

SOUTH AFRICA / JUDGMENT

Allner v Werner (2584/2018) [2020] ZAECGHC 12; [2020] 2 All SA 49 (ECG) (25 February 2020) [2020] ZAECGHC 12

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E Smith

CASE / FILE NUMBER

2584/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 2584/2018

Matter

heard on: 03/12/2019

Judgment

delivered on: 25/02/2020

In

the matter between:

SAMANTHA

KIM ALLNER

PLAINTIFF

and

PETER

ROY

WERNER DEFENDANT

JUDGMENT

SMITH J:

Introduction

- [1] The plaintiff seeks an order declaring that she and the defendant concluded an agreement of partnership, namely *societas omnium bonorum*, upon equal shares. The partnership allegedly commenced after May 1996 and, but for a short break, endured for a period of 22 years. She also sues for the dissolution of the partnership and for its liquidation.
- [2] The plaintiff alleges that the universal partnership emanated from the parties' cohabitation and conduct, thus relying on the existence of a tacit agreement, while the defendant asserts that their relationship was merely one of cohabitation as lovers.
- [3] A second claim, based on an oral agreement between the parties in terms of which the defendant would pay the plaintiff the sum of R20 000 for a period of 5 months after the termination of their relationship, was previously finalized when the plaintiff successfully applied for summary judgment.

The pleadings

- [4] Both parties have pleaded extensive factual bases in support of their respective claims.
- [5] The plaintiff pleaded the following facts:
 - (a) the parties commenced their cohabitation during 1996 when they, either tacitly or by implication, entered into a universal partnership in equal shares;
 - (b) they conducted a farming business on Melrose Farm in respect of which they took joint decisions and where, amongst others, they grew vegetables which the plaintiff had sold for the benefit of both parties;
 - (c) she acted as the defendant's secretary without remuneration until March 2018;
 - (d) the parties had contributed equally through their labour and business skills to the running of the farm and the blasting business conducted by Werner Blasting (Pty) Ltd, of which the defendant was the sole shareholder and director;
 - (e) she baked and sold goods to the public to assist with payment of household expenses and supported the defendant personally by taking care of their common home, purchasing provisions, preparing meals, maintaining their common home, and paying expenses;
 - (f) she had effectively acted as the defendant's wife and companion and had sacrificed her own career prospects in order to support the defendant;

- (g) the parties had, by mutual consent, withdrawn money from the farming and blasting businesses for their own needs and that of the common home; and
 - (h) the objective being to accumulate, through their direct and indirect contributions, an appreciating joint estate for their mutual benefit.
- [6] The plaintiff further augmented those averments in her replication by her alleging, inter alia, that:
- (a) the defendant had resided with her at her home in Queenstown;
 - (b) their relationship was interrupted for a period of one year, whereafter they resumed it and jointly discussed and decided upon the purchase of the farm Melrose;
 - (c) the intention was that they would operate the farm jointly and share equally in any profits or losses;
 - (d) the parties also ran a packaging shop, the interest of which were jointly held by them and which was operated for the benefit of both parties;
 - (e) the parties also jointly purchased and operated a bakery for a period of approximately 18 months;
 - (f) they thereafter took a joint decision to start a blasting company, Werner Blasting (Pty) Ltd, the running of which they both contributed to; and
 - (g) she denied that the farm Melrose was purchased prior to their cohabitation but admitted that the purchase of the farm had been funded through the sale of other properties owned exclusively by the defendant.
- [8] In his plea the defendant denied that the parties commenced cohabitation during 1996; that their common intention was to establish a universal partnership; and that he had ever conducted himself on that understanding.
- [9] He admitted that he lived with the plaintiff during the time he was employed at Aliwal North. When he was transferred to Kei Mouth he lived in East London and visited the defendant occasionally. Their relationship terminated when the plaintiff formed intimate relationships with other men. He also subsequently entered into a relationship with another woman, namely one Suzanne Peter. They resumed their relationship during 2005 and he had visited her at her home in East London occasionally.
- [10] During 2007 he sold his properties in Port Elizabeth and Bathurst and utilized the profits to fund the purchase of the farm Melrose. He resigned from his employment during 2009. The plaintiff then relocated to the farm where they continued their cohabitation.

- [11] He had lend the plaintiff the sum of R100 000 to enable her to establish a packaging business jointly with her brother. By arrangement with them, he sold vegetables produced on the farm from the business premises. The loan was subsequently repaid when the plaintiff withdrew from the packaging business.
- [12] He thereafter leased premises in Grahamstown to open a bakery. He used his own funds to purchase the necessary equipment. He conducted the bakery business from those premises and also sold vegetables produced at the farm. This arrangement endured for about 18 months.
- [13] During 2011 he resumed blasting operations on an ad hoc basis, and during 2012 ceased farming completely when he established Werner Blasting (Pty) Ltd. He thereafter resumed blasting on a full time basis. He funded the blasting company from the sale of shares in a private company and money inherited from his mother.
- [14] After 2009 both parties had contributed their income towards their living expenses and that of the plaintiff's daughter, Ashleigh.
- [15] The plaintiff assisted him in the blasting business by attending to administrative tasks and, with his consent, paying running expenses for the home. She did this on a voluntary basis until March 2018 from when she was paid a salary. He averred that neither party regarded Melrose Farm or Werner Blasting as assets of a partnership or joint ownership.
- [16] The plaintiff did not contribute to the purchase of the farm Melrose or the establishing costs of Werner Blasting. He denied that the parties conducted themselves as partners and averred that their relationship amounted to nothing more than one of co-habitation as lovers.

The law

- [17] Before I proceed to summarise the evidence adduced in the matter it would perhaps be helpful first to provide a summary of the applicable legal principles.
- [18] In our law cohabitation does not have special legal consequences. Generally the proprietary consequences and rights flowing from a marriage are not available to unmarried couples, regardless of the length of their cohabitation.
- [19] However, if a cohabitee can establish that the parties were not only living together as husband and wife but that they were partners; he or she can invoke that remedy.
- [20] The party seeking to invoke this private law remedy must prove that:
- (a) each of the parties brought something into the partnership, or bound themselves to bring something into it, whether it be money or labour skills;
 - (b) the business had been carried on for the joint benefit of both parties;
 - (c) the object was to make a profit; and

(d) the partnership contract was legitimate.

(Isaacs v Isaacs 1949

(1) 952 (C); Butters v Mncora 2012 (4) SA (1) (SCA))

[21] A universal partnership does not require express agreement but, like any other contract, can come into existence by way of tacit agreement.

[22] The contributions by the parties do not necessarily have to be confined to the profit making entity. In Butters (supra), at para.19, the court held that: “...on the premise that the partnership enterprise between them could notionally include both the commercial undertaking and the non-profit making part of their family life, for which the plaintiff took responsibility, her contribution to that notional partnership enterprise can hardly be denied.”

[23] Our law recognizes two types of universal partnerships namely *societas universorum bonorum*, where parties agree that all their possessions (present and future) will be considered assets of the partnership and *societas universorum quae ex quaestu veniunt*, where parties agree that all they may acquire during the continuation of the partnership from every kind of commercial undertaking shall be taken to the partnership property. (Sepheri v Scanlan 2008

(1) SA 322 (c) at 338 A-C). The plaintiff’s case is based on the *societas universorum bonorum*.

[24] In order to established the existence of a tacit contract the plaintiff must establish that:

- (a) the defendant was fully aware of the circumstances connected to the transaction;
- (b) the act relied upon was unequivocal; and
- (c) the tacit contract does not extend beyond what the parties contemplated.

(Christie’s Law of Contract in South Africa, 7th Edition page 102).

[25] A tacit contract will be interpreted strictly and not extensively, since a contract must be interpreted in favour of the person on whom it is sought to place an obligation.

[26] A court will find the existence of a tacit contract where by a process of inference it concludes that the most plausible conclusion from all the relevant proved facts and circumstances is that a contract came into existence. (Joel Melamed v Hurwitz v Cleveland Estates (Pty) Ltd [1984] ZASCA 4; 1984

(3) SA 155 (A) at 165-B: See also Butters (supra), at para. 18).

[27] These are then the legal principles which must underpin analysis of the evidence adduced on behalf of the parties.

The evidence on behalf of the plaintiff

- [28] The plaintiff is 47 years old and has a daughter from a previous relationship. She testified that she met the defendant during May 1996 when she was living in a rented flat in Queenstown with a friend. They became intimate within three days and commenced cohabitation in her flat.
- [29] At the time she was employed as an administrator at a local primary school. The defendant was then employed as a trainee blaster by Blasting Eastern Cape. He was working at Aliwal North and would return over weekends to spend time with her. She continued to pay the rental for the flat and the defendant contributed towards the purchase of groceries.
- [30] The defendant moved to East London at some stage and she commenced a relationship with another man. The parties' relationship then terminated during 2001. She also moved to East London during 2002 where she resumed the relationship with the defendant approximately a year after it had ended. At the time the defendant was working in Kei Mouth and she was employed by a packaging company in East London. After they had rekindled their relationship the defendant again moved in with her.
- [31] They thereafter jointly decided to purchase two plots in Bathurst, after having viewed them together. They were planning to build a house on the plots. The plots were paid for by the defendant and were registered in his name. The defendant attended to the construction of the dwelling over weekends, with her assistance. They thereafter spend holidays and weekends in Bathurst.
- [32] During 2007 they jointly decided to sell the Bathurst properties and to purchase the farm Melrose, situated close to Grahamstown. They had viewed the farm together before purchasing it. The defendant moved onto the farm during 2008 and she would visit him there regularly. At his behest, her daughter, Ashleigh, was enrolled at a school in Grahamstown. She first resided with the plaintiff's family whereafter she stayed with the defendant on the farm for some time. The defendant and Ashleigh had by then grown very close and she regarded him as a father.
- [33] She resigned from her employment at the packaging company during 2008 and moved to the farm during the beginning of
2009. At that time the defendant was still employed by Blasting Eastern Cape. They commenced planting and cultivating vegetables on the farm.
- [34] She thereafter started a packaging company in Grahamstown in partnership with her brother. The company was funded with the sum R100 000 which she and the defendant invested in the business. She continued to help with the planting of seeds and seedlings on the farm, and she and the defendant sold the vegetables produced on the farm from the premises of the packaging business. They used that money to buy groceries for their common home. She withdrew from the packaging business after three months and paid back the R100 000 which she had borrowed from the defendant.

- [35] She and the defendant thereafter decided to start a bakery, namely Earthly Edibles, from which they also sold vegetables produced on the farm. The venture was funded by money borrowed by the defendant. The money earned from the bakery and sale of the vegetables were used for their joint household expenses. They closed the bakery after two years, by which time the defendant had established Werner Blasting (Pty) Ltd.
- [36] The defendant attended to the transport of explosives and blasting while she worked in the office attending to vehicle licencing, payments of business expenses, and other administrative functions. The defendant would write out quotations which she would then type. In addition, she would make all such payments as the defendant instructed her to do. She also had access to the business account from which she paid household expenses without having to ask the defendant for permission.
- [37] She only started earning a salary with effect from April 2018. This was after she had written to the defendant's accountant stating that while she had been working for him she was also his partner and thus entitled to a salary.
- [38] During cross-examination the plaintiff conceded that:
- (a) the defendant had owned a farm at Amsterdamhoek prior to their meeting;
 - (b) she could not recall whether she and defendant had visited the plots at Bathurst before or after they had been purchased. She also conceded that she had never met the seller;
 - (c) the defendant had paid for and did the building works on the plots. She also did not know how much was spent on the building operations;
 - (d) she was unaware to whom and at what price the defendant had sold the Armsterdamhoek and Bathurst properties, and conceded that she was not part of the decision to sell those properties;
 - (e) she only went to Melrose Farm and did not view other farms with the defendant. She also did not know what other farms the defendant had viewed before deciding on Melrose Farm. She also did not know the seller and was not part of the negotiations;
 - (f) she admitted that Melrose Farm was paid for by the defendant from the proceeds of the sale of his other properties;
 - (g) she could not recall an invoice addressed to her by Kirk Attorneys and which related to an agreement between her and the defendant in respect of the R100 000 loan. She, however, conceded that the defendant had lent her the money to enable her to start the packaging business with her brother;
 - (h) she also conceded that the establishment of Werner Blasting was the defendant's decision and was financed with money from the sale of his investments in a private company and an inheritance from his mother;

- (i) she admitted that the defendant had concluded an agreement with Bulk Explosives Mining for the establishment of a magazine on the farm and that he had done all the work required to obtain the necessary licence for the construction of the magazine;
 - (j) she did not pay salaries or attend to the payment of UIF, PAYE, or to the Workmen's Compensation Fund. The failure to pay monies to the Workmen's Compensation Fund was because she had not been told to do it;
 - (k) she wanted to be paid a salary because she was tired of working for free and wanted to earn her own money. She was paid a salary when the business could afford to do so.
- [39] The plaintiff also led the evidence of her aunt, one Mrs Elise Naude, who testified that she had gone to the farm during August 2018 to fetch the plaintiff to take her to the family home in Queenstown. She said that when she told the defendant that the plaintiff was concerned that he would not allow her back on the farm he had said: "Why would I not allow her back on the farm when we have built up everything together?" It was put to her that the defendant could not recall having spoken those words.

The evidence on behalf of the defendant

- [40] The defendant is 55 years old and a duly qualified blaster. He testified that prior to 1996 he was employed as a Technician by Telkom in Cape Town. He later relocated to Port Elizabeth where he purchased a house at Amsterdamhoek. He was later employed as an apprentice blaster by Blasting Eastern Cape and travelled extensively throughout the Eastern Cape to various sites.
- [41] He was deployed to a contract in Whittlesea during 1997 and initially lived in a guesthouse in Queenstown. There he met the plaintiff and they became intimate within a few days. At the time he still considered his house in Port Elizabeth as his home, but had moved into the plaintiff's flat and contributed towards the household expenses.
- [42] After his deployment to Whittlesea he was sent to work on the road between Jamestown and Aliwal North. During this period of about a year, he lived in Aliwal North in a flat provided by his employer.
- [43] He also visited the plaintiff periodically since he also spent alternate weekends with his parents and sister. Whenever he had spent a weekend with the plaintiff he would also contribute towards their living costs.
- [44] He was thereafter deployed to Kei Mouth for a period of 2 years. His employers supplied him with a flat in Cambridge, East London. During this period he visited the plaintiff occasionally until their relationship terminated when she started seeing someone else.
- [45] He had by then also formed a relationship with another woman in Grahamstown. That relationship lasted only for one year. He was thereafter deployed to Adelaide, and towards the end of the year he started seeing the plaintiff again.

- [46] During 2003 he purchased two plots in Bathurst. This was a spontaneous, on the spur of the moment decision after he had met an estate agent in a pub. The latter showed him the plots and he decided there and then to buy them. He intended to build a house in Bathurst. He only informed the plaintiff about this decision after he had purchased the plots.
- [47] During that period he continued to visit the plaintiff occasionally and also took her to Bathurst where he was busy with the building operations. He took about three years to build the house since he worked only every alternate weekend. He had finalized the building plans without any input from the plaintiff. He denied that he ever discussed with the plaintiff any plans to make Bathurst their home and to live there permanently.
- [48] When his dream of a bucolic lifestyle in Bathurst was spoiled by numerous burglaries, he decided to sell the Bathurst properties and to utilize the money to buy a farm elsewhere. He subsequently viewed about 8 farms. The plaintiff did not accompany him on any of these occasions. He had originally intended to buy a farm jointly with his sister but those plans had fallen through.
- [49] After purchasing Melrose Farm he moved there without the plaintiff who was at the time still employed in East London. He was then still employed by Blasting Eastern Cape. The plaintiff would visit him at the farm from time to time.
- [50] At some point they agreed that the plaintiff would move to the farm permanently. She did so during 2009 when he had resigned from his employment and had taken up farming on a full time basis.
- [51] He had lent the plaintiff the sum of R100 000 to enable her to start the packaging business with her brother. Attorneys De Klerk and Associates of Port Alfred prepared the loan agreement.
- [52] He initially intended to obtain a hawker's licence to sell the vegetables produced on his farm, but grasped the opportunity rather to sell it from the premises used by the defendant and her brother's packaging business. The money made from the sale of the vegetables was used to defray day to day living expenses.
- [53] The plaintiff withdrew from the packaging business after she fell out with her brother. They agreed to part ways and an agreement was also reached regarding the repayment of the loan. Only a portion of the R100 000 was, however, subsequently repaid to him.
- [54] They thereafter started the bakery business which was intended to provide the plaintiff an opportunity to profit from her cooking skills, and also to provide an outlet for vegetables produced on the farm.

- [55] At the time he concentrated on farming while the plaintiff ran the bakery. The farming, however, turned out not as profitable as he expected and he started to concentrate on his blasting business again. When the blasting work had picked up sufficiently, he started Werner Blasting (Pty) Ltd. The decision to revert to blasting was taken by him alone without involving the plaintiff. He financed the company from money realized from the sale of his shares in a private company and an inheritance from his mother.
- [56] He subsequently entered into a contract with an explosives company in terms of which he would establish and operate a magazine on the farm for the storage of explosives.
- [57] The nature of his business required him to travel to various blasting sites throughout the province. On those occasions the plaintiff would rise early to prepare provisions since he was not allowed to stop along the road while conveying explosives.
- [58] He never discussed or agreed to any partnership with the plaintiff and also never acted in a manner so as to suggest to her that they were partners.
- [59] He confirmed that he could not recall having spoken to Mrs Naude in the manner alleged by her.
- [60] During cross examination the defendant admitted that he had never told the plaintiff “this is mine and this is yours and we keep everything separate” because that was not how they conducted their affairs.

The plaintiff's contentions

- [61] Ms Bands, who appeared for the plaintiff, submitted that the evidence established that soon after their relationship started in 1996, the parties effectively lived together as a family unit.
- [62] During their cohabitation in Queenstown the plaintiff attended to household duties such as cooking of meals, washing, cleaning and ironing. She was also responsible for the payment of the parties' communal expenses. During that period the defendant's personal effects were kept at the plaintiff's flat, and even though he was required to work in various locations he always returned home on weekends. They also often spent weekends together in Port Elizabeth and Bluewater Bay. Thus, even though the parties spent long periods apart, this was enforced by the defendant's work responsibilities. She argued that the defendant admitted under cross-examination that he derived benefit from this situation.
- [63] She furthermore argued that even though the defendant denied that they had jointly decided to purchase the plots in Bathurst, he conceded that he could have discussed it with her. She submitted also that the latter scenario would be more consistent with the nature of their relationship. It is unlikely that the defendant would not have discussed such an important decision with her.

- [64] In the event, the construction of the residence on the said plots was a joint endeavour. It is common cause that the plaintiff had input into the choice of bathroom fittings, tiling and decoration of the home.
- [65] She argued furthermore that the conduct of both parties, after the plaintiff had moved onto the farm, clearly evinced a common intention to enter into a universal partnership. In this regard she referred to the fact that the parties had undertaken various joint business enterprises, and by the time that the defendant had formed Werner Blasting (Pty) Ltd, the partnership was well and truly established. Whatever meagre profits were generated by these ventures were used to pay the joint household expenses.
- [66] She argued that the plaintiff has made a substantial contribution to the success of Werner Blasting (Pty) Ltd. She was responsible for the day to day administration, acquisition of licences and permits, and, in addition, had to rise early in the morning to make meal packs and ensure that transport permits were ready and in order. She also had access to the parties' business account from which she had paid communal expenses.
- [67] Ms Bands also argued that it was significant that the defendant conceded that had neither parties amassed any assets of value at the end of their relationship, he would have been contend that the parties' respective contributions entitled them to benefit from the assets of the joint estate. The defendant also conceded he would never have told the plaintiff that they would keep their assets separate, since that was not how they conducted their affairs. In addition, he also conceded that the plaintiff would never have agreed that while both parties may benefit from their joint contributions, the defendant would be entitled to retain surplus income and accumulate assets for himself.
- [68] She submitted that on a balance of probabilities, the parties' conduct was consistent with the common intention to form a universal partnership. This was also borne out by what the defendant had told Mrs Naude about the nature of their relationship.

The defendant's contentions

- [69] Mr de la Harpe SC, who appeared for the defendant, criticized the plaintiff for colouring events to suit her desired outcome. He submitted that she sought to exaggerate the extent of her involvement in the defendant's business in order to support her claim that they had tacitly agreed to form a partnership.
- [70] He argued that the first period of the parties' relationship which came to an end during 2001, cannot possibly be relevant to the determination of whether the parties concluded an agreement of universal partnership. He submitted that during that first period there was no continuous cohabitation, (except for alternate weekends together) or sharing of living expenses and nothing of value was acquired by common endeavour. In the event, the relationship terminated without any effort on the part of the plaintiff at the time to assert the existence of such a partnership.

- [71] He submitted furthermore that the evidence does not support the plaintiff's claim that she and the defendant jointly acquired the Bathurst plots and the farm Melrose. She had played no part in the decision to purchase those properties; neither did she make any financial contribution to their acquisition. Furthermore, at the time their relationship was not any different from that which existed before the 2001 termination. The defendant was busy with the construction of the house in Bathurst and he visited the plaintiff on alternate weekends, whenever he could.
- [72] Mr de la Harpe also argued that the fact that they intended to relocate to Bathurst establishes only that they contemplated cohabitation on a more permanent basis. Furthermore, contrary to the plaintiff's pleaded case, the evidence established that she did not accompany the defendant in search for a farm, but had only seen Melrose Farm after the defendant had already decided to purchase it. She accordingly played no part in the decisions to sell the Bathurst properties or to acquire the farm.
- [73] For the first year after the purchase of the farm the plaintiff had continued to live in East London and worked there. The defendant was at the time still involved in the blasting business and was farming on a part time basis. The parties were until then effectively living separate lives although they were involved in a romantic relationship.
- [74] It was only during 2009, when she had resigned from her employment and moved to the farm, that their cohabitation commenced in the true sense of the word. Up until that time there could thus not have been any question of her having "spent all her time and effort and energy in promoting the interests of both parties in their common enterprise by maintaining their common home".

(Butters v Mncora (*supra*)).

- [75] In the event, the cohabitation from that time did not automatically bring into existence a universal partnership. He submitted that on the contrary, the evidence pointed to the opposite conclusion. In this regard he referred to the fact that the defendant had lent the plaintiff an amount of R100 000 to help her start the partnership with her brother. This act, Mr de la Harpe submitted,

is inconsistent with an intention to form a universal partnership, but instead supports the inference that they regarded their estates and assets as separate. Furthermore, the fact that she had gone into business with her brother for her own account, means that she did not put aside her own career prospects.

- [76] The fact that the plaintiff sold vegetables produced on the farm from the premises of the packaging company can also not be said to have been unequivocal conduct consistent with the common intention to form a universal partnership. Neither is the fact that the proceeds were used for household expenses.

- [77] When the packaging business failed, the plaintiff repaid a portion of the loan. The fact that she was obliged to do so is also inconsistent with her claim that they jointly held all their property, present and future.
- [78] Mr de la Harpe submitted furthermore that their collaboration in respect of the bakery also does not prove on a preponderance of probabilities that they intended to enter into a universal partnership. At best for the plaintiff it could be construed as an intention to enter into a partnership agreement in respect of that business only. In any event, that business failed and whatever agreement had been concluded would have terminated with the closure of the business.
- [79] The defendant established Werner Blasting (Pty) Ltd by utilizing his own funds. The plaintiff played no part in that process and did not make any financial contribution to its establishment. The evidence established nothing more than that she was performing certain tasks on the defendant's instructions like any other employee would do. She was eventually paid a salary upon her own request. This is another indication that she regarded herself as an employee and no more.
- [80] The fact that she rendered assistance to the blasting business is also not inconsistent with a cohabitation arrangement. It does accordingly not ineluctably lead to the conclusion that they intended to form a universal partnership, or so Mr de la Harpe argued.
- [81] The evidence accordingly establishes only that the parties cohabited, and all events and their conduct were normal incidents of that cohabitation. What the plaintiff did in the management of their home and assisting the defendant in his farming and blasting operations were no more than what would be reasonably expected from a person who cohabits with another. The plaintiff accordingly failed to prove the conclusion of a universal partnership.
- [82] Mr de la Harpe argued in the alternative that if the court should find the existence of a universal partnership, the question arises as to what is to be included as partnership assets and on what percentages such partnership assets are to be shared.
- [83] He argued that the funds utilized by the defendant to purchase Melrose Farm and to establish the blasting business were all raised by the defendant before he had met the plaintiff. She has made no contribution to the acquisition of either asset. At best for the plaintiff she would accordingly only be entitled to a small percentage of what was accumulated, excluding Melrose Farm and the investment in Werner Blasting (Pty) Ltd.

Discussion

[84] I agree with Mr de la Harpe that the conduct of the parties after they first met during 1996 until the termination of their relationship during 2001 did not evince an intention to form a universal partnership. The fact that they lived together, shared some resources and made different but important contributions to the household, were no more than what one would have expected from lovers living together.

[85] That this was indeed their common understanding of the nature of their relationship up to that point in time, was borne out by the fact that upon the termination of that relationship neither of them attempted to assert such a partnership or claim entitlement to the assets of the other. Their parting was a clean break by lovers who had become romantically involved with other persons and had decided each to go his or her own separate way.

[86] When they eventually resuscitated their relationship it was, however, taken to a completely different level. Even though there is some dispute as to whether or not the plaintiff was involved in choosing the plots at Bathurst and the farm Melrose, the evidence is compelling that they resumed cohabitation in all earnestly, and for all practical purposes were living together as a family unit. The defendant had established a very close relationship with the plaintiff's daughter, they spent holidays together,

and the plaintiff was involved in the choice of tiling and decoration for the Bathurst dwelling.

[87] When she eventually moved to the farm, she became involved in the cultivation and selling of vegetables, the parties had undertaken various business ventures, and when the defendant decided to launch Werner Blasting (Pty) Ltd, the plaintiff enthusiastically did whatever she could to assist the business. After the packaging and bakery businesses had failed, she not only managed ordinary housekeeping duties, but also assisted with the administration of the blasting company. She undertook all these tasks without any remuneration for a period of at least 18 months, until she was advised by the company auditors that she was entitled to a salary.

[88] I do not agree with Mr de la Harpe's submission that the fact that she had been paid a salary was inconsistent with a common intention to form a partnership, and that it rather compels the inference that she was merely an employee. While it is so that in certain circumstances the payment of a salary would tend to militate against the existence of a partnership, in this case there is no evidence either that the defendant regarded or treated her as an employee, or that she regarded herself as such. In fact the evidence compels the opposite conclusion. For a period of 18 months, while they were establishing the business, the plaintiff attended to household duties, assisted with farming operations, and performed important and vital administrative tasks in respect of the blasting business.

[89] But the most compelling evidence that the parties intended to pool their resources for the benefit of a joint estate are the concessions made by the defendant during cross-examination. The following excerpt from pages 117 to 118 of the record illustrates this point.

When the defendant was questioned by Ms Bands regarding the decision to start Werner Blasting, the following transpired:

MS BANDS: In 2012, and that decision was discussed between you and the plaintiff.

MR WERNER: Correct.

MS BANDS: And you and the plaintiff decided that this was going to be the best financially viable option.

MR WERNER: I decided because that's my forte and I knew how I could make money.

MS BANDS: The plaintiff's version as she said under examination in chief, is that this was a decision that the two of you came to jointly.

MR WERNER: Well I believe I would have decided that, but if the plaintiff says so then I agree with that.

MS BANDS: So it's possible that the two of you [interrupted].

MR WERNER: It is possible yes.

MS BANDS: Agreed that this was the best way forward for now.

MR WERNER: It was the only way forward yes.

MS BANDS: It was the only way forward, it was also discussed that the plaintiff would assist you in that business and assist you in the running of the business, this was something that the two of you were going to do together.

MR WERNER: The day to day running of the office and administration had to be done, I was on the road most of the day, I would leave at sunrise and come home at sunset past, somebody had to attend to the office, day to day office.

MS BANDS: So you would play your role and she would play her role.

MR WERNER: Yes.

MS BANDS: And both roles were to the benefit of the venture.

MR WERNER: Both roles were to the benefit of the company yes.

MS BANDS: And to the benefit of both of you financially.

MR WERNER: It had, yes.

[90] In my view the inference is accordingly ineluctable that the parties have both brought something to the partnership, that they had carried on the partnership for the benefit of both parties, and that they had aimed to make a profit. There is also no dispute about the legitimacy of the partnership. I am accordingly satisfied that the plaintiff has established on a balance of probabilities that the parties had concluded a universal partnership.

[91] The question remains, however, whether the plaintiff is entitled to 50% of the partnership assets as at the date of termination, namely June 2018. In this regard I do not agree with Mr de la Harpe's submission that the farm Melrose and Werner Blasting (Pty) Ltd should be excluded from the assets of the universal partnership. Such an approach would not make any sense in the light of my finding that the common intention of the parties to form a partnership truly manifested after they had resumed their relationship in 2001 after the plaintiff had moved onto the farm. I am, however, of the view that it would not be equitable for the plaintiff to share 50% of the partnership assets.

[92] In Butters, the court a quo, per Chetty J, when considering the issue of equitable percentages of shareholding, distinguished the facts in Isaacs (supra) where equal distribution of the assets was ordered on the basis of equal contributions by the parties. He accordingly ordered

that the plaintiff in that matter was entitled only to 30% of the defendant's net asset value. In Isaacs Searle J held, at page 960, that:

"It is clear 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"

[93] It is common cause in this matter that the defendant utilized the proceeds from the sale of other properties; monies generated from the sale of shares in a private company; as well as an inheritance from his mother, to acquire the farm Melrose and to establish Werner Blasting (Pty) Ltd. In my view it would accordingly be inequitable and unfair on the defendant to order an equal division of the estate.

[94] I am also of the view that the evidence has established, on a balance of probabilities, that such an inequitable distribution of assets could not have been within the parties' contemplation when they concluded the universal partnership. Applying the approach adopted in the above cases, I am of the view that the plaintiff is entitled to 30% of the partnership assets.

Order

[95] In the result the following order issues:

- (a) It is declared that a universal partnership existed between the plaintiff and the defendant of all assets acquired by them up to June 2018.
- (b) It is declared that the plaintiff had a 30% share in such partnership.
- (c) It is declared that the partnership was dissolved with effect from June 2018.
- (d) Failing agreement between the parties within a period of two months (or such longer period as the parties may in writing agree upon), on the nett benefit payable to the plaintiff from the partnership and the manner and date of payment of such benefit;

(h)

(i) it is ordered that a liquidator be appointed to liquidate the said partnership;

(ii) unless the parties agree, in writing, on the appointment of a liquidator, the liquidator shall be appointed at the request of either of the parties by the chairperson of the Port Elizabeth Society of Advocates;

(iii) the parties shall, within one month of the appointment of a liquidator, deliver to the liquidator and to each other their statements of their assets and liabilities as of June 2018, duly supported by such available documents and records as are necessary to establish the extent of such assets and liabilities;

(iv) the liquidator may call on either of the parties, either mero moru or upon the request of one of them, to deliver further documents or records to the liquidator and the other party;

(v) the liquidator shall determine a date for the debatement of the statements referred to in paragraph (iii) and shall preside over such debatement;

(vi) the liquidator shall, within one month of the conclusion of the debatement, make an award in writing determining the assets and liabilities of the partnership and divide the net assets by awarding 30% to the plaintiff and 70% to the defendant;

(vii) the parties shall give effect to any award made by the liquidator within such period as he may direct in writing; and

(viii) the costs of the liquidator shall be borne by the parties in equal shares.

(e) The defendant is ordered to pay the plaintiffs costs of suit.

J.E SMITH

JUDGE OF THE HIGH COURT

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