

Murti v Afeaki & Kaitapu

Supreme Court, Nuku'alofa

Martin CJ

Civil Case No. 119/1989

8, 9 February, 24, 25, 26 September, 25 October 1990

10 *Partnership – creation – intention of parties*

Partnership – duties of partners – utmost good faith towards each other –

Partnership – termination – in absence of agreement to contrary a partner may dissolve a partnership at any time

Partnership – termination – disposition of assets in accordance with Partnership Act 1890 (UK)

Statutes – Partnership Act 1890 (UK) applicable in Tonga by virtue of Civil Law Act (Cap 25)

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The plaintiff and the defendants made arrangement to set up a garment factory. The plaintiff discovered that the wife of the second defendant had been allowed by him to sign cheques and there was a dispute between her and the plaintiff following which the second defendant excluded the plaintiff from the premises used for the factory. The plaintiff claimed the return of equipment which he had owned and was still in the premises, and also for unpaid wages. The defendants denied the claim for wages stating that the plaintiff was a partner, nor an employee; and was not entitled to remove partnership assets; they counterclaimed for loss caused by his failure to give one month's notice to terminate the partnership.

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HELD

Dismissing the claim and counterclaim, except for making an order for an account:

1. Whether or not there was a partnership depended on the real intentions of the parties, and the fact that letters had been written describing the plaintiff as an employee did not indicate a contrary intention since they were clearly shams;
2. Under the terms of the partnership agreement there was no requirement that one month's notice of dissolution must be given, and the partnership could therefore be terminated at any time by any partner and had been terminated when the second defendant excluded the plaintiff from the premises;
3. The second defendant was in breach of the partnership agreement in secretly arranging for his wife to be accepted by the bank as a signatory of partnership cheques;
4. Since there is no Tonga law relating to partnership, the Partnership Act 1890 (UK) applies by virtue of the Civil Law Act (Cap 25);

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5. Under the Partnership Act 1890 no partner is entitled on dissolution to withdraw property which he has contributed to the partnership, so that the plaintiff was not entitled to retain the equipment he had contributed;
6. An order should be made for an account to be taken to ascertain the extent of the partnership assets and liabilities.

Statutes considered:

Partnership Act 1890 (UK)

Counsel for the plaintiff : Mr S. Talanoa, Mr S. Etika
 Counsel for the defendants : Mrs F. Vaihu

Judgment

Background

The plaintiff Mr Murti is a tailor. He came to Tonga and obtained employment. That employment ended towards the end of 1988, and he then entered into a business arrangement with the Defendants Dr Afeaki and Mr Kaitapu. Between them they set up and began to operate a garment factory trading under the name of Sattex International. Mr Murti contributed certain sewing machines and equipment (the extent of which is in dispute) and his expertise, and together with his wife worked full time in the business. Mr Kaitapu works for the Bank of Tonga; he did the banking and contributed money. Dr Afeaki did a lot of preparatory work but then had to return to his medical duties in Vava'u; he also contributed money.

The parties fell out. Mr Murti left the business and this action ensued. He claims the return of certain machinery and equipment, damages for their retention, and unpaid wages. Most of the equipment claimed was immediately conceded by the defendants and is now in Mr Murti's possession. The items still in dispute when the trial commenced were:

1. a Toyota sewing machine with stand and button holer;
2. a button pressing machine with metal buttons;
3. a cutting counter;
4. 4 pairs of scissors;
5. cut patterns; and
6. a book of cotton samples.

During the trial Mr Kaitapu abandoned any claim to the sewing machine, but he still claims the button holer attachment.

The defendants deny the claim for wages, saying that this was a partnership. They counterclaim for loss of business caused when Mr Murti allegedly informed customers that the business was about to close, and for failure to give one month's notice to terminate the partnership agreement.

Mr Murti complains that he was excluded by the Defendants; that without his knowledge Mr Kaitapu's wife was given authority to sign cheques; that on 9th October 1989 he discovered that the Defendants had applied for a development licence in their names only; and that on 21st October he received a letter from Mr Kaitapu (Ex 4) excluding him from the business premises. The Defendants deny any intention to exclude him and say that the letter was only written to protect the partnership property when it seemed likely that Mr Murti would remove it.

The Facts

The parties worked closely together in planning and setting up the business. They each agreed to contribute \$5,000.00.

On 29th March 1989 each of the parties signed a similar document. That signed by Mr Murti (Ex 1) states:

"This document is to certify that I, Sham Murti ... has willingly handed to Sat Tex International my sewing machines worth T\$5,000.00

This is a joint venture between my very good friends Aloisio S. Kaitapu ... and Talia'uli Afeaki ..."

100 It was witnessed by Mr Kaitapu and Dr Afeaki.

The document signed by Mr Kaitapu (Ex 2) stated that he had contributed "... a sum of T\$5,000.00 to Sat Tex International. A joint venture between Aloisio Kaitapu ... Sham Murti ... Talia'uli Afeaki." It was witnessed by Mr Murti and Dr Afeaki. Dr Afeaki is said to have signed a similar document but it was not produced.

110 Mr Murti put in his equipment. Dr Afeaki and Mr Kaitapu each borrowed money from the bank and put in \$5,000.00, which was used to meet the expenses of setting up and running costs. Part of this money was used for travelling expenses for Mr Murti and his family, some money was transferred to him in Fiji to buy materials and equipment for the business, and some was used to meet rent, the cost of equipping the factory, wages and materials.

The business started on 14th March 1989. Mr Murti worked in it full time, and worked very long hours. The other two had paid jobs. At first Mr Murti drew no money, although his wife was paid. After a while he began to draw \$70.00 per week, later increasing to \$75.00 per week.

120 Application was made for a development licence. This showed that the owners of Sattex International were Mr Kaitapu and Dr Afeaki. Dr Afeaki explained that he was told by someone in the Ministry of Labour and Commerce that the application would take longer to process if a non-Tongan were involved. Tevita Va'ivaka, Assistant Secretary at the Ministry, told us that it made no difference. He dealt with the application and could not remember being told that any non-Tongan was involved. It is possible that Dr Afeaki had dealings with someone else at the Ministry.

130 Mr Murti said he knew nothing about that application. That is clearly incorrect because his handwriting appears on the draft application form. As will become evident, these three produced other documents which contained false information. They produced documents to suit the occasion without too much regard for the truth and I can draw no conclusions at all from any document which they prepared. It is quite likely that if they thought it would benefit them, they would have put incorrect information on this form. On this issue I accept the evidence of Dr Afeaki that the three of them sat down and worked through the form together; and that Mr Murti knew very well that his name would not be shown as a part owner.

140 The complaint that Mrs Kaitapu was made a cheque signatory without notice to Mr Murti is more serious. Mr Kaitapu conceded that she was authorised to sign cheques, but said that Mr Murti agreed. I accepted Mr Murti's evidence that he did not agree, and that he was not told. He discovered the fact by accident and was clearly upset by the discovery. Mr Kaitapu explained that this was a routine

requirement of his employer, the Bank of Tonga, where one of its employees enters into any outside business. There is no reason why the Bank should impose any such requirement. Nobody from the Bank gave evidence to support this unlikely story, and I do not believe it.

150 For whatever reasons, Mr Murti became discontented. Matters came to a head on 19th October 1989 when Mrs Kaitapu called at the factory to complain about delay in completing some work for her husband. It is clear from the evidence of several employees that she and Mr Murti quarrelled. Unknown to Mr Murti, Mrs Kaitapu had contributed some of her money towards her husband's share and no doubt felt that she had an interest in the business. Mr Murti probably resented what he saw as interference.

He appears to have decided there and then that he had had enough. Later that day he told an employee, Malakai Fonua, that he was leaving. Nina Kumar heard him say the same thing, and said that he told the staff to stop work. Later, he told another employee, Petisi Tu'ineau, that he was leaving because Mrs Kaitapu had used abusive language towards him.

160 Mr Murti said in evidence : "I never told anyone we would be closing the factory" but I do not believe him. Several employees confirmed that he told them to advise customers that their orders could not be completed; and one of those customers, Sapate Pale, was told by him personally to collect her sewing from the factory because it was about to close.

Mr Murti collected what he regarded as his machines together and dismantled them ready for removal. Mr Kaitapu learned what was happening and consulted a lawyer. On advise, he wrote the letter of 21st October (Ex 4) which reads as follows:

"Dear Sir'

170 Since you have given indications that you are no longer coming to work on Monday 23rd October 1989, I now inform you that from the moment you receive this letter, you are not to enter or to take anything from the garment factory on 'Uliti Uata Building known as "SATTEX INTERNATIONAL". Until the current dispute is resolved.

The rent for this factory is in my name. Failure to comply with the above instructions will result in prosecution.

Yours

(Signed) A. S. Kaitapu"

180 Mr Murti said that by this letter he was excluded from the factory without warning, and that he had never mentioned not coming back. As already indicated, I accept the evidence of the employees that he did say he was leaving. He had also demonstrated that intention by dismantling some of the machines ready to take away. It was clear that he intended to go. All that the letter did was to prevent him removing anything" ... until the current dispute is resolved". It was not unreasonable, and if Mr Murti was taken by surprise it was only because he hoped to leave with what he regarded as his goods before Mr Kaitapu learned of his intentions.

190 There were clearly matters which caused Mr Murti legitimate concern, particularly the addition of Mrs Kaitapu as a cheque signatory. But there was nothing done by either Defendant which made continuation of the business relationship

impossible. It was the action of Mr Murti which had this effect. He simply decided to go and started to pack up.

Was there a partnership?

The first issue to determine is the nature of the relationship between the parties. They all said that it was a partnership; but Mr Murti also claimed to be an employee of the business and claims arrears of salary. It is impossible in law to be a partner and an employee at the same time.

200 There is strong evidence that it was a partnership. They signed documents stating that it was a "joint venture". They behaved like partners. They worked closely together to set up the business and consulted each other at all stages. Each contributed goods or money to the same value.

Evidence to the contrary consists of a contract of employment which Mr Murti entered into with Sat Tex International (Ex 3); and a loan application by Mr Murti to the Bank of Tonga (Ex 17) in which he stated that he received a salary of \$5,760.00 p.a. and which he supported by a letter from Mr Kaitapu stating that:

"I have pleasure of informing your office that Mr Sham Murti is employed by Sat Tex International as Operation Manager.

210 He has a take-away pay of \$240.00 per fortnight ..."

All these documents were false. On the evidence of Mr Murti and Dr Afeaki the "contract of employment" was prepared solely in order to obtain permission from the immigration department for him to remain in Tonga. On Mr Kaitapu's evidence the letter to the Bank was designed to mislead the bank that Mr Murti had a regular income and was therefore credit worthy. It also substantially exaggerated what he was actually receiving. None of the documents reflected the true intentions of the parties. It was clearly a partnership.

220 In the absence of any agreement to the contrary a partner may dissolve a partnership at any time, without notice. Here there was no written partnership agreement containing any such agreement. The terms of the "contract of employment" cannot be relied on to establish a right to notice as the entire document is a sham. There was no provision for notice.

I find that

1. All the parties intended to, and did, enter into a partnership in equal shares;
2. There was no requirement that a partner should give one month's notice of termination; and
3. The partnership was dissolved on 21st October 1989.

230 The law imposes a duty on partners to observe the utmost good faith and honesty towards each other. In secretly arranging for Mrs Kaitapu to be a signatory to the firm's cheques (which would have enabled Mr and Mrs Kaitapu to withdraw money without the knowledge of the other partners) Mr Kaitapu was in breach of that duty. It remains to be seen whether in fact advantage was taken of that situation. If so any money taken out without proper authority will have to be refunded.

I further find that

4. Mr Kaitapu was in breach of the partnership agreement in secretly authorising his wife to sign cheques.
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The Law

There is no Tonga law relating to partnership. By virtue of the Civil Law Act English law therefore applies. The relevant law is to be found in the Partnership Act 1890. Section 44 states:

"44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

- (a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share of profits;
- (b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:
 1. In paying the debts and liabilities of the firm to persons who are not partners therein;
 2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;
 3. In paying to each partner rateably what is due from the firm to him in respect of capital;
 4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible."

Conclusions

On the dissolution of this partnership there were three steps to be taken:

1. pay its debts,
2. settle any accounts between the partners,
3. divided any remaining assets between the partners in equal shares, or, if those assets are insufficient,

make up any deficiency by contributions in equal shares.

Both the claim and the counterclaim display a misunderstanding of partners' rights on dissolution. Once assets have been put into a partnership they become partnership assets. They cease to belong to the individual who contributed them and are then jointly owned. No one partner is entitled as of right to take out what he contributed. Assets may be allocated to a partner in full or part settlement of his share, if anything is due to him. But no partner is entitled to simply walk away with what he brought in. If that were the law, Mr Kaitapu and Dr Afeaki would be entitled to walk away with the money they contributed, which they are clearly unable to do.

The parties in this action must establish what were the assets of the partnership at the date of dissolution, including any trading profit, and after payment of any debts outstanding at 21st October 1989. Those assets must then be divided equally between them.

Mr Muti has received certain equipment which was formerly his, but now belong to the partnership as a whole. That equipment must be valued and he must give credit for that value against any share of assets which may be due to him. He also received payments which he described as wages. In law those payments were an advance of his eventual share of the profits. In any distribution he must

give credit for what he has already received both in the value of equipment and in advances against his eventual share of profits.

I order that an account be taken of what was owing between the partners at 21st October 1989.

This will require proper accounts and valuations to be prepared. It will be an expensive exercise which may not be justified in view of the relatively small sums involved. I urge the parties to negotiate some settlement between themselves to avoid the partnership assets being wasted in legal and accountancy fees.

300 The original claims of the Plaintiff are misconceived. Return of goods is not appropriate because the items in dispute did not belong to him alone on 21st October 1989; no wages were due to him because he was a partner and not an employee; and the claim for damages for detection of goods falls with the claim for their return.

The counterclaim for loss of earnings is also misconceived. There was nothing to stop any partner from dissolving the partnership at any time. In any event no evidence at all was produced to show that the business which continued had lost any money. The claim for damages for failure to give notice fails because no notice was required to be given.

310 This action emphasises the desirability of partners entering into a written partnership agreement to provide reasonable protection for the others if one partner wishes to leave.

Subject to the order for an account, the claim and counterclaim are dismissed. There will be no order for costs.