REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

25/7/16

CASE NO: **19398/2014**

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

P T V PLAINTIFF

and

M J M DEFENDANT

JUDGMENT

MALI J

[1] The plaintiff a 50 year old unemployed lady and the mother of two children seeks an order for a declaration of universal partnership. The order sought is against the defendant, a 48 year old male financial manager who has no children of his own. The parties were never married to each other. The defendant denies the existence of a universal partnership.

[2] The parties have agreed that the only issues for decision are (a) whether a universal partnership came into existence; (b) if so, whether the parties had equal shares in the partnership; (c) if so, whether a liquidator ought to be appointed on terms and conditions to make an award in writing.

[3] The basis of the plaintiff's claim is that the parties had lived together as husband and wife for a period of approximately 18 years. It has been always the plaintiff's understanding that the parties came into a relationship on the basis that the they would give each other their respective possessions or properties.

[4] The following facts are common cause; that the parties commenced their relationship in 1992 in Witbank, Mpumalanga. They started living together in 1996. The plaintiff was working for BHP Billiton Gold Mine.("BHP"). The defendant worked for a bank when the parties met. The defendant commenced with his Bachelor of Commerce studies at the University of Pretoria before his cohabitation with the plaintiff. He completed his studies after he had moved in with her. The defendant also completed a Masters degree in Business Leadership ("MBL") during the course of the relationship. The defendant because of his qualifications enjoyed career growth in the Accounting and Financial Industry. The parties jointly purchased an immovable property, a house situated at […] V. St, Beun Fleur, Witbank. The property is commonly referred to as […] V. St. The parties agreed to share living expenses such as buying groceries, and home maintenance. In October 2013 their relationship was terminated on the instance of the defendant.

[5] In **PEZZUTO v DREYER AND OTHERS**[1] it was held that a universal partnership will exist if the following essentials are present:

(a) That each of the parties bring something into the partnership, whether it be money, labour or skill,

(b) That the partnership should be carried on for the joint benefit of the parties;

(c) That the object should be to make a profit;

(d) That the contract should be a legitimate one. This element has been discounted by our courts for being common to all contracts, as held in **BESTER v VAN NIEKERK[2].**

[6] In **BUTTERS *v* MNCORA[3]** at paragraph 17 -18 the following is stated;

"The requirements for a *partnership* as *formulated by Pothier had become* a *well-established part of our law. Those requirements have served us well. They have been applied by our courts to universal partnerships in general and universal partnerships between cohabitees in particular. I therefore cannot see the necessity for the formulation of special requirements for the latter category. This is also borne out by the fact that Pothier himself did not find his formulation of the requirements incompatible with the concept of universal partnerships of all property which he discussed in some detail.*

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*

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[1] 1992 (3) SA 379 (A)
[2] 1960 (2) SA 779
[3] [20121 ZASCA 29 at page 9 -10

inference, the test for when a *tacit universal partnership can be held to exist is whether it is more probable than not that* a *tacit agreement had been reached.*

(See eg Ally v Dinath 1984 (2) SA 451 (T) at 453F-455A; Miihlmann v Miihlmann 1981 (4) SA 632 (W) at 634A-B; Miihlmann v Miihlmann 1984 (3) SA 102 (A) at 109C-E; Kritzinger v Kritzinger 1989 (1) SA 67 (A) at 77A; Sepheri v Scanlan 2008 (1) SA 322 (C) at 338A-F; Vo/ks NO v Robinson 2005 (5) BCLR 44 (CC) para 125; Pone/at v Schrepfer 2012 (1) SA 206 (SCA) paras 19-22; J J Henning Law of Partnership (2010) 20-29; 19 Lawsa 2 ed para 257.)

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. The point is well illustrated, I think, by the very facts of this case. 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".*

[7] In **BUTTERS *v* MNCORA** above it is further stated that:

"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. "

[8] The only witnesses were the parties themselves.

[9] It transpired from the evidence that when the parties first moved together they stayed in the mine house. The mine house belonged to the plaintiff's then employer, BHP. The stayed with the plaintiff's two minor children from her previous marriage. The plaintiff was earning more income than the defendant and she was receiving maintenance from

the father of her children. The parties contributed towards household expenses and food together without following strict rules regulating their respective contributions. As the time went by the defendant contributed two thirds and the plaintiff contributed a third of the household expenses including food.

[10] The plaintiff further stated that in 1997 the defendant got employed by BHP on her instance. The defendant has disputed that the plaintiff assisted him to get employment at BHP. What is not in dispute is that at the time the defendant earned more than the plaintiff and as a result they jointly purchased [...] V. St. The defendant paid two thirds towards the bond instalment and the plaintiff paid a third. In the beginning, at [...] V. St the parties used the plaintiff's furniture and they later decided to buy new furniture. The defendant would buy more expensive furniture as he had means to do so.

[11] The plaintiff further stated that the defendant paid for the maintenance and renovations of [...] V. St and the plaintiff assisted by contributing physical labour and skill. The defendant personally carried out the repairs, a fact not disputed by the defendant. The plaintiff also took the responsibility for interior of the house by contributing her money, time and labour.

[12] Under cross examination it was put to the plaintiff that the reason for her participation in the renovations was because she was a half owner of the property and was duty bound to do so. It was also put to her that she was carrying ordinary duties of a wife. I cannot accept this contention because although they were joint holders the defendant paid more than what was required of him. He never followed the 50% principle in the daily practice.

[13] The plaintiff further stated that she believed that as they bought their first joint property they were going to grow old together and were working together towards the same goal. Both parties agree that [...] V. St was purchased jointly because neither of them then could afford to obtain housing finance individually. The plaintiff is adamant that the purchase of the property furthered their tacit intention of universal partnership.

[14] The plaintiff further gave evidence that the parties used to talk about growing old together in a large estate and were looking forward to sit in a *"stoep"* to watch the sun.

The defendant even joked with the plaintiff that he would buy her a house with a *"stoep"* somewhere in the Free State Province. This is not disputed by the defendant. Although this has an element of jest it is normal for parties who are committed to each other to make these kinds of jokes. If it was undesirable for the defendant to grow old with the plaintiff, it was his opportune moment to express his disapproval.

[15] It is evidence of both parties that when the parties moved in together the defendant continued with his studies and the plaintiff would assist by cooking , washing and ironing for the defendant and in making the household comfortable and conducive for studying. According to the plaintiff, she had contributed to the defendant's success.

[16] The defendant further testified that when they moved together he had a television set, a bed, his own vehicle, a pension investment and immovable property which he rented out. The defendant testified that he bought the property before he met the plaintiff. When he sold the property in October 1997 he did not share any proceeds with the plaintiff because he made it clear to the plaintiff that it was his investment.

[17] Both parties testified that the defendant later purchased another immovable property, a vacant land which is commonly known as Reyno Heights. The plaintiffs evidence is that they bought Reyno Heights in order to build a bigger house to occupy in the future. The plaintiff had no problem that the property was in defendant's name because from the actions of both parties it was clear that it was their dream home, in fact the plaintiff trusted the defendant. According to the plaintiff they verbally agreed to sell [...] V. St and other properties with the aim to use the proceeds to build their home on Reyno Heights.

[18] Under cross examination the plaintiff was questioned about the improbability of contributing proceeds from her only property into the property not registered in her name. She persuasively stated that she was operating under trust relationship and never wanted to upset the system that was working well by questioning things.

[19] The plaintiff further stated that the only reason that the building of the house was delayed was because of the constant change of plans as they were designing their dream house. Unfortunately whilst they were busy with the plans the defendant got

involved with another lady and the building of the property stalled. The defendant does not deny that the plaintiff made inputs into the plans and design of the property, however he proffers a different reason. His reason is that he only requested the plaintiff's input on how to design a best investment house, as there was no agreement between them that the plaintiff was part of the property.

[20] In the event that the defendant's contention above is accepted, the defendant on his own admission continued to source plaintiff's skills. It matters not whether the house was intended for investment. What is important is that both parties contributed something towards the property for the shared purpose of growing their joint estate with their retirement in mind. According to the plaintiff the partnership was carried on for the joint benefit of both parties.

[21] It also transpired from the evidence that the defendant later purchased another house on his name. As earlier testified by the plaintiff she never bothered about her not being the registered owner of the properties as she trusted the defendant. The defendant further purchased another immovable property referred to as Santica. When he bought the house it was no longer comfortable for the parties to live together. According to the plaintiff she was supposed to move to Santica, but because of the laser grass cutting machine which could not be accommodated at Santica the plaintiff did not move.

[22] The inferred conduct of a universal partnership, is further corroborated by the plaintiff's evidence that the defendant nominated her as a sole beneficiary for his death benefits. The defendant bequethed almost his entire estate to the plaintiff and some of his estate to the plaintiff's children. At the time of the hearing of the matter the defendant had retained the plaintiff on his medical aid. The defendant's evidence is that the will is not enforceable as it is. The policy was in terms of the oral agreement as well as that the conferment of benefits does not imply element of universal partnership. There is no evidence that the defendant ever amended the will, and nominated a new beneficiary for his death benefits.

[23] According to the defendant he is stingy and very money wise when it comes to savings and investment. One of his reasons is that he comes from a lacking and

deprived background. I find it implausible that a stingy and a financial sound person of defendant's stature would throw away his estate to anyone and everyone who means or meant nothing to him. My view is that in the least he would have bequethed a part of his estate to his parents and sister who were not doing well financially. This is because that according to his testimony the defendant has a close bond and or good relationship with his family.

[24] According to the plaintiff the defendant bought her a gift, a laser grass cutting machine mentioned above to start her own business. The defendant later insisted that the plaintiff pay him for the machine after the termination of their relationship. The plaintiff testified that she had all the reasons to believe that the machine was the present from the defendant as he used to buy her expensive gifts including a wristwatch valued at R12000.00. The wrist watch was purchased 15 years ago; the defendant further took her on expensive holiday destinations and bought her a Ducatti motorcycle. Under cross examination the plaintiff admitted that on two separate occasions paid the flight tickets both for he and the defendant to Las Vegas and Amsterdam, the majority of the expenses for the overseas holidays were paid for by the defendant.

[25] The plaintiff further testified that she is currently unemployed as she took a package in 2013 because she was being forced to transfer to Johannesburg. She was not prepared to move to Johannesburg as she was still in love with the defendant. The plaintiff currently earns her living from what she calls a salary, a substantial monthly amount of R16000.00 from the defendant. She also earns income from the business of grass cutting. She further stated that the defendant stopped paying the said "salary" on the advice of his own lawyers. The defendant informed her that according to his lawyers, continuation of the said "salary" payment could be seen as an admission of guilt.

[26] The defendant did not challenge the plaintiffs evidence that in 2011 when they encountered problems with their relationship the defendant offered to purchase the plaintiff a property. The above clearly shows how the parties were both committed to each other despite that in the end the defendant changed his minds about the relationship.

[27] Under cross examination the defendant admitted that if the relationship lasted

longer the plaintiff would have benefited. From this it appears that the defendant accepts the existence of universal partnership but the issue is the duration of the relationship. Is there any period more than 18 years of a relationship to qualify someone for the benefits of a universal partnership? By anyone's standards, 18 years is way more than reasonable to accept the existence of universal partnership although this is not a requirement. However when taking into account the totality of the circumstances nothing more is required to prove universal partnership particularly when the defendant's own admission is considered.

ASSESSMENT OF THE EVIDENCE

[28] The plaintiff testified in a coherent, lucid and credible manner. She would express her emotions by crying and confusing some of the facts. This is the expected behaviour from someone grieving the loss of an intimate relationship, and above all she is a layperson. Despite the above conduct the plaintiff managed to compose herself and adduced her evidence well.

[29] My observation is that she was deeply hurt because of the breakdown of the relationship on the instance of someone whom she considered her soul mate and her life partner. This is not farfetched because the defendant on his own admission under cross examination agreed that he regarded her as his wife. The defendant went to the extent of referring to his relationships with other people as extra marital affairs, and that after the first extra marital affair the defendant went for counselling to solve their problems.

[30] The credibility of the plaintiff was challenged when she was cross examined about the fact that defendant had more assets when they met. Taking into account that they started cohabiting in 1992 it is expected of the plaintiff not to remember everything.

[31] To the plaintitrs credit she could not remember the defendant's immovable property, the one he rented out and sold whilst taking shelter with the plaintiff in the mine house. The mine house was the plaintiff's benefit. At that stage the defendant was earning less than the plaintiff even though it was for a short while. This shows that the plaintiff is not driven by greed, she wants what is lawfully and rightfully hers. Under cross examination

the plaintiff went as far as admitting that her property including the movable property and other capital investment falls within the universal partnership.

[32] The defendant was coherent, logical and composed. There are few incidents when I found his credibility questionably. For example when he testified about selling his first house he said that he "thought" he told her about her career plans and that he was not prepared to share the proceeds of the sale of the house with her. Secondly regarding the issue of the laser cutting machine he was not convincing at all when he testified that he bought the plaintiff the machine based on the loan agreement. The defendant tried hard and painfully to ward off any facts and or evidence proving the existence of universal partnership.

[33] I fully agree with the counsel for the plaintiff that the most important concession made by the defendant was that if the relationship had not terminated because of his infidelity the plaintiff would have benefited from the assets he accumulated over time. According to the counsel for the defendant , the defendant's concession is irrelevant because it is not one of the elements required to prove the plaintiff's case. Even though it is accepted that indeed it is not one of the elements, however taking together everything into account it is more probable than not that a tacit agreement had been reached.

[34] In conclusion, the plaintiff has succeeded in establishing on the balance of probabilities the existence of a universal partnership between her and the defendant.

[35] The remaining question is whether the parties had equal shares in the partnership. The counsel for the defendant submitted that in the event that a universal partnership is found the plaintiff's share should not exceed 10%. There is no basis for this submission.

[36] The counsel for the plaintiff correctly submitted in my view that since the defendant earned larger salary and contributed a larger share the plaintiff could not share equally with the defendant. In my view it is fair and appropriate for the plaintiff to share 33% of the defendant's assets.

[37] I therefore make the following order:

1. It is declared that a universal partnership came into existence between the plaintiff and the defendant which partnership was dissolved on 30 October 2013;
2. It is declared that the parties should share in the joint combined assets of the parties as at 30 October 2013 as to 33% in favour of the plaintiff and 67% in favour of the defendant;

3. The parties are to appoint a liquidator or receiver with authority to release the universal partnership assets, to liquidate same, if necessary, to prepare a final account and to pay to the plaintiff 33% of the net proceeds thereof, the remainder to be paid to the defendant;

4. In the event that the parties are unable to reach consensus on the appointment of a liquidator or receiver the parties are directed to approach the court which shall, after hearing the parties, appoint or receiver;

5. Interest on the sum so determined shall be calculated at the legal rate as from 30 October 2013 to date of payment thereof;

6. The defendant is ordered to pay the plaintiff's costs of suit including the costs of two counsel.

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N P MALI

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:	Adv. T.P. Kruger (SC)
Instructed by:	MARAIS SASSON INC
Counsel for the Defendant:	Adv. K. Foulkes - Jones (SC).
Instructed by:	KYRAICOU INC
Date of Hearing:	3rd and 4th of March 2016
Date reserved:	6 April 2016
Date of Judgment:	25 July 2016