

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-OTH-2019/03810

In the matter between:

ANDRIES PIETER DELPORT

PLAINTIFF

and

ROSALIA ALWEENDO

DEFENDANT

Neutral citation: *Delport v Alweendo* (HC-MD-CIV-ACT-OTH-2019/03810) [2022]
NAHCMD 225 (6 May 2022)

Coram: PRINSLOO J

Heard: 17-18 January 2022, 7 March 2022

Delivered: 6 May 2022

Flynote: Civil practice- law of contract - oral tacit partnership agreement-
misrepresentation - mutually destructive versions - no official certificate/documents where
plaintiff is reflected as (part) owner of business - requirements of partnership - no
consensus between parties - defendant sole owner - Plaintiff's claim dismissed.

Summary: The plaintiff issued a summons against the defendant, with whom he had a romantic relationship and with whom he shares a child. The plaintiff claims that he and the defendant entered into an oral tacit partnership agreement and shared a common interest in various business enterprises acquired by the defendant. On the plaintiff's version, the parties entered into a written partnership agreement on 7 December 2015, wherein they agreed to have equal shares in the property concerned. As a result, the parties shared a joint bank account, and both parties had signing powers at the bank. However, the parties did not agree to a division of the partnership's profits. Still, the plaintiff pleaded that since the parties agreed to equal shareholding, it is a tacit term of the partnership agreement that the profits would be divided into equal shares. The plaintiff claims that the defendant prevented him from meaningfully partaking in the partnership's business operations. As a result, the relationship between the parties has irretrievably broken down, and the plaintiff wants the partnership to be dissolved.

The defendant disputes the whole partnership agreement and states that she has always been the sole trader of the businesses. And that the plaintiff was only assisting in the activities of the business as her romantic partner. The defendant concedes to signing a document in December 2015 but maintains that she signed the document prepared by the plaintiff with the understanding that the document was related to the welfare and future of their child. The defendant claims she was induced into signing the purported agreement. On this basis, the defendant maintains that the purported agreement was void. During 2017 the parties experienced problems in their relationship, and during 2018 the plaintiff started making demands for a share of the defendant's business and the profits, which the defendant resisted.

Held that for a partnership to be validly formed all the general requirements regarding validity must be met and consensus must have been reached on all the essential terms of the partnership.

Held that the documents presented to the court show that the defendant is the sole proprietor of the supermarkets. The implications, as acknowledged by the plaintiff, are that the defendant's liability is unlimited and that she is personally responsible for all the assets and debts of the businesses.

Held further that there are no official certificates/documents on which the plaintiff is reflected as a (part) owner of the businesses.

Held further that the documents the plaintiff relies on in support of his case drafted by himself are not sufficient to support his claim.

The plaintiff's claim is dismissed with costs.

ORDER

- (a) The plaintiff's claim is dismissed with costs.
 - (b) Such costs to include the costs of one instructing counsel and one instructed counsel.
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JUDGMENT

PRINSLOO J

Introduction

[1] The plaintiff is Pieter Andries Delpport, an adult male residing in Windhoek. The defendant is Rosalia Alweendo, an adult female residing at Epembe Village, Ohangwena.

[2] The plaintiff issued summons against the defendant in August 2019, which the defendant opposed.

[3] The plaintiff pleaded that during 2010 the plaintiff and the defendant entered into an oral tacit partnership agreement and shared a common interest in various business enterprises acquired by the defendant, particularly supermarkets situated at Onathing, Okankolo, Epembe and a property complex (called Pep Stores) at Okankolo village.

Pleadings

[4] The plaintiff pleaded that the partners pooled their assets and labour for their mutual benefit and the furtherance of the object of the business enterprises, including the acquisition of immovable property, furniture, fixtures, stocks, motor vehicles and equipment in respect of the said businesses.

[5] The plaintiff further pleaded that the parties shared a bank account(s) from which the household and business expenses were paid, and both the parties had signing powers in the said bank account(s).

[6] The plaintiff pleaded that on 7 December 2015 the parties entered into a written partnership agreement wherein the parties agreed to the parties having equal shares in the property concerned. The parties, however, did not agree to a division of the profits of the partnership. Still, the plaintiff pleaded that since the parties agreed to equal shareholding, it is a tacit term of the partnership agreement that the profits would be divided into equal shares.

[7] The plaintiff pleaded that the parties received monies from the bank account(s) from time to time but has no knowledge of the specific amounts received by each party as part of their profit.

[8] The plaintiff further pleaded that during the latter part of 2017, the defendant prevented the plaintiff from meaningfully taking part in the partnership's business operations. As a result, the relationship between the parties has irretrievably broken down. The defendant persistently refused to allow the plaintiff to participate in the business

operations of the partnership, thereby divesting the plaintiff of any control over its assets and income.

[9] The plaintiff prays for the following relief:

- '1. An order dissolving the partnership R Alweendo as Stop & Shop Supermarket.
2. An order directing that the defendant renders a full account of the partnership to the plaintiff.
3. An order that the defendant must not dispose of any of the partnership assets until the partnership is liquidated.
4. The plaintiff to appoint a receiver to realise all assets acquired by the parties of whatever nature and wherever acquired which they possess by virtue of their partnership agreement. Liquidate the liabilities of the partnership, to prepare a final account and to distribute the partnership estate between the parties in equal shares.
5. Cost of the action.
6. Further and/or alternative relief.'

[10] The defendant in opposition filed a special plea pleading that the partnership agreement is unlawful. In amplification, the defendant pleaded that the plaintiff was declared insolvent during 1998 in terms of the Insolvency Act, 24 of 1936 (Act), in terms of which the plaintiff, once declared insolvent, would only be entitled to have a direct or indirect interest in the business as a trader. At the time the agreement was entered into, the plaintiff had not been rehabilitated in terms of s 124 of the Act, nor was he deemed rehabilitated in terms of s 127A of the Act.

[11] The defendant pleads that the agreement relied upon is illegal, unlawful and amounts to criminal conduct on the part of the plaintiff and is therefore unenforceable and void *ab initio* and has no legal effect.

[12] In pleading over on the merits, the defendant denies that the plaintiff was a partner in the defendant's business. The defendant denied that she and the plaintiff entered into any oral/tacit partnership agreement in 2010.

[13] The defendant further denies that the plaintiff pooled his assets, income or labour to the joint benefit of a partnership for the furtherance of the objective of the business enterprise. The defendant pleads that the plaintiff placed his assets and income, and labour into his business in Windhoek, which traded under the name of Stop and Shop Supermarket.

[14] The defendant pleaded that the parties never shared a joint bank account but that the plaintiff had signing power on her bank account, and despite being an authorized signatory, the plaintiff was limited to access financial resources related to their daughter in the event that the defendant is hospitalized or incapable of signing.

[15] The defendant pleaded that the parties never entered into a written partnership agreement but admitted that an agreement was signed in December 2015 due to misrepresentation made by the plaintiff to the defendant. The defendant pleads that the document relates to the welfare of the parties' child. She was induced into signing the purported agreement on the understanding that the document related to the parties' child's welfare and the future planning for the child.

[16] The defendant pleads that the plaintiff was neither entitled to share in the profit generated from the business nor was he entitled to participate in the defendant's businesses.

[17] In the alternative, the defendant pleads that in terms of a written agreement entered into during about June 2005, the partnership related to the building known as Onathing Supermarket. The defendant denies that any partnership agreement was entered into regarding the Stop & Shop Group Supermarkets. The defendant denied that the parties would have equal shareholding in the supermarket group.

[18] The defendant pleads that the June 2005 agreement is to the effect that the plaintiff would not share in the day-to-day running of the business and would not be entitled to share in the profits gained from the business. The defendant pleads that the plaintiff is not entitled

in law to be provided with an account for the partnership as all the profits from the defendant's business are exclusively for the use and enjoyment of the defendant. The defendant denies that there has been a breach of the terms and conditions of the partnership agreement.

[19] In conclusion, the defendant pleads that the plaintiff did not establish any basis in fact or law for the dissolution of any partnership. The defendant pleads that in the absence of identification of the business constituting a partnership, no case has been made out for the relief sought by the plaintiff.

[20] In replication, the plaintiff denies that the oral/tacit agreement between the plaintiff and defendant was unlawful. The plaintiff pleads that the partnership was agreed upon and executed in terms of relevant contract law.

[21] The plaintiff admits that he was declared insolvent in 1989 and was rehabilitated after 10 years. The plaintiff further pleads that s 23(3) of the Act does not find application in the current action.

[22] The plaintiff denied the allegations of misrepresentation relating to the documents filed.

[23] The plaintiff pleads that he and the defendant entered into an agreement in June 2005. However, the plaintiff pleads that the contract is irrelevant for purposes of the current matter.

The pre-trial conference

[24] The pre-trial order issued by this court on 2 September 2021 contains 21 issues of fact to be determined. I do not deem it necessary to replicate all the issues of fact raised as it is to some extent set out in the pleadings as discussed above and also overlap. I will therefore summarise the main issues for determination as follows:

- a) whether the parties entered into a business partnership trading under the name and style of Stop & Shop Group Supermarkets in June 2005 and whether this related to Onathing Supermarket only;
- b) whether the parties entered into an oral alternatively tacit partnership during 2010 to establish various businesses at Onathing, Okankolo, Epembe and the Pep property complex;
- c) whether a business relationship existed between the plaintiff and the defendant;
- d) whether the parties entered into a business partnership trading under the name and style of Stop & Shop Supermarket Group in 2015;
- f) whether the plaintiff is entitled in terms of any agreement to an equal share of the profits from the businesses situated at Onathing, Okankolo, Epembe and the Pep property complex.

[25] From the issues of law and fact set out between the parties, it would appear that the special plea raised regarding the insolvency status of the plaintiff is no longer pursued by the defendant and will not form part of the adjudication of this matter. The plaintiff pleaded that he was declared insolvent in 1989 and not 1998 as pleaded by the defendant. Presumably, the defendant accepted this fact, although the facts not in dispute still reflect the date as 1998.

[26] The parties agree that the issues of law to be resolved during the trial relate to the principles relating to partnerships and the termination thereof.

Summary of the evidence

[27] Mr Delpport, Ms Sylvia Nakwalumbu and Mr Rudolph Francois Rittman testified in support of the plaintiff's case.

Pieter Andries Delpport

[28] The plaintiff testified that he had been engaged in a romantic relationship with the defendant since 2000. He was (and still is) married at the time but separated. The plaintiff

testified that before the year 2000, he was staying permanently in Windhoek, but after 2000 he permanently lived with the defendant in the North.

[29] The plaintiff testified that in the beginning of 2010, he and the defendant entered into an oral agreement that the plaintiff would become a partner in the business enterprise known as R Alweendo t/a Stop & Shop Supermarket, which consisted of various supermarkets as well as a catering business. Before 2010 he assisted the defendant as her romantic partner. However, the plaintiff stated that during 2010 they decided to have a child together and to cement their relationship, the defendant offered him a partnership. According to the plaintiff, they agreed that he would put his skills and labour into the business, but at that stage, it was not clear yet whether he would stay with the defendant or not. However, as they decided to have a child together and would have a business together, he was prepared to stay with the defendant.

[30] The parties agreed that since the plaintiff could not contribute any money to the partnership, he would contribute in the form of labour and skill. It was further decided that the income generated by the businesses would be ploughed back into the business, which would therefore mean that neither of the partners would receive any profits.

[31] The plaintiff testified that it was decided that both partners would pool their assets, income and labour for the joint benefit of the businesses, including the acquisition of immovable property, furniture, fixtures, stocks, motor vehicles and equipment. The plaintiff further testified that it was agreed between the parties that the bank account of R Alweendo t/a Stop & Shop Supermarket would be utilised and kept as the account for the business. The defendant gave the plaintiff signing powers on the said account without any restrictions or limitations in respect of the signing powers. Therefore, as a partner, he could access the account for both business and private purposes. The plaintiff testified that all the properties were registered in the defendant's name by agreement between partners. The negotiations with the different headmen would be easier if done by the defendant, who is local to the area.

[32] The witness testified that there was a tacit agreement between the parties that he would be responsible for all new business -developments, maintenance of the buildings and non-office work. The defendant would purchase stock for the businesses and deal with personnel and customers and all office related work. However, there were no hard and fast rules regarding the working relationship between the parties.

[33] The plaintiff testified that to supplement the income of the businesses, he and the defendant would go to different pension pay-out stations to sell their merchandise. The nanny and the couple's child would accompany either one of them.

[34] The plaintiff testified that in 2013 he had extended the supermarkets and added two bakeries, and renovated two of the takeaways into restaurants. He also negotiated with the Pepkor group to rent a building from the Stop & Shop Group, but the negotiations were unsuccessful.

[35] The plaintiff testified that in 2015 an issue arose that led him and the defendant, as partners of the Stop & Shop Supermarket, Okankolo, to take a neighbour to the Ondonga Traditional Authority, which ended in an appeal to the Community Court. In a letter dated 17 February 2015, the defendant signed a letter wherein she referred to the plaintiff as a partner in the said supermarket. The plaintiff further testified that on 22 June 2015, the defendant deposed to a confirmatory affidavit that the plaintiff is a partner and owner of the Stop & Shop Supermarket. Hereafter on 7 December 2015, the parties entered into another written partnership agreement setting out their wishes in the event of one of them passing away.

[36] The plaintiff testified that during 2017, he, on behalf of the partnership, entered into new negotiations with the Pepkor Group regarding the rental of property from the Stop & Shop group. An agreement was reached resulting in him acting as owner-builder and erecting the building that Pepkor currently occupies.

[37] According to the plaintiff, the relationship between him and the defendant became strained in 2018. Without any reason, the defendant informed him that he was no longer regarded as a partner in any of the businesses and should refrain from being involved in the said businesses' day-to-day running.

[38] Due to the breakdown in their relationship, the plaintiff moved back to Windhoek. He then drafted a letter terminating the partnership and suggested specific ways to resolve the termination of the business partnership amicably without the need to have the businesses liquidated. The defendant was not agreeable to the plaintiff's suggestions, resulting in the current litigation.

Cross-examination

[39] During cross-examination, the plaintiff testified that before 2010 the defendant operated the businesses as a sole proprietor under Rosalia Alweendo t/a Stop & Shop. During this period, the plaintiff assisted the defendant in the daily running of the business, and he did so as her romantic partner.

[40] The plaintiff confirmed that the defendant obtained loans from the bank in her personal capacity. The bank account was also in the defendant's name and not the parties' joint account. The plaintiff testified that he had signing powers to the said account and that he was not limited in using the bank account. He denied that he did not only have access to the account for the benefit of their minor child and testified that he used the bank account for the business operations. The plaintiff, however, agreed that he had no right to sign any documents on behalf of the business.

[41] The plaintiff testified that he participated in the negotiations with the Pepkor Group on behalf of the defendant and conceded that he only signed that agreement as a witness and not as a partner.

[42] The plaintiff testified that he volunteered to supervise the building project, wherein the Pepkor Group is now situated, and he did so as a partner in the business venture. He was, however, never remunerated for any services rendered.

[43] The plaintiff confirmed that he introduced the defendant to the business' bookkeeper and he would deliver the books to the bookkeeper in Windhoek. The plaintiff confirmed that although he had access to the business books, he could not sign any of the financial statements. When the court raised the question as to why he could not do so, the plaintiff testified that only the owner of the business could sign the financial statements and that he was only able to pp (sign on behalf of the defendant) with her permission.

[44] On the issue of profit sharing, the plaintiff testified that there was no agreement in this regard as all the profits would be ploughed back into the business.

[45] The plaintiff denied that the defendant acquired the businesses as a sole proprietor but conceded that the defendant obtained the grocery liquor licences for the respective supermarkets in the defendant's name and not in respect of a partnership.

[46] The plaintiff testified that he and the defendant discussed e would be responsible for all the new business developments and the maintenance of the current buildings and equipment. The defendant would in turn attend to the administrative side of the business. When confronted with the discrepancy between his witness statement and his oral evidence, the plaintiff conceded that there was no agreement or discussion between him and the defendant in this regard.

[47] Ms Ihalwa confronted the plaintiff regarding his reference to the Stop & Shop Group and whether it was a registered entity. The plaintiff testified that as it is a sole proprietor business, it need not be registered, and the reference to the Stop & Shop Group is merely because the business expanded to more outlets. For banking purposes, the business's name had to remain Stop & Shop Supermarket.

[48] Regarding the 2015 partnership agreement that the plaintiff is relying on, the plaintiff confirms that the agreement did not define Stop & Shop Group, nor does it define the nature of the business which will be conducted. The plaintiff further conceded that this agreement did not deal with the issue of profit and loss.

[49] When confronted about the date of signature of the 2015 agreement as 14 April 2003, the plaintiff testified that it was an error which was rectified. The rectification referred to is with reference to the pleadings and not the rectification of the agreement itself.

[50] The plaintiff denied that he gave the defendant an ultimatum to sign the agreement and that if she did not sign the agreement, he would leave her with their minor child. The plaintiff further testified that the defendant understood the agreement as he explained it to her.

[51] Upon a question of the court, the plaintiff testified that he did not receive a monthly salary, but he would ask the defendant for money, or he would go to the cashier at the different supermarkets and request money and will then write an IOU.

[52] When the court queried whether the bank knew of the partnership agreement, the plaintiff indicated that the bank did not but that it would have been a hassle to change everything at the bank and at the suppliers of the business. The plaintiff stated that he was comfortable with being a silent partner. Later, the plaintiff testified that a bank official advised him that if the business status is changed to that of a partnership, he (the plaintiff) would have to set security as well for the loans. Plaintiff further testified that because the defendant obtained the loan to build the building where Pepkor is situated, as the long term lease served as security with the bank, the lease agreement had to be in the defendant's name and not that of a partnership.

[53] When asked about the liabilities with the bank and implication of default, the plaintiff testified that he would still be liable if something went wrong and would stand to lose everything he had in the business and everything they accumulated as partners.

[54] The court further queried with the plaintiff why it was necessary to reduce the 2010 oral partnership agreement to writing in 2015. The plaintiff responded that the defendant was always asking him what would happen to her and their minor child should he pass away and if his family would be able to take over the businesses. After discussing it, they decided to enter into a written partnership agreement and draw up a will. As a result of the agreement, the defendant and their minor child would be safe from the plaintiff's family intervening in the business in the event of the plaintiff's passing.

Sylvia Nakwalumbu

[55] Ms Nakwalumbe testified that the defendant, between 2011 and 2018, employed her as a nanny and domestic worker. She testified that she took it for granted and that she was also working for the plaintiff since the parties lived together as husband and wife. During cross-examination, the witness testified that he was not introduced to her as the defendant's business partner when she met the plaintiff.

[56] The witness testified that during the period 2011 to 2013/2014, she used to accompany the plaintiff and the defendant when they went to sell their merchandise at the pension pay-out points. The plaintiff actively participated in the selling process. The witness testified that since the defendant employed her, the plaintiff has been actively engaged in the supermarkets, the catering business and the Pep Stores building. She testified that the plaintiff would assist the defendant in preparing the bank, and he would then take her (Ms Nakwalumbe) to deposit the money at the bank whilst he would make purchases at the wholesaler for the different supermarkets, whereafter he would distribute the stock to the various supermarkets.

[57] The witness testified that on occasion she was present when the defendant gave instructions to employees regarding different kinds of maintenance work at the supermarkets. She could, however, not say if the plaintiff acted on the defendant's instructions when he relayed instructions to the employees.

[58] The witness further testified that she observed various business dealings and negotiations, e.g. the 2013 negotiations with the Pepkor Group. The negotiations were unsuccessful, but in 2017, an agreement was reached with the Pepkor Group, and the plaintiff started to build the Pep Stores building.

[59] In addition to that on 7 December 2015 she attested to a partnership agreement between the plaintiff and defendant.

[60] Ms Nakwalumbu testified that although she attested to an agreement between the plaintiff and the defendant, she did not know what the agreement's contents were and neither did she know what a partnership agreement was. The witness could not confirm that what she attested to was indeed a partnership agreement.

Rudolph Francois Rittman

[61] Mr Rittman testified that he met the plaintiff in 2013 and was informed that the plaintiff was in a business partnership with Ms Rosalia Alweendo and that they had businesses in the north of Namibia. The plaintiff explained to the witness that they were looking for a person to do the maintenance work at the respective businesses and made the witness a job offer which he accepted.

[62] The witness testified that the plaintiff and the defendant, to a lesser extent, gave him instructions and assignments to do, which included the maintenance at the three supermarkets. Mr Rittman also assisted with erecting a house of the plaintiff's smallholding.

[63] The witness testified that the plaintiff and defendant managed the businesses individually and together.

[64] That concluded the plaintiff's case.

Defendant's case

[65] The defendant testified in favour of her case and called no witnesses.

[66] The defendant testified that she and the plaintiff were engaged in a romantic relationship between 1998 and 2017. During the existence of the relationship, a minor child was born that is residing with the defendant.

[67] The defendant testified that she solely owned businesses at three locations, namely Onathing, Epembe and Okankolo and all the businesses traded under the name of Stop & Shop Supermarket.

[68] The witness explained the background and the coming into existence of the businesses as follows:

1. The defendant met the plaintiff in 1998 when she was looking for employment, and the plaintiff offered her a position as a shop assistant at the Stop & Shop situated at Epembe Village. She held this position between 1998 to 2000. During that time, the plaintiff also had shops at Onaeyena Village, Okankolo Village and Windhoek, which all operated under the name Stop & Shop Supermarket.
2. In the year 2000, the plaintiff then approached the defendant and two other shop assistants with a proposition that he would lease stock to them, and they would then pay a specific amount for the stock, which had to be maintained at a particular amount and also the rental in respect of the premises. The profits generated from the stock would remain for the lessees.
3. The plaintiff entered into separate agreements with the other two shop assistants and was for a fixed period of five years. The defendant leased the Stop & Shop situated at Epembe. The other two leased the business at Okankolo Village and Onaeyena Village.
4. During the latter part of 2000, the plaintiff returned to the North and offered to assist the defendant in her business operation. In 2003 the defendant took a bank loan and bought a vehicle for the business to transport stock. The defendant

applied for a plot in Onathing from the Ondonga Traditional Authority during the same year. Once the plot was granted, she constructed a shop in Onathing. She obtained an overdraft and stocked the shop at Onathing.

5. The defendant further equipped the shop at Epembe either on credit, hire purchase, or overdraft. She also acquired adjacent land to the plot in Onathing.
6. During 2005 one of the shop assistants leasing from the plaintiff at Onaeyena, one Hendrina Usiku, fell on hard times. The plaintiff terminated the agreement and offered the shop's lease to the defendant, to which she agreed. The defendant leased the Onaeyena business for one year and handed it back to the plaintiff, who leased the business to a third person.
7. At the end of 2006 defendant bought the stock of the Epembe shop from the plaintiff.
8. In 2007 the defendant purchased the Stop & Shop building at Epembe, and she paid it by obtaining a bank overdraft. The defendant then started to do renovations to the Epembe shop. The defendant testified that she paid for all the costs incurred regarding the upgrades and extension of the shop building.
9. During the same year, 2007, the plaintiff terminated the agreement with the Okankolo Stop & Shop lessee and offered the lease to the defendant. The defendant leased the business from the plaintiff, but he did not own the building. The defendant applied for a plot from the Ondonga Traditional Authority. Once the plot was allocated to her, the defendant constructed a shop on the plot at Okankolo. Hereafter the defendant purchased the stock of the Okankolo shop from the plaintiff, which terminated the lease agreement between them. The defendant then occupied the newly constructed business.

[69] The defendant testified that she traded in all her businesses under Rosalia Alweendo t/a Stop & Shop Supermarket but stated that it should not be construed to mean that the plaintiff entered into a partnership.

[70] The defendant testified that she is trading as a sole proprietor under the name Rosalia Alweendo t/a Stop & Shop Supermarket. She holds liquor licenses, fitness certificates and a bank account, all in the name Rosalia Alweendo t/a Stop & Shop Supermarket. The defendant testified that she also holds a tax registration certificate to pay Value Added Tax in her name.

[71] The defendant testified that in 2017 she obtained a loan for N\$ 1 343 000 to construct a building complex known as Pep Stores, Okankolo Village. She entered into a lease agreement with Pep Stores Pty Ltd upon completing the building.

[72] The defendant testified that since 2008 she no longer leased any stock from the plaintiff and that the plaintiff was only assisting in the activities of the business in the capacity as her romantic partner. The defendant testified that due to their relationship she gave the plaintiff signing powers over her bank account to enable him to make purchases on behalf of the businesses when he travels to Windhoek. The defendant testified that she initially gave the plaintiff signed cheques to make the purchases, but because of the inherent risks in carrying signed cheques, she instead opted to give him signing powers on her bank account.

[73] The defendant testified that in December 2015, she signed a document understanding that the document relates to the welfare and future of their child. As a result of the misrepresentation by the plaintiff, she was induced to sign the purported agreement.

[74] The defendant testified that the document was prepared by the plaintiff, and as a result of her limited educational background (grade 10) she did not appreciate the implications of the document.

[75] In 2017 the plaintiff and defendant started to experience problems in their relationship, and then during 2018, the plaintiff began to demand a share of her business and profit. The defendant testified that she resisted the demands of the plaintiff. A meeting in this regard took place between the plaintiff, his wife and the defendant's cousin Moses. The defendant did not attend the meeting.

[76] The defendant submitted that the plaintiff's notice of termination proposal, which sets out the division of her assets, was unacceptable to her as she solely owned her business and assets, and the plaintiff is not entitled to any share of it.

Cross-examination

[77] During cross-examination by the plaintiff, the defendant testified that she does not deny that the plaintiff used his skill and labour to advance the business but denied that he did so as a partner in the business. Instead, the plaintiff did so to support her in his capacity as her romantic partner.

[78] When asked if the defendant compensated the plaintiff for his services rendered, the defendant testified that when the plaintiff came to her, he came with a suitcase of clothing, with no money, no food, and she assisted him. The defendant testified that she took the plaintiff in, and she even proceeded to pay his vehicle instalment as he had no money. The witness further testified that they did not agree on a monthly salary as she maintained the plaintiff.

[79] The defendant denied the existence of an oral agreement dating back to 2010 wherein the parties agreed to become partners. The plaintiff confronted the defendant with the fact that she gave him signatory rights on her account from 2011 and contended that it was due to the oral partnership agreement that they reached. The defendant denied the averment and explained that she gave him signatory powers on her account to purchase stock when he went to Windhoek. The witness conceded that the signing rights were not limited to the need of their minor child but also to purchase stock when so required.

[80] When requested to comment on the email to Pepkor Group wherein the plaintiff indicated that he and the defendant were partners, the defendant testified that there is only one computer at her office in Onathing. She received the email and saw that it was addressed to the plaintiff and was in Afrikaans, so she forwarded the email to the plaintiff without reading the contents. When the plaintiff responded to the email, he did not copy her in, and she was unaware of the response to the Pepkor Group.

[81] The witness testified when the gentleman from the Pepkor group came in 2013 to look at the area, they had a meeting in her office, and the plaintiff then took him to Okankolo. The defendant further testified that the plaintiff introduced himself as her partner when this gentleman arrived. However, according to the witness, the plaintiff usually introduced himself as her partner but not in the context of a business partner but as a romantic partner/husband.

[82] When confronted with the 2015 written partnership agreement, the defendant testified that she was concerned for the well-being of their child as their child is not of her colour or culture, and she was worried about what would happen to the child if one of them passed away. When she discussed her concerns with the plaintiff, she thought he would type a letter for her to sign and commission by the police. However, the plaintiff got very upset and told her that if she did not sign the agreement, he would leave her with the child, and he would go. She testified that she was scared and signed the document. She did not understand the document at the time but understands it now after consultation with counsel.

[83] When the plaintiff pushed further on this point, the defendant testified that she did not read the agreement before signing it and just accepted his explanation regarding the document.

[84] On questions of the court, the defendant stated that although their relationship stretched over 19 years, the plaintiff was not permanently staying with her. She said he would come to her for a week or so in a month and then go back to Windhoek.

[85] The defendant testified that during the years, she did seek business advice from the plaintiff and where needed, he would write letters on her behalf as he could draft proper letters.

[86] The witness further confirmed that she bought immovable property and vehicles during the time that she had the businesses, and she paid off all the loans, overdrafts and hire purchase agreements

Evaluation of the evidence

[87] In this matter, the court is faced with two mutual destructive versions, and the only two witnesses who have personal knowledge of the agreement(s) or the absence thereof are the plaintiff and the defendant.

[88] I will firstly deal with the witnesses called by the plaintiff. The plaintiff called two witnesses, ie Ms Sylvia Nakwalumbu and Mr Rudolph Rittman, to testify on his behalf to verify the partnership between him and the defendant. However, from their evidence, it was evident that neither of these witnesses would assist this court in coming to a conclusion. The reasons why I say so are as follows:

[a] Both these witnesses testified to what they were informed by the plaintiff and not about facts they have first-hand knowledge of.

[b] For example, Mr Rittman was told by the plaintiff when he solicited his services that he was in a partnership with Ms Alweendo, the defendant. The defendant never confirmed this fact. The witness testified that when he went to meet the defendant, she was introduced as the plaintiff's partner but did not elaborate on whether it was as a romantic partner or business partner and what the defendant's response was thereto. Further to that, the evidence of Mr Rittman was that he and other employees would receive their assigned work from the plaintiff and on occasion from the defendant.

[c] Ms Nakwalumbe knew the plaintiff as the defendant's partner. She took it for granted that the plaintiff and the defendant were a couple, like a husband and a wife. The witness confirmed that the plaintiff was actively involved in the business by going to pension pay-out points. He would also give instructions to other employees on occasion.

[d] This witness was also unable to positively attest to a partnership agreement between the parties. She attested to an agreement between the parties in December 2015, but it became clear during cross-examination that she did not know what document she attested to as a witness. Upon a question by the court, the witness admitted that she did not know what a partnership agreement was.

[e] What is interesting in respect of the witness statements of these two witnesses is that the plaintiff drafted the statements on their behalf, and I got the distinct impression that the contents in these statements were not the own words of the respective witnesses but rather those of the plaintiff.

[f] Ms Nakwalumbe, for instance, deposed to the witness statement in English but testified with the assistance of an interpreter. During her evidence, she testified that on occasion she heard the plaintiff and the defendant discuss things as her room was adjacent to the office but could not elaborate on the details and testified that the conversations were in English. Consequently, she did not understand everything that was said.

[g] From the evidence of Ms Nakwalumbe, it is clear that she drew her own conclusions as to the relationship between the plaintiff and the defendant as she was neither introduced to her as an owner of the business nor was he introduced as the husband of the defendant.

[89] As mentioned above, I will have to consider the versions of the plaintiff and the defendant to make any findings herein, which are unfortunately mutually destructive, as pointed out earlier.

Mutually destructive versions

[90] In *Burger's Equipment Spares Okahandja CC v A Nepolo t/a Double Power Tech Services*¹ the court discussed the approach by courts as follows when dealing with two mutually destructive versions:

[113] Two versions are mutually destructive if the acceptance of the one must necessarily lead to the rejection of the other.²

[114] In *Sakusheka & another v Minister of Home Affairs*,³ Muller J referred with approval to the case of *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others*,⁴ where the Supreme Court of Appeal of the Republic of South Africa stated that, where there are two irreconcilable versions in a civil matter, in order to come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of various factual witnesses; (b) their reliability; and (c) the probabilities.'

Applicable legal principles and discussion

[91] A partnership is a legal relationship that derives from a contract between at least two (2) persons. The person who relies on a partnership contract must allege and prove a contract with the following essentials⁵:

- a) an undertaking by each party to bring into the partnership, ie money, labour or skill;
- b) in order to carry on business for the joint benefit of all the parties and
- c) the common object of making profit.

¹ (SA 9-2015) [2018] NASC (17 October 2018).

² *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 662C-E.

³ *Sakusheka & another v Minister of Home Affairs* 2009 (2) NR 524 (HC).

⁴ *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) 11 (SCA) at 14I-15D.

⁵ *Amblers on Pleadings* 7th Ed at 308.

[92] The trite principles of partnership can be found in the often-quoted case of *Joubert v Tarry & Co* 1915 TPD 277 the court accepted Pothier's formulation of the essentials of partnership⁶:

'Now, what constitutes a partnership between persons is not always an easy matter to determine. The definitions which have been quoted to the Court differ to some extent. But I think we are safe if we adopt the essentials which have been laid down in Pothier on Partnership, borne out as these are by the definitions which he gives of partnership. These essentials are fourfold. First, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is, that the object should be to make a profit. Finally, the contract between the parties should be a legitimate contract.'⁷

[93] For a partnership to be validly formed all the general requirements regarding validity must be met. Furthermore, for an agreement to be one of a partnership, consensus must have been reached on all the essential terms of the partnership.

[94] According to the learned author RH Christie in *The Law of Contract in South Africa*⁸ states that in order to decide if a contract exists, one look first for the agreement by consent by two or more parties.

[95] In the words of Wessels⁹ and approved by Roberts AJ in the case of *Jordaan v Trollip*¹⁰ :

'Although the minds of the parties must come together, courts of law can only judge from external facts whether this has or has not occurred. In practice, therefore, it is the manifestation of their wills and not the unexpressed will which is of importance.'

External facts

⁶ This definition has been accepted by the Appellate Division in *Purdon v Muller* 1961 (2) SA 211 (A) at 218C - G per Ogilvie-Thompson JA (as he then was).

⁷ At 280 to 281.

⁸ 5th Ed at p 21.

⁹ RH Christie *supra* at p 21 with reference to Wessels at para 62.

¹⁰ *Jordaan v Trollip* 1960 1 PH A25 (T).

[96] Keeping these wise words in my mental spectacle, I will proceed to consider the external facts before me.

[97] The plaintiff was opposed to the defendant setting out how the businesses came into existence and found it to be irrelevant. However, to bring this matter into context and for the court to have a perspective of how the businesses came into existence is critical in light of the defendant's plea that no partnership agreement existed between the parties.

[98] The evidence of the defendant on how she started her business venture by leasing property and stock from the plaintiff stands undisputed. The defendant started leasing from the plaintiff in 2000, and from the time that she opened the bank in the name of R Alweendo t/a Stop & Shop Supermarket, she operated the bank account exclusively. The plaintiff testified that he had full access to the bank account by virtue of his signing power to the bank account, be it for business or private use. The plaintiff submitted around 30 pages of cheques (6 cheques per page) into evidence in support of this contention. However, having regard to these cheques spanning over 8 years (2010 to 2018), I observed only 5 cheques made out for cash signed by the plaintiff. The rest of the cheques were made out for what appears to be business expenses. One cheque was made payable to the plaintiff for N\$ 3000 dated 14 October 2014. The plaintiff clearly did not have free reign over the defendant's cheque account as he wanted the court to believe.

[99] It is common cause that the plaintiff had signing powers. The defendant explained that it was necessary because of the inherent danger to travel with large amounts of cash, which the plaintiff would have with him if and when he had to make purchases for the businesses.

[100] The plaintiff testified that the plots obtained from the traditional authorities were applied for and registered in the defendant's name as she is indigenous to the area, and it would be easier for her to be allocated plots by the traditional authority. This reasoning I can understand, but it does not explain why the bank account was never changed into that of the partnership. The defendant had to negotiate overdrafts and loans and carried all the

liabilities. Nothing was at the bank to indicate that this business or business falls within a partnership.

[101] From all the documents presented to this court, it is evident that the defendant is the sole proprietor of the Stop & Shop Supermarkets, and the implications, which the plaintiff acknowledged, are that the defendant's liability is unlimited and that she is personally responsible for all the assets but more importantly the debts of the businesses. In the eyes of the law, the defendant is not distinguished from the businesses.

[102] The plaintiff had no liability if the defendant defaulted on her overdrafts or loans or any other debt that she may have regarding the businesses.

[103] On his own version, the plaintiff had no right to sign or co-sign any of the businesses' financial documents. On a question of the court as to why he could not sign the financial statements, being a partner, the plaintiff responded by saying only the owner of the business could sign the financial documents but that he could probably 'pp' the documents, ie sign on behalf of the defendant, with her permission.

[104] It is undisputed that the defendant is registered as a VAT payer and presumably also a taxpayer as a sole proprietor, which falls under individual taxpayers. It is common cause that the plaintiff is not registered as a VAT payer regarding the businesses in question. Therefore in case of default, once again, the defendant alone will be liable to the Ministry of Finance for the payment of arrear VAT, if any.

[105] It is my understanding from the Income Tax Act, 24 of 1981, that a partnership is not regarded as a separate legal entity and the Act provides further in terms 56(15) that a person conducting a business in a partnership must submit separate returns and computations in how the tax was calculated and in addition to that a copy of the partnership's financial statements must be attached to it¹¹.

¹¹ (15) Persons conducting a business in a partnership shall furnish separate returns of income and computations as contemplated in subsection (1)(a), but every such person shall in his or her return include a copy of the joint financial statements of such partnership, together with such other or further particulars as may from time to time be prescribed.

[106] In my view, if there were two institutions that had to be apprised of the partnership status of the plaintiff and the defendant, it would be the Receiver of Revenue (Ministry of Finance) and the relevant banking institution.

[107] Although the plaintiff did not testify to it in as many words, one must assume that s 56(15) of the Income Tax Act was never complied with as the financial statements were not drafted for a partnership but a sole proprietor. The fact that the plaintiff had insight into the financial statements and signing rights to the business bank accounts does not assist him in his claims to be a partner in the defendant's business.

[108] There are no official certificates/documents on which the plaintiff is reflected as a (part) owner of the businesses. The liquor licences were applied for by the defendant and issued in the defendant's name. If a partnership applied for the relevant liquor licenses, there were specific requirements that had to be met, for example, sections 8 and 9 of the Regulations to the Liquor Act, 6 of 1998, which requires a resolution to be filed authorising the applicant to bring an application on behalf of the partnership¹² and the filing of an affidavit of financial interest listing each person who will have a financial interest in the business and the nature and extent of the interest. This was clearly not done as the liquor licenses are issued to Rosalia Alweendo as the owner of the businesses. The same applies to the fitness certificates.

[109] During cross-examination, the plaintiff conceded that he could not sign any documents on behalf of the business, which remains puzzling in light of the plaintiff's claim regarding the partnership. It would appear that the plaintiff was the spokesperson

¹² **Application by body corporate, organisation or association.**

8. (1) An application form or other document required to be signed by an applicant, licensee or other person must be signed, if the applicant, licensee or person is a body corporate, an organisation, partnership or other association of persons, by a person who is authorised to make the application or sign the document on behalf of the body corporate, organisation, partnership or other association by virtue of a resolution of the executive authority or the members or partners of the body corporate, organisation or association concerned.

(2) An extract of the resolution referred to in sub-regulation (1) must be attached to the application form or other document concerned.

(negotiator) on behalf of the defendant and also drafted correspondence in this regard. The defendant confirmed that the plaintiff assisted her in drafting letters or other documents and engaged in negotiations on her behalf, but the defendant insisted that it was never in the capacity of a partner. The plaintiff insisted that he acted as a business partner. However, there are limited documents before this court to confirm the plaintiff's allegations.

[110] In support of the plaintiff's claim that the partnership agreements existed between the parties, the plaintiff relies on some documents.

[111] There is a written partnership agreement entered into on 30 June 2005, wherein the parties agreed to a partnership in respect of the Onathing Supermarket. It was agreed that the defendant would pay an amount of N\$ 2500 per month to the plaintiff as his share of the building, and as the plaintiff did not share in the day to day running of the business, he would not be entitled to any profits gained. However, the plaintiff does not rely on this agreement in support of his claim, as will become clear later in my discussion.

[112] The first important document that the plaintiff relies on is the written partnership agreement, which reads as follows:

'PARTNERSHIP AGREEMENT (sic)

IT IS HEREBY DECLARED AND AGREED BETWEEN THE FOLLOWING PARTIES

ROSALIA ALWEENDO

And

PIETER ANDRIES DELPORT

That they hereby enter into a Business Partnership. The Partnership will be trading under the name of Stop @ Shop Group. It is further agreed that both parties will have equal shareholding and that the shareholding will remain the same in other businesses in future.

No Partner will engage or enter into another business without the explicit permission of the other Partner.

Both Partners will give their full attention to the business and assist each other where needed.

When a Partner passes away, his or her shares will automatically become the property of the remaining Partner without any compensation to be paid whatsoever. (my emphasis)

This is done and signed by the Parties on this day the 14 of April 2003 and at Ondangwa

Signed

PA Delpont

Signed

R Alweendo

Witnesses

Witness 1

S Nakwalumbu

07.12.15'

[113] Secondly, the plaintiff relies on a letter dated 17 February 2015 wherein the defendant referred to him as a partner in the Stop and Shop Supermarket. This letter read as follows:

'APPEAL AGAINST DECISION OF THE COMMUNITY COURT

We the owners of Stop & Shop Supermarket and more specifically Rosalia Alweendo hereby request the above court in terms of section 11.2(a) (i) and (ii) of Government Gazette no 3095 Regulations of the Community Courts Act 10 of 2003 to supply us with a copy of the record of proceedings in the case against Ms Rosalia Alweendo and presided over by the Ondonga Traditional Court, including a written judgment showing:

(i) the facts the Justice found to be proved, and

(ii) the Justice's reason for the decision.

Herewith a copy of the relevant regulation for your convenience.

Signed

Rosalia Alweendo and Partner'

[114] Following on this request for reasons from the traditional authority the defendant deposed to a confirmatory affidavit on 22 June 2015, in respect of the case before Ondangwa Magistrate's Court, wherein the defendant stated as follows (I extract the relevant portion only):

'I am a partner in Stop & Shop Supermarkets with Mr PA Delpport. We are trading at Okankolo Village, Oshikoto region under the name Stop & Shop Supermarket.

Mr Delpport is the senior partner and spokesperson for the Stop & Shop group.'

[115] Thirdly, the plaintiff relies on an email dated 22 July 2013, which he submits to prove that the defendant admitted that they were partners. The plaintiff directed this email correspondence to the Pepkor retail group, wherein he records as follows:

'I, André Delpport, and Rosalia Alweendo are partners in the business known as business known was Stop &Shop Supermarkets. One of our businesses is situated in the village of Okankolo 52 km from Ondangwa parallel to the tar road to Oshikango.' (remainder of the email is not repeated as it is not relevant to the discussion)

Greetings

André Delpport'

[116] It is common cause that the plaintiff drafted all the correspondence, including the letter mentioned above and email and the partnership agreement. In the confirmatory affidavit, and whilst pursuing an appeal, the defendant declared that the plaintiff was a senior partner with reference to the supermarket in Okonakolo Village. Interestingly, the plaintiff is referred to in this letter as the 'senior partner', yet he could make no decisions on behalf of the business.

[117] There are no other documents drafted by anybody other than the plaintiff or under the defendant's own hand wherein it is indicated that the plaintiff was the defendant's business partner. Not even the lease agreement with the Pepkor Group. In fact, the plaintiff only signed as a witness to the lease agreement. In my view, the issue raised that the defendant would easier obtain land from the traditional authority did not apply during the Pepkor transaction. It also makes no sense that the plaintiff would not co-sign as owner and partner, especially if the plaintiff was a 'senior partner' in the business.

[118] The plaintiff's explanation for not signing the Pepkor agreement as a partner is a poor one. By the time the defendant entered into negotiations with the Pepkor Group, it was two years after the conclusion of the partnership agreement. Yet, nothing was done to correct

the bank's records with reference to the partnership that the plaintiff relies on. To say he had to sign as a witness instead of a partner because the lease agreement would serve as security to the bank does not pass muster.

The 2005 partnership agreement

[119] Although omitted from the plaintiff's further amended particulars of claim dated 11 December 2020, the pre-trial order list one of the issues of facts between the parties, the question of whether the parties entered into a business partnership trading under the name and style of Stop & Shop Group Supermarkets in June 2005 and whether this related to Onathing Supermarket only.

[120] The plaintiff, in as many words in his replication to the defendant's plea, stated that that specific contract is irrelevant to the proceedings. The plaintiff is clearly not relying on this agreement. This appears to be for obvious reasons, as became apparent from the plaintiff's answers to the court's questions. According to the plaintiff, he assisted the defendant from 2000 to 2010 as her romantic partner.

[121] The plaintiff stated as follows on a question by the court¹³:

'So Mr Delport you say from 2000 to 2010 you were just assisting Ms Alweendo? ---- Yes My Lady.

You were not a partner you were her romantic partner, and you assisted her to make decisions and to execute things and plans and (indistinct) in the process, you were maintained that way? ---- Yes My Lady.

And then you say in 2010 when you decided you and her decided to have a child that is when the idea of a partnership came about, who came up with the idea?---- Both of us maybe I suggested it I cannot say for sure now after so many years and we would discuss the pros and cons and I mean why would I remain until I am in old age to be kept all the years otherwise I would left it, there is nothing in it for me and why would I have a child with the defendant if there is no future.' (my underlining).

¹³ Transcribed record at p 69 line 20 top 70 line 5.

[122] The 2005 agreement does not form part of the plaintiff's claim and will not be considered in reaching a decision in this matter.

The 2010 and 2015 partnership agreement

[123] In his particulars of claim the plaintiff pleaded there was an 'oral, tacit' partnership agreement between the parties during 2010 and a written partnership agreement in 2015. Unfortunately, there appears to be some theme before purportedly entering into the agreements pleaded to by the plaintiff.

[124] The defendant vehemently denies that a partnership agreement existed between the parties, with reference to the 2015 partnership agreement and further submitted that she did not understand the contents of the agreement that she signed and that she was under the impression that the agreement was to protect the interest of their minor child should it be necessary and she is incapacitated.

[125] I specifically emphasize the sentence in the 2015 partnership agreement 'when a partner passes away. This is my considered view is in line with the defendant's version that she was concerned about their minor child and that the agreement was drafted in the best interest of the couple's child.

[126] If I have regard to the evidence, it would appear that it is common cause that the defendant was concerned for the well-being of their child if either of the parties should pass away, and it is further evident that this was the starting point of the agreement. The specific wording of the agreement supports the evidence of the defendant. The agreement was entered at the plaintiff's insistence, and he conceded that he was the one to suggest the agreement (which he then drafted as well). The defendant's evidence is that the plaintiff insisted that she signs the document, and if not, he would walk away and leave her with a minor child without a father. In the defendant's mind, she signed this document securing their child's future and not agreeing to a partnership agreement.

[127] It looks like something similar happened in 2010 because from the plaintiff's evidence, it appears that he was not sure if he was going to stay with the defendant, and he wanted more. He wanted the child they agreed to have, but he wanted something more to keep him in the relationship. At first, the plaintiff stated that the defendant offered him a partnership to cement their relationship, but later, it appears the so-called partnership might have been his idea. The plaintiff also alleges it was an 'oral, tacit' agreement. I am not sure what the plaintiff means by that. During cross-examination on this issue it was determined that there was neither a discussion nor an agreement between the plaintiff and defendant in this regard.

[128] It is also evident that nothing changed after 2010 apart from the defendant giving the plaintiff signing powers for reasons she explained. The defendant denies that there was an oral or tacit agreement between the parties to enter into a partnership in 2010. Considering the facts before me, there were no external factors to support the plaintiff's evidence.

[129] The plaintiff brought the court under the impression that he was permanently residing with the defendant and was actively involved in the businesses' day-to-day running. This appears not to be the case. The defendant painted a much different picture to this court regarding the coming and goings of the plaintiff. She stated that she was the girlfriend whom the plaintiff would visit and not stay with permanently. When the plaintiff had the opportunity to confront the defendant on these startling statements, he left it at that and asked only two follow-up questions after those of the court¹⁴, ie

'And you told the Court Mr Delpont was only a frequent visitor to the North he would come and stay a few days and then to is that what you meant?---- Yes Mr Delpont.

But if I may refresh your memory all the cheques which I showed you which Mr Delpont bought goods from it was not a whole week and weeks after each other it was not just three days and then another three months again?---As I say Mr Delpont if the Court ask for Mr Delpont or me to set all the cheques in order that we can prove and explain why this month have a lot of cheques.'

[130] The questions directed to the witness did not amount to a denial but rather some form of qualification.

¹⁴ Transcribed record p 159 line 30 top 160 line 9.

[131] It is undisputed evidence that the defendant maintained the plaintiff, buying him food, cigarettes, paying his car instalments, give him fuel money to travel to or from the North. This evidence by the defendant rings accurate as, on the plaintiff's own version, he would ask the defendant for money or get money from a cashier by signing an IOU. That is not the behaviour of a partner in a business that appears to be quite lucrative and has shown profit during the past few years.

[132] The plaintiff relies on the documents in support of his case drafted by himself, but in my view, there are no external factors supporting this purported partnership agreement. The defendant pertinently pleaded that the agreement was signed due to the plaintiff fraudulently misrepresenting the document to her.

[133] The partnership agreement dated December 2015 was signed by the defendant, and the applicable principle is that in signing a document, the party so doing is bound by the meaning and effect of the words that appear over his or her signature unless such a person is under justifiable misapprehension caused by the other party who requires such a signature as to the effect of the document¹⁵.

[134] In *Brink v Humphries & Jewell (Pty) Ltd*¹⁶ Cloete JA writing for the majority, stated as follows:

[2] The applicable principles of law are well established and require little discussion. The basis of the caveat subscriptor rule relied upon by the respondent is the doctrine of quasi-mutual assent. The locus classicus on the point is the following passage in *George v Fairmead (Pty) Ltd*¹⁷

“As the latter part of the passage just quoted makes clear, an innocent misrepresentation by the other party suffices¹⁸: The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. Where such a misrepresentation is material, the signatory can¹⁹ rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if

¹⁵ *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) at para 2.

¹⁶ *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA).

¹⁷ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 470B - E.

¹⁸ *Spindrift (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 316I - J.

¹⁹ Absent a contractual term precluding reliance on the representation: See the majority decision in *Trollip v Jordaan* 1961 (1) SA 238 (A).

he had known the truth. Where the misrepresentation results in a fundamental mistake, the 'contract' is void ab initio²⁰. In this way, the law gives effect to the sound principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his/her signature, while, at the same time, protecting such a person if he/she is under a justifiable misapprehension, caused by the other party who requires such signature²¹, as to the effect of the document."

[3] In deciding whether a misrepresentation was made, all the relevant circumstances must be taken into account and each case will depend on its own facts. For present purposes, all that need be said in this regard is that the furnishing of a document misleading in its terms can, without more, constitute such a misrepresentation²².' (My emphasizes)

[135] The defendant testified that she was misled about the purpose of the agreement and that she had no intention of entering into a partnership agreement with the plaintiff. The defendant testified about the coercive circumstances under which the agreement was signed. The plaintiff did not confront the defendant with the true position of what happened at the time of signature of the agreement apart from suggesting that it was something thought up whilst in court, as it was not set out in detail in her witness statement. In this regard, the plaintiff's version during his cross-examination amounted to a bare denial.

[136] The plaintiff realized it was a question of his word against that of the defendant, and during cross-examination, she was questioned whether she had a witness to prove that she signed under duress. However, I am satisfied that the evidence demonstrates that the defendant signed the agreement to placate the plaintiff. There was no meeting of the minds regarding a partnership agreement.

[137] The defendant also testified that she did not have the benefit of legal advice as to the implication of the agreement, nor did she fully understand the agreement. In fact, she did not even properly read the agreement as the plaintiff was very angry at the time, and she had to accept what he told her. This evidence stands unchallenged.

²⁰ *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Janowski v Fourie* 1978 (3) SA 16 (O); *Maresky v Morkel* 1994 (1) SA 249 (C).

²¹ It is not necessary to consider the position where the misapprehension has been caused by a third party.

²² As in *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C).

[138] The plaintiff confronted the defendant in respect of her claim that she did not fully understand the agreement and that she did not properly read it.

[139] In *Brink v Humphries & Jewell (Pty) Ltd* Cloete²³ JA stated further in the judgment as follows:

'[11] It is true that the appellant had ample opportunity to read the form carefully and he did not avail himself of that opportunity. But that is no answer. It is not reasonable for a party who has induced a justifiable mistake in a signatory as to the contents of a document to assert that the signatory would not have been misled had he read the document carefully; and such a party cannot accordingly rely on the doctrine of quasi-mutual assent.'

[140] Having considered all the evidence before me satisfied that the defendant was coerced into signing the purported partnership agreement as a result of the plaintiff's misrepresentation as to the nature of the agreement. The plaintiff cannot rely on the agreement obtained by a material misrepresentation in an attempt to enforce the so-called partnership agreement.

[141] In any event, even if this court did not find that there was a material misrepresentation that causes the agreement to be void the plaintiff would have been hard pressed to convince the court that a valid partnership agreement was in place as the essentialia of a partnership agreement was lacking. One critical requirement was that there had to be an agreement regarding profit and loss. It is not a partnership where only of the 'partners' are entitled to the whole of the business's profits, which was the case in the current instance.

[142] The purported agreement is not even explicit as the business to which it would relate. It is common cause that there is not an entity such as the Stop & Shop Supermarket Group. The defendant traded as a sole proprietor. The nature of the business was also not identified.

²³ Supra footnote 16.

Conclusion

[143] Having considered all the relevant evidence, I am not convinced that the plaintiff was able to prove his case on a balance of probabilities, and his claim stands to be dismissed.

Order

[144] My order is as follows:

- (a) The plaintiff's claim is dismissed with costs.
- (b) Such costs to include the costs of one instructing counsel and one instructed counsel.

JS Prinsloo
Judge

APPEARANCES:

For the plaintiff:

In Person

For the defendant:

L Ihalwa

On the instructions of Nicky Ngula Legal
Practitioners