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# The dissolution of universal partnerships in South African law: Lessons to be learnt from Botswana, Zimbabwe and Namibia

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## SUMMARY

The universal partnership is a unique common-law creature that offers valuable benefits during its subsistence and especially upon its dissolution. This article is concerned with the application of the dissolution of universal partnership as an interchangeable legal remedy, by providing litigants with contractual remedies. Foreign jurisdictions such as Botswana, Namibia and Zimbabwe have used the consequences of the dissolution of the universal partnership in various cases from putative marriages to customary law cases in order to do justice between the parties. These foreign courts have applied the consequences of dissolution in a reformative and liberal manner, without being side-tracked by legislative departures and debates. Although much debate surrounds the interchangeable approaches followed by the courts when using this contract in cases of putative marriages, unrecognised religious marriages, cohabitation and customary law, it is nonetheless applied as a remedial measure. The intended “single marriage statute” and relevance thereof on the universal partnership is also explored in this article. The difference between intimate and commercial universal partnerships as well as the drawbacks of using the universal partnership in the context of cohabitation is shortly discussed. It is suggested that our courts more willingly provide contract-based relief to litigating parties by following a liberal application the universal partnership. Unmarried cohabiting persons are often left without legislative recourse and remedies as the intended “single marriage statute” and the Domestic Partnership Bill of 2008 has not yet been enacted into law. For this reason a reformative, progressive and liberal application of the universal partnership, as observed in foreign law, may certainly allow our courts to protect these vulnerable parties.

## 1 Introduction to universal partnerships

The universal partnership in South Africa has secured a very unique niche in our modern multi-cultural pluralistic legal system. A universal partnership will only exist if its three essentials are present. Firstly, each party brings something into the partnership, whether it be money, labour

or skill.<sup>1</sup> Secondly, the partnership should be carried on for the joint benefit of both parties. Thirdly, the object should be to make a profit and lastly, the contract should be a legitimate one.<sup>2</sup>

In this article the dissolution of universal partnership is viewed through multiple lenses from ancient Roman law to customary law. As the universal partnership is constantly developing, adapting and finding application in our law, the main inquiry of this article is concerned with the remedial application of the dissolution of the universal partnership in South Africa and abroad. The instances where the universal partnership is often employed to a remedial extent is usually rooted in putative marriages, unrecognised religious marriages, unregistered customary law marriages and unmarried intimate or cohabitation relationships, where women often find themselves with little or no legal recourse, except for the contractual remedies offered by the universal partnership.

## 2 Choice of foreign law

Zimbabwe has a dual legal system, comprised of general law (Roman-Dutch common law and legislation) and customary law.<sup>3</sup> Zimbabwe retained a large part of South African private law which it inherited from its predecessor, Southern Rhodesia which attained independence from Britain in 1980.<sup>4</sup> Botswana inherited most of its private law from the Cape of Good Hope; therefore it shares a common law heritage with South Africa.<sup>5</sup> Botswana has a pluralistic legal system in which both the common law and customary law operate. Namibia was previously administered by South Africa until its independence in 1990 and as a result thereof the private law of Namibia is largely inherited from South Africa.<sup>6</sup> The Constitution of the Republic of Namibia, 1990 makes

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1 Cassim *et al*, *The law of business structures* (2015) 13. See also Gibson *et al*, *South African mercantile and company law* (2003) 241 and Pothier *A treatise on the contract of partnership: With the civil code and code of commerce relating to that subject in the same order* translated by Tudor (1854) 5-6.

2 *Bester v Van Niekerk* 1960 2 SA 779 (A) confirmed that this last requirement has been discounted by our courts for being common to all contracts.

3 S 192 of the Constitution of Zimbabwe, 2013 provides that the law to be administered in the country is the law in force on the effective date of the Constitution. The law in force was provided for in S 89 of the Lancaster House Constitution, which provides that the law applicable in Zimbabwe is Roman Dutch Law and African Customary Law, as modified by subsequent legislation.

4 Zimmermann *et al*, *Southern Cross: Civil law and common law in South Africa* (1996) 4. See also SADC website: <https://www.sadc.int/member-states/> (accessed 2019-09-01).

5 Zimmermann *et al*, 3.

6 Zimmermann *et al*, 3.

express provision for customary law and common law to operate in its pluralistic legal system.<sup>7</sup>

It is also noteworthy that Botswana, Namibia, Zimbabwe and South Africa are all member States of the Southern African Development Community (SADC) which was established in 1992. The vision of SADC includes freedom, social justice, peace and security for the people of Southern Africa.

In very recent case law these three countries recognise the existence of universal partnerships and Pothier's influence on partnership law. According to these jurisdictions, universal partnerships are only recognised as a general law concept and is unknown to customary law. Despite this, these courts have applied the universal partnership in multiple customary law cases, in order to provide litigants with contractual remedies offered by the universal partnership upon its dissolution. These three countries offer valuable judicial lessons regarding the consequences of the dissolution of the universal partnership and the remedial application thereof. As these three countries geographically border South Africa, this close geographical proximity may imply that universal partnerships could also easily extend across these country borders.<sup>8</sup> For this reason, it makes sense to acquire some uniformity to the application of the universal partnership and the consequences of its dissolution, in order to promote legal certainty in South Africa, in line with the liberal approaches adopted by these foreign jurisdictions and the guiding SADC principles.

### 3 The universal partnership in South Africa

The majority of South African case law on universal partnerships is focused on the validity requirements of the universal partnership, whether or not the partnership legally came into existence and how dissolution and distribution should accordingly take place.<sup>9</sup> The recognition of a universal partnership is most common in cases where the surviving partner wishes to inherit from the deceased partner.<sup>10</sup> The universal partnership is also common in cases where either one of the partners is insolvent or the partnership itself is insolvent and the court is faced with the liquidation of the partnership, the sequestration of the partner(s) and incidentally the recognition of rights and duties in terms

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7 The Constitution of the Republic of Namibia, 1990 S 66(1) states that: "Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law".

8 Thomas *et al*, *Historical foundations of South African private law* (2000) 7. Zimmermann *et al*, 3. South Africa, Botswana, Namibia and Zimbabwe all have mixed legal systems.

9 See *Butters v Mncora* 2012 2 ALL SA 485 (SCA).

10 See *Bergman v Master of the High Court* 2015 JDR 0281 (GJ).

of insolvency law.<sup>11</sup> The fact that a universal partnership may extend beyond commercial undertakings contributes to the popularity of this partnership type, especially among cohabiting or unmarried individuals, although the universal partnership is not limited to them. Due to the ease with which universal partnerships may be created, the notion that universal partnerships have fallen into disuse must be disregarded, as very recent domestic and foreign case law have recognised universal partnerships.<sup>12</sup>

Although there is no single piece of legislation dealing with partnerships in particular, this does not imply that partnerships are solely regulated under the common law. In South Africa there are various pieces of legislation that deal with certain aspects of partnerships to a limited extent.<sup>13</sup>

Despite the availability of other works of De Groot, Van Leeuwen, Voet, Van der Keessel, Van der Linde and Felicius-Boxelius, the South African courts “virtually exclusively rely on the work” of Pothier.<sup>14</sup> *Traité du Contrat de Société* by Pothier is recognised by our courts as being one of the leading sources of our common law of partnership.<sup>15</sup> The reason for this is presumed to be the fact that *Traité du Contrat de Société* was translated into English and Dutch during the 19th century.<sup>16</sup> The requirements for a universal partnership, as formulated by Pothier, have become an engrained part of our law and that of Botswana, Namibia and Zimbabwe. Despite the universal partnership’s Roman law origin, it has managed to secure itself a place in our modern day democratic legal system and abroad.

Not only does this partnership form offer contractual remedies to persons excluded from legislative assistance, this partnership has also managed to offer women in customary-law unions, putative marriages and unrecognised religious marriages, an opportunity to share in the

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11 See for example the Insolvency Act 24 of 1936 and the Administration of Estates Act 66 of 1965. See also Cassim *et al*, 37.

12 See for example *Bergman v Master of the High Court supra*; *DA v AA* 2015 JDR 2611 (GJ); *CG v HG* 2014 JDR 1650 (GP). See also Cassim *et al*, 21 which mentions that “this type of partnership has neither fallen into disuse nor is it an unimportant type of partnership”.

13 See for example the National Credit Act 34 of 2005, the Consumer Protection Act 68 of 2008, the Firearms Control Act 60 of 2000 as amended by the Firearms Control Amendment Act 28 of 2006, the Customs Control Act 31 of 2014, the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, the Prevention of Organised Crime Act 121 of 1998 and the Restitution of Land Rights Act 22 of 1994.

14 Olivier and Honiball *International tax – A South African perspective* (2011) 167.

15 Rule “A square peg in a round hole? Considering the impact of applying the law of business partnerships to cohabitants” 2016 *Stellenbosch Law Review* 615. The importance of Pothier in South African law was emphasised by the court in *Robson v Theron* 1978 1 SA 841 (A).

16 Olivier and Honiball 167.

property jointly acquired by them and their partners.<sup>17</sup> Before discussing the judicial application of the universal partnership, a short overview of the partnership contract and its *essentialia* is necessary.

### 3 1 Universal partnership *essentialia*

In *Butters v Mncora*,<sup>18</sup> the court explains that the requirements for a partnership as formulated by Pothier have become a well-established part of our law and that these requirements have been applied by our courts to partnerships in general and universal partnerships in particular.<sup>19</sup> The *essentialia* for a partnership in general is the same for a universal partnership.<sup>20</sup> The three essential elements of a partnership, as discussed above, thus also apply to the universal partnership.<sup>21</sup>

There are two types of universal partnerships recognised in South African law as dictated by early Roman and Roman-Dutch law, namely the universal partnership of all property and the universal partnership of all profits. Although it is trite in our law that these two forms of the universal partnership exist Bonthuys,<sup>22</sup> has drawn an interesting distinction between “commercial universal partnerships” and “intimate universal partnerships”. Bonthuys notes that for an intimate universal partnership there are additional requirements to that of Pothier.

17 Barratt “Whatever I acquire will be mine and mine alone: Marital agreements not to share in constitutional South Africa” 2013 *South African Law Journal* 688-689: “[W]omen are usually the economically weaker spouses at the end of a marriage”. See also Barratt 2013 *South African Law Journal* 698: “It is universally recognized that the economically weaker spouse will almost always be the wife, because of gender roles usually assumed during marriage”. See also Bonthuys “Proving express and tacit universal partnership agreements in unmarried intimate relationships” 2017 *South African Law Journal* 263; and Bonthuys “Developing the common law of breach of promise and universal partnerships: Rights to property sharing for all cohabitants?” 2015 *South African Law Journal* 99: “In the absence of legislation, however, the courts’ treatment of unmarried same-sex cohabitation shows that undertaking financial and other caring responsibilities and sharing financial benefits is evidence of an agreement that financial benefits should be equally shared at the end of the relationship”.

18 *Butters v Mncora supra* 17-18.

19 See also *Isaacs v Isaacs* 1949 1 SA 952 (C) 956; *Pezzutto v Dreyer* 1992 3 SA 379 (A) 390A-390C; *Bester v Van Niekerk supra* 783H-784A; *Mühlmann v Mühlmann* 1981 4 SA 632 (W) 634C-634F.

20 *Isaacs v Isaacs supra* 955; *Sepheri v Scanlan* 2008 1 SA 322 (C) 338C-D; *Ally v Dinath* 1984 2 SA 451 (T); *V (also known as L) v De Wet NO* 1953 1 SA 612 (O) 615; *Festus v Worcester Municipality* 1945 CPD 186 (C).

21 Cassim *et al.*, 23. See also *Vermeulen v Marx* 2016 JDR 1435 (GP); *Davidson v Davidson* 2016 JOL 35109 (GP) 12; and *Pezzuto v Dreyer supra* 390.

22 Bonthuys 2017 *South African Law Journal* 263: “Nevertheless, universal partnerships in intimate relationships – to which I refer as intimate universal partnerships – differ from commercial universal partnerships, largely because of the different context within which they operate, which imply, in turn, different modes of bargaining, different contractual aims, and different behavioural norms during the subsistence and at the end of these contracts”.

Bonthuys notes that:

“In intimate universal partnerships the additional element of cohabitation could be used as a proxy for establishing the presence of *animus contrahendi* which, in turn, distinguishes a legal obligation from a promise made in the heat of a short-lived passion”.<sup>23</sup>

This suggestion by Bonthuys should not lead to the inference that normal cohabitation amounts to the *animus contrahendi* of a universal partnership, as cohabitation is not a requirement for a universal partnership and it is trite in our law that even longstanding cohabitation relationships do not have any legal consequences attached to them.<sup>24</sup> Furthermore, the distinction between an intimate and commercial partnership may be unnecessary as the requirements for both are exactly the same and there are no additional requirements.<sup>25</sup>

The benefits of utilising the universal partnership in the cases of putative marriages, unregistered (or even registered) customary-law unions and cohabiting relationships are wide-ranging. The remedial application of the universal partnership is shortly discussed in the following paragraphs, in order to indicate the beneficial judicial application of the dissolution of this partnership contract.

## 4 Remedial application of the universal partnership in Botswana, Zimbabwe and Namibia

It is noteworthy that the requirements for the universal partnership as formulated by Pothier also apply in Botswana, Zimbabwe and Namibia. Accordingly, the requirements for a universal partnership in Botswana, Zimbabwe and Namibia are the same as in South African law.<sup>26</sup>

### 4 1 Botswana

The High Court of Botswana, in *Tokoyame v Bok*,<sup>27</sup> declared that a universal partnership had existed between the deceased and the respondent, despite the fact that they were never married. The significance of this case is attributed to the liberal approach the court followed by declaring that a universal partnership had existed, despite arguments that the concept of a universal partnership is a common law

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23 Bonthuys 2017 *South African Law Journal* 267.

24 Sinclair and Heaton *The law of marriage* (1996) 274.

25 *Butters v Mncora supra* 17. See also Bonthuys 2017 *South African Law Journal* 265: “According to proponents of this argument, parties in intimate universal partnerships must also prove ‘cohabitation, sharing of profits and freedom of accounting to each other’. These additional requirements were rejected as being unnecessary in the *Butters* case”.

26 See for example *Bodutu v Motsamai* 2006 2 BLR 252 (HC) 257B-257C, *Ntini v Masuku* 2003 1 ZLR 638 (H) 640 and *LM v JM* 2016 2 NR 603 (HC).

27 *Tokoyame v Bok* 2008 1 BLR 384 (CA).

idea which is foreign to *Kisa* customary law.<sup>28</sup> The respondent accordingly received a half share of the deceased estate.

In the case of *Makobela v Kemedisa*,<sup>29</sup> the court willingly inferred a tacit universal partnership in a putative marriage. Despite the criticism against using the universal partnership in cases of putative marriages, the court in *Tape v Matoso*,<sup>30</sup> applied the principles of a universal partnership to a customary marriage. In this case the court correctly mentioned that it should be quite obvious that the universal economic partnership is different from the statutory marriage in community of property. The court however added that in appropriate circumstances, the finding of a universal partnership may be made with respect to the way a couple married under customary law.

It is vital to observe that complying with the *essentialia* of the universal partnership is of utmost importance, as the partnership cannot simply exist for convenience sake. In the case of *Maoto v Maoto*,<sup>31</sup> the applicant failed to demonstrate how cohabitation could be elevated to the level of a universal partnership. Consequently the application was dismissed with costs. Had the applicant been successful in proving the universal partnership *essentialia*, the court in this case could have possibly entertained the argument that the cohabitation relationship had been elevated to universal partnership status. This elevation may seem insignificant, but it is important to remember that according to South African law, even longstanding cohabiting relationships do not have any legal consequences attached to them.<sup>32</sup>

## 4 2 Zimbabwe

The concept of a tacit universal partnership is unknown to customary law, as confirmed by the court in *Chivise v Dimbwi*.<sup>33</sup> In *Maenzanise v Ratcliffe No.*,<sup>34</sup> the court held that although the concept of a universal

28 It is noteworthy that in South African customary law, a customary marriage entered into after the commencement of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA) may legally exist despite the fact that it has not been registered, provided that the requirements as set out in S 3 of the RCMA are complied with. See Rautenbach and Bekker *Introduction to legal pluralism in South Africa* (2014) 105: "A customary marriage entered into before the commencement of the Act had to be registered at the Department of Home Affairs before 15 November 2002".

29 *Makobela v Kemedisa* 2002 2 BLR 112 (CA).

30 *Tape v Matoso* 2007 1 BLR 512 (CA).

31 *Maoto v Maoto* 2011 2 BLR 136 (HC).

32 *Ally v Dinath supra*.

33 *Chivise v Dimbwi* 2004 1 ZLR 12 (H) 14. The court mentioned that there is no known principle of tacit universal partnership under customary law. In this case the court mentioned that the general principles to be applied for a just and equitable distribution of the estate include unjust enrichment, universal partnership and joint ownership. See also *Muringaniza v Muringaniza* 2003 2 ZLR 342 (H).

34 *Maenzanise v Ratcliffe No* 2001 2 ZLR 250 (H). In this case the plaintiff contracted an unregistered customary-law marriage with a man of British

partnership is a general-law concept and unknown to customary law, the “way of life” of the plaintiff and her husband indicated that, in terms of section 3 of the Customary Law and Local Courts Act 20 of 1990,<sup>35</sup> the general law should apply to the case.<sup>36</sup>

The court in *Chivise v Dimbwi*,<sup>37</sup> noted that the approach to property of persons in an unregistered union relate to the general principles of law (including unjust enrichment, universal partnership and joint ownership) and concluded that these general-law principles have been resorted through judicial innovation, aimed at providing a just and equitable distribution of such customary law estates.<sup>38</sup>

The court in *Jengwa v Jengwa*,<sup>39</sup> embarked on a discussion of using the universal partnership in customary law cases where a man has more than one wife. Consequently, various questions arise, such as with which wife or wives such a tacit universal partnership was formed, bearing in mind that the wives themselves may form universal partnerships with each other, to the exclusion of the husband.

Adopting a reformative approach to the application of customary law may fully justify the application of the tacit universal partnership concept to customary law, as expressed by the court in *Chapeyama v Matende*.<sup>40</sup> The court in this case expressed the view that the general-law concept of tacit universal partnerships may be relied upon in circumstances where the application of customary law would have led to injustice. The court concluded that the justice of the case required that general law should apply as the elements of a universal partnership had been established

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extraction and lived with him in Harare until his death 25 years later. Overall, her contribution towards the acquisition of the assets that constituted the man’s deceased estate was about equal to his. She claimed half the estate on the ground that she and the man had entered into a tacit universal partnership in which they had pooled their resources for their mutual benefit.

35 Customary Law and Local Courts Act 20 of 1990 S 3 states that: “When general law is the correct choice, then a recognised cause of action must be pleaded. Such a cause of action may be unjust enrichment, a tacit universal partnership or joint ownership. An averment merely to the effect that parties were in an unregistered customary union is not sufficient to found a cause of action at general law”.

36 See Rautenbach and Bekker. These factors indicating the choice of law is similar to that of South Africa.

37 *Chivise v Dimbwi supra*.

38 *Chivise v Dimbwi supra* 15.

39 *Jengwa v Jengwa* 1999 2 ZLR 121 (H) 121.

40 *Chapeyama v Matende* 2000 2 ZLR 356 (S). On appeal the court held, that where a husband and wife marry under customary law, and that marriage is not registered, customary law will apply to a dispute arising out the marriage or its dissolution. It is only possible to bring in the general-law concept of a tacit universal partnership if the court lays a foundation for applying such law.



tacitly.<sup>41</sup> In the case of *Chapendama v Chapendama*,<sup>42</sup> the learned judge was quite emphatic as to the inappropriateness of invoking the common law concept of a universal partnership where the parties were married according to customary law. The learned judge mentioned that:

“However unsatisfactory the application of the general law concept of a tacit universal partnership to an unregistered customary marriage scenario may be, it is currently the only legal régime available in order to do justice to the parties”.<sup>43</sup>

Despite the recognition of the duty of the court to assist women who “still find themselves being shifted to backward and meaningless positions in society, even where they now commercially contribute to their households”, the court in *Ntini v Masuku*,<sup>44</sup> strictly adhered to the requirements of the universal partnership. The court therefore did not use the tacit universal partnership as a legal vehicle to award a half-share of property in this unregistered marriage as the requirements for a universal partnership were not met.<sup>45</sup>

In this case the court correctly noted that the judicial duty “to follow a positive and progressive approach” in addressing the injustices in the legal system, does not renounce or negate the requirements of a universal partnership, and only where “practically possible, will it be used to assist individuals in their endeavour to find justice”.<sup>46</sup>

### 4 3 Namibia

The case of *Frank v Chairperson of the Immigration Selection Board*,<sup>47</sup> is regarded as one of the leading cases in Namibian equality jurisprudence. In this case, the Immigration Selection Board denied the application of a permanent residence permit to a German citizen, Elizabeth Frank, who was in a long-term lesbian relationship with a Namibian citizen. The Immigration Selection Board assumed that the long-term relationship between the two women was not one recognised by the courts.

41 *Chapeyama v Matende supra* 357. The court also referred to the case of *Matibiri v Kumire* 2000 1 ZLR 492 (H), where the court ruled that on the facts there was no tacit universal partnership, but made it clear that it would have applied the common law, had the facts warranted such an approach.

42 *Chapendama v Chapendama* 1998 2 ZLR 18 (H) 27-32. In this case the conduct of the parties was indicative of a tacit universal partnership (*societas unversorum quae ex quaestu veniunt*). The plaintiff was therefore entitled to a share of the assets on that basis.

43 *Chapendama v Chapendama supra* 31.

44 *Ntini v Masuku supra* 642.

45 *Ntini v Masuku supra*. In this case the court held that an unregistered customary-law marriage on its own does not entitle a party to claim property under the principle of tacit universal partnership. In order to establish such a claim, the party must lay a foundation under the general law and show that the requirements for such a partnership were fulfilled.

46 *Ntini v Masuku supra* 642.

47 *Frank v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

The Namibian High Court ruled that the concept of a universal partnership is a relationship recognised by the courts. The High Court noted that such a partnership may be concluded, expressly or tacitly, between a man and a woman who are not legally married, but who live together as husband and wife. Following this logic, the High Court concluded that the long-term relationship between these two women is in fact a universal partnership which is recognised by Namibian law. The High Court accordingly ordered the Immigration Selection Board to issue a permit within 30 days.<sup>48</sup>

The Immigration Selection Board thereafter appealed to the Supreme Court of Namibia against the decision of the High Court.<sup>49</sup> The Supreme Court concluded that the Constitution of the Republic of Namibia, 1990 and the Immigration Control Act 7 of 1993, did not discriminate against Frank or her partner and overturned the decision of the High Court. The majority of the Supreme Court judges in the appeal case concluded that homosexual relationships are not equal to heterosexual relationships and are therefore not afforded the same protection under Namibian law.<sup>50</sup>

The constitutional right to administrative fairness however required the Immigration Selection Board to adhere to the *audi alteram partem* rule. On this basis Frank was afforded the opportunity to reapply for the permanent residence permit. The permit was eventually granted, not on the basis of the universal partnership, but on the grounds of her work as gender researcher, gender trainer and gender journalist in Namibia.<sup>51</sup>

Although the decision of the High Court was overturned, it must be understood that this is not because the courts do not recognise the existence of universal partnerships. The conclusion of the High Court and confirmation by the Supreme Court of Appeal that same-sex partners can conclude a universal partnership, in the same way as opposite-sex partners, is correct and valid.<sup>52</sup>

The basis on which the High Court decision was overturned by the Appeal Court, is attributed to the constitutionality of section 26(3)(g) of the Immigration Control Act, which only referred to “spouse” which does not include a partner in a same-sex life partnership. The Appeal Court did not read into the word “spouse” to mean “partner in a same sex life

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48 Morgan and Wieringa *Tommy boys, lesbian men and ancestral wives: Female same-sex practices in Africa* (2005) 78.

49 *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC).

50 *Chairperson of the Immigration Selection Board v Frank supra* 143 O'Linn AJA stated that “although homosexual relationships must have been known to the representatives of the Namibian nation and their legal representatives when they agreed on the terms of the Namibian Constitution, no provision was made for the recognition of such a relationship as equivalent to marriage or at all. It follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marital relationship”.

51 Röhrs *et al In search of equality: Women, law and society in Africa* (2014) 35.

52 *Chairperson of the Immigration Selection Board v Frank supra* 113.

partnership”.<sup>53</sup> The Appeal Court did, however, add that the Immigration Selection Board should have considered this relationship.

Currently persons unable to marry in terms of Namibian law, are left with only one option, which is to conclude a legally recognised, binding and protected relationship, namely a universal partnership. This alternative may seem irrelevant to the discussion at hand, but upon further evaluation it is essential to remember that a cohabiting relationship does not secure any legal consequences. The universal partnership is currently the only legal alternative available to these individuals who are unable to marry in terms of Namibian law.

#### 4 4 A reflection on the foreign law

From the above discussion it is clear that the judiciary of Botswana and Zimbabwe rarely hesitate to apply the consequences of the dissolution of a universal partnership in order to attempt to protect the contributions of the parties and distribute the estate in a just and equitable manner. The courts of Botswana and Zimbabwe however caution against the dangers of inferring a universal partnership in instances where the *essentialia* is absent or where it was never the intention of the parties to create a partnership. The reformative and liberal approach of the Botswana and Zimbabwe courts do not negate the importance of the *essentialia* and proof of contribution. These cases illustrate the versatile application of the universal partnership to various cases in order to effect a just and equitable distribution of the property, in pursuit of the judicial duty to assist.

It is evident from the case law that the universal partnership, in essence, offers a legal avenue to share in the partnership property, jointly acquired by them, upon the dissolution of the partnership,<sup>54</sup> in addition to joint ownership or unjust enrichment. Furthermore, the discretion of the court to infer such a partnership in appropriate circumstances may avoid an unfair outcome, although the judicial discretion of inference should always be exercised with extreme caution.<sup>55</sup>

The courts should refrain from assuming an automatic discretion and imposing a private contract on the parties, as the universal partnership contract is not one which should be deemed to exist. Accordingly, litigants should plead and prove the existence of a universal partnership in order to avoid an unfavourable outcome. Hence, the judiciary should

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53 *Chairperson of the Immigration Selection Board v Frank supra* 156-157 the court mentioned that: “Whether or not an amendment shall be made to S 26(3)(g) to add the words ‘or partner in a permanent same-sex life partnership’, is in my view a matter best left to the Namibian Parliament”.

54 Please refer to Bonthuys 2017 *South African Law Journal* 264.

55 Barratt “Private contract or automatic court discretion? Current trends in legal regulation of permanent life-partnerships” 2015 26 *Stellenbosch Law Review* 110-118: This is referred to as the “inferred contract model” which is described by Barratt as a “precarious form of protection for economically vulnerable life-partners”.

not develop new default rules that long-term cohabiting or life partners are deemed to be universal partners, as this may not be the intention of the parties.

Utilising the universal partnership in cases where it is not intended will inevitably lead to a degree of disappointment and frustration.<sup>56</sup> As mentioned by the court in *Chapendama v Chapendama*,<sup>57</sup> however unsatisfactory the application of the universal partnership concept to customary law may be, it is currently the only legal régime available in order to do justice between parties. This amount of dissatisfaction is, however, lessened by the fact that without the contractual remedies offered by the partnership upon its dissolution, litigants would be left with barely no legal recourse.<sup>58</sup> Nevertheless, a cohabitee may invoke one or more of the remedies available in private law such as unjust enrichment, joint ownership or the universal partnership, provided, of course, that the requirements for that remedy are established.

#### **4 5 Versatile utilisation of the universal partnership: Benefits and drawbacks**

Despite the vast benefits offered by the universal partnerships in these cases, the drawbacks of the universal partnership's application should be mentioned. In a 2010 publication by the Gender Research and Advocacy Project, Legal Assistance Centre (LAC) titled "A family affair: The status of cohabitation in Namibia and recommendations for law reform",<sup>59</sup> the LAC explored the drawbacks of utilising a universal partnership as the basis for asset division between cohabiting partners. Although this paper is based on Namibian law and cohabitation, it is nevertheless relatable to South Africa in this context too.

The first drawback the LAC mentions is that proving a universal partnership is difficult and that the person attempting to rely on the contract bears the onus of proof. As a universal partnership may be

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56 Bonthuys 2017 *South African Law Journal* 264: "The relational elements of intimate universal partnerships do not fit easily into the classical or neo-classical contractual paradigm which remains dominant in South African law. These characteristics might make it more difficult to prove the existence and the terms of intimate universal partnerships in litigation".

57 *Chapendama v Chapendama supra* 27.

58 *Booyesen v Stander* 2018 6 SA 528 (WCC) 65 referred to *Butters v Mncora supra*. The general rule in our law is that cohabitation does not give rise to special legal consequences. Despite their cohabitation, those who remain unmarried do generally not enjoy the protective measures established by family law, see *Volks NO v Robinson* 2005 5 BCLR 446 (CC).

59 LAC "A family affair: The status of cohabitation in Namibia and recommendations for law reform" <https://www.lac.org.na/projects/grap/Pdf/cohabitationsummary.pdf> (accessed 2019-09-01). It should be noted that the research done by the LAC is focused on cohabiting partners. Universal partnerships are not necessarily between cohabiting persons.

concluded tacitly, proving its existence may be very burdensome.<sup>60</sup> Additionally, proving the contribution of each party may also be very difficult. Bonthuys mentions that another serious problem with the universal partnerships' jurisprudence is the percentage of the partnership assets awarded to female plaintiffs.<sup>61</sup>

Secondly, the LAC explains that if a cohabiting partner is married to someone else, it may be nearly impossible to establish a universal partnership in respect of the cohabitation. Although marriage does not prohibit the existence of a universal partnership between the married spouses or between a spouse and a third party, the matrimonial property regime could possibly exclude the existence of the universal partnership. Consequently, it may render proving the existence of the universal partnership nearly impossible.

The LAC continues to explain that in cases where one of the cohabiting parties is married in community of property to another party, the process of untangling which assets belong to the universal partnership versus the community of property is extremely complex. The LAC mentions that the utilisation of the universal partnership in cohabitation cases may pose severe disadvantages, if the main asset is the home where the parties live together. Moreover, even if a party is able to prove a right to a half-share in a universal partnership, this does not automatically entitle her to a half-share in the partnership's immovable property assets.<sup>62</sup>

Thirdly, the LAC mentions that remedies offered by the universal partnership do not provide definite protection to vulnerable parties and that this remedy is unpredictable and largely limited to litigants with the necessary financial resources to litigate in an action in the civil court. Accordingly, the LAC remarks that this is not a useful approach to the majority of Namibians. Not only are the majority of Namibians prejudiced by the costly litigation system, the majority of South Africans, Zimbabweans and Botswanan's are also prejudiced by their expensive litigation structures.

## 5 Current issues

In South Africa, section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) makes provision for a husband in a customary marriage to enter into a further customary marriage with another woman

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60 Bonthuys 2015 *South African Law Journal* 92 notes that treating these contracts as tacit in the face of evidence of oral agreements places additional evidentiary burdens on the female plaintiffs, while providing further opportunities for the defendants to cast doubt on the existence of the contract.

61 Bonthuys 2015 *South African Law Journal* 94.

62 In *Botha NO v Deetlefs* 2008 3 SA 419 (N), the court held that in the absence of an agreement between the partners on how the dissolution of the partnership is to be achieved, the normal course of action is to appoint a receiver to liquidate the partnership.

after the commencement of this Act. According to this section the husband must make an application to court in order to approve a written contract, intended to regulate the future matrimonial property system of his marriages. In the case of *MN v MM*,<sup>63</sup> the court declared that non-compliance with section 7(6) does not render the subsequent marriage void, but results in the marriage being out of community of property.<sup>64</sup> Although this registration is not a validity requirement and the avenue for declaring the subsequent unregistered customary marriage as a putative one exists, much legal uncertainty prevails. It is appropriate to mention the universal partnership as an interim alternative to this problem, until the Domestic Partnership Bill of 2008 is enacted in South Africa.<sup>65</sup>

In South Africa, parties to Muslim, Jewish, Hindu or other religious marriages must register their marriages in terms of the Civil Union Act 17 of 2006 or the Marriage Act 25 of 1961, in order for it to be legally recognised. Couples married in terms of Islamic or Jewish rites are excluded from concluding polygamous marriages in terms of the Civil Union Act, the Marriage Act and the RCMA. For these polygamous couples, the universal partnership is currently the only available legal vehicle to obtain legal recognition of their relationship. The South African Law Reform Commission (SALRC) has recently reiterated the fact that:

“[P]artners in unmarried intimate relationships have very few legal rights, except for the occasional cases granting rights to share in partnership assets on the basis that the partners had concluded tacit partnership agreements”.<sup>66</sup>

From the above statement made by the SALRC, it is clear that the universal partnership is currently one of the few legal remedies available to partners in unmarried intimate or cohabiting relationships, or unrecognised religious marriages. The SALRC added that:

“[T]he lack of a statutory remedy to claim a share of partnership property outside of valid marriages, is a problem with significant gendered consequences, potentially leading to the social and economic vulnerability of women (and often children) when intimate relationships end”.<sup>67</sup>

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63 *MN v MM* 2012 4 SA 527 (SCA).

64 See also *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) which was confirmed by the Constitutional Court in *Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC) 89. S 7(6) is not a validity requirement.

65 See Rautenbach and Bekker 110: It is suggested that the only option is a total division of all the assets of the estate.

66 South African Law Reform Commission (SALRC) <http://www.justice.gov.za/salrc/ipapers.htm> (accessed 2019-09-01) 12. See also Bonthuys “Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law” 2016 *Potchefstroom Electronic Law Journal* 1; and Barratt 2013 *South African Law Journal* 688-704.

67 SALRC <http://www.justice.gov.za/salrc/ipapers.htm> (accessed 2019-09-01) 46.

In order to attempt remedying this legal problem, the SALRC has suggested a “single marriage statute” which will be based on the principles of equality, human dignity and non-discrimination.<sup>68</sup>

As the “single marriage statute” is intended for submission to cabinet by March 2021, the universal partnership is currently the only available remedy to parties in unmarried intimate or cohabiting relationships, unrecognised religious marriages and putative marriages.<sup>69</sup> This single marriage statute may provide some harmonisation and potentially remedy current legislative gaps and conflicts.

Although the legality and recognition of homosexual relationships is not the focus of this current article, it is interesting to note that the Constitution of Zimbabwe, 2013 expressly prohibits same sex marriages in section 78(3). To date, the Constitutions of Namibia, Botswana and Zimbabwe do not prohibit discrimination based on sexual orientation, like the South African Constitution.<sup>70</sup> It is trite that the similarities and differences between the universal partnership and valid marriages or unions are largely debated. Despite this debate, it is suggested that because these countries do not provide for same-sex marriages, the

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68 SALRC <http://www.justice.gov.za/salrc/ipapers.htm> (accessed 2019-09-01) 1-6: The aim of this project according to the SALRC is to send a clear message that discrimination will no longer be tolerated and to enable South Africans of different religious and cultural persuasions to conclude legal marriages. This suggested “single marriage statute” may be replacing or additional to the suggested Domestic Partnership Bill of 2008.

69 South African customary law legislation has not been free of criticism and scrutiny and is in the process of reform and amendment. In the interim, it is noteworthy that the universal partnership may be utilised in order to do justice between parties that are in a relationship that is not legally recognised and protected. See Rautenbach and Bekker 110 and *Volks NO v Robinson supra* 124: “At present our law makes no express provision for the regulation of the affairs of cohabiting partners upon termination of their relationship. In several other jurisdictions, the law of implied or constructive trusts has been used to re-allocate property rights between partners at the termination of a cohabitation relationship to achieve equity. This remedy is not available in our law, given the different legal basis of the law of trusts in South African law. However, the common law rules governing universal partnership may in some circumstances assist the partners at termination”. See Cameron and De Waal *Honoré’s South African law of trusts* (2002) 110.

70 S 56 of Constitution of Zimbabwe, 2013 does, however, prohibit discrimination based on sex and gender, but not sexual orientation. S 10 of the Constitution of the Republic of Namibia, 1990 only prohibits discrimination based on sex, but not sexual orientation or gender. S 15 of the Constitution of Botswana, 1966 protects persons against discrimination based on sex, but not gender or sexual orientation. On 11 June 2019 the Botswana High Court in Gaborone decriminalised homosexuality and declared certain sections of the penal code banning gay sex, unconstitutional. See “Botswana legalizes same-sex relationships: Bucking trend in Africa” (2019-06-11) *Bloomberg* <https://www.bloomberg.com/news/articles/2019-06-11/same-sex-relationships-decriminalized-by-botswana-s-high-court> (accessed 2019-09-01).

universal partnership may currently be the only means to attach legally binding consequences to homosexual relationships.

As more than half of the African countries have laws penalising same-sex relationships, South Africa has become a “safe haven” for homosexual persons in other African countries, who often travel to South Africa to flee persecution in their home countries.<sup>71</sup> The relevance hereof on South Africa relates to the application of the *lex causae* of the foreign jurisdiction, where a couple from Zimbabwe, for example, flee to South Africa. If this couple, for example, concluded a universal partnership in Zimbabwe, the application of the *lex causae* is appropriate. This simple scenario indicates the potential cross-border use of this ancient contract form and its modern-day relevance.

## 6 Lessons to be learnt

Outlining the lessons to be learnt from the foreign-law research is no easy task. Despite this difficulty which is rooted in the abundance of detail, there are some key aspects which should be reiterated. The most important lessons to be drawn from the foreign-law research may be summarised as follow:

- a In the endeavour to do justice and exercising its judicial discretion, our courts may imply the existence of a universal partnership in appropriate circumstances, such as: putative marriages; unregistered marriages or unions; unrecognised religious marriages and cohabiting relationships.
- b The judicial discretion and duty to assist does not negate the universal partnership *essentia* and the *essentia* thereof must be pleaded and proven.
- c In order to prevent imposing on litigants a mindset which they do not have, our courts should not assume any automatic discretion and an inference of a tacit universal partnership should be exercised with extreme caution in appropriate circumstances.
- d Although the concept of a universal partnership is unknown to customary law, this fact must not preclude persons in customary or other unrecognised religious marriages from relying on the remedial benefits of the universal partnership upon its dissolution.
- e Although choice of law rules allow litigants to choose between customary- or common law, the basis for relying on the universal partnership should be made unambiguously.
- f The universal partnership may purposefully be applied to polygamous customary law marriages until legal certainty is attained regarding the regulation of subsequent unregistered polygamous customary law marriages;
- g Wives in polygamous customary marriages may conclude universal partnerships with each other, to the exclusion of the husband, as contemplated by the Zimbabwe High Court;

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71 See “Anti-gay laws widespread in Africa despite gains” (2016-06-10) *News24* <https://www.news24.com/Africa/News/anti-gay-laws-widespread-in-africa-despite-gains-20190610-2> (accessed 2019-09-01).



- h In cases where one or both of the parties are married in community of property to someone else, the form of universal partnership is more analogous to an ordinary commercial partnership than to any form of community of property arising from a matrimonial relationship;
- i A reformative, progressive and liberal application of the universal partnership, as observed in foreign law, may certainly allow our courts to do justice until the enactment of the intended “single marriage statute” and the Domestic Partnership Bill of 2008.

## 7 Conclusion

“The *societas universorum bonorum* is alive and well in South African law”.<sup>72</sup>

The unique niche that the universal partnership has managed to secure in our multi-cultural pluralistic legal system is extraordinary.

The universal partnership is not only beneficial upon its dissolution, but its creation and legally recognised existence may offer great remedial benefits and legal recourse to persons excluded from legislative protection. In Namibia, it is evident that the value of the universal partnership lies in proving the existence thereof, as observed in the *Frank*,<sup>73</sup> case. On the other hand, the remedial benefits of the universal partnership are mainly attributed to the effects of its dissolution as observed in Botswana and Zimbabwe case law, where the courts focus on employing the consequences of the dissolution of the universal partnership in order to do justice. In light of this liberal approach followed by these foreign jurisdictions, it is suggested that our courts more willingly provide contract-based relief to persons in putative marriages, unregistered civil- and customary law marriages, unrecognised religious marriages and cohabiting relationships. Until the enactment of the intended “single marriage statute” and the Domestic Partnership Bill of 2008, persons in legally unrecognised relationships are offered an opportunity to share in the jointly acquired property by relying on the universal partnership as contractual remedy.

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72 Henning “Perspectives on the universal partnership of all property (*societas universorum bonorum*) and the origin and correction of a historical fault line: Part 2” 2014 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 427-439.

73 *Frank v Chairperson of the Immigration Selection Board supra*.