THE LAW OF PARTNERSHIP

Principles of the law of Partnership in South Africa

Introduction to the South African law of Partnership

A partnership is a legal relationship that derives from a contract. The salient features of the contract are:

- it is concluded between two or more persons (but normally not more than 20 persons),
- each partner must undertake to contribute to an enterprise,
- the partnership must be carried on in common
- and the object must be the making and sharing of profits.

A partnership is not a corporate entity. It does not have a separate legal persona and this has several important legal consequences: in the relationship between the parties all rights and duties only exist between the partners inter se, the rights and duties of the partnership are the rights and duties of the partners and the continued existence of the partnership depends on the continued participation of partners in the partnership hence it has no perpetual succession.

Nevertheless, this notion that the partnership is not a separate juristic person is not followed through consistently. For the purpose of insolvency, the estates of partners and the partnership are mostly regarded as separate and as a matter of civil procedure the partnership is often treated as an entity in that it may be sued and be sued in its own name.

Partnerships are governed by the common law; legislation has only played a limited role. Thus Roman-Dutch law applies in this area. However, the treatise on the law of partnership by the French jurist Poitier has exerted great influence on this branch of South African law. Moreover, English law and English cases have been regarded as persuasive in the law of partnership. There are many similarities between South African and English law in this field. However, there are also important distinctions and English law can serve as no more than a guide.

Establishing a Partnership under South African law

Partnerships are created by contract. Thus for a partnership to be validly formed all the general requirements as regards to contractual validity must be met. Furthermore for an agreement to be one of partnership consensus must have been reached on all the essential terms of partnership or rather as was described herein above as its salient features.

The general principles of contractual capacity accordingly also apply to the contract of partnerships. An unrehabilitated insolvent may conclude a partnership agreement with the permission of his trustee and a minor with the assistance of his natural guardian.

South African law does not require that only natural persons be members of a partnership. A company as well as another partnership may become a party to a partnership agreement. However, in the latter case care must be taken that the number of its partners when added to the