REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: 881/2008

NOMSA VIRGINIA MNCORA Plaintiff

And

ANDREW KINLOCH BUTTERS Defendant

And

In the matter between: Case No: 3055/2010

ANDREW KINLOCH BUTTERS Plaintiff

And

NOMSA VIRGINIA MNCORA Defendant

Coram: **Chetty, J**

Heard: **22 November 2010**

Delivered: **7 December 2010**

Summary: Cohabitation – Universal Partnership – Formation – Can be entered into tacitly – Man and woman living together continuously for nineteen years – Agreement to commence business – Business located in one city and family home in another – Man residing with woman over weekends – Weekdays at business – Family home acquired – Essentials for universal partnership established – Breach of promise to marry – Merits conceded – Quantum – R25 000. 00 offered – Eviction – Existence of universal partnership – Woman not unlawful occupier

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JUDGMENT

Chetty, J

Introduction

[1] This is a case about a cohabitation relationship between the plaintiff and the defendant which endured for nineteen years and produced offspring. It ended abruptly on 1 January 2008. At the time the plaintiff lived and continues to live in a house situate at 9 Rubin Crescent, Summerstrand, Port Elizabeth, I shall henceforth refer to the premises as the common home, as will become clear in due course. The termination of the cohabitation relationship has the consequence that the plaintiff has no special right to occupy the common home and, as I shall in due course elaborate upon, the defendant seeks an order for her ejectment, contending that she is an unlawful occupier. Success for the defendant in that action will render the plaintiff and the minor children homeless. In order to avoid being reduced to a state of penury as a result of the termination of their cohabitation the plaintiff has posited her case against the defendant in the law of contract alleging the existence of a universal partnership between them. The consequence of cohabitation is described by Sinclair[1] as:-

> "The general rule of our law is that cohabitation does not give rise to special legal consequences, no matter how long the relationship has endured. Apart from limited statutory interventions which have conferred on cohabitants some of the rights and duties which attach

1 Law of Marriage, Volume I at p 274

> to spouses, the law has largely ignored cohabitation. Cohabitants may make use of the ordinary rules and remedies of the law, such as those relating to property and contract, but no family-law consequences flow automatically from their relationship. They can invoke none of the protective, adjustive and supportive measures available to spouses."

[2] The plaintiff's action against the defendant comprises three separate and distinct bases. The cause of action in the first, **claim A**, is based upon an alleged tacit universal partnership brought into existence by the parties' prolonged period of cohabitation. The alternative contractual claim for a breach of promise to marry was not persisted with and requires no adjudication. The second claim, **claim B**, is a delictual action for damages for breach of promise to marry. At the conclusion of the defendant's evidence, and prior to argument, his counsel, Mr. *de la Harpe*, conceded the merits of the claim. The only outstanding issue hereanent is the quantification of the damages suffered by the plaintiff. The third claim, **claim C**, for damages for an alleged assault, was abandoned prior to the commencement of the trial and it too falls by the wayside. The summons commencing action was issued by the Registrar in this Court.

[3] Several weeks thereafter, the defendant instituted action against the plaintiff in the High Court in Grahamstown. In his particulars of claim he alleged that the plaintiff was in unlawful occupation of premises, *to wit*, the common home and he sought her ejectment therefrom. His cause of action was premised upon the provisions of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act**[2] and, in addition, he claimed payment of the sum of

2 Act No 19 of 1998

R11 000, 00 per month, calculated from 1 January 2008, until the date the ejectment sought, was effected. The two actions were consolidated for purposes of trial and before me, Mr. *de la Harpe*, expressly abandoned the monetary component of this claim but persisted with the claim for ejectment. It is not in issue that the plaintiff has been residing in the common home since 1999 with the children. For the sake of convenience, I shall henceforth refer to Ms. *Mncora* as the plaintiff, Mr. *Butters* as the defendant, and, where appropriate, to them collectively, as the couple.

[4] The issues which fall for adjudication are –

i) **whether the plaintiff has discharged the onus of establishing, upon a preponderance of probabilities, the existence of a tacit universal partnership between her and the defendant;**

ii) **the quantum of her damages for breach of promise to marry; and**

iii) **whether an order for ejectment of the plaintiff is warranted.**

<u>Universal Partnership</u>

[5] The plaintiff's claim for the existence of a tacit universal partnership between her and the defendant is strenuously resisted. He steadfastly maintains that his assets, accumulated over time, are his own and the product of his

expertise, business acumen and labour. In order to resolve the factual issue the evidence must be analysed and evaluated in order to determine whether they had implicitly or by conduct, entered into a universal partnership. It is common cause that the defendant is man of affluence, possessed of considerable assets. But, that was not always the case. When he met the plaintiff, more than two decades ago and she became his minion, he was a technician, employed by the Post Office, now Telkom, and living in a rented garden cottage on residential premises in Grahamstown. The plaintiff on the other hand, then a young unmarried mother lived with her parents in New Brighton, Port Elizabeth. The circumstances in which they met and their life thereafter was recounted by the plaintiff in some detail and what follows is her story.

[6] The plaintiff is 45 years of age. She attended school and matriculated in Port Elizabeth in 1984. During 1987, she enrolled at the Iqaqaqi College in Port Elizabeth to pursue a course in office administration. During a vacation in 1998, she began selling hair products in order to generate an income and visited Grahamstown where she met the defendant at a function in the township. This was a case of love at first sight. The relationship took root and blossomed. The couple spent many weekends together, either in Grahamstown or in Port Elizabeth. The plaintiff was at that stage still living with her parents. In time they became intimate and rented a room in a house in Swartkops Valley in Port Elizabeth where the defendant would live with her every weekend when he was in Port Elizabeth. When he was not able to, she travelled to Grahamstown and

lived with him. In due course he moved from the garden cottage to a house which he shared with another person and the plaintiff would reside with him on her visits to Grahamstown.

[7] The plaintiff continued her education at the college and completed the course at the end of 1989. During 1990, she fell pregnant and a boy, *B*, was born on 7 January 1991. After *B's* birth the plaintiff continued to live with her parents but notwithstanding the employment enforced separation, the relationship grew stronger. Their living arrangements continued as before for the next few years.

[8] Throughout this period the defendant continued working at the Post Office but on his weekend visits to Port Elizabeth, began to moonlight as a home and car alarm technician to supplement the family income. To ensure the success of this venture the plaintiff introduced the defendant to various prospective clients and soon the alarm business burgeoned. During 1992, the couple discussed the possibility of operating the business on a full time basis. The plaintiff's undisputed evidence was that they agreed that the business would be located in Grahamstown by reason of the over saturation of the home alarm businesses in Port Elizabeth. The defendant duly resigned from the Post Office in June 1992 and opened a business, Hi Tech, in Grahamstown.

[9] Although the couple lived apart, the separation was business enforced, but the relationship continued unabated. As the business grew in stature, the

defendant built a home in Overbaakens in Port Elizabeth and the plaintiff and *B* moved into the home together with *F*, her daughter from a previous relationship. The defendant had long been aware of her and loved and treated her as his own and it was at his insistence that *F* moved into the home at Overbaakens. During 1994, and as *B* and *F* matured and were enrolled at school, the plaintiff commenced employment at the Department of Education where she worked for two years. Although the defendant disputed that he had asked the plaintiff to stop working, and devote herself full time to the children, I accept the plaintiff's evidence that she stopped working at the behest of the defendant. During the period at Overbaakens, the defendant provided the plaintiff with a motor vehicle, a credit card, a petrol card, and provided all the household necessaries.

[10] During 1998, the defendant proposed to the plaintiff in private and presented her with an engagement ring. Shortly thereafter she once more fell pregnant and in September 1998 the defendant arranged a party at the home where he, amidst much fanfare and merriment, publicly announced his engagement to the plaintiff. Thereafter their lives continued as before and they discussed marriage. During the conversation the plaintiff stated her preference for a white wedding, though not too big. The defendant raised no objection and although no fixed date was mentioned it was understood that a wedding would ensue as a matter of course, but that it would wait until the business was sufficiently established and on a sound financial footing.

[11] A second son, *J*, was born on 7 January 1999. Owing to the growth of the family, the defendant saw the need for a larger residence and built a new family home, common home. To assist in the upkeep of the home a domestic worker was employed on a full time basis and the plaintiff's lifestyle became commensurate with the increased standard of living generated by the profitability of the business. As time progressed the family bonds grew stronger and the couple were for all intents and purposes, a happily married couple. The plaintiff wanted for nothing. Her life was, as she described it **"nice and perfect"**. In conformity with their increased station in life, they travelled extensively.

[12] Family holidays, locally and abroad, were undertaken for extended periods of time. There were numerous holidays in Cape Town, Johannesburg and Durban. The couple holidayed for a long period in the Drankensberg and along the Wild Coast. They journeyed to Bali in Indonesia for an extended holiday together with the defendant's sister. Although no further overseas travel was undertaken, local holidays continued throughout their cohabitation.

[13] During 2004, the family unit increased by the arrival of *V* at the common home. She was the defendant's daughter and lived with her mother in Patterson. Her existence had been divulged to the plaintiff and *V* frequented the common home, and lived there over weekends. Actuated by his desire that *V* too be accorded the benefit of a better education, the defendant sought the plaintiff's consent that *V* reside with them in the common home and attend a local school.

The plaintiff readily acquiescenced and *V* came to live with her. *V* assimilated herself into the family and lived with the plaintiff for three years until she matriculated in 2007.

[14] Throughout the period of their cohabitation prior to 2007, the defendant's love and devotion to the plaintiff and children was unadulterated. He was the perfect husband and father. During her convalescence, following a botched operation in 2004, he, in conformity with his consistent caring attitude towards her, saw to the payment of her hospital bills and stood by her throughout her ordeal in hospital.

[15] During 2006, the first inkling that all was not as it seemed manifested itself. Quite fortuitously the plaintiff discovered an insurance policy in the defendant's name wherein the named beneficiary was listed as one *Thandiswa Mbewu* (*Thandiswa*). Angered at this discovery, the plaintiff confronted the defendant who, however, remained deadpan and silent. Notwithstanding this confrontation, the relationship endured and soon settled into the hitherto family routine.

[16] During 2007 however, the plaintiff noticed that the defendant's weekend visits, though regular, were being curtailed. Instead of arriving punctually on the Friday, he would on occasions arrive on the Saturday and sometimes the Sunday before returning to Grahamstown the Monday. Notwithstanding, the relationship

continued as before, they continued to share the same bed and the family unit remained intact. This semblance of a blissful, stable relationship between the couple was soon to be shattered and the manner in which the plaintiff unearthed the defendant's duplicity was entirely fortuitous.

[17] Unbeknown to the plaintiff, the defendant had married *Thandiswa* during November 2007. Notwithstanding the deception, he had conducted himself with thespian aplomb. He continued to share the plaintiff's bed and his behaviour towards her and the children remained unchanged. On the morning of 1 January 2008, the plaintiff and the children were, to the knowledge of the defendant, scheduled to leave for Jeffrey's Bay where they were to spend the evening and the next day at the beach. Seizing the opportunity, the defendant decided to spend the evening with his new bride in the common home. This soiree however, came to an abrupt end. During that evening and whilst in Jeffrey's Bay, *J*, became obstreperous and insisted on returning to the common home. Their unexpected arrival exposed the defendant as a philanderer. The evening ended acrimoniously and cohabitation between the plaintiff and the defendant ceased.

[18] The aforegoing exposition of the life and times of the couple was narrated by the plaintiff in her testimony in chief. Save for certain aspects, to which I shall in due course revert, her evidence was never challenged. The thrust of the cross-examination was directed at eliciting a concession from the plaintiff that she played no meaningful role whatsoever in the management, operation or

running of any of the defendant's business enterprises. The plaintiff readily conceded that save for some trivial assistance rendered to the defendant when he moonlighted as an alarm technician, she played no role in the conduct of his business ventures.

[19] During his testimony the defendant, notwithstanding the fact that the plaintiff's evidence was never challenged, sought to convey the impression that the plaintiff's idyllic account of their relationship was exaggerated. Although it had been put to the plaintiff that her penchant for alcoholic beverages caused the breakdown of the relationship between them, it became obvious as the cross-examination of the defendant continued, that the allegations of alcohol abuse were contrived and designed not only to denigrate the plaintiff, but moreover to frustrate her claim to the relief sought. The defendant was a particularly unimpressive witness. He lied unashamedly and there is more than sufficient reason for rejecting his evidence where it conflicts with that of the plaintiff. Three examples of his complete disregard for the truth will suffice to show that no weight whatsoever can be attached to his evidence.

[20] I have earlier adverted to the plaintiff's discovery of a policy of life insurance wherein *Thandiswa* was the named beneficiary. During the initial part of his cross-examination he stated that he met *Thandiswa* for the first time during the end of 2007. In response to a question by me, he said that he married her after a whirlwind romance. The fact of the matter is that in his amended plea, he

admitted having married her on 15 November 2007. That evidence was clearly concocted as the policy of insurance, circa 2006, attests to. Further questioning on this issue merely added to his woes. He was cross-examined on his response in his plea, to the plaintiff's allegations that she had accompanied him on vacations. Therein he had denied that she accompanied him on holidays, save for one occasion to Johannesburg and Cape Town.

[21] The falsity of those averments soon surfaced, particularly when he was confronted with the fact that the plaintiff's evidence, that they frequently went on holiday together, was never challenged. Disingenuously, he sought refuge for his lack of candour in a bout of amnesia. Thirdly, his evidence that the relationship between them soured during 2001 was clearly shown to be a fabrication. The plaintiff's evidence that up until 1 January 2008 they continued in an amorous stable relationship, was never challenged. He had great difficulty in explaining why he not only continued visiting the common home, but maintained intimacy with the plaintiff. There are numerous other examples of his complete disregard for the truth and the weight of the evidence establishes that the cause of the breakdown of the relationship between him and the plaintiff was his illicit relationship with and subsequent marriage to *Thandiswa*.

[22] The issue which accordingly falls for decision is whether, on the facts as outlined, an implied or tacit universal partnership existed between the couple. The legal position is trite – a universal partnership can exist between cohabitants

if the requirements for such a partnership have been met. Those requirements were succinctly articulated by Mccreath J, in **Muhlmann v Muhlmann**[3] as:-

> ". . . firstly, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract. (See *Rhodesia Railways and Others v Commissioner of Taxes* 1925 AD 438 at 465). The last requirement is, of course, common to all contracts and is not therefore, strictly speaking, essential to the definition of a partnership."

[23] A useful starting point in determining whether the first requirement has been satisfied is **Isaacs v Isaacs**[4] where the learned judge, Searle J, said the following[5]

> "On these facts the plaintiff asks the Court to infer a tacit universal partnership in all their undertakings. A partnership can be implied from the facts, even though there is no express agreement of partnership - *vide Fink v Fink and Another* (1945, W.L.D. 226 at p. 228), and in my view it is the only reasonable inference to draw from these facts when regarded as a whole. Both parties devoted their energy and skill over a number of years in order to provide the necessaries of life and such a measure of comfort and security as could be obtained for the common welfare in the home and the upbringing and education of their children. The proceeds of their energies were at all times pooled and devoted to this common purpose and it was with this object that they bought the land and built on it out of the profits derived from their work. To hold, as contended on behalf of the defendant, that the intention of the plaintiff was to work for her 'husband' and to assist him to accumulate for himself an asset, which he could dissipate at his pleasure, would be a most unreasonable inference to draw from the facts and contrary to all the probabilities, more particularly as such would conflict with the recognised principles of the law of their faith. Each party has to provide for their own maintenance and support in their old age and each party is liable to provide support for any

3 1981 (4) SA 632 (W) at 634c
4 1949 (1) SA 952 (CPD)
5 At p960-962

> minor children who still require maintaining and it is not conceivable that they could ever have intended that defendant alone should derive the benefit from their joint labours over twenty-eight years of association as man and wife. Accordingly I am of opinion that plaintiff has established that there was a tacit universal partnership in the sense I have referred to in my judgment on the application for absolution from the instance. The next question for decision is the proportion of the shares of each party. The plaintiff claims that she is entitled to share equally with the defendant, whereas the defendant maintains that her contribution was a minor one compared to his. It is clear law that on dissolution each party gets a proportionate share of the assets according to his or her contribution, and it is only when their respective contributions were equal or it is impossible to say that one has contributed more than the other that they share equally - *vide Fink v Fink* (1945, W.L.D. 226). Now it is obvious that as each of the parties devoted their whole time to work, part of which, in so far as the plaintiff was concerned, consisted of carrying out the duties of a mother and housewife, the defendant had more time to devote to the actual money-making side of their ventures and thus in a sense must have contributed a greater proportion of the labour directly to the production of the profits. I do not think, however, that this is the correct approach. Had the plaintiff devoted her whole time to the strictly commercial aspect of the ventures, doubtless greater gross profits would have been produced. The object of the partnership was, however, to provide for the household, and had plaintiff devoted her time entirely to commerce, the cost of the household to the partnership would be proportionately greater, as it would have had to pay others to do the work done by the plaintiff. The result would be a decrease in the nett profits, amounting possibly even to a loss. In the circumstances therefore, in my view, the plaintiff's labours in the home, in part, if not entirely, formed part of her contribution to the partnership. If I am correct in this, then clearly it is quite impossible to hold that defendant contributed more than the plaintiff and the parties are entitled to share equally."

[24] **Isaacs** has, over the decades, consistently been followed and applied and is of equal application to the facts in *casu*. Although the plaintiff played no direct role in the growth and expansion of the business *per se*, her contribution to the partnership was, in my view, not inconsequential. The evidence establishes that the object of the partnership was to provide for the household. Although the plaintiff worked for short periods during the couples' cohabitation, there is no evidence to suggest that she applied her earnings for herself. In the formative years of the business, the plaintiff lived frugally and was content with the R1000,

00 weekly contribution made by the defendant. She devoted all her time and energy in caring for the children, and, during weekends, for the defendant himself. As the children grew up, her care for them was akin to full time employment. She not only ferried them to and from school but transported them to their extra curricular activities.

[25] It must be recalled that during the subsistence of her cohabitation the children, whom she was required to care for and look after, increased in number. Her contribution in that sphere was immeasurable and the clear impression gained from her testimony is that she applied herself fully, not only to the children's well being, but the defendant's, as well. Her evidence that she implemented a dietary regime for the defendant for health reasons, given his weight gain, was never challenged and provides clear proof that her overriding concern was the well being of the family unit. Some point was made during the plaintiff's cross-examination that many, if not all, the household chores were performed by the domestic help. The fact that the plaintiff had full time, weekday help is, in my view, entirely irrelevant. Given her circumstances, in effect, a full time single mother to four children, she needed all the help she could get.

[26] Commercial reality dictated that the business be opened in Grahamstown but the common home continued to be in Port Elizabeth. There was no guarantee that the business would succeed. The plaintiff's undisputed evidence was that the choice of Grahamstown, as the location of the business, was a joint

decision and the probabilities favour the plaintiff's version that the business should be carried on for their joint benefit. The object was clearly to make a profit. The acquisition of, firstly, the home in Overbaakens and thereafter the common home demonstrates that the object of starting the business was to provide for their livelihood and comfort and the education of their children. The enrolment of the children at St Georges, St Andrews and Parsons Hill schools respectively, bear testimony to the fact that the profit was never intended to benefit the defendant alone. Although he eventually purchased a home in Grahamstown, it was used only during the week while he managed the business, weekends were routinely spent with the plaintiff and the children in Port Elizabeth. On those occasions they shopped together, dined out, and, as recounted earlier, holidayed extensively, all of which was enjoyed on the profits generated by the business.

[27] In the final analysis I am satisfied that the plaintiff's contribution to the home formed part of her contribution to the partnership. The second and third essentials have likewise been established and contract was clearly legitimate. The plaintiff is accordingly entitled to some relief. The question however, is whether, as claimed, she is entitled to payment of 50% of the nett value of the defendant's estate as at the date of their separation *viz*, 1 January 2008. During argument before me Mr. *Mullins* persisted with the claim for 50% whilst Mr. *de la Harpe* strenuously argued that the claim be dismissed. It is not in dispute that the plaintiff played no part, whatsoever, in the day to day running of the business.

The success of the business cannot however, be attributed to him alone. His capacity and ability to operate optimally and to grow the business is to a large measure also the product of a stable family environment. The support structure provided by the plaintiff permitted him the leeway to devote his energy to the business. Family matters became the sole province of the plaintiff. The success of the business, contextually, is thus in no small measure due to the role played by the plaintiff in single-handedly taking care of the defendant and the family.

[28] Notwithstanding the aforegoing and the longevity of the couple's cohabitation however, would it be equitable to order that half of his estate as at 1 January 2008 devolve upon the plaintiff? I think not. To attempt a formulaic approach to determine a fair apportionment is an impossibility and the only practical solution, to my mind, is a rough and robust approach.

[29] Although Searle J, found that the parties in **Isaacs** were entitled to an equal share of the universal partnership, that finding was justified on the facts *viz*, the wife's labour in the home coupled with her active involvement in the business. In those circumstances Searle J, was constrained to find it impossible to determine which of the parties had contributed more than the other, in which event equity dictated an equal share. Similarly, in **Fink v Fink and Another** [6] Ramsbottom J, found that on the facts the parties were entitled to share equally in the division of the estate.

6 1945 TPD 226 (TPD)

[30] The facts in *casu* are however, wholly dissimilar to **Isaacs** and **Fink**. That she is entitled to a percentage of the partnership assets as at 1 January 2008 is beyond question. The only remedy, though arbitrary, is one with an equitable outcome. Such an approach was adopted in the Botswana Court of Appeal in **Mogorosi v Mogorosi**[7], a matter involving parties who had cohabitated for approximately fourteen years, and had children. The court of first instance found that the evidence established the existence of a tacit universal partnership. On appeal, and after upholding the court below's finding that the parties' conduct created a universal partnership, Lord Coulsfield JA, (Zietsman JA, and McNally JA, concurring), after an analysis of the judgments in **Isaacs**, **Fink** and other cases, concluded by stating:-

> "It may be questionable whether, in a strict application of the rule governing the distribution of the assets of a universal partnership that approach would be correct. If the universal partnership is analogous to an ordinary partnership, it would follow that the rights of the partners should be ascertained at the time of termination of the partnership. That would mean that the value of the respondent's share would be determined as at, say 1981, and it would then be necessary to compensate her for the long period for which she has been denied payment of her share, by an award of interest or otherwise. However, the kind of calculation which would be required by a strict application of the rules would be totally impracticable in the circumstances of this case. The appellant and the respondent have now been separated for a long period of years during which they have neither lived together not engaged jointly in any kind of business. It may be possible to list the assets which belonged to the universal partnership in 1981, along the lines of the respondent's evidence before the customary court, but it would be futile to try to ascertain a money value of those assets as at 1981, and any calculation of shares or interests based on such an approach would be speculative in the extreme. In these circumstances, if we are not to deny the respondent an effective remedy for her just claims, we are driven to take a broader and more equitable approach. To do so, we have to find a way of fairly weighing and allowing for contributions of all the interested persons. In Isaacs v Isaacs Searle

7 (CAPP04105) [2005] BWCA 18 (30 January 2008)

> J did that when he made a division between the parties taking into account those contributions of the wife to which a financial value could not be assigned as well as her contributions to the businesses of the parties. That is also essentially what the judge did in this case in paragraphs 32 and 33 of his judgment. He took account of the respondent's contribution to the growth of the estate and the universal partnership, and also of her contribution to the care of Florah's children. He also gave full weight to the fact that the appellant was already the owner of some property before 1966. He does not expressly give a reason for ordering the division of the existing estate, but I am prepared to assume that he did so because of the impracticability of any other calculation. The effect of the judgment is to give the respondent 20% of the appellant's estate and I do not think that has been shown to be an inequitable outcome."

[31] Following the approach adopted in **Mogorosi** it would, in my view, be equitable to award the plaintiff an amount equal to 30% of the defendant's net asset value as at 1 January 2008.

The Quantum of damages for breach of promise to marry

[32] As mentioned hereinbefore, counsel for the defendant conceded the merits of the plaintiff's delictual claim for damages. The claim was premised on several allegations. The couple had been together for a period of nineteen years, had been engaged for nine years; the plaintiff had the legitimate expectation that they would in due course marry, and the acute embarrassment the sudden revelation of the defendant's marriage had caused her. Notwithstanding the concession made, it is apposite, in determining the quantum of the plaintiff's

damages, to refer to the remarks of Harms D.P, in **Van Jaarsevld v Bridges**[8] where the learned judge advocated the modern approach to actions based upon a breach of promise to marry. The learned judge stated[9]

> "[19] A breach of promise can only lead to sentimental damages if the breach was wrongful in the delictual sense. This means that the fact that the breach of contract itself was wrongful and without just cause does not mean that it was wrongful in the delictual sense, ie that it was injurious. Logically one should commence by enquiring whether there has been a wrongful overt act. A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature. In determining whether or not the act complained of is wrongful the court applies the criterion of reasonableness. This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society. To address words to another which might wound the self-esteem of the addressee, but which are not, objectively determined, insulting (and therefore wrongful), cannot give rise to an action for *injuria.* Importantly, the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby."

The learned judge found that on the facts the injury or contumacy was minimal and should have been discounted. Although neither counsel referred me to the aforementioned decision it is unnecessary, in view of the concession made, to consider the matter any further. The plaintiff's claim has been conceded and no useful purpose can be gained by visiting the merits of this claim. In my judgment, the plaintiff's humiliation can adequately be assuaged by the defendant's offer of R25 000, 00 for the contumacy suffered by her.

The Eviction Application

8 2010 (4) SA 558 SCA
9 At para [19]

[33] The plaintiff's defence to the eviction application was premised on the existence of a universal partnership. Having found in favour of the plaintiff on this issue, her continued occupation of the premises can hardly be construed as unlawful and the defendant's claim for eviction cannot be sustained.

[34] In the result the following orders will issue:-

A. Case No 881/2008

1. **It is declared that a universal partnership existed between the plaintiff and the defendant of all assets acquired by them during the period 1998 to 15 November 2007.**
2. **The universal partnership is dissolved with effect from 15 November 2007.**
3. **The parties are to appoint a liquidator and receiver with authority to realise the universal partnership assets, to liquidate same, if necessary, to prepare a final account and to pay to the plaintiff 30% of the nett proceeds thereof, the remainder to be paid to the defendant.**
4. **In the event that the parties are unable to reach consensus on the appointment of a liquidator or receiver the parties are directed to approach the court**

which shall, after hearing the parties, appoint a liquidator and receiver

5. **Interest on the sum so determined at the legal rate calculated as from 15 November 2007 to date of payment thereof.**
6. **The defendant is ordered to pay the plaintiff damages in the sum of R25 000. 00.**
7. **The defendant is ordered to pay the plaintiff's costs of suit.**

B. Case No: 3055/2010

The defendant's action is dismissed with costs.

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D. CHETTY
JUDGE OF THE HIGH COURT

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