds to the extent that the plaintiff is ordered to pay the defendant the sum of R17 541.81.

(c) The defendant is ordered to pay the costs of suit including the costs of two counsel.

3 The appellant (the defendant) is to pay the costs of the appeal, such costs to include the costs of two counsel.

_____

N Z MHLANTLA
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant: G Naudé
H N de Wet

Instructed by
S C Vercueil Inc Menlo Park
Symington & De Kok Bloemfontein

For Respondent: M C Erasmus SC
G Jacobs

Instructed by
Joubert & Scholtz Pretoria
Andries Spangenberg Inc Bloemfontein