

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION, OSHAKATI
PRACTICE DIRECTION 61

Case Title:	Case No:
Julius Racky Itope	HC-NLD-CIV-ACT-CON-2022/00372
Plaintiff	
and	Division of Court:
	High Court, Northern Local Division
Nella Cosmos	Heard on: 15 August 2023
1 st Defendant	
Kula Mbunda	Delivered: 25 September 2023
2 nd Defendant	
Oniipa Town Council	Reasons: 27 September 2023
3 rd Defendant	

Heard before: Honourable Mr. Justice Munsu

Neutral citation: *Itope v Cosmos and Others* (HC-NLD-CIV-ACT-CON-2022/00372) [2023]
NAHCNLD 100 (27 September 2023)

ORDER

1. A universal partnership had come into existence between the Plaintiff and the First Defendant.
2. The universal partnership between the Plaintiff and First Defendant is dissolved as from the date of this order.
3. The First Defendant is directed to render a full account of the assets of the partnership from period 2008 to 2018.

4. A debatement of the said account.
5. The Director of the Law Society or her representative is hereby appointed receiver from the date of this order and shall within 90 days of such date effect the equal division of the universal partnership property.
6. The costs of the receiver shall be on the account of the universal partnership property

MUNSU J:

Introduction

[1] This matter was registered at the court's Main Division. It was transferred to the court's Northern Local Division at pre-trial stage.

[2] The plaintiff is Mr Julius Racky Itope, a major self-employed male and resident of Ondangwa. He is represented by Mr P Greyling, to whom the court is indebted for the helpful submissions.

[3] The first defendant is Ms Nella Cosmos, a major female and resident of Oniipa. She is employed as a manager at MobiPay, Ongwediva.

[4] The second defendant is Ms Kula Mbundu, a major female and mother of the first defendant. She resides at Oniipa.

[5] The third defendant is Oniipa Town Council, a local authority constituted in terms of the Local Authorities Act 23 of 1992, with its address at B1 road between Ondangwa and Omuthiya. No relief is sought against the third defendant.

[6] Where reference is made to both the plaintiff and the first defendant, they shall be referred to as 'the parties'. Similarly, where reference is made to both the first and second defendant, they shall be referred to as 'the defendants'.

[7] The plaintiff and the first defendant were involved in an intimate relationship. The plaintiff alleges that during the subsistence of the relationship:

- (a) The parties intended to live together as husband and wife until such time as they would get married to each other;

- (b) The parties agreed to put in common all their properties both present and any that they would acquire in future;
- (c) From the common pool, the parties paid their expenses incurred by either or both of them according to their respective financial means.
- (d) Both parties contributed, according to their respective financial means, their labour and skill towards the maintenance of the joint residence.

[8] The plaintiff pleads that the parties built a home together, where they lived as husband and wife. Furthermore, it is alleged that the joint residence was built on a portion of land that the second defendant donated to the first defendant so that the parties could build their joint residence. The said piece of land is within the local authority area of Oniipa Town.

[9] The relationship between the parties terminated and the plaintiff seeks a declaratory order to the effect that a universal partnership existed between the parties and that same should be dissolved in order for the parties to share the estate in equal shares.

[10] The plaintiff pleads in the alternative that, by virtue of the improvements made by him on the property, the defendants have been unduly enriched at his expense and that he is entitled to compensation.

[11] Furthermore, the plaintiff states that the first defendant refuses to dissolve the partnership, thus, he claims that he is entitled to its dissolution.

[12] The defendants entered appearance to defend the action, however, they could not prosecute their defence to the end, presumably because of the sanctions imposed on them. By order dated 26 March 2020, the parties were directed to file their witness statements by 19 May 2020. The parties failed to comply with the order. On 05 June 2020, the court directed the parties to file sanctions affidavits explaining the reason for their non-compliance and show cause why sanctions contemplated in terms of rule 53(2) should not be imposed. The plaintiff filed his sanctions affidavit but the defendants failed to do so. On 11 June 2020, the court condoned the plaintiff's non-compliance and allowed him to file witness statements by 24 June 2020. The defendants were, however, barred from filing witness statements and were to proceed to trial without witness statements.

[13] In their plea, the defendants' deny the allegations made by the plaintiff. In amplification, of the aforesaid denial, they pleaded that the parties did not cohabit as husband and wife and that at

all material times, they were both married to third parties and could therefore not cohabit.

[14] Furthermore, the defendants pleaded that the dwelling in question was constructed with moneys of the defendants without any financial assistance from the plaintiff.

[15] In addition, the defendants pleaded that the second defendant did not donate any rights to the first defendant. The defendants further pleaded that, donation relating to immovable property is, in any event, required to be in writing as contemplated by section 1 of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969, and further that the second defendant is not the owner of the land and could therefore not donate what is not hers. The defendants denied that there was a universal partnership between the parties.

[16] The defendants further pleaded that the plaintiff did not contribute to the construction of the residence and that the residence was not a 'joint residence'. Additionally, the defendants stated that the parties never intended to live together as husband and wife or put in common all their properties whether present or future. According to the defendants, the adulterous relationship between the parties was terminated by the violent conduct of the plaintiff.

The evidence

[17] The plaintiff testified that during the year 2002 his wife left the common home indicating that she was not interested in being married anymore and wanted a separate life. He further testified that he agreed with his wife to live separate lives and that the plaintiff would maintain her for a period of 10 years after which they would get divorced.

[18] The plaintiff further testified that during June 2005, he entered into an intimate relationship with the first defendant. At the time, the first defendant was residing with the second defendant at the Erf in question. According to the plaintiff, the first defendant informed him that she has never been married and that she was just living together with a man that he only got to know by name. However, it turned out later that she was in fact legally married to him.

[19] In addition, the plaintiff recounted that from 2005, his relationship with the first defendant developed into a strong relationship. During 2008, the parties decided to construct a house jointly for cohabitation as they intended to get married in future. According to the plaintiff, it was their intention that the costs of maintaining the common home would be borne by them in accordance with their respective incomes.

[20] The plaintiff further narrated that the parties initially decided to construct the house at Omashaka village in Ondangwa, however, the first defendant informed the plaintiff that she had a discussion with the second defendant and that the latter offered to donate a portion of her land to the parties. The plaintiff testified that they considered the offer favourably as they would not be required to pay or compensate the second defendant. The witness recounted further that, in his presence, the second defendant demarcated to the parties the portion (50 x 50 metres) so donated to them.

[21] Furthermore, the plaintiff testified that the parties agreed that the plaintiff's construction company (Max Construction CC), would construct the house. According to the plaintiff, most of the costs of the construction were borne by the CC of which he was the sole member. In addition, he also used the bank accounts for his other businesses to make payments for the materials and labour. The plaintiff recounted that the first defendant contributed by buying food for the employees of the CC whilst the constructions was ongoing.

[22] It was the plaintiff's testimony that during 2011, the construction of part of the common home was completed. It consisted of 2 bedrooms, 2 bathrooms, a kitchen and a sitting room. The plaintiff further testified that the parties moved into the common home and cohabitated as husband and wife.

[23] Moreover, the plaintiff testified that from the year 2012 to 2015, the construction of the common home continued with the construction of a carport, braai area, a swimming pool and a guest house consisting of 2 bedrooms and 2 bathrooms. The plaintiff stated that the construction was completed during the year 2016.

[24] According to the plaintiff, the costs of the improvements amounted roughly to N\$ 635, 651.73.

[25] The plaintiff recounted that he made various payments to the first defendant by cheques, cash, and electronic transfers of money that the first defendant would cash and utilise to purchase furniture for the common home. According to the plaintiff, the costs of these amounted roughly to N\$ 78 300.

[26] In addition, the plaintiff testified that the second defendant did not make any financial contribution to the construction of the common home other than the food she purchased for the

construction workers. He further testified that as the parties' relationship continued, he regularly handed cash or transferred amounts to the first defendant by cheque or electronic transfer for the maintenance of the common home. He further narrated that he also assisted the first defendant and her two children financially such as paying of their school fees whilst they were schooling in Cape Town, South Africa. He further related that he paid for repairs to her motor vehicle.

[27] Furthermore, the plaintiff related that during 2014, he commenced divorce proceedings against his wife, which proceedings were finalised in 2015. He presented the divorce decree into evidence. According to him, the divorce was intended to pave the way for his marriage to the first defendant. He related that he was not aware that she was still married.

[28] The plaintiff narrated that during 2016, his relationship with the first defendant started to deteriorate as he realised that the first defendant had misled him when she informed him that she was never married. He recounted that he found her marriage certificate in the car she was driving. According to him, he confronted her and she admitted that she was still married and indicated that she would get a divorce. The plaintiff related further that the economic downturn was a further blow to the relationship as the plaintiff could no longer assist the first defendant with payments of the school fees for her children.

[29] In addition, the plaintiff testified that during 2018, while at the common home, the first defendant was extremely irritable and that the parties had a verbal spat to an extent that he temporarily moved out of the common home. However, the plaintiff testified that he was still in speaking terms with the first defendant and the relationship had not yet ended. The plaintiff recounted that the parties' still regularly exchanged messages and he still assisted her financially. The plaintiff discovered documents containing the said messages and presented same into evidence.

[30] It was the plaintiff's evidence that during October 2018, the first defendant started to ignore his messages and phone calls. The plaintiff recounted further that on 18 October 2018, the first defendant obtained an interim protection order against the plaintiff. The plaintiff related that the interim protection order was, however, discharged at the hearing where it was confirmed that she was still married and that she had commenced with divorce proceedings. According to the plaintiff, it was evident that the relationship between the parties had come to an end.

[31] Furthermore, the plaintiff related that during December 2018, it came to his knowledge that the first defendant had during the month of January 2018 commissioned a valuation of the property

according to which it was valued at N\$ 2, 046 000. The said valuation document was discovered and presented into evidence. According to the plaintiff, he started an investigation and found that the property was put up for sale by the first defendant. The plaintiff narrated that he was informed by two individuals, one Ms Maria Ruben an estate agent who saw the property being advertised in the market and another, a medical Dr. Munika who was approached by the first defendant to buy the property.

[32] The plaintiff recounted further that it came to his attention that the second defendant had already applied to purchase the plot, inclusive of the portion donated to the parties and that the sale thereof by the Oniipa Town Council to the second defendant was already advertised in a newspaper of 2 January 2018. Documents in this regard were discovered and presented into evidence.

[33] It was the plaintiff's further testimony that he was unaware of the proclamation of the land as part of the Oniipa Town Council which happened on 30 April 2015 as per Government Notice no 59 of Government Gazette no 5721 dated 30 April 2015.

[34] Furthermore, the plaintiff testified that although the Town Council of Oniipa became the owner of the land when it was so proclaimed, the improvements thereon remained the property of the second defendant and the parties (in respect of the donated portion). For this reason, the plaintiff states that the Oniipa Town Council may only sell the land and not the improvements. The plaintiff went further to narrate that should the town council intend to use the land, it would have to pay compensation to the parties.

[35] In conclusion, the plaintiff testified that subsequent to the ending of the relationship between the parties, the partnership in respect of the common home came to an end. He stated that the parties have not yet agreed on the dissolution and distribution of the assets that were procured during the subsistence of the relationship.

Analysis

[36] There was no appearance on behalf of the defendants at trial. As such, the detailed allegations and evidence by the plaintiff remained unchallenged. Notwithstanding the fact that the defendants were barred from filing witness statements, they were entitled to be present at trial to challenge and discredit the plaintiff's evidence. This did not happen and as a result, the credibility and veracity of the plaintiff's evidence was not placed in doubt.

[37] In *MN v FN*¹ a businessman, Mr Nakuumba, whilst lawfully married in community of property to the first woman (Ms Ipinge), entered into an adulterous relationship with the second woman (Ms Nakuumba) and subsequently purported to marry the latter without divorcing Ms Ipinge. He cohabited with Ms Nakuumba for some 37 years and lived with and made home with her as if they were married and raised a large family, she being the main care giver of the children. When he sought to evict Ms Nakuumba from a common home, she counter sued him, claiming that she was his universal partner in the substantial estate he had amassed.

[38] The High Court found in favour of Ms Nakuumba, holding that she was an equal partner in the estate built up by Mr Nakuumba. The court ordered an equal division of the universal partnership estate it found existed between Ms Nakuumba and Mr Nakuumba. On appeal, the Supreme Court upheld the High Court's order of a universal partnership in favour of Ms Nakuumba but excluded certain properties separately owned by the partners and not forming part of the universal partnership.

[39] In *MN v LI Another*² the Supreme Court stated that the courts have a duty, given that the universal partnership is a creation of the common law, to adapt it to changing circumstances so as to protect vulnerable persons who may otherwise suffer grave injustice. The apex court opined that the facts of the case before it demonstrated the importance to take a liberal and progressive approach to the institution of universal partnership.³ In addition, the Supreme Court expressed its agreement with a view expressed in an academic article⁴ on the institution of universal partnership in which the author makes the following important observations:

- (a) The contract is increasingly becoming a remedial measure to assist parties in putative marriages, cohabitation situations and customary marriages when otherwise by the application of the strict laws of marriage, they would have no remedy;
- (b) The institution of universal partnership should be more liberally applied by the courts to assist unmarried cohabiting persons who are often without a remedy in the absence of legislative intervention;

¹ *MN v FN* 2019 (4) NR 1176 (SC).

² *MN v LI Another* 2022 (1) NR 135 (SC).

³ At para 69 – 70.

⁴ L Hager *The dissolution of universal partnerships in South African law: lessons to be learnt from Botswana, Zimbabwe and Namibia* (2020) at 1-2.

(c) A 'reformative, progressive and liberal application of the universal partnership . . . may certainly allow our courts to protect . . . vulnerable parties' in domestic relationships;

(d) The universal partnership is 'constantly developing, adapting and finding application in our law'.

[40] In *MN v FN*⁵ the Supreme Court approved the essentials of a universal partnership as laid down in *Pezzuto v Dreyer*⁶ and confirmed in *Ponelat v Schrepfer*⁷ to be as follows:

- (a) Each of the parties contribute something to the partnership, whether it be money, labour or skill;
- (b) The partnership should be carried on for the benefit of the parties;
- (c) The object of the partnership should be to make profit.

[41] There need not be a written or oral agreement and the courts have found that a tacit agreement may also prove a universal partnership. In *Fink v Fink and Another*⁸ it was said that:

'If the agreement is not in writing the intention of the parties must be ascertained from their words and conduct...the mode in which they have dealt with each other...'

[42] As pointed out earlier, the plaintiff presented detailed evidence which was not discredited. He stated in his testimony that the parties contributed to the partnership according to their respective means. The evidence of text messages presented show that the parties were in a love relationship.

[43] The parties constructed a joint residence towards which the plaintiff contributed in terms of purchasing of building materials while the first defendant bought food for the workers. The plaintiff discovered and presented into evidence photos in respect of the improvements made to the property. He also discovered and presented evidence of receipts in respect of the materials he purchased as well as copies of cheques in respect of the money he expended to the first defendant for furniture and maintenance of the joint residence.

[44] There is evidence that upon completion of the joint residence, the parties cohabitated with the intention of getting married in the future. In addition, the plaintiff presented evidence relating to

⁵ *MN v FN* see footnote 1.

⁶ *Pezzuto v Dreyer* 1992 (3) SA 379 at 390.

⁷ *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) para 19.

⁸ *Fink v Fink and Another* 1945 WLD 226.

the construction of a guesthouse. Furthermore, the valuation of the property shows that the property is now worth in excess of 2 million, which is more than the amount spent on construction.

[45] Additionally, the plaintiff presented proof of the money he gave to the first defendant when he assisted her in paying school fees for her children who were schooling in South Africa, and the money she used to repair her vehicle. It was the plaintiff's evidence that the parties sought to engage in a universal partnership and that both had an interest in the business endeavour for their benefit. In the absence of evidence to the contrary, I find that the evidence presented established that a universal partnership existed between the parties.

The order

[46] In the result, the following order is made.

1. A universal partnership had come into existence between the Plaintiff and the First Defendant.
2. The universal partnership between the Plaintiff and First Defendant is dissolved as from the date of this order.
3. The First Defendant is directed to render a full account of the assets of the partnership from period 2008 to 2018.
4. A debatement of the said account.
5. The Director of the Law Society or her representative is hereby appointed receiver from the date of this order and shall within 90 days of such date effect the equal division of the universal partnership property.
6. The costs of the receiver shall be on the account of the universal partnership property

	Note to the parties:
D MUNSU Judge	None
Counsel:	
Plaintiff:	Defendant:
P Greyling Of Greyling and Associates Oshakati.	No appearance