



THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE
SUPREME COURT OF APPEAL

28 March 2012

STATUS: Immediate

Butters v Mncora 181/2011

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (the SCA) today dismissed an appeal from the Eastern Cape High Court, Port Elizabeth.

The appellant lived together with the respondent as husband and wife for nearly 20 years though they were never married. The appellant owned a business while the respondent maintained the home and raised the children of both parties. After the relationship ended, the respondent instituted action against the appellant claiming half of his assets on the basis that a tacit universal partnership existed between the parties in which they held equal shares.

The high court found in favour of the respondent that a universal partnership existed and awarded her an amount equal to 30 per cent of the appellant's net asset value at the date the partnership ended.

On appeal, the majority judgment of the SCA considered the rule of law regarding cohabitation. The SCA held that while cohabitation does not give rise to special legal consequences, a cohabitee can invoke remedies in private law which in this case was based on the law of partnership. The respondent alleged that she and the appellant lived as partners and to establish this, the court considered the three essential elements of the law of partnership as posited by Pothier.

Applying the first element, 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 SCA held such partnership extends beyond commercial undertakings and it can be a tacit agreement derived from the conduct of the parties. The SCA held that the decision of *Isaacs v Isaacs* 1949 (1) SA 952 (C) which held

otherwise was based on a faulty premise. The SCA reached this conclusion based on an historical analysis of Roman Dutch law.

Applying the second element that the partnership business should be carried on for the joint benefit of both parties, the SCA held that since it has been established that the partnership extends beyond a commercial undertaking and the respondent's contention was that the partnership encompassed both their family life and the business conducted by the defendant, the SCA accepted the respondent's proposition that both parties had tacitly agreed to share everything.

Applying the third element that the object should be to make a profit, the SCA held that once it is accepted that a partnership extends beyond commercial undertakings, logic dictates that the contribution of both parties need not be confined to a profit making entity.

Two further arguments were made on behalf of the appellant. Firstly, it was argued that the respondent did no more than was expected of her and secondly, it was argued that the position of cohabitees should not be identified with that of spouses married in community of property. The SCA held respectively that it is not possible to establish a norm for cohabitees like it could be done for spouses and that a universal partnership is not the same as a marriage in community of property.

The appeal was consequently dismissed. In a dissenting judgment, it was stated that the most important considerations in this case were whether either party said or did anything to manifest his or her intention to establish a universal partnership and, if so, what the reaction of the other was. Analysing the evidence, it was stated that the respondent produced nothing that established an intention on her part to share in the full breadth of the appellant's estate and 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 at any given time.

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