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

REPORTABLE

Case Number: 19122/14

In the matter between:

J S Plaintiff

and

J H S Defendant

JUDGMENT DELIVERED 27 JUNE 2018

Andrews AJ

Introduction

[1] The Plaintiff instituted a claim against the Defendant based on an *actio communi dividendo* for the termination of joint ownership of an immovable property, ERF […] Parklands ("the immovable property"), repayment of a loan and *rei vindicatio* for the return of a motor vehicle registered in the name of the Plaintiff.

[2] The Defendant, in her counterclaim, seeks an order declaring that a universal partnership existed between the parties, declaring the termination of the universal partnership and division of the joint estate.

Summary of Evidence

[3] At the trial, Roland Chute and J B testified in the case for the Plaintiff and J H S testified in the case for the Defendant. Their evidence can be summarised as follows:

[4] **Roland Trevor Chute,** an estate agent,[1] articulated that he prepared a valuation of the immovable property and valued same at R2.5 million. Mr Chute explained how the value of the immovable property was determined and the factors he considered when deriving at the said market value. He described the immovable property comprising of two separate or independent dwellings, one on the lower level and one on the upper level; a concept which, in his words, carried with it massive intrinsic value. He furthermore explicated that one had to factor the stairwell and deck into the valuation which was necessary to achieve the top floor. He explained that the top floor comprises of two bedrooms and two bathrooms with no garage and the bottom floor comprised of three bedrooms, two bathrooms and a garage, which differences are relevant in determining the estimated replacement values of the two dwellings. Hence, he determined that the replacement value of the top floor to be R1.1 million. Mr Chute also projected that the reasonable monthly rental for the immovable property at R21 000 per month being R10 000 per month for the top floor and R11 000 per month for the bottom floor.

[5] **J S (**hereinafter referred to as "the Plaintiff") testified that she was employed as a national IT Service and Operational Manager for [….]. She narrated that she was in a 17-year relationship with J S (hereinafter referred to as the Defendant). At the genesis of their relationship the parties were both employed. They decided to move in together and conducted a joint household. The Plaintiff articulated that it was established and agreed upon between the parties that each of them would contribute the same amount towards the joint household. She

[1] TTT Property Group – Table View.

described that their respective financial obligations would be split equally. The Plaintiff expounded further that it was agreed that whatever was put in by either party they would receive back.

[6] The Plaintiff narrated that the immovable property was initially registered in a close corporation and later transferred onto both the parties' names in undivided shares. The Plaintiff explained the circumstances under which the decision was taken to transfer the property out of the close corporation.

[7] The Plaintiff explained that her parents (hereinafter referred to as "the V E") sold their home and utilised the proceeds of the sale to erect the top floor dwelling which was completed in 2006. In light hereof, an agreement was entered into between the parties and formalised through a document headed "Addendum to Agreement" and dated 20 May 2006 in order to safeguard the V E' interest in the immovable property.

[8] The Plaintiff testified that she paid for the bond throughout the duration of her relationship with the Defendant. Additionally, she invested her pension fund pay-out of R180 000 into the property in 2007, which she did on the understanding that she would receive it back again. She explained that some of the money was utilised on alterations or improvements to the property. Various other expenses were also paid by her as evidenced from her bank statements. These expenses included the rates and taxes.

[9] In relation to the Toyota motor vehicle, the Plaintiff testified that same was registered in her name and that she had been paying the instalment of R2137.70. According to the Plaintiff, the vehicle is paid up and there is nothing owing on the vehicle. The Plaintiff stated that this is the only asset which the Defendant has in her possession.

[10] The Plaintiff furthermore testified that the Defendant borrowed money from her to start a business. She explained, referring to her bank statements, that payments were made to the Defendant in various amounts totalling R57 500. The Plaintiff testified that the Defendant undertook to pay the loan amount into her credit card or current account. The Plaintiff testified that the loan amount that she and the Defendant borrowed from her parents was in the amount of R150 000 of which only R80 000 was used. This loan has been fully settled.

[11] Furthermore, the Plaintiff articulated the reasons underlying the initial formulation of the pleadings as a universal partnership. Her evidence was that it was never her intention to give up her *'separate estate rights in any common law marriage'*. The Plaintiff testified that she and the Defendant never intended to get legally married which is evidenced by the fact that they had no shared accounts.

[12] The Plaintiff was taken line by line through her credit card and bank statements with a view to identifying which monthly and/or regular contributions she had made, which included *inter alia* the bond instalment amounts, ADT and ADSL line. The Plaintiff articulated that she registered the Defendant as a dependant on her medical aid and also paid for her cellular telephone contract.

[13] During cross-examination she confirmed that the parties conducted a joint household, but denied that a joint estate was formed. Although she regarded the Defendant as being her life partner the Plaintiff stated that the financial aspect was guided by the parties' respective Last Wills and Testaments, to regulate the extent of what needed to happen to their respective private estates.

[14] The Plaintiff testified that the parties set out a budget which amounted to a fair share split of their contributions. It was put to the Plaintiff that the Defendant would say that that there was no real arrangement *a pro pos* their finances, which the Plaintiff denied. The Plaintiff testified that she had the intention to

reclaim other expenses, but had no documents to support those claims. The Plaintiff testified that all payments on the bond account must be reimbursed to her and be deducted from the value of the property. Plaintiff testified that during the course of the relationship, there were contributions that were irrelevant. She referred to it as goodwill. These items would include medical aid for example.

[15] The re-advances drawn from the bond was used to settle both parties credit card debt, payments towards what the Plaintiff termed as high-end expenses, a swimming pool, improvements and putting up a wall around the house.

[16] In relation to the motor vehicle, the Plaintiff testified that she made the bulk of the payments towards the vehicle as it was agreed that the payments *'would transact to her'*. In light hereof, the Plaintiff held the view that the vehicle should be returned to her.

[17] The Plaintiff could not recall whether the Defendant also received her pension fund pay-out towards the end of 2007. She later confirmed that an amount which was not very legible was paid to her, which according to the Defendant was approximately R58 000.

[18] The Plaintiff was recalled to clarify the distinction between the payments on the bond. The one amount reflecting the instalment payment and the other amounts reflected as debit orders – variably. The Plaintiff confirmed that the Defendant had no use and enjoyment of the property since May 2014.

[19] **J H S,** the Defendant, testified that she and the Plaintiff enjoyed a lifestyle as a married couple. According to the Defendant, the parties' intimate relationship began on 14 July 1996. She described that the parties moved into a flat together in Gauteng when their relationship started. The Defendant narrated that she was employed at the time and that the Plaintiff was not. At some point, the Plaintiff,

after having worked as a hairdresser from 1993 to 1995, requested retrenchment. The Plaintiff was then unemployed for approximately two months, whereafter the Plaintiff found employment at Standard Bank.

[20] According to the Defendant, the parties never discussed who would be responsible for which household expenses. They did not keep any records in relation to the expenses paid by each of them. Initially the parties rented a property and she paid the rent. Her testimony was that she never expected the Plaintiff to reimburse her for these rental payments. When the parties moved into a two bedroom house in Gauteng, the rent payment was shared between them. The Defendant further articulated that when the parties moved to Cape Town in 1997, the Plaintiff was unemployed for a very brief period and then secured employment at Old Mutual on a contract basis. They were assisted by their families during this time and the Defendant carried the expenses because she was employed. The parties then moved to West Beach where they rented a property and shared the expenses. She narrated that they shared her vehicle that was then owned by the Defendant.

[21] Later the parties bought a property together and became joint owners of the property. They shared the expenses and there was no arrangement as to who was responsible for which expense. This property was then sold and the proceeds were used to purchase furniture for the new house.

[22] The current property was initially registered in a close corporation of which both parties held equal membership shares. This property was thereafter transferred from the close corporation and registered into their names jointly. The Defendant testified that there was no set financial arrangement. The Plaintiff paid the bond instalment and the Defendant paid for everything else. According to the Defendant, the intention was that it was their home where they would one day retire.

[23] The Defendant confirmed that the V E invested into the property by renovating the top level to enable the V E to reside there. The Defendant conceded that initially she was not happy with this arrangement but later had a change of heart. She testified that she regarded the V E parents as her in-laws.

[24] The Defendant testified that after her contract with her previous employer was terminated she decided to start her own business. She explained that she received R160 000 from her pension fund, of which she kept R80 000 as start-up capital for her business and shared the other R80 000 with the Plaintiff. The Defendant disputed that the Plaintiff gave her R50 00 towards starting her business venture and stated that it was in fact the Plaintiff's sister who advanced an amount of R20 000, which she had repaid with interest.

[25] During cross-examination the Defendant denied that the Plaintiff lent her money to advance her business, which started in 2009/2010. She denied having received R55 011.19 as a loan from the Plaintiff. The Defendant stated that this amount is a fictitious amount created by the Plaintiff's mother for the receiver of revenue. The Defendant stated that in 2011, when her business wasn't doing well, she found employment on a contract basis.

[26] The Defendant testified that she and the Plaintiff agreed that they were life partners. She testified that she understood that if the Plaintiff was to pass away, that the top portion of the property belonged to the V E. The Defendant testified that the way her Will was structured, upon her death, her entire estate would go to the Plaintiff. Furthermore, she testified that they discussed that the Plaintiff's estate would be split differently, namely, 25% to the V E, 25% to the Plaintiff's sister and 50% would go to the Defendant. The Defendant articulated that she understood that she had no claim to the top section where the V E resided as that portion was to be left to the Plaintiff's sister. She narrated that the parties signed their respective Wills before the top section was built.

[27] The Defendant explained that the re-advances taken on the bond would be paid into the Plaintiff's account. The Plaintiff would then essentially control how this money is to be shared. According to the Defendant, the bigger portion would always go to the Plaintiff. The Defendant denied that the Plaintiff demanded reimbursement of the bond payments. The Defendant testified that she never expected the Plaintiff to repay the insurance instalments for example, which was approximately R1 500 per month. The Defendant testified that she understood the parties to have a joint estate.

[28] The Defendant testified that the expenses she carried were no less important than the bond instalments, which were paid by the Plaintiff. She opposed the Plaintiff's request for the reimbursement of the rates and bond instalments paid by her. The Defendant disputed that it was a '50-50' arrangement and stated that it was not like a business partnership.

[29] The Defendant explicated that the vehicle that she is driving was registered in the name of the Plaintiff because she could not afford the payments. Her evidence was that from about 2004 to 2007/8, the instalments for the vehicle came off her account. During the period when the Defendant was in the process of establishing her business, the Plaintiff took over these payments. The instalments were in the region of R2 200 per month. The approximate value of the vehicle at the time when the Defendant testified was, according to the Defendant, R33 000 and not R42 500 as suggested by the Plaintiff.

[30] She testified that she previously owned a Toyota motor vehicle that she paid for. This vehicle was stolen and because the vehicle was not insured, they suffered a loss. Thereafter, they had an Opel Cadette motor vehicle that was registered in the Plaintiff's name. This Opel, according to the Defendant, was traded in for another Opel Astra, which was written off. The insurance money

was used to purchase the current vehicle being driven by the Defendant. The Plaintiff purchased a Mini Cooper motor vehicle in 2007.

[31] During cross-examination, the Defendant confirmed that the Plaintiff was the registered owner of the motor vehicle. The Defendant however regarded them as being joint owners of the vehicle because she had owned a vehicle previously. According to the Defendant, ownership of the vehicle was never discussed. She testified that the decision to register the vehicle into the Plaintiff's name was guided by the Plaintiff's mother who was concerned that the vehicle may be repossessed if the Defendant's company "folded".

[32] The Defendant testified that the reason why she was no longer residing in the property was because she had been locked out. She narrated that on 4 May 2014, after returning from being away from home for the weekend, she discovered that she was locked out of the house as the locks had been changed.

[33] The Defendant testified that she envisioned their relationship to never end. She was 13 years older than the Plaintiff and the Plaintiff undertook to always support her. According to the Defendant, she has no other money and will soon be 57 years old. The Defendant denied that the proposed distribution would be fair and equitable.

Principal Submissions on behalf of the Plaintiff

[34] Counsel for the Plaintiff requested the Court to exercise its wide and equitable discretion in applying the principals of *actio communi dividendo* in the division of the immovable property. It was argued that the Plaintiff never intended to waive her entitlement to reclaim expenses paid in excess of her share or set them off against the equity in the property upon termination of joint ownership. Additionally, it was contended that the Plaintiff never intended to waive her right to her own separate estate.

[35] The Plaintiff submitted that the most practical, just and equitable way to effect partition of the immovable property (after taking the V E contribution into account) would be to divide the equity therein equally between the parties, after determining the expenses incurred towards the purchase, improvements to, and maintenance of the property itself, and apportioning those expenses equally between the parties. It was argued that these expenses contributed toward the maintenance of the property and effectively increased the value of the property, which accordingly contributed directly to the increased equity in the asset.

[36] The Plaintiff submitted that the Court, in the exercise of its discretion, should allot the immovable property to the Plaintiff and order the Plaintiff to pay an amount of R150 000 to the Defendant as compensation. This amount was recalculated at R227 500.

[37] The Plaintiff contended that the partition based on the Defendant's counterclaim would be grossly unfair since the Defendant did not contribute to the property financially. The Plaintiff suggested that the Court make a finding that no universal partnership came into existence and dismiss the counterclaim with costs. Counsel for the Plaintiff requested the Court to grant an order as per the draft order proposed in line with the principals of *actio communi dividendo*.

Principal Submissions on behalf of the Defendant

[38] Counsel for the Defendant submitted that a universal partnership came into existence and that the estate should be divided equally between the parties, applying the principals of fairness. It was argued that there was no structured agreement and that both parties contributed equally. Moreover, it was argued that the Defendant found it to be irrelevant to keep records as the parties' relationship was based on two individuals who wanted to share their lives together and retire together. According to counsel for the Defendant, *'[i]t is simply impossible to untangle a 17 year intimate relationship'*.

[39] Counsel for the Defendant requested the Court to declare that a universal partnership existed between the parties as the parties were life partners, which union should follow the legal consequences akin to a marriage in community of property.

Common Cause Facts

[40] It is common cause that:

a) The parties had been in a relationship with each other since approximately 1996, which terminated in March 2014;
b) Both parties regarded each other as life partners;
c) The property was initially registered in a close corporation and later into both parties' names;
d) During 2006, the V E paid for a top floor apartment to be built on the property, and in which they now reside;
e) The V E' interest in the immovable property was not registered at the Deeds Office;
f) This arrangement was recorded in a document headed "Addendum to Agreement" which was signed by all parties on 20 May 2006;
g) The market value of the immovable property is approximately R2.5 million;
h) The outstanding bond on the property is in the region of R475 000;
i) The Plaintiff paid an amount of R180 000 from her pension pay-out into the bond account;
j) Re-advances from the bond account totalling R339 000 were utilised to finance improvements to the property, to pay some of the parties respective debts, and some of the cash was shared between the parties;
k) Further improvements and maintenance were effected to the immovable property to the value of approximately R27 500;
l) The Plaintiff paid all the monthly mortgage bond instalments, the total amount calculated from December 2004 to January 2018 being R900 466; and
m) The parties shared in contributing to the joint household.

[41] It was conceded during the trial that the value of the V E' interest in the immovable property should be calculated as 1/3 (one third) of the market value of the property, which equates to R833 333.

Issues to be determined

[42] The main issues in dispute are:

i. Whether a universal partnership came into existence or whether *actio communi dividendo* is applicable in deciding how the assets of the parties accumulated during the period of their relationship should be divided, which consideration includes the motor vehicle currently in the Defendant's possession (in view of the Plaintiff's claim based on *rei vindicatio*); and

ii. Whether the Plaintiff made a loan to the Defendant and if so, whether the Defendant is obliged to repay the loan.

Legal Principals

[43] The dispute in this matter revolves around the termination of joint ownership of an immovable property. It is common cause that the parties co-habited and had a joint household and pets. It was argued on behalf of the Plaintiff that this in and of itself does not translate into a universal partnership. The Defendant contended that the parties agreed to pool their resources including finances, time and effort, for the joint benefit of both parties.

[44] It is common cause that the parties regarded each other as life partners. It is trite that life partners are defined as people who live together, outside of marriage, in a relationship which is analogous to, or has most of the characteristics of marriage. This rule finds application to same-sex and opposite-sex life partners. Legislation has extended some recognition to persons in same-sex life partnerships. These include, *inter alia,* the use of the

term "life partner" in the Lotteries Act,[2] the Basic Conditions of Employment Act,[3] and the Road Traffic Management Corporation Act.[4]

[45] Additionally, courts have afforded recognition and certain benefits to same-sex life partners,[5] although distinctions *a pro pos* married and unmarried people are clear.[6]

[46] In view of the fact that the parties cannot agree on the terms of the partition, and specifically on the terms of the division of the equity in the joint investment, which also served as the parties' joint residence during the subsistence of their relationship, it is necessary to unpack the conflicting versions in this regard in relation to the applicable legal principles.

Actio Communi Dividundo

[47] In determining the termination of joint ownership of an immovable property based on *actio communi dividundo* it is trite that the court has a wide discretion to order an equitable partition amongst the co-owners. The Appellate Division examined the *actio communi dividundo* in ***Robson v Theron***[7] and summarized the applicable principals as follows:

> *'1. No co-owner is normally obliged to remain a co-owner against his will.*
> *2. This action is available to those who own specific tangible things (res corporals) in co-ownership, irrespective of whether the co-owners are partners or not, to claim division of the joint property.*
> *3. Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division. Since a partnership asset*

[2] 57 of 1997 at sections 3(7)(a)(ii), 3(8) and 7(5).
[3] 75 of 1997 at section 27(2)(c)(i).
[4] 20 of 1999 at sections 10(2) and 15(9).
[5] See *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC); *Du Toit and Another v Minister for Welfare and Population Development and Others (Lesbian and Gay Equality Project as* Amicus Curiae*)* 2003 (2) SA 198 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T) and *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).
[6] *Volks N.O. v Robinson and Others* 2005 (5) BCLR 446 (CC).
[7] 1978 (1) SA 841 (A) at 856H-857D.

is joint property which is held by the partners in co-ownership, it follows that a partner may as a co-owner bring this action for the division of a partnership asset where the co-partners cannot agree to the method of its division. …

4. It is for purposes of this action immaterial whether the co-owners possess the joint property jointly or neither of them possess it or only one of them is in possession thereof.

5. This action may also be used to claim as ancillary relief payment of praestationes personales relating to profits enjoyed or expenses incurred in connection with the joint property.

6. A court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode of distribution of partnership assets among partners as described by Pothier.'

[48] Counsel for the Plaintiff contended that the agreement between the parties was that they would contribute equally to the joint household. In light of the disputed arrangement or agreement, it is my view that it would be apposite to determine whether a special contract of partnership came into existence. ***Pezzuto v Dreyer***[8] is instructive and deals with the essentials of a special contract of partnership where it was stated that:

'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.'

[49] A distinction was made between the parties' joint household and what the Plaintiff termed "asset holding", referring to the immovable property. This, according to the Plaintiff, served as an investment vehicle and the parties' joint residence. It is common cause that this asset is the only asset which the parties owned jointly.

[8] 1992 (3) SA 379 (A) at 390.

[50] In amplification and justification as to why the Plaintiff contended that no joint estate was created is that the each party had separate banking accounts, credit cards and pension funds. Additionally, they each had an independent Last Will and Testament in terms whereof they bequeathed their separate estates to different beneficiaries.

[51] The Defendant testified that she invested all her time, effort and money into a 17-year partnership. It was contended on behalf of the Defendant that it would not be just and equitable if a greater value is placed on financial contribution to that of emotional contributions. Consequently, it would appear that the Plaintiff's payment of the bond instalment is more important than *inter alia*, the insurance payments and the DSTV payments, which the Defendant made.

[52] The high water mark, as counsel for the Defendant terms it, is that the Plaintiff conceded that the parties agreed to share in everything excluding "substantial investments" or "asset holdings" such as the immovable property. Counsel for the Defendant contended that had this been the case, it appears to be incomprehensible that the parties would have agreed to register the property in both their names notwithstanding that the Defendant made little or no contribution towards the immovable property jointly owned by the parties before they purchased the current property.

[53] In amplification, counsel for the Defendant mooted that it would have been nonsensical and illogical for the Defendant to have contributed to the day-to-day expenses of the joint household knowing that she would have no security in, or entitlement to, the "substantial investments" or "asset holdings" in the event of the relationship being terminated.

[54] In the case of *actio communi dividendo* adjustment of various claims such as extant expenses for necessary improvements are factored into the partition.[9] In order to achieve what the Plaintiff termed as the "squaring of the books" the Plaintiff desired the following deductions to be taken into account in determining the Defendant's portion in the immovable property, in addition to the V E' portion (R833 000) and the outstanding bond amount (R475 500), namely:

i. Pension contribution R180 000
ii. Maintenance and Improvements R 27 000
iii. Bond payments R900 500
iv. Municipal expenses (calculated at R1000 per month)

[55] It was further argued that, if the Defendant's version is to be accepted that the parties are joint owners of the motor vehicle currently in her possession, which the Plaintiff estimated to be valued at R42 500, the Plaintiff suggested that the Defendant retains the vehicle as her sole and exclusive property but that half of the value of the vehicle be deducted from the Defendant's portion.

[56] Counsel for the Defendant contended that had the parties intended to effect *actio communi dividendo*, then it would have made sense for the Plaintiff to account for every cent but she did not. When asked 'why if there were problems would they purchase a second property together' she responded by saying: *"I had the promises… wanted to hear that she still loved me and that she would change…when we purchased this…went in with the belief …promises that were not realised…there was hope it was going to get better…'*

[57] As stated by Voet D.10.3.2 and seen in ***Robson*** above[10], the *actio* may arise whether there is a partnership or not. If regard is to be had to the conspectus of the evidence, then the requirements set out in ***Pezzuto v Dreyer*** namely, that

[9] *The Law of South Africa* (2nd ed), vol. 27, at para 271.
[10] See the discussion in *Robson* at 854G-855F.

each of the partners bring something into the partnership; that the business should be carried on for the joint benefit of the parties; that the object should be to make a profit and that the contract should be a legitimate one, finds relevance.

[58] The evidence clearly suggests that the immovable property was acquired for the parties' retirement and not as a proverbial nest-egg. Even though the immovable property was an investment, it does not appear that the purpose of the investment was to make a profit, but rather as a place for the parties to eventually retire.

[59] The nature of their relationship was not purely a partnership for the purposes of a business transaction. Rather, I am of the view that a special contract of partnership came into existence as will be shown later in this judgment in relation to the principals of universal partnership. It is evident that the parties conducted a joint household and that both parties contributed thereto.

[60] Although the *actio* may be the form in which proceedings are brought to divide the assets of a partnership or claim payment for expenses incurred, I am not persuaded that the proposed calculation by the Plaintiff to achieve a "squaring of the books" is just and equitable.

[61] It is furthermore clear that that there is more to the dispute than just the impasse relating to the immovable property and as such the principals applicable in *actio communi dividendo* cannot be considered in a vacuum and would potentially be limited to an order facilitating the joint ownership of the immovable property to the possible exclusion of a directive in relation to the other assets which were acquired in the joint estate by the parties.

[62] In the circumstances, I am not persuaded that the parties' intended to effect *actio communi dividendo* as the parties did not keep an updated recordal of all

the financial contributions made by either of them, save for those which formed part of the trial bundle and were introduced into evidence during the course of the trial, which suggests that this was only possibly considered later. Additionally, it is evident that the equal arrangement suggested by the Plaintiff was never implemented and yet the Plaintiff stayed in the relationship for 17 years.

[63] The fundamental consideration therefore is what the parties' intentions were during the course of their relationship as set out in ***Butters v Mncora***,[11] in order to establish *inter alia*, whether a universal partnership came into existence between the parties.

Universal Partnerships

[64] The concept of universal partnership between cohabitees was extensively examined by the Supreme Court of Appeal in ***Butters***.[12] Briefly, the Court was asked to determine whether a universal partnership existed between two parties who had lived together for 20 years without getting married, where one party provided financially and the other cared for their children and maintained the common household. The Court found that, on the facts in that matter, a universal partnership existed.

[65] In the course of the judgment, the Court stated the relevant legal principles thus:

> *'[11] ... the general rule of our law is that cohabitation does not give rise to special legal consequences. More particularly, the supportive and protective measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period (see eg Volks NO v Robinson 2005 (5) BCLR 446 (CC)). Yet a cohabitee can invoke one or more of the remedies*

[11] 2012 (4) SA 1 (SCA) at para 27: '*An unexpressed mental reservation on the part of the defendant, that he was willing to share in the benefits derived from the plaintiff's contribution, but not in the surplus fruits of his own, would not, in my view, satisfy the dictates of good faith.'*
[12] *Ibid*.

available in private law, provided, of course, that he or she can establish the requirements for that remedy. What the plaintiff sought to rely on in this case was a remedy derived from the law of partnership. Hence she had to establish that she and the defendant were not only living together as husband and wife, but that they were partners. As to the essential elements of a partnership, our courts have over the years accepted the formulation by Pothier (RJ Pothier A Treatise on the Law of Partnership (Tudor's Translation 1.3.8)) as a correct statement of our law (see eg Bester v Van Niekerk 1960 (2) SA 779 (A) at 783H – 784A; E Mühlmann v Mühlmann 1981 (4) SA 632 (W) at 634C – F; Pezzutto v Dreyer 1992 (3) SA 379 (A) at 390A – C). …

…

[18] In this light our courts appear to be supported by good authority when they held, either expressly or by clear implication, that:

> *(a) Universal partnerships of all property which extend beyond commercial undertakings were part of Roman-Dutch law and still form part of our law.*
>
> *(b) 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 the parties.*
>
> *(c) The requirements for a universal partnership of all property, including universal partnerships between cohabitees, are the same as those formulated by Pothier for partnerships in general.*
>
> *(d) 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.*

(See eg Ally v Dinath 1984 (2) SA 451 (T) at 453F–455A; Mühlmann v Mühlmann 1981 (4) SA 632 (W) at 634A–B; Mühlmann v Mühlmann 1984 (3) SA 102 (A) at 109C–E; Kritzinger v Kritzinger 1989 (1) SA 67 (A) at 77A; Sepheri v Scanlan 2008 (1) SA 322 (C) at 338A–F; Volks NO v Robinson 2005 (5) BCLR 446 (CC) para 125; Ponelat v Schrepfer 2012 (1) SA 206 (SCA) paras 19–22; JJ Henning et al Law of Partnership (2010) at 20–29; 19 LAWSA 2 ed para 257.)'

[66] Counsel for the Plaintiff contended that the facts of this matter are distinguishable from the ***Butters*** matter *(supra).* In that matter, the plaintiff had been a housewife and stay-at-home mom for most of the duration of the parties'

cohabitation. The parties were also engaged but never married, and the plaintiff had taken care of the defendant's child from a previous relationship. There was also a vast discrepancy between the parties' estates.

[67] It is trite that two types of universal partnerships are recognised in our common law, namely the *universorum quae ex quaestu venuint* and the *universorum bonorum.*[13]

[68] The Defendant contended that the present claim falls within the ambit of *universorum bonorum*. Counsel for the Defendant, referring to ***Sepheri v Scanlan***,[14] contended that there is no requirement that a universal partnership which falls into this realm should be expressly entered into by the parties. Counsel for the Defendant also submitted that a universal partnership is akin to the matrimonial property regime governing marriages in community of property.[15]

[69] The test to be applied in determining whether a universal partnership came into existence was aptly dealt with in ***V v M***[16] where it was held that:

> *'I fully agree with the counsel for the plaintiff that the most important concession made by the defendant was that if the relationship had not terminated because of his infidelity the plaintiff would have benefited from the assets he accumulated over time.*

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[13] *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338A-C**:** *'Roman-Dutch law recognises two types of universal partnership, that is, a partnership* societas universum bonorum *by which the parties agree that all their possessions and everything which they may in the future collectively or individually acquire from whatever source should be considered to be partnership property, and a* societas universum quae ex quaestu veniunt *where the parties agree that all they may acquire during the continuation of the partnership from every kind of commercial undertaking shall be taken to be partnership property.'*

[14] *Ibid*.

[15] *Schrepfer v Ponelat* [2010] ZAWCHC 193 at para 29: *'The true enquiry therefore is whether it is more probable or not that a* tacit *agreement had come into existence (Muhlmann v Muhlmann (supra) at 124C). Taking into consideration the reason and purpose of the live-in relationship, the pooling of their finances, the pooling of their skills and resources, the joint investments made by them to secure their retirement. I concede that there was animus contrahendi between the Plaintiff and the Defendant and it is more probable than not that a universal partnership had come into existen*ce between the parties*.'*. See also *The South African Law of Husband and Wife* (5th ed) at 157-8: *'Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares.'*

[16] [2016] ZAGPPHC 652 at paras 33-4.

> *According to the counsel for the defendant, the defendant's concession is irrelevant because it is not one of the elements required to prove the plaintiff's case. Even though it is accepted that indeed it is not one of the elements, however taking together everything into account it is more probable than not that a tacit agreement had been reached… In conclusion, the plaintiff has succeed in establishing on the balance of probabilities the existence of a universal partnership between her and the defendant.'*

[70] In an attempt to further unpack this debate, it is necessary to examine the manner in which the parties conducted their affairs from the time they entered into the relationship.[17] Counsel for the Defendant, relying on ***V v M*** (supra) contended that on a balance of probabilities a universal partnership came into existence as the parties pooled their resources for the benefit of their joint estate.

[71] The Defendant's counsel submitted that it would be impossible to determine each party's financial contribution during their 17-year relationship. The Defendant was a beneficiary on the Plaintiff's medical aid and on the medical aid documents she is listed as a spouse. In terms of the Defendant's Last Will and Testament, the Defendant bequeathed her entire estate to the Plaintiff.

[72] Counsel for the Plaintiff argued that even though the parties regarded each other as life partners during the subsistence of their relationship, it does not

[17] See also ***Butters*** *(supra)* at para 27, where the Supreme Court of Appeal held that: *'It is true that according to the defendant's ipse dixit 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 (see eg South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) ([2004] 4 All SA 168) para 32). This must particularly be so where the parties lived together in an intimate relationship in which they shared their most personal interests for almost 20 years. An unexpressed mental reservation on the part of the defendant, that he was willing to share in the benefits derived from the plaintiff's contribution, but not in the surplus fruits of his own would not, in my view, satisfy the dictates of good faith.'*

mean that a universal partnership came into existence. It was further submitted that at common law, none of the *ex lege* consequences of a civil marriage ensue if a couple lives together as life partners. Counsel for the Defendant, relying on ***Muhlmann v Muhlmann***[18] argued that our courts have recognised that a universal partnership can come into existence between spouses and cohabitees where they agree to pool their resources.[19]

[73] In light hereof, it was argued by Counsel for the Defendant that should the Court declare that a universal partnership came into existence, division of the joint estate should follow and consequently only the outstanding bond amount of R474 500 and the V E portion, in the amount of R833 333, should be taken into account.

[74] If regard is had to the duration of the relationship, the nature of the relationship between the parties and that the parties conducted a joint household, the only reasonable inference to be drawn is that the parties pooled their resources to the benefit of the joint estate. Pellucid is the fact that both parties put everything they had into the proverbial melting pot (including their pensions). Because they were both fully committed to the relationship, they each gave what they could. To put a rand value to each one's contributions would, in my view, be tantamount to diminishing the value of their individual contributions. The manner in which the parties conducted their affairs fits with the concept of universal partnership which describes a state of affairs between parties who meet the requirements of a partnership as earlier stated: contribution by both, to the benefit of both and for the purpose of making a profit. Consequently, I am

[18] 1984 (3) SA 102 (A). See also *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) and *Ally v Dinath* 1984 (2) SA 451 (T).

[19] *Steyn v Hasse and Another* 2015 (4) SA 405 (WCC) at para 17: *'However our courts provide some measure of recognition to cohabitation and have on many occasions found that an express or implied universal partnership existed between cohabitants. (Butters v Mncora 2012 (4) SA 1 (SCA)). A universal partnership exists when parties act like partners in all material respects without explicitly entering into a partnership agreement. The three essential elements are firstly, that each contributes something into the partnership or bind themselves to contribute something into it, secondly, the partnership should be carried on for the joint benefit of both parties and, thirdly, the object should be to make profit…'*

satisfied on a balance of probabilities that a universal partnership came into existence between the parties.

[75] As previously stated, a universal partnership is similar to a marriage in community of property. It is trite that the nature of the relief which parties can claim when married in community of property is either an order for division of the joint estate or an order for forfeiture of the benefits of the marriage in community of property.[20] It is furthermore trite that each spouse automatically shares in the assets that are accumulated during the subsistence of the marriage. The moment spouses enter into a marriage in community of property, they become co-owners of everything that either of them owned prior to the marriage. Furthermore, a marriage in community of property not only results in community of assets but also in community of liabilities.

[76] These fundamental legal principals therefore reinforce my view that the Plaintiff's claim based on *actio communi dividendo* cannot be sustained as it is near impossible to untangle the threads of interwoven narratives of life partners, which have layered complexities akin thereto in the advancement of a joint household.

Discussion

[77] There is no question that both parties had very deep affection for each other. Over the passage of time, this relationship became discordant. In my view, the turning point in the relationship occurred in, during or about 2005 when, according to the Plaintiff, the Defendant would repeatedly tell her that she did not have money. The Plaintiff felt financially burdened and this is when, in my view, the Plaintiff started insisting on her *pro rata* share being reimbursed. I find support for this conclusion in the Plaintiff's utterances when she testified

[20] Van Nierkerk PA '*A Practical Guide to Patrimonial Litigation in Divorce Actions'* (Lexis Nexis) [Issue 16] at 2-1 to 2-7.

"If I take the burden – you can only do it for so long until it becomes a huge problem…"

[78] This was exacerbated by the Defendant's abusive, hostile and aggressive responses, which aggravated the Plaintiff's disappointment in the Defendant. She testified that there was no compassion from the Defendant and she often was subjected to emotional abuse and/or verbal abuse. The Plaintiff's evidence was that discussions pertaining to finances would often be met with hostility and the conversation would close down. It is pellucid that the Plaintiff feels deeply hurt which was borne out by numerous emotional episodes when she testified.

[79] Counsel for the Defendant contended that the Plaintiff's claim for division based on the *actio communi dividendo* is *mala fides* and borne out of bitterness towards the Defendant as she wishes the Court to take all her payments towards the bond into account whilst refusing to acknowledge that the Defendant also made substantial payments towards the insurance and other ancillary payments such as the DSTV.

[80] Counsel for the Plaintiff indicated that the legal team was grappling with how to plead the Plaintiff's cause of action, as at one stage forfeiture was also pleaded which is indicative that there was no *mala fide* in the Plaintiff's ultimate claim based on the *actio communi dividendo*. It was submitted that the Plaintiff did not change her instructions and neither was there a change of facts. The amendment was sort to facilitate a proper ventilation of the actual dispute between the parties.

[81] It was apparent during the proceedings that the Plaintiff was emotionally affected by what had happened, however I am not persuaded that her pursuit based on the *actio communi dividendo* was driven by a malicious intention against the Defendant. It is uncontroverted that the Plaintiff sought legal advice

and guidance from various legal minds, which may have had a persuasive influence on deciding the Plaintiff's course of action. It is for this reason that I will not make a negative inference about the various amendments to the pleadings although it does appear that the Plaintiff may have hardened her heart as the future she envisioned with the Defendant was clearly shattered. The evidence on record illuminates the position which is derived from the common cause facts. Despite the fact that both parties displayed a measure of bitterness, they presented as a sincere, credible witnesses.

[82] It is evident that the journey taken by the parties was filled with a plethora of events which must be viewed holistically, as it tells the story of two people who had a dream of retiring together as partners. The Plaintiff conceded that in the beginning of their relationship she considered it to be permanent. There is no doubt that the parties went through much together and each of them contributed towards this end goal which can at best be described as giving in an unselfish manner. The Plaintiff testified that she *'gave out of good love'*. It is however apposite to mention that the Plaintiff did not just give up on the relationship and continued to give out of compassion, emotional support and latitude. The Plaintiff's evidence was that she had hoped that the Defendant's business would be successful. As earlier stated, I reiterate that the Plaintiff's insistence on being reimbursed only commenced when the Defendant could no longer contribute her share of the joint household expenses, possibly because the Plaintiff felt it unfair that she should carry the full financial burden.

[83] This eventually resulted in the Defendant being denied access to the property. The Plaintiff conceded that the Defendant did not have the use and enjoyment of the property since 2014. Based on the projected rental income calculated at an escalation rate of 10% per annum, the Defendant's use and enjoyment of the property was calculated at R433 314.00, which amount, it was argued, should be reimbursed to the Defendant.

Conclusion

[84] During closing arguments proposed draft orders were prepared by each of the parties' counsel. In light of the conclusion to which I will come, I do not deem it necessary to deal with the proposals in detail, save to state that the Plaintiff no longer seeks payment of the amount of R56 000 in relation to the loan agreement. The calculation in determining the equity in the immovable property was also revisited. In light of my findings pertaining to the Plaintiff's claim based on the *actio communi dividundo*, the considerations in deriving at the proposed settlement amount is moot.

[85] The fact that the relationship terminated acrimoniously should not have a prejudicial consequence for the Defendant. In order to achieve fairness to both the parties, the end result will incorporated a hybrid of both concepts namely *actio communi dividendo* as well as a universal partnership as there are obvious overlaps in the overarching legal principals which further extends to the principals analogous to a marriage in community of property. It therefore flows that a division of the joint estate must follow. The deprivation of the use and enjoyment of the immovable property, should needless to say, also be factored into the equation. Of pivotal importance is that a "clean break" is achieved through the final order which will ultimately be granted in order to bring about an equitable partition amongst the parties.[21]

Costs

[86] The Plaintiff's arguments relating to the reasons for launching the amendments are clear from the record and referenced in this judgment and will not be repeated, save to state that it was contended that the amendment was allowed to facilitate a proper ventilation of the actual dispute between the parties . On 15 February 2017, leave was granted to amend the particulars of claim and it was ordered that the costs of the application stand over for later determination.

[21] *LR v PR* 2018 (3) SA 507 (WCC).

Counsel for Plaintiff requested the Court to grant the costs order of the application. In a proposed draft order, the Plaintiff tendered the bond cancellation costs, half of the cost of the transfer and suggested that each party pay their own costs. Counsel for the Defendant, on the other hand, argued that the Plaintiff is to pay the costs of suit, including the costs of the amendment.

[87] Costs remain in the unfettered discretion of the Court. In light hereof, and in order to bring about a just and equitable result, I am of the view that my order pertaining to all costs occasioned to give effect to the transfer of the immovable are to be carried by the Plaintiff and will serve to compensate the Defendant for deprivation of her use and enjoyment of the immovable property.

Order

[88] In the result, the following order is made:

1. It is declared that a universal partnership existed between the parties during the period 14 July 1996 up to and including 8 March 2014.
2. A division of the joint estate is ordered as follows:

    2.1. The parties' co-ownership in the immovable property known as Erf […] PARKLANDS CITY OF CAPE TOWN held under title deed T96371/99 ("*the immovable property*") is terminated.

    2.2. The Defendant's registered share in the immovable property shall be transferred and registered in the Plaintiff's name against payment to the Defendant of the amount of R596 083.50. (calculated as follows: R2 500 000 (value of the property) minus the outstanding bond of R474 500 and minus the amount of R 833 333 as agreed between the parties, and then divided equally).

    2.3. The Plaintiff shall be liable for the costs of the transfer contemplated in para 2.2 above.

2.4. The Plaintiff shall at her cost ensure that the Defendant is released from any and all obligations pertaining to the bond registered over the immovable property, upon the registration of transfer of the Defendant's share in the immovable property to the Plaintiff.

2.5. The parties shall sign all documents and do all things necessary to give effect to the above.

2.6. Should the Plaintiff not take transfer of the Defendant's half share in the property as set out above within 4 months of the date of this order, the property shall be sold on the open market and the proceeds of the sale, after deduction of only the outstanding bond in the amount of R474 500, estate agent commission and the amount of R833 333 (as agreed between the parties), shall be divided equally between the parties.

2.7. The Defendant shall be entitled to retain the Toyota Corolla motor vehicle with registration number CA656929 ("the Toyota motor vehicle") as her sole and exclusive property. The Defendant shall at her cost ensure that the registration and licensing of the Toyota motor vehicle is transferred into her name. Plaintiff shall sign all documents and do all things necessary to give effect to the contents hereof.

2.8. The Sheriff of the above Honourable Court or his deputy is authorized to take all such steps contemplated in paragraphs (2.1), (2.2), (2.3), (2.4), (2.5), (2.6) or (2.7) above in and on the parties' stead and behalf in the event of their failing to do so within SEVEN (7) calendar days of written demand.

2.9. Each party shall further retain as her sole property the assets and other property currently in their possession and shall have no further claim against each other.

3. Each party will pay their own costs.

P ANDREWS, AJ

Acting Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

	Case no: 19122/14
In the matter between:	
J S	Plaintiff
and	
J H S	Defendant

CIVIL JUDGMENT - overarching legal principals - *actio communi dividendo,* universal partnership –

- Analogous to marriage in community of property – "cleak break" in order to bring about an equitable partition amongst the parties.

JUDGE	**:**	Andrews AJ
JUGDMENT DELIVERED BY	**:**	Andrews AJ
FOR Plaintiff	**:**	Adv. L Venter
INSTRUCTED BY	**:**	J J Smit & Associates
FOR Defendant	**:**	Adv. T du Preez
INSTRUCTED BY	**:**	Nielen Marais Attorneys
DATES OF HEARING	**:**	22-24 May 2018; 7 & 13 June 2018
DATE OF JUDGMENT	**:**	27 June 2018