Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION)

REPORTABLE

CASE No: 17318/2009

In the matter between:

ERICA SCHREPFER **Plaintiff**

and

HEINZ GUNTHER PONELAT **Defendant**

JUDGMENT DELIVERED : 26 AUGUST 2010

MOOSA, J:

Introduction:

[1] In this matter the Plaintiff instituted action against the Defendant in terms of which she sought relief in respect of two claims. The first claim is for a declaration that a universal partnership existed between the Plaintiff and the Defendant, confirming the dissolution of such partnership and claiming certain consequential relief. In the alternative to the first claim, she claimed from the Defendant maintenance at the rate of R12 000 per month until her death, remarriage or permanent co-habitation with a partner. The first claim is premised on an oral agreement, alternatively on an implied

and/or tacit agreement based on their conduct. The second claim is for damages in the sum of R100 000 for breach of promise to marry and for certain ancillary relief. The Defendant opposed the action and, in his plea, denied that a universal partnership existed between him and the Plaintiff and denied that he had promised to marry the Plaintiff.

The Issues:

[2] In terms of the pleadings, the issues the court is called upon to determine in respect of the first claim are whether a universal partnership existed between the parties and if it is found that a universal partner existed, the court must make a pronouncement on the consequential relief sought by the Plaintiff. However, should the court find that a universal partnership did not exist, then the court must adjudicate the alternative claim of whether the Plaintiff is entitled to the payment of maintenance from the Defendant and if so, what is an appropriate amount. The issues the court has to determine in respect of the second claim are whether the Defendant promised to marry the Plaintiff and if so, whether there was a breach, and if there was a breach whether the breach was wrongful. If it is found that there was no promise to marry, or there was no breach or the breach was not wrongful, the Plaintiff cannot succeed. If on the other hand all those elements are established, before the court can award damages, the Plaintiff must establish the impairment of the *dignitas.*

The Law:

[3] The essentials of a special contract of partnership were confirmed in the case of **Pezzuto v Dreyer** 1992 (3) SA 379 (A) at 390, as follows:

> "*Our courts have accepted **Pothier**'s formulation of such essentials as a correct statement of the law (**Joubert v Tarry & Co** 1915 TPD 277 at*

280-1; ***Bester v Van Niekerk*** *1960 (2) SA 779 (A) at 783H-784A;* ***Purdon v Muller*** *1961 (2) SA 211 (A) at 218B-D). The three essentials are (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit (****Pothier:*** *A Treatise on the Contract of Partnership (Tudor's translation) 1.3.8). A fourth requirement mentioned by* ***Pothier*** *is that the contract should be a legitimate one."*

[4] The *essentiala* of the partnership set out above applies equally to a universal partnership. In this regard see **Muhlmann v Muhlman** 1981 (4) SA 632 (W) ; **V(aka)L v De Wet N O** 1953 (1) SA 612 (O) at 615; **Isaacs v Isaacs** 1949 (1) SA 952 (C) at 956 and **Schaeffer:** Butterworths Family Law: Cohabitation at page 3). The contract of partnership may not necessarily be expressed. It could be tacit or implied from the facts, provided they admit of no other conclusion than that the parties intended to create a partnership (**Festus v Worcester Municipality** 1945 CPD 186 (C). Our courts have recognised that a universal partnership, also known as domestic partnership, can come into existence between spouses and co-habitees where they agree to pool their resources (**Muhlmann v Muhlmann** 1984 (3) 102 (A); **Kritzinger v Kritzinger** 1989 (1) SA 67 (A); **Ally v Dinath** 1984 (2) SA 451 (T) and **V(aka) L v De Wet** (*supra)).*

The Universal Partnership:

[5] Our common law recognises two types of universal partnerships. The one is commonly known as the *universorum quae ex quaestu veniunt* which **Pothier**, according to **Tudor**'s translation at page 32, describes as follows:

"*The parties thereby contract a partnership of all that they may acquire*

> *during its continuance, from every kind of commerce. They are considered to enter into this kind of partnership when they declare that they contract together a partnership without any further explanation."*

The other is commonly known as *universorum bonorum* which **Pothier,** according to **Tudor**'s translation at page 24, describes as follows:

> "*The partnership universorum bonorum is that by which the contracting parties agree to put in common all their property, both present and future."*

(See **Isaacs v Isaacs** 1949 (1) SA 952 (C).)

[6] The present claim falls under the *universorum bonorum.* There has been some uncertainty firstly, whether the *universorum bonorum* has fallen into disuse (**De Wet & Yeats:** *Kontraktereg* at page 381) and secondly, whether it has to be entered into expressly (**Annabhay v Ramlall and Others** 1960 (3) SA 802 (D)). **Ellof J** (as he then was**)**, in **Ally v Dinath** 1984 (2) SA 451 (T) considered an exception taken to the claim for a universal partnership based on *universorum bonorum* on the ground that there was no allegation that the agreement of universal partnership was concluded expressly. **Ellof J**, accepted that our common law, in line with the decision of **Searle J**, in **Isaacs v Isaacs** *(supra)*, recognised two types of universal partnerships, namely *universorum bonorum* and *universorum quae ex quaesty veniunt.* After analysing the various Roman-Dutch law authorities, he concluded that there is no merit in the contention that the universal partnership of the type known as *universorum bonorum* should be expressly entered into by the parties. These decisions have been followed in a very recent case by **Davis J**, in **Sepheri v Scanlan** 2008 (1) SA 322 ©. I have no reason to differ from them and accordingly conclude firstly, that the *universorum bonorum* has not fallen in disuse and secondly that the *universorum bonorum* does not necessarily have to be

entered into expressly. It can come into existence tacitly or by the conduct of the parties.

[7] A universal or domestic partnership is akin to a marriage in community of property. **H R Hahlo:** *"The South African Law of Husband and Wife"* 5th edition, at pages 157-158, describes marriage in community of property as follows:

> *"Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares."*

And on the reciprocal duty of support in a marriage, he goes on to say at page 354 as follows:

> *"Divorce puts an end to the reciprocal duty of support that existed between the spouses during marriage. An existing court order for the maintenance of the wife comes to an end. So does a clause in a separation agreement providing for the maintenance of the wife."*

The Evaluation

[8] With that backdrop I turn to evaluate the evidence to determine whether the Plaintiff has made out a case for the relief she is seeking. In that determination, I will rely on the facts that are common cause and undisputed, the credibility of the witnesses and the probabilities (**Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie & Others** 2003 (1) SA 11 (SCA) at para 5). The Plaintiff is burdened with discharging the onus on a balance of probabilities. For the Plaintiff to succeed, the evidence must be such that, when she closed her case, an order of absolution from the instance was not warranted. The defendant's failure to testify cannot justify a verdict for

the plaintiff unless there is enough evidence to enable the court to say that having regard to the absence of an explanation, the plaintiff's version is more probable than not.

[9] In support of the Plaintiff's case, the Plaintiff, her son, Guido Tagliavini ("Guido") and one Lorraine Gregory ("Gregory") testified. The Plaintiff's witnesses essentially corroborated her evidence in certain respects. The Defendant closed his case without calling any witnesses.

[10] Adv **De Waal Nigrini**, on behalf of the Plaintiff, submitted that, in light of the totality of the evidence as well as the undisputed documentary evidence and the undisputed period during which the parties lived happily and worked purposefully towards their goal of a financially independent retirement, the Defendant made the tactical decision not to testify at his peril. He submitted further that the evidence called for an answer. In disputing the existence of a universal partnership, Adv **Jooste**, on behalf of the Defendant, contended that, at the very best for the Plaintiff on the evidence, it is difficult to come to any conclusion other than the Plaintiff was conducting herself as an ordinary spouse.

[11] I do not think that on the facts of this matter an adverse inference can be drawn because the Defendant did not testify or tender any oral evidence in support of his case. The Defendant under cross-examination challenged practically every vital aspect of the Plaintiff's evidence and placed it in dispute. However, by not testifying when he (the Defendant) was available to testify and not presenting oral evidence when such evidence was available, the Defendant took the risk of the court deciding the issues on the oral evidence placed before it by the Plaintiff without the benefit of any oral evidence presented by the Defendant. Depending on the quality of such evidence, it could be

fatal to the case of the Defendant.

The Credibility

[12] With that background I now proceed to evaluate the evidence before me. I will firstly evaluate the credibility of the witnesses. I do not think that the evidence of Guido or that of Gregory was seriously challenged. Although the former was the son of the Plaintiff and the latter a friend of the son, I do not get the impression that they were trying to mislead the court. They essentially gave evidence of what they saw and observed in their dealings and interaction with the Plaintiff and the Defendant. The involvement of Gregory was of a very limited scope and for a very short period of time. It essentially involved her observation of and interaction with the parties on her two visits to the farm as a guest. Her evidence is also substantially corroborated by the Plaintiff and Guido.

[13] The involvement of Guido stretched over a much longer period and to a greater extent. He was 16 years old when he was introduced to the Defendant. He described the Defendant as both loving and caring towards both him and his mother. He was intimately involved when the parties experienced problems in their relationship and as a concerned son of the Plaintiff, he tried to speak to the Defendant in order to resolve the differences between him (the Defendant) and his mother. He was also instrumental in obtaining legal assistance for his mother and in negotiating a settlement between the Defendant and his mother in respect of the eviction proceedings. He instructed the attorney to record the settlement in a letter which was confirmed and signed by his mother and the Defendant. His evidence is corroborated by his mother and by certain documentary evidence. No reason has been advanced by counsel for the Defendant why the evidence of Gregory and Guido should not be accepted. I accordingly accept

their evidence.

[14] In contrast to Gregory and Guido, the credibility of the Plaintiff was seriously challenged by counsel for the Defendant. The Plaintiff's evidence stretched over many days in court and covered a long period of time, to be exact, almost 17 years. She was taken under extensive and intensive cross-examination. Such cross-examination essentially concentrated on the allegations contained firstly, in the Founding Affidavit of her aborted Notice of Motion proceedings in respect of the same relief and secondly, the various amendments which were sought and effected to her Particulars of Claim in the present proceedings. The Notice of Motion proceedings were aborted on the advice of her present attorneys because of the possible disputes of fact.

[15] It was put to the Plaintiff by counsel for the Defendant that she was evasive and fabricated her evidence. I do not think that such accusation was justified. Her evidence must be seen in the context in which it was given, the time span over which it stretched and the nature of the evidence that was given. The Plaintiff's first language is German. Although she was reasonably fluent in English, she had difficulty in understanding legal terms that lawyers take for granted. She was baffled by some of these terms such as "tacit", "implied", "express" or "within the contemplation of the parties" and conceded that she did not know how to answer certain questions based on such terms. This is understandable as the Plaintiff is a lay person. The contention by counsel for the Defendant that the evidence of the Plaintiff was crafted and shaped on the facts of **Sepheri v Scanlan** *(supra)* is highly speculative and no basis exists for such conclusion.

[16] There were also certain errors in the pleadings which she found difficult to

explain. They were obvious errors. In the first place, the allegation that the Plaintiff agreed to resign from her post as personal assistant and secretary upon the commencement of their cohabitation relationship on the facts are wrong. The undisputed facts are that the cohabitation commenced in March 1989 whereas the Plaintiff resigned her position just before they moved to Plettenberg Bay, that is, in May 1998. In the second place, the allegation that they orally agreed to get married in March 1990 was an error. The Plaintiff conceded that it should read March 1989 when they commenced their cohabitation relationship. She could not explain how these errors arose. She insisted that she did not give the attorneys instructions to that effect. In my view these mistakes were either typographical errors or they were ostensibly made by the attorneys who drafted the pleadings. The Plaintiff's counsel, in my opinion, correctly conceded that they were manifest mistakes. I do not think that these shortcomings and errors impact adversely on the credibility of the Plaintiff.

[17] One must not lose sight of the fact that the Plaintiff was testifying on matters that spanned over a period of almost 17 years years. With the passage of time memories fade and details disappear in the mist of time. One cannot blame her for not recalling or remembering the details of events in the absence of documentary evidence. In such case, it is my view that it is sufficient if she describes in broad outlines such events in support of her version. In the circumstances, I conclude that the Plaintiff was a credible witness. Most of the facts in her testimony were either common cause, or not challenged, or were corroborated by her witnesses, or by documentary evidence. In the absence of other evidence to the contrary, I am constrained to accept the evidence placed before me in determining the issues in this matter.

The Universal Partnership

[18] The first issue the court is called upon to determine is, whether on the facts of this case, the Plaintiff has made out a case against the Defendant for the existence of a universal partnership. The Plaintiff relied on an oral agreement alternatively a tacit and/or implied agreement of universal partnership brought about by the conduct of the parties. I am going to examine the evidence to determine whether or not a universal partnership has come into being between the parties.

The Live-in Relationship:

[19] The evidence is that in March 1989, the Defendant asked the Plaintiff to move in with him as his life partner. He promised to support her and said that they could work together for a comfortable retirement. He explained that he could not get married to her at that stage because the Will of his deceased wife contains clauses to the effect that should he remarry within 10 years, he would forfeit his share of the inheritance to their sons. He promised to marry her after the expiry of 10 years. She then moved into his home in Benoni and they lived together as man and wife. They shared a joint household for their joint benefit. Plaintiff told her "what is mine is yours". In March 1994, the Defendant again promised to marry her as the impediment that hindered their marriage initially was removed by the effluxion of time. In pursuance to such promise to marry, he gave her a specially designed engagement ring. She testified that had they got married, the marriage would have been one in community of property. They were totally committed to the partnership. The Defendant used German terms to describe their relationship namely, *"lebens gefahrte" or "lebens genossen"* , which meant that they give each other love and companionship as partners for life or being committed to each other as partners for life. The Plaintiff testified that according to German custom, the husband controls the financial affairs of the partnership.

Pooled Financial Resources:

[20] According to the Plaintiff they pooled their financial resources and made joint financial decisions. At the inception of their relationship, she sold her furniture and effects and contributed the proceeds of approximately R10 000 to the partnership. She sold her car that she owned at the time and also contributed the proceeds thereof to the partnership. She continued working as a freelance beautician and earned on an average R2 000 per month, which she contributed towards their expenses. In August 1989, after a lapse of nine months, she resumed employment as secretary and personal assistant to the managing director of Mannesman Demag and contributed her income to the partnership. She worked for approximately 10 years. Her starting salary was R2 500 per month and when she left she was earning R5 600 per month. At the time she left the employ she had between R2 000 and R3 000 in her banking account. A substantial amount in the region of R100 000 had also accrued in her provident fund. She could not take out the proceeds, but could transfer it to another fund.

[21] At the time they started their live-in relationship, the Defendant was conducting a successful engineering business, which, according to the Plaintiff, was his contribution to the universal partnership. He was also the owner of the property in Benoni in which they lived. These properties were registered in the name of a company, known as Ponelat Properties (Pty) Ltd, for tax purposes. He was the sole shareholder and director of the company. In or about 1997 they purchased a farm in Plettenberg Bay. The farm was acquired to develop for retirement purposes. The Defendant's dream was to acquire a hunting farm. She was prepared to share the dream with him. The farm was registered in the name of the company. She regarded the company as part of the partnership. They relocated to the farm in and during 1999. According to Gregory,

the Defendant said that the construction of the cottages as tourist accommodation was to keep the Plaintiff busy. The farm was funded from the proceeds of the sale of the engineering business and the properties in Benoni. In and during 2003, they bought another property in Plettenberg Bay, situate at 45 Robberg Road. This was funded from the sale of the farm.

[22] From the proceeds of the sale of the farm an amount of R600 000 was paid to the Defendant's son for his involvement on the farm and an amount R1.2 million was invested in a joint retirement fund with Old Mutual. Under cross-examination it was put to her that the improvements on the farm were effected by the Defendant's son and she retorted that the son got his share for improving the farm, but she did not get her share for doing so. The value of both the farm and the Robberg property was substantially increased because of the improvements made to them. For effecting such improvements to the properties, she contributed her skills, labour and expertise.

[23] The Plaintiff also urged the Defendant to purchase a building from which the engineering business in Benoni was conducted instead of renting the premises. She motivated the proposal by stating that instead of paying rent, payments could be made to acquire the property. The Defendant accepted her advice and bought the property. Guido confirmed these facts in his testimony. The property was subsequently sold and the proceeds were used to fund the purchase of the other properties. The Plaintiff also told the Defendant to hold out for a better price for the farm and by so doing he realised an extra amount of R500 000 for the sale of the farm.

Pooled their Skills and Labour:

[24] The Defendant was involved full time in the engineering business and

contributed his skills and labour in sustaining and running the engineering business. His involvement in the business left him very little time to do anything else. Nine months after she moved in with him, he asked her to give up her work and serve his needs on a full time basis. He agreed to provide for all her needs. She did all the household chores, provided for all his needs and comfort, entertained friends and guests and business associates and they went on holiday together. She also served as his confidante, friend, adviser and hostess. She also assisted him in his business from time to time and more especially when his secretary was absent or on leave when she would fulfil her role in the business. After she resumed employment in August 1989 on a full time basis, she continued to serve him as before by seeing that his personal, physical and emotional needs were met and, in addition, assisted him with administrative functions after hours and during lunch times in the business. She also continued to act as his hostess by arranging social functions and parties for business associates and friends.

[25] After they relocated to the farm in Plettenberg Bay, the Plaintiff was actively involved in improving and running the farm. She assisted with the construction of two self-contained flats to generate additional income for the farm. She designed and furnished the flats. She supervised the workmen and purchased the materials. The improvements effected to the farm substantially increased the value of the farm. After its construction she managed the two apartments as a tourist accommodation and generated income for the partnership. She also assisted in rearing and feeding cows and oxen. She assisted with the felling of trees on the farm which netted approximately R70 000 for the partnership.

[26] She also conducted the administrative, bookkeeping and clerical functions on

the farm. She entered into negotiations and concluded agreements with employees on the farm and engaged in labour related disputes with employees and conducted disciplinary proceedings. She also ensured compliance with labour related matters, performed tax related services and conducted correspondence and negotiations with SARS and the Department of Labour in connection with farming operations and negotiated leases with prospective tenants. In support of such assertions, she handed in as exhibits a series of administrative documents. These exhibits were not disputed by the Defendant. She continued to act as his confidante, advisor, companion and partner. In support of these activities on the farm, the Plaintiff presented photographs as exhibits. These exhibits were not challenged by the Defendant. They reflected both social and business activities on the farm. She was corroborated on her involvement at the farm by both her son, Guido and Gregory.

[27] After the farm was sold, they moved into 45 Robberg Road, Plettenberg Bay on 1 December 2003. They made substantial improvements to the Robberg Road property, including the conversion and erection of two additional apartments. The Plaintiff was actively involved in the renovation, refurbishing and improvement of the property. According to her the bigger apartment was let out to generate income for the partnership and the smaller apartment was used for friends and guests. She continued to perform the administrative functions as before when they relocated to 45 Robberg Road. The relationship between the parties soured while they were residing at this address and it is common cause that the relationship between the parties came to an end on 1 April 2005. A trade reference dated 11 April 2005 given by the Defendant on behalf of the Company, corroborates the evidence of the Plaintiff that she served as freelance hostess, entrusted with the task of ensuring that the accommodation for tourists were in a clean and proper condition, that their transport and itinerary were

organised, their meals were arranged and their needs were taken care of.

Findings:

[28] On the above facts the court must determine whether the Plaintiff has established, on a balance of probabilities, the existence of a universal partnership between the parties. On the evidence placed before me, I am of the view that the Plaintiff has failed to prove the existence of an express or oral agreement of a universal partnership between the parties. I now turn to examine whether on the facts the Plaintiff has succeeded in establishing the existence of a tacit and/or implied agreement of a universal partnership between the parties. **Hoexter JA**, in **Muhlmann v Muhlmann** *(supra)* at 123H-I quoted with approval the following remarks of **McCreath J** in the court *a quo*:

> *"In the situation where one has to do with a relationship between spouses and there is no express agreement between the parties the Court must be careful to ensure that there is indeed an animus contrahendi and the conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife in a given situation."*

[29] In my view it is clear from the facts of this case that the services rendered by the Plaintiff manifestly surpasses those ordinarily expected of a wife in her situation. The true enquiry therefore is whether it is more probable or not that a tacit agreement had come into existence (**Muhlmann v Muhlmann** *(supra)* at 124C). Taking into consideration the reason and purpose of the live-in relationship, the pooling of their finances, the pooling of their skill and resources, the joint investments made by them to secure their retirement, I conclude that there was *animus contrahendi* between the

Plaintiff and the Defendant and it is more probable than not that a universal partnership had come into existence between the parties.

[30] The probabilities favour such conclusion because firstly, the parties held two insurance policies with one lump sum premium payment and the proceeds thereof was payable to the survivor on the death of the partner; secondly, the Defendant applied in the name of the parties for membership of a retirement village; thirdly, in terms of a letter dated 28 October 2004, if the Plaintiff should remain living with the Defendant until his death, he has made her a beneficiary in his Will, but should she wish to separate from him he would pay her R200 000 immediately; fourthly, in terms of a written settlement dated 18 August 2006 and signed by the parties personally, the Defendant agreed to advance the Plaintiff certain moneys to secure her alternative accommodation on condition that the monies so advanced will be set off against any award made against him arising from the proceedings instituted by the Plaintiff for the dissolution of the universal partnership; fifthly, the Defendant, in an application in terms of the Domestic Violence Act under the heading *"Nature of domestic relationship with the person who committed the act of domestic violence",* describes himself as "*ex-partner"*; sixthly, in leasing the business premises registered in the name of the Company, the lessor is described as G & E Ponelat who are the Defendant and the Plaintiff; seventhly, it seems highly unlikely that she would have devoted so much of her time, energy, skill and labour simply with the view that the Defendant increases his estate and lastly, had the Defendant opted to get married to her, she would have insisted in getting married in community of property, which would have ensured that she shared equally in the joint estate..

The Dissolution of the Partnership:

[31] I now turn to discuss the dissolution of the universal partnership. It is common cause that the relationship between the parties finally came to an end on 1 April 2005, when the Plaintiff moved out of the common home at 45 Robberg Street, Plettenberg Bay and moved into the flat on the property (**Fink vs Fink** 1945 WLD 226). The Plaintiff testified that in and during 2004, the Defendant was involved in certain life threatening incidents. She felt financially insecure. She insisted on receiving written confirmation that she was entitled to a half share of the partnership estate. The Defendant made certain offer which was alluded to above, but she rejected the offer. She then started experiencing problems in their personal relationship. She became disillusioned when it became clear to her that he was reneging on his promise to marry her and to secure her partnership interest in writing. In my view the universal partnership came into existence on 4 March 1989 and was terminated as at 1 April 2005.

Remedies for Dissolution of the Universal Partnership:

[32] Our common law recognises two legal remedies for the dissolution of a partnership. The one is known as the *actio pro socio* and the other is known as the *actio communi dividundo.* **Joubert JA**, in **Robson v Theron** 1978 (1) SA 841 (A) deals extensively with the characteristics and application of these two remedies. These two remedies can overlap in certain respects. In this matter there was no agreement between the partners for the dissolution of the partnership and the manner in which the partnership is to be liquidated and wound-up. On the facts of this case the most suitable remedy to liquidate and wind-up the partnership is by means of the *actio pro socio.* The court has a wide equitable discretion and in the exercise of such discretion the court may appoint a liquidator to realise the partnership assets for the purpose of liquidating the partnership debts and to distribute the balance of the partnership assets or the proceeds amongst the partners.

The Interest of the Parties in the Universal Partnership:

[33] Before deciding what order to make, it is imperative that I decide in what proportion the parties are to share the nett estate of the universal partnership. The Plaintiff contends that they should share equally. It is settled law that, in the absence of any agreement between the parties, on dissolution of the partnership, each party gets a proportionate share of the assets according to his or her contribution. When the contribution of the parties is equal or it is impossible to determine that the one party had contributed more than the other, then they share equally (**Fink v Fink** *(supra)*; and **Isaacs v Isaacs** *(supra)* at 961).

[34] It is common cause that the Defendant and his deceased spouse built up the engineering business together. At the time when the live-in relationship commenced, the Defendant had a flourishing business. For the major part of their stay in Benoni, other than for a very short period of time, the Plaintiff was employed on a full time basis. She contributed her income to the partnership. Although she was not active in the business, she assisted the Defendant in the business from time to time on a casual basis. The Defendant sold the business and the properties in Benoni and contributed the proceeds to purchase the farm in Plettenberg Bay. The Plaintiff was actively involved on a full-time basis on the farm and contributed her labour and time to the development of the farm. The farm was subsequently sold and the proceeds were use to acquire and develop the 45 Robberg Road property. The Plaintiff was also instrumental in developing the said property and likewise contributed her labour and time thereto. It was also because of her insistence that the farm realised and amount of R500 000 more than the Defendant was prepared to sell the farm for. However, I do not think that the contribution of each party to the universal partnership was equal. I am of

the view that the contribution of the Defendant both in terms of time, labour and capital was greater than that of the Plaintiff. In the circumstances I am called upon to determine in what proportion each contributed to the partnership.

[35] The objective fact is that the Defendant indicated that if she remained living with him until his death, she would inherit one-third of the balance of his current account with Nedbank, one-third of his investment in unit trusts with Old Mutual, a Mercedes Benz C220, which was valued at R300 000, one sixth-share in the 45 Robberg property and the right of occupation in the bigger flat at the property, free of charge until her death or remarriage. On the other hand, if she wished to separate immediately, he was prepared to pay her a sum of R200 000. The Plaintiff rejected the offer. In light of the concession made by the Defendant in respect of the property which is registered in the name of the Company and the evidence of the Plaintiff that the Company formed part of the universal partnership, I conclude that the assets and liabilities of the Company, as at the date of the dissolution of the partnership, for all intents and purposes, form part of the assets and liabilities of the universal partnership. In the circumstances, I am of the view that a fair and equitable distribution of the nett assets of the universal partnership is that the Plaintiff is entitled to 35% and the Defendant is entitled to 65%.

[36] Counsel for the Plaintiff argued that even if the Plaintiff was successful in her main claim, the court should order the Defendant to pay maintenance to the Plaintiff retrospectively from the date of issue of Summons to the date upon which the Plaintiff receives her share. In my view there is no merit in such argument because the claim for maintenance was based as an alternative claim to the main claim. In my view there are no legal grounds to sustain such a claim.

Breach of Promise to Marry:

[37] I now turn to deal with the second claim. The second claim deals with the breach of promise to marry. The case for the Plaintiff in respect of the second claim is pleaded as follows:

(a) that during March 1989 and at Johannesburg, the parties agreed to marry;

(b) that in or about March 1990 and at Johannesburg, the Plaintiff and the Defendant entered into an oral agreement in terms whereof they agreed to become engaged to marry;

(c) that on 4 March 1994 the Defendant again promised to marry the Plaintiff by asking her hand in marriage and by handing her a specially designed engagement ring.

The Defendant's case was essentially one of a denial.

The Requirements for the Remedy of Breach of Promise:

[38] Breach of promise to marry is a remedy which is *sui generis* and has features in common with an action based on contract and an action in delict. It not only amounts to a breach of contract, but also constitutes a wrong against the injured party. It entitles the injured party not only to claim damages for breach of contract, but she can also claim delictual damages arising from *contumelia* or *injuria.*

[39] Lawyers have been debating whether the breach of promise action is an appropriate remedy in our present day legal system. Some of them have been arguing that the remedy is inimical to the mores of our present day society and has become antiquated. They have argued that the action should be abolished as in other jurisdictions. Our courts have also expressed reservations in the retention of the remedy in light of the values entrenched in the Constitution. The Supreme Court of

Appeal in **Van Jaarsveld v Bridges** (344/09) ZASCA 76 (27 May 2010) *mero motto* raised, but did not decide the issue. **Harmse DP** considered the statement of **Davis J** in **Sepheri v Scanlan** *(supra)* relating to the reconsideration of the breach of promise action and said the following:

> *"…I do believe that the time has arrived to recognise that engagements are outdated and do not recognise the mores of our times, and that public policy considerations require that our courts must reassess the law relating to breach of promise … In what follows I intend to give some guidance to courts faced with such claims without reaching any definite conclusion because this case is not affected by any possible development of the law and can be decided with reference to two factual issues, namely, in relation to injuria, whether the breach was contumacious and, secondly, whether Bridges has suffered any actual loss as a result of the breach…"*

Although our courts have questioned the need for the existence of the action in light of the values and mores of our new constitutional dispensation, it has not been overruled as a remedy. However, it will not be necessary for me to decide the issue for reasons that will become apparent later. I will for our purposes accept that the Plaintiff is entitled to rely on such remedy.

[40] The Plaintiff's claim is based on a contumacious breach of contract to marry. From the pleadings it is clear that the Plaintiff is claiming only delictual damages for breach of promise. In order for her to succeed with her claim, she must show, firstly, on a balance of probabilities, that *animus contrahendi* was present at the time the promise to get married was made by the Defendant and accepted by her; secondly, that there was a breach of such promise and thirdly, that the breach was wrongful in the delictual

sense and contained the element of *animo* injuriandi. I will assume in favour of the Plaintiff firstly, that the parties concluded a contract to marry and secondly that the Defendant breached such contract. As the Plaintiff's claim is based on the *actio injuriarum*, I will concentrate on the third requirement namely, whether the breach was wrongful in the delictual sense and whether it was injurious or contumelios.

[41] The requisites for the establishment of *actio injuriarum* are first, an intention to injure, namely, *animus injuriandi;* second, a wrongful act; and third, an impairment of the *dignitas.* In such an enquiry if the second requisite, namely, the wrongfulness of such an act has been established, the first requisite, namely, *animus injuriandi* will be presumed and the third requisite namely, the impairment of the *dignitas* will have to be established. On the other hand if the wrongfulness of the act is not established, the claim fails. In order to determine whether the conduct complained of is wrongful, the test is an objective one and the Court applies the criterion of reasonableness and such conduct is tested against the prevailing norms in society (**De Lange v Costa** 1989 (2) SA 857(A) and **Van Jaarsveld v Bridges** *(supra)*.

[42] Applying the criterion of reasonableness and assessing the conduct of the Plaintiff before, during and after the breach objectively and in accordance with the prevailing norms in society, I conclude that such conduct militates against the element of wrongfulness in the delictual sense. I say so for the following reasons. Firstly, in response to the Plaintiff's demand that he either commits himself to a date of marriage or to something in writing that they were equal partners, the Defendant, in terms of a letter dated 28 October 2004, made her generous offer. In terms of such offer, he gave her two options. The one was to the effect that if she should continue living with him until his death, he has generously beneficiated her in his Will. The other was to the

effect that should she decide not to continue their relationship, he was prepared to give her a cash payment of R200 000.00. She rejected the offer out of hand.

[43] Secondly, when she moved out of the common home, she moved into a flat on the same property. Thirdly, at the time, she had the use of the Mercedes-Benz, which she continued using. Fourthly, a few days after she moved out of the common home, he gave a written testimonial, dated 11 April 2005, and described her as honest, reliable, hard-working and a gracious hostess. Fifthly, after she moved out of the common home and into a flat on the property the parties brought protection orders against each other but such matters were mutually settled through the intervention of the Plaintiff's son. Fourthly, he instituted ejectment proceedings against the Plaintiff and the matter was once more settled by mutual agreement through the intervention of the Plaintiff's son. In terms of the settlement, the Defendant advanced certain monies to the Plaintiff for alternative accommodation and agreed to set off such money against any monies that becomes payable to her in the terms of the universal partnership. Such settlement agreement was personally signed by the parties.

[44] Sixthly, in and during 2006, the Plaintiff approached the Pastors of the Evangelical Lutheran Church to counsel the parties because the Plaintiff "*was trying to solve problems within the struggling relationship"* as evidenced in a statement signed by the Pastors and dated 24 June 2007. It appears even after the parties separated, there was still some hope that the parties could be reconciled. Seventhly, that the Plaintiff, at all material times, wanted to secure herself either through the mechanism of marriage or through the mechanism of a universal partnership. I have found that a universal partnership had come into existence but not in the proportion that she had claimed. Lastly, it is my view that the actions of the parties described above are not motivated by

malice, ill-feeling or *contumelia* but appear to be genuine attempts on their part to resolve their personal relationship and their proprietary rights.

[45] Because of my findings, it is unnecessary to deal with the other requisites of the *actio iniuriarum.* It is assumed that no *injuria* was committed. In the circumstances her claim for breach of promise must fail.

The Order:

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

(A) In respect of the first claim:

(i) That a universal partnership existed between the Plaintiff and the Defendant and the Plaintiff had a 35% (thirty five per cent) share in such partnership and the Defendant had a 65% (sixty five per cent) share in such partnership;

(ii) that the said partnership was dissolved with effect as from 1 April 2005;

(iii) that the Defendant is directed to prepare and deliver to the Plaintiff a statement of account of his administration of the business of the universal partnership from the inception of the partnership i.e. 4 March 1989 until the termination of the partnership i.e. 1 April 2005, duly supported by vouchers, books of accounts and other source documents and in accordance with generally accepted accounting practices, within 3 (three) months of the date of this order;

(iv) that the Plaintiff and the Defendant are directed to debate the statement of account referred to in the preceding clause on a date to be agreed between the parties within 14 (fourteen) days from the

delivery of the statement of account and should the parties be unable to reach an agreement thereto, the Registrar is directed to arrange a date for the debatement of the statement of account between the parties;

(v) that the Defendant is directed to effect payment of the amount that appears to be owing to the Plaintiff and/or is directed to deliver the asset or assets of the universal partnership that has/have been distributed or is to be distributed to the Plaintiff after delivery of the statement of account and/or debatement thereof;

(vi) that either of the parties is granted leave to approach this court for further directions as circumstances may dictate on the same papers as supplemented including but not limited to the question of whether the Plaintiff is entitled to *mora* interest from date of dissolution of the universal partnership to date of payment.;

(vii) that the Defendant is ordered to pay the Plaintiffs costs.

(B) In respect of the second claim the Plaintiff's claim is dismissed with costs.

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