

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-ACT-OTH-2017/04117

In the matter between:

ALEXANDER MARITZ

PLAINTIFF

and

**FRANCOIS JOHANNES LOUW N.O CITED IN HIS CAPACITY AS
THE EXECUTOR OF THE ESTATE OF LATE
JOHANN WILHELM DE BEER UNDER MASTER'S
REFERENCE NUMBER: 2021/2012 WHK**

1st DEFENDANT

**SHALENE SCHREUDER N.O. CITED IN HER CAPACITY
AS THE CO-EXECUTOR, TOGETHER WITH
THEO VAN SCHALKWYK
IN ESTATE OF THE LATE JOHAN WILHELM DE BEER
MASTER'S REFERENCE NUMBER: 15533/2012**

2nd DEFENDANT

**SD PROPERTIES PARTNERSHIP,
A PARTNERSHIP BETWEEN THE DECEASED**

AND THE PLAINTIFF, CARE OF THE PLAINTIFF	3rd DEFENDANT
SUPER DECA INVESTMENT PROPERTIES (PTY) LTD	4th DEFENDANT
FRANCOIS JOHANNES LOUW N.O. IN HIS OFFICIAL CAPACITY AS TRUSTEE OF AUOB TRUST WITH REGISTRATION NUMBER IT 111/96	5th DEFENDANT
SUZETTE BRAND N.O. IN HER OFFICIAL CAPACITY AS TRUSTEE OF THE AUOB TRUST DULY REGISTERED IN TERMS OF THE TRUST PROPERTY LAWS OF NAMIBIA WITH REGISTRATION NUMBER IT 111/96	6th DEFENDANT
SUZETTE BRAND	8th DEFENDANT
DEDERICK MARTHINUS DE BEER	9th DEFENDANT
FRANCOIS JOHANNES LOUW	10th DEFENDANT
POINTBREAK WEALTH MANAGEMENT (PTY) LTD	11th DEFENDANT
SUPER DECA CONSTRUCTION CC	12th DEFENDANT
MASTER OF THE HIGH COURT	13th DEFENDANT
MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE DIVISION	14th DEFENDANT
JANITA TERBLANCHE	15th DEFENDANT

Neutral Citation: *Maritz v Louw N.O Cited In His Capacity As The Executor of the Estate of Late Johann Wilhelm De Beer under Master's Reference Number:*

2021/2012 *Whk* (HC-MD-CIV-ACT-OTH-2017/04117) [2018] NAHCMD 261 (28 August 2018)

CORAM: PRINSLOO J
Heard: 27 July 2018
Delivered: 28 August 2018
Reasons: 29 August 2018

Flynote: Practice – Pleadings - Special plea – Whether necessary to deliver plea on the merits where special plea is raised – Court to determine whether special plea raised can be heard separately from the merits.

Summary: The plaintiff sued for the dissolution of a partnership for a due accounting and ancillary relief against the plaintiff's deceased partner (Johann Wilhelm de Beer, herein represented by the first defendant in his capacity as the executor of the estate of the deceased).

The deceased and thereafter the first defendant, with the fourth and eighth defendant, took control over the partnership assets, including cash reserves and income.

After the death of the plaintiff's deceased partner, the partners in the partnership were unable to agree to the dissolution of the partnership while the partnership continued to trade.

During case management, the parties were issued with a case plan, instructing the defendants should file, amongst others, their exception or notice to strike out on or before 16 April. However, in the event that the defendants did not intend to except or strike, the defendants had to their plea with or without a counterclaim, on or before 16 April 2018.

As it turned out, the defendants filed neither an exception nor did they file a notice to strike out. Instead, the defendants filed a special plea without pleading over on the merits. In this regard, the plaintiff maintained that the special plea filed by the defendants did not constitute a special plea in the true sense of what is defined and regarded as a special plea.

The defendants, however, were of the view that the special plea be adjudicated upon separately from the merits as it will dispose of the matter if successful, whereas the plaintiff is of the view that the determination of the special plea is not dispositive of the relief sought by the plaintiff. As the parties could not agree on the further conduct of the matter the parties requested to argue the matter in order for the Managing Judge to make a ruling.

Held – it is thus clear, from the foregoing that a special plea can either be dilatory or peremptory. In the instant case, the special plea raised was not dilatory but peremptory as it sought to quash the proceedings altogether.

Held further – the Court is therefore convinced that the special plea raised by the defendants aimed at the legality of the partnership, if successful, will bring an end to the matter and therefore, must be determined separately from the merits of the case.

ORDER

- (a) The special plea must be determined separately from the merits of the case.
- (b) Issue of cost to stand over for later determination.
- (c) The case is postponed to 12 September 2018 at 15:00 for a Status Hearing.

JUDGMENT

PRINSLOO J:

Introduction

[1] The plaintiff in this matter, Alexander Maritz issued summons on 27 October 2017 against the first to the fifteenth defendants. The first defendant, Francios Louw acted in his official capacity as *nomine officio* and together with the fourth,¹ fifth,² sixth,³ seventh,⁴ eighth,⁵ ninth,⁶ tenth⁷ and the fifteenth⁸ defendant entered a notice of intention to defend on 22 November 2017 (hereinafter referred to as the defendants).

Background

[2] The plaintiff sued for the dissolution of SD Properties Partnership (hereinafter referred to as the “partnership”), for a due accounting and ancillary relief against the plaintiff’s deceased partner (Johann Wilhelm de Beer, herein represented by the first defendant in his capacity as the executor of the estate of the deceased).

[3] The deceased and thereafter the first defendant, with the fourth and eighth defendant, took control over the partnership assets, including cash reserves and income.

¹ Super Deca Investment Properties (Pty).

² Francois Johannes Louw N.O. in his official capacity as Trustee of Auob Trust with Registration Number IT 111/96.

³ Suzette Brand N.O. in her official capacity as trustee of the Auob Trust duly registered in terms of the Trust Property Laws of Namibia with Registration Number IT 111/96.

⁴ Dederick Marthinus De Beer N.O. in his official capacity as trustee of the Auob Trust duly registered in terms of the Trust Property Laws of Namibia with trust number IT 111/96.

⁵ Suzette Brand.

⁶ Dederick Marthinus De Beer.

⁷ Francois Johannes Louw.

⁸ Janita Terblanche.

[4] After the death of the plaintiff's deceased partner, the partners in SD Properties Partnership were unable to agree to the dissolution of the partnership while the partnership continued to trade.

[5] The summons initiating this matter was then issued for the dissolution of the partnership, return of assets, for the rendering of accounts and the debatement thereof and for payment of what is found to be due to the partners.⁹

Judicial Case Management

[6] On 01 March 2018 the parties were issued with a case plan, instructing the defendants that in the event that the defendants intend to except or strike out portions in the Plaintiff's Particulars of claim they should file their exception or notice to strike out on or before 16 April. However, in the event that the defendants did not intend to except or strike out portions in the plaintiff's Particulars of claim, the defendants had to their plea with or without counterclaim, on or before 16 April 2018.

[7] The defendants did not file an exception nor did they file a notice to strike out. Instead the defendants filed a special plea without pleading over on the merits. During the status hearings held in this matter the plaintiff maintained that the special plea raised by the defendants does not constitute a special plea in the true sense of what is defined and regarded as a special plea.

[8] The plaintiff was insistent that the court should not allow a piecemeal determination of the matter. The defendants¹⁰ primarily submit that the special plea be adjudicated upon separately from the merits as it will dispose of the whole case if successful, whereas the plaintiff is of the view that the determination of the special plea is not dispositive of the relief sought by the plaintiff. As the parties could not agree on the further conduct of the matter the parties requested to argue the matter in order for the Managing Judge to make a ruling.

⁹ Pages 69 to 75 of the plaintiff's particulars of claim.

¹⁰ The fourteenth defendant, the Master of the High Court of South Africa, Western Cape Division, filed a notice to abide by this court's order.

[9] What is therefore now before this court is the issue whether the defendant's special plea should be determined separately or together with the merits.

Submissions by the parties

The plaintiff

[10] The plaintiff submits that for purposes of due process and under the rules of court, a plea over the merits is required and the defendants' special plea does not amount to a true special plea, but is instead an attempt to raise a point *in limine* that is not dispositive of the action or relief sought. The plaintiff is of the opinion that the defendants' special plea does not constitute a defence against the relief sought.

[11] The plaintiff further submits that under the rules of court, any defence or matter pleaded by a party must be pleaded over with sufficient clarity to enable the opposite party "to identify the case that the pleadings requires him or her to meet."¹¹ The plaintiff further submits that the rules of court envisage the pleading over of all defences at one and the same time. There is no room in the rules for a reservation of the right to plead over as the defendants pray for.

[12] The plaintiff further submits that the adjudication of the defendants' special plea will amount to an untenable duplication of evidence and improper piecemeal adjudication that must be guarded against, as the issues will in due course form an integral or unitary matrix of facts for determination.

[13] The plaintiff is of the view that the defendants' thinly pleaded plea does not deal with the critical aspects of the partnerships' control over its assets including its income, cash reserves or the fact that the properties are regulated under the Communal Land Reform Act 5 of 2002,¹² or that all due taxes have been paid in

¹¹ Rule 45(6).

¹² Read with the regulations relating to occupational land rights under s 45 of the Communal Land Reform Act.

compliance with the law or not. The plaintiff further highlights that there is nothing in support of the defendants' plea to establish that leased properties (due to be controlled by the partnership, are not validly held.

[14] The plaintiff further highlights the point above in providing that the defendants' unsigned financial statements for 28 February 2013 show the leased properties as being held by the fourth defendant, and that the fourth defendant "currently have permission to occupy the above properties".¹³ The plaintiff submits that it is precisely this state of affairs that require to be addressed in the action as the fourth defendant is not entitled to hold the properties in any manner, save for the benefit of the partnership.

[15] In concluding, the plaintiff submits that the issues arising from the special plea are found inextricably linked to the relief sought by the plaintiff. The defendants' special plea does not in any manner deal with the claims for dissolution of the partnership and for due accounting of the proceeds of the partnership including the return of assets "held under the permission to occupy". The plaintiff submits that such relief will be required to be determined, irrespective of the determination of the point under the special plea.

[16] The plaintiff further submits that without discovery and pleading over, and approaching the matter on a piecemeal basis, the result will be that there will be two hearings with evidence on trial and an untenable duplication of evidence and proceedings. The plaintiff is further of the view that the expeditious disposal of the litigation will be best served by ventilating all the issues at one hearing.

The defendants

¹³ Annexure K at p. 12 item 2.

[17] The defendants submit that the plaintiff erroneously endeavored to oppose the special plea by the defendants on three points. The first point is based on considerations of rule 46 in that the rules of court contain no express provision as to whether pleading over is necessary when a special plea is filed and in the event that the special plea fails, the party desiring to plead over the merits may do so, and be mulcted in the costs of the application for leave to do so. In other words, there is no inflexible rule requiring a pleading over on the merits where there is a special plea.

[18] The second point is based on considerations of rule 63(6) in that where it appears that there is a question of law or fact which may be conveniently decided separately before any evidence is led, the court may make an order directing the trial of that question in such a manner as it considers appropriate and stay all further proceedings until the question has been disposed of.

[19] The third point, the defendants submit, goes without saying that the rule on exceptions do not apply to special pleas. With this, the defendants submit, disposes of the plaintiff's entire application.

[20] With regards to the special plea in primary, the defendants submit that it is one of legality and if successful, it will dispose of the plaintiff's claim in its entirety. The defendants further submit that the special plea encompasses very limited factual questions which require limited evidential material, as the only factual issues to be determined are whether or not the statutory prescripts have been complied with. If this has not been done (which is not alleged by the plaintiff) it is the end of the plaintiff's case. However, the defendants submit, if it were to be pleaded in the particulars of claim, the defendants could and would have successfully excepted thereto.

[21] The defendants further submit that as the issue of statutory prescripts has not been so pleaded by the plaintiff, it should not prejudice the defendants in their defence and the special plea should be separately determined. The defendants submit that the plaintiff may not refuse to make allegations, thereby avoiding an

exception, which could and would have speedily and cheaply brought an end to the matter, and at the same time attempt to avoid the special plea.

[22] In concluding, the defendants submit that the legality raised as issue against the plaintiff goes to the root of everything. If the partnership is illegal, the parties then acted on an “illusion” and financials, rent, factual properties and so on would never make legal what is illegal.

Conclusion

[23] The learned authors Herbstein & Van Winsen,¹⁴ provide the following regarding a special plea:

'As stated, a special plea is one that does not raise a defence on the merits of the case, but as its name implies, sets up some special defence which has as its object either to delay the proceedings (a dilatory plea) or to quash the action altogether (a peremptory plea). . . . These special pleas do not concern the merits of the action. They merely seek to interpose some defence not apparent on the face of the pleadings up to the time when they are raised.'

[24] With reference to the matter at hand, it is thus clear, from the foregoing that a special plea can either be dilatory or peremptory. In the instant case, the special plea raised was not dilatory but peremptory as it sought to quash the proceedings altogether.¹⁵

[25] In *Sibeko and Another v Minister of Police and Others* 1985 (1) SA 151 (W), Stegmann AJ made the following remarks in respect of special pleas:

'When a special plea, which is properly so-called, has been filed, it is quite proper to set the issues raised in the special plea down for hearing separately from the issues raised in the plea over, if there is one.'

¹⁴ The Civil Practice of the High Court of South Africa 5 ed vol 1 at 598.

¹⁵ See *Uvanga v Steenkamp and Others* 2017 (1) NR 59 (HC).

Stegmann AJ went on to note the following:

‘One of the purposes which a special plea is designed to serve is the convenience to all parties and the Court of dealing separately with an issue which, if the special plea is successful, will either eliminate or postpone any need to deal with other issues in the case. Another of its purposes is to avoid, if possible, the incurring of costs in relation to other issues when the special plea may prove decisive.’

[26] Although Flemming J disproved the judgment of *Sibeko* where it was held that pleading over is always necessary, it seems as though pleading over is subject to the discretion of the presiding officer. I say so for the following reason. Rule 46 of the High court rules makes provision for pleas and the manner in which such pleas must be filed by a defendant having received a combined summons. The defendant must therefore deliver a plea with or without a counterclaim or a notice of intention to note an exception or an exception with or without application to strike out.

[27] I have underlined “intention to note an exception” for a specific reason above. Exceptions, in terms of the high court rules, have their own rule and manner in which they are done. Rule 57 (6) provides that:

‘Where an exception is taken to a pleading on the grounds that such pleading lacks the averments which are necessary to sustain an action or defence, no plea, replication or other pleading over is necessary.’

The rule on exceptions was clearly laid out in *Van Straten No and Another v Namibia Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC) and this court abides by it. However, we are not concerned with exceptions in this matter and I will not accordingly repeat the law.

[28] I am therefore convinced that the special plea raised by the defendants aimed at the legality of the partnership, if successful, will bring an end to the matter and

therefore, must be determined separately from the merits of the case. If the partnership is proven to be one of illegality, the plaintiff's claim will be dismissed from the onset and the matter will be finalized.

[29] My order is as follows:

- (a) The special plea must be determined separately from the merits of the case.
- (b) Issue of cost to stand over for later determination.
- (c) The case is postponed to 12 September 2018 at 15:00 for a status hearing.

J S Prinsloo
Judge

APPEARANCES

PLAINTIFF: A P Möller
 instructed by Fisher, Quarmby & Pfeifer, Windhoek

DEFENDANT: R Heathcote (with him S J Jacobs)

instructed by Van der Merwe-Greeff Andima Inc., Windhoek