

**Barry Rider**

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## **Review: *Perspectives on the law of partnerships in South Africa***

J.J. Henning. *Perspectives on the law of partnerships in South Africa*.  
2015. Cape Town: Juta. 336 p. ISBN 9781485106401

The last word (well almost) on partnership!

As Judge Frederick Brand observes in the preface to *Perspectives on the law of partnership in South Africa*, given the significance of partnership law, it is surprising that the contribution of scholars has been, with one very notable exception, somewhat limited. The exception being, as judge Brand points out, Professor Johan Henning. The learned judge also observes that Johan Henning's contribution to scholarly writing on the law of partnership, especially in southern Africa, but also internationally has been second to none. His most recent contribution follows a long and distinguished list of publications ranging from substantial practitioner-oriented works to perceptive focused treatises on particular aspects of the law. In many ways, the present work has the advantage of drawing together this vast array of informed comment and analysis refined over a long and highly distinguished academic career – in which Professor Henning has made significant contributions to far more than the law of partnership!

As Professor Johan Henning is wont to emphasise, and does most eloquently in this book, the law of partnership is the bedrock of commerce and business. Ever since two persons got together in enterprise, it has proved necessary for society to develop rules relating to not only their relationship, but also the impact of their activities and agreement on others. Consequently, it is not surprising to note, in some of the earliest known systems of law, examples of principles that operate in much the same way today as they did then. Of course, as legal systems develop and enrich themselves through the experience of, and interplay with other systems and take advantage of the privilege of greater contemplation, a whole host of rules inevitably become intertwined. Thus partnership law – no matter how pure its genesis – becomes interwoven with the law

*Barry AK Rider OBE LLD, Professorial Fellow, Centre for Development Studies, University of Cambridge; Professor of Comparative Law, Renmin University, Peoples' Republic of China; Professor of Law, BPP University; Honorary Professor of Law, University of the Free State; Honorary Senior Research Fellow and former Director of the Institute of Advanced Legal Studies, University of London, and Master of the Bench of the Honourable Society of the Inner Temple*

relating to contract, tort and such special principles as arise to protect the confidence and trust reposed by those in mutual undertakings.

South African law, given its mixed and, at times, with respect to a simple common lawyer, almost schizophrenic heritage, appears to have cherished the opportunity that partnership law offers to flourish in the experience of other traditions. In the result we observe an especially rich tapestry of law, where principles of Roman law interwoven with the pragmatism of medieval jurisprudence retain a degree of relevance – if not authority – that would be near shocking in other contexts. South Africa's unique blend of Roman-Dutch principles has particularly lent itself to perhaps a more philosophical development than the common law. Hence, seizing the opportunity to exhibit great scholarship and learning, Professor Henning presents us with a very detailed discussion of the legal status of partnership in South Africa and, in particular, the influence aggregate and entity theories have had on the law nowadays. Of particular interest to comparative lawyers is the detailed analysis of the South African statutory provisions that treat a partnership as being a separate legal entity – an issue which many legal systems find extraordinarily difficult to contemplate. Indeed, it is one of the joys of this most readable and erudite treatise that one clearly perceives how the struggle between ancient concepts and modern business practices is still apparent in the modern law of partnership.

In the commercial and business history of South Africa, partnership law has played an important facilitative role. This is brought out and explained, not merely from the standpoint of historical context, but also in explanation of, in many regards, how the law is perceived and thus operates nowadays. It is, however, in recent years, with South Africa's transition into a deeper and fairer economy, that the role of partnership has had such a vital role. Having said this, as Professor Henning illustrates, the law and, in particular, the burst of legislative activity that has, in many respects, become cast in the role of empowerment, has not always been as well conceived and drafted as could be wished.

The rich sources of law and experience, which typify partnership law in South Africa and, to some degree, southern Africa, have in their persistency not always worked well with new law, which itself has tended to be partial in some respects both in its conception and articulation. In such circumstances, it is not surprising that, as again Judge Brand rightly points out, the courts in South Africa have rather more than in other – perhaps more straight forward areas of law – found real assistance and purchase in the kind of academic and intellectual analysis that characterises Johan Henning's work and is so well represented in the present work.

Although this book is aimed primarily at lawyers and those with an interest in business in South Africa, given the breadth of discussion, it will inevitably have a much wider appeal and, indeed, relevance. Anglo-American and continental lawyers will find much of interest, ranging from a historical perspective on *Bovill's Act* of 1865 and the corresponding

provisions of the *Partnership Act* of 1890, to a thorough consideration of the role and influence of the *societas leonina* and *contractus trinius* and partnerships *en commandite* in continental legal systems, of limited and limited liability partnerships in the USA and UK, as well as the failure of partnership and limited partnership reform in the UK, and the vicissitudes of the “jingle rule” in partnership insolvency in the UK and USA. While discussed with the authority of one of the world’s leading commercial and corporate academic lawyers, the analysis is both practical and pertinent to the current operation of law in many places beyond South Africa.

The book’s breath and depth is surprising not least because, while a very thorough and well-written work, it does not appear, in its presentation, as extensive as it is. In large measure, this is simply a result of small print and an economy on the part of the publisher in terms of size. The book is substantial nonetheless and perhaps in its coverage, not only of South African law and its heritage, but also in addressing the wider and more comparative aspects, and is unique in the clarity and range of its purview, as we have just noted in terms of the market. It encompasses analysis of the law and practice relating to every conceivable partnership structure that can be encountered in South Africa – and this itself is no small achievement – but it also addresses issues relating to capitalisation, structure, operation and management. It also focuses on the sadly all-important law relating to insolvency. While partnership law is rightly the backbone of smaller to medium-sized business, the reality in all jurisdictions is that this sector is simply most vulnerable. It is also the case that it is bang up to date – no ordinary achievement in such a fast moving and occasionally controversial (at least in South Africa) area of the law. Indeed, for example, an entire chapter is devoted to reasons for, and consequences of the removal of the twenty-partner limit by the *Companies Act* 71 of 2008 with effect from 1 May 2011. The implications for business activities in South Africa, while perhaps not being as profound and as far-reaching as some had predicted, have nonetheless been of real significance. It is not only developments in legislation that have, of course, been more amenable to policy that are so addressed, but also case law. There is, for instance, an in-depth discussion of the seminal and leading decision of the Supreme Court of Appeal in *Butters v Mncora* 2012(4) SA 1 (SCA), in which it was decided that the universal partnership of all property (*societas universorum bonorum*) still forms part of South African law and that the concept ‘partnership’ in South Africa is not limited to a purely monetary profit motive, but that the attainment of a broader joint benefit will suffice. Furthermore, and perhaps more importantly, the ambit of a partnership is not necessarily limited to the commercial sphere – it also embraces other forms of joint activity.

The present writer always approaches invitations to review books – and particularly law ‘black letter’ books, with trepidation and reluctance. Apart from the issue as to whether anyone other than academics read and regard such efforts, it is often embarrassing. Fields of expertise, even at an international level, tend, perhaps today increasingly, to be select. It is often

the case that one knows the relevant author and is, therefore, hesitant to be as forthright in one's comments as perhaps one should be. Indeed, s/he might be asked in the future to review one's own work! While I have had the honour and privilege to know and work closely with Professor Henning for many years, I can with honesty say that, on this occasion, it has been a pleasure to read and consider this work. There is no room for embarrassment as I search in vein to discover but one point upon which I could base a reasonable or even a political (in academic terms!) criticism. It is an excellent book in all respects, whether I retain my hat as an academic lawyer or don my wig as a practitioner. This book goes well beyond making a contribution to partnership law – it is the authoritative study of the subject!