

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 23664/2017

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

.....
DATE

.....
SIGNATURE

In the matter between:

L[....] D[....]

Plaintiff

and

G[....] V[....] O[....] B[....]

First Defendant

BULCON CONSTRUCTION CC

Second Defendant

NATURE HEIGHTS PROPERTIES CC

Third Defendant

KAREEBOOM PROPERTIES CC

Fourth Defendant

BIG D BUMPERS CC

Fifth Defendant

RIDER FORKLIFT BUMPERS CC

Sixth Defendant

JOINTSHELF 1187 CC

Seventh Defendant

TRIBAL ZONE TRADING 678 CC

Eighth Defendant

LAGOON BEACH (PTY) LTD

Ninth Defendant

CHISLETON (PTY) LTD

Tenth Defendant

**KYALAMI BURN (PTY) LTD
TABAC (PTY) LTD**Eleventh Defendant
Twelfth Defendant**B[....] FAMILY TRUST**

Thirteenth Defendant

B[....] V[....] O[....] B[....]
(In his capacity as trustee of the
B[....] Family Trust)

Fourteenth Defendant

J U D G M E N T*The judgment and order are accordingly published and distributed electronically. The date and time of hand down is deemed to be 10:00 on 30 March 2021.***TEFFO, J:****Introduction**

[1] The plaintiff instituted an action against the defendants in terms of which she claims, *inter alia*, a declaratory order that a universal partnership existed between her and the first defendant in respect of the defendants' businesses, assets and investments and a division of the assets of the partnership in equal shares. In the alternative, she claims that the defendants were unduly enriched to her detriment. That she is entitled to 50% of the net value of the first defendant and the remaining defendants' entities, being the amount by which they have been unduly enriched. She also claims additional relief as outlined in her particulars of claim.

[2] The defendants deny the existence of the universal partnership between the plaintiff and the first defendant.

The parties

[3] The plaintiff is Ms L[....] d[....]. It will be appropriate for the sake of these proceedings to refer to her as Ms D[....]. The first defendant is Mr G[....] V[....] O[....] B[....]. He will be referred to separately as Mr B[....]. The second to the twelfth defendants are the business entities, either close corporations or companies of the first defendant. They will also be referred to by name as Bulcon Construction CC ("*Bulcon*"), Nature Heights Properties CC ("*Nature Heights*"); Kareeboom Properties CC ("*Kareeboom*"); Big D Bumpers CC ("*Big D*"); Rider Forklift Bumpers CC ("*Rider*"); Jointshelf 1187 CC ("*Jointshelf*"); Tribal Zone Trading 678 CC ("*Tribal Zone*"); Lagoon Beach (Pty) Ltd ("*Lagoon Beach*"); Chisleton (Pty) Ltd ("*Chisleton*"); Kyalami Burn (Pty) Ltd ("*Kyalami*") and Tabac (Pty) Ltd ("*Tabac*"). The thirteenth defendant is the B[....] Family Trust. It will be referred to separately as the "*Family Trust*". The fourteenth defendant is Mr G[....] V[....] O[....] B[....] in his capacity as the Trustee of the B[....] Family Trust. He will be referred to separately as the Trustee of the Family Trust. Where appropriate the defendants will be referred to collectively as the defendants.

The pleadings

[4] In her particulars of the claim, the plaintiff alleges that she and the first defendant met in the year 2000. They became romantically involved. In 2005 they moved together under the same roof. They lived together in a relationship akin to husband and wife from 2005 to June 2016.

[5] In or around June 2005, she and the first defendant decided and agreed that she would reject a lucrative full-time position with global

consulting and construction firm Arup, and instead join the first defendant with both parties to, *inter alia*:

- 5.1 build up existing businesses for profit;
- 5.2 create and run new business ventures for profit; and
- 5.3 to jointly accumulate assets, for the joint benefit and reward of her and the first defendant.

[6] As a result, and in Johannesburg, she and the first defendant, whilst acting personally, orally, explicitly, alternatively tacit, alternatively by implication, further alternatively through conduct agreed that:

- 6.1 A partnership be formed and that the partnership businesses would be conducted initially from 11 Bushwillow Street, Fourways, Gauteng.
- 6.2 She and the first defendant would contribute their time, expertise, labour and capital to the partnership.
- 6.3 They intended for the partnership to make profit, acquire assets and income, and to be for their joint benefit.
- 6.4 The partnership would utilise, *inter alia*, the names and assets in the names of either or both she and the first defendant, trusts, companies and/or close corporations, to conduct the partnership and to accumulate assets in such names and/or entities in an attempt to, *inter alia*, protect and grow assets, including protecting such assets against claims from creditors.

6.5 The partnership assets held by the partnership in her names, the first defendant, or by the trusts or companies and close corporations and the net profits and net losses shall upon termination of the partnership be divided equally between her and the first defendant.

6.6 Her assets and those of the first defendant, the trusts, the companies and the close corporations would be regarded as assets of the partnership.

[7] She made business and domestic related contributions to the partnership.

[8] The partnership was terminated on or about 1 July 2016.

[9] She and the first defendant shall, upon termination of the said partnership, each be entitled to half of the assets, held by the partnership or her or the first defendant or any of the aforementioned company(ies) and close corporation(s), and/or the trust, the net profits or be liable for the net losses. In the alternative, she pleads that the contributions that she and the first defendant made to the said partnership in respect of the assets and/or income and/or labour, are not capable of being ascertained with precision. She and the first defendant are entitled to a distribution of the assets of the partnership in equal shares after termination of the said partnership.

[10] In their plea, the defendants raised the following points *in limine*:

10.1 Non-joinder. That the plaintiff has failed to site all the trustees of the thirteenth defendant in their respective capacities as such and that the thirteenth defendant is thus not before court.

10.2 Proceedings against non-entities. That the eighth to the twelfth defendants are entities no longer in existence. The entities were finally deregistered prior to the institution of the action. The defendants seek an order for the dismissal of any claim against the eighth to the thirteenth defendants with costs.

[11] With regards to the merits, the defendants pleaded as follows to the plaintiff's particulars of claim:

11.1 They admit that the plaintiff and the first defendant entered into a romantic relationship in terms of which they cohabited at the plaintiff's residence. The rest of the allegations have been denied.

11.2 It is contended that the plaintiff was at all material times qualified as a typist. She was employed by the first, alternatively, the second defendant and she was remunerated.

11.3 The defendants deny an agreement for a partnership of any kind between the plaintiff and the first defendant.

11.4 They also deny any contribution as alleged or otherwise to the alleged partnership.

11.5 The defendants further contend that while the first defendant was in the United States of America (USA) receiving cancer treatment, the plaintiff vacated the co-habited residence of the first defendant. In doing so, she unlawfully and intentionally appropriated household corporeal property belonging to the first defendant with the intention of permanently depriving the first defendant thereof. The value of the property misappropriated by the plaintiff is R750 000,00. Her actions were *mala fide*.

[12] The first defendant also filed a counterclaim against the plaintiff whereby he claims payment from the plaintiff in the amount of R750 000,00.

[13] The plaintiff denies the allegations made in the first defendant's counterclaim.

Non-joinder of the trustees of the Family Trust

[14] The defendants contend that the plaintiff has failed to site all the trustees of the thirteenth defendant in their respective capacities as such and that the thirteenth defendant is thus not before court.

[15] The Supreme Court of Appeal in *Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust*¹ referred with approval to the matter of *Hyde Construction CC v The Deuchar Family Trust and Another* [2014] ZAWCHC 118; 2015 (5) SA 388 (WCC) where the full court of the Western Cape Division of the High Court was called upon to determine, amongst other things, whether the Deuchar Family Trust which

¹ (364/2019) [2020] ZASCA 22 (25 March 2020) para 25

had sued in its own name was properly before the court as a litigant. At para 47 of the judgment, after analysing several judgments of our courts dealing with the legal standing of a trust, Rogers J, writing for a unanimous court, had this to say:

“[T]he applicant was cited as the Deuchar Family Trust. Of course, a trust is not a juristic entity. Whether it is procedurally acceptable to cite a trust by name as a litigant, and whether in that regard rule 14 is applicable to trusts (as to which, see Cupido v Kings Lodge Hotel 1999 (4) SA 257 (E) at 265B-C), need not be decided, because no objection was ever taken in the court a quo or for that matter on appeal to this mode of citation. One commonly refers to a trust by name even though it is not a juristic entity. Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whoever they may be.”

[16] The Supreme Court of Appeal further had this to say:

“I fully endorse that observation. To the extent that it can be said to be a departure from existing authority, it is appropriate that our law of trusts, as it has been evolving over the years, is developed along these lines.”²

[17] The SCA went on to say:

² Tusk Construction Support Services (Pty) Ltd & Another v Independent Development Trust para 25

“At the hearing of this appeal counsel for IDT was asked as to what would have happened if the belated point relating to IDT’s status as a defendant had not been raised. And whether in those circumstances it would have been open to IDT to impugn the validity of the ensuing judgment purely because IDT lacked legal personality. Understandably so, counsel did not embrace such a proposition. The reason therefore is not far to seek. It is so because where a trust has been cited in its name (in line with the burgeoning trend mentioned earlier) such citation is generally understood as a reference to the trustees. This is, however, not to say that a trust as such is possessed of legal personality. It does not, but remains ‘a legal institution sui generis’. Consequently, a trust’s citation as such in legal proceedings does no more than take cognisance of its existence as a legal institution sui generis.”³

[18] Having regard to the above case law I conclude that with the evolution and development of our law of trust over the years, there can be no doubt that the citation of a trust by name in litigation must be understood as a reference to the trustees. It cannot therefore be correct to say that the failure by the plaintiff to cite all the trustees of the thirteenth defendant in their respective capacities means that the thirteenth defendant is not properly before court. It follows that the defendant’s argument in this regard is bound to fail.

Proceedings against non-entities

³ Supra para 26

[19] The defendants contended in their plea that the eighth to twelfth defendants are entities no longer in existence. The entities were finally deregistered prior to the institution of the action. They sought an order for the dismissal of the claims against the eighth to the twelfth defendants with costs.

[20] The eighth to twelfth defendants are non-existent entities. There can therefore be no costs order in their favour. It follows that the action against the eighth to the twelfth defendant is dismissed with no order as to costs.

The evidence

[21] The plaintiff testified in support of her case and did not call any witnesses. The first defendant also testified and further called witnesses in defence of the defendant's case.

[22] Ms D[...] testified that she met Mr B[...] in January 2000. He was living in Fourways and she was staying in Alberton. Their relationship got very intimate. She started to drive to Fourways on weekends. This lasted for approximately four years. Eventually she and Mr B[...] agreed that she should come and reside with him in Fourways. She moved in with him in Bushwillow and rented out her flat in Alberton in 2005. She subsequently acquired a job at a company called Arup in Sandton where she worked for a year.

[23] Mr B[...] then told her that it was too costly for her to travel to Sandton. They discussed how much money she was spending when she travelled to Sandton and what she would make if she worked for Mr B[...], what they would do together and build the empire they had in mind and then move to the

USA. The intention was for her to run Big D. They decided that they were going to make money through the bumpers to all other companies. Mr B[....] offered her a job. At that time, she was earning ± R18 000,00 per month at Arup.

[24] She ran Bulcon, Kareeboom, Big D, the family trust, Tribal Zone Trading and Stone Mad. Stone Mad was not a registered entity. It was just a name they created. They used other entities like Bulcon and Kareeboom trading as Stone Mad. At times other entities like Kareeboom would be used as Kareeboom trading as B[....] Family Trust, trading as G[....] B[....], trading as L[....] D[....]. All these traded as Stone Mad. All entities included her personal accounts and Mr B[....]'s personal accounts.

[25] From Bushwillow she and Mr B[....] moved from one house to another residing and running businesses in buildings which were still under construction. The reason thereof was to save money for their retirement in the USA.

[26] Bulcon catered for the building of the houses in [....] in Fourways which she and Mr B[....] ran together. She ran around getting materials like sand, stone, cement, tiling, etc, while Mr B[....] remained on site with the foreman just to see that the buildings were on track. After the completion of the houses, she and Mr B[....] would do house fittings together in order to sell them. House number [....] was bonded to Kareeboom. No real work was going on through Kareeboom. It was just there for the bond of House No 2048 Mirabel Crescent. House No [....] was registered in the Family Trust. She assisted with the building of the house and also looked after the tenants

who rented the house. She did not mind doing everything for the Family Trust because at the end of the day all these was for her and Mr B[....]. All the money went to the Family Trust for their retirement.

[27] House No [....] which was subsequently sold, was registered in Kareeboom.

[28] Mr B[....] became ill. The building work seized. Shortly thereafter they decided to move to Alberton where they opened up a stone yard called Stone Mad. It was decided that she would run Stone Mad while Mr B[....] was busy doing renovations for tenants on the rented properties in Fourways. Subsequent thereto they moved to Plettenberg where they opened a stone yard business. She was not sure of the dates of when this happened. The stone yard was called Bulcon trading as Out of Africa Stone. This was not a registered entity. It was just a name. In the same year, she travelled from Plettenberg to Johannesburg every second week to do Big D as well as look after the tenants who were in house number [....] and Mr B[....] remained in Plettenberg Bay. This happened for approximately nine months.

[29] In 2011 Mr B[....] left for the USA. On his return to South Africa they decided to leave Plettenberg Bay and returned to Johannesburg. In 2012 they rented a house in Fourways for a year and half. They subsequently moved to house [....] where they resided until 1 July 2016.

[30] Bulcon was a building business but it traded as either Out of Africa Stone or Stone Mad. When they started the stone business, they used the family trust to put money through that name.

[31] At some stage, she could not tell the year, she and Mr B[....] decided to have a little holiday home away from Johannesburg. They went to [....] to look at various properties. They bought a site where house number [....] was built. This property was registered in the family trust. The funds to build that house would come from either Out of Africa Stone or Stone Mad, the sales of the other houses in [....], the rental and Big D.

[32] House numbers [....] were eventually sold and house number [.....] was still being rented. The house in [....] was completed and decorated. It was initially rented and at a later stage they used it as a holiday home.

[33] She did not know about Nature Heights until she did a windeed search on Mr B[....]'s name and the property came up. She does not have knowledge whether the entity is active or not. Money could have gone into the entity that she would not have known of. The entity was registered. Joint Shelf was used when they had the business Out of Africa Stone and when Out of Africa Stone had been sold Joint Shelf traded as Out of Africa. She was not sure of any entity in that account. The name Tribal Zone trading as Out of Africa Stone was used in Plettenberg Bay. When they returned to Johannesburg, the business was left for somebody else to run it. It was not sold. It eventually went insolvent.

[34] She did not know of the other entities, Lagoon Beach, Chisleton, Kyalami and Tabac. She never had any dealings with them.

[35] In the year 2000 she had bought herself a flat and a car. When she moved in with Mr B[....], he said they needed money in Bulcon. She sold her flat which had tenants at the time and gave Mr B[....] the amount of R50

000,00 for the partnership. The flat still had a bond and the proceeds of the sale were about R70 000,00. She used the R20 000,00 to put herself through a beauty school course. She intended making extra money to go towards household expenses. She never had time to do her beauty business.

[36] She had an Opel Astra which she traded in for a 4x4 vehicle. This was done specifically to run the bumper business. The 4x4 was a bit difficult for her to drive. They decided to trade it in and B[....] an Opel Corsa for the bumper business. The Opel Corsa was bought through Big D. When the Opel Astra was sold, it was paid off. She could have bought the Opel Astra for ± R25 000,00 but she was not sure of the price. The money was put as a deposit for another vehicle (the 4x4). The 4x4 was registered in her name. Sometime thereafter the Corsa bakkie was traded in and a Pathfinder was bought in Big D's name. She never received the proceeds of the sale of her flat. She never asked for the return of the proceeds of either the sale of her flat and the Opel Astra. These were the contributions she had made to build up the entities and for her and Mr B[....]'s retirement in America.

[37] She made another deposit of R50 000,00 into Kareeboom. This was the money that she received from her ex-husband for medical aid. At that time, Kareeboom had a cash flow problem. The money was also not refunded to her. The total amount she contributed to the partnership is R120 000,00.

[38] With regard to her labour contributions to the partnership; in 2005 she was running the bumper business. She worked from home. When Mr B[....] came back home from the building site, she would sit with him after hours and

go through what needed to be done the next day. In 2008 when they moved to [...] she would start working from 06:30. They had to have things needed to be done for the day completed to enable them to get to the building sites for people to start working. Throughout the day she would be running around getting the building materials as well as doing the bumpers one week a month and this included a lot of travelling. She worked until 21:30. She would arrive home at approximately 18:30 and go to the office (at home) where she would discuss the daily work with Mr B[....]. She also ran the household. She would get up at 06:30 clean the house and make breakfast. She and Mr B[....] would have breakfast in the office and then start their day. In the evening when they were in the office, she would go and prepare supper while Mr B[....] was making calls to his children in America.

[39] In 2014 Mr B[....] became sick and she basically ran the businesses. She looked after him, cleaned him and did what was necessary to make sure he was comfortable. He was sick for a period of two years. He would go to the site but not for a long period. When he had cancer, he could not do anything. He was homebound. The cancer was sorted and his retina fell off his left eye. For about eight months he could not attend to the businesses. She had to run the stone yard business. She drove Mr B[....] around for about five months after he was homebound with cancer. During the five months, she was running Out of Africa Stone. Bulcon had stopped building houses.

[40] With regard to Big D when she did the Johannesburg area, she would normally leave the house at \pm 6:30, go to Diepsloot and pick up two employees who assisted with the bumpers. They would then proceed to

various sites, find the forklifts, assess them and see what needed to be repaired on them. This would take the whole day per site. There were other sites in Northam in Thabazimbi and Rustenburg. When she went to Northam, she left the house at 05:00. She would first go to Rustenburg. She would B[...] food for the employees she was working with and also fill up the petrol using her personal credit card. From Thabazimbi she returned to Johannesburg at about 21:30 as she first had to drop off the other employees in Diepsloot. She also had other clients in Pretoria, Johannesburg, Devland, Bedfordview and Alrode. She would then sit on a Friday afternoon and do the invoicing of all those sites. She had signing powers on Big D and internet access. She did all the sites over a week. In 2009 Mr B[...]’s sister, Ms Christine Martin took over the Big D business.

[41] She still continued to work at Big D. Ms Martin lived in Pretoria. She ran the Pretoria part of the business while the witness continued with the Johannesburg and Northam areas. At the time she worked for Ms Martin, her allowance went up to R8 000,00. Ms Martin gave back the business in 2011. She never received a salary. The allowance that she received was agreed upon between her and Mr B[...] for her to cover some expenses. She was not registered for tax. The allowance was also used for credit cards, B[...]ing materials, groceries, fuel and pay for her policies, and pension. Mr B[...] also did not receive a salary. He took what he required to pay for credit cards, bonds, water and lights. The entities were not registered for VAT and UIF.

[42] For three months she had to write down a salary which would appear on her bank statement. She and Mr B[...] would make a letter of appointment

and a payslip purely for her to obtain a Visa and to show that she has a job for her to come back to South Africa after travelling abroad. They had to go to the USA in order to find a house where they would stay after retirement. They found a house in West Palm Beach, Florida. They discussed the changes they would make to the house to accommodate her beauty therapist business.

[43] Mr B[....] travelled to the USA every six months in order to keep his American green card active. When he was away, she took full responsibility of all the businesses. He would be away for a month.

[44] She had access to the accounts of Mr B[....], Bulcon, Kareeboom, Big D and the Family Trust.

[45] At some stage her ex-husband gave her and Mr B[....] a project for the value of more than R2 million. In appreciation thereof, Mr B[....] bought her a Honda Ballade which was registered in her name. She kept it for a year and Mr B[....] decided that they should sell it and B[....] a 4x4. The 4x4 was then registered in Big D s' name. She has never received the proceeds of the sale of the Honda. Eventually the 4x4 was sold and the money was transferred to Mr B[....]'s children in America.

[46] After Mr B[....] got sick, they decided that they would marry each other in 2015 and then relocate to the USA. In February 2016 Mr B[....] threw an engagement party for her. They never got married. Mr B[....] started accusing her of stealing money from the entities. She started reflecting and looking deeper into their relationship. Mr B[....] had told her that he had put her on his policies. She discovered that she was never put on any of his policies but instead his ex-wife was still on the policies. She received an antenuptial

contract. She read through it and discovered that everything that was there pertained to Mr B[....]'s children and whatever related to her was the amount of R100 000,00 that she had put into the businesses.

[47] She told Mr B[....] that she was moving out of the house on 1 July 2016. He asked her to reconsider. She told him that she would still move out but would continue working. She had to B[....] herself a car from an inheritance she received from her parents. She did not have a car when Mr B[....] left for the USA. While he was in the USA he asked her to pick him up at the airport when he returned to South Africa to discuss their relationship. She hired a car to pick him up but met him and gave him his credit card and the house keys. She requested him to bring back all her personal clothes that he had taken to the USA. He did not. A week after he had returned to South Africa, Mr B[....] phoned her and threatened to shoot her and her children.

[48] She was desperate and because of the threats and being called a thief, she drafted a document she referred to as an acknowledgement of debt. In the document she asked for the amount of R100 000,00 that she had put into the businesses back. She did not seek legal advice because she was in debt. She subsequently met Mr B[....] at Mug and Bean where she requested him to sign it. They both agreed to go to the police station where they signed the document. Nothing came out of the document.

[49] Reference was made to the salary advices of Mr B[....] dated 28 February 2013, 31 May 2013 and 28 June 2013 respectively, made out of Bulcon. She explained that those were made up payslips in order for Mr B[....] to get vehicle finance where they would require proof of employment.

[50] She was never an employee of any of the businesses. She and Mr B[...] were business partners.

[51] Under cross-examination she disagreed that she earned a salary when she was working in the business entities. She was adamant that she never had UIF and that no tax was deducted from the amount she received. She denied that she met Mr B[...] in 2003. She testified that she met him in 2002. After having been referred to the pleadings where it has been alleged that she met him on 29 January 2000, she testified that she met him in 2000. She conceded that she was never listed on any of Mr B[...]’s businesses. She denied that the West Palm Beach property in the USA was purchased on or about 25 November 2004. She testified that she travelled to the USA with Mr B[...] in 2005 to meet the seller. According to her the purchase of the property in the USA for their retirement was part of the partnership agreement. It was put to her that according to the pleadings, the oral partnership agreement between her and Mr B[...] was concluded on 15 June 2005 and this was the day they left to the USA. She testified that she cannot recall the date she left South Africa to the USA. She went to the USA three times. Furthermore, that the oral agreement was concluded in June 2005 and they left to the USA in March 2005. She was adamant that she had full authority to sign on the bank accounts of Bulcon. She reiterated that she left the shared residence on 1 July 2016 and that this was the day she alleged the partnership came to an end.

[52] She was further referred to a letter from her erstwhile attorneys, Mr Schoeman, to Mr B[...] where it has been stated that she had been employed

by him in various business entities for a period of approximately 11 years and that he was familiar with the background details which gave rise to the termination of her employment. She conceded that the letter refers to her employment by Mr B[...] in the various business entities but testified that she was not happy with the contents of the letter hence she eventually terminated Mr Schoeman mandate to represent her. She conceded that Mr B[...] was the sole member of Big D.

[53] Reference was made to a sale agreement of the stone business concluded between Mr B[...] and Ms Shepherd, and it was put to her that the fact the sale agreement was concluded by Mr B[...] and Ms Shepherd is not supporting her version that she and Mr B[...] had a partnership agreement. She conceded that the sale agreement was only concluded between Mr B[...] and Ms Shepherd. She denied that she was formally employed by Ms Shepherd. She testified that she was with Ms Shepherd's business as part of the sale agreement to ensure that she and Mr B[...] were paid the proceeds under the sale agreement. It was put to her that as a result of her formal employment with Ms Shepherd, her relationship with her resulted in her taking her to the CCMA where she ultimately received an award against her. She conceded that one can only get a CCMA award against an employer.

[54] There were funds which were deposited into her account with the reference of Shaun Richardson attorney which she transferred to Mr B[...]’s children in the USA. She denied that the transfer of the said funds had nothing to do with the partnership between her and Mr B[...].

[55] An email conversation between her and her ex-husband was read into the record. The salient portion of the email related to her explaining to her ex-husband that she was employed at the stone business in Alberton and only earning a basic salary. She was cross examined about the email and she testified that she did not want to get involved in the business in Alberton because she did not want to be shouted at by her ex-husband, a boyfriend and her children.

[56] The day following the cross-examination about the email between her and her ex-husband, she revisited that evidence and testified that she had been thinking about that evidence and the reason she mentioned that she was an employee and not a partner in the stone yard business was because she and her ex-husband did not see eye to eye. She did not want anything to do with him. Mr B[....] needed the funds to build up the company in Alberton. She just said she wanted to be a silent partner and work so that her ex-husband, her son and Mr B[....] can be partners because she knew that was going to disrupt the whole family.

[57] She conceded that the contents of the email she wrote to her ex-husband was not correct.

[58] She was also shown another document dated 31 August 2017 confirming that Mr B[....] was the only person who had authority on the account of Kareeboom and she testified that she still had internet access to the account.

[59] Reference was also made to the membership of Tribal Zone and Lagoon Beach and she testified that the property that was registered in the

name of Tribal Zone was handed back to the bank after the death of the co-member of the CC. With regard to Lagoon Beach she testified that she only became aware of the other three members/directors of the company when she did a windeed search. She alleged that these companies had been part of the partnership because Mr B[....] was still active as a member of the companies and she did not know if money was moved to the companies' accounts. It was put to her that according to her evidence she had signing powers, she did all the payments and had access to all the bank accounts of all the entities. She was asked as to how could she have not been aware of the membership in all the entities. She testified that Mr B[....] had ways of putting money away without people knowing. She referred to the USA account that was picked up which did not appear in any of his bank statements.

[60] It was put to her that on her own version she was hoping that she would be put on the family trust that she would have known fully well that the entitlements flowing from it, can in no way benefit her. She replied that the family trust was used as a close corporation (CC). It traded as Stone Mad. She had every right to have money put into the Trust. She worked for 11 years building the business of the Trust. Mr B[....] never consulted with the children regarding whether or not they could use the account of the family trust. She and Mr B[....] just did what they did as partners.

[61] She testified that it was necessary for her to have signing powers on the entities' accounts to document part of the partnership. Further that it was typical of her to use Mr B[....]'s signature in his absence.

[62] While trading as Stone Maiden, monies were paid into her private account which were not supposed to. She testified that she did not appropriate them for herself. Reference was made to her bank statement and she explained that the monies were paid back into the account of Kareeboom on 8 July 2016.

[63] As against what was put to her that according to a letter from Arup, she worked there for three and a half months for R75,00 an hour, she testified after referring to her Curriculum Vitae that the position she held at Arup was for six months between June 2004 to June 2006.

[64] She further explained that she stated on the CV that in the period July 2005 to July 2016, she was an Office Assistant/PA at Bulcon Construction ..., because at the time she prepared the CV, she was looking for a secretarial position.

[65] Ms D[...] then closed her case.

[66] Mr Morland on behalf of the defendants moved an application for absolution from the instance at the close of the plaintiff's case. He also informed the court that Mr B[...] withdraws the counterclaim only for the purposes of the application for absolution from the instance. The application was opposed.

[67] The basis of the application for absolution from the instance was that on Ms D[...]’s version, she entered into a settlement agreement with Mr B[...]. The issues between them have become settled. She cannot after settlement of the issues between them come to court and claim the existence of a

partnership between them. A submission was also made that Ms D[....]'s evidence is not consistent with her pleadings. Mr Wijnbeeck disagreed.

The law

[68] The test to apply in an application for absolution from the instance at the close of the plaintiff's case was set out in *Gordon Lloyd Page & Associates v Rivera and Another*⁴ by Harmse J as follows:

“[2] *The test for absolution to be applied by a trial court at the end of the plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:*

‘... When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty) Ltd v Adelson (2), 1958 (4) SA 307 (T).) The plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim.’”

[69] This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the

⁴ 2001 (1) SA 88 (SCA); [2000] 4 All SA 241 (A)

plaintiff.⁵ As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms. It has been said that the court must consider whether there is “*evidence upon which a reasonable man might find for the plaintiff*” (*Gascoyne* (10C *cit*)) – a test which had its origin in jury trials when “*the reasonable man*” was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “*reasonable*” person or court. Having said this, absolution at the end of the plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.

[70] Hattingh J found that the test to be applied in determining the question whether the defendant’s application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable court can find in favour of the plaintiff. Consequently, at the absolution stage the plaintiff’s evidence should hold a reasonable possibility of success for him, and should the court be uncertain whether the plaintiff’s evidence has satisfied this test, absolution ought to be refused.⁶

⁵ *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A, *Schmidt Bewysreg* 4th ed at 91-2

⁶ See: *Build-A-Brick BK en ‘n Ander v Eskom* 1996 (1) SA 115 (O) at 123A-E. See also *Schmidt CWH, Law of Evidence*, loose (1) leave edition, p. 3-16 to 3-18

[71] Mr Morland submitted that the settlement agreement between Ms D[....] and Mr B[....] settled the issues between them. Further that a court cannot reasonably find on the evidence before it that there is anything for the defendants to answer.

[72] Mr Wijnbeek for the plaintiff submitted that Ms D[....] introduced a document she referred to as an Acknowledgement of Debt "AOD". Her evidence was that at the time of drafting the document, she was desperate for money and without legal advice. The document was according to her, a device to bring an end to the interactions between her and Mr B[....] which relationship was acrimonious at the time. She and Mr B[....] signed the AOD. However, nothing came out of it. It was never given effect thereto. This evidence was never challenged. It was never put to Ms D[....] that the AOD has put an end to her claims against the defendants. It was further not pleaded that the AOD has put an end to Ms D[....]'s claims.

[73] I find merit in the submissions by Mr Wijnbeek. The evidence by Ms D[....] that the AOD was not given effect to, remains uncontested. The evidence pertaining to the circumstances that led to the AOD remains uncontested. The issues between Ms D[....] and Mr B[....] are still outstanding. The so-called AOD or settlement agreement can therefore not preclude Ms D[....] from bringing a claim based on the issues which have not been resolved.

[74] Mr Morland further submitted that while Ms D[....] accepted that the property in the USA was purchased in 2004, the agreement relating to the partnership on her own version was concluded on 15 June 2005. Her

evidence was that she and Mr B[....] had the discussion, reached an agreement and then went to the USA to go and B[....] the property. Mr Wijnbeeck correctly submitted that Ms D[....] testified that she was not aware that the property in the USA was purchased before the commencement of the partnership. She was clear in her evidence that she travelled to the USA with Mr B[....] in 2005 to meet the seller. According to her the purchase of the property in the USA for their retirement was part of the partnership agreement. She earned money that was paid as donations to Mr B[....]'s children in the USA to pay it over directly into the bond of the USA property. Mr Wijnbeeck correctly submitted that there is nothing in law precluding a partnership asset from being in existence prior to the conclusion of the partnership and therefore eventually forming part of the partnership.

[75] Mr Morland submitted that while Ms D[....] alleged in her particulars of claim that she had to reject a lucrative full-time position with Arup and join Mr B[....], the documentary evidence accepted by her proves that that did not happen. Further that she did not contribute her time, expertise, labour and capital as alleged. On her own version, she was employed by Mr B[....]. The court cannot on a balance of probability accept that any time she spent was pursuant to the agreement. She failed to convince the court that the agreement has been established. She does not have the expertise and has not brought her labour to the alleged partnership. Although she denies that she was an employee, her evidence is to the effect that after one of the businesses was sold to Ms Debbie Shepherd, she went with the business and became an employee of Ms Shepherd. Things did not go well. She left that employment and the matter ended at the CCMA where she obtained an

award against Ms Shepherd. The documents filed on record shows that she was an employee. As regards the allegation that she also made capital contributions to the partnership, he submitted that on her own version, the monies allegedly paid into the business were loans.

[76] It was further submitted that the correspondence that was received from Ms D[....]'s erstwhile attorneys was sent on her instruction. They were never retracted. There is consistency on Ms D[....]'s version on what the position was in respect of the loans. No court acting reasonably could conclude that there was a contribution towards the capital.

[77] Mr Wijnbeeck submitted that the issue about the work at Arup is what he calls a red-herring in that it is not an essential requirement to be proved in establishing a partnership.

The correspondence that related to the work that Ms D[....] had with Arup, was to the effect that the work was for three months. According to Ms D[....]'s evidence the work was for a period of 6 (six) months. She discussed the issue with Mr B[....] and it was agreed that she would work for him and together they would build the empire they had in mind and then retire in the USA. At the time Mr B[....] offered her a job, she was earning ± R18 000,00 per month at Arup. From her employment with Mr B[....] she was not paid a salary. She was paid a stipend which was far less than what she earned at Arup. Whether or not the work at Arup was for three or six months is immaterial. The fact of the matter is that she had to leave that job and join Mr B[....].

[78] I respectively disagree with Mr Morland's argument that Ms D[....] did not contribute her time, labour, capital and expertise into the partnership as alleged. Mr D[....]'s evidence which remains uncontested was that she would run Big D and the Stone Mad. She would wake up around 05:00 and then travel to Rustenburg, Northam and Thabazimbi after picking up other employees who assisted her with the bumpers. She would return home at approximately 21:30 as she would first drop off the other employees in Diepsloot before she returned home. She would also after a long day of work, sit with Mr B[....] after 18:00 in the office and go through the work that was done in the day, and also make sure that all is set for the work to be done the following day. She would go to the extent of preparing supper and go and have it with Mr B[....] while also performing her duties at the same time. She cleaned the house and also looked after and cared for Mr B[....] when he was gravely sick.

[79] She also looked after the tenants. She ran the businesses when Mr B[....] was in the USA and when he was ill. When the stone business was sold to Mr Peter Hardy and a restraint of trade applied against Mr B[....], she ran the stone business and the money made in the business was utilized in the other businesses for the benefit of Mr B[....] and herself.

[80] There was also evidence that the motor vehicles which were registered in Ms D[....]'s names, viz, the Opel Astra which was paid off at the time, and the Honda, were traded in and the 4x4's were bought and used to run the businesses and eventually registered in the names of Big D. The money for the motor vehicles were not paid back to her. This did not bother her because

she knew it was part of the plan to invest them in the business entities, make money and profit and then utilise the money on their retirement.

[81] Whether or not the other contributions she had brought into the partnership, e.g. from the proceeds of her flat and/or money from her ex-husband's medical aid, were regarded as loans in the letters from her erstwhile attorneys is neither here nor there. She was clear in her evidence that she was not happy with the service she had received from Mr Schoeman. She had to terminate his mandate and reclaim the fees paid. The monies were contributed to the businesses where there were cash flow problems. They were never repaid to her.

[82] The money that was received after the sale of one of her motor vehicles was sent to Mr B[...]'s children in the USA to pay for the bond of the USA property. The money that was paid through Attorney Shaun Richardson from her CCMA award against Ms Shepherd was also transferred and paid to Mr B[...]'s children in America. She also mentioned that the [...] home was also built with monies that were accumulated through the rentals and sale of the houses in [...], Out of Africa Stone or Stone Mad and money from the bumpers, et cetera.

[83] With regard to her expertise, she did her presentation in PowerPoint and brochures for the Big D and handed them out to people. She saved the business money by doing so. She also testified that when the houses were completed, she did the out-fittings with Mr B[...] to ensure that the houses were habitable. Mention was also made of the decorations made in the [...] home which has now been turned into a holiday home.

[84] A lot of debate centred around the issue of Ms D[...] denying that she was an employee while the documents that supported her evidence do not say so. She explained that she would make a letter of appointment and create payslips for purposes of her obtaining a VISA. She would do the same for Mr B[...] when he wanted to B[...] e.g. a motor vehicle to ensure that he was creditworthy. She was adamant that she did not receive a salary. She received a stipend to enable her to pay for her policies and pension. She was not registered for tax and UIF. From the payment schedules that she provided, Ms D[...] managed to show that she was at times not treated as an employee.

[85] The fact that she worked with Ms Shepherd and ended up taking her to the CCMA is in my view immaterial. She explained that the reason she went to work with Ms Shepherd was to ensure that Ms Shepherd pays the money for the sale of the business. This according to her was what was agreed between her and Mr B[...]. It explains why after she was paid the money as a result of the CCMA award, that money was also paid into the accounts of Mr B[...]’s children in the US.

[86] Mr Wijnbeeck correctly submitted that reference to section 197 of the Labour Relations Act “*LRA*” does not preclude Ms D[...]’s involvement in the businesses sold. There was further evidence that Ms D[...] did run the stone business for a profit. The profits thereof were also transferred to the USA for the joint benefit of Mr B[...] and herself.

[87] All these coupled with the fact that big amounts of money were transferred into Ms D[...]’s personal account and then paid into Mr B[...]’s

children's accounts in America as well as the payments of the expenses of the businesses from her personal account, underscore her role as a partner and not of an employee.

[88] Ms D[....] also explained why she referred to herself as an employee in her communication with her ex-husband.

[89] Regarding the proposition that the letters from Ms D[....]'s erstwhile attorneys, were never withdrawn, nothing much turns on that in that Ms D[....] explained herself as to why she did not proceed with them and ultimately instructed other attorneys. She has given instructions to a new firm of attorneys and the particulars of claim as drafted by them are consistent with the instructions of a partnership.

[90] Based on the above, I find that the plaintiff has discharged the *onus* of showing the existence of a *prima facie* case. I am not persuaded that the defendants are entitled to absolution from the instance at the close of the plaintiff's case. The application for absolution from the instance at the close of the plaintiff's case was therefore dismissed with costs.

[91] Mr B[....] testified that he was 70 years old. He was born in Durban from a Canadian father. He does not need visas to travel to America, Canada and Europe. He explained how he grew up with some sicknesses. He had to do part-time jobs while he was at school and paid his fees at college and university. He studied for a Bachelor of Science in Quantity Survey which he did not complete. He bought shares on the stock exchange and later moved to Johannesburg to look for a job on the stock exchange. He got a job as an unauthorised clerk but he could not trade. He subsequently became the

youngest authorised clerk on the floor. He could deal. He did very well until the market collapsed.

[92] He left owning one piece of land at Honeydew. He was later employed at IBM for a period of nine and a half years where he worked as a computer operator, programmer, system analyst, shift leader and salesman. He took a bricklaying course and later started building a house in Honeydew.

[93] After working at Leo Raphaely and Sons, he went full-time into building. He started with township developments and property divisions. He became successful and started acquiring property. He acquired various properties which included, amongst others, the Grand Beverley townhouse complex and three industrial stands in Wynberg.

[94] His father formed the B[...] Family Trust in 1984. He wanted to make sure that his children were provided for in the future. His children are the beneficiaries of the family trust. The trust had three trustees who were him, his mother and his brother-in-law.

[95] A friend of his designed the forklift bumper patent. He took it over and improved on it and became its owner. In the 1990's he and Alan Hincks, the original investor of the patent, rented the bumpers on a monthly basis. Mr Hincks did not have any financial interest in the business. He operated the business in the name of the CC and he was the sole member of the CC.

[96] He married his ex-wife, Ruth in the 1980's. They were blessed with four children. All his children and their mother are in the USA. The children are all well-educated.

[97] From 1998 until 2002 or 2003 he was not married but was in a romantic relationship with someone else with whom he was in a live-in relationship. He had not met Ms D[....] at the time. He denied that his relationship with Ms D[....] started in 2000.

[98] He explained how he met Ms D[....]. They met and started to see each other more regularly. She moved in with him in 2005. Before she moved in with him, Ms D[....] was living in a flat next to her brother's business. She would drive to him in Fourways during weekends.

[99] Ms D[....] subsequently informed him that her brother's business was not doing well. She needed to find a job. She enrolled with various employment agencies. She was offered a job in the Sandton area by Arup. She took the position because it was closer to his house. He could not recall when that was. She was at Arup for about three to four months as she was employed temporarily. She was later offered a position with Medscheme in Bryanston which she took. Medscheme was also closer to his house. She worked for Medscheme until she was advised that Medscheme was moving to the West Rand. This was too far. She asked if she could work with him. He did not have a position at the time but told her that if she is prepared to work like a personal assistant, he would create a position under Bulcon. Her duties involved doing everything in a company.

[100] He disputed that there was an agreement between him and Ms D[....] for her to reject a lucrative full-time position with Arup and join him in order to build up existing businesses for profit, for a partnership between them. Further

that they would create and run businesses and jointly accumulate assets for both their benefit.

[101] Bulcon was already in existence and operating in construction in 2005. He would not have agreed to give her a share of any of his existing businesses. If he was going to get into a business relationship with someone, he would do due diligence on their ability, financial expertise and if he had to come to a decision, he would have it well documented by professionals. This he had done with all his other businesses.

[102] In 2005 when Ms D[...] moved in with him, he was not involved in any of the stone businesses. Big D was already in existence and operating. He went into the stone business about 2008. He, together with Mr MacPherson who was a member of Tribal Zone and Kevin Davidson who was a partner bought a property under Tribal Zone in Plettenberg Bay and put the stone yard. He never agreed with Ms D[...] that any of the assets of the business would be owned by her. He agrees that Ms D[...] was employed as an Office Assistant/PA under Bulcon. He employed her because she could type. She was on her own. She did not have children at the nursery school. She could do menial tasks like photocopying and when the photocopier ran out of paper, she would go and get paper without any problems. He was in a romantic relationship with Ms D[...]. He could say to her they should not work on a Friday or visit his sister in [...]. She did not have to get permission from her bosses. This also applied to several overseas trips.

[103] Ms D[...] was offered a position as a secretary for Bulcon. She did all the typing of quotations, invoices and emails. If it was something urgent, he

would do it. She rarely helped with the B[....]ing and collection of all materials from cement, sand, et cetera. This was separate while ordering was part of her job. She would not meet with subcontractors but the foreman did. If she met with subcontractors that would have been to give them access and introduce them to any other staff member on site.

[104] He denied that Ms D[....] did the sale of houses. He testified that she did not have to be registered with the NHBRC to sell but had to be accredited and be registered with the different bodies.

[105] With regard to Ms D[....]'s evidence that she had to make sure that other businesses such as Kareeboom and the family trust were attended to, that she had to look after the tenants of the houses under them and also do an entry inspection, he testified that as part of her duties she would complete a checklist with a relocation agent. She would not interact with the security representative or the principal. He disputed that she did catalogues of houses that he has been renting out for prospective clients. Relocating agents would not allow any documents other than the agent estate handling the property. She would not give the estate agents anything in the form of information. They wanted everything on their own letterhead and they would refuse her description and layout.

[106] It was part of her job to do monthly invoices to tenants that lived in the houses. She had EFT access to some accounts of the various entities and in the main he would direct her what banking to do. She was not a signatory to any of his accounts. He denied that she ran all the bank accounts for the various companies and made sure all the accounts were paid up to date. He

testified that she would pay what he instructed her to pay. Her job functions included doing Excel spread sheets for the bookkeeper. She would prepare a schedule and he would sit with the bookkeeper to revise it. The bookkeeper would put it in a draft management account format and it would be taken to a Chartered Accountant. The accounts were handled with proper accounting principles.

[107] He denied that Ms D[...] would run the businesses every six months when he went overseas for a period of a month. He testified that she never ran any of the business entities. She does not have the ability to do so. He denied that she would oversee all subcontractors and staff. Further that she would make sure that the buildings were not falling behind schedule. He testified that she cannot read a plan.

[108] On the claims that Ms D[...] took over Big D between 2008 and 2011, he responded that it was not possible because at that time she was working for another company. He denied that she ran Big D from the start to finish. He testified that Big D started before the year 2000. The patent was registered in 1997.

[109] Although he agreed that it would have been part of Ms D[...]’s duties to do projector screen presentations on the bumpers, he testified that he did not know about the presentations. He knew all the clients. He conceded that Ms D[...] did the invoicing for Big D and collected money on those invoices. She also had duties in respect of the other entities. He denied that he opened the company Out of Africa Stone Mad between 2011 and 2016 with Ms D[...]. He explained that Mr Chris McPherson was a member of Out of Africa Stone

CC. He wanted to expand and do bigger jobs. Because he had a knowledge of building, Mr McPherson asked him to join him and open a stone yard in Plettenberg Bay. Mr Kevin Davidson also joined them as he knew Plettenberg architecture.

[110] He was diagnosed with prostate cancer in 2012 and he received treatment for it in 2014. He denied that because of his illness, he left the building construction and could not return. During the period of his illness, he could function normally. The impact of the cancer was at night. The first two years he visited many urologists for an opinion. In 2014 he heard of the Da Vinci robot. He had just come back to South Africa from America. He elected to have the prostate removed. He spent three days in ICU and one and half days in a ward. He was then home.

[111] He did not agree with certain duties that Ms D[....] alleged she did at Out of Africa Stone/Stone Mad but testified that certain duties were part of her job. He denied that she made up a website and testified that that was done by professionals whom they paid. Her duties have been to instruct the professionals to make up the website and do the calling for cards and flyers as well as letterheads.

[112] Big D had a truck of its own which was shared by all the business entities. He denied that every morning Ms D[....] would make sure that the correct quantity and stone was uploaded and delivered. He testified that he would get to work before 07:00, load the truck and make sure that it leaves before the rush hour traffic. Ms D[....] would get to work at 08:15, 08:30. Her scheduled work time was from 08:00 to 17:00 and it was flexible. It was part of

her duties to attend to wages on a weekly basis and ensure that all documents are in place. Being in charge of the stone yard was part of her duties. He denied that she would order new stock and take delivery. Further that she would get best prices possible for new stock as well as transport. He admitted that Ms D[...] would greet customers in a timely fashion while quickly determining their needs. She recommended merchandise to customers based on their needs and preferences and also responded to customer questions. She engaged with customers and built relationships with them to increase likelihood of repeat business. These tasks were part of her duties.

[113] He testified that Ms D[...] was paid a salary. When she commenced her duties she was paid a salary of R7 100,00 with a lot of benefits. She did not pay rent, water and electricity, fuel and motor vehicle insurance. When he went out with her as a couple, he would pay. When she left her employment with him in 2016, she received a salary of R10 300,00 per month. She normally received a salary increase in January of each year.

[114] He denied that Ms D[...] contributed her time, expertise, labour and capital to his businesses. The amount of R100 000,00 that she alleges that she has contributed to the businesses was not a contribution. That was a loan to the companies. She was never on his medical aid. He regards the amount of R100 000,00 as a loan because at some stage Ms D[...] presented him with a document which said they were loans and to get rid of all this, he said he would accept it and pay her back. In 2006 he sold an incomplete house (House [...]). The purchaser disagreed with some of the construction and stopped paying. He was advised to take occupation of the property

incomplete as it was and Ms D[...] decided to join him. She lent him money to improve the living conditions of the house.

[115] He denied the allegations made in the particulars of claim which related what the intentions of the parties were with regard to the alleged partnership, what the partnership would do and what would happen to the assets of the partnership upon termination. Further what would be the assets of the alleged partnership.

[116] His ex-wife, Ruth, was removed as a beneficiary of the trust because she had become established in America and the children were becoming self-sufficient.

[117] There was not much cooking when he resided with Ms D[...]. She said she could bake but not cook. The domestic worker would do the cleaning in the main. Ms D[...] would visit her parents on Sundays and would do a quick tidy up before she left. He denied that when he had cancer Ms D[...] would clean up the blood. Ms D[...] contributed nothing to his success.

[118] He decided to marry Ms D[...] because he wanted to get on the American Social Security System. Furthermore, Ms D[...] had said when her parents died, she would entertain going to America. He loved her.

[119] The Family Trust was managed by the three trustees. The other trustees knew about the decisions that he made on behalf of the Trust and they were happy about them. He denied that the family trust was used to accumulate, preserve and grow for Ms D[...] and him as a partnership.

[120] His relationship with Ms D[...] ended mid-2016. He does not know why it ended. It was news to him that the relationship was terminated because Ms D[...] was unhappy in that she did not benefit from the estate. He went with her to see an advocate and she was invited to draw up the will. He testified that the circumstances point to theft of his decoders and her giving money to her current husband. Her relationship with him was the best before he returned to South Africa. She sent him lots of loving and intimate messages. When he returned to the house, she was no longer a resident.

[121] He has been receiving a lot of calls saying he was owing Ms D[...] a lot of money and inviting him to meet with her. Ultimately they met at Mugg and Bean. She produced a document and they went through it. She said if he does not sign it, there were people on the way who were coming to kill him and she named them. He was scared and told her that he would sign it but wanted to sign it in a public space. They went to Douglasdale Police Station. He made some changes suggesting that it be done professionally.

[122] Ms D[...] has always received a salary from him. Even though she was not working in July 2016, she wanted her salary. He agreed to pay it and it was delivered to her erstwhile Attorney, Leisher.

[123] The first time he heard of the alleged partnership was when the summons was delivered to him by the sheriff. He has never received any letter from Ms D[...] or her attorney saying there is a partnership and he must do something.

[124] It was not possible that Rider would be used as a cash loan for the partnership as alleged because other people were members.

[125] There were business transactions relating to the stone business which were put through the family trust. The trust is a big user of stone.

[126] He denied that [...] was purchased as a holiday home for him and Ms D[...]. [...] was purchased as an investment for the family trust.

[127] Ms D[...] was employed by Ms Shepherd and that is the reason she got a CCMA award against her. She never received the money. There was no discussion between him and Ms D[...] about her going to a beauty school and using the money from the CCMA as a contribution towards the businesses.

[128] He admitted that money was transferred to the USA through Ms D[...]’s bank account. It was according to him for convenience. The money would come from where he would do a deal.

[129] Ms D[...] tried to use the name “*Out of Africa Stone*” to register a close corporation for her private benefit while she was still employed by him.

[130] Under cross-examination he was referred to the pleadings where he stated that the relationship that ensued between him and Ms D[...] was a live-in domestic relationship from or about 2005 to 2016. He testified that he and Ms D[...] did live in together but not the whole time. There was a period of two years where he was in Plettenberg Bay where he was involved with a stone yard while she was in Gauteng involved with the forklift bumper business in Pretoria. He denied that she was also involved with the tenants. He testified that she had very limited involvement with tenants as the rentals

were all international corporations. For security reasons they would use their own people.

[131] He denied that Ms D[...] did not receive any changes in salary for attending to Rider to Big D, assisting with the building of the houses and being responsible for the stone yard. He admitted that she assisted with transporting the masons but disagreed that on occasion she would assist with the measurements. He denied that she did not receive bonuses and that the basic salary that she received did not compensate her for all her inputs. He testified that it more than compensated her because her cost to the company was high. She did not have management skills or qualifications or experience. She was given a lot of holiday time and other benefits.

[132] He denied that when he went overseas he did not appoint somebody else in his stead in the bumper business, looking after the tenants and at the stone yard. He testified that the bumper business was done only three and half days a month and has been wound up. The tenants were for one or two properties and were attended to in less than one day a month. Stone yard did require attention but it was sold in 2014 and Ms D[...] went to work for the purchaser. It was taken back and resold and Ms D[...] again went to work for the purchaser and she was fired from both of them. He denied that Ms D[...] attended to managerial functions of the businesses when he was overseas. He testified that Ms D[...] grossly inflated his times in America. Sometimes his trips were as short as a week. He was adamant that the personnel at the stone yard did not need management. He denied that where the load was coming in very late, she stayed at the stone yard until very late at night. He

testified that they had one driver who would deliver late. He would sleep in his truck until the next morning and unload the truck himself.

[133] After being shown the bank statement of Ms D[....] for December 2007 and December 2010, December 2011, etc he conceded that the bonus that appears in December 2007 does not appear in December 2010 and the subsequent years. He disagreed that Ms D[....] did not receive bonuses like any other employee as she had more than one bank account. She had multiple credit card accounts. According to him Pearl Meyer's schedule shows a bonus. The document was not discovered. He denied that the plaintiff was not treated like a typical employee. He testified that she was treated better than an employee with much more holiday time, vehicle, phones, overseas trips, entertainment, took medical aid contributions out, and had multiple bank accounts and credit cards. She also received commission. He did not agree that the medical aid was a non-issue because it was the liability of her ex-husband. He maintained that he paid her medical aid. She recovered some of it, and her ex-husband would only pay the basic plan. He explained that in her divorce settlement, her ex-husband said he would pay her medical aid. He did not pay it. The witness paid it on the understanding that it would be refunded to him when the issue was resolved. Attorneys were involved and her ex-husband paid her a lump-sum. He also put her on the Discovery basic plan. He continued to pay the difference between the basic and the classic which amount was just over R2 000,00 per month.

[134] He was shown a letter from Ms D[....]'s ex-husband and bank statements confirming that her ex-husband was paying an amount towards

her medical aid but still contended that he also contributed and that the two had issues with it which had to be resolved by an attorney. He referred to the same letter where it is stated that Mr B[...] paid an amount of R85 829,00 for her medical aid.

[135] It was put to him that it is common cause that Ms D[...] provided furniture that was used in the business. His reply was that the settlement agreement referred to an expensive desk that she got from her brother. He said he would B[...] it. He was referred to the pleadings where Ms D[...] alleged that she furnished the offices of the partnership with her furniture, and the defendant's response in the plea denying any contribution as alleged. He was asked whether he agrees that she did furnish the offices of the partnership with her furniture and he referred to the defendant's response to the plaintiff's admissions sought to the effect that the plaintiff did utilize certain items of furniture belonging to her while employed by the first defendant. His response was that she did have a desk which she got from her brother. When he could not pay her, he bought it. He does not know if he is referring to the right furniture.

[136] He disagreed that the fact that Ms D[...]’s furniture was used in the business office is indicative that it is more probable that a partnership agreement existed than a mere employment relationship. He testified that Ms D[...]’s brother’s business went insolvent. She received a desk as part of her payment. She brought the desk and he paid for it.

[137] He was asked whether it was typical that employee would use personal accounts for business expenses up to and inclusive of other wages,

and his response was it is typical depending on the circumstances and he explained that Ms D[...] would pay them and these were never big amounts. He conceded that she had access to the bank accounts of the businesses and the cards of the businesses. It was put to him that the expenses could be paid from the bank accounts and/or cards of the businesses, he replied that the card was not with her permanently and she would pay with her personal bank account if the expenses were urgent. He was shown the amounts of more than R3 000,00 which were paid out of Ms D[...]’s personal account to pay for the business expenses, he replied that that might not be totally for the businesses.

[138] He was referred to the pleadings and was told that Ms D[...] claims a partnership. He replied that Ms D[...]’s involvement was restricted to her employment with him and the domestic relationship she had with him. He did not comment when it was put to him that Ms D[...]’s involvement went beyond that of an employment relationship and it is of a person with interest in the enterprises.

[139] He denied that he moved with Ms D[...] to Plettenberg Bay and that they lived together in Plettenberg Bay. He testified that she rented in Johannesburg at the time and would visit him. He further denied that Ms D[...] looked after tenants at the time and attended to Big D. He contended that the work was done by the estate agent.

[140] He denied Ms D[...]’s evidence relating to the [...] property. He testified that the bond on the property was paid with money the Trust borrowed from overseas. After being shown the VAT reconciliations to support

Ms D[....]'s evidence, he testified that the VAT reconciliations prepared by Ms D[....] were drafts, always corrected by the bookkeeper and not submitted to SARS because the [....] property was not VAT registered.

[141] He agreed that the tasks of Ms D[....] involved entities other than Bulcon. It was put to him that Ms D[....] testified that she was never paid PAYE or UIF like any other employee and his reply was that she was a provisional taxpayer.

[142] He testified that he did not employ Ms D[....] continuously from 2005. In 2006 she was employed by Ms Christine Martins under Rider Forklift. The employment could have been from 2007 to 2010. Rider Forklift paid her a salary and her tax. He was shown different amounts in different months which are reflected in the bank statement of Ms D[....] and he testified it was her salary. He explained the difference in the amounts received that she was paid on commission and received a cellphone and travel allowance. It was put to him that the difference in the amount paid to Ms D[....] shows that she was not regarded as a typical employee. He replied he was not a member of Rider. Ms D[....] did not work for him at the time. He denied that Ms D[....] resumed responsibility of much of the business operations of Big D. Although he conceded that the accounts of Big D shared a spaghetti of accounts intermingling all of the different businesses, it had a loss and he put a business through it to get rid of the loss from a tax point of view. He had nothing to do with Rider. He was not a member but he later took over and became a member. He used it for other things. Rider then changed its name to Big D.

[143] He received rental income in the amount of R55 000,00 per month from House no 2047 Mirabel which property had a bond with Nedbank. He disagreed that the rental income was substantial. The rented houses that eventually landed in the family trust, was only one house as at a time and not multiple houses. Each house had its own CC. When the house was sold, the CC also went. He denied that the building of the houses whether at the same time or whether they followed each other, were financed by the other business. He testified that they were financed from the bonds. He disputed that the rental income that was generated, was not used to finance the bonds but across business as and when they need it and the money was sent to the USA.

[144] After being referred to a letter dated 13 July 2013 written by him to Nedbank on behalf of the family trust wherein he requested the account of [...] to be converted to an Access Bond, thereby enabling extra funds to be deposited and subsequently withdrawn, he was asked whether he sought the permission of other trustees to write the letter. His response was yes. It was put to him that there was no resolution discovered to that effect. He testified that Nedbank had resolutions. He was allowed to communicate with them.

[145] He conceded that he did not seek the approval of others to write these letters. He denied that the date of the deed of the variation of the family trust was 2014 and not 2004 as alleged by Ms D[...]. He denied that there was no arm's length between him and the Trust.

[146] After he was shown the VAT Reconciliations for April-May 2015 which indicated that what he regarded as Ms D[...]'s salary was paid out of

Kareeboom and not Bulcon, he testified that probably Bulcon did not have money. She was paid where the money was in the different entities. He explained further that he was also treated the same as Ms De Oliveira. He drew his salary from drawings. He disputed Ms D[....]'s evidence that the amount she received constituted an allowance that provided her with sufficient income to pay her policies and to enable her to qualify for credit, overdraft, purchase groceries and pay the domestic servant.

[147] After being referred to the bank statement of Ms D[....] for the period 1 May 2005 to 31 December 2007 and the amounts in total of R50 000,00 which were paid from this account into Bulcon, it was put to him that the amounts represent the proceeds of the sale of Ms D[....]'s flat which she invested in the business enterprises which were the stone yard or the building of the houses and others. He replied that she made a loan of R50 000,00 but stone yard was not in existence in the year 2005. He was asked whether he repaid the loan and he replied that that has been recorded in her bank account.

[148] He was shown the restraint of trade agreement between him and Mr Peter Hardy concluded on 23 December 2005 relating to the stone business. He agreed with its contents. He denied that he had to be removed from Stone Mad. He testified that he was not paid for the sale of the business and the restraint of trade never worked.

[149] He testified that in 2014 or 2015 he was the sole member of Big D.

[150] After having been referred to the conversation between Ms D[....] and her ex-husband which was extensively dealt with during the cross-

examination of Ms D[....], it was put to him that there was ample contribution from Ms D[....] which included the contributions that came from her husband. He disagreed and testified that in the same document Ms D[....] disputes what her ex-husband says. Instead, she says he provided more than her ex-husband. He denied that part of the deal between him and Ms D[....]'s ex-husband was that she would receive a Honda, motor vehicle that would be hers. He testified that the deal was that she would receive use of the motor vehicle while the contract was on.

[151] He denied that Ms D[....] had a Corsa motor vehicle which was sold and the proceeds thereof were used towards the purchase of a bakkie for Big D. He testified that she was still owning a Corsa as he was still getting traffic fines. It was put to him that subsequently Ms D[....]'s Honda Civic was sold because of the business needs. He disagreed and stated that he does not think the motor vehicles were in Ms D[....]'s name.

[152] With regard to the settlement agreement concluded by him and Ms D[....], he conceded that what was demanded was not settled and nothing came out from the letter of demand from Ms D[....]'s erstwhile attorney (Neil Schoeman).

[153] Reference was made to the Settlement Agreement that he and Ms D[....] signed at the police station and he was asked whether he did perform in terms of the agreement. He testified that he paid Ms D[....]'s salary for July 2016. He was asked whether he paid the two amounts of R50 000,00 each in the total sum of R100 000,00 which comprised the proceeds of the sale of Ms D[....]'s flat and the amount she received from ex-husband's medical aid. He

testified that he paid Ms D[....]'s medical expenses which she mentioned in her conversation with her ex-husband and that his attorney tendered the payment. He was further asked if he had performed in terms of the settlement agreement. He testified that the R100 000,00 was tendered but the performance was subject to certain conditions. The other items listed in the settlement agreement were also tendered.

[154] When shown a policy of Ms D[....] dated 1 January 2014 where he is a beneficiary, he testified in 2014 he got cancer. He told her to go and get a policy because cancer is expensive. That was just a medical policy and not a life policy. It was put to him that the documents confirm a finding of a domestic partnership and goes along to show Ms D[....]'s devotion to him not only emotionally as a wife but also as a financier who contributed to the assets. He replied that she trusted him.

[155] He disputed that Ms D[....] took her personal washing machine to house no [...] and also contributed her personal washing machine to the partnership.

[156] He disputed that the Pathfinder that was allegedly sold and its proceeds of sale paid into the American account was a motor vehicle that was owned by Ms D[....] and that she was involved in the purchase or financing of it.

[157] Regarding the Wells Fargo Home Mortgage of the West Palm Beach Property in the US, he disputed Ms D[....]'s evidence that the bond on the property was reduced with about a million rand and that the money to pay the bond came from the money that she sent to the US through her bank account.

He testified that Ms D[...] would not have transferred such lots of monies. The property was rented. It provided an income. His son was involved in the purchase of the house and he put the funds when it was registered. Further that there is a large amount of money that is owing to the bank on the property. He does not recall money being transferred to the account. If it was, that was negligible.

[158] He disputed that he and Ms D[...] through their conduct had the intention to build the assets together. He disputed Ms D[...]’s evidence that she made contributions through all the motor vehicles she owned. He testified that Ms D[...] did not sell the Opel Astra. She owed the bank money and her ex-husband gave the motor vehicle to their son. The Toyota Fortuner was not registered in the name of the partnership but the company.

[159] He disputed that there was a partnership between Ms D[...] and him and that it existed until 2016. Further that he and Ms D[...] contributed to the partnership and that the legal entities used by the partnership were not separate. He testified that he was successful before he met Ms D[...]. She was not a member, director and/or trustee of any of the legal entities. She could not contribute.

[160] Mr Emmanuel Tshinnena Phaswa testified that he used to work for Big D Bumpers. He was employed by Mr B[...]. He worked with Ms D[...]. She was working as a driver. When they arrive on site, she would remain in the vehicle, sitting, and they would alight from the vehicle and go and work.

[161] He went to work after 08:00. He and Ms D[....] always worked until 15:00. He lived in Diepsloot at the time and he used public transport to come to work.

[162] Under cross-examination he testified that Ms D[....] never picked him up and travel to work with him. He denied that Ms D[....] would pick him up at 05:30 when they go to Thabazimbi. He testified that they never arrived after 15:00 from the long trips. The farthest they worked was Rustenburg and Northam. They would not leave at 05:30 to Northam and neither did they return after 15:00 from Rustenburg and Northam. They would leave at 8:00 the latest and return to the workplace at 15:00.

[163] He also worked with Ms D[....] at the stone yard and at the building sites. He worked with her when she travelled in a bakkie where they offloaded the stones at the building sites. It took him 10 minutes to change the bumper. In Northam and Rustenburg, he would change about 30 bumpers. At Northam the CTM does not have many forklifts. It had 5 and Rustenburg only had 2.

[164] He and Ms D[....] never waited until late for the truck for the stone deliveries. The trucks came at night and they would find stones in the morning. They would then offload them. Normally the trucks would come before 17:00. If it comes after 17:00, they would wait until the next morning as the business closed at 17:00 and everyone knocked off at 17:00.

[165] He never worked from very early until late. He only received overtime when the truck had a breakdown.

[166] Ms D[....] bought them food everyday when they work with the bumpers. Since he had been working for Mr B[....], he does not remember Ms D[....] taking him to Diepsloot. He never got instructions from Ms D[....]. He got them from Mr B[....].

[167] He and Ms D[....] would be at the stone yard for long periods of time when Mr B[....] was not there. Ms D[....] would be in the office of the stone yard. During the long periods when Mr B[....] was overseas, he took instructions from Ms D[....]. Every time she gives them instructions, she would say Mr B[....] said this.

[168] Ms Patricia Dorothy Loxly Bradley testified that she is an architect. She knows Mr B[....]. She designs houses for him. She designed 6 (six) houses for Mr B[....]. She also did other auxiliary services for him which included the showhouse, furniture and drapes. She also knows Ms D[....]. Ms D[....] was the girlfriend of Mr B[....] and she knew where Mr B[....] lived. Mr B[....] and Mrs D[....] used to live together.

[169] When asked what was Ms D[....]'s involvement in the development of the property activities, she stated that she remembers that in one of the properties where they lived, Ms D[....] used to type letters on the computer.

[170] With regard to accommodation and the letting of properties, she stated that at some stage when Mr B[....] was still in Plettenberg Bay, Ms D[....] had to come back to Johannesburg. Mr B[....] called her and asked her to help Ms D[....] to get accommodation. She became a tenant at one of her properties.

[171] Under cross-examination she testified that she would not dispute that Ms D[...] sold her flat and invested the money in the businesses she had with Mr B[...]. She would not be able to enlighten the court about Ms D[...]’s contribution in the business with about the three motor vehicles that she had. She does not know why Ms D[...] had to be in Johannesburg when Mr B[...] was in Plettenberg Bay. It was put to her that she would not be able to dispute Ms D[...]’s evidence that she was in Johannesburg to oversee the tenants, she engaged with them and the business of doing bumpers. She replied that she did not know what business she was doing.

[172] She was asked whether she knew of the contribution that Ms D[...] made in terms of labour to the businesses of Mr B[...]. She stated that she was aware that Ms D[...] worked with Mr B[...]. She was answering phones and she wrote letters. She could have helped him with his property rentals. She was his girlfriend. She would do that if she was helping her partner.

[173] It was put to her that she cannot dispute that during Mr B[...]’s absence to America, Ms D[...] took charge of the businesses in South Africa. Her response was that as his girlfriend, she cared about him. She helped him. She cannot see a partnership there.

[174] She was asked if she cannot deny that from 2005 until Ms D[...] left Mr B[...], she was involved in the businesses. She testified that Ms D[...] was paid a salary because when she came back to Johannesburg, Mr B[...] told her that she did not earn a lot of money. She informed Mr B[...] that she would help with reasonable accommodation. She could not dispute the Ms D[...]’s evidence that she received a stipend and not a salary for the work she

did. She also could not dispute that she made contributions to the businesses. Mr D[....] worked with Mr B[....]. Ms D[....] called her one day looking for the plans of the house they were planning to sell.

[175] It was put to her that Ms D[....] claims a universal partnership to which she and Mr B[....] made contributions and operated. She is not in a position to deny that because she does not know. She testified that she had known Mr B[....] for many years. She has known Ms D[....] as his girlfriend. Ms D[....] worked for him. She earned money from him. She does not recall dealing with Ms D[....] in Mr B[....]'s place or in any form that she could understand her to be a partner.

[176] Ms Marie-Louise Stoltz testified that she is a professional accountant and tax practitioner. She was Mr B[....]'s accountant for his company for a number of years. The companies were a family trust, Bulcon, Kareeboom, Big D and Rider. She knew Ms D[....]. She had dealings with her regarding the accounting when she presented them with a VAT schedule they required.

[177] Ms D[....] would prepare the schedules in Excel of all income and expenses and email them through to them and they would calculate VAT according to that. Sometimes they made adjustments but she would not be able to comment on the completeness of the list. Ms D[....] received a regular payment. She also did the tax for Mr B[....], Ms D[....] and the business entities. She also submitted tax returns for Ms D[....].

[178] She denied that there were no tax returns for Ms D[....]. She stated that her tax returns were filed on e-filing. Regarding accounting for the various entities, the expenses were reimbursed to Ms D[....]. She had to

reimburse the labourers at the different sites and she withdrew money from her personal account. There would also be small amounts of the things she had to pay there and there.

[179] Regarding the financial status of the business entities, she testified that some of them are dormant and some have huge assessed losses.

[180] She started doing the accounting for the business entities around 2011.

[181] Under cross-examination she testified that she is an accountant registered with SAIPA (the South African Institute of Professional Accountants). She is not a bookkeeper. Ms D[....] emailed the schedules to them directly. Mr B[....] trusted them that they would do the job with what Ms D[....] provided. She never sat down with Ms D[....] to discuss the schedules. Any discussion could have taken place telephonically or by email.

[182] Mr Peter Hardy's wife was actually the bookkeeper for Mr B[....]'s companies. She captured the daily slips and bank transactions and they took over from there to compile financial statements. They have a software that they use called a Pastel file, to do the accounting and the capturing work.

[183] She was asked whether she became involved with Mr B[....] and Ms D[....] close to the end of the relationship. She testified that she cannot remember exactly when they went their separate ways or how long they were together before she got involved. She was not involved when Mr B[....] and Ms De Oliveira came together. She does not know what their arrangements were.

[184] She was asked about the contributions that Ms D[...] made financially, the selling of a flat, through vehicles, through her labour, et cetera whether she knew anything about them. She testified that she does not recall the transactions. She would not know about them if they happened before her.

[185] She had regular meetings with Mr B[...]. She was asked if she would not dispute that no meeting of trustees of the trust or members of the close corporations or of directors or shareholders in the companies were ever convened, alternatively were not convened frequently – the trustees, members, directors or shareholders acted solely on the instructions of Ms D[...] and Mr B[...], alternatively Mr B[...]. She testified that it did not happen before she got involved. After she became involved, the meetings were only between him and Mr B[...].

[186] She discussed the tax returns she did on behalf of Ms D[...] with her on the telephone or by mail. It was put to her that Ms D[...] was not aware of the tax returns that were submitted on her behalf and she says they were not discussed with her. Further that such tax returns of her were never discovered. She testified that she has an engagement letter signed by Ms D[...] for the tax returns. It was put to her that the engagement letter has not been discovered.

[187] Ms D[...] was employed by either Kareeboom or Bulcon. When the tax return was submitted she did not write the name of the company from where her remuneration came. Her remuneration was reflected as a consulting fee. She was assisting Mr B[...] hence she was paid the consulting fee. She received schedules from many previous bookkeepers on the monies Ms D[...]

earned and what money she received from the business. She did not establish that herself. The same was done with the tax returns of Mr B[....]. He did not receive a salary.

[188] She could not dispute that Ms Oliveira was never registered for UIF. She was cross-examined on what purports to be a payslip of Ms D[....] and it was put to her that as per the payslip, her salary was paid from Big D and not from Kareeboom and Bulcon. Although not 100% certain, the companies were never registered for PAYE.

[189] She does not have any knowledge that Ms D[....] was paid a stipend of a certain amount that enabled her to pay her policies and instalments. All monies that were paid to her were shown as income. She was not certain, how they were structured or decided. She would not know that Ms D[....]'s payslip was not worth the paper it was written on. Further that the payslip was purely to present an employer and income for Ms D[....] and Mr B[....] in them planning to emigrate to the USA. She would also not have known that even the payslip of Mr B[....] was prepared for emigration purposes or applying for finance purposes. She would not comment on whether or not Ms D[....] was treated differently from Mr B[....].

[190] She knows that Ms D[....] was involved in one of the businesses but she does not know which one. She also knows that she was involved in a stone business. After having been referred to a letter on the letterhead of Bulcon Construction with the heading "*certificate of employment – Mrs L[....] D[....]*" dated 4 August 2015, it was put to her that the letter confirms that Ms

D[....] was only involved in Kareeboom and Bulcon. She testified that she knew nothing about the letter.

[191] Reference was made to Ms D[....]'s bank statement. There was an amount of money that was paid to Ramsay Buckley on 22 August 2006. She was asked whether she included the substantial amounts that were paid from Ms D[....] to Mr B[....]'s children in America in the tax she declared for her. Her response was that in 2006 she was not involved. After being referred another amount that was paid from Ms D[....]'s account to the USA on 6 December 2014 and asked whether the amount was declared for tax purposes, she testified that the payment of the money had nothing to do with Ms D[....]'s local tax. It is only money that was paid into the account that is taken into account.

[192] The bank statements of Ms D[....] show that money came in and out. She was refunded the same day for what she paid out. Ms D[....] assisted Mr B[....] and she was paid for it. Whether or not the payments made to Ms D[....] were regarded as salaries is for discussion. She cannot comment on Ms D[....]'s financial contributions. She knew that Ms D[....] and Mr B[....] wanted to go to the US together and that on Mr B[....]'s return from the US, he found that Ms D[....] had left the common residence.

[193] Under re-examination she testified that the contributions allegedly made by Ms D[....] to the partnership would appear on the loan account in her favour. She remembered a very small amount which could be seen as a financial contribution to the business. She would not be present at the meeting of the trustees. The accounting protocols and mechanisms which

she followed account on an ongoing basis. It did not deviate from what she received from the bookkeepers. It was not necessary for her to delve into previous accounting periods. The information on the VAT schedule was not the correct information upon which the financials were ultimately produced. The invoices had to go with them.

[194] Mr Michael Young testified that he was previously a property developer and is currently in the manufacturing industry. He has known Mr B[....] since 1997. He met him when he wanted to purchase one of his properties. His involvement with Mr B[....] was purely selling houses and they became good friends.

[195] He has knowledge of Mr B[....]'s business activities. He knows Ms D[....]. From his recollection and what she was told, Ms D[....] was Mr B[....]'s girlfriend. She was never present in any of the meetings he had with Mr B[....]. He sold house no. 2051 and considerable stuff from paving to aluminium windows, doors to roof and possibly sand to Mr B[....]. In anything that he did for Mr B[....], he never dealt with Ms D[....].

[196] Mr B[....] was threatened by Ms D[....] and Mr Lovett.

[197] Under cross-examination it was put to him that he cannot dispute Ms D[....]'s evidence that she has contributed to the partnership. He disagreed and testified that his friendship with Mr B[....] who was also his neighbour for about 7 (seven) years was such that they would discuss everything. Before they supplied anybody in the company or personal on account, people had to fill out a credit application form. They asked for the directors' and members' names. On the application form, Mr B[....] was the sole member of the CC and

the sole director of all the companies that he bought. Ms D[....] was never ever visible or discussed.

[198] He knew nothing about the proceeds of the flat that Ms D[....] sold. He does not have knowledge of Ms D[....] dealing with the finances and the motor vehicles. He denied that Ms D[....] took a bakkie and collected materials. She never collected any material from his business. Due to the nature and size of the quantities, they deliver everything. There are no collections.

[199] He was not the only supplier of Mr B[....]'s companies. He would not know if Ms D[....] collected sand from somewhere.

[200] He knew that Mr B[....] and Ms Lovett buried the hatchet after an agreement was reached. He facilitated the truce. He disputed that there was a partnership between Ms D[....] and Mr B[....]. He denied that he would not know what the arrangement between the two was.

FACTS THAT ARE COMMON CAUSE BETWEEN THE PARTIES

[201] Ms D[....] and Mr B[....] lived together in a relationship akin to husband and wife from 2005. She worked for Mr B[....] from 2005 until July 2016 when the relationship between her and Mr Bulkely was terminated. While working for Mr B[....] huge amounts of money were deposited into her account and then transferred through her account to Mr B[....]'s children in the USA.

[202] She sold her flat and the proceeds thereof were paid over to the business entities of Mr B[....] where there were cash flow problems. This also included the lump sum that she received from the Medical Aid of her husband.

[203] Mr B[....] and Ms D[....] were engaged but did not marry each other.

FACTS THAT ARE IN DISPUTE

[204] Ms D[....] alleges that a universal partnership existed between her and Mr B[....] and that although she worked for Mr B[....], she was not paid a salary. She was only paid a stipend just to pay for her policies, business expenses and household necessities. The allegations were disputed by Mr B[....].

Issues for determination

[205] The issue for determination is whether or not a universal partnership existed between Mr B[....] and Ms D[....].

THE LEGAL PRINCIPLES APPLICABLE

[206] In *Ponelat v Schrepfer*⁷, it was held that a universal partnership exists if the necessary requirements for its existence are met regardless of whether the parties are married, engaged or cohabiting. The requirements for the existence of a universal partnership have been summarised in the matter of *Pezutto v Dreyer and Others*⁸ and also confirmed in *Butters v Mncora*⁹:

“Our courts have accepted Pothier’s formulation of such essentialia 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-74A; Purdon v Muller 1961 (2) SA 211 (A) at 218B-D. The three essentials are (1)

⁷ 2012 (1) SA 206 (SCA) at 213

⁸ 1991 (3) SA 379 (A) at 390

⁹ 2012 (4) SA 1 (SCA) par [11] and [17]

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 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."

[207] In *Butters*¹⁰ the history of the different types of partnership 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 partnership 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*

¹⁰ *Supra* at par [18]

held to exist is whether it is more probable than not that a tacit agreement had been reached.”¹¹ (emphasis provided)

[208] 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

[209] 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

¹¹ *Ally v Dinath* 1984 (2) SA 451 (T) at 453F-455A, *Mühlmann v Mühlmann* 1984 (3) SA 20 (A) at 109C-E, *Ponelat v Schrepfer* *supra*

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 (QA) at 164G-165G; Christie's The Law of Contract in South Africa, 6ed 88-89, this is the essence of the matter."

DISCUSSION

[210] The court will approach the factual disputes which exist between the evidence presented on behalf of the plaintiff and the evidence on behalf of the defendants by applying the principles enunciated in the decision of *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others*¹². 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's candour and demeanour in the witness box; (ii) his bias,

¹² 2003 (SA) 11 at 14I-15D

latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with 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's 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 valuation of the general probabilities in another. The more convincing the former, the less convincing will be the later. But when all factors are equipoised, probabilities prevail."

[211] Ms D[...] was open to the court. She gave evidence in a satisfactory manner. Her evidence was logical and coherent save for minor discrepancies. She conceded that the contents of the email she wrote to her ex-husband pertaining to the fact that she was employed at the stone business in Alberton and only earning a basic salary were not correct. She explained why she did not state the true situation to her ex-husband. There was also an issue about

her stating that she did not receive what she called an allowance for June 2014. She was shown her Nedbank account statement where she conceded that she received the allowance for June 2014. It should be noted that Ms D[....] was testifying about things that happened long time ago. There was further evidence that related to her having testified that where she had paid for business expenses less than R1 000,00, the amounts were reimbursed to her. After she was shown that amounts which were in excess of R1 000,00 on her bank statement, were repaid to her, she conceded to that. While in her evidence in chief she testified that the work at Arup was for a period of a year, under cross-examination she testified that it was for a period of six months. This evidence is, in my view, not material to the issues at hand. It does not assist the court to determine whether a universal partnership as alleged exists or not. I find that her entire evidence was credible and therefore could be relied upon.

[212] Mr B[....] called witnesses in defence of the defendants' case. It is my view that the evidence of these witnesses would not be of assistance to the court to determine whether or not a universal partnership existed between Mr B[....] and Ms D[....]. The witnesses were not involved in Mr B[....] and Ms D[....]'s day to day activities and how they ran the businesses.

[213] Mr Phaswa was just an ordinary employee. He only testified about his work and interaction between him and Ms D[....]. I found serious contradictions in his evidence. While he denied that Ms D[....] picked him up in Diepsloot where she would travel to work with him, he testified that they took long trips together where they travelled to places outside Gauteng, i.e.,

Rustenburg and Northam. His evidence that they never left at 05:30 when they took long trips and would return to Gauteng around 15:00 is highly improbable if one considers the distance from Johannesburg to Rustenburg. Strange enough he testified that when Mr B[....] was overseas, he and Ms D[....] spent long periods of time at the stone yard. He never received instructions from Ms D[....]. Where he received instructions from her, she would always say the instructions came from Mr B[....].

[214] To a greater extent, Mr Phaswa's evidence corroborates Ms D[....]'s evidence. His evidence that he worked with her where they off-loaded the stones at the building sites and that she bought him food everyday when they worked with the bumpers.

[215] Ms Stoltz only became involved at a very late stage of the relationship between Mr B[....] and Ms D[....]. She knew nothing about the contributions allegedly made by Ms D[....] to the businesses of Mr B[....]. I did not find Mr Young's evidence credible. He is a friend of Mr B[....]. His evidence was just to protect the interests of Mr B[....].

[216] Mr B[....] literally disputed the evidence of Ms D[....]. According to him Ms D[....] was just an ordinary employee who was paid a salary for the work that she was doing and had more benefits than the other employees. She did not pay rent, water and electricity, fuel and motor vehicle insurance and could go on holiday with him free of charge. He and Ms D[....] had a live-in relationship. They agreed to stay together. The fact that she was not paying rent, water and electricity cannot be regarded as a benefit to her. He only saw her as a girlfriend. She could not cook and the cleaning in the main was

done by the domestic servant. Strange enough Mr B[....] testified that there was not much cooking when they resided together. The evidence that Ms D[....] did the cleaning in the house and also prepared meals for him and her was not contested. She even testified that she looked after Mr B[....] when he was gravely sick. I did not find any truth in Mr B[....]'s evidence that when he had cancer he could function normally because the impact of the sickness was only at night. He did not come clean and explain what was happening to the businesses between 2012 and 2014 after he was diagnosed with cancer until he was healed. The impression he gave was that the treatment did not take long and he was back on his feet again. Ms D[....] testified that when Mr B[....] had cancer, he could not do anything. He was home bound. The cancer was healed and his retina fell off his left eye. He could not attend to the businesses for about eight months. She had to run the stone business.

[217] Mr B[....] even denied that Ms D[....] ran the businesses when he was overseas although the evidence was clear that he left the businesses in the hands of Ms D[....]. Instead he criticised Ms D[....]'s evidence that she inflated his stay in America. He tried to justify his actions by mentioning that his trips to the US were of a short duration of about a week. The bumper business only had to be attended to three and a half days a month. It had been wound up and the tenants had to be attended to in less than a day in a month. Ms D[....] did not have the capacity to run the businesses. Mr B[....] was not candid with the court. He just gave evidence to suit his own case.

[218] Mr B[....] did not give a good impression to the court. He held the attitude that he was a successful businessman before he met Ms D[....].

According to him Ms D[...] could not do anything in the businesses than working as an employee. He could not explain why it was necessary for Ms D[...] to have EFT access to the accounts of the various business entities where he would direct her what banking to do while she was an ordinary employee.

[219] Although he testified that the amount of R100 000,00 that Ms D[...] contributed to the businesses when there were cash flow problems, were loans, he could not explain why were they not repaid to her when they were still together in the relationship.

[220] There was an issue about the money that was paid to Ms D[...] pursuant to the CCMA award against Ms Shepherd. Ms D[...] testified that the money was paid to her through her previous attorney Mr Shaun Richardson. It was subsequently paid over into the accounts of Mr B[...]’s children in the USA. Mr B[...]’s evidence was that the money was never paid to Ms D[...]. Strange enough his further evidence was that there was no discussion between him and Ms D[...] for using the money from the CCMA award as a contribution towards the businesses.

Whether or not a partnership agreement existed

Each of the partners bring something into the partnership whether it be money, labour or skill

[221] It is common cause between the parties that the proceeds of the sale of the flat that belonged to Ms D[...] in the amount of R50 000,00 were paid into the businesses of Mr B[...] when there were cash flow problems. Ms

D[....] testified that Mr B[....] told her after she had moved in with him that Bulcon had cash flow problems. She sold her flat which had tenants at the time and gave the money to Mr B[....]. The money was never repaid to her. Whether or not the money was regarded as a loan is immaterial. It was never refunded to her. It is also common cause that another amount of R50 000,00 from Ms D[....]'s ex-husband's medical aid was paid into Kareeboom. The reason given was that there were cash flow problems in the business.

[222] There were also other contributions in the form of trade-in of the motor vehicles that belonged to Ms D[....] and them being replaced with new motor vehicles which were eventually registered in Mr B[....]'s business entities. Mr B[....] tried to dispute Ms D[....]'s evidence regarding that but I did not find his evidence convincing. With regard to the Opel Astra he testified that the motor vehicle was not sold. It was given to Ms D[....]'s son. That evidence was not put to Ms D[....] when she testified. The other motor vehicle was the Honda Civic. Ms D[....]'s evidence was that Mr B[....] bought her the motor vehicle after her ex-husband had given a project to Mr B[....] to do some job for him. When he was asked how could Mr B[....] thank him, he asked him to B[....] a motor vehicle for her. That was done and the motor vehicle was bought and registered in her name. The motor vehicle was subsequently sold and the proceeds thereof were deposited into the account of Mr B[....]'s children in the US. While he conceded that the motor vehicle was bought as alluded to by Ms D[....], he denied that it was registered in her name. He testified that she was only entitled to the use of the motor vehicle. If his evidence is correct that would defeat the purpose why the motor vehicle was bought. It is more probable that the motor vehicle was registered in the name of Ms D[....].

[223] There was also evidence that the money that was paid to Ms D[....] pursuant to the CCMA award against Ms Shepherd was also paid into the account of one of Mr B[....]'s children in the US. If there was no arrangement between Ms D[....] and Mr B[....] why would these amounts be paid to his children's accounts in the US.

[224] Mr B[....] already had the various businesses when he met Ms D[....]. Ms D[....] explained how she left the job that she had at the time, her discussions with Mr B[....] regarding what they would do together and build the empire they had in mind and then retire to the USA. According to Mr B[....], Ms D[....] was not working for Arup at the time she employed her. She was working for Medscheme and she asked for a job from him because she had just been told that Medscheme was moving to the West Rand. Mr B[....] could not tell when was Ms D[....] working for Arup. He only testified that she worked there for three to four months. A letter was shown to Ms D[....] that stated that she worked for Arup for three months which she denied, and which she explained that she was seeing it for the first time. She was clear in her evidence that she worked at Arup for about six months and had to leave a salary of R18 000,00 per month to join Mr B[....] for a stipend of R7 100,00 per month because she and Mr B[....] had a plan to grow the businesses, make money and then retire to the USA.

[225] Her evidence was clear that she put long hours into the businesses and played various roles in order to ensure that whatever she planned with Mr B[....] was a success. She was in charge of the businesses when Mr B[....] was in the USA and when he was sick. She would even spent the little money

that she had in her account to pay for the expenses of her businesses and also B[....] food for staff members. She could pay wages of other employees and also B[....] groceries at home from her personal account. I am persuaded that Ms D[....] and Mr B[....] brought money, labour or skill into the partnership.

[226] I have dealt extensively with the issue pertaining to the oral agreement between Ms D[....] and Mr B[....] in the application for absolution from the instance. Although Ms D[....] alleged an express agreement between her and Mr B[....], it is more probable that a tacit agreement also came into being given the conduct of Mr B[....] and Ms D[....]. Ms D[....] literally did all the jobs in the business entities. She was in charge of the stone business in Alberton. She ran Big D and that is why the Open Astra was traded in and 4x4 was bought for her to be able to run the business.

The business should be carried on for the joint benefit of the parties

[227] Ms D[....] made capital contributions to the businesses of Mr B[....] and never demanded repayments. She worked long hours together with Mr B[....] and was left in charge of the various business entities when Mr B[....] was overseas and when he was sick. She was clear in her evidence that when Mr B[....] offered her a job, she and Mr B[....] decided that they were going to make money and then retire in the USA. This evidence is corroborated by the fact that she and Mr B[....] postponed their wedding in 2014 and their intention was to emigrate to the US after their marriage. They had already started to sell some of the properties, in particular, the houses which were rented and transferred money to the US for their retirement.

[228] There was uncontested evidence that they moved from one house to another, residing in incomplete houses and also running businesses from those houses in order to save money for their retirement in the USA. Whatever money they acquired was deposited in Ms D[....]'s personal account and then transferred into Mr B[....]'s children's accounts in the US. Mr B[....] had businesses before he met Ms D[....]. Why was it necessary for large sums of money to be deposited into Ms D[....]'s personal account if that was to benefit Mr B[....] and his children only. Obviously he had a way of sending money to the US prior to meeting Ms D[....]. The probabilities are that the reason why Ms D[....]'s account was used was to benefit Mr B[....] and Ms D[....] and further that the money could only be for their retirement in the US.

[229] Ms D[....] testified that she and Mr B[....] travelled to the US to meet with the seller of the house. Further, that some of their belongings which included their dogs and her personal clothes, which have not been returned to her, have already been moved to the US.

[230] There is overwhelming evidence that the business was carried on for the joint benefit of both Ms D[....] and Mr B[....]. They were the two parties who were responsible for the day to day running of the businesses.

The object of the partnership is to make profit

[231] There can be no doubt that the businesses were run for profit. The fact that Ms D[....] did not have a job title, did all the jobs that she could do in all the business entities, was not specifically employed by a specific business entity, is an indication that the jobs that she did could be done by a number of employees. However, to save costs of employing more people, she did all the

work. She was left in charge of the business when Mr B[....] was sick and in America and was not paid for the role she played in the absence of Mr B[....].

[232] If she was an ordinary employee like the others, she would have been paid for the work she did. If Ms D[....] was an ordinary employee who earned a salary of R7 100,00 per month and only Mr B[....]'s girlfriend, why was it necessary for Mr B[....] to make arrangements for her account to have a credit limit of R50 000,00 and an overdraft of R35 000,00 on her cheque account. Why would she be expected as an ordinary employee to use her credit card and cheque account to B[....] materials, pay wages of other employees, fuel for the truck, groceries and toiletries for the office. This does not, in my view, accord with the responsibilities of a typical employee in a business and a live-in partner in a domestic relationship.

Which assets form part of the universal partnership

[233] Ms D[....] devoted all her labour in all the business entities. She did not have a job title. She worked in all the business entities.

[234] Having regard to the totality of the evidence, I am satisfied that none of the assets or accounts were excluded from the operations of the partnership.

The counterclaim

[235] The counterclaim was withdrawn when an application for absolution from the instance at the close of the plaintiff's case was made. The counterclaim was opposed. The plaintiff is therefore entitled to the costs of the counterclaim.

[236] In the result the following order is made:

1. The thirteenth defendant is properly before the court.
2. The action against the eighth to the twelfth defendant is dismissed.
3. The counterclaim is dismissed.
4. The first to the seventh defendants and the thirteenth to the fourteenth defendants are ordered to pay the costs of the counterclaim jointly and severally, the one paying the other is absolved.
5. It is declared that a partnership existed between the plaintiff and the first defendant in equal shares in respect of the partnership, its businesses, assets and investments.
6. It is declared that the partnership between the plaintiff and the first defendant was dissolved, alternatively terminated on 1 July 2016, being the date that the plaintiff vacated the house shared by her and the first defendant.
7. All assets set out in paragraph 'I' 'Partnership Assets on Termination' on Annexure "A", form part of the assets of the Partnership.
8. An order appointing a liquidator being a chartered accountant, with authority to realise the whole of the partnership assets, to liquidate the liabilities of the partnership, to prepare a final account as on the date upon which the partnership was terminated, namely, 1 July

2016 and pay to the plaintiff half of the net profits and half of the assets or the net value of the assets of the partnership, together with mora interest at a rate of 10,25% from date of dissolution of the partnership until date of full payment.

9. That all the trustees, directors and the members of the company(ies) and or close corporation(s) be ordered to co-operate with the liquidator and to furnish the liquidator with such information, accounting records and documentation which may be requested by the liquidator.

10. Payment of the amount determined within 14 business days of a final accounting by the liquidator.

11. The first to the seventh defendants and the thirteenth to the fourteenth defendants are ordered to pay the costs of the action, which costs include the costs of two counsel, jointly and severally, the one paying the other to be absolved.

**M J TEFFO
JUDGE OF THE HIGH COURT
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Appearances

For the plaintiff

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Instructed by

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For the defendant

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Instructed by	B D K Attorneys
Heard on	17 September 2020
Handed down	30 March 2021