

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: 11 September 2025 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] This application was initially before me in the opposed motion court in August 2023. I referred the matter to oral evidence. A written judgment setting out the reasons for the referral was handed down on 5 September 2023. The application was set down

for oral evidence in March 2025. An inspection *in loco* was conducted on 27 March 2028. Evidence was led on 28 March 2025 and on 23 April 2025. Oral argument was presented on a virtual platform on 11 June 2025.

- [2] The applicant (Mr. Van Eden) seeks an order terminating a partnership he alleges was entered into between himself and the first respondent (Mr. Delcloo), and the appointment of a liquidator to oversee the winding up of the partnership. Mr. Delcloo denies that a partnership was entered into and seeks the dismissal of the application.

- [3] I indicated in the judgment handed down on 5 September 2023 that neither the applicant nor the first respondent set out their cases clearly, succinctly, and unambiguously. I unfortunately have to reflect that neither of the parties impressed as witnesses. Neither confided fully in the court. As in the affidavits filed, although to a lesser extent, both attempted to discredit each other. I am, however, satisfied that there is sufficient credible evidence before this court to make definite factual findings. Where inferences were drawn, they were drawn from properly established objective facts.

Inspection in loco

- [4] An inspection *in loco* was conducted to provide more clarity regarding the extent of the developments on the property. The parties were provided with a record of the observations made during the inspection, and neither objected to the record of the inspection forming part of the record of the proceedings.

Core issue

- [5] As stated, Mr. Van Eden seeks the termination of a partnership he alleges existed between himself and Mr. Delcloc. As a result, the core question that needs to be answered is whether Mr. Van Eden has made out a case that the agreement entered into between himself and Mr. Delcloo constitutes a partnership agreement, or to put it differently, whether the business venture they engaged in is a partnership.

Essentialia of a partnership

- [6] A partnership is established by means of a valid agreement that embodies the basic *essentialia* of a partnership. The agreement need not be reduced to writing. The agreement must be entered into with the true intention of creating a partnership.
- [7] In *Joubert v Tarry & Co*¹ De Villiers JP remarked that determining what constitutes a partnership between persons is not always an easy matter.² With reference to *Pothier*, De Villiers JP, confirmed the *essentialia* of a partnership to be the following: (i) each of the partners brings something into the partnership or bind themselves to bring something in, (ii) the business should be carried on for the joint benefit of both parties, (iii) the object should be to make profit, and (iv) the contract should be a legitimate contract.
- [8] De Villiers JP, concluded:³

'Where all these four essentials are present, in the absence of something showing that the contract between the parties is not an agreement of partnership, the Court must come to the conclusion that it is a partnership. It makes no difference what the parties have chosen to call it; whether they call it a joint venture, or letting and hiring. The Court has to decide what the real agreement is between them.'

- [9] The Appellate Division, as it was known then, revisited De Villiers JP's explanation as captured above, in *Purdon v Muller*,⁴ and expressed its view as follows:

'The meaning of this qualification is, I think, that, although the presence in an agreement of the four essentials will *prima facie* establish the existence of a partnership, such presence is not necessarily conclusive but must yield

¹ 1915 TPD 277 at 279

² *Joubert, supra*, 280.

³ *Joubert, supra*, 281.

⁴ 1961 (2) SA 211 (A).

to contrary intention as revealed in the agreement itself read in the light of the other admissible evidence.

Evidence

Mr. Van Eden

- [10] Mr. Van Eden testified that Mr. Delcloo bought an immovable property. He was a practicing attorney at the time, and Mr. Delcloo sold antique books. They bounced off ideas of how the property could be used to generate an income. The idea of them doing business together and running a wedding venue developed gradually. They then agreed that Mr. Delcloo would put up his small holding towards the business, and that he would provide the money for the development. Mr. Van Eden explained that the property was cleaned up, existing structures improved, and additional structures built. The second respondent, the company Bark at the Moon (Pty) Ltd, was registered with the aim of using it as a mechanism to create income. The business would later be sold. Each party would receive what they contributed, whereafter the profit would be divided equally. The parties planned to move to Croatia, where they would put up a bed-and-breakfast business. The agreement between them was not reduced to writing, as they were good friends like David and Jonathan.
- [11] The aspect where Mr. Van Eden's evidence became vague is why the business never got off the blocks. In the founding papers, the impression was created that the business could not continue due to the Covid-19 pandemic that ensued. Under cross-examination it became evident that he discussed the sale of the business with Mr. Delcloo before Covid-19 was a reality in South Africa. I have no doubt that Mr. Van Eden's personal circumstances moved him to discuss the termination of the business agreement with Mr. Delcloo – this eventually precipitated the breach between the parties. Mr. Van Eden's personal circumstances at the time, are, however, not of concern to this court.

- [12] The cross-examination was mainly directed at the source of the money used by Mr. Van Eden to develop the property and the nature of the legal entity that the parties used to conduct their business. Mr. Delcloo's counsel emphasised that a company was created, not a partnership. Mr. Van Eden steadfastly maintained that a partnership was constituted and that the company served as the mechanism through which the partnership conducted its business.

Mr. Delcloo

- [13] Mr. Delcloo confirmed that he purchased an immovable property. He and Mr. Van Eden bounced ideas around about how the property could be utilised. The idea of utilising the property as a wedding venue originated during the brainstorming session.
- [14] Mr. Van Eden phoned him the following morning. Mr. Van Eden offered to provide funding for the property's development. In turn, he wanted 'a place to crash, a place to get away from home, a place to clean his head.'
- [15] Mr. Van Eden contributed a substantial amount of money to the property's development. It was put to Mr. Delcloo by his counsel, leading his evidence in chief:

'At that point – now I [am] skipping, I might be skipping part of it, but at that point your testimony is that apparently there was enough money or a lot of money. Did you know at that point where the money originates from?'

- [16] I pause to state that Mr. Delcloo inferred that the money provided by Mr. Van Eden was tainted in that it was money that he siphoned from his trust account. That Mr. Van Eden's financial contribution to the development of the property was significant, however, was not challenged in Mr. Delcloo's oral evidence, although he initially downplayed it in the answering affidavit.

- [17] When Mr. Delcloo was asked by his counsel to comment on Mr. van Eden's evidence that the parties agreed to establish a business, Mr. Delcloo was evasive. He said – 'There was just offering to help me, you know, and there was a lot of talking, you know, between us.' He felt that he was 'conned' by Mr. Van Eden. He testified during cross-examination that it was he who later proposed that Mr. Van Eden share in the business's profit, if any.
- [18] When asked about the auctioning of books in the hall, Mr. Delcloo confirmed that 'I was selling books of [in] the venue and that was **before we were actually in business.**'
- [19] Mr. Delcloo denied that a partnership had been established. He regarded a partnership as 'a joint business signed, registered and everything'. His evidence is that the second respondent, the company, is the only relevant business entity. No business was, however, achieved through the company.
- [20] When cross-examined, Mr. Delcloo, however, testified that there was an arrangement relating to profit. He said:
- 'The agreement was after deducting all the costs like a normal business, as you know, take the costs away, and whatever is over, you know, or invest again in the business as I proposed, or we share the profit.'
- [21] Although Mr. Delcloo denied that he ever indicated that he would relocate to Croatia with Mr. Van Eden, he did acknowledge that the topic of Mr. Van Eden relocating to Croatia came up.

Discussion

- [22] It cannot be gainsaid that Mr. Van Eden and Mr. Delcloo entered into an agreement to conduct a business venture. Mr. Delcloo contributed the use of his property, while Mr. Van Eden contributed financially. The evidence shows that Mr. Van Eden spent significant amounts in developing the property. Both parties testified that the

business they proposed to conduct, namely a wedding venue, would be carried on for their joint benefit. There is no indication that the agreement between them was not legitimate. On this score, three of the four *essentialia* of a partnership agreement are met.

- [23] It is undeniable that both Mr. Van Eden and Mr. Delcloo were motivated to conduct a wedding venue business in the hope of achieving positive financial returns. They both wanted to make money out of the arrangement. They then registered a company, Bark at the Moon (Pty) Ltd, cited herein as the second respondent, as the vehicle through which the business would be conducted. The profits that would be generated, would be generated through the business. When the business came to its end, it would be sold, the parties would each receive the value of their initial contribution, and the remaining profit would be divided equally between them.

- [24] The gist of the argument raised on behalf of Mr. Delcloo is that, if any profit is generated, it would be generated in and for the company. This excludes the idea that a partnership came into existence, they contend.

- [25] Without the underlying agreement, Bark at the Moon (Pty) Ltd exists in a vacuum. No shareholders' agreement was concluded, and no loan account was established. No bank account was opened in the company's name, and no assets were transferred to the company.

- [26] Before Bark at the Moon (Pty) Ltd was registered, the parties had already engaged in a business relationship. This underlying business relationship was a partnership agreement, and a partnership estate came into existence. The evidence that the company was created as a vehicle to manage the business was not disputed. There is no legal obstacle preventing partners from using a company as the vehicle through which to conduct and manage the business of the partnership.

- [27] The evidence of both parties supports the following factual findings:
 - a. Mr. Van Eden and Mr. Delcloo formed the intention to conduct a business together – Mr. Delcloo's evidence, in fact, is that he proposed that Mr. Van Eden

share in the profit that stands to be generated. Whether Mr. Van Eden's evidence or Mr. Delcloo's evidence on this score is preferred, the end result is the same.

- b. Mr. Delcloo contributed his property, and Mr. Van Eden made substantial financial contributions. Mr. Delcloo's contention that he just provided the 'use of his property' and did not put up the property is untenable if regard is had to the facts of the matter where fixed structures were erected on land.
- c. The business was to be conducted for the parties' joint benefit, with the aim of making a profit. Using a company as the vehicle to conduct the partnership's business did not undermine or dilute this aim.
- d. A legitimate purpose was pursued by the parties.

[28] The court in *Cinema City v Morgenstem*⁵ said:

'No contracts are made in a vacuum; there is always a setting in which they have to be placed.'

The parties might not have sat down and defined their agreement formally as a partnership, but the proven facts constitute the *essentialia* of a partnership. Two legal entities were created as a result of the parties' agreement, and the existence of one does not rule out the other. In Mr. Delcloo's own words – 'The agreement was after deducting all the costs like a normal business, as you know, take the costs away, and whatever is over, you know, or invest again in the business as I proposed, or we share the profit'. With no loan account the parties would not have been able to recoup the value of their initial contributions from the company. The only way this aim can be realised is through the partnership agreement.

Costs

[29] The general rule that costs follow success applies. This includes all the costs of the application, including previously reserved costs.

⁵ 1980 (1) SA 796 (A) at 805A.

ORDER

In the result, the following order is granted:

1. The partnership between the applicant and first respondent is terminated on the following terms:
 - 1.1. A liquidator is to be appointed with the authority to realise the partnership assets at a market-related price in a manner most beneficial to the parties, and subject to 1.2 below, to liquidate the liabilities of the partnership, to prepare a final account, and to pay the net assets of the partnership to the respective partners in equal shares;
 - 1.2. The net proceeds arising out of the sale of the said immovable property shall be divided between the applicant and the first respondent in equal shares and shall be calculated by deducting, among others, the sum total of the following liabilities from the purchase price attained in respect of the immovable property, which shall be paid from the proceeds of the sale:
 - 1.2.1. The full outstanding amount due to the bondholders of any bonds registered over the immovable property;
 - 1.2.2. The full outstanding amount due to the local authority in respect of the immovable property;
 - 1.2.3. The amount required in order to obtain the necessary clearance certificate from the local authority;
 - 1.2.4. The amount required to obtain the necessary electrical compliance certificate;
 - 1.2.5. Estate agents' and/or auctioneers' commissions;
 - 1.2.6. Any necessary expenses that were incurred, that stand to be deducted in the discretion of the liquidator after determination thereof by the liquidator;
 - 1.2.7. The costs of the liquidator.
 - 1.3. Should the applicant and the first respondent be unable to agree on the identity of the liquidator within three weeks of the date of this order, they are to approach the Chairperson of the Pretoria Society of Advocates, who is to appoint a liquidator on the basis and utilising a process that she deems appropriate;

- 1.4. Both parties are to fully co-operate with the liquidator in so far as the sale of the immovable property is concerned, and sign all the necessary documentation in order to give effect thereto, failing which the Sheriff in whose area the said immovable property is situated, be and is authorised to sign such documentation on behalf of either, or both, of the parties;
- 1.5. The liquidator's fee is to be determined in accordance with the fees stipulated in Tariff B in the Second Schedule to the Insolvency Act 24 of 1936, as amended.
2. The first respondent is to pay the costs of the application on scale B, including previously reserved costs.



 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:	27 & 28 March 2025, 23 April 2025, 11 June 2025
Date of judgment:	11 September 2025