

SOUTH AFRICA / JUDGMENT

Lillie v Berry (17701/2013) [2014] ZAWCHC 153 (7 October 2014)

[2014] ZAWCHC 153**COURT**

Western Cape High Court, Cape Town

BEFORE

Davis

CASE / FILE NUMBER

17701/2013

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 17701/2013

DATE: 07 OCTOBER 2014

Reportable

In the matter between:

LUDWIG LILLIE.....Plaintiff

And

PENELOPE ANN BERRY.....Defendant

JUDGMENT: 07 October 2014

DAVIS J

Introduction

[1] Defendant excepted to the plaintiff's particulars of claim on the grounds that they do not disclose a cause of action. In his pleadings plaintiff sought an order declaring that a partnership existed between himself and the defendant in equal shares in respect of certain immovable property, which property was previously occupied by the parties. In seeking this relief the plaintiff has relied on an oral agreement which he alleges was entered into between himself and the defendant 'at or about the end of 2003 or the beginning of 2004'.

[2] The terms of the agreement, as set out by plaintiff, inter alia, were that:

1. The defendant would purchase the property for R 522 000.00 and be registered in her name only.
 2. The property would be purchased for the joint benefit of the parties and would be the only partnership asset.
 3. The parties would co-habit in the property
 4. In the event of a resale of the property, the parties would be entitled to share equally in the proceeds and profit made thereon.
 5. The parties would share equally in the proceeds of and consequent profit made on the sale of the property, should it be sold after the dissolution of the partnership.
- [3] Plaintiff further alleged that the partnership was dissolved during June 2012 and the parties decided to terminate their cohabitation of the property as ‘cohabitation was one of the principle purposes of the partnership’. On this basis plaintiff has sought an order that, as the partnership existed, the defendant is now required to account to him about the sale and the debatement of the account. He also seeks an order confirming the dissolution of the partnership and the appointment of a liquidator to prepare a final account and payment of that which is owing to him.

[4] Defendant contends in her notice of exception that:

‘One of the essential terms required in order for an agreement to embody a partnership is that the object of the partnership business must be to make a profit. A partnership cannot exist where the making of profits is an incidental possibility and not the main aim of the venture.

The plaintiff and the defendant were cohabitees for the duration of their personal relationship. According to the plaintiff, the partnership ceased when the parties ceased to cohabit. Indeed, he alleges in paragraph 11 of his particulars of claim that this cessation of the parties’ cohabitation “brought an end to the partnership” – this being “as cohabitation was one of the principal purposes of the partnership”.

The only element of profit alleged by the plaintiff, in paragraphs 4.4 and 4.9 of his particulars of claim, is that the parties would share in the proceeds of the sale of the property, should it be sold either during the cohabitation or after their cohabitation ceased. Such resale was thus a future uncertain event.

Sharing in such proceeds is a natural incident of the sale of any commonly owned property. Common ownership is however not alleged by the plaintiff.

In the absence of by allegation of an intended or profit-making enterprise on the part of himself and the defendant, the plaintiff has failed properly to plead a partnership.’

- [5] The basis of this exception taken by the defendant turns on the well-known formulation of the essentialia of partnership set out by Pothier Treatise on the Contract of the Partnership, which was accepted as reflective of our law in *Joubert v Tarry and Co* 1915 TPD 277; in

particular the requirement that each of the partners must bring something into the partnership or bind himself or herself to bring something into it whether it be money, labour or skill. Further, the business should be carried on for the joint benefit of both parties and the object should be to make a profit. Finally, the contract between the parties should be a legitimate contract.

- [6] Defendant contends that, as it is essential that a partnership should have as its objective the making of a gain or profit, the very nature of the parties' relationship, being cohabitation on its own, precludes the existence of this requirement. According to defendant, the only element of profit which is alleged by the plaintiff in his particulars of claim is that the parties should share in the proceeds of the sale of the property, should the property be sold either during their cohabitation or after cohabitation ceased.
- [7] Accordingly, in the absence of any allegation of an intended profit making enterprise on the part of himself and the defendant as well as the further absence of any allegation of the intention to place in common all their property, both present and future, the plaintiff had failed properly to plead a partnership.

Plaintiff's case

- [8] Mr Verster, on behalf of the plaintiff, submitted that a partnership can exist in a single asset or a single transaction. *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 784 B. In his view, it was clear from the pleadings, which set out the terms of the agreement, that the parties foresaw that the partnership would come to an end when their cohabitation terminated and, further, they foresaw what would occur if they made a profit from the sale of the property. That the date of the event which would end the cohabitation was uncertain did not mean that this date would not arrive. The uncertainty of the date of a certain event did not detract from the fact that the partners had agreed to share in the profits of the dissolution of the partnership.
- [9] Relying on *Purdon v Muller* 1961 (2) SA 211 (A) Mr Verster submitted that as the real intention of the parties had to be deduced from the whole agreement, evidence was required as to the true nature of the agreement and, accordingly this dispute cannot be decided on exception. He further based his argument on a dictum in *Ally v Dinath* 1984 (2) SA 451 (T) at 455 where the court decided, on exception, that the requirement of Pothier that the object of the enterprise must be to make a profit did not require an averment of a pure pecuniary profit motive. The achievement of another form of material gain, such as a joint exercise for the purpose of saving costs, would suffice to justify the existence of a partnership.

Evaluation

- [10] The decision in *Ally v Dinath*, supra, for the purposes of this dispute, requires a careful analysis. In this case, plaintiff pleaded that she and the defendant lived together as man and wife and,

‘they:

“(a) shared a joint household as if they were legally married for their joint benefit:

(b) pooled their assets, income and labour for their joint benefit.”

The pleading continues:

“In so acting, the parties tacitly, alternatively by implication, entered into a universal partnership in equal shares and accumulated a joint estate, including the premises where defended is presently residing, which is registered in defendant’s name, and which was the common home of the parties.”

The plaintiff therefore claimed that a universal partnership existed between the parties, in which they held equal shares ‘during the existence of the Islamic relationship’ and therefore sought an order dissolving the relationship and the appointment of a receiver to wind-up the partnership.

[11] The exception which was taken was that the particulars of claim did not disclose a cause of action, in particular in that there was no allegation that the agreement of universal partnership was concluded expressly, there was no allegation that the object of the alleged universal partnership was to make a profit, and there was no allegation that the said universal partnership was terminated. Of particular relevance to the present dispute, was the second point raised on exception, namely that there was a lack of an averment that the object of the enterprise was to make a profit. Eloff J (as he then was) dealt with the averment that the parties had entered into a universal partnership to make a profit as follows:

‘It is at once necessary to state what is meant by the requirement that the object of a partnership should be to earn a profit. What is required is not pure pecuniary profit motive; the achievement of another material gains, such as a joint exercise for the purpose of saving costs will suffice. De Groot 3.12.1 requires no more than that the aim should be “gemene baat te trekken”. And in Isaac’s case *supra* at 956 an object “to provide for the livelihood and comfort of the parties, and their children, including the proper education and upbringing of the latter” was held to be equivalent to making a profit and thus sufficient for partnership purposes. In the present case the objective of the accumulation of an appreciating joint estate is alleged, and, at least for pleading purposes, that is in my estimation sufficient.’ (at 455 A-D)

[12] In both *Ally’s case* and *Lee (also known as L) v De Wet* 1953 (1) SA 612 (O) our courts have recognised that couples, who are not married, can still, expressly or by implication, create a universal partnership (*societas universorum bonorum*). Parties to this form of arrangement agree to put in common all their property, both present and future. See *Bamford On the Law of Partnership and Voluntary Association in South Africa* (3rd ed) at 18; See also *Lee v De Wet* *supra* at 614 H.

[13] In general, it would appear that the requirement of making a profit is seen as critical to the existence of a partnership. See in this connection *Van der Keesel Dictata* 3.26.1

‘It is in the nature of a partnership that it is not enough that two or more agree to a community of goods, but it is necessary that they enter into it in that spirit, that through that community they seek a common profit. Thus, two owners who pool together liquid goods or mix together dry goods do indeed consent to a community ... However they are not partners if they do not seek profit from that community. I said before that it is the foundation of partnership that the property is common ... whence we understand that a partnership is not valid in which it is understood that the two or more persons will receive not profit.’

(In translation)

- [14] This requirement however has been dealt with somewhat differently in the case of a universal partnership. Thus, in *Butters v Mncora* 2012 (4) SA 1 (SCA) the plaintiff instituted action against the defendant, claiming half of the defendant’s assets on the basis that a tacit universal partnership existed between the parties in which they held equal shares. It appeared that for almost twenty years the parties lived together as husband and wife even though they were not married.
- [15] After setting out the law of universal partnership, Brand JA noted ‘once it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates, in my view, that the contribution of both parties need not be confined to a profit making entity.’ (para 19) Brand JA went on to hold, on the evidence, that there was an ‘all embracing venture pursued by the parties’ which included both their home life and the business conducted by the defendant was aimed at a profit which, in my view, they tacitly agreed to share. (para 31)
- [16] What these dicta appear to indicate is that the requirement that the object that a partnership should be to make a profit has not been jettisoned and that the requirement extends beyond the strict confines of a commercial undertaking, to ‘universal partnerships in general and universal partnerships between cohabitees in particular’. *Butters*, supra at para 17
- [17] *Butters* case turned on whether the evidence established the exist of a tacit universal partnership between the parties. In *Ally’s* case the agreement which was pleaded between the parties was that a universal partnership existed between the parties. By contrast, in the present case what was pleaded was an oral agreement of partnership, of which the only asset was a property which, in turn, formed the basis of cohabitation between the parties. This factual matrix appears to me to be a different situation from that pleading a universal partnership as was the case in the decisions to which I have made reference.
- [18] In *Volks NO v Robinson and others* [2005] ZACC 2; 2005 (5) BCLR 446 (CC) at para 58 Skweyiya J noted: ‘To the extent that any obligations arise between cohabitees during the subsistence of a relationship these arise by agreement and only to the extent of that agreement.’ The agreement pleaded in this case was not that of a universal partnership but of one encompassing a domestic property which constituted the sole basis of a partnership between the parties.

- [19] The averment in relation to profit making was that once the parties ceased cohabitation, they would enjoy what, in effect, would be the capital proceeds from the sale of the dwelling. Manifestly, what was not pleaded was a tacit universal partnership. That takes the arrangement out of ambit of the kind of universal partnership which Brand JA described as extending beyond commercial undertakings which 'need not be confined to a profit making entity' (para
- 19) Accordingly, in my view, the plaintiff failed properly to plead an agreement of partnership. The reference to profit is, at best, analogous to the proceeds of a capital nature, which analogy illustrates that the parties had not entered into a profit making venture nor into a universal partnership. If the property was sold, this capital asset would hopefully fetch a profit. In the result, the element of a profit making enterprise was not properly alleged in relation to a property which was considered to be the only partnership asset.
- [20] Accordingly, the plaintiff's particulars of claim do not disclose an adequate cause of action. The exception is upheld and the plaintiff's claim is dismissed with costs.

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