

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

LEBUSA MOTLOMELO

Appellant

and

LETHABELA MATHE

First Respondent

BOLIBA MULTI-PURPOSE COOPERATIVE

Second Respondent

LESOTHO BANK (1999) LIMITED

Third Respondent

11, 20 April 2005

CORAM: RAMODIBEDI, JA
 SMALBERGER, JA
GAUNTLETT, JA

Summary

Partnership - for a partnership agreement to be valid it must comply with the provisions of the Partnerships Proclamation 78 of 1957 - the law does not recognise a common law partnership falling short of such requirements.

JUDGMENT

SMALBERGER, JA

[1] The appellant (as applicant) sought an order in the High Court dissolving the partnership he alleged existed between himself and the (first) respondent, and certain

ancillary relief. The matter came before Guni J. The learned Judge dismissed the application, with costs. She held that there could not have been a partnership cognizable in law between the parties because of non-compliance with the relevant provisions of the Partnerships Proclamation 78 of 1957 (“the Proclamation”). The appellant appeals against her finding in that regard. The appeal raises the question whether the Proclamation precludes the existence of what would otherwise be a valid and enforceable partnership under the common law.

- [2] The appellant alleged facts in his founding affidavit which *prima facie* satisfy the requirements for a common law partnership i.e. a legal relationship between himself and the respondent to carry on a lawful undertaking to which each contributes something with the object of making, and sharing, profits (cf Purdon v Muller 1961 (2) SA 211 (A) at 217; Novick v Benjamin 1972 (2) SA 842 (A) at 851). The respondent in turn, in his answering affidavit, admitted to the existence of what he referred to as a “joint venture” between the parties, the terms of which he claimed differed in certain material respects from those alleged by the appellant. What is clear is that the parties were associated in a transportation undertaking the object of which was to make and share profits; the precise terms of their arrangement, however, are in dispute.
- [3] The preamble to the Proclamation records that its purpose is “[t]o consolidate the law relating to partnerships and their registration ...” Its relevant provisions are couched in peremptory terms. Thus section 2 (1) provides that:
- “The terms of every partnership agreement entered into after the commencement of this Proclamation shall be recorded in a deed of partnership, which shall be signed by all the partners before a notary or an administrative officer, who shall attest the same accordingly. Such deed shall be registered ...”.
- [4] Section 5 (1) sets out what every deed of partnership “shall record”. Included are, *inter alia*, the date of formation of the partnership; the full names and addresses of the partners; the purpose of the partnership; the period for which the partnership is formed; the place or area in which the partnership business is to be carried on; the amount of capital or the nature and value of the services or assets brought into the partnership by every partner; and the duties and degree of participation of each

partner in the business of the partnership.

- [5] In terms of section 1 of the Proclamation a partnership means “any legal relationship between two or more persons, but not exceeding twenty persons, who carry on, or intend to carry on, any lawful business or undertaking to which each contributes something, with the object of making a profit and of sharing it between them”.
- [6] The Proclamation is a commendable legal enactment. By requiring that a partnership agreement should be in writing, be registered and record the details set out in section 5 (1), it ensures certainty in relation to partnership arrangements, obviates disputes and discourages false claims. The legislature’s intention to achieve these aims would be negated if a common law partnership, with none of the safeguards provided by the Proclamation, were still to be recognised. While it is true that there is no express provision in the Proclamation which excludes common law partnerships, if regard is had to the Proclamation’s stated purpose, the aims it seeks to achieve and the peremptory, all-embracing nature of its provisions, such exclusion must inevitably follow by necessary implication. I conclude, therefore, that the law of Lesotho does not recognise as valid and enforceable a partnership agreement which, although it satisfies the essential requirements for a partnership in terms of the common law, fails to comply with the provisions of the Proclamation.
- [7] The appellant’s counsel suggested that some recognition of a common law partnership was to be found in the provisions of section 28 (5) of the Proclamation. In my view that section does not afford any legal recognition to an unregistered partnership. It merely allows a form of equitable relief in circumstances where the section applies.
- [8] It is common cause that the allegations made by the appellant, and the written agreement on which he relied, in support of his claim that a partnership existed between himself and the respondent do not satisfy the requirements of the Proclamation. There was accordingly no valid partnership to found the relief he sought. In the circumstances Guni J was correct in dismissing his application.
- [9] It does not necessarily follow that the appellant, assuming his version of the facts to be correct, is remediless. He may well have a cause of action founded on contract

(other than partnership) which would entitle him to a debate of account (cf Rectifier and Communication Systems (Pty) Ltd v Harrison and Others 1981 (2) SA 283 (C) at 286), or a claim based on enrichment. I express no definite view on the matter.

[10] In the result the following order is made: The appeal is dismissed, with costs.

J.W. SMALBERGER

JUDGE OF APPEAL

I concur.
M. M. RAMODIBEDI

JUDGE OF APPEAL

I concur.
J. J. GAUNTLETT

JUDGE OF APPEAL

For the Appellant: Mr Loubser

For the First Respondent: Mr K.E. Mosito