

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 36040/11

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

**L T
(BORN J)**

Plaintiff

and

**VLAM
(Identity number:...)**

Defendant

J U D G M E N T

MATHOPO J:

Introduction

- [1] The plaintiff instituted an action against the defendant on the basis of a universal partnership which she alleges existed between herself and the Defendant. As a result thereof, plaintiff claims her half share of the proceeds of a property (hereinafter referred to as the “Donnelley property”), which she alleges was acquired during the existence of their relationship. Alternatively, the plaintiff claim monies that she paid over in respect of certain properties, on the basis of an unjust enrichment claim.

BACKGROUND

- [2] The plaintiff and the defendant were life partners who started dating in October 2003. At that time plaintiff was working part time as driver at Mr Delivery. The parties moved together as a couple in December 2003 and resided at the defendant’s house in Von Brandis Street, Turffontein (Von Brandis property) together with the defendant’s parents.
- [3] It is the plaintiff’s case that prior to moving together, the defendant asked for a commitment from the plaintiff to show that she had “single her out to be exclusively hers”. As a token of commitment, plaintiff gave the defendant her grandmother’s gold band.
- [4] The plaintiff states that although she was employed part-time, it was agreed between her and the defendant that she would pay the bond every month and in fact paid R1 500.00 and the defendant would cover other household expenses. During February 2004 the plaintiff obtained permanent employment and the defendant wanted further commitment and discussed taking their relationship to another level. Marriage was also discussed. In addition and because same sex marriages were not yet legalised, the parties discussed universal partnership for a period of approximately six (6) months.

- [5] On the 11th December 2004, the parties reaffirmed a commitment to each other by exchanging vows to be life partners before Reverend McLachlan in Pretoria and after a ceremony which was attended by the defendant's friends were pronounced as a couple and signed the register and later furnished with a certificate entitled "certificate of life commitment".
- [6] The defendant later expressed a desire to have a child and the parties went to Cryobank for fertility treatment. After the second attempt at artificial insemination the defendant conceived and a child was born on the 8th December 2005. The fertility costs were covered by the defendant medical aid and some by herself.
- [7] The plaintiff states that she was in theatre when the child (Jessica) was born and cut the umbilical cord. After the birth of the child her role was to change the diapers, night feed her and see to it that the child got her bottle. She also transported the child to and from the day care centre and further contributed to the child's clothing.
- [8] As the Von Brandis property was now smaller, the parties went house hunting and after a period of 5 to 6 months, the plaintiff states that she saw an advert in the newspaper and showed it to the defendant. Thereafter they viewed the property in the company of the defendant's parents and decided to purchase it. The offer to purchase was signed by the defendant alone on the 27th April 2005, and the property registered in the defendant's name on the 14th October 2005. The reason why the property was registered in the name of the defendant is because she was working at First National Bank and thus qualified for a preferential or discounted interest rate. Another reason according to the plaintiff is that they did not want everyone to know about their relationship for fear of discrimination.
- [9] Plaintiff states that she continued with the bond repayments and contributed more than what was required of her so that the bond could

be paid off much quicker and the defendant continued with the payment of the household living expenses. Over and above the bond repayments, the plaintiff also paid for her cell phone which was in the defendant's name and later paid half the minor child's after care fees.

- [10] As regards the bond application, the plaintiff states that since the defendant's salary was insufficient to qualify for a bond, the bank advised the defendant to draw up a document indicating that she was receiving some monies monthly from the plaintiff and her mother. It is the plaintiff's evidence that after the said documents were signed and submitted to the bank, the bond was then granted to the defendant. In essence, her evidence is that absent the aforesaid documents, the defendant would not have been able to purchase the Donnelly property. The plaintiff states that all these steps were done in pursuance of their common design to put all their resources together and acquire this property.
- [11] The plaintiff also confirmed that monthly payments made by her to the defendant in various amounts as set out in Exhibit "A" as well as Exhibit "B" on page 18 of the bundle. These payments were not disputed by the defendants but the latter contended that they were not made in respect of bond payments but for living expenses and what she described as rent.
- [12] The plaintiff further testified that during the course of their relationship, she purchased clothes for the defendant and contributed towards the expenses of the defendant's parents holiday to Jeffrey's Bay by purchasing their train tickets and in addition gave them pocket money as well. She further testified that after moving to the Donnelly property, she painted each and every bedroom and also fixed locks before moving in. Again it is the plaintiff's case that this was done because of their agreement to acquire the property together and look after its maintenance and upkeep.

- [13] The plaintiff further gave evidence that during November 2008, she and the defendant attended the Cherry Festival in the Free State Province and along the way she stumbled upon a “sms” on the defendant’s cell phone apparently sent by her “girlfriend” one Kathlin. In the sms, the latter was declaring her undying love for the defendant. As a result of this incident, the relationship was damaged. She testified that she did not leave the defendant immediately because of her close ties with the minor child, J.
- [14] However during 2010, matters came to a head, the relationship could not be repaired. She discussed the dissolution of their agreement with the defendant. In lieu of her half-share in respect of the Donnelly property, the defendant undertook to pay R60 000 from her Sanlam Policy and balance to be paid in due course. In essence, the plaintiff stated that their relationship was in her eyes a marriage and that the agreement was at all times to jointly share in the common property.
- [15] The defendant gave evidence in support of her case and called her mother as a witness. The defendant did not dispute the evidence of the plaintiff regarding the fact that they were partners, signed a commitment before Reverend McLachlan in Pretoria. She pertinently disputed the existence of a universal partnership. Although she admitted that the plaintiff made certain monthly payments when they moved in together as a couple, these payments according to her were for living expenses and rent.
- [16] She testified that since the Donnelly property was her third property and having been a sole owner of her other previous properties, she did not intend to share the said property with the plaintiff. She disputed the plaintiff’s assertions that she made contributions towards the bond.
- [17] During cross examination, it was put to her that the evidence that Donnelly property was exclusively hers was not put to the plaintiff. She could not proffer any plausible explanation save reiterating that she

would never buy a property with someone else. When asked why the payments made by the plaintiff were above the bond amount of R2 400.00 she was unable to give an answer and when pressed further, she tried to introduce new evidence by stating that plaintiff often borrowed money for petrol from her and that the extra payments were sometimes for the petrol loan.

[18] The defendant further gave evidence regarding the loan that she supposedly took on behalf of the plaintiff at Absa Bank. It transpired during cross examination that the loan amount was R26 000.00 and the plaintiff was only given the sum of R6 000.00, the defendant using the balance for her needs.

[19] Although she tried to deny the existence of the universal partnership and the role played by the plaintiff in assisting with the acquisition of the Donnelly property and bond repayments. She conceded during cross examination that “without the plaintiff’s assistance, she could not have been able to purchase the said property”. She however, persisted notwithstanding the above concession and uncontradicted facts, that she made it clear in the relationship that the house was her property. Again this crucial aspect of her evidence was not put to the plaintiff. When asked why this aspect was not canvassed with the plaintiff, she was unable to give an answer. It being patently clear that this was a recent fabrication.

[20] When asked by the court she admitted that the plaintiff and her were life partners and able to share everything yet she was reluctant to concede that the plaintiff was entitled to share in the Donnelly property. She also conceded that the Donnelly property was the only asset acquired during the existence of their relationship.

[22] The defendant’s mother testified about the monthly payments she had been making to the defendant for rent since 2003. Her evidence did not advance the defendant’s case any further.

- [23] Counsel for the plaintiff submitted that having regard to the evidence, the property was the only asset which the partnership acquired and following the concession by the defendant, the only reasonable inference that can be drawn is the existence of the partnership. She argued correctly in my view that it would make no sense for the plaintiff to enter into a life long commitment, contribute financially to the maintenance and upkeep of the estate yet share no part in the property. As authority for her submission that the conduct of the parties expressly or tacitly evinces nothing less than universal partnership, counsel relied extensively on Pothier. A Treatise on the law of partnership (Tudor's Translation 1.3.8) and **Ponelat v Schrepfer 2012 (1) SA 206 SCA** and **Butters v Mncora 2012 (4) SA 1 SCA** cases which reaffirmed the principle of universal partnership between cohabitees. The courts described the three essentials of partnership as:

“The three essentials are, firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts (See eg Bester v Niekerk supra at 784).”

- [24] The case advanced for the plaintiff is that its case meets the above requirements. Specifically it was argued that Roman and Roman Dutch Law also recognised universal partnership and further that a distinction was drawn between two categories. The first was the *societas unversorum bonorum* by which parties agree to put in common all their property, present and future. The second type

consisted of the *societas unversorum quae ex quaestu veniunt*, where the parties agree that all they may acquire during the subsistence of the partnership, from every commercial undertaking shall be the partnership property. Counsel submitted that the case for the plaintiff falls squarely within the second category.

[25] Counsel for the defendant submitted that the defendant conceded receiving payments made by the plaintiff but states that these payments were for living expenses and what she described as rent and urged upon me to accept the evidence of the defendant that no universal partnership existed between the parties because the plaintiff's pleaded case is that an oral agreement came into being, whereas the property that formed the subject of this matter, the Donnelly property, was purchased and registered in the name of the defendant alone. Counsel submitted that this fact alone gives credence to the defendant's assertion that she made it clear to the plaintiff that she did not want to jointly own the property with anybody else.

[26] Another argument advanced by the counsel for the defendant is that universal partnership cannot come into existence in respect of a particular asset. This argument is misplaced, it is not the parties evidence that there were other assets in the relationship. The defendant conceded that the only asset acquired during the relationship was the Donnelly property.

ASSESSMENT OF THE EVIDENCE

[27] The plaintiff testified in a coherent, lucid and credible manner. She did not seek to advance her case by fabricating or adjusting her evidence as the case progresses. Observing her giving evidence, I was left with the distinct impression that she was committed to the relationship with the defendant. Right at the outset of their relationship with meagre

earnings whilst employed on a part time basis at Mr Deliver, she contributed towards the bond repayments in respect of the Von Brandis property. When she secured permanent employment she continued making payments towards the bond and this continued also after the Donnelly property was acquired. Her evidence that she made extra payments towards the bond so that it could be paid off much quicker, demonstrates an unqualified and unconditional commitment to their relationship. It is abundantly clear to me that she trusted and loved the defendant and regarded her a true life partner. It is not surprising that when she saw the “sms” sent by Kathlin, she was devastated. I have no doubt in my mind that when the defendant asked her to single her out and be exclusively hers. Evidently she took the relationship seriously and regarded same akin to a marriage.

[28] The defendant’s evidence is fraught with improbabilities and unreliable. Her evidence that she intended to keep the Donnelly property as her own exclusive property is unsustainable. The totality of the evidence and common cause factors demonstrates that the plaintiff and defendant were life partners who were not only committed to each other but formalised their commitment before Reverend McLachlan on the 11th December 2004. In my view the ceremony in church which was attended by some of the defendant’s friends was intended to achieve a measure of protection for their relationship. The parties lived together and they agreed as to how they were to share their expenses.

[29] I am fortified in my view by the defendant’s admission that indeed the plaintiff made substantial monthly payments albeit according to the defendant was for a different reason. In my view all the payments made by the plaintiff reflected in Exhibit “A” and Exhibit “B” of the common cause facts clearly shows that they were not rental payments but payments towards the bond. These payments commenced when parties were still residing at the Von Brandis Property and continued throughout until the Donnelly property was acquired.

[30] I agree with counsel for the plaintiff that it would be absurd for the plaintiff to enter into a life long commitment and yet share no part of the property. The plaintiff's evidence that she paid for the minor child after care fees, assisted with household chores is another factor which militates against the acceptance of the defendant's evidence. The same cannot be said about the defendant. Her evidence that she intended to keep the property as her own is negated by the objective facts. She could not acquire the property without the assistance of the plaintiff yet she wants to exclude her. I find this evidence to be illogical. This crucial aspect of her evidence was not put to the plaintiff, it only emerged during cross examination, this is an afterthought or recent fabrication. The suggestion that the plaintiff was a tenant or lodger is not borne out by the facts and evidence. I accordingly reject it.

[31] I am accordingly satisfied that the criticism levelled against the plaintiff regarding her failure to explain certain amounts does not detract from the reliability and veracity of her evidence. In my view it would be asking the impossible to expect her to remember and keep proof of each and every item paid by her over a considerable period of time (6 ½ years). The Defendant also could not provide other details of her payment.

[32] In conclusion, the plaintiff has succeeded in establishing on the balance of probabilities the existence of a universal partnership between her and the defendant and she is accordingly entitled to the order sought.

I therefore make the following order:

1. It is declared that a universal partnership existed between the plaintiff and the defendant and that the plaintiff and defendant had a fifty percent share in such partnership;

2. It is declared that the said partnership was dissolved with effect from 1 July 2010;
3. Failing agreement between the parties within a period of two (2) months (or such longer period as the parties may in writing agree upon) on the net benefit accruing to the plaintiff from the partnership and the manner and date of delivery or payment of such benefit to the plaintiff;
 - 3.1 It is ordered that a liquidator be appointed to liquidate the said partnership;
 - 3.2 Unless the parties agree in writing on the appointment of a liquidator, the liquidator shall be appointed at the request of either the parties by the Chairperson of the Law Society of the Northern Provinces. The liquidator will have not less than ten (10) years experience;
 - 3.3 The liquidator may call on either of the parties *mero motu* or at the request of one of them to deliver documents or records that the liquidator may require;
 - 3.4 The liquidator is authorised to realise the property situated at 89 Donnelly Street, Turffontein, to liquidate the liabilities of such property and to prepare a final account and to pay to the plaintiff half of the net proceeds of the said property;
 - 3.5 The costs of the liquidator shall be borne by the parties in equal shares.
4. The defendant is ordered to pay the plaintiff's costs of suit.

MATHOPO J*Judge of the South Gauteng**High Court, Johannesburg***Appearances:**

For the Plaintiff	:	Adv LL Norman
instructed by	:	Tracy Sischy Attorneys
For the Defendant	:	Adv AP Bruwer
instructed by	:	Manfred Jacobs Attorneys
Date of hearing	:	02 November 2012
Date of Judgement	:	22 November 2012