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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 25498/2011

- (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:

ELONA UYS

Plaintiff

And

FRANCISCO SARDINHA DUARTE

Defendant

J U D G M E N T

MASHILE, J:

[1] The Plaintiff instituted this action against the Defendant alleging that on account of the parties' permanent cohabitation relationship, they have concluded

an express, alternatively a tacit, further alternatively an implied universal partnership agreement the terms and conditions of which were that:

- 1.1 The parties would henceforth assume reciprocal duties of support against each other;
- 1.2 The parties would be joint owners of all assets of the universal partnership in equal shares;
- 1.3 The objective of the partnership was to accumulate an appreciating joint estate for the mutual benefit of both parties;
- 1.4 The parties' contribution towards the partnership would be in line with their respective means and abilities;
- 1.5 All assets and money that the parties acquired by the parties hereafter would fall within the partnership;
- 1.6 The parties' contribution towards the partnership would be by way of finance, labour, services, assistance, support and homemaking;
- 1.7 The parties would share the profits and losses of the partnership in equal share.

[2] The Defendant admitted that he had a relationship with the Plaintiff. He denied the nature of the relationship and that it had any legal proprietary consequences as averred by the Plaintiff.

[3] The Plaintiff relied on a number of incidents, which according to her shore up her allegation that the parties had entered into a universal partnership premised on the terms and conditions stated in the preceding paragraph.

[4] Needless to state that the Defendant equally referred to occurrences which, according to him, suggest that no such agreement existed. The Plaintiff then led evidence of several witnesses including her own in an endeavour to demonstrate the presence of the agreement.

[5] Prior to the parties embarking on the main case the court had to consider and decide on an application to separate issues in terms of Uniform Rule of Court 33(4) launched by the Defendant. The Plaintiff opposed the application on the ground that it would not be convenient to decide the matters discretely.

[6] The Plaintiff contended that the two were inextricably bound such that it would be prejudicial to her if the court were to order separation.

[7] The court considered the matter and guided by the Practice Manual of this court, ruled in favour of separation. Chapter 6.13.3.5.3 of the Practice Manual of this court provides that merits and quantum shall be decided discretely as envisaged in Uniform Rule of Court 33(4) if the parties do not settle the merits.

[8] Besides, contrary to the Plaintiffs' belief, the court held the view that it would be expedient and useful to have the two decided separately. This view was fortified by the fact that lack of proof of the existence of a universal partnership agreement could be dispositive of the whole case.

[9] Once the court had made a ruling as it did on separation, the issues upon which it had to adjudicate were narrowed to the following:

- 9.1 Whether or not the parties concluded an express agreement to establish a permanent cohabitation relationship in 1996;
- 9.2 If the parties did conclude such an agreement, what were its terms and conditions?
- 9.3 Did the agreement to create a permanent cohabitation relationship specifically give rise to a universal partnership between the parties?

[10] The Plaintiff gave evidence on her own behalf and thereafter called three witnesses to support her claim. Her evidence was that:

- 10.1 She was twenty years old when she met the Defendant in 1994 while in the employ of Stirrups Hotel in Westonaria. The Defendant ran and operated an estate agency business known as Utopia Homes whose offices were next to the Stirrups Hotel. The

parties befriended each other. The Defendant began a habit of bringing her fruits and food. On occasions the parties would go out on lunch;

10.2 In November 1994 the Defendant began to introduce her to his estate agency business by taking her along whenever he went to conclude property deals. On 2 January 1995 she accepted an employment offer from the Defendant at Utopia Homes. She, however, continued to live at the hotel until June 1995;

10.3 At the time when she joined Utopia Homes as an employee, she was in a sexual relationship with the Defendant. Utopia Homes paid her an amount of R1 000.00 per month at the time;

10.4 She inherited approximately R17 000.00 from her late mother's estate. She estimated that she utilized R10 000.00 of the amount to buy herself a property situated at No. 7 M....., W..... In July 1995 she left the hotel and took occupation of her newly acquired property;

10.5 The Defendant and his brother, Tony Duarte, bought furniture for her new property. Later that year, the Defendant advised her to let her property so that she could shift the responsibility of paying the mortgage bond to a tenant;

- 10.6 The Defendant offered her accommodation at his farm known as Poortjie. Once this was arranged, she found a tenant and concluded a written lease agreement. As planned, she moved to the farm where she lived with the Defendant as husband and wife;
- 10.7 The Defendant was initially responsible for the running of the farm but he later requested her to pay for cleaning products while he bought meat and paid staff.
- 10.8 Some of her duties at Utopia Homes included mending the reception, keeping the books of the business and banking. She had signing rights on the Defendant's personal bank account;
- 10.9 When Utopia Homes experienced financial hardships, she agreed not to take a salary so that it could settle its debts;
- 10.10 In 1996 the Defendant informed her and discussed his intention to purchase a property from which to operate Utopia Homes. This he wanted to do so that he could avoid renting his brother's property from which Utopia Homes was run then.
- 10.11 The Defendant informed her that they were in a partnership and that Utopia Homes would be hers one day as his children were not showing any interest in it;

10.12 She took out a life policy with Old Mutual wherein she nominated her sister as a beneficiary. She also appointed the Defendant as a beneficiary on the funeral benefit. She did this in anticipation of the Defendant taking care of the funeral arrangements in the event of her death;

10.13 In 1996 the parties resolved to buy ostrich chickens from her uncle and thereafter to raise them. The objective was to sell them later to her uncle at a profit. They bought approximately 500 ostrich chickens in total. Eventually, the grown ostriches were not sold back to her uncle but instead the Defendant sold them to people who wanted grown ostriches;

10.14 She and the Defendant put in money for this project. The understanding was that the proceeds would benefit both of them. She testified that they did everything together and agreed to share everything;

10.15 In 1996 the parties discussed their future on several occasions. The Defendant asked her whether she would still care for him when he is old in light of the age difference whereupon she advised him that they were in it together and that she would stay with him the age gap notwithstanding;

10.16 In November 2000, the Defendant told her that he bought Sombrero Tequila Hotel (hereinafter “the Sombrero Hotel”) in Westonaria as a going concern. He informed her further that they would henceforth manage and run it. Sombrero Hotel was the trading name of Tramtrade Trading No 46 CC whose only member was the Defendant;

10.17 She testified that she invested an amount of R32 000.00 of her own money into Sombrero hotel. Prior to this investment, she bought the property situated on 20 Mullin Street, Westonaria and subsequently sold it at a profit. She then used the commission that she earned from that transaction to invest in the hotel business;

10.18 The purchase price of the hotel was R28 000.00. The parties totally revamped the hotel with a new bar counter, pool tables and stock. Mark Duarte, the Defendant’s son, managed the Sombrero Hotel at the beginning;

10.19 She became aware of the provisions of the Defendant’s Last Will and Testament wherein he bequeathed 80% of the Sombrero Hotel to Mark Duarte. She protested to the Defendant stating that it was not fair as it was their business in which she worked without compensation;

10.20 The Defendant then drafted another Last Will and Testament by which he replaced the previous one. Paragraph 6 of the new Will and Testament reads:

“LEGACY

6.1 I hereby bequeath to my son MARK FRANK DUARTE, Identity Number 67....., and residing at Portion 8 of the farm Poortje 340, district Vanderbijlpark, Registration Division I.Q. Gauteng, unmarried.

6.1.1 50% of the business Sombrero Tequila conducted as a going concern from the premises of the Main Shaft Hotel situated on the corner of Botha & Allen Street, Westonaria.

6.1.2 My motor vehicles a 1995 Ford Mustang, registration number F.....

6.1.3 All my movable assets.

6.1.4 My firearms as contained in the schedule.

6.2 I hereby bequeath to ELONA UYS, Identity Number 7....., with residential address Portion 8 of the farm Poortjie 3....., I.Q. Gauteng.

6.2.1 Erf 910, also known as 56 Botha Street, W....., D..... C..... from where I conduct my Estate Agency business with the name of Utopia Homes.

6.2.2 My Estate Agency business, Utopia Homes, as a going concern.

6.2.3 50% of the business Sombrero Tequila conducted as a going concern from the premises of the Main Shaft Hotel situated on the corner of Allen Street, Westonaria.

6.2.4 Should Elona Uys predecease me, or should we die simultaneously, the legacy bequeathed to Elona Uys shall form part of the residue of my estate and will devolve upon my heirs in

equal shares, by substitution on the terms and conditions as set out hereunder.

6.3 I hereby bequeath to SAMANTHA THEA TAYLOR, Identity Number 7..... residing at 9 F.. V....., H.... G....., Extension 4, Midrand, married in community of property to V..... J.... T....., my Mercedes Benz CDI, registration number FRANKY GP."

10.21 In paragraph 7 of the Will he bequeathed the residue of his estate and effects to his three children in equal shares;

10.22 She read the Will at the time and was satisfied that her interests as the Defendant's partner were covered in terms of this Last Will and Testament;

10.23 The Defendant bought a property, 18 Creswill, Westonaria, in her name. He subsequently sold it. He purchased it in her name as he was blacklisted in respect of a cellphone account and could not obtain a bond;

10.24 She alleges that she was not paid any salary from Utopia Homes from 2001 until late 2008. This was despite that she still did the books and drew up the month end statements for the Defendant's personal properties and all the other property owners who rented their properties through Utopia Homes;

10.25 She started to earn a salary from Utopia Homes again at the end of 2008. This was after the resignation and departure of Utopia

Homes' receptionist and after she had bitterly complained that it was unfair on her that everyone was remunerated while she was not, even though she was doing all the work;

10.26 In 2002 while they still owned the Sombrero Hotel, the Defendant told her that they had to go to Port Alfred where he had seen potential holiday houses that they could purchase. They left together and stayed together in a hotel where they shared a bed as they did at home;

10.27 They looked at various properties and decided to buy Erf 1782 of the township West Beach situated at 2 Avocet Close, Port Alfred for R275 000.00. The offer to purchase was signed by her as a witness while the Defendant signed it as the purchaser;

10.28 The property was registered in the name of the Defendant only. The deposit and transfer costs were paid from the proceeds of the Sombrero Hotel. The Defendant said that he was buying the property as they would retire there one day;

10.29 The furniture bought for the property and the renovations that were effected came from the sale of the proceeds of Sombrero Hotel. In 2003, she and the Defendant bought 573 Cannon Rocks situated near Port Alfred for R165 000.00. The property was registered in the name of the Defendant only;

10.30 The offer to purchase this property was signed by her specifically on behalf of the Defendant. That she signed on behalf of the Defendant is common cause and it is in any event evident from the following paragraph of the offer to purchase:

“We, the Purchaser/s (full names) ELONA UYS OF NOMINEE of (physical address) GEDEELTE 8 PLAAS POORTJE hereby offer to purchase from the Seller the property described in clause 1 hereof ... on the following terms and conditions:”

10.31 She explained that she signed as the nominee of the Defendant as he was in Westonaria. This property is still undeveloped;

10.32 Sombrero Hotel was sold for R600 000.00 in 2004 and the reason for its sale was that the parties were working too long hours;

10.33 The Telkom telephone line for the Sombrero Hotel was in her name albeit that all her expenses in that regard were reimbursed. After the sale of the hotel there was still an outstanding amount of R1 800.00, which she settled out of her own pocket. The Defendant kept the proceeds of the sale of the hotel for himself;

10.34 In 2005, the parties purchased a property situated at 531 Eighth Street, Port Edward, for an amount of R590 000.00. The property was partly financed with a mortgage bond of R450 000.00. The

deposit and transfer fees were paid out of the proceeds from the selling of the Sombrero Hotel;

10.35 Utilising some of the proceeds of the sale of the Sombrero Hotel, wide-ranging renovations were effected to this property. The upstairs part of the house was extended, a water tank was converted into a cellar, new garage doors were installed, the upstairs bathroom was renovated and balconies added;

10.36 She averred that she paid for several items meant for the house and these were items such as curtains, television sets and kitchenware. The parties kept a photo album at Utopia Homes office containing photo's of the two holiday homes. She alleged that the Defendant showed the album to their friends often crowing to them how rich his partner (the Plaintiff) was;

10.37 She took her friends, Ms Trudie Vermeulen, the sheriff of Westonaria and Ms Elbie Botha, a magistrate of Randfontein, to these holiday homes;

10.38 She and the Defendant together bought furniture and appliances for the house in Port Alfred. It is common cause that the parties a bought bar fridge, a television set, a wine chiller and another Defy product costing a total of R8 930.00 for which she paid an amount

of R6 000.00 using her own credit card. The balance of the purchase price of the items was paid by the Defendant;

10.39 She also referred to a Makro invoice for a total amount of R924.00. She spent the aforesaid amount purchasing stationery for Utopia Homes with her own money. She maintained that she was not refunded and that she used her own money to pay because she regarded Utopia Homes as her own.

10.40 She also alleged that she framed a wall picture for an amount of R942.00. The picture was displayed at the Utopia Homes office. Again, the amount for the framing of the wall picture was not refunded to her;

10.41 The Defendant's personal and business mobile contract with Cell C were in her name. According to her calculations, she claimed to have paid an amount of R44 222.21 from October 2002 to July 2009 for the Defendant's mobile phone contracts. The Defendant only refunded part of the amount of R44 222.21 after the parties have separated in July 2009;

10.42 She alleged further that she paid for the DStv accounts for Port Alfred and the farm. The total that she spent from January 2005 to August 2009 amounted in all to a total of R16 783.26, which the Defendant did not refund;

10.43 Shortly before their separation in 2009, the Defendant informed her that he was planning to sell Utopia Homes for R500 000.00 half of which he would give to her. He also advised her that his plan was that they would relocate to Port Alfred where he would buy a fish and chips shop to keep her occupied. Utopia Homes was sold on 16 April 2009 after her separation with the Defendant;

10.44 After the sale of Utopia Homes, she prepared a reference letter, which the Defendant signed in order to assist her to secure another employment. She successfully obtained a new employment at the Connie Mulder Centre in Randfontein. To ensure a smooth transition, she drove back to Utopia Homes every day after hours to train the new owners in business administration and bookkeeping;

10.45 Of the amount of R250 000.000 that represented half of the proceeds of the sale of Utopia Homes, the Defendant only paid her R100 000.00 in two instalments of R50 000.00, one in June and the other, in July 2009;

10.46 Under cross-examination, the Plaintiff conceded that she started as an employee of Utopia Homes in January 1995 for which she was paid R1 000.00 for every property deal that she concluded. She also admitted that once she had begun working for Utopia Homes and purchased the property situated at 7 Montague, Westonaria,

the Defendant asked her to live at the farm Poortjie so that she could let her property to someone else, the rentals of which she could use to discharge her mortgage liability with the mortgagee;

10.47 She denied that the purpose of the offer by the Defendant to her to live at the farm Poortjie was solely linked to her employment at Utopia Homes. She maintained that she was invited to live there as a partner of the Defendant and not that the Defendant felt sorry for her and offered her a place to live;

10.48 She did not deny that she was a destitute orphan but contested that the Defendant just wanted to assist as he generally lent a hand to many other people that he knew. She did not vehemently dispute that she was seen as a “chuck and pap girl”, a “bottom feeder at the hotel” and known as being sexually promiscuous with men and women;

10.49 It was put to her that the Defendant would testify that he never shared a bed with her at the farm but that she lived in Mark Duarte’s old room and that Mark Duarte would be called to corroborate that version. She denied that she did not share a bed with the Defendant at the farm and that she lived in Mark’s old room;

10.50 She confessed that the terms and conditions that she was in a 50% partner in Utopia Homes, the ostrich chickens, the Sombrero Hotel and the seaside holiday home properties were never reduced to writing. She, however, stated that she accepted the Defendant's word that they were 50/50 partners in all of this.

[11] Ms CHARMAINE SCHADE testified that:

11.1 She and her husband are the joint owners of Lido Country Lodge in Westonaria. Lido Country Lodge is in the vicinity of the farm Witpoortje. She met the parties herein during 2007 at the Lido Country Lodge when they opened the pub at the lodge;

11.2 She and her husband mingled with the parties especially on Friday evenings at the Lido Country Lodge. At times, they met the parties on Saturdays and would watch rugby together and entertain themselves;

11.3 She noticed that the Plaintiff often held the Defendant's purse. Her husband and the Defendant became good friends;

11.4 The Defendant once invited her and her husband to join them on vacation at the house in Port Alfred. She and her husband arrived at Port Alfred approximately a week after the parties had been there;

- 11.5 During her ten day stay at Port Alfred with the parties, she noted that the parties shared the main bedroom;
- 11.6 The Defendant took them on a tour of Port Alfred during which he showed them a fish and chips shop. The Defendant informed them that he intended to purchase it for the Plaintiff when they retire. She was convinced that the parties were in a relationship;
- 11.7 When a larceny occurred at the parties' farm Poortje, she and her husband went to find out whether or not they could give a hand. The Defendant showed them the house where the goods were still scattered all over the house as a result of the burglary. She observed that the Plaintiff's personal possessions such as her clothes were in the main bedroom;
- 11.8 It was put to Ms Shade during cross-examination that the Plaintiff had a cupboard in the main bedroom because it was next to the bathroom. It was purely for purposes of expediency and practicality that she had the cupboard in the main bedroom. She was told that the Defendant would deny that he shared the main bedroom with the Plaintiff.

[12] Ms LIZ NEALE's evidence was that:

- 12.1 She was a homeloans consultant who has known the Plaintiff since 1995. During that time, she visited Utopia Homes at least twice per week on behalf of NBS. She made friends with both parties and became aware of the growth of the parties' relationship;
- 12.2 At first, she understood the relationship to be that of an employer-employee. With the passage of time, however, she noted that a personal relationship developed. In 1998, the parties invited her to the farm Poortje for a weekend. During this time, she saw an unmade bed in the main bedroom which was pointed out to her as the parties' bedroom;
- 12.3 Both parties were excited about the seaside holiday properties and generally referred to them as "their properties";
- 12.4 She also attended the wedding of the Defendant's daughter, Samantha, where the Plaintiff was a bridesmaid. She sat at the same table as the Defendant. The Plaintiff subsequently joined them at the table after her conclusion of her duties as a bridesmaid;
- 12.5 She had occasional conversations with the Defendant about his relationship with the Plaintiff as she was concerned about the age

difference. She once asked him whether he would marry the Plaintiff and his answer was that he would always take care of her;

12.6 He furthermore told her that his children were not interested in Utopia Homes and that the business would probably be left to the Plaintiff.

[13] The testimony of Elbie Botha was as follows;

13.1 She is a magistrate in Randfontein. She met the parties in 2000 and subsequently befriended both of them. From time to time, she paid them a visit at the Sombrero Hotel and would sit and chat with the Defendant while the Plaintiff carried on with her work;

13.2 On one occasion, the parties invited her to a 'braai' at Utopia Homes. While in conversation with the Defendant on that day, he informed her that Utopia Homes belonged to the Plaintiff;

13.3 She was present when the parties discussed the idea of purchasing the Port Edward holiday property. She has been to that property once and that was after the parties had bought it;

13.4 She has always thought of the Plaintiff as being naive because none of the assets were in her name. She held that opinion about the Plaintiff notwithstanding that she was told that the parties were

partners. She was not privy to the parties' business arrangements but knew that they were in a business relationship;

13.5 When she advised the Plaintiff that she was anxious that nothing was in writing, the Plaintiff told her to be at ease as the Defendant had a Will that protects her;

13.6 She conceded that her belief that the parties owned the Sombrero Hotel jointly was her own perception having been friends with the parties over ten years. She actually thought that the parties were partners both in life and business.

[14] The Plaintiff closed its case and the Defendant followed suit albeit without leading any evidence whatsoever in his instance. The evidence led by the Plaintiff, her witnesses and the response of both to questions put to them during their examination by either counsel are suppose to assist this court to adjudicate over the three issues raised above.

[15] To turn then to the question whether or not the parties concluded an agreement to cohabit permanently in 1996. This agreement is critical as according to the Plaintiff's papers, it forms the foundation of the subsequent universal partnership, which the Plaintiff alleges she concluded with the Defendant. If the court pronounces that there was an agreement to cohabit permanently, it must then determine whether such agreement led to the parties expressly or tacitly entering into a universal partnership. It makes sense in the

circumstances therefore to first consider the existence of the permanent cohabitation agreement.

[16] Cohabitation is said to be a stable, monogamous relationship where a couple who do not wish to, or are not allowed to, get married, live together as spouses. Cohabitation is not a recognized legal relationship but have legal consequences that may flow from it. See Teresa Schwellnus, the author of the chapter *Cohabitation in the Family Law Bundle* of Schafer *et al.*

[17] Referring to the decisions of *L v de Wet* N.O. 1953 (1) SALR 12 and *Ally v Dinath* 1984 (2) SALR 451 (T), she maintains that South African courts have, on occasions, come to the assistance of couples by deciding that an express or implied universal partnership exists between couples.

[18] In the absence of an express agreement, a tacit agreement can be proved with reference to the conduct of the parties. Again, see the chapter on Cohabitation *supra* by Schwellnus. Thus, in this case the court must determine whether the conducts of the parties objectively construed can lead to the conclusion that an agreement as averred by the Plaintiff existed.

[19] The evidence of the Plaintiff is that from the money that she inherited from her mother, she bought a property situated at 7 Montague, Westonaria. The Defendant and his brother contributed to the setting up of the flat by buying her furniture. Shortly thereafter, the Defendant recommended that she would save immensely if she could move to his farm known as Poortje.

[20] The Defendant suggested to her that if she could take up the offer of living at the farm, she could let her property and use the rentals to pay for her mortgage bond instalments. The administration of the rentals was done through Utopia Homes. The Plaintiff considered the Defendant's advice and seized the opportunity to move to the farm.

[21] On her own version, the Plaintiff's move to the farm in 1996 was therefore motivated by the savings that she would make. She was not paying mortgage bond, no costs for the administration of the letting of her property and there were no costs associated with living at the farm.

[22] The Defendant's version as stated earlier is that he employed the Defendant in an office administrative position at Utopia Homes in late 1994 or beginning of 1995. In consequence of that employment, he offered her accommodation at his farm, Poortje, an offer that she graciously welcomed. He admitted that he had a sexual relationship with the Plaintiff but that notwithstanding she remained an employee.

[23] None of the testimony of the three witnesses that were called by the Plaintiff could positively state that the two parties shared the same bedroom. Their evidence on the subject was circumstantial. Thus, for example, the Defendant's explanation of why the belongings of the Plaintiff were seen in the main bedroom of the Defendant at the farm is that the cupboard in which she stored her clothes was in the main bedroom. This is understandable especially

given the sexual relationship that the parties had but it does not establish an agreement to cohabit permanently.

[24] In my opinion, this would apply to what the witnesses noticed when they were on holiday with the parties at their seaside properties in Port Alfred and Port Edwards. That the parties were romantically involved is circumstantially unquestionable. This is the impression that the parties gave to all the three witnesses who testified.

[25] I tend to agree with Counsel for the Defendant that it is rather startling that the parties did not live together from the time of the Plaintiff's alleged acceptance of the Defendant's proposal of marriage in 1994. The question is what, are the probabilities that this proposal to marry actually happened? Given the evidence of the Plaintiff and presentation thereof, it is safer to surmise that they did not cohabit because the Plaintiff's evidence that the Defendant proposed marriage to her in 1994 is in all probabilities not true.

[26] It is astounding that the Plaintiff, having received such great news, especially having in mind her personal circumstances and that the proposal was not only made once, would not have told her friends and anyone who cared to listen. In fact, although her evidence is that the proposal was repeated on several occasions and at different times, no one or at least none of her three witnesses, including Mark, the Defendant's son, knew about it.

[27] Again, I must agree with Counsel for the Defendant that Ms Shade who owns and manages a wedding venue amongst the three witnesses would have been exposed to such news especially given her occupation. Ms Neals did not elicit a positive yes or no answer from the Defendant after posing a direct question whether the Defendant intended to marry the Plaintiff, the age difference notwithstanding. All that he could display was his shared concern regarding the prospects of such marriage.

[28] I have been asked to draw an adverse inference from the fact that the Plaintiff avoided to respond to a question relating to what her witnesses would testify when they took the stand on her behalf. The significance of this is that her refusal to answer the question limited the extent to which the Defendant could test her evidence against those of the witnesses.

[29] Against that background I am obliged to make that adverse inference as she should and must have known what her witnesses would testify when they took the stand ultimately. Her refusal shows some kind of dishonesty to which this court does not take kindly.

[30] The evidence of the Plaintiff has failed to demonstrate that the parties did at any one occasion expressly discuss entering into an agreement of the kind alleged by the Plaintiff. In the premises I am satisfied that the parties never concluded an agreement to cohabit permanently.

[31] Bearing in mind how the Plaintiff has pleaded her case, a resolution that there was no agreement to cohabit permanently, strictly speaking, should mark the end of the road for the Plaintiff. However, I deem it wise to proceed to traverse the subject of a universal partnership in case my pronouncement on the agreement to cohabit permanently is misguided.

[32] A universal partnership is an express or tacit agreement between two parties, including gay and lesbian couples, who choose to live together in a permanent relationship without marrying. They share the same responsibilities and obligations of a married couple, including their present and future assets. In other words, all of their property is owned jointly.

[33] The evidence adduced by the Plaintiff does not establish the conclusion of an express universal partnership. In the absence of such express agreement, the court will explore the possibility that it was tacit as alleged by the Plaintiff in the alternative. To determine whether or not that was the case, the conduct of the parties is enormously significant as the court will place reliance on it to rule in favour or against its existence.

[34] When considering the conduct of the parties, the court must bear in mind what was stated by this court in *Muhlman v Muhlman* 1981 (4) SALR 632 (W), which was upheld by the Appellate Division in 1984, as it then was:

“In the situation where one has to do with a relationship between spouses and there is no express agreement between the parties the Court must be careful to ensure that there is indeed animus contrahendi and that the conduct from which the contract is sought to be inferred is not simply that

which reflects what is to be ordinarily expected of a wife in a given situation.”

[35] In the same breath in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (4) SALR 586 (AD) at 532-533, a case to which the Defendant has drawn this court’s attention, the court stated that

“The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term...”

[36] Thus, where the evidence reflects an agreement to marry, as is the evidence of the Plaintiff *in casu*, the Court will not readily infer or find a tacit term that the parties entered into an agreement to cohabit permanently. Under those circumstances, the term that a Court will by law surmise is that the parties intend to enter into a marriage within a reasonable time or on a particular date in the future. To infer otherwise in that state of affairs would be to make a contract for the parties.

[37] A partnership will exist where the following four essential elements are present:

- 37.1 Each partner must make a contribution towards the partnership.
The gift or donation can be in the form of money or labour or skill;
- 37.2 The benefit derived from the conduct of the business should accrue
to all the parties involved in the partnership;
- 37.3 The objective of the carrying on of such business should be to
make profit; and
- 37.4 The contract between or amongst the parties must be genuine and
lawful.

The last requirement has been discounted as it is not peculiar to partnership agreements only. Where all these four elements are present, in the absence of something showing that the contract between the parties is not an agreement of partnership, the Court must come to the conclusion that it is a partnership. See *Butters v Mncora* 2012 (4) SA 1 (SCA).

[38] Confirming that the requirements for a partnership as formulated by *Pothier* have become a well-established part of our law, that they have served us well and that they have been applied by our courts to universal partnerships in general and universal partnerships between cohabitees in particular, Brand JA said at Paragraph 18:

“[18] In this light our courts appear to be supported by good authority when they held, either expressly or by clear implication that:

- (a) *Universal partnerships of all property which extend beyond commercial undertakings were part of Roman Dutch law and still form part of our law.*
- (b) *A universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties.*
- (c) *The requirements for a universal partnership of all property, including universal partnerships between cohabitees, are the same as those formulated by Pothier for partnerships in general.*
- (d) *Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached."*

See also *Adcock v Adcock* 2012 where Revelas J quoted the above passage with approval.

[39] The Plaintiff has submitted that her evidence has proved on a balance of probabilities that a tacit universal partnership existed between the parties and has accordingly implored this court to find that:

39.1 The parties were in a permanent cohabitative relationship since 1 April 1996;

39.2 The Plaintiff was responsible to buy general groceries for the common household while the Defendant paid for other expenses such as meat, water and lights and salaries of the servants;

39.3 The Plaintiff was not paid a salary from Utopia Homes for the period, 2001 and late 2008 nor was she remunerated for the work that she did for Sombrero Hotel from 2000 until it was sold;

39.4 The Defendant publically expressed the view that on his death, Utopia Homes would become the Plaintiff's business;

39.5 She and the Defendant entered into business ventures as partners in respect of the raising of ostriches, the running and ownership of the Sombrero Hotel, Utopia Homes estate agency, the buying, selling and renovation of the three seaside properties;

39.6 The Defendant bought the property 18 Creswill, Westonaria, on the Plaintiff's name as he was blacklisted and not creditworthy;

39.7 The Plaintiff contributed an amount of R32 000.00 towards the purchase of Tramtrade 46 CC, the owner of the Sombrero Tequila Hotel in Westonaria, although the Defendant was the only member of the close corporation;

39.8 The parties agreed that they owned Sombrero Hotel in equal share and that all profits and liabilities were to be shared between them;

39.9 The Defendant made a Last Will and Testament dated 17 July 2001 bequeathing the immovable property on which Utopia Homes was

situated, both Utopia Homes and 50% of Sombrero Hotel as going concerns to the Plaintiff;

39.10 The immovable properties situated on Erf 531, Port Edward and Erf 1782, Port Alfred were renovated, furnished and maintained with proceeds from the sale of Sombrero Hotel;

39.11 The deposit and transfer fees for Erf 531, Port Edward were paid from the cash income of the Sombrero Hotel;

39.12 The Defendant showed pictures from a picture album of the Port Edward and Port Alfred properties to people visiting Utopia Homes telling them that the Plaintiff owned the properties;

39.13 The Plaintiff contributed her labour and money to the two properties in Port Edward and Port Alfred;

39.14 The Defendant's cellphone account was on the Plaintiff's name and she paid for it;

39.15 The telephone account of Sombrero Hotel was in the name of the Plaintiff;

39.16 When the Defendant sold the business of Utopia Homes as a going concern for R500 000.00 after the termination of their relationship in 2009, the Defendant promised the Plaintiff her share of R250 000,00;

39.17 The Defendant bought his Toyota Hilux motor vehicle utilising income derived from Sombrero Hotel.

[40] I now turn to the examination of the elements of a partnership and then test the submissions of the Plaintiff as set out above against each of them.

EACH PARTNER MUST MAKE A CONTRIBUTION TOWARDS THE PARTNERSHIP

[41] The Plaintiff argues that although the Defendant initially ran the farm alone, she agreed to the Defendant's proposal to buy cleaning products for the farm while he bought meat and paid staff. She also did not receive a salary for the period between 2001 and late 2008 from Utopia Homes. In addition, she simultaneously worked for Sombrero Hotel again, without remuneration. I understand this to mean that her agreement not to be paid constituted a contribution.

[42] The Defendant challenges the allegation that the Plaintiff has satisfied the first requirement. The Plaintiff's evidence is that the Defendant employed her as a clerk at Utopia Homes on 2 January 1995. She utilized her inheritance from

her mother to purchase her own property in mid 1995 and subsequently took occupation thereof. The property was registered in her own name.

[43] All the financial benefits that stemmed from the letting of the property accrued to the Plaintiff alone and not the Defendant even as she lived with him at the farm Poortje until their separation. Moreover, it is very clear from the Plaintiff's own testimony that her relocation to the farm Poortje, was not dependant on an agreement to cohabit permanently or to marry.

[44] It is unquestionable that she took full financial advantage of the offer from the Defendant. She lived at the farm Poortje without any payment of rentals until the termination of her employment at Utopia Homes in 2009, she received income from the letting of her property for which she did not pay any administrative fees as she used Utopia Homes and she earned a commission of R1 000.00 for each sale of property. All this was possible because of her association with Utopia Homes as an employee.

[45] Against this backdrop, it is perfectly understandable why she would have agreed to purchase cleaning material while the Defendant bought the rest for the farm Poortje. It was her manner of saying thank you to the Defendant who had up to that time proved to be helpful. The fact that the parties might have had a sexual relationship while living at the farm Poortje is without doubt, neither here nor there.

[46] The Plaintiff's evidence that she was not paid from 2001 to late 2008 while employed at Utopia Homes must be approached with great circumspection especially in view of the flagrant discrepancy between her evidence in the application for separation of the issues and her cross-examination. Her evidence under oath is that she was not paid a salary by Utopia Homes for the period 2001 to late 2008.

[47] However, she admitted under cross-examination that Mr Gavin Jacobs' starting point when preparing the financial statements of the businesses was that she was not a partner in either the Sombrero Hotel or Utopia Homes.

[48] Furthermore the auditor, Gavin Jacobs, also drew financial statements reflecting that she held her own separate estate, and issued her with IRP5 forms that she presented to SARS reflecting that she received a salary from Utopia Homes until 2009 when the business was sold by the Defendant. These two versions are completely diametrically opposed yet both of them were given under oath. The court will, for that reason discount her testimony in that regard.

[49] The Plaintiff testified that the Defendant did not always refund her specific amounts, which she expended on his exact instructions. Surprisingly, as a partner or creditor of the partnership, she failed to ensure that Gavin Jacobs recorded these debts as obligations of the Defendant in his books of account or to ascertain that a partnership account was set up for this purpose.

[50] The above is also true for the R32 000.00 that she claims to have invested into the Sombrero Hotel. She has always been mindful that the Defendant was the sole member of the Close Corporation that owned the Hotel. She knew further that the Defendant's brother owned the property on which the business was conducted. Given that scenario, she failed to make any claim for payment.

[51] Her evidence in respect of the Sombrero Hotel is that she received no salary since its inception for the work she did. She also testified that the Defendant would arbitrarily and intermittently permit her to retain some of the cash income derived from the conduct of the business of the Sombrero Hotel. These amounts ranged from R10 000.00 to R20 000.00.

[52] The retention of the aforesaid amounts happened against the background that she was receiving a salary of R1 500.00 from Utopia Homes. That amount was in addition to a R1 000.00 commission that she would generate from time to time depending on whether or not she managed to secure a property sale.

[53] The Plaintiff admitted that the Defendant would leave signed uncompleted cheques in her possession and control. He generally delegated the detail of the accounting processes reflecting the application of these funds to her. She did not deny that the rental income from the rental business of Utopia Home was available to clear expenses. By extension, the money was also available to compensate her for any expenses that she might have incurred.

[54] It is clear that the money that she claims to have invested in the Sombrero Hotel and other expenses which she expended on the Defendant's behalf was, on her own version, set-off by the sporadic allowances. The court is in the premises unable to find that she contributed towards the partnership.

THE BENEFIT DERIVED FROM THE CONDUCT OF THE BUSINESS SHOULD
ACCRUE TO ALL THE PARTIES INVOLVED IN THE PARTNERSHIP

[55] In this regard the Plaintiff's testimony is that the Defendant specifically told her that Utopia Homes would be hers one day as his children were not interested in it and that he reiterated the statement to their friends. The Defendant's unilateral decision to sell and pocket the proceeds of the sale of Utopia Homes in fact makes mockery of the Plaintiff's claim that he told her that the business would be hers one day as his children were not interested in it.

[56] The Plaintiff benefitted no differently from any other employee who was in the employ of Utopia Homes at the time. The Plaintiff admitted that the Defendant pocketed the profit that the business generated and to the extent that she lived on the farm Poortje, which was run using profits coming from the business, she enjoyed the benefits.

[57] It is noteworthy that immediately when the Defendant sold the business, the benefits that accrued to every employee including the Plaintiff ceased. Surely, those employees cannot be said to have been in a tacit partnership with the Defendant by virtue of their employment. Yes, the Plaintiff was treated

somewhat differently but that is because she was senior in the first place and she was intimate with the owner of the business in the second. That treatment, in my opinion, did not elevate her to the level of a partner as she remained an employee receiving a salary and not making drawings as partners do.

[58] Although the Plaintiff claims that she has since 1996 professed herself to be a partner in that business, the Defendant never conferred such status to her at all. In response, the Plaintiff did not display any disgruntlement even as the Defendant appropriated the profit to himself to her exclusion.

[59] Similarly, there is no evidence to suggest that the Plaintiff made any drawings from the business of Sombrero Hotel, a business in which she alleges to have invested an amount of R32 000.00 in 2000. It was her understanding that she and the Defendant were equal partners.

[60] It comes therefore as a surprise that she protested when she learned of the contents of the Defendant's Will and Last Testament bequeathing 80% of the Sombrero Hotel to Mark, the Defendant's son.

[61] The Plaintiff's challenge to the provisions of the Defendant's Will was not those of a partner but rather those of a annoyed heiress. The Plaintiff conceded under cross-examination that she was satisfied when the second Will providing that 50% of the Sombrero Hotel business would be hers, was presented. Her contentment was notwithstanding her claim that she was a partner. If the

Defendant regarded her as a partner then he would not have had the right to legislate on her estate.

[62] For this court to regard the Plaintiff's claim of universal partnership as serious, it must have an explanation how the Defendant was allowed to have the authority to legislate over the entire estate. His ability to have done so suggests that he was the owner of the complete estate and not just 50% or part thereof.

[63] It is worth mentioning that the Defendant did not seek a commercial advice from the Plaintiff when he considered to sell Utopia Homes and neither did he do so with the sale of the Sombrero Hotel. The Defendant's concerns and discontentment in respect of the sale of Utopia Homes related to the cutback of staff and not that, as a partner, it was financially imprudent.

[64] The Defendant did not even give her an opportunity to share her views insofar as the terms and conditions of the sale of business agreements were concerned. Both of the agreements featured the Defendant as the seller and he was the sole signatory. Needless to state, he is the only party who stood to benefit from those two sales.

[65] The letter of reference that her friend drafted, which she personally typed and presented to the Defendant for signature is an insurmountable hurdle for the Plaintiff to overcome as it clearly suggests that she perceived herself as nothing but an employee. It appears that the notion of the universal partnership occurred

to the Plaintiff as an afterthought otherwise her aforesaid letter wherein she represents herself as an employee will remain a conundrum.

[66] The Plaintiff was aware of the seaside property transactions, Port Alfred, Cannon Rocks and Port Edward. The Defendant financed some of those properties while he registered mortgage bonds in his name alone, meaning, of course, that he was personally responsible for all the liabilities. In fact, the Plaintiff signed on behalf of the Defendant as a nominee in the sale of one of them. If she considered herself to have been a partner at that time it is staggering why she signed as a nominee not as a partner.

[67] The Plaintiff continues to retain certain assets as her own while she wants to be part of the estate of the Defendant. She cannot on the one hand retain certain assets and still want to be part of his estate to the exclusion of her own possessions. In this sense therefore the benefit does not and cannot accrue to both of them. For that reason, each party retains his or her own separate estates from which each one will benefit.

[68] According to the Plaintiff's evidence in the answering affidavit filed in the separation application, she describes the ostrich business as one of the major endeavours that she ran with the Defendant. When cross-examined, she conceded that she did not prepare and present any accounts including those of the partnership. This was despite the fact that her uncle was part of the business, a factor that would have made the preparation of such accounts indispensable.

[69] Pushed into this tight-spot, she stated that this undertaking was not a business. Needless to state, this is inconsistent with her evidence in the answering affidavit. In the light of the apparent conflicting evidence given under oath, the court must disregard it. On the whole, the Plaintiff has failed to establish on a balance of probabilities that the benefit derived from the partnership accrued to her as well.

[70] I am satisfied that the Plaintiff has not managed to show that two of the essential elements of a partnership existed between herself and the Defendant. The existence of a partnership requires the presence of all the elements. Thus, it suffices for a party defending the action to demonstrate that one or two or all of them are not present. In this case, it is my opinion that based on the Plaintiff's own evidence, at least two of the elements are not present. It is consequently unnecessary to consider the third requirement.

[71] The Plaintiff has urged this court to draw a negative inference from the fact that the Defendant did not give evidence. I do not believe that such an inference under these circumstances is warranted. The version of the Plaintiff is highly improbable and her witnesses did not in any manner assist to strengthen her case.

[72] The evidence of the Plaintiff considered in its entirety does not demonstrate what the Plaintiff sought to prove. In the premises the Defendant

was under no obligation to take the stand to defend a non-existent case. To do so would indeed have been a waste of time for the court.

[73] In the circumstances the court finds:

73.1 A proposal to marry cannot co-exist with an agreement to cohabit permanently;

73.2 The evidence adduced by the Plaintiff does not demonstrate an agreement to cohabit permanently;

73.3 The evidence failed to prove that all the essential elements of a partnership exist;

73.4 No agreement of universal partnership whether express or tacit can be said to have come into being between the parties;

73.5 In view of the absence of a prima facie case against the Defendant, it was not necessary for the Defendant to adduce any evidence in rebuttal.

[74] In the premises I make the following order

1. The case is dismissed with costs.

B. A. MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR PLAINTIFF: Adv I. M. Lindeque

INSTRUCTED BY: Geldenhuys Van Ryneveld Incorporated

COUNSEL FOR DEFENDANT: Ms S. de Jager (Attorney)

INSTRUCTED BY: Strydom Botha Incorporated

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