THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 419/13

In the matter between:

ANDREW KINLOCH BUTTERS **Appellant**

and

NOMSA VIRGINIA MNCORA **Respondent**

Neutral citation: *Butters v Mncora* (419/13) [2014] ZASCA 86 (30 May 2014)

Coram: Shongwe, Wallis, Willis JJA, Mathopo and Mocumie AJJA

Heard: **23 May 2014**

Delivered: **30 May 2014**

Summary: Civil Procedure – interpretation of Rule 42(1)*(b)* and *(c)* – circumstances in which court can alter or amend judgment or order – universal partnership – relevance of commencement date – not relevant.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Chetty J sitting as court of first instance):

1 The order of the high court is varied to read:

'paragraph 1 of the order granted in case no. 881/08 is amended as follows:

"It is declared that a universal partnership existed between the plaintiff and the defendant in respect of all assets acquired by them up to 15 November 2007."'

2 Save for the above variation, the appeal is otherwise dismissed.

3 The appellant is to pay the respondent's costs in this appeal, including costs of two counsel, where employed.

JUDGMENT

Shongwe JA (Wallis, Willis JJA, Mathopo and Mocumie AJJA concurring)

[1] On 7 December 2010 (in case no. 881/08) the Eastern Cape High Court, Port Elizabeth (Chetty J) made an order against the appellant, *inter alia*, that 'It is declared that a universal partnership existed between the plaintiff [respondent] and the defendant [appellant] of all assets acquired by them during the period 1998 to 15 November 2007'. The appellant unsuccessfully appealed to this Court and his application for leave to appeal to the Constitutional Court suffered the same fate. Subsequently, the respondent applied to the high court in terms of Rule 42(1)*(b)* of the Uniform Rules of Court, alternatively the common law, to have the aforesaid order varied by replacing the year 1998 with the year 1988. The application was granted. This appeal is with the leave of the high court.

[2] The facts are largely common cause. The undisputed evidence shows that the appellant and the respondent met each other for the first time at a party in Grahamstown in 1988 and fell in love. Two children were born of the relationship. In or about 1993 they lived together in Port Elizabeth as husband and wife. In the meantime, the appellant had started a business, which flourished and, as a result, the appellant accumulated substantial assets. Cracks in the relationship appeared and the final break came when the appellant married another woman on 15 November 2007 without the respondent's knowledge. The relationship came to an end. (For a detailed account of the facts see reported case *Butters v Mncora* 2012 (4) SA 1 (SCA)).

[3] As has already been mentioned, the respondent successfully applied to the high court for a declaration that a universal partnership existed in respect of all their assets, which were principally in the nominal ownership of the respondent. In granting the application, the high court also ordered that the universal partnership be dissolved with effect from 15 November 2007 and that the respondent was entitled to be paid 30 per cent of the nett proceeds of the assets.

[4] After the appellant unsuccessfully applied for leave to appeal to the Constitutional Court, negotiations commenced between the parties to have the matter resolved finally in accordance with the court order. On 22 May 2012 the appellant's attorneys wrote to the respondent's attorneys advising them that there may not be a need to appoint a receiver and liquidator to realise the assets of the universal partnership. They were prepared to submit an audited statement of the assets acquired by both parties between 1998 and 15 November 2007.

The appellant also indicated that if the audited statement was acceptable to the respondent's auditors, the parties could agree to a distribution of 30 per cent payable to the respondent, without the necessity of appointing a receiver and liquidator. The basis for this proposal was the reference in the order to assets acquired by the parties from 1998. The appellant's aim was to exclude from the distribution the bulk of the assets and in particular the source of his wealth, being the successful business he had established.

[5] Thereupon, the respondent indicated that the year 1998 in the order of the high court was a typographical error and it should have read 1988 because it was common cause, so respondent argued, that 1988 was the year in which the parties first met and commenced their relationship. As a result, a dispute arose. The respondent brought an application in terms of Rule 42(1)*(b)*, alternatively the common law, to correct what was alleged to be a patent error. In a supplementary affidavit, the respondent introduced a further alternative claim based on Rule 42(1)*(c)* that the reference to 1998 in the order was the result of a mistake common to the parties. The appellant opposed this application. Hence the judgment of Chetty J handed down on 23 April 2013 which is the subject of this appeal.

[6] It is instructive to note what the respondent had requested the high court to order. The respondent asked the high court to vary paragraph A1 of the order of Chetty J, dated 7 December 2010, to read 1988 instead of 1998 in terms of Rule 42(1)*(b)*. In addition, 'irrespective of the outcome of Prayer 1 above, paragraph A1 of the said order be interpreted to include all assets acquired by the parties of whatever nature and whenever acquired which they possessed as at 15 December 2007'.

[7] The high court found in favour of the respondent. It concluded that 'the year date 1998, in the order, was a patent typographical error. Its substitution, by the year date 1988, does not change the sense or substance of the judgment – it merely preserves its tenor. The patent error must accordingly be corrected'

[8] The issues for determination before this Court are whether the high court had the authority to vary its own judgment or order and whether the alleged patent error was attributable to the high court itself rather than to the respondent's legal representative. Uniform Rule 42(1) reads as follows:

'(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(c) an order or judgment granted as the result of a mistake common to the parties.'

[9] The appellant submitted that the factual foundation for the year date 1998 was because it was the year in which the parties agreed to marry. Therefore, so the reasoning went, the high court ought not to have varied the order to 1988. Counsel for the appellant argued that the year date 1998 was not a patent error because the respondent pleaded her case in the particulars of claim as such. Therefore, he argued further that the court order was simply a regurgitation of what was pleaded. He submitted that the initial judgment of Chetty J was correct and that this Court cannot at this late stage interfere with that order in the absence of an amendment of the particulars of claim. This submission is

flawed because it misunderstands the purpose of pleadings. De Villiers JA in *Shill v Milner* 1937 AD 101 at 105 quoted Innes CJ as saying that:

'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been.'

(See *Robinson v Randfontein Estates G M Co Ltd* 1925 AD 173).

[10] In this case, the date upon which the universal partnership was alleged to have commenced was part of the narrative of events, rather than a vital element of the scope and ambit of the partnership. The high court observed that –

'[24] …. Although the plaintiff worked for short periods during the couples' cohabitation, there is no evidence to suggest that she applied her earnings for herself. In the formative years of the business, the plaintiff lived frugally and was content with the R1000, 00 weekly contributions made by the defendant. She devoted all her time and energy in caring for the children, and, during weekends, for the defendant himself. As the children grew up, her care for them was akin to full time employment. She not only ferried them to and from school but transported them to their extra-curricular activities.

[25] It must be recalled that during the subsistence of her cohabitation the children, whom she was required to care for and look after, increased in number. Her contribution in that sphere was immeasurable and the clear impression gained from her testimony is that she applied herself fully, not only to the children's well being, but the defendant's, as well. Her evidence that she implemented a dietary regime for the defendant for health reasons, given his weight gain, was never challenged and provides clear proof that her overriding concern was the well being of the family unit. Some point was made during the plaintiff's cross-examination that many, if not all, the household chores were performed by the domestic help. The fact that the plaintiff had full time, weekday help is, in my view, entirely irrelevant. Given her

circumstances, in effect, a full time single mother to four children, she needed all the help she could get.'

[11] These findings were confirmed and supplemented by this Court where Brand JA observed that –

'[18] In this light our courts appear to be supported by good authority when they held, either expressly or by clear implication that:

(a) Universal partnerships of all property which extend beyond commercial undertakings were part of Roman Dutch law and still form part of our law.
(b) A universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties.
(c) The requirements for a universal partnership of all property, including universal partnerships between cohabitees, are the same as those formulated by Pothier for partnerships in general.
(d) Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached.
(See eg *Ally v Dinath* 1984 (2) SA 451 (T) at 453F-455A; *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634A-B; *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 109C-E; *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 77A; *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338A-F; *Volks NO v Robinson* 2005 (5) BCLR 44 (CC) para 125; *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) paras 19-22; J J Henning *Law of Partnership* (2010) 20-29; 19 *Lawsa* 2 ed para 257.)
[19] Once it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates, in my view, that the contribution of both parties need not be confined to a profit making entity. The point is well illustrated, I think, by the very facts of this case. It can be accepted that the plaintiff's contribution to the commercial undertaking conducted by the defendant was insignificant. Yet she spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children. On the premise that the partnership enterprise between them could notionally include both the commercial undertaking and the non-profit

making part of their family life, for which the plaintiff took responsibility, her contribution to that notional partnership enterprise can hardly be denied.

…

[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 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.'

[12] It is clear that the appellant's case was not, in truth, concerned with when the universal partnership began. Rather it has been about him denying the existence of a universal partnership all together and his refusing to share anything with the respondent. The essence of the dispute was the sharing of the assets of the parties and not the date of commencement of the universal partnership.

[13] Once the high court and this Court found that a universal partnership existed, the commencement date of such partnership was irrelevant. However the date of termination was relevant. The question whether or not a universal partnership came into existence was decided by the high court and confirmed by this Court on appeal. This appeal before us is not about redefining a universal partnership but about determining the correctness of the variation.

[14] The general rule, now well established in our law, is that once a court has duly pronounced a final judgment it has no authority to correct, alter or

supplement it. The reason is that its jurisdiction in the case having been finally exercised has ceased. (See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306 F-H; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176, 178, 186 – 7 and 192.)

[15] However there are exceptions to this rule. The principle that a court may clarify its judgment or order if, on a proper interpretation, the meaning remains uncertain and it seeks to give effect to its true intention is trite. The sense and substance of the order ought not to be altered. (*See Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) para 5.)

[16] The high court reasoned that the year date 1998 was a typographical error in the particulars of claim of the respondent in the trial action. I agree that its inclusion was clearly a patent error in the first place, inasmuch as it was irrelevant and unnecessary but the substitution and variation thereof was incorrect. It was incorrect because it went against the evidence adduced during the trial and also against the body of the ratio decidendi of the high court as well as this Court's reasons for dismissing the appeal. The order must therefore be varied to give effect to the conclusions of the trial court as endorsed by this Court.

[17] Brand JA elegantly summed up the conclusion by this Court as follows-

'[31] To complete the picture: the defendant did not argue – and I believe rightly so – that the third element of a partnership in terms of Pothier's formulation had not been satisfied. 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. On the only issue before us, I therefore agree with the finding of the court a quo, that the plaintiff had succeeded in establishing a tacit universal partnership between her and the defendant.'

[18] In the result the following order is made:-

1 The order of the high court is varied to read:

'paragraph 1 of the order granted in case no. 881/08 is amended as follows:

"It is declared that a universal partnership existed between the plaintiff and the defendant of all assets acquired by them up to 15 November 2007."'

2 Save for the above variation, the appeal is otherwise dismissed.

3 The appellant is to pay the respondent's costs in this appeal, including costs of two counsel, where employed.

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J B Z SHONGWE
JUDGE OF APPEAL

Appearances

For the Appellant:	R G Buchanan SC Instructed by: Spilkins Inc, Port Elizabeth; Symington & De Kok, Bloemfontein.
For the Respondent:	A Beyleveld SC with him O H Ronaasen Instructed by: Lulama Prince & Associates, Port Elizabeth; Honey Attorneys, Bloemfontein.