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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION. PRETORIA)

CASE NO: 19704/2011

DATE: 14 AUGUST 2014

REPORTABLE

OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN:

C[...] C[...] G[...] **PLAINTIFF**

AND

H[...] C[...] G[...] **DEFENDANT**

JUDGMENT

KOLLAPEN J:

1. This is an action in which the plaintiff has issued summons in which he seeks an order of divorce, the return of certain movable assets from the defendant and an order directing that he pay rehabilitative maintenance to the defendant in the sum of R10 000-00 per month for a period of two years.

2. The defendant does not oppose the relief relative to the granting of a divorce order, but she opposes the relief sought in respect of the return of the movable assets. In addition, she has instituted a counterclaim in which she seeks a decree of divorce, and an order declaring that a partnership existed between the parties, entitling her to fifty per cent of various partnership assets which include various immovable properties and businesses which will be referred to later. Further, she asks for an order dissolving the partnership and seeks that the plaintiff be directed to transfer fifty per cent of the net partnership assets to her. Her claim for

maintenance is for the amount of R39 414-00 per month which she contends the plaintiff is liable for and is able to pay.

3. At the commencement of the trial it was agreed that the defendant had the duty to begin and the evidence of the defendant, and one Mrs van der Merwe, and the daughter of the parties, Mrs C[...] B[...], was presented. The plaintiff testified in his own case and also called Mr Adolf Swart as a witness.

4. The dispute and the conflict between the parties has given rise to various other proceedings including numerous Rule 43 applications as well as an urgent application to interdict the plaintiff from transferring the assets which are the subject of the dispute between the parties and which the defendant claimed formed part of the assets of the partnership. In this regard reference was made to the various affidavits filed by the parties in those proceedings, and they also serve in their totality, as evidence in this action.

5. At the commencement of the trial it was also agreed that the question of the irretrievable breakdown of the marriage was not in dispute, it being common cause that the plaintiff left the common home on the 14 of January 2011, and that he has not returned since, and that both parties do not see any prospect whatsoever of the marriage relationship being restored. At the conclusion of the leading of the evidence in the trial and after both parties had closed their case, the Court accordingly made an order dissolving the marriage between the parties and it postponed the other relief pending the submission of heads of argument by the parties and argument on the outstanding issues in dispute.

6. The issues in dispute were accordingly:

a) Whether a universal partnership came into existence between the parties as alleged by the defendant and which would entitle the defendant to the relief she seeks in respect of this issue;

b) The plaintiffs claim for the return of various movable goods from the defendant, the details of which were originally set out in Annexure A to the summons, which was later amended to a reduced list during the course of the hearing; and

c) The amount of maintenance the defendant was entitled to, it being agreed that the principle that the plaintiff was obliged to pay maintenance was not in dispute.

7. Clearly the amount of maintenance to be paid was inextricably linked to the relief relative to a universal partnership. As I understand it, the computation by the defendant of her needs was based on her current income and assets. It must accordingly follow that that claim would have to be suitably moderated in the event that the Court finds that a universal partnership did exist, as the income and assets of the defendant's share in the partnership will have to be brought into reckoning.

8. The parties were also able to reach agreement on the net valuation of the various immovable properties which form part of the disputed claim to a universal partnership as at April 2014. They are as follows:

Item No	***Description***	***Liabilities***	***Assets***
1	*Remaining extent of Erf […], H[...], Gauteng Province, known as […] M[...] Street (the erstwhile common home) registered in the name of the Plaintiff*		*R1, 850,00.00*
2	*Portion 2 of Erf […], H[...],Gauteng Province, known as 28 H[...] V[...] Street, registered in the name of O[...] E[...] CC wherein the Plaintiff holds a 60% membership (R681,878.00 x 60%)*		*R750,000.00*
3	*Outstanding bond registered over the property with ABSA (R681,878.00 x 60%)*	*R409,127.00*	
4	*Portion 5 of Erf […] , H[...], Gauteng Province, known as 60 M[...] Street, registered in the name of O[...] E[...] CC*		*R 1,060.000.00*
5	*Outstanding bond registered over the property with Standard Bank*	*R1, 083,361.00*	
6	*H[...] 1036, V[...], 475,4324 hectares, Free State Province, registered in the name of V[...] G[...] V[...] B[...] (Pty) Ltd*		*R4,600,000.00*
7	*Remaining extent of M[...] 302, V[...], remaining extent of N[...] 843, V[...] portion 1 of N[...] 843, V[...], K[...] 1084, F[...], C[...] 1349, F[...], all propertieswhich are registered in the name of V[...] G[...] V[...] B[...]*		*R4,040,000.00*
8	*Bond registered over the farms referred to in items 6 and 7 supra with Standard Bank*	*R900,000.00*	
9	*Erf [1080, T[...], Mossel Bay, known as 25 S[...] Street, T[...], registered in the*		*R1,2000,000.00*

	name of the Plaintiff		
10	*Outstanding bond registered over T[...] with Standard Bank*	*R 1, 510, 624.00*	
	TOTAL	***R3,903,112.00***	***R13,5000,00.00***
	NETT VALUE	***R9,596,888.00***	

9. The defendant has also included as part of her claim and in addition to the immovable properties described above, other partnership assets being the business known as C[...] G[...] M[...] & K[...] CC, in which the plaintiff holds a one hundred per cent interest and the business known as V[...] G[...] M[...] CC in which the plaintiff holds a fifty one per cent interest.

BACKGROUND FACTS

10. The plaintiff and the defendant entered into a marriage on the 26 of September 1987 at Heidelberg after a courtship of about ten months. Both parties had been married previously. The defendant had two minor sons from her first marriage, G[...] who was fourteen years old, and J[...], who was eleven years old at the time of her divorce. The defendant was awarded the rights of primary care and residence in respect of both children.

11. The plaintiff was also married previously with no children being born of that marriage. That marriage was preceded by the plaintiff and his erstwhile wife entering into an ante-nuptial contract to regulate the proprietary consequences of the marriage. It appears that the marriage did not last for a long time and the plaintiff described the divorce as acrimonious because it involved disputes about property.

12. The circumstances surrounding the execution of the ante-nuptial contract and the rationale for it are in dispute. The plaintiffs stance is that given that he had just concluded a difficult and acrimonious divorce, which also involved proprietary disputes, he wanted a matrimonial regime that essentially kept apart what the parties had and what they would acquire in future and to this end he instructed his attorneys to prepare the necessary ante-nuptial contract. This contract provided as follows:

> ‘*En die Komparante het verklaar dat nademaal daar tot'n huwelik ooreengekom is en dit die voorneme is dat die huwelik tussen voltrek word; hulle ooreeengekom het en nou soos volg met mekaar kontrakteer:*
>
> *1. Dat daar geen gemeenskap van goed tussen hulle sal wees nie;*

2. Dat daar geen gemeenskap van wins en verloor tussen hulle sal wees nie;

3. Dat die Aanwasbedeling waarvoor daar ingevolge Hoofstuk I van die Wet op Huweliksgoedere, 1984 (Wet No. 88 van 1984) voorsiening gemaak word, uitdruklik uitgesluit word.

En die Komparante het beloof en ooreengekom om hulle voorgenome huwelik op bogemelde voorwardes te voltrek en om in die gees van hierdie kontrak te handel onder verpligting van hulle persone en eiendom volgens wet '

13. The stance of the defendant on the other hand is that the plaintiff informed her that the ante-nuptial contract was being prepared and signed purely to protect the plaintiff from any claim that may arise out of the printing business the defendant owned at the time. Her evidence was that while she understood that the ante-nuptial contract provided for separate property regimes for the parties, her understanding was that it was done solely to protect the plaintiff In her evidence she said she understood the marriage to effectively be one in community of property.

14. At the time the parties entered into the marriage, the plaintiff owned a property in East London, two properties in H[...] referred to as the W[...] Street property and the L[...] Street property, as well as holding a fifty per cent share in a gymnasium, his father being the other fifty per cent owner. The defendant on the other hand was the owner of a printing business known as Focus Printers and she also held a life usufruct in the property at 17 V[...] Street which was the property she and her former husband used as their common home. Her former husband was fifty per cent owner of this property while her two sons held the other fifty per cent.

15. After their marriage, the plaintiff continued to work as an insurance agent for Sanlam Insurance Company but it appears that he resigned in early 1988, and took up a position with Santambank for a short while and then returned to Sanlam. He testified that he resigned in order enable him to claim his pension benefits as he needed money at the time. He received approximately R16 000-00 as a pension pay-out and he says he used R7 000-00 to settle a debt of the defendant's printing business to Peter's Papers while the balance was used for the needs of the household.

16. The defendant's printing business was sold under circumstances which are also disputed. The plaintiff claims that the business was performing poorly and had incurred considerable debt and that the defendant sold it to one Senekal who was a friend of the defendant - the plaintiff says that he was not aware of the details of this sale. The defendant, on the other hand, contends that the plaintiff became actively involved in the business as a partner with her, that the business changed its name to C[...] D[...] (a combination of the

parties' first names), that the plaintiff brought Senekal in as a partner and ultimately sold the business to Senekal. She was simply instructed to sign the necessary documents at the bank and had no knowledge of the details of the sale agreement but believes it was sold for between R60 000-00 and R80 000-00. She said that the business was good and it did not have debts other than its ordinary running costs. This is a matter I will return to later.

17. After their marriage the parties lived for a very short period in the V[...] Street home (which at the time belonged to the defendant's former husband and her two sons born of that marriage). After about six months they moved to the L[...] Street home belonging to the plaintiff. It warrants mention that the two sons born of the defendant's first marriage lived with the parties and that their father did not contribute to their maintenance despite being under a legal obligation to do so. The plaintiff was *de facto* responsible for their needs as the defendant was pregnant at the time and was not working. The failure by the defendant's first husband to pay maintenance led to an arrangement in terms of which the V[...] Street property was sold and the proceeds allocated as follows: fifty per cent to the two minor sons of the defendant and fifty per cent to the defendant, *in lieu* of maintenance. The defendant's fifty per cent share, which came to about R21 000-00, was retained by the plaintiff on the understanding, the plaintiff maintains, that it represented a contribution to his on-going responsibility for the maintenance of the defendant's two minor sons.

18. It is common cause that the plaintiff stopped working as an agent for Sanlam and established his own brokerage in 1991 under the name of C[...] G[...] M[...] en K[...] CC which dealt with life insurance and investments. A second business, V[...] G[...] M[...] CC, was later formed, where the plaintiff held fifty one per cent of the interest and the defendant's son J[...] held the other forty nine per cent - this business dealt with short-term insurance. The appointment of the plaintiff as a broker entitled him to deal with both long-term and short-term insurance. The brokerage business was initially conducted from the Liebenberg Street property and it is not in dispute that the defendant assisted with administrative and other duties in the business. According to the plaintiff, this took place for about a month before the business appointed a secretary.

19. Over time, the businesses grew and expanded and moved to new premises, taking on more staff including the parties' daughter. It appears that the plaintiff was primarily responsible for the business of C[...] G[...] M[...] en K[...] CC while the defendant's son, J[...], was responsible for running V[...] G[...] M[...] CC.

20. The defendant was employed by both businesses and received a salary from each of them. Her evidence however was that she was more than an employee and she often took responsibility for the businesses in the absence of her husband and her son and she certainly did not consider herself to be an employee in the limited understanding of that term. Beyond assisting with administrative tasks, she states that she was also involved in the writing of policies. In support of this she referred to an application form for Sanlam Unit

Trusts wherein she is described as the agent, as well as a letter from Sanlam acknowledging her as the '*bemarker'* (marketer) for that transaction. It was however not disputed that the Agent's Code on the application form was that of the plaintiff. In addition the defendant could not recall applying to Sanlam to be appointed as an agent or, for that matter, receiving a letter of appointment as an agent, from them.

21. As the brokerage business developed, the plaintiff started to acquire immovable properties and over time a number of properties were bought and then subsequently sold, often at a profit. These included flats, houses, farms and holiday homes. In addition, the location of the common home changed initially from the V[...] Street home, to L[...] Street (where the brokerage business began), then to M[...] Street, then to V[...] Street and finally to the home in M[...] Street, which the defendant still occupies. In this regard and in relation to the V[...] Street property, three homes were built on the erven acquired and two of them were sold at cost to the defendant's two sons.

22. Of all of the properties that were acquired, the defendant was only listed as owner of one of them i.e. the V[...] Street property which was owned by S[...] E[...] 1 CC in which the defendant held a fifty per cent interest and the plaintiff the other fifty per cent. In this regard however, the Cipro Company Report in relation to the close corporation reflects that the plaintiff was the one hundred per cent owner from January 2002 until he transferred fifty per cent of his interest to the defendant on the 02nd of April 2003. According to the plaintiff, and this was not disputed, the sole reason for the transfer was to be able to use the existence of the defendant's income to boost the income of the members of the close corporation so that it could qualify for mortgage finance for a project that ultimately did not materialise .

23. The business premises also saw movement from L[...] Street to offices in J[...] Street, to M[...] Street (where the common home was also located), and then finally to H[...] V[...] Street into a property owned by O[....] E[...] CC in which the plaintiff holds sixty per cent and the defendant's son G[...] holds the other forty per cent.

24. It is not in dispute that the finances used to purchase the various immovable properties were derived from the two businesses and that even where mortgage finance was used, the mortgage repayments were made from funds derived from the two brokerage businesses.

25. The circumstances surrounding the acquisition and sale of the various properties suggest that in most, if not in all instances, the plaintiff discussed the proposed acquisition, or sale, as the case may be, with the defendant. In some instances, the defendant viewed the property in question before it was acquired. The properties were all, however, registered in the name of the plaintiff and his evidence was that it was not unusual to discuss the acquisition and sale of properties with the defendant or, for that matter, to discuss the business of the brokerages with her. They were, after all, married to each other and if he sought her view or

opinion on an issue, this was what married people ordinarily do -he certainly did not do it on the basis of the existence of a partnership with her.

26. In addition, the plaintiffs evidence was that while the two businesses supported the family's upkeep and lifestyle and indeed provided work and other opportunities to family members such as the defendant's two sons, nonetheless the businesses were not family businesses in the sense that their ownership and control vested in the family as an entity. According to the plaintiff, the owner / owners of the businesses and properties were those that were reflected in the CC Documents or in the Title Deeds - he steadfastly denied that a universal partnership came into existence either expressly or by any other means.

27. In her evidence, the plaintiff persisted that in 1988, the parties decided to commence business for their joint benefit. At that stage the business was an insurance business but it later developed into the two brokerages to which reference has been made. She considered herself to be a founding partner in the business and stated that she put in money and considerable effort into ensuring that the businesses were successful. The money contribution was the proceeds from the sale of Focus Printers as well as the sale of the V[...] Street home, while in respect of the brokerage businesses, her evidence was that even though for the most part she was a paid employee, her input and contribution was that of a partner.

28. In support of her claim she sought to rely on the financial statements of both the plaintiff as well as C[...] G[...] en K[...] CC. In the plaintiffs personal financial statements, the income of the defendant is reflected as part of the capital account of the plaintiff, while her loan account is reflected as part of the assets of the plaintiff. Similarly, in the statements of C[...] G[...] en K[...] CC, a loan from the defendant is reflected as a long-term liability of the business. The defendant relies on these entries to support her stance that there was a universal partnership, suggesting that if she was a mere employee of the brokerage, she would not have had a loan with the brokerage and the statements as signed by the plaintiff clearly point in the direction of the existence of a universal partnership.

29. The issue of the loan as reflected in the financial statements was the subject of some interesting evidence. In early 2012, and while this action was pending, the defendant issued summons out of the South Gauteng High Court seeking the repayment of a loan which according to the particulars of claim, was made by the defendant to C[...] G[...] en K[...] CC in 1986. The amount claimed was R306 605-00 (being the amount as reflected in the financial statements of C[...] G[...] en K[...] CC). The evidence of the defendant was that she had not instructed her attorneys to seek repayment of any loan. She, in fact, accepted that she made no loans of any nature to the plaintiff or to the brokerage business. She states that the claim was prepared by her attorney without her instructions to that specific effect. It is however also not in dispute that the amount claimed (R306 605-00) was then paid by the plaintiff to the defendant, presumably as a result of the summons being issued.

30. That being the case, it is difficult to place reliance on the financial statements given the defendant's own evidence of the non-existence of any loan by her -this in my view may well be consistent with the plaintiffs evidence that the statements were prepared by his auditor for his signature and that he cannot say why the entries relating to the loan account appear in the form that they do. In addition, the issue of the summons in respect of a loan whose existence was at best dubious, and of the payment of the claim which was the subject matter of the summons, only adds further confusion to the matter and raises serious doubt about the existence of any loan.

31. With regard to the evidence relevant to the defendant's claim for maintenance, the only question for determination is the amount of maintenance the defendant would be entitled to. In this regard, the defendant prepared a summary of her income and expenditure and it reflects a total monthly shortfall of R54 902-00. This includes amounts for rental in the event that the defendant has to secure accommodation, as well as provision for the purchase of a new vehicle.

32. When one has regard to the defendant's expenses in their totality, there appear to be various line items that may be regarded as excessive, unreasonable or premature. For example, the amount budgeted for rental is in respect of a three bedroom townhouse at R10 000-00 per month. The defendant lives alone and does not require such a large home and she could do with a smaller home that perhaps will present challenges when children and / or grandchildren come to visit and stay over - this in itself can hardly justify having a large home simply for the odd occasions when children come to visit.

The provision made for a new vehicle may well be premature - while the current vehicle is eleven years old, it appears to still be in reasonable running order and the purchase of a new vehicle may well be untimely at this stage. If, and when, such a need arises in the future, it may well be seen to by a request for an increase in maintenance, which the maintenance court will be in a good position to deal with. The amount for electricity and water in the sum of R3 790-00 for one person seems high as does the provision for R6 000-00 for food and groceries.

33. There are other items on the defendant's list of expenses which may be subject to similar criticism. In this regard however it warrants mention that the plaintiff currently contributes the sum of R25 000-00 in cash and by other means as maintenance. In the defendant's heads of argument, it is contended that the sum of R30 000-00 (thirty thousand Rand) per month would be a reasonable amount and I tend to agree with this submission. It would certainly enable the defendant to continue to enjoy the reasonably good standard of living the parties had become accustomed to during their marriage.

34. When one has regard, on the other hand, to the ability of the plaintiff to pay, as well as his existing income, then it was clear that the plaintiff was a poor witness in this regard and he admitted to under-stating

his income in the Rule 43 proceedings in order to avoid having to meet the defendant's maintenance claim. In this regard the details of his income provided during his evidence in this trial (an average of R66 000-00 per month) differed considerably from the amount of R35 000-00 per month that he alleged he was earning at the time he deposed to the various affidavits in the Rule 43 proceedings. Over and above that, his claim that he was unable to afford the amount claimed by the defendant hardly stands up to scrutiny if one simply analyses the undisputed evidence of the various amounts of money he paid to his girlfriend, known as Ms K[...], which he claims was a loan or a payment that was off-set by a payment the same girlfriend's father made in order to pay the plaintiffs legal costs. Whatever the case may be, it is inconceivable that someone who was facing financial pressure, as the plaintiff alleges he was, would be able to find the resources to pay some R300 000-00 to someone to whom he owed no legal obligation. My view on this aspect is that the plaintiff is well able to afford to pay maintenance in the sum of R30 000-00 per month.

THE CLAIM IN RESPECT OF A UNIVERSAL PARTNERSHIP

The applicable legal principles

35. In ***PONELAT v SCHREPFER*** **2012 (1) SA 206 SCA,** the Court stated the following (at 212H-213D):

> 'The essentials of a universal partnership were succinctly summarised in the passages of the trial court quoted hereunder:
>
> > 'The essentials of a special contract of partnership were confirmed in the case *of Pezzuto v Dreyer* 1992 (3) SA 379 (A) at 390, as follows:
> >
> > > 'Our courts have accepted Pothier's formulation of such essentials 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 skill; (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) 1.3.8). A fourth requirement mentioned by Pothier is that the contract should be a legitimate one.'
>
> The *essentialia* of the partnership set out above applies equally to a universal partnership. In this regard see *Muhlmann* v *Muhlmann* 1981 (4) SA 632 (W); *V {aka L)* v *De Wet NO* 1953 (1) SA 612 (O) at 615; *Isaacs* v *Isaacs* 1949 (1) SA 952 (C) at 956 and Schaeffer *Butterworths Family Law:* 'Cohabitation' at 3. The contract of partnership may not necessarily be expressed. It could be tacit or

implied from the facts, provided they admit of no other conclusion than that the parties intended to create a partnership (*Festus* v *Worcester Municipality* 1945 CPD 186 (C)). Our courts have recognised that a universal partnership, also known as domestic partnership, can come into existence between spouses and co-habitees where they agree to pool their resources *(Muhlmann* v *Miihlmann* 1984 (3) SA 102 (A); *Kritzinger* v *Kritzinger* 1989 (1) SA 67 (A); *Ally* v *Dinath* 1984 (2) SA 451 (T) and V (aka L) v De Wet (*supra)).* '

36. The most recent case dealing with universal partnerships is the case of ***BUTTERS v MNCORA*** **2012 (4) SA 1 (SCA)** where the Court stated the following (at 7D-G):

> 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.'

37. Applying these principles, one must interrogate the proposition that the defendant has succeeded in discharging the evidentiary burden she carries in proving that in or about January 1988, a tacit partnership in equal shares commenced between the parties. In this context, and having regard to the test enunciated in ***BUTTERS*** *(supra),* the question is whether it was more probable than not that a tacit agreement had been reached.

38. In considering the evidence and in particular that of the plaintiff, it is clear that he was not a good witness on certain aspects. His approach to the claim for maintenance, which I have dealt with hereinabove, indicates a willingness to subvert the truth in order to avoid meeting his obligations. In addition the evidence that was presented relative to the sale of the V[...] Street property to Mrs van der Merwe also appears suggestive of

someone who may well be willing to resort to questionable business methods. In this regard, the evidence of Mrs van der Merwe that she bought this property from the plaintiff for R 1,1 million was clear and satisfactory in my view. The plaintiff however testified that the sale price was R630 000-00 and the difference of R470 000-00 (between Rl.l million and R630 000-00) represented a loan he took from Mrs van der Merwe. Clearly this was not what happened and is simply an example of the poor impression the plaintiff made.

39. The same could be said of the unusual circumstances relating to the purported sale of the business known as C[...] G[...] M[...] en K[...] CC which appears to have been sold for Rl million, payable with a deposit of R180 000-00, and the balance payable at Rl 00 000-00 per annum while the plaintiff would continue to manage the business. The purported sale of the former common home of the parties situated at 82 H[...] Street for Rl,8 million with a down-payment of R200 000-00 and the balance payable over fifteen years also does not appear to make good commercial sense. Both these sales may well have the appearance of simulated transactions.

40. Notwithstanding my criticism of the plaintiffs evidence with regard to the maintenance claim as well as his business dealings relevant to the assets of what the defendant alleges is part of the universal partnership, the principle *"semel mentitus, semper mentitur*' (once untruthful, always untruthful) does not apply in our law of evidence. According to the authors Schwikkard and Van der Merwe (2002) *(Principles of Evidence* 2nd Edition) at pages 503-504, C(I)t is permissible either to accept or reject the evidence of a witness who has lied before or who has lied only with regard to a particular fact... '

41. The authors also refer to the decision in ***GOODRICH v GOODRICH*** **1946 AD 390** at 396-7 which they say 'emphasised that a court should carefully guard against the fallacious principle that a party should lose its case as a penalty for its perjury or lies under affirmation. It was pointed out that the specific circumstances of each case should be considered and that in each case the court should ask itself whether the fact that a party has attempted to strengthen or support its case with lies proves or tends to prove the belief of a party that its case is ill-founded...'

42. Accordingly and while the plaintiffs evidence on the issue of the maintenance and his 'disposal' of certain assets may well be questionable, the core issue is whether in the adjudication of the claim in respect of a universal partnership, his evidence falls to be rejected on account of this alone. The answer to that must decisively be no as to do so would make operational the principle 'once a liar, always a liar'. In my view the evidence relating to the claim in respect of a universal partnership requires evaluation with a view to respond to the question whether it is more probable than not that a tacit agreement was reached. It may then be useful to use Pothier's formulation as the backdrop in order to evaluate the evidence in its totality.

43. Before doing so however it may be necessary to dwell on the circumstances leading to the conclusion of the ante-nuptial contract and the parties' respective understanding of it. In her evidence the defendant stated that her understanding prior to their marriage in late 1987, was that they would be married as if they were married in community of property and that all the assets that they had then, and whatever they would acquire in the future, would be their joint property . In her view the ante-nuptial contract was simply being executed to protect the plaintiff from possible claims arising out of her business, Focus Printers. Clearly if that was her understanding then it is argued that it militates against the suggestion that a tacit partnership arose in early 1988 and in addition such type of partnership that her evidence points to, a *societas universorum bonorum*, would run counter to and be inconsistent with the existence of the ante-nuptial contract entered into and would constitute a revocation of the ante-nuptial contract, which is not permissible without the leave of the High Court (see *CW v JW* **2012 (2) SA 529 (NCK)).** My view, despite the submission by counsel for the defendant that not too much reliance should be placed on this evidence as the defendant is a lay person, is that it falls to be considered in the totality of the evidence and that if indeed it represents the defendant's own articulation of what transpired before her marriage to the plaintiff, it remains relevant.

THE POTHIER REQUIREMENTS:

i. That each of the partners bring something into the partnership, whether it be money, labour or skill:

44. It is common cause that the plaintiff was involved in the insurance business since about 1984 and that by 1988 he had acquired considerable experience in the industry. The defendant ran a printing business and had no experience in the insurance industry. Her claim is that she contributed capital, being the proceeds of the sale of the printing business, and the fifty per cent of the proceeds of the sale of the V[...] Street home. In this regard however, it warrants mention that her evidence relevant to the sale of the printing business was that she was simply asked to sign documents at the bank for the sale of this business at the request of the plaintiff. She was unable to state what the purchase price was and while she stated that she believed that the plaintiff received between R60 000-00 and R80 000-00 from the sale, this is not supported by any evidence and at best it remains a belief that is unsupported. If indeed she was the owner of the business one would have expected her to at least have taken a greater interest in establishing what the purchase price was and what was the share of the sale due to her, which she says the plaintiff retained. Under such circumstances and in the absence of there being any basis laid for her view that the plaintiff received the amounts she estimated, her evidence in this regard represents no more than a guess, and not even a calculated one at that. The failure by the plaintiff to specifically challenge this particular aspect of her evidence, even though his testimony was that it was the defendant who negotiated the sale of the business, does not in my view somehow elevate the guess she made with regard to the proceeds to something any stronger than that.

45. Under such circumstances it remains unclear what, if any, were the proceeds of the sale of the printing

business, and on the evidence on this issue, I am not satisfied that the defendant has discharged the evidentiary burden in proving a capital contribution.

The second leg of the defendant's argument relevant to a capital contribution is the sale of the V[...] Street home, and the plaintiff receiving some R21 000-00 from the proceeds of this sale. In this regard it was common cause that the proceeds that came to the plaintiff represented the fifty per cent share of the defendant's former husband and that the money represented both past and possible future maintenance that the defendant's former husband had failed to pay and was unlikely to pay in the future. Given that the plaintiff had accepted *de facto* responsibility for the maintenance and upbringing of the defendant's sons, this amount was in my view seen as being inextricably linked to the question of the maintenance of the two minor sons of the defendant as that was the rationale for the sale of the V[...] Street property - the failure by the defendant's former husband to pay maintenance. It would place a wholly artificial interpretation to see it as some kind of capital contribution to a tacit partnership. Accordingly on this aspect of the matter, it cannot be said that the R21 000-00 represented anything more or less than a payment to the plaintiff as reimbursement for the obligation he had undertaken for the on-going maintenance of the defendant's sons.

46. The defendant's testimony was that she contributed her labour to the partnership and that the contribution she made went beyond her role as an employee of the two businesses. It is not in dispute that for the most part, the defendant received a salary from the two businesses and that while it may well be that from time to time she went beyond what was required of a mere employee, could this be said to represent the kind of contribution consistent with that of a partner? In assessing this, sight must not be lost of the fact that these businesses became important for the family including the two sons of the defendant, one of whom was a forty nine per cent partner in one of the brokerages and the other, who was a forty per cent partner in the close corporation that owned the property at H[...] V[...] Street. To that extent the businesses were obviously important in anchoring the lives and the financial security of the extended family. It provided employment, investment opportunities, and in respect of the defendant's two sons, also provided the opportunity to acquire their own homes at a favourable price (S[...] Street development). Under these circumstances and given its pivotal role in the life of the family, the services rendered by the defendant and for which she was remunerated would not in my view surpass those ordinarily expected of a wife in that situation (see ***MUHLMANN* v *MUHLMANN*1984 (3) SA 102 (A)).**

47. In this regard the defendant also sought to place reliance on the financial statements of C[...] G[...] and K[...] CC for the years ending February 2009 and February 2010 which reflected the defendant as having a loan account. It was argued that if she was no more than a mere employee then she would not have had a loan account and that the existence of the loan account strengthens her claim to being a partner. As I have already indicated, the question of the loan account was the subject matter of litigation and this ultimately resulted in

the defendant being paid the sum of R306 605-00 which represented the amount of the defendant's loan account as at the 28th of February 2010 in the books of C[...] G[...] and K[...] CC.

48. What is unclear is the circumstances that led to the issue of the summons in 2012 at the instance of the defendant for the recovery of this amount. The summons alleges that in 1986 the defendant made a loan of R200 000-00 to C[...] G[...] and K[...] CC and that as at 28 February 2010 the amount due to the defendant was R306 605-00 as indicated in the financial statements of C[...] G[...] and K[...] CC. While the evidence of the defendant in this trial was that she made no such loan, she was unable to say on what basis and why those allegations appeared in the summons as they did, except that those were not her instructions to her erstwhile attorney, who issued the summons on her behalf.

49. Given that it is common cause that this amount was paid to the defendant by the plaintiff, it could in my view only have been received by the defendant on the basis of the allegations she made in her summons. If it was received by her on any other basis, that certainly did not emerge from her evidence. Under such circumstances and leaving aside for the moment the manner in which the financial statements were drawn and whether they represented an accurate exposition of what they purported to contain, on the matter of the loan only and in the light of the litigation that led to the payment of the claim, it is hardly open for the defendant on the one hand to have benefitted from the litigation in which she claimed she made a loan to the close corporation, while on the other hand denying the existence of such a loan and using the financial statements to support her argument that she was a partner in the close corporation. She cannot have it both ways, as it were, and if indeed the financial statements represented evidence of her partnership, then it is further inconceivable why she would, while her claim for a universal partnership was still pending (summons was issued in this matter during March 2011), launch a separate action in February 2012 for the repayment of a loan to C[...] G[...] and K[...] CC. This, in my view, is strongly suggestive that certainly in the view of the defendant, the amount reflected in the financials was somehow due to her without it being linked to any claim to a universal partnership. If it was, then surely she would have had it adjudicated in the context of this action.

50. I must accordingly conclude that for the reasons given, the financial statements do not support the defendant's contention of the existence of a universal partnership. That being the case, it cannot be said that it is more probable than not that a universal partnership came into existence. On the contrary it is more probable that it did not. In this regard, when one considers the situation that would have existed in early 1988, when the tacit partnership is supposed to have been formed, the plaintiff had just concluded a difficult divorce and was married to the defendant in terms of an ante-nuptial contract. In addition, he was possessed of various assets including three immovable properties and a fifty per cent share in a gymnasium and was also an established insurance advisor. It was his knowledge of the insurance business that formed the

foundation of his later businesses as broker and which provided the bedrock for his further financial success including the acquisition of various properties.

51. It would, in my view, have been inconceivable and highly improbable that shortly after concluding an ante-nuptial contract, the plaintiff would then enter into a tacit agreement with the defendant to form a partnership. At that stage, the defendant would have owned, in full or in part, a printing business whose value the defendant never alluded to in her evidence, and in addition, a life usufruct in respect of the Vos Street property, while the plaintiff on the other hand, was owner of various properties and a gym and importantly had just come out of a difficult marriage and was keen to ensure that he structured the matrimonial property regime in a way that avoided future problems. This is precisely what the ante-nuptial contract sought to do, and the suggestion of a tacit partnership so soon after executing the ante-nuptial contract, is highly improbable in my view.

THE CLAIM FOR THE RETURN OF VARIOUS MOVABLE GOODS

52. Much of this claim has been diluted by the concession by the plaintiff that various items listed in Annexure A have been given to the daughter of the parties. It is not precisely clear which items are with her, and in view of the uncertainty with regard to that aspect, I do not intend to make an order in this regard.

COSTS

53. While the plaintiff has been substantially successful, following the ordinary rule that costs should follow the result will bring about considerable financial prejudice to the defendant. It was suggested by counsel for the plaintiff that an order that each party pay its own costs may be an appropriate one. My concern is that such an order may well have the same effect. My view is that the defendant's counter-claim was not maliciously or recklessly launched even though it has been dismissed. The plaintiff, even though successful, was ordered to contribute to the defendant's costs to enable her to continue with this litigation. There is no reason, in my view, why such a contribution should not continue until the conclusion of the trial. In the circumstances, my view is that the plaintiff should pay the costs of the action.

ORDER

54. I accordingly make the following order:

i. The defendant's counterclaim is dismissed;

ii. The plaintiff is ordered to pay maintenance to the defendant in the sum of R30 000-00 (thirty thousand Rand) per month, commencing on 01 September 2014;

iii. The plaintiff is to pay the costs of this action.

HEARD ON: 19 TO 23 MAY 2014

FOR THE PLAINTIFF: ADV A. P. BRUWER

INSTRUCTED BY: VILJOEN & MEEK (correspondents: WEAVIND & WEAVIND; ref: D van Wyk/LVB/V30016))

FOR THE DEFENDANT: ADV D. A. SMITH SC

INSTRUCTED BY: C BEKKER AND ASSOCIATES (ref: GRE10/2/L Krugel/BP)