Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[Reportable]

CASE NO: 6222/2010 & 16433/2012

In the matter between:

ELSIE SOPHIA CLOETE Plaintiff

And

ANDRIES WILHELMUS JACOBUS MARITZ Defendant

JUDGMENT DELIVERED ON 13 JUNE 2014

HENNEY, J:

Introduction

[1] The Plaintiff's claim, as set out in the Particulars of Claim, is based on a breach of promise to marry. Having been in a relationship with each other, the parties on or about 10 March 1998 orally agreed to marry each other within a reasonable time after such date. As a result of this, the parties became engaged to

each other in February 1999. The Plaintiff alleges that on 24 April and 7 May 2009 the Defendant repudiated the said agreement by orally refusing to marry her. It is alleged that he did so by informing her that "he did not want to see her again" and that he "had somebody new" in his life. She alleged that the repudiation was wrongful and unlawful and the Defendant had acted *animo iniuriandi* by conveying this to her in foul and contumelious language and by conveying it to another female one Elize Steenkamp with whom she cohabited. This repudiation, she alleges, was preceded by lengthy repetitive, insulting, denigrating and humiliating statements made in foul language to her.

[2] As a result of this the Plaintiff on 26 March 2010 issued Summons against the Defendant. The Plaintiff claims payment, on the basis of breach of contract, of an amount of R26 000,00, being monies that she initially donated to him in contemplation of the marriage between them that was utilized to enable him to acquire a hair salon respectively on 12 August 1994 for an amount of R16 000,00 (R10 000,00 cash and R6 000,00 stock), and February 1996 when she donated a further R10 000,00. Claim 2 is for the payment of the amount of R6 065 000,00 for the loss of financial benefits of the marriage. Claim 3 is for the payment of the amount of R250 000,00 for the contumacious breach of promise to marry.

[3] Thereafter on 16 August 2012 the Plaintiff amended her Particulars of Claim. In the main, she claims the existence of a universal partnership between the parties, one that had been tacitly entered into between the parties during or about August 1994.

[4] The Plaintiff therefore in her Particulars of Claim requested an order declaring her to have a 50% share of the value of the assets in the universal partnership.

[5] As an alternative to the claim that there existed a universal partnership, she claims the repayment of the sum of R26 000,00 which was donated by her to the Defendant to acquire two hair salons, such claims being based on similar facts to those alleged in the initial claim 1 under paragraph 2 above.

[6] In terms of such amended Particulars of Claim, she further claims the payment of an amount of R25 000,00 for damages for breach of promise. She reduced this claim from the initial claim of R250 000,00.

[7] There were further claims in order to facilitate the Plaintiff's claim of the half-share of the universal partnership that the Defendant render a full account supported by vouchers and or documents of the nature of the universal partnership from August 1994 to August 2010 and an order for the debatement of such an account. The parties agreed that these claims be adjudicated together with the claim that there was a universal partnership and the claim for breach of promise (See further paragraphs 101 – 107 infra).

Defendant's Claim in Reconvention

[8] The Defendant claims that he is the owner of the property known as 8 Silverboom Avenue, Plattekloof 3, Western Cape Province ("Plattekloof property"), and that the Plaintiff has unlawfully occupied the property since April 2009. Notwithstanding the Defendant's demand that the Plaintiff vacate, she is still in unlawful occupation of the property.

[9] As a result of her unlawful occupation, the Defendant claims he has suffered damages in that he was unable to tender the property for lease to third parties. The fair and reasonable market related monthly rental of the property is R20 000,00. He claimed damages totalling R420 000,00, being the amount of 21 months unlawful occupation. In addition to this a further payment in the amount of R20 000,00 per month pro-rata from the date of claim to the date of Plaintiff vacating the property.

[10] Defendant's Plea

The Defendant denied that there was a legally enforceable engagement. He denied that there was a universal partnership agreement entered into between the parties. He additionally contended that on 22 March 2009, the Plaintiff repudiated the "agreement" to marry which repudiation he accepted, alternatively, he pleads that the parties terminated the agreement by mutual consent. As a further alternative he pleads that should it be found that he had repudiated the "agreement" he would aver

that he had just cause in terminating the “agreement”, namely, the Plaintiff’s vacation of the common house on several occasions without good reason to do so. Further, she had repudiated the “agreement” on various occasions prior to 22 March 2009 without just cause and she often acted in an irrational manner.

[11] Special Plea

The Defendant raised a Special Plea to the claim that there was a universal partnership that existed between the parties. He pleaded that when the Plaintiff served her amended Particulars of Claim on 16 August 2012, when she introduced the alleged universal partnership as a new cause of action, such claim had prescribed because a period of more than 3 years had lapsed since the claim arose. The Plaintiff’s claim based on the universal partnership arises on the termination of the partnership agreement. Such partnership (if any) was terminated in conjunction with the termination of the engagement and or their romantic relationship, whether on 22 March 2009 or alternatively during April 2009 or during May 2009.

[12] The Evidence

The Plaintiff’s Evidence

The Plaintiff testified in this matter. The Plaintiff testified that she and the Defendant became involved in a romantic relationship that lasted for 15 years as from 1994 to 2009.

[13] She started to live with him in Oranjemundt Namibia in August 1994. Shortly thereafter they bought a hair salon known as Hairline Unisex Hair Salon though the Defendant bought it in his name. The Hair Salon was bought for an amount of N$16 000. In order for them to raise the funds, the Plaintiff applied for a loan of N$10 000 at the First National Bank. The Defendant contributed the other N$6 000 from his own funds. Before she moved to Oranjemundt she had her own hair salon in Karasburg and she used some of the stock of that salon in the new salon they acquired.

[14] From the moment the salon opened she was solely responsible for the running thereof. The Plaintiff was also a signatory to the bank account of the hair salon. She drew a salary from the business and the rest of the income of the business was used to buy stock and equipment. At that stage the Defendant was in the full time employment of a mining company (CDM). At that stage because Oranjemundt was a protected area which had restricted access, she could only through the Defendant apply to CDM to give permission for her to take up residence with him. When he made such an application he referred to the Plaintiff as his business partner.

[15] Later in 1994 the Defendant acquired the opportunity to purchase his ailing father's farm known as, portion Narudas. He sought her advice whether he should buy the farm, whereupon she advised him that it would be a very good business opportunity for him. She further agreed that she would go and stay with him on the farm. They used the proceeds generated in the salon in the farming business. The

Defendant was still in full time employment at CDM at this stage and his brother managed the farm on his behalf.

[16] The Plaintiff further testified that around this time they experienced problems in their relationship and she left the Defendant and in a letter dated 18 December 1995 she made a decision to sell her interests in the Hairline Salon. She, however, changed her mind and decided against this because the Defendant requested her to come back.

[17] They acquired another hair salon on 17 February 1996. This business was known as Good Looks Hair Salon which they later renamed Visions Hair Salon. This hair salon was acquired for N$13 000. She once again borrowed N$10 000 from First National Bank. They opened a bank account in the name of the new Salon and both of them had signing rights on the bank account. According to her they were partners in this business. In terms of a document to open a banking account they declared that they were partners in Vision Hair Salon (page 33 and 34 Plaintiff's bundle Annexure A1).

[18] On 2 June 1997 they sold the first hair salon business Hairline for a price of N$19 354,56. The proceeds of the sale of this business were used in the farm. At that stage the Defendant was still employed on a fulltime basis whilst the Plaintiff was managing and running the Visions Hair Salon.

[19] The next business that was acquired by them was Black Diamond Clothing on 8 March 1999. Her attention was drawn to this after a client of hers informed her about the decision to sell the business. The Plaintiff thereafter told the Defendant that according to her it would be a very good business opportunity, because this business was one of only two clothing business in Oranjemundt. They then decided to buy this business. After they acquired the business the Plaintiff was responsible for the running and the managing thereof. In evidence she recognised certain documents as orders she placed for clothing they acquired for Black Diamond Clothing Store (Plaintiff Exhibit A1 page 54(1), 54(2), 54(3)). This business grew bigger and expanded. There was one other person who was employed in this business. At that stage the Plaintiff testified that she was still also responsible for the managing of Visions Hair Salon. The Plaintiff testified that she had to supervise and monitor the clothing business, by regularly visiting the business to see that everything was in order. She had to communicate with the suppliers. In this regard, she provided some documentary proof of how she did this (Plaintiff's bundle Exhibit A1 page 46). At the same time, she was also busy on the farm.

[20] During 1999 she became aware of a business property known as Penny Farthing that was on the market. She also informed the Defendant of this, and they discussed the viability of acquiring this property because they needed some space for their clothing business, Black Diamond, which they intended expanding. On 1 November 1999 they purchased the Penny Farthing property for an amount of N$255 000,00. They thereafter moved the Black Diamond clothing business to the Penny Farthing building. The rest of the Penny Farthing building was leased to a

business known as Biltong Bar as well as Telecom. This generated a further income for them.

[21] In April 1999 they acquired another business, a take-away business known as Amigo's. Amigo's was bought for N$75 000. This they acquired after a client of the Plaintiff, to whom this business belonged, informed her that they intended selling the business, because they wanted to move. According to the Plaintiff she went to have a look at the business. She observed cooling and freezing facilities that were in the backyard of the business which the Defendant could use to store his carcasses of livestock he sold from his farming business. Thereafter she discussed this business proposition with the Defendant and they decided to purchase this business. The Defendant informed her that she has to assume full responsibility for this business. This she did by managing it. She had to purchase all the stock and she had to attend to the problems of the employees.

[22] At that stage they became very busy. The Defendant, who was still working on a full time basis, suggested that Visions Hair Salon be sold. The business was sold in January 2000 for an amount of N$27 000. This decision was made in order for the Plaintiff to give more attention to Black Diamond Clothing, Penny Farthing, Amigo's Take-Aways and the farm.

[23] In 2000 the Defendant resigned from his position at the mine. At that stage the Take-Away business and Black Diamond Clothing were doing very well. In October 2000 they concluded an antenuptial contract and the Defendant asked the

Plaintiff to marry her, to which she agreed, to marry in December of that year, which ultimately did not occur because the Defendant continuously postponed it.

[24] In August 2001 they decided to purchase a house in Plattekloof in Cape Town. They bought the property as an investment. They wanted to rent out the property as a guest house. At that stage they came down from Namibia to Cape Town on numerous times to buy some stock for Black Diamond Clothing. During these times they used the property for accommodation.

[25] Although the house was registered in the Defendant's name, the Defendant said the house was hers. She also said the cars were also hers. The understanding was that the house was their common property, where they would retire together one day when older, so they could be near doctors for health reasons. She was also involved in the development and building to completion of the Plattekloof property, that was partially completed when they purchased it.

[26] In 2002 they bought another clothing shop, Ritz Clothing, in Rosh Pinah, a mining town near Oranjemundt. The Plaintiff was responsible for the layout, and the ordering of stock from suppliers for this shop, and she further assisted the Defendant with the pricing and tagging of the clothes sold there. She and the Defendant established this business together and were closely involved in setting it up.

[27] In April 2003 they sold Amigo's Take-Aways for N$124 000. These proceeds were also ploughed into the other businesses. In July 2004 they bought two shoe stores in Hermanus. These businesses were purchased for R450 000,00. The funds that were utilized to acquire these two stores were raised from money which accumulated over the years from the other businesses. It was decided that it would be to their advantage to move to the house they had in Plattekloof in order for them to control from there the shoe stores and all the other business, as well as the farm. The Plaintiff was thereafter requested by the Defendant to assist in setting up and taking over these businesses. She made notes about all the tasks she had to perform, which she kept (See Plaintiff bundle Exhibit A1 page 101, 102, 106). Once again she was involved in acquiring stock for these shops. He gave her instructions that she had to carry out. She also had to travel on her own from Oranjemundt to Hermanus to attend to the affairs of the two shoe stores on behalf of the Defendant.

[28] After they moved to Cape Town they stayed here in Plattekloof until 2007. They would travel between Cape Town and Oranjemundt on a monthly basis. As a result of their moving back to Cape Town, it was difficult for her as a citizen of South Africa to stay in Namibia, because she could only stay there for a period of three months at a time.

[29] Both the shoe stores in Hermanus were closed in June 2007. This decision was taken by both the Plaintiff and the Defendant. Before doing this, the Defendant sought the Plaintiff's advice. The reason for taking this decision was because they wanted to purchase another farm. At that stage they decided to move back to the

farm in Narudas-Suid. From there they would manage Black Diamond Clothing as well as Ritz Clothing in Rosh Pinah. The shoe stores in Hermanus were sold for R280 000,00 which included the stock. This money was paid into the bank account of the Defendant and was later used to expand their farming activities.

[30] By 2005 the farm as well as the Penny Farthing building were paid off. In order to extend the farming business they leased two other farms in 2007. As a result of this they decided to scale down their business interests and to concentrate more on farming. During this period, they still operated the two clothing stores and the Plaintiff was still involved in the management and day to day running thereof with the Defendant. On the Narudas-Suid farm she had her responsibilities as house wife and in addition to that she assisted the Defendant with office duties. At that stage the office from which they operated all their businesses was relocated to the farm. On the farm she also helped to assist the workers and dealt with other tasks that might have needed her attention.

[31] In March 2009 they again came back to Cape Town to check up on the property in Plattekloof. It was during this time, on 23 March 2009, when the Defendant told her that he was not interested in continuing their relationship anymore. On 25 March 2009 two days thereafter he packed his bags and told her that he was going back to Namibia. The Plaintiff testified that he asked her whether she was going with whereupon she answered that she could only stay in Namibia for 29 days and that he had to tell her when she would be returning to South Africa. He

did not answer, got into his vehicle and drove off. He never previously told her that he was leaving her; the issue was never discussed with her.

[32] The Plaintiff further testified that after a while she contacted him by telephone and he told her that he was not interested in her anymore and he had someone else in his life. When he told her this, she became hysterical and she became very sad. She pleaded with him to reconsider his decision. She told him that they had achieved a lot and they had acquired a lot of possessions. She testified that she told him that she had nothing but despite this, no provision was made for her.

[33] She further testified that at a later stage she contacted him again and told him that she wanted to go to him on the farm, but he told her she was not welcome. During this time, she stayed in the Plattekloof house and he told her that they should think about converting the house into a guest house. They also discussed the possibility of making the place available as a guest house for the 2010 soccer world cup in order for her to generate an income. During this period she was in constant contact with him regarding this issue. In a letter dated 3 June 2009 (Plaintiff bundle A2 page 2) she addressed among other things a salary that the Defendant had paid into her banking account, which he paid until February 2010. In this letter she also informed him about persons and businesses that wanted to contact him regarding payments that had to be made or arrangements that had to be made with regard to the businesses in Namibia. In this letter she also refers to everything that they had accumulated and built together through the years and states that she did not own anything and was totally dependent on him.

[34] For the period May - July 2009, February 2010 and 29 June 2009, she on a regular basis, on the instructions of the Defendant, made enquiries to various authorities, and sources on how to convert the Plattekloof house into a guest house for the 2010 World Cup. During this period she had regular contact with the Defendant to inform him about the progress and what she was required to do. During this time there was also regular telephone contact between her and the Defendant. According to the Plaintiff during this time the Defendant made regular payments towards the maintenance and upkeep of the Plattekloof property on her request.

[35] The Plaintiff testified that in a recorded telephone conversation dated 24 October 2009 the Defendant made the remark that …. "*Ons het die afgelope paar jaar 'n m…se klomp geld bymekaar gemaak*", to which she replied "*Daar is 'n klomp besittings bymekaar gemaak, eiendomme en goed Dries, wat ek niks van het, ek het nie eers 'n kar nie, ek het nie geld nie, ek het nie eers 'n heenkome as jy nie vir my toelaat om in die huis te woon nie, het ek mos nou net mooi niks.*"

[36] The Defendant, in a note to the Plaintiff dated 16 September 2007, explains what he expects from a wife (Exhibit A4 on page 16):

> "*om in die algemeen by my te staan met die besighede wanneer die tyd toelaat, of wanneer ek haar hulp benodig om 'n spesifieke taak gedoen te kry.*"

In the same note he states under paragraph 5:

> "*Nie ons besighede te benadeel nie deur onmoontlike druk op my te plaas nie (ek kan nie na 5 winkels, plase, huishoudings, tuine en kinders omsien en nog saam met Andries*[1] *vakansie hou nie*."

[37] The Plaintiff testified that when the Defendant referred to "*ons besighede*" it was the understanding that it was their businesses. It included the farm as well as the house in Plattekloof.

[38] At some stage in 2009 on the instructions of her erstwhile attorney Mr Pitman, the Plaintiff compiled a document (See Plaintiff's bundle Annexure A1 page 125) indicating all the assets they had acquired including the farm. This document also contained the value of the livestock on the farm. The value of the farm according to her was N$2 065 459,00. The price of the farm was determined according to its size. These valuations were given to her by people who had knowledge of the worth of such properties.

[39] During cross-examination, she conceded that she did not assist in calculating the wages of the farm workers but she assisted in handing them out to them. She further conceded that the Defendant was responsible for keeping the records of the cattle on the farm and for tending the cattle. She also conceded that the Defendant was responsible for keeping and attending to all the records of the farming business.

[1] The Defendant's son.

[40] According to her evidence they worked together and attended to the various duties on the farm which included assisting the workers with social problems and certain administrative tasks. She further testified that during the times when the Defendant was not present she had to supervise the farming activities. She further testified that she tended to all the household functions on the farm. In cross-examination she further conceded that she was not responsible for the management of the farm but would assist therein on the instructions of the Defendant.

[41] The Plaintiff further testified in cross-examination that even though there was an antenuptial contract which was concluded before their intended marriage, the Defendant assured her that she need not worry about it because he attended to her needs in his will. According to her understanding of what he told her, it was their businesses and everything would be for the benefit of both of them and not for his sole benefit.

[42] The Plaintiff further testified, when she was referred to a letter (Defendant's Exhibit B25) in cross-examination, that on 29 December 2000 she left the Defendant and did not want to proceed to marry him at that stage because he physically and verbally abused her at that stage. Although she did not want to get married to him, she did not break off the engagement when she addressed the letter dated 27 December 2000 to him. She never reported any of the assaults or physical abuse to the police because she did not want to place the Defendant in a bad light and she wanted to protect his reputation in the town of Oranjemundt where he was a well-

known person. She further stated she wanted to protect him because she felt pity towards him.

[43] She still had the engagement ring. She further testified that even though the Defendant abused her, she still wanted to be with him because she loved him very much and she wanted to spend the rest of her life with him. They had achieved a lot.

[44] She further testified that his references to "*ons goed*", and to their planning a life together, related to their businesses, the house and the cars. According to her it was not something he would have said to an ordinary worker, and with whom he had no plans to share a life together.

[45] She conceded that even though she did not always contribute financially towards the businesses, she contributed by physically managing, controlling and assisting in the businesses. She further testified that she was not aware that he sold his properties in Mossel Bay and De Kelders to raise the necessary capital to purchase the property in Plattekloof.

[46] She further testified that after she left the Defendant in November 2007, she only returned to him after he promised that he would not abuse her and that he would seek help for his behaviour towards her.

[47] She further testified that in or about 24 June 2010 the Defendant visited her in Cape Town to discuss the renting of the Plattekloof property with someone from a letting agency. It was during this time that the Defendant gave her instructions to investigate the possibility of renting out the house. She denied an allegation by the Defendant that the reason why she was instructed to investigate the possibility of renting out the Plattekloof property was not for the purposes of the business of a universal partnership but for her to earn an income.

[48] She further denied that she informed the Defendant towards the middle of March 2009 that she did not intend returning with him to Namibia. She denied that the Defendant told her that he would be taking over the management of all three farms as from May 2009.

[49] She further denied in cross-examination that the relationship was terminated on 22 March 2009. She testified that even though the Defendant informed her that he wanted to end the relationship, she thought it was once again a situation as happened in the past, where they would reconcile. She further testified that according to her, their relationship ended on 5 December 2009, when the Defendant married another woman. According to her understanding their business relationship never stopped. The Plaintiff testified that the Defendant told her before he got married to the other woman that should the relationship not work out, there would be a chance for them to reconcile.

[50] She further testified that an endowment policy of R21 000,00 had been paid out to her. During this time they had a relationship. She testified that a further endowment policy of R54 156,00 had also been paid out to her, which she invested. She transferred the money to her sister from when she borrowed money to cover her legal costs.

[51] She further testified that she lent an amount of R30 000,00 to her children. The Plaintiff further testified that during the last 5 years she has been unable to find a suitable job, because she does not have the necessary qualifications and she is not very young, being almost at retirement age.

[52] Defendant's Evidence

The Defendant testified that he met the Plaintiff on 30 April 1994 at a farmer's association function. About 3 to 4 months thereafter she contacted him and informed him that there was a Hair Salon that was for sale in Oranjemundt. She struggled to get accommodation in the area because Oranjemundt was a restricted area and not anyone could get access to the area. She requested him to assist her in acquiring the Hair Salon. He later found out from his cousin that the Plaintiff had already made inquiries about the Salon in June of that year. He then offered to help her and paid the purchase price of the Salon. The reason for this was because it was required by (Namdeb) De Beers that the salon be registered in his name because he was a resident of the area.

[53] On the 8 August 1994 the Plaintiff took up employment at the Salon. At that stage the Defendant was still in the employment of De Beers and earned a monthly salary package of approximately R30 000,00.

[54] The Plaintiff worked in the salon and earned a salary. After working there for more than a month the Salon began to be a profitable business. The Plaintiff indicated that she wanted an increase in her salary. He however indicated to her that she could buy a share in the business. The Defendant testified that he invested R16 000,00 in the business. The Plaintiff as a result of this offer invested R10 000,00 in the business. This made her a 50% shareholder and entitled her to a share in 50% of the profits.

[55] In 1996 they acquired a new hair salon named Visions. He assisted in setting up this salon and invested further capital therein. These two hair salons were in operation at the same time. The Plaintiff managed Visions, whilst one of the workers took care of Hairline. This continued until 1999 and the first salon, Hairlines, was eventually sold in 2000. The Plaintiff, right from the onset, earned a salary of R2 265,00 per month. There were other people who were also employed with the Plaintiff at Visions.

[56] In the meantime, during the period 1993 – 1994 the Defendant bought the farm from his father for R300 000,00. Due to the fact that he could not be promoted any further at his place of employment in Namibia, he later decided to concentrate on acquiring private businesses in Oranjemundt. It is for this reason that he first

purchased Black Diamond Clothing in March 1999 and a month thereafter he purchased Amigo's Take-Aways.

[57] Whilst this happened he remained in full time employment until the businesses got off the ground. During this time he found it extremely difficult to give attention to all the businesses as well as hold a permanent job. The Plaintiff's salon did not perform very well in this time and it barely managed to cover its expenses. During the five year period since she came from Karasburg, she invested an amount of R26 000, 00 which included the value of the stock of her Karasburg salon to acquire a share in the business. The business however did not perform very well; only on one occasion it managed to declare a profit. A dividend in the amount between of R2 000, 00 – R3 000, 00 was paid out to each of them. During the first five years of her being employed in Oranjemundt she earned an amount of R180 000,00 representing the accumulation of her salary over such period. His intention right from the beginning was to assist her in acquiring the salon in order to give her an opportunity to earn her own salary. During this five year period he only managed to retrieve the capital amount he had put into the business.

[58] In addition to the R180 000,00 she received, she also received free accommodation, meals plus the free use of the telephone. This all she received in return for an investment of R26 000,00 in the business. When the Defendant purchased the take-away restaurant in 1999 he proposed to the Plaintiff that she would earn a better income if she sold the salons and work in the take-away. As a result of this, her salary was increased from R2 265,00 to R4 000,00 per month.

Early in 2000 during his leave period he discovered a loss of R40 000,00 that was incurred in the take-away. It was at that stage that he decided to resign from his job in order to give attention to his businesses and the farm. In the first half of 2000 the salon was sold.

[59] The Plaintiff's principal task between 1999 to 2003 was to ensure that the supervisor and other workers fulfilled their daily duties in the take-away. All her attention was therefore concentrated on the take-away business. The Plaintiff since the end of 1995, at least once a year, sometimes twice a year, abandoned the salon and did the same when she was involved in the take-aways.

[60] On 31 March 2002 she resigned from Amigo's take-aways. The continued absence of the Plaintiff from the business created a problem for him especially during the busier times during the November – December period, since he also had to attend to the business in Rosh Pinah, Ritz Clothing. As a result of her continued and sporadic absence he had to sell Amigo Take-Aways to the Plaintiff's son in May 2003. The Plaintiff spent most of her time at the take-aways and was only involved in Black Diamond Clothing when she had to do some stocktaking. Black Diamond Clothing had a manageress. The Plaintiff did not spend much time at the other businesses.

[61] During October 2000 they concluded an antenuptial contract with the intention to get married in December of that same year. The Defendant further testified that he left it to the Plaintiff to make all the arrangements for the wedding as he was

extremely busy running the businesses. As he put it "*December had come and gone*", and the Plaintiff had never gave him any feedback about any of the wedding arrangements.

[62] On 26 December 2000 as a result of a break-in at the take-aways he went to Oranjemundt and when he returned to the farm on 28 December 2000 the Plaintiff had left. She left him a letter wherein she wished him well for the future. Whilst this shocked him he was also used to this kind of behaviour. She used to do this on a regular basis. During the times that she left him, especially during the December holidays when his son visited him, he found it very difficult to cope, especially when he had to tend to the domestic responsibilities in and around the house at the farm.

[63] The Defendant testified that the Plaintiff's contribution in Ritz Clothing in Rosh Pinah was very limited. Most of the time she was busy in the take-aways. He was the one who was responsible for the layout, the planning and the placing of stock in this shop. He further testified that after they sold Amigo's, they bought two shoe stores in Hermanus. These two businesses did not do too well. After an investigation, and because of the fact that these two businesses did not make any profit, he decided to close them down. During the time they went to Hermanus to evaluate these two businesses, the Plaintiff did not in any way assist him, instead she went to do some shopping in the Hermanus area.

[64] The Defendant further testified that towards the end of 2007 he was offered to lease two farms adjacent to his from his cousin. His cousin then offered to manage

the farms on his behalf. To lease such properties he utilized a portion of the loan that was granted to him by his mother during the period 2004 to 2005. This loan also assisted him in acquiring the stock for the shoe stores in Hermanus. When the two shoe stores were sold, the proceeds were used to acquire livestock for the farm. He further used another R180 000,00, that was meant for a student loan for his son, to buy some livestock for the farm. After the sale of the shoe stores in July 2007, he could spend more time in the farm in Namibia. During this time his office was also transferred to the farm. He however still came to Cape Town on a regular basis to purchase some stock for his businesses.

[65] The relationship between him and his cousin, who managed his farms for him, soured. The Defendant testified he had to spend some more time on the farms to supervise the operations. This continued until March 2009. During the period January – February 2009, his cousin then informed him that he was not able to manage the farms anymore. The Defendant testified that this meant that he had to manage the farm and he also had to see to its day-to-day running of the farms. Apart from this the Defendant testified he still had to see to the two businesses that were situated in Rosh Pinah and Oranjemundt.

[66] When in March 2009 he came to Cape Town, the Plaintiff was aware that he had to assume and take over the responsibilities on the farm. The Plaintiff around 16 or 17 March 2009 informed him that she would not be going back with him to Namibia. This she did without giving him any reasons for her decision except that her South African passport did not permit her to go to Namibia for a period of a year.

According to the Defendant, he and the Plaintiff agreed that they should end their relationship on 22 March 2009 when he told her that he did not want to continue with the relationship. There was no argument or unhappiness about it. On 25 March 2009 he went back to Namibia. Currently the clothing shop in Oranjemundt is barely in existence and the stock is old stock.

[67] When he uttered the words "*Ons het die afgelope paar jaar 'n m….. klomp geld bymekaar gemaak*", it was understood and quoted out of context by the Plaintiff. According to him they did not make a lot of money, because he incurred a lot of expenses. The farm was bought for R300 000,00. The livestock on the farm was purchased from the proceeds of the sale of the shoe stores. The capital value of the businesses increased, but there was no increase in the profits or proceeds. Penny Farthing was bought for about R225 000,00 and according to the municipal valuation it is now worth more than R1million. The increase in the value of the assets was as a result of the risks he took to acquire it.

[68] The Defendant testified that during the last six years while they were together, the Plaintiff gave particular attention to the household. It is for this reason he needed her. He needed her to look after his house and his household. He could not have given all his attention to his businesses if he also had to deal with the responsibilities of the household. He also said that he needed her to give attention to the household so that he could expand his businesses.

[69] He further testified that the loan that was granted to him by his mother of R500 000,00 has not yet been paid off, he was only able to pay the interest and not the capital. He further denied as stated in the amended Particulars of Claim that the relationship was terminated between 24 April and 7 May 2009. He denied that during August 2009 they endeavoured to restore their relationship as alleged in the Particulars of Claim. He further denied that a commercial partnership came into existence between them. There was no tacit universal partnership.

[70] He further testified that he did make arrangements with the Plaintiff regarding the renting out of the Plattekloof property after the termination of the relationship because he realised it would be very difficult to remove her from the house and he needed to generate funds as a matter of urgency. He also realised that the Plaintiff needed an income. That is why he created an opportunity for her to earn a salary should the house be rented out for holiday accommodation. She did not make use of this opportunity. He was also not satisfied that she stayed in the property because it would not have created a favourable impression if the house was rented out for holiday accommodation whilst someone was staying there.

[71] He further testified that he requested the Plaintiff on several occasions to vacate the property since 2009. The Plaintiff even knew before that he wanted to rent out the property and did not want her to stay in the house.

[72] Evaluation of Evidence

Before the issues as set out in the pleadings can be determined a proper evaluation of the evidence upon which the court has to make findings of fact and the law will now be dealt with.

[73] The Plaintiff gave a clear and detailed account of the relationship she had with the Defendant. Her evidence was supported and corroborated by various documents that she kept over the years. She gave a detailed account of how she became involved with the Defendant, how each and every business started and in what respects she contributed to each and every business.

[74] She came across as an honest and genuine person, who did not contribute to and assist the Defendant purely to gain financially, but because of her deep love, affection, admiration and loyalty she had for him. It was clear that it was never her intention when she entered into the relationship with the Defendant to gain financially from it. The impression that was created was that she was the submissive and caring partner who at all times acted in the Defendant's best interests.

[75] She also did not exaggerate or embellish the role she played in each of the businesses. She readily conceded that the Defendant also worked hard to build up these businesses. She also conceded that she played a limited role in the farming activities of the Defendant, where her role was confined to attending to the

household and to a lesser extent she also assisted with certain mundane tasks like attending to the problems of the workers and to tasks he requested her to perform.

[76] Her version that she was involved in the building up of the businesses which they acquired make sense because it is clear that between the period 1994 to 2000 the Defendant was in the full-time employment of Namdeb while she was busy working on a full time basis tending to the hairdressing salons, the two clothing stores, as well as the take-aways. This version is consistent with the probabilities. The fact that the Plaintiff's whole existence revolved around the Defendant and his businesses is evident and is undisputed.

[77] She performed these functions and tasks due to the intimate relationship they were involved in and for the benefit of their businesses, notwithstanding the abuse and lack of respect the Defendant had for her. This fact is clearly borne out by the evidence regarding the communications between them either in the form of the telephone calls, letters and sms's exchanged between them.

[78] The Defendant on the other hand tried to down play her involvement and the contribution the Plaintiff made to the businesses. After living with her for a period of 15 years he tried to diminish her role to that of an ordinary worker, and not as a person who made an equal contribution in their businesses, let alone as an equal partner.

[79] When it was pointed out to the Defendant that he gave credence to the allegation that they were involved in a universal partnership through the years when he stated in correspondence to her that … *"ons het 'n m….se klomp geld bymekaar gemaak oor die jare*", and when he frequently referred to "*ons goed*", he tried to explain this away by saying that such statements was taken out of context or misunderstood by the Plaintiff. However, the Plaintiff's position is strengthened by the Defendant's own evidence in court where he on more than one occasion referred to "*ons*" in relation to how they referred to the businesses. In his evidence-in-chief at page 450, line 10 – 15 he states the following:

> "*Nadat Amigo's Take Aways verkoop is, het **ons** die volgende besigheid wat **ons** – wat gekoop is, is twee skoen winkels hier in Hermanus*". On page 444 of his evidence-in-chief at line 5 – 15 he once again makes such a reference.

[80] His further evidence that the Plaintiff frequently absented herself from the businesses to such an extent that she did not make any meaningful contribution towards them, in my view, is an exaggeration and is disingenuous. I am of the view that such evidence constitutes an attempt to down play her role. According to her version she absented herself only on the occasions when he verbally and physically abused her. The Defendant conveniently tried to down play and mislead the court about this.

[81] In my view, the Defendant could not successfully counter these allegations, because the Plaintiff's allegations of such abuse is evident from the many phone calls between them during November 2004, on 24 October 2009 and 29 October 2009, in which he verbally abused her by using vile and vulgar language towards

her. This is an indication how he treated her with disrespect and disdain. The Plaintiff's version as to the reasons for why she absented herself is entirely plausible.

[82] The Defendant had difficulty in explaining why if he did not regard the Plaintiff as his business partner, in correspondence to third parties he referred to her as his business partner. This is illustrated in a letter he addressed to the Chairman of the Housing Committee CDM (Pty) Ltd regarding accommodation for the Plaintiff where he stated[2] … "*Mrs Cloete, my business partner in Hairline and friend shares the house with me*". In response to this he said that they were only business partners on paper.

[83] Similarly, he was unable to explain why in an application to First National Bank, in a document[3] entitled "*Declaration of Partnership*", to acquire banking facilities for the Visions Hair Salon, it was stated that he and the Plaintiff will be carrying on a "*business in co-partnership under the name and style of Visions*". His explanation why in the document he refers to them as partners was that he wanted to assist the Plaintiff financially. I find this explanation improbable. He further did not want to concede in the face of overwhelming evidence that the Plaintiff was the one who ran the day to day businesses of Visions, Black Diamond Clothing and Amigo's, whilst it was abundantly clear that he was in fulltime employment.

[2] Page 8 – Plaintiff Exhibit Bundle A1
[3] Plaintiff Bundle Exhibit A1 page 33.

[84] He once again tried to down play her role in setting up the shoe outlets in Hermanus[4], whilst there was overwhelming documentary evidence, which he could not dispute, that shows how she contributed to the establishment thereof. He once again stubbornly refused to concede the extent of her involvement.

[85] The Defendant in evidence testified that his monthly loan repayments of R4 200,00 on a R500 000,00 loan made to him by his mother constituted only interest and not capital payments. The Plaintiff testified that this loan was paid off after 10 years. This he denied, but could not explain why in a document he stated that the monthly payment of an amount of R4 200,00 to his mother constitutes an allowance and not his loan repayment. There is clearly no proof that, if the loan was still in existence, he is still paying it off. His evidence around this issue has to be viewed with great suspicion.

[86] The Defendant further argued that the fact that they signed an antenuptial contract before their intended marriage was proof showing that there was never an intention to form a universal partnership. Mr McClarty, on behalf of the Plaintiff, argued that this is of no significance, because the antenuptial contract can only have any validity or influence if there indeed was a valid marriage.

[87] The Defendant on more than one occasion said that he needed the Plaintiff to come back to him on the occasions that she had left him, so that he could focus on

[4] Plaintiff Exhibit A1 pg 101, 102, 106, 109 and 112 etc.

his businesses and farming activities. In making such a concession, he failed to appreciate that were it not for her contributions, he would not have been able to expand the businesses.

[88] On a conspectus of the evidence I find the version of the Plaintiff regarding the functions and the role she played in the businesses of the Defendant not only credible but overwhelmingly consistent with probabilities. The Defendant's version, on the other hand, I find that it not only lacks credibility, but is also highly improbable.

[89] Universal Partnership

The next question that needs to be considered is whether there was a universal partnership that existed between the Plaintiff and the Defendant. The legal principles applicable to a universal partnership were summarized by *Brand JA* in *BUTTERS v MNCORA 2012 (4) SA 1 (SCA)* at 5 [11] as follows:

> *"I now turn to the relevant legal principles. As rightly pointed out by June Sinclair (assisted by Jaqueline Heaton) The Law of Marriage vol 1 at 274, the general rule of our law is that cohabitation does not give rise to special legal consequences. More particularly, the supportive and protective measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period (see eg Volks NO v Robinson 2005 (5) BCLR 446 (CC)). Yet a cohabitee can invoke one or more of the remedies available in private law, provided, of course, that he or she can establish the requirements for that remedy. What the plaintiff sought to rely on in this case was a remedy derived from the law of partnership. Hence she had to establish that she and the defendant were not only living together as husband and wife, but that they were partners. As to the essential elements of a partnership, our courts have over the years accepted the formulation by Pothier (RJ Pothier A Treatise on the Law of Partnership (Tudor's Translation*

> *1.3.8)) as a correct statement of our law (see eg Bester v Van Niekerk1960 (2) SA 779 (A) at 783H – 784A; E Mühlmann v Mühlmann1981 (4) SA 632 (W) at 634C – F; Pezzutto v Dreyer1992 (3) SA 379 (A) at 390A – C). The three essentials are, firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts (see eg Bester v Van Niekerk supra at 784A)."*

See also *PONELAT v SCHREPFER 2012 (1) SA 206 (SCA)* at *para [24]*; *MCDONALD v YOUNG 2012 (3) SA 1 (SCA)*.

[90] In order for the court to conclude that a universal partnership existed between the parties the court has to find whether the Plaintiff has satisfied the three essential elements of a partnership as formulated by *Pothier* (R J Pothier A Treatise on the law of Partnership) to which *Brand JA* refers to in the *Butters* judgment. Firstly, each of the parties must bring something into the partnership or must bind themselves to bring something into it, whether it be money, or labour, or skill. Secondly, the partnership business should be carried on for the joint benefit of both parties. Thirdly, the object of such partnership should be to make a profit.

[91] Regarding the first element, it is clear that both the Plaintiff as well as the Defendant brought something into the partnership. The Plaintiff used some of her money to invest in the businesses, and put in a lot of hard work into the businesses. She also used her skills to make the businesses a success. She also sought out the business opportunities for the partnership, an example being when she made

enquiries about a further hair salon that was for sale. Furthermore, she brought to the attention of her partner the opportunities to purchase the businesses of Black Diamond, Penny Farthing and Amigo's, and she advised him of the good business sense in doing so. She encouraged the Defendant to buy his father's farm and also encouraged him to lease the two further farms adjacent to their farm. She was not a passive bystander who left it only to the Defendant to seek out business opportunities.

[92] She was further instrumental in assisting with the design and completion of the Plattekloof property. She even continued to investigate the possibility of using the Plattekloof property to generate an income for herself and the universal partnership after the Defendant left her. This she did enthusiastically under the supervision of and with the approval of the Defendant during the period May – July 2009, and from February 2010 to June 2010, when she made enquiries and tried to convert the Plattekloof property into a guest house for the 2010 World Cup.

[93] I have already accepted the Plaintiff's version above that of the Defendant in regard to the hard work and effort she invested in not only establishing the businesses but also in sustaining them, especially whilst the Defendant was still in full-time employment.

[94] Regarding the second element, I am satisfied that the partnership business was carried on for the joint benefit of both the Plaintiff and the Defendant. As a result of their partnership they managed to acquire many assets during the

subsistence thereof. The Defendant was not able to show that the Plaintiff did not make any contribution to any of the assets they acquired during the period in which they were involved in their intimate relationship and which they may still currently own. It is clear that their assets accumulated during the period of their relationship. The Defendant when he at that stage said that "*ons het die afgelope jare 'n m…. klomp geld bymekaar gemaak*", implicitly acknowledged their status as partners, is later explanation that these words were not meant to be literally construed as such, is highly unlikely, when he referred to the assets which they accumulated as "*ons goed*". The Plaintiff's evidence was that the proceeds of the business were used to acquire further business or assets.

[95] Regarding the third element it is clear that the Plaintiff and Defendant initially started off by buying a hairdressing salon in 1994. From there, their businesses showed a steady growth. The Penny Farthing building for example was acquired for an amount of R225 000,00. The value thereof is currently N$1 282 800,00. The farm was bought for N$300 000,00. The value currently is N$2 891 000,00. When the Hermanus shoe outlets did not make any profit they decided to sell them. It is therefore clear from this evidence that the further object of their partnership was to make a profit. In the *Butters* matter (*supra*) where the Plaintiff's contribution was restricted to maintaining the common home and raising her and her partner's children, the SCA confirmed the determination of the Plaintiff's share in the universal partnership as 30%. In this particular case, the parties had been living together in an intimate relationship of 15 years. The Plaintiff's role in the formation, expansion and subsistence of the partnership was far more than that of just a passive partner who merely kept a home for the Defendant in order to create the opportunity for him to

give his undivided attention to the various businesses. Although the Plaintiff also played such a role, she made a direct and integral contribution to each of the businesses they established. The businesses would not have gotten off the ground and the Plaintiff and the Defendant would not have acquired all these assets had it not been for her direct involvement. This was especially so during the time when the Defendant was in full time employment.

[96] In each and every one of the businesses her skills and energy are inextricably linked. This also applies to the house in Plattekloof, and is borne out by the role and contribution she played in maintaining their common home. During the time she worked in the businesses all her time and energy was focused on promoting the interests of both the parties. It was from this time that the universal partnership came into existence. The Defendant referred to the property they acquired and the businesses as "*ons goed*" (our property), and "*ons besighede*". As said earlier, the Defendant's argument, that his references to their property and business in this manner, should not have been taken literally such that they be understood as his giving credence to the existence of a universal partnership, is implausible. In the light of the relationship they were involved in, and the Plaintiff's inextricable involvement in each of their businesses, the only conclusion that one could come to is that a universal partnership had come into existence.

[97] Even on the Defendant's own version he needed the Plaintiff to be with him because he wanted her to maintain their common home so that he could concentrate on running the farm and the other businesses. Even if one should accept on his

version that the Plaintiff's contribution to the commercial undertaking was insignificant, it does not necessarily mean that no universal partnership came into effect. In this regard, *Brand JA* held at para [19] of *Butters* 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. The point is well illustrated, I think, by the very facts of this case. It can be accepted that the plaintiff's contribution to the commercial undertaking conducted by the defendant was insignificant. Yet she spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children. On the premise that the partnership enterprise between them could notionally include both the commercial undertaking and the non-profit making part of their family life, for which the plaintiff took responsibility, her contribution to that notional partnership enterprise can hardly be denied."*

In this case, however, on the version that I accepted of the Plaintiff, the role the Plaintiff played in the commercial enterprise or business of the partnership cannot be regarded as insignificant.

[98] Her partnership role cannot be limited to that of a housewife who tended to the maintenance of the home. When she played this role it was to assist the Defendant in executing the commercial undertaking of the partnership. This contribution she made was in addition to the indispensible contribution she made to the businesses where she contributed her skills, energies, time, capital and income to promote the interests of the universal partnership. She further contributed her administrative skills and know-how for the promotion of the businesses. She further

contributed to the financial growth of the businesses. As a result of this, they acquired the following assets:

1) A hair salon in Oranjemundt, Hairline Unisex (August 1994);

2) The farm, Narudas-Suid (8 December 1994);

3) The hair salon in Oranjemundt, 'Good Looks', which changed its name to 'Visions Hair Studio' in February 1996;

4) In March 1999, a clothing store in Oranjemundt, 'Black Diamond Clothing';

5) In April 1999 a take-away business in Oranjemundt, 'Amigos Take-Aways';

6) In November 1999 a commercial building in Oranjemundt, namely 'Penny Farthing';

7) In April 2001, the 'Ritz Clothing' store in Rosh Pina;

8) In August 2001, the residential property at 8 Silverboom Avenue, Plattekloof 3, Western Cape and furniture;

9) In June 2004, the two footwear stores in Hermanus together with stock and equipment;

10) In June 2005, a flatlet was built onto the premises of Penny Farthing in Oranjemundt;

11) Livestock on the farm Narudas-Suid as well as farms rented by the Defendant;

12) Motor vehicles;

13) Certain insurance policies.

[99] In the *Ponelat* case *(supra) Meer AJA* at para [20] followed the approached adopted in *Mühlmann v Mühlmann 1984 (3) SA 102* where she held:

"In E Mühlmann v Mühlmann1984 (3) SA 102 (A) at 124C – D the approach as to whether a tacit agreement can be held to have been concluded was said to be, 'whether it was more probable than not that a tacit agreement had been reached'. It was also stated that a court must be careful to ensure that there is 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. See *Mühlmann v Mühlmann, supra, at 123H – I; Muhlmann v Muhlmann1981 (4) SA 632 (W) at 634F – H."*

[100] Given the relationship they were involved in and the Plaintiff's relationship and involvement in each of their businesses, the only conclusion that one could come to is that a universal partnership came into existence. Such partnership came into existence as from February 1994, and continued up to and until June 2010. The question of the termination of the universal partnership will be discussed below under the issue of Prescription.

I am therefore convinced that the Plaintiff discharged her onus to prove the existence of a universal partnership in which they agreed to put in common all their property present and future.

[101] <u>The Value of the Universal Partnership</u>

As stated earlier during a pre-trial conference held between the parties on 16 September 2013[5], the parties in terms of Rule 33(8) agreed that the merits and the quantum in respect of the counter claim would be separated, unless the parties could agree on the quantum of the counter claim before the trial. This had as a

[5] Page 63 paragraph 7.1, 7.2 of Pleadings Bundle.

consequence that all the claims of the Plaintiff would be adjudicated conjunctively together with the counterclaim of the Defendant except the quantum in respect of the counterclaim.

As a result of this, the parties' approach has resulted in the unusual situation where the partnership together with the debatement or settlement of accounts claim was to be adjudicated conjunctively.

In *Doyle and Another v Fleet Motors PE (Pty) Ltd 1971 (3) SA 760 (A)*, *Holmes JA* at 762F – 763D made the following general observations regarding the procedure which would be applicable with respect to a claim for the delivery of an account the debatement thereof, and the payment of monies owed in terms of such an account.

> *" '1. The plaintiff should aver -*
>
> *(a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;*
>
> *(b) any contractual terms or circumstances having a bearing on the account*
> *sought;*
>
> *(c) the defendant's failure to render an account.*
>
> *2. On proof of the foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account.*
>
> *3. The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach it for further directions if need*

be. Ordinarily the parties should first debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues. These could be set down for debate in Court. Judgment would be according to the Court's finding on the facts.

4. The Court may, with the consent of both parties, refer the debate to a referee in terms of s 19bis(1)(b) of the Supreme Court Act 59 of 1959.

5. If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account.

6. Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any).

7. In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require."

Such a procedure was also followed in *Dale Street Congregational Church v Hendrickse en 'n Ander 1992 (1) SA 133 (E)* where it was held in the headnote that:

"An order of court for the delivery of an account is not a prerequisite for the debatement of the account. Even if it is accepted that 'debate' of an account 'is . . . ancillary to rendering an account', it is a non sequitur to contend on the basis of this assumption that an order of court for the delivery of an account is a prerequisite for the debatement thereof.

A plaintiff is, in an appropriate case, entitled to insist on his claims for the delivery of an account and the debate thereof being heard simultaneously provided he can establish a prima facie case for the relief sought."

In this particular case, accept for the value of the livestock, the Defendant accepted the valuations of the assets based on that which was proven by the Plaintiff as well

as the valuation of those assets contained in a document discovered by the Defendant as exhibit “CSVH3” (Plaintiff exhibit bundle A1 page 148).

It was proven that the assets of the universal partnership are the following:

The Farm Narudas-Suid		N$ 2 891 000,00
Boerbok rams 30 @ N$1300		N$ 39 000,00
Bok ewes 650 @ N$1000		N$ 650 000,00
Dorper rams 75 @ N$750		N$ 56 250,00
Dorper ewes 1500 @N$700		N$ 1 050 000,00
Dorper lambs 1500 @ N$400		N$ 600 000,00
Bok lambs 1500 @ N$550		N$ 825 000,00
Cattle 45 @ 456x12 per kilo		N$ 246 240,00
N$5 472,00		
Motor vehicles		N$ 500 000,00
Pennyfarthing building		N$1 282 800,00
Black Diamond/Ritz		
Clothing:		
Stock	N$200 000	
Fittings	N$ 75 000,00	
Plattekloof Property		N$ 2 950 000,00
Furniture		N$ 85 000,00
Policies		N$ 1 601 626,00

N$ 13 740 916,00

Liabilities:

Due to the bank: N$ 129 656,00

Mortgage bond on N$ 778 963,00

Plattekloof property:

[102] As stated above, in respect of the value of the above assets, the Defendant only disputed the value of the livestock as an asset that he had on the farm. The Plaintiff by means of evidence of persons who are from the area where the Defendant conducts his farming activities, presented certain figures to prove the value of the livestock the Defendant had at his farm. The Defendant, despite persistent requests to discover and to assist the Plaintiff in determining these values, was reluctant and declined to do so. He persisted with this despite him agreeing during Rule 37[6] pre-trial proceedings that in order for him to render a full account which indicated all documents and statements relating to the assets of the business of the partnership he had to make a full disclosure thereof.

[103] Due to the fact that the parties have lived as husband and wife for a period of 15 years and have accrued valuable assets over the years, it would not be wrong to follow the principles and guidelines laid down by the courts in dealing with the division of marital property. In *MGB v DEB [2013] 4 ALL SA 99 (KZD)* the court remarked at [39]: "*In my view litigation is not a game where parties are able to play their cards close to their chest in order to obtain a technical advantage to the*

[6] Pleadings bundle – Record page 63 para 7.1 read with page 11 Particulars of Claim.

prejudice of the other party. This is even more so in matrimonial matters where the lives of the parties have been inextricably bound together and as in this case, the efforts of both parties made a significant contribution to the Defendant's estate".

[104] In my view therefore the values as presented as evidence by the Plaintiff about the livestock on the farm is accepted as correct and will be accepted in determining the value of the assets of the universal partnership.

[105] <u>The Special Plea of Prescription of the claim based on Universal Partnership</u>

Mr McClarty argued that there is no merit in the defence that the plea of the Plaintiff had prescribed, even if the court should accept that the intimate relationship between the parties had been terminated before 16 August 2009, being a date 3 years prior to the amendment of the Summons incorporating the claim based on universal partnership. He argued that there is enough evidence to suggest that the universal partnership which came into existence as a result of this intimate relationship continued to exist after 16 August 2009. He said the strongest evidence to indicate this state of affairs was that the Plaintiff continued to receive payment in salary each and every month until March 2010 from the universal partnership.[7] He further argued that on the Defendant's own evidence the parties were still engaged in partnership business regarding the letting out of the Plattekloof property in June 2010 for the purposes of the Plaintiff receiving an income and the balance of the

[7] This is indicated in a bank statement of the Plaintiff Exh A5 page 21.

rental income being paid to the partnership. In this regard he referred to enquiries the Plaintiff made to letting agencies.[8]

[106] To further illustrate this point Mr McClarty also referred to a transcript of a telephone conversation between the parties dated 24 October 2009 where they discussed the plans to rent out the Plattekloof property as a guest house or overnight club for the 2010 Soccer World Cup.[9] He also referred to evidence where the Plaintiff made enquiries in regard to the requisite municipal authority to run a business of a guest house from the Plattekloof property. According to him the universal partnership claim was served on 16 August 2012 in an amended Particulars of Claim. He therefore argued that in the circumstances, a period of three years had not lapsed by the time the universal partnership claim was served on the Defendant.

[107] In reply to this the Defendant in his heads of argument, does not deal directly with the arguments of the Plaintiff as to why the claim has not prescribed. The Defendant argued that according to him, the relationship between them was terminated on 22 March 2009. He further argued that after he left for Namibia on 25 March 2009 that there was barely any contract between them except when he responded to requests from the Plaintiff to advance funds for the maintenance of the house, electrical, garden services and the payment of her salary.

[8] Pages 95 and 120 – Exh A2.
[9] Exh A3 page 29 and page 30.

[108] He further denied an assertion of the Plaintiff in her initial Particulars of Claim that their romantic relationship was terminated on 24 April and/or 7 May 2009. As pointed out by Mr McClarty, the Defendant however did not either in his evidence or argument deal with the facts based on the evidence that the universal partnership was still in existence after the termination of the relationship due to the fact that she still continued receiving payment from the universal partnership until 5 March 2010, and that on the instructions of the Defendant they were still engaged in partnership business regarding the letting out of the Plattekloof property in June 2010, for the purposes of the Plaintiff receiving an income of which the balance of the rental income would be paid to the partnership.

[109] On the undisputed facts therefore I agree with Mr McClarty, that the universal partnership claim had not prescribed. The evidence clearly indicates that for the periods May 2009, June 2009, July 2009, February 2010 and June 2010 the Plaintiff was engaged in partnership business regarding the letting out of the Plattekloof property. This was in addition to the salary she was paid until March 2010. The Plattekloof property was acquired whilst they were still in a relationship and was acquired due to their collective efforts as business partners in the universal partnership. The purpose of the further business she conducted was for the benefit of the universal partnership.

[110] The above is a clear indication that even though the romantic relationship had ceased to exist on the Defendant's version on or during March 2009, the universal partnership continued to exist at least until June 2010. As such, when the claim

relating to the universal partnership was made on 16 August 2012, the claim had not yet prescribed.

[111] The Plaintiff's Claim for Damages based on the *actio iniuriarum*

I will accept on the Defendant's version that the engagement was broken off on or during 22 March 2009.

In *Van Jaarsveld v Bridges 2010 (4) SA 558 (SCA) Harms DP* at 561 at *para [4]* held that:

> *"A breach of promise may give rise to two distinct causes of action. The one is the actio iniuriarum. The 'innocent' party is entitled to sentimental damages if the repudiation was contumelious. This requires that the 'guilty' party, in putting an end to the engagement, acted wrongfully in the delictual sense and animo iniuriandi. It does not matter in this regard whether or not the repudiation was justified. What does matter is the manner in which the engagement was brought to an end. The fact that the feelings of the 'innocent' party were hurt or that she or he felt slighted or jilted is not enough. I shall revert to this issue."*

Harms DP furthermore held at *para [19]*:

> *"A breach of promise can only lead to sentimental damages if the breach was wrongful in the delictual sense. This means that the fact that the breach of contract itself was wrongful and without just cause does not mean that it was wrongful in the delictual sense, ie that it was injurious. Logically one should commence by enquiring whether there has been a wrongful overt act. A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature. In determining whether or not the act*

complained of is wrongful the court applies the criterion of reasonableness. This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society. To address words to another which might wound the self-esteem of the addressee, but which are not, objectively determined, insulting (and therefore wrongful), cannot give rise to an action for injuria. Importantly, the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby."

[112] The act of repudiation in this particular case must be viewed in the light of the totality of the facts and circumstances of this matter, especially the conduct of the Defendant preceding the repudiation of the agreement to marry, and the expectation created by the Defendant, and the Plaintiff's desire, notwithstanding this conduct to fulfil her obligations in terms of the agreement to get married. This repudiation should be viewed against the history and background of the relationship that existed between the parties. The Plaintiff was 43 years old[10] when she and the Defendant became involved with each other in 1994. They became engaged to one another in February of 1999, at which stage the Plaintiff was 48 years of age. She was about 58 years of age when the engagement was broken off. She was therefore engaged to the Defendant for a period of 10 years. During all this time he promised to marry her. She started to make plans for the wedding and the parties even went ahead to enter into an antenuptial contract on 17 October 2000. As a result of this she was instructed by the Defendant to proceed with the wedding arrangements. The wedding was to have taken place in December 2000. According to the Plaintiff's evidence, which I accept, the Defendant provided various excuses as to why they should not get married. The Defendant's version was, as he put it, "*December came and went and nothing happened*". What I find strange about his version is that if the

[10] Plaintiff was 62 years old at the time of her giving evidence.

Plaintiff was the hold-up, why did he not enquire from her, when the wedding approached, why there was no progress in the wedding preparations? The objective and undisputed evidence was that there was at all times a burning desire on the part of the Plaintiff to get married. Throughout the duration of their relationship the Defendant created the expectation that he would marry the Plaintiff, but this never materialized.

[113] It is evident from correspondence between the Plaintiff and the Defendant (Exhibit A4 Plaintiff's bundle), as referred to earlier, that the Plaintiff loved the Defendant notwithstanding the humiliation and degrading treatment she suffered at the hands of the Defendant. This was characterized by extreme verbal abuse and physical abuse. Notwithstanding the infringement of her dignity and self-respect, she still loved him and wanted to get married to him right until the end. On the night the Defendant broke off the engagement, the Plaintiff became hysterical and even went on her knees to beg him not to do so. She also felt betrayed when she found out that after all the years that he had left her for another woman. Even after their relationship broke down she still made attempts with him to reconcile.

[114] In applying the objective test in determining whether the act of repudiation was wrongful, the conduct of the Defendant, given the circumstances of the case, cannot be regarded as reasonable if tested against the prevailing norms of society. In my view, the conduct of the Defendant viewed objectively is sufficient to sustain an action for *iniuria*.

[115] Mr McClarty argued that in the *Butters* decision an award for damages for breach of promise was made in the amount of R25 000,00 and that the court in this case should award a similar amount. Although the facts and circumstances of this particular case are not similar to those of the *Butters* case, there is no reason for me not to make a similar award, particularly where the Plaintiff seems to be satisfied with such an amount.

[116] The Defendant's Claim in Reconvention

This claim in my view is unsustainable and cannot be upheld for the following reasons. In my view, having regard to the totality of the evidence, and in particular in the light of the Defendant's and the Plaintiff's repeated references to the partnership property as "*ons goed*", even though the house was registered in the Defendant's name, this type of partnership can be characterized as a *societas universum bonorum*, by which the parties agreed that all their possessions and everything which they in future collectively or individually acquired from whatever source should be considered to be partnership property. The Plaintiff, being a partner who is entitled to enjoy the benefits of the partnership property, is entitled to free and undisturbed access to such property. See *LAWSA* paragraph 294 *Henning and Delport*. See also *Sepheri v Scanlan 2008 (1) SA 322(C)* at *337J – 338A – D*.

[117] There is no evidence and the Defendant also did not contend, that the Plaintiff's occupation was for her exclusive use and to the exclusion of the rights of the defendant in the property. On the contrary, the evidence tends to suggest

otherwise. There is no basis upon which it is alleged that, from April 2009, the Plaintiff unlawfully occupied the said property. There was no formal request to Plaintiff to vacate the property. The only evidence that would remotely suggest that the Defendant may have not been satisfied with the Plaintiff's occupation of the property, was to the extent that he alleged that it would have been undesirable for her also to stay on the property should guests be accommodated there. To this, she answered that she needed a place to stay and that it would have been in the interest of her running the property as a business for her to remain there. This however does not amount to unlawful occupation on the property on her part.

[118] According to the evidence the Plaintiff's continued presence on the property was to ensure that it was properly maintained and for the benefit of the universal partnership. The Defendant on a regular basis advanced some funds to her to pay for the maintenance of the property. He also supported and encouraged her to enquire from the relevant authorities how best to utilize the property for the purposes of providing accommodation for the 2010 Soccer World Cup. All these facts tend to suggest that he only made this claim when she became involved in litigation. As a result of this, this claim is dismissed.

[119] Calculation of 50% Share

According to the evidence the Plaintiff has shown that the universal partnership assets amount to N$13740 916,00. The liabilities include an outstanding amount

owed to the bank of N$129 656,00 plus the mortgage bond on the Plattekloof property of N$ 778 963.

[120] Mr McClarty argued that although the Defendant's evidence regarding the loan of N$ 500 000,00 is suspicious, the court should give the Defendant the benefit of the doubt and hold that such loan is still outstanding and reduce the Plaintiff's share by an amount of N$250 000,00. He argued that the 50% share that the Plaintiff would be entitled to would be N$6 166 488,50 or its rand equivalent.

[121] He further requested that the court should issue an order declaring that failing payment of the amounts of N$6 166 488,50 and R25 000,00 within 30 calendar days of this order, the property known as 8 Silverboom Avenue, Plattekloof 3, Cape Town should be attached in order to find and confirm jurisdiction and to be declared executable for it to be sold in execution of the judgment. I agree with his contention.

[122] In the result therefore I make the following order:

1) The Special Plea of prescription is dismissed;

2) That the Defendant pay the Plaintiff the sum of N$6 166 488,50 which constitutes a 50% share in the universal partnership;

3) That the Defendant pay the Plaintiff the sum of R25 000,00 for the contumacious breach of promise;

4) Cost of suit.

5) It is ordered that failing payment of the amounts in 2 and 3 above, within 30 calendar days of this order, the property known as 8 Silverboom Avenue, Plattekloof 3, Cape Town be attached in order to find and confirm jurisdiction and further that this property is declared executable to be sold in in execution of the judgment debt;

6) The counterclaim of the Defendant is dismissed with costs.

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HENNEY, J

Judge of the High Court