

WE HAD A PARTNERSHIP, DID YOU NOT KNOW THIS?

Allner v Werner (2584/2018) [2020] ZAECGHC 12 (25 February 2020)

This judgment deals with a dispute between two persons regarding their shares in wealth generated whilst they cohabited over a period of 22 years. It highlights the very difficult position for such partners to have to search back in their personal and joint histories to be able to convince a court, so many years later, that they created a partnership and agreed on a shareholding, not in words but in deeds done (tacitly). The obvious message is that cohabitees are well advised to reduce their financial arrangements to writing.

The Judgment can be viewed [here](#).

FACTS

Allner and Werner commenced a cohabitation relationship during 1996. According to Allner, the relationship also established a universal partnership in equal shares between them which, but for a short break, endured for a period of 22 years.

The facts showed that Allner and Werner had for parts of the 22 years conducted various businesses together, on and off. The businesses were conducted from properties that Werner bought on his own deliberation, including a blasting business, packaging operations and selling farm produce and baked goods. For certain businesses they took joint decisions and shared in the profits, although this was not for the full period of their relationship or in all aspects of the undertaking, as both Allner and Werner moved around a bit, as jobs and businesses required.

When the relationship broke down, Allner approached the Court for an order declaring that Werner and herself had concluded an agreement of partnership (a *societas omnium bonorum*) tacitly and in equal shares. She also sued for the dissolution of the partnership and for its liquidation.

Werner disputed the existence of a partnership and stated that their relationship was (merely) one of cohabitation as lovers. For example, his decision to revert to blasting was taken by him alone without involving Allner. He financed the company from money realized from the sale of his shares in a private company and an inheritance from his mother. He subsequently entered into a contract with an explosives company in terms of which he would establish and operate a magazine on the farm for the storage of explosives.

(Editor's note: For purposes of this publication, a detailed summary of the facts are not provided. the emphasis is rather on the consequences of cohabitation.)

HELD

Summary of the applicable legal principles

- Cohabitation does not have special legal consequences in our law. Generally the proprietary consequences and rights flowing from a marriage are not available to unmarried couples, regardless of the length of their cohabitation.
- However, if a cohabitee can establish that the parties were not only living together as married spouses but that they were partners (in the commercial sense), he or she can invoke the private law remedy that their relationship established a commercial partnership.

- The party seeking to invoke this remedy must prove that:
 - a) each of the parties brought something into the partnership, or bound themselves to bring something into it, whether it be money or labour skills;
 - b) the business had been carried on for the joint benefit of both parties;
 - c) the object was to make a profit; and
 - d) the partnership contract was legitimate.
- A universal partnership does not require express agreement but, like any other contract, can come into existence by way of tacit agreement. The contributions by the parties do not necessarily have to be confined to the profit making entity. The premise is that the partnership enterprise between the cohabitants could, for example, notionally include both a commercial undertaking and a non-profit making part of their cohabitation existence (family life).
- Our law recognizes two types of such universal partnerships, namely a *societas universorum bonorum*, where parties agree that all their possessions (present and future) will be considered assets of the partnership and a *societas universorum quae ex quaestu veniunt*, where parties agree that all they may acquire during the continuation of the partnership from every kind of commercial undertaking shall be taken to the partnership property.
- In the present matter, Allner's case is based on the *societas universorum bonorum*. In order to establish the existence of a tacit contract to this effect, Allner had to prove that:
 - a) Werner was fully aware of the circumstances connected to the transaction;
 - b) That these circumstances were unequivocal; and
 - c) That the tacit contract does not extend beyond what the parties contemplated.
- The aforementioned needs to be proved against the background that in our law, a tacit contract will be interpreted strictly and not extensively, since a contract must be interpreted in favour of the person on whom it is sought to place an obligation.

Partnership established and percentage share

- The facts showed that initially, before their first break-up, there was no intention to establish a universal partnership. The fact that they lived together, shared some resources and made different but important contributions to the household, were no more than what one would have expected from lovers living together.
- When they eventually resuscitated their relationship it was, however, taken to a different level. The evidence showed that they resumed cohabitation in all earnesty and, for all practical purposes, were living together as a family unit supporting each other's business ventures. The evidence showed further that the parties both brought something to the partnership, that they had carried on the partnership for the benefit of both parties, and that they had aimed to make a profit. There also was no dispute about the legitimacy of the partnership.
- The question remained, however, whether Allner was entitled to 50% of the partnership assets as at the date of termination, namely June 2018. The law holds that, on dissolution, each party gets a proportionate share of

the assets according to his or her contribution and it is only when their respective contributions were equal or it is impossible to say that one has contributed more than the other, that they share equally.

- It was common cause in this matter that Werner utilized the proceeds from the sale of other properties; monies generated from the sale of shares in a private company; as well as an inheritance from his mother, to acquire the farm Melrose and to establish Werner Blasting (Pty) Ltd. It would accordingly be inequitable and unfair on Werner to order an equal division of the estate.
- The evidence has established, on a balance of probabilities, that such an inequitable distribution of assets could not have been within the parties' contemplation when they concluded the universal partnership.

CONCLUSION

Applying the approach adopted in the previous cases as to determine a division, the Court held that the facts showed that Allner was entitled to 30% of the partnership assets.