

SOUTH AFRICA / JUDGMENT

Pooe v Macheke (72144/18) [2023] ZAGPPHC 1941 (8 November 2023)

[2023] ZAGPPHC 1941

COURT

North Gauteng High Court, Pretoria

BEFORE

Mudau

CASE / FILE NUMBER

72144/18

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 72144/18

(1)

REPORTABLE; NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE:

08 November 2023

In

the matter between:

MPHO

RACHEL POOE Plaintiff

and

STANLEY

TIYANI MACHEKE Defendant

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives by e-mail. The date and time for hand down is deemed to be 10h00 on 8 November 2023.

JUDGMENT

MUDAU, J

[1] This is a civil action In which the plaintiff claims, inter alia, a declaratory order that a universal partnership exists between the parties, and she claims orders for its dissolution and the appointment of a receiver with a view to a settlement of the partnership's affairs and payment to the parties of what may be due to them in this regard. Only in the event of this Court finding that no partnership came into effect between the parties, in which claim the plaintiff persists, then and in that event, the plaintiff claims, inter alia, in the alternative as follows:

"The parties are co-owners in equal undivided shares of the immovable property situated at 38 Flametree Street, Karenpark, Pretoria,

Gauteng Province ("the immovable property")"

- [2] The plaintiff does not wish to remain a co-owner of the immovable property with the defendant and seeks that the co-ownership of the parties of the immovable property be terminated with the *actio communi dividundo*.
- [3] The defendant opposed the action and, in his plea, denied that a universal partnership exists between himself and the plaintiff or that the plaintiff was entitled to any proprietary relief under *actio communi dividundo*. The defendant pleaded that he has a counterclaim of unjustified enrichment against the plaintiff for the bond instalments that he had paid since the inception of the bond re-payments in respect of a Joint property. This was however, not pursued.
- [4] The parties themselves are the only witnesses who gave evidence before the Court. It remains for this Court to decide on whether there was any partnership formed between the parties.
- [5] The evidence of the plaintiff was as follows: the defendant and the plaintiff formed a romantic relationship during 1999. By 2000, their relationship was serious. In 2001, the plaintiff fell pregnant and in the fullness of time, gave birth to their daughter in 2002. At the time, both parties were staying in Orlando, Soweto At that time, the defendant was not employed and the plaintiff was the one employed. In mid-2001 the defendant was employed on a part time basis at Ster-Kinekor, Southgate.
- [6] The defendant was later transferred to the Cresta branch until 2002, when his contract ended. The plaintiff at the time owned a Toyota Tazz motor vehicle, which the defendant used for going to work. The defendant sometimes worked in shifts until late into the night. The plaintiff, instead, used a staff bus from Robert Bosch, where she was employed, to the Calton Centre, Johannesburg and then boarded a taxi to home in Orlando.

- [7] The defendant was later employed at Bosch in Midram, where the plaintiff worked. Plaintiff had assisted the defendant in securing employment at their IT Department when the position became available as she had his curriculum vitae. He started working in 2003, as a temporary employee which contract was terminated in 2004. In 2005, he was recalled when he resumed work on a permanent basis.
- [8] In 2004, they moved to a townhouse in Germiston where they were renting. The defendant's mother paid for the deposit for the rental of the house for the couple and their minor child. The plaintiff maintained the monthly rental fees and attendant costs of living fees as the main bread winner. The defendant lost his employment in 2004, when his contract was terminated. In 2005, the defendant with the help of his brother bought a GT GolfVR6 motor vehicle, which was sold in the same year and the proceeds (R10 000.00) used as partial payment for the plaintiffs R20 000.00 lobola, agreed upon on 17 December 2005. In about the year 2006 or 2007 when the defendant's mother passed on, the plaintiffs brother spoke in the funeral as the in-law's representative.
- [9] During approximately 2007, the parties jointly acquired an immovable property in Karenpark, Pretoria North, Pretoria in equal undivided shares as co-owners, which was closer to the defendant's work in Brits. The parties moved into the immovable property in 2009, from their rented premises in Germiston. They decided to share responsibilities. The defendant paid the bond instalments in respect thereof whilst the plaintiff paid for the electricity; car repairs; expenses pertaining to the children such as school fees; and medical aid membership for the parties and their children, which inducted the defendant's son from a previous relationship until 2014, when the plaintiff became retrenched.
- [10] During 2011, the parties formed a Close Corporation known as Exodec 286 CC in respect of which they equally held the member's interest. The plaintiff testified that, during approximately 2016, through the aforesaid Close Corporation, the parties were awarded a landscaping contract which provided an income of a substantial sum from which proceeds the defendant purchased a Hyundai motor vehicle.
- [11] On her version, during 2015, after the said Close Corporation obtained a substantial contract in respect of landscaping relating to Marabastad, the defendant removed the plaintiff as a member of the said Close Corporation. In the meantime, during December 2014, the defendant moved to the common home in his home village in Limpopo after she discovered he was cheating. In his temporary absence, she registered another trading entity - Preferred Consulting - which she used to get a landscaping project in Pretoria North after her retrenchment for which she received R80 000.00 for two months. She used the money to pay for the children's school fees and other household expenses.

- [12] In 2015, the defendant studied project management at the University of Pretoria. In the same year, Exodec used the proceeds from Mallosana, to which it was subcontracted after the plaintiff had been introduced to a company called Holobye by a friend who is now deceased. They bought a Ford Ranger under Exodec for R100 000, followed by a Honda Civic in 2017, and a tow truck at the plaintiff's suggestion in 2018, as well as a BMW X5.
- [13] The defendant resigned from his formal employment in 2018, during which time he suggested the plaintiff should relinquish her membership in Exodec. There was tension between the parties. Matters came to a head when the defendant moved out of the common home on 10 December 2018, and took possession of their cars. On the plaintiff's version, it was only in 2021 that she established that her access to the joint bank accounts in relation to the business enterprise had been stopped, which she reported to the police.
- [14] During cross examination, the plaintiff testified that Exodec 286 CC ("Exodec") was established against the backdrop that they were building a family together and needed a financial injection for stability, as they at times faced hardships. She also testified that the defendant paid her an allowance of about R10 000.00, which endured for approximately 2 months, which she respected as he was the head of their family. As for her relinquishing her membership in the trading entity, Exodec, she testified that when she signed exhibit A to that effect, it was a blank document.
- [15] In response to clarifying questions by this Court, the plaintiff also testified that the parties had access to each other's personal accounts. On her version, she received nothing since the termination of her membership in Exodec, which is still trading.
- [16] In his defense, the defendant testified that he could not proceed with the lobola after establishing that the plaintiff was advanced in years in comparison to himself. Had she been younger he would have married her. The defendant testified that the plaintiff played no role in him getting a job where she worked. Instead, after dropping her at her workplace, he noticed the advertisement for the vacant position for which he subsequently applied. As for Exodec, it was a dormant entity when the plaintiff relinquished her membership until 2018, when he took over as sole member in 2017, after asking the plaintiff whether she still wanted to continue their membership in the entity.
- [17] The plaintiff's family received R10 000.00 for cultural damages after the pregnancy and the birth of their daughter. The delegation sent on his behalf had no instructions to conclude the lobola negotiations then. He always had business ambitions, and the registration of Exodec as a trading entity was his idea. He left formal employment to pursue his business dreams. He started to look for business opportunities in 2017. He bought a truck for R699 000.00, and had it registered through the trading entity. In total, there are four vehicles registered in the entity's name. The fifth motor vehicle, a BMW X5, had since been hijacked. Exodec started trading in 2018.

- [18] As for the Karen Park property, although he qualified for a bond on his own, he opted for a joint bond because the plaintiff wanted surety to ensure that she will not be thrown out of house with their child. He wanted to move them from the rented premises in Germiston to Pretoria, to the registered property where they still live.
- [19] During cross examination, he testified that the plaintiff contributed towards groceries when they lived in Germiston as he was unemployed at the time. It was for the same reason that the plaintiff paid the monthly rent and her personal details were used to secure the lease.
- [20] Regarding the essentials of a universal partnership, it is trite that the three essentials are that each of the partners bring something into the partnership, whether it be money, labour or skill, that the business should be carried on for the joint benefit of the parties; and that the object should be to make a profit. The said essentialia of a partnership apply equally to a universal partnership. The contract of partnership may not necessarily be expressed. It could be tacit or implied from the facts, provided they admit to no other conclusion than that the parties intended to create a partnership. Our courts have recognised that a universal partnership, also known as a domestic partnership, can come into existence between spouses and co-habitees where they agree to pool their resources.[1]
- [21] A universal partnership in which the parties agree to put in common all their property, both present and future, is known as *universum bonorum*. A universal partnership exists if the necessary requirements for its existence are met, and this is regardless of whether the parties are married, engaged or cohabiting. The essentials of a special contract of partnership were confirmed in the case of *Pezzutto v Dreyer and Others*,[2] in the following terms:
- "Our Courts have accepted Pothier's formulation of such essentials as a correct statement of the law (*Joubert v Tarry & Co* 1915 TPD 277 at 280-1; *Besterv Van Niekerk* 1960 (2) SA 779 (A) at 783H-784A; *Purdon v Muller* 1961 (2) SA 211 (A) at 218 B-D). The three essentials are (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit (Pothier: *A Treatise on the Contract of Partnership* (Tudor's translation) 1.3.8). A fourth requirement mentioned by Pothier is that the contract should be a legitimate one."
- [22] This Court formed the impression overall that the plaintiff was a frank and impressive witness who stood up well to a thorough cross-examination and who tried neither to exaggerate the importance of her own contribution to the business nor to underestimate that made by the defendant. It is only in relation to exhibit A, the subject of which her signature was inserted, that her evidence in that regard was blurry. Her evidence on the main is either common cause or largely unchallenged.
- [23] I find the defendant to be an unimpressive witness who was characterised by evasive and contradictory answers. The defendant

took pains to distance himself that there were lobola negotiations concluded to formalise the parties' marriage relationship in his oral testimony. This is even though in his plea, the defendant admitted that during 2005, the parties were the subject of lobola negotiations with a view to marriage and a lobola contract was concluded in respect of which the defendant effected part-payment.

- [24] The defendant had also pleaded in this regard that, "the reason why the Lobola was never paid in full was because the boyfriend and girlfriend relationship had collapsed, and the parties had accepted that they cannot become husband and wife in terms of customs". The overall impression created by the defendant as a witness, in my observation, was that of a man determined to minimise the plaintiffs role in all respects relating to this matter.
- [25] There is no doubt in my mind that Exodec was established by the couple as an all-purpose vehicle to explore business opportunities with a view to improve their standard of living as the plaintiff testified. I am of the view that, due to the poor credit rating of the plaintiff and her inability to pay for her motor vehicle, which was repossessed, as she pleaded, it explains why the defendant initially paid her monies derived from the business activities of the trading entity as she testified.
- [26] Regard being had to the duration of the relationship between the parties, the nature of their relationship, and that the parties conducted a joint household, the only reasonable inference to be drawn was that the parties pooled their resources to the benefit of the joint estate. The way the parties conducted their affairs regarding this matter fit the concept of a universal partnership which describes a situation between parties who meet the requirements of a partnership. To recap, those requirements are that each of the partners bring something into the partnership; that the business should be carried on for the joint benefit of the parties: that the object should be to make a profit: and that the contract should be a legitimate one.
- [27] I have no difficulty in concluding in this instance that a universal partnership existed on the basis that the plaintiff and the defendant had lived together as man and wife and that they (a) shared a joint household as if they were legally married for their joint benefit; and (b) pooled their assets, income, and labour for their joint benefit. 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 the plaintiff is presently residing, which is registered in both their names, and which remains the common home of the parties. Overwhelmingly, the evidence suggests that from the nature of the discussions between the parties prior to their cohabiting and their intent during their 16 or so years together, they had the requisite animus contrahendi to form a universal partnership.
- [28] Accordingly, it is therefore more probable than not that a tacit universal partnership agreement existed between the parties. I am satisfied that the essentials of a contract of universal partnership have been established regarding this matter.

Order

1. It is declared that a commercial and property partnership existed between the parties;
2. It is declared that the plaintiff has an undivided half share in the partnership and the assets listed in paragraph 3.18.3 of the particulars of claim and the further assets, as may be identified. and which were acquired from the income and profits earned from the businesses and properties of the partnership;
3. It is declared that the partnership between the parties is terminated with effect from the date hereof;
4. Failing agreement between the parties within a period of one (1) month (or such longer period as the parties may in writing agree upon) on the net benefit accruing to the plaintiff from the partnership and the manner and date of delivery or payment of such benefit to the plaintiff, it is ordered that a liquidator be appointed to liquidate the said partnership with authority to realise all the partnership assets, to pay the liabilities of the partnership, and to distribute the balance of the proceeds of the assets equally between the parties;
5. 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 Legal Practice Council;
6. The parties shall within one month of the appointment of the liquidator deliver to the liquidator and to each other a statement of his or her assets and liabilities as at the date of this order duly supported by such available documents and records as are necessary to establish the extent of such assets and liabilities;
7. The liquidator may call on either of the parties either *mero motu* or at the request of one of them to deliver further documents or records to the liquidator and the other party;
8. The liquidator shall determine a date for the debate of the statements referred to in paragraph 6 above and shall preside over such debate;
9. The liquidator shall within one month of the conclusion of the debate make an award in writing determining the assets and liabilities of the partnership and dividing the net assets equally by awarding 50 percent to the plaintiff and 50 percent to the defendant;
10. The parties shall give effect to any award made by the liquidator within such period as he or she may direct in writing;
11. The costs of the liquidator shall be borne by the parties in proportion to their shares in the partnership estate; and
12. The defendant is ordered to pay the plaintiff's costs of suit.

TP MUDAU

JUDGE OF THE HIGH COURT

PRETORIA

APPEARANCES

For the Plaintiff: Adv.

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Instructed by: Mothemane

Given Attorneys

For the Defendant: Adv.

Ngwana

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Incorporated

Date of Hearing: 08-10 September 2023

Date of Judgment: 08 November 2023

[1] Muhlmann v Muhlmann 1984 (3) SA 102 (A); Kritzinger v Kritzinger 1989 (1) SA 67 (A); Ally v Dinath 1984 (2) SA 451 (T)

[2]

[1992] ZASCA 46; 1992 (3) SA 379 (A) at 390A-C.

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