REPUBLIC OF SOUTH AFRICA

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

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

DATE SIGNATURE

CASE NO: 14/05429

In the matter between:

LE ROUX: JOHANNA ELIZABETH Plaintiff

and

JAKOVLJEVIC: BRANMIR Defendant

Judgment

INGRID OPPERMAN J

INTRODUCTION

[1] The Plaintiff seeks a declaratory order that a universal partnership existed between the parties. The defendant denies the existence of a partnership, universal or otherwise.

COMMON CAUSE FACTS (OR FACTS WHICH ARE UNDISPUTED)

[2] The defendant immigrated to South Africa from Serbia in 1975 at the age of about 16. During approximately 1978, he started a business, which traded as Batos Radio and TV (‘*the business’*).

[3] The parties met in 1984 when the plaintiff was 15 years of age and in grade 10. The defendant is 11 years older than the plaintiff. During her matric year in 1986, she moved into the home of the defendant’s parents. He was residing there with his parents and sister, Svetlana Jakoljevic (‘*Seko’*). The plaintiff moved into the defendant’s bedroom where she shared his bed from 1986 to 2013 ie for 27 years.

[4] The plaintiff was taught the Serbian language, culture, traditions and was accepted into the Serbian Orthodox Church.

[5] Two children were born from this relationship, a daughter, born on 22 January 1989 (‘*the daughter’*) and a son born in 1995. The plaintiff fell pregnant again during 2007 but this pregnancy was terminated.

[6] The family was close knit. Grandparents and parents alike adored the children. Seko, who has no children of her own, also took a keen interest in the children. All would attend concerts and prize givings. The plaintiff however, was involved in the day-to-day care of the children ie taking and fetching to rehearsals and co-curricular activities.

[7] The plaintiff left the defendant during 1991 for a period of approximately 10 days.

[8] During 1991 the parties started planning a wedding. On 17 November 1991, the plaintiff and the daughter were christened. The wedding ceremony was planned for 24 November 1991 but it was postponed as it fell on the plaintiff's menstrual cycle. The parties were 'married'[1] according to Serbian custom on 1 December 1991.

[9] The plaintiff, Seko and defendant's mother, started a beading business, which involved making jewellery and selling it at markets over weekends. This they did from approximately 2000 to June 2013.

[10] On 29 April 2002 the plaintiff signed her first employment contract with the defendant. A dispute exists as to the reason for signing it.

[11] During 2003 the defendant's lung collapsed and the plaintiff's involvement in the business intensified as she had to step into the breach. On 1 June 2003 the defendant procured medical aid cover which reflected the plaintiff as 'Mrs Jakovjlevic'.

[12] On 5 December 2011, the plaintiff signed a second employment contract with the defendant. A dispute exists as to the reason for this.

[13] On 18 August 2013 the parties separated.

[14] There are two properties relevant to this relationship:

14.1. Erf […], Selcourt North – […] Road, Selcourt – the property where the defendant lived with his parents and where the plaintiff moved to ('*the Selcourt property*'). The defendant's father transferred the Selcourt property to the defendant, during 1991.

[1] The legal consequences of this union will be analysed hereinafter.

14.2. Erf […], Springs. This is a property acquired by the defendant for the business ('*the business premises*') during 1987, which property was transferred to Seko, on 24 July 2017.

[15] The money the plaintiff received from the beading business was ploughed back into the house, used to buy things for the children and personal necessities.

LEGAL PRINCIPLES APPLICABLE

The Requirements for a Universal Partnership

[16] In *Paixao v Road Accident Fund*[2] Cachalia JA held that:

> "Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. It entails, in my view, demonstrating that the partnership was akin to and had similar characteristics – particularly a reciprocal duty of support - to a marriage."

[17] The requirements for the existence of a universal partnership are summarised in the matter of *Pezutto v Dreyer and others* [3] which was also confirmed in *Butters v Mncora*[4] at par 17:

> "Our courts have accepted Pothier's formulation of such essentiala as a correct statement of the law. (Joubert v Tarry & Co 1915 TPD 277 at 280 -1; Bester v Van Niekerk 1960 (2) SA 779 (A) at 783H – 784A; Purdon v Muller 1961 (2) SA 211 (A) at 218B – D). The three essentials are (1) that each of the partners bring something into the partnership whether it be money, labour or skills; (2) that the business should be carried on for the joint benefit of the parties and (3) that the object should be to make a profit. (Pothier: A Treatise on the contract of Partnership (Tudor's translation) A fourth requirement mentioned by Pothier is that the contract should be a legitimate one."

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[2] 2012 (6) SA 377 (SCA) para 29. See too *Booysen v Stander* 2018(6) SA 528 (WCC) at para [44]
[3] 1992 (3) SA 379 (A) at 390
[4] 2012 (4) SA 1 (SCA) par [11] and [17]

[18] In *Butters*[5] the history of the different types of partnerships as well as their applicability to cohabitants was discussed. It was held at par [18] that such partnerships can extend beyond commercial undertakings and 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**. "[6] (emphasis provided)

[19] In the majority decision of *Butters,* it was held at par [19] that:

> "Once it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates, in my view, that the contribution of both parties need not be confined to a profit making entity. ……It can be accepted that the plaintiff's contribution to the commercial undertaking conducted by the defendant was insignificant. Yet she spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children. On the premise that the partnership enterprise between them could notionally include both the commercial undertaking and the non-profit making part of their family life, for which the plaintiff took responsibility, her contribution to that notional partnership enterprise can hardly be denied."

The Requirements for a tacit agreement

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[5] Supra at par [18]
[6] *Ally v Dinath* 1984 (2) SA 451 (T) at 453F – 455A; *Muhlmann v Muhlmann* 1981 (4) SA 632 (W) at 634A – B; *Muhlmann v Muhlmann* 1984 (3) SA 102 (A) at 109C – E; *Kritzinger v Kritizinger* 1989 (1) SA 67 (A) at 77A; *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) par [19] – [22].

[20] In the minority judgment in *Butters*, penned by Heher JA with whom Cachalia JA concurred, he summarised the approach to establishing whether a tacit agreement exists, as follows:

> '[34] This appeal is about an alleged tacit agreement. As in all such cases the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, per contram, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement. Despite the different formulations of the onus that exist: see the discussion in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 164G-165G; *Christie's The Law of Contract in South* Africa, 6ed 88-89, this is the essence of the matter.'

ANALYSIS OF THE EVIDENCE

[21] This Court is to approach the factual disputes which exist between the evidence adduced on behalf of the Plaintiff[7], and the evidence presented on behalf of the Defendant[8], by applying the principles enunciated in the decision of *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others*[9], Nienaber JA held as follows:

> "To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with

[7] Only the plaintiff testified
[8] The defendant testified as well as Seko
[9] 2003 (1) SA 11 at 14I-15D

> what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[22] There were some hotly contested topics, which have a bearing on the 3 requirements identified by Pothier, which make up a partnership. Applying the principles applicable to the evaluation of evidence quoted above, I intend dealing with them thematically and in no order of importance. In addition, the headings of the themes do not clearly compartmentalise the different topics and are not intended to. More than one theme is addressed under each heading as it is not practicable to isolate the facts under the chosen topics.

The Wedding and the nature of the relationship

[23] On 1 December 1991, the parties had a Serbian wedding ceremony in the Serbian Orthodox church. The plaintiff testified that this was a ceremony designed to

legalise their intimate relationship. The defendant testified that it was a farce, intended to ensure that the daughter was not labelled a ‘copile’ or ‘bastard’ in the Serbian community and that she could be christened to ensure that if she died, she could go to heaven.

[24] Towards the end of 1991, a bishop in the Serbian church visited many towns in South Africa including the town of Springs. It was decided that this visit would be an opportune moment to have the wedding ceremony. In order to get married, the plaintiff had to be baptized. The plaintiff, together with the daughter, was baptized on 17 November 1991.

[25] During her evidence, the plaintiff made reference to some wedding photographs, which were received as evidence. They depicted, amongst other things, how a white cloth had bound their hands; they were carrying large white candles and were wearing crowns. The plaintiff explained that the crowns symbolized the glorification of the couple and the institution of marriage, the candles symbolized their future, and how they would light their way and would keep them happy and prosperous. The plaintiff testified that she believed they would grow old together and that they had unified their relationship before God.

[26] On questions by the court it became evident that the usual western Christian customs were also followed during the ceremony, which included a vow to God that they would be faithful to one another until death.

[27] In analysing the defendant’s version as to the reason for the wedding ceremony the following glaring contradiction is revealed: He said that the wedding ceremony was a pre-requisite for the baptism yet the uncontradicted evidence of the plaintiff was that the baptism had occurred two weeks prior to the wedding. The

defendant could not place a date on the baptism and there is no reason to question the time frame of this event, as provided by the plaintiff. The defendant's version was further that the wedding ceremony was a ploy to deceive God into accepting that the daughter had been legitimised by an authentic marriage in his church when in truth, the wedding was a farce to achieve two objectives one, to deceive God so that the gates of heaven would be opened to their daughter in the event of her passing away and two, to deceive the Serbian community so that their daughter will not be labelled a 'copele'.

[28] The defendant testified that he never intended to marry the plaintiff, that he enjoyed sex with her but that she was not good enough for him. It is, in my view, most unlikely that the bishop would have been in on this scam to deceive God. If the bishop were not party to this deception then the defendant's version essentially boils down to the following: The defendant deceived the bishop, the plaintiff and God. But God is all knowing and cannot be deceived. The object of the entire scam would thus come apart when the daughter arrived at the gates of heaven as God would presumably say that entry were precluded as passage was sought in an improper manner.

[29] I have very little hesitation in concluding that on 1 December 1991 the parties intended to be married in a conventional sense and, in the absence of agreement to the contrary, to share in their estates, rather like a customary union,[10] as if they were married in community of property.

[30] It subsequently transpired that their marriage was not recognised civilly. To this the defendant responded that they should get married. The plaintiff's response

[10] The parties were in agreement that the Recognition of Customary Marriages Act, 120 of 1998 had no application and the case was not couched nor argued on this basis.

was that they are married in the eyes of God. The defendant denies that he ever suggested that they should have a civil marriage as his version throughout was that he never wanted to marry the plaintiff, that she was more like a servant in the home, serving his sexual needs and working as an employee at his business.

[31] The defendant's mother, in preparation for this trial, requested confirmation from the Serbian church as to whether the wedding had been registered in Serbia. The court was referred to the very letter recording this request. If it (the wedding) had been a farce and everyone (including the bishop) had been in on the deceit, why was it necessary to make the enquiry, I ask.

[32] I have very little hesitation in accepting the plaintiff's version in relation to the wedding ceremony and the perceived consequences at the time.

[33] The subsequent conduct of the parties support the conclusion I draw – the defendant suggested that the plaintiff might have had a relationship/s with others and sought to paint her in a poor light by virtue of this. If they were not married and she was simply an employee, what did it matter? It was because they considered themselves partners in love and life, that the defendant considered him entitled to object to her 'extra-marital' affairs, which she denied and no evidence was led to support this suggestion.

[34] In an answering affidavit in a domestic violence dispute, the defendant described their relationship as follows:

> '5. My family agreed that she could live with us and accepted her as my wife and part of the family from that day onwards.
> 6. Although we were never married in terms of the laws of the Republic of South Africa we had been living together as husband and wife from 1986 until during 2011 when the Applicant refused to share conjugal rights, despite her continuing to sleep in our bed and share our bedroom as if nothing was amiss.'

[35] During the defendant's evidence he denied that anyone ever referred to the plaintiff as Mrs Jakovljevic in his presence. He said that the reference on his medical aid to the plaintiff as Mrs Jakovljevic was a clerical error, correspondence to the parties by the school as Mr and Mrs Jakovljevic was a mistake, the reference by the defendant's bookkeeper to the plaintiff in the accounting records as Mrs Jakovljevic was a mystery and the reference in the defendant's financial statements to her as such, which statements he signed, were inexplicable. In my view, the defendant was neither a reliable nor a credible witness. He was argumentative and failed to answer questions squarely. The aforegoing answers evidences a desperate attempt by him to disassociate himself from the plaintiff, this in the face of statements made, under oath[11], to the contrary.

[36] In my view the probabilities are overwhelmingly in favour of a finding that the parties lived together as husband and wife and represented this state of affairs to the world at large.

Batos Radio & TV – The Business

[37] When the plaintiff met the defendant, he had an established electronic shop which he conducted from rented premises in Springs. It traded under the name Batos Radio & TV[12].

[38] From about this time, being 1986, the plaintiff worked at the business on Fridays after school and Saturday mornings. During 1987 the plaintiff started working at the business full time from 8h00 to 17h00. This is disputed.

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[11] Quoted in para [34] hereof
[12] Defined previously as '*the business'*

[39] The plaintiff contended that she had worked there as a co-partner. The defendant testified that the plaintiff was no more than an employee and only started working there during 2002. In support hereof two contracts of employment were presented.

[40] The plaintiff admitted having signed the contracts of employment but explained that it was for tax purposes ie SARS were to understand that she was an employee so that the defendant would receive the tax benefit.

[41] The employment contract concluded on 29 April 2002 did not reflect a salary and the employment contract concluded on 5 December 2011, reflected a weekly salary of R1 100. The plaintiff testified that she never received a salary. She explained that the other employees had been paid in cash but that she never received a salary. What is clear from these agreements is that she worked at the business performing the following duties: *'Cleaning Sales, Stock Control, Answer Telephone, Helping on the Bench, Books, Banking and Post'.* In terms of these contracts she was required to work from 8 to 5 on weekdays and 8 to 1 on Saturdays. It follows, if reliance can be placed on the correctness of the facts recorded in the contracts, that from 2002 to December 2012, the plaintiff brought her labour and skills to the business. She however testified that as from 1986, she used to work at the business on Fridays and Saturdays and after matric, from 1987 to 1988, she worked full day. Their daughter was born on 22 January 1989 and for the first 40 days, as is required by Serbian custom, she was precluded from leaving the house. She returned to work after 9 months. They were living with the daughter's paternal grandparents so there were many caregivers around.

[42] Seko got married and left the Selcourt property but returned after having been divorced. No evidence was lead as to the exact date of her departure or return.

[43] Of significance though is the fact that the grandparents and Seko ran another business, separate from the business, which I shall refer to as *'the factory'*.

[44] Seko and the plaintiff also started a beading business together with the paternal grandmother ('*the beading business'*). The most money ever received from this source was, according to the plaintiff, between R5000 and R7000 in a given month. She testified that she ploughed this money back into the house, towards the children or towards personal necessities. It is common cause that the plaintiff did not accumulate any assets during the subsistence of the parties' relationship.

[45] Despite the written employment contracts, it appears from the evidence of the parties that the plaintiff would work at the shop in the mornings and fetch the children from school. She would take the children to their respective co-curricular activities. It is clear that the plaintiff was a very involved parent, assisting at school with the tuck shop, being on the matric dance committee and helping the daughter further her ballet aspirations. I find on the probabilities that the plaintiff could not have been at the business full time but that she assisted there for significant periods of time but not as an employee. The defendant's attempts at casting the plaintiff as an employee in his business and an absent mother are not to be reconciled with that which he stated in the very same affidavit referred to hereinbefore:

> '8.3.3.4 The Applicant had been involved in the tuck shop at the children's schools, baking and selling and organising. This started when our daughter started school in about 1996, also moving to Springs Girls High School when our daughter started high school. This continued at two schools simultaneously, until our daughter finished school. The Applicant then continued with this when our son went to Springs Boys High School…….

> 8.3.3.5 The Applicant was put in charge of the committee that prepared the matric farewell at our son's school and they had a resounding success. She managed to obtain sponsorships from Selcourt Spar, an insurance company, individual shops and companies for the invitations, the food, the decoration, and all that went into the farewell.'

[46] It can be accepted that the plaintiff's contribution to the business of the defendant was less significant than that of the defendant. I find though that the plaintiff spent all her time, effort and energy in promoting the interests of both parties. The plaintiff clearly took responsibility for their family life and assisted in the business. There is no suggestion, on the probabilities of the evidence placed before this court, to the contrary.

Loan and Sale of business to Seko

[47] Both the defendant and Seko testified that the defendant was indebted to Seko in the amount of R1000 000 ('*the loan*'). This indebtedness was recorded in a document dated 23 August 2012 ('*the 23 August 2012 acknowledgment*') in which the business premises and the business were pledged to Seko for repayment of the loan. It was recorded that the transfer of the business premises would take place as soon as funds were available for such transfer, registration and attorneys fees. The business premises were transferred to Seko during May 2017.

[48] The existence of the underlying debt does not bear scrutiny and I find on the probabilities, and on the credibility of both the defendant and Seko, that such debt did not exist and that the 23 August 2012 acknowledgment serves only to confirm that both the defendant and Seko were acutely aware of the fact that the plaintiff could lay claim to the business and the business premises and, to avoid this, they 'created' a

debt the effect of which would be, to nullify the plaintiff's claim to the business and the business premises.

[49] Seko testified that the R1000 000 was made up of moneys lent and advanced to the defendant for the defendant's and the plaintiff's daughter's needs which funds were not gifted but constituted loans to the defendant. I do not accept that the payments were made by Seko, nor do I accept that there was any agreement that these monies would be repaid ie that they constituted a loan/s to the defendant, for the following reasons:

49.1. Seko testified that the loan was made up of expenses incurred in respect of the daughter's university expenses thus expenses incurred from about 2009 until date of the 23 August 2012 acknowledgment. The defendant in contrast testified that the debt included expenses incurred in respect of the daughter from 2000 until 2012. This is a material and fundamental contradiction. The one version spans a period of 3 years, the other 12 years.

49.2. Seko made much of the fact that she had paid for the daughter's medical expenses. The defendant had excluded all medical expenses when he had listed the expenses, which were encompassed in the loan – he had included fees for WITS, residence costs, books, visit to Cape Town to participate in a competition and clothing.

49.3. Most telling is Seko's failure to have kept a record of these expenses. If, as she testified, this were a loan, one would have expected some record keeping together with receipts to enable Seko to do a

reconciliation and justify the amount claimed. Instead, this court was presented with schedules listing the expenses and compiled after the fact. None were in the name of Seko but rather in the name of a company called Commercium Trading (Pty) Ltd *('Commercium'*) – the company run by the defendant's parents and Seko. Seko explained that the amounts listed in the schedules, although paid by Commercium, were deducted from her salary. No evidence supporting this was presented to this court. Presumably and probably, because none exists.

49.4. In addition, the reconciliation does not add up to R 1000 000 but to R297 273.20. When confronted with this during cross-examination, Seko explained that the cheques in respect of some amounts paid, could not be located. Her attention was then drawn to 4 payments on the reconciliation which reflected 'cash' or 'no copy'. They were: R7000 allegedly paid on 4 August 2009, R2000 on 10 February 2012, R10 000 on 10 February 2013 and R15 000 on 22 January 2011. This document, the reconciliation, on the face of it, sought to be a comprehensive list of expenses paid by Commercium but the total falls far short of R1 000 000 and the explanation for the shortfall does not bear scrutiny.

49.5. I find it improbable that the grandparents would have paid for the daughter's university fees and disbursements but would then have recovered it from their own daughter, Seko by deducting the monies from her salary. I find it far more probable that the grandparents

wanted to assist their granddaughter and paid the expenses directly as the cheques/payments suggest.

49.6. On the 5th of December 2013 in a supplementary affidavit in proceedings in the Roodepoort magistrate's court and in response to, amongst other things, a claim for a monthly contribution of R10 000, the defendant stated: *'I owe my sister over R400 000, such amount having been borrowed to pay for our daughter's studies'*. When asked why, when he was armed with a document evidencing a loan of R1 000 000 (the 23 August 2012 acknowledgment), he stated under oath that he only owed Seko R400 000, he could not answer. The defendant initially attempted to lay the blame at the foot of his legal representatives but could not avoid the fundamental criticism being that he had not drawn the 23 August 2012 acknowledgement to the attention of his legal representatives. The estate under discussion is, relatively speaking, not large. The amount of the loan comprises almost 50% of the entire estate. It is thus not an insignificant amount and not something the defendant could have overlooked or forgotten about. He was asked how many other people, in his life, he owed R1 000 000. The response was none. That being so, it is incomprehensible that he could not have mentioned it in his affidavit if, as he contends, the 23 August 2012 acknowledgment existed at the time of him deposing to the affidavit. The reason is plain – no such debt as recorded in the 23 August

2012 acknowledgment, existed at the time of deposing to the affidavit on 5 December 2013.

49.7. An acknowledgment of debt must always be grounded on a debt and, absent a debt, the acknowledgement is without any legal force.[13] The facts do not support a finding of a debt underpinning the acknowledgment of debt dated 22 August 2012 and I accordingly find such acknowledgement without legal force.

EVALUATION

[50] The plaintiff's case is that the parties had entered into a partnership which encompassed both their family life and the business.

[51] The plaintiff explained that just after matric, she asked whether she could apply to be employed elsewhere but the defendant refused. During 1991, she had applied and had secured employment, but the defendant had again persuaded her not to take up the employment.

[52] The Plaintiff spent most of her time, effort and energy, promoting the interests of both parties and their children. She worked at the business, maintained their common home and cared for the children. She also worked at the factory when needed, made deliveries when needed, and attended to the children in the afternoons after school.

[53] The parties resided together from 1986 until 2013 with the exception of 10 days during 1991. During this time, they raised two children. They represented themselves to the world as a couple. The plaintiff was referred to at school as Mrs.

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[13] *Moving Violations Systems Phumelelo (Pty) Ltd v The City of Johannesburg Metropolitan Municipality* (A5028/2018) [2019] ZAGPJHC 143 (16 April 2019) at para [31]

Jakovjlevic, she was reflected as a dependent on the defendant's medical aid as Mrs Jakovjlevic, as such by the doctor who admitted her to the Akeso hospital, by the bookkeeper employed by the defendant and on the financial statements signed by the defendant.

[54] I am driven to conclude that the contribution by both parties, be it financial or otherwise, was shared and consumed in the pursuit of their common enterprise. The bead money was ploughed back into the house.

[55] The existence of the partnership was contested by the defendant on the basis, amongst others, that the Serbian culture does not permit of a partnership described by and relied upon by the plaintiff. He testified that a patriarchal system underpins the Serbian culture. All decisions in respect of the business and the running of the home had to be approved by, and discussed with, his father. The facts, as presented by the defendant and if accepted, revealed that the decision-making would have had to have been taken over by Seko, who is the oldest. In a patriarchal system however, the decision making would have been taken over by himself and thereafter by his son. The defendant, when asked where the plaintiff fell into this framework, responded that she did not fit in anywhere. The facts reveal that the plaintiff was an integral and reliable part of the life they created together. I find that the cultural confines within which the parties found themselves held no bar to the existence of the universal partnership. I find that the evidence presented to the contrary was a self-serving untruth. Although the defendant might have consulted his father from time to time as children do, his father did not dictate the relationship between the plaintiff and the defendant and how they ran the business.

Conclusion in respect of the existence of a universal partnership

[56] Having regard to all the facts and circumstances of this case I conclude that it is more probable than not that a tacit agreement had been reached. Their partnership enterprise included both the business and their family life. The plaintiff's impression as to the core of their relationship is borne out by the conduct of the parties. The plaintiff testified that the income she earned from the beading business was ploughed back into the home, was spent on the children and a fraction, about 10% thereof, spent on personal necessary items. The defendant said that he did not know what she had done with the money so earned. That being so, it must follow that he cannot dispute what she contended she used it for. In *Butters* supra, it was argued which argument was accepted, that if both parties had earned an income which they then shared, the plaintiff would have gone a long way in meeting Pothier's second requirement. Here, the plaintiff's beading business income was shared. The income from the business was used for running the business, the family home and general expenses. It can safely be said that this income was shared. In addition, on all the evidence it is clear that the venture pursued by the parties, which included both their home life and the business, was aimed at a profit they tacitly agreed to share. The defendant contended that the plaintiff did not have knowledge of the finances of either the Selcourt property or the business. On the defendant's own say so, this cannot be accepted. The defendant testified that the plaintiff had been the business's data capturer and that she prepared the books for the bookkeeper. It can hardly be contended under such circumstances that she did not have at least a working knowledge of the detail of the finances in the business. It is, in any event, not necessary for the second requirement that the intention should be based on the

actual state of affairs. It is sufficient for there to be an intention to make a profit, which there clearly was.

DURATION OF THE PARTNERSHIP

[57] I find that the partnership commenced during 1986 and endured until 18 August 2013, which is the date that the parties parted company.

[58] A life partnership is terminated by the death of either or both partners or by the separation of the parties. Whereas the termination of a civil marriage or civil union, while both parties are alive, involves state participation and must be done on the basis of the grounds of divorce prescribed in the Divorce Act 70 of 1979, each life partner is free to terminate the life partnership any time they wish to enter into a life partnership with someone else.[14] The physical act of termination does not involve the courts and occurs extra judicially. However, the consequences of separation may be determined extra-judicially by agreement or if necessary, by means of judicial determination.[15] The universal partnership was dissolved when the parties separated. The date when the parties separated, a fact undisputed, is the 18 August 2013.

ASSETS WHICH FORMED PART OF THE UNIVERSAL PARTNERSHIP

[59] On 1 February 1991, the Selcourt property was transferred into the name of the defendant. It will be recalled that this was the year the parties got married according to Serbian custom. The Selcourt property was transferred because, so the defendant and Seko testified, the defendant's father's business was in trouble and this asset needed to be protected from the creditors. Commercium was a company

[14] *Volks No v Robinson and others* 2005 (5) BCLR 446 (CC) at par [55]
[15] *McDonald v Young* 2012 (3) SA 1 (SCA).

so this scheme was not necessary and this explanation cannot be accepted. Both the defendant's parents passed away during the week of June 2019 of natural causes. Their last will and testament was not placed before the court and one therefore does not know whether they considered the Selcourt property to form part of their estate. Be that as it may, it would in any event have been of little assistance as we follow the abstract theory of property transfer, in respect of both movable and immovable property, which does not require a valid underlying contract of sale for ownership to pass.[16] The most plausible inference to draw from the available facts is that the Selcourt property was gifted to the defendant during 1991 shortly before the wedding.

[60] Having concluded that the partnership commenced during 1986, that it ended 18 August 2013 and that it was a partnership of all property, I find that the following assets formed part of this partnership:

60.1. The Selcourt property.

60.2. The business premises.

60.3. The business.

60.4. A Polo Vivo purchased in 2013.

PORTION OF ESTATE TO WHICH PLAINTIFF IS ENTITLED

[61] The question however, is whether, as claimed, the plaintiff is entitled to payment of 50% of the nett value of the defendant's estate as at the date of their separation *viz*, 18 August 2013. It is not in dispute that the plaintiff played no part, whatsoever, in the day to day running of the business, from 1978 until 1986 or that

[16] *Legator McKenna Inc v Shea*, 2010 (1) SA 35 (SCA) Brand JA at p 44

the business premises was acquired during 1987 presumable from the fruits of the defendant's labour for the preceding period. The continued success of the business (post 1986) cannot however, be attributed to him alone. His capacity and ability to operate optimally and to grow the business is to a large measure also the product of a stable family environment. The support structure provided by the plaintiff permitted him the leeway to devote his energy to the business. Family matters became the sole province of the plaintiff assisted by very willing grandparents and sister-in-law. The success of the business, contextually, is thus in no small measure due to the role played by the plaintiff.

[62] Notwithstanding the aforegoing and the longevity of the couple's cohabitation, I do not think that it would be equitable to order that half of the defendant's estate as at 18 August 2013 should devolve upon the plaintiff. To attempt a formulaic approach to determine a fair apportionment is an impossibility and the only practical solution, to my mind, is a rough and robust approach.

[63] In *Isaacs*[17], Searl J found that the parties were entitled to an equal share of the universal partnership, that finding was justified on the facts *viz*, the wife's labour in the home coupled with her active involvement in the business. In those circumstances Searle J, was constrained to find it impossible to determine which of the parties had contributed more than the other, in which event equity dictated an equal share. Similarly, in *Fink v Fink and Another*[18] Ramsbottom J, found that on the facts the parties were entitled to share equally in the division of the estate.

[64] The facts in *casu* are however, dissimilar to *Isaacs* and *Fink*. That the plaintiff is entitled to a percentage of the partnership assets as at 18 August 2013 is beyond

[17] 1949 (1) SA 952 (C)
[18] 1945 WLD 226

question. The only remedy, though arbitrary, is one with an equitable outcome. Such an approach was adopted in the Botswana Court of Appeal in *Mogorosi v Mogorosi*[19], a matter involving parties who had cohabitated for approximately fourteen years, and had children. The court of first instance found that the evidence established the existence of a tacit universal partnership. On appeal, and after upholding the court below's finding that the parties' conduct created a universal partnership, Lord Coulsfield JA, (Zietsman JA, and McNally JA, concurring), after an analysis of the judgments in *Isaacs*, *Fink* and other cases, concluded by stating:-

> "It may be questionable whether, on a strict application of the rule governing the distribution of the assets of a universal partnership that approach would be correct. If the universal partnership is analogous to an ordinary commercial partnership, it would follow that the rights of the partners should be ascertained at the time of the termination of the partnership. That would mean that the value of the respondent's share would be determined as at, say 1981, and it would then be necessary to compensate her for the long period for which she has been denied payment of her share, by an award of interest or otherwise. However, the kind of calculation which would be required by a strict application of the rules would be totally impracticable in the circumstances of this case. The appellant and the respondent have now been separated for a long period of years during which they have neither lived together not engaged jointly in any kind of business. It may be possible to list the assets which belonged to the universal partnership in 1981, along the lines of the respondent's evidence before the customary court, but it would be futile to try to ascertain a money value of those assets as at 1981, and any calculations of shares or interests based on such an approach would be speculative in the extreme. In these circumstances, if we are not to deny the respondent an effective remedy for her just claims, we are driven to take a broader and more equitable approach. To do so, we have to find a way of fairly weighing and allowing for contributions of all the interested persons. In Isaacs v Isaacs Searle J did that when he made a division between the parties, taking into account those contributions of the wife to which a financial value could not be assigned as well as her contributions to the businesses

[19] [2008] BWSA 18 (30 January 2008)

> of the parties. That is also essentially what the judge did in this case in paragraphs 32 and 33 of his judgment. He took account of the respondent's contribution to the growth of the estate and the universal partnership, and also of her contribution to the care of Florah's children. He also gave full weight to the fact that the appellant was already the owner of some property before 1966. He does not expressly give a reason for ordering the division of the existing estate, but I am prepared to assume that he did so because of the impracticability of any other calculation. The effect of the judgment is to give the respondent 20% of the appellant's estate and I do not think that has been shown to be an inequitable outcome."

[65] Following the approach adopted in *Mogorosi* it would, in my view, be equitable to award the plaintiff an amount equal to 30% of the defendant's net asset value as at 18 August 2013, this is so, amongst the reasons highlighted herein, because the plaintiff had walked into an established business during 1986 and the Selcourt property had been transferred to the defendant during 1991 as a gift from his father. This is not a case, such as *Isaacs*, where the parties had commenced their 'married' life with no assets.

THE DIVISION OF THE UNIVERSAL PARTNERSHIP

[66] Where a court finds it impossible, impracticable or inequitable to physically divide a particular asset between the parties or to cause it to be auctioned and to have the proceeds divided between them it can place a valuation on that asset with due regard to the particular circumstances concerning its value at date of dissolution of the partnership. The court may then award the assets to a partner and order him to pay the other her share.[20]

[67] In this matter the plaintiff pleaded that if the parties cannot agree to the division of the assets after a declaratory order was granted that a universal

[20] LAWSA paragraph 322 on Distribution; *Robson v Theron* 1978 (1) SA 841 (A) at 858.

partnership came into existence, that a liquidator be appointed. However, during argument this court was urged to award the assets to a party and order him/her to pay the other party his/her share.

[68] The Selcourt property: On 9 April 2013, an objection was received by the Ekurhuleni Metropolitan Municipality ('*the Municipality*') in respect of the valuation of the Selcourt property. On 13 December 2013 a response was received which reflected the market valuation of the Selcourt property at R 1 280 000 and the municipal valuation at R 980 000. Ms Engelbrecht representing the plaintiff argued that the court should accept the lower municipal valuation, rather than appoint a liquidator to determine the value of the Selcourt property which would simply be time consuming and costly, something which the parties in this litigation can ill afford. I agree. I intend ordering the defendant to pay the plaintiff 30% of R 980 000 within 6 months of date of this judgment. Evidence of a bond that was taken out over the property during 2017 in the amount of R 150 000, I will disregard, as this liability was incurred after the dissolution of the partnership.

[69] Ms Engelbrecht also urged the court to have regard to the valuations the defendant and Seko placed on the business and the business premises. On 23 August 2012, the date of the acknowledgement of debt, the defendant and Seko had agreed that the business and the business premises was worth R 1000 000. The addendum to the purchase agreement dated 28 March 2018, reflects a purchase consideration for the business premises at R 560 000 and R 440 000 for the business. Ms Engelbrecht argued that the business premises should be considered to be R 1 000 000 as this is what the parties agreed to on 23 May 2017 being the agreement underpinning the transfer which occurred on 24 July 2017. If I am to take

a robust and pragmatic approach as suggested by Ms Engelbrecht I need to rely on evidence reflecting the value as at 18 August 2013. This can only be the value attributed by the defendant and Seko in the 23 August 2012 acknowledgment read with the 28 March 2018 addendum. The collective value of both the business and the premises was R1 000 000 which value I consider correct and intend ordering the defendant to pay 30% of R1 000 000 to the plaintiff within 3 months of this order. I have no evidence relating to the value of the Polo Vivo and in her heads of argument, Ms Engelbrecht did not seek any order in relation to this vehicle.

COSTS

[70] The plaintiff sought a punitive costs order by virtue of the manner in which the defendant conducted the litigation and by virtue of the quality of his evidence.

[71] Reliance was placed on the judgment of *B v B*[21] where the defendant had not provided all necessary documents to calculate the accrual of his estate. The following was stated at paragraph [39]:

> "The attitude of divorce parties, particularly in relation to money claims where they control the money can be characterised as "catch me if you can": These parties set themselves up as immovable objects in the hopes that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be caught and have to disgorge what is in the law due to the other party."

[72] The plaintiff contended that the defendant ran this trial on a "*catch me if you can*" basis, conceding that this was not a divorce properly so.

[21] (700/2013) [2014] ZASCA 137 (25 September 2014)

[73] Almost every topic the defendant touched was tainted with lies, deception or disrespect: the wedding ceremony, the loan to his sister, the manner in which he sought to paint the defendant as no more than a sex slave to him and an employee to the business, whilst this woman is the mother of his two children. The embarrasment she had to endure during the hearing coupled with the defendant's failure to provide credible substantiating corroborative and primary evidence, all contribute towards a finding that a punitive costs order is justified.

ORDER

[74] I accordingly grant the following order:

74.1. It is declared that a universal partnership existed between the parties during the period June 1986 and 18 August 2013 ('*the universal partnership'*).

74.2. It is declared that the following assets formed part of the universal partnership:

74.2.1. Erf […], Selcourt North – […] Road, Selcourt ('*the Selcourt property*').

74.2.2. Erf […], Springs ('*the business premises'*).

74.2.3. Batos Radio & TV ('*the business'*).

74.3. It is declared that the value of the assets, as at 18 August 2013, was:

74.3.1. The Selcourt property – R 980 000.

74.3.2. The business premises – R 560 000.

74.3.3. The business – R 440 000.

74.4. The defendant shall pay the plaintiff:

74.4.1. the amount of R 594 000, being 30% of R 1 980 000 (R 980 000 + R 560 000 + R 440 000), by no later than 28 February 2020.

74.4.2. interest on the amount of R 594 000 at 10,5% per annum from 28 February 2020 to date of final payment.

74.5. Costs of suit as between attorney and client.

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I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 30 & 31 January 2019, 1 February 2019, 24 & 27 June 2019.
Judgment: 5 September 2019
Appearances:
For Plaintiff: Adv T Engelbrecht
Instructed by: Schalk Britz Inc
For Defendant: Adv Van Veenendal
Instructed by: Darrell Strydom Attorneys