

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 6070/2008

Date: 16 September 2011

In the matter between:

U, D A

Plaintiff

And

U I J (BORN W)

Defendant

JUDGMENT

PRETORIUS J,

The plaintiff instituted action against the defendant for the division of the joint estate of the *societas universorum bonorum*. The parties were married to each other on 5 August 1994 in community of property which marriage was dissolved by a decree of divorce on 23 June 1995. The plaintiff is Polish and is not fluent in the English language. It is further common cause that there was a brief separation between the two parties in 1995. They moved into the same house at Kronendal Flats during 1995 where they lived until December

1996.

According to the plaintiff the defendant and he had been in a cohabitation relationship for twelve years. Since living together in the Kronendal Flats according to the plaintiff, there was a tacit agreement of partnership between the parties comprising of their movable and immovable assets. This partnership came into effect in December 1995 when the plaintiff moved into the defendant's house at her request. The pleadings set out that the terms of the agreement were that parties would contribute towards the living - and other expenses of one another and both would contribute to the expenses for acquiring the immovable property. According to the pleadings the plaintiff would contribute more to the common household than the defendant. A further term of the agreement was that at the dissolution of the relationship the parties would share equally in the profits.

The plaintiff requested the court to find that there existed a partnership between the parties regarding the right, title and interest in the immovable property, as well as the furniture and household effects in the parties' possession during November 2006 when they finally separated. The defendant denied that any such partnership existed after she had divorced the plaintiff in 1995.

Mr Urbanski, the plaintiff, gave evidence that he had only found out about the divorce in 2007, although the defendant told him in June 1995 that they were divorced and he had to move out, which he did. He further admitted that the summons had been served on him personally on 6 June 1995. He moved to Westlife House after the divorce where the plaintiff visited him and even stayed overnight. In 1996 he moved to Kronendal Flats and the defendant lived with him. They were living as husband and wife. The uncontroverted evidence by both parties was

that during the period 1996 to 2006 the defendant had completed and signed numerous forms as the plaintiff's wife. The defendant wrote to the plaintiff's mother on 30 October 1996, 2 May 1996 and 25 March 1996. These letters were clearly written as a daughter-in-law who was living with her husband. I refer to the contents of the letter which she wrote on 2 May 1996 as an example:

"He doesn't like to write but Mum be assured we love you, and our plans for the future definitely include you. We will talk about it in more details when we see each other in Poland.

Dear Mum, lately Derek is very healthy but I think you will be able to see and judge for yourself when looking at his photographs which I send in my previous letter. I care about him and make sure he takes his vitamins everyday and this way he stays healthy. It is true, 8 months ago he stop smoking."

and

"He relies on me and me on him and there is respect and balance

between us. He is a good loving partner, opponent or friend in life."

The court cannot accept the defendant's explanation that she had made up these letters to pacify the plaintiff's mother as his mother had not known that they were divorced. She could give no cogent reason for acting in this way. The mention of wanting children also indicates that she and the plaintiff were a couple at that stage and that she wanted children with the plaintiff.

It is clear that the immovable property at 14 Hawkshaw Street, Vanderbijlpark, belonged to the defendant. The house was bought for her and registered in her name by her previous

employer. This was done as part of a settlement agreement that had been reached due to a court case between the defendant and her employer. These facts were admitted by the plaintiff under cross examination and there can be no doubt that he had not contributed in any way to the acquisition of the house.

The plaintiff averred in his particulars of claim that the house was bought with the money his mother had sent to him from Poland. This version of the plaintiff is rejected as there was no evidence to support it. Even the plaintiffs own evidence did not support his pleadings.

On 2 May 2005 the defendant had indicated on the "Expression of Wish" form of Air Products Provident Fund that she was the wife of the plaintiff. On 3 January 1996 the defendant completed the inland revenue form where she again indicated, on behalf of the plaintiff, that they were married. This confirms that the defendant's defence that she did so at the request of the plaintiff to ensure that he refunded the money she owed him was repaid, cannot be entertained seriously, as this form was a government form which did not relate to any money owed to the plaintiff.

The court accepts that the plaintiff gave his whole salary to the defendant when they were living in Kronendal. The eleven thousand dollar which the plaintiff's mother sent from Poland was used to fix the house and to buy the Ford Laser according to the plaintiff. The plaintiff testified that there was no agreement between himself and the defendant to have the money paid back to him as he had treated the relationship as a proper marriage in all respects and did not expect to be repaid. The defendant, as his wife, and her brother, as his brother-in-law, even vouched for the plaintiff on 7 August 2000 to enable him to obtain a licensed firearm.

On 2 May 2005 the defendant had completed the membership application form for the Discovery Medical Aid. This form clearly stated that the defendant was the spouse of the plaintiff and that her mother was a dependant of the plaintiff.

According to the plaintiff they moved into 14 Hawkshaw Street at the end of 1997 where they stayed until the plaintiff left on 1 January 2005 to do contract work in Namibia. The defendant rented the property out and went to stay with her mother without informing the defendant of the move. The defendant had access to his bank account and had a bank card of her own which she could use to withdraw money from the plaintiff's bank account. The rent she received from 14 Hawkshaw Street was hers alone and the plaintiff did not receive any of it - in fact he did not even know what the rent was.

When he returned he went to live with the defendant at her mother's house, although her mother had not been talking to him at all. The defendant's evidence that the plaintiff rented a room for R2000.00 was admitted by the plaintiff, but according to him it was for utilities and food. Mrs Kraus, his previous mother-in-law, testified that it was to pay back the defendant, although the defendant's contradictory evidence was that it was for utilities and food - thereby corroborating the plaintiff's evidence. The further evidence was that the plaintiff fetched his mother from Poland to visit. He and his mother stayed at the defendant and his previous mother-in-law for the approximately six months of her visit.

The court rejects the evidence of the defendant that when the plaintiff and his mother arrived they immediately sat down and she informed the plaintiff's mother that they had been divorced and that he had been arrested for theft. This version was never canvassed with the plaintiff, although it is clear that it is an important aspect of the defendant's evidence. Her

version that she had told her current boyfriend at the time not to visit her whilst the plaintiff and his mother were there is so implausible as to be untrue. If the plaintiff's mother had been informed of the divorce there would have been no reason to keep her boyfriend a secret. During November/December 2006 there was an altercation between the plaintiff, the defendant and the defendant's mother which resulted in the plaintiff moving out. The defendant indicated to the plaintiff that she was tired of the plaintiff and evicted him from her mother's house.

The defendant's evidence that she was very angry with the plaintiff after she had read the letter that he had written to his mother on 9 April 1995 is accepted as the truth. This letter was derogatory in the extreme and caused her to divorce the plaintiff in 1995. It is clear from the defendant's evidence that she had supported the plaintiff financially, as well as emotionally, after the divorce whilst they were living together. She had bought the plane tickets for him to fetch his mother from Poland; she supported him when he was unemployed; she paid the instalments on his car and was forced to sell it at a loss when the plaintiff was arrested for theft. There is no evidence that she claimed payment from the plaintiff for these amounts that she had paid on his behalf. There is no evidence of what the amounts were that were owed to her or any evidence as to what it was for. Whilst the plaintiff was working in Namibia the defendant moved his belongings to another room. At his return the defendant informed him that she did not want to live with him anymore.

On 2 December 2006 the defendant evicted the plaintiff from her mother's house. She made a list of movables which the plaintiff took with him and he had to sign for it, which he did.

According to the defendant this was the only possessions that he owned.

The plaintiff had to prove an universal partnership to succeed in his claim. In *Muhlman v*

Muhlman 1984 (3) SA 102 (A) Hoexter JA held that:

"When parties in all material respects act like partners in respect of a certain venture, without entering into a normal explicit partnership agreement, but by implication and through their conduct act as partners in respect of such a venture, a universal partnership ensues."

In order to prove that a universal partnership existed the plaintiff has to prove on a balance of probabilities:

1. that a universal partnership came into existence between the parties at all;
2. if so, that it came into existence at the time alleged by the plaintiff;
3. and, exactly how it came into existence;
4. exactly what were the terms of the partnership; and
5. exactly to what assets did it relate.

According to the plaintiff's pleading the material terms of the tacit partnership agreement were:

"11.1 The parties were to be equal partners in respect of their activities;

11.2 Each party would contribute towards the living and other expenses of the parties and expenses in regard to the acquisition of the immovable property, even though it was expected that the Plaintiff contribute more to the common household than the Defendant;

11.3 The parties would be entitled to an equal share of the profits;

11.4 On termination of the relationship between the parties, the partnership would be dissolved and the assets and liabilities thereof would be divided between the parties in equal shares;"

There is no mention that the partnership was conducted for profit. The date on which the tacit

agreement was entered into had also not been defined by the plaintiff except stating that it was during December 1995. There is no evidence before court that the plaintiff had contributed more to the household or living expenses of the parties. This was contrary to the plaintiff's pleadings. The contrary was true as the evidence was that the plaintiff was unemployed at various times when the defendant had to maintain him. She was employed throughout the relationship. The plaintiff stated that the partnership came into effect in December 1995 when the defendant invited him to stay with her. This version is totally denied by the defendant.

In Francis v Dhana [2006] JOL 18401 (N) Murugasen AJ found at p 16:

"As it is common cause that there was no express agreement between the parties to this action, there can be no universorum bonorum between them."

and at p 18:

"A further unsatisfactory aspect of the plaintiff's case is that while she has alleged that in entering into the universal partnership she undertook to make specific contributions to the partnership (paragraph [5]), the pleadings are silent as to any undertaking by the defendant, save for the allegation in paragraph [6] that both parties contributed labour, services, money and skills, lived on the defendant's income and the profits made by the plaintiff and acquired assets, which conduct constituted universal partnership in equal shares. (Court's emphasis)

In Fink v Fink 1945 WLD 226 the court held that all the elements of a partnership in respect of the specific joint commercial enterprise had to be proved before the court could find that a universal partnership existed."

In the plaintiff's pleadings there is no reference to any undertaking by the defendant as to her contribution to the partnership. It is clear from the evidence that the plaintiff and defendant lived together as husband and wife from December 1995 until December 2006. The court cannot accept the defendant's evidence that she was only trying to help the defendant to obtain work. The evidence that she completed all the various forms referring to herself as "spouse" and "wife" to ensure that she got her money back from the plaintiff cannot be accepted, but indicates that they were living together.

The defendant was flustered under cross-examination and her explanation as to her conduct whilst the plaintiff's mother was visiting for 6 months is not true. She tried to explain her dishonestly regarding the completion of the forms as helping the plaintiff, but the court finds that she had completed the forms as the "wife" of the plaintiff. Her evidence that the plaintiff rented a room at her mother's house, although her mother disliked the plaintiff thoroughly and did not speak to him is so improbable as to be untrue. It is clear they lived at her mother's house as partners until the defendant evicted the plaintiff from the property.

The evidence was overwhelming that the immovable property was the property of the defendant and that the plaintiffs pleadings were misleading in this respect.

The plaintiff explicitly gave evidence that there was no agreement between him and the defendant to repay any of the \$11000 that he had spent on the house and the car. The list of his contributions attached to the summons was carefully canvassed by counsel for the defendant and it is clear that the plaintiff's contention that he had contributed to the partnership through installing and providing these items is not true in all respects. The defendant had written proof that she had paid for all renovations to the house as set out in the

list. The plaintiff agreed under cross examination that he had misrepresented some of the items and that he had not paid for it.

This court finds the plaintiff's evidence in this regard as untrue and finds that he did not contribute to the house in the manner he wanted the court to believe in his pleadings.

In *McDonaid v Young* (292/10) [2011] ZASCA 31 (24 March 2011) Theron JA found at par 14: a[14] The appellant bore the onus of proving the agreement upon which he relied as well as the terms thereof. Having regard to the deficiencies in the appellant's evidence and the probabilities, it cannot be said that it measures up to the standard required for acceptability in respect of the existence of the joint venture agreement" (Court's emphasis)

This court finds that the plaintiff's evidence contradicted his own pleadings as to the acquisition and ownership of 14 Hawkshaw Street, Vanderbijipark. Furthermore, when he finally left the defendant in December 2006 he had signed that he had received the movables belonging to him, without indicating that he had not received all his possessions.

Therefore I find after considering all the probabilities and improbabilities that the plaintiff and defendant did cohabit until he left for Namibia. However, due to the deficiencies in the plaintiff's evidence and having regard to the pleadings and the contradictions with his evidence the plaintiff has not proved the existence of the joint venture agreement on a balance of probabilities.

There is in any event no evidence that the property is an asset in the universal partnership or that it was ever intended by the defendant that the plaintiff should share in the house. There is

furthermore no evidence that there was a consensual contract between the plaintiff and defendant to enter into a joint venture. It is not proved on a balance of probabilities that the parties pooled

their resources for the benefit of one another. Therefore the court cannot find that a universal partnership existed in these circumstances.

The order is:

1. The action is dismissed with costs.

Judge Pretorius

Case number : 6070/2008

Heard on : 6 September 2011

For the Applicant / Plaintiff : Adv Thompson

Instructed by : Stopforth Swanepoel & Brewis Inc

For the Defendant : Mr Uys

Instructed by : Piet Uys

Date of Judgment : 16 September 2011