REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: 881/2008

NOMSA VIRGINIA MNCORA Applicant**/**Plaintiff

and

ANDREW KINLOCH BUTTERS Respondent/Defendant

AND

In the matter between: Case No: 3055/2010

ANDREW KINLOCH BUTTERS Respondent/Plaintiff

and

NOMSA VIRGINIA MNCORA Applicant/ Defendant

Coram: **Chetty, J**

Date Heard: **2 April 2013**

Date Delivered: **23 April 2013**

Summary: ***Practice*** *– Judgments and orders – Correction, alteration or amendment of Court's own judgment – Court entitled to do so to give effect to its true intention*

Nature of matter: Application for amendment of Court's own judgment

Order: Patent error must accordingly be corrected, so was this order

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JUDGMENT

Chetty, J

[1] This application has been precipitated by a personality trait akin to that of the main character, Ebenezer Scrooge, the curmudgeon, in Charles Dickens' tale, A Christmas Carol. Since this matter first served before me, it has ventured, unsuccessfully, first, to the Supreme Court of Appeal, and, thence, to the Constitutional Court. The principal issue in this application, as in the preceding litigation, is money, or, more precisely, the unwillingness to share it. The respondent contends that the subject matter of the universal partnership I found to have been established between himself and the applicant is confined to assets acquired by the parties during a defined period i.e. 1998 to December 2007, and not, as contended for by the applicant, from 1988 to December 2007. Henceforth I shall refer to the parties as referred to in my earlier judgment, viz plaintiff and defendant,

[2] In order to place this application in proper perspective, it is apposite to consider the precise nature of a universal partnership. In his treatise, ***Law of***

***Partnership*[1],** Professor J.J Henning, with reference to eminent authority, described it as follows: -

> "In Roman and Roman-Dutch law universal partnerships were distinguished into two kinds: first, those of all present and future property, termed *societates omnium bonorum* or *societates universorum bonorum* and, second, those extending only to everything acquired from every kind of commerce, referred to as *societates universorum quae ex quaestu veniunt*.
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> South African law accommodates partnerships of all sorts satisfying the applicable requirements. The distinction between the archetype of universal partnership, the *societas omnium bonorum*, and the partnership in all commercial undertakings, namely the *societas universorum quae ex quaestu veniunt*, is still relevant. This is particularly so since the question whether, in which instances and to which extent universal partnerships of all property were and are recognised in South African law, has not always been free from doubt.
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> The partnership of all present and future property is the oldest and most comprehensive form of universal partnership. Thus when the term "universal partnership" is used without qualification, it is usually a reference to this kind of universal partnership.
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> According to one definition the partnership *omnium bonorum* (or *universorum bonorum*) "is that by which the contracting parties agree to put in common all their property, both present and future. It covers all their acquisitions whether from commercial undertakings or otherwise". According to Pothier, all the property of each of the partners at the time of entering in the partnership becomes from that moment the common

[1] Transactions of the centre of business law 45

> property of the partnership, without formal transfer. Every asset is included in this partnership which comes to each of the partners under any title, even by way of succession, gift or legacy. There is no exception to this, except what comes to one of the partners on condition that it will not fall into the partnership, or what has been acquired by criminal or dishonest means. Such a partnership is liable for all the debts of each of the partners due at the time of entering into the partnership, as also for the debts which each of the partners is compelled to incur during the partnership, both for himself and for his wife and family. This, however, does not extend to waste of money in gambling, fines or penalties on account of crime.
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> The societas *omnium bonorum* is probably the oldest and certainly the most comprehensive form of consensual *societas*. Having its origin in the ancient *consortium* of *sui heredes*, it retained much of the nature and character of the earlier *societas fractum*. Rules in the texts initially applicable to all *societas*, notably the *beneficium competentiae*, were long applied only to this form. ” (emphasis added)

[3] In my judgment I found that the three *essentialiae* of a universal partnership, the *societas universorum bonorum*, formulated by *Pothier*, and referred to in **Muhlmann v Muhlmann**[2], had been established, and awarded the plaintiff an amount equal to 30% of the defendant’s net asset value as at 1 January 2008. The ratio for that finding appears clearly from the following factual findings in the judgment, to wit: -

[2] 1981 (4) SA 632 (W) at 634C

"[24] . . . Although the plaintiff played no direct role in the growth and expansion of the business *per se*, her contribution to the partnership was, in my view, not inconsequential. The evidence establishes that the object of the partnership was to provide for the household. 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.

[26] Commercial reality dictated that the business be opened in Grahamstown but the common home continued to be in Port Elizabeth. There was no guarantee that the business would succeed. The plaintiff's undisputed evidence was that

> the choice of Grahamstown, as the location of the business, was a joint decision and the probabilities favour the plaintiff's version that the business should be carried on for their joint benefit. The object was clearly to make a profit. The acquisition of, firstly, the home in Overbaakens and thereafter the common home demonstrates that the object of starting the business was to provide for their livelihood and comfort and the education of their children. The enrolment of the children at St Georges, St Andrews and Parsons Hill schools respectively, bear testimony to the fact that the profit was never intended to benefit the defendant alone. Although he eventually purchased a home in Grahamstown, it was used only during the week while he managed the business, weekends were routinely spent with the plaintiff and the children in Port Elizabeth. On those occasions they shopped together, dined out, and, as recounted earlier, holidayed extensively, all of which was enjoyed on the profits generated by the business."

[4] On appeal, the majority, in upholding the finding that the plaintiff had established the requisites for a universal partnership, dealt with the defendants counter argument as follows: -

> "[26] What the defendant's contention amounts to is that it must be inferred from the conduct of the parties that, though they intended to share the benefits of their joint contribution, the defendant would retain the surplus income and accumulate assets only for himself. From the plaintiff's viewpoint that intent would be quite remarkable. It would mean that she intended to contribute her everything for almost 20 years to assist the defendant in acquiring assets for himself only; that in her old age she would be entirely dependent for her very existence on the benevolence of the defendant towards her.

> [27] It is true that, according to the defendant's ipse dixit during his testimony, he indeed intended to keep everything he acquired for himself to the entire exclusion of the plaintiff. But I believe there is more than one reason why this court is not bound by the defendant's self-serving ipse dixit. Firstly, it is clear from his testimony that the defendant would say virtually anything that advanced his cause. Secondly, 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 (see eg *South African Forestry Co Ltd v York Timbers Ltd*2005 (3) SA 323 (SCA) ([2004] 4 All SA 168) para 32). 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. An unexpressed mental reservation on the part of the defendant, that he was willing to share in the benefits derived from the plaintiff's contribution, but not in the surplus fruits of his own, would not, in my view, satisfy the dictates of good faith. Finally there is the plaintiff's own appraisal of the defendant's conduct, namely, that he was willing to share everything. Absent any statements to her in cross-examination that her appraisal was mistaken or unsubstantiated, it must, in my view, be accepted as reasonable and well founded. Hence I agree with the court a quo that the plaintiff had succeeded in establishing Pothier's second requirement for a partnership."

[5] It is explicit, both from my judgment and the majority judgment in the Supreme Court of Appeal, that the universal partnership endured for approximately 20 years. The submission now advanced, that the Hi-Tech business is specifically excluded from the universal partnership, is spurious – as a matter of law, the universal partnership comprises ***"all present and future property***"[3]. However, in light of the submissions advanced on behalf of the defendant relating to the year date in both the plaintiff's prayer and my order, it is necessary to deal herewith.

[3] The business, Hi-Tech form part of the universal partnership

[6] Notwithstanding the clear and unambiguous findings in my judgment, the plaintiff has been compelled to launch this application pursuant to the provisions of Rule 42 (1) (b) for a variation of paragraph 1 of the order by deleting the date 1998 and its substitution by the year date 1988. The general principle is that once a court has pronounced a final judgment or order, it itself has no authority to correct, alter or supplement it. There are of course a number of exceptions to this general rule and one specifically relied upon by the plaintiff is that the year date in the order is a patent error. As pointed out by Harms J.A, with reference to earlier authority, in **Thompson v South African Broadcasting Corporation**[4]: -

> "... there appears to be a misunderstanding about the power of a Court to amend or supplement its findings in contradistinction to its orders. The correct position was spelt out in *Firestone South Africa (Pty) Ltd v Gentiruco AG*1977 (4) SA 298 (A) at 307C - G:
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> 'The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. . . . This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. Kotzé JA made this distinction manifestly clear in [*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 186 - 7], when, with reference to the old authorities, he said:
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> ''The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.'' '
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> And in *S v Wells*1990 (1) SA 816 (A) at 820C - F the matter was dealt with in these words:
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> 'The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, *provided that the sense or substance of his judgment is not affected thereby (tenore substantiae perseverante*). . . . According to *Voet* a Judge may also, on the same day, after the pronouncement of his judgment add (*supplere*) to it all remaining matters which relate to the consequences of what he has already decided but which are still missing from his judgment. He may also explain (*explicare*) what has been obscurely stated in his judgment and thus correct (*emendare*) the wording of the record *provided that the tenor of the judgment is preserved*.'"

[7] The defendant's response to the plaintiff's contention that the year date in paragraph 1 of the order is a patent error is rather ambivalent. On the one hand,

[4] 2001 (3) SA 748 (SCA) at 748

the submission was made that **"the defendant of course has no direct knowledge of what gave rise to the insertion of the date 1998"** and, on the other, it contends that the order, with minor exceptions, merely mirrored the relief sought in prayer 1 of claim A to the amended particulars of claim. Mr *Buchanan* submitted that even on the assumption that the aforestated prayer in the relief sought by the plaintiff contained a typographical error, the mistake was unilateral – the defendant and his then legal representatives were unaware of the error, and had conducted their case on an acceptance of the correctness of the allegations made by the plaintiff and the form of the relief sought.

[8] He relied in this regard on the depositions by the defendant's erstwhile attorney and counsel. In response to plaintiff's then counsel's (Mr *Mullins*) evidence in his supporting affidavit that the reference to the year date 1998 was a typographical error, Mr *Huxtable* and Mr *de la Harpe* stated as follows respectively: -

(Mr *Huxtable*)

> "6. I confirm that Advocate de la Harpe and myself after a careful consideration of the pleadings came to the conclusion that the Plaintiff's claim was based on a tacit agreement of partnership, the date of which coincides with the date of the agreement to marry."

(Mr *de la Harpe*)

> "7. In all these consultations Plaintiff's Particulars of Claim were considered carefully. On my advice it was

concluded that what was sought to be advanced was a claim founded upon a tacit agreement of partnership which coincided with an agreement to marry during 1998.

8. Never was it considered, having regard to that which was pleaded, that the case sought to be advanced by Plaintiff was that immediately the parties became intimate, during 1988, that an express agreement was concluded or that facts and circumstances existed such as to justify the conclusion that a tacit agreement of partnership was concluded.

9. In essence my understanding of Plaintiff's case was that which was to be understood on a plain and obvious meaning of the effect of that which was pleaded, no more and no less."

[9] The difficulty I have in accepting the correctness of these averments arise from the trial particulars furnished by the plaintiff wherein she made the following allegations: -

"2.3 <u>For nineteen years</u> the Plaintiff contributed all her time and labour to the common household and to making it a family home for the parties and their two minor children."

"4.2 In setting up a common home, having children, living together, acquiring assets and remaining

> together for nineteen years the parties tacitly agreed to the establishment of a partnership.
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> 4.3 The Plaintiff acquired her personal belongings and a few household items during the nineteen years in which the parties were together."

and

> "5.2 During 1990/1992 the Plaintiff worked as a receptionist for the Department of Education earning R2, 500.00 per month. She contributed her entire income to the partnership." (emphasis added)

[10] One of the purposes which trial particulars serve, is to inform the other side, with greater precision, the case the one party intends to prove in order to enable his/her opponent to prepare accordingly. The plaintiff, in clear and unambiguous language, informed the defendant that the universal partnership endured for nineteen years. Neither the defendant nor his legal advisors could therefore have been under any illusion that any lesser period i.e. from the date they became engaged, was intended. During her oral testimony, portions of which I paraphrased and reproduced in paragraph [3] hereinbefore, the plaintiff specifically stated that the universal partnership commenced at the inception of their cohabitation and endured until the termination of their relationship. The cross-examination was directed to disprove the plaintiff's testimony. There was no suggestion made that the universal partnership endured merely since their engagement. The defendant's case, as presented and persisted with, not only at

trial, but moreover on appeal to the Supreme Court of Appeal, and, in the application for leave to appeal to the Constitutional Court, was that the plaintiff had failed to establish the existence of a universal partnership between them, *caedit questio*.

[11] It will be gleaned from the aforegoing and in the reproduced extracts of my judgment detailing the plaintiff's chronological account of the inception and duration of the universal partnership, 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.

[12] In the result therefore the following orders will issue –

1. Paragraph 1 of the order is amended by the deletion of the year date 1998 and its substitution by the year date 1988.
2. The defendant is ordered to pay the costs of this application.

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D. CHETTY
JUDGE OF THE HIGH COURT

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