IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 9236/2014

In the matter between:

L [. . .] M [. . .] **Plaintiff**

and

R [. . .] K [. . .] **Defendant**

JUDGMENT DELIVERED ELECTRONICALLY: WEDNESDAY, 19 JANUARY 2022

NZIWENI AJ

Introduction

[1] The Plaintiff and the Defendant (the parties) started a romantic relationship around 1996 and they lived in the same house together until 2013. Three children were born from the relationship. The parties' long-term relationship never resulted into a marriage. In 2013, the parties' relationship ended. Pursuant to the breakdown of the relationship, the Plaintiff moved out of the common household, and stayed in a flatlet situated on the same plot with the dwelling. In 2014, the Plaintiff was evicted from the premises where the parties stayed.

[2] In this action; the Plaintiff claims that during the subsistence of her relationship with the Defendant, they entered into a tacit universal partnership. Hence, she commenced this action to seek a declaration that a tacit universal partnership was concluded between herself and the Defendant, during the existence of their relationship.

[3] Through this action the Plaintiff is seeking to prove the existence of a universal partnership between herself and the Defendant in order to claim entitlement to an equal share in the division of assets; as at the date of the dissolution of the relationship.

[4] The Plaintiff is seeking a declaratory order for the following reliefs:

(a) Declaring that a universal partnership existed between herself and the Defendant in respect of all properties and monies acquired by them during the period of 1996 to 2013.
(b) Declaring Plaintiff to have a 50% share of such partnership.
(c) Declaring that the said partnership was dissolved with effect from September 2013.

[5] The Defendant on the other hand, strongly denies and contests the existence of a universal partnership during the subsistence of their relationship. I understand the Defendant to mean that, when the relationship finally broke down between himself and the Plaintiff, anything that a party bought or brought into their relationship belongs to that party who brought it, to keep. It is also the Defendant's contention that during

the subsistence of the relationship between himself and the Plaintiff, he was the one who was in a financially strong position.

[6] This action centres around the issue of whether the evidence presented in this case establishes a tacit universal partnership as claimed by the Plaintiff. The burden of proving existence of the partnership rests with the Plaintiff.

In general

[7] Currently, there is no statute in South Africa that regulates the relationships between cohabitees.

[8] The institution of a formal, licenced marriage is universal. Formal marriage is a much-recognised legal union between couples. Different societies recognises and treasure the tradition or institution of marriage.

[9] As is generally known, when couples get married, certain legalities such as financial advantages, protection and entitlements can come with marriage. Certified marriage also gives couples a certain legal status.

[10] It is an undoubted important fact that the South African jurisprudence, through court decisions, took a bold step of recognising, and treating universal partnerships the same manner as the traditional marriages. See *Bwanya v Master of the High*

Court, Cape Town and Others [2021] ZACC 51, at paragraphs 53-57and 67. Consequently, the moment a universal partnership is proven to be in existence between the parties, it becomes a legal valid arrangement, as it is the case with a traditional marriage.

[11] At the same time, it is now well settled that a universal partnership may confer the same legal rights and responsibilities conferred in a traditional marriage. The obvious reason for this is that, a universal partnership accords formal legal recognition to partners in a co-habitation relationship.

[12] Due to the fully fledged recognition afforded to the arrangement of universal partnerships in South African law; a universal partnership thus exists and runs in parallel to the institution of formal marriage as it also affords some form of legal protection to partners who would otherwise be left in the cold and vulnerable; because of not having a marriage certificate. On the basis of the recognition accorded to universal partnerships, at times it also comes to the assistance of unmarried partners who may find themselves to be financially dependent on their partners.

[13] Therefore, besides the formal marriage, couples may also elect to enter into a universal partnership, if they do not intend to get formally married to one another. Though a universal partnership does not involve any type of solemnisation, in a South African context, it remains the most formidable alternative to the traditional marriage. *See Banywa's case supra*.

[14] However, the existence of a universal partnership is not always easily discernible or certain as a formal traditional marriage. Even more so, in situations as

in the present case where the parties did not reduce their intentions into a written agreement. I pause to mention that in the *Banywa* judgment, the Constitutional Court succinctly opined that the difficulties attendant to proving permanent life partnerships are not insuperable.

[15] As pointed out in the *Banywa* matter, it is not possible to overlook the fact that a party may not want to get married in order to avoid the obligations that come with formalised marriage. Therefore, as it usually happens, if there is no existing contract concluded between the parties to establish a universal partnership, the Court, as in this instance, would be faced with a momentous task of determining its existence.

The Evidence

[16] The Plaintiff in her endeavours to discharge the onus of proof to establish that a universal partnership existed between herself and the Defendant; testified and called her mother as a witness. On behalf of the Defendant, it was only the Defendant who testified.

[17] The Plaintiff testified that she was born in February 1973. She met the Defendant in December 1995, when she was 23 years old and the Defendant was 33 years old at the time. They were in a romantic relationship they lived like husband, and wife, and their relationship resembled a marriage.

[18] When the relationship started she lived in an apartment and the Defendant resided in a one bedroom rented tiny flat. The Defendant kept on pushing her to move

in with him and in 1996; she decided to move in with him in his flat. They stayed at that flat of the Defendant for about 14 months. When she moved in with him, the Defendant owned a television set, a mattress, two sets of bed linen, a microwave oven and a motor vehicle with a R5000, 00 instalment per month. On the other hand, she moved in with a washing machine, lounge suite, bed linen, kitchenware and a motor vehicle for which she paid an instalment of R700, 00 per month.

[19] Within four months of them moving together they were pregnant with their first-born. They did not plan the pregnancy. Whilst they stayed together, three children were born from their relationship. The first-born was born on 26 January 1998, the second child was born on 2 November 2001 and the last-born was born on the 14 August 2009.

[20] It is her testimony that she and the Defendant lived together as husband and wife for 17 years. They were also engaged in those years, and she even bought a wedding dress. When they had talks about getting married, the Defendant would tell her that she would receive 50 percent when they got married.

[21] From the beginning of their relationship, the Defendant would tell her the following:

"*It is all in one pot my baby, I will never leave you in the cold*". She then concluded that there was a joint estate between her and the Defendant. She held this view because whenever she handed over monies to the Defendant and complained,

enquiring about her interests as everything was under his name; the Defendant would always respond that he would never leave her in the cold.

[22] The Defendant had a gambling business, which he ran for about five years. There were also periods when the Defendant was unemployed and he was sitting at home. The Defendant also worked at Kenilworth racecourse, did books as an accountant and worked for other places as well.

[23] She also used to assist the Defendant by putting advertisements at her swimming school for parents who might have required their books to be done. Her brother also found the Defendant a good job at a game reserve. Her brother gave the Defendant a shirt, shoes and pants. The Defendant earned R25 000, 00 at the game reserve. When the employment at the game reserve ended, the Defendant started his own business ventures. She also assisted the Defendant in these business ventures. When she worked for the Defendant in his business ventures, she was not paid. She helped the Defendant virtually on daily basis.

[24] She started giving swimming lessons on an ad hoc basis. She started with her own swimming school in 1998 when their first-born was born. Her swimming lessons were for nine months per year. The school was doing fairly well. She built a good reputation for herself in Houtbay. She received payments in cash. The parents would put in cash in brown envelopes handed to them. The Defendant helped with the printing of brown envelopes and did swimming school administration. She would then give the cash to the Defendant, who acted as her accountant. The Defendant would

then put the money on a credit card. He would also use the cash. From time to time, she would ask for the credit card to do some shopping.

[25] She initially gave swimming lessons at her parents' house for just under two years. During that time she earned between R 8000, 00 to R12 000, 00 per month. She incurred no expenses whilst she ran the swimming school from her parents' house. Around year 2000, she moved her school from her parents' house to a swimming pool belonging to Samantha, who was a parent to one of her leaners. She struck a deal with Samantha, that her father would fix her heat pump. Samantha's swimming pool was small and she earned about R10 000, 00 per month. She then moved her school to another house where she operated until they moved to 101 Victoria Avenue. At the new venue she did quite well as she earned R15 000, 00 per month and she did not pay any rent. She installed a heat pump and solar panels and her father helped with a bubble cover. The Defendant paid for the electricity bill.

[26] When they bought the 101 [. . .] ('the second property') property, they moved the swimming school there. At the second property, the main expense generated by the school was the electricity. However, the Defendant made plans to eliminate the electricity expense. At V [. . .] A [. . .], the school brought an income of about R15000 00, 00 to R18 000 00, 00 per month. Her payment system never changed.

[27] She operated the swimming school at V [. . .] A [. . .] until 2009. The school stopped running at the instance of the Defendant. The Defendant pointed out that they were about to be parents to three children, therefore, she needed to stay with the

children. The Defendant suggested that they should substitute the income from the swimming school by renting out a flatlet. She never stopped completely to give swimming lessons. The schools would call her as a substitute teacher.

[28] Her parents gave them money to finance the building of the flatlet at the second property. They then rented it out for R 5000 00, 00 to R 7000 00, 00 per month. When the last tenant of the flatlet moved out, the relationship between her and the Defendant had deteriorated. The Defendant then offered that she should move into the flatlet. She stayed in the flatlet for a year or two, until the Defendant evicted her.

[29] It was her testimony that she also took care of the children, would cook as the Defendant could not cook, would also do school lunches for their children. For meals, she would have to do two meals, as the Defendant is a vegetarian. Even though they had a domestic worker, she did laundry and other domestic chores.

[30] The Defendant would transport the children to school. The Defendant would also help with the children's homework. They were both responsible for buying groceries. She would use the Defendant's credit card to pay for groceries. She did not operate any bank account. The Defendant kept her credit card in a safe. The swimming school moneys went to the Defendant's credit card.

[31] The Defendant controlled the finances of the household. She had no say in the finances. According to her testimony the arrangements between the parties,

pertaining to their finances was that the finances were in one pot. The Defendant would pay for rent and she would pay for food. She also testified that if she received any money she had to hand it all to the Defendant. The Defendant would thank her and say the money is a nice cash business and it was keeping them afloat.

[32] The Defendant told her that women should not control finances and about his financial background as an accountant.

[33] The Defendant also undertook to pay a Liberty life policy and their son's study policy. When she pointed out to the Defendant that they did not have a pension fund, the Defendant responded by saying that the Liberty policy was their *'little nest egg'*. The Defendant was the policyholder of the Liberty insurance; she is not sure whether it was her or the children that were the beneficiaries. The Defendant explained that the Liberty insurance was an emergency they could fall back on. She understood it to represent something, which was going to look after them when they were older.

[34] She was content to have the policy under the name of the Defendant, as things were done that way in their house. She testified that she believed the Defendant when he said 'baby you know I will never leave you in the cold.' She put her trust in him. She also blames naivety and the fact that she was very young when they started with the relationship.

[35] They maintained their standard of living because she and the Defendant worked hard and she contributed immensely to the joint household.

[36] With the arrival of their first-born and the business of the Defendant struggling, they battled with the rental of the Defendant's flat. The Defendant even sold his motor vehicle. When they could no longer afford the rental of the flat, her parents offered them accommodation rent-free. They moved to her parents' house for six months.

[37] From her parents' house they then moved to Chapman's View where they paid approximately R2000, 00 rent. The Chapman's View property was tiny for them and she decided to go and look for another rental property that they could rent. They then moved to 115 [. . .] ('the first property') where they paid a rent of R3000, 00 per month. When the house the first property went on the market whilst they were renting it, she persuaded the Defendant that they should purchase the first property, as it was a good investment.

The first property

[38] It is the Plaintiff's testimony that before they bought the first property, they got engaged when their first-born was over a year old.

[39] According to the Plaintiff, they used a bank loan to finance the purchase price for the first property. To pay for the loan, they used her earnings from her swimming school together with the money earned from the Defendant's business. The purchase price and transfer costs were also financed with a loan from her mother. She does not think that the loan from her mother was ever repaid.

[40] The property was then registered only under the name of the Defendant because the Defendant told her that she did not need to worry as their finances were in one pot and when they get married they would earn half share of their property.

[41] When the first property was purchased it was in a bad condition. It was a fixer upper. The Defendant did the renovations and she was the project manager and did the interior decoration. Her parents also helped with the renovations. Her father's employees also helped with the gutters, which were falling off.

[42] Financing for the renovations came from her mother together with the monies from her swimming school and the Defendant's money. The furnishings for the house came from her, and her mother would give and purchase furniture for them. The Defendant purchased a bed and he brought a second hand fridge. They stayed at the first property until 2002 or 2003.

The second property

[43] She then saw another property down the road on V [. . .] A [. . .]. The property address was [. . .] V [. . .] A [. . .]. What attracted her to the property was the size of its swimming pool. The size of the swimming pool was ideal for her swimming school. When the house was on show, she took the Defendant to the house. She testified that the Defendant reacted by asking her if she was mad as they could not even afford their rent.

[44] When they decided to buy the property at [. . . .] V [. . .] A [. . .], they did an evaluation of the first property. The first property was sold for R980 000, 00. With the profit from the first property, they bought the second property and moved in. The size of the property was very big and had quite a big plot.

[45] The purchase price for the second property was R 1 250 000, 00. The Defendant put the proceeds from the swimming school into his bank account and explained that he did so because it would look good with the bank. They applied for a bond to finance the purchase price. The bond was registered at R650 000, 00. They moved into the second property in 2003.

End of relationship

[46] The Plaintiff testified that their relationship had incidents of domestic violence and these led to their temporary breakup in August 2007. Her relationship with the Defendant finally ended in 2013. In 2014, the Defendant evicted her from the 101 Victoria Avenue house. She then moved into her parent's property.

Anshen Moore testified that the Plaintiff is her daughter. When the parties wanted to purchase the first property, the Defendant went with her to the bank. The Defendant told her that he needed R60 000, 00; otherwise he could not get the loan. She obliged and gave the Defendant R60 000, 00. She testified that they gave the R60 000, 00 because the Plaintiff and the Defendant were in a relationship and had two children.

[47] The R60 000, 00 was not the only amount of money the Defendant borrowed from her. She and her husband also helped with the fixing of the first property.

[48] When she was asked who was going to be the owner of the first property; she responded by saying if money is requested from the in-laws, one would think the house would be on both names.

[49] She testified that the Plaintiff started her swimming school before the birth of her first-born. It was also her testimony that the Plaintiff's swimming school moved to different locations. She also testified that her husband also helped with the maintenance of the swimming pools.

[50] She thinks her husband spoke to the Defendant about building up at the second property. When a subdivision of the second property did not go through, her husband got a builder, which was going to convert a portion of the house to a flatlet. The flatlet was going to be rented out and the income was going to be the Plaintiff's contribution towards the Plaintiff's family coffers.

[51] She together with her husband financed the building of the flatlet. They did this not as a loan but they thought it was a contribution and it was an arrangement to help them out. Most of the time her husband would be on the building site supervising the building. On Fridays they would go and pay the builder, except for the last payment,

which they gave to the Defendant. According to her, it is clear that she and her husband maintained the K [. . .] household over the years.

[52] It was her testimony that she would hear the Defendant utter the words 'it is all in one pot I will not leave you in the cold.' She would also hear these words from her daughter. She testified that these words are etched in her mind.

The Defendant's version

[53] In his amended plea the following is pleaded by the Defendant:

> "3A Defendant pleads that in or about and during 1996 or 1997 and at Cape Town, the parties both acting in person entered into an express oral, alternatively tacit cohabitation agreement on the following terms:
>
> 3A.1 the parties would live together and share a joint household;
>
> 3A.2 the parties would each contribute to the expenses of joint household in accordance with his or her means;
>
> 3A.2(*sic*) the parties would each contribute to the furnishing and fitting of the joint household as is required, and in accordance with his or her means."

[54] The Defendant testified that when he and the Plaintiff lived together they entered into a cohabitation agreement. The agreement entailed sharing of living expenses. He ended up paying most of the expenses, as the Plaintiff was not bringing much. The Plaintiff brought little money and she contributed as she pleased. The

pregnancy of their first and the third child was unplanned. Only the second born child was a planned pregnancy.

[55] The Plaintiff did not contribute to his business. The only time the Plaintiff had been to his business premises was just one Saturday for half an hour and when her mother called her, she left. She never cleaned his business premises she merely arrived there to drink beer. He would only ask the Plaintiff to buy stock if there was an emergency and he would request her to physically go and buy.

[56] He claims that when they stayed at the house of the Plaintiff's parents, they stayed in a room linked to the braai area and not in the actual house. The accommodation was quite uncomfortable and unsuitable for them. He denies that he borrowed R60 000,00 from Plaintiff's mother. According to evidence he only borrowed an amount that was between R50 000.00 – R55 000. The money he borrowed from the Plaintiff's mother was not for the purchase price of the property but was for the transfer costs. He took an access bond for R 460 000, 00 and only used R 414 000, 00 of the bond amount that was allocated to him.

[57] It was his testimony that the proceeds of the swimming school were used for day-to-day living expenses between them. However, the proceeds from the swimming pool were not that much; as a result, he had to carry the major expenses. The swimming school properly started in 2003. It is the Defendant's testimony that the swimming school was running at a loss.

[58] Whilst they stayed at the first property, there were talks of them putting a swimming pool at the first property but the plot was small. He also put an application to the council and by the time the council approved they had to move to the second property. However, during cross-examination he testified that he did not submit plans for the swimming pool and it was not an option at the first property as there was no space. He denies that it was the Plaintiff's family that maintained the pool at the second property and claims that he maintained the pool. He provided an enclosure and heat pump. He also testified that he played an integral role in the swimming school business and did its administration. During cross-examination, he testified that it is false that the Plaintiff's father installed the solar heating and bubble cover at Rina Conrad's pool. According to his testimony, he did the solar panels installation. When the Plaintiff's counsel put it to him that he was contradicting himself as he testified earlier that he was not involved with the pool at Rina's place; he testified that he financed the solar panels and the Plaintiff's father installed them.

[59] It was his testimony that his involvement with the swimming school became more pronounced at the second property. At the second property, he was a partner in the swimming school. He supplied a pool, did an enclosure, maintained the pool and did the administration of the school.

[60] The purchase of house the second property came about because the Plaintiff liked it and he also knew about the house and he viewed it when it was on auction. The Plaintiff liked it because it had a big pool.

[61] He testified that he would juggle the cash received from the swimming school. He would use the cash from the school for the expenses of the school and household expenses. Cheque payments were deposited in the Plaintiff's bank account. When his counsel asked who would do that; he responded by saying 'I assume it would be me, I cannot recall'.

[62] According to his testimony that Plaintiff's mother proposed subdividing the second property so that there could be a self-contained flatlet, on order for her to reside there. He testified that the Plaintiff's mother was going to do the conversion to make a self-contained flatlet. The Plaintiff's mother was responsible for the design.

[63] The Plaintiff did not bring anything when she moved in with him. When they moved to the first property, her mother brought a mirror. The entire house at the second property was renovated at his expense. The Plaintiff's mother virtually contributed nothing to the furnishing of the house except to supply linen and maybe a curtain or two.

Analysis

[64] The evidence in this matter reveals the following facts, which are not seriously disputed:

(a) The parties lived at the house of the Plaintiff's mother for about six months rent-free. The two properties in V [. . .] A [. . .] were bought during the subsistence

of the relationship of the parties and they were registered only under the name of the Defendant at the Deeds Office.

(b) When the first house was to be purchased, the Plaintiff's mother lent the Defendant cash that could be in the excess of R50 000, 00.

(c) The first property, was a fixer upper and when it was sold there was a profit made and the profit was used to partially pay for the bond of the second property.

(d) Upon termination of the parties' relationship, the Plaintiff resided in a flatlet, situated on the premises of the parties' former common household; until the eviction of the Plaintiff in 2014.

(e) At one stage, there was a plan, endorsed by the Defendant; that the mother of the Plaintiff was going to stay on the premises of the second property.

(f) That the plan to have the parents of the Plaintiff residing on the premises of the house registered under the name of the Defendant, involved a situation where the parents of the Plaintiff would have to finance the building of a flatlet on the premises.

(g) That the Plaintiff's parents paid for the renovations of the flatlet

(h) That there was no expressed agreement of universal partnership and the Plaintiff relies on implied agreement.

(i) The Plaintiff's main source of income was her swimming school.

(j) The Defendant did play a role in the swimming school of the Plaintiff.

(k) Some sort of an agreement was concluded between the parties regarding their relationship.

Was there a universal partnership between the parties?

[65] Obviously, the commencement of the relationship by a couple does not necessarily signify the start of a universal partnership between them. Similarly, when the parties live together continuously for a considerable period, that is not an indication of a universal partnership, particularly if there is no written agreement. Equally, the living together and having children together, is not sufficient to prove that a universal partnership was entered into.

[66] In the case of *Butters v Mncora* (181/2011) [2012] ZASCA 29 (28 March 2012) at paras 17, 18, 19 and 22, the Supreme Court of Appeal opined:

"[17] . . . The requirements for a partnership as formulated by Pothier had become a well-established part of our law. Those requirements have served us well. They have been applied by our courts to universal partnerships in general and universal partnerships between cohabitees in particular. I therefore cannot see the necessity for the formulation of special requirements for the latter category. This is also borne out by the fact that Pothier himself did not find his formulation of the requirements incompatible with the concept of universal partnerships of all property which he discussed in some detail.

[18] In this light our courts appear to be supported by good authority when they held, either expressly or by clear implication that:

(a) Universal partnerships of all property which extend beyond commercial undertakings were part of Roman Dutch law and still form part of our law.

(b) A universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties. . .

(c) The requirements for a universal partnership of all property, including universal partnerships between cohabitees, are the same as those formulated by Pothier for partnerships in general.

(d) Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached.

[19] Once it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates, in my view, that the contribution of both parties need not be confined to a profit making entity. The point is well illustrated, I think, by the very facts of this case. It can be accepted that the plaintiff's contribution to the commercial undertaking conducted by the defendant was insignificant. Yet she spent all her time, effort and 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 enterprise can hardly be denied.

[22] As I see it, this argument harks back to the model of a partnership confined to a commercial enterprise. Taken to its logical conclusion, it would mean that even a negligible monetary contribution would outweigh an invaluable non-financial contribution to the family life of the parties. 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."

[67] In this case when it comes to implied universal partnership, it is essential that the party that relies on it should prove through evidence that mutual agreement can be inferred from the parties' conduct or circumstances. See *Mcora's case, supra,* at paragraph 20. Clearly, there can never be a blanket approach; it can never be a one size fits all approach. Accordingly, it is very critical that each case falls to be decided on its own particular facts and circumstances.

[68] In my view, principally the Defendant's defence of the action is based on two distinct strands. The first leg is that he and the Plaintiff entered into a cohabitation contract, wherein they formalised the obligations they have towards each other. The second leg is that there was never a universal partnership entered tacit or otherwise between the parties.

[69] The Defendant makes a significant concession that he and the Plaintiff concluded a contract of cohabitation. The corollary to this is that the Defendant is pertinently admitting that the parties consented to contract their relationship in order

to regulate it and their finances. Strange as it may sound, I find the concession regarding a contract of cohabitation as a striking key element in the version of the Defendant and in this case.

[70] It is also quite significant that in this matter it was never the case of the Defendant that the parties generally in their relationship kept separate finances. Instead, the Defendant strongly maintains that he is the one who contributed the lion share towards the running of the joint household. It is also the Defendant's own evidence that the parties used the Plaintiff's swimming school proceeds for day-to-day living expenses between them.

[71] Most interestingly, though, from both sides, the evidence in terms of this case manifest that the parties ran a joint household. For instance, they shared chores and expenses. Even from the language used by both parties when they testified, it becomes clear that they ran a common household. For example, as pointed out previously, on the version of the Defendant, he testified that the parties entered into a cohabitation agreement and the agreement entailed sharing of living expenses. Additionally, an important observation is that during the Defendant's testimony and in his amended plea, it is also discernible that, he would refer to their house as the common household. Little wonder the Plaintiff's mother when she testified she also referred to couples' household as the Kenmuir household and described herself as an in law of the Defendant.

[72] Furthermore, in my view, in the context of this case, it would have been a different situation had the Defendant simply said that the parties decided only to cohabitate, and to keep their finances separate.

However, the Defendant in the instant case went further and stated that the parties entered into a cohabitation agreement, which involved sharing of expenses. Consequently, as already pointed out, it appears to me, therefore, that the Defendant on his own version inadvertently admitted that the parties' arrangement to stay permanently together extended to their finances.

[73] In the present case, the fact of the matter is that the Defendant never disputed that:

(a) The Plaintiff looked after the children, took the children to school, cooked for the family, and did school runs for the children.
(b) He told the Plaintiff to close the swimming school so that she could look after the children.
(c) The Plaintiff swimming school did contribute towards the living expenses of the household.
(d) There was an instance where the Plaintiff helped at his business.

[74] Additionally, the Defendant never disputed that the purchase of house 101 Victoria Avenue came about because the Plaintiff liked it. It is further the Defendant's own version that he would juggle the cash received from the swimming school, for the expenses of the school and household expenses. In my view, this powerfully illustrates that the parties' finances were merged into a single pool.

[75] Interestingly, on the Defendant's own version, he also played an integral role in the swimming school business and did its administration and at the second property his involvement was pronounced in the swimming school, and he became a partner.

[76] When the Plaintiff testified that both the parties maintained their standard of living because she and the Defendant worked hard and she contributed immensely to the joint household; her testimony in this regard explains so much, in the context of this case. Particularly, if regard is given to the version of the Defendant.

Demonstrably, when the parties conducted themselves there was no distinction between what is mine and what is yours because all funds and expenses were pooled together.

[77] One thing, which is abundantly clear in this case is that, merely on the version of the Defendant, it is quite clear that it was the parties mutual understanding that they were in a partnership agreement. It is readily apparent on the version of the Defendant, that the parties' finances and financial responsibilities were intrinsically and intimately interconnected for purposes of their own household financial security. There is no other way to perceive it.

[78] An obvious example is the fact that the Defendant testified that he had to carry major expenses of the common household, and this offers insight to the fact that the finances of the common household were connected towards a common purpose. Quite clearly, this also strongly implies pooled income.

[79] In the context of this matter, I have no hesitation in concluding that the evidence reveals that the Defendant was playing an instrumental role in making financial decisions for the common household to increase its economic security and well-being. Additionally, the evidence also shows that the Defendant played a central role in the cash flow management of the joint household. This much was not disputed by the Defendant.

[80] The control of the household finances by the Defendant is partly demonstrated by the fact that the Defendant was the one who played a key role in obtaining a substantial loan from the Plaintiff's own mother when the second property was purchased. This aspect is an illustration of the fact that the Defendant was firmly in charge of financial matters of the common household purse strings. It is evident that he was the financial manager of the partnership.

[81] The unilateral financial control of the finances by the Defendant also created an underpinning and important link between the finances of the Plaintiff and the Defendant's finances. As it was the Defendant's own evidence that, he was the one who juggled the income from the swimming school. Moreover, it is palpable that the funds from the swimming school were also used to enhance and increase the financial stability of the joint household. The evidence in this matter also bears the point that the Plaintiff was also an active member in the partnership.

[82] The fact that the parties' finances were so intertwined illustrates the point that all the money in the household came out of two pots and went into one pot, for a

common goal. The pooled funds clearly indicate that the parties were totally invested in their relationship. The testimony of the Plaintiff eloquently illustrates the point when she testified that she, together with the Defendant worked very hard for the joint household.

[83] There are thus ample objective facts, which support the testimony of the Plaintiff that the Defendant throughout their relationship kept on telling her *that 'it is all in one pot baby, I will never leave you in the cold.'* Moreover, the mother of the Plaintiff also corroborated the Plaintiff that the Defendant did utter those words.

[84] As noted, the objective facts in this matter quite articulately proves that everything in the household of the parties was in one pot. Hence, I accept the Plaintiff's version that the Defendant did utter such words. Another objective fact, which supports the version that everything was in one pot, is the fact that when the parties broke up in 2013, the Plaintiff moved into the flatlet for more than a year.

[85] As already indicated that; it is common cause in this matter that the parties lived together for about 17 years. The patterns in the evidence in this matter strongly suggests that during the subsistence of the parties' co-habitation, their relationship resembled a partnership. Another noteworthy scenario of this matter is that the Defendant interacted with the Plaintiff's parents; the Plaintiff's brother helped the Defendant to secure employment. In my mind this shows that the Defendant was willing to go through endless lengths to provide financial stability for the joint household.

[86] I have no hesitation in concluding that absolute control of finances by the Defendant made the Plaintiff financially dependent on him. Without doubt, the dynamics of the relationship between the parties in this matter evinces that the Plaintiff did not have control over her own money.

[87] It is the Plaintiff's testimony that the use and control of her swimming school funds facilitated the purchase of the two properties. The Plaintiff testified that she was inhibited in spending, and she would be forced to do groceries on a tight budget. The Plaintiff was adamant that she did run a swimming school from the beginning of their relationship and there was no way the Defendant could afford the bond alone.

[88] The Defendant in his testimony was set in trying to minimise the contribution of the Plaintiff in the household. In fact, the Defendant tried throughout his testimony to minimise the role the Plaintiff played in their relationship and by anyone from the side of the Plaintiff. It is almost comical how blatant this is. I think it is highly important to recite some examples. For instance, the Defendant strenuously asserted the following:

(a) That the school ran only for four to five months per year and that the business was not profitable.

(b) It was also put to the Plaintiff during cross-examination that her earnings from the swimming school had nothing to do with the purchase of the properties.

(c) The Plaintiff overstated the income generated from the swimming school business.

(d) The Defendant also denied that the Plaintiff played a role of a project manager and an interior decorator when they purchased the first property.

(e) It was put to the Plaintiff that she did not have money to contribute to the bond.

(f) The Plaintiff's mother never gave her R60 000, 00, and the amount the Defendant obtained from the Plaintiff's mother did not go towards the payment of the purchase price for the second property.

(g) The Plaintiff never did any renovations at the first property.

(h) The mother of the Plaintiff did not provide furniture for the first property.

(i) The father of the Plaintiff did not help with the swimming pool's maintenance.

(j) The type of accommodation they received from the Plaintiff's mother was unsuitable and uncomfortable.

(k) The role played by the Plaintiff's parents in the building of the flatlet at the second property.

(l) The type of mother the Plaintiff was.

[89] Both the Plaintiff and her mother made a good impression as witnesses in this Court. They gave evidence in a clear and calm fashion without being argumentative. I never got the impression that they were colluding against the Defendant, or tried to pad their version, or endeavoured to cast the Defendant in bad light. I did not get the impression that they went out of their way to create an atmosphere of suspicion against the Defendant or that their version was set out to mislead this Court. Surely, if they were calculative, brazen and manipulative, as the Defendant would like this Court to believe, they could have easily embellished the contributions made by the Plaintiff's parents in the parties' joint household and even minimize the role played by the Defendant.

[90] The Plaintiff's mother did not come across as a witness who was actuated by ulterior or improper motives in testifying, in order to come build a case for her daughter.

[91] In fact, it is not in dispute that during the purchase of the second property she did advance monies to the Defendant. The Defendant only disputes the amount advanced. However, it is significant to note that there is not a huge gap between the amounts she claims was advanced to the Defendant and the amount as per the version of the Defendant.

[92] Clearly, in the context of this case, there is definitely no reason why the Plaintiff's mother would lie about the amount. As far as I am concerned, both the Plaintiff and her mother were completely honest with this Court.

[93] What is significant is that though the Defendant disputes the amount, however, on his own version he is not sure whether it was R50 000, 00 or R55 000, 00. It is rather an oddity that the Defendant cannot remember such a significant amount, particularly, if regard is given to the fact that the lending of the money was related to a major milestone marked by a moment of pride and celebration in personal development. It is also significant to note that this new version of the amount was never put to the Plaintiff's mother when she testified. Once again, this new evidence was another demonstration of abysmal failure in endeavours to minimise other people's roles.

[94] In the context of this case, all the indications are that the Defendant could hardly explain how he could pay the purchase price, if he only obtained R414 000, 00, bond. Evidently, the Defendant was caught in an outright lie in this instance. It is palpable that the Defendant is merely disputing the amount merely to minimise the contribution of the Plaintiff's family. This was also evinced when the Defendant colossally failed in his attempt to demonstrate that the bond covered the purchase price, yet the documentary evidence showed otherwise. The version of the Defendant could not bear out as to how the shortfall was covered, without the loan from the Plaintiff's mother. Clearly, the manipulation of facts by the Defendant was demonstrated in this regard.

[95] Equally, when it comes to the aspect of the subdivision of the second property, the attempt to manipulate the facts emerged from the evidence of the Defendant. Initially he testified that it was the proposal of the Plaintiff's mother and later on he testified that she had nothing to do with it.

[96] As far as the swimming school is concerned, the Defendant was emphatic in his testimony that it was running at a loss. However, when he was asked in cross-examination how was it able to pay for expenses if the swimming pool was running at a loss; the Defendant could not answer but simply said it was basically a loss and he constantly asked Plaintiff to give more lessons but she refused. Without doubt, it would not make sense for the Plaintiff to want a big pool yet the swimming school was all along not thriving.

[97] Similarly, it would be irrational to invest in the swimming school if it was not profitable; yet the evidence bears the point that, the Defendant invested in the swimming pool. Little wonder, he contradicted himself regarding whether he considered putting a pool at the first property, and obviously whilst the Defendant was testifying he could realise that he could not consider that if the swimming pool was not profitable. When the Defendant realised the trap he set for himself; he quickly somersaulted and stated that the swimming pool was a consideration not for the swimming school but for the enhancement and increase of the property value. Quite clearly, the Defendant was adapting his testimony as he went along. He also attempted to adapt his version by saying why would he go to all the expense when the income generated from the school is so negligible. Evidently, the Defendant is not so good in making things up as he slips up when he does.

[98] At times, the Defendant became unduly contrived in trying to explain away simple details. For instance, he testified that cheque payments were deposited into the Plaintiff's bank account. When his counsel asked who would do that; he responded by saying I assume it would be me, I cannot recall. This is rather a very odd way of answering, particularly, for someone who was controlling the finances of the swimming pool and who was emphatic in his version that the Plaintiff did receive cheque payments.

[99] The mother of the Plaintiff corroborated the Plaintiff regarding the places where she ran the swimming school. There is a whole range of things in this matter to show

that the Defendant did not speak the truth or take this Court in his confidence when he testified. However, if I go through all of them, I will never finish this judgment.

[100] In my view, there is no reason that this court should not accept the testimony of the Plaintiff and her mother as being the truth, particularly, in the face of the fact that the Defendant did not make a good impression to this Court as a witness.

[101] Consequently, I reject the version of the Defendant as false, as far as it is in conflict with that of the Plaintiff and her mother.

[102] Quite clearly, only on the accepted version, inclusive that of the Defendant, it is evident that the Plaintiff as envisaged in *Mcora's* case, *supra,* spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home, raising their children and running the swimming pool school. It is now settled that does not matter if one person makes twice as much money as their partner.

[103] I simply cannot fathom on what basis the counsel on behalf of the Defendant contends under the circumstances of this case that joint household does not create a joint estate. In this matter, it is not the Plaintiff's claim that a joint household is what created the joint estate. The Plaintiff contends that the joint estate is a consequence of a universal partnership, agreed upon tacitly by the parties.

[104] In as much as the Defendant would like to deny the existence of a universal partnership, plainly in the context of this case, the denial of a universal partnership proved to be extremely difficult to navigate, for the Defendant, even on his own version. At the risk of repetition, for instance, the fact that he testified that there was a cohabitation agreement concluded between the parties; together with the evidence that the finances from the swimming pool school were intermingled with his, under his control and management; puts the parties squarely within the realm of a universal partnership.

Equally important or true, there is no evidence in this matter to support that there was distinction between what belonged to the Plaintiff and what belonged to the Defendant as all funds and expenses were combined in one pool.

[105] In light of the fact that this Court accepted that the Defendant stated that; '*it is all in one pot baby, I will never leave you in the cold*'; it is thus quite clear in my mind that these words in plain language signify beyond any doubt that there was a mutual understanding, or some sort of declaratory of intention, between the parties; pertaining to their relationship.

[106] The Plaintiff also testified that the parties agreed on sharing everything equally, upon getting married. In the context of this case, I have absolutely no reason not to believe that. In this particular aspect, the key element is that consent plays a pivotal role in a universal partnership; as it is the case with any partnership. Obviously, in this case the parties mutually agreed through their conduct and otherwise that they were in a universal partnership. They did so amongst others by agreeing to contribute all

their individually owned property and to devoting all their skill, labour, and services to the common household.

[107] There is ample evidence in this case that demonstrates that the parties handled their finances in many ways as a partnership for their joint benefit. The facts and circumstances as described hereinabove constitute evidence of a universal partnership. Significantly, the Defendant at one point referred to himself as a partner in the swimming school business. This concession on its own is extremely telling.

[108] The Plaintiff presented in my view more than conclusive proof that a tacit universal partnership existed between herself and the Defendant from 1996 to September 2013 and that she is entitled to the 50% share of assets as she claims.

Division of the estate

[109] The evidence in this matter also establishes that the joint estate of the partnership grew whilst they were living together. Given the fact that the finances of the partnership were intermingled it is not possible to calculate the percentage contributed by each party. Nevertheless, it is a significant fact in this matter that the accepted evidence reveals that it was the parties' intentions to share the joint estate equally, regardless who contributed more. Hence, I find that the Plaintiff is entitled to 50% share.

[110] During the closing arguments, I asked the parties if the appointment of the liquidator should not be deferred in order to allow the parties an opportunity to attempt to settle the division of the partnership's joint estate; before this Court makes an order for the appointment of the liquidator. Both parties were amenable to the suggestion. However, with the advantage of hindsight, I have come to the realisation that even if this Court orders that a liquidator should be appointed; there is absolutely nothing which will inhibit the parties from engaging one another, should they desire to do so; regarding the division of the assets of the partnership.

[111] Consequently, I am not going to defer the appointment of a liquidator pending negotiations between the parties.

[112] In the result, I make the following orders:

(a) An order declaring that:

(i) a universal partnership existed between the Plaintiff and the Defendant in respect of all property, whether movable and/or immovable and the money acquired by them during the period 1996 to 2013;

(ii) the Plaintiff has 50% share in such partnership;

(iii) the said partnership was dissolved with effect from September 2013;

(b) An order appointing a liquidator with authority to realise the whole of the partnership assets, to liquidate the assets of the partnership; to prepare a final account and to pay the Plaintiff and the Defendant each a half of the net profits made by the partnership.

(c) An order that the costs of the liquidator shall be borne by the parties in proportion to their shares in the partnership estate;

(d) The Defendant to pay the costs of suit.

CN NZIWENI
Acting Judge of the High Court