



**REPORTABLE**

CASE NO: SA 28/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**M N**

**Appellant**

and

**F N**

**Respondent**

**Coram:** DAMASEB DCJ, CHOMBA AJA and MOKGORO AJA

**Heard:** 4 October 2018

**Delivered:** 15 November 2019

**Summary:** The respondent became an employee within one of the appellant's business enterprises in 1975. Later that year they engaged in an intimate relationship while the appellant was still married to his wife, LN. The appellant filed for divorce from LN and subsequently married the respondent on 1 November 1988. At that time, both parties *bona fide* believed that the appellant was divorced from LN. It turned out, to the contrary, that the divorce had not been granted and this fact came to the parties' knowledge only in 2013, shortly before they separated. It is therefore common cause that the marriage between the parties was null and void, and to date, the appellant remains lawfully married to LN.

The parties lived together as husband and wife for 37 years and during that time they had five children. In 2015 the appellant filed an application for the eviction of the respondent from Erf 353, Oshakati, which he co-owns with the respondent. The respondent in turn instituted action against the appellant, seeking the orders which the High Court ultimately made in her favour, including an order that the appellant render a full account of the partnership from 1976, when appellant made reference to respondent as his 'second wife by tradition'. As an alternative to the appointment of a receiver, she sought a further order that would require appellant to rebate the net balance of the universal partnership account. The two cases were consolidated by the High Court.

The High Court dismissed the eviction application brought by the appellant and declared that there was a universal partnership that came into existence between the parties and the assets thereof were to be split equally between the parties. The appellant, aggrieved by this decision, appealed against the whole judgment of the High Court. During the appeal hearing however, the appellant abandoned the claim for eviction against the respondent. The issue which remained before this court was whether the High Court was correct in holding that a universal partnership came into being between the parties, and if so, whether the assets were to be divided equally between the parties.

*Held*, in order for a universal partnership to exist there are three requirements that must be met: (a) both parties had to make contributions towards the partnership; (b) such contributions should be for the joint benefit of the parties; and (c) the object of the partnership should be to make a profit.

*Held* that, both parties played their roles skilfully and with utmost dedication for their joint benefit and the benefit of their unique family and household. They therefore consciously exerted themselves to build a profitable business that would in turn benefit themselves and their household.

*Held*, a universal partnership came into existence between the parties from 1976-2013.

*Held*, although the appellant had owned business enterprises before the respondent joined him, that does not preclude her from sharing in the later net gains of those assets.

*Held* that, the High Court had erred in ordering that all the assets of the partnership must be divided in equal shares.

*Held* that, a receiver be appointed who shall make an award for the equal division of the assets of the universal partnership within one month of the date of this order.

---

### APPEAL JUDGMENT

---

MOKGORO AJA (DAMASEB DCJ and CHOMBA AJA concurring):

#### Introduction

[1] This appeal concerns the consolidation of two cases in the High Court as applied for by the parties and ordered by the court *a quo*. In the first, the appellant there had prayed for the eviction of the respondent from the house on Erf 353, Oshakati which he co-owns with her.

[2] In the second matter, the respondent had claimed before the High Court that a universal partnership existed of all the assets they owned in their marriage which had been declared null and void. She further sought an order that the court appoint a receiver, who would ensure that the assets of the universal partnership are divided in equal shares between them.

[3] The High Court dismissed with costs the appellant's eviction claim and upheld the respondent's claim of a universal partnership, directing the equal

division of assets between the parties. The appellant lodged an appeal against the whole of the judgment and orders of the High Court.

[4] On appeal before this court, the appellant abandoned the appeal against the dismissal of his eviction claim. This appeal is therefore confined to the High Court's judgment and order made in relation to the existence of the universal partnership and the equal division of its assets between them.

#### Factual background

[5] Initially, the relationship between the parties was that of employer and employee. The respondent was a 24 year old young woman when she commenced employment with the appellant in 1975. Later in the same year, they started an intimate relationship. At the same time, respondent had been aware of the existing marriage between the appellant and his wife, LN. About a year later, the first child of the appellant and respondent was born. By 1993, they had five children. The other four were born between 1978 and 1993.

[6] The appellant had filed for divorce from LN when he decided to marry the respondent. The High Court found that when the parties entered into marriage on 1 November 1988, both were under the *bona fide* belief that the appellant had been divorced from LN. He had been advised by his erstwhile legal practitioner in 1988 that the divorce he had filed against LN had been granted. It turned out on the contrary, that the divorce had not been granted and that fact came to their knowledge only in 2013, shortly before their separation. It is therefore common cause that the marriage between the parties was null and void as to date the appellant remains lawfully married to LN.

[7] In 2015 the appellant instituted eviction proceedings against the respondent from the house on Erf 353, Oshakati. The respondent in turn, instituted action against the appellant, seeking the orders which the High Court had made in her favour indicated above, including an order directing that the appellant render a full account of the partnership from 1976 when appellant made reference to respondent as his 'second wife by tradition'. As an alternative to the appointment of a receiver she sought a further order that would require appellant to rebate the net balance of the universal partnership account.

#### Findings of the High Court

[8] Having held that the appellant was not a credible witness the High Court rejected his characterisation of the relationship between him and the respondent as that of employer and employee respectively. Even after they had realised that their marriage had been and null and void, the court held, the appellant and respondent continued to live together as husband and wife. Throughout, they had together accumulated a substantial estate through various successful business ventures, planning together the extension of their business, including the accumulation of agricultural land.

[9] The High Court held:

'I have reached this conclusion, considering the following. The plaintiff introduced the defendant as his second wife to his mother after she fell pregnant with their first born. He instructed his lawyers to file his divorce from LN and after that he tried to solemnize his union with the defendant. The fact that she raised his children, regardless of the fact that she was not the biological mother of all of them. I took into consideration the very fact that they were together for 37 (thirty-seven) years. TN considered his parents to have been married and together. He

testified that they indeed had a rich family life during their upbringing in Onesi. They were a happy and prospering family, he testified - things were good. The plaintiff displayed the successes of the family in business during school holidays, when the family sat down, and discussed the future plans to extend the businesses, acquiring agricultural land and so forth.<sup>1</sup>

[10] Finding that the relationship between the appellant and respondent amounted to a putative marriage the court reasoned that:

‘ . . . Earlier South African authors expressed the view that universal partnerships of the first kind, ie those including all property, were not allowed in Holland, save between spouses and perhaps in the case of putative marriages. This passage supports a view that a formation of a universal partnership is possible at the backdrop of a putative marriage [reference excluded]. I’m inclined to rely on this line of reasoning. The union between the parties in this case, [led] to the building of a substantial estate, [thus] the declaration of a universal partnership if the defendant’s case meets the legal requirements, can in my view be a befitting manner to deal with the claims for division of the estate between the parties<sup>2</sup>.’

[11] Having viewed the union of the parties as a putative marriage, the court conveniently considered it as a basis for determining that a universal partnership existed between the parties. Noting that the putative marriage shall nevertheless first have to meet the requirements of a universal partnership entitling each party to a share in the accumulated assets, the court proceeded to apply the requirements of universal partnership to the facts of the case.

[12] Having found that a universal partnership existed between the parties, relying on *Butters v Mncora*<sup>3</sup>, the court held that a universal partnership may

---

<sup>1</sup> *MN v FN* (I 450/2015) [2017] NAHCMD 124 (21 April 2017) para [49].

<sup>2</sup> *Supra* at paras 66 and 67.

<sup>3</sup> 2012 (4) SA 1 (SCA).

extend beyond a profit-making enterprise. Thus, the court held that even though the relationship between the parties was not of a commercial or profit-making nature, based on the facts of common cause in this matter, both parties had made contributions towards the accumulation of property during their union.

[13] Having found that the relationship between the parties was not that of employment nor of a cohabitation, but of a putative marriage although the issue had not been raised or argued, the court held that the assets of the partnership shall be divided between the parties in equal shares.

[14] However, having held that the assets of the putative marriage shall be divisible only if it satisfies all the requirements of a universal partnership, the High Court set out first to determine and then decided that based on the facts of common cause in this case the union of the parties indeed meets the requirements of a universal partnership as established in *Butters*. In that regard the High Court found that by placing all her efforts into managing a household of almost 50 people together with managing their business affairs delegated to her, the respondent had made sufficient contribution to satisfy the first legal requirement of a universal partnership.

[15] The High Court further held that the respondent's support for the appellant in all his major business ventures throughout the duration of their union is indication of the fact that their efforts were for the joint benefit of the household including all the children of the appellant with other women. That, the court *a quo* found, satisfies the second requirement of a universal partnership.

[16] Furthermore, relying on *Ponelat v Schrepfer*<sup>4</sup> as authority for the notion that a purely pecuniary profit-making intention is not always required of the parties for them to satisfy the third element of a universal partnership, the conclusion of the court was that, although the union of the parties was not purely intended to make money, they did accumulate substantial wealth. Thus the last requirement for the existence of a universal partnership had been met.

[17] It is thus in the context of the above reasoning that the High Court concluded that a universal partnership existed between the parties and ordered that all the assets of the partnership shall be divided between the parties and that division, for reasons of equity, shall be in equal shares.

[18] The court noted that the title deed of Erf 353 Oshakati reflected that the appellant and the respondent were co-owners of the property. Thus the court found against the appellant in his application for the eviction of the respondent from the house on the property, a finding against which he had lodged an appeal in this court but as indicated above, later withdrew. For that reason, that appeal is no longer an issue before this court. The High Court found that Erf 353 is the only property which the parties co-owned. The fact that the marriage between the parties had been declared null and void did not impact the joint ownership of the house.

---

<sup>4</sup> 2012 (1) SA 206 (SCA).



[19] Further, notwithstanding some contradictions in the respondent's evidence regarding existing family properties, the court found her to be generally credible with respect to her contributions to family life and the accumulation of assets during their life together as husband and wife. The court concluded that 'surely, there is something to be said for sharing the proceeds of their labour'.<sup>5</sup> The High Court thus ordered that the assets be divided in equal shares between the parties.

#### Issues for determination on appeal

[20] What remains to be determined by this court is whether, by law or on the evidence, the High Court was correct in its decision that a universal partnership existed between the parties; whether the assets of the universal partnership shall be divided between the parties; if so, whether they shall be divided in equal shares and if the court was not correct in that regard, what the appropriate order would be for this court to make regarding the division of the assets.

[21] Before proceeding with the above determination, it is important first to make clear the approach to be adopted in this judgment when responding to the above questions. The appellant contended before this court that the High Court had committed what he termed a grave error in its conclusion that the relationship between him and the respondent constituted a putative marriage, and relying heavily thereon determined that a universal partnership had existed between them and, based thereon, deciding that the accumulated assets shall be divisible between them.

---

<sup>5</sup> *MN v FN* para [57].

[22] That heavy reliance, he further argued, was also erroneously placed on the notion of the putative marriage when deciding that the partnership property shall be divided in equal shares between the parties. He further submitted that although the issue of the putative marriage had not been raised nor argued by any of the parties, the court nevertheless took the putative marriage line of reasoning to make those far-reaching findings against him.

[23] In making the point, the appellant cited the following passage from the judgment of the High Court:

‘The parties in the current case were in a putative marriage, they were not merely in co-habitation. That is a fundamental factual distinction between this case and the case of *Butters v Mncora*. However, I hold that the private law institution of the partnership so laid out, can similarly be applied to the case of the putative marriage.’<sup>6</sup>

And,

‘. . . a universal partnership is possible at the backdrop of a putative marriage. I am inclined to rely on this line of reasoning. The union between the parties in this case, led to the building of a substantial estate, the declaration of a universal partnership, if the defendant’s case meets the legal requirements, can in my view be a befitting manner to deal with the claims for the division of the estate between the parties.’<sup>7</sup>

[24] The respondent conceded that the High Court’s declaration of the parties’ union as a putative marriage was unsolicited. However, she argued, that declaration was of no particular consequence in the court’s conclusion that a universal partnership existed between the parties. I agree.

---

<sup>6</sup> *Supra* para [82].

<sup>7</sup> *Supra* at para [67].

[25] The putative nature of the marriage, although not raised or argued, was not the basis upon which the High Court arrived at its conclusion that a universal partnership between the parties had come into existence. To the contrary, the court, whether correctly so or not, made a distinction between the nature of the relationship of the parties in *Butters* and in this case. It held that whereas in *Butters*, the parties were in a cohabitation, here the parties were in a putative marriage which can serve as a 'backdrop' to a universal partnership. The court was thus at pains to determine that the putative marriage must still be put through the universal partnership test and held that the putative marriage would be a universal partnership only 'if the defendant's case meets the legal requirements'.

[26] Before it justified and concluded that a universal partnership had come into existence, the High Court indeed meticulously proceeded to determine that in the context of the facts and circumstances of this case, all the requirements of a universal partnership had been met and for that reason each party is entitled to a share in its assets.

[27] Therefore, as the respondent further contended before this court, the fact that the High Court had declared the union between the parties a putative marriage is indeed neither here nor there as not much turns on it. Further, it may also have been unnecessary to define the nature of the relationship as that of a putative marriage, considering the principle established in *Ponelat v Schrepfer*<sup>8</sup> where the court held that once all the requirements of a universal partnership have been met a universal partnership would come into existence whether the parties

---

<sup>8</sup> 2012 (1) SA 206 (SCA).

are married, engaged or cohabiting. For purposes of applying the test in *Butters* to the facts and circumstances of this case, it was therefore sufficient that the appellant and respondent had for 37 years of their lives lived together in a union. Thus, in responding to the questions which remain before this court, there will be no need to enter into the questions whether or not the relationship between the parties constituted a putative marriage which has its own particular proprietary consequences.

[28] For that reason too, in determining the probability that a universal partnership had come into existence this judgment will proceed directly to the question whether, based on the facts and circumstances of this case, all the requirements for the existence of a universal partnership established in *Butters v Mncora*<sup>9</sup> have been met.

#### The appeal

[29] Generally, in the past and under common law if a person was not married to a partner they had no claim to each other's assets should the partnership terminate. However, recent developments in South African case law have given recognition to the notion of the universal partnership which may exist between partners but only if certain legal requirements which are similar to those for a regular common law partnership have been met. In *Ponelat v Schrepfer*<sup>10</sup>, the court confirmed the essentials of a universal partnership crisply laid down in *Pezzuto v Dreyer*<sup>11</sup> as follows:

---

<sup>9</sup> 2012 (4) SA 1 (SCA).

<sup>10</sup> 2012 (1) SA 206 (SCA) para [19].

<sup>11</sup> 1992 (3) SA 379 at 390.

'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; *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 783H-784A; *Purdon v Muller* 1961 (2) SA 211 (A) at 218B-D). The three essentials are (1) that each of the parties 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 on the Contract of Partnership (Tudor's translation)* 1.3.8). . . '.

A fourth requirement which has generally not been adopted and therefore recognised in our case law is that the contract should be a legitimate one.

[30] These three requirements were applied in the *Ponelat* matter to show the existence of a universal partnership between parties who had been cohabiting for 16 years. There the court defined the universal partnership as an express or tacit agreement between two partners to contribute something or commit themselves to do so whether it be money, labour or skill, and whether the partners were married, engaged or cohabiting.

[31] In this appeal, as the appellant correctly submitted, the first question that must be addressed is whether the finding of the High Court that a universal partnership had come into existence between the parties was correct. With reference to the approach of the court in *Butters v Mncora*<sup>12</sup> and in particular with regard to the application of the requirements for the existence of the universal partnership to the facts and circumstances of this case, the High Court had positively answered the questions first, whether the parties had brought or tacitly bound themselves to contribute something to the property of the partnership; second, whether the partnership was conducted for the joint benefit of the parties;

---

<sup>12</sup> 2012 (4) SA 1 (SCA).

and third, whether the intention of the parties was to make a profit. Following the principle in *Ponelat*, the High Court determined that the onus was on the respondent to show that all the requirements of universal partnership have been met.

Whether each party made a contribution towards the partnership

[32] In *Ponelat v Schrepfer*<sup>13</sup> it was held that the first requirement for a universal partnership to come into existence is that each party must bring something into the partnership, whether it be money, labour or skill. Thus, the contribution of a party to the property of the universal partnership need not be confined to a monetary benefit.

[33] It is common cause that the respondent joined the appellant's business at his Ruacana shop as his employee. The appellant made the submission that when the respondent joined his business in 1975 she came as an employee and remained as such throughout. The contention was that whatever participation and contribution of labour, skill and commitment she made in the business was in her capacity as an employee who like all his other employees, was remunerated with a salary. The argument was that her contributions could not be viewed as those towards a universal partnership existing between them. That submission must therefore be addressed before we proceed with the determination whether a universal partnership existed between the parties, entitling the respondent to a share in its assets.

---

<sup>13</sup> 2012 (1) SA 206 (SCA).

[34] The respondent did not refute that she had joined the appellant's business at his shop in Ruacana as his employee, receiving a salary of between N\$150 and N\$250 like everybody else. She however refutes that she continued to serve in that position throughout the life they shared. She further submitted, as was also common cause, that they became intimate, she fell pregnant with their first child, and the appellant introduced her to his mother as his 'second wife in terms of tradition'. At the insistence of the appellant they moved in together, living as husband and wife despite the fact that the appellant was still married to LN, albeit separated from her. As their son TN had testified, from then onwards, the respondent worked for long hours without a salary. In my view, the line between employee and life partner had started to shift.

[35] Further, submitted the respondent, after the birth of their first child, the appellant filed for divorce from LN. The appellant and respondent got married in what they termed a 'church wedding' in 1988. They were oblivious to the fact that the appellant had not validly divorced from LN at the time, making their own marriage null and void. The parties continued to live together as husband and wife and eventually had five children of their own. By that time, in my view and contrary to the submission of the appellant, the relationship between the appellant and the respondent was no longer an employment relationship. Although they were not married, they were cohabiting in a union where they lived together, regarding each other and conducting their lives as that of husband and wife.

[36] To contend that because their marriage was null and void and therefore invalid and their relationship was simply that of employer and employee is to disregard the operational context and reality of their family and business. It is

overly legalistic and places form before substance.<sup>14</sup> Even before their perceived marriage, the appellant himself regarded the respondent as his 'second wife in terms of tradition', having introduced her as such to his mother. That was significant.

[37] From then onwards, their union strengthened, five children were born of it and the household grew bigger and closer with proud and motivational conversations about family business successes and future plans discussed around the family dinner table during school holidays. Together, the appellant and the respondent enjoyed the warmth and security of family and had built a successful business empire.

[38] Thus, throughout their union the contributions made by the parties, including the respondent's labour, skills, commitment, and business acumen were all made towards what she believed to be the family business and not to her employer's business. That was a reasonable belief. Her further contributions, taking care of an extraordinarily large household of about 50 people under one roof which included their children and the children of the appellant with other women were contributions made for their joint benefit and not the benefit of her employer. That too was a reasonable belief to entertain.

[39] Therefore, contrary to what the appellant had contended, it is in the context of a union and not that of an employment relationship that the appellant and the respondent worked together and made their contributions. Based on the principle

---

<sup>14</sup> *Swart v Tube-O-Flex Namibia (Pty) Ltd & another* 2016 (3) NR 849 SC para [38]; *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 para [8], also see *Xinwa & others v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC) at 395B-D and *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 757B-C.



in *Ponelat*<sup>15</sup> that a universal partnership can also exist when the parties are not married but are in a cohabitation, to determine whether all the requirements of a universal partnership had been met in this case, it is apt for this judgment to proceed to consider the contributions of the parties in the context of a union between them.

[40] In that regard, the appellant made the submission that when the respondent joined his business in 1975, he at that stage already owned several businesses which included general dealerships, construction enterprises and transport businesses. He however emphasised that traditionally, the business belonged to his maternal family. It is for that reason, he contended, that when he married LN he had done so out of community of property and therefore did the same when he got married to the respondent. In *Fink v Fink & another*,<sup>16</sup> the court found that a universal partnership can exist between spouses in respect of specific property, being a milk-producing business even where they had been married to each other out of community of property.

[41] So too in *Mühlmann v Mühlmann*,<sup>17</sup> where similarly, it was shown that where parties are married out of community of property a universal partnership can come into existence in relation to certain commercial or business enterprises. Thus, even if the business property the respondent found the appellant with indeed belonged to his maternal family and/or the proprietary regime of the invalid marriage between the appellant and the respondent had in fact been out of community of property as the appellant submitted, that would not necessarily

---

<sup>15</sup> 2012 (1) SA 206 (SCA).

<sup>16</sup> 1945 WLD 226 at 228.

<sup>17</sup> 1984 (3) SA 102 (A).

preclude the existence of a universal partnership in respect of property accumulated through the contributions of the parties during the subsistence of their union. The existence of a universal partnership must be inferred from the conduct of the parties taking account of the facts and circumstances of the case.

[42] Further, in view of the fact that the marriage between the respondent and the appellant was null and void, the property regime of that marriage has no relevance for purposes of determining questions of the existence of a universal partnership between them. That is the case not only in relation to the property of the union as a whole but in particular in relation to the property of the business.

[43] The appellant also submitted that at no point, whether explicitly or tacitly did he enter into any partnership with the respondent in relation to the business property. Demonstrating the point, he submitted that even after they had become intimate and had had children, he only provided her with maintenance from time to time, including buying her cosmetics, paying for her trips and buying her a motor vehicle. Sometime between 1975 and 1980 he further submitted, he also built her a house at her mother's place in Uukwaluudhi. The respondent did not refute the submissions.

[44] We may therefore assume that the appellant is correct that at no stage did he and the respondent expressly enter into any partnership with the respondent as he submitted. However, there is unrefuted evidence that starting with the birth of their first child following their intimacy, throughout the family life they shared with their own and other children as part of a large household, they both participated in and contributed towards developing the business, cooperating with each other and

each playing a significant role in strengthening the business. Subsequent to their purported marriage in 1988, which they had both believed to have been valid until they separated in 2013, they continued to live as husband and wife. There was substantial evidence that during the relevant period the appellant and respondent had together built a solid and united family, a successful business empire and had accumulated significant wealth.

[45] As already indicated, the appellant contended that he had not, explicitly or implicitly, entered into any agreement with the respondent regarding the business. The common law of universal partnership, however, does not always require that an express contract be concluded to that effect. Thus the common law recognises a universal partnership tacitly agreed to.<sup>18</sup> As the appellant correctly submitted with reference to relevant case law,<sup>19</sup> when a universal partnership is inferred from the conduct of the parties the surrounding facts and circumstances of the case must be the relevant context.<sup>20</sup> A court must therefore not easily draw an inference without ensuring that a concrete case has been made out.<sup>21</sup> Thus, should a party contend that a universal partnership had been tacitly concluded, questions of probability come sharply into play and the party who so contends must show that it was more probable than not that a tacit agreement had been reached. Also critical is that the inference must be drawn from the conduct of not only one but of both parties.<sup>22</sup>

---

<sup>18</sup> *Butters v Mncora* para [18].

<sup>19</sup> *Butters v Mncora* paras [18], [20]-[27] and *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 123H-I and at 124C-D.

<sup>20</sup> *Supra*.

<sup>21</sup> *Hanel v Hanel* 1962 (3) SA 625 (C) and *Chiromancy v Katzidzira* 1981 (4) SA 748 (ZA).

<sup>22</sup> *Ibid*.

[46] Thus in the case of *V v M*,<sup>23</sup> the court held that a universal partnership like all other contracts does not require an express or explicit agreement. It may come into existence by tacit agreement discerned from the conduct of the parties in the context of the facts and circumstances of the particular case. The court in *Fink v Fink & another*<sup>24</sup> found that:

‘If the agreement is not in writing, the intention of the parties must be ascertained from their words or conduct . . . [and] the mode in which it, with the knowledge of the other, dealt with other people. . .’

[47] In *Butters* the court held that ‘where the conduct of the parties is capable of more than one inference to be drawn, the test for whether a universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached’.<sup>25</sup> Thus, where there is no express agreement that the relationship between the parties constituted a universal partnership as in this case, whether all the requirements of the universal partnership have been met shall be discerned from the conduct of the parties. A tacit agreement can therefore be inferred if plainly, there is only one inference to draw from the conduct of the parties. However, where there is more than one inference, the more probable will determine in the final analysis whether a universal partnership has come into existence. Critical is to determine the conduct of the parties in the context of the facts and circumstances of the particular case as a whole.<sup>26</sup>

[48] When Mr Ipinge Nestor who had managed the shop in Ruacana left for exile in 1976 the respondent took over as manager. She never looked back. As

---

<sup>23</sup> (19398/2014) [2016] ZAGPPHC 652 (25 July 2016).

<sup>24</sup> 1945 WLD 226 at 228.

<sup>25</sup> *Butters v Mncora* para [18] (d).

<sup>26</sup> See *Isaacs v Isaacs* 1949 (1) SA 952 (C).

soon as the appellant and the respondent became intimate, they had their first child and started a life of husband and wife. They later, in 1988 entered into a marriage, which, although it turned out to be invalid, had more children with a household which swelled to 50 people. Together, the parties created a strong united family where the appellant and respondent simultaneously and together conducted a successful business.

[49] Although the appellant was, as he emphasised, a 'traditional man' there was no strict gender role restriction in relation to the role played by the respondent in the family. In that role she proved to be an exceptional home maker and manager, taking care of a household of close to 50 people which included 15 children. Five of the children were their own and the rest were of the appellant with other women and of his relatives.

[50] On the evidence as found by the court *a quo*, generally, the respondent was the main care-giver of their uncommonly large household. There is evidence, not disputed by the appellant and corroborated by their son TN, that not only did the respondent spend most of her time and energy taking care of their extraordinarily large household, she also applied to the business her skills and business acumen, in that way playing a significant role in managing the various business enterprises in the string of businesses that formed part of the property. She juggled her business activities with the central role she played, managing their unique and extraordinarily large household. Therefore, not only did she contribute her time, labour, skills and commitment to the management of their home and care of all the children, she did the same, managing in particular the local enterprises of the business, cashing up with the appellant at the end of the day, doing the banking

thereafter, recruiting, interviewing, appointing, training, allocating staff duties and managing the payroll. She did all of that and did not draw a salary as she was not an employee. The appellant in the meantime played his role, mostly engaging in his business travels, doing business with third parties, and ensuring the expansion of the business including the acquisition of land for their farming ambitions and plans.

[51] When the respondent joined the appellant as his employee in 1975 she was only 24 years of age and had recently left school, having intended to resume her studies at a later stage. Her plans did not materialise. As the evidence would show, she and the appellant instead developed an intimate relationship a year after her arrival and employment at Ruacana. She would later become an extraordinarily committed wife and skilful mother, care-giver and needless to say, a businesswoman of note.

[52] The appellant makes much of the submission that when respondent joined his business in 1975 he had already owned several businesses ranging from general dealerships to construction and transport companies. As already mentioned, that assertion is not disputed by the respondent. However she argued, then, the business was not thriving as much as it did once she had joined him and made her own contributions, 'making him the wealthy man that he has now become', as she asserted. The question, however, is whether the contributions she had made were sufficient to discharge the burden of showing the first requirement of a universal partnership had been met.

[53] Under the common law, when a court determines whether a union between parties meets the requirements of a universal partnership in the absence of an agreement, it must make that determination by drawing an inference from the conduct of both parties and not only from the conduct and/or perception of one of the parties.<sup>27</sup>

[54] In *Butters v Mncora*, the Supreme Court of South Africa held that a universal partnership which extends beyond commercial enterprises is part of Roman-Dutch Law. The High Court, holding that that principle is also part of the Namibian Common Law and relying on *Butters*, decided that the first question to be answered in determining whether the requirements of a universal partnership have been met in a particular case is whether each party made a contribution towards the property of the partnership. As in *Butters*, the court held that the contribution of the parties need not be of a monetary nature. Thus if parties have made much effort contributing their labour, skills, business acumen of some sort including their talents, that must count as a contribution in terms of the principle established in *Butters v Mncora*. On that basis, I agree, as the High Court has found, that the respondent has discharged that onus. Her contributions alongside those of the appellant have indeed met the first requirement of the existence of a universal partnership during the period of the family and business life they shared with each other.<sup>28</sup>

#### Whether the contributions made were for the joint benefit of the parties

---

<sup>27</sup> *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 124D-E, also see *LM v JM and others* 2016 (2) NR 603 (HC) para 11 and *MB v DB* (HC-MD-CIV-ACT-MAT-2017/03195) [2018] NAHCMD 266 (31 August 2018) para 14.

<sup>28</sup> See *Butters v Mncora*.

[55] The question whether the contributions of the parties were to their joint benefit is essential to answer in the positive and must, as always, be inferred from the facts and surrounding circumstances of each case, drawing inferences from the conduct of both parties<sup>29</sup>. Considering, as was established in *Butters*, that a universal partnership may extend beyond a commercial entity, the joint benefit requirement must not necessarily be confined to that of a commercial nature. Thus, when the appellant brought into their common home his children with other women to become part of his extended household he had the unusual benefit of having all his children, including those with other women under his roof, with easy access to all of them, making it most convenient for him to perform his role as their father. The appellant could thus embark on his business trips for extended periods of time, away from home as he often did and focus on business interests. He could rest assured that his unusually large household including all the children are being taken care of, a task which could not have been the easiest to fulfil on the part of the respondent.

[56] That mature attitude and approach of the respondent to managing their unique family and household must have made a substantial difference to family stability and peace of mind for both of them. It must have enabled the appellant to better focus on expanding and flourishing the business for their joint benefit and the benefit of the family. Ensuring the wellbeing of an extraordinarily large and varied family was not all that the respondent contributed to the common benefit. As the business flourished they opened more branches of their shops elsewhere, including a supermarket, a bottle store, and take-away outlets at Onesi, Tsandi,

---

<sup>29</sup> See *Butters v Mncora* paras [18], [20] - [27] and *Mühlmann v Mühlmann* 1984 (3) 102 (A) at 123 H-I and at page 124 C-D.



Outapi, Ongwediva and Ondangwa, as she contended. More businesses were opened and established in Ruacana.

[57] Importantly, the respondent conceded that she had knowledge of businesses that the appellant had owned before the country's independence. When a long-standing lease agreement for business premises with the government was cancelled, they used the proceeds to fund the construction of a shopping complex, a fuel service station, rental accommodation and a shopping centre at Onesi.

[58] In addition, they built a 24-room family house, also at Onesi, for their joint benefit and the benefit of the family as a whole after they had relocated from Oshakati, a house the appellant often told her belonged to her until he started to execute his intention to evict her. The respondent submitted that, although the appellant hardly lived in that house as he was away on business most of the time, it was regarded as the family home. He would occasionally buy and bring food for the household and provide money for other household necessities.

[59] Through their joint efforts, operating in collaboration with each other, each played a particular role for their business to flourish. The High Court found in favour of the respondent that she had dutifully managed the household and simultaneously managed the local business, including some of her own personal projects where the appellant seemingly exercised oversight over the business overall. It was also the respondent's duty and responsibility to employ and train staff. She had to ensure that all retail outlets are sufficiently stocked at all times, a responsibility appellant had entrusted to her. Further, it was the respondent's task

to manage the business accounts, ensuring that the financial records of the business enterprises were properly balanced. While the respondent and the appellant would cash up together when he was not travelling, it was for the respondent to see to the weekly deposits of the daily takings. That also required her to travel to Tsandi where she would do her regular inspection of the business and also saw to the needs of the business and staff there. As their son TN had testified before the High Court, she performed all of her duties 'from sunrise to sunset without taking a salary'.

[60] In *Butters*, Heher JA stated:

'[37] When parties cohabit in a state of amity over a long period of time, as here, and family results, it is likely that certain things will happen: the principal breadwinner will contribute substantially, either regularly or on an ad hoc basis, to the needs of the family by providing accommodation, food, clothing, education, transport and healthcare. To these will usually be added vacations and presents of various kinds. The other party, usually the woman, will stay at home or engage in lesser employment and oversee the needs of the family and the upbringing of the children. These are the normal incidents of cohabitation just as they are of marriage. That they happened in the case under consideration contributes nothing to the present enquiry because they are at best equivocal, absent some evidential feature that links them to the special intention that attaches to a universal partnership'.

[61] In this matter, however, there is abundant evidence showing that in their union, the lifestyle of the parties was far from that of yesteryear as described by the learned judge in *Butters* above. In the matter before us, what is absent is the strict gender role division articulated in the *Butters* example. To the contrary, while the respondent was indeed the main care-giver of their large household, she was also a skilled and active businesswoman who operated in close collaboration with

the appellant and through their joint efforts and contributions, monetary and otherwise, they built a flourishing business empire and accumulated substantial family wealth throughout the 37 years of the life they shared. The High Court thus correctly concluded that:

‘. . . the entire purpose and effect of the union between the plaintiff and the defendant was for the joint benefit of themselves and of their household, which included all the children they had together as well as the children of the plaintiff with other women’.<sup>30</sup>

[62] I have no doubt that, discerned from the surrounding facts and circumstances of this case, the financial gains of the business, the labour, skills, commitment, and business acumen of both parties were intended to benefit and did benefit the appellant and the respondent jointly. Together, they served their own interests, the interests of their large household and that of their flourishing business, thus satisfying the second requirement of the existence of a universal partnership. The next and last requirement to consider is whether the object of the union was to make a profit.

#### Whether the object of the partnership was to make a profit

[63] The third requirement of a universal partnership established in *Mühlmann* is that of a profit-making objective with which the partnership must be conducted. The submission of the appellant in this regard, relying on *Ponelat v Schrepfer*<sup>31</sup>, is that the High Court had erred in concluding that a purely pecuniary profit motive is not always essential to meet this requirement.

---

<sup>30</sup> *MN v FN* para [74].

<sup>31</sup> *Ponelat v Schrepfer* para [24], footnote 1. See *Ally v Dinath* 1984 (2) SA 439 (T) at 455A-C.

[64] In *V v M*<sup>32</sup> the court found that once it is accepted that a partnership enterprise may extend beyond commercial undertakings, the contributions of the parties, logically, need not be limited to that made to a profit making entity. Further, the jurisprudence developed in *Fink v Fink*<sup>33</sup> and later confirmed in *Mühlmann*<sup>34</sup> highlights that it is from the facts and circumstances of a case that one should draw the inference that, tacitly, a universal partnership has more probably than not come into existence. So too, in my view; can the profit-making contribution be determined to satisfy this requirement of universal partnership. Nevertheless, based on the facts and circumstances of this case, that requirement must be considered in the context that the relationship between the parties was a union where they simultaneously conducted what can be viewed as a family business. For that reason a more nuanced approach to this third requirement of a universal partnership must be taken.

[65] As already articulated, the parties had together accumulated substantial business-based wealth for themselves and their extended household. They started their intimate relationship in 1975, and entered into a purported marriage in 1988. Notwithstanding the invalidity of their marriage they nevertheless continued to live together in a union as if they were husband and wife. They enjoyed a comfortable family life with their unusually large household which they were able to sustain through their flourishing business.

[66] Throughout what they believed was a valid marriage, the appellant and respondent lived together until they separated. During that time, both of them

---

<sup>32</sup> (19398/2014) [2016] ZAGPPHC 652 (25 July 2016) para [6].

<sup>33</sup> 1945 WLD 226.

<sup>34</sup> 1984 (3) SA 102 (A).

collaboratively made substantial contributions to the growth of their various business enterprises and to their vast property.

[67] In this matter, not only had the parties been life partners living as husband and wife for 37 years, they both played an active and substantial role in advancing the well-being of their extra-ordinarily varied and large family and the interests of their thriving business with each of them fulfilling their assumed roles and tasks. They both played their roles with dedication, for their joint benefit and the benefit of their unique family and unusually large household. They therefore consciously exerted themselves to build a profitable business that would in turn provide their household with the resultant benefits. Their shared business and family lives offered them the security of family and the comfort of wealth which were significantly beneficial to them jointly and to their family. I therefore conclude that, based on the particular facts and circumstances of this case, the business of the parties was conducted to accumulate wealth which would also benefit the union in the context of the family and the household.

[68] That, in my view, must count as an objective of the parties of the union to make a profit, thus fulfilling the third requirement of the existence of a universal partnership. All three requirements of the existence of a universal partnership having been fulfilled, the High Court was therefore correct in holding that a universal partnership had come into existence between the appellant and the respondent.

[69] As the appellant correctly submitted, the mere existence of a universal partnership entitles the parties to share in the assets of the partnership.<sup>35</sup> Thus, now that the universal partnership has come to an end both of them have a right to a share in the assets accumulated over the 37 years of their lives together.

#### Division of the universal partnership assets

[70] Before this court, the appellant submitted a list of assets he claimed belonged to him and could therefore not feature as part of the assets to be divided between them. He contended that prior to the respondent joining him in 1976 he already had businesses of his own, constituted by the shop in Ruacana, the business in Oshakati and a trucking business. He also submitted that he had properties which he developed with his own resources, constituted by the Elago supermarket in Oshakati, the business in Onesi and a house also in Oshakati.

[71] The appellant further submits that he had businesses which the respondent conceded she had no knowledge of. Those were a business in Ondangwa, a petrol station he had with NN,<sup>36</sup> a small shop in Tsumeb and some buildings in Tsumeb and Otjiwarongo and a trucking business. He also had joint ventures with third parties made up of a shopping complex with one Ben Zaaruka, a trucking business and the Afrikuumba Construction and Fixture property he shared with their son TN. Furthermore, the appellant presented to the court properties over which he submitted the respondent had no control. These constituted farms in Tsumeb and Otavi. There was also a flat in Swakopmund, an Erf in Oshakati, a business complex rented out in Tsumeb, an Erf in Otjiwarongo, shares in Bank

---

<sup>35</sup> See *Butters v Mncora* 2012 (4) SA 1 (SCA), *Mühlmann v Mühlmann* 1984 (3) 102 (A) and *Isaacs v Isaacs* 1949 (1) SA 952 (C).

<sup>36</sup> NN is the biological daughter of the parties in this matter, born on 16 December 1976.

Windhoek, Old Mutual and Zeta le Fishing Company and the Afrikuumba company over which the respondent had no control over. The above assets, contended the appellant, could thus not be part of the property of a universal partnership. The implication was that the respondent could not claim a share therein.

[72] In cases like *Fink v Fink & another*,<sup>37</sup> *Mühlmann v Mühlmann*<sup>38</sup> and *RD v TD*,<sup>39</sup> parties had married out of community of property, owning separate estates. Notwithstanding, they were held to have a right to a share in the assets of the universal partnership which had come into existence in relation to the business enterprises towards which they both contributed. The property of the partnership in those cases was therefore held to constitute separate legal entities from the matrimonial proprietary regimes of the parties. In *Ponelat*<sup>40</sup>, it was held that a universal partnership may exist even where parties were not married to each other. The parties would have a right to the net benefits derived from the universal partnership property even where it may be found that they also owned separate assets of their own.

[73] Thus, as in the above cases, the fact that appellant had owned business enterprises of his own before the respondent joined him does not preclude her from sharing in the net gains of those assets. Her claim to share therein would be based on her contribution to the particular properties, whether it be through her labour, skills or her money.

---

<sup>37</sup> 1945 WLD 226.

<sup>38</sup> 1984 (3) SA 102 (A).

<sup>39</sup> 2014 (4) SA 200 (GP).

<sup>40</sup> 2012 (1) SA 206 (SCA).

[74] Appellant also argued that during the subsistence of their union, the respondent had not once laid claim to a share in the estate. She must therefore have known that she is not entitled to any, he argued. In the context of the facts and circumstances of this case, in particular the secure family ties and collaborative business relationship that the parties enjoyed as articulated in the preceding paragraphs, the respondent in my view, had no reason to ventilate what might have been considered a polarising claim against the property. The need to do so had not arisen at the time. So far as she was concerned, she had a subsisting marriage and or union with the appellant; together they were conducting a thriving business and led a fulfilling family life. The need to claim a share at this point in their lives has been precipitated or triggered by the apparent intention of the appellant to exclude her from benefitting from the property that they jointly accumulated, depriving her of the fruits of 37 years of her labour, skills, commitment, sacrifice, and business acumen, among other efforts.

[75] The respondent conceded that when she joined the appellant in her younger years, he had indeed already been conducting the business enterprises he mentioned. However, she contended, those businesses had not been as profitable and as successful then as they had become once she had come on board. Alongside him, she contended, she made her contributions throughout their union as his life partner. Considering the central role she had played in the advancement of the business as a whole and the creation of a secure family home for their household there is no reason to doubt that her contributions were substantial.



[76] I wish to deal with those business enterprises which appellant submitted that he conducted as joint ventures with others, those that he developed with what he termed his own resources, those over which he exercised sole control, and those he contended the respondent had no knowledge of. In view of the fact that the respondent established that she contributed her time and industry to the property of the universal partnership as a whole, questions surrounding her lack of involvement, knowledge and control of specific business projects and joint ventures are not particularly eventful. In my view, they do not take the matter any further. In that context, it bears mention that the appellant repeatedly asserted that he was a traditional man, presumably in his attitude towards aspects of his family life and/or relationship with the respondent. It would therefore not be unreasonable to conclude that when he found it necessary, he would, in certain circumstances, take full control of aspects of their business and would be the dominant partner in that regard. In any case, whatever his approach to the family business had been, excluding the involvement of the respondent and taking full control must be seen as his own contribution to the joint efforts of the parties in accumulating the vast property of the universal partnership during the subsistence of their union.<sup>41</sup> The evidence therefore shows that both parties made their respective contributions to the success of their business. It must follow that both parties have a right to share in all the property of the universal partnership.<sup>42</sup>

[77] The appellant also contended that the business they conducted together belonged to his maternal family and the respondent could therefore not share therein. He further argued that the fact that their marriage, which was subsequently declared invalid, was out of community of property must be taken

---

<sup>41</sup> See *Ponelat v Schrepfer* and *Butters v Mncora*.

<sup>42</sup> See *Butters v Mncora*.

into account in the determination of what property needs to be shared. Furthermore he submitted, what must also be considered in the division of the partnership assets is that throughout, the respondent had conducted her own separate business ventures on the side. The argument was that the respondent had her own separate properties and could thus not lay claim to a stake in the rest of the assets which belonged to the family on his maternal side.

[78] It is worth repeating that the High Court had found the appellant to be an unreliable witness. The High Court found him to have been argumentative, evasive and deliberately convoluted so as to confuse the understanding of issues relating to the relevant facts in the case. His evidence was generally found to be inconsistent and peppered with untruths. It is on that basis that the trial court made the credibility findings against him.

[79] Unless an irregularity or a misdirection by the trial court is claimed and shown, which was not the case here, an appeal court may not unsettle its credibility findings as findings of that nature fall primarily within the purview of the trial court. In other words, where no irregularities or misdirection are present, a court on appeal may not reject credibility findings of the trial court and must proceed on the factual basis as found by the trial court.<sup>43</sup>

[80] Similarly, this court will not disturb the credibility findings the High Court made against the appellant. As a result, this appeal will proceed with the consideration of the division of the assets on the basis of the conclusion that a

---

<sup>43</sup> *Absalom v S* (CA 112/2016) [2017] NAHCMD 251 (04 September 2017). Also see *Carneiro v S* (425/18) [2019] ZASCA 45; 2019 (1) SACR 675 (SCA) (29 March 2019).

universal partnership existed between the parties, entitling them each to a share in its property accumulated over the years of their lives together.

[81] It is common cause that the respondent herself had business ventures regarded as her own, including a sewing business. However, following TN's testimony that if the respondent does not benefit from the property of the union, she will be left destitute, an assertion which was corroborated by the respondent herself and has not been refuted, there is a need to deal with this minor matter to avoid leaving it hanging. It was in *Butters v Mncora*<sup>44</sup> where the court held that it does not take a matter any further if a cohabiting partner who claims a share in the other partner's estate bases a claim to a share merely on an assertion that they will be left destitute, without any concrete evidence showing that the partner is entitled to a share in the assets of the universal partnership. That, held the learned judge, is a natural consequence of a cohabitation where there is no agreement to share, as is the case in this matter.

[82] In this case however, the respondent did not rely solely on the notion that she would be left destitute should she not benefit from the partnership property. She has shown that her claim and entitlement to a share are firmly based on the substantial contributions she had made towards the property of the universal partnership over the 37 years of her life with the appellant. Further, even if the respondent had her own business enterprises still running that would not detract from her entitlement to share in the property on which the universal partnership is based<sup>45</sup>. For the above reasons, the respondent has a right to share in the

---

<sup>44</sup> 2012 (4) SA 1 (SCA).

<sup>45</sup> See *Pezzuto v Dreyer* 1992 (3) SA 379 (A); *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) and *Mühlmann v Mühlmann* 1984 (3) SA 102 (A).

property of the universal partnership. The extent to which each will share in the universal partnership property shall now receive this court's attention.

The extent of each party's share

[83] Having found in favour of the existence of a universal partnership and the right of both parties to share in its assets the extent to which each party is entitled to share must be determined. In particular, this court must determine whether the High Court was correct in its decision that, based on 'the need to achieve equity' the parties were each entitled to a 50% share in all the assets of the universal partnership. In the event that it is found that the parties were not entitled to a 50% share of the whole of the property of the universal partnership, then this court will now proceed to determine what the share of each of the parties should be.

[84] The extent to which a party may share in the property of a universal partnership on its termination has been held to be a question of fact.<sup>46</sup> In this court, the appellant submitted that even if the respondent had proved that a universal partnership tacitly existed, the High Court erred in ordering that the assets of the partnership must be divided in equal shares. He further contended that without evidence of the respondent's contribution it would be difficult to determine the share she is entitled to.<sup>47</sup> The appellant makes these contentions notwithstanding that he did not refute respondent's submissions of her substantial contributions in managing the business and the well-being of their unique family and household as shown above.

---

<sup>46</sup> *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 960-961.

<sup>47</sup> *LM v JM & others* 2016 (2) NR 603 (HC) para [14].

[85] The appellant further submitted that the respondent also argued that she could not indicate what percentage of the estate she is entitled to as she had no knowledge and/or was not familiar with some of the business enterprises he was in control of and or owned jointly with third parties. That was indeed so. However, the fact that the respondent was unable to indicate with precision or at all what share of the partnership property she is entitled to is not unreasonable considering that the appellant did not share the information with her. Further, the fact that the respondent does not have the necessary information on and/or control over assets that form part of the property of the union is not dispositive of her share in those assets as the extent of each party's share is objectively determined based on the facts of the case. Furthermore, where the appellant is entitled to a portion of the assets of a joint venture with third parties, those assets will form part of the property of the union. Therefore, the inability of the respondent to indicate the size of her share in the universal partnership property is no reason for denying her the right to benefit from the estate unless there is evidence that she had agreed to forfeit her share in the assets concerned.<sup>48</sup> Here, there is no such evidence.

[86] In *S v S*<sup>49</sup> the court held that a universal partnership has traits similar to those of a marriage in community of property where parties automatically share in the estate of the marriage. In other words, the division of the property of a universal partnership is also an invariable consequence of the termination of its existence. The appellant acknowledged as much. Thus, the parties in a marriage in community of property become co-owners of all property they had accumulated during the subsistence of the marriage, its assets and its liabilities. However,

---

<sup>48</sup> See *Robson v Theron* 1978 (1) SA 841 (A).

<sup>49</sup> [2018] 3 All SA 662 (WCC); 2018 (6) SA 528 (WCC) (27 June 2018). Also see *Robson v Theron* 1978 (1) SA 841 (A).

unlike a marriage in community of property, the parties in a universal partnership do not necessarily divide the partnership property in equal shares. The extent of their contribution to the partnership property determines the extent of their share.

[87] It is trite, the court *a quo* further held, that the relief a party may seek when a marriage in community of property terminates is either an order for the division of the joint estate or an order for forfeiture of benefits of the marriage. The court concluded that these are also fundamental legal principles that apply in the advancement of a joint household of life partners.

[88] If there is no agreement as to the extent of the share of each party in the division of the assets of the universal partnership property at termination, a duty is placed on the court to apply its discretion, ensuring that each party acquires a fair or equitable share of the partnership assets. A party may also show or declare a willingness to forfeit any of the assets of the universal partnership and the court, in exercising its discretion, must take that into account when realising an equitable division.<sup>50</sup>

[89] Besides, the appellant himself made the submission that the respondent was not fully apprised or had no knowledge at all of specific businesses which were in his knowledge and total control. Even if that be the case, those assets are nevertheless the assets of the universal partnership in which both parties must share.<sup>51</sup> This court, in exercising its discretion to effect an equitable division of the

---

<sup>50</sup> *S v S; Rob v Theron supra.*

<sup>51</sup> *S v S; Rob v Theron supra.*

partnership property must include that property as also belonging to the universal partnership property.<sup>52</sup>

[90] Where the contributions of the parties to the universal partnership property were not made in strict measurable terms as in this case, the determination of the share of each party will more often than not become difficult.<sup>53</sup> It is in that regard that the relevant circumstances of the case holistically considered, will stand the court in good stead. A determination takes account of the contributions made by each of the parties as a basic consideration.<sup>54</sup> The contributions, it is worth repeating, need not be in pecuniary terms. They may be in the form of a party's labour, time or skills.

[91] In *V (aka L) De Wet, NO*<sup>55</sup> the court recognised that in Roman-Dutch Law there is no presumption of equality of shares in a partnership but that the share of each partner is determined by the proportion of her or his contributions. However, the court held that, where it is impractical or impossible to determine the proportion of contribution a partner made or whether one partner had contributed more than the other, the parties would be entitled to share the partnership property in equal shares. Further, where a substantial period of time had passed since the dissolution of the universal partnership, the court may adopt a broad and equitable approach, determining that a division of assets as at the date of dissolution had become impractical, if not impossible. In that case, an order for an equal share between the parties would be an equitable order.<sup>56</sup>

---

<sup>52</sup> *Hanel v Hanel* 1962 (3) SA 952 (C) at 625H.

<sup>53</sup> *Isaacs v Isaacs* 1949 (1) SA 952 (C).

<sup>54</sup> See *Isaacs v Isaacs*, also see *Fink v Fink & another* (1945, W.L.D. 226).

<sup>55</sup> 1953 (1) SA 612 (O) at 615F.

<sup>56</sup> *V (aka L) De Wet, NO* supra.

[92] In this matter, there is ample evidence of substantial contributions made by both parties for the benefit of the union as has been shown. However, it is also common cause that appellant had owned property in the form of business entities he had owned before the respondent joined him in 1975. That property, as already indicated, consisted of a shop in Ruacana, 'a business in Oshakati and a trucking business'. Although a party may not claim that property brought into the universal partnership must be returned on termination,<sup>57</sup> respondent confirmed that she does not claim any of those assets for the reason contended by the appellant. On that basis it is reasonable for the appellant to retain personal ownership of those enterprises. The respondent however, insists that her own contributions in making a success of these very enterprises during the subsistence of the union must count in her favour. I agree. Besides, those contentions of the respondent were not refuted by the appellant. It is thus for this court, applying its discretion, to consider the benefit to those business enterprises of the respondent's labour, skills, business acumen, extra-ordinary commitment, and sacrifice.<sup>58</sup> While the sole ownership of the appellant of the business entities he had owned when the respondent joined him in 1975 must be recognised, the contributions of the respondent in their exceptional profitability must be taken into account when the portion of the share of each party in the universal partnership property is considered.

---

<sup>57</sup> *S v S* [2018] 3 All SA 662 (WCC); 2018 (6) SA 528 (WCC) (27 June 2018).

<sup>58</sup> *Butters v Mncora* 2012 (4) SA 1 (SCA) and *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) and *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA).



[93] Therefore, the respondent's contributions of her skills, business acumen, her time and effort, taking care of their unique and extra-ordinarily large household while the appellant could focus on his business travels throughout the years, enhancing and/or growing their business profile and family property are contributions that she made to the universal partnership property and those cannot be disregarded<sup>59</sup>. So too must the appellant's contributions as articulated in this judgment. In other words, the contributions of both parties in accumulating their vast wealth for their joint benefit over a span of more than three decades must be shared equitably between them.

[94] Indeed, at termination of a universal partnership it is ideal that parties agree as to the extent of the division of the partnership assets. Equitable agreements and concessions expressly or tacitly made during the subsistence of the universal partnership regarding the allocation and/or ownership of specific assets, as determined above are therefore appropriate questions determined in the discretion of this court.<sup>60</sup>

[95] Although that discretion is wide, it must be exercised in the context of the circumstances of this case. Further, the division of the assets must be an equitable one.<sup>61</sup>

[96] In *Butters v Mncora* the court held that:

'It can be accepted that the plaintiff's contribution to the commercial undertaking conducted by the defendant was significant. Yet she spent all her time, effort and

---

<sup>59</sup> See *Butters v Mncora* supra and *Isaacs v Isaacs* 1949 (1) SA 952 (C).

<sup>60</sup> *Supra*.

<sup>61</sup> See *Butters v Mncora* 2012 (4) SA 1 (SCA), *Isaacs v Isaacs* 1949 (1) SA 952 (C) and *Mühlmann v Mühlmann* 1984 (3) SA 102 (A).

energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children. 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 could hardly be denied.<sup>162</sup>

The court held further that:

‘In this light I must admit some sense of relief that, freed from the restraints of regarding universal partnerships as being confined to commercial enterprises, we are now able to evaluate the contribution of those in the position of the plaintiff in its proper perspective. This also accords with a greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families.’<sup>163</sup>

Granting the application, the court ordered that Ms Mncora was entitled to 30% of the net proceeds of the partnership property.

[97] In *Isaacs v Isaacs*,<sup>64</sup> a case which as early as 1949 indeed seemed to have presaged *Butters*, the wife in a 28 year-old religious marriage, in which she and her husband had established and operated a successful business in which she had played a significant role in addition to caring for the home and their 10 children, similar to the case at hand. The court held that a universal partnership had been tacitly shown to exist, considering the contributions of the wife were so significant ‘. . . to provide the necessities of life and such a measure of comfort and

---

<sup>62</sup> *Butters v Mncora* supra para [19].

<sup>63</sup> *Butters v Mncora* para [22].

<sup>64</sup> *Isaacs v Isaacs* 1949 (1) SA 952 (C).

security as could be obtained for the common welfare in the home and the upbringing and education of their children'.<sup>65</sup>

The court further held:

'... it could never have been their intention that the profits of their ventures should accrue to the man only'.<sup>66</sup>

The court ordered that the appellant is entitled to a 50% share in the property of the universal partnership.

[98] Similarly, the appellant and the respondent in the case at hand collaborated and cooperated with each other throughout, the respondent managing their household and local business entities while the appellant, travelling extensively, continued to expand their business portfolio. As the appellant engaged in his business travels the respondent was not only the main household manager. She went way beyond the traditional home-maker role, playing a significant role in managing and growing mostly their local business enterprises with utmost loyalty and dedication. Against that background, it could hardly have been intended by the parties that at termination of their union the respondent will be excluded from sharing in the estate of their union.<sup>67</sup>

[99] Having found that there existed a universal partnership tacitly agreed to between the appellant and the respondent and that both parties have a right to share in the assets of its property, first, the assets decided in this judgment to

---

<sup>65</sup> *Isaacs v Isaacs* at 961.

<sup>66</sup> *Isaacs v Isaacs* at 961.

<sup>67</sup> *Isaacs v Isaacs supra*.

belong to the appellant and the respondent respectively must be distinguished from the rest of the property which must in this judgment be regarded as the universal partnership property.

[100] The appellant, as already indicated, has shown that he had owned a number of business entities before the respondent joined him in 1975, a contention not opposed by the respondent. Specifically, these enterprises are apparently still up and running. The ownership of those business entities must remain with him. If the trucking business the appellant claims he already had before the respondent joined him is the same enterprise listed under the business enterprises appellant claimed before this court that respondent had no knowledge of, that trucking business shall remain as his own asset. If otherwise, it shall as already explained, fall within what for purposes of this judgment is the universal partnership property. However, the respondent's contributions to the success of these enterprises during the subsistence of their union must be a consideration that counts in her favour when the respondent's share in the partnership property is determined.

[101] Further, the unrefuted evidence by respondent is that, prior to Namibia's Independence, the appellant had a longstanding lease agreement for business premises with the government. However, that lease no longer exists. When it was cancelled, the parties used the proceeds to fund the construction of a shopping complex, a fuel service station, a rental accommodation, and a shopping centre at Onesi. That lease, in my view, was a substantial contribution made by the appellant to the estate of the universal partnership. The business entities acquired with the funds from the lease and developed by the common efforts of the

appellant and the respondent must form part of the universal partnership property. Those acquisitions, which must have benefitted substantially from the respondent's time, labour, skill and business acumen, must also be regarded as a substantial contribution of the appellant to the property of the universal partnership.<sup>68</sup> Thus, both parties deserve a share in that property.

[102] The separate assets belonging to the parties respectively as determined above must be distinguished from the rest of the property of the estate of the union and shall, as already determined in this judgment be regarded as the property of the universal partnership which must be equitably shared between the appellant and the respondent. Similarly, in *Khabeer v Sene & others*<sup>69</sup> the court separated in its order property which the parties individually owned from the property belonging to the universal partnership and in which both parties were entitled to a share.

[103] The evidence in this case shows that both parties were exceptionally hardworking business people, each so in their own right. In their individual roles and in their roles as a couple during the subsistence of their union, they operated collaboratively and in cooperation with each other for their joint benefit and the benefit of their large and unique household. Although the appellant might have contributed what may be regarded as the hard and tangible capital of their business, in my view, the respondent contributed substantially to the success of the business through her time, energy, business acumen and skills, her exceptional dedication in the management of her assumed or allocated business tasks and in the management of the home and their unique household. She

---

<sup>68</sup> See *Butters v Mncora* 2012 (4) SA 1 (SCA), *Isaacs v Isaacs* 1949 (1) SA 952 (C) and *Mühlmann v Mühlmann* 1984 (3) SA 102 (A).

<sup>69</sup> *Khabeer v Sene & others* (2006/56669) [2008] ZAGPHC 453 (22 August 2008).

therefore also contributed substantially to the accumulation of their vast wealth. That contribution, relative to the contributions of the appellant, must not be underestimated. While the appellant was engaged in his business travels, the respondent would manage the local business enterprises, occasionally visiting nearby out-of-town undertakings to attend to the necessary management duties there. When they were both at home, they worked together, each fulfilling their allocated tasks with utmost trust, cashing up together and the respondent consistently ensuring that the daily takings are promptly deposited in the bank accounts of the business enterprises. Together they made a formidable team, succeeding as they did in their business and in managing their unique household to the extent they did.

[104] The respondent's contributions in my view went way beyond the supportive role traditionally ascribed to women in similar circumstances. Therefore, not only is she entitled to benefit from her exceptional household organisational skills, she deserves to benefit from her equally exceptional business acumen from which the universal partnership gained abundantly. It is in that context unimaginable that the appellant would have wanted to exclude the respondent from benefitting in the assets of the universal partnership. The property they accumulated together, the collaborative industry and cooperation in advancing the interests of the business, their union and family throughout was for their joint benefit and the benefit of their family. In view of the absence of any agreement between the parties regarding what would be an equitable share for each of them in the assets of the universal partnership, this court must use its wide discretion to give effect to the principle

that the share of a party in the property of the universal partnership at its termination is based on the portion of the contributions made.<sup>70</sup>

[105] However, since *Schrepfer v Ponelat* it is trite that where it is not possible to determine the proportion of the contributions with certainty, a court will order an equal share of the property even where the contributions were not equal.<sup>71</sup> In the context of the facts and circumstances of this case, it is not only difficult, it is also impossible to determine that the respondent contributed more than the appellant considering the substantial but immeasurable contributions made by her relative to the more tangible contributions of the appellant. In the result, it is just, equitable and fair that the appellant and the respondent share equally in what this judgment determined was the property of the universal partnership.<sup>72</sup>

[106] The High Court had concluded that a universal partnership had come into existence between the appellant and the respondent, a decision confirmed in this judgment. The court there did not make a distinction between the personal assets of the individual parties and what this court has determined was the property of the universal partnership. Based on the need for an equitable division the High Court simply held that the parties shall share equally in the property of the universal partnership as a whole. Having distinguished the personal assets of the parties from the universal partnership property, and further holding that only the universal partnership property shall be shared between the appellant and the respondent, for the foregoing reasons, the respondent and the appellant are each deserving

---

<sup>70</sup> *Isaacs v Isaacs* 1949 (1) SA 952 (C).

<sup>71</sup> *Isaacs v Isaacs supra*.

<sup>72</sup> See *Isaacs v Isaacs supra* and *Robson v Theron* 1978 (1) SA 841 at 855C. Also see *V v M* (19398/2014) [2016] ZAGPPHC 652 (25 July 2016), where this idea was rejected based on the facts of the case there.

of and shall receive a 50% share of what has in this judgment been determined to be the universal partnership property.

[107] This court therefore confirms the High Court's decision that all the requirements of the existence of a universal partnership having been met, tacitly, a universal partnership has on a balance of probabilities indeed come into existence based on the facts and surrounding circumstances of this case. I am satisfied that it is reasonable, just and fair that certain specified assets shown to be individually owned by the parties be separated from the rest of the universal partnership property. The ownership of those separate assets thus remain with the individual parties respectively.

[108] In the absence of an agreement between the parties as to the extent of the share of each party in the division of the universal partnership property and in the context of the notion that no one shall be judge in their own cause, it is necessary to order, as the respondent had prayed, the appointment of a receiver who shall preside over the equal division of what in this judgment is considered to be the property of the universal partnership. The receiver shall determine and decide the collection, realisation and division of the common universal partnership property.<sup>73</sup>

[109] In *Brighton v Clift (2)*<sup>74</sup> when defining the role and power of the court-appointed liquidator to achieve the equitable division of the property of a commercial partnership, the court held:

---

<sup>73</sup> See *Revill v Revill* 1969 (1) CPD 325; *Van Onselen NO v Kgengewenyane* 1997(2) SA 423(B); *Morar NO v Akoo* (498/10) [2011] ZASCA 130 (15 September 2011).

<sup>74</sup> 1971 (2) SA 191 (R) at 193B-D.



'With regard to the powers to be conferred on the liquidator, it seems to me that it is not this Court's function to act as a liquidator and to anticipate problems which may present themselves to the liquidator at a later stage. Doubtless these will arise in any liquidation, but they are matters for the liquidator to decide and, in doing so he may seek the parties' concurrence in any course he takes. Failing their agreement, his decisions are open to objection by either party with recourse to the Courts'.

[110] The court in its order consequently appointed the liquidator to wind up the partnership, realise its assets, collect the debts due to it, prepare a final account and effect the division of the partnership assets between the partners once the debts and costs of the liquidation have been settled. In the absence of an agreement between the parties as to the equitable sharing of the property of their union, there has been no reason shown why this court in exercising its discretion should not vest the receiver with a similar role and power of the liquidator as did the court in *Brighton v Cliff*.<sup>75</sup>

### Costs

[111] Although both parties had initially prayed for costs, the appellant subsequently, in the oral hearing before this court, withdrew his prayer. The respondent who had claimed costs for one instructing and one instructed legal practitioner must therefore be awarded her costs without more.

### The order

[112] The order of the High Court is set aside and replaced with the following order:

---

<sup>75</sup> See *Robson v Theron* 1978 (1) SA 841 (A); and *Isaacs v Isaacs* 1949 (1) SA 952 (C) 958.

- (a) A universal partnership had come into existence between the appellant and the respondent from the date of their cohabitation in 1976.
- (b) The universal partnership between the appellant and the respondent is dissolved as from the date of this order.
- (c) The specific assets identified in this judgment as such shall fall within the personal ownership of the individual parties.
- (d) The property of the universal partnership shall exclude the assets determined in paragraph (c) of this order.
- (e) The sole ownership in the property, to wit Erf 353 Oshakati is confirmed by this order to vest in the respondent from the date of this order.
- (f) The Director of the Law Society or her representative is hereby appointed receiver from the date of this order and shall within 90 days of such date effect the equal division of the universal partnership property determined in paragraph (d) of this order.
- (g) The receiver shall determine an equitable and reasonable process to ensure the respondent's access to Erf 353 Oshakati including that the transfer of sole ownership in the property is effected forthwith.

- (h) The receiver shall make an award effecting the equal division of the universal partnership property and submit such award to the High Court within 14 days of the date of the award for confirmation as an order of court.
- (i) The costs of the receiver shall be on the account of the universal partnership property.
- (j) Costs in this matter, occasioned by one instructing and one instructed legal practitioner are granted to the respondent.

---

**MOKGORO AJA**

---

**DAMASEB DCJ**

---

**CHOMBA AJA**

## APPEARANCES

## APPELLANT:

I V Maleka SC, (with him S

Namandje and E Nekwaya)

Instructed by Sisa Namandje & Co.  
Inc.

## RESPONDENT:

J Maritz, SC (with him A H G Denk)

Instructed by Theunissen, Louw &  
Partners