

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 7573/2022

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

DATE 19 FEBRUARY 2025 SIGNATURE.....

In the matter between:

NIKO VLADIMIR KUCER

PLAINTIFF

-and-

DE KUILE BOERDERY CC

DEFENDANT

JUDGMENT

BRESLER AJ:**Introduction:**

[1] The matter came before court as a trial. The Plaintiff claims judgment against the Defendant in the following terms:

- 1.1 A declarator that a partnership agreement existed since 2012 between the Plaintiff and the Defendant;
- 1.2 A declarator that the partnership was dissolved with effect from 31 August 2020;
- 1.3 A declarator that the improved value of Portion 3 of the farm Hoornbosch, attributable to the establishment thereof of a residential lodge providing residential rental accommodation, *inter alia* to persons engaged on the Medupi Power Station, comprises a partnership asset which is to be brought into account in the liquidation of the partnership;
- 1.4 An order that the partnership is liquidated on the following basis:
 - 1.4.1 The Defendant shall deliver a statement of account setting out the income and expenditure of the partnership, and reflecting the Plaintiff's 50% share of the net profit due to the Plaintiff during the

period July 2012 to August 2020, within 15 (fifteen) days from the date of the order;

1.4.2 The Plaintiff shall accept or dispute the amount set out in the aforesaid account within 15 days from the date the account was delivered, and if accepted, the Defendant shall forthwith pay such amount to the Plaintiff.

1.4.3 In the Plaintiff disputes the correctness of the account the Plaintiff is granted leave to set the matter down for a debatement of the account and for an order for payment of the amount due, with interest thereof at the rate to be determined in terms of the Prescribed Rate of Interest Act from time to time, from 1 September 2022 to date of payment.

1.4.4 That 50% of the amount of the improved value of the Defendant's farm attributable to the establishment of the lodge be paid to the Plaintiff

1.5 That the issue of the determination of the value of 50% of the improved value of the Defendant's farm and the prayer for payment of the amount due to the Plaintiff, be postponed *sine die*.

1.6 That the Defendant be ordered to pay the costs of suit including costs to Counsel on Scale B.

[2] The Plaintiff's claim is premised on an oral partnership agreement concluded during or about July 2012, between the Plaintiff and the Defendant, duly represented by Gerhardus Human (who has since passed away) (hereinafter 'Mr. Human'). The alleged terms relevant for purposes hereof are:

- 2.1 The purpose of the partnership is to develop and operate a lodge providing residential accommodation on Portion 3 of the Farm Hoornbosch, LQ 439 (the 'Farm'), owned by the Defendant.
- 2.2 The primary target market would be the provision of accommodation to persons engaged in the construction of the Medupi Power Station.
- 2.3 The Plaintiff and the Defendant would each contribute R620,000.00 to the partnership to fund the costs of construction of the lodge on the Farm.
- 2.4 As security for the Plaintiff's contribution and the Plaintiff's 50% share in the partnership, the Plaintiff's contribution was recorded in a written loan agreement.
- 2.5 Once the lodge has been constructed and was operational, the Plaintiff would be actively involved in the day-to-day operation thereof and would be entitled to reside on the Farm.

2.6 Profits realised by the partnership from the operation of the Lodge would be shared equally between the Plaintiff and the Defendant.

2.7 As partial security for the payment of the Plaintiff's 50% share in the partnership in the event of the Plaintiff's death, the partnership would pay the monthly premium of a life policy to be taken out on the life of the Plaintiff in an amount of R1,500.000.00.

[3] The Plaintiff pleads that both parties contributed an initial amount of R620,000.00 towards the construction of the Lodge. An additional amount of R160,000.00 was contributed at a later stage.

[4] From approximately October 2012, the Lodge started operating and generating an income. A banking account was opened for the business of the partnership, on which account the Plaintiff and Mr. Human had full transactional rights.

[5] The monthly profits were shared equally between the parties.

[6] During or about March 2020, Mr. Human passed away. The Defendant repudiated the partnership agreement which repudiation was accepted by the Plaintiff, resulting in the agreement being cancelled.

[7] The Defendant's Plea was amended on several occasions. In the original Plea the Defendant raised *inter alia* the following defences:

7.1 The existence of the partnership agreement was denied.

7.2 Mr. Human was neither a member of the Defendant, nor an employee and was therefore not entitled to bind the Defendant to any partnership agreement.

7.3 The Plaintiff lent and advanced an amount of R620,000.00 to the Defendant, which amount was duly repaid by the Defendant.

7.4 At the time of the conclusion of the loan agreement, the Plaintiff and the Defendant, duly represented by Mrs. Hester Human (hereinafter Mrs. Human') concluded an oral agreement in terms whereof the Plaintiff was offered employment with the Defendant as a manager for the duration of a specific contractor's accommodation period (being ELBCON). ELBCON's accommodation contract was terminated in July 2020.

7.5 During the course of the ELBCON accommodation contract, the Plaintiff would aid with the management of the residence and receive a management fee equal to 50% of the net profits per month from the accommodation contract.

7.6 The Plaintiff would prepare an invoice to the Defendant, which invoice was payable upon demand.

[8] The Plaintiff submitted that the version of the Defendant was changed during pre-trial and after a request to deliver IRP 5 certificates issued in favour of the

Defendant. The Defendant now stated that the Plaintiff was an independent contractor and as such no IRP 5 records are available.

[9] During the trial, and whilst the Plaintiff was under cross-examination, the Defendant applied for a postponement of the matter to enable the Defendant to amend its Plea.

[10] The amended Plea provided for the following:

10.1 The Plaintiff was appointed as Lodge Manager on the basis of an independent contractor.

10.2 During the conclusion of the agreement, the Plaintiff was represented by Mrs. Human, alternatively Mr. Human.

10.3 The Plaintiff was entitled to receive a management fee equal to 50% of the gross income of the lodge, less Value Added Tax.

10.4 Monthly commissions would be earned only after the loan to the Plaintiff was repaid.

10.5 The Plaintiff would prepare a monthly invoice in respect of the management fee and any expenses paid by the Plaintiff personally on behalf of the Defendant.

Issues that require determination:

- [11] The Plaintiff launched an application for the separation of the issues in terms of Rule 33(4) i.e that prayers 1 to 4 and 6 of the Particulars of Claim be determined separately.
- [12] By agreement, and with the consent of the Court, the issues were separated. Essentially, this Court is called upon to determine if a partnership agreement came into existence between the Plaintiff and the Defendant. If so, the Court must determine the appropriate manner in which the partnership estate should be determined and divided.
- [13] It is evident that the parties agree that should the court find that a partnership indeed existed, the statement and debatement of the account and the determination of the improved value of the Farm, will be determined in the continuance of the trial in due course.

The Plaintiff's testimony:

- [14] The Plaintiff testified that he met Mr. Human on a professional hunting course prior to 2009 and became friends as they shared in interest in hunting and fishing. At that time, Mr. Human was running operations on two farms, being Van Wykspan and Hoornbosch.

- [15] At the commencement of their friendship, the Plaintiff was not made aware that Mr. Human was not a member of the Defendant as Mrs. Human was not involved in the day-to-day running of the Close Corporation. Her sole membership only came to his knowledge in approximately 2014.
- [16] During the course of 2009, the Plaintiff and Mr. Human started discussing the development of the River Camp contained on the Farm (the 'River Lodge'). It was agreed that the Plaintiff would loan and advance an amount of R380,000.00 to the Defendant, which loan would be repaid over a period of three years. It was furthermore agreed that after repayment of the loan, the Plaintiff would be entitled to one third of the net income of the venture for a further period of 5 (five) years.
- [17] Mr. Human managed this business venture. By August 2012, the loan was repaid in full. From August 2012, the Plaintiff was therefore entitled to one third of the net profit. He did not receive due and timely payment as partial payments were sometimes made with the further payments only being made once funds became available.
- [18] During or about the middle of 2012, the Plaintiff and Mr. Human started discussing the construction of another lodge (the 'De Kuile Lodge').
- [19] During the initial discussions between the parties, it was agreed that the Plaintiff and the Defendant would each contribute an amount of R600,000.00 in respect of the development of the De Kuile Lodge. The initial agreement was that the Plaintiff would loan and advance the funds to the Defendant for purposes of the

development. The parties would share the profit derived from the operation of the De Kuile Lodge on an equal basis after taking overhead expenses into consideration.

[20] It was furthermore initially agreed that Mr Human would manage the De Kuile Lodge whilst the Plaintiff would manage the River Lodge.

[21] As the parties provided customers with food and laundry services, it was agreed that the Plaintiff would be entitled to the income derived from the food and laundry services delivered at the River Lodge whilst the Defendant would be entitled to the income derived from the food and laundry services delivered at the De Kuile Lodge.

[22] The Plaintiff pertinently testified that no employment agreement was ever concluded between himself and the Defendant, no Unemployment Insurance contribution was deducted, and no IRP 5 document was ever provided to him.

[23] The Plaintiff furthermore testified that he had no fixed working hours, nor did he perform any instructions at the behest of either Mr. Human or Mrs. Human as he was a partner and not an employee. He likewise denied that he was ever employed as an independent contractor.

[24] The Plaintiff testified that during the course of the partnership agreement and save for his contribution in the form of labour and management services, he also constructed two rooms for the staff at his own cost. This was never repaid to him as it was deemed part of his contribution.

- [25] During approximately April or May 2013, the Plaintiff and Mr. Human decided that a loan agreement would be prepared and signed. This agreement was backdated to 1 July 2012 to protect the Plaintiff. As further security, a life insurance policy was to be taken out on the life of the Plaintiff.
- [26] Hereafter, Mr. Human and the Plaintiff were *ad idem* that they are partners in perpetuity and that the Plaintiff would continue to receive 50% of the net income derived from the De Kuile Lodge venture.
- [27] Further contributions included the renovation and transformation of two carports into two rooms, payment of the approval of building plans and the installation of an I-beam for which the Defendant was not refunded.
- [28] The Plaintiff also testified that two bank accounts were opened – one relating to the operations of the River Lodge and the other relating to De Kuile Lodge. The Plaintiff had shared signing rights on both these accounts.
- [29] As to the allegation that the amount of R620,000.00 referred to in the loan agreement constituted a loan that was repaid, the Plaintiff testified and substantiated every payment (with the exclusion of one unrelated refund) with documentary evidence showing that the payment in fact constituted a profit share payment (although reference was made to 'commission' in his corroborating documentation) .
- [30] It stands to be noted that the Court found the reasoning of the Plaintiff to be sound: if indeed these payments were the repayment of a loan, then the Plaintiff did not receive any remuneration for services rendered (as alleged by the Defendant) but

in fact utilised his own funds to repay himself. This does not presuppose that a partnership agreement was indeed concluded – it merely serves as confirmation that this court accepted the evidence that the said loan was not repaid.

- [31] During 2013, the Plaintiff was advised by his tax consultant that the payments should be deemed to be repayments of a loan in respect of all payments up to June 2013, and thereafter it should be invoiced as 'commission'. The Plaintiff testified that he is not well versed in tax law and as such, he accepted the advice from his tax consultant, especially in so far as a discussion allegedly took place between his tax consultant and the accountant of the Defendant.
- [32] During 2017, the River Lodge profit sharing agreement came to an end. The separate bank accounts in respect of River Lodge and De Kuile Lodge were closed and the parties made use of the Defendant's main bank account.
- [33] After the passing of Mr. Human in 2020, the Plaintiff was prohibited and frustrated from performing any management functions at the lodge. If he issued an invoice, as was the normal practice, he will be told that the Defendant already issued an invoice to the client. His internet access to the Defendant's account was also blocked the day after the passing of Mr. Human.
- [34] A meeting took place between the Plaintiff, Ms. van Vuuren (the accountant of the Defendant) and Ms Rule van Vuuren (the other member of the Defendant). During the meeting, he was advised that there would be changes going forward. He then indicated that the partnership should be terminated, and he should receive the value

of his share in the partnership to him. Ms. van Vuuren pertinently informed him that the building had no value as it has been written off in the books.

[35] A subsequent meeting between the Plaintiff and Mrs. Human also proved to be futile. Mrs. Human took full control of the business, and all personnel were instructed to cease reporting to the Plaintiff.

[36] During or about the 29th of June 2020, the Defendant's attorneys recorded in writing that the Plaintiff was merely a tenant on the farm and therefore had no right to manage the staff.

[37] In the initial cross examination, *inter alia* the following submissions were made to the Plaintiff:

37.1 There is no mention of a partnership agreement in the written loan agreement;

37.2 Ms. van Vuuren will testify that during the meeting between the Plaintiff and Mr. Human, the loan was discussed and the fact that the Plaintiff would be appointed as a lodge manager. No mention was made of a partnership agreement.

[38] After the amendment of the Plea referred to herein above, the Plaintiff was recalled for further evidence in chief with specific reference to the new issues raised in the amended Plea.

- [39] The Plaintiff testified that he did not conclude any oral agreement with the Defendant, duly represented by Mrs. Human, during 2012. The agreement was concluded with the Defendant, duly represented by Mr. Human.
- [40] Of particular importance is the testimony by the Plaintiff that it is not possible for the alleged Independent Contractor agreement to 'come to an end' when the work at Medupi seized as, to the present day' the works has not seized. Evidence was led to the effect that the Defendant continued receiving payments from ELBCON during the months September 2022 to January 2021, thus rebutting the Defendant's version that the work seized, resulting in the termination of his 'independent contractor agreement'.
- [41] As to the allegation that the Plaintiff was entitled to 50% of the gross income of the venture, this was vehemently denied by the Plaintiff. Likewise, he denied that he was entitled to recover 100% of the expenses paid. This agreement only related to expenses unrelated to the Lodge (for instance repairs to the Defendant's tractor).
- [42] During cross examination, the testimony of the Plaintiff remained unwavering. The Defendant's version, to be testified to by Ms van Vuuren, was clearly and unambiguously rejected.
- [43] Of importance for purposes of this judgment are the following submissions made by counsel for the Defendant during the course of cross examination, in closing argument and in his Heads of argument:

43.1 No written proof could be provided that a partnership exists.

- 43.2 The written loan agreement makes no mention of a partnership.
- 43.3 The loan agreement was concluded to protect the investment of the Plaintiff.
- 43.4 The Plaintiff prepared a spread sheet highlighting the repayment of a loan.
- 43.5 The Plaintiff's documentation makes no reference to 'profit share' but consistently refers to 'Commission' and 'loan'.
- 43.6 The Plaintiff pertinently instructed his accountant that the amounts should be allocated to repayment of a loan and thereafter, commission.
- 43.7 The accounting records of the Defendant does not refer to a partnership agreement nor does separate accounting records exists for such partnership. It is common cause that the bank accounts utilised were that of the Defendant.
- 43.8 Having regard to *inter alia* the aforesaid, it is evident that in the Plaintiff's own mind, no partnership existed. There was furthermore no evidence that Mr Human had the intention to bring about a partnership agreement. The conduct of the parties are therefore not 'unequivocally consistent with consensus on the issue'.¹

¹ *Butters v Mncora* 2012 (4) SA 1 (SCA)

- [44] The Plaintiff correctly highlighted in its Heads of Argument that the testimony regarding the calculation of the payments made to the Plaintiff, was not placed in dispute in cross examination. Once again, in this court's view the manner in which the 'commission' payments were calculated is of no real relevance to the determination if a partnership agreement came into existence.
- [45] In this regard, specific cognisance is taken of the fact that the late Mr. Human cannot testify and clarification can only be gleaned from the conduct found to be common cause between the parties.

The Defendant's testimony: Ms H van Vuuren

- [46] From the onset it must be noted that the Defendant elected not to call Mrs. Human, notwithstanding her apparent availability to testify and her alleged involvement in the Defendant's version of the contractual relationship between the parties. It must also be noted that Mrs. Human was married to the late Mr. Human. One would assume that she would have personal knowledge of the actions of the late Mr. Human.
- [47] Ms. van Vuuren testified that she has been the accountant of the Defendant since 2009. During or about 2012, Mr. Human and the Plaintiff met with her to discuss his intention to start a new lodge operation in the name of the Defendant. He mentioned that funds will be advanced by the Plaintiff to finance the venture. She recalled that, at some stage, the Plaintiff provided a document to her that she utilised

to make entries in favour of the Plaintiff in his loan account ledger in the books of the Defendant.

[48] According to Ms. van Vuuren, no mention was made of a partnership at any stage during her communications with the Plaintiff and Mr. Human. Nor does it appear that either party presented her with any corroborating documentation in respect of the alleged partnership.

[49] Ms. van Vuuren testified that she did have a discussion with the Plaintiff's tax consultant. She wanted to put the Plaintiff on the payroll of the Defendant. The Plaintiff however informed her that he will attend to his own taxes and as such, he made use of his own tax consultant.

[50] She furthermore testified that, had there been any partnership, she would have drafted separate financial statements in respect of the said partnership. The payments made to the Plaintiff was therefore recorded as 'commission' in the books of the Defendant. She confirmed that, to the best of her knowledge, that was the nature of the payments made by the Defendant to the Plaintiff.

[51] Contrary to her statement that she was the accountant for the Defendant from 2009, she alleged that she had no knowledge of the 2009 River Lodge loan made by the Plaintiff to the Defendant. She only learned about this loan when compiling the financial statements from 1 March 2012 onwards. A loan account ledger was accordingly created in the financial bookkeeping of the Defendant in the name of the Plaintiff with an opening balance of R300,000.00, premised on the information provided to her by Mr. Human. When explaining the journals done by her to the

effect of crediting a certain amount to the loan account of Mrs. Human, she pertinently testified that this was done due to lack of information pertaining to the nature of the amount.

[52] This Court had difficulty in accepting the evidence of Ms van Vuuren in so far as it appears that numerous journals and corrections were done to 'balance the books' (so to speak), without these journals demonstrating the factual background of the transaction. By means of example, she described the 'contributions' of Mrs. Human as capital contributions that were presumably later journalled to a loan account. It follows that the nature of a 'capital contribution' is far removed from the nature of a 'loan account'. On her own concession, the bookkeeping of the Defendant was in shambles and she lacked sufficient information to give the Court a clear and accurate analysis of the financial statements of the Defendant.

[53] Ms. van Vuuren, contrary to the version in the Plea, testified that she was not privy to the discussions and arrangements between the Plaintiff and Mr. Human as she was not present. She did, however, testify that the Plaintiff was not an employee of the Defendant in the true sense of the word.

[54] Of particular importance is the concession by Ms. van Vuuren that the relationship between parties should be examined as opposed to merely accepting the terms utilised in a document. As such, commission can be earned by employees, subcontractors or partners. It is however unlikely that an employee would inject capital in a company as this is normally reserved for a partner.

- [55] This must be borne in mind against the backdrop that the Defendant does not deny that a loan agreement was concluded between the Plaintiff and the Defendant. It follows that an employee or contractor can loan monies to a business without holding an interest or share in such business.
- [56] This court found the testimony of Ms. van Vuuren reliable in so far as her lack of knowledge of all the personal dealings between the Plaintiff and Mr. Human is concerned. Nothing much turned on her testimony as she was evidently, and admittedly, not present when the alleged partnership agreement was concluded. She received instructions from Mr. and Mrs. Human as to the contents of the accounting records and it appears that she performed those instructions to the best of her abilities.
- [57] Neither the Plaintiff nor the Defendant called any further witnesses.

Applicable law:

- [58] A partnership is often defined as a contract between two or more parties in term of which each contributes or undertakes to contribute towards an enterprise to be carried on jointly by them with the object of making a profit and of sharing it between them.²

² Sharrock R, **Business Transaction Law**, 2017, Juta at page 516

[59] The *essentialia* of a partnership agreement has been authoritatively dealt with in numerous cases. In the well-known case of **Joubert v Tarry & Co**³ referred to by the Plaintiff, the requirements for the existence of a partnership were recorded to be the following:

55.1 Each one of the partners must bring something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill.

55.2 The business should be carried on for the joint benefit of both parties;

55.3 The object of the business should be to make profit; and

55.4 The contract between the parties should be a legitimate contract. (It was subsequently held that this is not a requirement peculiar to a partnership but rather applicable to all types of contracts).

[60] These requirements originate from the formulation by Pothier⁴ that has been accepted by the South African courts⁵ as correct.

³ 2015 TPD 277

⁴ RJ Pothier, **A Treatise on the Law of Partnership** (Tudor's Translation 1.3.8)

⁵ See for instance **Bester v Van Niekerk** 1960 (2) SA 779 (A) at 783H – 784A and **Pezutto v Dreyer** 1992 (3) SA 379 (A) at 390A - C

[61] The fact that a partner is entitled, in addition to a share of the profits, to payment for his contribution does not, *per se*, alter the nature of the contract.⁶

[62] Brand J, in the case of **Butters v Mncora**⁷ held as follows at [14]:

*'[14] It appears to be uncontroversial that, apart from particular partnerships entered into for the purpose of a particular enterprise, Roman and Roman-Dutch law also recognised universal partnerships. Within the latter category, a distinction was drawn between two kinds. The first was the *societas universorum bonorum* — also referred to as the *societas omnium bonorum* — by which the parties agree to put in common all their property, present and future. The second type consisted of the *societas universorum quae ex quaestu veniunt*, where the parties agree that all they may acquire during the existence of the partnership, from every kind of commercial undertaking, shall be partnership property.'*

[63] Both types of partnership can be constituted tacitly, that is, by mere consent and circumstance. Neither type requires an express agreement. Like any other contract, they can also come into existence by tacit agreement derived from the conduct of the parties. Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement was reached.⁸

⁶ Sharrock R, **Business Transaction Law**, 2017, Juta at page 516 with reference to **Uys v Le Roux** 1906 TS 129

⁷ 2012 (4) SA 1 (SCA)

⁸ Henning JJ, **Perspectives on the Law of Partnership in South Africa**, Juta at page 88

[64] In this regard, the Court is obliged to look at substance, rather than form, to determine what the intention of the parties are. Where more than one inference can be drawn from the conduct of the parties, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement was reached.⁹

[65] In **Muhlman v Muhlman**¹⁰ the following was stated at 635:

'Before tacit agreement can be held to have been reached in any case it must be clear that the conduct relied upon is not only consistent with the making of the contract alleged but is consistent with no other reasonable interpretation. (Festus v Worcester Municipality 1945 CPD 186 at 193; Wille and Millin Mercantile Law of South Africa C 17th ed at 16; and cf Isaacs v Isaacs 1949 (1) SA 952 (C) at 960 (bottom of page)). In Wessels Law of Contract in South Africa 2nd ed vol 1 para 266 the learned authors state that before a court can find that there has been a tacit contract, it must be satisfied that the person whom it is proposed to fix with a tacit contract must be fully aware of all the circumstances connected with the transaction, the act must be unequivocal and the tacit contract must not extend to more than what the parties contemplated.'

[66] As far as the ambit of the two types of partnership referred to herein before is concerned, the universal partnership proper in principle comprises all the present

⁹ **Butters v Mncora** 2012 (4) SA 1 (SCA) at [18] – [19]

¹⁰ 1981 (4) SA 632 (W)

and future property of the partners. Thus, all the assets which the partners possess at the inception of the partnership as well as all the assets they obtain during the duration of the partnership from whatever source. The general partnership comprises only the profits derived from all the commercial activities of the partners during the duration of the partnership.¹¹

[67] In practice the dividing line between the two types of partnership may not always be very apparent, for instance where the parties contribute the assets they have at or obtain after the inception of the partnership to a single joint business, to which all devote all their time, labour and expertise and from which they derive their only income, which they reinvest in their business and use for their joint maintenance.¹²

[68] *In casu* the Plaintiff alleged an oral agreement with express, alternatively implied, further alternatively tacit terms comprising that of a partnership. It is not necessary for purposes of this judgment to determine the exact nature of the alleged partnership. Suffice to state that it appears that the Plaintiff alleges that it is a combination of the two types of partnerships. The Plaintiff does not only claim the profit that was derived but also a proportionate part of the improved value of the immovable property that belongs to the Defendant.

[69] The Plaintiff is however obliged to proof his case on a balance of probabilities. The test applied in cases where a tacit agreement potentially came into effect between

¹¹ Henning JJ, **Perspectives on the Law of Partnership in South Africa**, Juta at page 89

¹² **Fink v Fink and Another** 1945 WLD 226

the parties, has been clearly stated herein before: there must be no other reasonable inference from the conduct of the parties.

[70] The Defendant has raised numerous incongruities in the testimony of the Plaintiff such as the fact that no reference is made to a partnership in the documentation discovered by the Plaintiff. Moreover, the Plaintiff's own documentation makes reference to 'commission' and 'management fees' as opposed to profit sharing. Of considerable concern to this court is the fact that the Plaintiff has apparently instructed his personal tax consultant to also 'capture' the payments to him as 'commission' and 'loan repayments'. Needless to say, this has considerable taxation implications as opposed to capturing same as income of profit sharing in the partnership. It must therefore be assumed that the Plaintiff's instructions to his tax consultant reflected the true factual position.

[71] Having regard to the testimony of Mrs. Van Vuurren, this Court finds it curious that Plaintiff's insistence that a partnership came onto effect, did not extend to his dealings with her. In this Court's view, if it was intended by both parties that a partnership came into effect, one would assume that there would be some record keeping on behalf of the said partnership separate from the records held by the Plaintiff. The Plaintiff's testimony did not highlight any instructions to Mrs. Van Vuurren to prepare, or even discuss, financial statements. The Plaintiff did however take care to communicate with her regarding his personal taxes. This begs the question why he did not raise the accurate bookkeeping records of the partnership at any stage.

- [72] Having a holistic view of the oral evidence and taking into consideration the documentation presented during the oral evidence, it is evident that the relationship between the Plaintiff and the Defendant is susceptible to a reasonable alternative interpretation being that of an employer / employee or employer / contractor relationship as intimated to by the Defendant.
- [73] Having concluded that there is a reasonable alternative interpretation, this Court does not deem it necessary to define the said relationship between the Plaintiff and the Defendant. It is indeed irrelevant if it is employer / employee or employer / contractor. The *onus* was on the Plaintiff to proof its case, and the Defendant does not carry any *onus* to disprove.
- [74] The Plaintiff's case therefore stands to be dismissed. There is no reason why the costs should not follow the outcome of the proceedings. Having regard to *inter alia* the nature of the proceedings, the amount of preparation required, the volume of the documents presented to court and the importance of the proceedings to the parties, costs to counsel are warranted on Scale C.

Order:

- [75] **In the result the following order is made:**

75.1 The Plaintiff's claim is dismissed with costs on party and party scale including costs to counsel on Scale C.



M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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DATE JUDGEMENT RESERVED	:	23 August 2024
DATE OF JUDGMENT	:	19 February 2025