

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: I 450/2015

In the matter between:

MN

PLAINTIFF

And

FN

DEFENDANT

Neutral citation: *MN v FN* (I 450/2015) [2017] NAHCMD 124 (21 April 2017)

CORAM: VAN WYK, ACTING

Heard: 17 August 2016

Delivered: 21 April 2017

Flynote: Title Deed is a notice to the world of ownership of property – The abstract system of ownership – no regard for any underlying *causa* of the transfer – putative

marriage – universal partnership of all property – partnership object can include the building of family life – the object need not be purely pecuniary – tacit agreement – sufficient to establish universal partnership.

Summary: Consolidation of two cases. One in which the plaintiff asked for the eviction of defendant from Erf 353, Oshakati. He handed up a title deed explicitly evidencing that both plaintiff and defendant are registered owners of Erf 353, Oshakati. His intent with submission of the title deed was to prove that the plaintiff is the lawful owner of Erf 353, Oshakati. He argued that defendant bears the onus - to prove her rights to remain in occupation of the property.

Held, the title deed, handed up by the plaintiff as an exhibit as proof of his ownership, also placed a judicial fact before the court that the defendant is a co-owner.

Held, the title deed is a notice to the world that both the plaintiff and defendant are the owners of Erf 353, Oshakati and the admission by both parties that the marriage is a nullity is of no consideration in the interpretation of their rights, as contained in Title Deed 470/2003.

In the second matter, the defendant requested the declaration of a universal partnership between the parties, based on their union of 37 (thirty-seven) years.

Held, the existence of a putative marriage between the parties.

Held, that there are convincing grounds to recognize the existence of a universal partnership of all property in relation to the putative marriage.

Held, the declaration of a universal partnership and appointment of a receiver to wind up the partnership and divide the partnership estate in equal parts.

ORDER

1. Plaintiff's claim for the eviction of the defendant from Erf 353, Oshakati is dismissed.
2. The existence of a universal partnership of 37 (thirty-seven) years between the parties is declared and confirmed.
3. The assets of the universal partnership shall be divided in equal shares between the parties.
4. Defendant appoints a receiver to wind up the partnership and distribute the partnership estate, existing between the parties, in equal shares.
5. Cost is granted in favour of the defendant, occasioned by one instructing and one instructed counsel.

JUDGMENT

VAN WYK AJ

In Case Management

[1] In this matter, MN brought an action on 3 February 2015 to evict FN from the property situated at Erf 353, Oshakati(hereinafter referred to as Erf 353), under case number I 281/2015.

[2] On 13 February 2015, FN caused the issue of combined summons against the MN in case number I 450/2015 asking the court for the following relief:

- 2.1 An order declaring that a universal partnership existed between the two parties.
- 2.2 An order dissolving the said partnership.
- 2.3 An order directing that MN renders a full account of the partnership for the period from January 1976 to date of this order, to FN.
- 2.4 Debatement of said account;
- 2.5 Alternatively, to prayers in paragraphs 2.3 and 2.4 above, appointment of a receiver to wind up the partnership and distribute the partnership estate between the parties in equal shares.
- 2.6 Costs of the action.
- 2.7 Further and/or alternative relief.

[3] Case numbers I 281/2015 and I 450/2015 were consolidated on the 22 June 2015, through a court order in case management and the matter proceeded under Case number I 450/2015. MN became the plaintiff and FN the defendant in the consolidated matter. I will forthwith refer to the parties in these terms.

[4] At the pre-trial conference, the parties recorded that they were unlawfully married. The marriage was null and void. The defendant is currently in possession and occupation of the property at Erf 353 and such property is registered in the name of the plaintiff. These facts were agreed upon and made an order of court, following the pre-trial proceedings.

[5] The issues of fact to be resolved in terms of the pre-trial order are the following:

- 5.1 Whether the plaintiff is the lawful owner of the property at Erf 353, Oshakati.

5.2 Whether the defendant is currently in unlawful possession and occupation of the property and whether she has any other rights to continue occupying the house, given the admitted illegality of the marriage.

[6] The issues of fact and of law to be resolved in terms of the pre-trial order are the following:

6.1 Whether the defendant should be evicted from Erf 353 Oshakati on the basis of correct facts and after the hearing of the consolidated case.

6.2 Whether a universal partnership was formed between the parties, in which each one has equal share.

The Eviction of Defendant from Erf 353 Oshakati

[7] I am forthwith going to deal with the factual and legal questions concerning the ownership of the Erf 353. Counsel for the plaintiff, Mr Namandje, pointed the court to the facts recorded in the pre-trial order and in particular, to paragraph 5.4 of the pre-trial order stating that Erf 353 is registered in the name of the plaintiff:

'5.4 That the property at Erf 353, Oshakati is registered in the name of ...' MN.¹

[8] Mr. Namandje essentially raised two arguments. The argument that the defendant's claim is inconsistent with her concessions in the pre-trial order and her plea to plaintiff's case. Secondly, he raised an argument based on the plaintiff's evidence. In his heads of argument, he stated that plaintiff testified² that defendant has no right to occupy his property at Erf 353. He further argued, based on plaintiff's testimony, that to the extent that the defendant had occupied the property on the mistaken basis that the parties were married legally to each other, it would follow that the defendant has since lost such a right, given her concession that the marriage between the parties is null and

¹ Pre-trial order page 4

² Page 16 of the Record

void. He argued that defendant admitted the essential allegations for an eviction order in the pre-trial order and that shifts the burden to the defendant to prove her rights to lawfully occupy Erf 353.

[9] Counsel for the defendant, Mr. Denk, argued that nothing much turns on paragraph 5.4 of the pre-trial order. For purposes of pre-trial, the defendant confirmed the legal fact that Erf 353 is registered in the name of the plaintiff. The defendant stands by her confirmations, which were made an order of court during the pre-trial proceedings. She however disputes that the plaintiff is the sole owner of Erf 353. This denial is consistent with her plea, so the argument goes, wherein she specifically denied and traversed the allegations that she is in unlawful possession and occupation of Erf 353.³ Defendant does not dispute that the plaintiff is the registered owner of Erf 353, he is just not the only owner. Paragraph 5.4 is not an explicit admission that the plaintiff is the only owner of Erf 353, so Mr. Denk argued.

[10] I am inclined to concur with Mr. Denk's submissions in this regard. Both the plea and the pre-trial order is consistently providing a basis for this court to make enquiry into defendant's rights to lawfully occupy Erf 353. This court does not support the interpretation of paragraph 5.4 of the pre-trial order to mean that the plaintiff is the only registered owner of Erf 353. More so, paragraph 2.2 of the pre-trial order places in factual issue the aspect of whether the defendant is currently in unlawful possession of Erf 353 and 'whether she has any other rights to continue occupying the house given the admitted illegality of the marriage'.⁴

[11] In the premises, I am satisfied that paragraph 2.2 of the pre-trial order placed the aspect of the defendant's continued rights to occupy Erf 353, as an aspect for determination before court. I will forthwith determine this question.

Defendant's Rights to Occupy Erf 353

³ Paragraph 4 of defendant's plea dated 20 March 2015

⁴ Page 3 of the pre-trial order

[12] Mr Namandje submitted that the joint pre-trial order confirmed that the plaintiff is the registered owner of Erf 353 and that the marriage was a nullity. That being the case, he argues, the plaintiff's essential allegations to obtain the relief of eviction of the defendant from Erf 353 is complied with. He referred the court to the authority of *Agricultural bank of Namibia v Witvlei Meat (Pty) Ltd*⁵:

'[26] Mr.Bokaba, SC, who appeared for the applicant correctly submitted with reference to authority that the point of departure is that the applicant's ownership being admitted as well as the respondent's continued occupation, it would then be for the respondent to establish its right to be in possession of the premises. If the respondent is unable to establish a right to be in occupation of the premises, then an eviction order should follow.'

[13] The Plaintiff handed up Title Deed 470/2003 marked Exhibit "A". The Title Deed explicitly evidences that both the plaintiff and the defendant are the registered owners of Erf 353. Mr. Namandje handed up the Title Deed on behalf of the Plaintiff, to prove to the court that the plaintiff is the lawful owner of Erf 353. This very same title deed handed up by the plaintiff as an exhibit, to prove his ownership, however also places a legal fact before the court that the defendant is a co-owner of Erf 353.

[14] The title deed indicates that the property rights in Erf 353 have been ceded and transferred, in full and free property to and on behalf of the plaintiff, born on the 11 November 1939 and the defendant, born on 8 August 1953. The deed stated that the defendant and the plaintiff are married in community of property to each other:

' MN
Born on: 11 November 1939
and
FI
Born on: 8 August 1953
MARRIED IN COMMUNITY OF PROPERTY TO EACH OTHER'⁶

⁵ (A 98/2012) [2013] NAHCMD75 (20 March 2013)

⁶ Page 2 of the Title Deed (names are not fully cited to protect the parties identity as this case is a status matter)

[15] In his heads of argument, Mr. Denk placed a number of authorities before the court in relation to the effect of registration of real rights in the Namibian legal system. I considered his arguments and my views are as follows.

Registration of Real Rights in the Deeds Office

[16] As a point of departure, I respectfully considered the authority in *Registrar of Deeds (Transvaal) v Ferreira Deep Ltd*,⁷ in which De Villiers CJ stated at 181:

"In *Hollins v Registrar of Deeds (supra)* INNES CJ expressed the opinion that the Court should be very careful in dealing with the Registry of Deeds. With that view I entirely agree, and it is for that reason the more that it is satisfactory to be able to arrive at this conclusion. It would be no light matter for the Court to declare of no value rights which have been registered against title, which have been looked upon by the public as valid, and upon the faith of which numerous transactions have been entered into."

[17] Further to that, it was held in *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others*,⁸ that an abstract system of land registration is followed in Namibia and in South Africa. The Court quoted Van der Merwe⁹ as the authority on ownership under the heading 'Abstract system' to have stated the following:¹⁰

'Under an abstract system of passing of ownership the mere intention of the parties to pass ownership is sufficient without reference to the underlying causa for the transfer'¹¹

[18] The reference in the *Oshakati Towers* case to the underlying *causa* is of interest, in the light of the argument raised by Mr. Namandje that the defendant lost her right to occupy Erf 353 due to her admission that her marriage to the plaintiff was a nullity. In

⁷ 1930 AD 169

⁸ (2) 2009 (1) NR 232 (HC)

⁹ The writer on the subject of 'Things' in the *Law of South Africa (LAWSA)* Volume 27

¹⁰ *Oshakati Tower matter* at Paragraph 20

¹¹ Paragraph 203 page110 of *LAWSA* Volume 27

the case currently before this court, the following words are written in the Title Deed, immediately following the parties' names:

'MARRIED IN COMMUNITY OF PROPERTY TO EACH OTHER'

[19] It is now common cause that the marriage is a nullity. However, from the exposition of the law set out in the authorities cited by Mr. Denk, this fact has no bearing on the ownership of Erf 353 as reflected in the Title Deed. The authorities are clearly indicating that the abstract system of ownership followed in Namibia has no regard for any underlying *causa* of the transfer:

'The public system of deeds registration is a notice to the world of the ownership of immovable property and this would take no consideration for the underlying *causa* of the transaction¹².

[20] The case of *Cape Explosive Works Ltd v Denel (Pty) Ltd*,¹³ an authority regarding the effect of registration of real rights, echoed this view and it was held that:¹⁴

'[16] A real right is adequately protected by its registration in the Deeds Office (see *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582A). Once Capex's rights had been registered they were maintainable against the whole world (*Frye's* case at 583E)'.¹⁵

[21] Having considered the above stated authorities, this court is satisfied that the Title Deed speaks for itself - in the determination of the question posed in the pre-trail order paragraph 2.2 '...whether she has any other rights to continue occupying the house given the admitted illegality of the marriage.¹⁵

[22] In my respectful view 'it would be no light matter for the Court to declare of no value rights which have been registered against title, which have been looked upon by the public as

¹² *Prophitius and Another v Campbell and Others* 2008 (3) SA 552 (D)

¹³ 2001 (3) SA 569 (SCA)

¹⁴ Paragraph 16

¹⁵ Page 2 of the Pre-Trail Order

valid, and upon the faith of which numerous transactions have been entered into.’¹⁶ I hold that the Title Deed is a ‘notice to the world’¹⁷ that both the plaintiff and the defendant are the owners of Erf 353 and it is my respectful view that the admission by both parties that the marriage is a nullity, is of no consideration in the interpretation of their rights as contained in Title Deed 470/2003.

[23] On the basis of the above, this court is not inclined to require the defendant to provide additional evidence that she has an entitlement to occupy Erf 353. It follows, that the plaintiff’s claim for the eviction of the defendant from Erf 353, must fail.

Determination of whether a Universal Partnership existed between the Parties

[24] I will now deal with the following legal question to which this court must give resolution in terms of the pre-trial order. The determination of whether a universal partnership existed between the parties.

The Facts in Common Cause

[25] The following facts were not in dispute:

[26] The plaintiff and the defendant started an intimate relationship in 1976. On 16 December 1976 their first born (a daughter) NN was born. On 4 May 1978, the plaintiff and the defendant together with their daughter NN moved to Oshakati from Ruacana. On 18 July 1978 their son, TN, was born in Oshakati.

[27] A third child was born to the plaintiff and the defendant on 11 September 1984, named HN. Another child, AN was born on 19 January 1987. On 2 February 1993, AN was born; however this child passed away in a car accident on 4 June 1993.

¹⁶ *Registrar of Deeds (Transvaal) v Ferreira Deep Ltd* 1930 AD 169

¹⁷ *Prophitius and Another v Campbell and Others (supra)*

[28] The plaintiff and the defendant stayed together in an intimate relationship, from the time they moved to Oshakati until they got married on 1 November 1988. The marriage, which the parties entered into in 1988, was invalid due to the fact that the plaintiff was still legally married to LI at the time of his marriage to the defendant. Both parties were under the *bona fide* belief that the plaintiff lawfully divorced LI prior to their unlawful marriage at Onesi in 1988.¹⁸ They had this belief until 2013.

[29] The parties have been in a relationship for a period of 37 (thirty-seven) years from 1976 until 2013.¹⁹ The plaintiff and the defendant continued that relationship until the plaintiff asked the defendant to leave their common home at Onesi in 2013.

[30] The plaintiff allowed the defendant to sell retail stock from his other smaller business she operated, in order to maintain herself, their children and other relatives, including other children of the plaintiff.

The Plaintiff's Evidence

[31] In his evidence, the plaintiff testified that during the 37 (thirty-seven) years at the side of the defendant, she was his employee with whom he happened to have had five children. The following ensued under cross-examination:²⁰

'So they went to your house at Onesi did Ms FN go there to be with the children? --- My Lady that is correct the Defendant went along with the children but the reason is not for any other reason but with work.'

What do you mean by that? --- My Lady it is put to me then the Defendant and the children moved there so that the Defendant can look after the children that is not correct, the reason why the Defendant and the children went there is Defendant went there with work just as she has been working for me there back at Oshakati.

What work did she do there at Onesi? ---The same work, working in our shops, the shops there.'

¹⁸ Page 209 of the Record A-2016.06.09

¹⁹ Page 1 of the Record A-2016.06.08

²⁰ Page 22 of the Record

[32] He maintained that she was running only her small undertakings as a manner to maintain herself:²¹

'That she had that business the takeaway business. --- My Lady the takeaway business the Defendant know that she run it herself the items there are hers and the income is for her, is to help herself, to help them.

Her and the children? --- To help the Defendant herself, the children I used to provide or give. Yes but yesterday you said it was to maintain the children so now you are changing your story. --- My Lady a traditional man like myself what we do you give something concrete for example this takeaway and takeaway to the Defendant and the items that I has and she sells them but the structure or the place or where she is operating from is mine, I said okay get this place you will not pay me for the rent of using my structure but the income you should have it and help yourself and the children.'

[33] He maintained that he did not build the house at Erf 353 for the defendant and the children. He informed the court that the house at Erf 353 was just for the workers:²²

'And where did they stay from 1977 the family together with Ms FN - was it not in Oshakati, from 1977 to 1988. --- My Lady Ms FN the Defendant cannot be singled out from the other employees or workers so it was just that this house was build that it should accommodate my workers including the Defendant not that it was specifically build for her.'

[34] He maintained that he did not enlarge the Onesi house for the defendant and the children, but that he did so for political reasons, so as to be instrumental in housing a number of returning political refugees from Zambia during the time of the liberation struggle of Namibia.²³ Yet he testified that she went to Onesi for work, in school always with the children, and she returned when the children had to go back to school in Oshakati.²⁴

²¹ Page 22-23 of the Record

²² Page 26 of the Record

²³ Page 24 of the Record

²⁴ Page 27 of the Record

[35] The plaintiff denied that the parties jointly pulled their resources together to build a sizable estate. He argued that he has been a traditional man and neither the defendant nor his first wife LI had any control over his assets, neither did they have any details regarding the financial performance of his businesses. Neither did they help him to build these businesses.²⁵ I will deal with the credibility of plaintiff's evidence further on.

Defendant's Evidence

[36] I will now deal with the evidence for the defendant, her evidence and that of their son, TN. TN was probed at length about his relationship with the plaintiff, his father. The relationship with his father has taken strain in his adult life and at the time of this trial, it was still a strained relationship.

[37] TN gave evidence about the defendant's involvement in what he termed the family business. He testified that the defendant, his mother, was as far as he could remember responsible for the general management of family and business affairs. He gave concrete examples, such as that she managed the entire household, wherever the family moved, including children that the plaintiff fathered with other women. At the household at Onesi there was at one stage about 50 (fifty) persons that the defendant cared for as the matriarch of the family, including children of the plaintiff from other women.

[38] He testified that the defendant's duties included stock-taking, handling of cash and orders, training and supervision of employees, amongst others at a number of shops belonging to the family business. Some places where shops were located included, Oshakati, Tsandi, Oshifo, Ruacana and Epalela. He testified that his mother was performing all these functions from an office in the shops at Onesi. His father had an office at the wholesaler and he was performing the same functions on that end of the

²⁵ Page 16 of the Record, C-2016.06.07

business.²⁶ His father went on business trips during the week returning to the extended household at Onesi over weekends. His mother worked in the shops from Monday to Saturday, from sunrise to sunset; only on a Sunday the shop opened after church.²⁷

[39] TN testified that he never saw the title deeds to his father's farming properties,²⁸ but he never doubted that they belonged to both his parents, 'it was never a question to me that they were not together'.²⁹ The major commitments in the family business plans were at times displayed to the children. He recalled memories wherein his father called them together during a school holiday, to give them pocket money and in front of his mother, informed the children that they were buying a new farm.³⁰

[40] He impressed the court as a detailed and reliable witness in respect of his childhood memories of the organization of the household and his parent's management of their business.³¹

[41] The defendant gave an account to the court of how the love affair between herself and the plaintiff unfolded when she was a young woman with aspirations to finish school. She met the plaintiff, started to work for him and fell pregnant. She was assured that she would become his wife in the traditional sense,³² and would have the security of having a husband. After she fell pregnant with his child in 1976, he visited his mother and made clear his intent to take the defendant as his second traditional wife.³³

[42] She testified that she committed herself to his businesses, and followed him from Ruacana to Oshakati, with their baby NN in 1978. She testified that she was under the impression that they were building a life together, as the children were being born one after the other and the family grew. They had a Christian marriage in 1988. They were

²⁶ Page 106 of the Record

²⁷ Page 105 of the Record

²⁸ Page 166 of the Record

²⁹ Page 167 of the Record

³⁰ Page 180 of the Record

³¹ Pages 99 – 116 of the Record, A-2016.06.08

³² Page 192 of the Record

³³ Page 193 of the Record

both under the impression that he was duly divorced from his first wife, LI. The defendant believed they were duly married and after the marriage, in her mind, committed herself even further by building the family interests.

[43] In relation to the above, during cross-examination of the defendant the following exchanges ensued:³⁴

'No Madam you are saying you became a part owner of the businesses; do you know when that situation came about? --- My Lady I found the Plaintiff with a small business it is not a market but a small business at home there and then another one, a small shop and then a bottle store and then another one at Ruacana, My Lady beside the business at home that I mentioned and the one at Ruacana and the truck business that I loaded sand in those years that is 1970's the most businesses were acquired, My Lady there are many other businesses they are acquired when I am with the Plaintiff and I started when I was 22 years old and count 22 and how many years have I been with the Plaintiff and we have acquired this wealth together, if the Plaintiff has to claim today that I have no part or we are jointly not owning the wealth that we acquired together then that is abuse of a human being then the (indistinct) is an abusive man.'

[44] She was made to believe that she was his wife and she directed all her efforts knowing that she was working hard to accumulate a joint wealth for herself, the plaintiff and their children:³⁵

'Okay let me just make it clear, are you suggesting that you became the owner, a joined owner of the business of, all businesses of the Plaintiff in 1976 are you trying to say that? --- That is clear enough 1976 is when I born NN, and he promised me the Plaintiff that I am his wife. And out of that promise the Plaintiff made me to believe that I am his wife and when I was working, I worked with all my efforts, I put all my efforts, my sweat knowing that I am working hard for our wealth or for something that will belong to us because I believe I was going nowhere I was there to stay.'

[45] She admitted that she started out as an employee working for the plaintiff in

³⁴ Page 240 of the Record

³⁵ Page 241 of the Record

Ruacana, but after she fell pregnant, he confirmed her status as second traditional wife. She gave critical evidence under cross-examination that she paid the salaries to the employees, she kept a record of salary payment, and she did not receive a salary.³⁶ She received money from the plaintiff from time to time for necessities.³⁷

[46] The defendant testified that the entire household moved to Onesi in 1988, everyone, including the children. At this stage the defendant had under her care a household close to 50 (fifty) persons. She explained the number of children as follows. The children included the four surviving children of the parties and four children of the plaintiff with LI.³⁸ The plaintiff fathered four other children with three other women, bringing the number of children between the parties to 12 (twelve).³⁹ In addition to these 12 (twelve) biological children of the plaintiff, there were also three children born to the plaintiff's eldest sister in the Onesi-household, bringing the total number of children under defendant's care to 15 (fifteen).⁴⁰ During this time, the plaintiff was often not at Onesi, and the defendant was responsible to see that there was sufficient food and necessities for everyone in the household and that all the children attended school. When one of them was sick, it was the defendant who attended to the sick and took them to obtain medical care.

[47] The defendant remained steadfast under cross-examination on the crucial aspects of her case. She maintained her evidence in chief in relation to the contributions she made to the joint household she shared with the plaintiff. She testified about her state of mind and her expectations that arose over a period of 37 (thirty-seven) years she shared with the plaintiff.

[48] This is contrary to this court's evaluation of the plaintiff's evidence. I do not find him a credible witness. He essentially placed a version to this court, that the defendant was only his employee. An employee with whom he had five biological children, (only

³⁶ Page 244 of the Record

³⁷ Page 247 of the Record

³⁸ Page 207 of the Record, A 2016-06-09

³⁹ Page 208 of the Record, A 2016-06-09

⁴⁰ Page 208 of the Record, A 2016-06-09

four surviving) and she raised 11 (eleven) other children on his behalf. In the 37 (thirty-seven) years that they were together she was never his life partner, so he maintained.

[49] This court rejects his version of the nature of their relationship. I have reached this conclusion, considering the following. The plaintiff introduced the defendant to his mother as a traditional second wife, after she fell pregnant with their first born. He instructed his lawyers to file his divorce from LI 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.⁴¹ 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.⁴²

[50] The above stated factual matrix points this court to make a finding that the parties did not merely have an employment relationship, they were living together as life partners in an intimate familial relationship, they had a common household and they jointly invested themselves in building their family and their family fortune.

[51] I find the defendant's evidence credible in respect of her contributions to the family life and family fortune in all stages of their 37 (thirty-seven)-year long union. She invested herself in this union and all her sweat and all her efforts went into building up a life for the family. She embraced the plaintiff's extended family, including his eight children with other women, enabling him to have the time and energy to invest in building up his business interests, further from home. She took care of the sick in their 50 (fifty)-member household. She took care of the businesses in the vicinity of the common home, for the benefit of the common home. She worked extended hours without a salary in the family businesses. This household at times, included political

⁴¹ Page 99 of the Record

⁴² Page 180 of the Record

refugees, whom she housed and provided for and in that way contributed to building the reputation of the plaintiff.

[52] According to his own testimony and from what is evident from their business growth over 37 (thirty-seven) years, plaintiff himself, had an exceptional entrepreneurial flair. Further away from home, he acquired business interests in other sectors, whilst, his household and home-based businesses were well organized and taken care of. He did not openly share the exact nature of his other business interests with the defendant and according to her testimony, it was not custom for her to ask too many questions. She accepted it as that. She also did not have any insight into the stance of the bank account, although she prepared the cash deposits for banking at her end of the business. Plaintiff always dealt with withdrawal of funds from the bank personally.

Finding a Putative Marriage

[53] The issue of law that remains to be resolved in terms of the pre-trial order is:⁴³

‘Whether the parties formed a universal partnership in which each one has equal shares as alleged by the plaintiff.’

[54] This reference to the plaintiff, means the defendant in the consolidated current matter before this court. On the question of whether or not a universal partnership existed between the parties, the defendant bears the onus of proof. It was common cause that the parties are not legally married. It was also common cause that both parties were under the *bona fide* belief that they were married lawfully until 2013. It is my finding that the union between the parties is clearly a putative marriage, based on the facts in common cause. Neither of the parties pleaded or argued this point.

[55] However, in considering the evidence, the court took judicial notice of the following: A marriage certificate was handed up and marked as “Exhibit B”, the document indicated that the parties were married without an ante nuptial agreement on

⁴³ Page 3 of the Pre-Trial order paragraph 3

11 November 1988. According to their marriage certificate, the marriage was solemnized in Onesi, Oukolonkadi, District: Ovambo. Also in this regard, the Deed of Transfer, “Exhibit A” indicated that the parties were married in community of property.

[56] No submissions were made regarding the possible matrimonial property regime, which this putative marriage could possibly have attracted. The reasons for this is not entirely clear to me and I am not inclined to unsolicitedly venture into the determination of this question.

[57] I shall deal with the relief claimed in the pleadings and which the parties argued before me. Hence, I am going to deal with the defendant’s prayer for the declaration of a universal partnership. In a putative marriage, the parties cannot legally be said to have a joint estate in the same legal context as parties that are lawfully married. However, after 37 (thirty-seven) years of co-habitation, thinking that they are married, jointly building-up a sizable estate and jointly raising 15 (fifteen) children, surely, there is something to be said for sharing the proceeds of their labour.

The Law

[58] In this regard, I respectfully considered the following *dicta* from the Supreme Court case of the *Chairperson of the Immigration Selection Board v Frank*,⁴⁴ in which Strydom, CJ, expressed in *obiter dicta* that a universal partnership concluded tacitly has frequently been recognized in our courts of law between a man and a woman living together as husband and wife, but who have not been married by a marriage officer. He said this when he dealt with three misdirections by the Court *a quo*. The *dicta* following below is *obiter*, but of interest

⁴⁴ 2001 NR 107 (SC) at Page 47

in the current matter. I need only to refer to the third instance.⁴⁵ It follows herein below:

‘(iii) The Court stated:

In his affidavit Mr. Taapopi referring to the lesbian relationship between the applicants, said that ‘applicant’s long terms relationship was not one recognized in a Court of Law and was therefore not able to assist’ the first applicant’s application.

This too is an incorrect statement of the law. In *Isaacs v Isaacs*, 1949(1) SA 952(C) the learned Judge dealt with the position in common law where parties agree to put in common all their property both present and any they may acquire in future. From the common pool they pay their expenses incurred by either or both of them. They can enter into this type of agreement by a specific undertaking verbal or in writing or they can do so tacitly. Such an agreement is known as a universal partnership.

A universal partnership concluded tacitly has frequently been recognized in our courts of law between a man and a woman living together as husband and wife but who have not been married by a marriage officer.” (See *Isaacs, supra*, and *Ally v Dinath*, 1984(2) SA 451 (TPD)).’

[59] In the above stated passage, the Supreme Court in Namibia in *obiter dicta*, expressed a view in relation to the formation of a universal partnership between a man and a woman who is not married, but living together as man and wife where the ‘parties agree to put in common all their property both present and any they may acquire in future. From the common pool they pay their expenses incurred by either or both of them.’⁴⁶

[60] However, both Mr Namandje and Mr. Denk, referred this court, to the South African authority on the formation of universal partnership between unmarried persons, in an effort to persuade this court to their standpoints regarding recognition, or not, of the universal partnership in our law. They referred to the case of *Butters v Mncora*,⁴⁷ a case bearing certain distinct factual correspondences to the present matter. The

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⁴⁶ *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC)

⁴⁷ 2012 (4) SA 1 (SCA)

judgment was handed down by the South African Supreme Court of Appeal for the defendant, Ms Mncora.

[61] This court will forthwith, respectfully consider the similarities and the stipulation of the law set out in this South African authority considering its convincing value to form an opinion in the current case.

[62] The parties in case of *Butters v Mncora*⁴⁸ were not lawfully married, but lived together as husband and wife for a period of nearly 20 (twenty) years when their relationship came to an end in 2008. By that time Mr. Butters was by all accounts a wealthy man, while Ms. Mncora owned no assets worthy of mentioning.

[63] I have alluded to the fact that the factual matrix in the *Butters* case corresponds significantly to the circumstances of the current putative marriage under my scrutiny. The parties were not legally married, but lived together as husband and wife for an extended period of time. In the *Butters* case, close to 20 (twenty) years, in the current matter close to 37 (thirty-seven) years. The female partner in the union in the *Butters* case did not only take care of the children from the union, but also took care of children of both parties from other relationships.

[64] The male partner in both unions pursued successfully certain business objects and became very wealthy men. The female partner in both unions, left their own academic or career aspirations behind and placed all their energy into the affairs of the union, in various ways. In the *Butters* case, she placed her energy in the household and the raising of the family, as it was the plaintiff's wish that she quotes her job and takes care of the household and the children.

[65] Having established that there is a remarkable similarity in the factual circumstances of the two cases, I examined the legal principles regarding the universal partnership in the *Butters* case. Ms. Mncora sought to rely on a remedy from the law of

⁴⁸ 2012 (4) SA 1 (SCA)

partnership. She had the onus to establish that she and the plaintiff were not only living together as husband and wife, but also that they were partners in the context of the institution of a partnership recognized by law.

[66] The defendant in this matter, bears the exact same onus, in her claim for a declaration of a universal partnership, flowing from their union, which I have now held was a putative marriage. To succeed, her case must be that they were partners within the context of the institution of a partnership recognized in the law. This legal context was stipulated in the following *dicta* from *Butters v Mncora*:⁴⁹

[14] It appears to be uncontroversial that, apart from particular partnerships entered into for the purpose of a particular enterprise, Roman and Roman Dutch law also recognised universal partnerships. Within the latter category, a distinction was drawn between two kinds. The first was the *societas universorum bonorum* – also referred to as the *societas omnium bonorum* – by which the parties agree to put in common all their property present and future. The second type consisted of the *societas universorum quae ex quaestu veniunt* where the parties agree that all they may acquire during the existence of the partnership from every kind of commercial undertaking, shall be partnership property. 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 (see eg De Wet & Yeats *Kontrakte- en Handelsreg* 3 ed (1964) 565 and Brian Bamford *The Law of Partnership and Voluntary Association in South Africa* 3 ed (1982) 19). This was accepted by the courts as good authority (see eg *Isaacs supra* at 955; *V (also known as L) v De Wet NO* 1953 (1) SA 612 (O) at 614B-F). Moreover, the perception was that even where a partnership of all property was allowed, it required an express agreement and could therefore not be brought about tacitly. (See eg *Annabhay v Ramlall* 1960 (3) SA 802 (D) at 805E.)

[67] In the context of my finding that this is a putative marriage, the following part of the extract is of particular interest to me: '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'.⁵⁰ This

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Butters v Mncora supra, paragraph 14

passage supports a view that a formation of 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, lead 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 division of the estate between the parties.

[68] The South African Supreme Court, in the case of *Butters v Mncora*,⁵¹ established the following in respect of a universal partnership in South African law:

'[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.

(See eg *Ally v Dinath* 1984 (2) SA 451 (T) at 453F-455A; *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634A-B; *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 109C-E; *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 77A; *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338A-F; *Volks NO v Robinson* 2005 (5) BCLR 44 (CC) para 125; *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) paras 19-22; J J Henning *Law of Partnership* (2010) 20-29; 19 *Lawsa* 2 ed para 257.)'

⁵⁰ *Butters v Mncora supra*, paragraph 14

⁵¹ Paragraph 18

[69] Of interest to this court was the manner in which the court in the *Butters* case applied the law in respect of the essential elements of a partnership as formulated by *RJ Pothier in A Treatise on the Law of Partnership (Tudor's Translation 1.3.8)*:⁵²

‘As to the essential elements of a partnership, our courts have over the years accepted the formulation by Pothier (RJ Pothier A Treatise on the Law of Partnership (Tudor's Translation 1.3.8)) as a correct statement of our law (see eg *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 783H – 784A; *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634C – F; *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 390A – C). The three essentials are, firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts (see eg *Bester v Van Niekerk* *supra* at 784A).’

[70] For the convenience of my findings in this matter, I extracted the above stated three elements and I will examine the existence thereof in my reasoning below:

- (a) Each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill.
- (b) The partnership business should be carried on for the joint benefit of both parties.
- (c) The object of the partnership should be to make a profit.

Each Party Brings Something into the Partnership

[71] In the *Butters* case the court held that:⁵³

‘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

⁵² *Butters v Mncora* *supra*, paragraph 11

⁵³ Paragraph 19

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.'

[72] I fully concur with the above stated *dicta*. In the current matter, the factual matrix remarkably resembles the efforts of the female partner in the *Butters* case, to the extent that she placed all her efforts into managing a household of close to 50 (fifty) persons and the delegated business affairs of the parties:⁵⁴

'And out of that promise the Plaintiff made me to believe that I am his wife and when I was working, I worked with all my efforts, I put all my efforts, my sweat knowing that I am working hard for our wealth or for something that will belong to us because I believe I was going nowhere I was there to stay.'

[73] I hold that the defendant met this requirement, '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.'⁵⁵

The Partnership Business should be for Joint Benefit of the Parties

[74] In the early part of their union up until 1988, the defendant was by the plaintiff's side at every major business venture the plaintiff embarked upon, he was accompanied by the defendant. When he opened a branch of the business in Oshakati in 1978, the defendant accompanied the plaintiff from Ruacana and started residing in Oshakati.

⁵⁴ Page 240-241 of the Record

⁵⁵ *Butters v Mncora* supra, paragraph 19

When the plaintiff opened a shopping complex at Onesi, shortly after his putative marriage to the defendant in 1988, the defendant moved together with the whole family to Onesi. She testified that she extensively contributed to the growth of the family enterprise and various places in the north. The shared history of the plaintiff and the defendant is simply unassailable and cannot be ignored. 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.

[75] In the latter part of their union, after they moved to Onesi, the plaintiff was often away from home on business. During these times, the defendant held the fort at home. She dedicated her days at Onesi to enable the plaintiff to venture further and enlarge the family fortune. I respectfully agree with the reasoning of the court in the *Butters* case⁵⁶ that the efforts of the one partner dedicating her life at home to support the other party to make a fortune, should equally count as a contribution toward the partnership. In the current matter, the defendant invested tremendous efforts as the good wife at home. But, she went beyond that, she laboured with equal zeal, inside and outside the home for the benefit of the family. It is for this reason that I find that defendant's case is compliant also with the second element of establishing a universal partnership.

The Object to make a Profit

[76] In respect of the third requirement, namely that the object of the partnership should be to make a profit, it is submitted that the parties pursued both their home life and businesses with a profit motive to which they tacitly agreed. With regards to this requirement that the object of a universal partnership should be to make a profit, it has been stated in *Ponelat v Schrepfer*,⁵⁷ that a purely pecuniary profit motive is not always

⁵⁶ Paragraphs 24-26

⁵⁷ 2012(1)SA 206 (SCA) at Paragraph 24

required. I am convinced by this authority and in particular the application thereof in the case of *Butters v Mncora*⁵⁸. I hold that defendant's case meets this requirement.

[77] Mr Namandje argued at length that there was no tacit agreement between parties, to equally share in the estate of the plaintiff, and that the law in relation to the universal partnership in fact requires an express agreement to share in profits and losses. In respect of this element of the law, I once again found the exposition of the law in the *Butters* case convincing:⁵⁹

'(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.'

And in

'(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.'

[78] I respectfully concur with this reasoning in the *Butters* case. I hold that a universal partnership, can like any other contract come into existence by way of a tacit agreement, evident from the conduct of the parties. In this matter, I find that a universal partnership to share everything was formed, and is evident from the conduct of their family life and business-life over 37 (thirty-seven) years. I cannot make a contrary finding. They were in it together for the betterment of themselves and the family. I accepted above⁶⁰ that a purely pecuniary profit motive is not always required, however in this case there was definitely a pecuniary motive in addition to the aspect of a building a family life together. I am satisfied that a tacit agreement to that effect existed between the parties.

⁵⁸ Paragraphs 23 - 26

⁵⁹ Paragraph 18

⁶⁰ *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA)

[79] Having considered the above stated reasoning and exposition of the law by the Supreme Court of Appeal of South Africa, and having considered the *obiter dicta* regarding the existence of a universal partnership in Namibian law,⁶¹ I hold that there are convincing grounds to recognize the existence of a universal partnership of all property between the plaintiff and the defendant in this matter. I find the reliance on this partnership law remedy in the case of *Butters v Mncora* a plausible one, and I am respectfully, convinced by the reasoning of the court in that matter.

[80] I hold that there is a universal partnership between the parties in relation to all property belonging to them and it should be divided in equal shares between the parties. I am compelled to clarify my decision that the universal partnership between them extends to all property between the parties. The defendant managed the household and the business affairs in and around the household; the plaintiff invested himself in businesses at home and further away from home. In this respect, I considered the following *dicta* from the *Butters* case:⁶²

‘[26] What the defendant's contention amounts to is that it must be inferred from the conduct of the parties that, though they intended to share the benefits of their joint contribution, the defendant would retain the surplus income and accumulate assets only for himself. From the plaintiff's viewpoint that intent would be quite remarkable. It would mean that she intended to contribute her everything for almost 20 years to assist the defendant in acquiring assets for himself only; that in her old age she would be entirely dependent for her very existence on the benevolence of the defendant towards her.’

[81] If a contention is to be upheld in this case, that the defendant should not share in the ownership of all plaintiff's businesses, ‘It would mean that she intended to contribute her everything’ for a period of 37 (thirty-seven) years to assist the plaintiff ‘in acquiring assets for himself only; that in her old age she would be entirely dependent for her very existence on the benevolence of the defendant towards her.’ I think not.

⁶¹ Supreme Court case of *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC), page 47

⁶² *Butters v Mncora* supra, paragraph 26

[82] 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 the *Butters v Mncora*. However, I hold that the private law institution of the universal partnership so laid out, can similarly be applied to the case of this putative marriage. I hold that the requirements of a private law partnership have been met by the factual circumstances of the case. Defendant established that she and the plaintiff were not only life partners, but they were also partners within the context of the institution of a partnership recognized in the law.

[83] Based on the above I make the following order:

1. Plaintiff's claim for the eviction of the defendant from Erf 353, Oshakati is dismissed.
2. The existence of a universal partnership of 37 (thirty-seven) years between the parties is declared and confirmed.
3. The assets of the universal partnership shall be divided in equal shares between the parties.
4. Defendant appointments a receiver to wind up the partnership and distribute the partnership estate, existing between the parties, in equal shares.
5. Cost is granted in favour of the defendant, occasioned by one instructing and one instructed counsel.

L VAN WYK

ACTING JUDGE

APPEARANCES

PLAINTIFF:

**S Namandje
Of Sisa Namandje & Co. Inc.
Windhoek**

DEFENDANT:

**A Denk
Instructed by Theunissen, Louw & Partners
Windhoek**