



REPORTABLE

CASE NO: SA 48/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between

C A D

Appellant

and

V E D

Respondent

Coram: SHIVUTE CJ, SMUTS JA and FRANK AJA

Heard: 18 June 2019

Delivered: 30 July 2019

Summary: In a defended action in the High Court the respondent as plaintiff, instituted divorce proceedings against the appellant (defendant *a quo*). The parties were married to each other on 4 October 2000 in South Africa out of community of property, profit and loss and with the exclusion of the accrual system contemplated in the South African Matrimonial Property Act 88 of 1984. The High Court granted a final order of divorce on 31 July 2017.

The plaintiff in addition also sought orders on the following contested claims: an order for the return of 100% member's interest in a close corporation known as Zanja Properties Number Four CC (the close corporation). The plaintiff also sought an order declaring that the parties had tacitly formed a universal partnership; an

order dissolving the partnership, and an order appointing a receiver to wind up the affairs of the partnership. The High Court found in favour of the plaintiff on all the contested claims and granted relief accordingly. The defendant was not satisfied with this outcome and appealed to this court.

Court on appeal *held* that it would appear from the totality of the evidence and the general probabilities that the parties did not distinguish between the various business entities. The hardware business (before it was taken over by someone else), the farm and the stud farming venture were all treated by the parties as if they were joint businesses. The court thus *held* that the evidence presented points to a tacit commercial partnership in respect of the stud herd and the farm which can be inferred from the conduct of the parties.

As regards the apportionment of the partnership interests, *held* that the evidence establishes that, although the defendant made significant financial contribution towards the purchase of the member's interest of the close corporation owning the farm, the plaintiff also made a contribution to the management and development of the stud herd. Accordingly, the court granted 60 percent partnership interest in favour of the defendant and 40 percent in favour of the plaintiff.

Appeal allowed with limited costs in favour of the appellant and the order of the High Court is set aside and substituted.

APPEAL JUDGMENT

SHIVUTE CJ (SMUTS JA and FRANK AJA concurring):

Background

[1] This appeal arises from a divorce action, which the wife (as the plaintiff), instituted in the High Court against the husband (the then defendant and now the appellant in this court). The parties were married to each other on 4 October 2000

in South Africa out of community of property, profit and loss and with the exclusion of the accrual system contemplated in the South African Matrimonial Property Act 88 of 1984 according to the laws of South Africa. A final order of divorce was granted on 31 July 2017. For the sake of convenience, I will refer to the parties as they were cited in the High Court.

[2] As part of the divorce action, the plaintiff also sought orders on the following contested claims: an order for the return of 100% member's interest in a close corporation known as Zanja Properties Number Four CC (the close corporation). It was alleged that such interest was donated in terms of an invalid donation on the basis that it had been made in *stante matrimonio* or that the plaintiff could revoke it on account of the defendant's gross ingratitude. The plaintiff also sought an order declaring that the parties had tacitly formed a universal partnership; an order dissolving the partnership, and an order appointing a receiver to wind up the affairs of the partnership. The High Court found in favour of the plaintiff on all the contested claims and granted relief accordingly. Dissatisfied with the judgment and orders of the High Court, the defendant has appealed to this court.

[3] Although the notice of appeal says that the appeal was against the entire judgment and order of the High Court, it appears that the appeal was directed only against orders 8 to 12 granted in favour of the plaintiff on the contested claims referred to above. The appeal was argued on this basis.

Universal partnerships

[4] In Roman-Dutch Law two types of universal partnerships were recognised, namely a *universorum bonorum* and the *universorum quae ex quaestu veniunt*. In terms of the first partnership, the parties would contribute all their property, both present and future, aimed to cover all acquisitions whether from commercial undertakings or otherwise. As to the *universorum quae ex quaestu veniunt*, the parties agreed to share what they acquired during the continuance of specific commercial undertakings.¹

[5] The South African Supreme Court of Appeal has confirmed that universal partnerships of all property which extend beyond commercial undertakings were part of Roman-Dutch Law and still formed part of the South African law.² It has also been found that the universal partnership of all property did not require an express agreement;³ that the requirements for a universal partnership of all property were the same as those formulated by Pothier.⁴ That court also held that where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership could be held to exist, was whether it was more probable than not that a tacit partnership had been concluded.⁵ The distinction between these two partnerships has been recognised in this jurisdiction.⁶ It has been accepted that a universal partnership could exist in a marriage.⁷ In *Mühlmann v Mühlmann* 1984 (3) SA 102 (A), the South African Appellate

¹ *Isaacs v Isaacs* 1949 (1) SA 952 (C) and *JW v CW* 2012 (2) SA 529 (NCK).

² *Butters v Mncora* 2012 (4) SA 1 (SCA) para 18 (a).

³ *Id* para 18 (b).

⁴ *Id* para 18 (c).

⁵ *Id* para 18 (d).

⁶ For example, in *MB v DB* [2018] NAHCMD 266 (HC) para 11, *Mbaisa v Mbaisa & others* [2015] NAHCMD 181 para 9 and *Immigration Selection Board v Frank* 2001 NR 107 (SC) at 113A-C.

⁷ *Fink v Fink & another* 1945 WLD 226.

Division found that a universal partnership in respect of certain commercial enterprises existed between spouses who were married to each other out of community of property. That court stated at 123G that:

‘Where a business is started and built up through the joint endeavours of a man and his wife married out of community of property the elements of a partnership may be present although there is no express agreement to that effect.’

[6] The requirements⁸ for a partnership are as follows:

(a) Each of the partners should bring something into the partnership, whether it be money, labour or skill;

(b) The business should be carried on for the joint benefit of the parties;
and

(c) The object should be to make a profit.

Donations between spouses

[7] At common law true donations between spouses *stante matrimonio* were prohibited. In *Avis v Versput*⁹ Tindall JA described a donation, ‘properly so called,’ in the following terms:

‘A donation is said to be properly so called when a person gives something with the intention that he desires it immediately to become the property of the donee and under no circumstances to revert to himself *and he makes the donation for no*

⁸ Taken from *Pezzuto v Dreyer* 1992 (3) SA 379 (A) at 390A-B.

⁹ 1943 AD 331 at 364.

other reason than in order to exercise his liberality and generosity.' (Added emphasis.)

[8] In the *Avis* case at 353, after a review of authorities on the point, the court came to the following conclusions on the distinctions between remuneratory donations and benevolent donations:

'The conclusion to be drawn from these authorities seems to me to be that in Roman-Dutch Law remuneratory donations are exempted from the restrictive rules governing donations in general by reason of the fact that they are not inspired solely by a disinterested benevolence but are, as a rule, made in recognition of, or in recompense for, benefits or services received, and therefore are akin to an exchange or discharge of a moral obligation. Whether or not a donation is remuneratory must, of course, depend principally upon the motive inspiring the gift.'

[9] Hahlo¹⁰ deals with the extent of the prohibition of donations *stante matrimonio* as follows:

'The prohibition extends to every transaction, whatever its form or character, by which one of the spouses, gratuitously and solely or, at least, mainly, out of motives of liberality, confers an economic benefit upon the other spouse, with the result that the giver becomes poorer and the receiver richer.'¹¹

[10] The prohibition is justified on the basis (rather paternalistically in today's age) that it seeks to protect spouses from their own excessive generosity or weaknesses 'lest they be kissed or cursed out of their money'.¹² It would appear

¹⁰ Hahlo (1975) *The South African Law of Husband and Wife*, 4 ed at 130.

¹¹ At 130.

¹² *Id* at 129.

that only donations given gratuitously and induced by liberality are prohibited.¹³ The onus remains on a party who wishes to set aside the transaction as a donation.¹⁴ We have not heard full argument on the question whether the prohibition should be retained or not. In any event, I do not consider it necessary for the purposes of the present appeal to decide the issue.

Evidence of the parties

Plaintiff's evidence

[11] The plaintiff was granted an order declaring that a fifty-fifty commercial partnership existed between her and the defendant in respect of a stud farming herd. In support of such claim, the plaintiff testified that she had obtained a loan of N\$400 000 from the Agricultural Bank of Namibia (Agribank) to purchase cattle which were in turn sold to establish the stud farming business. Both parties contributed their skills and labour towards the management and development of the stud for their joint benefit. Neither party received a salary from the business, but the couple would draw money from the profits generated by the business and for the further upkeep of the common household. The parties and their children lived on the income and profits earned by the business and they further used certain profits to buy other assets.

[12] According to the plaintiff, the couple conducted their financial affairs as if they were married in community of property. Their expenses were paid from various bank accounts, including that of the farming business, the close corporation, the defendant's construction company and the plaintiff's own

¹³ Hahlo at 130 and 136.

¹⁴ *Smith's Trustee v Smith* 1927 AD 482.

hardware business without distinction. While the defendant - who was a building contractor - concentrated on his construction business often away from home for long periods, the plaintiff attended to the stud farming business. She supervised the employees and did the actual farming as well as the administration of the stud herd. Her evidence as to the role she played in relation to farming over and above what is expected of a wife has been corroborated by two farm workers whom she called as witnesses.

[13] The plaintiff further testified that no express agreement had been reached for the division of the business, but that it was tacitly agreed that the profits would be equally shared. As a result of the breakdown of the marriage, it became impossible to continue with the partnership.

[14] As to the alleged donation in question, the plaintiff stated that in December 2001, the couple entered into negotiations to buy member's interest in the close corporation that owned the farm from where the stud farming business was being conducted. The plaintiff subsequently concluded the transaction in terms of which she obtained transfer of 100% member's interest in the close corporation. She gave two reasons for the registration of the member's interest in her name. Firstly, she said the defendant already had his own farm in South Africa and secondly, she alleged that the defendant had used the transaction as a stratagem to prejudice his creditors from securing any claim against the farm should the defendant's construction business experience liquidity problems.

[15] The plaintiff stated further that the defendant provided her with N\$800 000 to secure the transaction. She in turn paid the remaining balance of N\$440 000. Out of this amount, the sum of N\$200 000 was paid through a loan obtained from a bank by her hardware business. The remaining N\$240 000 was cash sourced from the hardware business.

[16] The plaintiff further testified that during 2005, she voluntarily donated the 100% member's interest in the close corporation to the defendant. In doing so, she got nothing in return; nor did she expect anything in return. She donated the 100% member's interest to the defendant, because as a married couple at the time; she loved him and never thought that their marriage would end up in a divorce. The donation was in *stante matrimonio* and the plaintiff thus sought to revoke it. The plaintiff was pressed in cross-examination for the reasons for the transfer of the interest to the defendant. Her answer was not quite coherent, but if I understand her correctly, she referred to discussions that started in 2004 to 'increase our overdraft' in the close corporation and to the need to reduce her debt burden as the defendant had assured her that transferring the interest to him would ease the debt burden on her.

Defendant's evidence

[17] I turn next to the presentation of the summary of the defendant's version of events. The defendant testified that he and the seller of the member's interest agreed on the price. He then surrendered his policy and paid the amount of N\$800 000 into the plaintiff's bank account for the latter to pay the deposit on the purchase price. A dispute arose during negotiations between the seller and the

defendant. The defendant engaged a lawyer to resolve the dispute. As he was out of the district on his construction business, he agreed with the plaintiff for her to sign the agreement and to obtain transfer of the member's interest. This portion of his evidence, like many others, is disputed by the plaintiff, but not much turns on this dispute. In May 2008, the defendant repaid the entire amount outstanding on the Agribank loan taken out by the plaintiff. He had made such payment from the construction business and from the sale of some of the weaners.

[18] The defendant denied the existence of a universal partnership or any partnership in relation to the stud herd and explained that he 'worked like a slave' while the plaintiff, occasionally, undertook some administrative tasks in relation to the stud herd. He insisted that he had not purchased the farm for the plaintiff and explained that he had bought the farm 'for the cows that we had on the farm'. In cross-examination, he also said that he had bought the farm 'for us', meaning he and the plaintiff. The defendant confirmed that one of the reasons for the transfer of the member's interest to the plaintiff was to protect the farm from creditors in the event of problems arising in his construction business. He maintained that the parties' intention at all times was for the member's interest to be transferred to him. He had no intention to buy the farm and then to donate it to the plaintiff.

Analysis of the evidence

[19] It would appear from the totality of the evidence and the general probabilities that the parties did not distinguish between their various business entities. The hardware business (before it was taken over by someone else), the farm and the stud farming venture were all treated by the parties as if they were

joint businesses.

[20] When the plaintiff was asked about other facts relied upon for the contention that the parties had tacitly agreed that the farm profits would be divided in equal shares, she replied that it was on the basis that the parties conducted their affairs as if married in community of property.

[21] The plaintiff's evidence that the parties, *inter partes*, behaved as if they were married in community of property, can also be gleaned from her rule 89 affidavit where it was apparent that she did not distinguish between the defendant's different bank accounts and referred to the funds therein as 'our money'. Without restricting herself to the farming business, she also stated that all expenses were paid from the farming business, the close corporation, the defendant's construction company and her own hardware business. The description she gave in her witness statement also appears inconsistent with the member's interest having been hers alone.

[22] She mentioned how one of the parties' children had moved into 'our' second home at the farm after he matriculated. She also explained how the defendant had come onto the farm to perform 'his' farming activities and repeated that the parties' affairs were conducted as if they were married in community of property. Despite the hardware and plumbing close corporation having been registered in her name, she referred to it as 'our new business venture.' She explained how the debts of the different businesses were paid by the hardware business, how the new close corporation known as On-Tap Hardware CC was also acquired on behalf of the hardware business and how she and the defendant

had entered into negotiations to purchase the farm from the seller. She explained the joint contribution to the development of the stud herd and the joint benefits that the parties would derive from the venture in the following terms:

‘Both of us supplied our labour and skills towards the management and development of the stud farming for our joint benefit.’

[23] Moreover, the plaintiff’s claim that the member’s interest in the close corporation belonged to her alone and that she had donated it to the defendant in circumstances not sanctioned by law is also not consistent with her evidence that the interest in question had been registered in her name by the defendant with the premeditated intention of harming his creditors. The only reasonable inference to be drawn from this statement of hers is that it must have been accepted by the parties that the defendant was, in fact, the beneficial owner of the member’s interest or at the very least that it, too, formed part of the universal partnership. It will be recalled that not only did the defendant make payment of the N\$800 000 towards the purchase of the member’s interest, but the balance of N\$440 000 was financed through a loan granted to the hardware business the plaintiff referred to as ‘our new business venture’.

[24] It appears also that the plaintiff’s attitude towards the ownership of the close corporation was such that she regarded it either as the defendant’s asset or their joint asset. For example, when the defendant requested for the member’s interest to be transferred to him, she did not testify (as ordinarily one would have expected) that she was reluctant to do so because it belonged to her, but rather her evidence was that she was sceptical about the request due to the defendant’s

bad history with some unsuccessful ventures. In other words, instead of saying that the member's interest was hers and the defendant had nothing to do with it, her only concern was that the defendant could squander the farm. Counsel for the defendant is therefore correct in his submission that as far as the plaintiff was concerned, the farming business and the farm constituted the same venture. The plaintiff's understanding of this position is reflected, amongst others, in the following description of the parties' roles in the close corporation:

'Following such change in member's interest, the role of the defendant and me in running [the close corporation] remained virtually the same. The defendant and I both shared in the profits. The conduct of the defendant and I constituted a universal partnership, which represented the product of the joint endeavour and aforementioned contributions of the partners.'

[25] It was common cause between the parties that the close corporation also undertook construction work through the defendant. In those circumstances, it is highly improbable that the member's interest would have been owned solely by the plaintiff. It is also highly unlikely in light of this consideration that the plaintiff would have retained transfer of the interest as a true or sole beneficial owner.

[26] The evidence given by the defendant about the purchase of the farm also eschews the notion of the member's interest constituting a true donation. As earlier noted, the defendant initially negotiated the purchase price. He then surrendered his policy and paid the amount in the plaintiff's bank account for the latter to pay the deposit on the purchase price. He engaged a lawyer to resolve the

dispute relating to the purchase price. The plaintiff signed the agreement because the defendant had been away on his building business.

[27] The defendant was correctly criticised by the court *a quo* for his attempt to minimise the role played by the plaintiff in the farming business and was found to have been an untruthful witness for his initial denial of the other relationships he had had during the subsistence of the marriage, but the criticism and the adverse credibility finding do not detract from the overall probabilities drawn from a conspectus of the evidence, including the conduct of the parties, that clearly establish that the purchase had been made for the joint benefit of the parties. There is thus no evidence on the balance of probabilities that the farm was a true donation. At best for the plaintiff, the transfer of the member's interest forms part of the partnership. As the plaintiff testified, the parties did everything together 'as a team' for their joint benefit.

[28] Reading the evidence as a whole, it seems that the transfer of the member's interest to the plaintiff and later to the defendant served the parties well at the time. The first transfer appears to have been designed to shield the close corporation from the defendant's creditors and the transfer from the plaintiff to the defendant served to enhance the defendant's credit profile and/or ease the plaintiff's debt burden. That explains the seamless transfer of the member's interest between the parties. In all probabilities, therefore, a tacit commercial partnership – *universorum quae ex quaestu veniunt* - in respect of the stud herd and the farm can be inferred from the conduct of the parties. The only issue remaining would be to determine the apportionment of the partnership interests.

Partnership Interests

[29] The evidence establishes that the plaintiff personally had no other source of income except the funds that came from the hardware business. The amount of N\$240 000 that she said the hardware business contributed to the purchase price of the member's interest appears to have originated from the defendant. The defendant testified in this respect that the amount had been generated from the sale of a truck belonging to his construction business. The plaintiff acknowledged that it was possible that the amount was paid into the hardware business by the defendant for onward payment towards the purchase price. As earlier noted, the hardware business also borrowed the N\$200 000 that was paid towards the purchase of the interest. The defendant co-signed as surety for the due repayment of the loan. If I understand his evidence correctly, he also repaid some of money in the fulfilment of his obligations as a surety. The loan was repaid in monthly instalments partly with the funds sourced from the hardware business. The plaintiff also made payments in respect of the loan from her personal account. There is, however, no doubt that the plaintiff made a contribution to the management and development of the stud herd. There was ample evidence that she was virtually responsible for the administration of the stud and took charge of the farming activities during the defendant's absence.

[30] The defendant, on the other hand, was the prime mover for the purchase of the stud farm and made a significant financial contribution towards the purchase of the member's interest. He also contributed significant amounts towards the repayment of the Agribank loan, which amounts were sourced from his construction business and the sale of weaners. While the plaintiff made a

contribution to the management and development of the stud herd, the defendant by far contributed more towards the acquisition of the member's interest. As counsel for the defendant put it in this court, he was burning both ends of the candle with construction work throughout the country while at the same time attending to the farming side of the business. Given the relative contributions made by the parties, I consider that an apportionment of 60% (in favour of the defendant) and 40% (in favour of the plaintiff) would be fair and just.

Costs

[31] Although the defendant has succeeded on appeal, it is clear that he was not entirely successful. This result should be reflected in the order to be made in respect of costs both in this court and in the court below.

Order

[32] The following order is accordingly made:

- (a) The appeal is upheld.
- (b) The orders of the High Court embodied in paragraphs 8, 9, 10, 11, and 12 of that court's order are set aside and the following order is substituted therefor:
 - '(i) It is declared that a tacit commercial partnership existed between the parties in respect of the stud farming herd and that the member's interest in the Zanja Properties Number 4

Close Corporation forms part of the commercial partnership.

- (ii) It is declared that the respective interests of the parties in respect of such partnership are apportioned 40% (in favour of the plaintiff) and 60% (in favour of the defendant).

 - (iii) The Director of the Law Society shall appoint, within thirty (30) days of being so requested by either party in writing, a receiver to wind up the partnership and distribute the partnership estate between the parties, in the shares as aforementioned.

 - (iv) No order as to costs is made.'
- (c) The respondent is directed to pay 1/3 of the appellant's costs of the appeal.

SHIVUTE CJ

SMUTS JA

FRANK AJA

APPEARANCES

APPELLANT: J Marais SC, with him E Nekwaya
Instructed by Sisa Namandje & Co Inc

RESPONDENT: K Kangueehi
Of Kangueehi & Kavendjii Inc