IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1898/2012

In the matter between:

ANTOINETTE CHARMAINE HORTON		**Applicant**
And		
ROY DOUGLAS NICOLAS – FANORAKIS	**1st**	**Respondent**
REGISTRAR OF DEEDS	**2nd**	**Respondent**
ATTORNEY GENERAL	**3rd**	**Respondent**

Neutral citation: Antoinette Charmaine Horton v Roy Douglas Nicolas - Fanorakis and 2 Others 1898/2012) [2012] 06 SZHC (23rd January 2013)

Coram: M. Dlamini J.

Heard: 4th December 2012

Delivered: 23rd January 2013

Universal partnership – part of our law – essential elements – duty of court to ascertain whether requisite have been satisfied.

Summary: The applicant seeks for an interdict against the 1st respondent who intends to transfer immovable property to a trust on the basis that the latter forms assets of a universal partnership.

[1] The applicant asserts that she started cohabiting with the 1st respondent in 1988. In 1994 she was engaged to 1st respondent. She is not however married to the latter. During the year of cohabitation she worked to amass property inclusive of a farm, sugar cane fields, various chicken sheds, a number of motor vehicles and goodwill as a result of sugar cane and chicken sheds businesses. The 1st respondent has now formed a trust where she does not feature either as a trustee or beneficiary whose subject is the immovable property where the businesses are established.

[2] On the other hand, the 1st respondent contends that the farm was a bequest by virtue of a will attested by his biological father who passed away in 2005. The applicant was employed as a teller and subsequently an accounts clerk. The businesses situate at the farm were established by his father and are an inheritance. 1st respondent informs the court further that he assisted his father in building this empire as it were.

[3] Although there are contradicting averments as can clearly be deduced from the replying affidavit they are not material for the determination of the issue.

[4] It is common cause that the property under issue is an immovable, a farm, together with the improvements thereof, bequeathed to the respondent by his father under a will.

[5] The issue is whether an inheritance can form part of the assets of a universal partnership.

[6] The first question to be ascertained in *casu* is whether universal partnership is part of our law.

[7] **Joubert**, writing on **"The Law of South Africa, Negotiable Investments and Partnership, Volume 19, Butterworths reveals** at page 247:

> "*In Roman –Dutch law various kinds of partnership were distinguished with reference to, inter alia, duration, method of formation, extent of contract, kind of employment in which engaged and extent of liability for partnership debts.*"

[8] The distinguished author proceeds at the same page:

> *"Terminology and classification varied, but one of the primary divisions made with reference to Roman law was between universal and particular partnerships."*

[9] Under universal partnership, two arch type emerge *viz. societas universorum bonorum* and *societas universorum quae ex quaestu veniunt* as highlighted by **Joubert** *supra*. The prior refers to partnership of "*all present and future property*" while the latter to "*those extending only to everything acquired from every kind of commerce*" according to **Joubert** *supra* at page 250.

[10] **Brenda J. A**. in **Butters v Macora (181/2011) [2012] ZASCA 29** at page 3 describes the two archtypes of universal partnership as:

The first was the societas universorum bonorum – also referred to as the societas amnium bonorum – by which 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."

[11] The learned judge, **Brenda J. A**. *supra* then concludes:

"*It appears to be uncontroverted that apart from particular partnership entered into for the purpose of partnership enterprise, Roman and Roman Dutch Law also recognized universal partnership."*

[12] In our jurisdiction universal partnership, although not expressly so stated was recognised in the case of **Malaza Thandi v Malaza Margaret 1987 – 1995 (4) S.L.R. 97**.

[13] The facts of the case briefly were that the deceased who had been married to the appellant under civil rite, later contracted a Swazi law and custom marriage with the respondent. He then lived with the respondent for a considerably lengthy period. During their cohabitation, they acquired the immovable property which was under issue. The respondent moved an application to claim a partnership of the immovable on the basis that there was a tacit partnership between her and the deceased.

[14] **Browde J. A**. dismissing the appeal held that:

"this was an agreement between two people who happened to be living together to buy the farm in partnership where the respondent paid the deposit".

[15] On the basis of the two cases cited immediately above, it is clear that universal partnership is part of our law.

[16] What remains to be determined therefore is whether in *casu* the applicant has established the essentials of a universal partnership.

[17] **Nugent J. A**. in **Bester v Van Niekerk 1960 (2) S.A. 779 (A)** following the *ratio decindi* in **Joubert v Tarry & Co. 1915 TPD 277** at 280 -1 stated at follows:

"*These essentials are four fold. First, that each of the partners brings something into the partnership or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on the joint benefit of both parties. The third is, that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract."*

[18] The last essential was held in various subsequent decision to be tautologise as by the term "contract" it denotes lawfulness in **Bester** *supra*.

[19] Consequently the definition of a partnership as propounded in **Pezzutto v Dreyer 1992 (3) S.A. 379 (A)** at **390 D – E**:

"In essence …….a partnership is the carrying on of a business to which each partner contributes in common for the joint benefit of the parties with a view to making a profit."

[20] I now turn to the evidence presented in affidavits herein in order to determine whether the requisites of a partnership as laid down in **Bester** *op. cit.* have been satisfied by the applicant on the tilt of the scales of justice.

[21] It is revealed for the first time by the 1st respondent in his answering affidavit at paragraph 2:

"2.1 That the said port 3 of Consolidated Farm "Peebles Block (South) No.8 situated in the District of Manzini (this farm "is a property that belonged to my late father Antoine Socrates Nicolas Fanorakis who passed away in 2005).

2.2 That in fact this farm was bequeathed to me by my father in his last will and testament, a copy of which is annexed hereto marked "R1".

[22] In reply, applicant does not say anything to this averment. The court therefore considers admitted and therefore common cause.

[23] At paragraph 7 page 37 of the book of pleadings 1st respondent deposes:

"7.1 I deny that the applicant has been the brains behind my father's project or mine for that matter. All the companies which run the family business were the brainchild of my father. ……"

7.2 My father started the family business and worked hard together with my mother and I to enhance and advance these businesses which are incorporated as companies.

7.3 The applicant was employed as a teller at one of the family companies and has generally been an accounting clerk at that company being Ngwane Poultry (Pty) Ltd. She still is an accounting clerk."

[24] In reply, the applicant does not dispute the averments as stated by 1st respondent at paragraph 7 more specifically she does not dispute that the businesses were as a result of 1st respondent, his father and mother tireless efforts. On the contrary she admits being the accounts clerk. She dismally fails to contradict the submission that she is currently occupying the same position as 'accounts clerk employee'.

[25] A case similar in *casu* is **Venter v Liuni 1950 (1) S.A. 524**. The court in that case was seized with the question as to whether there was a partnership or a master-servant relationship between the parties. The court found that a letter was produced in court appointing respondent to be manager of the farm and:

"*shall be entitled to one sixth share of the nett profit from all crops reaped during her management*"

[26] It was upon this cited clause that respondent claimed partnership.

[27] **Ramsbottom J.** at page 528 dismissing respondent's assertion stated:

> "*It seems to me that the fact that a servant is given, as an inducement to industrious work, a share in the profits resulting from that work, does not necessarily alter the nature of the contract.*"

[28] In *casu* there is no averment on sharing of the profits. However, there is undisputed evidence that the applicant was employed as an accounts clerk and still occupies that position.

[29] In summary of the above assertion it is clear that the applicant never worked or contributed her skills and labour for the benefit of a partnership between 1st respondent and herself. Technical know-how and labour were, however discharged as an employee of not 1st respondent's property but 1st respondent's father during the years 1988 to 2005.

[30] Viewed from a different angle, when applicant worked in the farm or businesses as the case may be, the property or profit accumulated was not for the benefit of the parties i.e. applicant and 1st respondent but for 1st respondent's father. On their own (that is parties) no property was accumulated on their behalf.

[31] Taking this from a different perspective, imagine the testator having bequeathed the farm to a different beneficiary other than the 1st respondent. That would mean the applicant would be entitled to lay a claim over the farm under the guise of a partnership, a position which is completely unattainable in our law.

[32] What about the period post 2005 i.e. period when the property was given to the 1st respondent? Could it be said that as applicant continued to work in

the farm, the extent at which the property was developed was as a result of her contribution towards a partnership.

[33] The uncontroverted assertion by 1st respondent is that applicant is still the accounts clerk. There is no evidence on affidavit how the property was enhanced or developed since the period 2005 nor is there allegation that applicant's position changed since 2005. The averment that she is still an accounts clerk is not specifically denied.

[34] On the question of costs, I consider that the applicant has been cohabiting with the 1st respondent since 1988. Although an accounts clerk in the property or businesses that have been bequeathed to the 1st respondent, she is in a way dependant upon the 1st respondent. For these reasons, I am not inclined to order costs against her.

[35] In the premises applicant has in totality failed to establish the very first requirement of a partnership on a balance of probabilities and it follows that her application ought to be dismissed.

[36] The following orders are entered:

1. Applicant's application is dismissed.
2. No order as to costs.

M. DLAMINI
JUDGE

For the Applicant : Adv. L. Maziya instructed by Malinga & Malinga Inc.

For 1st Respondents: S.A. Nkosi Attorneys