REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 8052/2019

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 13 FEBRUARY 2025

SIGNATURE:

In the matter between:

R[...] D[...] M[...] **PLAINTIFF**

-and-

M[...] D[...] K[...] **DEFENDANT**

JUDGMENT

BRESLER AJ:

Introduction:

[1] The matter came before court as a trial. The Plaintiff claims judgment against the Defendant in the following terms:

1.1 A declarator that a partnership for gain was created between the parties.

1.2 A declarator that the partnership was terminated during or about April 2019.

1.3 Appointment of a liquidator to liquidate the assets and divide the proceeds thereof between the parties.

[2] The Plaintiff pleaded that during or about 2014, the Plaintiff and the Defendant entered into a life partnership agreement in terms whereof the parties will live together for as long as the partnership lasted.

[3] The material express, alternatively implied, further alternatively tacit terms of the life partnership agreement between the parties were that:

3.1 The parties will live together under one roof as life partners;

3.2 The parties will care for, maintain one another, and accord each other societal comforts and benefits in a relationship similar to that of husband and wife.

3.3 The parties will contribute their resources, assets and labour towards the accumulation, upkeep and maintenance of the joint and shared estate.

3.4 The parties would create a universal partnership for gain between themselves and for their benefit.

[4] The Plaintiff further pleaded that the parties commenced their co-habitation as life partners since 2014 when the Plaintiff moved into the Defendant's home.

[5] The Plaintiff contributed *inter alia* a portion of his pension pay-out in the amount of R416,388.77. The Defendant, in return, contributed *inter alia* the immovable property situated at 2[…] Zone 3 Seshego. During the subsistence of the partnership, the parties accumulated further movable assets as well.

[6] The Plaintiff requires an equal division of these assets.

[7] The Defendant pleads that the extension and improvements to the immovable property was a gift, and not a contribution in terms of the alleged partnership agreement.

[8] The existence of the partnership agreement is pertinently denied. The Defendant furthermore denies that she ever contributed the immovable property to the alleged partnership. It is also denied that any life partnership agreement was concluded between the parties.

Issues that require determination:

[9] Having regard to the position as postulated by the Pleadings, this Court is therefore called upon to determine if the requirements for the existence of a partnership has been met, and if so, how it should be liquidated and dissolved.

[10] The Plaintiff explicitly stated in its Heads of Argument that a 'universal partnership of all property' or '*societas universorum bonorum*' was created. Considering this submission, this court is therefore obliged to limit its enquiry within the accepted parameters of this specific type of partnership.

The Plaintiff's testimony:

[11] The Plaintiff testified that he met the Defendant during 2014. At that stage, he was staying with his sister, and the Defendant had her own place. The parties then resolved that the Plaintiff would move in with the Defendant.

[12] At some point, the Defendant indicated that the house is too small for them as her daughter was also residing there. They then decided to extend the Defendant's immovable property. The Plaintiff, the Defendant and her daughter shared the household expenses by means of an equal contribution of R300.00 each per month.

[13] According to the Plaintiff, he commenced with *lobola* discussions and in the eyes of the Plaintiff and family members, the Defendant was his intended bride. Evidence was also led pertaining to the purchase of rings that the Defendant chose in lieu of the anticipated marriage. This evidence was later rebutted by the Defendant who claims that she never chose the rings, nor did she receive them at any stage.

[14] The Plaintiff testified that he never indicated that the monies contributed towards the improvement of the immovable property constituted a gift or a donation. At all material times it was his contribution to the partnership.

[15] Of particular importance is the fact that the Plaintiff did not, at any stage, testify as to his own assets or that of the Defendant that the parties owned prior to the conclusion of the partnership agreement, which assets would form part of the alleged partnership estate. His testimony was largely concerned with the considerable amount contributed towards the improvement and extension of the Defendant's immovable property.

[16] During cross examination, the Plaintiff was extensively questioned on the *lobola* arrangements (or rather the lack thereof), and the Plaintiff's intention to marry the Defendant. Numerous questions were also asked pertaining to the agreed monthly contribution paid by the Plaintiff, the Defendant and her daughter. Nothing turns on the concessions made by the Plaintiff in so far as the purpose of the payments are concerned or the fact that the funds were paid to the Defendant's account for the purpose of purchasing building material. Same do not prove or disprove the existence of a partnership.

The Defendant's testimony:

[17] The Defendant confirmed that she was in a relationship with the Plaintiff. She furthermore confirmed that, when the parties met, he was still staying with his sister. At that stage she was employed, and he was searching for employment.

[18] The Defendant denied that the Plaintiff stayed with her uninterruptedly for the period 2014 to 2019. According to her testimony, he sometimes left for extended periods.

[19] As to the specific amount of R10,000.00 that was paid by the Plaintiff to the Defendant, she testified that he gave her the money and told her to 'keep it'. It was therefore not *lobola* as submitted by the Plaintiff.

[20] As to his contribution towards the extension of the Defendant's property, she was adamant that there was no explicit discussion, or tacit intention on her behalf, to create a partnership of any form. Moreover, there was never any discussion that he would acquire any right whatsoever towards her property. The only discussion that ensued between the parties related to the fact that the house was too small to accommodate them all and as such, the Plaintiff offered to use a portion of his pension fund to extend the property. No mention was made of creating a partnership estate.

[21] Of particular importance is the testimony that the Defendant was able to take care of herself, and the fact that she indeed did so. Save for the monthly contribution of R300.00 the Plaintiff did not contribute financially to her welfare. There was no testimony of a shared endeavour to create a mutually beneficial situation. As such, she remained adamant that no partnership agreement was concluded either expressly or by means of the conduct of the parties.

[22] In cross examination, it was put to the Defendant that the Plaintiff's intention was not a mere 'boyfriend – girlfriend' relationship. The Defendant however remained adamant that people who are in a relationship will act in a certain manner.

This does not presuppose that a partnership was intended. It is clearly common cause that the parties were in a relationship and acted accordingly.

[23] In re-examination she again reiterated that the contribution towards the renovation and extension of her property was not part and parcel of performance in terms of a partnership agreement but merely intended as a gift to make the joint occupation of the property more comfortable. The contribution was not demanded but tendered voluntarily by the Plaintiff.

[24] From the aforesaid, it is indisputable that the parties were engaged for some time in a romantic relationship. During the course of the relationship certain payments were made by the Plaintiff to the Defendant, including but not limited to the amounts utilised to improve and extend the property. It is furthermore common cause that the relationship broke down irretrievably, resulting in the Plaintiff vacating the Defendant's immovable property.

[25] Neither the Plaintiff nor the Defendant called any further witnesses. After several endeavours to arrange a mutually suitable date for oral closing argument, it became apparent that the most convenient manner in which to dispose of the matter is to direct the parties to deliver written closing arguments in the form of Heads of Argument. A written directive was accordingly sent to the parties on the 23rd of August 2024. This Court is indebted to both Counsels for promptly responding and complying fully with the directive by delivering the said Heads of Argument for consideration by the Court.

Applicable law:

[26] A partnership is often defined as a contract between two or more parties in term of which each contributes or undertakes to contribute towards an enterprise to be carried on jointly by them with the object of making a profit and of sharing it between them.[1]

[1] Sharrock R, Business Transaction Law, 2017, Juta at page 516

[27] The *essentialia* of a partnership agreement has been authoritatively dealt with in numerous cases. In the well-known case of ***Joubert v Tarry & Co***[2] referred to by the Plaintiff, the requirements for the existence of a partnership were recorded to be the following:

> 55.1 Each one of the partners must bring something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill.
>
> 55.2 The business should be carried on for the joint benefit of both parties;
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> 55.3 The object of the business should be to make profit; and
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> 55.4 The contract between the parties should be a legitimate contract. (It was subsequently held that this is not a requirement peculiar to a partnership but rather applicable to all types of contracts).

[28] These requirements originate from the formulation by Pothier[3] that has been accepted by the South African courts[4] as correct.

[29] Brand J, in the case of ***Butters v Mncora***[5] held as follows at [14]:

> *'[14] It appears to be uncontroversial that, apart from particular partnerships entered into for the purpose of a particular enterprise, Roman and Roman-Dutch law also recognised universal partnerships. Within the latter category, a distinction was drawn between two kinds. The first was the societas universorum bonorum — also referred to as the societas omnium bonorum — by which the parties agree to put in common <u>all their property, present and future</u>. The second type consisted of the societas universorum quae ex*

[2] 2015 TPD 277
[3] RJ Pothier, **A Treatise on the Law of Partnership** (Tudor'sTranslation 1.3.8)
[4] See for instance ***Bester v Van Niekerk*** 1960 (2) SA 779 (A) at 783H – 784A and Pezutto v Dreyer 1992 (3) SA 379 (A) at 390A - C
[5] 2012 (4) SA 1 (SCA)

quaestu veniunt, where the parties agree that <u>all they may acquire during the existence of the partnership</u>, from every kind of commercial undertaking, shall be partnership property.'

(own underlining)

[30] Both types of partnerships can be constituted tacitly, that is, by mere consent and circumstance. Neither type requires an express agreement. Like any other contract, they can also come into existence by tacit agreement derived from the conduct of the parties. 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 was reached.[6]

[31] In this regard, the Court is obliged to look at substance, rather than form, to determine what the intention of the parties are. Where more than one inference can be drawn from the conduct of the parties, the test for when a tacit universal partnership can be held to exists is whether it is more probable than not that a tacit agreement was reached.[7]

[32] In ***Muhlman v Muhlman***[8] the following was stated at 635:

'Before tacit agreement can be held to have been reached in any case it must be clear that the conduct relied upon is not only consistent with the making of the contract alleged but is consistent with no other reasonable interpretation. (Festus v Worcester Municipality 1945 CPD 186 at 193; Wille and Millin Mercantile Law of South Africa C 17th ed at 16; and cf Isaacs v Isaacs 1949 (1) SA 952 (C) at 960 (bottom of page)). In Wessels Law of Contract in South Africa 2nd ed vol 1 para 266 the learned authors state 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

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[6] Henning JJ, **Perspectives on the Law of Partnership in South Africa**, Juta at page 88

[7] ***Butters v Mncora*** 2012 (4) SA 1 (SCA) at [18] – [19]

[8] 1981 (4) SA 632 (W)

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.'

[33] As far as the ambit of the two types of partnership referred to herein before is concerned, the universal partnership proper in principle comprises all the present and future property of the partners. Thus, all the assets which the partners possess at the inception of the partnership as well as all the assets they obtain during the duration of the partnership from whatever source. The general partnership comprises only the profits derived from all the commercial activities of the partners during the duration of the partnership.[9]

[34] *In casu* the Plaintiff alleged an oral agreement with express, alternatively implied, further alternatively tacit terms comprising that of a partnership. The Plaintiff explicitly argued that a *societas universorum bonorum* (universal partnership proper) was concluded.

[35] In a *societas universorum bonorum* the parties agree to contribute all their property and possessions which they own at the commencement of the partnership as well as property and possessions they may acquire in future from whatever source, irrespective of whether such property is acquired from commercial undertakings or otherwise.[10]

[36] As stated herein before, no testimony was led as to the respective assets of the parties prior to the commencement of the alleged partnership, or the assets that were acquired thereafter in their individual names. This is a critical element of a *societas universorum bonorum.*

[37] The Plaintiff pleaded that the agreement was oral but that the terms thereof was express, alternatively implied or further alternatively tacit. The test applied in cases where a tacit agreement potentially came into effect between the parties, has

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[9] Henning JJ, **Perspectives on the Law of Partnership in South Africa**, Juta at page 89

[10] ***Annabhay v Ramlall*** 1960 (3) SA 802 (D) 805

been clearly stated herein before: there must be no other reasonable inference from the conduct of the parties.

[38] The Plaintiff's testimony made no reference to the profit *essentiale*, Pothier's third requirement stated herein before. This requirement will be satisfied if the Plaintiff was able to show that their relationship was an all-embracing venture, which included both their home lives and the business lives and that aimed at a profit to be shared between the parties. The Plaintiff's testimony was largely limited to his contributions. This is but one element of a partnership.

[39] As to the Defendant's contribution to the profit *essentiale*, the Plaintiff's testimony was effectively limited to the fact that she contributed the immovable property and she paid the agreed R300,00 per month. No testimony was led at all that she explicitly shared his view that this is a partnership of all assets. As stated before, no testimony was led as to the assets in their separate estates that would automatically form part of the assets of the joint estate, nor was any testimony lead regarding the joint assets accumulated in either of the parties' personal names subsequent to the formation of the alleged partnership. The Court therefore cannot see, from the testimony as to the conduct of the parties, that there was an endeavour to conduct the 'business for the joint benefit of the parties' and with the aim of 'making profit' as contemplated by the requirements stated by Pothier.

[40] in ***Mühlmann v Mühlmann***[11] the court pointed out that 'unless a wife has rendered services manifestly surpassing those ordinarily expected of a wife in her situation, a court will not easily be persuaded to infer a tacit agreement of partnership between the spouses'. The same can be said of the conduct of the parties in casu. This Cout is not convinced that the conduct shows that the only reasonable inference is that of a partnership.

[41] In ***Ponelat v Schrepfer***[12] the Supreme Court of Appeal stated the following:

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[11] 1984 (3) SA 192 (A)
[12] 2012 (1) SA 206 (SCA) at [20]

'A universal partnership in which the 'parties agree to put in common all their property, both present and future', is known as universum bonorum (see Isaacs v Isaacs 1949 (1) SA 952 (C) at 955, citing Pothier's translation), which in Sepheri v Scanlan 2008 (1) SA 322 (C) at 338C – D was described as effectively a community of property. In Mühlmann v Mühlmann 1984 (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 Muhlmann 1981 (4) SA 632 (W) at 634F – H.'

[42] This Court is not convinced that the required *animus contrahendi* appears from the conduct of the parties.

[43] It must be borne in mind that a *societas universorum bonorum* does not equate to a marriage in community of property.[13] The normal principles pertaining to contributions of spouses in a marriage in community of property will therefore not apply to determining if a *societas universorum bonorum* came into existence. The mere fact that parties co-habitate does not entitle them to a proportionate share of the other parties' estate.

[44] Having a holistic view of the oral evidence and taking into consideration the documentation presented during the oral evidence, it is evident that the relationship between the Plaintiff and the Defendant is susceptible to a reasonable alternative interpretation, being that the parties were merely co-habitating and sharing expenses. This Court is not persuaded that what was contributed by the Plaintiff, amounts to partnership contributions. In this regard, the Court agrees with the submission made

[13] See for instance ***Butters v Mncora*** 2012 (4) SA 1 (SCA) where this distinction was specifically clarified.

by the Defendant's Counsel that one should be careful to conceive every gift or donation as the basis of a *societas universorum bonorum.*

[45] The *onus* was on the Plaintiff to proof its case, and the Defendant does not carry any *onus* to disprove. The Plaintiff had to proof its case on a balance of probability. The Plaintiff failed to establish that a *societas universorum bonorum* came into existence in that there was no evidence to the effect that the parties pooled all their assets. There was furthermore insufficient evidence that the alleged pooling of the assets was with the purpose of making a profit.

[46] That the conduct of the parties is susceptible to an alternative interpretation being actions that naturally follows from co-habitation.

[47] The Plaintiff's case therefore stands to be dismissed. There is no reason why the costs should not follow the outcome of the proceedings. Having regard to *inter alia* the nature of the proceedings, the amount of preparation required, the volume of the documents presented to court and the importance of the proceedings to the parties, costs to counsel are warranted on Scale B.

Order:

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

48.1 The Plaintiff's claim is dismissed with costs on party and party scale including costs to counsel on Scale B.

M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

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DATE JUDGEMENT RESERVED:	23 August 2024
DATE OF JUDGMENT :	19 February 2025