THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6572/2013

Before the Hon. Mr Justice Bozalek

Hearing: 18, 19, 21 September and 11 October 2018
Delivered: 8 February 2019

In the matter between:

M M ***Plaintiff***

and

M M ***Defendant***

JUDGMENT

BOZALEK J

[1] This is an action in which the plaintiff sues the defendant, her former husband under both civil and Muslim law, for a declaratory order that a universal partnership existed between the parties between late 1990 and August 2012 with each party having a

50% interest in the partnership. Ancillary relief was sought terminating the partnership and establishing a mechanism to divide the assets equally between the parties. In the alternative, the plaintiff laid claim to a one half undivided share in a residential property in which the parties lived during the period in question.

[2] In regard to the main claim, the plaintiff sought specific relief in relation to the residential property, a shop business which was conducted from that property, the defendant's pension interest and any cash on hand. Essentially, the plaintiff sought an order requiring the defendant to purchase her share in all these assets and, failing him doing so, directing that such assets be liquidated by a receiver in order to divide the proceeds between the parties.

[3] In regard to the alternative relief, the plaintiff similarly sought an order that the defendant purchase her claimed share in the property at its prevailing market value and, failing that, an order that the property be sold, if needs be at the instance of a receiver, and the proceeds divided.

Common cause facts

[4] The following facts were common cause:

1. The parties concluded a civil marriage in community of property on 21 March 1986;
2. On 23 March 1986 they also concluded a Muslim marriage;
3. During 1989 the parties jointly purchased a residential property, Erf […] Gaylee situated at […] Road, Dennemere, Blackheath in the Western Cape ('the property');
4. On 2 March 1989 the property was registered in both their names and was initially bonded to Saambou Bank in an amount of approximately R40 000;
5. During 1990 the defendant instituted civil divorce proceedings against the plaintiff pursuant to which a consent paper was signed by both parties on 7 April 1990;

6. The civil marriage was terminated by decree of divorce, incorporating the terms of the consent paper, on 15 May 1990;

7. Around May 1990 the plaintiff left the common home (the property) but returned in November/December of the same year. The parties then lived together on the property as husband and wife until their relationship finally came to an end 22 years later in August 2012, when the plaintiff again left the common home;

8. The parties never remarried civilly;

9. On 17 September 2012 the Muslim marriage entered into by the parties in 1986 was terminated by way of Talaq, at the instance of the defendant;

10. Prior to her marriage to the defendant the plaintiff bore, by another man, a son named R;

11. In addition a son, N, was born to the parties in approximately 1987; and

12. In terms of clause 3 of the consent paper the parties agreed that the property would become exclusively that of the defendant who undertook to pay the plaintiff an amount of R600 in monthly instalments of R50 in respect of her half share in the property.

The plaintiff's case

[5] The plaintiff's case was based on the primary allegation that when the parties reconciled in late 1990 they agreed to henceforth live together as husband and wife as if they were still married in community of property. As a result, the plaintiff's claim continues, the parties expressly or tacitly or by implication concluded a universal partnership in terms whereof both parties abandoned the rights granted to them in terms of the deed of settlement, undertook to invest their *'assets, investments and future income'* in the partnership to the benefit of both parties who would each have a 50% share in the partnership and further agreed that at the termination of the partnership all assets, investments and income would be divided equally between them.

The defendant's case

[6] The defendant denied the existence of a universal partnership between himself and the plaintiff. He pleaded that he had discharged his obligations in relation to the property

in accordance with the consent paper by paying the full amount of R600 to the plaintiff. With regard to the fact that the parties remained married in accordance with Islamic law after their civil divorce, the defendant pleaded that the proprietary consequences of their living together as man and wife were regulated by their Islamic marriage. In terms thereof there was no community of property nor a universal partnership. The defendant also filed a claim in reconvention pleading that he had discharged his obligation to the plaintiff in terms of the consent paper in regard to the property with the result that he had become the sole and exclusive owner. He sought an order that the plaintiff sign all documents necessary to transfer her share in the property into his name, failing which that the sheriff be authorised to take such steps or sign such documents necessary to transfer the plaintiff's share in the property to the defendant.

The issues

[7] The plaintiff was represented by counsel whilst the defendant was unrepresented and conducted his own case. The only evidence heard was that of the plaintiff and the defendant. I proceed to summarise the salient aspects of the evidence given by the parties against the background of the issues which are:

1. Whether a universal partnership subsisted during the period November/December 1990 to August 2012 whilst the parties lived together on the property as husband and wife;

2. If so, whether that universal partnership encompassed all of the parties' assets, investments and entitlements;

3. If no universal partnership was formed, whether the parties ever abandoned their rights in terms of the consent paper to the property with the result that the plaintiff remained the legitimate owner of a one half undivided share in such property.

The evidence

The plaintiff

[8] The plaintiff testified that she met the defendant in 1984 and that they were engaged for just over a year before marrying in March 1986. At that stage the plaintiff was 20 years of age and the defendant was 26. They first lived with the plaintiff's mother. In approximately 1988, they viewed a number of properties and eventually jointly purchased the (Dennemere) property through the Garden City company, an incorporated association not for gain which provided housing loans to less privileged persons, for R41 390 with a bond to the value of R40 000 being registered over it. The property was registered in the names of both parties. The plaintiff testified that both of them paid towards the house since both were working. The bond instalments were met through a deduction from the defendant's account but the plaintiff would contribute her salary to the defendant in accordance with the convention that a Muslim husband is the head of the household. The defendant accordingly administered their joint finances and applied them towards their common household expenses. The plaintiff testified that the bond was first held with Saambou and thereafter with FNB.

[9] A bundle of documents was handed up by agreement. One document indicates that there was a joint bond account number in the names of the plaintiff and the defendant.

[10] The plaintiff testified that soon after acquiring the property she began to run a shop from it, initially selling crisps and sweets through a window. When she and the defendant saw that the business was going well, it expanded and he began doing the purchases for the business as it grew. The business was then moved from the house into

the garage on the property, which was converted into a house shop. At that stage the parties were still both employed and the shop would be opened in the afternoon and run by a schoolgirl until the plaintiff or the defendant returned home. Around 2002, the plaintiff resigned from her full-time employment in order to devote herself entirely to the shop. Her hours in it were from 7 in the morning until 5 at night, seven days a week. When the defendant returned home from work at about 5 o'clock he would take over the running of the shop and the plaintiff would then attend to all the household chores and prepare supper. The plaintiff testified that she did all the work in the house, including caring for their child, and employed no help. The income of the shop was used to pay for further stock, for their common household expenses and for their personal expenses. The takings of the shop fell under the defendant's control since he cashed up. Whatever the plaintiff needed to purchase she did so from money which the defendant gave her out of the shop's takings. These takings were used to cover expenses relating to their son, groceries, electricity, furniture purchases from OK Bazaars and contributions towards the Muslim school and Mosque; in short all the household's monthly expenses. The cash takings were never paid into a banking account, the cash being simply used.

[11] In support of her version, the plaintiff handed up copies of monthly budgets which were prepared and used during the course of the relationship. These budgets were in the defendant's handwriting and reflect the amounts which were to be paid to various instances or creditors, for water and rates, electricity, M-Net each month and the R600 to R750 monthly instalment to Saambou Building Society in respect of the bond repayments. The plaintiff had made copies of all these documents before she finally parted from the defendant in 2012. She had found them in a file or briefcase of the defendant. Apart from the bond instalments which were paid by debits from the

defendant's bank account, all the other expenses were paid for in cash from the shop's takings.

The parties divorce

[12] During 1990 the defendant had caused a divorce summons to be served upon the plaintiff. The sheriff had explained to her that she should defend the action or run the risk of losing her son and everything else. However, the defendant took the papers from her and said that he would sort the matter out so she took no further steps. Not long thereafter the defendant returned home one evening and handed her a copy of a divorce order telling her that they were now divorced. The plaintiff had then become very emotional and asked the defendant how he could have done that to her i.e. tricked her. His reply was dismissive. She identified in the bundle the consent paper which was concluded between the parties and made an order of court. It provided for the defendant to obtain custody and control of their minor child subject only to the plaintiff's right of reasonable access. As far as the proprietary consequences of the marriage were concerned, it provided that whatever they purchased from their own income during the marriage would remain theirs, that the defendant would purchase the plaintiff's half share in the property for the amount of R600 payable in monthly instalments of R50 and that no maintenance would be payable to the plaintiff. In other words, the consent paper was completely tilted in favour of the defendant.

[13] The agreement reveals that it was signed at Kuilsriver on 7 April 1990 and the final order indicates that the divorce order was granted on 15 May of that year. The plaintiff testified that she had signed the agreement without reading or appreciating its consequences. The defendant had approached her with a document and told her she

should accompany him to the police station and sign it and that it had to do with a claim that they had against Saambou relating to the bond. She had not read the document before signing it since she trusted the defendant. The plaintiff denied ever consenting to sell or transfer her half share property to the defendant, or to accept R600 as compensation therefor. She also testified that the defendant had in fact never paid R600 in compensation to her, let alone any of the monthly instalments. Nor had he ever demanded that she transfer her half share in the property to him prior to instituting his claim in reconvention.

[14] As regards the reasons for the divorce, the plaintiff indicated that the defendant was unhappy with her religious views. However, as far as she was concerned that was not a problem because she had become a Muslim when she married the defendant. She felt the main difficulty in the marriage was that she had had a child before marrying the defendant. That child only moved in with them when he was seven years of age and later caused tension in the marriage. A month after being told of the divorce, the plaintiff left the common home and went to live with members of her family for a period of approximately six months. During that time, however, the defendant visited her regularly often bringing her presents. Asked the reasons for these visits, the plaintiff testified that she believed that the defendant had regretted the divorce although he had not expressly said so. Eventually the defendant came to *'fetch'* the plaintiff saying that she must come home. She eventually agreed to go back to the defendant because they still loved each other and this was a chance to reconcile. From then on they lived in the property as husband and wife as if they had never been divorced. They were still married, however, in terms of Muslim law. At this stage their son, N, was four years old.

[15] For the next 22 years, the parties lived together as husband and wife until, in August 2012, the plaintiff decided to finally leave the marriage. Her primary reason for doing so was the manner in which the defendant treated her first child, R. He had become *'naughty'*, as she put it, and found himself in trouble with the law. The relationship between R and the defendant deteriorated and the latter would chase her son from the house. On the last occasion this happened the defendant had said that her son was not his problem and that she was lucky to have a roof over her head. The plaintiff responded that if that was the case she was leaving as well and everything was over. The defendant had also said that she was a waste of time.

[16] Asked about the financial or proprietary basis of the 22 years which they had spent together after reconciling, the plaintiff testified that everything returned to *'normal'*, as it was before they got divorced. There was no difference in the manner in which they ran their affairs compared to that prior to their divorce. Asked further what her reaction would have been had she been told in 1990 that their reconciliation would be based on their Muslim marriage and that their proprietary consequences would be regulated thereby, the plaintiff replied that she would then not have agreed to reconcile. When asked what the plaintiff understood at the time of their reconciliation would happen if they once again parted ways, her response was that her understanding was that the assets would be divided equally amongst them.

[17] During the 22 years following their reconciliation the plaintiff had worked in the house shop day and night, even after she underwent major heart surgery in 1993 and was declared unfit to work. The income from the shop was also utilised to effect various improvements to the property. These included building another garage onto the house for

the storage of vehicles, erecting vibracrete walls all around the house and paving parts of the grounds. They also built an en suite bathroom for the main bedroom and installed kitchen and other cupboards. Also funded by the shop takings was a separate entrance to the property and a granny flat.

[18] The plaintiff was also asked what she understood to be married in community in property and her response was that the assets belonged to both parties in equal shares and this is what should have been given effect to in August 2012 when the parties' relationship finally ended. When, at that time, she had brought up the question of the property and other assets the defendant's response was that she was entitled to nothing. The plaintiff testified that she only learnt late in the relationship that the defendant received a pension in the form of a provident fund investment which was last held by Alexander Forbes. She stated, moreover, that she had little knowledge of its value and had never received a cent from the proceeds. She estimated that during all the years the monthly takings from the shop could have been R3000 but added that she was unable to say how much profit it had made. In this regard, it should be noted that when the defendant testified he stated that during the 1990's the shop made an average of R4000 to R5000 per month in profit.

[19] The plaintiff produced, as part of the bundle, various documents relating to the defendant's pension. These indicated that his retirement fund benefits with the Bidcorp Group Provident Fund had amounted to some R274 000 in March 2011 and then apparently had been placed with an Alexander Forbes preservation provident fund. The defendant then made regular withdrawals from the fund including one for R30 000 in April 2011 and a further lump sum withdrawal of R120 000 in November 2013. Another

document relating to his pension fund interest reflected the defendant's wishes as at December 2009 as to whom his benefits should go in the event of his death. In that document he recorded the plaintiff as his spouse and her degree of dependency on him as 100% and his wishes as follows:

> *'Our benefits must be calculated and distributed (sic) according to the Muslim Inheritance Law i.e. my spouse one eighth, my son seven eighths. After calculation each beneficiary must get 20% of their lump sum and then 5% every month of the balance'.*

[20] The plaintiff testified that she regarded the defendant's pension benefits as part of the assets falling under the universal partnership but that prior to the termination of their relationship in 2012 she had no knowledge of either the defendant's pension benefits or his wishes regarding how these were to be disposed of in the event of his death.

[21] She testified further that in the Muslim religion the husband was the head of the household and must make provision for his wife and other family members. He must see that they have a roof over his head and that his wife is clothed and provided with food. According to the plaintiff the Muslim faith did not require that she as the wife had to go out and work. In the context of these observations the plaintiff made the point that, by contrast, she had been a full economic partner in the marriage. She testified that the dowry she had been given by the defendant in the Muslim marriage, was R50. The plaintiff also testified that the bond over the house had been settled well before the end of the term of the loan. Documents in the bundle indicated that the bond had been cancelled around July 2005 when a final instalment had been paid.

[22] After the plaintiff left the common home in August 2012, her belief was that all the assets which had been accumulated during the relationship and marriage had to be

divided equally between the parties. When the defendant had indicated that she would get nothing she consulted her present attorney and instituted her claim in 2013. She testified that the unbonded property had a present value of about R600 000. She would prefer to sell what she regarded as her half share to the defendant but was doubtful whether he could pay her for her half share. Plaintiff testified that she presently worked three days per week earning R3 600 per month and lived in rented accommodation which cost her R2 000 per month. The defendant, meanwhile, was living in the property with his son and daughter in law. The son works for the City of Cape Town and his wife was also employed. The shop business was still going strong with the defendant running it. Since 2012 the defendant had not given her so much as a '*half a loaf of bread'*.

[23] In cross examination the plaintiff testified that they had bought all assets together during the second relationship, such as furniture, a bakkie and major home appliances. The plaintiff insisted that the parties had had a joint banking account and that they both had to sign a slip when money was withdrawn from the account. The defendant put to her that there was a bank account but it was not a joint one. It was also put to the plaintiff that the divorce summons must have been served upon her first and thereafter she signed the consent paper rather than the other way around, as she had testified. The defendant also put it to the plaintiff that her evidence that she only received a dowry of R50 was false because he had a certificate showing that the dowry he paid was R6, a concession the plaintiff was prepared to make. The plaintiff testified that she did not progress beyond primary school. She agreed that after the civil divorce she did not have a will but that the defendant did. During the parties relationship she had received about R300 per week from the defendant and used it for both her personal accounts and for household goods. The plaintiff conceded that the term *'universal partnership'* is not one

which the parties used during the years they were together. It was put to her by the defendant that she had left the common home for long periods of time. She denied this although stating that she had stayed with family and friends on occasions when the defendant had chased or locked her out of the house. The defendant raised the issue of the domestic worker, named Grieta, putting it to her that she had worked in the common home once a week and done many household chores. The plaintiff denied this saying that Grieta had been asked to assist only on an occasional basis when she, the plaintiff, had a lot of orders to attend to in the shop. The plaintiff did not dispute that one mortgage bond over the property had been settled in the greater part during approximately 2002 from an inheritance that the defendant had received from his late father. She also testified that the plaintiff had borrowed some R7 000 from her of the proceeds from an insurance policy and that she had loaned him this money because there was not sufficient capital from the shop at that time. She received the loan back through monies earned by the shop but these monies went back into the household in the form of expenses that she paid and vehicles that she bought for her two sons.

[24] The plaintiff testified that she knew that the defendant had his own will but she was not troubled by this because she trusted him. She testified that the defendant had never told her that she was merely his Muslim wife and would therefore only inherit accordingly. She had only come across much, if not all, of the documentation which she produced and which was found in the trial bundle when she left the relationship. At that stage she had made a point of looking for and copying documents which cast light on the parties' financial situation. She was shown the document indicating what she would inherit as at December 2009 in accordance with Islamic law, namely, one eighth of the

defendant's provident fund entitlement. The plaintiff conceded that this was in accordance with Muslim law but stated that she had only seen the document at the time she had left the common home. The defendant put it to her that he had paid her the R50 instalments every month after their civil divorce, but this was emphatically denied by the plaintiff.

[25] The plaintiff confirmed that the defendant had not expressly explained to her the proprietary basis upon which he allegedly wanted to reconcile with her. In fact there were no express discussions about the property or money. When the plaintiff was asked why she had not raised these matters, she said they had not spoken about them since the matter of the divorce was a sensitive issue. The plaintiff testified that the defendant had never told her at the time of reconciliation that the property was his and would remain only his. Had he done so, the plaintiff testified, she would not have gone back to the defendant. Inasmuch as the defendant put to her in cross-examination that after the reconciliation they had lived only solely in accordance with Muslim law, the plaintiff stated that this made no sense to her since even before they had divorced they had lived as a Muslim husband and wife. As far as she was concerned the defendant had cheated her in the initial civil divorce. The defendant cross-examined the plaintiff on her working record and it transpired that he was using the plaintiff's curriculum vitae to this end. The plaintiff confirmed the details in her curriculum vitae in all material respects.

The defendant

[26] The defendant confirmed that they had purchased the property together and lived in it both before and after the civil divorce. He testified that he had initiated the first divorce proceedings because the plaintiff had slept out on occasions and not told him

where she had been. He had claimed custody of their child and the property, his intention being that the plaintiff would receive only her own personal assets and the amount of R600 in respect of her share in the property. The plaintiff testified that the summons had been served on the defendant and she had agreed that he would get custody of their child and sole ownership of the property. He confirmed that she had returned to the common home after the civil divorce and that the couple had lived together as Muslim husband and wife. However, she had again moved out of the common home from time to time. On the last such occasion in 2012 the argument between them had related to her son, R, who had begun to steal things out of the house. On that occasion he stole a geyser from the defendant who had told the plaintiff that he would not accept such behaviour. The plaintiff had become cross and said that if he chased R away then she would also move out with him and she duly did so in August 2012. The following year the defendant had approached the Muslim Judicial Council and obtained a Muslim divorce from the plaintiff. The defendant testified that he did not accept the plaintiff's claims in the present action since she had come and gone during the marriage and was the cause of the final '*Muslim divorce'*. Asked if he had accepted the plaintiff's alternative claim for a half share of the house he replied that this would only have been appropriate if the parties had remarried civilly. The defendant initially testified that the shop had not been *'very'* profitable. If it was he would have stayed at home and worked there fulltime.

[27] The defendant was cross-examined at some length since his evidence in chief was relatively brief. He testified that he had worked for Conway Travel and thereafter for Rennies Travel from which employment he had retired in 2012 as a result of a persistent back problem. At Rennies he had earned about between R5 500 to R6 000 per month.

He testified that the bond over the property was originally with Saambou and that they had never increased the bond nor had he drawn any cash out of it. The defendant testified that he proceeded as far as grade 10 at school and that he was good with figures. He agreed that the bond had eventually been taken over by FNB and that there was, at the very least, a joint bond account in the parties' names. He conceded that the numerous monthly budgets in the bundle were in his handwriting and were drawn up by him. The defendant conceded that he had not disputed the plaintiff's evidence that everything but the bond instalments was paid out of the takings from the shop. Nor did he appear to take issue with the plaintiff's evidence that the bulk of the household expenses were paid out of the takings of the shop which themselves were never banked. The plaintiff testified, however, that not all the household expenses were paid out of the shop. The defendant referred to the plaintiff's CV which he had used to cross-examine her and conceded that according to it the plaintiff had worked in the home *'Shop 4 U*' business fulltime for nearly 10 years between 2002 and 2012 between 7 and 5pm daily as well as performing her household duties. In the CV, the plaintiff described herself as a '*shop assistant'* and her duties as driving, administration, banking, the ordering of stock and keeping track of stock.

[28] The defendant denied that at the time of their reconciliation the parties had tacitly agreed to once again live together on the same financial or proprietary basis prior to their civil divorce. He conceded however, that prior to their divorce they had both been members of the Muslim religion and had followed Muslim principles, with the same regime applying after their reconciliation. The defendant also conceded that the manner in which the parties had run the home shop and dealt with the proceeds had been the

same before and after their divorce and reconciliation. He conceded too that, apart from the proceeds of his pension, the parties had both enjoyed the benefits of the other assets referred to in the particulars of claim, principally the property.

[29] Regarding the civil divorce the defendant denied that there were any suspicious circumstances surrounding it. In particular, he denied that he had taken the served summons from the plaintiff and told her that he would sort out the matter. He admitted that he had accompanied the plaintiff to the police station where she had signed the consent paper. He denied however that he had misled the plaintiff regarding the nature of the document which she had signed.

[30] The defendant conceded that the attorney whom he had instructed in the divorce had never met or spoken to plaintiff and that he alone had given the attorney instructions in drafting the consent paper. He testified that the plaintiff had agreed to give him custody of N and had agreed to the terms relating to the property prior to the signing of the consent paper. He was not able to explain where the amount of R600 came from but said that the parties had discussed the figure. At a much later stage in the trial, in fact during argument, the defendant claimed that the consideration for the plaintiff's half share of the house had been so small because little had been paid off on the bond at that stage. This however was never put to the plaintiff nor was any evidence led regarding the value of the property at the time that the divorce was concluded.

[31] Issue was taken with the defendant on behalf of the plaintiff regarding her allegedly leaving the common home for long periods. It was put to him that the true reason for the divorce was tension surrounding R, and differences in their faith and that this remained the situation until they finally parted. He conceded in cross-examination

that he had not challenged the plaintiff's evidence that he took the divorce summons from her saying that he would attend to them himself but stated that he did indeed dispute this. According to the defendant the parties had reconciled mainly in the interests of the plaintiff and for their child.

[32] The defendant testified that he was still running the shop business from the property and it was put to him that he must be earning at least R5000 a month out of the shop. At all times the defendant was uncharacteristically vague about the income which the shop produced. He conceded that the property had enjoyed many improvements but he stated that the costs of the various improvements had been limited because of the good prices that he had obtained. According to the defendant, the plaintiff had earned R300 per week and that this was compensation for her services in the shop, a proposition strongly disputed by the plaintiff when she had testified.

[33] It was further put to the defendant that it was strange that, notwithstanding that the consent paper provided that he acquired the plaintiff's half share in the property, he had never taken any steps to transfer her portion into his name between 1990 and 2013 when the plaintiff had instituted action against him. The defendant disputed the obvious inference however and stated that he had approached an attorney in this regard but had been deterred by the transfer and related costs. He had discussed the matter with the plaintiff and they had agreed in 2004 that they would ultimately transfer the house to their son, N. The defendant did not explain why he would consult the plaintiff about the issue of to whom the house would be transferred when, according to his version, the plaintiff had forfeited her half share in the property. When it was again put to him that his taking no steps to transfer the property militated against his version, the defendant's

answer was that the parties had had no money to do so. Regarding his retirement and the shop business it was put to the defendant that he had clearly earned enough from the shop post-retirement to maintain himself. As regards his pension benefits, the defendant stated that he had to use these to supplement his retirement income. According to him all his pension benefits had now been exhausted. The defendant was again very vague as to where these monies had gone even though one withdrawal was R120 000. In this regard he testified he simply put these monies into his ordinary bank account and used them up. He stated that he used these monies to *'enjoy himself'*. He denied that he had spent all these monies after receipt of summons in the action so that the plaintiff could not get her hands on these sums. He had been 55 years old when he retired from Rennies. The defendant also claimed to have spent R40 000 on his son's wedding. It was put to him that according to the plaintiff he had spent only R15 000 in that regard and that she had been involved in the matter and knew of the details. He stated that of the balance of R120 000 he spent R70 000 *'just enjoying himself'*. The defendant conceded that he had been a spendthrift in relation to his pension monies. The only reason he could give for this was because he had the money and he had spent it.

[34] As regards the payment of R600 for the plaintiff's half share in the house the defendant testified that he made the first payment on or about 1 June 1990 and thenceforth monthly. On each occasion he had expressly told the plaintiff that the payment was in respect of her share of the house. It was put to the defendant that taking into account that the plaintiff was aggrieved about how he had tricked her in taking the order of divorce, it was completely improbable that he would have paid her R50 religiously each month in this manner whilst at the same time wooing her to come back

to the former common home and resume the marital relationship. The defendant denied the apparent incompatibility of wooing the plaintiff back on the one hand and paying her out R600 for her half share thereon on the other hand. Asked if he had obtained any receipts for these payments the defendant replied in the negative, stating that he had trusted the plaintiff.

[35] Earlier in cross examination the defendant agreed that he and the plaintiff had first used the cash from the shop's takings to settle their monthly expenses and only if that was insufficient did he draw money from his salary. His salary was therefore not depleted every month.

The applicable law

[36] The principles which a Court will apply where, in divorce proceedings, a spouse married out of community of property claims that a universal partnership had existed between them and claims an order in respect thereof and a division of the assets of such partnership, were summarised in *Muhlmann v Muhlmann* 1981 (4) WLD 632 by McCreath J. There the Court stated that the four requisites of a partnership as laid down by Pothier and *'long accepted by courts'* are,

> *'Firstly, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or his skill. The second essential is that business should be carried out for the joint benefit of both parties. The third is that the object should be to make a profit. Finally, the contract between the parties should be a legitimate contract'*.[1]

[37] The Court quoted with approval from the 4th edition of Hahlo South African Law of Husband and Wife, page 290 where the following was stated:

[1] At page 634 A – D.

> *'However, there must be something to indicate that the parties intended to operate as a partnership, the mere fact that the wife worked in her husband's business without pay is not sufficient. Unless it can be shown that she made a substantial financial contribution or regularly rendered services going beyond those ordinarily expected of a wife in her situation, the Courts will not be readily persuaded to imply a partnership agreement'.*

[38] The Court added that it was a sound practical guide that where Pothier's four requirements are shown are to be present *'the Court will find a partnership established unless such a conclusion is negatived by a contrary intention disclosed on a correct construction of the agreement between the parties'*.[2]

[39] In *Ponelat v Schrepfer* 2012 (1) SA 206, the Supreme Court of Appeal held that it was apparent from the case law that a universal partnership can exist in a marriage if the necessary requirements for its existence are met. The Court cited with approval the dictum in *Mulhmann v Mulhmann* regarding the approach as to whether a tacit agreement can be held to have been concluded, namely, *'whether it was more probable than not that a tacit agreement had been reached'*.

[40] The question of a tacit agreement giving rise to a universal partnership came under the spotlight again in the matter of *Butters v Mncora*[3] before the Supreme Court of Appeal. The Court held, once again, that a universal partnership of all property does not require an express agreement. Like any other contract, it can also come into existence by tacit agreement, that is, by an agreement derived from the conduct of parties. The Court

[2] At page 635 D – E.
[3] 2012 (4) SA 1 (SCA).

held, echoing *Muhlmann v Muhlmann*,[4] that where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached. The majority of the Court in *Butters v Mncora*, per Brand JA, summed up the law in relation to universal partnerships between cohabitants as follows:

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

[41] In his evidence and argument, in disputing the existence of any universal partnership, the defendant placed considerable reliance on the proprietary regime established by the Muslim marriage between himself and the plaintiff. It is necessary therefore to have some regard to this issue. It is well established that, as our law currently stands, marriages entered into in terms of the tenets of Islam have not been afforded legal recognition for all purposes. In a minority judgment in *Daniels v Campbell and others*[5] at para 19, Moseneke J (as he then was) noted that the *'persisting invalidity of Muslim marriages is ... a constitutional anachronism'*. The Courts have, however, on a piecemeal basis tried to ameliorate the hardships faced by women and children in Muslim marriages in a number of cases relating inter alia to the husband's duty to maintain his wife as contemplated in sec 2(1) of the Maintenance Act, 99 of 1998 (*Khan v Khan* 2005

[4] 1984 (3) SA 102 (AD).
[5] 2004 (5) SA 331 (CC).

(2) SA 272 (T)) and intestate succession (*Hassan v Jacobs NO and others* 2009 (5) SA 572 (CC) and *Moosa NO and Others v Minister of Justice and Correctional Services and Others* 2018 (5) SA 13 (CC)).

[42] In the recent matter of the *Women's Legal Centre Trust v The President of the Republic of South Africa*[6] and a host of other parties, which involved three consolidated applications, the applicants sought an order that the President and Parliament of the Republic of South Africa had failed to fulfil the obligations imposed upon them by the Constitution and requiring them to prepare and initiate a Bill for the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences of such recognition. In the alternative, an order was sought declaring the Marriage Act, the Divorce Act and the Recognition of Customary Marriages Act, insofar as they failed to provide for and regulate for Muslim marriages as valid marriages for all purposes in South Africa, to be inconsistent with various constitutional rights. A Full Bench of this Court issued a declaration that the state was indeed obliged to enact legislation to recognise marriages solemnised in accordance with the tenets of Sharia Law (*'Muslim marriages'*) as valid marriages and to regulate the consequences of such recognition. It ordered the President and the Cabinet to rectify the position within 24 months.

[43] In *Rylands v Edros*,[7] the Cape Provincial Division (as it then was) recognised a monogamous Muslim marriage as a contract that is enforceable under South African law. The Court granted the wife's claim for spousal maintenance and *mut-ah-talaq*. However,

[6] 2018 (6) SA 598 (WCC).
[7] 1997 (2) SA 690 (C).

the Court was not able to grant the wife's claim for an equitable share of her tangible and intangible contributions to the growth of her husband's estate because, unfortunately, there was no evidence before the Court to confirm that such a practice was widely practised in the parties' community.

[44] According to a paper entitled *'Proprietary Consequences of a Muslim Marriage and Divorce'*, by MT Karaan,[8] community of property as a consequence of marriage is foreign to Islamic law. Dealing with the concept of a universal partnership between parties to a marriage under Muslim law, the author states that the validity of such a concept under Islamic law is undermined by the element of *gharar* (uncertainty) in that it prospectively disposes of unidentified and therefore uncertain, future assets. The author goes on to state that where both partners had contributed physical assets to the household, each retains ownership of what he/she had contributed; the estate thus formed is considered one in which separate assets are mixed but not merged into one estate. He adds:

> *'What further makes the claim of a universal partnership within an Islamic marriage untenable is the fact that the duty of support (nafaqah) is one of the major proprietary consequences in marriage in Islam. In a universal partnership, since the partners share joint control and equal ownership over the estate, there is no duty of support'.*

[45] In *Women's Legal Centre Trust* supra, the Court confirmed that Islamic law does not recognise the concept of communal property and the division of property.[9] I am

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[8] Proprietary Consequences of a Muslim Marriage and Divorce, by MT Karaan at page 24 para 41.
Source:
http://duai.org.za/downloads/fatawa/Proprietary%20consequences%20of%20a%20muslim%20marriage%20and%20divorce.pdf

[9] At para 222.

aware, however, of no authority for the proposition that the fact that parties are married under Muslim law precludes a universal partnership being formed between such parties. In this regard one must bear in mind that up until the present, marriages under Sharia law do not enjoy full legal recognition in our law and that even the existence of an established proprietary regime in respect of a marriage does not preclude the parties thereto from entering into an agreement that a different proprietary regime will operate, such as a universal partnership. In my view each case must be judged on its own merits, more particularly as to whether such an agreement was reached either expressly, impliedly or tacitly. If, however, this Court should find that the proprietary consequences of the relationship between the parties since 1990 were regulated solely in terms of Muslim law, the defendant will be correct in submitting that no universal partnership was not concluded. But that is a matter of fact.

Evaluation of the parties as witnesses

[46] The plaintiff generally created a favourable impression as a witness. Her evidence was straightforward and apparently from the heart. She made no claims which might have lightened the burden of proof she bore and willingly made concessions such as that there had been no express discussion regarding a universal partnership. The plaintiff's evidence stood up well to the defendant's cross-examination. Indeed in many respects her recollection of events appeared to be better than that of the defendant's and she was able to convincingly refute a number of propositions put to her by him, such as the role of the domestic worker, Grieta. This is not to suggest that the plaintiff's evidence was without flaws. She insisted that there was a joint bank account when, it seems clear, this could

only have been the joint bond account. This, however, appeared to be an instance of a flawed recollection as opposed to a fabrication.

[47] The defendant did not create as favourable impression as a witness. His answers were short and succinct and most of his evidence was given with an air of great confidence. Notwithstanding his limited formal education, the defendant appears to be a very astute, commercially speaking. This was evident from his command of financial and legal matters which he dealt with in his evidence. He is obviously good with figures and well organised, even pernickety, in his affairs. But at the same time the defendant was cagey and at times evasive in regard to financial matters. This was particularly the case when he was questioned about what he had done with his pension benefits to exhaust them within a very short period of time and the earnings which the shop generated. His evidence that he simply splurged the pension benefits was both lacking in detail and unconvincing. Such conduct on his part appeared, moreover, completely out of keeping with general careful and canny financial conduct throughout the marriage as a whole. Furthermore, I cannot accept the defendant's contentions that the parties did not live together for lengthy periods of times during the 22 years following their reconciliation. Whilst it may well have been the case that during troubled periods in the marriage the plaintiff lived elsewhere for short periods of time, it is clear that the relationship endured until August 2012.

[48] It was also clear that had the plaintiff not found and salvaged documentation relating to the financial aspects of the marriage, little of that information would have been forthcoming from the defendant. Important aspects of the defendant's evidence were implausible. Examples of this were his evidence regarding the terms of their initial

divorce and subsequent reconciliation which I have discussed above. In particular, the defendant floundered when he was asked about payments he claimed to have made to the plaintiff pursuant to the consent paper in regard to her half share of the property. Where his evidence differs from that of the plaintiff and is unsubstantiated it must be approached with caution since the defendant was clearly quite prepared to give self-serving and even misleading evidence.

Analysis

[49] Turning to the central issue of whether a universal partnership was formed pursuant to a tacit agreement, it is necessary in the first place to have regard to the conduct of the parties upon and after their reconciliation against the background of the normal proprietary consequences of a Muslim marriage. A Muslim wife is not required to work or contribute towards the payment of household expenses. It is the duty of the Muslim husband to provide a roof, food and clothing for his family. Despite this, the plaintiff contributed substantially, initially by way of her salary, and later by running the shop virtually singlehandedly and attending to domestic chores. These facts distinguish the present matter from the normally expected responsibilities and undertakings of a married Muslim couple. Given the circumstances in which the parties reconciled, it seems clear that it was mutually understood that they would be living together as husband and wife as if they had not been divorced; in other words with much the same proprietary consequences as was the case prior to their divorce. The conduct of the parties throughout the rest of their relationship was ,in my view, also not in line with what normally would have been expected from a Muslim wife and supports the inference that a tacit agreement was struck between the parties to conclude a universal partnership. Yet a further important instance of conduct signifying the existence of a universal partnership was the

manner in which the parties handled the finances and in particular the takings earned from the shop business. These were not pocketed by the plaintiff or the defendant for either of their own personal use or consumption. The monies were used to pay all the household expenses and to acquire assets which were jointly used such as a bakkie, large electrical appliances and extensive improvements to the property in the form of additions and alterations. Earnings were also ploughed back into the business to purchase further stock and to convert the garage into a shop. As far as the common expenses were concerned it appears that it was only the bond instalment which was paid through a debit off the defendant's banking account, presumably because it would have been inconvenient or unacceptable to the mortgagee for any other arrangement to be utilised.

[50] The following passage from the judgment of Brand JA in *Butters v Mncora* at paras [25] – [26] seems most apposite to the present matter:

> *'[25] From the plaintiff's point of view it is clear that she shared in the benefits of the defendant's financial contribution. The defendant's attitude that she paid the household expenses with money supplied by him confirms this fact. In short, he paid for everything because she had no earnings of her own. If the parties had spent all the money earned by the defendant in this way it would be quite plain, I think, that the contribution by both parties, be it financial or otherwise, was shared and consumed in the pursuit of their common enterprise. Does the fact that his earnings exceeded their financial needs, which facilitated the accumulation of capital assets, make any difference? I think not.*
>
> *[26] What the defendant's contention amounts to is that it must be inferred from the conduct of the parties that, though they intended to share the benefits of their joint contribution, the defendant would retain the surplus income and accumulate assets only for himself. From the plaintiff's viewpoint that intent would be quite remarkable. It would mean that she intended to contribute her everything for almost 20 years to assist the defendant in acquiring assets for himself only; that in*

her old age she would be entirely dependent for her very existence on the benevolence of the defendant towards her.'

[51] As far as the property is concerned there was evidence that the defendant was able to pay off the bond well before the usual maturity date because he made use of monies which he inherited from his late father in 2002. However, this evidence did not fully emerge when the defendant testified, but was only set out in his heads of argument. This fact alone does not render the property that of the defendant since this merely released a greater proportion of the shop's earnings for improvements to the property and the balance to the property and of their spousal joint estate to be built up. Further in this regard, it is significant that in the 22 years following the granting of an order of divorce and, notwithstanding the fact that according to the defendant he settled the amount owing in terms of the mortgage bond in 2002, he never took any concrete steps to have the property transferred into his name. The reasons he furnished, namely, that various expenses would follow should he have the plaintiff's half share transferred into his name are far from convincing, particularly inasmuch as in 2011 when he retired the plaintiff had access to a large cash reserve. The defendant's failure to pursue his alleged rights in regard to transfer the property lends credence to the plaintiff's case that a universal partnership was formed in which the property was the major asset.

[52] Reverting to the requirements for a normal partnership, the first of which is that each of the partners must bring something to the partnership or bind himself to do so, it appears to me that this requirement has been met. What the plaintiff brought was, in large measure, her labour and her skills as well as her conceiving of the idea for a shop. When the business required capital this was generated from the shop's earnings. The defendant

also contributed in the form of skills and labour although on a much lesser scale in the form of serving behind the counter for a limited number of hours at the end of the day and in assisting or undertaking the purchase of replacement stock.

[53] The defendant also contributed the property, being the premises from which the business was run. It is arguable that both parties contributed that property since the shop business was started when the parties were still civilly married and, therefore, when the property was jointly held and owned by the parties. After the divorce, at least nominally, the property was owned by the defendant alone and it could be argued on his behalf that this was the contribution he alone made. However, it is equally arguable that, through not pursuing his apparent right to claim ownership of the entire property and transferring it into his own name, the defendant waived his right to any such claim and the property reverted to one being jointly owned by the parties. In support of this is the fact that the defendant was unable to offer proof that he had even paid the token sum of R600 to the plaintiff in respect of her half share of the property. The defendant's evidence was that at one and the same time he made such payments month in month out whilst simultaneously wooing the plaintiff to come back and live with him as husband and wife. This, in my view, is inherently improbable. Be that as it may it is unnecessary for the Court to make a definite finding that the plaintiff retained her half share of the property in order to find that she made a contribution to the partnership. Her labour and skills alone would suffice for Pothier's first requirement to be met.

[54] The second requirement is that the partnership has to be carried on for the benefit of both parties. This was undoubtedly the case as is demonstrated by the fact that the business' takings were used to satisfy the joint household expenses including bond

instalments. Clearly, payment of the household expenses from the earnings ensured that part of the defendant's salary necessary to meet the bond instalments was always available. The business' earnings were also used to improve the property, which both parties enjoyed, and to purchase other assets which they each used to their benefit such as major electrical appliances and a vehicle. The third requirement for a partnership, namely, that its object be to make profit was also clearly met. The entire rationale behind the house shop business was to make a profit and to improve the financial position of the parties.

[55] It is as well to recall or bear in mind the admonition in *Muhlmann* that where one has to do 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. In this regard, Hahlo goes further, suggesting that simply showing that a wife worked in her husband's business without pay is insufficient. In the present matter the business was not that of the husband but was a joint project largely initiated and driven by the plaintiff. She clearly made a substantial contribution of her time, skills and in ploughing her share of the takings back into the business. The plaintiff was clear about her *animus contrahendi.* She testified that financially speaking things went back to normal after their reconciliation and that she would not have agreed to reconcile on the basis that she would henceforth be entitled to more than a Muslim wife's proprietary rights.

[56] It is common cause that the parties were initially civilly married in community of property. It follows therefore that had the civil marriage not ended within approximately

four years but had continued for a substantial period of time, all things being equal the plaintiff would have expected to share equally in whatever assets the parties built up during the course of the marriage including, most notably, the equity in the property.

[57] Although it was obviously important to the parties in 1990 to marry also under Muslim law, their prior civil marriage with its resultant community of property regime clearly showed the proprietary basis upon which their relationship was initially built. There was no evidence of any factors which, after the first divorce, caused the parties to change their views on what would be an appropriate proprietary regime following their reconciliation some six months later.

[58] In essence it is the defendant's case that having divorced the plaintiff civilly but nonetheless having reconciled and resumed a spousal relationship within six to nine months, the proprietary consequences of the relationship were governed solely by the provisions of Muslim law, i.e. the marriage still subsisting. For a number of reasons I have difficulty in accepting this proposition. In the first place, the defendant never testified that at the time of reconciliation, as one would expect in such circumstances, he advised the plaintiff that in any new relationship she could expect no more than what a woman married under Muslim law alone could expect i.e. as provided by Sharia law and different to that when they were married under civil law. Nor was there any suggestion that the defendant made this position clear to the plaintiff at any later stage, apart perhaps from the period shortly before the plaintiff left around 2012.

[59] A further reason why the existence of such a common understanding is improbable is the background to the divorce and the reconciliation. The plaintiff testified that in effect that she had been duped by the defendant who obtained a divorce order on

terms strikingly unfavourable to her. Not only did she cede custody of her infant son but her half share in the only and primary asset in the marriage was acquired by the defendant for next to nothing. The plaintiff's evidence that she had been lulled by the defendant into not disputing the divorce was detailed and credible. When she signed the consent paper, the plaintiff was still young, comparatively uneducated and had taken no legal advice. The defendant was six years older than her and, clearly, even then, a man who knew what he wanted and how to go about achieving this. It was common cause that it was the defendant alone who gave instructions to his attorney to draw the consent paper. One asks why, if the consent paper truly represented the wishes of the plaintiff, the defendant saw it as necessary to sign it a police station.

[60] When, soon after the divorce the defendant began to woo the plaintiff to come back to him, the defendant must have been well aware that as far as the plaintiff was concerned she had been duped into a divorce settlement which unashamedly favoured him. In these circumstances it is most unlikely either that she willingly resumed the relationship on the basis that she would acquire no assets during the course of the marriage other than those which she herself earned through her own individual efforts or that, the other side of the coin, anything which the parties built through their joint efforts would accrue solely to the defendant. Equally, it is quite improbable that the defendant, at that stage a supplicant in relation to the plaintiff's affections, could have believed that, having left the household smarting after the dubious civil divorce, the plaintiff would resume a marital relationship with him after six or nine months on proprietary terms even more unfavourable her.

[61] A further important consideration in determining whether a tacit agreement was reached to form a universal partnership lies in the conduct of the parties. Apart from the very act of reconciling and resuming their relationship, the further conduct of the parties must be examined to determine whether a tacit agreement as contended for arose. Significantly, the house shop business began as early as 1988 and was the initiative of the plaintiff. She began selling crisps and sweets from inside the house through a window. When the defendant noted how well the little business was doing he began to take an interest and assisted in making purchases. It was, however, mainly the plaintiff's contribution that got the business up and running and growing. In retrospect this may well have been another reason why the defendant was so keen to reconcile with the plaintiff after divorcing her civilly since clearly without her contribution the business was not sustainable. That contribution to the business was invaluable. It was she who worked from 7am till 5pm in the shop once it became a fulltime enterprise around 2002. The defendant merely had to take over for a few hours after returning home from his job at approximately 5pm. When he took over at that time there was no question of the plaintiff then getting a chance to relax. She then had to attend to the household chores and ensure that the defendant got his supper. The plaintiff was no mere employee in the business although the defendant sought to argue that his payment to her of R300 per week was in respect of her services in the shop. It is hardly credible that a person running a business from 7 until 5, let alone a wife, would accept such a paltry sum in respect of these services. In any event, the plaintiff testified that this was not compensation but was merely money which she used to pay certain household expenses and some of her expenses. Throughout the approximate twenty year period when the shop business flourished, the defendant was working and had it not been for the plaintiff the business

would have either closed up or the defendant would have had to find someone completely trustworthy and pay such person to run the business for those long hours.

[62] As far as his *animus contrahendi* is concerned, the defendant's evidence in support of a contrary intention (to that of concluding a universal partnership) was firstly that his intention was to merely live together with the plaintiff as husband and wife in accordance with Muslim law or custom. This argument or intention is undermined firstly by the fact that the parties did not act in strict compliance with Muslim law and custom when it came to the sharing of their income and expenses. Perhaps more importantly is the fact that they were already married under Muslim law during the duration of the civil marriage (in community of property). The defendant was also not able to cite any instances of him externally manifesting his claimed intention. Relevant in this regard is Brand JA's remarks at para 27 of the judgment in *Butters*:

> *'[27] It is true that, according to the defendant's ipse dixit during his testimony, he indeed intended to keep everything he acquired for himself to the entire exclusion of the plaintiff. But I believe there is more than one reason why this court is not bound by the defendant's self-serving ipse dixit. Firstly, it is clear from his testimony that the defendant would say virtually anything that advanced his cause. Secondly, when evaluating the conduct of the parties, the court is entitled to proceed from the premise that they were dealing with one another in good faith.'*

[63] Secondly, the defendant relied on the fact that he had executed a Muslim will according to which the plaintiff would merely have inherited one eighth of his estate. This fact however does not take the matter much further. In the first place a will, by definition, disposes of one's own estate and nothing more and does not necessarily address one's existing proprietary circumstances. Secondly, in ignorance of the

consequences of their marriage, parties married in community of property often execute wills in which they purport to bequeath joint assets under the mistaken belief that they are the sole owner thereof.

[64] On the other hand there were indications in the evidence pointing away from an unlimited universal partnership. The defendant testified that the plaintiff had loaned him R7000 from funds received by herself from an insurance policy in order to supplement a cash shortfall in the shop and further that she had her own bank account at Absa Bank. The loan, which was admitted by the plaintiff, suggests that there were monies which the parties regarded as solely theirs and to a limited degree this is reinforced by the fact that the parties had personal bank accounts. Another such indicator was the manner in which the defendant dealt with his pension benefits and the fact that these only came to the direct attention of the plaintiff late in the relationship. A document which found its way into the trial bundle recorded the defendant's directions to his provident/pension fund, namely that his son would acquire seven eighths of such benefits and the plaintiff only one eighth. The plaintiff's evidence was that she became aware, presumably, in 2011 or thereabouts, that the defendant received pension benefits of some R250 000 which she nonetheless regarded as *'part of the universal partnership'*. Given the plaintiff's lack of direct knowledge during most of the relationship of these benefits and in the light of the defendant's express wishes as to how they should devolve on his passing, I do not consider that they can be included in the universal partnership. The defendant's pension benefits were earned by his labour and service alone. They were not an asset which the parties discussed and were far more likely to be an asset which the defendant would consider to be his alone, as borne out by his written instructions.

[65] As mentioned, the defendant's evidence that it was his intention to retain all the profits and proceeds of the shop business for himself must be approached with caution on account of its self-serving nature. Acceptance of his evidence would imply either that he *bona fide* believed that the plaintiff would continue the marital relationship indefinitely knowing that if it ended she would be left virtually destitute or he must have realised that this was not the case but remained silent, so allowing his conduct to lull the plaintiff into believing that this was not the case. As noted by Brand JA in *Butters v Mncora*, if the latter inference was the correct one to draw, this would not satisfy the dictates of good faith.

[66] A further admonition in *Mulhmann* is the reference to the statement in Wessels Law of Contract[10] that before a court can find that there has been a tacit contract it must be satisfied that the person whom it is proposed to fix with a tacit contract must be fully aware of all the circumstances connected with the transaction, the act must be unequivocal and the tacit contract must not extend to more than what the parties contemplated.

[67] What was before the parties on a daily basis was their shared enterprise (the shop business) which sustained the household through the contributions of the plaintiff and the defendant and which allowed them to acquire and enhance their assets which principally were the property and the movables such as the vehicle and other lesser assets which they acquired and enjoyed.

[68] I am satisfied on the evidence as a whole therefore that the parties entered into a universal partnership following the reconciliation. However, I am not persuaded that it

[10] Wessels Law of Contract in South Africa 2nd ed vol 1 para 266.

included either the defendant's pensions benefits or monies which the parties held in separate bank accounts. In the result I find that a limited universal partnership came into existence in or about late 1990 encompassing all the assets of the parties, most notably the property, but excluding the defendant's pension benefits and any monies separately held by them in personal bank accounts.

[69] The conclusion which I have reached renders it unnecessary for me to deal with the plaintiff's alternative claim to the effect that the defendant waived his right to exclusive ownership of the property notwithstanding the terms of the consent paper. It follows then that the defendant's counterclaim falls to be dismissed.

Conclusion

[70] For these reasons the following order must issue:

a) It is declared that a limited universal partnership existed between the parties and that each party held a 50% interest therein;

b) It is declared that the assets of the universal partnership include the property as well as all the assets acquired by the parties between November/December 1990 and August 2012 save for any pension benefits earned by the defendant or any assets acquired by him from the proceeds thereof and any monies held by the parties in personal (i.e. non joint) bank accounts as at 2 August 2012;

c) The universal partnership was terminated on 2 August 2012;

d) A receiver shall be appointed and authorised to liquidate the universal partnership on the following basis:

(i) Unless the parties within 30 (thirty) calendar days agree upon a receiver, the receiver shall upon the request of any party be appointed by the chairman of the Cape Law Society;

(ii) The parties shall within 30 (thirty) calendar days of the appointment of the receiver each furnish the other with a complete statement of all the assets and liabilities which each party deems to belong to the universal partnership, properly supported by the available documents and records in order to determine the full extent of such assets and liabilities;

(iii) The receiver may, *mero motu* or upon request by a party, request the other party to provide any further documents or records to the receiver or the requesting party;

(iv) The receiver shall determine a date for the disclosure and debatement of the statements referred to in prayers (ii) and (iii) and shall preside over the meeting;

(v) The receiver shall within 30 (thirty) calendar days subsequent to the debatement of the statements make a written award wherein all the assets and liabilities of the universal partnership are confirmed and the net assets thereof are divided between the parties in accordance with each party's interest as determined by the Honourable Court;

(vi) The receiver shall be authorised to sell any asset of the universal partnership in order to divide the proceeds thereof between the parties or to apply the proceeds towards the settlement of any liabilities of the partnership and/or his costs;

(vii) The receiver's finding shall be final and the parties shall give effect thereto within the period to be determined by the receiver;

(viii) Should any party refuse to give his or her co-operation in order to give effect to the receiver's award, the receiver is authorised to sign any document on behalf of such defaulting party in order to give effect to his award.

(ix) The costs of the receiver shall be paid by the parties in accordance with their respective interest in the universal partnership.

e) In the event that Erf […], Gaylee, situated at […], Dennemere, Blackheath, Western Cape *("the property")* falls to be sold it must be at the prevailing market value, or such price as the parties may agree upon, and the nett proceeds thereof must be divided between the parties equally.

f) Should the property not be sold within 90 days from the date of any award by the receiver to that effect, the parties may within 14 (fourteen) days furnish the name of a reputable auctioneer to the receiver who, in his/her discretion, shall appoint an auctioneer to sell the property upon terms to be set by the receiver, whereafter the nett proceeds must be divided between the parties equally.

g) The receiver is authorised to furnish the chosen auctioneer with the necessary mandate and to sign all documents that may be required by them on behalf of the Defendant;

h) Should the Plaintiff or the Defendant fail within 7 (seven) days of a request by the receiver to sign any document in order to give effect to the

order of the Honourable Court, the Sheriff of the Honourable Court is authorised to sign such documents on behalf of such party;

i) The Defendant's counterclaim is dismissed;

j) The Defendant shall pay the costs of the suit.

BOZALEK J

For the Plaintiff	:	*Adv A Walters*
As Instructed by	:	
For the Defendant	:	*In Person*