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**IN THE HIGH COURT OF SOUTH AFRICA**  
**(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

DATE: 2018-02-09

SIGNATURE: 

9/2/18

**Case No. 61397/2015**

In the matter between:

**ELIZABETH CORNELIA TIMMER**

**PLAINTIFF**

and

**FLORIS STEPHANUS ZWARTS**

**DEFENDANT**

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## JUDGMENT

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### MILLAR AJ

1. This is an action brought by the plaintiff against the defendant. The plaintiff claims:
  - 1.1 the dissolution and liquidation of an alleged partnership between them;  
and
  - 1.2 for the repayment of certain money which it is alleged the defendant was supposed to invest on behalf of the plaintiff but which he did not.
2. It is common cause between the parties that during October 2007 they entered into an oral agreement in terms whereof the plaintiff would contribute to the building of a flat on the property of the defendant and that pursuant to that contribution, they would both derive a benefit from the income of letting out that flat.
3. The parties disagree on the amounts contributed by the plaintiff and the defendant respectively and the manner in which the income from the flat was to be dealt with.

4. Only two witnesses were called to testify. The plaintiff and defendant.
5. The plaintiff testified that during 2006 she had entered into a relationship with the defendant. They had become engaged and decided to live together in the plaintiff's home in Danville.
6. The home in Danville was modest and during 2007, they had decided that the plaintiff would sell her home and that they would move to live at the defendant's house in Pretoria North. The reason for the move was that his property was of a higher value and was much bigger. It was decided that a flat would be built on that property and that it would be let out.
7. The plaintiff testified that she had contributed R130 000,00 in cash and had contributed a further sum by way of purchases at Builders Warehouse towards the cost of building the flat. The plaintiff produced in evidence her bank statements which demonstrated these payments. This was paid mainly from the proceeds of the sale of her house which had been sold for R380 000,00 on 8 October 2007. This was the last time the plaintiff owned any immovable property. For his part, the defendant had written the plaintiff into his will as a beneficiary, one dated 19 April 2007 and another on 10 September 2007. In both she would inherit the Pretoria North property. The plaintiff testified that this was done by the defendant to ensure she was protected if something happened to him.

8. The flat was built and subsequently let for R2 500,00 per month. The plaintiff testified that the defendant had collected the rent but had never given any of it to her or accounted for it. While they had lived together, and she was employed, she had paid all her own expenses and had in addition bought the food for the home and paid the home helper. The Defendant had paid all the other expenses.
9. Some years later the defendant's father had passed away and had left him a house and investments. The plaintiff and defendant had gone to live in the late fathers' house and had left her daughter in the Pretoria North house. The reason for this had been that there was insufficient space to take all their furniture to the new house.
10. During April 2014, the defendant had suggested to the plaintiff that she resign from her employment. She had done so and had cashed in her pension. She had received R376 000,00 which she had used to pay some debts and make some purchases. The defendant had offered to invest R150 000,00 of the pension money with his investments, the reason advanced being that the higher the amount invested the better the interest rate for them both.
11. After the payment of the R150 000,00 to the defendant, the plaintiff was totally dependent on the defendant. The plaintiff then asked for some proof of her investment and an indication of what it was earning. The defendant told her to



"believe in him" and that everything would be fine. He never produced any documents. The plaintiff persisted until May 2015 and eventually moved out, going back to the Pretoria North house where her daughter stayed. They left that property two months later after having made other arrangements. The plaintiff testified that she had seen a lawyer in June 2015.

12. The defendant testified that he and the plaintiff had met during 2005. He had subsequently lived with her at her home in Danville before the property had been sold. The plaintiff had paid for all the expenses there and he had only paid for the water and lights and occasionally contributed to the cost of food. He had not paid any rent. He said that the decision to sell the house had been hers and that his only role had been to see that she was not cheated. He agreed that they had decided to live together at his Pretoria North home and that they would build a flat there to rent out.
13. He confirmed that the plaintiff had paid the sums of R50 000,00 and R80 000,00 respectively to him and that she had also purchased goods for the building of the flat from Builders Warehouse. From the R50 000,00 he had purchased bricks and cement for the construction of the flat and had paid a bricklayer but besides this he had done all the work himself save when the plaintiff's sons had assisted. His evidence was that only R5 000,00 was spent towards the flat and that the remainder was towards the "standard of living they enjoyed". He disputed the amounts spent at Builders Warehouse were spent for the flat stating that the plaintiff may have bought flowers and flower pots.

14. He initially disputed that there had been any agreement between them stating *"we never agreed anything, I gave something, and she gave something, there was no partnership or agreement, it was just the relationship"* during his examination in chief, but during cross examination conceded *"she was working at Builders Warehouse when the flat was built. She paid for the groceries – she never paid the bond or the water and lights, she paid for all that stuff, that was the agreement. She also paid for the housemaid. The agreement was that she pay all that stuff."* (my underlining).
15. The rental received from the flat was R1 500,00 per month and when it was received was paid towards the water and electricity for both the main house and the flat. The defendant testified that he had included the plaintiff as a beneficiary in his will, to initially inherit the immovable property subject to conditions, in a will dated 4 May 2007 and thereafter to inherit without conditions in a subsequent will dated 10 September 2007. He explained this by saying that it was because they were together. The defendant's evidence was that he had not encouraged the plaintiff to resign from her employment and played no role in her decision to cash in her pension. He did not know how much she had received and denied that he had ever offered to add her funds to his own for investment purposes to increase the interest earned.
16. His evidence was that the plaintiff had given each of her children R5 000,00 and had bought various items and had then said *"I want to give you something"*

whereupon she had deposited R150 000,00 into his bank account. He regarded this as a gift. He denied that the plaintiff had ever asked him about the income for the flat or for information relating to the investment.

17. It was put to him that his failure to provide this information had led to the termination of the relationship, but he denied this and said that his refusal to sign a joint will with the plaintiff had been the real reason she had terminated the relationship.
18. The defendant testified that notwithstanding the reference to the plaintiff in the two wills before the court as "*verloofde*" or fiancé, they had never in fact been engaged. He had gone on the instructions of the plaintiff to purchase a ring for her. He was adamant that they were not engaged but could not explain the reference in his will.
19. The plaintiff gave her evidence in a clear and forthright manner. Much of her evidence was unchallenged. The defendant was, on the other hand not a particularly impressive witness. Although he had been in court when the plaintiff testified, he was unable to explain why the plaintiff had been unchallenged on a number of material aspects, not least of which that she had indeed paid R130 000,00 to him. It had been put to the plaintiff that she had only given the defendant R5 000,00 towards the cost of bricks for the flat, but this had been disputed and the plaintiff had tendered her bank statements to corroborate her evidence. The defendant gave a different version in evidence and stated that the



cost of the bricks had been part of the first R50 000,00 paid to him. He said of the balance, that this had been used to maintain a lifestyle and said the same of the R80 000,00. He did not explain why these payments had been made to him given the terms of the agreement testified to by him.

20. The evidence given by the parties is mutually destructive. In these circumstances, the test to be applied is that set out in by Eksteen JP in *National Employers' General v Jagers*,<sup>1</sup> as follows:

*'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'*

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<sup>1</sup> *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D. See also *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 1 (SCA) para 5 and *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 558E-G.



21. In regard to Claim 1, relating to the partnership and flat, the probabilities do not favour the version of the defendant. The plaintiff had no reason, given the living expenses that she and the defendant each paid by agreement, to advance anything more than the R5 000,00 contended by the defendant toward the cost of the flat. On the probabilities the plaintiff advanced the R130 000,00 so as to secure an income for herself. The defendant, for his part benefitted by an improvement in the value of his property and utilized the income from the flat to pay what was his agreed expense.
22. The version of the plaintiff is to be preferred over that of the defendant which is rejected as being so improbable as to be untrue.
23. The evidence of the parties establishes that the agreement entered into by them in respect of the flat was a partnership *societas universorum quae ex quaestu veniunt*. This type of partnership "is referred to also as a partnership of general profits, or of all profits<sup>2</sup>, or merely as a general partnership. This kind of partnership comprises all that the partners may acquire during its continuance from every kind of commercial activity. Partners are considered to enter into this kind of partnership when they declare that they contract with a view to creating a partnership without any further explanation, or that they contract a partnership of all profits which they may make from all sources. Unlike the partnership of all

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<sup>2</sup> Sometimes referred to as a leonine partnership.

*present and future property (societas omnium bonorum), it is confined to profits alone.*<sup>3</sup>

24. The terms of this type of partnership may be entered into expressly or tacitly.<sup>4</sup> While the plaintiff asserts that there was an express agreement to enter into the partnership and the defendant disputes this, I find that on the evidence of the conduct of the parties that at the very least, by their conduct, a tacit agreement of partnership to realize the profits from the flat came into existence between them.
25. The plaintiff sought in her particulars of claim, *inter alia* an order that a liquidator be appointed to liquidate the partnership assets. I am of the view that this is impractical given that the partnership at no stage extended to include the immovable property of the plaintiff on which the flat was constructed. The flat has acceded to the property and a liquidator would not be able to realize its value without dealing with the whole of the property. It is common cause that the partnership has no creditors and furthermore the defendant has testified that there are no records available to account for the income from the flat. The appointment of a liquidator would in the circumstances serve no purpose.<sup>5</sup> The plaintiff derived no benefit from her contribution to the partnership and it is for this

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<sup>3</sup> Perspectives on The Law of Partnership in South Africa, JJ Henning, Juta, 2014 at pages 86-87.

<sup>4</sup> Ibid and *Paixao and Another v Road Accident Fund* 2012 (6) SA 377 (SCA) at 383 D-E where the court stated "An agreement may be made expressly or tacitly. An express agreement may be made orally or in writing. A tacit agreement is inferred from the surrounding circumstances and conduct of the parties".

<sup>5</sup> See in regard to the granting of alternative relief to that expressly claimed *National Stadium South Africa (Pty) Ltd and Others v Firststrand Bank Ltd* 2011 (2) SA 157 (SCA) it was held that: "The court below justified its approach on the ground that in joining the managers in the proceedings and supporting them the City became a co-wrongdoer and had to be restrained. This, however, does not dispense with the required prayer for relief against the City. The court also relied on the prayer for alternative relief. It erred because this superfluous prayer does not entitle a court to grant relief that is inconsistent with the factual statements and the terms of the express claim..."

reason that I intend to order that the defendant repay to the plaintiff her contribution to the partnership.<sup>6</sup>

26. In regard to claim 2, the probabilities similarly favour the version of the plaintiff. The assertion by the defendant that the plaintiff, who was now unemployed and dependent on him, simply paid the last of her pension proceeds in the sum of R150 000,00 as a gift or donation is improbable. The plaintiff and defendant were not married, and on the version of the defendant not even engaged. The reason given by the plaintiff for leaving the defendant and ending the relationship is cogent and would certainly have on the probabilities given her cause for doing so. The evidence of the defendant that the plaintiff left him because he would not sign a joint will is so improbable that it can be rejected. The plaintiff was by all accounts totally dependent on the defendant at the time she left and the sole beneficiary in his will, his late father who was the beneficiary to certain of his movables having predeceased him. The reason proffered by him is contrived and is so improbable as to be untrue.
27. I find that the plaintiff did indeed give the R150 000,00 to the defendant to invest for her and that he failed to do so.
28. I was addressed by counsel on the scale of costs. Having regard to the nature of the dispute and the relief sought, I find that the plaintiff was justified in instituting action in this court and in the circumstances the costs will follow the result.

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<sup>6</sup> The defendant benefitted to the extent of the improvement of his immovable property and in respect of the unaccounted-for income over a period of some eight years.



29. In the premises, I grant the following order:

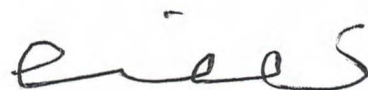
29.1 The partnership between the plaintiff and the defendant relating to the flat located at 219 Burger Street, Pretoria North is hereby dissolved.

29.2 The defendant is ordered to pay to the plaintiff in respect of claim 1, the sum of R130 000,00 (One hundred and thirty thousand Rand).

29.3 The defendant is ordered to pay to the plaintiff, in respect of claim 2, the sum of R150 000,00 (One hundred and fifty thousand Rand).

29.4 The defendant is ordered to pay interest on the amounts referred to in paragraphs 29.2 and 29.3 above at the legal rate *a tempore mora* from 7 August 2015 to date of payment, both days inclusive.

29.5 The defendant is to pay the plaintiffs costs of suit which costs are to include the trial costs for 7 and 8 February 2018, on the High Court scale as between party and party.

**A MILLAR****ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

HEARD ON:

7 &amp; 8 FEBRUARY 2018

JUDGMENT DELIVERED ON:

9 FEBRUARY 2018

COUNSEL FOR THE APPLICANT:

ADV J VILJOEN

INSTRUCTED BY:

DP DU PLESSIS INC.

COUNSEL FOR THE RESPONDENT:

ADV F BIRKHOLZ

INSTRUCTED BY:

GIDEON VAN DEN BERG INC.