IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held in Mbabane **Case No. 57 / 2021**

In the matter between:

ZWAKELE NTSHANGASE (Born NXUMALO)	1st Appellant
MASIZA NKAMBULE (Nee NTSHANGASE)	2nd Appellant
MAZWI NTSHANGASE	3rd Appellant
MZAMO NTSHANGASE	4th Appellant
MINENHLE NTSHANGSE	5th Appellant
LINDOKUHLE GAMEDZE (Nee NTSHANGASE)	6th Appellant
And	
DUDUZILE ANNAH NTSHANGASE (Nee SHABANGU)	1ST Respondent
NKOSINATHI MPANZA	2nd Respondent
THE MASTER OF THE HIGH COURT	3rd Respondent
THE ATTORNEY GENERAL	4th Respondent

Neutral citation: *Zwakele Ntshangase vs Duduzile Annah Ntshangase (57/2021)[2022][SZSC 47] (20 September 2022).*

Coram: **MJ Dlamini JA; SB Maphalala JA** and **AM Lukhele AJA**

Heard: **12 May, 27 May, 3 June, 2022**

Delivered: **20 September 2022**

Summary: *Partnership – Universal partnerships – Applicant married to deceased in terms of siSwati customary law – Deceased already married to Respondent by civil rites under the Marriage Act 1964 – Whether such marriage in community of property – Applicant's marriage bigamous and putative – Applicant may claim under tacit universal partnership – Whether marriage in community may co-exist with tacit partnership involving a third person considered. In general, partnership that is tacit and universal does not have to be asset-specific or profit-making. The appeal is allowed – Costs to be borne here and below by the Estate.*

JUDGMENT

MJ Dlamini JA

Introduction

[1] In this appeal from the judgment of Maphanga J. the main protagonists are substantially as they were in the court below. They are the 1st Appellant who was the 1st Applicant; 1st and 2nd Respondents who were 1st and 2nd Respondents. The other Appellants or Respondents are generally supporting parties. The record consists of two volumes together making up about 550 pages. The founding affidavit, without the annexures is about 40 pages, and some 14 prayers, summarized and reduced to seven at the hearing. The main contention of the Appellant is that she is entitled to inherit as a lawful wife of deceased or in the alternative to benefit as a tacit universal partner in the deceased Estate.

[2] The High Court dismissed with costs the application of the Applicants for the 1st Applicant (the Applicant), to inherit as a wife (widow) from deceased's estate or to benefit as a partner in a tacit universal agreement with deceased. The Applicant is the mother of the other five Applicants who are deceased's children. The 1st Respondent (the Respondent) is the widow of the deceased by civil rites and the 2nd Respondent is the

executor dative of the deceased estate. Condonation granted by consent of the parties. The interlocutory application was withdrawn and costs tendered.

[3] The evidence in this matter is to be gathered mainly from the affidavits of the leading protagonists, namely, the Applicant on the one hand and 1st and 2nd Respondents on the other hand. In light of the disputes it is not clear why trial or oral evidence was not resorted to at the hearing a quo. In the result this Court stands in the same position as the Court *a quo* in evaluating the depositions and contentions of the parties. The Respondents oppose virtually everything of substance deposed to by the Applicant. This is understandable in light of the stakes at the table of distribution. I have taken the liberty to refer to the Minutes of the Ntshangase Family Meeting of 27 May 2018, at Nsingizini. [(MB5) pp 73 – 87 of the Record]. They were recorded by 2nd Respondent as chairman and the deceased's preferred executor. From the Minutes, it appears that the meeting was imbued with a sense of affinity, goodwill and a general concern that those who lived on the farm should not be evicted or turned to squatters.

Background

[4] From her marriage certificate, it appears that Applicant was born in 1960. In 1981, soon after finishing high school, Applicant met, fell in love with and married the deceased, one Willie Mbhavumane Ntshangase, a reasonably successful businessman and cotton farmer in the south of the Swati kingdom. The marriage was in accordance with siSwati customary law for which 20 herd of cattle was paid. The marriage subsisted for some 37 years until death did the two part in early 2018, and she was about 60 years old. For all that time, Applicant had been to all intents and purposes a wife to deceased, with whom she bore and raised five children. In 1981, deceased had allegedly built her a homestead in a farm called Hereford Farm 288, Shiselweni District, at a place called Matsanjeni. That is also where the cotton farming enterprise was carried on. Some of deceased's children born out of 'wedlock' were allegedly brought by deceased to live and grow up with the Applicant at the farm. At her *teka* ceremony, Applicant says she was smeared with red

ochre by one Zenzele Ntshangase. The Ntshangase extended family accepted her as a second wife of deceased; and that is what she considered herself to be during her married life. A traditional wedding was conducted in 1981.

[5] It appears that in 1972, the deceased married by civil rites the 1st Respondent and that marriage still subsisted in 1981 when deceased purportedly married the Applicant by customary rites. Applicant says that when deceased proposed he told her that his marriage with Respondent was in terms of siSwati customary law. In the result, Applicant did not know that deceased was married by civil rites and she suspected nothing until about 18 years into the relationship. Even then it was just a rumour, nothing concrete. When Applicant married deceased she was aware that deceased and 1st Respondent were married but was not aware that they were married by civil rites in community of property. No one told Applicant about the details of Respondent's marriage. Respondent did not tell or confront Applicant about that issue of her being married by civil rites. Respondent's marriage still subsisted in 1981 when deceased married Applicant. That made Applicant's marriage bigamous and void. Respondent who knew of Applicant's relationship with deceased did not remonstrate with her or in any way inform her of the bigamous relationship Applicant was involved in. Applicant also alleged that Respondent had made her a cake during her wedding. The Respondent denied.

[6] Applicant deposed that she was taken from her parents by deceased soon after completing tertiary school in preparation for her marriage. The *lobola* cattle were paid even before the wedding ceremony (*umtsimba?*) took place. For most of her productive years, she was a primary school teacher and the second wife of the deceased and not a 'live-in lover' as Respondent subsequently alleged, instigated by the Master, although *"at no point since 1981 had 1st Respondent ever denied or challenged [her] marriage with the deceased"*. (At p 43 of Record). Applicant stated that after tertiary school, in 1980, *". . . I was personally fetched by the deceased from my parental home as we were already in love. In 1981, about February, I got employed at Galile Primary School and I only worked for*

about two weeks as the deceased went to the department of education to negotiate for my transfer to Nsingizini Primary School so I could be closer to him as we were already preparing for our lobola ceremony. I never got to know any details about the 1st Respondent save for the fact that she was traditionally wedded to the deceased."

[7] According to Applicant, building her matrimonial home on the farm started around 1981, soon after the *lobola* ceremony. Her *teka* ceremony was conducted at the house on the farm in August 1981. The farm house was her marital home: *"a three (3) bedroom house on or around 1980, was a modern house at the time"*, (para 18, p173) and not just a *"compound for [deceased's] employees and office for [the] cotton farming business"*, as Respondent alleged, denying any marital or matrimonial home for Applicant on the farm. Applicant also stated that Boy, the eldest son of deceased, had a bedroom at the farm house which he occupied soon after the house was finished until he married, while staying there. Boy had assisted in the building of the farm house.

[8] Applicant alleged to have worked and contributed to the purchase and commercial development of the farm as a cotton-growing enterprise. In this regard, Applicant expended labour and her meager salary as a primary school teacher and ensured that the labourers at the farm had something to eat. That during her life with deceased, her salary was entirely "controlled and used by deceased" for the accumulation of the joint estate (see p. 45 *et seq.*):

> *"89.3 I worked tirelessly in the farm as the [deceased] was growing cotton that was sold to pay [for] the farm and purchase all the assets of the Estate. My bales of cotton were also sold and deceased used or took all the proceeds of such sales to pay for the farm.*
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> *89.4 My salary, my effort, time and resources were used to repay the farm from the onset until the farm was paid in full.*

89.5 I was involved from the onset in the construction of my matrimonial and or parental home that I am [now] sought to be evicted from with my children (--).

89.6 I have invested my entire thirty-seven (37) years of my employment by the Government of eSwatini and all the benefits that accrued from my employment to the accumulation of the Joint Estate.

90 . . . I ought to benefit as a universal partner to the deceased and or the Joint Estate. It is not in dispute that I contributed immensely to the accumulation of the Estate and for thirty-seven (37) years I have not accumulated anything for myself on the side other than putting it to the Joint Estate."

94 . . . I am old now and sickly to be evicted and start to build a (new) home"

[9] Applicant also deposed:

"24....I further humbly aver that I moved into the matrimonial house and all my children who are the Applicants herein were born in the same matrimonial home. I do not know why the 1st Respondent is fabricating such well-known facts.... I contributed in the construction of the matrimonial house or homestead from its inception . . . physically working on the construction on Saturdays and also monitoring the site at night. This was solely with the instruction of the deceased that we [were] constructing our matrimonial home and we were in a hurry to finalise same so that we may get married.

"25 After finalization of the construction, I took full ownership and or occupation of the matrimonial home and there is no other wife who ever stayed or owned the matrimonial home in question herein. Even the 1st Respondent never at any point had rights over such matrimonial home." (See pp 174 – 175 of Record).

[10] In reply to the Respondents, the Applicant stated, at page 172 of the Record:

"17 I further, humbly aver that all construction in the farm started after I had my lobola ceremony and it was in preparation of my marriage with the deceased. The marriage was scheduled to take place in the newly built homestead in the farm. The house plan and foundation of the main house was agreed and approved by me with the deceased. There were no sons who participated in the building of the homestead save for Boy as alluded in the founding affidavit. I wonder as to why the 1st Respondent is going to such lengths to lie about such a well-known fact. We started by building a one (1) room for some of the labourers to stay in and I was always on the site, especially on Saturdays. The deceased used to pick-up the construction company from Nsingizini where they were constructing the RDA during the day and at night they were picked up to do construction on site".

The family meeting – 27 May 2018

[11] At a family meeting after death of deceased, Applicant attended and was accepted as a second wife and widow of deceased and was due to benefit from the deceased estate if a solution could be found on how to deal with the Applicant's home on the farm. The family meeting had been homely and no hostile issues were raised or said about or against any of the family members, in particular the Applicant. A brief glance at the Minutes of the Family Meeting [(MB5) of 27 May 2018] may help give an inside view of the family atmosphere before their visit to the Master's office at the beginning of June 2018. At the family meeting:

(a) Applicant is recorded among the attendees as *"Mrs. Zwakele Ntshangase – Second wife of the deceased"*, and comes after 1st Respondent as *"First wife"* of the deceased.

(b) The meeting considered creating a Family Trust for a 39.0 ha. Portion of the farm *"to avoid any individual from having powers to evict the family living there at any given day..."*

(c) "A follow-up by Mr. Mzamo, he was of the view that the farm was also part of the assets. As Mrs. Zwakele Ntshangase has been living in the farm since the time she got married to the deceased, it was logical that any time of the day she would decide to plough at a certain portion since she well knew the farm by this far..."

(d) Masiza Nkambule is recorded as follows: *"She stressed that the Ntshangase family was lucky since Mr. Willie had two wives with two homes. ...She also agreed on the idea where Mr. Mzamo suggested that since Mr. Willie had two wives and he used to keep his assets separately between the two homes, it would be wise if things were to be kept as Mr. Willie left. She viewed it as a good idea to keep all the assets that are on the other home and keep the portion of the farm to the wife living in it..."* (sic)

(e) Of Applicant's contribution at the meeting, it is recorded: *"Mrs. Zwakele Ntshangase recommended that the meeting should ask for advices from the Master of the High Court on how possibly can the home be protected other than migrating. She guided the gathering on subdividing the farm as the better option to protect the home, reason being, she got graves on the farm, within the home vicinity, and she had spent her all marital life on the farm.... She strongly suggested that the farm be subdivided and have the remaining portion sold."*

[12] It was sentiments like the foregoing that gave hope and familial affinity that was shuttered by the revelation that the civil rites marriage effectively ousted the customary rites marriage and turned Applicant to a stranger in the Ntshangase family. Whether these sentiments were real or not is hard to say. What is clear on the Minutes is that no one had wanted Applicant to be evicted from the farm and rendered homeless. Importantly no one considered her not to be a lawful wife/ widow of deceased. If there had been any doubt

about her status as a wife and family member, the family meeting proffered the ideal occasion and opportunity to raise that issue. No one raised it. Not even 1st or 2nd Respondent

[13] The turning point was at the meeting with the Master of the High Court on 6 June 2018 where the Master is alleged to have *"...out of the blue raised the issue of the civil rites marriage of the 1st Respondent and alleged that it was the only marriage she will recognize..."* (At p. 26 of Record). From then on Applicant and all that she stood for was rejected by the family, not only 1st and 2nd Respondents but also some of the children of the deceased who had hitherto recognized her as the second wife of the deceased. The Minutes of the follow-up meeting of the family on 23 June 2018, *inter alia*, record the following, (paragraph 2 at p.274):

> *"The chairperson once again invited the members to voice ideas as it had been previously suggested that the home [on the farm] be migrated but an agreement could not be met... Zwakele Ntshangase had no better idea at the moment, but she was there to discuss since the Master of the High Court opened the room for discussing the matter at a family level. [Applicant] recalled that the Master of the High Court said she was only a live-in lover but in understanding all the family members knew she was a wife to the deceased. She did not want to dwell much on the stay-in lover words.... She said she was very surprised by the Master's words as she had all along known herself as a wife. She felt abused by the Master's words..."*

[14] After almost 40 years living as a wife and mother on the farm and in the twilight of her life, almost 60 years old, without a husband and unemployed, Applicant is now due to be sent packing out of the farm and her matrimonial home, with nothing except for the throw on her shoulders. The farm with her homestead has either been sold or is due for selling soon with the Master's stamp of approval. The Applicant stands to be rendered homeless and with no means of securing another home in which to live and die. All this

misery is attributable to two persons who decided to perpetuate a lie and hide the truth. Those persons are the deceased and the Respondent.

[15] Applicant recalled the meeting of 23 June, following the meeting of 6 June 2018, and said that *"for the first time the 2nd Respondent insisted that I [was] not a lawfully wedded wife and I [was] not entitled to benefit from the Estate. All suggestions or points that were raised regarding my inheritance were simply blocked or dismissed by the 2nd Respondent..."* From then on Appellant was excluded from all benefits in the Estate. That gave rise to these proceedings.

[16] It is true that in her papers the Applicant strongly asserted that she was lawfully wedded as the second wife of deceased in terms of siSwati customary law. On that basis, she contended that she was entitled to inherit in deceased's estate. In its judgment, the Court *a quo* held that it was *"more likely than not that [Applicant] was aware of the deceased's marital status and proprietary regime with the first respondent."* I do not know how the Court *a quo* came to make that proposition, but I do not think Applicant would have been so adamant that she was lawfully married to deceased had she been aware of deceased's civil rites marriage. Applicant averred that she did not know as no one told her about it. And none said that they told her about it, other than a passing rumour.

General

[17] For her two-pronged claim the Appellant averred –

- That deceased never told her that he was married to Respondent by civil rites;

- Whilst deceased was alive, Respondent never raised the issue of her marriage by civil rites, even as she was present at Applicant's customary wedding, (p.14);

- Deceased, in a public news-paper advert with the assistance of his Attorney (now representing the Respondents) openly stated that he was married to Respondent under customary law; (See pp 440 and 447 of Record)

- Applicant was *tekaed* by Zenzele Ntshangasse, (a relative of the deceased) and twenty herd of cattle paid as *lobola;*

- Applicant was built a three bedroom house on the farm at Matsanjeni while 1st Respondent had her own homestead at Nsingizini;

- Applicant stayed at the farm homestead for all her 37 years of marriage and on the farm bore and raised five children of and with deceased;

- Applicant had some of her relatives buried on the farm.

- Contributed financially and physically to the construction of the matrimonial home, the payment of the farm and ploughing the farm as from the year 1981, as I was already employed by eSwatini Government and had started teaching.

- After the marriage, deceased "took or had full control of [Applicant's] personal account" from which money was used by deceased *"to take care of the family needs, the farming business of the family and even to repay the farm"* as well as pay salaries for the farm labourers.

[18] In sum, Applicant stated:

"33. By this background, I am trying to demonstrate that from on or about 1981, I contributed immensely to the development and accumulation of the deceased's Estate, the building of my matrimonial [home] which was built to accommodate all

the deceased's children as well as my children. This is the very same homestead that 1st and 2nd Respondents....are now seeking to sell and evict us from.

"34. It is my humble submission that it was never be intention of the deceased that we will one day live in the farm as squatters but we were establishing a permanent matrimonial home which is a homestead to my children as well as the deceased's children and grandchildren.

"63. I humbly aver that I am duly entitled to the benefits from the Estate of the deceased and the proceeds of the sale of the farm as I was also wedded by the deceased and I contributed immensely to the accumulation of the Estate. I did not accumulate any assets for myself and despite that I was gainfully employed and all my salaries and proceedings (sic) of my hard work on the farm were used by the deceased for the accumulation of the Estate and the repayment of the farm. ...Currently, I have nothing in my personal name other than the assets of the Estate of the deceased which is now being shared in my exclusion.

"64. It is therefore on those bases that in the unlikely event that the Honourable Court finds that the 2nd and 3rd Respondents were correct to disregard the family resolution and exclude me from the account, I am then duly entitled to share and benefit from the Estate and the proceeds of the farm as a universal partner of the deceased".

[19] The Respondents denied and opposed every important allegation by the Applicant, not only that Applicant was not a wife to deceased but also that she did not contribute anything to the development of the farm and the accumulation of the wealth of the Estate. The Respondents argued that Applicant had no basis for entitlement to share in terms of a tacit universal partnership with deceased. Respondent went as far as asserting that: ". . . *any resolution that seeks to elevate the 1st Applicant to the status of a wife who is entitled to equal what I benefit affects my interest more than any other person. That would mean*

I am now not able to benefit to the extent of half the value of the estate. I would have to expressly renounce my right to a half share of the estate . . ." (See para 32.4 at p 116 of Record).

Proceeding in court *a quo*.

[20] The Court *a quo* dismissed the application with costs. Pertinently, the Court early in its judgment stated as follows:

> *"[7] The crux and recurring theme in this application and one on which much of the relief sought by the applicant is founded is her claim to the deceased's estate which is premised on her alleged status as the deceased's lawful wife to whom she was married in terms of Swazi law and custom; alternatively that she is entitled to a share in the estate by operation of her common law contractual principles of universal partnership. I intend to deal with this as the main issue or core legal assertion on which much of the 1st Applicant's prayers are pegged".*

[21] The court *a quo* remarked that deceased had married Respondent in terms of civil rites under the Marriage Act, 1964, and "in community of property". The court referred to the marriage certificate, 'Annex DN1' and noted that the certificate reflected no premarital entry. On that account the court should have referred to sections 24 and 25 of the Act for guidance instead of concluding that the marriage was in community of property. Reference was also made to section 7 of the Act and the following trite comment was made: *"[14]..... However a person already married according to civil rites cannot contract a valid marriage with another person whilst the first marriage to the first spouse still subsists.....* (See **Dlamini v Dlamini** NULL *(1989) SZHC 15 (21st April 1989) per F.X. Rooney J;* **Knox Mshumayeli Nxumalo N.O. v Nellie Siphiwe Ndlovu and 3 Others** *Appeal Case No 42/2010).*" The court in paragraph 10.3 stated, as matter of fact, that the Applicant *"first became aware of the fact that the 1st Respondent's marriage with the deceased was*

a civil rites union around 1999 – having lived [with] the deceased for about 18 years by then". It is, however, not stated how Applicant became aware of that 'fact'. Applicant says she heard a rumour regarding Respondent's civil marriage but which deceased "flatly denied". Respondent herself said nothing about it. There were deceased's children said to be born out of wedlock and that did not raise any concern for Respondent. If anything, that was indication that deceased had married Respondent by customary rites. In my view, the court's conclusion on this rather important consideration was based on a rather weak circumstance and not supported by surrounding facts.

[22] On the basis that Respondent's marriage to deceased was in terms of the Act and that Annex DN1 was authentic, Applicant's siSwati customary marriage was bigamous and void. The Applicant could not therefore have been a lawful second wife of deceased. But that is not the end of Applicant's story for she spent 37 years as part of the Ntshangase family and a 'second wife' of deceased with whom she had five children and a fully-fledged homestead and no one had ever challenged her purported status as such within the family or in the area. There is not much point in belaboring the first limb of Applicant's claim to inheritance based on her alleged status as a second wife of deceased. Only that her life and presence in the Ntshangase family cannot be ignored or swept under the carpet as dirt nor she be shooed away as *persona non grata.* It is to the second limb she must look to for any succour, as a partner in a tacit universal partnership with deceased.

[23] The court *a quo* dismissed the application under both limbs: that is, that she could not inherit as a 'second wife' because legally she was not, and, in the alternative, that is the second limb, the standard test for the remedy under universal partnership was not met. In the latter regard, the learned trial Judge stated:

> *"[46] The 1st Applicant asserts a right to share in what she terms the 'matrimonial home', meaning the main asset in the deceased's estate in the form of the farm as articulated in her founding affidavit that seems to be a singular*

focus of her claim. This leads to testing whether she has proven the existence of a universal partnership over the farm in question as the immovable property that she seeks to be proclaimed as the object of the partnership".

[24] The court *a quo,* noting that in general cohabitation relationships on their own, no matter how long, do not have legal consequences of a proprietary nature even under the umbrella of universal partnership and that universal partnerships founded on cohabitation cannot coexist with civil rites marriages in community of property, stated: *"The rationale being that property which already forms part of a joint marital estate cannot form part of a universal partnership with another person.* In casu, *it is an inevitable consequence of the deceased's marital regime with first respondent that all property including the farm fell to be administered [as] and formed part of the joint marital estate".* The court, however, reacting to the decision in **Zulu v Zulu,** [1] to the effect that a pre-existing marriage in community would render a subsequent universal partnership untenable, stated:

"[43] . . . *Perhaps it is time the courts moved away from the hard and fast moral position of protection of the institution of marriage at the expense of a pragmatic approach to dispensing justice. To me, there seems to be no logical reason why a spouse to an existing civil [rites] marriage in community of property could not enter (and presumably bind the joint estate in so doing) into an enterprise constituting a universal partnership in a commercial venture. Of this, I see no legal impediment. There seems to be nothing that could notionally render the co-existence of these arrangements mutually exclusive provided the existence of a universal partnership can be proved.*"

See **Khoza v Sedibe** 1963 – 69 SLR 413 (HC) where the court did not bother to consider the possibility of a partnership but applied the maxim *ex turpi causa non oritur actio* once it found that the purported marriage was bigamous and void *ab initio.* Unfortunately, the court *a quo* did not proceed to give effect to these progressive sentiments adumbrated by

[1] 2008 (4) SA 12 (D)

the learned Judge about there being no impediment to the co-existence of a partnership with marriage in community of property.

[25] The court *a quo* also admitted a *"dearth of case law directly addressing the peculiar condition of a cohabitee in a relationship where the other party to the alleged partnership was married to another person in community of property."* Again, the learned Judge expressed his inclination towards recognition of universal partnership between married spouses jointly or between one spouse and a third party, pointing out that in theory *"a universal partnership between a spouse in a valid marriage in community [of property] could co-exist with a tacit universal partnership in a defined enterprise or commercial venture as between a spouse to the marriage and a life partner or cohabitee."*

[26] In principle, I share the above sentiments of the learned Judge. Times are changing, with gay-partners pressing for a sit at the high table, and the Constitution recognizing 'common law' spouses, the morality of the canon law, which had significantly influenced our law of marriage, is gradually weakening in line with modern trends. In this regard there has *"evolved a flexible open-minded approach that seeks to recognise the vulnerability faced by economically disadvantaged partners in long-term relationships (often unmarried cohabiting women) who would ordinarily have no protection of their interests upon termination of such relationships"*, says Maphanga J. However, this is subject to the proviso that *"the standard test for the remedy must be met."* But ultimately, the learned Judge did not live to the expectation as he found against the Applicant as a result of the standard test he applied. In para 40, the learned Judge, in part, stated as follows: *"Using the test in* ***Butters'*** *case and the approach favoured by His Lordship Justice Cachalia JA (sic) above, the probabilities do not favour the applicant in my respectful view. . . . In the circumstances, I am unable to find that a universal partnership of all property* (societas universorum bonorum) *could be inferred from the peculiar circumstances of the long cohabitation between the applicant and the deceased."* That finding was unnecessary since Applicant's main claim was founded on her assertion as a

second wife of deceased in the same way as the Respondent was the first wife. That basis, of course, proved unsustainable as it was legally mistaken. And the test referred to by his Lordship was that used by the minority and not supported by the majority in **Butters v Mncora.**[2] The court went on to also find against the Applicant on the alternative claim.

[27] According to the court *a quo*, it is easier for an ordinary cohabitee to prove tacit partnership than it is for a party in a putative marital relationship. This is so, or so the argument goes, because the quasi-marital relationship has its own incidents which militate against the inference of partnership. Thus what the woman or man does for the 'family' is taken for granted, as normal and expected, and as such may not count as evidence of partnership. This line of thinking is drawn from the minority opinion in **Butters v Mncora** case as represented by Heher JA. I do not agree with this opinion. I think that the correct position is the other way. That is, it is easier for a putative spouse to prove partnership than it would be for an ordinary cohabitee. The reason is that a casual cohabitee knows or ought to know that there being no 'marital' or 'husband and wife' situation, he/she is not in any way legally bound to the other party except as may be shown by clear evidence. In this regard, the cohabitee would have collected over the period of cohabitation evidence in support of his/her claim. On the other hand, in the case of the putative spouse in a quasi-marital relationship there is and there must be an assumption that the quasi-spouses agreed to pool all their assets and share everything they have. In the result, no need arises for any of the 'spouses' to keep a record of evidence supporting partnership. The semi-formal relationship renders it unnecessary for the party to be always on the look-out for conduct conducive or otherwise to partnership. In my view, this is the essence of the **Butters v Mncora** majority decision. The minority unduly upgraded the test applicable resulting in the demand for higher quality test in case of tacit partnership which is by its nature reckoned retrospectively.

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[2] 2012 (4) SA 1 (SCA) (28 March 2012)

[28] Whilst the court *a quo* found some similarities on the facts between **Butters v Mncora** and this case. In the former, the applicant female cohabitee succeeded while the Applicant *in casu* was unsuccessful. The court based that finding, in part, on the disputes of fact which it felt Applicant should have anticipated. The court, however, seems to have been oblivious of the fact that the Applicant had approached the matter mainly from the position of being a 'second wife', hitherto undisputed by the family until the meeting with the Master of the High Court, already referred to. It is true that there were disputes of fact: but the trial court had every right to order the three main protagonists to oral evidence and cross-examination or refer the matter to trial. In the circumstances of the case, it would not be fair to hold the disputes against the Applicant. The court *a quo* dismissed the application and concluded as follows:

> *"[52] Regretably, whilst she should have reasonably anticipated such disputes, the applicant does not provide even an iota of verifiable evidence beyond her bald averments and claims in her founding affidavit. She does not adduce any evidence of her claim that she was responsible for paying some of the instalments towards liquidating the purchase price of the farm. Her affidavit is bereft of any evidence of what the purchase price of the farm was and what her 'immense' financial contribution to the acquisition was. . . . In all, the applicant's claim to contributions towards the farm was ambiguous.*
>
> *[53] She equivocates in that in the same breath she alleges to have devoted all her earnings, time and efforts to the business she also avers that during the deceased's lifetime she also contributed financially to the livelihood of the joint household including the maintenance of the deceased's children from other love liaisons; . . .*
>
> *[54] I think that given the fact that by operation of the law any acquisition of assets by the deceased devolved into the joint estate with the first respondent, in order to succeed the applicant's claim of a joint enterprise over the farm with the deceased has to be clearly and firmly established as a reasonable probability on a*

balance. I am not satisfied the applicant's onus has been discharged in this regard.
(My emphasis)

[56] In the result, having elected to proceed, albeit in the alternative basis, on tacit universal partnership as an optional relief to her claim to the estate, I am not persuaded she has made out such a case for that claim establishing the co-existence of a universal partnership in relation to the farm with the deceased's joint estate with the first respondent. On this basis the applicant's claim founded on universal partnership as alleged must equally fail".

[29] The Applicant appealed the judgment of the court *a quo*. Applicant has paraded about thirteen grounds of appeal, the most relevant of which in this judgment being ground number 10 which reads:

"The Honourable Court a quo erred in law and in fact in finding that the 1st Appellant failed to establish the co-existence of a universal partnership in relation to the farm with the deceased joint estate with 1st Respondent and thus dismissing the 1st Appellant's Claim of a universal partnership".

General assessment

[30] In dismissing the application on tacit universal partnership, the court *a quo* stated that Applicant's claims had been disputed (mainly by Respondent) resulting in there being no *'iota of verifiable evidence beyond her bald averments and claims in her founding affidavit'*. With respect, it is not clear what more evidence the court wanted from Applicant. She had averred that her banking account was from the outset controlled by the deceased. That was not disputed save that her salary as a primary school teacher in the 1980s could not have been much. But the size or amount of her contribution did not matter. That was not the only form of contribution: she allegedly expended much labour and emotions towards the acquisition of the farm, in the cotton farming and general assistance on the

farm and in providing food to the farm labourers. She had been hands-on in the building of the farm house that became her matrimonial home for all her 37 years with the deceased; she had in that farm house raised five of her children with the deceased as well as other children of the deceased; and more. It is this relationship that gave rise to tacit universal partnership with deceased to the farm and farming business. As tacit, it was communication by conduct; there was nothing special or specifically defining terms and conditions of their relationship. There was no need to allege all the bits and pieces that would normally go to the proof of a partnership. It makes better sense to point to the farm and the cotton farming thereon; the work at home involving the conception, birth and raising of the children. Clearly, without the farm house, work on the farm would have been more challenging than it probably was. The farm house was not just a home for the Applicant and children, it was the depot and front office for the cotton farming enterprise.

[31] Was the Applicant supposed to keep a record of her day to day activities at home and on the farm? Record everything she did or discussed with deceased? Keep receipts of payments she made or contributed to the purchase of the farm and the farming enterprise; the acquisition of farming tools including the motor vehicles and tractors used on the farm? Having regard to her marital life, why would it be necessary to keep records of what she did as the second wife of the deceased? The court *a quo* unduly raised the bar and the test for tacit universal partnership, in my view, resulting in a misdirection. Applicant's baldness was, in the circumstances, justified. From her stand point, Applicant was not just an ordinary cohabitee or 'live in lover', as Respondent preferred to call her. Worth noting is what Drake says: *"Whether or not a partnership exists is a mixed question of fact and law, that is to say it is an inference from the primary facts which, in the clearest case, will consist of a written agreement, but which may involve an inference from more equivocal circumstances, such as conduct."*[3]

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[3] Charles D. Drake, **Law of Partnership**, (2nd edition,) Sweet and Maxwell (1977) at p 11.

[32] Applicant had been married by custom to deceased for over 30 years. She had remained and lived in her 'matrimonial' home for all that time. Her marriage had never been questioned or challenged by the Respondents. All of Applicant's averments in this matter must be viewed and understood from that purported marital background. Applicant's marriage was by custom not void; it was the unexpected existence of the Respondent's civil marriage that conceivably destroyed Applicant's marriage. It is not as if Applicant was aware of the civil rites marriage of the Respondent/deceased. Applicant was therefore not a guilty party; not even by association with the deceased. One may ask: What punishment does the deceased suffer for creating the matrimonial debacle? What penalty does the law have for such a person, now deceased? He may be dead but he left behind a live estate that may very well answer for his sins.

[33] The alleged partnership was between Applicant and deceased. Respondent was no party to it; her evidence was at best of a second hand nature bordering on hearsay. She was not always at the farm or Applicant's homestead or in the presence of deceased and Applicant to know the finer aspects of deceased/Applicant's relationship. It is the deceased who could best dispute Applicant's allegations regarding the tacit partnership in issue. Corbett JA has stated:[4] *"In the cases concerning tacit contracts which have hitherto come before our Courts, there have always been at least two persons involved; and in order to decide whether a tacit contract arose the Court has had regard to the conduct of both parties and the circumstances of the case generally. The general approach is an objective one."*

[34] Section 7 of the Marriage Act, 1964, is helpless in a situation such as confronts the Applicant in this matter. Section 7, *inter alia,* addresses a person *"who is already married under the Act"*. That person is not the Applicant who is an innocent victim of a law insensitive to her lot. It is in this light that Applicant's predicament is to be considered.

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[4] **Joel Melamed and Hurwitz v Cleveland Estates** 1984 (3) SA 155 (AD) at 164G

She did not set out to establish a commercial enterprise or partnership with the deceased. Instead she had set out to establish a normal (Swati) homestead and family, which must now be turned around and recast as a partnership of sorts for lack of a better term. It was only when her true marital status was revealed that she woke up and found herself a totally different person – not a wife but a cohabitee or 'live- in lover' according to her protagonists. Applicant was justified to be angry, and confused. Worse still, that she was not entitled to receive anything from the deceased estate as the executor (2nd Respondent) intimated in his draft account. Applicant is now called upon to redefine her entire lifestyle and relationship with deceased, and present suitable evidence if she is to benefit from the deceased's estate, something she had always taken for granted.

[35] It should never be forgotten that in such cases the Applicant is faced and dealing with events that happened without planning. Her contribution to the building of the homestead on the farm, to the purchase of the farm did not have to be in hard cash, supported by receipts or documented evidence as the court *a quo* seemed to require when it referred to 'verifiable evidence'. Maintaining the homestead, raising five children and assisting in various ways in the cotton farming was relevant contribution to the purchase of the farm and other farm equipment in so far as it facilitated and created a conducive home environment for the deceased to work and realise the purchase of the farm and sustainable cotton farming enterprise. So long as Applicant lived on the farm and participated in the various activities on the farm she did contribute to a commercial partnership which involved the building of the home, the purchase of the farm and the cotton farming. This would be so even were the deceased shown to have obtained a loan for the purchase of the farm. If Applicant contributed in the food that fed the farm workers, that would still be a 'financial' contribution even if it be only in kind.

[36] In his evidence, Boy Ntshangase, the first born son of deceased, born in 1964, admits that he had assisted in the building of the 'homestead' on the farm, in these terms: *"7 ...I state that the homestead was built long before the arrival of the 1st Applicant. I know this*

because I was assisting the builders; my father was actually building a compound for the labourers who worked in the farm. He had also intended building a wing for all his children from out of wed-lock that includes me, some of my sisters and brothers. . . . 14.1 . . . . I state that I lived with the 1st Respondent and I was later joined by the other children my father had from out of wedlock. 14.2 Initially when we were building at the farm my father had said that the homestead would house the labourers and all of us children who were born out of wedlock. He had planned to hire a person to look after us. When the construction of the house was complete the 1st Applicant came to live with us." Boy's evidence seems tainted. He does not say that he and the other siblings lived at the farm house as the deceased had allegedly planned and as Applicant alleged. He gives the impression that he and the other out of wedlock siblings were joined by Applicant at 1st Respondent's home. Neither Applicant nor Respondent have attested to this arrangement. The better evidence is that Boy and the other out of wedlock children lived with Applicant at the farm house.

[37] In a case like this, how long is 'long before', as Boy averred? The averment is not very helpful. If the farm was bought by deceased in 1978 and Appellant says she married deceased and occupied the farm house in 1981, the farm house could not have been built 'long before' 1981. Boy does not deny that Applicant came to the farm in 1981. The farm house was according to Boy built also for the children born out of wedlock. Boy, the eldest, was about 14 or 15 years in 1978, meaning that the other siblings were younger. It is not stated that a helper was hired for the children at the farm house. It is then reasonable to conclude that Applicant was placed at the farm house as mother to all of deceased's children beside the employees who also stayed there. Rather strange that deceased would have dumped his children at the farm house without a 'mother'. The story told by Applicant that the farm house was built for her and the other children of deceased, like Boy, sounds closer to the truth and Applicant has lived in the farm house since 1981.

The civil rites marriage

[38] Marriage, says Hahlo: [5]

". . . creates a physical, moral and spiritual community of life, a consortium omnis vitae. Conjugal love in the words of Young J. in T v T [1968 (3) SA 554 (R) at 555] 'embraces three components: (i) eros *(passion), (ii)* philia *(companionship) and (iii)* agape *(self-giving, brotherly love)'. Flowing from the marital relationship are the duties of cohabitation, loyalty, fidelity, mutual assistance and support. Spouses are under a duty to live together, to afford each other marital privileges and to be faithful to each other. Thus husband is obliged to provide his wife with a suitable home, the wife, to live in it. An agreement by which they seek to contract out of any of these duties is invalid as being against public policy."*

[39] Before we consider the property consequences of civil marriages, it is apposite to first understand the underlying bond binding the spouses in the marriage. Hahlo[6] describes marriage from the common law point of view as *"the legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts"*. Marriage is a contract; a peculiar contract with its own characteristics. Professor Hahlo names four such characteristics, the fourth being that *"the ends of marriage cannot be fully expressed in terms of legal rights and duties. They include* ***community of life*** *and the procreation of children..."* (My emphasis). Hahlo further states that while some of the features of marriage way be excluded by the parties, *"there are others, which being of the essence of matrimony, cannot be excluded. Such are the duty to live together and the duty to observe conjugal fidelity"*. And as Lord Russell of Kilowen [7] put it *"the married status should as far as possible, as long as possible and whenever possible be maintained"*. In **Simelane v Simelane** [8] Dunn J. cited Hahlo as saying ". . . *Once it is accepted that a marriage that is null and void ab initio is a non-existent marriage, which does not require a formal act of annulment to deprive it of effect, it is difficult to see why the guilty party*

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[5] **The South African Law of Husband and Wife,** Fourth Edition (1975) at 109 -110
[6] **Ibid** at 28
[7] **Fender v St. John's Mildway** 1938 AC 1 (HL) at 32 - 3
[8] High Court Case No. 1537/96 (6 June 1997)

should be precluded from having this proclaimed by the court. On the contrary, it is clearly in the public interest that the question whether or not there is a marriage should be settled once for all, never mind at whose instance. Status is, by its very nature, indivisible: there is a marriage or there is not."

[40] Hahlo (at 219) further writes: *"Community includes all the property and rights of the spouses which belonged to either of them at the time of the marriage or which were acquired by either of them during the marriage", Assets forming part of the joint estate are owned by the spouses in equal, undivided shares".* And that: *"As regards acquisitions* ***stante matrimonio****, whatever either spouse acquires during the marriage falls automatically into the joint estate, no matter whether it be acquired by onerous or gratuitous title; . . . as a result of legal or illegal activities. The salary which the husband earns; the shirts and shares he purchases; the earnings of the wife and the jewels which she inherits from her mother; the tainted gains of gambling, fraud, theft or prostitution: all alike fall into the common estate".* (p 220). Generally speaking, 'community comes into being as soon as the marriage is solemnised'. And *"the basis of community is the Frankish notion of conlaboratio; in other words, whatever spouses acquire during the marriage they do by reason of their combined but specialized efforts. Community of property and of profit and loss results in a universal economic partnership of the spouses, with the husband as the senior, and the wife as the junior, partner. All the assets and liabilities of the spouses are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares."*(At 214-5) (My emphases).

[41] In **Hare v Est. Hare** [9] Kuper J. observed: *"It has commonly been said that on a marriage in community of property a universal partnership between the spouses is created.* Professor Hahlo in his book on the *Law of Husband and Wife* states the position in the following terms (at p. 142): *'Community of property and of profit and loss results in a*

[9] 1961 (4) SA 42 (WLD) at 44 F-G

universal partnership of the spouses, with the husband as the head of the community and the wife as junior partner. All the assets and liabilities of the spouses are merged in a common estate under the administration of the husband'". Kuper J. continues, on the partnership created by marriage in community:

> *"...But it was not intended in these statements nor in the original sources such as Grotius 3.21.10.11 ... to give to a joint estate created by a marriage in community all the characteristics of a partnership. The essential conception of a partnership, namely that it be formed for the purpose of making a profit, is lacking, the fact that the control must be in the hands of the husband and the husband alone has power to deal with the joint estate offends against another basic principle of partnership, as does the consequence that it is only in very special cases that the wife is able to obtain a division of the joint estate before the marriage is dissolved".* (My emph.)

[42] Whilst it may not be properly denied that the purported customary marriage of the Applicant was bigamous, null and void by reason of the fact that deceased was already married by civil rites, it is not unimportant to mention that in light of the Respondent's marriage certificate, Respondent's proprietary rights flowing from her marriage with deceased were governed by siSwati customary law. That is the effect of sections 24 and 25 of the Marriage Act, 1964. On the face of the marriage certificate, deceased and Respondent did not adopt the common law to regulate the property consequences of their marriage. The relevant column of the certificate remained empty. Dealing with this matter as if the marriage was in community is only for convenience in the hope that justice will be served. In a matter like this, the customary law arena is simply an unchartered jungle.

Putative marriages

[43] Of putative marriages, Hahlo[10] writes: *"The requirements for a putative marriage in old law were: first, that the marriage had been solemnized with the prescribed*

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[10] Hahlo, **The South African Law of Husband and Wife** 4th ed. (1975) Juta & Co p 493

formalities (.....); secondly, that both or at least one of the spouses had contracted the marriage in good faith (....)". Professor Hahlo also points out that *"the requirement of good faith forms part of modern law, as it did of the old law. One or both of the spouses must have been ignorant of the impediment to the marriage."* Hahlo further explains:[11] *"....The requirement that the marriage must have been solemnized with the prescribed formalities derives from canon law, where the institution of putative marriages originated as a device to mitigate the harshness of annulment to an innocent spouse. . . . The institution of the putative marriage was unknown to English common law.* The Legitimacy Act, 1959 [UK*] introduced the rule that the child of a void marriage should be treated as a legitimate child if at the time of its conception or of the celebration of the marriage, if later, both or either of the parties reasonably believed that the marriage was valid."* In my view, the application of the notion of tacit universal partnership to cases of cohabitation and related relationships is also a device improvised to compensate partners or spouses who otherwise stand to lose from a relationship whose validity and terms of engagement were mistakenly considered to be legitimate. The imposition of the partnership concept on the parties is to stabilize the relationship whose proprietary consequences have as yet not been formally determined.

[44] Hahlo states that if a couple in a putative marriage *"have lived together as husband and wife for some length of time, the court may decree that their combined property is to be shared equally between them or their heirs, as the case may be. If one of the parties was* bona fide, *community of property takes place if this is to the advantage of the innocent party, but not otherwise".* (See **Isaacs v Isaacs** 1949 (1) SA 952 (c); **V v De Wet NO** 1953 (1) SA 612 (O)). Question here is: Why not do likewise where married spouses have lived apart for a considerable period, that is, consider the partnership ended on day of parting, where there is no good explanation for the separation?

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[11] Ibid, **Footnote 70** at p 494

[45] Applicant was not just an ordinary, casual, live-in lover as Respondent would want the court to believe. On the basis that her marriage to deceased was bigamous, Applicant was a putative wife of deceased. The nullity of her marriage does not invalidate this. To that end, Applicant's five children should be declared legitimate, if this be not the current position. Deceased is said to have lied about his civil marriage with Respondent, who said that when she confronted deceased about the Applicant's status in the family, deceased 'broke down and cried'. Respondent did not then confront Applicant with the truth regarding her purported marital situation. Respondent was apparently content that her own marital status would not be affected by the bigamy.

[46] In **Dlamini v Dlamini** [12] Rooney J. stated as follows in regard to a marriage declared null and void for being bigamous: *"The first applicant is prima facie guilty of the crime of bigamy and now seeks to undo his own unlawful act. If second applicant was aware of the existence of the previous marriage under Swazi law and custom she is an accessory to the crime"*. In the present matter, Respondent is an accessory to the crime of bigamy committed by deceased. Respondent could not have been unaware of the purported marriage between deceased and Applicant from as far back as the first year of that marriage in 1981. On the contrary, Applicant entered into the marriage with deceased in good faith, unaware of the civil marriage with Respondent.

[47] In **Nhlapo v Nhlapo** [13] Dunn AJ stated: *"The evidence led in the main action clearly established that the defendant was ignorant of the impediment to her marriage to the plaintiff. In my view, the defendant acted in good faith in going through the marriage ceremony with the plaintiff. On this basis, the marriage was a putative one...."* It may be asked whether Applicant's bigamous marriage in present matter was putative. I can see no objection in principle since the customary marriage is a legally recognized form of

[12] [1989] SZHC 15 (21 April 1989)
[13] 1982 – 86 SLR 361 (HC) at 362H

marriage in this country. In **Zulu v Zulu** [14] Hugo J remarked that where the applicant had acted in good faith in so far as she was not aware of the deceased's prior marriage with the respondent: *"The question is then whether the applicant's marriage to the deceased was therefore a putative marriage, which carried with it proprietary consequences."* And the learned Judge continued: *"Where one or both parties to a marriage were bona fide at the time of entering into the 'marriage' and they had not excluded the community of property by an ante-nuptial contract, the party acting in good faith may nevertheless claim that there was a community of property and therefore he/she is entitled to an appropriate share as if the 'marriage' is dissolved".*

[48] In para 128 of her Replying Affidavit to 1st Respondent's Answering Affidavit, the Applicant stated:

> *'Ever since I got married to the deceased, the 1st Respondent never challenged and or objected to such marriage yet she was allegedly aware of her civil rites marriage. The 1st Respondent acquiesced to my marriage and waived her rights to object to my marriage as she is now doing even if indeed she was married in terms of civil rites. I am, therefore, advised and verily believe that, in fact it would be the 1st Respondent who would be benefitting from her own wrong doing, as she accordingly acquiesced to my marriage with the deceased..."*

[49] Can the siSwati customary marriage, not originating in canon law and not steeped in the Roman Dutch common law, be ever considered 'putative'? I see no reason why not. After all it is a legally recognized form of marriage. *In casu,* I have dealt with the customary marriage between deceased and Applicant as putative. If not from the point of view of both deceased and Applicant, then from the point of view of the latter. From the Applicant's point of view, I have no reason not to believe that she innocently and in good faith got married to deceased. From the deceased's point of view it may be argued that he believed

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[14] **Zulu v Zulu and Others** Case No. 17413/2005 (High Court of South Africa) (DCLD) (25/2/2008)

his marriage with Respondent to be governed by customary law. When asked by Applicant about it, deceased is said to have denied the civil marriage. Considering that the common law had been excluded in their marriage, it is easy for an uneducated person to be confused about the legal status of his/her marriage. Deceased, by his attorney, had put an advert in the *Times of Swaziland,* (April 12, 2017) and stated that he was married to Respondent by customary law. Fully aware of Applicant's marriage, Respondent did nothing about it. Applicant may be forgiven for any wrong impression she may have had. In practice, the failure to adopt the common law may very well confuse spouses as to where to draw the line between the civil and the customary in the marriage. This is a matter for further legislative consideration.

Universal partnerships

[50] In light of the tenuous situation in which she found herself, the Applicant's claim could not be of the *societas universorum bonorum* type since this requires express agreement or formal civil marriage in community. Applicant's claim to a share lay in the *universorum quae ex quaestu venuint* partnership *"whose object was a share in the profits or fortunes deriving from the farming enterprise as a commercial undertaking i.e. in respect of the farm as a specific asset."* That was the alternative claim which could be founded on tacit agreement. In the circumstances in which she found herself, any equivocation by Applicant between the two types of partnerships is, in my view, understandable. The family meeting had accepted her and was ready to entertain her claim as a second wife. Naturally, once the marital error was laid bare, Applicant could only look to the farm and her homestead as the only tangible assets she was closely associated with during lifetime of deceased. To be sure, Applicant's main claim was not based on *societas universorum bonorum* but on her alleged status as a wife of deceased. It was the alternative claim that was founded on tacit universal partnership. It should further be considered that in marriage-based partnerships, as Kuper J. points out above profit is not an essential.

[51] In **Malaza v Malaza** [15] Browde JA remarked: *"As far as the onus of proof is concerned, Mr. Shilubane has conceded, rightly in my view, that all that is required and the true inquiry is simply whether it is more probable than not that a tacit agreement had been reached. In this regard see Muhlmann v Muhlmann 1984 (3) SA 102 (A) at 124C and Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner of Inland Revenue 1987 (3) SA 345 (A) at 357H."* In that case, respondents marriage by custom to deceased was obviously bigamous and arguably '*contra bonos mores*'. Respondent was granted half share in a farm she and deceased had bought. She produced a receipt issued to her for the deposit paid. In granting her the half share, the Court overlooked the bigamous union of the parties and simply said that the agreement to buy the farm was that of two persons *"who happened to be living together"*. In the result, no reliance was placed on the 'marriage' as such, *"only a tacit agreement to share the farm in partnership"* was noted. But "living together" must refer to cohabitation.

[52] Regarding the test which Applicant had to meet in support of her claim, it should be borne in mind that the partnership being tacit, Applicant and deceased never sat down and expressly agreed on the terms and conditions of their partnership. Accordingly, the partnership was implied, based on conduct of the parties in light of their relationship as husband and wife, putative as it turned out to be. Evidently, in a case of tacit agreement, it is not correct to even think of a *consensus* as such as that would be the case in normal contracts. *In casu*, the parties or at least one of them, believed that their relationship was lawful, and with that in mind behaved as husband and wife customarily conduct themselves. In other words, the relationship of the parties as between themselves, had the external features of a lawful marriage according to custom. In the result, there was no need for the Applicant to secure a definite response on how to handle or deal with any particular family asset or activity, be it commercial or other. That is why the test is one of inference on a balance of probability from 'equivocal circumstances' as Drake says. On the contrary,

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[15] **Swaziland Court of Appeal,** Case No. 9 / 1993

from a family point of view, if a particular asset or activity were excluded from the general family pool, it would be for the party concerned to ensure that the exclusion was understood by the other party. Otherwise, everything belonged to the general pool.

[53] The question posed by the Court *a quo*, that is, *"whether such a partnership over a specific thing or project between the cohabitees could co-exist with the notion of the joint estate deriving from the pre-existing community of property civil marriage of the deceased and the first respondent"*, must be answered in the affirmative, in this case. In the first place, we intimated that the property regime of deceased and Respondent was the customary law. In the second place, the claim of the Applicant is to be defined and limited to the farm. In the third place, as a last resort, Applicant could claim from the deceased's half-share of the joint estate with Respondent. The Court *a quo* rejected any claim of the Applicant essentially that any such claim could not co-exist where the other partner's assets are effectively locked in a community of property. In the result, Applicant's claim had to be directed to specific assets for which specific agreement had to be proved. It was in this regard that the Court *a quo* found "no iota of verifiable evidence", that the evidence was "sketchy" and "equivocal". In a case of tacit agreement, that was bound to happen and anything else would be expecting too much from a 'second wife' in a customary union.

[54] At 173D of **Joel Melamed and Hurwitz** case, it is written: *"Melamed conceded that the alleged acceptance was neither oral nor in writing, but tacit. He was asked: 'Tacitly, by what conduct?' to which he replied ..."* Ultimately, the test or proper formulation of a tacit contract was left hanging by Corbett JA in that case. It may be necessary, however, to set out what has been described as the traditional formulation of tacit agreement, which itself is by no means satisfactory as it seems to pitch the standard rather too high. This is what Corbett JA stated:[16]

[16] **Joel Melamed and Hurwitz v Cleveland Estates** 1984 (3) SA 155 (A) at 164G – 165E.

"As to tacit contracts in general, in ***Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc. and Others*** *1983 (1) SA 276 (A) it was stated (at 292 B – C):*

> *'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem. (See generally* ***Festus v Worcester Municipality*** *1945 CPD 186 at 192-3; .....****Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd*** *1979 (3) SA 267 (W) at 281 E – F;* ***Muhlmann v Muhlmann*** *1981 (4) SA 632 (W) at 635 B –D).'*

*This is the traditional statement of the principle, as is borne out by the cases cited; and it was accepted as being correct by appellant's counsel. The correctness of this general formulation has nevertheless been questioned on the ground that it would appear to indicate a higher standard of proof than that of preponderance of probability as regards the drawing of inferences from proven facts (*see Christie *The Law of Contract in South Africa at 58-61; ...****Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd*** *1983 (1) SA 978 (A) at 981 A-D). In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence (see* ***Plum v Mazista Ltd*** *1981 (3) SA 152 (A) at 163-4). It may be that in the light of this the principle as quoted above from* ***Standard Bank of SA Ltd v Ocean Commodities Inc.*** *(supra) requires reformulation... While it is perfectly true that in finding facts or making inferences of fact in a civil case the court may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the*

inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. " (My emphases). It follows that the inference is drawn from *equivocal* facts informed by its plausibility. Were the test otherwise, there would be no need for drawing an inference.

[55] To be sure, the following is what Botha JA said in **Spes Bona Bank** case, as cited above, which seems to support the call for a reformulation of the test:

"The agreement relied upon by the appellant is alleged to have been entered into tacitly. In regard to the proof of a tacit agreement generally, Nestadt J. ([17]) referred to certain authorities, some of which suggest that in relation to a tacit contract a higher standard of proof is required than in the case of an express contract. That is not so. The general rule is now well established that the onus *of proof in respect of any* factum probandum *in a civil case can be discharged on a balance of probabilities. The instance of a tacit contract is no exception to the general rule. That such a contract needs to be proved by way of inference from circumstantial evidence does not render the criterion of proof on a balance of probabilities inapplicable, for in a civil case that criterion applies also to the drawing of inferences from proved facts (. . . .)"*

[56] If we accept that *consensus ad idem* is itself a product of inference on a balance of probabilities, the test of a tacit agreement should not appear so high as to be cause for concern and a need for reformulation. So long as the principle is predicated on tacit, unexpressed intention, 'unequivocal conduct capable of no other interpretation' becomes neutralized when assessed on a preponderance of probability. Further, the preferred approach in search of the *consensus* is to view the situation as a whole and not the individual acts or conduct. As it has been said a single swallow does not make a summer. Thus the inference is best done at the end of the period which is alleged to establish the

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[17] **Spes Bona Bank v Portals Water Treatment** 1981 (1) SA 618 (W) at 630E – 631B)

partnership agreement. The piece-meal approach in which single acts of conduct are selected, assessed and evaluated for *tacit* partnership is likely to lead to unsatisfactory conclusion in which the requisite partnership is denied.

[57] A tacit universal partnership should be distinguished from a partnership by contract which comes to existence where two or more persons, orally or in writing, agree that *"each of them contribute something, whether capital or labor, to a lawful business which is to be carried on for their joint benefit with the object of making a profit and of sharing the same"*. Accordingly, once there is an express, oral or written intention to establish a partnership, that partnership cannot properly be said to be tacit. In a tacit agreement, the intention also must be looked for and inferred from the conduct alleged to establish the partnership.

General case review

[58] Whilst it may be true, as Brand JA says, that *"the general rule of our law is that cohabitation does not give rise to special legal consequences"* in particular *"the supportive and protective measures established by family law,"* *in casu,* we have a case of not just casual cohabitation. Appellant was a putative wife of deceased. The Appellant had undergone a recognized marriage ceremony and was generally recognized and accepted as a married woman and wife of deceased. In my view, the marriage formalities (the *teka* and *lobola*) however legally void created a *de facto* contractual relationship which a Swati court will recognize. That is, to all intents and purposes, she was a married woman for the thirty-seven years; she did not behave differently from normally customarily married women. A tacit contract of marriage and or partnership must be implied in the circumstances.

[59] In this matter we should always bear it in mind that the focus is on Applicant and her personal circumstance in the unfortunate situation she found herself. The real culprit to whom section 7 is mainly addressed is now beyond the reach of the law. Section 7(1) speaks to a "person already legally married", and section 7 (2) speaks to a "person married in terms of this Act". In both instances, that person was the deceased. That is the person

who was guilty of the offence of bigamy. Respondent would possibly be guilty as an accessory for aiding and abetting the commission of the offence. Respondent said that when she confronted deceased regarding the wedding of Applicant, deceased broke down and cried but reassured her that her own marriage would not be affected. So Respondent kept quiet until deceased passed on. Applicant being thus ignorant of the true situation, why should she be visited with the sins of the deceased and Respondent?

[60] In the **Butters v Mncora** case (supra) Brand JA continued as follows:

> *"[11].....(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 (RJ Pothier A Treatise on the Law of Partnership (Tudor's Translation) 1.3.8) as a correct statement of our law (see* ***Bester v Van Niekerk*** *1960 (2) SA 779 (A) at 783H-784A;* ***Muhlmann v Muhlmann*** *1981 (4) SA 632 (W) at 634 C-F;* ***Pezzutto v Dreyer*** *1992 (3) SA 379 (A) at 390 A-C. The necessary essentials are, firstly, that each of the parties brings 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 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* ***Bester v van Niekerk*** *supra at 784 A)."*

[61] The civil rites marriage presupposes a life of togetherness of the spouses, not a paper marriage which is to all intents and purposes an abuse of the institution of marriage. This is particularly so in the case where the innocent/victim spouse is aware of acts by the other

spouse which normally entitles him/her to sue for divorce or claim of conjugal rights or other remedy but does nothing over a lengthy period only to await the death of that other spouse and return to claim a half-share of the deceased estate. This is immoral and should not be encouraged. A paper marriage should not be supported if used as basis for benefits never contributed to their acquisition.

[62] In **Magagula v Magagula** [18]it appears that the parties were married by civil rites in community of property in South Africa in 1960 under section 22 (6) of the then Black Administration Act of 1927. They lived together for only about ten years and separated for more than 40 years without being divorced. The couple had relocated to eSwatini in 1964, where they separated in 1969. The husband died in 2011, having purported to marry by customary rites the second respondent. During the 40 year-period of separation, the civil marriage only existed on paper but physically and emotionally was nonexistent. The parties lived an adulterous life to their knowledge. Nevertheless, the applicant, wife by civil rites, was granted a share on a 50-50 basis in the entire deceased husband's estate. The claim only excluded what the customary law wife showed to have contributed in acquiring such as Plot 707 at St. Marks area, Mbabane. The plot and the building finance had been obtained by the customary wife. This asset was easy to prove. But there must have been many other small but cumulatively valuable things she bought which were otherwise individually not so easy to prove on the test touted by the court *a quo* in the present case.

[63] Brand JA for the majority in **Butters v Mncora** stated:

> *"[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*

[18] **Magagula v Magagula NO and Others [2019] SZHC 187 (7 October 2019)**

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. ....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 prove 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."

[64] The foregoing excerpts virtually settle the claim for the Applicant in the instant case. The fact that her income as a primary school teacher could not make a significant

contribution to the building of her homestead, the raising and education of their children and those of deceased from outside relationships, the purchase of the farm and the cotton farming business including the acquisition of the farming plants and equipment, do not mean that Applicant had a life of her own apart from the deceased and or that the two did not share in the acquisition and the administration of the homestead and the business on the farm. The evidence though denied by Respondents is that Applicant contributed and was hands-on in the family home and the cotton farming. The financial size of that contribution is not materially important to the issue of sharing with deceased.

[65] That the Applicant may have somewhat overstated her case does not mean that on the whole she has no case. It has not been shown what else Applicant could have done or said in proof of her contribution to a common estate with the deceased, at least, located around her home area and the farm. Nor did the court *a quo* point to anything definite in rejecting Applicant's factual allegations as sketchy and unverifiable. Short of a trial, how else was Applicant to be vindicated? As it was stated in **Butters v Mncora** (at para 27: ". . . *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. ... 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*". *In casu,* that period of intimate relationship is even longer than 20 years and was founded not on mere cohabitation as in the **Butters v Mncora** case but on something stronger, an honest albeit mistaken marital relationship.

[66] I am very skeptical of the logic justifying a spouse who returns after many years of *de facto* separation to lay claim to a deceased spouse estate to which she /he had not contributed. In my view, spousal entitlement, if any, should end on the date of physical separation unless some post-separation assets are shown to have been generated by assets already held by the spouses before separation. And in any case, I think that tacit universal partnership need not be asset-targeted; it should be motivated and driven by the facts of the particular case. A spouse need not have contributed a cent to the acquisition of a particular

asset to lay claim to it under tacit universal partnership. It should be sufficient that the parties lived together as husband and wife, legally or by repute and there is nothing specifically prohibiting a sharing generally or in respect of identified assets.

[67] With the spouses married in community of property, their joint estate is divided when one of them dies, with the survivor entitled to one half of the net residue of the joint estate after debts of the estate are paid. It follows that *in casu* on the death of the deceased there had to be a liquidation and distribution of the joint estate. But does the liquidation occur where the property rights of the spouses were governed by customary law? The property rights of the spouses could not be governed by the common law and customary law all at once. As intimated above, for tactical convenience, we shall proceed on the basis that the common law applies to the deceased's estate. In community of property, the spouses are equal partners in a tacit partnership. That is how Respondent expects to be treated in this matter, as a 50 percent shareholder. Deliberately or not, the Applicant has also proceeded on that assumption. We need not here go into the question why this is so in an estate governed by customary law in light of sections 24 and 25 of the Marriage Act. During the hearing this aspect of the case was not raised. But the sooner it is dealt with at the appropriate level the better for the proper administration of justice. Here I will only echo the words of Justice SJK Matsebula AJA, as he then was, in the case of **Thandi L. Dlamini v Regina T. Dlamini:** [19]

> *"[22] The issue of jurisdiction, that is, the jurisdiction of the Master of the High Court as well as the original jurisdiction of the High Court on the estates of emaSwati married under Swazi law and custom and who die intestate is a thorny and important matter that the Courts of eSwatini must resolve quickly and bring certainty in this aspect of the law in this country."*[20]

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[19] [2020] SZSC 9 (9 June 2020)

[20] I am not aware that anything has been done pursuant to the Court's very pertinent observation. It is amazing that this issue has thus far evaded full judicial attention. I do not know if the Courts can resolve the issue save by declining jurisdiction, as I almost did. In my view the matter requires proper investigation by a properly constituted select committee presided by a Judge for Parliament to consider. The Ministers of Justice and Home Affairs are especially implicated.

[68] Even though the 'marriage' of the deceased and Applicant is by the common law null and void as confirmed by the Act, there is justification for the presumption of a universal partnership created by the manifest family or 'house', that has been allowed to grow and become attached to the 'main house'. That family or house was not the result of mere cohabitation of a married man and a live in lover. The family was the result of a deliberate customary marriage as far as Applicant was concerned. I do not see why the common law principle stated by Hahlo should not apply to a customary set-up. The learned writer referring to spouses in a marriage that turns out not to be entirely lawful, says: "....*If they have lived together as husband and wife for some length of time, the court may decree that the combined property is to be shared equally between them ....If only one of the spouses was* bona fide, *community of property takes place if this is to the advantage of the innocent party, but not otherwise.*"[21] That is how I see the situation in this matter.

[69] In the present matter, the Applicant, being the innocent party, may lawfully demand an appropriate share from the deceased's portion of the deceased's estate (that is, the half share of the deceased) before that share is distributed among deceased's heirs. The customary marriage was duly solemnized with all relevant customary formalities. I see no reason why the farm that was the mainstay of that marriage may not be declared property of the universal partnership of deceased and Applicant. Applicant's marital rights being subsidiary, she can only claim in terms of the common law since the alleged partnership is unknown under customary law. To be noted that deceased died intestate.

[70] In its conclusion the court *a quo* relied on the dissenting opinion in **Butters v Mncora** case. In that opinion, Heher JA was highly critical of the respondent's case. He said, for instance: *"[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*

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[21] **The South African Law of Husband and Wife**, Juta and Co, Fourth Edition (1975) p 497.

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 (....) at any given time. [45] In my view, the respondent failed to discharge the onus on her at the trial. . . " That was not the impression of the majority. In my view, the learned dissentient demanded too much from a partner alleging tacit agreement, which depends on and is driven by conduct and a sense of responsibility predicated on the *bona fides* of the actors, not on any express intention.

[71] I also do not understand how the learned Judge of Appeal could describe the respondent as an "ad hoc recipient" of appellant's generosity in light of the period for which the parties had been associated. The learned Judge also seemed to ignore the fact that Mr. Butters and Ms. Mncora had been practically husband and wife for about 20 years, 10 years of which they had been engaged to marry. The cohabitation was not colourless; there was an element of stability to it, cohabitation *"in a state of amity over a long period"* and resulting in the birth of two children. How could such a 'family' be described as *ad hoc*? It should be considered that parties in the situation of Appellant and deceased in this case were not united and bound by any 'special intention' to a universal partnership, but were in the first place united in love and marital fidelity, even as the marriage may be said to be putative. That is what kept the Applicant going for 37 years. What Justice Heher did in para 37 is to trivialize and underestimate the "normal incidents" of cohabitation / marriage, the very anchor and substance sustaining spousal life as adding no value to non-spousal tacit partnership for lack of what the learned Justice of Appeal called "special intention that attaches to a universal partnership". What exactly that 'special intention' is, short of oral agreement, I am not aware.

[72] Elsewhere[22] Heher JA refers to certain *"incidents of cohabitation"* being the same as of marriage. But marriage in community has been said to establish a universal

[22] See **Butters v Mncora,** supra, para 37

partnership. This is not necessarily the same of cohabitation "without an agreement to share". But what form does this "agreement to share" take in the case of tacit partnership? Heher JA does not say even as he refers to 'evidential feature' that links the incidents to the "special intention that attaches to a universal partnership". It has been said that in our law "cohabitation does not give rise to special legal consequences", in particular, "the supportive and protective measures established by family law', which are generally "not available to those who remain unmarried, despite their cohabitation, even for a lengthy period". Central to the decision of the majority would seem to be the following paragraph:

> *"[17] ....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 the 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".*

[73] In **Butters v Mncora** the court recognized the value of non-financial contribution a party may have made to the family life of the parties and thereby emphasized that universal partnership need not revolve around a commercial enterprise to which both parties contributed, as the appellant had contended. That is pertinent to the present appeal. If the argument is that Applicant contributed nothing to the farm purchase and the cotton farming business, despite her own assertions, due attention must be directed at the family home situate on the farm. In all probability, it cannot and it could not be that for 37 years Applicant had nothing to do around and about the farming enterprise and the home management thereon. Applicant was not just a casual visitor to the homestead she regarded as her home and the business activities that went on the farm as part of her family responsibilities. The home which Applicant managed was the base and business office from where the farming enterprise was planned and administered. This is not to mean that

universal partnership is necessarily confined to commercial enterprises. The mere presence of Applicant on the farm as the wife and mother of the children of the deceased added value on whatever business was operated by deceased on the farm.

[74] It cannot be and was not stated, that deceased managed the cotton business from his other home at Nsingizini where Respondent stayed. On the contrary, Respondent herself deposed to the effect that deceased had built the homestead on the farm as a "compound for the farm employees and office for the cotton farming", that is, as a base for the close management of the farming operations. For the proper upkeep of the farm house deceased placed Applicant as the mistress of the homestead, and in that house five of deceased's children were born and raised. As in the **Butters v Mncora** case, it is clear from her depositions that her case is that they had entered into a partnership which "encompassed both their family life and the business conducted by the [deceased]". In the result, Applicant shared in the benefits derived from the deceased's contribution to the general welfare of Applicant's life on the farm. Small her contributions might have been it was never a separate existence on her own account. That is, when Applicant was employed as a teacher, she averred without contradiction that her bank account and its use was entirely in the hands of deceased as she could not withdraw money without his permission. Applicant also cared for deceased's children from other relationships. The presence of their 'extra-marital' children – of which Respondent was most likely aware - must have cleared any doubts and confirmed to Applicant that Respondent and deceased were in a customary marriage.

[75] In my view, the Butters / Mncora situation provides a worst case scenario, as it were. Butters and Mncora were openly 'cohabiting' and even engaged over a ten year period. Applicant and deceased, *in casu,* were openly 'married'. The life expectations of Ms. Mncora on the one hand and the Applicant on the other hand could not be the same. The proof of a partnership in the latter case ought to be less demanding/exacting than in the former. That is, the inference of a tacit partnership is easier to make in the Applicant's

case than in Mncora's case. In the Applicant's case, only those who had intimate or inside knowledge of the deceased's marital life with Respondent would have had any idea that Applicant and deceased were not married – at least legally speaking. What is more, Applicant believed to have been lawfully married to deceased and acted accordingly. Thus, in my opinion, even though Applicant's case is not one of lawful marriage it still cannot properly and fairly be equated to a case of simple cohabitation with no rights in law. The Applicant's is not as the court *a quo* insinuated a case of *"casual arrangement evolving from the cohabitation and intimate nature of their relationship to simply run a household or family unit"*.

Conclusion

[76] It should be mentioned that persons, a man and a woman, do not establish a family, lawfully or informally, for purposes of profit. Generally speaking, a family is not a commercial enterprise. Even where the family is circumstantially viewed as a partnership, profit making is only a temporary and passing phase. A family may make profit without itself being a business. Partnership itself need not be profit oriented. That marriage in community of property creates partnership does not mean that profit is the purpose. Where profit is the primary aim and reason to be for the marriage, then that would not be a marriage as is ordinarily known. As we have been told, certain features of partnership are not present in marital partnership. Profit-making is one such outstanding feature.

[77] Whilst it may be true as a general principle that universal partnership may not co-exist happily with marriage in community, because of the immorality associated with that arrangement, realism however informs otherwise. Take the case where husband and wife married in community of property separate without divorcing for twenty years, and cohabit with other persons until one of them dies. The surviving spouse may legally claim all the property of the former husband/wife new family on the basis that she/he never divorced the deceased. To grant such a relief would be complicit to marital infidelity. In particular, the circumstance of non-co-existence must be carefully reconsidered in a case like the

present where the apparent cohabitation is in reality married life outside the common or statute law. *In casu*, there is nothing per se immoral in the deceased/Applicant marriage. At the level of generality, if cohabitation is not to be equated with marriage in community then it is conceivable that there could be room for universal partnership outside the marriage in community. In short, there is life, however shoddy or 'immoral' outside of marriage by civil rites. To say that the family is normally not a profit-making entity is not to say where profit is pursued and realized within the four corners of the family that profit should not be recognized and exploited for what it is worth, even where generated by the effort of one of the spouses.

[78] In **Butters v Mncora,** Brand JA concluded as follows: *"[31]...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".* The same may equally he said of the present case as far as life at Matsanjeni was concerned. Because of the exigencies of the pre-existing civil marriage in community only a fair portion of the farm, excluding the home and its immediate grounds and or fields, may be set aside for the Applicant and the other portion remain part of the joint estate involving the Respondent. What we mean is that Applicant and deceased shared as tacit partners in the family home and farm and farming business at Matsanjeni. In the result, the deceased, Respondent and Applicant all had shares in the Matsanjeni establishment. First, Applicant's home must be excluded and retained as a going concern. The remaining portion of the farm must then be divided between deceased and Respondent and deceased's share be divided between deceased and Applicant. The remaining deceased's share to be shared among his heirs. This apportioning is in recognition mainly that Applicant was at all material times unaware of the invalidity of her marriage and the insincerity of the deceased and Respondent. The Respondent ought to have known better instead of playing wiser after the event.

[79] In this conclusion, I am not unaware of what Hugo J clearly stated in **Zulu v Zulu**:

"Where a person is married in community of property, all assets, save for those expressly excluded therefrom, form part of a joint estate and each spouse enjoys an equal, undivided share of such joint estate. During the subsistence of the marriage the spouses thereto cannot by agreement divide the estate in such a way that their assets become separate property of the individual spouses and nor can one of the parties transfer his undivided share of the estate.

"....The joint estate between the deceased and the first respondent was not terminated prior to the applicant's marriage. In the circumstances all the assets of the deceased formed part of the joint estate between himself and the first respondent. The deceased was entitled to an undivided half share of that joint estate. In the absence of any property excluded from the joint estate the deceased could not have created a new community of property regime with the applicant".

[80] The above statement by Hugo J. evidently does not apply in a case like the present where the Applicant was an innocent, bona fide, victim of deceased's unscrupulous behavior and aided and abetted by Respondent. Ordinarily, I would be sympathetic to a situation where only one spouse was guilty of a matrimonial offence. *In casu,* both deceased and Respondent were guilty: deceased of bigamy and Respondent of being accessory to bigamy. It may then be asked: What penalty lies in store for such persons? What stops the court in its enduring wisdom and fidelity to justice from imposing an appropriate penalty in sympathy with the victim?

[81] What Hugo J is saying in **Zulu v Zulu** is that spouses can separate without divorcing and lead their own separate lives and await the demise of the other spouse, and when that happened he/she would return and claim from the other spouse's estate, even though, since separation, he/she was no part of nor contributed to the effort that generated that estate. With respect that does not make good sense in tandem with the public policy and due respect to the institution of marriage. From the point of view of the civil rites marriage, whilst in separation each or both could be living in immorality, which should not be

encouraged by ascribing benefits therefrom to the surviving spouse who was well aware of the other spouse's immorality and illegality. This does not only commercialise marital life but prostitutes it as well. In short, why should a spouse reap where he/she has not sowed? When the spouses go their separate ways, there could be no marriage between them and any community could best be considered as suspended if not dead.

[82] It is in light of the foregoing considerations that the joint estate of deceased and Respondent, if for no other better reason, then by way of penalty for the bigamy, that the said joint estate is interfered with in favour of the Applicant who innocently acted in good faith for thirty seven years. Any error in this judgment should take into account that the deceased or 'joint' estate was in any event, legally regulated by customary law. We have not relied on the customary law since this was an issue that would have necessitated a referral of the matter to the High Court or conceded total loss of jurisdiction by this Court and the High Court. If this judgment finds support, the Attorney General should be afforded a copy by the Registrar so that office could consider clarifying the law and the penalty for bigamy.

[83] Applicant is now about 60 years old and alleges to be sickly. To send her away empty-handed on the twilight of her life would be wrong and unjust. She deposed that other than what assets there are in the alleged partnership with the deceased, she has no other assets or means of a reasonable lifestyle if denied partnership with the deceased. Even the *lobola* cows for one of her daughters were at the family meeting adjudged to be part of the deceased's assets to be shared by the family members. On the evidence deposed, Appellant is plausibly entitled to benefit as a tacit universal partner with the deceased. We have also explained that in our view there is no reason why community of property in a case like the present cannot coexist with universal partnership.

[84] In the result, the appeal succeeds and the matter is referred to the Master of the High Court to oversee the due execution by the Executor of the order that follows. The Applicant

is to share as a tacit universal partner in the farm in which her home is located. The farm, 288 Hereford, is to be apportioned so as to allow Applicant, **Zwakele Ntshangase (Born Nxumalo),** protection of her home and a fair share in the remaining portion of the farm is to be subdivided as hereinafter set forth. I have found no compelling reason to suspend or remove 2nd Respondent from the executorship of the Estate or chairmanship of the Family Meeting. I accordingly make the following order -

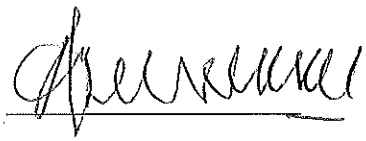
1. The appeal succeeds and the Order of the High Court is set aside.
2. Farm 288 Hereford is to be divided as follows –
   (a) A reasonable portion incorporating Applicant's home is to be excised and registered in Applicant's name;
   (b) The remaining portion is to be sold so as to allow 1st Respondent a half share; and,
   (c) The other half share to be divided so as to allow Applicant a half share; and,
   (d) The last half share is to be shared by deceased's heirs and heiresses.
3. Removal of the Executor (2nd Respondent) is denied.
4. The costs in this Court and the High Court to be borne by the Estate.

MJ Dlamini JA

I Agree

SB Maphalala JA

I Agree



AM Lukhele AJA

For the Appellants	K. Simelane
For 1st and 2nd Respondents	I. Du Pont
For 3rd and 4th Respondents	No Appearance