THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 292/10

In the matter between:

IAN LESLIE McDONALD **Appellant**

and

LESLEY JUDITH YOUNG **Respondent**

Neutral citation: *McDonald v Young* (292/10) [2011] ZASCA 31 (24 March 2011)

Coram: MPATI P, CLOETE, SNYDERS and THERON JJA and PETSE AJA

Heard: **17 February 2011**
Delivered: **24 March 2011**

Summary: Contract ─ Standard of proof necessary ─ Uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus.
Maintenance ─ There is no legal duty of support on unmarried cohabitants.
Formation of a tacit contract regarding maintenance ─ A tacit contract cannot be inferred where its terms would conflict with an express contract ─ Evidence and conduct of the parties must justify an inference that there was consensus between them.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Veldhuizen J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

THERON JA (MPATI P, CLOETE, SNYDERS JJA and PETSE AJA concurring)

[1] The parties were involved in a relationship and had cohabited, as man and wife, for approximately seven years from June 1999 until May 2006. After the relationship broke down, the appellant instituted an action against the respondent in the Western Cape High Court (Cape Town) for an order declaring that a joint venture agreement existed between the parties in respect of immovable property (the property) situate at Port Island, Port St Francis, in the Eastern Cape, alternatively, for an order that the respondent pay maintenance to the appellant. The high court (Veldhuizen J) found that the appellant had failed to prove the existence of a joint venture agreement and, in respect of the maintenance claim, that there was no duty on the respondent to support the appellant. The appellant appeals to this court with the leave of the high court.

[2] The issues on appeal, as in the high court, are whether the appellant has established the existence of a joint venture agreement between the

parties, alternatively, whether the respondent is under a duty (by operation of law, or alternatively, by virtue of a tacit contract) to support the appellant subsequent to their cohabitation.

[3] Shortly after the parties were introduced to each other the appellant took up residence with the respondent at her farm in Knysna. The appellant's main business interest was the promotion and marketing of surfing and surfboard products. During 1999, the appellant and his Durban-based brother had been in the process of establishing a new business, Inter Surf Africa Exporters (ISAE), which was involved in the manufacture and export of surfboards. The appellant did not possess any meaningful assets and had very limited income. The respondent, on the other hand, was a woman of considerable means. She had an annual cash income in excess of R1,3m and possessed substantial assets. When the appellant and the respondent met, they were 59 and 54 years of age, respectively. It was common cause that the appellant had not been in receipt of a regular income and had, for a time, during the course of the relationship, received a monthly allowance from the respondent.

[4] The appellant's claim to a half-share in the property was based on an express oral joint venture agreement concluded by the parties. The appellant testified that the terms of the agreement were that the respondent would contribute financially to the acquisition, completion and refurbishment of the property while the appellant would contribute his time and expertise to oversee the development of the property. According to the appellant, it was agreed that they would each share jointly in the property. The appellant testified that the primary objective of the agreement was to ensure that he gained financial independence. Despite the fact that the property was to have been registered in both their

names, it was subsequently agreed, according to him, that the property would be registered in the respondent's name for tax purposes. It was common cause that the initial written agreement had reflected both their names as purchasers of the property.

[5] It was contended, on behalf of the appellant, that the high court had erred in failing to accept and rely on the appellant's evidence regarding the agreement, having particular regard to the fact that his evidence was unchallenged. It was further contended that the respondent's failure to testify was fatal to her case and that this court was obliged to accept his unchallenged evidence in respect of both the agreement and the claim for maintenance.

[6] It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. In *Kentz (Pty) Ltd v Power*,[1] Cloete J undertook a careful review of relevant cases where this principle was endorsed and applied. The learned judge pointed out that the most succinct statement of the law in this regard is to be found in *Siffman v Kriel*,[2] where Innes CJ said:

'It does not follow, because evidence is uncontradicted, that therefore it is true . . . The story told by the person on whom the onus rests may be so improbable as not to discharge it.'

[7] It is thus necessary to consider the appellant's evidence in detail. It is clear from the judgment of the high court that it was mindful that the appellant's evidence, in order to be reliable, had to be credible. The high court, on the evidence, reached the conclusion that the respondent had 'initially intended that the contract should reflect the [appellant] as one of

[1] [2002] 1 All SA 605 (W).
[2] 1909 TS 538 at 543.

the purchasers'. However, it did not accept his evidence in its entirety and went on to find that the appellant had failed to prove the existence of a joint venture agreement.

[8] In my view, there were a number of unsatisfactory aspects in the appellant's evidence. It is significant to note how the appellant's claim against the respondent has developed over time. During May 2006 and shortly after the parties parted ways, they met, in the presence of their respective attorneys, with a view to settle the disputes between them. The appellant's evidence regarding the claim he had advanced at that meeting, was as follows:

'So the idea was to try and settle the split between yourself and Mrs Young? --- I accept ─ I looked at it like that because it did look like we weren't going to get together again, so I assumed that that was the reason.

And what were your claims that day? --- My claims that day with regards to my share of Port St Francis, with regards to my contribution I had made over the seven years and discussion on my contract with the bakkie.'

This was in stark contrast to his testimony in the magistrate's court[3] to the effect that he had, at the time of the meeting, been under the impression that he did not have a claim against the respondent and that the claim had 'materialised some time afterwards when I . . . approached some attorneys for advice'. The appellant's explanation for the contradiction, that he had meant to convey that he had not yet 'implemented' his claim, is, in my view, unsatisfactory. The very purpose of the meeting was an attempt to resolve the dispute between himself and the respondent without the need to resort to litigation.

[3] The appellant had, during February 2007, instituted an action against the respondent in the magistrates' court, Knysna, in which he claimed damages from the respondent for, inter alia, wrongfully and maliciously setting the law in motion by launching a false and unfounded application for a protection order against him.

[9] On 17 July 2006, and following upon the May 2006 meeting, the appellant's attorney wrote a letter to the respondent's attorney, which was intended to 'motivate and substantiate' the appellant's claim against the respondent 'as *comprehensively* as possible'. (My emphasis.) It was recorded in the letter that the appellant believed that a universal partnership had existed between the parties and that he was entitled to '*some form of compensation*' (Again my emphasis.) for his contribution to the partnership. It is instructive that no mention was made of the appellant's half-share in the property, despite the fact that the appellant testified that he had given his attorney instructions in this regard and that he (the appellant) had had sight of the letter prior to it being dispatched. The development of the appellant's claim over time is not without significance.

[10] During the period that the parties were cohabiting, the appellant drafted numerous agreements and proposals, the purpose of which was to define the financial relationship between him and the respondent. It is not necessary, for the purpose of this judgment, to consider all the agreements entered into between the parties or drafted by the appellant. On 24 July 2003, the respondent executed a sole agency mandate in terms of which she appointed the appellant as agent to sell the property and undertook to pay a commission of ten per cent to him. It was the appellant's testimony that the commission he would have earned was to have provided him with financial security. The appellant agreed that he had, during October 2004, drafted an agreement, aimed at resolving the constant disputes he and the respondent had had regarding his financial security. The salient terms of this agreement were that (i) he was appointed as sole agent to sell two properties, including the property which is the subject of this dispute; (ii) he would be paid a commission of

ten per cent for securing the sale of the properties; and (iii) the respondent would purchase government retail bonds to the value of R500 000 on behalf of the appellant. It was also his evidence that the relationship between him and the respondent had been particularly volatile at that time and his intention, in drafting this agreement, was to achieve clarification regarding his financial position.

[11] It is surprising that the appellant failed to mention his half-share in the property in the October 2004 proposal. This is even more surprising when regard is had to his evidence that he was at that time concerned, as there was uncertainty regarding his financial future. The wording of this proposal, as well as the agency agreement, excludes the possibility that he had acquired a share in the property. It is, in my view, extremely improbable that had the parties agreed in 1999 when the property was purchased that they would be joint owners thereof, the appellant would not, in 2004, have recorded his right to, or even a claim for, a half-share in a proposal aimed at settling outstanding matters between him and the respondent.

[12] Counsel for the appellant attached great importance to the fact that the initial agreement had recorded both parties' names as purchasers. The appellant assumed that both names were inserted on the instructions of the respondent. There is no evidence to support this assumption. Even if such instructions did emanate from the respondent, it does not necessarily follow, as was found by the high court, that this meant that there was an agreement between the parties as alleged by the appellant. The recording of both parties' names is nothing more than an indicator pointing towards the conclusion of an agreement and it is a factor to be considered in conjunction with the probabilities.

[13] There are a number of factors that support the respondent's denial of the existence of a joint venture agreement between the parties. These include: the claim as articulated at the meeting with their legal representatives shortly after the break-up, the letter written after that meeting, various agreements drafted by the appellant, and the unsatisfactory and often contradictory evidence given by the appellant. I pause to mention that the appellant contradicted himself on one of the essential terms of the agreement, namely, whether it was agreed that he would be entitled to half of the proceeds of the sale of the property only or the property together with its contents.

[14] The appellant bore the onus of proving the agreement upon which he relied as well as the terms thereof. Having regard to the deficiencies in the appellant's evidence and the probabilities, it cannot be said that it measures up to the standard required for acceptability in respect of the existence of the joint venture agreement. In *Da Mata v Otto NO*,[4] Van Blerk JA, dealing with the approach to be adopted when deciding probabilities, said:

'In regard to the appellant's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted ─ the only witness who could have disputed them had died ─ they should be taken as proof of the facts involved. Wigmore on *Evidence,* 3rd ed., vol. VII, p. 260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

"It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable

[4] 1972 (3) SA 858 (A) at 869B-E.

probabilities or conceded facts ─ testimony which no sensible man can believe ─ goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded."'

In my view, the appellant's testimony is contrary to all reasonable probabilities and, despite the fact that it was unchallenged, counts for 'nothing'. In assessing the probabilities, the conclusion seems to be inescapable that the appellant has not discharged the onus resting on him. It follows that the appellant is not entitled to the relief sought in respect of the main claim.

[15] I turn now to consider the alternative claim for maintenance. I shall deal first with the argument that such a duty existed by operation of law. In South African law, certain family relationships, such as parent and child and husband and wife, create a duty of support. The common law has been extended in line with the Constitution to protect contractual rights of support in the same way as the common law duty of support.[5] In *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*,[6] this court recognised a contractual right to support arising out of a marriage in terms of Islamic law for purposes of a dependant's action.[7] In *Du Plessis v Road Accident Fund*,[8] the common law action by a spouse, for loss of support against the wrongdoer who unlawfully kills the other spouse, was extended to partners in a same-sex permanent life relationship similar in other respects to marriage, who had tacitly undertaken reciprocal duties of support. The Constitutional Court in *Satchwell v President of the Republic of South Africa & another*,[9]

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[5] See *Langemaat v Minister of Safety and Security & others* 1998 (3) SA 312 (T). *Santam Bpk v Henery* 1999 (3) SA 421 (HHA); *Petersen v Maintenance Officer & others* 2004 (2) BCLR 205 (C).

[6] 1999 (4) SA 1319 (SCA).

[7] See *Khan v Khan* 2005 (2) SA 272 (T).

[8] 2004 (1) SA 359 (SCA).

[9] 2002 (6) SA 1 (CC); 2002 (9) BCLR 986.

found that the common law duty of support, could, in certain circumstances, be extended to persons in a same-sex relationship. Madala J, writing for the court, commented as follows:

'The law attaches a duty of support to various family relationships, for example, husband and wife, and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships. Whether such a duty of support exists or not will depend on the circumstances of each case.'[10]

[16] Counsel for the appellant relied on *Kahn, Amod* and *Du Plessis* in support of his contention that a legal duty of support rests on the respondent. This contention is misplaced. In both *Amod* and *Khan*, the parties in respect of whom a duty of support had been alleged had been married to each other in terms of Islamic law. The ratio of the court, in both cases, was that the marriage between the parties had given rise to reciprocal contractual duties of support on the part of the parties to that marriage. In *Du Plessis*, Cloete JA, having had regard to the facts of that matter, concluded that the plaintiff had proved that the deceased had undertaken to support him and that the deceased had owed the plaintiff a contractual duty of support. The learned judge of appeal said:[11]

'In the present case the case for drawing an inference that the plaintiff and the deceased undertook reciprocal duties of support is even stronger. The plaintiff and the deceased would have married one another if they could have done so. As this course was not open to them, they went through a "marriage" ceremony which was as close as possible to a heterosexual marriage ceremony. The fact that the plaintiff and the deceased went through such a "marriage" ceremony and did so before numerous witnesses gives rise to the inference that they intended to do the best they could to publicise to the world that they intended their relationship to be, and to be regarded as, similar in all respects to that of a heterosexual married couple, ie one in which the

[10] Para 25.
[11] Paras 14 - 15.

parties would have a reciprocal duty of support. That having been their intention, it must be accepted as a probability that they tacitly undertook a reciprocal duty of support to one another.

Further support for this finding is the fact that the plaintiff and the deceased thereafter lived together as if they were legally married in a stable and permanent relationship until the deceased was killed some 11 years later; they were accepted by their family and friends as partners in such a relationship; they pooled their income and shared their family responsibilities; each of them made a will in which the other partner was appointed his sole heir; and when the plaintiff was medically boarded, the deceased expressly stated that he would support the plaintiff financially and in fact did so until he died.'

Amod, *Khan* and *Du Plessis* were decided on the basis of contracts entered into by the respective parties, and are not authority for the contention that there is a duty of support, by operation of law, on the respondent to maintain the appellant.

[17] The question whether the relationship between the parties, a heterosexual couple who choose to live together, free from the bonds of matrimony, gives rise to a legal duty of support, can, in my view, be answered with reference to *Volks NO v Robinson & others*.[12] In that matter the Constitutional Court was concerned with the interpretation and constitutionality of s 2(1), read with s 1, of the Maintenance of Surviving Spouses Act 27 of 1990, which confers on surviving spouses the right to claim maintenance from the estates of their deceased spouses if they are not able to support themselves.[13] The court had to determine whether the exclusion of survivors of permanent life partnerships from the protection of the Act constituted unfair discrimination. Skweyiya J, writing for the

[12] 2005 (5) BCLR 446 (CC).

[13] Section 2(1) of the Act states that:

'If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.'

majority, referred with approval to the comments made by O'Regan J in *Dawood & another v Minister of Home Affairs & others*; *Shalabi & another v Minister of Home Affairs & others*; *Thomas & another v Minister of Home Affairs & others*[14] that:

'Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.

. . .

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function.'[15] (Footnotes omitted.)

[18] The Constitutional Court was of the view that the law may distinguish between married people and unmarried people and may, in appropriate circumstances, accord benefits to married people which it does not accord to unmarried people.[16] The learned justice reasoned as follows in para 55:

'There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses' rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married.'

[19] The court found that whilst there was a reciprocal duty of support between married persons, 'no duty of support arises by operation of law

[14] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837.
[15] Paras 30-31.
[16] Para 54.

in the case of unmarried cohabitants'.[17] This was an unequivocal statement of the law by the Constitutional Court. Skweyiya J went on to state that to the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement.[18]

[20] I turn now to consider whether the respondent assumed a contractual duty of support towards the appellant. The argument, presented as a second alternative to the claim based on a joint venture, was that the court should find that the parties had entered into a tacit agreement in terms of which the respondent had agreed to support the appellant even after the end of their relationship.

[21] The facts upon which the appellant relies in support of his claim that the respondent had assumed a duty of support towards him are the following:

(i) He and the respondent had lived together as if they were legally married in a stable and permanent relationship;

(ii) The respondent had supported him during the seven-year period that they had resided together and the appellant had been dependent on such support. She had given him an allowance, provided transport for him and paid for entertainment and overseas holidays;

(iii) The respondent had, in a series of wills, made extensive provision for financial support of the appellant in the event of her death;

(iv) The respondent was a wealthy woman while he had no assets and very limited income;

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[17] Para 56.
[18] Para 58.

(v) He had contributed to the maintenance of and increase in value of the respondent's estate, often at the expense of his own business interests;
(vi) The appellant was reliant on an income from employment and could not, due to his advanced age, guarantee for how much longer he would be able to earn a living; and
(vii) The respondent had advised the appellant that she had sufficient funds to support both of them.

[22] The argument that the parties had entered into a tacit agreement regarding maintenance cannot be sustained for a number of reasons. First, the reliance on a tacit contract is inconsistent with the appellant's evidence. The appellant believed and gave evidence to the effect that he and the respondent had concluded an express agreement in respect of the property, the aim of which was to ensure that he was financially independent. Implicit in this is the intention that he would not have to rely on the respondent, or any other person, for financial support. In the circumstances, the appellant could not have formed the intention to contract tacitly with the respondent. Having regard to his evidence that the purpose of the joint venture agreement was to render him financially independent, the appellant could not at the same time have contemplated, that the respondent would continue to support him for the rest of his life. A tacit contract must not extend to more than the parties contemplated.[19] In *Rand Trading Co Ltd v Lewkewitsch*[20] the parties had erroneously assumed that there was a contract in existence between them. The court did not accept the argument that the company's conduct in recognising the existence of the lease, paying the rent and otherwise performing in terms of the contract had created a binding contract. Solomon J said:

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[19] Wessels, *Law of Contract in South Africa* 2nd ed vol 1 para 266(3).
[20] 1908 TS 108.

'But I think the answer to that argument is a very clear one, and it is this ─ that all these facts are explained on the simple ground that both parties erroneously assumed that there was a contract in existence between them . . . And the mere fact . . . that both parties erroneously assumed that there was a contract in existence at that date altogether precludes us from now inferring a new contract.'[21]

[23] The appellant's stated belief, that there was an express contract between him and the respondent in respect of the property, precludes this court from drawing an inference to the effect that the parties had entered into a tacit agreement the terms of which were inconsistent with the express agreement to which he testified. It was not open for the appellant to contend that if the court disbelieved his evidence that a joint venture agreement had been concluded, the court should infer from the proved facts that a tacit contract had come into existence, because such an inference cannot be drawn where it would conflict with what he said was the actual position. A litigant can plead, but not testify, in the alternative.

[24] Secondly, the appellant's evidence was that the respondent's attitude had always been that in the event that their relationship ended, he would receive no financial benefit from her. This conduct, on the part of the respondent, is inconsistent with a tacit agreement to support the appellant. The appellant's explanation for drafting the various proposals regarding the financial relationship between him and the respondent was as follows:

'Well, the motivation behind it at that particular time, we were going through quite a patchy period; we were arguing and not agreeing on a lot of things. And it appeared to me that all of a sudden my situation could alter and I'd be left standing *high and dry*. And I discussed it with Lesley [the respondent] and I felt that if we had something in

[21] At 115.

writing, and if that did occur at least I had something to fall back on . . . '. (Emphasis added.)

[25] It is trite that a tacit contract is established by conduct. In order to establish a tacit contract, the conduct of the parties must be such that it justifies an inference that there was consensus between them.[22] There must be evidence of conduct which justifies an inference that the parties intended to, and did, contract on the terms alleged. It is clear from the appellant's evidence that there was no consensus between the parties. The appellant, on his own testimony, was uncertain about his financial future. He realised that he would only be entitled to what had been agreed between the parties, hence his desire to have a written contract 'to fall back on'. The respondent's attitude, as testified to by the appellant, that he would leave the relationship without any financial benefit, is an indicator that she had not, tacitly or otherwise, agreed to support the appellant. I am not satisfied that this court can conclude, from all the relevant proven facts and circumstances, that a tacit contract, in terms of which the respondent undertook to financially maintain the appellant, for as long as he needed such maintenance, came into existence.

[26] For these reasons, the appellant's maintenance claim which is premised on a legal, alternatively, a contractual duty, must also fail.

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[22] *Standard Bank of South Africa Ltd & another v Ocean Commodities Inc & others* 1983 (1) SA 276 (A) at 292B–C; *Joel Melamed and Hurwitz v Cleveland Estates* (*Pty*) *Ltd*; *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 164G–165G.

[27] The appeal is dismissed with costs.

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L Theron
Judge of Appeal

APPEARANCES

APPELLANT:	RS van Riet SC Instructed by Johan Rhoodie Attorneys, Pretoria; Hill McHardy & Herbst Inc, Bloemfontein
RESPONDENT:	(Ms) A de Vos SC Instructed by Millers Attorneys, George; Rosendorff Reitz Barry, Bloemfontein