

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO.: 33933/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

In the matter between

T G (NEE M)

PLAINTIFF

And

T V

DEFENDANT

JUDGMENT

VAN DER WESTHUIZEN, A J

[1] The plaintiff instituted action proceedings against the defendant in terms whereof plaintiff sought a decree of divorce and a declaration of the existence of a universal partnership wherein the parties each hold 50% and ancillary relief.

- [2] The defendant opposed the action. The defendant filed a plea and refrained from filing a counterclaim. In taking the aforesaid steps, the defendant was remiss and did not keep to the prescribed time periods. A notice of bar was served upon the defendant for filing his plea to the plaintiff's particulars of claim after which the plea was served and filed.
- [3] Pleadings having closed, the parties exchanged the required notices relating to discovery. On 25 May 2016, the plaintiff launched an application against the defendant to compel further and better discovery. An order compelling the defendant to file further and better discovery was granted on 4 November 2016. The defendant did not comply with the order of 4 November 2016 despite being requested to do so by the plaintiff's attorneys. No response to that request was forthcoming.
- [4] On 2 December 2016 the plaintiff launched an application to strike out the defendant's defence. That application was served upon the defendant's attorneys on 5 December 2016. The said application was heard on 21 December 2016 and an order striking out the defendant's defence was granted on that day.
- [5] The defendant applied for a rescission of the order striking out his defence. The plaintiff was compelled to launch an application in terms of Rule 30 in respect of the defendant's rescission application, the latter being defective. The plaintiff's Rule 30 application was heard on 22 February 2017 and granted on 23 February 2017.
- [6] On 12 February 2016 the plaintiff applied for a trial date of the action and a trial date was set for 22 February 2017. At the trial roll call the aforementioned Rule 30 was argued.
- [7] The matter was allocated to me on 23 February 2017. Due to the fact that the defendant's defence was struck out and the Rule 30 application granted, the defendant has no right to participate further in

these proceedings. After hearing evidence, counsel appearing on behalf of the plaintiff requested leave to file written heads of argument in particular on the issue of the existence of a universal partnership between the parties. I granted that request and consequently reserved judgment.

- [8] The parties were married according to customary rights in August 2004. Thereafter, during December 2004, the parties entered into a civil marriage, out of community of property with the exclusion of the accrual. One minor child was born of the relationship between the parties. At the time that the parties entered into the customary union and the civil marriage, both had minor children from previous relationships with other partners.
- [9] The parties separated and the plaintiff left the common home on 1 May 2014. The plaintiff testified in respect of the irretrievable breakdown of the marriage. I do not intend dealing with that evidence and I am satisfied that the marriage relationship between the parties has irretrievably broken down. The plaintiff is entitled to a decree of divorce.
- [10] The only issue that remains is that relating to the question whether a universal partnership existed between the parties. The issues pertaining to the minor child born of the marriage is not in dispute as the parties have come to an agreement in that regard. That agreement is contained in the order I intend granting.
- [11] In respect of the question of the existence of a universal partnership, the plaintiff testified as follows:
 - (a) It was understood by the parties that they would run their affairs as one and as a joint estate. The purpose of the marriage out of community and exclusion of the accrual system was purely to protect their respective business interests;

- (b) The plaintiff paid substantial amounts of money into the joint estate, these include:
 - (i) The proceeds of the sale of her own property that she held in her name and acquired prior to the parties meeting;
 - (ii) The school fees of the children from other relationships and that of their own;
 - (iii) Purchasing furniture for the communal home;
 - (iv) Maintenance and repair of the communal home;
 - (v) Holidays for the family and the like;
 - (vi) The plaintiff paid for all the expenses of the communal home, but for the monthly bond repayments, although the proceeds of the plaintiff's own property was deposited into the bond account as recorded above.
- (c) The plaintiff also provided furniture to the communal home that she acquired prior the meeting of the parties. Some of that furniture was provided to the homestead on a farm that the defendant acquired subsequent to the marriage.
- (d) The communal home was acquired jointly. By agreement, the parties would sell their respective immovable property and jointly purchase a communal home. Although it was registered in the defendant's name only, the intention was to have it registered in both of the parties' names. The plaintiff's property took longer to be disposed of and affected her obtaining a bond in her name.

The proceeds of the sale of the plaintiff's property were eventually deposited into the bond over the communal property.

- (e) The parties never discussed the issue of reimbursement of monies paid by either on behalf of the other. It was accepted by the parties that they would pool their resources.
- (f) Joint decisions were taken whenever the plaintiff or the defendant considered undertaking ventures. This included the purchasing of motor vehicles when the need arose.
- (g) The defendant holds interest in 31 entities, and wherein he is a director and shareholder and the sole member of 4.
- (h) The plaintiff referred to various e-mails from the defendant to plaintiff that indicate that the defendant himself considered their relationship as a universal partnership with a 50/50 shareholding.

[12] From the foregoing, the plaintiff claims that a universal partnership, and more specifically a *universorum bonorum*, was entered into tacitly.¹

[13] Counsel for plaintiff submitted that the evidence of the plaintiff and the documentation relied upon, confirm that throughout the parties' intentions were to obtain/purchase/acquire property and as a joint estate. The contrary was not shown, nor could it be inferred.²

[14] It is trite that the *essentialia* of a partnership requires:³

- (a) A contribution by both parties to a joint venture either by skill, labour or money;

¹ See *Ally v Dinath* 1984(2) SA 451 (T); see also *Butters v Mncora* 2012(4) SA 1 (SCA)

² *Festus v Worcester Municipality* 1945 CPD 186; see also *Butters v Mncora*, *supra*

³ *Purdon v Muller* 1961(2) SA 211 (A); *Pezzuto v Dreyer* 1992(3) SA 379 (A)

- (b) The business should be carried out for the joint benefit of the parties;
- (c) The object of the joint venture should be to make a profit;
- (d) The contract should be a legitimate one.

The foregoing *essentialia* equally apply to a universal partnership.⁴

[15] In my view, the plaintiff has proven compliance with the required *essentialia* for the existence of a universal partnership, and in particular a *universorum bonorum*. That partnership ended when the parties separated and the plaintiff left the common home on 1 May 2014.

[16] In the absence of evidence to the contrary, the plaintiff has proven that each of the parties hold a 50% share in the partnership.

[17] There remains the issue of costs. The plaintiff seeks a punitive cost order against the defendant. The punitive cost order is premised upon the defendant's actions during the period since issuing of the action for divorce and until the trial was finally heard and further pertaining to the various interlocutories that were brought. I am of the view that in each of those applications the appropriate cost order was granted and a punitive cost order at this stage would result in unfairness towards the defendant. The defendant's adverse actions have already been dealt with in respect of appropriate cost orders.

[18] It follows that the plaintiff is entitled to an order declaring that a universal partnership existed between the parties and that each holds a 50% share therein.

⁴ See *Mulhmann v Mulhmann* 1981(4) SA 632 (W); see also *Kritzinger v Kritzinger* 1989(1) SA 67 (A)

I grant the following order:

- (a) A decree of divorce;
- (b) It is declared that a universal partnership exists between the parties and that the parties each hold a 50% share in such partnership;
- (c) The partnership is dissolved with effect from 1 May 2014;
- (d) Failing an agreement between the parties within a period of 2 (two) months (or such longer period as the parties may in writing agree to) the nett benefit accruing to the plaintiff from the universal partnership and the manner and the date of delivery and payment of such benefit to the plaintiff: -
 - (i) that a liquidator be appointed to liquidate the partnership;
 - (ii) unless the parties agree in writing on the appointment of a liquidator, the liquidator shall be appointed at the request of either of the parties by the Chairperson of the Johannesburg Bar;
 - (iii) the parties shall within 1 (one) month of the appointment of the liquidator deliver to the liquidator and to each other a statement of his or her assets and liabilities as at 1 May 2014 duly supported by such available documentation and records as are necessary to establish the extent of such assets and liabilities;
 - (iv) the liquidator may call on either party *mero motu* or at the request of one of them to deliver further documents or records to the liquidator and to the other party;

- (v) the liquidator shall determine a date for the debatement of the statements referred to in para. (iii) above and shall preside over such debatement;
 - (vi) the liquidator shall within 1 (one) month of the conclusion of the debatement make an award in writing determining the assets and the liabilities of the universal partnership and dividing the nett assets by awarding 50% to the plaintiff and 50% to the defendant;
 - (vii) the parties shall give effect to any award made by the liquidator within such period as the liquidator may direct in writing;
 - (viii) the costs of the liquidator shall be borne by the parties equally;
- (e) It would be in the best interest of the minor child born of the marriage relationship between the parties that the plaintiff shall have sole parental responsibilities and rights with regard to the care as well as guardianship of the said minor child as envisaged by the provisions of s 18 of the Children's Act, Act 38 of 2005, (the Act) and that all the defendant's parental responsibilities and rights in respect of the said minor child as envisaged by the provisions of s 18 and s 20 of the Act be terminated in terms of s 28 of the Act and that the plaintiff therefore be awarded the right to provide the primary care and the primary place of residence for the said minor child;
- (f) That specific parental responsibilities and rights as set out in s 18(2)(b) and s 18(2)(d) of the Act, and in particular the right to maintain contact with the said minor child and the right to contribute to the maintenance of the said minor child be awarded to the defendant;

- (g) That the defendant contributes to the maintenance of the said minor child as set out hereunder;
- (i) The defendant is ordered to pay maintenance for the said minor child in the amount of R6 000.00 (six thousand rand) per month until such time as the said minor child becomes self-supporting and independent, to increase at the rate of 10% (ten percent) per annum on the anniversary of the divorce order being granted;
 - (ii) The defendant is ordered in addition to the foregoing, to retain the said minor child on his present medical aid scheme or any other medical aid scheme with similar benefits and the defendant shall be liable for the monthly instalments in respect of same. In addition to the aforesaid, the defendant is ordered to pay for any reasonable and necessary medical expenses, hospital, dental, surgical, optometric, ophthalmic, pharmaceutical, nursing, orthodontic and therapeutic costs in respect of the said minor child not covered by such medical aid scheme;
 - (iii) The defendant is ordered to pay the school fees, school uniforms, books and stationery and other related schooling costs in respect of the said minor child, including tertiary education subject to the said minor child showing an aptitude in terms of the proposed tertiary education;
 - (iv) The defendant, in addition to the foregoing, is ordered to pay all the other school expenditure and extra mural activities including equipment required and other related schooling costs of the said minor child not listed above.

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

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Plaintiff: Ms A E Willcock
Instructed by: Jurgens Bekker Attorneys

Date of hearing: 23 February 2017

Date of judgment: 03 March 2017