



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL CASE NO: 64/2021

In the matter between:

ANASTASIA STYLIANOU

First Appellant

MARIA STYLIANOU

Second Appellant

ATHINA MARIA PANTELI

Third Appellant

KYRIAKI MARIA STYLIANOU

Fourth Appellant

ANNASTASIA STYLIANOU N.O.

Fifth Appellant

MARIA STYLIANOU N.O.

Sixth Appellant

And

FIFI CLEMENCE MIKANGO

First Respondent

ANDREAS PANTELI

Second Respondent

MARIA PANTELI MOUZOURI

Third Respondent

ARGYRI KARVAZONI

Fourth Respondent

AVGI PARASKEVA

Fifth Respondent

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL
AFFAIRS**

Sixth Respondent

THE ATTORNEY-GENERAL, eSWATINI

Seventh Respondent

THE MASTER OF THE HIGH COURT

Eighth Respondent

Neutral Citation: *Anastasia Stylianou & Five others vs FIFI Clemence Mikango & Seven Others (64/2021) [2022] SZSC 44 (21 April 2022)*

CORAM: **S. P. DLAMINI JA**
 S. B. MAPHALALA JA
 A.M. LUKHELE AJA
 J. C. CURRIE AJA
 M.J. MANZINI AJA

DATE HEARD: 21 April, 2022

DATE DELIVERD: 12 September, 2022

Summary: *Civil Law and Procedure – All procedural issues relating to filing abandoned by the parties and by consent parties agreed to proceed to the merits or demerits of the appeal; universal partnership Rule 18 and its application to the matter – Held that the applicant did not pursue any other issues by the prayer that the Court orders that the Appellant be granted the opportunity to adduce further evidence and refer the matter back to the High Court subject to such directions that the Court may attach to the court order – Held that the Appellants have failed to make a case for the relief sought and as such the appeal stands to be dismissed with costs.*

JUDGMENT

S. P. DLAMINI – JA

INTRODUCTION

[1] This matter arises out of a judgment of a full Bench of the High Court dated 25 May 2021.

[2] The Appellants were Respondents and the First, Second Third, Fourth and Fifth Respondents were Applicants before the High Court. The parties throughout the judgment will be referred to as cited before this Court namely the Appellants and Respondents, respectively.

BACKGROUND

[3] The High Court (judgment) gives a detailed background and information relating to the matter in its judgment. Therefore, this Court will limit itself to a very brief background to the extent that it is necessary for the issues falling for consideration.

- [4] The matter concerns the Estate of the late Chris Stylianou (Chris) who died on 04 September 2019. Chris died in Cyprus while undergoing cancer treatment.
- [5] Chris in his lifetime had celebrated two marriages in his home country which were all terminated. The last one was terminated through divorce in 2006. The First, Second and Fourth Appellants are his children from Chris's second marriage whilst the Third Respondent is his child from his first marriage.
- [6] Chris initially came to Eswatini in 1986. He returned to Cyprus in 1990. He came back to eSwatini in 2002 leaving kin and kindred behind with a clear desire to make eSwatini his home. This is clear enough from the papers before Court.
- [7] In the proverbial adage of from rags to riches, Chris borrowed money from relatives and embarked on a very successful business journey in eSwatini; establishing various successful business entities.

[8] It appears that as he was prosperous with business, his love life also blossomed as he met and started a relationship with the First Respondent that continued until his death.

[9] Pursuant to the death of Chris and at the commencement of the winding up of his estate, disputes emerged between the parties regarding as to who was entitled to benefit under the estate and the existence or otherwise of a valid Will. Unfortunately a very rampant phenomenon in the winding up of estates in our jurisdiction.

[10] These disputes were not resolved before the Master of the High Court resulting on the aggrieved parties approaching the High Court.

PROCEEDINGS BEFORE THE HIGH COURT

[11] The Respondents approached the High Court on an urgent Notice of Motion wherein they sought relief comprised of Part A and Part B.

[12] In Part A, the Respondents' prayers were, *inter alia*, that;

- “1. The applicants’ non –compliance with the Rules of the above Honourable Court in regard to service and time limits is condoned and this application is permitted to be heard as one of urgency.**
- 2. Pending the outcome of the relief set out more fully in Part B of this application:**

 - 2.1 the seventh respondent is hereby interdicted and restrained from issuing letters of administration in favour of the first and second respondents as provided for in terms of section 22 of the Administration of Estates Act of 1902 (“the administration of Estates Act”) or in favour of any third party whether nominated as executor dative or not and purporting to act on the basis that the late Christodoulos Stylianou died intestate.**
 - 2.2 in the alternative to 2.1 above, and only in the event that it is found that the seventh respondent issued letters of administration in favour of the first and second respondents, the fifth and sixth respondents cited herein in their capacities as the appointed executors dative of the deceased estate of the late Christodoulos Stylianou (“the estate”) are hereby interdicted and restrained from taking any further steps in the administration of the deceased estate and directed to return their letters of administration to the seventh respondent.**
 - 2.3 the seventh respondent is hereby directed to forthwith appoint a *curator bonis* to take custody and charge of the estate for purposes of the due administration thereof in**

accordance with section 21 of the Administration of Estates Act.

2.4 in the alternative to 2.3 above:

2.4.1 Emmanuel Ofori-Abrokwah is hereby appointed as the *curator bonis* of the estate in order to take custody and charge of the estate for purposes of the due administration and distribution thereof;

2.4.2 the aforesaid person is released from any obligation as may be imposed by the seventh respondent to furnish security.

- 3. The applicants are afforded the opportunity to supplement their founding papers for purposes of the relief calmed in Part B within fifteen days of the granting of an order in respect of the relief provided for in Part A whereafter the normal time periods laid down in the Uniform Rules of Court will apply in governing the further conduct of the proceedings for purposes of Part B.**

The first to sixth respondents are hereby ordered to pay the costs of the application jointly and severally *in solidum* the one paying the others to be absolved which costs are to include the certified costs of counsel.

In the event that one or more of the remaining respondents elect to oppose the relief sought, such respondents are ordered to pay the costs of the application together with the first to sixth respondents jointly and severally *in solidum* the one paying the others to be absolved which costs are to include the certified costs of counsel.”

[13] In Part B, the Respondents' prayers were, *inter alia* that;

"It is hereby declared that:

- 1.1. the relationship between the first applicant and the late Christodoulos Stylianou constituted a universal partnership.**
 - 1.2. The aforesaid partnership was dissolved by the death of the late Christodoulos Stylianou on 4 September 2019.**
 - 1.3. The first applicant is entitled to the exercise of all rights and/or privileges in respect of the estate that flow from the universal partnership that subsisted between her and the late Christodoulos Stylianou.**
-
- 2.1. In the event that it is found that the seventh respondent previously issued letters of administration in favour of the first and second respondents acting in terms of section 22 of the Administration of Estates Act, the appointment of the fifth and sixth respondents cited herein in their capacities as the appointed executors dative of the estate is hereby reviewed and set aside, alternatively they are removed from office.**
 - 2.2**

- 2.2.1. the document annexed to the notice of motion marked “NM1” is hereby declared to be the last will and testament of the late Christodoulos Stylianou.
- 2.2.2 the non-compliance of the document annexed hereto marked “NM1” with the formalities set out in the Wills Act of 1955 (“the Wills Act”) is hereby condoned.
- 2.2.3 the seventh respondent is hereby directed to accept the document annexed to the notice of motion marked “NM1” as the last will and testament of the late Christodoulos Stylianou for purposes of the administration and distribution of the assets forming part of the estate.
- 2.3. in the alternative to the relief contemplated in 2.2 above and only in the event that it is found that the above Honourable Court is not empowered to grant the relief claimed in 2.2.1 to 2.2.3:
- 2.3.1 it is hereby declared that section 9 of the Wills Act read with the applicable common law principles are inconsistent with the right to dignity enshrined in section 18(1) of the Constitution of eSwatini read with section 58(1) thereto, the right to equality before the law as protected by sections 14(1) (a) and 20(1) and the right to property in terms of section 19(1) of the Constitution insofar as the absence of the power of condonation precludes the High Court from declaring valid a will which does not meet the formalities of the Wills Act but which was intended by a deceased person to be his or her last will and testament.
- 2.3.2 pending the amendment of the Wills Act if any by the legislature, the common law is hereby developed in order to

give effect to the aforesaid constitutional rights so that the High Court is entrusted with the power to grant the following relief in all matters where it is satisfied that the testamentary document in question was intended by the deceased to be his or her last will and testament:

- 2.3.2.1. declaring the document to be the last will and testament of the deceased;**
- 2.3.2.2. condoning the non-compliance of the document with the formalities set out in the Wills Act;**
- 2.3.2.3. directing the seventh respondent to accept the document to be the last will and testament of the deceased for purposes of the administration and distribution of the assets forming part of the estate.**

- 2.3.3 the document annexed to the notice of motion marked “NM1” is hereby declared to be the last will and testament of the late Christodoulos Stylianou.**
- 2.3.4 the non-compliance of the document annexed hereto marked “NM1” with the formalities set out in the Wills Act is hereby condoned.**
- 2.3.5 the seventh respondent is hereby directed to accept the document annexed to the notice of motion marked “NM1” as the last will and testament of the late Christodoulos Stylianou**

for purposes of the administration and distribution of the assets forming part of the estate.

The first to sixth respondents are hereby ordered to pay the costs of the application jointly and severally *in solidum* the one paying the others to be absolved which costs are to include the certified costs of counsel.

- 4. In the event that one or more of the remaining respondents elect to oppose the relief sought, such respondents are ordered to pay the costs of the application together with the first to fourth respondents jointly and severally *in solidum* the one paying the others to be absolved which costs are to include the certified costs of counsel.”**

[14] For the relief sought under both Part A and Part B, the Respondents relied on the Founding Affidavit (together with annexures) deposed to by the First Respondent, Fifi Clemence Mikango (Mkikango).

[15] The Supporting Affidavits to the Founding Affidavit were deposed to by the Second, Third, Fourth and Fifth Respondents. In addition to the Supporting Affidavits, Confirmatory Affidavits to the Founding Affidavit were filed, deposed to by persons not parties namely; **EMMANUEL OFORI – ABROKWAH, MARISA BOXSHALL-SMITH,**

**EFSTATHIOS EFSTATHIOU, HERMON VILFLEKTI, TAKIS
KARVAZONIS, DINO RUSSO, SAVVAS STYLIANOU AND
NKOSINGIVILE DLAMINI.**

[16] Mikango, in addition to the Founding Affidavit, deposed to a Supplementary Affidavit.

[17] The Application was launched on an urgent basis by the Respondents before the High Court and was opposed by the Appellants. The Appellants in their opposition relied on the Answering Affidavit deposed to by the attorney of record before the High Court, Joseph Waring (Waring).

RESPONDENTS' CASE BEFORE THE HIGH COURT

[18] Mikango in her papers, *inter alia* contends that;

- 18.1. She is a life partner of Chris and that, in the first instance, she was seeking a declaration that her relationship with Chris constituted a universal partnership with the result that she was entitled to the exercise of all the rights and/or privileges that flow from her universal partnership with Chris;
- 18.2. That in the event the Master of the High Court had appointed Anastasia and Maria as executrixes of the estate of the late Chris that such appointment be set aside or that they be removed from being the executrixes;
- 18.3. That the Will of Chris attached to the papers be declared valid notwithstanding that it might fall short of the requirements of the Wills Act of 1955 and be accepted as Chris's last testament for the purposes of the administration and distribution of the assets forming part of the estate;
- 18.4. That in the event it is not possible for the court to condone any shortcomings in Chris's Will due to failure to comply with certain

formalities, the High Court should apply the rights relating to family and dignity under the Constitution in such way as to develop the common law and direct the Master of the High Court to accept the document in question as the last will and testament of Chris;

18.5. That Chris in 2005 established Ocean Fresh Import and Export (Pty) Limited (Ocean Fresh) and that other companies were subsequently established by Chris due to the success of Ocean Fresh;

18.6. That in 2006 Chris and his second wife were formally separated pending the outcome of divorce proceedings. The divorce proceedings were acrimonious resulting in some of his children testifying against him or suing him for maintenance;

18.7. That the proceedings were costly and there was strife within Chris's family whereby the only support he got was from her and his brother who joined him in eSwatini in 2012. There was virtually not much communication between Chris and his daughters;

- 18.8. That in 2010 Chris became afflicted with cancer. Chris travelled to Germany for treatment but the cancer had spread to his liver as shown by diagnosis in 2019. Ultimately Chris succumbed to death due to the cancer in September 2019;
- 18.9. That during his health challenges that ultimately took his life none of his daughters offered any support to him;
- 18.10. That she met Chris through a family friend in 2006 and commenced a relationship. They immediately moved in together and lived as common law wife and husband until his death in 2019;
- 18.11. That they did not have children but considered options to have children of their own through medical procedure but cancer shortened their dreams of having children;
- 18.12. That she nursed Chris within and outside the country when he was battling his illness and at the same time made sure she attended to businesses;

- 18.13. That in preparation for marriage to Chris in November 2016 she submitted to the Greek orthodox faith in which event she was given the name Christina which was Chris' mother's name;
- 18.14. That Chris encouraged her to join him in business and treated her as a partner in the business and that she accordingly embraced the business world investing her time and energy in the businesses. That she shared office space and took major business decisions together for mutual benefit. As an outcome of this she held interest and directorship in some of the companies, drawing a very small salary, as it was understood between her and Chris that they were creating common wealth;
- 18.15. That in April 2019 Chris took steps to put the affairs of his estate in order. This resulted in the drafting of what was supposed to be his last will and testament benefiting her and the other beneficiaries which was never signed due to his death.

APPELLANTS' CASE BEFORE THE HIGH COURT

[19] As already stated above, the then attorney of record for the First to Sixth Appellants Mr. Joseph Waring, deposed to the Answering Affidavit on behalf of the said Appellants. Waring contended, *inter alia*;

19.1 That due to the urgency in which the Respondents' application was launched before the High Court, it was prejudicial to the rights of the Appellants in that they did not have time to prepare for the case; and that this was compounded by the fact that they lived outside the jurisdiction of the Court.

19.2 That the matter was not urgent and ought to be struck off, alternatively dismissed, alternatively postponed to a future date after 5 December 2019 being the date of hearing.

19.3 That Chris died without having executed a valid will as provided for under the Wills Act.

19.4 That the first Appellant refused or failed to cooperate regarding the inventory of the assets falling under the state of the late Chris.

19.5 That the Master was correct to reject the attempt to lodge the unsigned document as a Will and Intestate Succession applied.

- 19.6 That these issues of a universal partnership and other related issues were so involved to depose of by way of motion proceedings.
- 19.7 That the Appellant's papers failed to establish a *prima facie* case to entitle them to be granted the relief they sought.
- 19.8 That the Fifth and Sixth Appellants undertook not to proceed with the distribution of assets of the Estate prior to the finalization of matters that were still pending after the hearing.
- 19.9 That the rights of dignity and property sought to be enforced by the Respondent were without merit.
- 19.10 That reliance upon equal protection under the law by the respondents was not applicable in the circumstances of this case.
- 19.11 That the Respondents failed to establish any prejudice and that the balance of convenience favoured the Appellants.
- 19.12 That a case justifying the review of the Master's decisions had not been made out by the Respondents.

FINDINGS BY THE HIGH COURT

[20] When the matter appeared before her Ladyship Justice M. Dlamini the parties agreed to a consent order in the following terms;

”1. Pending the outcome of the relief set out more fully in Part B of the application:

2.1 the Seventh Respondent is hereby interdicted and restrained from issuing Letters of Administration in favour of the First and Second Respondents as provided for in terms of Section 22 of the Administration of Estates Act of 1902 (“the Administration of Estates Act”) or in favour of any third Party whether nominated as Executor Dative or not and purporting to act on the basis that the late Christodoulos Stylianou died intestate; and

2.3 the Seventh Respondent is hereby directed to forthwith appoint a *curator bonis* to take custody and charge of the Estate for purposes of the due administration thereof in accordance with Section 21 of the Administration of Estates Act.

2.4.2 the aforesaid *curator bonis* is released from any obligation as may be imposed by the Seventh Respondent to furnish security.

2. The rest of the prayers on Part A are postponed for determination under Part B on the return date.

3. Part B is postponed to the 31st January, 2020 pending settlement negotiations between the Parties.”

[21] In view of the above the issue of urgency of Respondents' Application and the apprehension of lack of appropriate relief in due course was resolved through the consent order.

[22] Notwithstanding paragraph 3 of the Consent Order above, there is nothing in the record that indicated that the envisaged negotiations ever taking place or if there was a return date prior to the hearing on 25 May 2021 regarding the impugned judgment.

[23] After the said hearing before a full Bench of the High Court (comprising their Lordships Mamba, Mlangeni and Fakudze J J), the High Court delivered the impugned judgment per Mamba J. The High Court made the following findings at paragraph 22 of the judgment;

“[22] For the foregoing reasons, I would make the following order:

- 22.1 The relationship between the first applicant, Fifi Clemence Mikango, and the late Christodoulos Stylianou constituted a universal partnership.**
- 22.2 The aforesaid universal partnership was dissolved by the death of the late Christodoulos on 04 September 2019.**
- 22.3 The 1st applicant is entitled to the exercise of all rights or privileges in respect of the estate that flow from the universal partnership that subsisted between her and the late Christodoulos Stylianou.**
- 22.4 Prayers 2.2.1 to 2.3.5 (inclusive) of Part B are hereby dismissed.**
- 22.5 Save that the applicants are ordered to pay the 7th, 8th and 9th respondents' costs of this application, each party is ordered to bear its own costs."**

[24] The Appellant launched an appeal against the said judgment in terms of a Notice of Appeal dated 19 October 2021.

[25] In the Notice of Appeal, the Appellants noted "an appeal against that portion of the judgment delivered on 20 September 2021, declaring that a universal partnership existed and awarding rights flowing therefrom".

[26] The Appellants proceeded to state the grounds of appeal. The grounds of appeal are both lengthy and also seek to incorporate evidential material that ought not to be introduced through the Notice of Appeal or Heads of Argument for that matter.

The reason for this, it seems, is to remedy the failure to have filed opposing affidavits by the Appellants.

[27] The Appellants, in addition to their challenges against the universal partnership, proceeded to raise the following issues in the Notice of Appeal;

27.1 That it was the fault of the erstwhile attorney in not filing the opposing Affidavits and that in so doing he acted contrary to the instructions of the Appellants. This issue is irrelevant.

27.2 The Appellants challenged certain averments that were made by the First Respondents in the Founding Affidavit. This is clearly unprocedural. The Appellants only raised technical challenges to the Founding Affidavit.

27.3 Appellant seeks to rely on rule 18 for the court to accept the delivery of further affidavits. There is absolutely no case that has been made by the

Appellants for justifying this Court to make an order for the delivery of further affidavits.

27.4 That the High Court should have referred the matter to oral or direct evidence by the Appellants. There is no such application for the referral that was raised and considered by the High Court. Therefore, there is no misdirection on the part of the High Court.

27.5 Appellants pray for this Court “to remit the matter back to the High Court for further hearing for purposes of;

- (a) determination of whether a factual basis is established for a declaration of a universal partnership, alternatively;

- (b) an order to permit the Appellants “to deliver opposing Affidavits if they so wish”. There is no legal basis for this Court to make any of the orders that the Appellants are seeking to persuade the Court to do so.

27.6 That the High Court “erred in noting in paragraph [5] of the judgment that the Application was opposed by the Appellants who have however only filed legal points in support of the opposition” and in failing to have regard to the fact that the Affidavit by the erstwhile attorney, as set out above, specifically requested an opportunity to deliver further Affidavits...”. The fact of the matter is that the issue of the further Affidavits was pursued before the High Court right up to the delivery of the judgment. Therefore, it cannot be said that the issue is still alive to be revived before the High Court.

UNIVERSAL PARTNERSHIP

[28] In view of the above, the only ground of appeal falling for consideration by this Court is the issue of the universal partnership which was found to be in existence by the High Court. Also, Counsel for the Appellants appeared to accept that the issue of the existence of a universal partnership between Chris and Mikango was central to the Appellants’ appeal against the judgment of the High Court.

[29] The concept of universal partnership has been decided both within and outside our jurisdiction. Foreign jurisdictions such as the Republic of South Africa, Zimbabwe, Namibia and Botswana have dealt the principles governing universal partnerships.

[30] Common to all these jurisdictions and our own jurisdiction is that there are four requirements to establish the existence of a universal partnership namely that;

- (a) each party must bring something to the a partnership such as money, labour or skill.
- (b) the partnership must be for joint benefit of the parties.
- (c) that the purposes of the partnership should be to make profit or to promote a common interest.
- (d) the contract should be legitimate.

It is to be noted that the requirement in (c) namely partnership for profit have been restated in subsequent judgments to include endeavors that promote mutual interests of the parties.

[31] The character of a partner's rights in a universal partnership was articulated in **KHAN v SHAIK (641/2019) [2020] ZASCA 108 (21 September 2020)** as follows at paragraph 6;

“[6] The label ‘universal partnership’ in our law, refers to the *societas universorum bonorum* of the Roman-Dutch Law. The elements of a relationship between two persons that evidences the existence of this species of partnership were most recently affirmed by this Court in *Butters v Mncora*: ‘I now turn to the relevant legal principles. As rightly pointed out by June Sinclair (assisted by Jaqueline Heaton), *The Law of Marriage* vol 1 274, the general rule of our law is that cohabitation does not give rise to special legal consequences. More particularly, the supportive and protective measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period (see eg *Volks NO v Robinson* [\[2005\] ZACC 2; 2005 \(5\) BCLR 446](#) (CC)). Yet a cohabitee can invoke one or more of the remedies available in private law, provided, of course, that he or she can establish the requirements for that remedy. What the plaintiff sought to rely on in this case was a remedy derived from the law of partnership. Hence she had to establish that she and the defendant were not only living together as husband and wife, but that they were partners. As to the essential elements of a partnership, our courts have over the years accepted the formulation by Pothier (RJ Pothier *A Treatise on the Law of Partnership* (Tudor's Translation 1.3.8)) as a correct statement of our law (see eg *Bester v Van Niekerk* [1960 \(2\) SA 779](#) (A) at 783H-784A; *Mühlmann v Mühlmann* [1981 \(4\) SA 632](#) (W) at 634C-F; *Pezzutto v Dreyer* [\[1992\] ZASCA 46; 1992 \(3\) SA 379](#) (A) at 390A-C). The three essentials are, firstly, that each of the parties brings something into the

partnership or binds themselves to bring something into it, whether it be money or labour or skill. The second element is that the partnership business

should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts (see eg *Bester v Van Niekerk* supra at 784A).”

(See also the Namibian case of **MALAKIA LUKAS NAKUUMBA v LINDA IPINGE AND FRIEDA NAKUUMBA SUPREME COURT OF NAMIBIA CASE NO: SA 17/2020 BUTTERS v MANCORA 2012 (2) ALL SA 485 (SCA)**).

[32] Both the High Court and the Supreme Court in our jurisdiction have dealt with the concept of universal partnership. In this regard see **GREGORY ARCHIBALA NEWELL v SIPHESIHLE SHARON MALAZA AND 3 OTHERS (2076/16) [2016] SZHC 66 (21 APRIL 2017) AND GREGORY ANCHIBALD NEWELL vs SIPHESIHLE SHARON MALAZA NO. (40/2017) [2017] SZHC 54 (2017)**.

[33] In the High Court judgment of the Gregory Newell case (*supra*), His Lordship Magagula J had this to say at paragraph 16 of the judgment;

“[16] The courts have on numerous occasions stipulated the requirements of a partnership to be the following:

- (i) That each of the partners bring something into the partnership, whether it be money, labour or skill
- (ii) That the business should be carried on for the joint benefit of the parties
- (iii) That the object should be to make profit
- (iv) That the contract between the parties should be a legitimate contract.

(See for instance Rhodesia Railways and others v Commissioner of Taxes, 1925 AD 438 at 465; V (also known as L.) v De Wet N. O 1953 (1) SA 612 at 615)”

[34] In the Supreme Court judgment of the Gregory Newell case (*supra*), the Court per His Lordship the Chief Justice had this to say at paragraphs 24, 25 and 26;

“[24]. The issue for decision before this Court is whether on the evidence does establish that a universal partnership existed between the appellant and the first respondent. This Court in *Antoinette Charmaine Horton v. Roy Douglas Nicolas, Fanourakis and Two Others* quoted with approval the leading South African case on universal partnership being *Butters v. Mncora*.

[25]. In the Butter case the parties had lived together as husband and wife for a period of twenty years but they were not married to each other; however, they had been engaged to marry for almost ten years. They had two children of their own. Initially the appellant’s husband was working for the Post Office but subsequently resigned and established a business where the respondent wife assisted occasionally until she was gainfully employed as a Secretary in a Government department; however, she stopped working after two years since the appellant wanted her to stay at home and look after the children and further maintain their common home. The appellant’s business grew and he became wealthy. Subsequently, he began cheating on the respondent, and, this brought the relationship to an abrupt end.

[26] Brand JA who delivered the unanimous decision in the Butters’ case found that a universal partnership existed between the parties, and, he awarded 30% of the appellant’s net asset value as at the date when the partnership came to an end.”

[35] The Learned Chief Justice proceeded to state the following at paragraph 30 of this judgment;

“[30] Similarly, it is trite law that the requirements for a universal partnership of all property is the same as formulated by Pothier including universal partnerships between cohabitees, and, that the test for the existence of a tacit universal partnership is whether it is more probable than not that a tacit agreement has been reached. Accordingly, the contribution of the parties should not be confined to

a profit making enterprise; any activity or effort made by a party in promoting the interests of both parties in their communal enterprise should be considered. This should include both commercial enterprises as well as non-profit making activities of their family life for which that party has taken responsibility in contributing to that vision and mandate of partnership enterprise.” (my underlining).

[36] Regarding the issue of proof of the existence of a universal partnership see **MUHLMANN v MUHLMANN 1984 (3) SA 102.**

[37] The enquiry was formulated as to “whether it was more probable than not that a tacit agreement had been reached. I am satisfied that all the aforesaid requirements were established in Mikango’s papers. In fact, Chris and Mikango became co-directors or shareholders in some of the entities.

[38] Furthermore, it is common that a party may seek half or an equivalent of half of the assets falling under the universal assets upon its dissolution. In the **MUHLMANN** case (*supra*) the ratio was 20% to the plaintiff and 80% to the defendant.

[39] I entirely agree with the High Court that a case for the existence of a universal partnership between Mikango and Chris was established. However, neither of the parties raised the issue of the ratio to be applied in relation to determining the assets and the ratio to be applied on their distribution of the partnership. The High Court also did not pronounce itself on the issue.

[40] Mikango's averments in the Founding Affidavit in relation to the existence of a universal partnership between her and Chris have not been successfully challenged by the Appellants. Accordingly, on the papers before the High Court and this Court Mikango discharged the onus of proving the existence of a universal partnership between her and Chris. Therefore, there is no legitimate basis to interfere with the judgment of the High Court on the question of the existence of a universal partnership between them.

[41] In view of the above, the matter must be referred back to the High Court for the determination of the ratio to be applied to the distribution of the assets falling under the universal partnership between Mikango and Chris.

[42] To the extent that the matter is referred back to the High Court, the appeal partially succeeds.

COSTS

[43] Costs usually follow the result. However in family disputes and estates matters the Courts are usually reluctant to award costs. In the circumstances of this case including the partial success of the appeal, I order that the costs of this appeal be paid from the estate of the late Chris.

COURT ORDER

[44] In view of the foregoing, the Court makes the following orders;

1. The Appeal by the Appellant is partially successful in so far as the High Court did not determine the ratio to be applied in the distribution of the assets and in determining the assets falling under the universal partnership between Mikango and Chris.

2. In view of 1 above the matter is referred back to the High Court to determine the ratio and to determine the assets falling under the universal partnership between Mikango and Chris on the papers already filed of record before the High Court.

3. The costs of the appeal be paid by the Estate of the late Chris and such costs to include duly certified costs of both Counsel analogous to rule 68 of the High Court rules.

S. P. DLAMINI
JUSTICE OF APPEAL

I AGREE

S.B. MAPHALALA
JUSTICE OF APPEAL

I ALSO AGREE

A.M. LUKHELE
ACTING JUSTICE OF APPEAL

I ALSO AGREE

J. C. CURRIE
ACTING JUSTICE OF APPEAL

I ALSO AGREE

M.J. MANZINI
ACTING JUSTICE OF APPEAL

Counsel for Fourth to Sixth Appellants: ADVOCATE SKINNER INSTRUCTED
BY HOWE MASUKU NSIBANDE
ATTORNEYS

Counsel for First to Fourth Respondents: ADVOCATE BESTER INSTRUCTED
BY DYNASTY INC.

