

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Date: 17 April 2013

Case number: 5508/11

In the matter between:

M M V[...] D[...] H[...]

Plaintiff

and

G D P V[...] D[...] H[...]

Defendant

JUDGMENT

A B ROSSOUW A J

- [1] This is a divorce action involving the characteristics of a *societate universorum quae ex quaestu veniunt*.

- [2] The plaintiff instituted action against the defendant for a decree of divorce, rehabilitative maintenance, a declaratory order that a universal partnership existed between the parties and costs. The defendant instituted a counter claim for a decree of divorce and a punitive costs order.
- [3] The plaintiff subsequently delivered a notice of intention to amend her particulars of claim in terms whereof she abandoned her claim in respect of a universal partnership and in lieu thereof claimed rehabilitative maintenance in the amount of R16 500 per month for a period of one year as well as a unique resettlement allowance in the amount of R 450 000. This amendment was never pursued. Shortly before the trial, the plaintiff delivered a further notice of intention to amend in terms whereof she amplified her particulars of claim pertaining to the existence of a universal partnership.
- [4] *Mr Kok*, who appeared for the defendant, had his reservations about the clarity of the plaintiff's cause of action, but in view of his instructions to avoid a postponement, he did not to object to the late amendment.
- [5] The case then proceeded on the amended particulars of claim. Prior to the amendment, the particulars of claim relating to the existence of a universal partnership contained the following allegations (The numbering is my own):

'1. During the existence of the marriage between the parties the Plaintiff and Defendant acted as follows:

- 1.1 From March 2009 the Plaintiff applied her labour and business skills towards the day-to-day running of the Defendant's business;
- 1.2 Therefore both parties applied their labour and business skills to the management of the business; and
- 1.3 Both parties equally shared in the profits accruing from the aforesaid business for the joint benefit of the parties.
2. In the premises a universal partnership came into existence between the parties in respect of the business known as G[...] v[...] d[...] H[...] Optometrist.'

The following additional paragraphs were inserted in terms of the amendment (the numbering is my own):

3. During or about 2009 and at Bela – Bela , Limpopo Province, the Plaintiff and Defendant verbally agreed as follows:
 - 3.1 Parties would contribute their skills, time and effort to a business and to share the profits and losses of the business.
 - 3.2 Plaintiff would resign from her profession as a teacher in order to work full time to further the business' interest.
 - 3.3 The business would be called G[...] v[...] d[...] H[...] [Optometrist] trading as G[...] V[...] d[...] H[...] [Optometrist] Warmbad and G[...] V[...] d[...] H[...] [Optometrist] Nylstroom.
 - 3.4 It was later specifically and verbally agreed that both parties would earn salaries from the business and also that both parties would use the profits of the business for their respective benefits and needs as well as for the needs of the joint household.
 - 3.5 The Plaintiff would be responsible for the practice management including the creditors, debtors, all personnel, marketing, purchasing of products, sales, overseeing the administrative and financial expenses and obligations of the

business and do everything necessary to further the interests of the business.

- 3.6 The Defendant would contribute his skills and time and practice as an optometrist.
- 3.7 The parties jointly decided on the name, logo, marketing, branding and management of the business, appointment of staff and a financial officer.
- 3.8 Since or from about March 2009 the Plaintiff contributed her skills, knowledge, time and effort to the business, as agreed.
- 3.9 The parties jointly appointed a short-term and long-term insurer to manage their respective insurance portfolios as well as the portfolio of the business. The profit of the business was used for payment of some of their personal insurance instalments.
- 3.10 The parties both contributed their skills, knowledge, time and effort as agreed and shared in the profits of the business.
- 3.11 Both parties were paid salaries from the business but also utilized the profits of the business for the joint household and to maintain a high standard of living.
- 3.12 There is no express agreement regarding the division of the profits of the business, but the parties tacitly agreed that the profit would be divided equally.
- 3.13 The business made profits for the period that both parties jointly contributed their knowledge, skills, time and effort.
- 3.14 In the premises a universal partnership came into existence between the parties in respect of the business known as G[...] v[...] d[...] H[...] [Optometrist].
4. The partnership was terminated during or about June 2011.
5. As a result of the Defendant's conduct as more fully set out in paragraph 6

above (this paragraph deals with the grounds for the breakdown of the marriage relationship), the partnership cannot continue successfully, *alternatively* the Plaintiff is not prepared to continue with the aforesaid partnership with the Defendant.'

- [6] In terms of the amended particulars of claim, the plaintiff claims a decree of divorce; rehabilitative maintenance for the plaintiff in the amount of R16 500 per month for a period of one year; a declaratory order that a universal partnership existed between the parties in respect of the business known as G[...] v[...] d[...] H[...] Optometrist; a declaratory order that the universal partnership in respect of G[...] v[...] d[...] H[...] Optometrist has terminated; that a liquidator be appointed to take charge of the assets of the partnership, dispose of same, pay all the debts of the partnership and to divide the net proceeds equally between the parties; and costs.
- [7] The defendant admits the irretrievable breakdown of the marriage, albeit on different grounds, but he denies that a universal partnership ever existed and he disputes the claim for rehabilitative maintenance.
- [8] It is not clear from the plaintiff's amended particulars whether the plaintiff relies on a tacit or an express (oral) partnership agreement and whether she relies on a universal as opposed to a specific partnership agreement. I deal with this later on.

- [9] Three witnesses were called, ie the plaintiff, the defendant and Ms Sauders, the former bookkeeper of G[...] v[...] d[...] H[...] Optometrist. Ms Saunders was called to testify in the plaintiff's case. The parties handed up documents consisting of 19 volumes, the authenticity of which was common cause. The duration of the trial was five days.

THE RELEVANT FACTS

- [10] The plaintiff is a graduate primary school teacher and the defendant is a registered optometrist.
- [11] The plaintiff and the defendant met each other during September 2007. When the parties met the defendant was a practising optometrist in partnership with a certain Mr Van Rooyen and the plaintiff was employed by the Department of Education as a nursery school teacher at B[...] K[...], Bela Bela. The plaintiff had been employed as such for the past eleven years. The plaintiff had a son born of a previous marriage and they were living with the plaintiff's mother in Bela Bela. Her son was about 12 years old then. The plaintiff was earning a net salary of about R10 000 per month. She also received maintenance from her struggling ex husband in the meagre amount of R1 000 per month. The defendant had two sons and a daughter born of his previous marriage. His children were staying with his ex wife.
- [12] The defendant's partnership terminated on 1 March 2008. The

partnership's businesses were divided and defendant took over the two more thriving businesses in Bela Bela, where he lived, and the one in Nylstroom, with its satellite branch in Vaalwater. The defendant retained the personnel and his clients that he had built up over the past 22 years.

The termination of the partnership did not affect his practice and it continued to be a busy and lucrative business ever since.

- [13] The plaintiff and her son moved in with the defendant and about four months later (on 4 October 2008) the parties got married. They married out of community of property and community of profit and loss with the exclusion of the accrual system.
- [14] The defendant persuaded the plaintiff to resign her work with a view to her becoming involved in his practice as office manager on a full time basis.
- [15] During April 2009 the plaintiff resigned her work and took up her new role as office manager. It was agreed between the parties that the plaintiff would manage the practice, which included the management of the creditors, debtors, all personnel, marketing, purchasing of products, sales, the administrative and financial expenses and the obligations of the business in general and that the defendant would devote all his time and effort to the obstetrical needs of his clients.

[16] The plaintiff testified that she and the defendant discussed their use in equal shares of the income of the business. She also testified that the defendant felt that the parties should spend their labour on the business with a view to securing a nest egg for their old age. This was basically the sum total of her evidence relating to the alleged oral partnership agreement. She also stated that Ms Saunders was aware of the fact that the parties shared equally in the profits. The defendant denied ever having discussed the sharing of the income of the business or the entering into a partnership with the defendant. He testified that the agreement between him and the plaintiff was that she would start with a monthly net salary equal to that which she earned as a nursery school teacher, ie R10 000, and that her salary would be adjusted upwards from time to time.

[17] In order to place the administration of the business on a new foothold, the parties went to First National Bank, opened two personal accounts and three business accounts for the Nylstroom and Bela Bela branches as well as an account called 'Salaris Rekening'. The business accounts were opened under the name 'G[...] v[...] d[...] H[...] [Optometrist]' with the defendant as the sole account holder. Plaintiff had unrestricted access to operate on and to make payments out of these accounts and she also had unrestricted access to the defendant's personal bank account. The parties also testified about other accounts, which I find unnecessary to deal with.

[18] The defendant appointed Ms Saunders, a university graduate and

qualified bookkeeper to, inter alia, assist the plaintiff with the financial side of the business. Ms Saunders was of the view that there was no proper system in place to capture all daily transactions. In view of this shortcoming and in order to assist the plaintiff in her new role, Ms Saunders trained the plaintiff in Pastel, ie a computer software accounting programme.

[19] Ms Saunder's main task, however, was to prepare the business' annual financial statements and tax returns, which she did from April 2009 until June 2011. She also prepared the business's management statements on a bi-monthly basis. Ms Saunders never had access to any of the parties' personal bank accounts. Ms Saunders prepared the books of the business on the basis of it being a sole proprietorship and not a partnership. She testified that no party ever informed her about the existence of a partnership. She also testified that whenever she had any queries, she had to rely on the plaintiff's say-so.

[20] Ms Saunders testified that at the end of June 2009 the parties decided that the plaintiff and the defendant would receive a net monthly salary of R15 000 and R25 000 respectively and that same would be implemented with retrospective effect from April 2009. She further testified that, although the plaintiff never earned a commission, her salary would be divided into two components, namely, a salary and commission component for tax purposes. According to the plaintiff it was agreed that her starting salary would be R15 000. The defendant denied this and testified that the plaintiff's agreed net

starting salary was R10 000 and that it was increased to R15 000 at a later stage. According to the plaintiff's personal bank statements, her salary was transferred to her personal account on a regular basis. According to the bank statements payments in amounts varying between R10 000 and R15 000 were during the initial period transferred to the plaintiff's personal bank account in view of which the bank statements are not of much assistance as to what the parties agreed to.

[21] The business's annual financial statements were signed off only by the defendant, which he did on the assumption that they were correct. Since he left the administrative and financial side of the business entirely in the plaintiff's hands and because of his wholehearted trust in her, he never took the trouble to verify any of the figures, nor did he question any of her doings.

[22] The plaintiff in administering the financial side of the business, caused money to be transferred between the business accounts, and between the business accounts and the parties' personal accounts and between their personal accounts whenever she found it necessary or whenever it was so discussed between the parties. The plaintiff stated that she saw the three business accounts as one global pool of money that she utilised to cover all the parties' personal and household expenses. According to the plaintiff, no real distinction was made between the business accounts and their personal accounts and it did not really matter from which account withdrawals were made. As already stated, the defendant preferred not to be involved in the financial administration of the business and he was at peace with whatever the plaintiff was doing.

- [23] The parties also took out insurance on each other's lives.
- [24] It was common cause that the parties maintained a high standard of living throughout their marriage relationship.
- [25] As time went by a number of factors contributed to the development of friction between the parties: the defendant degraded and belittled the plaintiff in front of her son, the defendant humiliated her son, the parties assaulted each other, the defendant became insensitive towards the plaintiff's wishes as to how he should conduct himself toward her son and so on, the particulars of which I find unnecessary to deal with. This caused a gradual heating-up of their relationship until it reached its melting point on 10 June 2009 when the defendant unilaterally terminated the plaintiff's appointment as office manager and asked her to leave. The defendant and her minor son left the communal home shortly thereafter and moved in with her mother.
- [26] On 23 June 2011 a meeting took place between the plaintiff, the defendant and the defendant's labour consultant. During the meeting a voluntary redundancy package was offered to the plaintiff, which she accepted. In terms of the agreement the defendant would pay the plaintiff an amount equal to three months salary and her last working day would be 30 June 2011. It was further agreed that the payments would be effected in three instalments, the first being at the end of July 2011. I shall henceforth refer to this agreement as 'the June agreement'.
- [27] The defendant refused to honour his agreement with the plaintiff. His explanation was that he had discovered that monies had disappeared from his business and that he suspected the plaintiff to be involved.

- [28] During or about July 2011 the plaintiff managed to get temporary employment as a teacher for about a month.
- [29] As a result of the defendant's failure to make any payments in terms of the June agreement, the plaintiff referred the dispute to arbitration under the auspices of the CCMA in terms of the Labour Relations Act, 1995. The plaintiff's referral of the dispute was based on her alleged procedurally and substantively unfair dismissal on 23 June 2011.
- [30] During the end of September 2011 the plaintiff instituted the present divorce proceedings against the defendant.
- [31] The aforesaid arbitration was held on 24 November 2011 and the plaintiff was not successful for reasons that are not relevant to the present matter.
- [32] On 8 November 2011 the plaintiff issued a rule 43 application. In her founding, she said the following:
- ‘Ek was sedert Maart 2009, op aandrang van die respondent, as kantoorbestuurder in die oogkundige praktyk van die respondent werksaam en het 'n maandelikse salaris van R16 500 verdien.’
- and
- ‘Die respondent het my ook op 10 Junie 2011 summier afgedank, en weier om my uitstaande gelde, gelykstaande aan drie maande se salaris soos ooreengekom, te betaal. Die respondent weier ook om enige statutere gelde aan my verskuldig te betaal. In hierdie verband het ek die KBVA en die Departement van Arbeid genader. Op 3 Oktober 2011 het die respondent nie by die konsiliasieverrigtinge opgedaag nie, en is die saak na arbitrasie verwys op 24 November 2011.’
- [33] On 19 January 2012 the plaintiff instituted action out of the magistrates' court for the district of Bela Bela for specific performance of the June agreement. The defendant issued a counter claim based on unauthorised withdrawals in the total amount of roughly R200 000. In paragraph 4 of her particulars of claim in the magistrates' court's action the plaintiff alleges as

follows: 'The plaintiff was employed by the Defendant at G[...] v[...] d[...] H[...] Optometrists in Bela Bela.' This allegation was confirmed under oath in her application for summary judgment. This matter is still pending.

[34] The rule 43 application was heard on 28 February 2012; and the defendant was ordered to pay maintenance to the plaintiff in the amount of R12 000 per month pending the finalisation of the present action.

[35] On 1 May 2012 the plaintiff succeeded to be employed on a permanent basis by the governing body of High School Bela Bela as a teacher with a varying net salary averaging just over R7 500 per month.

[36] As a result of the plaintiff's changing circumstances the rule 43 order was amended on 17 October 2012 in terms whereof the defendant was entitled to deduct the plaintiff's salary from the payments he was obliged to make in terms the rule 43 order previously made, and that is currently still the position.

THE SOCIETAS UNIVERSORUM QUAE EX QUAESTU VENIUNT

[37] Our law recognizes two broad categories of partnerships, namely universal partnerships and particular or specific partnerships, ie those partnerships entered into for the purpose of a particular enterprise such as partnerships in particular things, partnerships limited to in a specific kind of property or undertaking, partnerships in the exercise of some profession or art and commercial and trading partnerships. Universal partnerships are divided into universal partnerships of all present and future property (*societas*

universorum bonorum) and partnerships in commercial undertakings (*societas universorum qua ex quaestu veniunt*). Particular or specific partnerships are divided into ordinary partnerships and extraordinary partnerships and extraordinary partnerships are divided into silent or anonymous partnerships and partnerships *en commandite*.

(See *Wille's Principles of South African Law* 9 ed p 1014 to 1016; 19 LAWSA 2 ed para 255 and *Butters v Mncora* 2012 (4) SA 1 (SCA) at 6C to E and the authorities there cited).

[38] The plaintiff alleges in her particulars of claim that a universal partnership came into existence between the parties in respect of the business known as G[...] v[...] d[...] H[...]Optometrist.

[39] The plaintiff's particulars of claim are not an example of clarity and both Ms *van der Walt* for the plaintiff, as well as Mr *Kok* for the defendant were uncertain as to whether the pleaded cause of action is based on a universal partnership of the second kind or a specific partnership. It appears from the particulars read as a whole that the plaintiff's cause of action is based on the existence of a *societas universorum qua ex quaestu veniunt*, but I shall nevertheless deal with both possibilities.

[40] As to the essential elements underlying all partnerships our courts have over the years accepted the formulation by Pothier as a correct statement of our law. The four essential elements proposed by Pothier are; 1) that each of the partners brings something into the partnership whether it be money,

labour or skill; 2) that the business should be carried out for the joint benefit of both parties; 3) that the object should be to make a profit; and 4) that the contract between the parties should be a legitimate contract. The fourth element has been discounted by our courts for being common to all contracts. (See *Butters v Mncora* supra at 5D to G).

- [41] Insofar as the plaintiff relies on the existence of a particular or specific partnership, the following: It is common cause that the defendant was at all relevant times a registered practitioner (optometrist) in terms of the Health Professions Act 56 of 1974 ('the Act'). In terms of rule 8 (1) and (3) of the Ethical Rules of Conduct ('the Rules') that were published in terms of s 49 read with s 61 (2) and 61A (2) of the Act, a practitioner registered in terms of the Act may practice only in partnership with a practitioner who is registered under the Act and only in respect of the profession for which such practitioner is registered, failing which, the professional board of such practitioner could, if such a person is found guilty, inter alia, remove his name from the register in terms of r 2 of the Rules read with ss 41 and 42 (1) of the Act (that is, of course, if such a penalty is legally indicated). (Similar prohibitions are also contained in inter alia s 38 (1) (a) of the Auditing Profession Act, s 29 of the Pharmacy Act 53 of 1974, s 83 (6) of the Attorneys Act 53 of 1979 and s 9 (2) of the Admission of Advocates Act 74 of 1964). Even on the assumption that the parties entered into some kind of partnership agreement, I find it highly improbable that the defendant would have agreed to practice in partnership with the plaintiff in view of the risk of being struck off the register of optometrists.

- [42] The only remaining cause of action upon which the plaintiff could rely is the second kind of universal partnership viz the *societas universorum quae ex quaestu veniunt*, which was alongside the *societas universorum bonorum*, recognized by Roman and Roman Dutch Law. The *societas universorum quae ex quaestu veniunt* has received the attention of our Courts in *Fink v Fink and Another* 1945 WLD 226, *Isaacs v Isaacs* 1949 (1) SA 952 (C), *V v De Wet* N.O. 1953 (1) SA 612 (OPD), *Annabhay v Ramlall and Others* 1960 (3) SA 802 (D&CLD), *Muhlmann v Muhlmann* 1981 (4) SA 632 (WLD), *Muhlmann v Muhlmann* 1984 (3) SA 102 (AD) and *Butter v Mncora* supra).

- [43] In order to get a more complete picture of this kind of partnership I find it necessary to quote (just about) the whole article contained in Pothier's *Traite du Contrat de Societe* that deals with the *societas universorum quae ex quaestu veniunt*, which could be condensed thus:

'43. The second kind of universal partnership is that which is called in the Roman law *universorum quae ex quaestu veniunt*, and the parties thereby contract a partnership of all they may acquire during its continuance from every kind of commerce. They are considered to enter into this kind of partnership when they declared that they contract together a partnership without any further explanation. This same kind of partnership is also considered to be entered into when the parties declare that they contract a partnership of all the gains and profits they make from all sources. 44. According to the Roman law, the enjoyment only of the property and not the property itself which the parties had when they contracted the partnership, entered therein. 45. It is only what each of the

partners acquires during the partnership by some kind of commerce, as by purchase, lending, &c., which falls therein. Thus also whatever each of them acquires by the exercise of his profession, his pay, his appointments. 46. This partnership being generally of all that the partners may acquire during the term of the partnership, it suffices that one of them may have made by some kind of commerce any acquisition during the period, in order that it may fall into the partnership, even although the contract by which such acquisition is made does not express that it is entered into on account of the partnership. Yet more, if the contract expressly declares that the acquisition is made on the private account of one of the partners, still the others can oblige him to bring into the common stock

unless it has been made out of his own private monies excepted from the partnership. 47. Observe also that real estates, although acquired by commerce during the partnership, do not fall into it, when the title, by virtue of which one of the partners has acquired them, is anterior to the contract of partnership, as when, having bought an estate before the contract of partnership, the tradition of conveyance of it has not been made to him until after. In that case, the estate is his own private property; he ought only to account to the partnership for the money, which he has drawn therefrom to pay the purchase-money. 48. In like manner the property, of which one of the partners becomes owner, during the partnership, by the cancellation of the contract of alienation, which he had entered into with respect to it before the contract of partnership, rather than by a new acquisition which he has made thereof, does not fall into the partnership; 51. It is only what each of the partners has acquired under the head of commerce during the partnership which falls into it. Whatever comes to one of the partners by succession, donation or legacy does not fall therein. 52. With respect to the charges on this partnership, according to the Roman law, the partners not bringing into it any of the property which they had when they entered into the contract, it ought not to be bound by the debts which they then

owed. With regard to the debts contracted by the partners during the

partnership, the partners will be bound by those only which are contracted for the business of the partnership.' (Pothier *Treatise on the Contract of Partnership* 2.1.2 (Tudor Translation)).

- [44] Pothier's short overview of the *societas universorum quae ex quaestu veniunt* is, as far as I could ascertain, not in conflict with the recently introduced 17th century Roman-Dutch authority of Felicius-Boxelius *Tractatus de Societate* (Translated by JJ Henning, HA Wessels & JH De Bruyn *Perceptives on and a Selection from Felicius-Boxelius Tractatus de Societate: A Treatise on the Law of Partnership* (2006)). The latter work played an all important role in *Butters v Mncora* supra, which decision, I think, has strengthened the position of the *Tractatus de Societate* to become the standard work of reference regarding the *ius commune* of partnerships.
- [45] Turning to the facts of the case, I am of the view that the plaintiff has failed to prove an express oral agreement of a universal partnership of the second kind. The plaintiff wanted the court to believe that such an agreement was in place and in this regard she relied on the contents of certain discussions between her and the plaintiff, which the latter denied. The discussions relied upon by the plaintiff were, in my view, typical of discussions between husband and wife regarding their future and nothing more. If there was an oral agreement of partnership, it would have surfaced in various forms from time to time, which never happened.
- [46] The next question is whether the evidence justifies a finding of a silent

agreement of partnership. As in all cases of tacit agreements the court must search for evidence of manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, per contram, any indication that cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement. In any analysis of the evidence the most important considerations are thus whether either party said or did anything to manifest his or her intention and, if so, what the reaction of the other was. (See *Butters v Mcora* supra at 11D to F and the authorities there cited).

- [47] It is clear from the evidence that the business was carried out for the joint benefit of both parties and that the object was to make a profit. Regarding the plaintiff's contribution, there was no evidence placed before the court that the salary she received was substantially less than the market value of the services she rendered to the business. I am also of the view that the conduct of the plaintiff does not translate into a partnership agreement as alleged by her or at all: The fact that she never mentioned a partnership agreement, or at least her right to share in the profits of the business to Ms Saunders or in any of the rule 43 applications or in the summons issued out of the magistrates court or in any of the steps taken by her consequent upon her dismissal is, in my view, a clear indication that such an agreement never existed. On the contrary, there is every indication that she was an employee of the business and that the idea of a partnership only entered her thoughts

after her legal team had interpreted the facts as such. This is strengthened by the fact that she at all relevant times prior to the institution of the present proceedings saw herself as an ex employee and not as a partner of the business.

REHABILITATIVE MAINTENANCE

[48] The plaintiff claims rehabilitative maintenance in terms of s 7 (2) of the Divorce Act 70 of 1979 ('the Act'), which confers a discretion upon the court to make a maintenance order in favour of one spouse against the other.

[49] An ex wife is not entitled to maintenance as of right, but must persuade the court to exercise its discretion in her favour. In doing so, she has to provide a factual basis for a maintenance award before the court determines the quantum and duration thereof. (See also *AV v CV* 2011 (6) SA 189 (KZP) at 192B).

[50] The factual basis that must be provided is indicated with reference to considerations mentioned in s (7) (2), which, in turn, encompasses the enquiries as to whether or not an award of maintenance should be granted, and if so, in what amount, for what period and under what conditions. (See *Botha v Botha* 2009 (3) SA 89 (W) at 98F).

[51] In terms of s 7 (2) of the Act the court may, having regard to the specified

factors and any other factor which in the opinion of the court should be taken into account, make an order which the court finds *just* in respect of the payment of maintenance.

- [52] A 'just' order contains a moral component of what is 'right' and 'fair'. Fairness envisages an 'appropriate' order between the parties, measured against the specified factors and those other factors, which a court decides should also be taken into account. What is 'appropriate' brings one back to the moral consideration that the order must be 'deserved'. (See *Botha v Botha* 2009 (3) SA 89 (W) at 98D to E).
- [53] Regarding rehabilitative maintenance, Satchwell J said the following in *Botha v Botha* 107F:

'The court's understanding of rehabilitation gives meaning to the concept and purpose of limited-period maintenance. The spouse who has been disadvantaged or disabled in some way by the marriage is enabled, through training or therapy or opportunity, to be restored either to the economic position vis-a-vis employment which she occupied prior to the marriage, or to be reintroduced to the ability to participate effectively and profitably in the normal economic life.'

- [54] The plaintiff was self-supporting before the marriage and she is presently not less able to support herself neither has she suffered in her ability to support herself by reason of the marriage. It is true that the plaintiff resigned her work, but it is also true that there were no disagreements between the

parties as to her proposed course of action. Furthermore, it is so that the plaintiff's present income is less than what she probably would have received had she not married the defendant and that her present employment is less secure than what it was prior to her marriage, but I also take into consideration that the defendant has paid maintenance to the plaintiff for more than a year, which I find sufficient to constitute rehabilitative maintenance. All things considered, I am of the view that the plaintiff is presently in a position where she can participate effectively and profitably in the normal economic life.

- [55] In the premises I am not convinced that the plaintiff is entitled to (rehabilitative) maintenance.

COSTS

- [56] The general rule is that costs are awarded to the successful party in order to indemnify him for the expense to which he has been put through having been *unjustly compelled* either to initiate or defend litigation as the case may be. (See *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488). This general rule is subject to the overriding principle that the court has a judicial discretion in awarding costs. (See *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A))
- [57] When the plaintiff issued the present divorce action in September 2011 she was unemployed and in my view, entitled to rehabilitative maintenance for a year. Due to the defendant's refusal to pay maintenance, the plaintiff

simply had no choice but to institute proceedings. When the plaintiff finally got relief on 28 February 2012 in terms of the rule 43 order, she had been without an income for about seven months. At all relevant times aforesaid the defendant persisted with his attitude that the plaintiff was not entitled to maintenance. When the matter came before me the plaintiff's claim for rehabilitative maintenance, which I would have granted had the matter been before me prior to the expiry of one year and one month reckoned from date of the rule 43 order, had just run out of steam. Thus, the defendant was not, in my view, unjustly compelled to defend the action, at least not in respect of the plaintiff's claim for rehabilitative maintenance. On the other hand, I can think of no good reason why the defendant should be deprived of his costs that he has incurred since March 2013.

[58] In the result, I make the following order:

1. A decree of divorce is granted.
2. The plaintiff's claim for a declaratory order that a universal or any other kind of partnership existed between the parties in respect of the business known as G[...] v[...] d[...] H[...]Optometrist is dismissed.
3. The plaintiff's claim for rehabilitative maintenance is dismissed.
4. The defendant is ordered to pay the plaintiff's costs that she has incurred up to and including 28 February 2013.
5. The plaintiff is order to pay the defendant's costs that he has incurred since 1 March 2013.

A B ROSSOUW A J

DATE: 17/04/2013