THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 802/2010

In the matter between:

HANS GUNTER PONELAT Appellant

and

ERICA SCHREPFER Respondent

Neutral citation:	*Ponelat v Schrepfer* (802/10) [2011] ZASCA 167 (29 September 2011)
Coram:	Heher, Maya, Malan, Majiedt JJA and Meer AJA
Heard:	**31 August 2011**
Delivered:	**29 September 2011**
Summary:	Contract – whether tacit contract of universal partnership can be inferred from proven facts – existence of tacit universal partnership confirmed.

ORDER

On appeal from: Eastern Circuit Local Division of the High Court (Moosa J sitting as court of first instance):

1. The appeal is dismissed with costs.

2. The order of the court below is replaced by the following:

'(A) In respect of the first claim:

(1) It is declared that a universal partnership existed between the plaintiff and the defendant and that the plaintiff had a 35 per cent and the defendant a 65 per cent share in such partnership;

(2) It is declared that the said partnership was dissolved with effect from 1 April 2005;

(3) Failing agreement between the parties within a period of two months (or such longer period as the parties may in writing agree upon) on the net benefit accruing to the plaintiff from the partnership and the manner and date of delivery or payment of such benefit to the plaintiff-

(i) It is ordered that a liquidator be appointed to liquidate the said partnership;

(ii) Unless the parties agree in writing on the appointment of a liquidator, the liquidator shall be appointed at the request of either of the parties by the Chairperson of the Law Society of the Cape of Good Hope;

(iii) The parties shall within one month of the appointment of the liquidator deliver to the liquidator and to each other a statement of his or her assets and liabilities as at 1 April 2005 duly supported by such available documents and

records as are necessary to establish the extent of such assets and liabilities;

(iv) The liquidator may call on either of the parties either mero motu or at the request of one of them to deliver further documents or records to the liquidator and the other party;

(v) The liquidator shall determine a date for the debatement of the statements referred to in paragraph (iii) and shall preside over such debatement;

(vi) The liquidator shall within one month of the conclusion of the debatement make an award in writing determining the assets and liabilities of the partnership and dividing the nett assets by awarding 35 per cent to the plaintiff and 65 per cent to the defendant;

(vii) The parties shall give effect to any award made by the liquidator within such period as he may direct in writing.

(viii) The costs of the liquidator shall be borne by the parties in proportion to their shares in the partnership estate.

(4) The defendant is ordered to pay the plaintiff's costs of suit.

(B) In respect of the second claim:

The plaintiff's second claim is dismissed with costs.'

JUDGMENT

MEER AJA (HEHER, MAYA, MALAN and MAJIEDT JJA concurring)

[1] This is an appeal from a judgment of Moosa J sitting as court of first instance in the Eastern Circuit Local Division of the High Court in

terms of which the court found that a tacit universal partnership agreement existed between the parties and made an order for its division. The appeal is with leave of the court a quo.

[2] The respondent as plaintiff in the court a quo instituted action against the appellant as defendant, seeking relief in respect of two claims. It is convenient to refer to the parties as they were in the court a quo.
The first claim sought a declaration that a universal partnership existed between the parties, an order confirming the dissolution of such partnership and the appointment of a liquidator. The first claim was premised on an oral agreement, alternatively on an implied and/or tacit agreement based on the conduct of the parties. Alternatively, the plaintiff sought an order for maintenance at the rate of R12 000 per month until her death, re-marriage or permanent cohabitation with a partner.
The second claim, as a separate and not alternative claim was for damages in the amount of R100 000 for iniuria arising from the defendant's alleged breach of promise to marry the plaintiff.

[3] The defendant opposed the action and in his plea denied that a universal partnership existed between himself and the plaintiff or that the plaintiff was entitled to maintenance. In respect of the second claim he denied that he had promised to marry the plaintiff. He further pleaded that an agreement of engagement as postulated in the second claim, was destructive of the first claim and the existence of a universal partnership.

[4] At the trial the plaintiff and two witnesses testified on her behalf. The defendant closed his case without testifying. The court a quo found that a tacit universal partnership existed between the parties, the plaintiff's share therein being 35 per cent and that of the defendant, 65

per cent. The partnership was found to have commenced on 4 March 1989 and to have terminated on 1 April 2005. The alternative claim for maintenance and the second claim for damages based on a breach of promise were dismissed with costs. It is against the finding of a tacit universal partnership that the defendant appeals. The paramount issue which arises on appeal therefore is whether a tacit universal partnership agreement existed between the parties.

[5] The evidence of the plaintiff was as follows: The defendant, born in 1938, and the plaintiff, born in 1945, formed a romantic relationship during 1988. The plaintiff worked as a freelance beautician at the time and the defendant owned a successful electrical business which he had built up with his late wife. In March 1989 the defendant invited the plaintiff to move in permanently with him as his life partner. He promised to support her and also look after her 16 year old son. He expressed a desire to marry her but explained that he could not do so at that stage because the will of his deceased wife stipulated that if he remarried within ten years of her death he would forfeit a share of his inheritance to his sons. He promised to marry the plaintiff when the ten year period expired. The plaintiff moved into the defendant's home in Benoni where they lived together as man and wife, sharing a joint household. The defendant informed the plaintiff, 'what is mine is yours'. This statement was repeated several times during the duration of the relationship. As the defendant gave no evidence it is not possible to determine his understanding of these words.

[6] Prior to the move the plaintiff had at the defendant's request sold her furniture and effects and the proceeds of approximately R10 000 were made available to the joint household, as were the proceeds from the sale

of her car. The plaintiff continued working as a freelance beautician and contributed her earnings, on average R2 000 per month, towards their joint expenses. However at the defendant's request the plaintiff stopped working soon after they began living together. The defendant's domestic worker was discharged and the plaintiff took over all household responsibilities and domestic chores, a task she continued for the 16 years that the parties lived together. In August 1989 the defendant agreed that the plaintiff could go back to work, which she did as a personal assistant, earning a salary of R2 500 per month. Her income once again went towards their joint expenses.

[7] In March 1994 the parties became engaged to marry and the defendant presented the plaintiff with an engagement ring. The defendant had described their relationship by the German terms 'Lebensgefährte' or 'Lebensgenosse' which denoted that they would give each other love and companionship as partners for life. The plaintiff described the defendant as her protector and provider.

[8] According to the plaintiff the defendant's electrical business was his contribution to the universal partnership which she alleged came into existence between them. The defendant had initially rented the business premises but had later purchased the property on the plaintiff's advice that it would be more beneficial to own than rent the property. The defendant also owned the property in which they lived. The properties were registered in the name of a company, Ponelat Properties (Pty) Ltd, of which the defendant was the sole shareholder and director. Although the plaintiff was not active in the defendant's business, she assisted with the administration after hours, and during lunch times when required. She also helped out when the defendant's secretary was absent or on leave. In

addition she provided for the defendant's needs and comfort, entertained guests and business associates and served as his confidante and advisor.

[9] The plaintiff stopped working in 1998 at the defendant's request. He wanted her to retire with him to live on a farm in Plettenberg Bay. The plaintiff's salary had by then increased to R5 600 per month which she continued to contribute towards joint expenses. She also had between R2 000 and R3 000 in her bank account and an amount of R100 000 had accrued to her provident fund. The defendant purchased a farm in Plettenberg Bay for R790 000, which was registered in the name of Ponelat Properties and he moved there in 1998. The plaintiff joined him in 1999 after she had arranged for the rental of the business premises and negotiated the sale of the house in Benoni. The house was sold for R480 000 at a profit and the proceeds went towards funding the purchase of the farm. Upon moving to Plettenberg Bay the defendant asked the plaintiff to close her bank account as he would provide for her. She trusted him and did so.

[10] In Plettenberg Bay the plaintiff was actively involved in improving and running the farm. She assisted with the construction of two self-contained apartments to generate additional income. She designed and furnished these, supervised the workmen and purchased the material. Thereafter the plaintiff managed the apartments as tourist accommodation and generated income for the joint household. The witness, Lorraine Gregory, who stayed on the farm with her family as a paying guest, testified about the plaintiff's accomplishments as a hostess.

[11] On the farm the plaintiff also assisted in rearing and feeding cows and calves and with the felling of trees which netted approximately

R70 000. In addition she performed the administrative, book-keeping and clerical tasks and supervised the employees, negotiating agreements and overseeing disputes. She corresponded and negotiated with SARS and the Department of Labour in connection with farming operations and negotiated leases with prospective tenants. Documentary and photographic evidence of the aforementioned activities were furnished. The plaintiff's testimony about her involvement on the farm was corroborated by her son Guido.

[12] In June 2000 the defendant applied in the names of the parties for membership to a retirement village. The plaintiff was referred to as the defendant's spouse in the application. In August 2003 the farm was sold for R3 500 000. According to the plaintiff due to her intervention and advice the farm was sold for R500 000 more than the defendant was prepared to accept. The defendant thereafter bought a house in Plettenberg Bay for R1 500 000 to which the parties relocated. A flat was built, which together with a pre-existing flat, improved the property. The plaintiff was actively involved in the renovations and refurbishings. The bigger apartment was let out to generate income. The plaintiff continued to perform the administrative functions as before.

[13] Of the proceeds from the sale of the farm, the defendant invested R1,2 million in an Old Mutual Insurance policy held by the parties. The policy provided for one lump sum payment, and the proceeds thereof were payable to the survivor on the death of one of the parties. An amount of R600 000 of the proceeds of the sale of the farm was paid to the defendant's son for his involvement on the farm. The plaintiff noted that she did not get her share for improving the farm, pointing out that the value of both the farm and the house subsequently purchased had been

increased by the contribution of her skills, labour and expertise.

[14] During 2004 the plaintiff began to feel financially insecure about her future after the defendant experienced certain life threatening incidents. She asked the defendant for written confirmation that she was entitled to a half share of the partnership estate. Her attorney received a letter from the defendant's attorney dated 26 October 2004, which stated as follows:

"On condition that your client remains living with our client under the present circumstances, she will benefit from his deceased estate in the event of our client's death namely:

1. Our client has left in his Last Will and Testament to your client the following namely:
    - 1.1 One-third of the balance of his current account with Nedbank;
    - 1.2 One-third of the balance of his Old Mutual Investment in units trusts held with Old Mutual currently;
    - 1.3 His Mercedes Benz C220 diesel motor vehicle, registration number CX 39794, engine number 64696330177608 current value R300 000-00 (three hundred thousand rand);
    - 1.4 One-sixth un-divided share in his immovable property known as Erf 929, Bitou Municipality, Plettenberg Bay;
    - 1.5 The right of occupation in respect of flat number one of the said Erf 929, aforesaid, free of charge, after our client's death until the sale of the property or her death or her marriage which ever is the sooner;
    - 1.6 All the above uses awarded to your client is subject thereto that she remains living with our client until his death, failing to do so, the awards made as set out hereinabove become nil and void.

In addition as an alternative to the above, should your client wish to separate from our client, our client is prepared to award to your client the following on a contractual basis namely:

1. R100 000-00 (one hundred thousand rand) cash payment with immediate effect;

2. A further R100 000-00 (one hundred thousand rand) payable over 60 (sixty) consecutive months, following the month after the first R100 000-00 as aforesaid has been paid.

There are various reasons and circumstances that [are] not set out in this letter, referring to the first 10 (ten) years that our respective clients have spent together and the later 6 (six) years which they have spent together in Plettenberg Bay, during which respective periods of time, our client has financially maintained your client with all her needs, despite the fact that she was at one stage earning a salary of approximately R6 000-00 (six thousand rand) per month, and [is] currently receiving interest of R1 000-00 (one thousand rand) per month. Her personal needs, includes medical aid and personal requirements not to mention herein.

Our client is then prepared to enter into an agreement with your client along these lines, and await your response thereto.

Please note that there is no obligation on our client to do so, but he is prepared to do so in the circumstances.'

The plaintiff did not accept the offer as contained in the letter.

[15] The relationship between the parties came to an end on 1 April 2005. The plaintiff initially moved out of the common home into the bachelor flat on the premises and thereafter into a flat of her own for which the defendant paid a deposit. The defendant gave her R1 500 a month until February 2007. The plaintiff had very little to show in the form of assets on the termination of the relationship. She was entitled to R1 300 a month from her retirement annuity and 400 Swiss francs from a Swiss pension. A trade reference given by the defendant to the plaintiff as an employee after the termination of their relationship corroborates the evidence of the plaintiff that she served as a freelance hostess, entrusted with the task of ensuring that the accommodation for tourists was in good condition and that their needs were taken care of. He describes her as honest, reliable, hard working and a gracious host. No adverse inference against the plaintiff can be drawn from the fact that she was described as

an employee in this reference. She typed it on the defendant's instructions.

[16] During cross-examination the plaintiff emphasised that her contribution to the partnership went beyond that of the ordinary housewife, asserting that an ordinary housewife has a domestic helper and an ordinary housewife is not a secretary. She emphasised moreover that if the defendant only wanted to give her a roof over her head he could have given her a cottage next door, instead of making her give up her life to move in with him, promising what was his was hers, and promising to marry her. She was adamant that had they married it would have been in community of property.

[17] The credibility of the plaintiff was challenged when she was cross-examined about notice of motion proceedings instituted and subsequently abandoned by her, in which she had claimed the same relief as in the action proceedings, and the various amendments which were sought and effected to her particulars of claim in the latter proceedings. Counsel for the defendant submitted in this context that the plaintiff's particulars of claim had undergone a metamorphosis like the claim of the defendant in the case, *McDonald v Young* 292/10 [2011] ZASCA 31 heard recently by this court. The comparison is misplaced. In *McDonald* the appellant sought the confirmation of a joint venture agreement, alternatively the payment of maintenance. This court noted that there were a number of unsatisfactory aspects in the appellant's testimony and referred to how his claim had developed over time. His testimony in the magistrates' court that at the time the parties met to settle their dispute, he did not have a claim, was in stark contrast to his later testimony in the high court that his claim at that meeting was inter alia for his share in the disputed property.

Thereafter a letter from the appellant's attorney stated that a universal partnership had existed between the parties. In comparison, the testimony of the plaintiff in this matter was not characterised by similar unsatisfactory aspects, and her claim did not develop during her evidence.

[18] The plaintiff's pleaded version, notwithstanding various amendments to her particulars of claim, and her testimony that a universal partnership agreement was concluded, remained unchanged. Unlike the defendant in *McDonald*, the plaintiff did not contradict herself and her evidence withstood extensive cross-examination. The amendments to her particulars of claim were precipitated, inter alia, by exceptions taken by the defendant and cannot be said to illustrate her developing a claim over time. The plaintiff's evidence on the facts was either common cause or largely unchallenged. By choosing not to testify in the face of her evidence, the defendant took the risk of the issue being determined on the plaintiff's evidence. The trial court correctly in my view found the plaintiff to be a credible witness.

[19] The essentials of a universal partnership were succinctly summarised in the passages of the judgment of the trial court quoted hereunder:

'The essentials of a special contract of partnership were confirmed in the case of **Pezzuto v Dreyer** 1992 (3) SA 379 (A) at 390, as follows:

> *"Our courts have accepted **Pothier**'s formulation of such essentials as a correct statement of the law **(Joubert v Tarry & Co** 1915 TPD 277 at 280-1; **Bester v Van Niekerk** 1960 (2) SA 779 (A) at 783H-784A; **Purdon v Muller** 1961 (2) SA 211 (A) at 218 B-D). The three essentials are (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit (**Pothier:** A Treatise*

on the Contract of Partnership (Tudor's translation) 1.3.8). A fourth requirement mentioned by ***Pothier*** *is that the contract should be a legitimate one."*

The *essentialia* of the partnership set out above applies equally to a universal partnership. In this regard see **Muhlmann v Muhlmann** 1981 (4) SA 632 (W); **V(aka L) v De Wet NO** 1953 (1) SA 612 (O) at 615; **Isaacs v Isaacs** 1949 (1) SA 952 (C) at 956 and **Schaeffer**: Butterworths Family Law: Cohabitation at page 3). The contract of partnership may not necessarily be expressed. It could be tacit or implied from the facts, provided they admit of no other conclusion than that the parties intended to create a partnership (**Festus v Worcester Municipality** 1945 CPD 186 (C)). Our courts have recognised that a universal partnership, also known as domestic partnership, can come into existence between spouses and co-habitees where they agree to pool their resources (**Muhlmann v Muhlmann** 1984 (3) SA 102 (A); **Kritzinger v Kritzinger** 1989 (1) SA 67 (A); **Ally v Dinath** 1984 (2) SA 451 (T) and **V(aka L) v De Wet** (*supra*).'

[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 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; *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634F-H.

[21] Counsel for the defendant argued that the existence of a promise to marry was an express agreement which was destructive of a tacit universal partnership. The defendant appeared to rely on the *McDonald* case for this submission too. Once again the comparison is misplaced. In *McDonald* this court found that a reliance on a tacit agreement regarding maintenance could not be sustained as such was inconsistent with the appellant's evidence that there was an express agreement in respect of certain property, the aim of which was to ensure that the appellant was financially independent and would not have to rely on the respondent for support. The evidence was clearly contradictory on these two aspects. The same cannot be said about the evidence of the plaintiff concerning the promise to marry and the tacit universal partnership agreement.

[22] It is apparent from the case law that a universal partnership can exist in a marriage as was the case in *Mühlmann* supra and *Fink v Fink* 1945 WLD 226. It does not follow then that a universal partnership cannot exist between parties who are engaged to be married. A universal partnership exists if the necessary requirements for its existence are met, and this is regardless of whether the parties are married, engaged or cohabiting. See V*(aka L) v De Wet NO* at 614B-E, 615F-616A. The evidence is clear that the respondent wanted (and, after throwing herself at the mercy of the appellant, needed) immediate security and that the respondent, aware of that need, voluntarily committed himself to satisfy it.

[23] The evidence suggests that from the nature of the discussions between the parties prior to their cohabiting and their intent during their 16 years together, they had the requisite *animus contrahendi* to form a universal partnership. The plaintiff came into the relationship on the basis

that the defendant would give her what was his and she would give him what was hers, (a stronger statement of the creation of a communal estate it would be hard to imagine). There was the promise of security. And during their 16 years together the parties did pool their assets and resources. The plaintiff contributed all she had financially and physically, the proceeds of the sale of her assets, her salary, time, energy, labour, skills and expertise. Using an analogy from the Appellate Division decision in *Mühlmann* referred to at paragraph 20 above, regarding the conduct ordinarily expected from a wife, it can be said that plaintiff's conduct was not simply that which is ordinarily to be expected of a cohabitee. The defendant contributed his business, financed the various properties and provided financial security. The pooling of their resources, their joint investment of R1,2 million in the form of the Old Mutual policy and the plaintiff's entitlement to the proceeds thereof in the event of the defendant's death, their working together to secure their retirement and increase their income are all indicators of the existence of a universal partnership. So too the appellant's offer to the plaintiff, in the letter of 26 October 2004, of effectively a fair portion of his estate.

[24] In my opinion the essentials of a contract of universal partnership have been established. Each party brought something into the partnership, the partnership was carried on for their joint benefit and the object was to make a profit.[1] The activities engaged in by the parties were for their joint benefit and they increased their assets. This being so I am in agreement with the court a quo that it was more probable than not that a tacit universal partnership agreement existed between the parties. The universal partnership came into being in March 1989 and was terminated on 1 April 2005.

1 A pure pecuniary profit motive is not required. The achievement of another material gain, such as the joint exercise for the saving of costs will suffice. See *Ally v Dinath* 1984 (2) SA 439 (T) at 455A-C.

[25] There was no appeal against the trial court's adjudcation of the respective interests of the parties in the partnership. The distribution of 35 per cent/ 65per cent, which I believe in all the circumstances to have been fair and equitable, remains.

[26] The order of the court a quo does not make provision for the appointment of a liquidator to liquidate the estate of the partnership. It is therefore necessary to amend the order to provide for such appointment.

[27] I accordingly grant the following order:

1. The appeal is dismissed with costs.
2. The order of the court below is replaced by the following:

'(A) In respect of the first claim:

(1) It is declared that a universal partnership existed between the plaintiff and the defendant and that the plaintiff had a 35 per cent and the defendant a 65 per cent share in such partnership;

(2) It is declared that the said partnership was dissolved with effect from 1 April 2005;

(3) Failing agreement between the parties within a period of two months (or such longer period as the parties may in writing agree upon) on the net benefit accruing to the plaintiff from the partnership and the manner and date of delivery or payment of such benefit to the plaintiff-

(i) It is ordered that a liquidator be appointed to liquidate the said partnership;

(ii) Unless the parties agree in writing on the appointment of a liquidator, the liquidator shall be appointed at the request of either of the parties by the Chairperson of the Law Society of the Cape of Good Hope;

(iii) The parties shall within one month of the appointment of the liquidator deliver to the liquidator and to each other a statement of his or her assets and liabilities as at 1 April 2005 duly supported by such available documents and records as are necessary to establish the extent of such assets and liabilities;

(iv) The liquidator may call on either of the parties either mero motu or at the request of one of them to deliver further documents or records to the liquidator and the other party;

(v) The liquidator shall determine a date for the debatement of the statements referred to in paragraph (iii) and shall preside over such debatement;

(vi) The liquidator shall within one month of the conclusion of the debatement make an award in writing determining the assets and liabilities of the partnership and dividing the nett assets by awarding 35 per cent to the plaintiff and 65 per cent to the defendant;

(vii) The parties shall give effect to any award made by the liquidator within such period as he may direct in writing.

(viii) The costs of the liquidator shall be borne by the parties in proportion to their shares in the partnership estate.

(4) The defendant is ordered to pay the plaintiff's costs of suit.

(B) In respect of the second claim:

The plaintiff's second claim is dismissed with costs.'

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Y S MEER
Acting Judge of Appeal

APPEARANCES:

For appellant:	P E Jooste T Zietsman Instructed by: Jordaan & Pretorius Attorneys c/o J C van der Berg Attorney, George Rosendorff Reitz Barry, Bloemfontein
For respondent:	De Waal Nigrini Gaby Damalis Instructed by: Schwarz-North Attorneys c/o Millers Inc, George Honey & Partners, Bloemfontein