Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: **13827/2008**

In the matter between:

GABRIELLE MARY ANDREW Plaintiff

and

MARK TIMOTHY ANDREW Defendant

JUDGMENT: 13 JANUARY 2012

SABA, AJ

[1] The parties were married out of community of property on 14 December 1985. The parties' marriage was subject to the accrual system as provided for in Chapter 1 of Act 88 of 1984 ("**the Matrimonial Property Act**"). This marriage was dissolved by this court on 3 August 2011 as per agreement between parties.

[2] The relief claimed in respect of children is no longer an issue as both children have reached majority. Both parties waved their respective maintenance claims against one another. The only issue for determination is the defendant's counterclaim in respect of the farm Modderdam ("**the property**"), registered in plaintiff's name. For the sake of convenience, I will refer to the wife as the plaintiff and the husband as the defendant.

[3] It is the plaintiff's case that this property has to be excluded from any form of accrual since it originated from an inheritance, legacy or donation received by the plaintiff. Section 5 (1) of Act 88 of 1984 reads as follows:

> *"5. Inheritances, legacies and donations excluded from accrual – (1) An inheritance, a legacy or donation which accrues to a spouse during the subsistence of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise".*

[4] The defendant's case is that there was a tacit and or universal partnership agreement between him and the plaintiff and as such, he is entitled to one-half of the value of the property. It is contended that the property was not originally obtained through funds inherited or donated. The defendant further contends that he contributed his skill and labour on the property.

The facts of this matter are largely common cause and are as follows:

[5] During the subsistence of the marriage, the plaintiff's mother regularly donated money to the plaintiff and this money was used by both the plaintiff and the defendant. The plaintiff also inherited a sum of R444 000, 00 from the Roberts Grandchildren Trust ("**the trust**") which was set up by her late grandmother, one Margaret Grant Roberts (**Roberts**). She used the R444 000, 00 to purchase a residential erf in Knysna and constructed a dwelling house on which she and the defendant lived. They later decided to purchase the farm Modderdam (**the property**). At that stage, they had not yet received the proceeds of the sale of the Knysna property and had no money. Plaintiff was given by her mother a sum of R162 000, 00 as a gift. This money was used towards the purchase of the property. The balance of R100 000, 00 of the purchase price of the property was financed through a bond obtained by the plaintiff through First National Bank. The defendant never contributed money towards transfer duties related to this property, they were paid for by the plaintiff. The plaintiff paid the bond off twice with the money donated to her by her mother. The defendant had access into the bond and he would withdraw money from it to fund the parties' lifestyle.

[6] When the plaintiff received R976 000, 00, being the proceeds of the sale of the Knysna property, she repaid a sum of R162 000, 00 to her mother, used some of the money to effect improvements on the property and also bought building material for two extra rooms which were later built by the defendant for her and their daughter, Peggy. She also invested a sum of R100 000, 00 in shares with a woman called Vee Ashton (**Ashton**). Although the R100 000, 00 was a profit from the sale of her house, Ashton invested some of the shares into the defendant's name and they are still in his name. The plaintiff never questioned that because she and the defendant were married and in love. Defendant also fixed an old house they found on the property, he built wooden sheds, verandas and the plaintiff contributed money.

[7] The plaintiff opened up a restaurant and defendant assisted with the day-to-day activities on the farm and on the restaurant until such time that he started small projects, like building organic gardens in other people's yards, growing vegetables and ferns and later selling them to people in town. The plaintiff's mother assisted the defendant by buying a bakkie for him with her own money. At first, the parties kept a joint bank account known as Daily Holdings in which they put monies received from plaintiff's projects. Later on, the defendant decided that the parties should keep separate banking accounts for their businesses. The money he earned from his projects went into his bank account and he did not show it to the plaintiff. He later opened a business called Creative Building Skills and then offered courses on how to build straw-bale houses.

[8] The following facts are not in dispute:

8.1 The defendant paid monies he had earned separately into the bond account over a period of approximately five years. It is also not in dispute that on more than one occasion, the defendant would withdraw money from the bond, transfer it into his personal account and thereafter make a payment towards the bond, of a lesser amount than the one he had earlier transferred into his account.

8.2 The defendant resigned from SAB Hop Farms (where he worked as an assistant farm manager) because he wanted to pursue a lifestyle on a little

farm with his wife and two children. That by doing this he was not pursuing a business venture, but had aimed at making enough money to live and support a lifestyle. This was also confirmed by Dr Doctor Whitehead, an industrial psychologist, who testified for the defendant.

8.3 The defendant received a sum of R13 980, 00 after resigning from Hoop Farms and transferred R10 00, 00 to the joint account for the benefit of the family.

[9] In her testimony, plaintiff denied that she tacitly entered into a partnership agreement with the defendant. She said the partnership she had with the defendant was only in respect of their marriage and not of a business nature. She testified that defendant was very secretive with his finances. The defendant did not deny this and further stated that this fact drove the plaintiff mad.

LEGAL POSITION

[10] In Pezzutto v Dreyer 1992 (3) SA 379 (A) at 389I-J and at 290A-B, the following about partnership contracts is stated:

> "What is necessary to create a partnership agreement is that the essentialia of a partnership should be present. Our Courts accepted Pothier' 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-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".

[11] In argument against the granting of the relief claimed by the defendant, Counsel for the plaintiff relied on **Muhlmann v Muhlmann** 1984 (3) SA 102 (A) at 123 G – 124 F. At 124B of this judgment, Hoexter JA placed reliance upon the remarks of a trial court in **Muhlmann v Muhlmann** 1981 (4) SA 632 (W) at 634G, which are as follows:

"In the situation where one has to deal with the 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 that 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".

[12] Muhlmann's case was cited with approval in an unreported Supreme Court of Appeal case of **Ponelat v Erica Schrepta** (802/10) [2011] ZASCA 167 (delivered on 29 September 2011).This matter dealt with a question whether a tacit contract of universal partnership can be inferred from proven facts. At paragraph 24 of the judgment, the following is stated:

"In my opinion the essentials of a contract of universal partnership have been established. Each party brought something into the partnership, the partnership was carried on for their joint benefit and the object was to make profit. The activities engaged in by the parties were for their joint benefit and they increased their assets. This being so I am in agreement with the court a quo that it was more probable than not that a tacit universal partnership agreement existed between the parties".

[13] In support of the defendant's claim, Counsel for the defendant relied on **Standard Bank of South Africa Ltd and another v Ocean Commodities Inc and others**1983 (1) SA 276 A at 292A-B where the following was stated:

"To establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem".

[14] In casu, each party contributed something (in the form of money or labour) into the household. In my view, the fact that the parties made the contributions they made cannot be interpreted to mean that they intended to be in a partnership in the legal sense. It is clear from the evidence presented that the object of the parties was not to

make a profit, but to live happily as husband and wife in a smallholding. Each party in any marriage has a duty to contribute something to the common home according to his or her means. This duty increases when children are involved. In my view, the contributions made by both parties to their household do not amount to any partnership agreement, whether tacit or otherwise.

[15] The fact that the parties' finances were administered separately and the plaintiff had no control over the finances of the defendant does not point to any tacit contract of partnership between them. The essentials of a partnership enunciated in Pezutto's case (supra) were not met in this case. The defendant confirmed this on cross examination when he said he realized there was tacit partnership between him and plaintiff when his attorney told him so. It therefore cannot be said under these circumstances, that there was an unequivocal conduct, which is not capable of any other reasonable interpretation than the parties intended to.

[16] Counsel for the defendant argued that the labour contributed by the defendant in fixing the property as well as the two houses he built on the property for the plaintiff and her daughter enhanced the value of the house. Counsel for the plaintiff disagreed. On this point, Louis Janse Van Rensburg, an expert valuer who testified for the defence said the improvements made on the property did not add any value to the property because the structures were made of clay.

[17] I find that the property was obtained with inheritance money and donations made to the plaintiff. It is therefore excluded from the accrual of her estate. I also find that no tacit or universal partnership existed between the plaintiff and the defendant. In the circumstances, the defendant is not entitled to any half of the value of the property.

[18] I, for the reasons mentioned above, make the following order;

18.1 The defendant's counterclaim is dismissed with costs.

N SABA

Acting Judge of the High Court