Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED.

SIGNATURE DATE: 12 December 2023

Case No. A018010/2023

In the matter between:

LL	Appellant
and	
CH N.O.	First Respondent
CH	Second Respondent
CJB	Third Respondent
THE MASTER OF THE HIGH COURT	Fourth Respondent
THE REGISTRAR OF DEEDS, JOHANNESBURG	Fifth Respondent

CORAM: OPPERMAN J, WILSON J AND NOKO J

JUDGMENT

WILSON J (with whom OPPERMAN J and NOKO J agree):

1 The question at the centre of this appeal is whether the appellant, LL, established on the papers before the court below that he was in a universal partnership with EH. LL applied in the court below for a declaration that there was such a partnership, and that it had subsisted for many years before EH died on 21 July 2016. EH's daughter, CH, who is cited as the first respondent in her official capacity as the executor of EH's estate, and in her personal capacity as the second respondent, denies that EH's and LL's relationship ever amounted to a universal partnership.

2 The court below did not finally decide the issue either way. It held instead that the issue was so hotly disputed on the facts that it could not be determined on motion. In addition, applying the well-known rule, set out in *Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162, that an application for final relief instituted in the knowledge that "a serious dispute of fact was bound to develop" will generally be dismissed, the court below refused LL's application with costs. LL now appeals.

3 In my view, LL was right to proceed on motion, and the court below was mistaken when it held that the factual version LL put up in his founding affidavit had been materially disputed. It follows that LL's appeal must succeed, and that the order of the court below must be replaced with an order declaring the existence of the universal partnership between LL and EH, and granting ancillary relief.

4 In giving my reasons for reaching that conclusion, I shall first set out the nature of a universal partnership and the requirements for accepting that one

has come into existence. I shall then apply those requirements to the facts that ought to have been accepted as undisputed in the court below.

Universal partnerships

5 A universal partnership is an agreement between individuals to share their property and their gains and losses. The partnership need not be formed for a commercial purpose. It regularly comes into existence, whether expressly or tacitly, between unmarried cohabitees, although cohabitation is not essential. The requirements for the existence of a universal partnership are the same as those for partnership in general. Where a tacit universal partnership is alleged, a court will confirm its existence if the conduct of the parties is such that it is more probable than not that such a partnership agreement had been reached between them (*Butters v Mncora* 2012 (4) SA 1 (SCA) ("*Butters*"), paragraphs 17 and 18).

6 A partnership exists if "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"; if the agreement is struck for "the joint benefit of both parties"; and if the object of the partnership is material gain (*Butters*, paragraph 11).

7 These requirements are now well-settled in law, and are fairly regularly applied (see, for example, *Le Roux v Jakovljevic* [2019] ZAGPJHC 322 (5 September 2019)). The nature of the factual inquiry can be quite complex, especially where a court is asked to draw inferences from conduct. Those

seeking to prove the existence of a tacit universal partnership may generally be well-advised to seek to do so by way of a trial action. There is, however, no reason why a court ought not to infer the existence of a universal partnership from the undisputed and common cause facts that appear from the papers in motion proceedings. The question is merely whether, on evaluating those facts as a whole, the probable inference is that there was a universal partnership.

8 It is to an evaluation of the undisputed and common cause facts disclosed on the papers in the court below that I now turn.

The papers in the court below

9 LL is an architect. He met EH in June 1970. EH was already married at that time, but LL says that it was a marriage in name only. EH continued to live with her husband at the matrimonial home in Montgomery Park, and to work with him in a property development business. However, according to LL, EH did not share a bed with her husband. LL and EH fell in love and their relationship co-existed with EH's marriage until her husband's death.

10 In 1982, LL sold his home in Auckland Park. LL put the proceeds of that sale towards purchasing a house in Westcliff, which was registered in EH's name. LL says that he and EH intended to move in together at the Westcliff property, but that the property required substantial renovation. The plan was apparently to turn it into a multi-dwelling property, with LL and EH living together in one of the dwellings while renting the others out. LL moved his home and his architectural practice to the Westcliff property. In addition to servicing the bond on the property, he undertook substantial renovations at

the property over several years. LL knew that he was enhancing a property that did not formally belong to him, but considered himself to be preparing the property to be the home that he and EH would eventually share.

11 In 1990, EH's husband became gravely ill. He relocated to Germany and died on 11 December of that year. From about that time CH also relocated from South Africa to Germany, after which LL says that EH and CH became estranged from each other. They would have telephonic contact every few months, but were never, LL says, on good terms. They met only twice between 1990 and 2016.

12 After EH's husband died, LL and EH lived together at the Montgomery Park property from time-to-time, with LL moving back and forth between the Westcliff property and the Montgomery Park property while the renovations to the Westcliff property were completed. In 1995, work on the Westcliff property was finally completed, and EH and LL moved in together there. The Montgomery Park property was left empty, but EH and LL worked together to renovate it into a multi-dwelling property, units in which would be sold as part of a sectional title scheme. LL says that, while the property was owned by EH, he funded and performed much of the work done on the property.

13 Once the Montgomery Park property had been renovated, in 2002, LL and EH sought to sell it, but LL says that EH's expectations of the price the property was meant to bring were too high, and as a result the sale never went ahead. LL says that EH was not keen on renting the units on the property out either. As a result, the property stood empty until 2017, when

CH took it over, and completed the registration of the sectional title scheme with a view to selling the dwellings EH and LL had constructed on it.

14 In 1993, EH and LL purchased LL's parents' home in in Schulensee, Germany. They did so for 300 000 Deutsche Marks, which was said to be about half the value of that property. The proceeds of the sale were given to LL's siblings and EH and LL gave LL's parents a lifelong right of habitation at the property. This, LL says, was his parents' way of passing on LL's inheritance before they died.

15 Between 1990 and 2016, EH's health gradually declined. She had persistent problems with her back, which required multiple surgeries. She also developed thyroid problems, high blood pressure and cataracts. It seems that EH eventually became so ill that she required extensive care, which LL says he provided. He also funded at least some of her medical expenses.

16 As EH's health continued to decline, LL foresaw the need to ensure that he would have some formal claim to the properties that EH shared with him. He prepared wills for both him and EH to sign, each bequeathing their whole estate to the other. LL signed a will leaving his estate to EH, but EH never signed a will leaving her estate to LL. LL says that this is because she did not want to face her mortality, but it seems to me that EH's reasons for not wanting to sign a will in favour of LL are not really discernible from the evidence.

17 It seems clear from the papers that EH suffered from dementia towards the end of her life. The burden of caring for her became too much for LL. He contacted CH and asked for help.

18 Two or three months before EH's death, CH returned to South Africa and arranged to have herself appointed as the curator of EH's estate. When EH died in July 2016, at the age of 76, CH was appointed as the executor of EH's estate. According to LL, CH promised, in a fairly vague way, to settle half of EH's estate on him, but never followed through.

19 In need of money, LL took steps to sell his parents' property in Schulensee. This was now possible, as LL's father had died in 2000 and his mother died in 2013.The property sold for 750 000 Euros. Presumably in the course of arranging that sale, LL discovered that CH had transferred EH's share of the Schulensee property to herself. CH eventually received half the proceeds of the sale.

20 In the two years following EH's death, the relationship between CH and LL, which could never have been particularly strong, deteriorated markedly. They quarrelled about what was due to LL. CH demanded that LL return EH's ashes. CH ultimately took steps to terminate LL's occupancy of the Westcliff property. Finally, in September 2018, LL instituted these proceedings in the court below.

21 The story I have told so far is taken from LL's founding affidavit. It is contested in a lengthy answering affidavit deposed to by CH. However, that affidavit is noteworthy for its almost complete failure to address the substance of LL's case. There is no serious dispute that LL and EH shared the property development ventures that I have described; that they lived together after EH's husband died; that they shared their possessions and

expenses; that they had a romantic relationship; and that LL cared for and supported EH on his own right up until just before her death.

22 The substance of CH's affidavit is not directed at contesting these basic features of LL's story, but at trying to place a different gloss on them. The fact that LL and EH never got married is asserted in support of the conclusion that there was never a universal partnership. Much is made of EH's failure to sign a will. An aggressively idealised picture of EH's marriage to her husband is painted. CH also denies allegations that LL simply does not make (for example that LL and EH lived together from 1980). CH accuses LL of frustrating her attempts to contact EH. CH also takes issue with various gaps in the substantial documentation that LL annexes to his founding affidavit in support of his claims. However, CH puts up no positive case that would exclude the conclusion that LL and EH shared the life that LL says they did. Nor does CH seriously dispute the core facts LL relies upon in his founding affidavit. CH's answering affidavit contains a great deal of chaff, but almost no wheat.

23 Affidavits are about facts, not legal conclusions. In order to create a material and genuine dispute, an answering affidavit must clearly and unambiguously contradict the facts underlying the claim advanced in the founding papers. In some cases, a bare denial might be enough. However, in most cases, a denial must be accompanied by a positive factual version in which "a basis is laid for disputing the veracity or accuracy of the averment" being answered (*Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (A), paragraph 13).

24 Even though CH had been substantially absent from her mother's life between 1990 and 2016, there is no suggestion that she was unaware of, or that she was not reasonably able to acquire knowledge of, facts that might have thrown doubt on the core of LL's version. But this she failed to do. I think the irresistible inference is that there are no such facts available. In other words, CH put up no facts to contradict the LL's version that he and EH lived together as LL describes in his founding affidavit, that they shared the benefits and burdens of the property developments he described, and the LL cared for and supported EH in her final years.

25 It seems to me, therefore, that the question of whether and when LL and EH had tacitly formed a universal partnership must be decided substantially on LL's version.

Does LL's version sustain the inference that there was a tacit universal partnership?

26 I think that LL's papers do more than enough to sustain the conclusion that there was such a partnership. LL and EH each brought something into the partnership. Most of the money was EH's. She appears to have taken on the lion's share of the cost of purchasing and renovating the Westcliff property, of renovating the Montgomery Park property and of purchasing the Schulensee property. The core of LL's contribution seems to have been in sweat equity. He renovated the Westcliff and Montgomery Park properties using his architectural skill, but he also funded a significant portion of the renovation costs and serviced the bond on the Westcliff property. Most telling, in my view, was LL's keenness to share his interest in his parents'

home with EH. The purchase of LL's parents' home at half its true value was designed to provide a substantial gain for LL. LL and EH shared that gain. CH does not dispute that fact, and she has sought to benefit from it.

27 These transactions were plainly carried out for the benefit of both LL and EH. They both lived in the Westcliff property, and they would both have benefited from the appreciation in value of the Schulensee property and from the sale of the Montgomery Park property if it had gone ahead.

28 Finally, it follows from all this that, while LL makes clear that EH was his life partner, their partnership was also plainly at least partly about material gain. In my view, the probable inference on the undisputed facts is that EH and LL both intended to enter into, and did in fact tacitly conclude, a universal partnership. The partnership commenced on the death of EH's husband, and continued until EH's death twenty-six years later. It was one in which each party shared all of their assets with the other, akin to a marriage in community of property. Although LL suggests that a partnership started earlier than EH's husband's death, I do not think that the universal partnership could have co-existed with EH's marriage in community of property with her husband. It seems to me that EH could only have intended to enter a universal partnership with LL after the death of her husband, when the assets she shared with LL became exclusively hers to share.

29 That is not the same as saying that a universal partnership could never co-exist with a marriage in community of property. Much depends on the nature and object of the partnership, the assets it encompasses, and the arrangements that might be reached between spouses married in community

of property. In this case, however, LL contends for a universal partnership that was itself akin to a marriage in community of property. The contention is that LL and EH shared everything. On the facts of this case, EH could only have realistically formed the necessary intention to share all her assets with LL as part of the universal partnership after her marriage in community of property with her husband ended. I accept, however, that LL and EH had probably formed a partnership of some sort before EH's husband died. Because the nature of the partnership changed on EH's husband's death – and took on a universal character – I need not consider exactly what sort of partnership that was. It seems clear, though, that EH and LL shared assets and industry. Had their partnership ended before EH's husband died, LL would probably have had a claim based on the ordinary principles of partnership and donation, where the donor's intention is to be considered in assessing the rights of the parties.

Order

30 The appeal must accordingly succeed. It is clear from the facts that LL and EH entered a universal partnership that encompassed all of each party's assets, and in which they shared in each of those assets equally. At the point of EH's death, each party owned half of the other's estate.

31 In light of that fact, LL asked the court below to settle half of EH's deceased estate on him. On the facts of this case, that seems to me to be an entirely appropriate outcome. It accords with the approach taken by the Constitutional Court in *Bwanya v Master of the High Court, Cape Town* 2022 (3) SA 250 (CC), where it was recognised that partners in a permanent life

partnership in which the partners have undertaken reciprocal duties of support are entitled to inherit as spouses would under section 1(1) of the Intestate Succession Act 81 of 1987.

32 The effect of this is that LL is entitled to 50% of the assets that fell into the partnership. He is also entitled to inherit a life partner's share of EH's estate, in terms of section 1 (1) of the Intestate Succession Act 81 of 1987.

33 Mr. Boden, who appeared for LL before us, asked that the costs in the court below and in this court be paid by CH in her personal capacity on the scale as between attorney and client.

34 CH's conduct in this case has been unfortunate. It does not appear that she ever came to grips with or fully recognised her mother's relationship with LL. Shortly before EH's death, she placed herself in charge of EH's assets and ultimately had herself appointed *curator bonis*. That application was premised upon EH being of unsound mind and incapable of managing her own affairs. The application was brought *ex parte* and without giving LL notice, in circumstances where CH must have known that LL had an interest in how CH's assets were to be dealt with.

35 Having taken these steps, CH was able to sell EH's 1969 280 SL Mercedes Benz for R1.25 million in June 2016, one month before EH died. CH transferred R1 million into an account opened by her in EH's name on 15 July 2016. Soon after EH's death, the proceeds of the sale were then transferred into CH's personal account.

36 CH became EH's executor three weeks after EH's death. Yet CH failed to open the account required under section 28 of the Administration of Estates Act 66 of 1965 in which she was required to deposit moneys held on the estate's behalf. CH misrepresented to the Master that she is permanently resident in South Africa in order to obtain letters of executorship.

37 Many of CH's duties as an executor have gone unfulfilled. No liquidation and distribution account has been filed with the fourth respondent, the Master. Neither has a cash recapitulation statement nor an income or expenditure account. No estate duty account has been submitted. No extension has been applied for. None of this has been disputed or explained in CH's answering affidavit. In addition, an executor acts in a fiduciary capacity and avoids conflicts of interest in the performance of their functions. CH's conduct has fallen far short of these obligations.

38 Moreover, it seems to me that CH could never seriously have thought that LL was not entitled to a portion of EH's estate, and the pre-litigation correspondence on the record demonstrates that she accepted that he was entitled to something. Yet her stance in this litigation has been one of dogmatic and unfounded opposition. Her papers give LL no quarter. In particular, apart from contesting LL's claims without the factual basis necessary to do so, CH makes no effort to quantify the amount to which she accepts LL is entitled and to explain why she accepts that he is entitled to it. It seems to me that this is reason enough to require CH to pay the costs of this litigation in her personal capacity.

39 I am not convinced that this means that CH is liable to a punitive costs order, however. CH is a grieving daughter. Her conduct, though worthy of censure, must be assessed in that light. In light of all the circumstances of this case, I think it is enough that she be required to pay the costs of this litigation out of her own pocket on the ordinary scale.

40 Mr. Boden also asserted that there is no basis on which CH can maintain the detachment required of the executor of EH's estate, and that a new executor must be appointed by the Master. I accept that this must be so. CH's failure to administer the estate in the manner required by law also makes it unrealistic for her to continue as the executor.

41 For all these reasons, we make the following order –

41.1 The appeal succeeds, with costs to be paid by the second respondent in her personal capacity. The executor of the deceased estate appointed in terms of the order below is directed to pay those costs from the second respondent's share of the deceased estate should those costs not be paid by the second respondent within 30 days of presentation of a taxed or agreed bill of costs.

41.2 The order of the court below is set aside, and is substituted with the following order –

"1. It is declared that a universal partnership existed between applicant and EH ("the deceased") during the period between 11 December 1990 and 21 July 2016, such that each owned half of the other's estate.

2. It is declared that the applicant is entitled to inherit half of the deceased's estate.

3. The first respondent is removed from her position as the executor of the deceased's estate in terms of section 54 (1) (a) (v) of the Administration of Estates Act 66 of 1965.

4. The fourth respondent is to appoint an executor of the deceased's estate to replace the first respondent by no later than 31 March 2024.

5. The executor of the deceased's estate must provide for, record and deduct the applicant's 50% ownership and its value from the assets of the deceased's estate in the ordinary course of its administration.

6. The executor of the deceased's estate and the fifth respondent are directed to take the necessary steps to record and transfer the applicant's 50% ownership of the following immovable properties –

   6.1 […] Avenue, Westcliff, Joahnnesburg, also known as ERF […], Westcliff, Johannesburg.

   6.2 Units 1, 2 and 3 of Scheme […], S[…], 1 […] Road, also known as ERF […], Montgomery Park, Johannesburg.

7. It is declared that the applicant is entitled to 50% of the deceased estate's undivided half-share of the property known as G[…], Molfsee-Schulensee, Germany. The second respondent is directed to repatriate the proceeds of the sale of that property to South Africa, which must be deposited into the deceased's estate's bank account within 30 days of a demand from the executor appointed in terms of this order.

8. It is declared that the applicant is entitled to 50% of the funds held in HypoVereinbank, Munich, Germany, under account number […] as at the date of the deceased's death. The second respondent is directed to repatriate the funds held in that account on the date of the deceased's death to South Africa, which must be deposited into the deceased's estate's bank account within 30 days of a demand from the executor appointed in terms of this order.

9. It is declared that the applicant is entitled to 50% of the deceased's movable assets including all jewellery. The second respondent is directed to provide a full inventory together with sworn valuations of all the deceased's movable assets within 10 days of the date of this order.

10. The second respondent is directed to account for the proceeds of the sale of the deceased's 1969 Mercedes

Benz 280 SL and to make payment of the proceeds of that sale into the deceased estate's bank within 30 days of a demand from the executor appointed in terms of this order.

11. The second respondent is to pay the costs of this application. The executor of the deceased estate is directed to pay those costs from the second respondent's share of the deceased estate should those costs not be paid by the second respondent within 30 days of presentation of a taxed or agreed bill of costs."

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 12 December 2023.

HEARD ON:	1 November 2023
DECIDED ON:	12 December 2023
For the Appellant:	CE Boden Instructed by JJS Manton Attorneys
For the First, Second and Third Respondents:	P Marx Instructed by Gerhard Botha Attorneys