

JJ Henning

Some manifestations of the statutory recognition of a partnership as an entity

Summary

The general rule in South African law is that a partnership has no existence in itself distinct from the partners of which it is composed. A brief analysis of South African legislation, however, reveals a significant number of instances departing from the general rule to some extent. This leads to a conclusion that, notwithstanding the general rule, whether or not a partnership can be treated as a mere aggregate of individuals or a “juristic person”, “entity”, “person”, “private body” or the like for purposes of a particular statutory provision is a matter of careful interpretation.

Etlike verskyningsvorme van die statutêre erkenning van 'n vennootskap as 'n entiteit

Die algemene reël in die Suid-Afrikaanse reg is dat 'n vennootskap geen afsonderlike bestaan het van die vennote nie. 'n Bondige ontleding van Suid-Afrikaanse wetgewing toon egter 'n beduidende getal gevalle waar van die algemene reël, in die een of ander opsig, afgewyk word. Dit kan 'n gevolgtrekking regverdig dat, ondanks die algemene reël, dit telkens 'n sorgvuldige uitleg vereis om vas te stel of 'n vennootskap vir die doeleindes van 'n sekere statutêre bepaling as 'n blote versameling individue of eerder as 'n “regspersoon”, “entiteit”, “persoon”, “privaat liggaam” of iets soortgelyks beskou moet word.

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1. Introduction

Internationally and historically, considerable debate has been devoted to the respective merits of the entity and aggregate theories of the legal status of partnership and, consequently, the extent to which courts and legislators have treated or should regard the partnership as an entity distinct from the partners or merely as a collection of individuals. Some controversy still remains.¹

From early on, South African jurisprudence has in the main² regarded a partnership as a mere aggregate or collection of individuals, having no separate identity or existence apart from its members.³

Thus, the basic principle or general rule in South African law is that a partnership is not a legal entity or persona separate from its members; it has no existence of its own, distinct from the partners of which it is composed, although some exceptions or quasi-exceptions are acknowledged.⁴ The rights and duties of the partnership are the rights and duties of the partners, and its property is owned by the partners jointly in undivided shares.⁵ If two or more individuals, in their capacity as partners, enter into an agreement with another person, the identity of the partners is synonymous with the identity of the individuals entering into the agreement. Evidence that they entered into the agreement as partners is merely evidence as

1 See Henning 2014:139-140.

2 For exceptions in post-Union jurisprudence, see, e.g., *Silbert v Evans* 1912 TPD 425:434, 441; *Potchefstroom Dairies v Standard Fresh Milk Supply* 1913 TPD 506:512; *Estate Brown v Brown* 1923 EDL 291:295; *Rees v Feldman* 1927 TPD 884:888; *Liquidators of the Durban Roodepoort Mynpacht Syndicate v Blankfield* 1922 TPD 173:176; *Ex parte Buttner Bros* 1930 CPD 138:140; *Mahomed v Karp Bros* 1938 TPD 112:113; *Michalow v Premier Milling* 1960 2 SA 59 W; *Standard Bank v Lombard* 1977 2 SA 808 W:813G.

3 For jurisprudence during the past 60 years, see, e.g., *Commissioner for Inland Revenue v Epstein* 1954 3 SA 689 A:699; *Goldberg v Di Meo* 1960 3 SA 136 N:142; *Michalow v Premier Milling*:61; *Muller v Pienaar* 1968 3 SA 195 A:202-203; *Abro v Softex Mattress* 1973 2 SA 346 D:351; *Ex parte Cohen* 1974 4 SA 674 W:675; *Standard Bank v Lombard*:813; *Strydom v Protea Eiendomsagente*:209; *Spie Batignolles Société Anonyme v Van Niekerk: in re Van Niekerk v SA Yster & Staal Industriële Korporasie* 1980 2 SA 441 NC:446; *Ex parte Menzies et Uxor* 1993 3 SA 799 C:6; *Da Silva v Pillay* 1997 2 All SA 217 D:221; *Metlika Trading v Commissioner, South African Revenue Service* 2005 3 SA 1 SCA:13; *Gardee v Dhanmanta Holdings* 1978 1 SA 1066 N:1067-1068; *Ferela v Craigie* 1980 3 SA 167 W:169A; *DF Scott (EP) v Golden Valley Supermarket* 2002 6 SA 297 SCA.

4 *Muller v Pienaar*:202-203; *Ex parte Cohen*:675; *Strydom v Protea Eiendomsagente*:209; *Standard Bank v Lombard*:813; *Lombard v Standard Bank* 1977 2 SA 806 T:807D; *DF Scott (EP) v Golden Valley Supermarket; Spaeth v Schneider* 1960 2 SA 629 SWA:631; *Michalow v Premier Milling*:63. See in particular also Henning 2014:139-167; De Wet & Van Wyk 1978:391, 408, 525-526; Hahlo & Kahn 1960:702; Jorna 1993:22; Snyman 1995.

5 *Sacks v CIR* 1946 AD 31:40; *Muller v Pienaar; Strydom v Protea Eiendomsagente*.

to the relationship between the two or more individuals – a relationship established by contract.⁶

An analysis of Roman-Dutch law sources⁷ reveals that there was some appreciation of the entity view of partnerships, and that a number of statutory provisions treated a partnership as a separate entity for certain purposes.⁸ Although our jurisprudence has not as yet taken full cognisance of these sources, they do give rise to the question as to whether a similar recognition appreciation of the entity view of partnership is to be found in South African legislation.

Therefore, this contribution aims to explore whether, in view of the general rule that a partnership is not a separate entity at common law,⁹ South African law also contains statutory provisions that do not treat a partnership as a mere aggregate of individuals, as the general rule maintains. Put differently, when interpreting a particular statutory provision, can it be summarily accepted that the status of the partnership under that legislation will conform to the general common-law rule, or is there sufficient reason to believe that a more considered approach has to be followed in order to determine a partnership's status, necessitating a careful analysis of, for instance, the definitions section of the particular statute?

To answer this question, a search of traditional hard-copy legal sources was conducted, supplemented with an electronic search of the Jutastat e-publication *Juta's Statutes of South Africa*¹⁰ using the keyword "partnership". The results obtained are summarised below.

2. Statutory provisions¹¹

2.1 Acquisition of legal personality

In so far as a partnership qualifies as an association of persons formed after 31 December 1939 for the purpose of carrying on a business aimed at the acquisition of gain by its individual members, it is prohibited by the *Companies Act 71 of 2008* to be a body corporate, unless it is registered as a company under the *Companies Act*.¹² The effect is that it is not

6 *Muller v Pienaar*:203; *Strydom v Protea Eiendomsagente*:211; *DF Scott (EP) v Golden Valley Supermarket*.

7 For example, Kohler 1907:293.

8 For instance, the *Rechte ende Costumen van Antwerpen* of 1582, which carried considerable weight in Holland and especially in Amsterdam, and a Brabant statute of 1609. See Van der Keessel 1967:3.21.7 (Thesis 703); Voet 1689:14.4.8; Hansmann *et al.* 2006:1375.

9 *Chipkin (Natal) v Commissioner, South African Revenue Service* 2005 5 SA 566 SCA:570.

10 Expiry date 30 April 2015.

11 See also Henning 2014:166-169.

12 Or is formed pursuant to some other law, or was formed in pursuant to Letters Patent or Royal Charter before 31 May 1962 – *Companies*

possible for such an association of persons to acquire legal personality by conduct.¹³

It should be noted that the entity theory of the status of partnership does not entail that a partnership is clothed with all the attributes of legal personality in the same way as a common-law *universitas personarum* or an incorporated company or close corporation.¹⁴ Generally, it negates neither the ultimate personal liability *ex contractu* or *ex delicto* of the partners *singuli in solidum* for partnership debts and obligations, nor dissolution by disassociation by virtue of *selectus personae*. Thus, even in Scotland, where the separate entity of the firm is explicit, it is acknowledged that the partnership entity's legal consequences differ from those of the juristic persona of an incorporated association.¹⁵ It may, therefore, be argued that the precursors of this provision in the *Companies Act* 46 of 1926 and the *Companies Act* 61 of 1973 were aimed specifically at associations with large, fluctuating memberships, such as building societies, instead of ordinary partnerships.¹⁶

2.2 Juristic person or separate entity

2.2.1 Consumer protection, national credit, constitutional democracy, organised crime and land claims

The definition of "juristic person" in the *Consumer Protection Act*¹⁷ and the *National Credit Act*¹⁸ includes a partnership. The definition of "juristic person" in the *Firearms Control Act*¹⁹ originally included a partnership, but was substituted by the *Firearms Control Amendment Act*²⁰ with effect from 1 July 2003 and presently only includes a trust. However, the definition of "juristic entity" in the *Customs Control Act*²¹ includes a partnership.

Act 71/2008:section 8(3). See *Companies Act* 46/1926:section 4b; *Companies Act* 61/1973:section 31; *Helpmekaar (Thusano) Taxi Diens v Nasionale Vervoerkommissie* 1978 1 SA 250 O:255; *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 A; De Villiers 1976:144; Cilliers & Benade 1982:6-7; Cilliers *et al.* 2000:4-5.

13 Cilliers *et al.* 2000:7-8.

14 For these attributes, see Cilliers *et al.* 2000:7.

15 See Miller 1994:16.

16 See *Morrison v Standard Building Society* 1932 AD 229:238-239; Delpont & Vorster 2011:50-51.

17 *Consumer Protection Act* 68/2008:section 1. "[J]uristic person' includes – (a) a body corporate; (b) a partnership or association; or (c) a trust as defined in the *Trust Property Control Act*, 1988 (Act 57 of 1988); ..."

18 *National Credit Act* 34/2005:section 1.

19 *Firearms Control Act* 60/2000:section 1.

20 *Firearms Control Amendment Act* 28/2006.

21 *Customs Control Act* 31/2014:sectio 1.

The definition of “entity” in the *Protection of Constitutional Democracy against Terrorist and Related Activities Act*,²² the *Prevention of Organised Crime Act*²³ as well as the *Land Claims Court Rules*²⁴ includes a partnership.

2.2.2 Insolvency

The definition of “debtor” in section 1 of the *Insolvency Act*,²⁵ in connection with the sequestration of the debtor’s estate, includes a partnership or the estate of a partnership, which is a debtor in the usual sense of the word. The *Insolvency Act* treats the partnership as having a separate estate and as being in the same position as any other debtor.²⁶ It not only retains the partnership estate as a separate estate from the estates of the individual partners, but also precludes partnership creditors from preferring their claims against the individual estates.²⁷ At least initially, partnership creditors have to look for payment to the partnership estate only.²⁸ The trustee of the partnership estate is only entitled to the residue, if any, of a partner’s estate after all the claims of the private creditors of the partner have been paid in full, if that residue is required to pay the partnership’s debts.²⁹ Similarly, the trustee of a partner’s estate is entitled to the residue, if any, in the partnership estate after the claims of partnership creditors have been paid in full, to the extent that such partner would have been entitled to it, if his estate had not been sequestrated.³⁰ In accordance with this arrangement, separate accounts must be framed in the estate of the partnership as well as that of each individual partner.³¹ This leads to the hypothesis that third parties dealing with, and granting credit to a partnership do so in reliance only on the assets of the partnership, and that, throughout their dealings with the partnership, they regard it as a separate entity.³²

22 *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33/2004:section 1.

23 *Prevention of Organised Crime Act* 121/1998:section 1.

24 *Land Claims Court Rules*:Rule 1(a).

25 *Insolvency Act* 24/1936.

26 *Insolvency Act* 24/1936:section 2 (definition of “debtor”), 3(2), 13, 49, 92(5), 128; *Michalow v Premier Milling*:63; *Cassim v The Master* 1962 4 SA 601 D:606; *Ex parte Fernandez* 1965 3 SA 726 O:728; *Stellenbosch Farmers’ Winery v Pretorius*; *Ex parte Cohen*:677; *Gardee v Dhanmanta Holdings* 1978 1 SA 1066 N:1067-1068; *Strydom v Protea Eiendomsagente*:209; *Ferela v Craigie* 1980 3 SA 167 W:169A.

27 *Michalow v Premier Milling*; *Ex parte Cohen*; *Jorna* 1993:23.

28 *Insolvency Act* 24/1936:section 49; *Michalow v Premier Milling*; *Ex parte Cohen*; *Strydom v Protea Eiendomsagente*.

29 *Insolvency Act* 24/1936:section 49; *Michalow v Premier Milling*; *Ex parte Cohen*; *Strydom v Protea Eiendomsagente*.

30 *Insolvency Act* 24/1936:section 49; *Michalow v Premier Milling*; *Ex parte Cohen*; *Strydom v Protea Eiendomsagente*.

31 *Insolvency Act* 24/1936:section 92(5).

32 *Michalow v Premier Milling*:62; *Ex parte Cohen*; *Cassim v The Master*:606; *Gardee v Dhanmanta Holdings*:1071; *Strydom v Protea Eiendomsagente*:209;

From the moment a partnership is sequestrated, the partnership creditors are primarily confined to the partnership assets and automatically deprived of recourse against the partners individually. For purposes of insolvency law, the partnership estate is treated as a separate entity as soon and as long as its liabilities exceed the value of its assets.³³ Otherwise, partnership creditors would be deprived of the safeguards against preferences extended to all other types of creditors.³⁴

In an application for the sequestration of a partnership and of the partners, the “debtor” envisaged by section 10(c) of the *Insolvency Act* 24 of 1936 is the partnership, and the partnership alone: What must be considered under this provision is confined to the question as to whether, *prima facie*, there is reason to believe that the sequestration of the partnership estate would be to the benefit of the partnership’s creditors. All that counts is the effect of sequestration on the partnership’s own creditors; not the effect of the ancillary sequestration of the partners’ estates on the partners’ creditors.³⁵

In *Commissioner for SARS v Hawker Air Services: In re Commissioner for SARS v Hawker Aviation Services Partnership*,³⁶ the Supreme Court of Appeal held that the estate of a partnership can be sequestrated even where the estate(s) of one or more or even all of the partners cannot be sequestrated by virtue of a reason *not* provided for in section 13 of the *Insolvency Act*.³⁷

As far as the rehabilitation of an insolvent partner is concerned, the relevant provisions of the *Insolvency Act* 24 of 1936³⁸ refer only to the claims against a partner’s private estate that need to be considered, and do not include the claims against the estate of a partnership of which he has been a member.³⁹ The court may, however, take into account the partner’s conduct in respect of partnership matters.⁴⁰

Ex parte Fernandez:728.

33 *Michalow v Premier Milling*:63; *Cassim v The Master*:606; *Ex parte Fernandez*:728; *Ex parte Cohen*:677; *Strydom v Protea Eiendomsagente*:209; *Gardee v Dhanmanta Holdings*:1071; *Ferela v Craigie*:169.

34 *Michalow v Premier Milling*:63.

35 *Gardee v Dhanmanta Holdings*.

36 *Commissioner for SARS v Hawker Air Services: In re Commissioner for SARS v Hawker Aviation Services Partnership* 2006 2 All SA 565 SCA:575; *Commissioner, South African Revenue Services v Hawker Air Services*; *Commissioner, South African Revenue Service v Hawker Aviation Partnership* 2006 4 SA 292 SCA.

37 A body corporate falls outside the ambit of the definition of a debtor in section 2 of the *Insolvency Act*, and its estate cannot be sequestrated under the *Insolvency Act*, but can be liquidated pursuant to the provisions of the *Companies Act* 71/2008.

38 *Insolvency Act* 24/1936:sections 124(3)(b), 124(5).

39 *Ex parte Fernandez*; *Ex parte Cohen*; *Noordkaap Lewendehawe Koöperasie v Raath* 1977 2 SA 815 (NC):818.

40 *Ex parte Cohen*.

2.2.3 Rules of court

A partnership may sue or be sued in its own name.⁴¹ A partnership that was dissolved after the accrual of the cause of action, but before the issue of summons, may nevertheless be sued in its name at the date of the accrual of the cause of action.⁴² If so sued and judgement is taken against a partnership without the name of any of the partners being disclosed, execution may follow only against the property of the partnership. The assets of a partner who has not been served, who has not appeared, who has not been adjudged to be a partner, and whose name has not been disclosed as partner under the court rules⁴³ cannot without further proceedings be attached in execution of a judgement against the partnership.⁴⁴ These rules deal with procedure and not with substantive law. It does not turn a partnership or firm into a different entity or a juristic person existing separately from its members or owners.⁴⁵

The court has also refused to exercise its discretion to order payments by instalments in terms of *Uniform Rules of Court* rule 45(12)(j) in respect of a partnership debt against a partner in circumstances where both the partnership and the partner *prima facie* appeared to be insolvent, because, apart from other considerations, such an order would probably not be in line with the trends concerning partnerships in insolvency.⁴⁶ Although this approach was taken under review less than a decade after the decision,⁴⁷ it may still appear that, for purposes of civil proceedings, a partnership is to some extent treated as an entity.⁴⁸

41 *Supreme Court Rules*:rule 14; *Magistrates' Court Rules*:rule 54.

42 *Kirsh Industries v Vosloo & Lindeque* 1982 3 SA 479 W; *Spie Batignolles Société Anonyme v Van Niekerk*: in re *Van Niekerk v SA Yster & Staal Industriële Korporasie*.

43 *Kirsh Industries v Vosloo & Lindeque*; *Spie Batignolles Société Anonyme v Van Niekerk*: in re *Van Niekerk v SA Yster & Staal Industriële Korporasie*.

44 *Rees v Feldman*:889. See also *Engelbrecht v Visentin* In re *Visentin v Clensatron* SA 1997 1 All SA 48 W.

45 See *DF Scott (EP) v Golden Valley Supermarket*:301; *Ahmed v Belmont Supermarket* 1991 3 SA 809 N; *Simpson's Motors v Flamingo Motors* 1989 4 SA 797 W:791; *Standard Bank v Lombard*:813; *Strydom v Protea Eiendomsagente*:209; *Standard Bank v Pearson* 1961 3 SA 721 E.

46 *Noordkaap Lewendehawe Koöperasie v Raath*: 818G.

47 *P de V Reklame v Gesamentlike Onderneming van SA Numismatiese Buro & Vitaware*.

48 *Standard Bank v Pearson*:723C; *Greef v Janet* 1986 1 SA 647 T.

2.3 Person

2.3.1 Value-added tax (VAT)⁴⁹

The definition of “person” in the *Value-Added Tax Act* 89 of 1991⁵⁰ includes a partnership. If a partnership carries on an enterprise, it is, for VAT purposes in terms of the *Act*,⁵¹ deemed to carry on such enterprise as a person separate from its members. It is obliged to apply for its own VAT registration number. Registration of the partnership must occur separately from any registration of any of its members for any other enterprise. Liability for tax for supplies made by the partnership must be determined and calculated independently of any other enterprise carried on by its members. The statutory duties and obligations imposed upon a member must be performed by the partnership separately from the duties and obligations imposed on any of its members.⁵² In effect, therefore, a partnership is distinct from its members for VAT purposes. The practical significance is that a supply by a member to the partnership, or to a fellow member constitutes a taxable supply.⁵³ Since a partnership is constituted *intuitu personae*, which means that the *delectus personarum* is regarded as one of the main considerations on which an agreement of partnership is based, any change in membership destroys the identity of the firm. If a partner retires or dies, or a new partner is admitted, this brings about the dissolution of the existing partnership at common law. If the remaining partners agree to continue the business of the partnership, a new partnership is created. Since a new partner can be admitted only by agreement between him and all the existing partners, the existing partnership is dissolved and a new partnership created upon such new admission. Therefore, the reconstituted firm is, in each event, a new partnership and, although precisely the same business may be carried on under the style of the old firm, the business must be transferred to the new partnership.⁵⁴ In principle, therefore, each time a change in partners occurs, the partnership should, in the absence of specific statutory

49 De Koker & Kruger 2002.

50 *Value-Added Tax Act* 89/1991:section 1. “[P]erson’ includes any public authority, any municipality, any company, any body of persons (corporate or unincorporate), the estate of any deceased or insolvent person, any trust fund and any foreign donor funded project; ...”

51 *Value-Added Tax Act* 89/1991.

52 *Value-Added Tax Act* 89/1991:section 51(1).

53 De Koker & Kruger 2002; *Commissioner, South African Revenue Service v Hawker Aviation Services Partnership* 2005 5 SA 283 T.

54 *Executors of Paterson v Webster*, Steel 1881 1 SC 350:355: “There can be no doubt that, as a general principle, the Court can only recognise the members of which the firm consists, and that any change among them destroys the identity of the firm”; *Standard Bank v Wentzel & Lombard* 1904 TS 828:833-834; *Wagstaff & Elston v Carter & Talbot* 1909 TS 121; *Whitelock v Rolfes, Nebel* 1911 WLD 35:37-38; *Divine Gates v African Clothing Factory* 1930 CPD 238:240; *Goldberg v Di Meo* 1960 30 SA 36 N:142; *Kirsh Industries v Vosloo & Lindeque*:483.

provisions to the contrary, be required to re-register as the “person”, since the old partnership ceases to exist.

In terms of the *Value-Added Tax Act*,⁵⁵ however, if a partnership is dissolved, because one of its partners withdraws or a new partner is admitted, but the new partnership continues to carry on the enterprise as a going concern, the new and the dissolved partnership are deemed to be one and the same partnership. The new partnership, in effect, steps into the shoes of the dissolved partnership, and no new registration is required.

2.3.2 Jurisdiction: Magistrates’ courts

Under the *Magistrates’ Courts Act*,⁵⁶ jurisdiction in relation to a “person” includes a partnership that has business premises situated, or any member thereof residing within the district of that court.

2.3.3 Jurisdiction: Small claims courts

The *Small Claims Courts Act*⁵⁷ provides that its jurisdiction in respect of a “person” as defendant includes a partnership that has business premises situated, or any member thereof residing within the area of jurisdiction of the court. However, only a natural person may institute an action in the court, and a juristic person may become a party to an action in a court only as defendant.⁵⁸ In *Da Silva v Pillay*, in response to the submission that, although a partnership as such is not a natural person or juristic person, the individuals who constitute the partnership are natural persons, and may sue in a small claims court jointly as individuals,⁵⁹ it was held that in a case where all the partners are natural persons, this submission may be sound.⁶⁰ However, if the partners are juristic persons, or only one of them is a juristic person, none of them could institute action in a small claims court to enforce a right of the partnership. If all partners are juristic persons, this would be because none of them are natural persons; if only one partner is a juristic person, it would be because proceedings by the remaining partners who are natural persons would be prejudicial for non-joinder of the remaining partner, who, not being a natural person, could not institute action in a small claims court. Thus, if the submission is correct, the legislature has created an anomalous situation, namely that the individual partners of a partnership may institute action in a small claims court, provided that each of them is a natural person, but that a partnership in which all or some of the partners are juristic persons, or one

55 *Value-Added Tax Act* 89/1991:section 51(2).

56 *Magistrates’ Courts Act* 32/1944:section 28.

57 *Small Claims Courts Act* 61/1984:section 14. See also *Da Silva v Pillay*.

58 *Small Claims Court Act* 61/1984:section 7(1).

59 *Da Silva v Pillay* 1997 3 SA 760 D:765.

60 *Da Silva v Pillay*:766. Also see *Raman v Barlow Motor Investments t/a Natal Motor Industries, Prospection* 1999 4 SA 606 D.

of the partners is a juristic person, may not do so. There appears to be no *prima facie* reason why the legislature would wish to discriminate against a partnership of the latter kind. Indeed, this then suggests that, by its reference to “a natural person” in section 7(1) of the *Act*, the legislature did not intend to refer to partners in a partnership, even if they all happened to be natural persons.⁶¹

2.3.4 Jurisdiction: High court

In view of the entity approach apparent from the *Insolvency Act* as well as rule 14, especially rule 14(5)(h), of the *Uniform Rules of Court*, it was held in *Metlika Trading v Commissioner, South African Revenue Service*⁶² that the high court, in whose area of jurisdiction the principal place of business of a partnership is situated, is the most convenient forum as far as the partnership is concerned, and is, in general, the court whose judgements against the partnership could most effectively be enforced. Therefore, as in the case of companies, the location of the principal place of business of a partnership within the area of jurisdiction of a court is sufficient to confer jurisdiction on that court in respect of the partnership.

2.3.5. Other provisions

Partnership is included in the definition of “person” in the *Banks Act*,⁶³ the *Co-Operative Banks Act*,⁶⁴ the *Mutual Banks Act*,⁶⁵ the *Financial Institutions (Protection of Funds) Act*,⁶⁶ the *Securities Services Act*,⁶⁷ the *Law Society (Cape of Good Hope) Private Act*,⁶⁸ the *Customs and Excise Act*,⁶⁹ the *Private Security Industry Regulation Act*,⁷⁰ the *Export Credit and Foreign Investments Insurance Act*,⁷¹ the *Credit Rating Services Act*,⁷² the *Financial Markets Act*,⁷³ the *Financial Advisory and Intermediary Services Act*,⁷⁴ the *Gambling Act*,⁷⁵ the *Community Schemes Ombud Service Act*,⁷⁶

61 *Da Silva v Pillaty*:766.

62 *Uniform Rules of Court*, it was held in *Metlika Trading v Commissioner, South African Revenue Service* 2005 3 SA 1 SCA:13 per Streicher JA.

63 *Banks Act* 94/1990:section 1.

64 *Co-Operative Banks Act* 40/2007:section 1.

65 *Mutual Banks Act* 124/1993:section 1.

66 *Financial Institutions (Protection of Funds) Act* 28/2001:section 1.

67 *Securities Services Act* 36/2004:section 72, repealed and replaced by the *Financial Markets Act* 19/2012.

68 *Law Society (Cape of Good Hope) Private Act* 20/1916:section 17(b).

69 *Customs and Excise Act* 91/1964:section 103.

70 *Private Security Industry Regulation Act* 56/2001:section 1.

71 *Export Credit and Foreign Investments Insurance Act* 78/1957:section 1.

72 *Credit Rating Services Act* 24/2012:section 1.

73 *Financial Markets Act* 19/2012:section 1.

74 *Financial Advisory and Intermediary Services Act* 73/2002:section 1.

75 *Gambling Act* 7/2004:section 1.

76 *Community Schemes Ombud Service Act* 9/2011:section 1.

Henning/Manifestations of the statutory recognition of a partnership as an entity

and the *Prevention and Combating of Trafficking in Persons Act*,⁷⁷ while the definition of “person” in the *Interpretation Act* includes any body of persons unincorporate.⁷⁸

2.4 Unregistered person and institution

The definitions of “associated institution” and “unregistered person” in the *Inspection of Financial Institutions Act*⁷⁹ and the definitions of “institution” and “unregistered person” in the *Financial Institutions (Protection of Funds) Act*⁸⁰ include a partnership.

2.5 Private body

Under the *Regulation of Interception of Communications and Provision of Communication-Related Information Act*,⁸¹ the *Electronic Communications and Transactions Act*,⁸² the *Promotion of Access to Information Act*⁸³ and the *Protection of Personal Information Act*,⁸⁴ a “private body” includes a partnership that carries on any trade, business or profession.

2.6 Business, enterprise and firm

The definition of “business” in the *Statistics Act*⁸⁵ includes a partnership carrying on a commercial activity, while the definition of “enterprise” in the *Prevention of Organised Crime Act*⁸⁶ and the *Prevention and Combating of Corrupt Activities Act*⁸⁷ includes a partnership.

In terms of the *National Environmental Management Act*,⁸⁸ “firm” includes a body incorporated by, or in terms of any law, as well as a partnership. The definition of “firm” in the *Auditing Profession Act*⁸⁹ includes a company and a partnership, while the definition of “firm” in the *Competition Act*⁹⁰ includes a partnership and a trust.

77 *Prevention and Combating of Trafficking in Persons Act* 7/2013:section 1.

78 *Interpretation Act* 33/1957:section 1.

79 *Inspection of Financial Institutions Act* 80/1998:section 1.

80 *Financial Institutions (Protection of Funds) Act* 28/2001:section 1.

81 *Regulation of Interception of Communications and Provision of Communication-Related Information Act* 70/2002:section 1.

82 *Electronic Communications and Transactions Act* 25/2002:section 1.

83 *Promotion of Access to Information Act* 2/2000:section 1.

84 *Protection of Personal Information Act* 4/2013:section 1.

85 *Statistics Act* 6/1999:section 1.

86 *Prevention of Organised Crime Act* 121/1998:section 1.

87 *Prevention and Combating of Corrupt Activities Act* 12/2004:section 28(7).

88 *National Environmental Management Act* 107/1998:section 34(9).

89 *Auditing Profession Act* 26/2005:section 1.

90 *Competition Act* 89/1998:section 1.

2.7 Agent

Under the *Income Tax Act* 58 of 1962,⁹¹ “agent” includes a partnership acting as an agent.

2.8 Other examples

2.8.1 Single rather than multiple

Section 19 of the *Agricultural Produce Agents Act*⁹² requires each fresh produce agent to open and keep a trust account at a deposit-taking institution, but stipulates that only one trust account has to be kept by a fresh produce agent which is a partnership.

2.8.2 Appointment and continuation of appointment at dissolution

In terms of the *Pension Funds Act*⁹³ and the *Mutual Banks Act*,⁹⁴ the appointment of a partnership as auditor does not lapse by reason of a change in the composition of the partnership, as long as not less than half of the partners in the reconstituted partnership are persons who were partners as at the date when the appointment of the partnership was last approved. The *Companies Act*⁹⁵ stipulates that, if a company appoints a firm as its auditor, any change in the composition of the members of that firm does not by itself create a vacancy in the office of auditor for that year, provided that, if by comparison with the membership of a firm at the time of its latest appointment, more than one half of the members remain after the change.

The *Companies Act*⁹⁶ provides also for the appointment of a partnership as a company secretary. A change in the membership of a partnership that holds office as company secretary does not constitute a casual vacancy in the office of company secretary, if the remaining or new partners satisfy the prescribed requirements.⁹⁷

3. In closing

The legislation referred to is by no means intended as a *numerus clausus*. There may well be other instances where, for certain purposes, the

91 *Income Tax Act* 58/1962:section 1.

92 *Agricultural Produce Agents Act* 12/1992.

93 *Pension Funds Act* 24/1956:section 9.

94 *Mutual Banks Act* 124/193:section 45.

95 *Companies Act* 781/2008:section 91(4) & (5).

96 *Companies Act* 71/2008:section 87.

97 *Companies Act* 71/2008:section 84(5).

mercantile view of the status of partnership prevails and the partnership is statutorily recognised or treated as a separate entity for certain purposes.⁹⁸

Although the general rule that a partnership is not a person at common law⁹⁹ serves as point of departure in the interpretation of legislation, it is clear that whether or not a partnership can be considered a “juristic person”, “entity”, “person”, “private body” or the like for purposes of a particular statutory provision warrants careful consideration.¹⁰⁰ In the final analysis, if the legislature expressly alters the common law, the presumption that legislation does not intend to change existing law¹⁰¹ does not apply, and the changes must be effected.¹⁰²

98 See *Nedbank v Van Zyl*; *Michalow v Premier Milling*; *Ex parte Cohen*; *Noordkaap Lewendehawe Koöperasie v Raath*:818; *Strydom v Protea Eiendomsagente*:209-211; *Metlika Trading v Commissioner, South African Revenue Service*:13.

99 *Chipkin (Natal) v Commissioner, South African Revenue Service*:570.

100 *Herman v Faclier* 1949 4 SA 377 C; *Helpmekaar (Thusano) Taxi Diens v Nasionale Vervoerkommissie* 1978 1 SA 250 O:255.

101 *Glen Anil Finance v Joint Liquidators, Glen Anil Dev Corp (in liquidation)* 1981 1 SA 171 A.

102 *Gordon v Standard Merchant Bank* 1983 3 SA 68 A.

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