

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 36792/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO //
(3) REVISED: NO

Date: 8 September 2023

E van der Schyff

In the matter between:

JACOBUS CORNELIUS VAN EDEN

APPLICANT

and

FILIP ROBERT CHRISTIANA DELCLOO

FIRST RESPONDENT

BARK AT THE MOON (PTY) LTD

SECOND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant (Van Eden) essentially seeks an order terminating the partnership allegedly entered into between himself and the first respondent (Delcloo), and the appointment of a liquidator to oversee the winding up of the partnership.

- [2] Delcloo denies that a partnership was entered into and seeks the dismissal of the application.

The applicant's version

- [3] Van Eden contends that he and Delcloo agreed to start a business venture during the middle of 2017. Delcloo proposed that they erect a venue on a property near Cullinan owned by Delcloo and that such venue be utilised for weddings, functions, holiday accommodation, and the like. The sole purpose of the business venture was to raise sufficient capital, whereafter the property would be sold. The proceeds of the sale would be used by the parties to emigrate to Croatia.
- [4] After Van Eden researched how to operate a venue of this nature, he agreed, and the parties entered into an oral partnership agreement in terms whereof they traded under the name Bark at the Moon. In terms of the agreement, Delcloo would give his plot on a small holding situated in the Sering Nature reserve outside Cullinan. The plot was purchased at a price of R850 000.00. Van Eden, in turn, would advance the capital to create and erect the necessary infrastructure on the plot.
- [5] In terms of the agreement, each party would first receive payment of the monies invested by it, and only after the initial investments were recovered, would the profit be shared equally between Van Eden and Delcloo. The second respondent was registered as the vehicle to conduct the business through.
- [6] Construction of the venue was concluded during the course of 2019. Van Eden contributed approximately R3 428 903.00 towards, amongst others, financing the building costs of erecting the venue, applying and obtaining consent from the Tshwane Municipality to build the lodge, and applying for a liquor licence.
- [7] The parties started advertising the venue for weddings, functions, and the like. A website was also created through which guests could make bookings. Both parties' cellphone numbers were listed as the contact numbers for bookings. The business was listed on websites that promote holiday accommodation. Van Eden attached

photographs of, amongst others, himself and Delcloo's son painting the venue hall during construction.

- [8] Just as the business was starting to grow, the Covid-19 pandemic hit, and the country was placed under lockdown. The business was hard hit and did not generate sufficient income. Van Eden proposed that the parties sell the business, but although Delcloo initially agreed, he apparently changed his mind as he has taken no meaningful steps to market the property.

- [9] The business does not have its own bank account, and Delcloo's bank account is utilised for bookings. Van Eden has not received any portion of the income generated to date. The relationship between Van Eden and Delcloo has become strained to the point where it is no longer possible to continue with the partnership.

- [10] Van Eden provided a breakdown of his alleged expenses without indicating clearly what the expenses relate to. In motion proceedings, it does not suffice to state: *'I have been advised not to attach all the vouchers and bank statements of the expenses, to avoid prolixity of the papers. I do however attach hereto a breakdown of all the expenses paid as annexure 'FA1'.*' The applicant's contention that he paid for the building material and construction of the venue must be weighed against the first respondent's claim that he paid for the building material. Without any confirmatory affidavits and a clear exposition of which amounts relate to what improvements, this issue cannot be dealt with in motion proceedings.

The respondent's version

- [11] Delcloo avers that he bought a plot of land near Cullinan. At Van Eden's request, he took Van Eden to see the property. After this visit, Van Eden informed him that he (Van Eden) was desirous to assist Delcloo in transforming the property. Van Eden indicated repeatedly that he wanted to assist Delcloo financially as he (Van Eden) was 'looking for a destination where he could clear his mind. Delcloo states that Van Eden did not show his true intentions at that stage.

- [12] Delcloo explains that he initially objected to the proposal, but that Van Eden was relentless. He (Delcloo) 'finally gave in without knowing what to expect'. Delcloo denies that there was any arrangement between the parties at that stage, or that any arrangement was reached between them at a later stage.
- [13] Delcloo commenced cleaning up the premises as a precursor of the improvements he intended, improvements he failed to disclose to the court, except for a cursory remark that he wanted to convert an existing old building structure on the plot into a second dwelling.
- [14] Van Eden arrived at Delcloo's premises, and enquired '*what it is that is needed to effect the improvements as discussed.*' Delcloo informed Van Eden that he did not intend to acquire any debt as he was debt-free at the time. He also informed Van Eden that he did not have a lot of building material and would rather attempt to use the building material he had, as opposed to incurring debt to '*effect the contemplated improvements.*' Delcloo reiterates that Van Eden informed him again that he just wanted a place where he could go to clear his mind and relax.
- [15] The building commenced, and Delcloo purchased building material as and when he was financially able to do so, to Van Eden's irritation. Van Eden brought a range of movables, including new television sets and secondhand furniture.
- [16] Delcloo claims that he signed the documentation to register Bark at the Moon, but that he did not know the nature of the documentation he signed. He denies that it was his intention to enter into a business venture with the applicant, and denies entering into a partnership. He denies that he '*ever had the true and honest intention to immigrate to Croatia*' or that he had the intention to sell his primary residence for at least the next ten years. Delcloo denies that the venue erected was of an extent to be described as a '*venue of magnitude*'. Delcloo claims that improvements were affected to the outbuildings and the main building wherein he and his family resided. He states that he only included Van Eden as a contact on the website because he '*succumbed to*' his pressure and entertained his request.' He claims he applied for the liquor licence, not Van Eden. Delcloo takes issue with the fact that Van Eden provided a mere breakdown of alleged expenses incurred in the construction of the

venue without providing documentary proof and indicating how the money was used in the construction of the venue.

Discussion

- [17] The answering affidavit is replete with irrelevant, scandalous material. Since no striking-out application was filed, I will not deal further with this, except to state that the drafters of pleadings and affidavits must not forget that they do their clients a disservice if they become tools through which the emotive mudslinging is affected.

- [18] It is trite that in motion proceedings, affidavits serve not only to place evidence before the court but also to define the issues between the parties. Where affidavits are poorly drafted, or all the relevant evidence is not placed before the court so that the opposing party can deal with it meaningfully, the court cannot finally decide the issues between the parties on affidavit.

- [19] In this application, neither the applicant nor the first respondent sets out their cases clearly, succinctly, and unambiguously. The applicant tends to oversimplify matters by, for instance, not dealing in the founding affidavit with the full extent of improvements effected by him on the property, providing confirmatory affidavits, and giving a clear exposition of the expenses incurred by him during the construction of the buildings and other features on the property. By not dealing meticulously with the expenses he allegedly incurred in the construction of the venue and the full extent of improvements made on the property, the first respondent is deprived of an opportunity to deal with the issue meaningfully.

- [20] On the other hand, the first respondent's contention that the 'venue' was erected as a place for the applicant to 'get away and clear his head', is in light of objectively determinable evidence, amongst others, the website and the photos of the facilities as depicted in the annexures to the answering affidavit, arguably susceptible to be categorised as 'so far-fetched and clearly untenable' to the extent that the court may reject it merely on the papers. Having considered the first respondent's answering affidavit, and in particular the first respondent's choice not to deal head-on with all

the issues raised by the applicant's papers but to engaged in a mudslinging exercise, filling the papers with a host of irrelevant almost slanderous averments, I do not believe it would be fair and just to dismiss the application. The questions that arise can be answered if evidence is led, parties are cross-examined, and an inspection *in loco* is conducted.

[21] Rule 6(5)(g) provides that where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision. In particular, the court may direct that oral evidence be heard on specified issues to resolve any dispute of fact or refer the matter to trial with appropriate directions as to pleadings.

[22] The court held in *Du Plessis en 'n Ander v Tzerefos*:¹

'Nie een van die partye het op enige stadium aansoek gedoen dat die aangeleentheid vir mondelinge getuienis verwys moes word nie of dat een van die deponente aan kruisverhoor onderwerp moes word nie. 'n Hof kan egter ook *mero moto* 'n bevel met sodanige strekking maak'

[23] In *Airport Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC*,² Windell J followed a similar approach when she referred an opposed motion to trial.

[24] I requested the parties to file additional heads of argument dealing specifically with the question as to whether the application should not be referred to trial. After having considered the supplementary heads of argument filed, I am of the view that it is better suited to direct that oral evidence be heard on specified issues

Costs

¹ 1979 (4) SA 819 (O)

² (2388/2020) [2022] ZAGPJHC 410 (10 May 2022).

[25] Since I am of the view that it is just to refer this matter for oral evidence, the costs occasioned by this application should be costs in the cause.

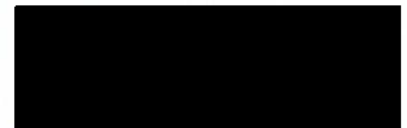
ORDER

In the result, the following order is granted:

1. The application is postponed *sine die*;
2. The matter is referred for oral evidence before Van der Schyff J at a time and date to be arranged with her Registrar, on the following issues:
 - 2.1. Whether on the applicant's version there exist a partnership agreement between the applicant and the first respondent, and if so, the terms thereof, or whether on the first respondent's version the applicant assisted the first respondent financially because he was looking for a destination where he could clear his mind.
 - 2.2. The extent of the improvements affected to the immovable property by the respective parties, and each party's contribution in this regard.
3. Jacobus Cornelius van Eden and Filip Robert Christiana Delcloo (the applicant and first respondent) are ordered to appear personally and be examined and cross-examined as witnesses at the hearing;
4. The evidence shall be that of any witness whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 5 below;
5. Save in the case of the applicant and the first respondent, neither party shall be entitled to call any witness unless:
 - 5.1. The parties give an estimate of the number of witnesses they intend to call when a date for the hearing of oral evidence is applied for;
 - 5.2. That party has served on the other party at least fourteen days before the date appointed for the hearing (in the case of a witness to be called by the applicant) and

at least ten days before such date (in the case of a witness to be called by the first respondent), a statement wherein the evidence to be given in chief by such person is set out; or

- 5.3. The court, at the hearing, permits such person to be called despite the fact no statement has been so served in respect of his or her evidence, subject thereto that a substantive application is filed to request such indulgence at least 5 days before the evidence is heard;
6. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not;
7. The fact that a party has served a statement in terms of paragraph 5 hereof, or has subpoenaed a witness, shall not obliged such a party to call the witness concerned;
8. Within 15 (fifteen) days of the date of this order, each of the parties shall make discovery on oath of all documents relating to the issues referred to in paragraph 2 above, which are or have been in the possession or under the control of such party;
 - 8.1. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative;
9. The issue of the costs is reserved to be determined after the hearing of oral evidence.



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:

Mr. C.A. van Bruggen

Instructed by:

Van Bruggen Attorneys

For the first respondent:

Adv. A.C.J. van Dyk

Instructed by:

Van Dyk Steenkamp Attorneys

Date of the hearing:

21 August 2023

Date of judgment:

8 September 2023