THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 181/2011

In the matter between:

ANDREW KINLOCH BUTTERS **APPELLANT**

v

NOMSA VIRGINIA MNCORA **RESPONDENT**

Neutral citation:	*Butters v Mncora* (181/2011) [2012] ZASCA 29 (28 March 2012)
Coram:	**Brand, Heher, Cachalia, Mhlantla *et* Tshiqi JJA**
Heard:	**8 March 2012**
Delivered:	**28 March 2012**
Summary:	**Unmarried couple living together as husband and wife for almost 20 years – claim based on tacit universal partnership – whether established.**

ORDER

On appeal from: On appeal from Eastern Cape High Court, Port Elizabeth (Chetty J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

BRAND JA (MHLANTLA and TSHIQI JJA CONCURRING):

[1] I find it convenient to refer to the parties as they were cited in the court a quo. Hence, I shall refer to the appellant, Mr Butters, as 'the defendant' and to the respondent, Ms Mncora, as 'the plaintiff'. For nearly 20 years the parties lived together as husband and wife. But they were not married. Even though they were engaged to be wed for almost ten years, this never happened. Eventually the relationship came to an end on New Years day 2008. By that time the defendant was by all accounts a wealthy man while the plaintiff owned no assets worthy of mention.

[2] The plaintiff then instituted action against the defendant in the court a quo, claiming half of the defendant's assets. She founded her claim on two alternative grounds. First, on the basis that a tacit universal partnership existed between the parties in which they held equal shares. Alternatively, she claimed contractual damages arising from the defendant's breach of promise to marry her, calculated on the basis that the intended marriage would be in community of property. During the course of the proceedings in the court a quo (before Chetty J), the plaintiff, however, abandoned her alternative claim for contractual damages. Other claims between the parties against each other were also abandoned or resolved. All that remained at the end of the proceedings in the court a quo were

the plaintiff's claims based on the existence of a universal partnership and her delictual claim for damages resulting from the defendant's breach of promise to marry her.

[3] With regard to the first claim, Chetty J decided that a tacit universal partnership did in fact exist between the parties. He then determined the plaintiff's share in the partnership at 30 per cent and awarded her an amount equal to that percentage of the defendant's net asset value as at the date when the partnership came to an end. On the plaintiff's second claim Chetty J awarded her delictual damages for breach of promise in an amount of R25 000. The defendant's appeal, with the leave of the court a quo, is confined to the judgment on the plaintiff's first claim. Moreover it is directed only against the finding that a tacit universal partnership existed between the parties. No issue is therefore taken with the percentage of the defendant's estate awarded to the plaintiff. The only question for determination on appeal therefore turns on the existence of a universal partnership between the parties. This question is to be considered in the light of the background facts which, in turn, are to be distilled from the evidence led at the trial.

[4] The only two witnesses in the court a quo were the parties themselves. In so far as their versions were sometimes conflicting, the court a quo decided, on the basis of its credibility findings, to accept the plaintiff's account. On appeal the defendant's counsel conceded, rightly in my view, that these credibility findings cannot be faulted. On the record the defendant came across as a particularly bad witness and the adverse comments of the court a quo appeared to be fully justified. What follows therefore derives mainly from the account of the plaintiff. The defendant's version is only relied upon where it stood uncontroverted.

[5] The plaintiff was born in 1964. After she matriculated, she enrolled for a two year course in business administration. She met the defendant during 1988 when she was 24 and he was 27. At the time she lived with her parents in Port

Elizabeth while he lived in Grahamstown where he worked as a technician for the post office, which later became Telkom. He stayed in a garden flat at the back of someone's house. The parties visited each other regularly over weekends, either in Port Elizabeth or Grahamstown. In time they became intimate and a child was born from their relationship in January 1991. While the defendant continued to work at the post office he started to install alarm systems in houses and cars, in his spare time, for extra income. During the week he did so in Grahamstown, after hours, and over weekends in Port Elizabeth where the plaintiff assisted him, so she testified, by 'giving him some stuff and wires that he wanted' and also by introducing him to prospective clients.

[6] In June 1992 the defendant resigned from the post office and started a security business under the name Hitech. Though the plaintiff continued to reside in Port Elizabeth, the parties discussed the matter and decided that he should establish the business in Grahamstown where there was less competition. As the business grew, the defendant built a house in Port Elizabeth where the plaintiff moved in together with their son and her daughter from a previous relationship, whom the defendant maintained and treated as his own. During 1994 the plaintiff started working as a secretary with the Department of Education at a salary of R2 000 per month, but she stopped doing so after two years because, so she said, the plaintiff wanted her to stay at home with the children.

[7] During 1998 the defendant proposed to the plaintiff and gave her an engagement ring whereafter he announced their engagement publicly. On 7 January 1999 the plaintiff gave birth to their second son. In 2004 the defendant's daughter from a previous relationship also took up residence with them, so as to enable her to receive a better education in Port Elizabeth. She stayed for three years until she matriculated in 2007. The defendant's business continued to grow and their lifestyle improved correspondingly. They moved into a house with four bedrooms and a swimming-pool; they employed a full-time domestic worker; expensive family holidays were undertaken; and the children went to expensive

private schools. In short, the defendant in time became a very generous provider while the plaintiff took responsibility for raising the children and maintaining their common home, which the defendant visited over weekends.

[8] Eventually the defendant gathered many assets. The 'common home' and all other immovable properties so acquired were registered in his name. Yet, the plaintiff's understanding was, so she testified, that 'everything . . . was for both of us'; that 'we were sharing everything'; and that 'no-one was saying that one is mine and the other one is [yours]'. The defendant's intransigent attitude, on the other hand, remained throughout his testimony that whatever he acquired was his and his alone.

[9] During cross-examination the plaintiff conceded that she had virtually nothing to do with the Hitech business after it had been established in Grahamstown and that she in fact never entered the premises of this business. Her contention, however, remained that while she made no direct contribution to the defendant's business after he resigned from the post office, she supported him, cared for him and the children and maintained their common home. The defendant's counter-position was that the plaintiff played no part in his business life; that he was the only one who earned any income while she, as he put it, at best brought up the children and paid the household expenses with money provided by him.

[10] Cracks started appearing in the relationship in 2006 and from 2007 changes in the defendant's behaviour occurred in that, for example, he started spending less time with his family in Port Elizabeth. Ultimately matters came to a head on the evening of New Year's day 2008. The plaintiff and the children, who were to stay over in Jeffrey's Bay for the night, unexpectedly came home. There they found the defendant with another woman, Ms Mbewu. The evening ended acrimoniously and the relationship between the parties came to an abrupt end. It then for the first time came to the plaintiff's notice that the defendant had married

Ms Mbewu on 15 November 2007. The termination of the relationship left the plaintiff unemployed and without any personal income at the age of 44.

[11] I now turn to the relevant legal principles. As rightly pointed out by June Sinclair (assisted by Jaqueline Heaton), *The Law of Marriage* Vol 1 274, the general rule of our law is that cohabitation does not give rise to special legal consequences. More particularly, the supportive and protective measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period (see eg *Volks NO v Robinson* 2005 (5) BCLR 446 (CC)). Yet a cohabitee can invoke one or more of the remedies available in private law, provided, of course, that he or she can establish the requirements for that remedy. What the plaintiff sought to rely on in this case was a remedy derived from the law of partnership. Hence she had to establish that she and the defendant were not only living together as husband and wife, but that they were partners. As to the essential elements of a partnership our courts have over the years accepted the formulation by Pothier (R J 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 bind 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).

[12] Referring to these three elements, the defendant's first contention is that the plaintiff had failed to establish that she had contributed anything to the alleged partnership. His argument in support of this contention departed from the

premise that the partnership business contemplated in the second element must pertain to a commercial undertaking. The plaintiff's efforts, so the argument went, were confined to the common home and the children. Though the value of these efforts should not be underestimated, he argued, the fact remains that the plaintiff made no contribution to the commercial undertaking of the Hitech business which was exclusively undertaken by the defendant. In consequence, so the argument concluded, the plaintiff had failed to meet Pothier's first requirement for a partnership.

[13] As authority for the proposition that a partnership, including a universal partnership, must consist of some commercial undertaking, the defendant relied primarily on *Isaacs v Isaacs* 1949 (1) SA 952 (C) which also found particular favour with the court a quo. It appears to me that *Isaacs* (at 954-956) does indeed lend support to the defendant's argument. But with the benefit of historical research, first published in 1980 (see J J Henning 'Die Leeuevennootskap: Aspekte van deelname in wins en verlies deur vennote' 1980 *Modern Business Law* 147) and the even more recently introduced 17th century Roman Dutch authority of Felicius-Boxelius *Tractatus de Societate* (translated by J J Henning, H A Wessels & J H de Bruyn *Perspectives on and a Selection from Felicius-Boxelius Tractatus de Societate* a treatise on the law of partnership (2006)) it can now be said with some confidence that *Isaacs* was based on a faulty premise. An exposure of the fault line requires some historical perspective.

[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.)

[15] The Roman Dutch authorities relied upon for these propositions were primarily De Groot *Inleidinge* 3.21.3. and Voet *Commentarius ad Pandectas* 17.2.4. What the historical research published in 1980 revealed, however, was that De Groot and Voet were contradicted by others, such as Pothier op cit 7.2.79-81 and Van Leeuwen *Rooms-Hollandsch Recht* 4.23.1-2, who dealt with universal partnerships of all property at some length as being usual and valid in Roman Dutch law (see J J Henning *Law of Partnership* (2010) 24-27 and the authorities there cited). Most explicit in this regard appears to be Felicius-Boxelius *supra* (10.15) who stated the position as follows:

'There are some jurists who maintain that a *societas omnium bonorum* cannot be entered into tacitly . . . but that . . . for all the assets to be brought into the partnership it is necessary that the *societas omnium bonorum* be entered into expressly. [B]ut there are other jurists who hold the contrary view: that a *societas omnium bonorum* may surely be entered into tacitly by performing an act of partnership, because it is that type of contract which can be entered into by consensus alone and the validity of tacit and express partnerships is the same.'

[16] With regard to the requirements for a universal partnership of all property between cohabitees, we were invited on behalf of the plaintiff to accept the

following statement by Felicius-Boxelius (10.17) (referred to by J J Henning *Law of Partnership op cit* 28) as part of our law:

'I would like to add that for this type of contract to be presumed there are three interlinked prerequisites; namely cohabitation, sharing of profits and freedom of accounting to each other.'

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

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

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

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

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

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

(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.)

[19] Once it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates, in my view, that the contribution of both parties need not be confined to a profit making entity. The point is well illustrated, I think, by the very facts of this case. It can be accepted that the plaintiff's contribution to the commercial undertaking conducted by the defendant was insignificant. Yet she spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children. On the premise that the partnership enterprise between them could notionally include both the commercial undertaking and the non-profit making part of their family life, for which the plaintiff took responsibility, her contribution to that notional partnership enterprise can hardly be denied.

[20] This brings me to the defendant's further contention, that the plaintiff had failed to satisfy Pothier's second element which requires that the partnership enterprise must be carried on for the joint benefit of both parties. His first argument in support of this contention was that, on the plaintiff's own version, the parties never discussed the issue and that the best she could do was to rely on her own understanding that 'we were sharing everything'. The argument is correct as far as it goes. In short, there was never an express partnership agreement. Yet the question remains whether the plaintiff's impression as to the core of their relationship is borne out by the conduct of the parties. Incidentally, it was never suggested to the plaintiff in cross-examination that her impression was either mistaken or unfounded. In fact, the focus of the cross-examination was confined to persuading the plaintiff that she made no contribution to the Hitech business, which she readily accepted.

[21] During argument in this court counsel for the defendant conceded that if both parties had earned an income which they then shared, the plaintiff would have gone a long way in meeting the second requirement. In that event, so the defendant's counsel conceded, it would not matter if the plaintiff's earnings were far less than the defendant's and that her financial contribution was therefore quite modest when compared to his. But, so counsel argued, those are not the facts of this case. In this case the defendant earned virtually all the income. Absent any agreement to the contrary, so the argument went, the default position, that the defendant retains everything he acquired from his own income, must therefore prevail.

[22] As I see it, this argument harks back to the model of a partnership confined to a commercial enterprise. Taken to its logical conclusion, it would mean that even a negligible monetary contribution would outweigh an invaluable non-financial contribution to the family life of the parties. In this light I must admit some sense of relief that, freed from the restraints of regarding universal partnerships as being confined to commercial enterprises, we are now able to evaluate the contribution of those in the position of the plaintiff in its proper perspective. This also accords with a greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families.

[23] The plaintiff's case is not that she and the defendant had entered into a commercial partnership which was confined to the Hitech business. Her case is that they had entered into a partnership which encompassed both their family life and the business conducted by the defendant. In view of what I have said earlier, I have no conceptual difficulty with a partnership agreement in those terms. The validity of the plaintiff's proposition that they tacitly agreed to share everything, including the income of the business conducted by the defendant, must therefore be approached from that vantage point.

[24] On that approach it is clear to me that the defendant shared in the benefits derived from the plaintiff's contribution. First, there is no evidence that during the short period of two years when the plaintiff earned an income she applied those earnings for herself. The indications are that she shared that income with the defendant. If it were otherwise one would have expected it to be put to her in rebuttal of her statement that they shared everything. But more significantly, in the present context, I believe, is that the defendant shared the benefits of the plaintiff's contribution to the maintenance of their common home and the raising of the children. With regard to the latter it is of some consequence, I think, that she was not only prepared to take responsibility for the children of the parties, but also for the defendant's daughter from a previous relationship. If the question were to be asked, what more she could have done to promote their family life over 20 years, the answer would probably be 'nothing'.

[25] From the plaintiff's point of view it is clear that she shared in the benefits of the defendant's financial contribution. The defendant's attitude that she paid the household expenses with money supplied by him confirms this fact. In short, he paid for everything because she had no earnings of her own. If the parties had spent all the money earned by the defendant in this way it would be quite plain, I think, that the contribution by both parties, be it financial or otherwise, was shared and consumed in the pursuit of their common enterprise. Does the fact that his earnings exceeded their financial needs, which facilitated the accumulation of capital assets, make any difference? I think not.

[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.

[27] It is true that according to the defendant's *ipse dixit* during his testimony he indeed intended to keep everything he acquired for himself to the entire exclusion of the plaintiff. But I believe there is more than one reason why this court is not bound by the defendant's self-serving *ipse dixit*. Firstly, it is clear from his testimony that the defendant would say virtually anything that advanced his cause. Secondly, when evaluating the conduct of the parties, the court is entitled to proceed from the premise that they were dealing with one another in good faith (see eg *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 32). This must particularly be so where the parties lived together in an intimate relationship in which they shared their most personal interests for almost 20 years. An unexpressed mental reservation on the part of the defendant, that he was willing to share in the benefits derived from the plaintiff's contribution, but not in the surplus fruits of his own, would not, in my view, satisfy the dictates of good faith. Finally there is the plaintiff's own appraisal of the defendant's conduct, namely that he was willing to share everything. Absent any statements to her in cross-examination that her appraisal was mistaken or unsubstantiated, it must, in my view, be accepted as reasonable and well-founded. Hence I agree with the court a quo that the plaintiff had succeeded in establishing Pothier's second requirement for a partnership.

[28] A further argument on behalf of the defendant was that the plaintiff did no more than could be expected of a cohabitee. This argument relied on the following statement, made in the context of parties married out of community of property, in *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 124D-E:

'It is, of course, well known . . . that many wives work in the businesses of their husbands without expecting or receiving any remuneration for their services. From this it follows that, unless a wife had rendered services manifestly surpassing those ordinarily expected of a wife in her situation, a Court will not easily be persuaded to infer a tacit agreement of partnership between the spouses.'

[29] I do not believe, however, that the statement relied upon can be transposed, without any qualification, on a relationship between cohabitees. The relationship between spouses is governed by well-established standards, both legally and socially imposed. We therefore have a good idea of what can 'ordinarily be expected of a wife in her situation'. Relationships between cohabitees, on the other hand, are not so governed. It is therefore not possible to establish a norm. In consequence I do not believe that the defendant's case is assisted by this argument in any way.

[30] The final argument on behalf of the defendant derived from the proposition that the position of cohabitees should not be identified with that of spouses married in community of property. Support for this proposition was sought in cases such as *Du Toit v Minister for Wellfare and Population Development* 2003 (2) SA 198 (CC) and *Volks v Robinson* 2005 (5) BCLR 446 (CC), where the Constitutional Court had recognised the importance of marriage as a social institution, which is not to be equated with mere cohabitation. But the simple answer to this argument, I believe, is that a universal partnership is not the same as a marriage in community of property. As pointed out by J J Henning *Law of Partnership* 30, there are numerous differences between the two (see also eg *Hare v Estate Hare* 1961 (4) SA 42 (W) at 44G-45D).

[31] To complete the picture: the defendant did not argue – and I believe rightly so – that the third element of a partnership in terms of Pothier's formulation had not been satisfied. On all the evidence it is clear that the all-embracing venture pursued by the parties, which included both their home life and the business conducted by the defendant, was aimed at a profit; a profit which, in my view, they tacitly agreed to share. On the only issue before us, I therefore agree with the finding of the court a quo, that the plaintiff had succeeded in establishing a tacit universal partnership between her and the defendant.

[32] In the result, the appeal is dismissed with costs including the costs of two counsel.

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F D J BRAND
JUDGE OF APPEAL

HEHER JA (CACHALIA JA concurring):

[33] I have read the judgment of my brother Brand JA. My conclusion differs from his. [1] These are my reasons.

[34] This appeal is about an alleged tacit agreement. As in all such cases the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, per contram, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on 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. Despite the different formulations of the onus that exist: see the discussion in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 164G-165G; *Christie's The Law of Contract in South* Africa, 6ed 88-89, this is the essence of the matter.

[35] 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.

[1] I agree with Brand JA's exposition of the law contained in paras 12 to 19 of his judgment. My disagreement stems from his assessment of the evidence in paras 23 to 29 thereof.

[36] 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. In the present instance by far the most significant contributory factor to the 'partnership' estate was the business started, managed and brought to a substantial level of success by the appellant alone during the cohabitation of the parties.

[37] When parties cohabit in a state of amity over a long period, as here, and a family results, it is likely that certain things will happen: the principal breadwinner will contribute substantially, either regularly or on an ad hoc basis, to the needs of the family by providing accommodation, food, clothing, education, transport and healthcare. To these will usually be added vacations and presents of various kinds. The other party, usually the woman, will stay at home or engage in lesser employment and oversee the needs of the family and the upbringing of the children. These are the normal incidents of cohabitation, just as they are of marriage. That they happened in the case under consideration contributes nothing to the present enquiry because they are at best equivocal, absent some evidential feature that links them to the special intention that attaches to a universal partnership. If a cohabitee lays claim to a share in his or her partner's estate it does not assist that person to argue that he or she will be left with nothing without such an order. That is the natural consequence of cohabitation without an agreement to share.

[38] The duration of the cohabitation and the degree of financial dependence attaching to one of the parties may seem to render it more probable that one or both of them implicitly intends to share his or her all, but in fact both are just as likely to be attributable to a perceived obligation, inertia, boredom, disinterest or simply, self-interest in preserving the status quo. Of themselves, such factors are also, therefore, ambiguous.

Analysing the evidence

[39] When the appellant started out, moonlighting in effect, the respondent would go with him at weekends and help with the installation of alarm systems in cars and houses. She also introduced him to friends who boosted his business. That was the extent of her direct contribution. It seems to have been of short duration and not of enduring benefit. Beyond this there is no evidence of either interest or participation in his work or its fruits. There is no suggestion that the fact that it was profitable produced in the respondent any reaction at all save an unacknowledged acceptance of such largesse as he chose to bestow. She neither asked for any sort of accounting nor sought a greater contribution. Nor did her claims increase with the burgeoning success of his endeavours. Under cross-examination she admitted that she had never set foot in the business premises in Grahamstown and knew next to nothing of the business or how it was conducted. Soon after the appellant began operating in Grahamstwon he purchased a house there at which the respondent stayed when she visited him. By the time of their separation in 2007 the appellant personally or through close corporations owned some twenty properties in various Eastern Cape towns. The respondent did not hold a registered interest in any. Her evidence did not suggest that she played any role in their acquisition, maintenance, leasing out, collection of rents or otherwise.

[40] The respondent started work as a secretary in the Department of Education as a relief from boredom when the children were at school. She earned R2000 per month but, so she testified, was persuaded by the appellant to stop after two years in order to care for the children. The appellant bought a vehicle for her. He also supplied her with a credit card and a petrol card for both of which he made the payments that arose from their use.

[41] Asked by her counsel how financial affairs were organised between herself and the appellant the respondent replied:

‘Everything I mean was for both of us, no-one saying that one is mine and the other one is mine. We are sharing everything.’

[42] This was, at best, a subjective view that remained unsupported by evidence. It gained nothing by the failure to attack it under cross-examination. When counsel for the appellant put to the respondent that she had played no part whatsoever in the appellant’s business affairs and that the contributions she had made were nothing more than would ordinarily be expected of someone in her circumstances, the respondent had nothing to say.

[43] When the appellant testified the respondent’s counsel neither suggested to him that he and the respondent intended to share in the estate amassed by him or behaved as if they so intended. Nor were any instances of conduct that pointed to that conclusion adduced in cross-examination. The appellant denied in examination in chief the respondent’s evidence that they ‘shared everything’. His denial was left unchallenged in cross-examination. I do not think, given the critical nature of the denial and the lack of countervailing evidence, that it is correct or fair to dismiss it as a self-serving untruth. Nor do I consider an intention to retain what is one’s own to be contrary to good faith – there is no reason to doubt that if the parties had not fallen out, acrimoniously, the appellant would have maintained the respondent for the rest of her life. The evidence did not establish that her expectations went beyond this.

[44] The evidence as a whole was skimpy in the extreme. On the cardinal issue it was, in my view, non-existent. The respondent produced nothing that established an intention on her part to share in the full breadth of his estate. The appellant said and did nothing to treat the respondent as other than an ad hoc recipient of the fruits of his labours according to his own generosity (or tight-fistedness) at any given time.

[45] In my view the respondent failed to discharge the onus on her at the trial.

For that reason I would uphold the appeal with costs, set aside paragraphs 1 to 5 of the order of the court below and substitute for them an order of absolution from the instance on the claim for a declaration, directing each party to pay his or her own costs.

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J A Heher
Judge of Appeal

APPEARANCES:

For Appellant:	J J Gauntlett SC R G Buchanan SC
Instructed by:	Spilkins Inc PORT ELIZABETH
Correspondents:	Symington & De Kok BLOEMFONTEIN
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