

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION - PORT ELIZABETH)**

**CASE NO: 1112/2012
DATE HEARD: 30/08/2012
DATE DELIVERED: 13/11/2012**

In the matter between

RENE SMALBERGER

PLAINTIFF/EXCIPIENT

and

GABRIEL JACOBUS STOLS

DEFENDANT/RESPONDENT

JUDGMENT

ROBERSON J:-

[1] In this matter the plaintiff has excepted to a portion of the defendant's counterclaim. The plaintiff and the defendant are husband and wife. The plaintiff has instituted an action in which she claims a decree of divorce, an order that she be awarded primary residence of the minor child born of the marriage, subject to certain defined contact with the defendant, and maintenance for the minor child. The defendant has counterclaimed for a decree of divorce, alleging different grounds for the irretrievable breakdown of the marriage, slightly different

terms of contact with the minor child, a declaration that a partnership existed between the plaintiff and the defendant in the proportion of 70%/30% respectively, an order dissolving the partnership as at the date of issue of summons, and the appointment of a liquidator. It is not in dispute on the pleadings that the parties were married out of community of property with the exclusion of the accrual system.

[2] The portion of the defendant's counterclaim to which the plaintiff has excepted relates to the claim that a partnership between the plaintiff and the defendant existed. The defendant's allegations relating to the alleged partnership were as follows:

9. During the subsistence of their marriage the parties entered into a tacit universal partnership by virtue of the following:

9.1 The plaintiff at all times subsequent to the marriage had a far superior earning capacity and income to that of the defendant.

9.2 Notwithstanding the foregoing, defendant contributed all of his income from whatever source to the payment of household and family expenditure.

9.3 The plaintiff utilised her excess income and her earning capacity to accumulate assets.

9.4 The defendant sacrificed his own career within the church by passing up employment opportunities for the benefit of plaintiff's career and so as to contribute significantly to the needs of the family in their home environment.

10. The parties contributed to the said partnership their earnings and thereafter the defendant contributed 30% in respect of labour, services and skill to the partnership and the plaintiff 70%, including but not limited to the following:

10.1 Direct contributions from earnings;

10.2 Defendant did more than expected of an ordinary husband married to a working wife, including but not limited to:

10.2.1 Looking after the minor child when the plaintiff was away on business, sometimes for up to a week; and

10.2.2 Contributing to the running of the household to enable the plaintiff to concentrate on her work; and

10.2.3 Foregoing career opportunities so as to be able to support the plaintiff at home.

11. No express agreement as to the division of the profits of the partnership was arrived at between the parties, but defendant avers that in the premises, it was tacitly agreed that the profits would be divided in the share of 70% to the plaintiff and 30% to the defendant.

12. It was further a tacit term of the said partnership that upon the parties' marital relationship having irretrievably broken down, the partnership would be terminated.

13. The plaintiff does not acknowledge the existence of the partnership.

[3] The plaintiff, having first given the defendant notice to remove the cause of the exception, excepted in the following terms:

1. Ad paragraphs 9, 10, 11, 12 and 13 thereof:

1.1 In these paragraphs defendant alleges and claims a tacit universal partnership, however evidence in support of a universal partnership as described and alleged in the defendant's claim in reconvention would contradict the terms of the antenuptial contract concluded between the parties and admitted by the defendant in his claim in reconvention as being out of community of property with the exclusion of the accrual system.

1.2 Such evidence in support of a universal partnership would accordingly be inadmissible on the basis that it would offend against the parol evidence or integration rule, alternatively on the basis that such an agreement of universal partnership would amount to an invalid amendment of the parties' antenuptial contract.

1.3 In the light of the above, defendant's claim in reconvention is vague and embarrassing and lacks the necessary averments to sustain the claims as set out in defendant's claim in reconvention.

1.4 Accordingly the plaintiff is prejudiced in pleading to these paragraphs.

[4] At the hearing of the exception, counsel for the plaintiff limited the exception to the ground that the portion of the counterclaim excepted to, lacked the necessary averments to sustain the claim.

[5] It was submitted on behalf of the defendant that the exception as framed was to the effect that evidence in support of the existence of a universal partnership would be inadmissible. This was not a ground for an exception and the exception should accordingly be dismissed for this reason alone. I do not agree with this submission. Exceptions have been upheld where evidence to support a defence would be inadmissible. See for example *Gerber v Naude* 1971 (3) SA 55 (TPD) and *Plascon-Evans Paints (Transvaal) Ltd v Virginia Glass Works (Pty) Ltd and Others* 1983 (1) SA 465 (OPD). I therefore am of the view that I may deal with the exception as one taken on the ground that the counterclaim lacks averments to sustain the claim.

[6] In *Butters v Mncora* 2012 (4) SA 1 (SCA)¹ at paragraph [14], Brand JA discussed the two types of universal partnership, as follows:

“It appears to be uncontroversial that, apart from particular partnerships entered into for the purpose of a particular enterprise, Roman and Roman Dutch law also recognised universal partnerships. Within the latter category, a distinction was drawn between two kinds. The first was the *societas universorum bonorum* – also referred to as the *societas omnium bonorum* – by which the parties agree to put in common all their property present and future. The second type consisted of the *societas universorum quae ex quaestu veniunt* where the parties agree that all they may acquire during the existence of the partnership from every kind of commercial undertaking, shall be partnership property.”

[7] The matrimonial property regime chosen by the parties in this matter has the effect that their estates remain separate, and they do not share in each other's accrual.² The partnership alleged by the defendant appears to be a *societas universorum bonorum*.

[8] In *Fink v Fink and Another* 1945 WLD 226 and *Mühlman v Mühlman* 1984 (3) SA 102 (AD), tacit partnerships were found to have come into existence between spouses married out of community of property. In both cases, the partnership concerned a commercial enterprise to which both parties had contributed. In the present case the defendant does not allege such an enterprise. The subject matter of the partnership in the present case appears to be the marriage itself, and the alleged contributions of the parties are those which can be expected to be made in a marriage, as a result of the way the parties choose to run the

¹ This case concerned cohabitees

² *Boberg's Law of Persons and the Family* second edition 196

matrimonial household. In that case the distribution of the “profits” of the alleged partnership would be contrary to the chosen matrimonial property regime, and would, as submitted, amount to an invalid amendment of the antenuptial contract. Effectively some form of accrual sharing would be introduced, when it had been expressly excluded. I therefore do not agree with the submission on behalf of the defendant that the matrimonial property regime and the alleged universal partnership could co-exist.

[9] It is so, as was stated in *Butters v Mncora* (*supra*) at paragraph [18], that universal partnerships of all property which extend beyond commercial undertakings still form part of our law, and that such partnerships may be tacitly concluded. However, in my view, that theoretical legal position does not mean that spouses married in accordance with a specific matrimonial property regime can validly enter into an agreement which contradicts the terms of such regime.

[10] In *Butters v Mncora* the submission was made that the respondent had done no more than could be expected of a cohabitee, relying on what was said in *Mühlman* at 124D-E as follows:

“It is, of course, well known that many wives work in the businesses of their husbands without expecting or receiving any remuneration for their services. From this it follows that, unless a wife has rendered services manifestly surpassing those ordinarily expected of a wife in her situation, a Court will not easily be persuaded to infer a tacit agreement of partnership between the spouses.”

Brand JA dealt with that submission at paragraph [29] as follows:

“I do not believe, however, that the statement relied upon can be transposed, without any qualification, on a relationship between cohabitantes. The relationship between spouses is governed by well-established standards, both legally and socially imposed. We therefore have a good idea of what can ‘ordinarily be expected of a wife in her situation’. Relationships between cohabitantes, on the other hand, are not so governed. It is therefore not possible to establish a norm.”

This distinction between cohabitantes and spouses is in my view significant in considering the contributions the parties in the present matter allegedly made, and in deciding whether or not the alleged partnership could co-exist with the parties’ chosen matrimonial regime.

[11] Counsel for the defendant submitted that the distinction between the two types of universal partnerships was artificial in the light of what was said in *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at paragraph [22]:

“A universal partnership exists if the necessary requirements for its existence are met, and this is regardless of whether the parties are married, engaged or cohabiting.”

However in that case the parties were not spouses but cohabitantes, and the above extract must be seen in the context of what was said earlier at paragraph [22], as follows:

“It is apparent from the case law that a universal partnership can exist in a marriage, as was the case in *Mühlman v Mühlman* supra and *Fink v Fink and Another* 1945 WLD 226. It does not follow then that a universal partnership cannot exist between parties who are engaged to be married.”

Seen in this context, the passage relied upon by the defendant is not in my view blanket authority for the existence of a universal partnership in a marriage, regardless of the chosen matrimonial property regime. The reference to *Mühlman* and *Fink* is in any event a reference to universal partnerships involving a commercial enterprise.

[12] The matter of *JW v CW* 2012 (2) SA 529 (NCK), a divorce action, dealt with a similar situation. The parties were married out of community of property with the exclusion of the accrual system. The defendant counterclaimed for a declaratory order that a universal partnership existed between the parties, and other consequential relief. The issue of a universal partnership could not be dealt with by way of exception, as there was no allegation in the pleadings that an antenuptial contract had been concluded and such contract did not form part of the pleadings. The issue was however dealt with separately. At paragraph [25], Olivier J said the following:

“The establishment of a partnership like that alleged by the defendant would have defeated the clear purpose of the terms agreed upon in clauses 1 and 2 of the antenuptial contract. It would have substituted the matrimonial property regime agreed upon in the antenuptial contract with a regime which would have the opposite effect. **The partnership envisaged in the counterclaim would not have been a legal entity separate from the matrimonial property regime which was supposed to apply between the parties.**” (My emphasis.)

With respect, this passage is directly applicable to the present case.

[13] After referring to the requirement of a Court order for the revocation or amendment of an antenuptial contract³, Olivier J concluded as follows, at paragraph [36]:

“In my view evidence of an invalid revocation or amendment of the terms of the antenuptial contract would be inadmissible, on the basis of it being irrelevant as a result of the doctrine that an antenuptial contract cannot be revoked or amended in this manner.”

I am in respectful agreement with this conclusion.

[14] In the result, the exception should succeed. Evidence in support of the defendant’s counterclaim in respect of the universal partnership would be inadmissible and that portion of the counterclaim therefore lacks the necessary averments to sustain the claim.

[15] The following order will issue:

[15.1] The exception is upheld.

[15.2] Paragraphs 9, 10, 11, 12 and 13 of the defendant’s counterclaim are struck out.

[15.3] The defendant is to pay the costs of the exception.

³ There was no allegation in the counterclaim in the present matter that a Court order had been obtained, or that there were grounds for such an order.

**J M ROBERSON
JUDGE OF THE HIGH COURT**

Appearances:

For the Plaintiff/Excipient: Adv P Scott, instructed by Kaplan Blumberg Attorneys, Port Elizabeth

For the Defendant/Respondent: Adv J Nepgen, instructed by Goldberg & De Villiers Attorneys, Port Elizabeth

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