**THE SUPREME COURT OF APPEAL**
**REPUBLIC OF SOUTH AFRICA**

# JUDGMENT

Case No: 348/08

In the matter between:

**JOSEF ANDRIES ESPAG** **FIRST APPELLANT**

**PIETER JOHANNES VAN STADEN** **SECOND APPELLANT**

**v**

**BAREND DANIëL HATTINGH** **RESPONDENT**

**Neutral citation:** *Espag v Hattingh* (348/2008) [2009] ZASCA 104 (21 September 2009).

Coram: Streicher JA, Leach and Wallis AJJA

Heard: 27 August 2009

Delivered: 21 September 2009

Summary: Partnership – misconduct on the part of a partner – no obligation on the other partners to afford the guilty partner a hearing before terminating the partnership.

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**ORDER**

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

The following order is made:

(a) The appeal succeeds with costs, including the costs of two counsel.

(b) The order of the court a quo upholding the respondent's application and dismissing the appellants' counter-application is set aside and is replaced with the following:

'1. The applicant's application is dismissed with costs, including those costs previously reserved and the costs of two counsel.

2. It is declared that:

2.1 The partnership between the applicant and the first and second respondents was dissolved on 3 October 2006 in terms of clause 13.4 of the parties' partnership agreement.

2.2 In terms of clause 14.2 of the partnership agreement, the assets and liabilities of the aforementioned partnership accrued to the first and second respondents who are entitled to deal therewith in their new legal practice.

3. The applicant is ordered to pay the costs of the respondents' counter-application, including those costs previously reserved and the costs of two counsel.'

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**JUDGMENT**

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LEACH AJA (STREICHER JA, WALLIS AJA CONCURRING)

[1] The parties are attorneys who practised in partnership in Polokwane from March 2000 until 3 October 2006. Unfortunately the partnership terminated in acrimony, with the parties unable to reach agreement on the division of the partnership assets. The appellants contended that in terms of clause 13.4 of the parties' written partnership agreement (dealt with more fully below) they had been entitled to require the respondent to withdraw from the partnership as a result of certain misconduct on his part and that the dissolution was to be effected under various provisions of the partnership agreement which applied in such circumstances. The provisions concerned essentially provided for the appellants to retain the business of the partnership and to pay the respondent the credit balance of his capital account in the partnership as determined in terms of an agreed formula. On the other hand, the respondent contended that the appellants had not been entitled to require him to withdraw from the partnership and that, by doing so in the manner they did, they had repudiated the agreement which had entitled him to cancel it. Consequently he contended that the partnership assets fell to be divided under the common law rather than under the terms of the agreement and that a liquidator should be appointed with the power

to liquidate the assets, pay the debts and distribute the balance amongst the former partners.

[2] Neither side was prepared to give way and, faced with an impasse, the respondent instituted motion proceedings in the High Court, Pretoria seeking an order declaring that the partnership had been dissolved on 3 October 2006 and appointing a liquidator. This application was opposed by the appellants who, in a counter application, sought an order declaring the partnership to have been dissolved under the terms of the partnership agreement due to the respondent's misconduct and that the partnership assets should therefore be distributed under the relevant provisions of the agreement. The matter came before Ledwaba J who, on 16 May 2008, upheld the respondent's application and dismissed the appellants' counter-application. With leave of the court *a quo*, the appellants now appeal to this court.

[3] After its formation, the partnership appears to have been busy and successful, and there is no suggestion of any meaningful conflict between the respective partners until the final week of September 2006. The catalyst for the rapid deterioration in their relationship which then occurred was the news that the crime fighting unit commonly known as 'the Scorpions' had decided to continue with an earlier investigation into the affairs of Mr N A Ramatlhodi, at the time the Premier of the Limpopo Province, and also matters relating to the close

corporation known as Thaba Pula Investments CC ('Thaba Pula') in which a local businessman, Mr Eli Stroh, held a member's interest.

[4] Through a series of transactions, some involving the wife of the Premier, Thaba Pula had acquired land earmarked for land restitution. It paid R1,5m for the land but shortly thereafter sold it to the state at almost double that price. The respondent had provided Thaba Pula with professional services during this process. Not only were the circumstances of the purchase and resale of the land somewhat suspicious but, on an occasion in 2005 when it was mentioned that members of the Scorpions were present at Eli Stroh's business premises and had asked to see all documentation relating to Thaba Pula, the respondent promptly left his office, taking the firm's Thaba Pula file with him. Quite naturally, the appellants suspected that the file contained information the respondent did not want the Scorpions to discover.

[5] Although the appellants took the matter no further in 2005, they became concerned in the last week of September 2006 when they heard that the Scorpions had decided to revive their earlier investigation into Mr Ramatlhodi and his affairs. In the absence of the respondent who was recovering from a recent eye-operation, they decided to make a few enquiries of their own. According to the appellants, they then learned for the first time that the respondent held a 50% member's interest in Thaba Pula. They further allege that, on inspecting the partnership's books of account, they ascertained that Mr Ramatlhodi had been

paid an amount of some R260 000 by way of a cheque drawn on the partnership's trust account for which they could find no explanation. From this they drew the inference that the payment had been for an improper purpose.

[6] In addition, the appellants claim that they learned that from 1995 to September 2006 the respondent had performed a great deal of professional work in connection with a certain piece of farmland and claims relating thereto, originally on behalf of a Mr F W C Botha who had held certain rights in the land and, subsequently, for a private company known as Chir Beleggings (Pty) Ltd ('Chir') that had purchased those rights from Botha. The land in question had been expropriated by the state but had never been used for the purpose for which it had been expropriated. After Chir had purchased the land rights from Botha, it obtained transfer of the land from the state but subsequently resold it to the state at a handsome profit. They also learned for the first time that the respondent held a 50% shareholding in Chir through his family trust and that, apart from the fees incurred by Chir bringing an application against the state, which the respondent had himself paid, the respondent had not charged fees for all the professional work he had done for both Botha and Chir in regard to the land in question for some eleven years. The work had therefore effectively been rendered at the firm's expense and resulted in the respondent receiving a substantial personal benefit through his family trust.

[7] The appellants were most unhappy about what they had learned, and took the view that the respondent was guilty of gross misconduct which entitled them to request him to withdraw from the partnership under clause 13.4 of the written partnership agreement which provided for the partnership to be dissolved in the following circumstances:

'Indien 'n vennoot hom skuldig maak aan growwe wangedrag, of in geval van enige optrede of versuim wat 'n grond sal wees vir ontbinding van die vennootskap deur 'n bevoegde hof, dan sal die vennootskap ontbind word indien minstens drie kwart van die agterblywende winsdelende vennote hom skriftelik versoek om uit te tree, met kennisgewingtydperk soos deur hulle bepaal.'

[8] Accordingly, on 3 October 2006 the appellants confronted the respondent about the Thaba Pula and Chir matters and asked him to withdraw from the partnership. Although there is a dispute which cannot be resolved on the papers in regard to the respondent's reaction on being so confronted, it is common cause that the appellants proceeded to hand the respondent a draft agreement relating to the dissolution of the partnership and the distribution of its assets. After considering its contents, the respondent refused to sign this draft and, in a memorandum addressed to the appellants later that day, expressed the view that the appellants' conduct in requesting him to do so amounted to a repudiation of the partnership agreement. In response, the appellants wrote to the respondent acknowledging receipt of his memorandum and putting him to terms to vacate his office by 1pm that day. In these unhappy circumstances the partnership came to an end.

[9] The nub of the dispute turns on the appellants' reliance on clause 13.4 of the partnership agreement. It is therefore convenient to deal at this stage with two defences raised by the respondent flowing from the provisions of this clause. Firstly, it was contended both in the papers and in the respondent's heads of argument that the appellants had not complied with the clause as they had failed to give him a written request to withdraw on a period of notice. On appeal, while counsel for the respondent did not abandon the point, he found himself unable to advance any meaningful argument on this issue. His reservation was well founded. The draft dissolution agreement handed to the respondent at the meeting on 3 October 2006, together with the appellants' later memorandum that day which gave him until 1pm to vacate his office, clearly amounted to a written request for him to withdraw within that period of notice. The fact that this request was forcefully expressed does not alter its essential nature. There is therefore no merit in the argument that this requirement of clause 13.4 was not satisfied by the appellants.

[10] Secondly, the respondent's case rested heavily upon the contention that the appellants had been obliged to raise their difficulties with him and to afford him the opportunity of explaining his conduct before calling upon him to withdraw from the partnership. This obligation, so it was argued, was founded upon the obligation of the partners to act in good faith in their dealings with each other.

[11] While partners are undoubtedly obliged to act in good faith in their dealings with one another, it is not a rule of our law that a partner who suspects another partner of misconduct is obliged, in effect, to apply the *audi alteram partem* rule before exercising a contractual right to dissolve the partnership, and there is no need to read such an obligation into the agreement of the parties. If the respondent was guilty of misconduct as envisaged by clause 13.4 the appellants were lawfully entitled under the partnership agreement to call upon him to withdraw, and the fact that they invoked their right to do so cannot amount to a breach of good faith. Even if in doing so they perceived the possibility of an end to the partnership bringing them other advantages, this cannot affect the lawfulness or legitimacy of their conduct. The respondent's contention that the appellants' action in calling upon him to withdraw was directed at achieving an ulterior purpose was not only disputed but is without foundation.

[12] In these circumstances, the cardinal issue is whether the respondent had indeed been guilty of misconduct as envisaged by clause 13.4 as, if he was, the appellants were entitled to call upon him to withdraw from the partnership and the court a quo erred in granting the respondent relief. I therefore turn to the question of the respondent's alleged misconduct.

[13] All too often in litigation arising out of the dissolution of a partnership, the papers become burdened by mutual recriminations and mudslinging. Unfortunately, that is here the case. No purpose would be served in attempting to

detail the wide-ranging allegations levelled by each side against the other as they are impossible to determine on the papers. Nevertheless, it should be mentioned that the respondent denied being a party to any wrongdoing in respect of the Thaba Pula incident and the appellants did not attempt to persuade this court that this could be rejected without recourse to oral evidence. Consequently, this matter must be determined on the basis that the appellants have failed to show any misconduct on the respondent's part in respect of the first complaint they raised at their meeting on 3 October 2006.

[14] Turning to the Botha/Chir complaint, the appellants' case ultimately put up in their papers was far broader than that with which they initially confronted the respondent. Their additional allegations also gave rise to serious factual disputes which cannot be resolved on the papers. However, there is no dispute that for many years the respondent did professional work for Botha and for Chir for which he did not levy fees. There is also no doubt that he neither informed the appellants of this nor sought their consent not to charge fees.

[15] Under clause 9.2 of the partnership agreement, each partner was obliged at all times to avoid a conflict between his interests and those of the partnership, with the latter always to have preference. By doing work for Botha and Chir without levying fees, particularly over such an inordinately long period, the respondent put himself in a position of conflict of interest. It was obviously in the partnership's interest for fees to be both charged and collected. Not only did the

respondent fail to act in that interest by not charging fees but, by reason of his interest in Chir through his family trust's shareholding, it was in his personal interest to postpone the payment of fees for as long as possible. It is not clear what amounts should have been debited, but the total sum appears to have been in the vicinity of R100 000 and cannot be regarded as trifling. The respondent thus clearly acted in conflict with the best interests of the partnership in this regard.

[16] Due to the disputes of fact that appear on the papers, the non-debiting of these fees is the only aspect of the respondent's conduct with which he was confronted on 3 October 2006 that may be taken into account in considering whether the appellants were entitled to request his withdrawal. However, the appellants are certainly not limited to this issue as it is well established that an innocent party seeking to justify the cancellation of a contract may afterwards rely on any other ground which existed at, but was only discovered after, the time of cancellation.[1] And in regard to the respondent's conduct, there are two further issues in respect of which there is no dispute of fact which are relevant to the issue whether the respondent was guilty of misconduct as envisaged by clause 13.4 of which the appellants only came to learn after 3 October 2006.

[17] Section 51(4) of the Administration of Estates Act, 66 of 1965 provides that an executor of an estate shall not be entitled to receive any remuneration

[1] See eg *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 28.

before distribution of the assets has taken place '. . . unless payment of such remuneration has been approved in writing by the Master'. That the respondent was well aware of these provisions is evidenced by a letter he wrote to the Master on 30 June 2004 in his capacity as co-executor in the estate of the late S R Pohl, in which he asked for permission for 80% of the executor's fee to be paid under s 51(4). However, despite such written consent not having been forthcoming, the respondent proceeded to pay out at least R72 276 in respect of executor's fees.

[18] Importantly, this was not the only incident of the respondent drawing executor's fees from estates of which he was the executor without having obtained the necessary written authority. On 10 March 2006, he debited executor's fees of R20 520 against the estate of the late J G Vorster, just two days after the liquidation and distribution account had been lodged. Similarly, in the estate of the late M Mangena, he drew an executor's fee of R10 320 on 8 June 2006, within days of the liquidation and distribution account being lodged. In the case of the estate of the late T Joubert, he withdrew R25 080 in respect of executor's fees on 13 February 2006, more than three months before the liquidation and distribution account was lodged. And in the estate of the late M E Maponyi, he withdrew executor's fees of R58 140 and R74 100 in June and September 2005, respectively.

[19] The respondent admitted to charging and receiving these fees without the necessary written authority, despite the Master in a letter dated 30 June 2005 having pertinently and unequivocally drawn it to his attention that fees were not to be paid out of estates without written authority under s 51(4). He failed to offer any meaningful explanation for having done so. Instead he merely stated that he had erred in this regard and offered his apologies, although he went on to remark that the debiting of fees before finalisation of the estate accounts is a reasonably general practice and one not necessarily censured by the Master. This is a startling observation in the light of his admission that he had made substantial withdrawals from these estates in respect of fees, well knowing that the withdrawals were unlawful. The respondent acted in blatant disregard of statutory provisions designed to provide protection for the funds of others held in trust and helped himself to moneys that were not due at that time. This cannot be taken as a trivial irregularity. Rather, it amounts to gross misconduct on his part.

[20] A second instance of misconduct discovered by the appellants after the cancellation of the partnership agreement relates to the respondent's administration of the estate of the late S R Pohl (out of which he irregularly paid his executor's fees as already mentioned). On 20 April 2006, acting in his capacity as a conveyancer, he issued a certificate under s 42(1) of the Administration of the Estates Act 66 of 1965 stating that the proposed transfer of the farm Vygeboomspruit 358 was in accordance with the final liquidation and distribution account of the estate which had lain open for inspection without

objection. Pursuant thereto the farm was transferred out of the estate into the name of an heir, one Montagu Ross Pohl, a son of the deceased.

[21] The certificate issued by the respondent was deliberately false. Not only did he know that the deceased's widow and a minor child had objected to the account in 2004, but he knew that the Master had upheld the objection in February 2005. He also knew that he and his co-executor had brought review proceedings against the Master's decision to uphold the objection and that such review was still pending when he issued the false certificate in April 2006. The sole explanation offered by the respondent for his action in giving a false certificate was that the deceased's son, to whom the property was transferred, had been in urgent need of capital and needed the farm to be transferred to him so that he could burden it by way of a bond and thereby obtain the funds he needed to continue farming. That may well be so, but the fact remains that in order to circumvent the provisions of s 42, which would otherwise have acted as a bar to the farm being transferred to the heir, the respondent deliberately issued a false certificate in order to facilitate the transfer of an immovable property out of the estate well knowing that there had been an objection to the liquidation and distribution account. In my view this was a deliberate flouting of the law and constitutes a grave infraction of his duties as an attorney and conveyancer.[2]

[2] Compare *Incorporated Law Society, Transvaal v Meyer* 1981 (3) SA 962 (T) at 973H.

[22] The cumulative effect of the respondent's failure to debit fees to his own advantage in the Botha/Chir matter; his taking fees from estates he was administering without the written consent of the Master; and his action in issuing a false certificate in the Pohl estate, clearly amounted to gross misconduct as envisaged by clause 13.4 of the partnership agreement. The appellants were therefore fully entitled to request his withdrawal from the partnership as they did on 3 October 2006.

[23] In an attempt to overcome the obvious consequences of such a finding, it was argued on behalf of the respondent that the appellants should not be allowed to rely upon the clause as they had not approached the court with clean hands. This argument was based on the contention that the appellants had known about the Scorpions' interest in the Thaba Pula transactions for a year before they asked the respondent to withdraw from the partnership, during which period they did nothing about the matter. The argument, as I understood it, was that this delay amounted to a breach of the reciprocal duty of good faith which exists between partners and, in effect, constituted a repudiation of the partnership agreement, the provisions of which the appellants were therefore not entitled to enforce.

[24] This argument is logically flawed. There is a dispute in regard to the Thaba Pula incident, with the respondent contending that he had done nothing wrong and denying that he had absconded from the office with the Thaba Pula

file in 2005 as the appellants allege. These disputes cannot be resolved on the papers, and it therefore cannot lie in the respondent's mouth to complain that his partners did nothing about a transaction which, on his version, was innocent and about which they had nothing to complain. In addition, the appellants' allegation that the information which caused them to suspect the respondent of gross misconduct only emerged during the last week of September 2006 is not gainsaid, and it was only then that they had sufficient cause to confront him. In these circumstances it can neither be said that the appellants did not have clean hands nor that they had repudiated the partnership agreement and were not entitled to enforce its terms.

[25] To summarise, the respondent made himself guilty of gross misconduct as contemplated in clause 13.4 of the agreement and the appellants were therefore entitled to call upon him to withdraw from their partnership, as they did on 3 October 2006. Their action in doing so was lawful and did not amount to a repudiation of the terms of the partnership agreement. The partnership was accordingly dissolved in terms of the provisions relating thereto contained in the partnership agreement itself. In these circumstances, the court *a quo* erred in holding that the appellants were not entitled to request the respondent to withdraw. Instead, it ought to have dismissed the respondent's application and upheld the appellants' counter application.

[26] The parties were agreed that in the event of this court reaching the conclusion it has, an order in the terms set out below would be appropriate.

[27] The following order is made:

(a) The appeal succeeds with costs, including the costs of two counsel.

(b) The order of the court a quo upholding the respondent's application and dismissing the appellants' counter application is set aside and is replaced with the following:

1. The applicant's application is dismissed with costs, including those costs previously reserved and the costs of two counsel

2. It is declared that:

2.1 The partnership between the applicant and the first and second respondents was dissolved on 3 October 2006 in terms of clause 13.4 of the parties' partnership agreement.

2.2 In terms of clause 14.2 of the partnership agreement, the assets and liabilities of the aforementioned partnership accrued to the first and second respondents who are entitled to deal therewith in their new legal practice.

3. The applicant is ordered to pay the costs of the respondents' counter-application, including those costs previously reserved and the costs of two counsel.

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**L E LEACH**

**ACTING JUDGE OF APPEAL**

APPEARANCES:

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|---|---|
| COUNSEL FOR APPELLANTS: | J P Vorster SC; H H Steyn ( heads of argument prepared by AP Joubert SC; HH Steyn). |
| INSTRUCTED BY: | Fourie Fismer Inc; Pretoria |
| CORRESPONDENT: | Symington & De Kok; Bloemfontein |
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