269/84

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

RENé DU PLESSIS N.O. Appellant

and

LEWIS ERIC MILTON 1st Respondent

RODNEY GORDON MILTON 2nd Respondent

YVONNE MARY MILTON 3rd Respondent

CORAM: RABIE, CJ, JANSEN, JOUBERT, SMALBERGER, JJA, NESTADT, AJA

HEARD: 6 March 1986

DELIVERED: 26 March 1986

J U D G M E N T

NESTADT, AJA

The litigation which has led to this appeal has

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its origin in a dispute concerning the conduct, in Swaziland, on a farm called Mliba Ranch, of certain cattle breeding operations and, in particular, the right to ownership of the herd involved. Sad to say, it is set against an undercurrent of financial greed, mistrust and animosity between members of a large but not happy family. It is to be regretted that its ventilation in court could not be avoided.

The factual background to the matter is, in brief, the following. The land in question, some 13 000 acres in extent, was, since before 1950, owned by Norman Fairbanks Johnston. The herd of cattle comprised about 1 700 head. It was the property of his wife, Ethel Amy Johnston (though

how she acquired ownership is not clear). She also owned the farming implements including certain tractors and trailers as well as the other animals on the ranch. They consisted of horses, sheep, goats and pigs. Mr. Johnston died in 1952. In his will the land was bequeathed in trust, in equal shares, to the two children of the marriage, Yvonne and Andrew, subject to a life usufruct in favour of Mrs. Johnston. Andrew is a teacher. In about 1950 he emigrated to the United Kingdom where he has since lived as a bachelor. Yvonne married a Mr. Gordon Milton. They had five children, namely, Margaret, Eric, Rodney, Denis and Peter. After her husband's death, Mrs. Johnston, though living in the Republic of

South .....

South Africa, continued the farming operations on Mliba Ranch. Over the years she was assisted in doing this by various persons. They included Yvonne's husband (whom she divorced in about 1965) and later, Yvonne herself. In about 1971 Eric, who had trained as a fitter and turner, assisted by Rodney, an electrician, took over the management of the farm. The primary activity conducted on it was the breeding and ranching of the cattle referred to and the sale of their progeny in excess of those retained to keep the numbers of the herd constant. From about mid-1979 (or possibly earlier), however, Eric, being in control of the business, commenced to dispose of the herd itself. Indeed, by about 1981 (or 1982) it had, in this

way .....

way, been sold in its entirety for not less than R494 355.93. The proceeds received by Eric were, in the main, or at least in part, whether directly or indirectly, used to finance the establishment and operation of an agricultural farm in the Groblersdal area of the Transvaal. It had, in about 1976, been purchased (in Peter's name) by the five grandchildren. Later, on 16 January 1978, a company called Beefline Brahman Stud (Pty) Ltd was incorporated and it took transfer of the farm. They became and remained its shareholders and directors. What gave impetus to what may loosely be termed the transfer of farming operations from Mliba Ranch to Groblersdal, was the fact that the former had, in June 1979, been sold by the

administrators ..

administrators in Mr. Johnston's estate to the Swaziland government for R235 000,00. In terms of the deed of sale, occupation had to be and was given to the purchaser on 30 September 1979. In the meantime, in about March 1979, Yvonne, who was at this stage resident in Benoni, learned or became suspicious of the fact that Eric was disposing of the herd. This marked the genesis of the present controversy. She regarded this as irregular. Her attitude was that the cattle (still) belonged to her mother, that Eric, neither having his grandmother's permission to do this nor having accounted to her for the proceeds, was, in effect, committing theft of the cattle or embezzlement of the moneys received from the sale there-

of. She determined to take action. Purporting to act on behalf of her mother, who was living with her, she reported the matter to a Mr. René Du Plessis, an attorney practising in Pretoria,and instructed him to investigate it. He had been a friend of the family for many years. In addition, he had,in 1977,become an administrator of Mr. Johnston's estate when the then incumbent died. Pursuant to his mandate, which had been confirmed in writing by Mrs. Johnston herself in November 1979, Du Plessis, on 7 January 1980, wrote to Eric requesting certain information concerning the farming operations on Mliba Ranch and the cattle in particular. This led, during the course of the following few months, to two meetings between them,as

also a number of further letters being written by him to Eric. Their contents are of importance and will be reverted to in due course. By September 1980, the matter had not been resolved, at least to the satisfaction of Yvonne. The result was that Du Plessis, having in October 1980 obtained a power of attorney from Mrs. Johnston to issue summons against Eric for the recovery of all amounts received by him from the sale of the cattle, prepared to do so. Shortly thereafter, however, it was brought to his attention that Mrs. Johnston's mental condition had deteriorated to an extent that the appointment of a curator bonis was required. She was suffering from senility. On 3 November 1981 an application for this

relief .....

relief, brought by Yvonne, was granted by the Transvaal Provincial Division. Du Plessis was appointed to the office. At the same time Mrs. Johnston, who by now was 87 years of age and living in a nursing home, was declared incapable of managing her affairs.

It was in these circumstances that Du Plessis, the present appellant, in his capacity as curator of Mrs. Johnston, in January 1982 caused summons to be issued in the Transvaal Provincial Division against Eric, Rodney and Yvonne as first, second and third defendants (now the respondents) respectively. In summary, his cause of action was the following. In about 1971 the defendants concluded an oral agreement with Mrs. Johnston in terms

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whereof the farming operations on Mliba Ranch were to be conducted in co-partnership (on the basis of profits and losses being equally shared); pursuant thereto, she made available to the partnership, for its use, inter alia the herd of cattle, dominium whereof, however, was to be retained by her; despite being in charge of the business, first defendant, notwithstanding demand, had from 1976 onwards, and in breach of his obligations, failed to render an account of his activities; he had also misused partnership assets. Whilst it is not alleged that the actual sale of the cattle was wrongful, his failure to pay over the proceeds of the sale or to render an account in regard thereto to Mrs. Johnston or Du Plessis, as plaintiff,

is .....

is complained of. In respect of the partnership, the claim was, in essence, for an order dissolving it and delivery of a statement of account and debatement thereof (though surprisingly, not for payment of whatever may be due). As regards the cattle, payment of R494 355,93 (being the minimum amount received by first defendant from their sale), the rendering of an account of his dealings with the cattle and payment of whatever other sums were found to be owing as a result of further sales thereof, were sought (against first defendant).

The third defendant did not defend the action. First and second defendants, however, did. Their plea, whilst admitting that in 1971 a certain transaction was

concluded .....

concluded with Mrs. Johnston involving cattle farming on Mliba Ranch and that pursuant thereto her herd of cattle was utilised there, denied the alleged partnership. The true agreement, so it was alleged, was a farming contract in terms whereof first defendant was employed by Mrs. Johnston to manage the venture at an undetermined salary. This was done until about 1975 when, consequent upon Mrs. Johnston orally donating and delivering the cattle (and the other movable assets used on the farm) to him in trust on behalf of all her grandchildren, alternatively directly to the grandchildren, the contract terminated. The first defendant was accordingly entitled, as he admittedly had done, to subsequently sell the cattle.

The proceeds had been used for his and his brothers' and sister's benefit. In the premises, there was no obligation to render an account to Mrs. Johnston or the plaintiff, neither in respect of any partnership activities or arising from the sale of the cattle; nor was any amount owed to her.

The trial was heard by SPOELSTRA J. In the light of the pleadings to which I have referred, the main issues which arose for determination were two-fold, namely, '(i) whether, as plaintiff alleged, a partnership had been entered into between Mrs. Johnston and defendants, and, (ii) whether the herd of cattle, which was admittedly Mrs. Johnston's property, had been donated as alleged, which

was .....

was first and second defendants' case. It would appear to have been common cause that Mrs. Johnston's condition was such that she could not testify. Plaintiff's case therefore rested on the evidence of Du Plessis himself and in particular on certain oral admissions which he deposed to had been made to him by first defendant on 1 February 1980. Consequent on having received instructions to protect Mrs. Johnston's farming interests and in particular her cattle (as mentioned earlier), he interviewed him in his offices on this date. Also present was Peter. The substance of what first defendant stated was the following. Since about 1971 a partnership in respect of the ranching operations had existed between Mrs. Johnston

and .....

and the three defendants. The profits made from the sale, from time to time, of excess cattle had over the years been shared between them, though not on any formal basis or with any regularity. Not all the profits had, however, been paid out. Each partner was entitled to substantial amounts of undrawn profits. The partnership was still in existence. He undertook to furnish plaintiff with all balance sheets relating to it. The cattle were the property of Mrs. Johnston. He had recently sold 470 head for R70 000,00. There remained about 1 265. After initially expressing the view that this money had to be "divided four ways in terms of the partnership agreement", he conceded, or at least the plaintiff received the

impression .....

impression that he conceded, that Mrs. Johnston would be entitled to it. He undertook to keep the plaintiff "fully informed of any financial matters of importance relating to the cattle". He intended to continue to "farm" with them; if he was able to, he would sell cattle at about R260,00 per head. It was this conversation, considered in the light of certain further conduct on the part of first defendant (to which reference will be made), that formed the foundation of the plaintiff's case.

First defendant, in his evidence, did not deny that this was what he told plaintiff. He maintained, however, that neither his statement that there was a partnership between Mrs. Johnston and second and third defen-

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dants and himself, nor that the cattle belonged to her, was correct. The true position was that no such partnership had ever been formed and that the cattle had been donated by Mrs. Johnston. As to the former, the pith of his testimony was that, at his grandmother's instance, he took over the running of the farm on her behalf; he became her manager. He was not in receipt of a fixed salary. He simply drew moneys by way of remuneration from the farm banking account (on which he had signing powers) as he needed them. However, the money made from the farm belonged to her. As regards the cattle, his grandmother, being financially secure, realising that she was getting on in age and wishing to avoid death duties, had in 1975

or .....

or 1976 said to him, "Eric, the cattle are yours now". She added the rider, however, that, seeing that she had nothing left to give her other grandchildren, he, first defendant, had to "look after them" or "see them right" (i.e. financially). He had misinformed the plaintiff because he believed that he was really acting, not on behalf of his grandmother, but for third defendant (his mother) who, had the truth been told by him, namely, that there was no partnership and that the cattle had been donated, would have learned of it and, so he feared, have vented her wrath on Mrs. Johnston. This he wished to avoid.

Second defendant did not testify. Nor did

third .....

third defendant. However, Peter, Denis and Margaret gave evidence mainly and broadly in corroboration of the alleged donation and first defendant's denial of a partnership. So too did a Mrs. Wise and a Mrs. Coull. They were friends of Margaret who, in "about the middle 1970's", had become acquainted with and spoken to Mrs. Johnston whilst she stayed with her.

The trial court, after a hearing lasting several days, did not arrive at any conclusion concerning the donation issue. This was held to be unnecessary in the light of the finding that plaintiff had failed to establish that a partnership had been entered into. Having also rejected an alternative basis argued for the furnishing

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of an account, namely, an obligation so to do arising from the farming contract pleaded by the first defendant, SPOELSTRA J dismissed the claim with costs. Hence this appeal. It was brought after the necessary leave was granted by this Court.

It is, I think, plain that on plaintiff's evidence, he was entitled to succeed in his claims. This is certainly so if a partnership as alleged was proved and ownership of the cattle remained with Mrs. Johnston. Less clear, however, is whether, in the absence of a relationship of partnership, the claim to the cattle (to use a composite term for what was sued for in this regard) was bound to fail. This, as I have indicated, is the view

that .....

that the trial court took. It was, in my opinion, erroneous. Admittedly, plaintiff's summons is capable of being construed as linking the claim to the cattle to the alleged partnership, thus making the former dependent on the latter. This, however, so it seems to me, adopts too narrow a view of the pleadings. In any event, on the evidence as presented and canvassed, they were (or became) two independent issues. In other words, even if, as alleged by first defendant, the relationship between himself and Mrs. Johnston was merely that of employer and employee, his dealing with the cattle would have been wrongful and accountable unless they had been donated as alleged (or, I must add, for reasons which will appear, he was otherwise .....

wise authorised to dispose of them). It was therefore necessary that this latter issue be decided irrespective of the outcome of the partnership dispute. Whether the converse situation applied, namely, that a finding that first defendant was entitled to dispose of the cattle would dispense with deciding the partnership issue, was raised with counsel before us. On behalf of the plaintiff, Mr. Southwood, adopting a wise and pragmatic course, was prepared to answer this in the affirmative; there would be no or little advantage to Mrs. Johnston if she were found to be a partner in the farm venture in circumstances where it or she had, so to speak, lost the benefit of the cattle. The result thus is that, contrary to the trial

court .....

court, we consider it necessary, at least in the first instance, to focus attention on first defendant's right to deal with the cattle and in particular the alleged donation. It is, of course, difficult to separate the two issues. One is, perforce, dealing with a single series of events. It must be borne in mind that evidence on one necessarily obtrudes on and affects the other, especially in relation to the credibility of the witnesses.

With this in mind, I commence with certain observations of a general nature. Firstly, there are some preliminary procedural matters that require mention. Mrs. Johnston died on 13 January 1986, shortly before the hearing

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of this appeal. In terms of Rule 15 (3) of the Uniform Rules of Court, Du Plessis, in his capacity as her duly appointed executor, was substituted as plaintiff. Under her last will (to which I refer again shortly) third defendant and Andrew are Mrs. Johnston's heirs. If then, what may be termed her quasi-vindictory claim to the cattle should have succeeded, the benefit thereof would accrue to them. It may, therefore, be said that they had an interest in the outcome of the action sufficient to require their joinder. The same may be suggested of the other grandchildren who are not defendants, namely, Peter, Denis and Margaret; they would stand to lose if plaintiff's action succeeded. This does not, however, give rise to

difficulty .....

difficulty. The latter three persons testified. Yvonne is the third defendant. It is clear on the evidence that Andrew was fully aware of the proceedings; indeed plaintiff had his general power of attorney. Secondly, there are the following evidential points. The inadmissibility, as against first and second defendants, of the numerous extra-curial assertions made by third defendant to plaintiff and testified to by him, must not be lost sight of. The failure by both parties to call certain witnesses was alluded to. I agree with the learned trial judge that no adverse inference was to be drawn from the failure of second defendant to give evidence. Nor could it have been expected, in view of the ill-feeling between mother

and .....

and children as also that, as will be seen, she stood to lose in the event of the action failing, that third defendant should have been called by first and second defendants. On the contrary, I would have expected her to testify for the plaintiff. Finally it is, I think, worth emphasising that what has to be resolved is not so much a conflict of evidence between plaintiff and first defendant (and his witnesses) but rather whether, accepting the former's credibility (which was not, save in certain relatively minor respects,impugned) and accordingly, notwithstanding and indeed contrary to the latters' admissions, the true state of affairs was as testified to by him, namely, that no partnership existed and that the cattle had been

donated .....

donated (or, at least, that Mrs. Johnston permitted him to deal with them as he did). This requires a detailed analysis of the relevant evidence. I turn to the task in hand, dealing firstly with the donation issue.

The meeting of 1 February 1980 was to discuss an accusation that first defendant was wrongfully disposing of the herd or, as it was put, that he was guilty of embezzlement. It was a serious one, made more so seeing that it was advanced by an attorney. It is difficult to accept first defendant's description of his interview as "social". That he was entitled to sell the cattle would have been a complete answer. Peter testified that first defendant wished at the meeting "to clear the air" (by

telling plaintiff that the cattle had been donated). Yet instead, as one would have expected, of disclosing this, it is stated that they were Mrs. Johnston's property. In the circumstances, the improbability of this being untrue, is, prima facie, a strong one. The admission is in the clearest terms. It was ostensibly solemnly made. It is quite unequivocally inconsistent with the cattle having been donated (of which there was, of course, no mention). In these circumstances, its weight cannot be underestimated. As Phipson on Evidence, 13th ed., quoting old English authority, points out (in para 19.04):

> "Whatever a party says is evidence against himself ... what a party himself admits to be true may be presumed to be so".

Moreover .....

Moreover its cogency is enhanced by what succeeded its making. By letter dated 5 February 1980, written by plaintiff, first defendant is asked to advise of any inaccuracies in the memorandum which was enclosed and which sets out in great detail what was said at the meeting on 1 February. At the same time, certain information is requested from him concerning the cattle. A letter dated 23 June 1980 is to similar effect. On 27 September 1980 plaintiff again wrote to first defendant accusing him, in effect, of wrongfully disposing of Mrs. Johnston's cattle. All these letters were received; none were replied to and this despite first defendant having been warned that his failure to reply to previous

letters .....

letters "will be used against you adversely". On the basis that, according to ordinary human expectation, firm repudiation of the allegations therein contained would be the norm if it was not accepted as correct, first defendant's silence and inaction must prima facie count against him as a (further) admission (McWilliams v First Consolidated Holdings (Pty) Ltd 1982(2) SA 1 (A) at 10 E-F). Other evidence to the same effect is the following. On 25 February 1980 first defendant again consulted with plaintiff. This time it concerned the sale by him of certain of the cattle to a Mr. De Bruyn. Difficulty had arisen over payment by the purchaser. It is unnecessary to canvass the details thereof. What is significant is that,

according to plaintiff, first defendant wished steps to be taken to collect the money on Mrs. Johnston's behalf. On 2 April 1980 plaintiff sent first defendant a copy of a letter he had written to the purchaser's attorneys. In it is the allegation that the cattle in question "belong to Mrs. Johnston". Again, despite receipt, there was no reply and accordingly no refutation. On 2 December 1980 plaintiff received on behalf of the purchaser an amount of R7 252,50, representing interest on the price. First defendant never claimed it. His explanation was not that he did not know about it but that "it (the money) was going to my gran so it did not really make any difference to me".

It .....

It is against this background that one has to consider whether the admission has been shown to be untrue. It is of course not conclusive. It can be explained. As Wigmore on Evidence, Vol IV, para 1059 says:

> "(I)t is merely an inconsistency which discredits, in a greater or lesser degree, his present claim and his other evidence".

The onus of establishing this is on first (and second) defendants. This is so, not only because of the admission itself, but also by reason of the presumption or inference against liberality (Joubert: LAWSA, Vol 8 para 130) though where, as here, the parties involved are closely related (by blood) to each other, it would be less strong (Smith's Trustee v Smith 1927 AD 482 at 486).

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A logical point of departure is a consideration of the reasons, as proffered by first defendant in his evidence, for having lied to plaintiff. Now it may be said, with some force, not only that it is improbable that plaintiff was not duly instructed by Mrs. Johnston, but that, if this was first defendant's impression, he would simply have refused to speak to plaintiff or, being prepared to do so, have put it to him that it was his mother who was behind things, or, tell him the truth but ask him not to divulge it to third defendant. One would have expected him to have discussed the letters he had received from plaintiff (which, incidently, specifically allege that he is acting for Mrs. Johnston) with her. He did not , though he does say ,.....

say that he mentioned receipt of them to her. He just, so he added, ignored them. Later in his evidence, first defendant gives a different reason for not telling the truth about the herd, namely, "because I had no legal documents to say they were mine". As to his apprehension that third defendant would maltreat Mrs. Johnston if, as he feared, she learned about the donation (a specious reason in itself), Mr. Southwood pointed to various passages in the evidence indicative of third defendant already knowing the true state of affairs. On this basis the whole reason for misrepresenting the position would fall away.

On the other hand, however, in evaluating these

criticisms ..

criticisms of first defendant's version it is important, in the first instance, to bear in mind that he is a relatively uneducated person. One has to guard against expecting from him the sort of reaction that normally would be forthcoming. Secondly, the identity of the complainant is relavant in determining with what degree of anxiety first defendant would treat the accusations made against him. His evidence in this regard was: "But when your own mother says you are embezzling money no that is not that serious whatsoever". Furthermore, as he put it: "I just know my grandmother would never do it". He was referring to the allegation of embezzlement that was being made against him. Thirdly,

there .....

there is good reason for finding that,though plaintiff undoubtedly believed that he was duly instructed by Mrs. Johnston, this was not the case; that it was third defendant who was calling the tune (or at least that this was what first defendant believed). I have already, at the beginning of this judgment, indicated that it was she who initiated an investigation of first defendant's activities by plaintiff. The evidence shows that on numerous occasions between 20 March 1979 and 1 February 1980 and even thereafter she pressed, or to use plaintiff's own words, "pressurised", him to proceed against first defendant. The instructions to sue, given in September 1980, came from third defendant. There is no information of the cir-

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cumstances in which Mrs. Johnston signed the power of attorney in October 1980 (which it is to be noted in passing, was just two months before it was decided to appoint a curator). It was sent to her by post and received back through the same medium. Unfortunately, the only occasion on which plaintiff consulted with Mrs. Johnston herself was on 19 February 1980. Even then it was in the presence of third defendant. It does not seem as if the ownership of the cattle was discussed. Moreover, so plaintiff stated, because of her deafness, she took only a minor part in what was being discussed; nor did she follow a great deal. He also conceded that, on her own admission, third defendant was keeping information from her. In a letter

dated .....

dated 29 January 1980 to third defendant he recorded:

> "I confirm that you indicated that it would not be in your mother's interests to advise her immediately of Eric's admissions to you although of course at some stage she will have to be put fully into the picture. You considered that in view of your mother's age care should be taken in preventing unnecessary shocks. Obviously I will bear this in mind".

The relevance of these considerations is heightened, not only by the clash of financial interests that existed between them, but also by the fact that the relationship between third defendant and her children was a bad one. There is reference, in the evidence, to litigation between them, to her having been assaulted by one of them and, generally, to an atmosphere of antagonism. Of particular moment is plaintiff's own assesment of third defendant as

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being unstable, untrustworthy and even unbalanced. He conceded that he "would not put it past Yvonne to try and manipulate Mrs. Johnston or to influence her" (though he did not believe that Mrs. Johnston would allow this). However, she was an old lady by this time and was living with third defendant and was apparently physically dependent on her. I find it strange that third defendant, who was in a good position to judge Mrs. Johnston's condition, never suggested a curator bonis. There is, furthermore, the probability that had Mrs. Johnston really been aware of what was transpiring, she, particularly having regard to her strong personality, would either have taken a much more active part in instructing plaintiff or she would .....

would have confronted first defendant herself, or both. Of course, much of what has been stated would not have been present to the mind of first defendant. Nevertheless, it provides reinforcement for his belief that he was not dealing with his grandmother's attorney. Indeed, his evidence was that plaintiff himself told him that "your mother is telling me stories". Finally, first defendant's version for misinforming plaintiff, viz., his apprehension for Mrs. Johnston's well-being in the event of third defendant finding out or receiving confirmation that the cattle had been donated, though perhaps exaggerated, is, at least subjectively regarded, not without substance. Viewed in the light of the cumulative effect of these considerations, first de-

fendant's explanation for having, on 1 February 1980 admitted that the cattle were the property of Mrs. Johnston, if not convincing, and whilst, in no way to be condoned, must be regarded as plausible.

Its probity must, naturally, in addition, be examined in the light of the evidence as to the donation itself. In this regard, first defendant, to begin with, labours under the handicap of, ex hypothesi, being an untruthful person, the question being: was he lying to plaintiff or the court? He was categorised by the trial court as a poor witness (a conclusion for which there is ample support in the record). Margaret and Peter were similarly branded. Due weight must be given to these

findings .....

findings. That they are not impartial witnesses is manifest. A particular criticism of first defendant is his statement that on one occasion on the farm, long prior to February 1980, Mrs. Johnston had, in plaintiff's presence, told Andrew of the donation of the cattle. Plaintiff's denial of this was never challenged in cross-examination of him. The difficulty that one experiences with the defence version arising from these general credibility deficiencies is multiplied when its content is looked at. It is virtually impossible to make a finding as to when the donation took place or exactly who the donees were. On the last point, the witnesses contradict each other and, in addition, their evidence is at variance with the plea.

Without .....

Without going into detail, the position may be summarised by saying that it is uncertain whether the cattle were given to first defendant (as he, though not consistently, alleges) or to him in trust (and, if so, who exactly the beneficiaries were) or to the grandchildren or to the grandsons or to the grandchildren and the third defendant. Margaret's version that it was on the advice of an attorney that the donation was to first defendant, coupled with a moral obligation to share it with the others, is questionable. It means that first defendant was to be trusted with, not only deciding who was to benefit and the extent thereof, but whether they would benefit at all. There was no suggestion that he, as eldest, or on any other basis,

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was especially favoured by his grandmother. There is an even more basic confusion in the defence evidence, i.e., whether a donation took place at all. For example, Peter testified that it was merely his understanding that there had been a donation; later that Mrs. Johnston "regarded it (the herd) as her property at all times"; that he believed that they would one day inherit the cattle. His evidence in this latter regard reads:

> "Now during the same time that your grandmother discussed these things with you, what was said by her about the cattle? --- Well, the cattle on her death would be left to Eric because Mr Versfeld says that you would not be able to sort out a bull and a cow and this and this to the grandchildren, it would be much better to leave them to the oldest and he would be able to deal them out between the four of us,

> the five of us, sorry. Between all the grandchildren.
>
> Did she convey to you that you were going to inherit the cattle, you the grandsons? --- For sure.
>
> And was that always the position? --- That is right."

Margaret conceded that when she spoke to plaintiff shortly after action had been instituted and after initially alleging a donation of the cattle, she altered her stance and relied on a contemplated inheritance. Her explanation that "I did slip up" and that "I can also get muddled up" is hardly convincing. Also inconsistent with her earlier evidence of a donation (to first defendant, later changed to "us"), is her description of what happened when the Groblersdal farm was bought. She said, in answer to a question as to what Mrs. Johnston said to first defendant:

"Oh .....

"Oh she said 'Eric I am giving you the authority to sell the cattle and bring up the implements and the sheds and everthing movable from ... Mliba'". It may be said that this is contra-indicative of a donation. Mrs. Wise, in her evidence, stated inter alia:

> "Now who did the cattle then belong to? --- To gran.
> Yes. Was that at all times the situation? --- That is right.
> Did that ever change? --- Not that I know of "

(Though, almost immediately thereafter, she contradicts herself and says: "It (the cattle) belonged to the grandchildren"). Initially, Mrs. Coull said that Mrs. Johnston had told her that "she wanted to give the cattle to the boys". This was then changed to an allegation that

"she .....

"she had given" the cattle. She conceded she knew the difference between "wanting to give" and "actually giving".

I turn to look at the other side of the coin, namely, those factors favouring defendants' version. Making due allowance for the defects, i.e., the improbabilities and contradictions in their evidence, the fact remains that all six defence witnesses depose (in their different ways) to the cattle having been donated by Mrs. Johnston. I have already referred to the trial court's poor impression of first defendant, Peter and Margaret. At the same time it is relevant to note that the learned judge was not unfavourably impressed by them "as persons"; he did not regard them as inherently dishonest or unreliable.

Denis .....

Denis was found to be a good witness. So too were Mrs. Wise and Mrs. Coull who, as is pointed out in the judgment, are disinterested persons. I think this comment is correct, despite their friendship with Margaret. The point was well made by Mr. Maritz, for the first and second defendants, that, had these witnesses dishonestly conspired to fabricate their version of a donation, one would have expected their evidence to coincide to a much greater extent than it did. They were testifying to what had occurred some years before, not on a particular occasion when all were present, but to what was no more than chance, almost casual, remarks made by Mrs. Johnston. There was no formal announcement by her of the donation. The cri-

ticism, arising from the uncertainty as to the identity of the donees, must not be taken too far. It is, of course, an important consideration in testing whether a donation took place. At the same time, it is not essential that there be a finding in this regard. It could still be concluded that Mrs. Johnston had lost her ownership in the herd (which, after all, is the real issue).

Of more fundamental importance are the following factors. On plaintiff's case, first defendant was openly and brazenly disposing of the cattle when he had no right to do so. It seems to me to be unlikely that he would act in this way. A donation of the cattle would not have prejudicially denuded Mrs. Johnston. Her needs were few;

she had adequate means from other sources. Realising her advanced age, she, so it appears, wished to avoid death duties. It is probable that she thought this could be done by divesting herself of the cattle (which could explain why no formal deed of donation was executed). The evidence establishes, quite clearly, that the relationship between Mrs. Johnston and her grandchildren was an extremely close and affectionate one. She regarded them as her children. Second defendant, Denis, Peter and Margaret had lived with her for extended periods of time when they were young. She was and continued to be like a mother to them. In latter years they reciprocated. She often stayed with and was cared for by Margaret, Denis

and .....

and Peter. As will be seen, she often visited them at the Groblersdal farm. Whilst the donation is in dispute, what is not is her oft-expressed desire that "the cattle be theirs". Plaintiff conceded this. What he said was:

> "I have no doubt it (the herd) was promised and I have no doubt that Mrs. Johnston always had the intention that the children would benefit from the cattle."

Denis' evidence that she said that she "would never forget us" has the ring of truth. This is illustrated by the terms of a will she made on 4 November 1975. Under it the cattle are bequeathed to her grandsons. They (and Margaret) were, if not completely, then substantially, dependent on her; and she knew this. They had no assets of their own.

First .....

First and second defendants were, at her instance, and over a number of years, actually utilising the cattle for their benefit. This is to be contrasted with the relationship between her and her two children, viz., third defendant and Andrew. She had very little to do with him. True, she lived with third defendant, but I do not have the impression that they were close. She seems to have had no option. Plaintiff said that it was an "up and down" relationship with "serious lows". There was no question of third defendant and Andrew being able to farm with the cattle. In any event, both of them, as heirs to Mr. Johnston's estate, would, to Mrs. Johnston's knowlegde, be financially provided for.

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It may be said, however, that much of the afore-going shows merely that her intention was no more than that her grandchildren would inherit the cattle. There are two circumstances which, in my view, strongly indicate that this is not so; that her desire that the cattle should be theirs was translated into reality. The one is Mrs. Johnston's second will. It was executed on 21 March 1979. Its effect is to constitute third defendant and Andrew as her heirs. There is simply no mention of the grandchildren in it. If the cattle were then part of her estate, the result can only be described as startling. It would mean that they had been disinherited. This is inconceivable. There was no evidence of any deterioration

in their relationship. I refer to what I said earlier regarding the improbability of Mrs. Johnston fully understanding that first defendant was being sued for the cattle. Even if it be assumed that he had blotted his copy book, it does not explain why the other grandchildren should have been excluded. There could be no question of Mrs. Johnston thinking that a bequest of the cattle to third defendant and Andrew would ever benefit her grandchildren. I accordingly agree with the submission that it is to be inferred that she had already donated the cattle, thus making it unnecessary to bequeath them; her grandchildren had, so to speak, received their inheritance.

The other circumstance which, not surprisingly, was in the

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forefront of defendants' argument, is, I think, illustrative of actions speaking louder than words; of conduct being more probative than oral pretences. As a fact, first defendant was never asked by Mrs. Johnston to account for his dealing with the cattle. Moreover, it clearly emerges that the sale of the cattle by first defendant and the utilisation of the proceeds to finance the Groblersdal venture and the fact that the shareholders of the company which owned it were the grandchildren, were all facts which were known and appreciated by her (at a time when her mental faculties were intact). There is a good deal of evidence that it was, in truth, her idea and that she was active in pursuing it. I quote only what plaintiff said

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in this regard, namely:

> "That would seem to indicate that she wanted to establish them in Groblersdal in a financially lucrative undertaking? --- I have no doubt that that was her intention, that she was really happy to see the Groblersdal operation established on a proper basis... We have established that she was aware ... that certainly the operations would be transferred from Mliba to Groblersdal. That was her basic plan, you know that? --- Yes."

Interestingly, in plaintiff's note of his consultation with Mrs. Johnston, held on 19 February 1980, it is recorded:

> "Mrs. Johnston requested Mr. Du Plessis to attend to the sale of the cattle as soon as possible as no control was being exercised over the cattle and she was fearful that the Swazi Government would prohibit money being taken out of the country. Mrs. Milton agreed and Mr. Du Plessis undertook to attend to having the cattle sold and to, if necessary, exert pressure on Eric to assist him therewith."

At the very least, she encouraged and approved of what has been referred to in the evidence as the transfer of farming operations to Groblersdal or the "milking" of Mliba Ranch. It is noteworthy that the dates when sales of cattle commenced, coincide, more or less, with the commencement of the Groblersdal venture, or, perhaps, the formation of the company. On the probabilities, this is compatible only with a donation of the cattle by conduct (the company being the vehicle for its implementation) or of a right to dispose of the herd and, as such, is corroborative of the defence case that there had been an express donation.

The exercise of assessing where the probabilities

lie is often difficult. This is such a case. What is involved is a comparison between the two opposing contentions. As Wigmore, Vol IX, para 2498, quoting an American case,puts it:

> "By a proponderance of evidence is meant, simply, evidence which is of greater weight, or more convincing, than that which is offered in opposition to it ...."

The catalogue of defects in defendants' case on the merits of whether there was a donation, must seriously detract from its acceptability. One must, however, guard against magnifying them out of proportion to what is justified in the circumstances. Taking an overall view of the evidence, they are, in my judgment, sufficiently explained

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and out-weighed by the considerations to which I have referred as to warrant the conclusion, to which I accordingly come, that first and second defendants succeeded in proving that the cattle were donated by Mrs. Johnston. It follows that she, and accordingly plaintiff, had no right to them and that those parts of the claim relating to the cattle were correctly dismissed.

This conclusion, in the light of the concession referred to earlier, really makes it unnecessary to decide the partnership issue. In order, however, to avoid any future litigation which may arise from the matter being left uncertain, it is desirable to deal (albeit only briefly) with it. I must preface doing so by returning, for a moment, to the pleadings. In an at-

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tempt to widen the ambit of the cause of action in this regard, plaintiff, at the hearing before us, sought an amendment to his particulars of claim. Its effect, if granted, would have been to introduce an alternative ground for the alleged obligation by first defendant to *render an account, namely, his employment by Mrs. John-*ston as her farm manager. The account sought to be claimed in the amendment relates to his dealings with the cattle, but the intention was, no doubt, that it be in respect of, or include, his activities generally on the farm. A similar argument that on his own version of the relationship between them, he was obliged to account to Mrs. Johnston, was rejected by the trial court. The only difference

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was that apparently the umbrella of "Alternative Relief" was relied on rather than, as now, a specific amendment to the summons. However, I think it should suffer the same fate. I agree with Mr. Maritz that plaintiff failed to prove that the terms of the farming contract were such as to enable it to be concluded that the contended for obligation to account existed. Certainly, the matter was not fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue. This is what is required before an ex post facto amendment, having the effect of retrospectively widening the issues, will be allowed (South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd 1976 (1) SA 708 (A) at 714 G; Director of

Hospital .....

Hospital Services v Mistry 1979 (1) SA 626(A) at 636 C).

During his opening address at the trial, counsel for plaintiff disavowed reliance on the farming contract in this connection. The amendment must be and is refused.

The onus was, of course, on plaintiff to prove the alleged partnership. I deal, firstly, with those factors militating against its discharge. There is, to begin with, first defendant's detailed admission on 1 February 1980 to this effect and his failure to deny the allegations, contained in plaintiff's subsequent letters, that a partnership existed. It was common cause that a partnership between Mrs. Johnston and the defendants was held out to exist and that first and second defendants were parties

to this representation. Thus, in respect of the financial years 30 June 1974 to 30 June 1978, the balance sheets submitted to the Swaziland Income Tax authorities for Mliba Ranch, describe the persons involved as "Mrs. E.A.Johnston, Mrs. Y.M. Milton, Mr. L.E. Milton and Mr. R.G. Milton Farming in Partnership as Mliba Ranch". The pre-trial conference minute contains an acknowledgement that they were prepared on the instructions and with information given to the bookkeeper, who drafted them, by first defendant. Some of them were signed by the partners themselves. The explanation for the alleged fiction was that it enabled less income tax on the proceeds of the farming operation to be paid than would otherwise have

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been the case. It has, however, remained a mystery to me how or why this would have been so. Third defendant was under the impression there was a partnership. So, too, was De Bruyn, the purchaser of cattle from first defendant. He could only have been led to believe this by first defendant who, in fact, at one stage of his evidence, conceded that what he termed "the loose family arrangement", appertaining to the farming operations, was "run as a four-way partnership". Whilst Mrs. Johnston would not appear to have received any moneys from the farming venture, all three defendants did.

The above constitutes a formidable body of evidence in favour of a finding that there was a partnership

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as alleged by plaintiff. I have, nevertheless, come to the conclusion that the trial court's decision to the contrary was correct or, at least, I am not persuaded that it is incorrect. The three *essentialia* of a partnership are (i) a contribution by each of the partners to the business; which (ii), is to be carried on for their joint benefit, (iii) the object being to make a profit (*Bester v Van Niekerk* 1960 (2) SA 779 (A)). It is unnecessary to consider to what extent, if at all, they are satisfied *in casu* (save to point out, in passing, that it is difficult to appreciate what contribution third defendant is supposed to have made). In addition, however, there must be a clear intention, by the parties involved, to create

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a partnership. Whilst their statements or expressed intentions are of importance in deciding this issue, a partnership will, notwithstanding the presence of the three elements referred to, only be found to exist if it corresponds with their real intent. A court will not give effect to a simulated intention (LAWSA Vol. 19 paras 372 and 373). The real nature of the agreement, rather than what the parties choose to call it, is looked to (Blismas v Dardagan 1951 (1) SA 140 SR at 146 H). Approaching the matter thus, a partnership was, in my view, not established. I refer, in this regard, to the reasons given by the trial court. I would merely stress or add the following. Denis, in particular, corroborates first defendant, Peter

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and Margaret's evidence that it was a sham (a version which is actually,in some respects, against their interests). The conduct of the parties involved bears this out. No partnership meetings were held. There was the virtual liquidation of the Mliba Ranch venture; had a partnership existed, this would have been wrongful, at least as far as third defendant was concerned. On the instructions of Mrs. Johnston, various amounts were paid out over the years, from the Mliba Ranch account, to non-partners. These were the university fees and other personal expenses of Peter and Denis. The balance sheets reflect the herd as a partnership asset. It was common cause that this was incorrect. This must seriously detract from their proba-

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tive value of what the relationship between the parties was. If third defendant was not a partner, the whole or main basis of plaintiff's case falls away. In my view, and despite there being a written agreement dated 26 January 1965 drawn on the basis of the existence of a partnership between them, it is inherently improbable that this was so. In 1971 the relationship between Mrs. Johnston and third defendant was summarily terminated by Mrs. Johnston. Thereafter third defendant had nothing to do with the conduct of the business. What amounts she was paid would seem to have been ex gratia. I am bound to say, in conclusion, that it does the parties concerned no credit that they were prepared to and did misrepresent the true relationship between them. Their con-

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duct in having done so might well have given rise to an estoppel,were third parties involved. That, however, is not the position here.

Even on the basis of the appeal failing, the trial court's order for costs was attacked by plaintiff. For it to be sustained, it would have to be shown that the latter's refusal to depart from the usual rule that costs follow the event, amounted to an improper exercise of its judicial discretion. Only then, would an interference on appeal be justified (Rondalia Assurance Corporation of SA Ltd v Page and Others 1975 (1) SA 708 (A) at 720 C-D). What was apparently sought (obviously in the event of plaintiff's claims failing) was that first

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and second defendants be deprived of some or all of their costs. According to the judgment, this was based on "their reluctance to co-operate fully" with plaintiff "in solving the disputes". In this court, however, Mr. Southwood was more bold. His main submission was that first defendant be ordered to pay plaintiff's trial costs; alternatively that he be deprived of all his costs. The factual foundation of the argument was the false statements he made to plaintiff on 1 February 1980. It was contended that it was this (dishonest) conduct, coupled with his subsequent failure to reply to plaintiff's letters, which was the primary cause of the litigation which ensued. I agree with this. Indeed, plaintiff in his evidence describes

it as "decisive in regard to my further actions relating to this estate". What took place, therefore, was a positive deception by first defendant, not merely an absence of co-operation. This is so even though, soon after summons was issued, second defendant attempted to discuss the case with plaintiff who, however, refused to see him. Margaret did instead. Plaintiff cannot be criticised for not accepting her initial assertion, later retracted, that there had been a donation. The trial court, apparently not having had full regard to first defendant's dishonesty and its effect on plaintiff, as referred to above, we are, I consider, free to decide the issue of costs afresh. This must be done in the light of the principle that a litigant misleading another into unnecessary proceedings may be deprived

of his costs. In unusual or extreme cases where, for example, the deceptive conduct is intentional and is the cause of all the costs in the proceedings, he may even, to mark the court's disapproval of his conduct, be ordered to pay the unsuccessful party's costs, at least where the latter acted reasonably in instituting action or continuing with it. In the light of what has already been stated, plaintiff, a manifestly methodical and meticulous attorney in all other respects, should, I feel, have been alerted to the danger of Mrs. Johnston not fully comprehending the situation and therefore of the need to consult with her more closely so as to obtain better and more pertinent instructions to sue first defendant. I accordingly do not

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think the latter, more drastic, type of order is warrant-
ed. In all the circumstances, however, a qualified de-
privation of costs is. This can, naturally, only apply to
first defendant. Second defendant was not, on the evidence,
a party to plaintiff having been misled and must therefore
not be prejudiced by the proposed special order. The
problem is how to cater for this seeing that both were re-
presented by the same attorneys and counsel. There are
various choices. To give effect to my desire that first
defendant should forfeit only part of his costs, I have
decided on one which provides for plaintiff having to pay two
thirds of (first and second) defendants' costs, coupled with
a direction that first defendant is to pay the balance
of .....

of second defendant's costs, provided, however, that if they are not recoverable from him, plaintiff will be liable therefor. It was, correctly, not suggested that this limited success on appeal should, in any way, affect the costs thereof.

The result is that the appeal fails and is dismissed with costs. The order for costs made by the trial court is, however, altered to read: Plaintiff is ordered to pay two thirds of first and second defendants' costs; the balance of second defendant's costs is to be paid by first defendant, provided that in so far as it is not recoverable from him, it is to be paid by plaintiff.

NESTADT, AJA

RABIE, CJ
JANSEN, JA
JOUBERT, JA
SMALBERGER, JA
} Concur