

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 799/2010

In the matter between:

**ARTHUR ROLF PREUSS**

**RESPONDENT/PLAINTIFF**

And

**ERIKA PREUSS**

**1<sup>ST</sup> APPLICANT/1<sup>ST</sup> DEFENDANT**

**HAW RETAILERS CC t/a ARK TRADING**

**2<sup>ND</sup> APPLICANT/2<sup>ND</sup> DEFENDANT**

**CLAUDIA PROPERTIES CC**

**3<sup>RD</sup> APPLICANT/3<sup>RD</sup> DEFENDANT**

**Neutral citation:** *Preuss v Preuss* (I 779/2010) [2017] NAHCMD 2 (18 January 2017)

**Coram:** UNENGU AJ

**Heard:** 10 November 2016

**Delivered:** 18 January 2017

**Flynote:** Practice – Trial – Absolution from the instance at the close of the plaintiff's case – A *prima facie* case test – Plaintiff and first defendant married by ante-nuptial contract – After a divorce, plaintiff instituted an action against the first defendant alleging universal partnership to have been established between them

during the existence of their marriage - At the close of his case, plaintiff failed to establish a *prima facie* case of a universal partnership – Application for absolution from the instance granted with costs.

**Summary:** At the close of the plaintiff's case where he claimed universal partnership the first defendant's counsel applied for absolution from the instance arguing that with the evidence presented before Court, the plaintiff had failed to establish a *prima facie* case of his claim. Further, counsel argued that the evidence presented by the plaintiff was about theft of something which allegation was not contained in the pleadings. That being the case and in view of a failure to establish a *prima facie* case by the plaintiff absolution from the instance with costs is granted.

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### ORDER

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- (i) The application for absolution from the instance is granted.
- (ii) Cost is granted in favour of the first defendant, including costs of one instructing and two instructed counsel.

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### JUDGMENT

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UNENGU AJ:

#### Introduction

[1] A lengthy burdened case of paperwork commenced with the institution of summons by the plaintiff against the first defendant on the 17 March 2010.<sup>1</sup> The plaintiff's amended particulars of claim prayed for a declaratory order declaring that a universal partnership existed between the parties, in respect of the close corporation cited as the 2<sup>nd</sup> defendant in the main action, namely Haw Retailers CC t/a Ark Trading.<sup>2</sup>

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<sup>1</sup> Page 1 of the record of index: pleadings.

<sup>2</sup> Page 6 of the record of index: pleadings.

[2] Further, should the declaration be made, the plaintiff accordingly asks this Court to simultaneously have the partnership dissolved effective from the date when the decree of divorce was granted.<sup>3</sup>

[3] On the 7 November 2016, the court commenced with the trial proceedings between the present parties as per the papers disclosed before it. At the close of the plaintiff's case, counsel for the first defendant applied from the bar for absolution from the instance. Accordingly, the matter was postponed to 10 November 2016 allowing for heads of argument to be filed and for hearing of arguments in respect of the application.

[4] It is this application which presently lends itself for adjudication before me.

#### Background

[5] The first defendant in the present matter is Ms Erika Preuss, an adult female and former wife of the plaintiff. The respondent is Mr Arthur Rolf Preuss, an adult male and the former husband of the first defendant. For purposes of this judgment, the parties will be referred to as the plaintiff and 1<sup>st</sup> defendant respectively and collectively as the parties.

[6] It is common cause that the parties in question were married on the 20 March 1969 out of community of property at Windhoek by an antenuptial contract<sup>4</sup> and a decree of divorce was granted on 12 February 2013 by this court.

[7] Furthermore, the parties are in agreement that in or about 1980, the plaintiff together with two other partners started a builder's hardware business called Ark Trading. The plaintiff consequently became the sole owner of the business in or about 1983. The first defendant joined the business thereafter contending that the only partnership she admits existing was during the period of 1983 – 1997, where they conducted business for their joint benefit.

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<sup>3</sup> Page 7 of the record of index: pleadings.

<sup>4</sup> Index: pleadings, pages 30 – 34.

[8] Here is where the facts in dispute start to brew and the bone of contention arises. The plaintiff alleges that the business undertaking of Ark Trading was conducted as a universal partnership between the parties for their joint benefit where skills and labour were contributed. Furthermore, he supports his theory of events by alleging that the first defendant was the financial director of the business.<sup>5</sup>

[9] On the other side of the coin, the first defendant claims that she was employed by the plaintiff to assist with the business' books and accounts and never actually became a partner in the business after it ceased to exist in 1997. As a result, she claims that there cannot be a universal partnership in respect of the second defendant and/or any other close corporations alleged by the plaintiff. Furthermore, she argues that our law prohibits a universal partnership where parties are married out of community of property.<sup>6</sup>

#### Respondent/Plaintiff's case

[10] At the commencement of the plaintiff's claim, he alleged that there is a tacit universal partnership that existed between the parties in respect of all business ventures trading as Ark Trading, although the parties were married out of community of property. The plaintiff referred to the judgment of *Preuss v Preuss* delivered by Miller, AJ on 26 November 2013 in support of his above contention.<sup>7</sup> He drew the court's attention specifically to the paragraph stipulating that there is ample authority in our case law for the proposition that parties who are married to one another out of community of property can enter into a partnership agreement to conduct business for profit.<sup>8</sup>

[11] The plaintiff himself testified, in proving his case, and called only one witness, long-time friend, Paul Stefanus.

[12] Under oath, the plaintiff testified that the first defendant was a financial director in Ark Trading and to prove this, he relied on a board resolution passed on the 18 November 1995 stating that the first defendant had resigned as the financial

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<sup>5</sup> Index: pleadings, page 5.

<sup>6</sup> Index: pleadings, page 13.

<sup>7</sup> I 799/2010 [2013] NAHCMD 355 (26 November 2013).

<sup>8</sup> I 799/2010 [2013] NAHCMD 355 (26 November 2013), para 11.

director of Ark Trading and accordingly her submission in her amended plea stating that she never was the financial director, is untrue.<sup>9</sup> In the same breath however, the plaintiff states that the first defendant was never a director of Ark Trading, contradicting his previous statement.<sup>10</sup> He further contends under oath that what he is asking from this court is quite simple – that is, that the first defendant is stealing his business, Ark Trading, and this has been happening since he commenced business in 1980.<sup>11</sup>

[13] The plaintiff then called Mr Paul Stefanus, who in summary testified that he and the first defendant on 16 October 2015 had a conversation whereby she asked him to speak to the plaintiff to convince him to sell Ark Trading as a business, as there would be a lot of profit to be shared and that due to their old age, as they no longer required all that money.<sup>12</sup> The witness also referred to an incident which took place on 15 October 2015 where one Koster, in his presence, told the plaintiff to leave the premises of Ark Trading as he no longer owned the business and at that time the 1<sup>st</sup> defendant contacted the police to have the plaintiff removed. Mr Stefanus stated that the plaintiff was informed by the police to leave the premises as Mr Koster had entered into an agreement to purchase Ark Trading (which was not concluded as the matter was pending in court) and that there was no proof of any criminality.<sup>13</sup>

[14] Under cross-examination, Mr Heathcote simply asked the witness whether he knew why the matter was before this court. The witness answered in the affirmative stating that he has known the plaintiff since 1993 and knows a lot what is going on.<sup>14</sup> When further asked about what was stolen as alleged or put forth by the plaintiff, all he knew was that the plaintiff told him that the first defendant put all the close corporations in her name, having 100% ownership.<sup>15</sup>

[15] At the close of the plaintiff's case, Mr Heathcote applied from the bar for absolution from the instance.

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<sup>9</sup> Record of proceedings, pages 8 – 9. Reference was made to a flyer discovered in the bundle referred to index: pleadings on page 166.

<sup>10</sup> Record of proceedings, page 9 lines 10 – 11.

<sup>11</sup> Record of proceedings, page 12 lines 24 – 25.

<sup>12</sup> Record of proceedings, page 17 lines 16 – 25.

<sup>13</sup> Record of proceedings, page 20 lines 20 – 28.

<sup>14</sup> Record of proceedings, page 22 lines 10 – 23

<sup>15</sup> Record of proceedings, page 22 lines 24 – 27.

### The application for absolution from the instance

[16] Mr Heathcote, in arguing the application, referred this court to the Supreme Court judgment of *Stier and Another v Henke*, outlining the test applied when applications for absolution from the instance is sought:<sup>16</sup>

“...(W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958(4) SA 307 (T).” (My underlining.)

Harms JA went on to explain at 92H- 93A:

“This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4<sup>th</sup> ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is ‘evidence upon which a reasonable man might find for the plaintiff’ (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the ‘reasonable man’ was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another ‘reasonable’ person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice.”

[17] Mr Heathcote further relies on the recent judgment of *LM v JM and Others*, outlining what elements the respondent/plaintiff needs to prove in order to establish that a tacit universal partnership exists:<sup>17</sup>

<sup>16</sup> Case number: SA 53/2008 delivered on 3 April 2012, at paragraph 4 which cites Harms, JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA), at page 92 paragraphs F – G.

<sup>17</sup> 2016 (2) NR 603 (HC), paragraph 12.

‘As in all such cases, the court searches the evidence for manifestation of conduct by the parties that are unequivocally consistent with consensus on the issue. At the end of the exercise, if the party placing reliance of such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement. In any analysis of the evidence the most important considerations are thus whether either party said or did anything to manifest his or her intention and, if so, what the reaction of the other was. Where the tacit agreement that is relied on is one of universal partnership, the cardinal intention of both parties must be to share in the profits of the subject matter alleged to be covered by the agreement.’

[18] Mr Heathcote states that the plaintiff in his amended particulars of claim alleges that a tacit universal partnership came into existence between the parties. The plaintiff therefore wrongly relies on the portion of the judgment of Miller, AJ which contends that there is nothing in our law that prohibits parties who are married out of community of property to set up a business venture in a partnership, as the profits from the business venture once distributed in terms of the partnership agreement will accrue to the individual estate of each of the parties.<sup>18</sup> He therefore has not understood or read the judgment further in that our law prohibits a proposition by parties, who are married out of community of property, putting in common all their property – in other words referring to a partnership *universorum bonorum*.<sup>19</sup>

[19] In summation, Mr Heathcote contends that not only what the plaintiff is claiming is prohibited by our law in light of their antenuptial agreement, but the elements of a tacit universal partnership has not been proven by the plaintiff. He argues that neither the testimony of the plaintiff nor that of Mr Stefanus assists this court in deciding the matter on the papers before it. Rather that the plaintiff has brought a case to court alleging theft or misappropriation of the business known as Ark Trading.<sup>20</sup>

## Finding

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<sup>18</sup> Preuss judgment of 2013, paragraphs 11 – 13.

<sup>19</sup> Preuss judgment of 2013, paragraph 15.

<sup>20</sup> Applicant’s heads of arguments, page 7 paragraph 12.

[20] This court acknowledges that 'After the plaintiff has closed his case the defendant, before commencing his own case may apply for the dismissal of the plaintiff's claim. Should the court accede to this, the judgment will be one of absolution from the instance'.<sup>21</sup> A defendant may accordingly apply to the court for absolution from the instance in terms of *Rule 100 of the Rules of the High Court* (hereinafter referred to as the Rules).<sup>22</sup> Absolution from the instance should therefore be granted in cases 'where the plaintiff has failed to establish an essential element of the claim...'<sup>23</sup> This court confirms the principal test laid down in the *Stier* judgment as referred to by Mr Heathcote in his heads of argument and outlined above.

[21] In order to absolve the first defendant in this matter, the plaintiff should not have established the essential elements of a tacit universal partnership as claimed. A universal partnership is a concept that has gained recognition in our common-law and is divided into two, namely: a *societas universorum quae ex quaesta veniunt* (parties intend that all they have acquired during the existence of the partnership, from any and every kind of commercial venture, forms part of the partnership property) and a *societas universorum bonorum* (parties agree to put in a common stock all their property, both present and future, and including all the acquisitions, whether from commercial endeavours or otherwise).<sup>24</sup> The plaintiff has not made it clear, from the papers or during presentation of his case, on which type of universal partnership he is relying. This becomes important due to the fact that the former type of partnership still exists in law today, whereas, the latter has fallen into disuse and in light of the marital regime the parties have found themselves, it would be prohibited by law.<sup>25</sup>

[22] It is clear from the evidence adduced that the plaintiff has failed to establish a *prima facie* case when examining the evidence of his testimony and that of Mr Stefanus. The plaintiff testified and confirmed that the first defendant was a financial director of Ark Trading and in proving this he referred to a board resolution and a flyer where the first defendant labelled herself as such, contrary to her answering affidavit. However, the plaintiff in arguing this application contradicts his own

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<sup>21</sup> Cilliers, C et al (5<sup>th</sup> Ed).2009.*Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*.Cape Town: Juta & Co, Ltd, page 920.

<sup>22</sup> Rules of the High Court of Namibia.

<sup>23</sup> *Herbstein and Van Winsen*, at page 923.

<sup>24</sup> Fouché M A."Partnerships" in Fouché MA et al (6<sup>th</sup> Ed).2004.*Legal Principles of Contracts and Commercial Law*.Durban: LexisNexis Butterworths, page 244.

<sup>25</sup> *Preuss* judgment of 2013, paragraph 15.



testimony by telling the court that the first defendant was never a partner in Ark Trading and that she did not do anything in or for the business.<sup>26</sup> To make matters worse, the plaintiff steered the court on a journey of persuasion that the first defendant is merely a thief as she has done nothing other than steal his business,<sup>27</sup> which I submit is not on the papers before this court.

[23] In concluding their arguments in the application for absolution, Mr Heathcote, asks the court to grant the application with costs, including the cost of one instructing and two instructed counsel.<sup>28</sup> 'A defendant who is absolved from the instance should be regarded as being the successful party, and the plaintiff should be ordered to pay the defendant's costs unless there are good reasons for ordering otherwise'.<sup>29</sup>

[24] The court in this case will not derogate from the general rule,<sup>30</sup> this court is a court of equity and fairness and will award costs, including one instructing and two instructed counsel as it was necessary for the first defendant to source the services of two counsel in view of the complex legal issues involved in the matter.

[25] This court is satisfied that no *prima facie* evidence exists for supporting the claim that a tacit universal partnership has been established between the parties and accordingly makes the following order:

- (i) The application for absolution from the instance is granted.
- (ii) Cost is granted in favour of the first defendant, including cost of one instructing and two instructed counsel.

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<sup>26</sup> Record of proceedings, page 41.

<sup>27</sup> Record of proceedings, page 12 lines 21 -26.

<sup>28</sup> Record of proceedings, page 38.

<sup>29</sup> *Herbstein and Van Winsen*, at page 925.

<sup>30</sup> *Four Winds Logistics CC v The Government of the Republic of Namibia (1918-2012)* [2015] NAHCMD 115 (3 June 2015), paragraph 20 'The application for absolution from the instance is therefore granted. As regards the costs I see no reason why the general rule that costs must follow the course should not apply'.

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E P UNENGU  
Acting Judge

APPEARANCES

RESPONDENT/PLAINTIFF: In person

1<sup>st</sup> APPLICANT/1<sup>st</sup> DEFENDANT: R Heathcote (with him C Van Der Westhuizen)  
Instructed by Theunissen, Louw & Partners

2<sup>nd</sup> RESPONDENT/2<sup>nd</sup> DEFENDANT: No appearance

3<sup>rd</sup> RESPONDENT/3<sup>rd</sup> DEFENDANT: No appearance