REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 34672/18

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

29 November 2022

In the matter between:

LAMPRECHT, LUTZ	**APPLICANT**
And	
HORN, CAPRICE N.O.	**FIRST RESPONDENT**
HORN, CAPRICE	**SECOND RESPONDENT**
BOTHA, GERHARDUS JOHANNES	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT	**FOURTH RESPONDENT**
THE REGISTRAR OF DEEDS, JHB	**FIFTH RESPONDENT**

JUDGMENT

MUDAU, J

[1] The applicant, Mr Lutz Lamprecht ('Lutz') seeks a declaratory order that his relationship with Eva Hedwig Horn ('the deceased') was a permanent life-partnership akin to that of a marriage for purposes of section 1 (1) of the Intestate Succession Act[1] ('the Intestate Succession Act'), as well as ancillary relief. The second respondent ('Caprice'), the deceased's only daughter, opposes this application. This application is brought out of an alleged 46-year relationship between the applicant and Eva that began circa June 1970 until her death on 21 July 2016.

Background facts

[2] The deceased, Eva was married in community of property to her husband Horst until he passed away in 1990, in Germany. Eva who was a widow, passed away on 20 July 2016, of natural causes aged 76 years. Eva died intestate. Caprice is the only child born of the marriage between Eva and her deceased husband, Horst. Caprice was appointed by the fourth respondent ('the Master') as the Executrix of Eva's estate. It is not in issue that that Eva and Lutz cohabitated since at least after her husband's death in 1990. It is not disputed that Lutz and Eva conducted an extra marital affair whilst Horst was alive. Horst and Eva never divorced and their marital status continued until the death of Horst. Due to this status, Eva received a widow's pension from the German government until her death.

[3] It is common cause that Eva and Lutz never married nor entered into any written agreements pertaining to their financial affairs, be it movable or immovable property. It is also common cause that on several occasions, Lutz presented several copies of a proposed last will and testament to Eva, but she refused to sign any of them. Caprice approached the Court for the appointment of a *Curator Bonis* and *Curator ad Litem* when it became clear that Eva could no longer take care of her own affairs. Caprice, applied for and was granted the appointment as Executrix of the deceased's estate some three weeks after Eva's death.

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[1] 81 of 1987.

[4] At the time of her death, Eva owned the following immovable properties: 50% share in a property in Germany knows as G [....] E [....] [....], M [....] – S [....]; Erf [....] Westcliff, situated at [....] W [....] A [....], Westcliff, Johannesburg; Units [....], [....] and [....] of Scheme 172, SS Monte Cattini, [....] W [....] 1 P [....] Road, described as Erf [....] Montgomery Park, Johannesburg. Eva also owned movable property: funds in Hypo Vereinbank, Munich, Germany in account no: [....] ;a 1969 Mercedes Benz, 280 SL motor vehicle; jewellery and other movable assets.

The applicant's case

[5] The applicant immigrated to South Africa in 1966, from Germany. He studied architecture with the University of Witwatersrand. He was registered as an architect during 1974. However, it was in June 1970 that he met Eva as a full-time student but in full time employment. He understood from Eva that her marriage to Horst had irretrievably broken down already prior to their meeting. Eva and her husband were property developers in an enterprise known as "Eva and Horst Properties (Pty) Limited".

[6] The husband and wife team continued to work together as business partners in various developments. The most important was a housing development in Pringle Bay, Western Cape, which proved to be a particular success. According to Eva, her husband tried to repeat similar success further afield overseas, which thus contributed to his increasing absence from the country. Eva turned to the applicant for support in day-to-day matters. As a result, and on his version, the applicant inter alia, took over the payment of municipality account bills, telephone accounts as well as the purchase of groceries.

[7] However, throughout the period prior to Horst's death, the applicant and Eva did not live together, but spent as much time together as circumstances would allow. During the time of their relationship, a child was conceived, however the pregnancy was terminated for medical reasons with Eva undergoing a hysterectomy.

[8] In 1982, Lutz sold a residential property in Auckland Park that he owned. From the proceeds of the sale, he and Eva purchased the Westcliff property in which

he currently resides for approximately R116 000,00, which property was registered in Eva's name on 21 October 1982. A bond for the balance of the purchase price in the amount of R25 000,00 was also registered in favour of Allied Bank which he duly serviced until its cancellation on 17 August 1998. Both he and Eva intended the Westcliff property to be their common home. He considers himself to be a co-owner of the property. The property underwent extensive improvements and renovations. Given the intensity of the task and attention it required, he moved his architectural practice and residence to the Westcliff property during which time, he acted as project manager and general supervisor of the renovation. Eva and her family continued to live in their matrimonial home, in Montgomery Park.

[9] Following Horst's death in 1990 after having moved permanently to Germany, and as the Westcliff property alterations were ongoing, his residence alternated between Montgomery Park, where Eva resided and the Westcliff property. It was in 1998 that he and Eva decided to relocate to the Westcliff property. Caprice had joined her father shortly before he died. It was from Eva, that he learnt that Caprice took possession of her late father's valuables.

[10] Following Horst's death, the Montgomery Park property was developed as they had done with the Westcliff property by building separate housing units on the property and then, either selling them as a sectional title development or renting them out to tenants. However, Eva had reservations about allowing occupation of the newly built units for fear that they might deteriorate once tenants had moved into them.

[11] Consequently, the Montgomery Park property remained unoccupied from date of completion of the renovations, circa June 2001 to July 2016, when Eva died, which is a period of about 15 years. On his version, until her death, he was compelled to maintain, repair and deal with the vacant units on the property and its gardens. According to the applicant, as with the Westcliff property, he was the architect, project manager, financier and supervisor of the improvements undertaken.

[12] As with the Westcliff property, he considered himself co-owner of the Montgomery Park property. The value of the Montgomery Park property has appreciated, due in no short measure to his contributions and is currently valued at approximately R2 million. According to the applicant, from 1990 (around Horst's death), Eva's health deteriorated. Consequently, she had severe and repetitive back surgery. As a result, he became Eva's caretaker and sole means of support. He registered Eva as his dependent on his medical aid with Profmed until 1995, when it lapsed.

[13] According to the applicant, Eva deposed to an affidavit confirming that she lived with the applicant as husband and wife from March 1992, in 1999. The applicant's heavy reliance on the purported affidavit is misplaced and of no assistance. The alleged affidavit does not comply with the requirements as set out in Regulations Governing the Administering of an Oath or Affirmation[2]. In terms thereof: *"(1) An oath is administered by causing the deponent to utter the following words: 'I swear that the contents of this declaration are true, so help me God.' (2) An affirmation is administered by causing the deponent to utter the following words: 'I truly affirm that the contents of this declaration are true*'". The purported affidavit is silent in this regard, and accordingly not legally compliant.

[14] The applicant further relies on annexure "LL18", a 2006 document from one Dr Naomi Rapeport wherein the Dr refers to the applicant as Eva's husband. This document does not help the applicant as it is hearsay evidence.

[15] Caprice deposed to an opposing affidavit in both her personal capacity as well as the Executrix of Eva's estate. The dispute regarding this application is apparent. In the opposing affidavit, she is adamant that a multitude of factual disputes exist, which should have been foreseen by the applicant. She has various audio recordings in her possession, disclosed to the applicant, which will confirm the various disputes between not only the applicant and her; but also of the applicant's version and experience of his relationship with Eva.

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2 GN R1258 of 21 July 1972.

[16] Caprice has available audio recordings, confirming discussions between her mother and herself; as well as between her mother, herself and the applicant, in which Eva refused to sign any will prepared by the applicant. The said recordings further confirm that Eva despised the manner in which the applicant treated her, and further, that he was only interested in her financial legacy to be received after her death.

[17] Furthermore, Caprice alleges that the applicant went as far as attempting to coerce Eva's neighbour, Wilfred Burgener, to agree to sign as a witness to the prepared will of the deceased, in her absence.

[18] Caprice alleges that the applicant makes various unsubstantiated allegations of contributions towards the deceased's estate. According to Caprice, her deceased parents had open relationship with various affairs with third parties. Eva's relationship with Lutz was not exclusive, she was aware of other relationships that Eva had even after she met the applicant. She disputes the period of cohabitation as suggested by the applicant. She avers that her parents were financially stable, and her mother had her own separate South African bank account/s, which account/s had in due course been closed or taken over by Lutz.

[19] Also, she points out that the applicant makes an inconsistent statement that he moved in with the deceased in 1990, whereas he previously stated that he lived in the Westcliff property up until 1995, and that the deceased moved in with him permanently at the Westcliff property in 1998.

[20] As for the applicant's allegation with regard to the purchase of the Westcliff property, she decries his failure to disclose the original offer to purchase. Furthermore, she points to the improbability of his version, given the fact that as her parents were married in community of property; which would by law, have allowed her father to claim one undivided half share in the said property. She also makes issue of the fact that no proof of the deed of surety and registration of the bond is supplied by the applicant in support of his claim. She also points out that the applicant fails to disclose the amount he invested in the Westcliff property (if any), and what proceeds he received from his Auckland Park property.

[21] Caprice decries what the applicant refers to as a schedule of “amounts expended” per annexure “LL8” in the construction, refurbishment and general improvements to the Westcliff property over the period in question. She states that the figures quoted were estimates in apparent contradiction. Also, she notes that the bank statements for the periods in question have not been supplied as per the Rule 35(12) notice.

[22] As for the Western Cape properties, she points out that one property was purportedly sold to the applicant during or about 2004 for R 15 000.00, and then on-sold by the applicant for R 103 500.00 in 2006, thus earning him a return on investment of 690% over 2 years, which proceeds should be attributed to the deceased. In fact, the remaining property in Pringle Bay was also sold, whereafter the proceeds were deposited into an account held and nominated by the applicant, which should have been received by the deceased.

[23] Regarding the Montgomery Park renovations, Caprice states that Eva supplied at least the capital asset to the development. She avers with her father’s estate not having been reported, and her mother’s subsequent death, she is entitled to the property through intestate succession. She also rejects the schedule of expenses for reasons inter alia that there is no substantiation of the amounts are even tendered by the applicant. Further, for the reason that the applicant includes VAT at a rate of 14%, while at that stage it was in fact 10%.

[24] As to the applicant’s alleged investment in the Montgomery Park property, Caprice invites the applicant to explain how he could “invest” more than R 1 500 000.00 (which she denies) in a property; and could not convince his co-investor to sell or rent out the properties. She alleges when she took control of the property in 2016, it was in a state of disrepair, as it was unoccupied for 15 years. Inter alia, the garden was almost non-existent; the swimming pool cracked and empty; the roof leaking; tiles had to be replaced; the gate motor was not working. She contracted painters to paint the property.

[25] As for the applicant’s contribution to Eva’s medical costs, it is Caprice’s version that she on various occasions transferred funds not only to the nominated

account of the applicant, but also to the trust account of the applicant's attorneys, which funds were supposedly required for the medical treatment of the deceased. The total value of such transfers amounted to at least R 300 000.00. As for her mother's health condition, Caprice points out that Eva was still active and very pedantic about her appearance. This is supported by the fact that she attended an operation known as a "tummy tuck" at the age of 74 in 2013, not a required medical procedure.

[26] As for the allegation the applicant incurred more than R 1 500 000.00 as medical expenses for the deceased, Caprice asserts that the applicant simply could not have afforded all the alleged expenses. On her version, the information supplied by the applicant, through the Rule 35(12) notice confirmed that the medical expenses, with proof of payment, amounted to R 116 840,64. In addition, she referred the Court to an e-mail from the applicant, dated 10 November 2013, wherein he required a loan from her in the amount of € 20 000.00 as per annexure "RA12".

[27] In 2011 the applicant required funds for a cataract operation for Eva. Caprice transferred € 5 000.00 to the account of the applicant's attorney of record for the operation. To her surprise, in 2016 she discovered that the operation was not nearly as expensive; but that the applicant himself also underwent a cataract operation, and clearly used funds earmarked for her mother for his operation too. Caprice also puts into dispute averments made by the applicant in relation to summary of his income with the expenses claimed.

[28] As for the German property purchased for DM 300,000 in 1993, Caprice invites the applicant to disclose his contributions towards the purchase price and also to disclose to this Court the Reserve Bank clearances obtained for such purchase. As for the proceeds of sale of Eva's car, it is her version that from the account that she opened for her mother with a power of attorney, she made a transfer into the estate late bank account as per annexure "RA22". She also puts into issue that she agreed to a redistribution agreement with the applicant regarding the estate.

[29] Finally, it is her case that the applicant's claim for assistance had been accepted as a loan against the estate as confirmed in writing; and that the applicant was requested to file any claim that he thought he had against the estate, but simply failed to do so.

The law

[30] It is the position of our law that a universal partnership or permanent life-partnership ofall property does not require express agreement. It may also come into existence by tacit agreement, that is,by an agreement derived from the conduct of the parties, as counsel for the applicant submitted.[3] However, counsel for the first and second respondents submitted that no relief is prayed for in the notice of motion for a declarator to confirm a universal partnership; neither are any assets identified by Lutz to form part of such alleged universal partnership. In light of the view that I have of the matter, it is unnecessary to resolve this particular dispute for reasons that follow.

[31] Rule 6(5)(g) of the Uniform Rules states that where an application cannot be decided on affidavit the court may dismiss the application or make such other orders as it may deem fit.

[32] The court will dismiss an application if the applicant should have realised when launching his application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop.[4]

[33] It is trite that if an affidavit sets out facts based on hearsay information, the deponent must state that the allegations of fact are true to the best of his information, knowledge and belief and state the basis of his knowledge or belief; and failure to

[3] See *Butters v Mncora* 2012 (4) SA 1 SCA.

[4] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 and 1168. See also *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) at 154B–C.

state the source of the information or grounds of belief in the original affidavit is an irregularity.[5]

[34] There are fundamental disputes of fact on the papers and the applicant has failed to make out a case for the relief claimed. Reliance by the applicant on Le Roux v Jakovljevic[6], a judgment by this court (Opperman J) for the relief claimed is not helpful. Le Roux concerned action proceedings.

[35] As the first and second respondents contend, there are no written contracts entered into to substantiate Lutz's claims that he and Eva were, for all practical purposes partners and effectively co-owners of the Westcliff and Montgomery Park properties registered in Eva's name pursuant to section 1 of Alienation of Land Act[7]. As for the first property, the applicant gives no documentary evidence as to the amount he allegedly invested into "their" property. He also gives no rational explanation why the property was registered in Eva's name if it was a joint property, particularly at this time when Eva was allegedly married in community property. It goes without saying that Eva's husband would have had a claim against the Westcliff property, *ex lege*.

[36] In addition, there are no written contracts pertaining to the alleged contributions by Lutz. Significantly, he failed to supply any details of the alleged contribution towards any property purchased from the proceeds of the sale of his Auckland Park property, neither is same answered by an affidavit in response to the Rule 35(12) notice issued at the instance of the second respondent.

[37] As for the Montgomery Park property, the first and second respondents contend that the allegation that the applicant personally spent a large amount of money, in this instance an amount of R1 280 220.00, which includes VAT at 14% on upgrades and conversion is suspect. This is against the background that the document that he provided in support thereof is, on the face of it, a recent fabrication

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5 *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672B. See also *Galp v Tansley* 1966 (4) SA 555 (C) at 558H and *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 230F–G.

6 Unreported case14/05429 [2019] ZAGPJHC 322 (5 September 2019).

7 68 of 1981.

if one considers the VAT and round figures to his convenience. I tend to agree, more so that the real costs of the said alterations when not submitted.

[38] The first and second respondents also submitted that, as the applicant took over Eva's financial affairs, the rental income was also paid into his account. The contributions made by Caprice were also paid into his account. Importantly, any expense of Eva that was paidwith her own money would be reflected as a payment from Lutz's account. It follows accordingly, as I find, the applicant should have realized when launching his application that a serious dispute of fact, incapable of resolution on the papers exists. This is such a case. There is no reason why costs should not follow the result.

Order

[39] The application is dismissed with costs.

T. P MUDAU
JUDGE OF THE HIGH COURT

APPEARANCES:

For Applicant:	Adv. C Boden
Instructed by:	JJS Manton Attorneys
For Respondents:	Adv. E S Heyneke
Instructed by:	Gerhard Botha Attorneys
Heard on:	30 August 2022
Delivered on:	29 November 2022