The Dissolution of universal partnerships in South African law

by

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KEY TERMS

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Annexure G

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SUMMARY

In this research the dissolution of the universal partnership is viewed through multiple lenses from ancient Roman law to modern insolvency and customary law. As the universal partnership is constantly developing, adapting and finding application in our law, the main inquiry of this research is concerned with the consequences that exist upon the dissolution of the universal partnership. The impact of the legislative departure from the common law upon the dissolution of the universal partnership due to insolvency is explored as the first inquiry. The second inquiry is focused on the application of the dissolution of the universal partnership as an interchangeable legal remedy in order to do justice between parties, by providing contractual remedies to the litigating parties. Foreign jurisdictions such as Botswana, Namibia and Zimbabwe have used the effects of dissolution of the universal partnership in various cases from putative marriages to customary law cases in order to do justice between the parties, although the parties never expressly created a universal partnership. The courts of Botswana and Zimbabwe have applied the consequences of dissolution in a reformative and liberal manner, without being side-tracked by legislative departures and debates, especially in customary law cases. In the leading Namibian equality jurisprudence, the universal partnership has also been employed in order to do justice between litigating parties. The main inquiry is thus concerned with the effects of the dissolution of the universal partnership. The inquiry is thus two-fold, focusing firstly on the departure from the common law as created by the Insolvency Act and secondly on the remedial judicial application of the consequences of its dissolution by foreign courts.

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CHAPTER 1

1 The dissolution of universal partnerships in South African law

1.1 Introduction

The universal partnership in South Africa has managed to secure a very unique niche in our modern multi-cultural pluralistic legal system. The universal partnership is a multi-purpose legal vehicle which finds its application from the context of business law to the reaches of family law. In this research the universal partnership is viewed through multiple lenses, from the historical development and reception of the universal partnership all the way to its modern-day application in our law and that of our neighboring jurisdictions such as Namibia, Botswana and Zimbabwe.

Partnership law in South Africa is uncodified, which means that it is largely unregulated by any specific piece of legislation. For that reason, there are no prescribed formalities for the formation of a partnership contract and it can easily be formed without burdensome statutory regulations.[1] As partnerships in South African law are not creatures of statute, the primary source of partnership law is the common law.

The fact that there is no single piece of legislation dealing with partnerships in particular, does not automatically amount to the conclusion 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. For example, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 include a partnership in their definition of a 'juristic person'. The Firearms Control Act 60 of 2000 as amended by the Firearms Control Amendment Act 28 of 2006 does not include a partnership in its definition of a 'juristic person' anymore and presently only includes a trust. 'Juristic entity' as defined in the Customs Control Act 31 of 2014 includes a partnership. A partnership is included in the definition of 'entity' in 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.

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1 FHI Cassim & MF Cassim 'Partnerships' in FHI Cassim *et al The law of business structures* (2015) 13. See also JTR Gibson *et al South African mercantile and company law* (2003) 241. Although there are no burdensome statutory regulations governing the formation of a partnership, the common law prescribes certain essential elements (*essentialia*) that must be complied with in order to create a legally binding partnership.

From ancient Roman times up until our modern law today, a partnership is still broadly defined as the 'relationship resulting from an agreement or a contract'.[2] From this definition it is clear that a partnership is contractual in nature, as it is essentially based on the agreement between two or more parties to enter into a legally binding partnership relationship or partnership contract.[3] A partnership is defined by French jurist, Pothier as an agreement or contract, where two or more persons 'put, or oblige themselves to put, something in common' with the objective to make therefrom 'in common a lawful profit, whereby they are reciprocally bound to render each other an account'.[4] This correlates with the Roman law definition of a partnership stating that a partnership is a contract whereby two or more persons agree to contribute something towards a common goal for their mutual benefit.[5]

In order to differentiate the partnership contract from other contracts, it is essential that this legal relationship be formed with the joint objective to make a profit.[6] The other essential elements of the partnership contract include the requirements that each party must bring something into the partnership, the business should be carried on for the joint benefit of the partners and that the contract should be lawful.[7] In South African law a partnership contract may be entered into either expressly or tacitly, bearing in mind that the essential elements for the formation of the partnership contract must be complied with.[8]

Three types of partnerships are recognised in our law namely: the ordinary partnership, the extraordinary partnership and the universal partnership.[9] The ordinary partnership refers to a partnership where all the partners are jointly and severally liable for all the debts incurred by the individual partners in the course of the partnership business.[10] The extraordinary partnership is divided into the *en commandite* partnership and the anonymous partnership.[11] The business of the *en commandite* partnership is carried on in the name of

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2 RJ Pothier *A treatise on the contract of partnership: With the civil code and code of commerce relating to that subject in the same order* trans OD Tudor (1854) 1. See also Cassim & Cassim (n 1) 12.

3 Cassim & Cassim (n 1) 13.
Gibson *et al* (n 1) 240.

4 Pothier (n 2) 1.

5 PHJ Thomas *et al Historical foundations of South African private law* (2000) 298.

6 Cassim & Cassim (n 1) 12. Gibson *et al* (n 1) 240.

7 Cassim & Cassim (n 1) 14. Pothier (n 2) 7. Thomas *et al* (n 5) 298. The essential elements for the formation of a partnership are discussed in detail in Chapter 2.

8 Cassim & Cassim (n 1) 13. See also G Wille *et al Wille's principles of South African law* (2007) 1006.

9 L Olivier & M Honiball *International tax – A South African perspective* (2011) 166. See also Cassim & Cassim (n 1) 21.

10 Olivier & Honiball (n 9) 166. Gibson *et al* (n 1) 252.

11 Olivier & Honiball (n 9) 166.

only one of the partners and the identities of the other partners are not disclosed.[12] The liability of the undisclosed partner is limited to the amount contributed to the partnership fund and the undisclosed partner in essence has limited liability.[13] In an anonymous partnership the identity of the anonymous (or silent) partner is kept anonymous and the anonymous partner does not participate in the business of the partnership, although he shares in the profit and loss of the anonymous partnership.[14] In both the *en commandite* and the anonymous partnerships, third parties are unable to sue the *en commandite* or anonymous partner for the debts of the partnership.[15] The liability of these two partnerships differs in that the anonymous partner is liable to his partners for his pro rata share of all the partnership debts where the *commanditarian* partner on the other hand is only liable for the amount of his agreed capital contribution.[16]

According to Roman and Roman-Dutch law the universal partnership is also divided into two types, namely the universal partnership of all property (*societas universorum bonorum*) and the universal partnership of all profits (*societas quae ex quaestu veniunt*).[17] A universal partnership may extend beyond commercial undertakings and include contributions that are not of a profit-making nature that include support, care, and maintenance of the common home or a non-profit contribution to the family life.[18] 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 dealt with the recognition, application and dissolution of universal partnerships.[19] The recognition of a universal partnership is most common in cases where the

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12 Olivier & Honiball (n 9) 166. Gibson *et al* (n 1) 252.

13 As above.

14 Olivier & Honiball (n 9) 166-167. Gibson *et al* (n 1) 252.

15 Olivier & Honiball *et al* (n 9) 167. An anonymous partner is, however, liable for his full share of the debts and losses to the disclosed partners.

16 WA Joubert & TJ Scott *The law of South Africa* Volume 19 (1983) 367.

17 Olivier & Honiball (n 9) 166. Thomas *et al* (n 5) 300. Gibson *et al* (n 1) 246.

18 Cassim & Cassim (n 1) 22. Although the joint objective to make a profit is an essential element of the universal partnership, non-profit contributions may nonetheless contribute to the universal partnership that extends beyond commercial activities.

19 See for example *Bergman v Master of the High Court* 2015 JDR 0281 (GJ); *DA v AA* 2015 JDR 2611 (GJ); *CG v HG* 2014 JDR 1650 (GP). See also Cassim & Cassim (n 1) 21 which mentions that 'this type of partnership has neither fallen into disuse nor is it an unimportant type of partnership'.

surviving partner wishes to inherit from the deceased partner.[20] The recognition of a 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 of insolvency law.[21]

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.[22] The recognition of a universal partnership gives rise to various rights and duties (liabilities or obligations) that exist between the partners *inter se* and between the partners and third parties. Upon the determination that a universal partnership exists or existed, the dissolution thereof is usually the next issue to be determined by the court. This point is clearly illustrated by case law in the following chapters.

Any partnership, including a universal partnership is automatically dissolved[23] upon the death a partner,[24] insolvency of the partnership or any one of the partners,[25] or via mutual agreement.[26] Other causes and grounds of dissolution include effluxion of time, change of membership, alien enemy, frustration, notice of dissolution, court order or the determination that the partnership business is only carried on at a loss.[27] The grounds and consequences of dissolution on partnerships in general and specifically the universal partnership are discussed in detail in the following chapters. The most important consequence of dissolution for

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20 See for example *Bergman* (n 19).

21 See for example the Insolvency Act 24 of 1936 & the Administration of Estates Act 66 of 1965. According to Cassim & Cassim (n 1) 37 a partnership is liquidated, which 'entails the realisation of partnership assets, payment to creditors, return of capital to the partners and the distribution of surplus assets among the partners'.

22 See for example *Butters v Mncora* 2012 2 ALL SA 485 (SCA). Hereafter *Butters*.

23 The dissolution of a partnership should not be confused with its liquidation or winding-up. See Cassim & Cassim (n 1) 37 according to which 'the partnership relationship is not terminated by dissolution' and that the dissolution of a partnership is usually, although not necessarily, the first step towards the liquidation of the partnership. The partnership relationship is not terminated by dissolution and continues until its liquidation.

24 Cassim & Cassim (n 1) 18. Because there is a change in the partners of the partnership and a partnership does not enjoy perpetual succession. Death of both partners will also dissolve the partnership.

25 Cassim & Cassim (n 1) 38. See also *Tobias & Co v Woolfe Brown* 1915 (OPD) 60 60-64; *Cassim v The Master* 1961 4 SA 624 (D) 623 and *Ex parte Buttner Brothers* 930 (CPD) 138 138-144.

26 Cassim & Cassim (n 1) 37. See also *Herbst en 'n Ander v Solo Boumateriaal* 1993 1 SA 397 (T) 399H.

27 Cassim & Cassim (n 1) 37-41. Gibson *et al* (n 1) 253.

purposes of this introductory discussion is that upon the dissolution of a partnership, the partnership does not possess any separate legal personality.[28]

What this means is that the partnership is not a separate legal entity that is distinct from the partners who compose it.[29] As a partnership is generally not recognised as a separate legal entity, the debts of the partnership are the legal debts of the partners and the assets of the partnership are indistinguishable from the assets of the partners.[30] Upon the dissolution of the partnership, the partners become jointly and severally liable for partnership debts.[31] For example, if two partners in a partnership, contract on behalf of the partnership and incur debts, the partnership cannot be held liable as a separate legal entity for those debts, but the partners will be held liable.

An exception does, however, exist to this general rule that a partnership does not possess any separate legal personality. This exception holds that the separate legal personality of a partnership is deemed to exist, according to statute in the field of insolvency law. Hahlo and Khan refer to a 'juristic ghost' which accurately describes statutory instances, such as insolvency, when a partnership is treated as a separate legal entity and deviates from the general common-law rule that a partnership does not enjoy separate legal personality.[32]

Except for insolvency law, where the separate legal personality of the partnership is recognised only after the dissolution of the partnership, the separate legal personality of a partnership may be recognised during the subsistence of the partnership. This may be for purposes of litigation, taxation and in accordance with common law exceptions.[33]

1.2 Problem statement or inquiry

The universal partnership and the consequences of its dissolution do not necessarily pose a problem, but rather an inquiry. The main research question or inquiry of this research is concerned with the consequences that exist upon the dissolution of the universal partnership. As mentioned, the main consequence of dissolution is that the universal partnership does not enjoy separate legal personality, except for insolvency.

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28 CG Van der Merwe *et al Introduction to the law of South Africa* (2004) 366. Thomas *et al* (n 5) 300.

29 Cassim & Cassim (n 1) 18.

30 As above.

31 Cassim & Cassim (n 1) 18. See also Gibson *et al* (n 1) 249.

32 Cassim & Cassim (n 1) 18: Cassim & Cassim refer to Hahlo and Khan's description of a 'juristic ghost'.

33 These exceptions only apply during the subsistence of the partnership and not upon dissolution like insolvency. Cassim & Cassim (n 1) 19-20.

The impact of the 'juristic ghost' exception and the legislative departure from the common law upon the dissolution of the universal partnership due to insolvency is compared to the dissolution of the universal partnership due to other reasons. For this reason, the field of insolvency law is researched in more detail than the other grounds of dissolution of the universal partnership, as the first inquiry. The second inquiry is focused on the application of the dissolution of the universal partnership as a legal remedy in order to do justice between parties, by providing contractual remedies to parties pleading and proving the existence of the universal partnership.

The main inquiry is thus concerned with the consequences of the dissolution of the universal partnership. The inquiry is two-fold, focusing firstly on the departure from the common law as created by the Insolvency Act 24 of 1936 (hereafter the Insolvency Act) and secondly on the remedial judicial application of the consequences of its dissolution.

1.3 Conclusion

The focus of this research is on partnerships and specifically universal partnerships that extend beyond commercial activities and the consequences of their dissolution.[34] A universal partnership may include partners that are cohabiting, engaged, married, in a civil union, customary marriage, putative marriage or unmarried. Even though the universal partnership is governed as a business entity based on contract law, it may extend beyond business and commercial law, as a partnership is generally not regarded as a legal entity separate from those who compose it, except for insolvency.

The issue of universal partnerships and specifically the consequences upon dissolution (including the rights and duties of the partnership and the partners) is a complicated one, one that has not yet received sufficient academic or judicial attention.

The goal of my research is therefore to indicate the relevance, implications and consequences of the dissolution of a universal partnership and prove that the universal partnership offers remedial advantages upon its dissolution as it may extend beyond commercial undertakings. A further goal of my research is to indicate that, despite conflicting approaches to the consequences of the dissolution of the universal partnership, a reformative, transformative and more liberal approach may be found without being side-tracked by

[34] Cassim & Cassim (n 1) 23 notes the universal partnership of all property extending beyond commercial undertakings still forms part of South African law. Furthermore, the universal partnership of all profit is 'not necessarily confined to a specific business activity'.

legislative departures and debates. These advantages held by the universal partnership contract, especially upon dissolution, are illustrated by foreign case law, where the universal partnership is frequently utilised in order to do justice between litigating parties.

Foreign jurisdictions such as Botswana and Zimbabwe have applied the consequences of a dissolved universal partnership to customary law cases in order to do justice between the parties, although the parties never expressly created a universal partnership. This reformative approach used by foreign jurisdictions may indicate a much more versatile and remedial application of the universal partnership, that extends beyond the 'statutory ghost' exception and the seemingly conservative approach largely followed by our judiciary in cases dealing with the dissolution of the universal partnership.

I intend to prove that the consequences of dissolution of this ancient contract form may provide very beneficial legal remedies to litigating parties and provide the courts with an opportunity to do justice.

1.4 Research questions and sub-questions

a) What are the grounds for dissolution of the universal partnership in South Africa?

b) What are the consequences of the dissolution of the universal partnership in South Africa?

- How does the Insolvency Act's creation of separate legal personality upon insolvency depart from the common law?
- How does Botswana, Namibia and Zimbabwe's legislation on partnerships and insolvency compare to that of South Africa?

c) How are the consequences of the dissolution of the universal partnership employed or utilised in Botswana, Namibia and Zimbabwe?

d) What is the relevance of this ancient Roman law contract in modern day multi-cultural and pluralistic legal systems?

1.5 Points of departure

a) The primary source of South African partnership law is the common law, as it is not dealt with by any piece of comprehensive legislation. The South African common law

in the context of partnerships is largely based on Roman-Dutch law which operated in Holland during the 17th, 18th and 19th centuries.[35]

b) Our common law which has been significantly influenced by the work of French jurist Pothier. 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.[36]

c) Although a partnership may be seen as an entity with which may be contracted in its own name, South African courts usually follow an aggregate approach (as opposed to an entity approach) when dealing with partnerships. This means that a partnership is usually not treated as an entity in its own right, but rather as an aggregate of persons.[37]

d) The causes and grounds for dissolution of the universal partnership as found in Roman law, old French law and modern law include: effluxion (or expiration) of time; the extinction of the thing which constitutes the object of the partnership; the thing which produces fruits perishes; determination that the partnership is only carried on at a loss; death of a partner; mutual consent; resignation; alien enemy; court order; and insolvency.

e) Upon the dissolution of a partnership each partner becomes jointly and severally liable for the debts of the partnership,[38] but this does not include the possibility of insolvency. What this means is that when the partnership is dissolved for reasons other than insolvency**,** each partner will be jointly and severally liable for partnership debts which may be claimed from each partner individually.[39]

f) The preferred aggregate approach to partnerships is altered by the Insolvency Act's entity approach to partnerships upon the dissolution thereof, as the Insolvency Act deviates from the common law by creating deemed separate legal personality for a partnership upon insolvency.

g) Insolvency (of any partner[40] or the partnership itself) is not only a ground for dissolution of a partnership but also provides an exception to the general rule that a partnership does not enjoy separate legal personality.[41]

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35 Olivier & Honiball (n 9) 167.

36 As above.

37 JJ Henning *Perspectives on the law of partnership in South Africa* (2014) 150.

38 Cassim & Cassim (n 1) 21. Olivier & Honiball (n 9) 167.

39 *Standard Bank of SA Ltd v Lombard* 1977 2 SA 808 (W) 813: Before the assets of individual partners may be attached in execution, execution must first be levied on partnership assets.

40 However, when only one partner is insolvent (and not the partnership itself) and deceased, sec 34 of the Administration of Estates Act deals with the administration of the deceased's insolvent estate without

h) Legislation of Botswana, Zimbabwe and Namibia deals with partnerships to a very limited extent. The insolvency legislation of Botswana, Zimbabwe and Namibia is similar to that of South Africa, save for a few exceptions. The insolvency legislation of these jurisdictions thus also provide for a departure from the common-law aggregate approach to partnerships in a similar manner as the South African insolvency legislation.

i) Foreign jurisdictions such as Botswana, Namibia and Zimbabwe have used the consequences of the dissolution of the universal partnership in various cases of putative marriages to customary law cases in order to do justice between the parties, although the parties never expressly created a universal partnership.

1.6 Hypothesis

Upon adjudicating matters dealing with universal partnerships, our courts have been eager to acknowledge the rights of partners with regards to either an insolvent estate, a deceased estate or upon dissolution of the universal partnership for other reasons.[42] As observed in South African case law, our courts are seemingly hesitant in their assignment of duties or liabilities to the partners upon dissolution of the universal partnership.[43] The South African courts have furthermore been reluctant in engaging in debates as to the legislative departure from the common law and the consequences that this legislative departure has on the dissolution of the universal partnership.

The lack of separate legal personality of a partnership is described by some academics as a 'remarkable defect'.[44] This branding of a 'remarkable defect' may imply that an entity approach is more advantageous than the common-law aggregate approach to partnerships and

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the same necessarily being sequestrated. When dealing with an insolvent universal partnership and death of one of the partners, sec 34 of the Administration of Estates Act is not applicable.

41 Gibson *et al* (n 1) 565. CJ Nagel *Commercial law* (2011) 503-504. Upon liquidation of the partnership estate, the private estates of each individual partner are sequestrated simultaneously but separately. Partnership creditors must prove their claims against the partnership estate and the private creditors of each partner must prove their private/individual claims against the individual/private estate of such partner. Thus, the private estate of a partner cannot be held liable for partnership debts upon sequestration. Cassim & Cassim (n 1) 18.

42 Such as one of the partners claiming that he/she intends to terminate the partnership for reasons excluding insolvency or death, see *Vermeulen v Marx* 2016 JDR 1435 (GP).

43 In a minority of cases the courts have turned their attention to the assignment of duties. See for example *Botha NO v Deetlefs* 2008 3 SA 419 (N), where the court ruled that upon death a partner is not entitled to remain in possession or in occupation of partnership assets in the absence of a bequest or agreement which states the contrary. The court in *Ponelat v Schrepfer* 2012 1 SA 206 (SCA) ordered that the costs of the liquidator be borne by the parties in proportion to their shares in the partnership estate.

44 Cassim & Cassim (n 1) 18.

the liability of partners. It is debatable whether or not the Insolvency Act's deviation[45] from the common law and creation of a 'juristic ghost' upon dissolution is preferable in the context of delivering just and equitable decisions.

Existing approaches to the liability of the universal partners upon dissolution and the impact of the 'juristic ghost' exception may provide some answers. The insolvency legislation of foreign jurisdictions such as Namibia, Zimbabwe and Botswana correlate with that of South Africa, in that these jurisdictions also follow the 'juristic ghost' exception upon insolvency. The courts of Namibia, Zimbabwe and Botswana have tried, to varying degrees of success, to decide issues associated with the consequences of the dissolution of the universal partnership. These foreign jurisdictions apply the concept of a universal partnership in order to provide litigating parties with contractual remedies associated with the dissolution of the universal partnership.

1.7 Research methodology

As mentioned above, universal partnerships and the consequences of their dissolution do not necessarily pose a problem, but rather an inquiry as to the consequences of the dissolution of the universal partnership and the remedial application of this ancient contract form.

To attempt a response to this inquiry, a comparative study of universal partnerships, the grounds and consequences of dissolution and in particular the implications of the 'juristic ghost' exception, is required. Furthermore, the remedial application of the universal partnership as found in foreign case law is researched, in order to indicate how the dissolution of the universal partnership is judicially utilised as a remedy in order to do justice between litigating parties.

Domestic and foreign legislation and case law are explored in order to illustrate the consequences of dissolution and the balancing of the rights and duties of the partners and creditors.

Theory from the law on partnership, contract and insolvency is used, as dictated by the South African common law, text books, legislation, case law, various academic articles and foreign law. The methodology of this research is based on a historic as well as comparative study.

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[45] In *Michalow NO v Premier Milling Co Ltd* 1960 2 SA 59 (W) 61-63, Marais J mentions that the Insolvency Act has 'plainly intended to alter the course of the common law and to treat a partnership as having a separate estate and as being in the same position as any other debtor'.

The law of insolvency's approach to universal partnerships and the liabilities of a partner for partnership or private debts will be researched and compared to the liability of the partners upon the dissolution of the partnership for other reasons. The information gathered on the law of insolvency's approach is analysed and compared to the approach followed in the common law.

Foreign law is researched by firstly looking at foreign case law and thereafter legislation. The recognition of the universal partnership as well as the remedial application of its consequences of dissolution as found in foreign case law is discussed first. Foreign legislation is researched and discussed in order to explore the extent to which the legislature of Botswana, Namibia and Zimbabwe regulates partnerships in general and insolvent partnerships in particular. This research is analysed and compared, by contrasting the different approaches from foreign jurisdictions and emphasising the differences and similarities between the foreign-law approaches. Foreign law is furthermore employed to illustrate the liberal and transformative approach followed by these foreign jurisdictions in order to ultimately do justice between the parties.

1.8 Choice of foreign law

1.8.1 Botswana, Namibia and Zimbabwe

South Africa borders with Namibia, Botswana and Zimbabwe in the North, and with Swaziland and Mozambique in the North East. South Africa, Botswana, Namibia and Zimbabwe all have mixed legal systems.[46] Zimbabwe has a dual legal system, comprised of general law (Roman-Dutch common law and legislation) and customary law.[47] Zimbabwe also retained a large part of South African private law which it inherited from its predecessor, Southern Rhodesia which attained independence from Britain in 1980.[48] Botswana inherited most of its private law from the Cape of Good Hope; therefore it shares a common law heritage with South Africa.[49]

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46 Thomas *et al* (n 5) 7. V Zimmermann *et al Southern Cross: Civil law and common law in South Africa* (1996) 3.

47 Sec 192 of the Constitution of Zimbabwe Amendment Act 20 of 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 sec 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.

48 Zimmermann *et al* (n 46) 4. See also SADC website: https://www.sadc.int/member-states/ (accessed 10 September 2019).

49 Zimmermann *et al* (n 46) 3.

Following its independence, Botswana was divided into 13 regions as determined by the Delimitation Commission and proclaimed in March 1992.[50] 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.[51] The Constitution of Namibia makes express provision for customary law and common law to operate in their pluralistic legal system.[52]

Botswana, Namibia, Zimbabwe and South Africa are all member States of the Southern African Development Community (SADC) which was established in1992.[53] The vision of SADC includes freedom, social justice, peace and security for the people of Southern Africa. In order to fulfil the mission of SADC the Member States are guided by the principles, as stated in article 4 of the SADC Treaty. These guiding principles include solidarity, peace, human rights, democracy, equity, peaceful settlement of disputes and the rule of law.[54]

In very recent case law these three countries recognise the existence of universal partnerships and Pothier's influence on partnership law. According to these cases, 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 the litigants with the contractual remedies offered by the universal partnership upon its dissolution. Furthermore, the legislation of these countries may provide for valuable insight with regards to liability of partners upon insolvency, the deemed separate legal personality of a partnership, the dissolution and ultimate termination of a universal partnership.

These three countries are researched in order to indicate valuable legislative and 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,

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50 See also SADC website (n 48).

51 Zimmermann *et al* (n 46) 3.

52 The Constitution of the Republic of Namibia, 1990 art 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'.

53 See also SADC website (n 48). SADC is a Regional Economic Community comprising of 16 member states and is committed to regional integration and poverty eradication within Southern Africa through economic development and ensuring peace and security.

54 See also SADC website (n 48).

this close geographical proximity may imply that universal partnerships could easily extend across these country borders.

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.

1.9 Delimitations of study

My research will not focus on the domestic partnership or cohabiting relationships, nor the intended legislation thereon, as the primary focus of the research is universal partners that have a valid universal partnership, whether it be tacit or express. This research will not consider the requirements for a valid marriage, civil union or other religious marriages, although references are made to them in the context of the universal partnership and the utilisation of its remedial consequences upon dissolution. This research will not include discussions on the utilisation of the universal partnership in order to claim maintenance, as this is not a consequence of its dissolution. This research will not include a comprehensive summary of South African cases that have dealt with universal partnerships in the context of marriage and cohabitation. Even though cohabiting universal partnerships may be concluded between married persons or persons in a valid union, the universal partnership should be carefully distinguished and differentiated from civil marriages, civil unions, customary marriages and putative marriages or unions.

In Chapter 4, reference is made to customary law marriages (or unions), whether they are monogamous or polygamous. This research is not focussed on the validity requirements of a valid customary marriage and subsequent marriages, although they are shortly discussed in order to indicate how the universal partnership is relevant to valid, unregistered or putative marriages.

Although the universal partnership has been utilised in the case where there is a breach of promise to marry, it will not form part of this research.[55] It is worth mentioning that the breach of promise to marry no longer permits a claim for prospective loss, as ruled by the court in *Nhlapo v Zimu.*[56]

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55 See *Sepheri v Scanlan* 2008 1 SA 322 (C).

56 (2016/8478) 2017 ZAGPJHC 236 (1 September 2017).

1.10 An overview of Chapters

Chapter 2 – The partnership contract and the universal partnership

This Chapter introduces the reader to the world of partnership law, with an introductory historical overview of partnerships. The origin of the partnership or *societas* in Roman law and old French law is discussed in the introduction of this Chapter, with a short overview of the works of Gaius, Van Leeuwen, De Groot, Felicius-Boxelius, Voet, Van der Linden and Pothier. The *essentialia* for the partnership is discussed thereafter with reference to Voet, Pothier and Roman law. A short discussion on the rights and duties of the partners in general is then briefly discussed, where after the juristic nature of the partnership is explored with reference to the general rule and the exception to the general rule.

The universal partnership in particular is explored in greater detail in the second part of this Chapter, with reference to the two types of universal partnerships and the *essentialia* thereof. The unique nature of the universal partnership, including a short discussion on the rights and duties of the universal partners are explained. A detailed discussion on the historical and modern causes and grounds for dissolution are subsequently discussed, where after the consequences of dissolution and liability are explored with reference to Ulpianus, Pothier, old French law, Roman law and modern law. This Chapter concludes with a short discussion on the modern consequences of dissolution and liabilities of the partners.

Chapter 3 – Universal partnerships, dissolution and insolvency

In this Chapter the Insolvency Act and its regulation of partnerships is investigated in detail. This Chapter engages with the provisions of the Insolvency Act regulating the dissolution of the universal partnership upon insolvency. The exception created by the Insolvency Act to the general rule that a partnership does not enjoy separate legal personality is discussed in detail. The dual-priorities rule, the aggregate theory and the entity theory are explained in this Chapter with reference to the work of JJ Henning and case law. The judicial application of the Insolvency Act, in cases dealing with universal partnerships, is explored, as to indicate the consequences of dissolution due to insolvency. In the conclusion of this Chapter the legislative departure from the common law is summarised.

Chapter 4 – Foreign legislation

In this Chapter the legislation of Botswana, Zimbabwe and Namibia regulating partnerships is investigated and summarised. These provisions of foreign legislation are compared to that

of South Africa as to indicate the similarities and differences. Although these pieces of legislation may seem redundant, they cannot be overlooked, as legislation is one of the main sources of law. The legislation of these jurisdictions in essence confirms the general rule, that a partnership does not enjoy separate legal personality.

Chapter 5 – Foreign case law

This Chapter engages with the judicial application of the dissolution of the universal partnership as a remedy. The case law of Botswana, Zimbabwe and Namibia is discussed in this Chapter in order to illustrate the utilisation of the universal partnership in cases of putative marriages, cohabiting persons and customary law cases. Some short comparative references to South African customary law are made in the context of the universal partnership. This Chapter indicates how foreign jurisdictions are not deterred by the common law, legislative or mercantile views of the partnership contract and substantively engage with the consequences of the dissolution of the universal partnership in order to do justice between litigating parties.

Chapter 6 – Reflection

This Chapter reflects on the previous chapters with an overview and conclusion. The universal partnership is a unique common-law creature that offers valuable benefits during its subsistence and especially upon its dissolution. The dissolution of the universal partnership upon insolvency is complex and indicates the versatility of the consequences thereof upon its dissolution. Although much debate surrounds the interchangeable approaches followed by the courts when using this contract in cases of putative marriages, cohabitation and customary law, it is nonetheless applied as a remedial measure. The difference between an intimate and commercial universal partnership as well as the drawbacks of using the universal partnership in cohabitation cases are shortly discussed in this chapter.

Chapter 7 – Conclusion

This partnership form has managed to survive from ancient Roman times, up until today and will remain alive, relevant and important for a long time to come. This short Chapter provides the final conclusion to the dissertation together with short suggestions as to the essence of the lessons to be learnt from the three foreign jurisdictions.

CHAPTER 2

2 The partnership contract and the universal partnership

2.1 Introduction

Determining what constitutes a partnership between two or more persons is not always an easy task, as differing definitions are often quoted to our courts, by litigants.[1] In order to understand the universal partnership and its relevance in the South African common law today, it is important to firstly pay attention to the historical development and reception of the partnership contract or *societas*, as observed in Roman law and old French law,[2] as the South African partnership law is rooted in the *societas* of the *ius commune*.[3]

As mentioned in Chapter 1 South African partnership law is largely based on our Roman-Dutch common law, which has been significantly influenced by the work of Van Leeuwen, De Groot, Felicius-Boxelius, Voet, Van der Keessel, Van der Linden and Pothier.[4] The South African courts 'virtually exclusively rely on the work' of Pothier[5] despite the availability of other works, as mentioned in Chapter 1.

In order to understand why our courts favour Pothier's work above that of other jurists, a short historical overview of the origin and reception of the partnership agreement is crucial, before discussing the *essentialia* of a partnership and the universal partnership in particular.

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1 See *Uys v Le Roux* 1906 TS 429 432.

2 In this context old French law refers to the 19th century French law, Code Napoléon or *Code civil des Français*. See also PHJ Thomas *et al Historical foundations of South African private law* (2000) 58: The codifications of Napoleon 1756-1811 were very successful and had lasting effect. Despite the fact that the French codifications such as the *Code Civil* of 1804, contained a blend of Roman law and old French law, these French codes largely determined legal development through the 19th century. See also JJ 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) 77 *THRHR* 427 add page no of quote: 'It is clear that Roman law has known this type of [universal] partnership from the second century BC until Justinian's codification.'

3 R Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1996) 473. See also Henning (n 2) 439.

4 L Olivier & M Honiball *International Tax: A South African perspective* (2011) 167. Zimmermann (n 3) 472. See also JJ Henning *Perspectives on the law of partnership in South Africa* (2014) 7. See also JJ Henning 'The uncovering of a neglected source of the *ius societatum* and the validity of universal partnerships in the South African law' (2006) 40 *TCBL* 16.

5 Olivier & Honiball (n 4) 167: 'The South African courts have however tended to base their decisions regarding partnership issues on the writings of Pothier above all others.' See also Henning *Perspectives* (2014) (n 4) 7: 'The writings of the French jurist, Pothier, influenced the Roman Dutch law of partnership to some extent and the South African courts have in the past viewed Pothier as an invaluable source of partnership law'.

2.2 Historical overview of the partnership contract

The earliest form of partnership agreements is presumably thought to be in the *consortium ercto non cito* or the undivided estate of heirs who inherited the family assets upon the death of the *paterfamilias.*[6] The presumed origin of the partnership contract is thus presumably rooted in the fraternal relationship upon the death of the *paterfamilias.* The earliest form and historical basis of the *societas* or partnership agreements in Roman law can be drawn from the pre-classical (*olim*) law.[7]

The classical jurist Gaius lived during the second century AD.[8] *Institutes* was written by Gaius about 160 AD as a textbook for law students, which today constitutes one of the most important sources of classical and post-classical Roman law.[9] *Institutes of Gauis* is the only known systematisation of Roman law and was used by Justinian and Hugo de Groot in their own writings.[10]

Gaius describes this contract as one based on the partnership model of the brothers of an undivided *familia*.[11] In the pre-classical Roman law the *consortium* and classical *societas* refered to the *consortium* which was created by the parties who wished to pool their assets together.[12] The classical *societas* in Roman law was based on the formless consent of the *socii*.[13] This *consortium familia* or *societas ercto non cito* was later imitated by non-heirs who created their own artificial *societas* or consortium which was allowed by means of the *certa legis actio,* an ancient formal type of procedure.[14]

The *certa legis actio* procedure was followed up by the purely consensual *societas*, where the parties pooled together their property in order to pursue a common purpose.[15] As the partnership is consensual in nature, the *affectio societas* or intention to form a partnership

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6 Thomas *et al* (n 2) 299. Zimmermann (n 3) 452.

7 Zimmermann (n 3) 452. Reference is made to Gaius, reference to family law and the death of the *paterfamilias*.

8 Thomas *et al* (n 2) 32.

9 As above.

10 As above.

11 JJ Henning 'Perspectives on the universal partnership of all property (*societas universorum bonorum*) and the origin and correction of a historical fault line – Part 1' (2014) 77 *THRHR* 234.

12 Zimmermann (n 3) 450-451. See also Henning (n 11) 234.

13 Zimmermann (n 3) 454. See also Henning (n 11) 234.

14 Thomas *et al* (n 2) 299. Zimmermann (n 3) 450-451.

15 See also Henning (n 11) 235: Henning notes that 'by this mere consensus, a *communio* was formed and the property of the partners became joint property' and that there is 'no doubt that the *societas universorum bonorum ex consensu* was still known in classical and post-classical times'. See also Henning (n 11) 236.

was one of the *essentialia* in Roman law for the valid formation of a partnership.[16] It is interesting to note that the ancient *consortium* and *societas ercto non cito* were originally not dissolvable, but this later changed as the *societas universorum bonorum* which could be dissolved.[17]

Throughout the classical and post-classical law this *societas* remained one of the basic types of partnerships and retained certain of the characteristics of the old *consortium*.[18] The *societas* is one of the four consensual contracts in Roman law.[19] In Roman law, the four broad types of partnerships were the *societas unius rei; societas unius negationis; societas quae ex quaestu veniunt*; and the *societas omnium bonorum.*[20]

Simon van Leeuwen (1625-1682) uses the idea of a partnership as a lens through which to view the community of property, rather than considering the universal partnership in the context of any business undertakings.[21] Van Leeuwen does not discuss the partnership outside the scope of the community of property and evidently it does not appear in his writings.[22] It is suggested that the appropriate approach to Van Leeuwen's work is provided by Hugo de Groot (1583-1645); he supports the view that universal partnerships of all property between partners were forbidden in Holland, except between spouses.[23]

According to Van Leeuwen, the universal partnership of all property may be formed either expressly or tacitly in the context of marriage or a putative marriage. It is suggested that to extend Van Leeuwen's work on universal partnerships beyond the context of marriage and putative marriage would amount to an application of his work to a context which was not contemplated in his writings.[24]

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16 Thomas *et al* (n 2) 298.

17 See also Henning (n 11) 236.

18 See also Henning (n 11) 235: 'The old *consortium* disappeared at the latest at the end of the Republic'.

19 Zimmermann (n 3) 451.

20 Thomas *et al* (n 2) 300. In *Schrepfer v Ponelat* 2010 ZAWCHC 193 para 29 the court noted that a universal partnership is akin to the matrimonial property regime governing marriages in community of property. See also HR Hahlo *The South African law of husband and wife* 5th Edition (1985) 157-158: 'Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares.'

21 BJ Rule 'A square peg in a round hole? Considering the impact of applying the law of business partnerships to cohabitants' (2016) 27 *Stell LR* 610 610-611. See also JP van Niekerk & G van Niekerk 'A tale of two translations: Van Leeuwen and Van der Linden and the application of Roman-Dutch law at the Cape in the 1820s' (2018) 24 *Fundamina: A journal of legal history* 174.

22 Rule (n 21) 611.

23 Rule (n 21) 612. Thomas *et al* (n 2) 57: De Groot laid the foundation for modern natural law and differentiated between natural law and divine law. See also Henning (n 2) 428.

24 Rule (n 21) 612.

Like Van Leeuwen, the work of De Groot on universal partnerships is limited to the universal partnership in the context of marriage and De Groot it seems did not extend his discussions on the universal partnership outside the scope of the marriage.[25] It is reasonable to interpret the opinion of Van Leeuwen as being that the operation of the universal partnership is limited to the context of marriage and the marital community of property.[26] On the other hand, Johannes Voet (1673-1743), Robert Joseph Pothier (1699-1772) and Van Der Linden (1756-1835) explored the universal partnership within the field of contract and extended their discussions as to include the commercial context of the universal partnership.[27]

Felicius-Boxelius is described as a lesser known source on partnership law due to the fact that the works were not translated until recently.[28] The work of Felicius-Boxelius was first cited as an authority by the court in the *Butters* case.[29] Italian jurist Hector Felicius (1589-1623) published a number of editions of the work *Tractatus de Societate* in his lifetime.[30] Subsequent annotations were made by his son, Angelus Felicius.[31] Dutch scholar and legal practitioner Hugo Boxelius made further annotations which were first published in 1666.[32] These annotations formed part of an edition entitled *Tractatus desidetratissimus de communion seu societate deque lucro item ac quaestu, damno itidem ac expensis.*[33] This work is referred to in our jurisprudence as Felicius-Boxelius.[34] Although Hector Felicius did not live during the evolution of Roman-Dutch law in the 17th century the main text of Felicius-Boxelius and the notes by Boxelius contain a large number of references to Roman-Dutch sources such as Van Leeuwen and De Groot.[35]

Felicius-Boxelius explored the law of partnership in great detail and specifically the *bonorum* which was described as 'a partnership involving all the assets'.[36] Felicius-Boxelius pinpoints two grounds by which consensus is declared and a partnership is formed, namely:

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25 As above.
26 As above.
27 As above
28 Rule (n 21) 613. CN Jorna 'The legal nature of partnerships' (1994) 21 *Transactions of the Centre of Business Law* 17. University of London (con) Institute of Advanced Legal Studies (con), Counselex Global (Organization) (con) *ICCLJ* 3 (2001) 428. See also Henning (2006) (n 4) 29, where he notes that Felicius-Boxelius 'contains a most valuable and more in-depth discussion of the problems relating to partnership capital than Pothier's *Traité du Contrat de Société* in which much is left unsaid on other important aspects'.
29 *Butters v Mncora* 2012 4 SA 1 (SCA) 13. Hereafter *Butters*.
30 Rule (n 21) 613. See also Henning (2006) (n 4) 24.
31 Rule (n 21) 613.
32 As above
33 As above.
34 As above.
35 DH Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 345.
36 Rule (n 21) 613. Henning (2006) (n 4) 27.

words and conduct.[37] These two grounds or causes have been interpreted by various jurists to mean express and tacit. It is interesting to note that Felicius-Boxelius supported the view that a partnership agreement involving all assets could be formed tacitly, with the caveat that three requirements or prerequisites had to be met, namely: the parties must live together; there must be sharing of profits; and lastly there must be a freedom of the parties from rendering accounts to each other.[38]

In addition to these three requirements, Felicius-Boxelius further suggested that the partners should have been cohabiting for at least ten years in order to satisfy the first requirement.[39] Felicius-Boxelius noted that as a universal partnership involves all property, everything that is acquired legitimately must be contributed.[40] If the parties fail to contribute everything, no universal partnership will come into existence, as a partnership involving all the assets can never be presumed where the partners failed to contribute everything.[41] Felicius-Boxelius observed that in the instance that it is clear that unequal contributions have been made and both of the partners do not engage in commercial activities or only one partner does, it cannot be said that a partnership of all assets have been created.[42] Accordingly, a proper understanding of Felicius-Boxelius suggests that a partnership of all assets may be formed tacitly, if the three requirements have been met and that the partners should both contribute everything and must be involved in commercial activities.[43]

The *Commentarius ad Pandectas* of Voet is described as being a complete review of the existing Roman-Dutch law at that time.[44] The consequence thereof is that Voet is presumably the most cited Roman-Dutch authority in South African law.[45] Voet's discussion on partnerships starts with a clear distinction between express and implied partnerships. Voet explains that not all instances of community of property are considered to be partnerships and notes that co-ownership may be dealt with distinct form partnership law. In order to illustrate

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37 Rule (n 21) 613.

38 Rule (n 21) 613. Henning (n 11) 241.

39 Rule (n 21) 614. See *Butters* (n 29) 16 where the court referred to following statement by Felicius-Boxelius (10.17) (referred to by JJ Henning *Law of partnership* (2010) 28): 'I would like to add that for this type of contract to be presumed there are three interlinked prerequisites; namely cohabitation, sharing of profits and freedom of accounting to each other.' The court in para 17 declined the invitation to accept this statement as a part of our law.

40 Rule (n 21) 614.

41 Rule (n 21) 614. Henning (n 11) 241-242.

42 Rule (n 21) 614.

43 As above.

44 Rule (n 21) 614. Henning (2006) (n 4) 30: According to Henning, Voet refers to Felicius quite often in his discussion of the law of partnership in his *Commentarius ad Pandectas.*

45 Rule (n 21) 614, with reference to WJ Horsten *et al Introduction to South African law and legal theory* (1980) 179-180.

this, Voet mentions the joint inheritance and buying shares in the same thing separately without knowing.[46] Voet's requirements for a partnership are similar to those later set out by Pothier.[47] On the formation of the universal partnership, Voet states that this agreement cannot be entered into by implied consent and circumstance.[48] Voet is therefore of the opinion that the *bonorum* cannot be entered into tacitly.[49] Voet did, however, acknowledge the view of De Groot that a universal partnership of all goods, both future and present, had already been discounted in Holland, except between spouses by force of statute.[50]

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.[51] 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.[52] *Traité du Contrat de Société* was translated and introduced into the Roman-Dutch law by Van Der Linden.[53] Van der Linden also wrote about the law of partnership in his *Regsgeleerd Practicaal en Koopman's Handboek (Boek IV, Afdeeling I. SS XI sqq)* in which he heavily relied on Pothier's *Traité.*[54]

In *Traité du Contrat de Société* Pothier starts by drawing a clear distinction between the idea of a partnership and community.[55] Reference to community is to be understood in the context of a community of property. Pothier explains that although a 'community' and partnership contract may exist simultaneously, they are not the same thing.[56] Pothier notes that upon the execution of a contract of partnership, a community is formed.[57] An example of a community which exists without a partnership contract is for example a legacy that has

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46 Rule (n 21) 614.

47 As above.

48 As above.

49 Rule (n 21) 615. See *Butters* (n 29) 15: 'What the historical research published in 1980 revealed, however, was that De Groot and Voet were contradicted by others, such as Pothier and Van Leeuwen.' See also JT Pretorius *et al Student case book on business entities* 3rd Edition (2004) 4.

50 Rule (n 21) 615.

51 Rule (n 21) 615. The importance of Pothier in South African law was emphasised by the Appellate Division in *Robson v Theron* 1978 1 SA 841 (A).

52 Olivier *et al* (n 4) 167.

53 Rule (n 21) 615.

54 Zimmermann (n 3) 474. See also van Niekerk *et al* (n 21). Henning (2006) (n 4) 21.

55 Rule (n 21) 615. Pothier explains the nature of the contract of partnership in Chapter 1 of RJ Pothier *A treatise on the contract of partnership: With the Civil Code and Code of Commerce relating to that subject in the same order* trans OD Tudor (1854) in very simplistic terms, by contrasting the nature of the partnership contract to that of 'part-ownership' or 'community'. See also Henning (n 11) 239, where Henning notes that Pothier discussed the universal partnership of all property in detail, with reference to Roman law and prevailing French law.

56 Pothier (n 55) 3.

57 Pothier (n 55) 1. Rule (n 21) 615. Therefore, as a result of the partnership agreement, a community will exist.

been bequeathed to several legatees jointly.[58] Although a community exists between the heirs of the descended estate, there exists no partnership between them.[59] Co-heirs of a deceased estate or a legacy left to legatees jointly creates a community different from the partnership agreement as it is described as a quasi-contract which creates obligations similar to those arising from a partnership contract.[60] According to Roman law, co-heirs or co-owners would not by the fact that they acquired common ownership alone, be partners in a partnership, as they lacked the intention to form a partnership.[61]

In Chapter 2 *Traité du Contrat de Société* Pothier draws a distinction between universal partnerships and particular partnerships.[62] Many particular partnerships exist, as a partnership may be contracted in particular things or even in a single thing alone.[63] Other examples of particular partnerships include the partnership for the exercise of a profession and the partnership of commerce (or trade).[64] Van Leeuwen distinguished between three different types of partnerships namely a partnership that is able to be of all things, or some particular thing, or of a certain undertaking or trade.[65]

Roman and Roman-Dutch law differentiated between two kinds of universal partnerships.[66] Pothier continues to define the partnership *universorum bonorum* and the *universorum quae ex quaestu veniunt.*[67] It may be deducted that Pothier's position is that the *universorum bonorum* must arise from an active expression such as a communication, as opposed to the actions of the parties alone.[68] For the *universorum quae ex quaestu veniunt* Pothier does not state the requirement that there had to be an express contract.[69] From the work of Pothier there is no indication that he attached a different meaning to the word

58 Pothier (n 55) 3.
59 Pothier (n 55) 3. See also J Story *Commentaries on the law of partnership: As a branch of commercial and maritime jurisprudence, with occasional illustrations from the civil and foreign law* (1841) 5.
60 Rule (n 21) 615.
61 Thomas *et al* (n 2) 298.
62 Pothier (n 55) 23.
63 Pothier (n 55) 36. Pretorius *et al* (n 49) 28: Voet and Van Leeuwen also noted that a partnership may be contracted in particular things or one thing alone.
64 Pothier (n 55) 38-39.
65 Rule (n 21) 611. Pretorius *et al* (n 49) 28.
66 See *Isaacs v Isaacs* 1949 1 SA 952 (C) 955; *V* (also known as *L*) *v De Wet NO* 1953 1 SA 612 (O) 614; *Annabhay v Ramlall* 1960 3 SA 802 (D) 805. See also Henning (n 11) 231.
67 Rule (n 21) 616.
68 As above.
69 As above.

'express' like the other jurists who unambiguously dealt with the distinction between 'express' and 'implied'.[70]

It is suggested that as the *bonorum* forms part of South African law and is applicable outside the scope of marriage and putative marriage, the authority of Pothier and Voet must be preferred to that of Van Leeuwen.[71] The correct position in Roman-Dutch law is that the *bonorum* may only be formed expressly. However, the common-law position on this point was changed by the court in *Ally v Dinath*,[72] where the court ruled that the *bonorum* could be created tacitly too.

Although there are no burdensome statutory regulations governing the formation of a partnership, the common law prescribes certain essential elements (or *essentialia*) that must be complied with in order to create a legally binding partnership.

2.3 Partnership *essentialia*

The *essentialia* for the partnership contract as formulated by Pothier are similar to that of Voet.[73] The first element or *essentialia* of a partnership is that each party must bring something into the partnership or oblige himself to bring something into it, whether it be money, labour or skill.[74] Roman law also required the consensus to contribute as one of the *essentialia* of the partnership contract.[75] Secondly, the business (or partnership) should be carried on for the joint benefit or common interest of both parties (intended partners). Thus the partnership should be contracted for the common interest of the partners.[76] Thirdly, the

> parties propose thereby to make a gain of profit in which each of the contracting parties may expect to have a share, in proportion to what he has brought into the partnership.[77]

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70 Rule (n 21) 616. See *Butters* (n 29) 15: 'There are some jurists who maintain that a *societas omnium bonorum* cannot be entered into tacitly…but that…for all the assets to be brought into the partnership it is necessary that the *societas omnium bonorum* be entered into expressly. [B]ut there are other jurists who hold the contrary view: that a *societas omnium bonorum* may surely be entered into tacitly by performing an act of partnership, because it is that type of contract which can be entered into by consensus alone and the validity of tacit and express partnerships is the same'.

71 Rule (n 21) 616.

72 1984 2 SA 451 (T). See also Rule (n 21) 612-616.

73 Rule (n 21) 616.

74 Pothier (n 55) 5-6. Pothier mentions that this contract is consensual in nature and it is formed by consensus. The contract is 'complete as soon as the parties have agreed to bring something in common, although they may not at the time have actually contributed their quota'. What is brought into the partnership should be 'appreciable'.

75 Thomas *et al* (n 2) 298. Henning (n 2) 439: 'Roman law did not require for each type of *societas* that the common benefit necessarily had to consist of pure monetary gain'.

76 Pothier (n 55) 7. It is important to note that a contract of mandate is not a partnership contract, as it is an agreement where the 'private interest of one of the parties only is regarded'.

77 Pothier (n 55) 7.

According to Roman law, this profit motive, as one of the *essentialia*, had to be pecuniary in nature or for economic gain.[78] The object of the partnership should be to make a profit or gain in which each partner may expect to have a proportional share.[79] The last requirement is that the contract should be a legitimate one,[80] namely the:

> [B]usiness which is its object, and for which the contracting parties associate themselves, should be lawful, and that the profit which they propose to draw therefrom should be a lawful profit.[81]

According to Roman law, not only did the common venture have to be lawful, but also possible and not immoral.[82] The last requirement has been discounted by our courts as being common to all contracts and accordingly does not constitute an essential element of a partnership contract in particular.[83]

Interestingly enough, Pothier mentions that any prescribed formalities for the partnership contract, are only to serve as proof of the contract and do not belong to its substance.[84] For this reason, although the prescribed formalities as dictated by the Ordonnances were not complied with, the contract would be complete and binding between the contracting parties and it is only with respect to third parties that these formalities are complied with.[85] Once the contract of partnership has been concluded, certain rights and duties exist between the partners among themselves and between the partners and third parties.

2.4 Rights and duties of the partners in general

The rights and duties of the partners among themselves is not the main focus of this research, but will be discussed shortly. The partners, among themselves have the rights and duties to share in profits and losses, the right to participate in the management of the partnership business, the duty to exercise reasonable care and the duty of good faith, honesty and loyalty.[86] As co-owners of the partnership property in undivided shares, the partners may not

78 *Thomas et al* (n 2) 298.
79 Pothier (n 55) 7.
80 FHI Cassim & MF Cassim 'Partnerships' in FHI Cassim *et al The law of business structures* (2015) 13.
81 Pothier (n 55) 11.
82 Thomas *et al* (n 2) 298.
83 Cassim & Cassim(n 80) 14. See in this regard *Bester v Van Niekerk* 1960 2 SA 779 (A).
84 Pothier (n 55) 5.
85 As above.
86 Cassim & Cassim (n 80) 24-29. See also Thomas *et al* (n 2) 300.

use partnership property to the exclusion of the other partners.[87] Furthermore, partners may not use partnership property for private purposes unless an agreement proves to allow the contrary. A partner may furthermore not use, alienate, mortgage or encumber any partnership assets as personal security without prior written consent or approval of the other partners, nor may a partner exclude the other partners from controlling the partnership assets or property.[88]

It is important to note that the existence of a universal partnership does not give rise to duties of support between the partners either during or after the relationship.[89] As a partnership is generally not a legal entity, the debts of the partnership are the legal debts of the partners and the assets of the partnership are indistinguishable from the assets of the partners.[90] The partners are thus the co-owners in undivided shares of the partnership property or partnership assets.[91] As the partnership property is owned jointly in undivided shares by the partners, the rights and duties of the partnership are the rights and duties of the partners.[92] The aforementioned discussion already indicates the seemingly complex juristic nature of a partnership.

2.5 Juristic nature of the partnership

2.5.1 The general rule

According to 18th century French law, partnerships were indeed viewed as entities separate from the individual partners.[93] Henning notes that:

> [D]espite the weight of authority to the contrary, in South Africa conventional wisdom still has it that in Roman-Dutch law partnerships were not regarded to any extent as separate legal entities.[94]

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87 Cassim & Cassim(n 80) 29. Partnership property consists of all the property and assets that the partners have contributed to the partnership or that property acquired during the existence of the partnership. This property may be movable, immovable, corporeal or incorporeal. Thomas *et al* (n 2) 300.

88 Cassim & Cassim (n 80) 29. The partnership assets are those assets that were brought into the partnership at inception and also those acquired during the existence of the partnership.

89 E Bonthuys 'Domestic violence and gendered socio-economic rights: An agenda for research and activism?' (2014) 30 *SAJHR* 111 120.

90 Cassim & Cassim(n 80)18.

91 Cassim & Cassim(n 80) 18. However, take note that although the partners are necessarily co-owners of the partnership assets, co-owners are not necessarily partners of the partnership. See also Cassim & Cassim (n 80) 12. It is worth mentioning that a contract of partnership and part- ownership or community are not the same thing. See Pothier (n 55) 3 where he mentions that although a partnership is a 'kind of community' it is 'formed in execution of a contract of partnership'. See Pothier (n 55) 9 where he mentions that each partner's share may conditionally depend on the amount of the partnership profits or the partner's respective contribution. See also Thomas *et al* (n 2) 298.

92 JJ Henning 'Some manifestations of the statutory recognition of a partnership as an entity' (2014) 53 *Journal for Juridical Science* 54.

93 JJ Henning 'A partnership of companies under the Insolvency Act: Historical and comparative perspectives on the resolution of a South African conundrum' (2009) 72 *THRHR* 351 353.

Accordingly the South African interpretation of Roman law is that it did not regard a partnership as a separate legal entity or a juristic person, and the partnership itself could not be the owner of any property.[95] Henning continues by stating that:

> [E]minent Roman-Dutch authorities often relied on by the courts have been criticised for their failure to appreciate new developments, particularly in the sphere of mercantile law, as well as for their uncritical reliance on outmoded Roman law concepts.[96]

Henning observes that 'from early on the courts, with a few notable exceptions, treated the partnership merely as an association of individuals having no existence in law apart from that of its members'. [97]

The modern juristic nature of a partnership is described as not being a separate legal entity on its own, as it is a mere association of individuals.[98] This means that the partnership is not regarded as a separate legal entity and has no separate legal personality that is distinct from the partners that compose it.[99]

The property brought into the partnership either remained the property of the individual partner or formed part of the common property of the partners, depending on the provisions of the partnership contract.[100] This general rule of the juristic nature of a partnership, namely, that a partnership does not have any separate legal personality distinct from the partners that compose it does, however, have a few exceptions as outlined in Chapter 1.

2.5.2 Exceptions to the general rule

As mentioned in Chapter 1, the most influential exception is created by statute in the field of insolvency, where the separate legal personality of a partnership is created and therefore deemed to exists.[101] According to Hahlo and Kahn[102] a 'juristic ghost' materialises when the exceptions to the common-law rule apply. Other exceptions to the juristic nature of a partnership include litigation, taxation and common-law exceptions.

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94 Henning (n 93) 353.
95 Thomas *et al* (n 2) 300.
96 Henning (n 93) 353.
97 Henning (n 93) 353.
Cassim & Cassim (n 80) 18. Thomas *et al* (n 2) 300. See also *Strydom v Protea Eiendomsagente* 1979 2 SA 206 (T) 209C-209D. *Muller v Pienaar* 1968 3 SA 195 (A) 202G-202H.
99 Cassim & Cassim (n 80) 18.
100 *Thomas et al* (n 2) 300.
101 Cassim & Cassim (n 80) 19-20.
102 E Kahn & HR Hahlo *The Union of South Africa: The development of its law and Constitution* (1960) 702.

Except for insolvency, which is discussed in Chapter 3, the separate legal personality of a partnership is only recognised during the subsistence of the partnership. These include, for example, taxation, litigation and a common-law exception.

Value-added tax purposes

For value-added tax purposes, a partnership is deemed as a separate legal entity that is distinct from those individuals who compose it.[103] A partnership must thus register as a vendor for purposes of the Value-Added Tax Act 89 of 1991 if the prescribed thresholds for registration have been satisfied.[104] A partnership is, however, not treated as a separate legal entity for purposes of income tax according to the Income Tax Act 58 of 1962.[105] Although the partnership is not a taxable entity, the partners are subject to income tax on the income that has accrued to them proportionately.[106] Income thus flows through the partnership to be taxed only in the hands of the partners themselves.

Litigation

During the subsistence of the partnership, the Uniform Rules of Court[107] make provision for a partnership to sue or be sued in its own name.[108] According to rule 14(3) the names of the partners do not have to be alleged when a plaintiff sues a partnership.[109] According to this rule, any error of inclusion or omission shall not afford a defence to the partnership. Rule 14(5)(a) affords the plaintiff suing the partnership the right to deliver to the defendant a notice calling for the particulars as to the full name and residential address of each partner, any time before or after judgment. The execution of a judgment against a partnership shall first be levied against the assets of the partnership, in terms of Rule 14(5)(h). Thereafter, the judgment may be levied against the private assets of 'any person held to be estopped from denying his status as a partner, as if judgment had been entered against him'. In the event that a person has obtained a judgment against the partnership, without calling on the partnership

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103 Cassim & Cassim (n 80) 20, with reference to the Value-Added Tax Act 89 of 1991 sec 51(1)(a).

104 Cassim & Cassim (n 80) 20.

105 The Act does not include a partnership as a 'person' which is taxable in its definition. See also *Chipkin (Natal) (Pty) Ltd v CSARS* 2005 5 SA 566 (SCA) 243, where the court upheld the view that a partnership is not a separate legal entity in the context of income tax.

106 Cassim & Cassim (n 80) 20.

107 Uniform Rules of Court, rule 14(2).

108 Cassim & Cassim (n 80)19. See also JJ Henning 'The origins and development of the dual priorities rule in partnership insolvency' 243 (2008) *South African Mercantile Law Journal* 266. Supreme Court rule 14(2) and Magistrates' Court rule 54(1) permit a partnership to sue or be sued in the partnership name. See *Parker v Rand Motor Transport Co* 1930 (AD) 353.

109 See also Cassim & Cassim (n 80) 19.

to forward the names of the partners, such a person may only execute the judgment against the partnership estate and not against the private estates of the individual partners.[110]

In the event that a partnership has since the institution of legal proceedings against it been dissolved, Rule 14(7) states that the proceedings shall nevertheless continue against all persons alleged or stated to be partners of the partnership, as if they are 'sued individually'.

For the purpose of civil proceedings against, or by the partnership itself, during its subsistence or even after its dissolution, a partnership may be treated as a legal person or entity that is separate from those who compose it.[111]

In the case of *Standard Bank of SA Ltd v Lombard*,[112] the court mentioned that in matters of practice and procedure the law does to 'some extent recognise the existence of a partnership as an entity in itself, albeit not as an entity endowed with legal personality'. The court then added that during the subsistence of the partnership a partnership creditor must sue all the partners together for the payment of a partnership debt and execution must be levied first on partnership assets before attaching the assets of individual partners.

Common-law exception

A common-law exception also exists where a partnership is regarded as a separate legal entity, during its subsistence. This exception applies when a partnership creditor intends to claim payment of a partnership debt during the subsistence of the partnership. According to this rule the partnership creditor may not claim the payment from an individual partner as all the partners are joint co-debtors and co-creditors of partnership contracts.[113] This is only applicable to the partnership during its subsistence and upon its dissolution the partners each become jointly and severally liable for partnership debts. Upon the dissolution of a partnership any partnership creditor may sue any partner for the full amount of a partnership debt.[114]

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110 Cassim & Cassim(n 80) 19. See also See also Henning (n 108) 266: Supreme Court rules 14(5)(h) and 14(6) and Magistrates' Court rule 40(3) provide that execution must first be levied against the partnership assets. Only if these are insufficient may the creditor turn to the individual partners' estates.

111 See Henning (n 92) 59: For purposes of civil proceedings such as the Uniform Rules of Court rule 45(12)(j), a partnership is to some extent treated as an entity.

112 1977 2 SA 808 (W) 813. Hereafter *Lombard.*

113 Cassim & Cassim (n 80) 20. During the subsistence of the partnership the proceedings must be brought jointly against all the partners or the partnership itself must be sued which implies that a partnership is in essence an entity, containing partners, as either the partnership or all the partners must be sued.

114 Cassim & Cassim (n 80) 21.

As mentioned, except for insolvency, the separate legal personality of a partnership is usually only deemed during the subsistence of the partnership as in the examples discussed above. The above discussion is by no means a comprehensive summary of the legal nature of a partnership. It is merely an introductory explanation of a partnership contract in general, in order to grasp the essence of the universal partnership and the enquiry of this research.

2.6 The universal partnership in particular

2.6.1 Essentialia of the universal partnership

The above discussion is on partnerships in general and I now turn to the discussion of universal partnerships in particular. In *Butters*,[115] 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.[116]

The essential elements for a partnership in general are the same for a universal partnership.[117] The three essential elements of a partnership thus apply to any universal partnership as well.[118] A universal partnership will exist if the following essentials are present, namely that each of the parties bring something into the partnership, whether it be money, labour or skill. Secondly the partnership should be carried on for the joint benefit of both the parties. Thirdly the object should be to make a profit and lastly the contract should be a legitimate one. As mentioned, this last requirement has been discounted by our courts for being common to all contracts, as confirmed by the court in *Bester v Van Niekerk.*[119]

2.6.2 The two types of universal partnerships

There are two types of universal partnerships recognised in South African law as dictated by early Roman and Roman-Dutch law above, namely the universal partnership of all property (*societas universorum bonorum*) and the universal partnership of all profits (*societates*

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115 N 29, 17-18.

116 See also *Isaacs* (n 66) 956; *Pezzutto v Dreyer* 1992 3 SA 379 (A) 390A-390C; *Bester* (n 83) 783H-784A; *Mühlmann v Mühlmann* 1981 4 SA 632 (W) 634C-634F. Hereafter *Mühlmann-1*.

117 *Isaacs* (n 66) 955; *Sepheri v Scanlan* 2008 1 SA 322 (C) 338C–D; *Ally* (n 72); *V* (also known as *L*) (n 66) 615; *Festus v Worcester Municipality* 1945 CPD 186 (C).

118 Cassim & Cassim (n 80) 23. See also the cases of *Vermeulen v Marx* 2016 JDR 1435 (GP); *Davidson v Davidson* 2016 JOL 35109 (GP) 12; and *Pezzuto v Dreyer* 1992 3 SA 379 (A) 390, where the court applied the essential elements of a universal partnership as formulated by Pothier.

119 *Bester* (n 83).

universorum quae ex quaestu veniunt).[120] Each form of the universal partnership will be discussed in turn.

The societas universorum bonorum

The partnership *universorum bonorum* has been described as the seemingly oldest form of a consensual *societas.*[121] It is described as the complete pooling of all assets from whatever source, which leads to the communal ownership by a group.[122] This type of partnership was described as not really being suitable to mercantile or trading ventures, but more appropriate for farming between relatives and close friends.[123] This partnership contract subsequently created a community of property that intended to benefit the society which was formed for the advantage of its members.[124] The partnership *universorum bonorum* was thus nothing more than a fraternal association with a common goal rather than a commercial enterprise.[125]

The universal partnership of all property exists where the partners agree to put in common all their property, both present and future. The contracting parties thus:

> [A]gree to contribute all their property and possessions which they own at the commencement of the partnership, as well as property and possessions they may acquire in future from whatever source, irrespective of whether such property is acquired from commercial undertakings or otherwise.[126]

The universal partnership of all property includes everything which accrues to either of the partners during the partnership, 'regardless of the title it comes to him'.[127] Thus an accrual via succession, legacy and a donation would, according to Pothier, fall within this partnership property, unless a bequest or condition states otherwise.[128] It is interesting to note that Pothier mentions that this contract may only be entered into expressly. In the past, South African courts have expressed the view that universal partnerships of all property were not allowed,

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120 The *societas universorum bonorum* was also referred to as the *societas omnium bonorum; societas totorum bonorum; societas universorum fortunarum.* See E Gaius *et al Gai Institutiones: Institutes of Roman law by Gaius with a translation and commentary by the late Edward Poste* (1904) 144.

121 Henning (2006)(n 4) 34. Henning (n 11) 233.

122 Henning (2006)(n 4) 34.

123 As above.

124 As above.

125 As above.

126 Cassim & Cassim (n 80) 21. Pothier (n 55) 26 mentions that Roman law did not intend active debts to pass from one person to another unless cession had taken place, but 'that debts owing to the parties who enter into a partnership of this kind, at once fall, as well as their other property, into the partnership, without there being any necessity for express cession of the rights of action'.

127 Pothier (n 55) 27.

128 Pothier (n 55) 27, Pothier mentions that even 'civil reparation of an injury' may form part of the partnership property according to French law.

save between spouses and perhaps in the case of putative marriages.[129] The perception was that even where a partnership of all property was allowed, it required an express agreement and could therefore not be brought about tacitly.[130] A universal partnership of all property does not require an express agreement in our law and can like any other contract come into existence via a tacit agreement.[131]

The universal partnership of all property has not fallen into disuse nor is it an unimportant type of partnership.[132] The court in *Butters* declared that universal partnerships of all property which extend beyond commercial undertakings were a part of Roman-Dutch law and still form part of our law today.[133] If the partnership enterprise extends beyond commercial activities, the contributions of the partners need not be confined to a profit-making entity.[134]

The societas quae ex quaestu veniunt

The second type of universal partnership is the universal partnership of all profit, where the partners 'agree to put in all profits that they may acquire from every commercial or business activity or undertaking during the subsistence of the partnership'.[135]

Although this is a general partnership of all profits, it is not necessarily confined to one specific business activity. According to Pothier the parties are considered or deemed to have entered into this kind of partnership when they 'declare that they contract together a partnership, without any further explanation'.[136] In a similar manner it may also be

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129 *Isaacs* (n 66) 955. See also Henning (2006)(n 4) 34: Henning notes that the universal partnership of all future and present property was of old prohibited in Holland, except between spouses who had a customary community of property. See Henning (n 4) 35, where Henning is inclined to the more acceptable view that the partnership *universorum bonorum*, although then not of common occurrence, was in fact not prohibited expressly either in Holland or France during the early 19th century. See *Isaacs* (n 66) 955; *V* (also known as *L*) (n 66) 616; *Annabhay* (n 66) 805.

130 *Annabhay* (n 66) 805.

131 *Butters* (n 29) as discussed in Cassim & Cassim (n 80) 21. Our courts have now confirmed either expressly or by implication that universal partnerships of all property which extend beyond commercial undertakings were part of Roman-Dutch law and still form part of our law, and that a universal partnership of all property does not require an express agreement.

132 Cassim & Cassim (n 80) 21. An example of a *societas universorum bonorum* is found in the case of *Butters* (n 29), where the parties lived together as husband and wife for nearly 20 years. The court found that a universal partnership came into existence between the parties in that Ms Mncora shared in the benefits of Mr Butter's financial contribution (income of the business conducted by him) and he shared the benefits of her contribution to the maintenance of their common home and the raising of the children.

133 *Butters* (n 29) 17-18. The court in *Butters* ruled that life-partners can enter into universal partnerships in the form of the *societas universorum bonorum.*

134 *Butters* (n 29) 17-18.

135 Cassim & Cassim (n 80) 23.

136 Pothier (n 55) 32-33.

considered or deemed to be a universal partnership of all profit when the parties declare that they 'contract a partnership of all the gains and profits they may make from all sources'.[137] This type of universal partnership tends to be associated with particular business enterprises and would presumably exclude non-financial contributions and gains. This type of universal partnership may also extend beyond commercial activities, such as the universal partnership of all property.[138]

2.6.3 Unique character of the universal partnership

Any form of universal partnership may thus extend beyond commercial undertakings and include contributions that are not profit-making, such as support, care and maintenance of the common home or a non-profit contribution to the family life.[139] Therefore any time, effort and energy spent in promoting the interests of both parties in their communal enterprise via maintaining the common home and perhaps raising children may serve as indication of an extension beyond commercial activities.[140]

Universal partnerships are very unique in the sense that they are typically entered into for an indefinite time period and usually extend far beyond a specified project. It is important to note that a universal partnership can be concluded between two persons that are cohabitees, married or engaged. Marriage, engagement or cohabitation does not prevent these persons from concluding a universal partnership contract in addition to any other legally recognised contracts or obligations already in existence.[141] In *Ponelat v Schrepfer*,[142] the Court mentioned that 'a universal partnership exists if the necessary requirements for its

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137 Pothier (n 55) 33.

138 Examples of *societas universorum quae ex quaestu veniunt* are found in the cases of *Fink v Fink* 1945 (WLD) 226, *Mühlmann v Mühlmann* 1984 3 SA 102 (A), hereafter *Mühlmann-2*; *RD v TD* 2014 4 SA 200 (GP), where our courts found that universal partnerships existed between spouses only in respect of certain commercial enterprises and not all their property.

139 Cassim & Cassim (n 80) 22. See Pothier (n 55) 29, where Pothier mentions that expenses may include maintenance and education of children. Henning (n 2) 436.

140 *Butters* (n 29) 17-18.

141 See *Booysen v Stander* 2018 6 SA 528 (WCC), where the court mentioned that unmarried cohabiting life partners may enter into a universal partnership. See also *RD* (n 138) 30-31, where the court noted that partners who are married out of community of property with an ante-nuptial contract excluding community of profit and loss, create a partnership agreement by complying with the *essentialia* for a partnership. In this case the partnership constituted a separate legal entity from the matrimonial property regime applicable to the parties. According to this case the *societas universorum quae ex quaestu veniunt* treated the parties as business partners each having their own separate estate. In *Davidson* (n 118) the court ruled that a *societas universorum quae ex quaestu veniunt* existed between the parties married out of community of property.

142 2012 1 SA 206 (SCA) 22. See also E Bonthuys 'Developing the common law of breach of promise and universal partnerships: Rights to property sharing for all cohabitants?' (2015) 132 *SALJ* 76 88: 'Ponelat represents an expansion of the remedies available to certain groups of engaged people and cohabitees by allowing for a tacit universal partnership'.

existence are met, and this is regardless of whether the parties are married, engaged or cohabiting'.

In *Butters v Mncora*,[143] the court mentioned that a tacit universal partnership had been entered into between two cohabitees and the court also confirmed that that all partnerships, including universal partnerships between cohabitees, can be entered into tacitly. In *Mühlmann – 2*,[144] the court stated that it will require weighty evidence to infer a tacit agreement of partnership and that a cohabitee may struggle to prove such tacit agreement. Where the conduct of the parties is capable of more than one inference, the test for whether or not a tacit universal partnership exists, is whether it is more probable than not that a tacit agreement had been reached.[145]

On this point, it is noteworthy that not all commercial agreements result in a partnership and the true agreement between the parties will suffice when determining whether or not a partnership exists, as opposed to the label the parties attached to their relationship.[146]

Rights and duties of the universal partners

The general rights and duties that exist between the partners in a universal partnership can be described as those that apply to partnerships in a commercial sense (or as a business structure). The duties of partners in a partnership include that each partner must contribute to the partnership (usually as set out in the partnership agreement), each partner must act in good faith towards the other partner (in accordance with his or her fiduciary duties), partners must avoid a conflict of interest, each partner must contribute to the losses of the partnership (in accordance with the partnership agreement and his or her liability as set out therein) and each partner must act with the necessary care when carrying out partnership affairs.

The duty to contribute to the profit and loss of the partnership correlates with the partnership *essentialia*.

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143 *Butters* (n 29) 18.

144 *Mühlmann*-2 (n 138).

145 See *Ally* (n 72) 453F-455A; *Kritzinger v Kritzinger* 1989 1 SA 67 (A) 77A; *Mühlmann-1* (n 116) 634A-634B; *Volks NO v Robinson* 2005 5 BCLR 446 (CC) 125; *Mühlmann-2* (n 138) 109C-109E; *Ponelat* (n 142) 19-22; *Sepheri* (n 117) 338A-338F. In *V v M* (19398/2014) 2016 ZAGPPHC 652 (25 July 2016) 33-34, the court stated that the test to be applied in determining whether a universal partnership came into existence is on a balance of probabilities. See also *McDonald v Young* 2012 3 SA 1 (SCA) where the Court held that in order to establish a tacit contract, the conduct of the parties must be such that it justifies an inference that there was consensus between them.

146 Cassim & Cassim (n 80) 13. See also Pothier (n 55) 7, where an example is made of a 'pretend partnership' that will be void if it is agreed that 'the entire profit should belong to one of the contracting parties, without the other being able, in any case, to make any claim to it'. See also Pothier (n 51) 17 on 'fictitious contracts of partnership'.

The general rights and duties that exist between the partners are usually relevant when considering the dissolution grounds of the partnership. For example, the persistent failure to perform duties or breach of an essential term of the partnership agreement may constitute an *iusta causa* for dissolving the partnership by order of court.

The various grounds and causes for dissolution are accordingly discussed, bearing in mind the non-compliance with the partnership *essentialia* that contributes as a ground for dissolution of the partnership.

2.7 Historical and modern causes and grounds for dissolution of partnership

According to the jurist Ulpianus, the partnership could be dissolved *ex personis, ex rebus* or *ex actione.*[147] The following causes and grounds for dissolution of a partnership in general also apply to the universal partnership in particular. It is interesting to note that the causes of dissolution as mentioned by Pothier are also recognised by the laws of Scotland, Spain and Holland as they derive the basis of their jurisprudence from Roman law.[148]

2.7.1 Effluxion of time

The expiration of time for which the partnership has been contracted or effluxion of time is a mode of dissolution according to old French and Roman law.[149] This mode of dissolution is applicable when the partnership has been contracted for a specified or fixed time period. The partnership is then automatically dissolved at the expiration of that specific time.[150]

This mode of dissolution is also applicable to a partnership that has been contracted for the completion the business or specific project which is subsequently completed.[151] According to old French law and Roman law completion of the project the partnership will automatically be dissolved.[152] It is possible to prolong or extend this time period if the parties agree to do so.

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147 G Mousourakis *Roman law and the origins of the civil law tradition* (2014) 140. Thomas *et al* (n 2) 33: Ulpianus is one of the prefects of the praetorian guards and was a contemporary of Paulus. The *Regulae Ulpiani* is a post-classical work for which Ulpianus is perhaps best known.

148 Story (n 59) 384. See also Story (n 59) 409: The grounds for dissolution of the partnership according to Pothier under old French law are the same as the law of Holland and other countries that derive the basis of their jurisprudence from the Roman law. Accordingly this is said to confirm the general principles of natural justice and reason.

149 Story (n 59) 403. Mousourakis (n 147) 140.

150 Pothier (n 55) 102. Mousourakis (n 147) 140

151 Cassim & Cassim (n 80) 37. Thomas *et al* (n 2) 301. Pothier (n 55) 105.

152 Story (n 59) 406. Mousourakis (n 147) 140.

2.7.2 The object of the partnership

'The extinction of the thing which constitutes the object of the partnership' is mentioned as the second ground of dissolution of a partnership in old French and Roman law.[153] This type of dissolution is based on the assumption that 'when a partnership has been contracted in a certain thing, it is evident that it must end by the extinction of such thing'.[154] This correlates with the Roman-law ground for dissolution of the partnership based on impossibility.[155]

Pothier provides the example of a donkey which is purchased to carry certain goods to a market. He argues that upon the death of the donkey the partnership in that donkey will come to an end.[156] In Roman law a ground for dissolution is the loss of the communal property or extinction of the thing held in the partnership, which links to the example given by Pothier here.[157] The partnership in a thing, such as the donkey, must be distinguished from a partnership which is not contracted in things, but rather in the fruits arising from certain things.[158]

If this thing which produces fruits perishes, the contract of partnership will also be terminated as the partners can no longer contribute to the partnership, bearing in mind that it is essential to a partnership that each partner contributes thereto. This ground for dissolution is thus based on the assumption that the extinction of the thing which constitutes the object of the partnership renders either one or both of the partners unable to further contribute to the partnership. Based on this incapability to comply with one of the *essentialia* of a partnership, the partnership will be terminated. This mode or ground for dissolution in old French and Roman law links with the dissolution of the partnership based on the determination that the partnership is only carried on at a loss.[159]

An essential element of a partnership is that it should be formed and carried on with the mutual objective to make a profit or gain. If no prospect to make a mutual profit or gain exists, the partnership should be dissolved.[160] In a similar manner the partnership will be dissolved due to frustration of the partnership contract. Frustration of the partnership contract

153 Pothier (n 55) 102. Story (n 59) 383.
154 Pothier (n 55) 102.
155 Story (n 59) 421 Thomas *et al* (n 2) 301. Mousourakis (n 147) 140. Bear in mind possibility as one of the essentials in Roman law.
156 Pothier (n 55) 102.
157 Mousourakis (n 147) 140. Story (n 59) 383.
158 Pothier (n 55) 102.
159 Cassim & Cassim (n 80) 39. Story (n 59) 422.
160 Cassim & Cassim (n 80) 39.

refers to the impossibility to achieve the partnership business due to supervening impossibility of performance.[161] Since the partnership cannot reasonably expect to make a profit it should be dissolved.

2.7.3 Death

According to the Roman law jurist Ulpianus any change in the partnership would terminate the partnership.[162] The death of a partner in any partnership, including a universal partnership will dissolve the partnership at once, according to old French and Roman law.[163] Death dissolves a partnership as the change in membership destroys the identity of the partnership.[164]

According to old French law, upon the death of a partner the partnership agreement may provide that the partnership continues to the benefit of the deceased estate, if it is provided for in the will of the deceased.[165] If no such provision is made for in the partnership agreement and the will of the deceased, the partnership will be dissolved upon the death of a partner and the surviving parties do not continue as partners.[166]

Pothier mentions that this dissolution of the partnership has two effects or consequences. The first consequence is that 'the heir succeeds to the share which the deceased had at the time of his death in the partnership property' and also the 'share of the debts of the partnership by which the deceased was bound'.[167]

The deceased does not, however, 'succeed to the future rights of the partnership, for he does not take his place, he is only in community with them'.[168] Interestingly enough, Pothier adds that if after the death of a partner, the surviving partner makes an advantageous bargain, relating to the commerce for which the partnership was contracted, the heir of the deceased partner has no claim to any share thereof.[169] Similarly, if the surviving partner makes a disadvantageous bargain, the heir of the deceased cannot be compelled to bear any part thereof, even though the bargain had relation to the commerce for which the partnership

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161 As above.
162 *Thomas et al* (n 2) 301. Story (n 59) 383. Mousourakis (n 147) 140.
163 Pothier (n 55) 105. Mousourakis (n 147) 140.
164 Cassim & Cassim (n 80)38.
165 As above.
166 As above.
167 Pothier (n 55) 105.
168 As above.
169 Pothier (n 55) 106.

was created. Furthermore it is noted that a partner cannot bind an heir to become a partner.[170] According to Roman law any stipulation admitting the heir of the deceased into the partnership was declared void.[171]

The reason that the death of a partner dissolves the partnership is attributed to the fact that the personal qualities of each partner is taken into consideration in the contract of partnership.[172] A partnership of five persons will thus be dissolved upon the death of one partner as any change in the partners of a partnership will automatically dissolve the partnership, as a partnership does not enjoy perpetual succession.[173] A change in partners may include the death of one of the partners, resignation of a partner, retirement or insolvency of a partner.

According to the case of *Botha NO v Deetlefs*,[174] a partner is not entitled to remain in possession or in occupation of partnership assets upon the death of a partner, in the absence of a bequest or agreement which states the contrary. In the absence of any agreement or bequest, all assets in possession of either party must be surrendered to the receiver (or executor) once appointed.[175] A half owner of property is not *ex lege* entitled to remain in occupation of the property.[176] The court in *Deetlefs* ruled that the first respondent's occupation was unlawful and her right to an undivided half-share in the partnership is not necessarily extensive with a half-share in the immovable property.[177]

In *Bosman NO v Registrar of Deeds and the Master*,[178] the court explained that the realisation of the assets of a partnership, dissolved by the death of one partner, is performed by the surviving partner or partners because their authority as agents of the partnership subsists for this purpose.[179] It is in this capacity, as agent, that the surviving partner performs

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170 Pothier (n 55) 106. The reasoning therefore is that it is contrary to the nature of the partnership that an uncertain and unknown person be contractually bound to the partnership. However, a stipulation that the heir may succeed can possibly be binding.

171 N Gow *A practical treatise on the law of partnership with an appendix of precedents* 3rd Edition (1830) 220.

172 Pothier (n 55) 107; Mousourakis (n 147) 140.

173 Cassim & Cassim (n 80) 18.

174 2008 3 SA 419 (N). Hereafter *Deetlefs*.

175 *Deetlefs* (n 174) 15.

176 *Deetlefs* (n 174) 19.

177 *Deetlefs* (n 174) 19. See also *Deetlefs* (n 174) 25 where the court further mentioned that if she is able to prove the existence of a universal partnership, she might be able to negotiate and achieve her stated intention of acquiring the remaining interests of the estate in the property.

178 1942 CPD 302. See also JTR Gibson *et al South African mercantile and company law* (2003) 257.

179 Cassim & Cassim (n 80) 18. Partners act as both principals and agents within the limit of their authority.

these functions and in no sense in the capacity of *dominus* or *domini* of the partnership property.

2.7.4 Insolvency

According to Roman law any change in status, for example insolvency or *capitis deminutio* (or forfeiture of that partner's entire estate) automatically dissolves the partnership by operation of law.[180]

Insolvency of a partner also dissolves the partnership in the same manner as death.[181] If a partner or the partnership itself becomes insolvent the partnership will automatically be dissolved by operation of law.[182] The Insolvency Act 24 of 1936 includes a partnership in its definition of a 'debtor'. A partnership may thus be sequestrated even though it has no separate legal personality. When the partnership estate is sequestrated the private estates of the partners are simultaneously, but separately sequestrated.[183] A deceased estate may fall within the ambit of the Insolvency Act.[184]

A deceased's insolvent estate can be administered in terms of section 34 of the Administration of Estates Act without first being sequestrated.[185] Only after the appointment of an executor can a creditor apply for the sequestration of such an estate. Such a creditor will have to convince the court that the sequestration will be more advantageous than the section 34 procedure.[186] The consequences of insolvency and the dissolution of the partnership will be discussed in more details in the following Chapter.

2.7.5 Mutual consent

According to Roman law the mutual consent of all the partners can also dissolve the partnership.[187] As the formation of the partnership is based on contract and requires the consent of all the parties, the dissolution of a partnership based on the consent of all the partners can dissolve the partnership.[188] A unanimous decision is required to dissolve the partnership via mutual agreement and the majority decision of partners to dissolve the

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180 Story (n 59) 446 *Thomas et al* (n 2) 301. Mousourakis (n 147) 140.
181 Pothier (n 55) 108.
182 Cassim & Cassim (n 80)38.
183 As above.
184 Insolvency Act secs 2 & 3(2).
185 Sec 34 deals with insolvent deceased estates.
186 CJ Nagel et al *Commercial law* 4th Edition (2011) 490.
187 Story (n 59) 383. *Thomas et al* (n 2) 302. Mousourakis (n 147) 140.
188 Cassim & Cassim (n 80) 37.

partnership will not be sufficient.[189] This unanimous or mutual agreement of all the partners to dissolve the partnership may be either express or implied from the conduct of the partners.[190] A notice of dissolution of a partnership that has been contracted for an indefinite period will instantaneously dissolve the partnership, if all the partners have agreed thereto.[191]

The wish to no longer be a partner is also a ground for dissolution. The dissolution *ex voluntate* or renunciation via a unilateral express declaration that a partner wishes to dissolve the partnership is a ground for dissolution.[192] According to old French law, if a partner wishes to dissolve the partnership by his 'sole will' a distinction must be made between partnerships that have been contracted without any time limitation and those that have been contracted for a certain time.[193] According to old French law, for a partnership contracted without any time limitation, any partner may at any time dissolve the partnership by giving an oral, written or tacit notice to the other partner(s) that he no longer intends to remain in the partnership and therefore resigns.[194] This renunciation of the partnership should, however, be made *bona fide* and should not be made at an unreasonable time.[195]

According to Roman law the partner had to fulfil any existing obligations towards the partnership prior to his withdrawal or renunciation, in order to avoid the consideration of a fraudulent withdrawal (*dolo malo*).[196] If a partner made a fraudulent renouncement or withdrew at a bad time for the business, the other partners could hold him liable for damages with the *actio pro socio.* [197]

A partnership that is contracted for a limited or certain time infers that the partners agreed not to dissolve the partnership before the expiration date, unless there is a just cause to dissolve it sooner.[198] A just cause to dissolve the partnership trumps an express clause in the partnership contract that prohibits a partner from quitting the partnership before the expiration date.[199] Pothier mentions that such a clause is thus superfluous because it cannot

189 As above.
190 Cassim & Cassim (n 80) 37 refers to *Fink* (n 138) 226.
191 Cassim & Cassim (n 80) 40.
192 Pothier (n 55) 109. Mousourakis (n 147) 140. Story (n 59) 390. Thomas *et al* (n 2) 302.
193 Pothier (n 55) 109.
194 Pothier (n 55) 109. See also Cassim *et al* (n 80) 40.
195 See Pothier (n 55) 109 for an example on when the renunciation is not made in good faith. See also Cassim & Cassim (n 80) 40, which states that if the partnership agreement makes no mention of a dissolution notice, it must be done in good faith and at a reasonable time.
196 Mousourakis (n 147) 140.
197 As above.
198 Pothier (n 55) 113.
199 As above.

prevent a partner with a just cause from withdrawing from the partnership.[200] If the renunciation is made in bad faith or is unreasonable, the withdrawing partner will be compelled to bear his share of the losses.[201]

2.7.6 Other grounds for dissolution

Being an alien enemy is also mentioned as a ground of dissolution of a partnership. This is applicable to partners who are domiciled or resident in different countries which are at war with each other.[202] Any declaration of war or the determination of a *de facto* state of war will automatically dissolve the partnership.[203] The reason why being an alien enemy dissolves a partnership is based on the fact that upon the outbreak, declaration or determination of war, the object of the partnership becomes impossible.[204] The partnership is accordingly automatically dissolved. When partners become alien enemies they do not forfeit their rights, but these rights are instead suspended until they cease to be alien enemies.[205]

A court order may also dissolve a partnership, whether the partnership is fixed for a certain time period or indefinite.[206] A partner of the partnership may apply to court for a dissolution order and the *actio pro socio* may be employed to dissolve the *societas.*[207] If a just cause exists for the dissolution of the partnership, the circumstances of the case will determine the just and equitable dissolution of the partnership.[208] The *iusta causa* relied on by the applicant must be substantial, for example conduct that destroyed the mutual trust and confidence of the partners and not a mere disagreement or quarrel.[209] The applicant must, however, not by his own conduct have caused or contributed to the destruction or breakdown of the partnership relationship.[210]

Dissolution by court order is mainly based on the inability of the partners to work together.[211] This may be caused by persistent failure to perform duties due to illness, breach

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200 See Pothier (n 55) 114, where he gives examples of what may constitute a just cause with reference to *Ulpian.*

201 Pothier (n 55) 115. See also Cassim & Cassim (n 80) 40, for examples of renunciation based on bad faith and the liability of the partner for damage or injury to the other partners.

202 Cassim & Cassim (n 80) 39.

203 As above.

204 As above.

205 As above.

206 Cassim & Cassim (n 80) 40.

207 Zimmermann (n 3) 455-465. *Thomas et al* (n 2) 302.

208 Cassim & Cassim (n 80) 40.

209 As above.

210 Cassim & Cassim (n 80) 41. Story (n 59) 416: In Roman law misconduct of a partner constituted a ground for dissolution of the partnership.

211 Cassim & Cassim (n 80) 41.

of an essential term of the partnership agreement, failure of proper book keeping or accounts of a partner, improper conduct, persistent breach of the partnership agreement, constant quarrelling, or no reasonable prospect to make a profit in the partnership business.[212]

The above discussion on the dissolution of a partnership also applies to universal partnerships. In the majority of South African case law universal partnerships are dissolved either due to death, insolvency or notice of dissolution when one partner wishes to dissolve the universal partnership for other reasons. Regardless of the ground for dissolution, the consequences of dissolution remain the same, except for insolvency. The consequences of dissolution and the liability of the partners will be discussed in the next paragraph.

2.8 Pothier on the dissolution and the consequences thereof

In terms of Roman law, upon the termination of the partnership the partners could institute the *actio pro socio* against one another or the *actio communi dividundo* for the liquidation and distribution of the common property.[213] Pothier explains in some detail what the consequences of the dissolution of a partnership entails in Chapter 9 of Pothier on Partnership.[214] Pothier starts by stating that:

> [T]he effect of the dissolution of partnership is, that thenceforth and for the future, all contracts, which each of the former partners may enter into, will be on his own account only, unless they were necessary consequences of the affairs of the partnership.[215]

According to old French law, the consequence of dissolution for whatever reason puts an end to the joint powers and authorities of all the partners. No new contracts or obligations binding on all the partners may be created after the dissolution of the partnership. Pothier notes that this will be the consequence of dissolution as to third parties, either when they have received notice thereof, or in the case of death or insolvency 'there has been no notice'.[216] Pothier provides a practical example of the effect of dissolution of the partnership. He explains that:

> [I]f two grocers of Orleans think proper to dissolve a partnership in the grocery trade, all the new purchases made by either of them of grocery stock in trade, after the dissolution of the partnership, will be on his sole account. If there be profit, he alone will have it; if, on the contrary, there be a loss, he alone must bear it.[217]

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212 As above.
213 Mousourakis (n 147) 140.
214 Pothier (n 55) 116.
215 As above.
216 As above.
217 Pothier (n 55) 117.

Pothier continues to explain:

> [B]ut if, before the dissolution of the partnership, one of the partners had bought at Genoa a certain number of flasks of oil, in order to re-sell them at Orleans for the profit of the partnership, the bargains which he may make after the dissolution of the partnership, for their carriage to Orleans, being a necessary consequence of a purchase made during and on account of the partnership, and, therefore, a necessary consequence of its affairs, will be at the risk of all the former partners, as being done in a partnership transaction. [218]

Pothier thus clearly distinguishes between partnership transactions made before and after dissolution in order to determine the consequence of dissolution on the partners and their liabilities or obligations.

As discussed, death does dissolve a partnership. Pothier, however, adds that according to old French law, the heir of the deceased does not become a partner in the place of the deceased and cannot commence new transactions on account of the partnership of which the deceased was a member. Interestingly enough, the heir does, however, have the duty to complete those transactions which had been commenced by the deceased on account of the partnership.[219]

If a partner has good grounds for being unaware or ignorant of the dissolution of the partnership and consequently enters into some transactions relative to the partnership trade, the bargains which this partner may have made in the name of the partnership of whose dissolution he is ignorant, will nonetheless bind his former partners.[220] An example of this type of situation may be where a partner is unaware of the death of a partner and the subsequent dissolution of the partnership. According to Pothier the:

> [G]ood faith with which that partner acted renders, in this case, these contracts binding, in the same manner as the good faith of a mandatory renders valid whatever he has done in execution of a mandate after the death of the mandant, when the mandatory was ignorant of his death, which extinguished the mandate.[221]

During the subsistence of the partnership, the partners have the power to manage for each other the affairs of the partnership, including the power to receive all debts. Upon the dissolution of the partnership, the partners no longer have this power. A payment made by a partnership debtor to one of the former partners of all that he owed, after the dissolution of

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218 As above.
219 As above.
220 As above.
221 Pothier (n 55) 117-118.

the partnership will, however, be valid if the partnership debtor was *bona fide* ignorant of the dissolution of the partnership.[222]

The consequence of dissolution on a universal partnership is discussed by Pothier:

> It is another effect of the dissolution of a partnership, that when the partners have put into a universal partnership the enjoyment of all their property, or in a particular partnership the enjoyment of certain property, that enjoyment ceases to be common from the day of the dissolution of the partnership; and all the produce of the property received after the day of dissolution of the partnership, will entirely belong to the partner who was the owner of it.[223]

The things that the partners put into the partnership, not only for their enjoyment, but also for the purpose of being common between them may continue to be common among the former partners even after the dissolution of the partnership.[224] The dissolution of the partnership does not prevent such things, as well as those acquired during the partnership from continuing to be common between the former partners.[225] This property may remain common until distribution or division takes place. According to Pothier 'whatever may arise from them, until the distribution, although after the partnership has been dissolved, will be common between them'.[226] Pothier concludes his discussion on the consequence of dissolution by reiterating that:

> [I]n like manner the dissolution of the partnership does not put an end to the debts of each of the former partners to the partnership, and those of the partnership to each of the former partners or to their obligation of respectively accounting for them on the winding up of the partnership.[227]

2.9 Distribution of partnership property

As mentioned, distribution or division of the partnership property or estate follows after the dissolution of the partnership. In order to dissolve the community which subsists after the dissolution of the partnership, each former partner has a right to demand from the other former partners an account and distribution of the partnership effects.[228] Furthermore the

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222 Pothier (n 55) 119. It must, however, be noted that when a partnership is contracted for a specified amount of time, those who have business with partners ought to inform themselves of the terms of the partnership. Settling a debt or delivering goods to a partnership that is dissolved due to effluxion of time, will be not be a recognised justification for ignorance.

223 Pothier (n 55) 120. According to Pothier this will be the case even if such produce is at the time of dissolution untethered or unfit to cut. See Pothier (n 55) 121 on rule of law and choice of law when interpreting the chosen custom of the partners.

224 Pothier (n 55) 122.

225 As above.

226 As above.

227 As above.

228 As above.

actio pro socio and *actio communi dividundo* is available to the former partners to claim debts for which the partners may be liable to each other.[229] In *Deetlefs* the deceased died intestate and there existed no unilateral act making over any property to the first respondent and the court mentioned that no *actio pro socio* seems to be available, but only the *actio communio dividundo.*[230]

Pothier mentions that distribution is nothing more than an act 'determining the indeterminate share of each of the joint owners of the common stock, by awarding to him those things only which are assigned for his lot'.[231] As the partners are the co-owners of the partnership property or assets, the partnership property is owned jointly in undivided shares by the partners. Upon dissolution of the partnership the partners share in the partnership assets that are jointly owned, but not necessarily in equal shares. Each partner's share may conditionally depend on the amount of the partnership profits or the partner's respective contribution.[232]

On this point the court in *Isaacs*,[233] mentioned that:

> It is clear in law that on dissolution each party gets a proportionate share of the assets according to his or her contribution, and it is only when their respective contributions were equal or it is impossible to say that one has contributed more than the other that they share equally.

The partnership agreement will usually stipulate what the share of each partner in the partnership is. If there is no partnership agreement regulating the proprietary aspects of the partnership, each partner's contribution (domestic services, money or assets) will determine his or her share in the partnership.[234] In the case of *C v V,*[235] the court mentioned that it will take into account the 'finances, skill, effort and time' of each party when deciding on the contribution of each partner.[236]

According to Pothier each former partner alone can demand distribution against the others and compel them to make a distribution of the effects which remain in common after

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229 Pothier (n 55) 123. See also *Robson* (n 51) 852D-852F & 854E-854F. Pothier's view that the *actio pro socio* could be applied as an action of division, was preferred by the Supreme Court of Appeal to the opposite opinions of institutional Roman-Dutch writers such as Voet, Vinnius and Huber. See also the case of *Booysen* (n 141) 85, where the court used a hybrid of both the *actio communi dividendo* as well as a universal partnership concept in order to achieve fairness to both the parties.

230 *Deetlefs* (n 174) 16.

231 Pothier (n 55) 123. Pothier refers to his work on the Contract of Sale, Part vii, art 6.

232 Pothier (n 55) 9.

233 *Isaacs* (n 66) 961.

234 See *Isaacs* (n 66) and *Mühlmann-1* (n 116).

235 *C v V* (2012/36328) 2015 ZAGPJHC 174 (21 August 2015).

236 *C v V* (n 235) 67.

the dissolution of the partnership.[237] The partner who demands a distribution ought to seek it against all the partners or their heirs.[238] If the demand for distribution is sought only against one partner, that partner against whom it is sought 'will have grounds for demanding by exception that the plaintiff is bound to make all the others parties to the cause' as it is proper that the division should take place amongst all the partners as they share in the community.[239] Continuing this procedural discussion Pothier mentions that the other partners who have not been summoned may intervene without waiting for a summons.[240]

Usually the distribution demand can be made immediately after the dissolution of the partnership. The parties may, however, agree that the distribution be delayed or postponed until a time which they believe will be more convenient to dispose of their community of property.[241] Such agreement ought to be executed, although an agreement not to make a distribution for an indefinite period will not be binding.[242] This agreement does, however, not prevent a former partner selling his undivided share in the community to a third party in the meantime.[243] The agreement may, however, be 'set up against the purchaser if he seeks a distribution before the time stipulated in the agreement' as the purchaser has no greater right that the partner.[244]

Pothier notes that according to old French law prescription may take place only in the instance where a partner has had separate possession of the property for more than 30 years, as it will be presumed that distribution has taken place and the right to claim distribution has then prescribed.[245]

Harms AJA in *Van Staden v Venter*,[246] specifically refers to and relies on *Hector Felicius Tractatus de Societate* 32.74 and 32.75 as authority that in Roman-Dutch law the *actio pro socio est perpetua* and that the period of prescription did not commence before the dissolution of a partnership.

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237 Pothier (n 55) 123. See para 162 where Pothier mentions that an heir or successor can in like manner make the demand, even a successor to whom one of the former partners may have sold or given his share.

238 Pothier (n 55) 123.

239 As above.

240 Pothier (n 55) 124.

241 As above.

242 As above.

243 As above.

244 Pothier (n 55) 125.

245 As above.

246 1992 1 SA 552 (A) 560H-561C. In this case the Appellate Division placed great emphasis on the work of Felicuis-Boxelius.

Before distribution can take place a distribution account must be drawn up. This account will include what each party owes to the community to be distributed as well as what is due to each party by the said community.[247] What is owed to the partnership at the date of dissolution as well as what has become due to the community upon dissolution should accordingly be reflected in this account.[248] The account must thus reflect not only what was due to a partner by the partnership at the time of its dissolution, but also what is due by the community to each partner.[249] The amount of the sums for which each party is debtor to the community ought to be set off against those for which he is a creditor to the community.[250] That which remains after this set off should accordingly be put to the debit or credit of the community.[251] After this account has been completed, a detailed account of all the different things of which the community is composed should be created.[252] Moveable things or estates of which the community is composed must undergo a valuation. The parties may themselves make this valuation when they are in a position to do so, otherwise a person will be appointed by the court to make the valuation if the parties cannot agree on a person to do so.[253]

Distribution commences with the movable property being distributed first.[254] Each partner may demand the sale of movable property if it is necessary to settle the debts of what the community owes to strangers or if it is necessary for settling a debt which the community owes to a partner.[255] After the movable property has been distributed the immovable property will be distributed.[256]

2.9.1 An alternative to distribution

According to Pothier an alternative to the distribution, as discussed above, would be for the parties to auction between themselves the things which are to be distributed.[257] This action of licitation will then in effect replace the act of distribution. Pothier explains what is meant by licitation in this context:

> To licitate a thing. Is to adjudge it to the one who offers most, and is last bidder, in order that it may belong to him entirely, upon condition of his paying the price for which it was adjudged to him; and the

247 Pothier (n 55) 126.
248 As above.
249 As above.
250 As above.
251 As above.
252 As above.
253 Pothier (n 55) 127.
254 As above
255 As above.
256 As above
257 Pothier (n 55) 128.

> price will be distributed amongst the joint owners, according to the share which each of them had in the thing.[258]

Furthermore, each partner can oblige the others to submit to licitation when the distribution cannot take place otherwise.[259] This will usually be the case when there is only one single estate which cannot be divided without depreciating its value.[260] The debts that are due to the community have no need for distribution as they are divided by mere operation of law.[261] It may, however, according to Roman law be necessary that:

> [H]e to whose lot they had fallen should obtain an assignment from others of their rights of actions for the shares which they each had in them, and should sue for them as well in his own name as in theirs.[262]

According to old French law this is not necessary as:

> [H]e to whose lot the debts due to the community have fallen may, by serving the debtors with an extract of his allotment in the distribution, require payment in his own name alone.[263]

Debts due from the community are not subject to distribution.[264] If the sale of moveable property is not sufficient to settle or discharge community debts, the debt may be distributed or shared amongst the partners who undertake to pay certain debts.[265] This undertaking only binds the partners *inter partes* and is not binding on a creditor, as this undertaking does not discharge the other partners from the debts.[266]

The expenses of the act of distribution and the preparation thereof ought to be taken first from the common monies and then each of the joint owners ought to contribute proportionally to his share in the stock thereto if the joint monies are not sufficient.[267]

Pothier explains the obligations which arise from distribution next. The partner whose allotted share is subject to a charge has the obligation to pay it. Thus, upon distribution this partner contracts to discharge the debt to which his allotted share is subject.[268] The charge

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258 As above.
259 As above.
260 Pothier (n 55) 128-129. Interestingly enough Pothier remarks that even infants can be compelled to submit to licitation only if it can be proven that distribution could not be made otherwise. In the case where minors are involved in licitation a judge will be present and the biddings of strangers ought to be admitted. The bidding of strangers is not admitted when all the parties are majors, except upon the demand of one of the partners.
261 Pothier (n 55) 129.
262 As above.
263 As above.
264 Pothier (n 55) 130.
265 As above.
266 As above.
267 As above.
268 Pothier (n 55) 131.

may consist of a sum of money or rent according to which the parties have agreed.[269] If the charge upon one allotted share is in favour of another partner's allotted share, this charge is a personal debt.[270] The partner may not discharge himself from this debt by offering to abandon his lot entirely.[271]

The effect of distribution is that it dissolves the community which remained between the partners after the dissolution of the partnership.[272] Pothier notes that there is a great difference between the French and Roman law regarding the effect of distribution.[273] According to the Roman law, division was a kind of exchange where:

> [E]ach of the joint owners was considered to acquire from his fellows the shares which they had before the distribution in the effects comprised in his lot, and cede to them in lieu thereof what he had, before the distribution in the effects comprised in theirs. On this account, the things which fell to the lot of one of the joint owners remained subject to the charges of the creditors of his co-partners, according to their shares therein before the distribution.[274]

According to the old French law, the contrary is true and:

> [A] distribution is not regarded as a title of purchase, but as an act which solely converts the indefinite shares which each of the joint owners previous to the distribution, was entitled to, in the community which existed between them, into the property alone fallen to the lot of each.[275]

In terms of old French law the acts of distribution thus have a retrospective effect.[276] Furthermore according to the French law, distribution is not a title of purchase and there is no claim afforded to seigneurial rights.[277] For this reason no part of the estates fallen to the lot of each joint owner is subject to the liens of private creditors of the others.[278]

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269 Pothier (n 55) 131. 'When, in the partition of immovables, the charge upon one lot in favour of another, consists of a rent' that rent is 'a ground-rent or rent-charge upon the estates composing that lot'. Furthermore 'these rents are of the same nature and entirely similar to those which are created by lease of an estate'.

270 Pothier (n 55) 131.

271 Pothier (n 55) 131. Pothier adds that 'the person to whom the charge is due has a primary lien over all the immovable's of the lot liable to it, and a privilege over the movables of the said lot, similar to that of a vendor on credit'.

272 Pothier (n 55) 133.

273 As above.

274 As above.

275 As above.

276 As above.

277 As above.

278 Pothier (n 55) 134.

2.10 Modern consequences of dissolution and liability

In order to understand the consequences of dissolution and the liabilities of the partners, it is important to note the distinction between dissolution and sequestration or winding-up of a partnership, as these are not synonyms. The dissolution of a partnership is usually, although not necessarily the first step towards the sequestration of the partnership.[279] Dissolution refers to the altered partnership relationship as the partners cease to carry on business together.

Dissolution does not, however, terminate the partnership, as the partnership continues to exist until it is sequestrated and terminated. Dissolution is usually followed by sequestration or winding-up of the partnership.[280] The sequestration of the partnership refers to the realisation of partnership assets, payment to creditors, return of capital to the partners, and the distribution of surplus assets among the partners.[281] Distribution of the partnership property or assets is a necessary consequence that follows after the dissolution of the partnership. Distribution will be discussed after the dissolution of the partnership and liabilities of the partners is explained.

The liability of partners in a partnership must be distinguished in two phases. The two phases include the liability of partners *during* the subsistence of the partnership and the liability of partners *upon* dissolution of the partnership.

2.10.1 Liability of partners: Two phases

During the subsistence of the partnership a creditor cannot sue a partner individually for a partnership debt.[282] During the subsistence of the partnership the proceedings must be brought jointly against all the partners or the partnership itself must be sued.[283]

On the other hand, upon the dissolution of a partnership, the partners become jointly and severally liable for partnership debts.[284] This means that a creditor can sue any individual partner for the full amount of the partnership debt upon the dissolution of the partnership. If a creditor sues the partners of a dissolved partnership as individuals jointly and severally,

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279 Cassim & Cassim (n 80) 37.

280 Liquidation will not take place in the instance where the partnership is dissolved and a new partnership is subsequently formed and takes over the assets and liabilities of the dissolved partnership.

281 Cassim & Cassim (n 80) 37.

282 Cassim & Cassim (n 80) 34. See the above discussion on the common-law exception where a partnership is regarded as a separate legal entity.

283 Cassim & Cassim (n 80) 34.

284 As above.

execution may take place against the assets of each partner.[285] Execution of the judgment may take place against the private assets of a partner after dissolution and before liquidation of the partnership estate.[286]

Dissolution of the partnership does not only affect the partners among themselves, but also affects the creditors and third parties. As mentioned, dissolution does not terminate the partnership. Upon dissolution the partnership relationship continues until the partnership is liquidated or wound-up.[287] Dissolution of the partnership does not release the partners from their duties as partners, although the partnership agreement has been terminated upon dissolution.[288] Furthermore, the dissolution of a partnership does not release the partnership from its duties or obligations to third parties or creditors.[289]

The rights of third parties and creditors are thus not terminated by the dissolution and remain binding on the partners after the dissolution of the partnership.[290] If this was not the case, partners would dissolve a partnership in order to avoid their duties or obligations to third parties and creditors.

The most important consequence of dissolution is that upon dissolution of the partnership, the partners become jointly and severally liable for the debts of the partnership. Upon dissolution a partnership creditor may sue any partner individually for all the partnership debts, without claiming payment from any other partners.[291] Any partner may thus be held individually liable for the full amount of all partnership debts upon dissolution of the partnership.

2.11 Conclusion

From the above discussion and glimpse at the historical background of dissolution and distribution of partnerships, including a universal partnership, it is clear that partnership law is not very discernible. The background explanation given above is merely an introduction as to the true complexity of partnership law when dealing with the deemed separate legal

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285 As above.

286 As above.

287 Cassim & Cassim (n 80) 41. Pothier (n 55) 116. According to Pothier, if the partnership is not determined for a specific period of time, it will continue to exist after its dissolution only for the purpose of winding-up the partnership affairs.

288 Cassim & Cassim (n 80) 42. For example the fiduciary duty of good faith.

289 Cassim & Cassim (n 80) 42.

290 As above.

291 Cassim & Cassim (n 80) 42. This partner will have a claim to recover from his co-partners their proportionate share of the partnership debts and liabilities.

personality and alteration of the common law. Insolvency law and the consequence thereof on the juristic nature of a partnership is discussed in the next Chapter.

CHAPTER 3

3 Universal partnerships, dissolution and insolvency

3.1 Insolvency law and the universal partnership

3.1.1 An introduction to insolvency law

The legal status or *stare* of a person refers to the totality of their legal capacities and includes the capacity to act and to litigate.[1] Various factors such as mental illness, disability, age, insolvency and domicile influence a person's legal status. Insolvency diminishes the legal capacity (*capitis diminutio*) of a person. In Roman law *capitis diminutio* referred to the loss of a citizen's legal status, which may have included loss of freedom, membership in a family or even loss of citizenship.[2]

The origin of South African insolvency law is presumably to be found in the Twelve Tables, Table III, which dates back to 451 BC.[3] South African insolvency law is a hybrid of Roman-Dutch law and English law.[4] Insolvency law is described as the totality of rules that regulate the situation where a debtor cannot pay his or her debts.[5] Two basic principles underlie insolvency law, namely the right which creditors have to satisfy their claim via the process of execution against the debtor's assets and the concurrency of creditors who do not have a preferred or secured claim.[6] Insolvency law mechanisms will step into motion only if an advantage or benefit to the creditors can be proved.

For example, in an application for the sequestration of a partnership and of the partners, the 'debtor' as intended by section 10(c) of the Insolvency Act 24 of 1936,[7] is the partnership, and the partnership alone.[8] Henning mentions what must be considered under this provision is confined to the *prima facie* belief that the sequestration of the partnership estate will be to the benefit of the partnership's creditors.[9] The consequence of sequestration

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1 T Boezaart *Law of persons* (2010) 6.

2 GG Adeleye *et al World dictionary of foreign expressions: A resource for readers and writers* (1999) 57.

3 AL Stander 'Geskiedenis van die insolvensiereg' (1996) 21 *TSAR* 371.

4 Stander (n 3) 376.

5 CJ Nagel *et al Commercial law* (2011) 487. This refers to the instance where a debtor does not have sufficient assets to settle all of his or her debts in full, thus the total liabilities of the debtor exceed his or her total assets.

6 Nagel *et al* (n 5) 487. See the doctrine of *concursus creditorum.*

7 Hereafter the Insolvency Act.

8 JJ Henning 'Some manifestations of the statutory recognition of a partnership as an entity' (2014) 53 *Journal for Juridical Science* 58.

9 Henning (n 8) 58.

on the partnership creditors is of importance and not the effect of the additional sequestration of the partners' estates on the partners' creditors.[10]

A deceased's insolvent estate can be administered in terms of section 34 of the Administration of Estates Act 66 of 1965 without first being sequestrated. Only after the appointment of an executor can a creditor apply for the sequestration of such an estate. Such a creditor will have to convince the court that the sequestration will be more advantageous than the section 34 procedure. Once an order for sequestration is given by the High Court the insolvent loses all control over his estate, as his status is changed from solvent to insolvent.[11] Sequestration can take place by either voluntary surrender of an estate or the compulsory sequestration of an estate by creditors.[12]

As mentioned above, insolvency alters the status of a person and especially a partner in any form of partnership. The insolvency of a partner dissolves the partnership in the same manner as death.[13] This is due to the fact that insolvency causes a change in membership, as the status of the partner is altered from solvent to insolvent. The insolvent partner will no longer be able to contribute to the partnership and no prospect to make a mutual profit or gain from the partnership will exist. The reason why insolvency dissolves the partnership is due to the fact that the partners can no longer comply with the *essentialia* of a partnership, such as the element that the partnership should be formed and carried on with the mutual objective to make a profit or gain.

Upon the determination that the partnership is only carried on at a loss, it should be dissolved. Insolvency is not only a ground for dissolution of a partnership, but also provides an exception to the general rule that a partnership does not enjoy separate legal personality. From early on, South African jurisprudence has mainly regarded a partnership as a mere aggregate or collection of individuals, having no separate identity or existence apart from the partners composing it.[14] According to Henning and Delport[15] there are two theories on the nature of a partnership. The first theory or approach is the entity theory or approach, which

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10 As above.

11 Nagel *et al* (n 5) 487. A trustee is appointed by the court which will then realise the estate property (assets) and accordingly distribute the proceeds among the creditors in the manner provided for in the Act. Secs 49 & 92(5): Separate trustee's accounts have to be framed in the estate of a partnership and in the estate of each individual partner.

12 Nagel *et al* (n 5) 491.

13 RJ Pothier *A treatise on the contract of partnership: With the Civil Code and Code of Commerce relating to that subject in the same order* trans OD Tudor (1854) 108.

14 Henning (n 8) 54.

15 JJ Henning & HJ Delport 'Partnership' in WA Joubert (ed) *The law of South Africa* Vol 19 (1983) 386.

has its origin in the mercantile concept of partnership law and the second theory is the aggregate approach. These two dissimilar concepts of partnerships operate in our mixed legal system and have undoubtedly created a lot of confusion and debate as to the exact legal nature of a partnership. A clear appreciation of these two theories and their application consequently remains of utmost importance in order to comprehend the legal nature of a partnership.

3.1.2 The entity theory and the aggregate theory

> It is clear that to some extent the entity theory of the nature of partnership was adopted since it was considered to be a *corpus mysticum or een lichaem op zich zelven* for particular purposes.[16]

According to this theory the partnership is a separate legal entity apart from those who compose it and has rights and obligations distinct from the members that compose it. On the other hand, the aggregate theory looks only at the individual partners that compose the partnership, as the partners are the owners of the partnership property and the rights and liabilities of the partnership are indistinguishable from those of the partners.

According to the South African common law, a partnership is viewed according to the aggregate theory, which treats a partnership as a collection of individual partners or aggregate of persons, as opposed to an entity on its own.[17] The basic principle or general rule in South African law is that a partnership is generally not a legal entity or persona separate from those individuals that compose it and has no existence in itself or of its own, nor any separate legal personality which is distinct from the partners composing it.[18]

According to the South African common-law aggregate approach, the rights and duties of the partnership are the rights and duties of the partners, partnership property is owned in common by the partners in undivided shares and the partners are ultimately liable for the partnership debts in their personal capacity.[19] According to the aggregate approach the legal position is therefore established by looking through (or beyond) the partnership and considering the attributes of the individual partners.[20]

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16 JJ Henning 'A partnership of companies under the Insolvency Act: Historical and comparative perspectives on the resolution of a South African conundrum' (2009) 72 *THRHR* 351.

17 JJ Henning *Perspectives on the law of partnership in South Africa* (2014) 150. The aggregate approach or theory is the opposite of the entity approach or theory.

18 Henning (n 8) 54. Although some exceptions or quasi□exceptions are acknowledged. See also *Ehrig* & *Weyer v Transatlantic Fire Insurance Co* 1905 TS 560; *R v Levy* 1929 (AD) 322.

19 Henning (n 8) 54.

20 See Henning & Delport (n 15) for a detailed discussion.

In *Ex parte Buttner Brothers*,[21] the court mentioned that the persons carrying on the business are commonly spoken of as a partnership or firm, as if they constitute a legal persona. In *Strydom v Protea Eiendomsagente*,[22] the court considered the question of the legal personality of a partnership and mentioned that it has been dealt with in numerous cases over the years.

The court concluded that there should be no doubt that the common-law principle is that a partnership is not a legal entity or persona separate from its members. This means that the rights of the partnership are vested in the partners and the liabilities of the partnership are binding on the individual partners. In *Michalow NO v Premier Milling Company Limited*,[23] the court confirmed that:

> [A] partnership does not have an existence apart from the individuals constituting it and it cannot have assets and liabilities. The debts of the partnership are the debts of the partners and as far as third parties are concerned the assets of the partnership are indistinguishable from the assets of the partners. The partnership debts are debts *in solidum* of all the partners. Any partner unable to meet the claim would be entitled to sue the other partners for *pro rata* payment of the debts.

As previously mentioned, any partnership including the universal partnership may be dissolved due to various reasons, including insolvency. If a partner or the partnership itself becomes insolvent, the partnership will automatically be dissolved by operation of law.[24] It should be kept in mind that upon the dissolution of a partnership each partner becomes jointly and severally liable for the debts of the partnership, but this does not include the possibility of insolvency.[25] When dealing with insolvency law, a partnership enjoys deemed separate legal personality as the Insolvency Act makes provision for the treatment of a partnership as a separate legal entity and the Act in essence deviates from the general common-law rule.[26]

3.1.3 Statutory deviation from the common law

In order to understand how the Act deviates from the common law, it is necessary to first appreciate the definition of a 'debtor' in terms of the Act, before discussing the substantial and procedural exceptions to the common-law aggregate approach as created by sections 13

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21 1930 CPD 138 146. Hereafter *Buttner*.

22 1979 2 SA 206 (T) 209. Hereafter *Strydom*.

23 1960 2 SA 59 (W) 61. Hereafter *Michalow*.

24 FHI Cassim & MF Cassim 'Partnerships' in FHI Cassim *et al* (eds) *The law of business structures* (2015) 38.

25 Cassim & Cassim (n 24) 21.

26 *Pretoria Hypothec Maatschappij v Golombick* 1906 (TH) 51; *Essakow v Gundelfinger* 1928 (TPD) 313; *Divine Gates & Co v African Clothing Factory* 1930 (CPD) 238 240; *Wilson, Est v Est Giddy, Giddy & White* 1937 (AD) 244.

and 49 of the Act. Section 2 of the Act defines a 'debtor' in connection with the sequestration of the debtor's estate to mean:

> [A] person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies.

The definition of a debtor in section 2 includes a partnership, thus clothing a partnership with deemed separate legal personality upon dissolution due to insolvency. It should be carefully noted that any 'other association of persons' which may be liquidated in terms of the Companies Act 71 of 2008, will not be included in the definition of a 'debtor'. According to section 2 the term 'insolvent' when used as a noun, means 'a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context'.[27]

As the definition of 'insolvent' includes the term 'debtor', a partnership may be an insolvent as well. These definitions are the first indication of the deemed separate legal personality of a partnership in terms of the Act. As mentioned above, sections 13 and 49 of the Act provide an exception to the common-law aggregate approach by treating a partnership as a separate legal entity for purposes of insolvency and sequestration. Each section will be discussed in turn to indicate how they facilitate the deviation from the common-law aggregate approach.

Section 13 of the Act deals in detail with the sequestration of the partnership estate and as mentioned provides an exception to the aggregate approach. Section 13(1) makes provision for the simultaneous, but separate sequestration of the partnership estate and the sequestration of every individual partner's estate.[28] According to section 13(1) the private estate of a partner will, however, not be sequestrated if that partner has undertaken to pay the partnership debts within a period determined by the court and has provided satisfactory security for such payment to the registrar. The provision that is made for a partnership to be sequestrated without sequestrating the individual estates of the partners accordingly supports the entity theory.

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27 Furthermore the 'insolvent estate' means 'an estate under sequestration'.

28 Sec 13(1): 'If the Court sequestrates the estate of a partnership (whether provisionally or finally or on acceptance of surrender), it shall simultaneously sequestrate the estate of every member of that partnership'.

Section 13(2) further mentions that if the individual or private estate of the partner cannot fully meet the costs of sequestration, the balance shall be paid out of the assets of the estate of the partnership. Once again provision is made for the separate and distinct treatment of the partnership estate and the private estates of the partners.

The reason for dealing with these estates separately is based on the nature of the claim against the estate, as envisaged by section 49. A claim against the partnership estate will usually be for a partnership debt and claimed by a partnership creditor. A private debt is usually claimed by a private creditor against the private estate of a partner.

Section 49 of the Act differentiates between the claims against the partnership and the claims against the individual partners, which is also referred to as the dual-priorities rule. Before discussing section 49, I turn my attention to a brief discussion of the dual-priorities rule, as the dual-priorities rule has strongly influenced the division of the proceeds of insolvent partnerships' and partners' estates.[29] The dual-priorities rule in essence means: 'Partnership estate to partnership creditors, private estate to private creditors, anything left over from either go to the other'.[30]

As the name signifies, the dual-priorities rule embodies two constituents. The first part of the rule acknowledges the priority of partnership creditors on the partnership assets which is referred to as entity shielding.[31] The second component of the rule creates a priority of private creditors on the assets in a particular partner's private estate which is referred to as owner shielding.[32] Despite the second component of the rule being heavily criticised and branded as being contrary to one of the basic principles of partnership law (namely the unlimited liability of ordinary or general partners for partnership debts and obligations) the dual-priorities rule is at present still firmly embedded in section 49(1) of the Act.[33]

Section 49(1) states that when the partnership estate and the private estates of the partners are under simultaneous, but separate sequestration, the partnership creditors are not

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29 JJ Henning 'The origins and development of the dual priorities rule in partnership insolvency' (2008) 20 *SA Merc LJ* 243.

30 Henning (n 29) 243. This is also known as the 'jingle rule' as described by JJ Henning in 'Criticism, review and abrogation of the jingle rule in partnership insolvency: A comparative perspective' (2008) 20 *SA Merc LJ* 307.

31 Henning (n 29) 243.

32 As above.

33 As above. See also Henning (n 29) 267, where he refers to the South African Law Reform Commission Project 63: Report on review of the law of insolvency (2002) 1: 'In its April 2002 "Report on Review of the Law of Insolvency", the South African Law Reform Commission proposed that the second component of the dual priorities rule (that is, the priority of private creditors) should no longer find application in the South African law of partnership insolvency.'

entitled to prove claims against the estate of a partner. The creditors of a partner are also not entitled to prove claims against the estate of the partnership.[34] However, the appointed trustee of the partnership estate shall be entitled to any balance of a partner's estate that may remain over (after satisfying the claims of the creditors of the partner's estate) in so far as that balance is required to pay the partnership's debts.

The appointed trustee of the estate of a partner shall also be entitled to any balance of the partnership's estate that may remain over (after satisfying the claims of the creditors of the partnership estate) so far as that partner would have been entitled thereto, if his estate had not been sequestrated.[35] The moment the partnership estate is sequestrated, partnership creditors are generally restricted to the partnership assets and unavoidably deprived of any recourse against the partners individually.

It is important to note that section 49(1) only applies where the estate of a partnership and the estates of the partners in the partnership are simultaneously under sequestration. Henning notes that the dual-priorities rule may therefore not apply where one or more of the partners' estates are not sequestrated simultaneously.[36] As section 49(1) does not apply where the estate of a partner is sequestrated, unless the partnership is also sequestrated, the partnership creditors may be entitled to prove claims against the estate of an insolvent partner.[37]

In *Barclays Bank v the Master*,[38] the court held that section 49 must not be understood as to deprive a partnership creditor, who is simultaneously a creditor of a partner, of the right to prove claims against the partner's estate where the claim against the partner is founded on a cause of debt distinct and separate from that on which the claim against the partnership is

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34 When the partnership estate and the separate estates of the partners are under sequestration simultaneously, the creditors of the partnership are not entitled to prove claims against the separate estates of the partners and the creditors of a partner are not entitled to prove claims against the estate of a partnership.

35 Sec 49(2) states that: 'Nothing in this section shall be construed as preventing the Secretary for Inland Revenue or the Commissioner for Inland Revenue of the Territory from proving in the manner provided in this Act a claim against the estate of a partnership in respect of any sum referred to in para (b) of Sec 101, or any interest due on such sum'.

36 Henning (n 29) 266. Henning provides the example in the case of a partnership with one or more corporate partners who estates are not susceptible to sequestration under the Insolvency Act.

37 Henning (n 29) 266.

38 1958 2 SA 119 (O) 121.

based.[39] Hence, section 49 does not prevent claims being lodged in both the partnership estate and the estate of a partner if the claims are based on different causes of action.[40]

In addition to sections 13 and 49 providing an exception to the aggregate approach, section 92 of the Act deals with the manner of framing a liquidation account. Section 92(5) mentions that if the partnership estate is under sequestration, separate trustees accounts shall be framed in the estate of the partnership and in the estate of each member of that partnership whose estate is under sequestration.[41] This contributes to the separate legal treatment of a partnership estate upon insolvency, in addition to sections 13 and 49.

Section 128 of the Act states that if a partnership's estate has been sequestrated it shall not be rehabilitated. This section indirectly confirms the common law on partnerships, as a partnership is dissolved upon insolvency and terminated once sequestration is completed. As the partnership is no longer in existence it cannot be rehabilitated. This section may seem insignificant, but upon further interpretation it reiterates an important common-law rule.

If a partnership was capable of rehabilitation it would suggest that insolvency does not dissolve and ultimately terminate the partnership, but that insolvency only suspends the partnership and after rehabilitation the partnership would revive (or that the suspension would cease). This is, however, not the case and a partnership cannot be rehabilitated like other insolvents.[42] As far as the rehabilitation of an insolvent partner is concerned, the Act only considers the claims against a partner's private estate[43] and not the claims against the partnership estate of which he has been a member.[44]

The aforementioned discussion indicates how the Insolvency Act in essence deviates from the common law and illustrates the modified approach to partnerships upon insolvency. Henning explains that sections 3(2), 13(1), 49(1) and 92(5) amount to more than a mere theoretical modification of the common law.[45] According to Henning these sections necessitate the hypothesis that:

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39 Henning (n 29) 266.

40 As above.

41 Secs 49 & 92(5).

42 Sec 124 deals with the application for rehabilitation.

43 Henning (n 8) 58. See sec 124(3)(b) & sec 124(5).

44 Henning (n 8) 58. The court may, however, take into account the partner's conduct in respect of partnership matters.

45 Henning (n 29) 264. Sec 3(2) states that: 'All the members of a partnership (other than partners *en commandite* or special partners as defined in the Special Partnerships Limited Liability Act 24 of 1861 of the Cape of Good Hope or in Law No. 1 of 1865 of Natal) who reside in the Republic, or their agent,

> [T]hird parties dealing with and granting credit to a partnership do so in reliance only on the assets of the partnership and that throughout their dealings with the partnership they have looked on it as a separate entity.[46]

This hypothesis is based on the fact that the moment a partnership is sequestrated the partnership creditors are primarily confined to the partnership assets and deprived of any recourse against the partners individually.[47] For this reason partnership creditors in essence deal with a partnership as a separate legal entity on its own, as the partnership creditors know that upon insolvency they will be confined to only the partnership assets and have no right of recourse against the partners individually.

Henning refers to the case of *Michalow*,[48] where the abovementioned was described by the court as a 'scheme' which radically departs from the common-law position, as it treats a partnership as a separate entity by precluding partnership creditors from preferring their claims against the individual estates of the partners.[49]

By precluding private creditors from proving a concurrent claim against the partnership estate, the Insolvency Act merely gives effect to the common-law preference of partnership creditors and does not depart from Roman Dutch law.[50] The Act does, however, depart from common-law principles where it precludes partnership creditors from proving concurrent claims against the individual estates of the partners.[51] In this manner partnership creditors are in effect downgraded from concurrent creditors to deferred creditors of the individual partners' estates.[52] This, according to Henning, amounts to a severe limitation of the common-law rights of partnership creditors.[53]

Upon the sequestration of the partnership the partnership creditors are automatically and without their consent 'deprived of their recourse against the individual partners' as the partnership creditors lose the additional security the common law provides throughout the existence of the partnership.[54] Henning notes that for this reason (that a partnership creditor is

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may petition the Court for the acceptance of the surrender of the estate of the partnership and of the estate of each such member'.

46 Henning (n 29) 264. Henning (n 8) 57.

47 Henning (n 29) 264. Henning (n 5) 58.

48 *Michalow* (n 23) 63.

49 Henning (n 29) 263.

50 Henning (n 29) 264.

51 As above.

52 As above.

53 As above.

54 Henning (n 29) 265. This is because the sequestration of the partnership dissolves the partnership due to insolvency.

upon insolvency confined to only the partnership assets) it would be fair that a partnership creditor should have the right to insist that the partnership estate should be treated as a separate entity for purposes of insolvency law, as soon and as long as its liabilities exceed the value of its assets.[55]

The opinion of the court in *Michalow,*[56] that the Insolvency Act plainly intended to alter the course of the common law and to treat a partnership as having a separate estate and as being in the same position as any other debtor, supports the opinion of Henning. If the Insolvency Act did not provide for this it would essentially deprive the partnership creditors of protection against the preferences extended to all other types of creditors.[57]

In the case of *Acar v Pierce*,[58] the court confirmed that 'in partnerships, there are multiple and separate estates which are involved'. The court, however, added that 'the partnership itself never becomes an insolvent, hence the necessity, as provided for by the Insolvency Act, to sequestrate simultaneously partnership estates'. The court explained that 'this is not simply a procedural matter but a vital component of the law of insolvency as applied to partnerships'. The court correctly interpreted section 13 of the Act by confirming that upon the sequestration of the partnership estate, the private estates of the partners are simultaneously sequestrated and that there are consequently multiple and separate estates involved.

According to this case, it cannot be said that the partnership itself is an insolvent, as the court reasoned that section 13 captures the estate of every member of the partnership together, but separate from the partnership estate. This view is open to criticism as it may be argued that the partnership as a 'debtor' and 'insolvent' in terms of section 2, may very well be an insolvent in terms of the Act.[59]

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55 Henning (n 29) 265.

56 Henning (n 29) 265 *Michalow* (n 23) 63.

57 Henning (n 29) 265.

58 1986 3 All SA 215 (W) 220. Hereafter *Acar.* See also *Muller en 'n ander v Pienaar* 1968 3 SA 195 (A) 202, where the court mentioned that although a partnership may be regarded as a separate legal entity for some purposes such as insolvency, it does not clothe the partnership with any separate legal personality. Accordingly, a partnership has no separate legal existence apart from the partners composing it.

59 Sec 2: '[D]ebtor, in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies.' Sec 2: '[I]nsolvent, when used as a noun, means a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context'.

According to the definition of 'debtor' and 'insolvent' and the section 13 procedure, the court in *Acar* may have erred by stating that a partnership itself cannot be an insolvent. The court in *Acar* followed the common-law approach by insisting that a partnership is not a separate legal entity capable of being an insolvent itself. It may certainly be argued that the court failed to observe the Insolvency Act as an exception to and alteration of the common law. The presumption that legislation does not intend to change existing law should not apply in this instance, as the legislature has expressly altered the common law and the changes must be effected.[60]

The interpretation of legislation such as the Insolvency Act and the necessary comprehension of the common-law's altered position is not always an easy task. The Insolvency Act is interpreted and applied by our courts on a daily basis, as they primarily only deal with the mere sequestration of an insolvent partnership and/or private estates of the partners. The difficulty, however, arises when dealing with insolvent partnerships on the backdrop of complex factual situations which essentially side-track the courts from the main issues at hand. In order to illustrate this, some examples from case law are discussed.

3.2 The Insolvency Act and judicial application

3.2.1 The A v A[61] case

A good example of where a court has been side-tracked from the main issue at hand is the *A v A* case. In this case the parties were married out of community of property in terms of an ante-nuptial contract without accrual. It is on this basis that the plaintiff sought a decree of divorce against her husband (Alan).

Alan did not oppose the divorce *per se*, but he did, however, oppose the basis upon which it is granted because he claimed that numerous assets, both movable and immovable acquired by him before the marriage were his, and those acquired by them during the course of their marriage was the outcome of their joint efforts, contributions, energy, commitment and ultimately in consequence of a universal partnership for their joint benefit.

For that purpose, he filed a counterclaim to the action and sought, inter alia, an equal division of the assets acquired by them during the marriage as based on the existence of the *universal partnership* and not the ante-nuptial contract. On this note, it is important to point

60 Henning (n 8) 65.
61 (2013/00875) 2015 ZAGPJHC 259 (20 November 2015). Hereafter *A* case.

out that a marriage out of community of property, profit and loss without the accrual system, does not necessarily exclude the existence of a universal partnership.[62]

As a consequence of Alan's final sequestration in 1995, the parties agreed that they would conclude an ante-nuptial contract in terms whereof community of property, profit and loss would be excluded and that the accrual system would not apply to their marriage. The parties, on conclusion of the marriage also entered into an oral or tacit universal partnership in terms whereof it was agreed between the parties, that the plaintiff would hold all the assets acquired by the parties jointly during the marriage in her name. In the event of a divorce, the plaintiff would then be obliged transfer half of the assets acquired, into the name of the defendant.

The issues at hand, according to the court, were: whether or not the parties expressly agreed, in the context of Alan's insolvency, that Alan would transfer any assets acquired by him subsequent to the marriage to his wife; and in the event of a divorce would she be obliged to transfer the assets to him according to the universal partnership?

The court considered whether the relevant agreement was designed to mislead the Master, the trustees or the creditors of Alan's estate and if this amounted to immoral conduct which is against public policy or in contravention of the provisions of the Insolvency Act. If it was found to be any of the aforementioned it would render the agreement illegal and void *ab initio* and consequently preclude Alan from recovering what he had transferred.

The court thus focused on the motive behind the formation of the universal partnership and not the impact of Alan's insolvency on the formation of the universal partnership. The court considered the *essentialia* of a universal partnership and declared that a universal partnership had existed between the parties from 1994 until the date of their separation and that the partnership estate should be divided equally between them.

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62 The Supreme Court of Appeal's decision in *Mühlmann v Mühlmann* 1985 3 SA 102 (A) confirmed that a universal partnership could exist in a marriage out of community of property. In *JW v CW* 2012 2 SA 529 (NCK) 22-25, the court held that given the fact that a *societas universorum bonorum* would effectively change the marriage from being out of community of property without accrual to a marriage in community of property this informal method of variation of the ante-nuptial contract could not be allowed. There is authority to the effect that universal partnerships *universorum bonorum* are precluded in marriages out of community of property, but that partnerships *quae ex quaestu veniunt* would be possible. In *JW v CW* the court held that an agreement stipulating that all of the parties' movable and immovable assets, both existing and future, would form part of the assets of a partnership *universorum bonorum* between them would be irreconcilable with the ante-nuptial contract, which excludes community of both existing and future property of the parties.

The court followed a holistic approach by viewing all the evidence and concluding it was more probable than not that a tacit agreement had been reached.[63] The approach followed in this case is open to criticism and problematic upon interpretation as the insolvency of a partner automatically dissolves an existing universal partnership because the *essentialia* of the partnership can no longer be complied with.

A universal partnership cannot be formed when a partner (such as Alan) is insolvent at the creation of the partnership, as the *essentialia* of the universal partnership (such as the intention or objective to make a profit) cannot be fulfilled. The intention to escape liability upon insolvency and subsequent creation of a universal partnership in order to protect private assets would have never been possible in this case, as Alan was already insolvent during the attempted creation of the universal partnership.[64]

If it can be said that a universal partnership may be validly formed during the insolvency of a partner or by an insolvent, this would drastically alter the grounds of dissolution of a universal partnership as well as the *essentialia* thereof, as the grounds of dissolution are primarily based on non-compliance with the *essentialia*.

Another issue that the court failed to take cognisance of is the conditional formation of a universal partnership. To protect the assets of a partnership is not illegal, immoral or against public policy. The problem is, however, framing a fraudulent scheme in order to preclude existing creditors from claiming outstanding debts during one's current insolvency. Alan did not marry the plaintiff in community of property of profit and loss, as this would mean that she too would be insolvent as he was.[65]

Marrying in community of property of profit and loss would not be beneficial to Alan as he would not be able to protect his assets. Whether or not the universal partnership was

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63 *A* case (n 61) 10.

64 Sec 8 deals with the acts of insolvency: '(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another; (d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another.'

65 In the case of *Maharaj v Sanlam Life Insurance Ltd* 2011 6 SA 17 (KZD), the court referred to sec 17(5) of the Matrimonial Property Act 88 of 1984 according to which 'the solvent spouse may, after the dissolution of a marriage in community of property, be held jointly liable for debts incurred *stante matrimonio* by the insolvent spouse in the course of earning an income for the joint household'. The Insolvency Act makes provision for the attachment of the solvent spouse's property by the Master of the High Court, together with the insolvent spouse's property. Sec 20(1)(a) of the Insolvency Act expressly provides that the effect of sequestration shall be to 'divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed'. The Act states that the estate includes all property of the insolvent at the date of sequestration and all property which the insolvent may acquire or which may accrue to him during the sequestration.

created to mislead any parties is essentially irrelevant, as the universal partnership had factually never existed. The issue of whether or not the plaintiff was in fact aware of Alan's insolvency is also irrelevant as to the validity of the universal partnership, as the partnership cannot factually be carried on as a profit-making entity, whether she knew about his insolvency or not.

The fact remains that insolvency dissolves a universal partnership as the *essentialia* can no longer be complied with. Insolvency as a ground of dissolution is largely based on the inability of the parties to make a profit from the universal partnership and for this reason it is dissolved. It cannot be said that a pseudo-partnership existed as the enquiry into the existence of a partnership is a factual one.

An alternative approach

In this case, the court erred in concluding that a universal partnership had existed. If the universal partnership had been validly concluded, the court in this case would in any event have failed to pay attention to section 23 of the Insolvency Act. This section deals with the rights and obligations of an insolvent during sequestration. Section 23(2) expressly states that:

> The fact that a person entering into any contract is an insolvent, shall not affect the validity of that contract: Provided that the insolvent does not thereby purport to dispose of any property of his insolvent estate; and provided further that an insolvent shall not, without the consent in writing of the trustee of his estate, enter into any contract whereby his estate or any contribution towards his estate which he is obliged to make, is or is likely to be adversely affected, but in either case subject to the provisions of sub-section (1) of section twenty-four.

Despite the incorrect conclusion of the court, it should have paid attention to section 23(2) of the Act, instead of considering the intention of the transferee and transferor.

If the court found that a universal partnership had not existed between the parties based on the reasons above, a lot of time and money during litigation would have been saved as the court would only have dealt with the ante-nuptial contract and the relaxation of the *par delictum* rule in order to do justice between the parties.[66] This case illustrates that a correct understanding, interpretation and application of insolvency law on universal partnerships is of utmost importance for legal certainty and protecting the rights of the partners, creditors and third parties upon insolvency.

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66 *A* case (n 61) 66.

3.2.2 Cruzn Motors (Pty) Ltd v Hussen Family Partnership,[67]

In this case the court confirmed that the Insolvency Act treats a partnership as being a separate estate for most purposes.[68] The court ruled that the so-called Hussen Family Partnership was a figment of the applicant's imagination which was also supported by the fact that there was not a single document or any proof that suggested the existence of such a partnership.[69] The applicant failed to provide any documents which bore the name 'The Hussen Family Partnership'.[70]

Although documentation is not a prerequisite for the proof of the partnership, the court considered this absence of documentation in addition to the fact that the *essentialia* for the partnership were not complied with. The application thus failed at multiple levels since the necessary elements had not been established.[71] The applicant failed to prove that a universal partnership, or any partnership for that matter, existed between the respondents, or that the respondents committed the alleged acts of insolvency.[72] In conclusion the applicant failed to discharge its onus that a universal partnership had existed and that it was insolvent.[73]

What is interesting about this case is that the applicant presented three versions of liability (of the partners and the partnership), which were 'in fact mutually destructive'.[74] The court considered it necessary to list the three versions:

> (a) Firstly, that both the partnership (first respondent) and the partners are liable for the alleged indebtedness;
>
> (b) Secondly, that the fourth respondent represented the first respondent in concluding the business transactions and through this representation the first respondent is liable;
>
> (c) Thirdly, that the second to sixth respondents are jointly and severally liable to the applicant for the alleged indebtedness.

From the above it is clear that the applicant bore no attention to the common-law rules of liability of the partners and failed to take into account the effect of insolvency on a

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67 (10250/2017P) 2018 ZAKZPHC 15 (15 May 2018). Hereafter *Cruzn*.
68 *Cruzn* (n 67) 10.
69 *Cruzn* (n 67) 20. The court referred to the fourth respondent's answering affidavit.
70 *Cruzn* (n 67) 22. As much as the applicant failed to state the type of partnership that is allegedly in existence, the respondents inferred that reliance was placed on a *universorum bonorum* although the term was never used in the papers.
71 *Cruzn* (n 67) 22.
72 *Cruzn* (n 67) 27.
73 As above.
74 *Cruzn* (n 67) 22.

partnership. The first version, that the partnership and the partners are liable for the alleged indebtedness is incorrect.

The partnership does not have an existence apart from the individuals constituting it, it cannot have assets and liabilities and the debts of the partnership are the debts of the partners.[75] As mentioned, during the subsistence of the partnership a creditor cannot sue a partner individually for a partnership debt.[76] In the first version the applicant attempted to create separate legal personality for the partnership and joined the partnership as a debtor, equal to the partners (as debtors). The applicant failed to understand that during the subsistence of the partnership the proceedings must be brought jointly against all the partners or the partnership itself must be sued.

The applicant (as creditor) cannot sue both the partners and the partnership simultaneously during the subsistence of the partnership and according to the court in *Mahomed v Karp Brothers*,[77] the legal action must be brought against the partnership estate only. Furthermore, the influence of insolvency on liability of the alleged partners was not even mentioned by the applicant.

In the second version of liability averred by the applicant, the applicant contended that a partner represented the partnership in concluding the business transactions and through this representation the partnership is liable. It is true that partners act as both principals and agents within the limit of their authority.[78] From a legal perspective, the character of a partner is, however, much more complex than that of an agent.[79] Because a partnership generally has no separate legal personality, the partners act as both principal and agent in the same transaction.[80] When a partner concludes a contract in the name of the partnership, the partner is firstly acting as principal, by binding himself to the transaction and secondly the partner is acting as agent by binding the other partner(s).[81] Partners are not merely agents of the

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75 See *Michalow* (n 23) 61.

76 Cassim & Cassim (n 24) 34. Upon dissolution of the partnership, the partners become jointly and severally liable for partnership debts.

77 1938 (TPD) 112.

78 Cassim & Cassim (n 24) 18. See also Pothier (n 13) 39-40.

79 Cassim & Cassim (n 24) 30. V Zimmermann *et al Southern Cross: Civil law and common law in South Africa* (1996) 351.

80 Cassim & Cassim (n 24) 30.

81 Cassim & Cassim (n 24) 30. See also *Bosman NO v Registrar of Deeds and the Master* 1942 (CPD) 307: 'It is trite law that in the case of partnership each partner is an agent for the other partners'. See also Pothier (n 13) 39-40.

partnership, but also principals, as the partners are ultimately jointly and severally liable for the partnership debts and liabilities.[82]

The agency that partners have arises by operation of law as soon as the partnership agreement has been entered into.[83] Each partner thus has the implied authority to conclude contracts on behalf of the partnership that fall within the scope of the partnership business.[84] In order for a third party to hold the partners liable on a contract concluded by a partner, this third party must prove three things. Firstly, it must be proven that the partnership does in fact exist, secondly that the contracting partner had the authority to contract on behalf of the partnership. Lastly it must be proven that the contracting partner did indeed contract on behalf of the partnership.[85]

The second averment of the applicant is thus also incorrect, as the partnership never existed and the alleged partner could in fact not bind the alleged universal partnership. The applicant further relied on the representation made by the alleged partner, which raises the question of whether ostensible authority is applicable in this case.

Ostensible authority and joint and several liability

Ostensible authority refers to the situation where the principal has made a representation, via words or conduct, to a third party that the agent has the necessary authority to act on behalf of the principal. If the bona fide third party reasonably relies on this representation the principal will be estopped from denying that the agent had authority.[86] For ostensible authority to be established certain requirements must be met, of which the first one is that:

> (i) the partner must have made a representation (whether by words or conduct), or must have permitted it to be represented, that the contracting partner has authority to enter into the contract in question. It is not enough that only the contracting partner had represented that he or she had authority to act on behalf of the other partners.[87]

The reliance by the applicant in *Cruzn* on the representation of the alleged partner does not even meet the first requirement of ostensible authority, as 'it is not enough that only the

82 Cassim & Cassim (n 24) 30.
83 As above.
84 Cassim & Cassim (n 24) 31.
85 As above.
86 Cassim & Cassim (n 24) 33: 'As ostensible authority is no authority at all, the contracting partner would have exceeded the limits of his or her authority and would consequently have incurred liability to the other partners for any damages suffered by them, unless they have ratified the unauthorised act.' See also *Bester NO v Schmidt Bou Ontwikkelings* CC 2016 JOL 35314 (SCA) 17.
87 Cassim & Cassim (n 24) 33.

contracting partner had represented that he or she had authority to act on behalf of the other partners'. The other requirements for ostensible authority are: the third party must have relied on the representation; such reliance was reasonable in the circumstances; it could reasonably be expected that a third party would rely on the representation; and the third party must have suffered some damage or prejudice due to the reliance.[88] The other requirements for ostensible authority are, however, not applicable, as the first requirement has not been met.

The last averment made by the applicant that the second to sixth respondents are jointly and severally liable is probably the only seemingly correct one of the three averments. Joint and several liability is, however, only applicable upon the dissolution of the partnership, which was not alleged or proven by the applicant.

An alternative approach

It is interesting to note that the applicant did not explore the English doctrine of the undisclosed principal in this case.

> The doctrine states that if an agent contracts with a third party without disclosing that he or she is acting for and on behalf of a principal, the third party is entitled to hold either the principal or the agent personally liable on discovering that the agent is acting for a principal.[89]

In the case of *Cullinan v Noordkaaplandse Aartappelkernmoerwerkers Koöperasie Bpk,*[90] the court mentioned that the doctrine of the undisclosed principal is a part of South African law, but does not apply when there is more than one undisclosed principal. In *Eaton and Louw v Arcade Properties (Pty) Ltd*,[91] the court mentioned that the doctrine of the undisclosed principal does apply to partnerships in our law. In terms of this doctrine, the partnership itself would be the undisclosed principal which in truth consists of all the partners, as the partnership itself is not a separate legal entity and a partner acts as both principal and agent in a dual capacity. The partnership and the partners would then be principals.

This would in essence seem to contradict the *Cullinan* case's exception that the doctrine does not apply when there is more than one undisclosed principal. If the partnership itself is the undisclosed principal this doctrine will clothe the partnership with deemed separate legal personality, by treating the partnership as an entity which can be held liable by the third party.

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88 As above.
89 Cassim & Cassim (n 24) 32.
90 1972 1 SA 716 (A). Hereafter *Cullinan.*
91 1961 4 SA 233. Hereafter *Eaton.*

The fact that the doctrine permits a third party to hold either the principal or the agent personally liable is also contrary to partnership common law, which prohibits a partnership creditor from claiming payment from an individual partner during the subsistence of the partnership.[92] It may then be argued that the creditor is not a partnership creditor, but rather a private or individual creditor of a partner, which would in essence negate the necessity for the doctrine. As mentioned, during the subsistence of the partnership the proceedings must be brought jointly against all the partners or the partnership itself must be sued.[93]

3.3 Conclusion

> Recently there seems to be a tendency to adhere even more faithfully to extreme applications of the aggregate view and to deny any further development of the entity approach.[94]

The importance of this chapter lies in the acknowledgement of the intricate application of not only legislation such as the Insolvency Act, but also common-law principles. As the common law has dictated partnership law for decades, it is understandable that the deviation as created by the Insolvency Act is criticised. Criticism is acceptable as it contributes to the checks and balances of our constitutional democracy. Criticism of the Act's deviation and alteration of the common law should, however, not alter the normal application of legislation as intended by the legislature. As mentioned, the presumption that legislation does not intend to change existing law should not apply when dealing with the Insolvency Act, as the legislature has expressly altered the common law and the changes must be effected.[95]

The advantages and the disadvantages of the deemed separate legal personality of a partnership upon insolvency are seemingly clear. It does, however, appear that neither the entity nor aggregate approach provide a satisfactory solution when used in a mutually exclusive manner. The approach followed by our law is a more hybrid approach, where the common law has dictated the aggregate approach and legislation has introduced the entity approach. These two approaches currently co-exist in South African law and both find application, but at different stages in time, for example during the subsistence of the partnership or upon dissolution thereof.

In the next Chapter I will turn to a discussion of foreign law and universal partnerships in order to indicate to what extent foreign jurisdictions provide for the

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92 As all the partners are joint co-debtors and co-creditors of partnership contracts. See common-law exception in Chapter 2 above at 2.1.

93 Cassim & Cassim (n 24) 34.

94 Henning (n 16) 354.

95 Henning (n 8) 65.

acknowledgement of universal partnerships and the dissolution of universal partnerships. Furthermore, the following Chapter indicates a much more liberal approach followed by foreign jurisdictions when confronted with contradicting common law and legislation.

CHAPTER 4

4 Foreign legislation

4.1 Introduction

As discussed in Chapter 3, the aggregate and the entity theory are not always sufficient or satisfactory in every given situation. For this reason, our judiciary and legislator have to some extent adopted the mercantile view in order to clothe a partnership with deemed separate legal personality in certain instances, such as insolvency. In a similar manner the entity theory may be disregarded in exceptional circumstances, if the court deems it necessary in order to achieve a just and equitable decision.

It may be argued that the entity and aggregate theories are merely theories, as they are not binding in law, although some theories have through tradition become established and secured their judicial application. It is important to recall that because partnership law in South Africa is to a large extent not dealt with by legislation, reliance on common law and judicial precedent is vital when attending to partnership law, especially universal partnerships.

In this Chapter the legislation of Botswana, Zimbabwe and thereafter Namibia is discussed. As mentioned in Chapter 1, South Africa, Botswana, Namibia and Zimbabwe all have mixed legal systems.[1] Botswana inherited most of its private law from the Cape of Good Hope, therefore it shares a common-law heritage with South Africa.[2] Namibia was 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.[3] Zimbabwe also retained a large part of South African private law which it inherited from its predecessor, Southern Rhodesia.[4]

Upon conclusion of this Chapter it will be clear that the legislation of these foreign jurisdictions deal with the dissolution of the universal partnership in a similar manner as that of South African legislation, save for a few exceptions. The case law on universal partnerships as discussed in Chapter 5, however, provides a much more detailed insight as to the approach these

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1 PHJ *et al Historical foundations of South African private law* (2000) 7; V Zimmermann *et al Southern Cross: Civil law and common law in South Africa* (1996) 3.

2 Zimmermann *et al* (n 1) 3.

3 As above.

4 Zimmermann *et al* (n 1) 4.

jurisdictions follow when dealing with the dissolution of universal partnerships. Although the legislative discussion may seem redundant or irrelevant, it is important to bear in mind that the legislation cannot be overlooked for convenience sake, as legislation often offers valuable insight on the regulation upon dissolution of various business structures. As mentioned, this is not necessarily the case with reference to these foreign jurisdictions, as the heart of this discussion and the liberal approaches are observed in the case law of these jurisdictions. Nonetheless, the legislation of these jurisdictions on partnerships is discussed and compared to South African legislation.

4.2 Botswanan partnership law

4.2.1 Botswanan Rules of Court

The Botswanan Rules of the High Court[5] make provision for a partnership to sue or be sued in its own name. Rule 18(3) states that a plaintiff suing a partnership need not allege the names of the partners and if it does, any error of omission or inclusion shall not afford a defence to the partnership. Rule 18(4)(8) states that the execution in respect of a judgment against a partnership shall first be levied against the assets of the partnership. Thereafter, the judgment may be levied 'against the private assets of any person held to be, or held to be estopped from denying his status as a partner, as if judgment had been entered against him'. Rule 18(6) states that if a partnership is sued and it appears that since the relevant date it has been dissolved, 'the proceedings shall nevertheless continue against the persons alleged by the plaintiff or stated by the partnership to be partners, as if sued individually'. From these Rules of Court it is clear that in a similar manner to South African law, the partnership may, during its subsistence or even after its dissolution, be treated as a legal person or entity that is separate from those who compose it, for the purposes of civil proceedings.

4.2.2 Botswanan Companies Act and partnerships

The Botswanan Companies Act,[6] deals with the formation and dissolution of partnerships to a very limited extent. Unlike the South African Companies Act,[7] section 2 of the Botswanan

5 Chapter 04:02, rule 18(2).
6 Chapter 42:01. Hereafter the Companies Act.
7 71 of 2008.

Companies Act defines a partnership as 'any partnership not registered as a company under this Act or the repealed Act'.[8]

The Botswanan Companies Act only deals with the winding-up of a partnership if it consists of more than seven members. In terms of section 483 an 'unregistered association' may be wound-up in terms of the Companies Act, but an 'unregistered association' unfortunately excludes a partnership consisting of seven or less members from its ambit.[9] Therefore a universal partnership will not fall within the ambit of the Botswanan Companies Act.

The Act further mentions a prohibition of large partnerships in section 515. This section expressly prohibits the formation of a partnership consisting of more than twenty members, unless it is registered as a company under this Act or other law.[10]

4.2.3 Botswanan Insolvency Act and partnerships

The Botswanan Insolvency Act[11] specifically deals with the sequestration of a partnership estate in section 11. A partnership is not defined in the Act, nor does the definition of a 'debtor' include a partnership, unlike the South African Insolvency Act, which does include a partnership in its definition of a debtor.[12] The Botswanan Insolvency Act does, however, mention that any company, body corporate or other association of persons which may be placed in liquidation under the law for the time being in force relating to the winding-up of companies, is not a debtor.[13] This is similar to section 2 of the South African Insolvency Act, which defines a debtor.

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8 Section 2 of the Act defines a 'corporation' as 'a body corporate, including an external company or a foreign company or a partnership formed or existing in Botswana or elsewhere'. A 'firm' is also defined by the Act and means 'the association formed by persons who enter into a partnership not registered under this Act or the repealed Act'.

9 Sec 483 defines an unregistered association to mean 'any syndicate, association or partnership having a place of business in Botswana which consists of more than seven members and is not a company or an external company'.

10 Sec 515 does, however, not apply to the formation of any association, syndicate or partnership for carrying on any organised professions. See sec 515(2).

11 Chapter 42:02. Hereafter the Insolvency Act.

12 In sec 2 of the South African Insolvency Act 24 of 1936 a debtor is defined.

13 Sec 2 of the Botswanan Insolvency Act: '[W]hen used in connection with an estate which is about to be sequestrated or assigned, includes any person who, or any estate of a person which, is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law for the time being in force relating to the winding up of companies'.

Section 11(1) of the Act makes express provision for the simultaneous, but separate, sequestration of the individual estate of a partner and the partnership estate.[14] Unlike the South African Insolvency Act, this Act mentions that: '[E]very fact which is a ground for the sequestration of the estate of a partnership shall be a ground for the sequestration of the separate estate of every partner'.

This in essence confirms the South African common law position that the partnership, although having a separate estate, is in fact nothing more than the partners composing it. As mentioned, any ground for sequestrating the partnership estate is automatically a ground for the sequestration of any individual partner's estate. The opposite, although not mentioned in the Act, must be true, namely that the sequestration of the estate of a partner may be a ground for the sequestration of the partnership estate, as insolvency of a partner automatically dissolves a partnership.

Section 11(1) does, however, make some provision for the sequestration of the partnership estate without sequestrating the estate of an individual partner, only if that partner is willing and able to satisfy the debts of the partnership within a time to be determined by the court.[15] In this instance the separate estate of that partner shall not be placed under sequestration by reason only of any fact forming a ground for the sequestration of the estate of the partnership.[16]

Section 48 of the Insolvency Act deals with the case of simultaneous sequestration of the partnership estate and the estate of a partner. This section is similar to that of section 49(1) in the South African Insolvency Act, as discussed in Chapter 3. This section mentions that when the estate of a partnership and the estate of a partner are under sequestration simultaneously, the creditors of the partnership are not entitled to prove claims against the estate of the partner nor the creditors of the partner against the estate of the partnership. This confirms the dual-priorities rule as discussed in Chapter 3.

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14 A similar provision may be found in the South African Insolvency Act, sec 13.

15 This is similar to sec 13(1) of the South African Insolvency Act.

16 Sec 11(2) further mentions that 'nothing contained in this Act shall affect the rights or liabilities under Roman-Dutch law of partners *en commandite* or anonymous or other partners who have not held themselves out as ordinary or general partners'. This is not mentioned in the South African Insolvency Act.

Furthermore, the trustee of the partnership shall, according to this section, be entitled to any balance of the partner's estate that may remain over after satisfying the claims of the creditors of the partner's estate in so far as the same is required to pay the partnership's debts. In a similar manner the trustee of the partner shall be entitled to any balance of the partnership's estate that may remain over after satisfying the creditors of the partnership estate, so far as that partner would have been entitled thereto, if he had not been insolvent. This section in the Botswana Insolvency Act correlates with the dual-priorities (or jingle) rule and the exception to the aggregate approach, as discussed in Chapter 3.

Section 93 of the Insolvency Act deals with the liquidation account and plan of distribution. Section 93(b) mentions that if the estates of a partnership and of a partner are under administration simultaneously, separate accounts shall be framed in the estate of that partnership and in the estate of the partner. This is similar to section 92 of the South African Insolvency Act, which in essence also contributes to the departure from the common law and separate legal treatment of a partnership estate upon insolvency.

It is, however, interesting to note that this Act does not expressly prohibit a partnership from being rehabilitated like the South African Insolvency Act does in section 128. The Botswana Administration of Estates Act[17] deals with the payment of debts in insolvent estates. The Botswana Administration of Estates Act makes provision for the administration of an insolvent estate without first sequestrating the estate in section 43, similar to section 34 of the South African Administration of Estates Act.

4.3 Zimbabwean partnership law

4.3.1 Zimbabwean Rules of Court

The Zimbabwean Rules of the High Court make provision for a partnership to sue or be sued in its own name in rule 8. The Zimbabwean Magistrates Court Act,[18] states that where a judgment is given against a member of a partnership in an action in which he was individually a plaintiff or defendant, his interest in the partnership or other property held jointly with any other person or persons, may be attached and sold in execution. This means that where a partner is the judgment

17 Chapter 31:01.
18 Chapter 7:10, sec 22(6).

debtor, the joint property of that partner (as an interest in the partnership) may be attached and sold in execution. This confirms the aggregate theory as the partnership is treated as a collection of individual partners or aggregate of persons, as opposed to an entity on its own.

4.3.2 Zimbabwean Companies Act and partnerships

The Zimbabwean Companies Act[19] deals with partnerships to a very limited extent. Section 6 of the Companies Act prohibits the formation of partnerships exceeding twenty members.[20] The provisions in the Companies Act deals with the winding-up of an unregistered association are only applicable to unregistered partnerships consisting of more than seven members. For this reason, universal partnerships are excluded from the winding-up provisions of the Zimbabwean Companies Act.

4.3.3 Zimbabwean Insolvency Act and partnerships

The Zimbabwean Insolvency Act[21] has recently been amended; the amended provisions came into force on 25 June 2018. The following discussion broadly entails a comparison between the new and old Act, as well as a contrast to the South African Insolvency Act. In section 2 of the new Act a 'debtor' is defined as:

> [A]ny person or entity that is able to incur debt whose estate has been liquidated and includes:
>
> (a) the estate of any such person or entity;
>
> (b) any such debtor or debtor's estate before liquidation.

The definition in the new Act does not mention the word 'partnership' like the old Act did.[22] The word partnership has been deleted from the new definition, which now refers to the word 'entity' only. The word 'entity' is, however, not defined in section 2 of the new Act. The reference to a debtor 'including a partnership which has been terminated but has not been wound up' as in the

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19 Chapter 24:03. Hereafter referred to as the Companies Act.

20 Sec 322 of the Act also defines an 'unregistered association' to mean 'any company, syndicate, association or partnership having a place of business in Zimbabwe which consists of more than seven members and is not a company to which Parts 2, 3 and 4 or 5 apply'.

21 Chapter 6:07. Hereafter referred to as the 'new Act'.

22 Sec 2 of the previous Zimbabwean Insolvency Act gave the following definition: '[I]n connection with the sequestration or assignment of the estate of a debtor, means a person or partnership or the estate of a person or partnership, including a partnership which has been terminated but has not been wound-up, which is a debtor in the usual sense of the word, but does not include a body corporate or a company or other association of persons which may be placed in liquidation or which may be wound up in terms of the law relating to companies or any other law'.

old Act, has also been deleted from this new definition, which simply refers to the ability to incur debt. The person or entity is only a debtor if the estate has been liquidated, according to this definition, but may include the debtor's estate before liquidation. It appears that this new definition does not include partnerships that have been terminated, but not yet wound-up as termination does not imply liquidation.

The term 'insolvent' is also defined to mean 'a debtor whose estate is under liquidation' in the new Act. This definition does not include the estate of a debtor before the sequestration of his estate, like the South African Insolvency Act. What this in essence entails is that for purposes of the new Insolvency Act, a debtor can only refer to a person or entity, which is able to incur debt and whose estate has been liquidated. According to a narrow interpretation of the definition, the person or entity cannot be a debtor if the estate of that person or entity has not been liquidated. Despite regulating the liquidation of a partnership estate in quite some detail, a partnership is not defined by the new Act.

Section 7(1) of the new Act states that when an application is made to a court for the liquidation of the partnership estate, a simultaneous application must be made for the liquidation of the individual estates of every partner, 'other than a partner who is not liable for partnership debts or a partner in respect of whom there is a lawful bar to the liquidation of his or her estate'. This provision is similar to section 13 of the South African Insolvency Act in that provision is made for the simultaneous, but separate, sequestration of the partnership estate and the sequestration of every individual partner's estate. As mentioned in Chapter 3, this supports the entity theory and as mentioned provides an exception to the aggregate approach.[23] Section 7(3) of the new Insolvency Act further states that:

> [A] Court granting a provisional or a final order for the liquidation of the estate of a partnership must simultaneously grant an order for the liquidation of the individual estates of every partner, except a partner who is not liable for partnership debts or a partner in respect of whom there is a lawful bar to the liquidation of his or her estate: Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the Court and has given security for such payment to the satisfaction of the

[23] Sec 97(4) mentions that: '[I]f the estate of a partnership is under liquidation, separate accounts must be lodged in respect of the partnership and the estate of each partner whose estate is under liquidation, confirming the simultaneous but separate liquidation of the partnership estate and the estate of the individual partners'.

> registrar, the individual estate of that partner must not be liquidated by reason only of the liquidation of the estate of the partnership.

This subsection confirms the separate, but simultaneous, liquidation of the partnership estate and the estates of the individual partners. It is interesting to note that this subsection further states that the granting of an order for the liquidation of these individual estates of the partners must also take place when a final order for the liquidation of the estate of the partnership is made. This means that simultaneous, but separate, liquidation must be done and an order granting the final liquidation of the estates must also be done.

The South African Insolvency Act does not expressly state that the final order for the liquidations of the estates must take place simultaneously, which supports the entity theory to an extent. Partners in an insolvent partnership in Zimbabwe cannot escape the final liquidation order being granted against their respective estates, which supports the aggregate theory. The final liquidation order will, however, not be granted against a partner who is not liable for the partnership debts or if the partner has undertaken to pay the debts of the partnership and provided security as such.

Section 7(4) overcomes the hurdle where there is no partner whose estate may be liquidated as contemplated in subsection 3. This may be due to the fact that the one partner is for example not liable for the partnership debts and the other partner has a lawful bar to the liquidation of his estate. Section 7(4) states that the court may nevertheless liquidate the partnership estate. This section does, however, mention that although the estate of that person may not be liquidated, that person is regarded as a person whose estate is under liquidation. Section 7(5) states that:

> [W]here the individual estate of a partner is unable to meet fully the costs of the liquidation of that estate, the balance must be paid out of the partnership estate and where the partnership estate is unable to meet fully the costs of liquidation the balance must be paid out of the estates of the other partners.

The first part is similar to section 13(2) of the South African Insolvency Act, in that the partnership estate is liable to pay the balance if the individual estate of the partner is unable to fully meet the costs of the liquidation. The South African Insolvency Act does not expressly deals with the instance where the partnership estate is unable to fully meet the costs of the liquidation, like the Zimbabwean Insolvency Act does.

Section 7(6) of the Zimbabwean Insolvency Act contemplates an interesting scenario, where the partnership has been dissolved and the partnership estate is unable to pay its debts. In this case the partnership creditor or a former partner may apply to court to have the partnership estate liquidated as an insolvent estate,[24] which in turn supports the entity theory. This section does not provide *locus standi* to an individual creditor of the partner. This section is unique in that a partnership that has already been dissolved is brought back to life in order to finally liquidate and terminate it. This may therefore create an exception to the dissolution of a partnership, in that although the partnership has been dissolved, this Act creates a legal remedy for partnership creditors or former partners for the unpaid debt of the dissolved partnership itself. Therefore, a statutory remedy, namely liquidation in terms of section 7(6), is created as opposed to relying on common-law remedies such as unjustified enrichment, joint ownership or estoppel.

Section 21 of the Act sets out the rights and obligations of a debtor during insolvency. Section 21(18) states that a debtor must at the request of the liquidator assist him to the best of her ability in 'collecting, taking charge of or realising any property belonging to the insolvent estate'. This statutory duty created by the new Act did not exist in the old Act and there is no similar provision in the South African Insolvency Act. Section 64 of the Act deals with the claims by a partnership creditor against the estate of an insolvent partner and states that:

> [W]hen the estate of a partner is liquidated without the partnership being placed in liquidation-
>
> (a) the partnership is dissolved; and
>
> (b) until the debts of the partnership have been settled in terms of the dissolution of the partnership, any claim by a creditor of the partnership against that estate of the partner must be tendered as an unliquidated claim in terms of section 66(10).

This section confirms that the liquidation of a partner in a partnership dissolves the partnership. This section makes provision for the settlement of partnership debts in terms of the dissolution and claims against the estate of the partner are treated as unliquidated claims. Section 65 of the Act deals with the claims against the partnership and states that:

> When the estate of a partnership and the estates of the partners are under liquidation-

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[24] If a partnership has been dissolved and the partnership estate is unable to pay its debts, the partnership estate may, on the application of a creditor of the partnership or a former partner, be liquidated as an insolvent estate and the provisions of subsections (l), (2), (3), (4) and (5), in so far as they are applicable, apply with the necessary changes to such liquidation.

(a) a claim for a partnership debt must be proved against the partnership estate despite liability of a partner for the debt; and

(b) a shortfall on the claim against the partnership is admitted without formal proof as a claim against each of the estates of the partners who are liable for the debt; and

(c) any balance in the partnership estate after payment of the debts is distributed amongst the estates of the partners in so far as the partner would have been entitled to such a balance upon the dissolution of the partnership.

This section is similar to section 49 of the South African Insolvency Act, however, it expressly states that despite liability of a partner for a partnership debt the claim for said debt must be proved against the partnership estate and not the estate of the individual partner. The opposite, namely that the creditor of a partner must prove his claim against the estate of the partner and not the partnership, is not stated in the new Act. This provision has been deleted from the old Act. The shortfall will without formal proof be admitted as a claim against each of the estates of the partners who are liable for the debt. No similar provision exists in the South African Insolvency Act. This provision may save the partnership creditors time and money in proving the claim against the estates of the partners who are liable for the debt.

Section 106(12) of the Act expressly states that a partnership whose estate has been liquidated may not be rehabilitated. The Zimbabwean Companies Act[25] also prohibits the formation of a partnership exceeding 20 members.[26] An unregistered association is also defined to mean a partnership having a place of business in Zimbabwe which consists of more than seven members.[27]

The Zimbabwean Administration of Estates Act[28] deals with insolvency in section 48. According to this section, if an executor, after inquiry, finds that the estate is insolvent he shall immediately take the necessary proceedings for having such estate placed under sequestration as insolvent, unless the creditors consent to receive a dividend in full satisfaction of their claims and

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25 47 of 1951 (Chapter 24:03).

26 Companies Act sec 6(1): 'No company, association, syndicate or partnership consisting of more than twenty persons shall be formed in Zimbabwe for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act'.

27 Sec 322.

28 12 of 1929 (Chapter 6:01).

proof of such consent is produced to the Master. It is clear that the interests of the creditors remain important and are considered throughout the sequestration proceedings.

4.4 Namibian partnership law

4.4.1 Namibian Rules of Court

The Namibian Rules of the High Court[29] make provision for a partnership to sue or be sued in its own name.[30] According to rule 42(3) the names of the partners need not be alleged when a plaintiff sues a partnership and any error of inclusion or omission shall not afford a defence to the partnership. Rule 42(5) affords the plaintiff suing the partnership the right to deliver to the defendant a notice calling for the particulars as to the full name and residential address of each partner, any time before or after judgment. The execution of a judgment against a partnership shall first be levied against the assets of the partnership, in terms of rule 42(12). Thereafter, the judgment may be levied against the private assets of the partner, who will be 'held to be estopped from denying his or her status as a partner, as if judgment had been entered against him or her.'

In the event that a partnership has since the institution of legal proceedings against it been dissolved, rule 42(14) states that the proceedings shall nevertheless continue against all persons alleged or stated to be partners of the partnership, as if they are 'sued individually'. From these Rules of Court it is clear that in a similar manner to South African law, the partnership may, during its subsistence or even after its dissolution, be treated as a legal person or entity that is separate from those who compose it, for the purposes of civil proceedings.

4.4.2 Namibian Companies Act and partnerships

Section 35 of the Namibian Companies Act[31] prohibits the formation of associations or partnerships exceeding 20 members. The Act further only mentions the word 'partnership' in relation to the common powers of companies[32] and matters which must be stated in a prospectus in addition to those specified in the Act.[33] The Companies Act does not deal with the formation or dissolution of a partnership.

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29 High Court Act 1990.
30 Rule 42(2).
31 28 of 2004, as amended.
32 Schedule 2.
33 Schedule 3.

4.4.3 Namibian Insolvency Act and partnerships

The Namibian Insolvency Act[34] defines a 'debtor' in section 2 in connection with the sequestration of the debtor's estate, to mean a partnership, a person or the estate of such a partnership or person, which is a debtor in the usual sense of the word, 'except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies'.

This definition of a debtor is the same as the definition in section 2 of the South African Insolvency Act. The word 'insolvent' is also defined in section 2 of the Act to mean, when used as a noun, 'a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context'. This definition of an 'insolvent' is the same as the South African Insolvency Act. Accordingly, a partnership may be referred to as an insolvent.

The Namibian Insolvency Act further deals with the sequestration of partnership estate in section 13. Subsection 1 mentions that if the court sequestrates the estate of a partnership (whether provisionally, finally or on acceptance of surrender), the court shall 'simultaneously sequestrate the estate of every member of that partnership'.[35] This provision is similar to section 13 of the South African Insolvency Act in that provision is made for the simultaneous, but separate, sequestration of the partnership estate and the sequestration of every individual partner's estate. Section 13(1) also mentions that the separate estate of that partner shall not be sequestrated if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment. This proviso is the same as that in section 13(1) of the South African Insolvency Act.

The Namibian Insolvency Act deals with the claims against partnership estate separately from those claims against the partners. Section 49 of the Act mentions that during the simultaneous, but separate, sequestration of a partnership and the estates of the partners:

> [T]he creditors of the partnership shall not be entitled to prove claims against the estate of a partner and the creditors of a partner shall not be entitled to prove claims against the estate of the partnership.

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34 24 of 1936.

35 '[O]ther than a partner *en commandite* or a special partner as defined in the Special Partnerships' Limited Liability Act, 1861 (Act 24 of 1861) of the Cape of Good Hope or in Law 1 of 1865 of Natal, who has not held himself out as an ordinary or general partner of the partnership in question'.

This in essence correlates with the dual priorities rule as embedded in section 49 of the South African Insolvency Act. Section 49 of the Act further mentions that:

> [T]he trustee of the estate of the partnership shall be entitled to any balance of a partner's estate that may remain over after satisfying the claims of the creditors of the partner's estate in so far as that balance is required to pay the partnership's debts and the trustee of the estate of a partner shall be entitled to any balance of the partnership's estate that may remain over after satisfying the claims of the creditors of the partnership estate, so far as that partner would have been entitled thereto, if his estate had not been sequestrated.

This is similar to section 49 of the South African Insolvency Act as discussed in Chapter 3. Section 128 also expressly mentions that a partnership whose estate has been sequestrated shall not be rehabilitated, similar to the South African Insolvency Act. Section 10 of the Namibian Insolvency Act allows provisional sequestration if the court, to which the petition for the sequestration of the estate of a debtor has been presented, is of the opinion that *prima facie* there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated. The estate of the debtor may according to this section be sequestrated provisionally. This is similar to section 10 of the South African Insolvency Act.

The Namibian Insolvency Act deals with the manner of framing the liquidation account in section 92(5) and mentions that if the estate of a partnership is under sequestration, separate trustees' accounts shall be framed in the estate of the partnership and in the estate of each member of that partnership whose estate is under sequestration. This is similar to section 92 of the South African Insolvency Act as discussed in Chapter 3. The Namibian Administration of Estates Act[36] also deals with insolvent deceased estates. Section 34(4) of this Act mentions that upon receipt of notification, the executor shall:

> [W]ithout delay, by notice in writing (a copy of which he shall lodge with the Master) report the position of the estate to the creditors, informing them that unless a majority in number and value of all the creditors instruct him in writing, within a period (not being less than fourteen days) specified in the notice, to surrender the estate under the Insolvency Act, 1936 (Act No. 24 of 1936), he will proceed to realize the assets in the estate and distribute the proceeds in accordance with the provisions of sub-section (5).

[36] 66 of 1965.

Thus, provision is made for the administration of the insolvent's deceased estate without it necessarily being sequestrated, which is similar to section 34 of the South African Administration of Estates Act.

4.5 Conclusion

As mentioned in the introductory paragraphs of this Chapter, the legislation of these foreign jurisdictions does not necessarily provide vibrant insight into the approach these jurisdictions follow when dealing with the consequences of the dissolution of the universal partnership. The legislation of these jurisdictions is often found to be similar to that of South Africa in cases of insolvency, save for a few sections.

This foreign legislation in essence supports the general rule that a partnership does not enjoy separate legal personality upon insolvency. The dual-priorities rule as discussed in Chapter 3 is also illustrated upon evaluating the provisions in this legislation. It must however be suggested that the South African insolvency legislation be amended, as inspired by the new provisions included in the Zimbabwe Insolvency Act, as mentioned above.

In the following Chapter, the judicial application of the consequences of dissolution of the universal partnership is discussed. Chapter 5 indicates how the courts of Botswana, Namibia and Zimbabwe apply the consequences of dissolution as a remedial measure to litigating parties.

CHAPTER 5

5 Foreign case law

5.1 Introduction

South Africa has a multicultural society, in which multiple legal systems, such as customary law and common law, operate simultaneously.[1] The common law and customary law of South Africa are officially recognised systems of law. In this context, customary law refers to the various customs and usages as traditionally observed among the indigenous African people of South Africa, forming part of those people's culture.[2] Upon the determination of choice of law issues, there are various factors that influence the decision as to whether customary law or common law is applicable.[3]

As this Chapter continues, it becomes evident that the courts of Botswana and Zimbabwe primarily use universal partnerships in the case of a putative marriage, cohabiting relationships and/or unregistered customary-law unions.[4] This interchangeable approach followed by Botswana and Zimbabwe primarily consists of applying the consequences of the dissolution of the universal partnership and the consequential contractual remedies to putative marriages, cohabiting relationships and unregistered customary-law unions in order to effect some just and equitable distribution between the parties.

In contrast with Botswana and Zimbabwe, the courts of Namibia attach greater value to an existing universal partnership, as opposed to using it as a legal vehicle to effect an equitable distribution between the parties upon its dissolution. From this short discussion it is already evident that the universal partnership not only offers valuable legal protection during

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1 C Rautenbach (ed) & JC Bekker *Introduction to legal pluralism in South Africa* (2014) 18. See also the Constitution of the Republic of South Africa, 1996 sec 39(2) & (3).

2 As above.

3 Rautenbach & Bekker (n 1) 42-44, these factors include: the expectations of the parties; express or tacit agreement between the parties; prior conduct; remedy sought in pleadings; nature of the cause of action; overall cultural orientation; background etc. It should be noted that although *lobolo*, for example, may be indicative of customary law and commercial contracts of common law, party autonomy in choice of law according to secs 30 & 31 of the Constitution remains important. Parties may for example conclude a civil marriage and a *lobolo* agreement, indicating the concurrent presence of customary and common law. See also Rautenbach & Bekker (n 1) 41-42 for a discussion on the statutory choice of law rules in South Africa and the Black Administration Act 38 of 1927. See also Rautenbach & Bekker (n 1) 118: 'They may, however, enter into a civil marriage with each other as long as neither is a spouse in a subsisting marriage with another person'. A registered customary marriage may also be converted into a civil marriage.

4 In South Africa customary law marriages and the proprietary consequences thereof are regulated by the Recognition of Customary Marriages Act 120 of 1998 (the RCMA) which commenced on 15 November 2000. One of the reasons for the enactment of the RCMA was to provide for the equal status and capacity of spouses in customary marriages.

its existence, but it also offers some legal recourse upon the determination that it had in fact existed, even though it is now dissolved.

In this Chapter, I do not intend to use foreign law research as to indicate whether the entity or aggregate approach to insolvent universal partnerships as discussed in Chapter 3, is the most appropriate. This Chapter intends to illustrate the liberal approach followed and preferred by foreign jurisdictions when dealing with the recognition and dissolution of a universal partnership. Bear in mind that this study is in essence not dedicated to the theories of partnerships or the validity requirements of civil or customary marriages, but is focused on universal partnerships and the effects of its dissolution.

In this discussion I intend to indicate how foreign jurisdictions are not necessarily influenced by common law, legislative or mercantile views of the partnership contract, but substantively engage with the issue before court in order to do justice between the parties. This may be regarded as a very liberal approach that contributes to the development of the common law and in some cases, even customary law. This liberal, almost transformative approach followed by these foreign jurisdictions is obviously not perfect and subject to criticism, debate and potential legal reform. Despite the criticism that these rather liberal approaches may attract, they are definitely worth researching, as they provide an alternative perspective on universal partnerships and the effects of their dissolution. The South African approach to universal partnership law may be described as very narrow and traditional, as opposed to the liberal approach of these selected foreign jurisdictions.

5.2 Botswanan case law

The requirements for a universal partnership in Botswana are the same as in South African law.[5] In the case of *Mosinyi v Kaote*,[6] the court defined a partnership with reference to legislation, as a legal relationship arising out of an agreement between two or more persons not exceeding twenty, each to contribute to an enterprise with the object of making profits and to share or divide such profits. In this case the court ruled that it did not seem to be the intention of the parties to create a partnership as one of the essentials of a partnership as

5 See for example the case of *Bodutu v Motsamai* 2006 2 BLR 252 (HC) 257B-257C, where the court confirmed the three *essentialia* for the universal partnership contract that must be proven by the party alleging the existence of such a contract.

6 1998 BLR 361 (HC). Hereafter *Mosinyi*.

formulated by Pothier was lacking, namely the requirement of a business (or partnership) to be carried on for the joint benefit of all the parties with an object of sharing profits.[7]

In Botswana, customary law and general law are distinguished from one another, as the concept of a universal partnership is generally unknown to customary law because it is a general (or common) law concept. Customary law is defined in the Customary Courts Act,[8] to mean:

> [I]n relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.

It is noteworthy that this Act defines the 'law of Botswana' to mean: '[T]he common law and statute law from time to time in force in Botswana but does not include customary law.'

5.2.1 Customary law and the universal partnership

Before turning to a discussion on Botswanan customary law and the universal partnership, it is worth mentioning the universal partnership in terms of South African customary law. In the unreported case of *Tshabalala v Bidi & City of Johannesburg Municipality*,[9] the application was opposed by the first respondent who alleged that the parties had entered into a customary marriage, alternatively a tacit universal partnership, which in essence precluded the granting of the eviction order sought by the applicant.[10] Given the failure of the first respondent to deal sufficiently with the requirements of both the alleged customary marriage and the tacit universal partnership, the court rejected both and concluded that the first respondent is in unlawful occupation of the property.[11] In the case of *T v T*,[12] the parties were married according to customary rights, whereafter they entered into a civil marriage, out of community of property with the exclusion of the accrual system.[13] The court granted an entitlement to a decree of divorce as the marriage relationship between the parties had irretrievably broken down.[14] The court accordingly dealt with the remaining issue relating to

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7 See Chapter 2 above for a discussion on the *essentialia* of a partnership.
8 Chapter 04:05 sec 2.
9 Case No 03791/2016 (Not Reportable) 12.12.2016. Hereafter *Tshabalala*.
10 *Tshabalala* para 3. In para 17 the court mentioned the four essential elements for a tacit universal partnership. In para 27 the court concluded that the first respondent's averments in respect of the universal partnership were insufficient to establish the essential requirements of such a partnership.
11 *Tshabalala* paras 30 & 31.
12 (33933/2015) 2017 ZAGPJHC 50 (3 March 2017).
13 *T* (n 12) para 8. At the time that the parties entered into the customary union and the civil marriage, both had minor children from previous relationships with other partners.
14 *T* (n 12) 9.

the question whether a universal partnership existed between the parties.[15] The court ruled that the plaintiff had proven compliance with the required *essentialia* for the existence of a universal partnership, and in particular a *universorum bonorum*,[16] and that each holds a fifty per cent share therein.[17]

The High Court of Botswana, in *Tokoyame v Bok*,[18] 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 idea which is foreign to *Kisa* customary law.[19]

It was argued that the idea of an unmarried woman sharing in the estate of her partner is foreign to the *Kisa* community. Despite this, the Customary Court of Appeal, High Court and the Court of Appeal all agreed that the Customary Court had been correct in its conclusion that the parties had contributed to the assets acquired by them jointly and the deceased's assets had to be divided accordingly. Although the Customary Courts did not expressly mention the universal partnership, they ordered a division of the deceased estate, similar to that of a universal partnership. The High Court and the Court of Appeal later confirmed that a universal partnership had in fact existed. The relevant contributions of each party including time, money, labor and skill were used to determine the respective share of each party upon the distribution. The respondent accordingly received a half share of the deceased estate and the other half share was awarded to the children of the deceased.[20]

This case is a good example of how the courts in Botswana applied the consequences of the dissolution of a universal partnership in order to do justice between the parties, even though this concept applied by the courts is foreign to customary law.

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15 *T* (n 12) 10.

16 *T* (n 12) 15.

17 *T* (n 12) 18.

18 2008 1 BLR 384 (CA). Hereafter *Tokoyame.*

19 It is noteworthy that in South African customary law, a customary marriage entered into after the commencement of the Act may legally exist despite the fact that it has not been registered, provided that the requirements as set out in sec 3 of the RCMA are complied with. See Rautenbach & Bekker (n 1) 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'.

20 It should be noted that the Customary Courts Act in sec 13 expressly excludes any cause or proceeding arising out of the administration of a deceased estate from the jurisdiction of customary courts, as well as relationships to which customary law is inapplicable.

5.2.2 Putative marriage and the universal partnership

In *Mograbi v Mograbi*,[21] it was decided that where the parties intended to and entered into a marriage in community of property, which was subsequently proved to be invalid, the contract arising out of the putative marriage was, in so far as the proprietary rights of the parties were concerned, analogous to one of a universal partnership.[22] This case illustrates the interchangeable use of a universal partnership to the proprietary rights of the parties in a putative marriage. There are countless debates regarding the application of an interchangeable approach followed by courts upon utilising the universal partnership in cases of putative marriages. For one, a universal partnership and a civil or customary marriage are not the same. The legal consequences of a universal partnership and a marriage, although resembling some commonalities, drastically differ in their formation, legal recognition and dissolution.

In the case of *Makobela v Kemodisa*,[23] the court referred to South African law in that parties are regarded as being married in community of property unless they have entered into an ante-nuptial contract making their marriage one out of community of property. The court mentioned that as the parties did not conclude a valid marriage, but rather a putative one, and as they lived together as man and wife believing that they had been validly married, the courts would, on any dissolution of the assets accumulated by them during such period, presume that their intention had been to be married in community of property and that, therefore, despite the marriage not being valid, a tacit universal partnership between the parties existed. It seems that although the parties did not intend to form a universal partnership, the court may be open to inferring such partnership upon the dissolution of a putative marriage, as portrayed by the court in *Makobela*.

The assumption of the court in this case may be very dangerous and detrimental as the marriage in community of property and the universal partnership are not the same. It should be noted that an inference of a universal partnership should only be made if it is pleaded and the *essentialia* of such partnership is proven.

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21 1921 (AD) 274. Hereafter *Mograbi.*

22 See Chapter 2 above where South African courts have in the past expressed the view that universal partnerships of all property were not allowed, save between spouses and perhaps in the case of putative marriages.

23 2002 2 BLR 112 (CA). Hereafter *Makobela.*

In the case *Monyatsi v Monyatsi*,[24] the parties were married out of community of property for 23 years until the respondent instituted an action for divorce. Notwithstanding this, the respondent testified in the High Court that they had intended their marriage to be in community of property, but the district commissioner had erred in having them sign the wrong form. She also sought to persuade the court to order the rectification of the proprietary regime of the marriage, but the court declined to do so and instead held that the marriage should be deemed to be one in community of property or alternatively a universal partnership.

The Court of Appeal mentioned that the court *a quo* had erred in finding that the marriage was one which could be 'deemed' to be in community of property, but the court *a quo* was correct in finding that the parties had entered into a tacit universal partnership.[25] Accordingly, the universal partnership may be applied at the dissolution of a marriage, as this cannot be deemed to be of another proprietary regime.

Despite the criticism against using the universal partnership in cases of putative marriages, the court in *Tape v Matoso*[26] 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.

In this case the respondent ignorantly elevated her adulterous relationship with the defendant to the status of a lawful marriage in community of property.[27] The Court of Appeal held that this relationship had created a universal partnership and that the respondent was therefore entitled to share in the joint assets equally with her partner, since it was impossible to quantify the contribution of each.[28]

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24 2013 3 BLR 478 (CA). Hereafter *Monyatsi*.

25 The Appeal Court concluded that this was not an equal partnership, but one in which the appellant played the dominant role. Taking into account their respective efforts and financial contributions as a whole their partnership was one in which the contribution of the appellant was two thirds whilst that of the respondent was one third and the estate had to be divided on this basis.

26 2007 1 BLR 512 (CA). Hereafter *Tape.*

27 The evidence in this case disclosed that the plaintiff gave up her employment as a housemaid and together they set up a grocery business. The appellant played her part in the running of various commercial enterprises and they purchased and sold livestock, as well as thatching.

28 According to the case of *Runicta Engineering (Pty) Ltd v Garrick Operations (Pty) Ltd* 2013 1 BLR 568 (HC). It is important to note that the profits are usually shared in proportion to the contribution

In a similar case, the court *a quo* in *Mbenge v Mbenge*,[29] held that the plaintiff (appellant in the present proceedings) had ignorantly elevated her position of adulterous cohabitation to the status of a lawful marriage in community of property and that, as such, whatever she had done was the normal contribution of a wife to the establishment of a happy family life without any profit motive.[30] Despite this observation by the court *a quo*, the Court of Appeal concluded that the equities of the situation required that appellant be awarded a 50 per cent share of respondent's assets as acquired by the joint efforts of the parties. The universal partnership is accordingly also employed in order to achieve a just and equitable distribution of the partnership or deceased estate where one partner was still married to a third party, which was not a partner of the universal partnership.

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*,[31] the applicant failed to demonstrate how cohabitation could be elevated to the level of a universal partnership and dismissed the application with costs. Had the applicant been successful in proving the *essentialia* of the universal partnership, the court in this case could have entertained the argument that the cohabitation relationship had been elevated to a universal partnership. 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.[32]

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each party has made. In situations where the contributions are not ascertainable, the profits are shared equally. It is important to note that although the court in the *Tape* case could not ascertain the contribution of each party, the parties nevertheless had to prove that they contributed to the universal partnership in order to share in the distribution of the partnership estate. Failing to prove a contribution may lead to the conclusion that a universal partnership never existed due to the non-compliance with the *essentialia* of the universal partnership. See also *Isaacs v Isaacs* 1949 1 SA 952 (C) 961.

29 1996 BLR 142 (CA). Hereafter *Mbenge*. The appellant in *Mbenge* sought an order for the equal division of all the property acquired by the parties while living together as husband and wife although they were never married. Throughout the period that the parties were living together the appellant played her part in the running of various commercial enterprises. She maintained that all these activities were directed towards the maintenance of the parties and their children, and that by tacit agreement a universal partnership was created.

30 As the basis of the plaintiff's claim was at variance with the declaration, the claim was dismissed. The appellant noted an appeal against this decision. The court held, allowing the appeal that the court *a quo* had erred in placing undue emphasis on the appellant's evidence that her claim was based essentially on the assertion that she was the wife of the respondent.

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

32 *Ally v Dinath* 1984 SA 451 (T).

5.2.3 Locus standi

In the case of *Omphile v Rasekawana*,[33] the court dealt with an interesting scenario as to the *locus standi in judicio* of an applicant claiming the existence of a universal partnership. The respondents argued that as the applicant was still married, she could not claim the existence of a universal partnership with the deceased and for that reason any claim by her upon the deceased estate could not exist in law.[34] It was argued that as the applicant was at the date of death living in adultery with the deceased she could not claim from the deceased estate as this would be *contra bonos mores* and unenforceable in terms of common law.

The court mentioned *obiter* that she had a claim against the deceased estate in respect of her contribution to joint property, whether a universal partnership was declared to exist or not, and that she certainly had *locus standi in judicio* to bring the application. Although this case focuses on the contribution that needs to be proven in order to claim a share in the estate of the deceased, it is important to note that the court found no bar to the *locus standi* of the applicant due to marriage or adultery.

In *Mogorosi v Mogorosi*,[35] the court noted that 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.[36] Following a broad and equitable approach, the court ordered that 20 per cent of the value of the partnership assets as at the date of dissolution of the partnership was to be paid by the appellant to the respondent, together with an interest adjustment to compensate for the lengthy delay since the dissolution of the partnership.[37]

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33 2003 1 BLR 394 (HC). Hereafter *Omphile.*

34 The applicant, before meeting the deceased, was married by civil law to another person but they drifted apart and have not seen each other for 22 years. That person is still alive and the marriage unfortunately, still exists. The applicant and the deceased had been living together for 20 years and had three children together while acquiring assets as well as building a roof over their and their children's heads.

35 2008 1 BLR 185 (CA). Hereafter *Mogorosi.* This case originated in the customary courts. The Court of Appeal in Botswana applied the common-law principle of a universal partnership and ruled that the woman was entitled to a 20 per cent share of the man's estate, which was valued at the date at which the cohabitation ended. See also M Hallward-Driemeier & T Hasan *Empowering women: Legal rights and economic opportunities in Africa* (2012).

36 See also E Bonthuys 'Proving express and tacit universal partnership agreements in unmarried intimate relationships' (2017) 134 *SALJ* 263, for an explanation by Bonthuys on her distinction between intimate and commercial universal partnerships.

37 Court referred to *Isaacs* (n 28) 960-961 & 961-962. See also *Mbenge* (n 29) and *Tape* (n 26).

5.2.4 Universal partnership between tribesmen and women

It is moreover exciting to observe that a universal partnership may be concluded between tribesmen or women subject to customary law, according to the court in *Rebagamang v Ntwaetsile.*[38] In this case, the court ruled that there is in principle no reason why tribesmen, or women, cannot enter into a universal partnership or any other form of partnership with each other, provided that the circumstances permit and that there is no legal obstacle under customary law. In South African customary law, woman-to-woman marriages are recognised, although it is suggested that this marriage is not homosexual in nature, but rather a relationship between two families.[39] Without considering the possible prohibition of homosexuality, it is noteworthy that the universal partnership may potentially find its application in same-sex marriages under customary law.

5.3 Zimbabwean case law

In the case of *Minga v Gunda,*[40] the court mentioned that a tacit universal partnership is possible between spouses married out of community of property, putative spouses and probably persons living together as if they were married. The court reiterated the fact that an ordinary marriage does not in itself establish a tacit universal partnership, but this does not mean that an individual seeking a division of property after divorce is not entitled to make a claim, provided that the claim is based on a suitable cause of action.

5.3.1 Customary law and the universal partnership

The requirements for a universal partnership in Zimbabwe are the same as in South Africa.[41] In Zimbabwe a distinction is drawn between customary law and general law. The Customary Law and Local Courts Act,[42] defines 'customary law' in section 2 to mean: '[T]he customary law of the people of Zimbabwe, or of any section or community of such people, before the 10th June, 1891, as modified and developed since that date.'

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38 2008 3 BLR 21 (HC).

39 Rautenbach & Bekker (n 1) 116.

40 2016 1 ZLR 667 (H).

41 *Ntini v Masuku* 2003 1 ZLR 638 (H) 640: 'The principle of tacit [and express] universal partnership is part of our law and generally in order for it to apply the following requirements must be fulfilled: 1 each of the parties must bring something into the partnership or must bind himself or herself to bring something into it, whether it be money or labour or skill; 2 the business to be carried out should be for the joint benefit of the parties; 3 the objective of the business should be to make a profit; and 4 the agreement should be a legitimate one'. Hereafter *Ntini.*

42 Chapter 7:05.

The general law of Zimbabwe is also defined in this Act to mean: '[T]he common law of Zimbabwe and any enactment, and excludes customary law.'

The concept of a tacit universal partnership is unknown to customary law, as confirmed by the court in *Chivise v Dimbwi.*[43] In *Maenzanise v Ratcliffe No,*[44] the court held that although the concept of a universal 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,[45] the general law should apply to the case.[46] Although the universal partnership in Zimbabwe may extend beyond commercial undertakings,[47] the court cautioned against the reckless *ex post facto* conversion of a marriage relationship into a business partnership.[48]

If a wife makes a substantial financial contribution or regularly renders services exceeding those ordinarily expected of a wife, a court may be persuaded to imply a partnership agreement. Once again, the courts should be cautioned against implying a partnership agreement.

The court correctly reiterated that a universal partnership is a general-law concept and that a foundation must be laid for its application. In this case the court focused on the determination of the existence of a tacit universal partnership and turned its attention to the South African case of *Mühlmann v Mühlmann,*[49] where Judge McCreath stated that:

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43 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 the case of *Muringaniza v Muringaniza* 2003 2 ZLR 342 (H).

44 2001 2 ZLR 250 (H). Hereafter *Maenzanise.* In this case the plaintiff contracted an unregistered customary-law marriage with a man of British 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.

45 Chapter 7:05. Hereafter the Customary Law and Local Courts Act. Sec 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'.

46 See Rautenbach & Bekker (n 1). These factors indicating the choice of law is similar to that of South Africa.

47 *Marange v Chiroodza* 2002 2 ZLR 171 (H) 180. Hereafter *Marange.*

48 See *Minga v Gunda* 2016 1 ZLR 667 (H), where the court mentioned that although a marriage relationship should not be recklessly converted into a business partnership *ex post facto,* if a wife makes a substantial financial contribution or regularly renders services exceeding those ordinarily expected of a wife, a court may be persuaded to imply a partnership agreement.

49 1981 4 SA 632 (W) 634G-634H.

> In the situation where one has to do with a relationship between spouses and there is no express agreement between the parties, the Court must be careful to ensure that there is indeed an *animus contrahendi* and that the conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife in a given situation.

It is important to remember that although a universal partnership may be concluded between spouses, the intention to contract must exist.

5.3.2 Polygamous customary-law unions and the universal partnership

Before I continue my discussion on the law of Zimbabwe, it is appropriate to mention the South African law on polygamous customary law marriages. In South Africa, section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 makes provision for a husband in a customary marriage to enter into a further customary marriage with another woman 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*,[50] 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.[51] Even though this registration is not a validity requirement and the avenue for declaring the subsequent unregistered customary marriage a putative one exists, much legal uncertainty prevails. It is appropriate to mention the universal partnership as an alternative to this problem, until the Domestic Partnership Bill is enacted in South Africa.[52]

In Zimbabwean law, it may be problematic to use the concept of a tacit universal partnership in cases when a customary-law union has not been solemnised in order to achieve an equitable division of property upon divorce, especially where there is more than one wife. The court in *Jengwa v Jengwa*,[53] noted that a finding of such a partnership must be based on the factual probability that both parties gave their actual, even if unspoken, assent to the creation of the mutual rights and obligations for the forming a partnership.

In this case, the court warned litigants against the danger of imposing upon the husband a state of mind which he did not have. The court in *Jengwa* embarked on a discussion of using the universal partnership in customary law cases where the man has more

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50 2012 4 SA 527 (SCA).

51 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) para 89. Section 7(6) is not a validity requirement.

52 See Rautenbach & Bekker (n 1) 110: It is suggested that the only option is a total division of all the assets of the estate.

53 1999 2 ZLR 121 (H) 121. Hereafter *Jengwa.*

than one wife. As a result, 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.

5.3.3 Property rights and unregistered customary-law unions

In the case of *Muleya v Muleya*,[54] the court mentioned that in the case of an unregistered customary law union, the Magistrates Court may not necessarily have jurisdiction to distribute the estate in terms of the Customary Marriages Act.[55] The court, however, mentioned that alternative causes of action include joint ownership, the universal partnership or unjust enrichment. In the case of *Pasalk v Kuzora*,[56] the court ruled that as the first respondent in the case was in an unregistered customary-law union with the late Pasalk, she could not inherit from his estate on intestacy. She was, however, declared to be a universal partner in the universal partnership between herself and the late Pasalk. On this basis she was awarded an entitlement of 50 per cent of the deceased estate.

The court in *Jengwa* made an interesting observation as to the choice of law when dealing with immovable property and noted that general law might apply, since custom, as it is presently understood, recognises no ownership of immovable property.[57] In the case of *Chivise*,[58] the court mentioned there is also no known principle of joint ownership between persons in a customary-law union analogous to a marriage.[59]

The Court in *Jengwa* mentioned that it is unjust and 'promotes discrimination' against a certain class of women to 'deny rights to immovable property to women in customary unions that are not solemnised'. It is very interesting of the court to remark that the reliance on general law is currently the only feasible legal avenue available for women in customary unions that are not solemnised, that anticipate in sharing in the immovable property.[60] The

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54 2011 2 ZLR 151 (H) 152.

55 Chapter 5:07.

56 2003 1 ZLR 287 (S).

57 The court mentioned that where other types of property are involved the choice of law is to be made on other grounds, although the need to prevent gender discrimination may lead the court to decline to apply customary law to all forms of property.

58 *Chivise* (n 43) 14.

59 *Chivise* (n 43) 14, where the court ordered that each party must be awarded what they contributed to the marriage. The court attempted to find an equitable solution to the dispute after declaring that there was no marriage and the parties did not acquire much by way of a joint estate.

60 *Jengwa* (n 53) 122, the court mentioned that a claim in these instances may be based on tacit universal partnership, unjust enrichment or on an expectation of the solemnisation of their marriages. It, however, remains important that the potential rights of the other spouses must be taken into account where one wife seeks a division of property in which others expect to share.

court mentioned that if it is found that general law is applicable the next issue relates to the identification of the cause of action.[61]

The importance of this case lies in the willingness revealed by the court to exploit the concept of a tacit universal partnership in order to provide a discretionary broad relief or even to discover a new common-law discretionary relief and assistance analogous to the statutory remedy in the Matrimonial Causes Act.[62] The Court in *Chivise* 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.[63]

Upon deciding the entitlement to share in property acquired during the existence of the unregistered customary-law union in terms of a tacit universal partnership, the court in *Mautsa v Kurebgaseka*,[64] ruled that the action of tacit universal partnership is the most appropriate principle for sharing the assets acquired during the unregistered customary-law union.[65]

Despite the availability of the consequences of dissolution of the universal partnership as remedy in customary-law cases, it should be noted that the general-law concept of a tacit universal partnership cannot be applied where there is no basis laid for applying general law instead of customary law, in terms of section 3 of the Customary Law and Local Courts Act.[66] In *Mashingaidze v Mashingaidze*,[67] the applicant had sought to apply the general-law concept of tacit universal partnership to an unregistered customary-law union, which had

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61 *Jengwa* (n 53) 128 the court noted that a cause lying in an unjust enrichment has been rejected in this case and that the allegation of a tacit universal partnership is theoretically available. The court however emphasised the limitations of this remedy.

62 Chapter 5:13. *Jengwa* (n 53) 129.

63 *Chivise* (n 43) 15.

64 2017 ZWHHC 106 (HC). In the case the main issues before court was whether or not the defendant is entitled to a share of the property acquired during the existence of the unregistered customary-law union in terms of a tacit universal partnership or alternatively unjust enrichment. *In casu*, the defendant based her claim on tacit universal partnership, alternatively, unjust enrichment.

65 *Mautsa* (n 64) 19. The court referred to the South African case of *Butters v Mncora* 2012 2 ALL SA 485 (SCA) and concluded that although a tacit universal partnership existed it does not automatically translate to a half share of the assets as claimed by defendant. The court further reiterated that in Roman-Dutch law there is no presumption of equality of shares in a partnership, but the share of each partner is in proportion to what they have contributed.

66 The choice of law rules prescribed by section 3 of Customary Law and Primary Courts Act 1981, Chapter 7:05 allows litigants to choose between general and customary law in certain instances.

67 1995 1 ZLR 219 (H). Upon the termination of an unregistered customary-law union, the applicant applied for an order, on the basis of a tacit universal partnership, awarding her a half share of all the assets, movable and immovable, which she and the respondent had acquired during the subsistence of their union.

come to an end. The court concluded that as the applicant failed to lay any foundation for applying general law instead of the customary law the application had to be dismissed as being ill-founded.

Before concluding the case in *Chiromo v Katsidzira*,[68] the court stressed the need for urgent attention to be given to 'the increasing numbers and complexity of the cases which are likely to arise in the future'. The court mentioned that with increasing numbers of both wives and husbands working and contributing to their joint property there will continue to be difficulty in arriving at fair settlements of property rights on coherent lines. The court further mentioned that Roman-Dutch law has not fully developed the notion of beneficial interests in property. The court indicated that the judiciary cannot develop a coherent and comprehensive solution to these problems without authority and guidelines from the legislature.

The court in this case held that the application of the concept of a tacit universal partnership was fully justified and accordingly allowed the wife's counter-claim. In coming to this conclusion on the application of the universal partnership concept, the court expressed its view that the courts should adopt a reformative approach to the application of customary law.

5.3.4 Reformative approach

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*.[69] The court in this case expressed the view that a general-law concept such as tacit universal partnership may be relied upon in circumstances where the application of customary law would have led to an injustice. The court concluded that the justice of the case required that the general law should apply as the elements of a tacit universal partnership had been established.[70]

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68 1981 4 SA 746 (ZA). Hereafter *Chiromo.* In this case the wife claimed a share of the matrimonial home. The court held that the claim must be based on a universal partnership or on a partnership in a particular venture. Where, on divorce, the wife claims a share in what was for a number of years the matrimonial home of the parties, in our law the claim has to be based either on a universal partnership or on a partnership in a particular venture, in which case the remedy lies in the usual remedy available for the dissolution of a partnership. There are, however, difficulties in the way of establishing such a partnership.

69 2000 2 ZLR 356 (S). Hereafter *Chapeyama-2.* 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.

70 *Chapeyama-2* (n 69) 357.

In *Chapeyama v Matende*,[71] the court noted that although an unregistered customary-law marriage is not valid as far as the general law is concerned, it is nevertheless a valid marriage according to customary law and is nonetheless recognised by general law for various reasons. In this case the court concluded that even where a tacit universal partnership has not been pleaded during the dissolution of a customary-law marriage, a division and distribution of the property acquired during the subsistence of the customary union is still possible. This in essence supports the reformative approach to the application of customary law, as urged by the courts in *Chiromo* and *Chapeyama-2.*

In the case of *Chapendama v Chapendama*,[72] the learned judge was quite emphatic as to the inappropriateness of invoking a common-law concept of a tacit 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.[73]

5.3.5 The judicial duty to assist

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*[74] 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.[75]

In this case the court correctly noted that the judicial duty 'to follow a positive and progressive approach' in addressing the injustices in our legal system, does not renounce or

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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.

71 1999 1 ZLR 534 (H). Hereafter *Chapeyama-1*.

72 1998 2 ZLR 18 (H) 27. Hereafter *Chapendama.* See *Chapendama* 32: In this case the conduct of the parties was indicative of a tacit universal partnership (*societas universorum quae ex quaestu veniunt*). The plaintiff was therefore entitled to a share of the assets on that basis.

73 *Chapendama* (n 72) 31.

74 *Ntini* (n 41) 642.

75 *Ntini* (n 41). 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.

negate the requirements of a universal partnership, and only where 'practically possible, will it be used to assist individuals in their endeavor to find justice'.[76]

In the interests of justice, the court mentioned joint ownership and unjust enrichment as alternative causes of action as the appropriate basis on which to divide matrimonial property, available to parties not able to prove a universal partnership.[77]

In the case of *Marange*,[78] the court correctly mentioned that an ordinary marriage does not comply with the requirements of a universal partnership and must not be understood as being one. The court in this case noted that the concept of a tacit universal partnership may be relied upon in order to arrive at a fair division and distribution of the estate if the existence thereof is pleaded and proved. The court further noted that if it is not pleaded, the court may nonetheless use the universal partnership in its judicial discretion to arrive at a just and equitable decision.

The universal partnership and the consequences of its dissolution is used especially in cases of unregistered customary marriages in Zimbabwe, as these unregistered marriages are not regulated by the Matrimonial Causes Act. Spouses in these unions have to rely on general-law principles such as the tacit universal partnership and unjust enrichment in order to share in the property.[79]

In *Mandava* v *Chasekwa*,[80] Judge President Makarau notes that although it may appear that the plaintiff has chosen to have the dispute settled as a claim for distribution of assets under a tacit universal partnership, the court may in fact err in disposing of the matter as if the court was considering a divorce under customary law.

It should be noted that falling into the error of treating the claim as if it had been brought under customary law when the particulars clearly identified the claim as one falling under general law, may render the proceedings a complete nullity. It is thus of great

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76 *Ntini* (n 41) 642.

77 *Ntini* (n 41) 643. In this case the court mentioned that 'it is clear that there was no tacit universal partnership and no joint ownership. The only basis which the court found to be appropriate was unjust enrichment. See also *Chivise* (n 43).

78 *Marange* (n 47) 181, the court mentioned that universal partnerships extend beyond commercial undertakings and that 'judges in this jurisdiction have held that a tacit universal partnership existed where the parties were not running commercial ventures'. It is, however, important to note that although it may extend beyond commercial undertakings it is not the same as a marriage.

79 See Centre for Conflict Management and Transformation Cultures in Conflict *Challenges of marriage and divorce under Zimbabwe's dual legal system* (2016) 8.

80 (532/05) 2008 ZWHHC 42 (07 May 2008). Hereafter *Mandava.*

importance to clearly distinguish between general law and customary law when relying on choice of law rules, as well as identifying the cause of action that is relied upon.

5.4 Namibian case law

The requirements for a universal partnership in Namibia are the same as in South African law, as outlined by the court in the case of *LM v JM*.[81] In this case the applicant failed to discharge the onus on her and also failed to prove her contribution, which made it difficult to determine the share that she was entitled to, as it is commonplace in law that the distribution in a partnership is based on each partner's contribution. In the case of *Mbaisa v Mbaisa*,[82] the court reiterated the importance of proving the contribution of each party, as:

> [W]ithout the evidence of her contribution, it becomes difficult to determine the share that she is entitled to because it is trite that distribution in a partnership is based on each partner's contribution.[83]

The court remarked that 'the other requirements also then fall through the cracks because there is no evidence before court that the partnership was for the joint benefit of the partners'.[84]

Similar to South African law, spouses married out of community of property and of profit and loss may enter into a partial or universal partnership with each other as confirmed by the Court in *ZS v ES*.[85] It is, however, important that the litigating parties clearly distinguish between the two different types of universal partnerships (namely *societas universorum quae ex quaestu veniunt* and and a *societas universorum bonorum*) as the former type of partnership still exists in law today, but the latter has according to the court fallen into disuse as the marital regime the parties found themselves in would prohibit a *societas universorum bonorum* by law.[86]

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81 2016 2 NR 603 (HC). In this case the applicant and first respondent were married to each other in 1965 in terms of the customary laws of the *Ovaherero* traditional community. In 2011 their marriage was annulled by the Maharero Community Court in terms of the applicable customary laws, following the first respondent's adultery.

82 2015 NAHCMD 181.

83 See *Behrenbeck v Voigts* 2015 NAHCMD 11.

84 As above.

85 2014 3 NR 713 (HC) 96. See also the case of *MB v DB* 2018 NAHCMD 266, where the court found that even though the parties are married out of community of property, with the exclusion of community of property, profit and loss, they nevertheless carried on a *bona fide* business and the *essentialia* to create a partnership agreement are present, and accordingly a partnership exists. See also *Ponelat v Schrepfer* 2012 1 SA 206 (SCA), as discussed in Chapter 2.

86 *AP v EP* 2017 1 NR 109 (HC). The court concluded that no *prima facie* evidence existed for supporting the claim that a tacit universal partnership had been established between the parties and absolution from the instance was granted.

In the unreported case of *Sindlgruber v Hessel-Enke*,[87] the court warned that free co-ownership should not be misconceived as constituting a partnership. The elements of a universal partnership are firmly set out and must be complied with in order to establish the existence of a universal partnership. This confirms the common-law position as discussed in Chapter 2, namely that although the partners are necessarily co-owners of the partnership assets, co-owners are not necessarily partners of the partnership.[88]

5.4.1 Namibian equality jurisprudence and the universal partnership

The case of *Frank v Chairperson of the Immigration Selection Board*,[89] 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, based on the assumption of the Immigration Selection Board that the long-term lesbian relationship between the two women was not one recognised by the courts.

The High Court of Namibia ruled that the concept of a universal partnership, where the parties agree to put in common all their present and future property, is a relationship recognised by the courts. The High Court further noted that if such a partnership may be concluded either expressly or tacitly between a man and woman not married by a marriage officer, but who lived together as husband and wife, the long-term relationship between the two women in this case is recognised by law as far as it is a universal partnership. The High Court accordingly ordered the Immigration Selection Board to issue the permit within 30 days.[90]

The Immigration Selection Board thereafter appealed to the Supreme Court of Namibia against the decision of the High Court.[91] The Supreme Court concluded that the Namibian Constitution and the Immigration Control Act 7 of 1993[92] 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

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87 2017 NASC 41.
88 See Chapter 2 above.
89 1999 NR 257 (HC). Hereafter *Frank.*
90 R Morgan & S Wieringa *Tommy boys, lesbian men and ancestral wives: Female same-sex practices in Africa* 1st Edition (2005) 78.
91 *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC). Hereafter *Chairperson.*
92 Hereafter the Immigration Act.

equal to heterosexual relationships and are therefore not afforded the same protection under Namibian law.[93]

The constitutional right to administrative fairness, however, required the Immigration Selection Board to adhere to the *audi alteram partem* rule and 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 as in the High Court, but on the grounds of her work as gender researcher, gender trainer and gender journalist in Namibia.[94]

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.[95]

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 Act, which only referred to 'spouse' which does not refer to 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 partnership'.[96] The Appeal Court did, however, add that the Immigration Selection Board should have considered this relationship.

5.4.2 The universal partnership in Namibia

In Namibia there are two types of marriage, civil marriage and customary marriage. It is not possible for homosexual couples to marry under civil or customary law in Namibia.[97]

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93 *Chairperson* (n 91) 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. If follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marital relationship'.

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

95 *Chairperson* (n 91) 113. Sec 10 of the Namibian Constitution provides that all persons are equal before the law and no person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

96 *Chairperson* (n 91) 156. *Chairperson* (n 91) 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'.

97 See D Hubbard *Namibian law on LGBT issues gender research and advocacy project* (2015) 129 http://www.lac.org.na/projects/grap/Pdf/LGBT_mono.pdf (accessed 30 September 2019); and *Canaries in the coal mines: An analysis of spaces for LGBTI activism in Namibia – Country report* (2017) 10

Furthermore, the Namibian Constitution only refers to marriages between men and women of full age, and does not protect homosexual partners. As mentioned by Judge O'Linn 'equality before the law for each person, does not mean equality before the law for each person's sexual relationships'.[98]

Presently, the universal partnership is indirectly protected by the Constitution of Namibia with reference to the protection of property and freedom of association as contemplated in sections 10, 16 and 21(1)(e) of the Namibian Constitution.[99] Currently the persons unable to marry in terms of Namibian law, are left with only one option to conclude a legally recognised, binding and protected relationship, namely a universal partnership. The universal partnership is currently the only legal alternative available to these individuals who are unable to marry in terms of Namibian law.

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.

5.5 Conclusion

From this discussion it is evident that the aggregate approach is followed by these courts, by treating the partnership as a collection of individuals, as opposed to a separate legal entity. The requirements for the formation of a universal partnership in Botswana, Zimbabwe and Namibia are the same as in South African law. In Botswana and Zimbabwe the universal partnership forms part of general law and is a foreign concept to customary law. Although the concept of the universal partnership is a general-law idea, the Botswana and Zimbabwe courts are seemingly liberal and reformative in their outwardly eager application of the universal partnership to customary law cases, putative marriages, unregistered customary-law unions and even adulterous cohabiting relationships.

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. Botswana and Zimbabwe courts do, however, caution against the dangers

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http://theotherfoundation.org/wp-content/uploads/2017/06/Canaries_Namibia_epub_Draft2_CB2.pdf (accessed 30 September 2019).

98 *Chairperson* (n 91) 155.

99 *Chairperson* (n 91) 169: 'The Court a quo referred to certain articles of the Constitution, namely Arts 10, 16 and 21(1)(e), but this referred to the forming of a universal partnership and the protection of property and freedom of association'.

of inferring a universal partnership in instances where the *essentialia* are not present and it was not the intention of the parties to ever create such 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.

Namibia on the other hand has a much narrower application of the universal partnership and the legal protection afforded by it. The Namibian cases dealing with universal partnerships are primarily dedicated to the *essentialia* of the universal partnership, the contributions of the partners and ownership rights. It is interesting to observe the rigid distinction drawn by the court in *ZS v ES* between the two different types of universal partnerships and the prohibition of the *societas universorum bonorum* in a marital regime that does not allow it. The only leading Namibian equality jurisprudence on universal partnerships is the *Frank* case. The essence of this case is that in Namibia the universal partnership is a constitutionally recognised and protected relationship.

The following Chapter serves as a reflection of the research up to this point, before the conclusion of this research in Chapter 7.

CHAPTER 6

6 Reflection and current issues

6.1 Introduction

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 fact that the universal partnership originates from ancient Roman times, it has managed to secure itself a place in our modern day democratic legal system and abroad.

This ancient partnership form offers legal recourse to persons excluded from legislative remedies, as illustrated in the case law of Namibia, Botswana and Zimbabwe. 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 invalid religious marriages, an opportunity to share in the property jointly acquired by them and their partners.[1]

Although Bonthuys[2] draws a distinction between commercial universal partnerships and intimate universal partnerships, the legal requirements for both are exactly the same.[3] Bonthuys notes that for an intimate universal partnership there are additional requirements to that of Pothier. Bonthuys notes that:

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1 A Barratt 'Whatever I acquire will be mine and mine alone: Marital agreements not to share in constitutional South Africa' (2013) 130 *SALJ* 688 689: '[W]omen are usually the economically weaker spouses at the end of a marriage.' Furthermore, this partnership form offers parties left without any formal statutory remedy for judicial redistribution of their matrimonial property upon divorce, a right of recourse. See also Barratt 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 E Bonthuys 'Proving express and tacit universal partnership agreements in unmarried intimate relationships' (2017) 134 *SALJ* 263. See also E Bonthuys 'Developing the common law of breach of promise and universal partnerships: Rights to property sharing for all cohabitants?' (2015) 132 *SALJ* 76 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'.

2 Bonthuys 2017 (n 1) 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 behavioral norms during the subsistence and at the end of these contracts.'

3 *Butters v Mncora* 2012 2 ALL SA 485 (SCA) para 17. See also Bonthuys 2017 (n 1) 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'.

> 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.[4]

This suggestion of Bothuys 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.[5] The courts should not assume an automatic discretion and infer a 'quasi-status' of the parties. Furthermore, the distinction between an intimate and commercial partnership may be unnecessary, as our courts and that of our neighboring countries as discussed, prefer the aggregate approach to partnerships, treating a partnership as an aggregate of persons, as opposed to a legal entity on its own.

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. It is evident from the case law that the universal partnership, in essence, offers these parties the legal avenue to share in the partnership property, jointly acquired by them, upon the dissolution of the partnership,[6] 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.[7]

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 unfavorable outcome. Hence, our courts should not develop new default rules that long-term cohabiting or life partners are deemed to be universal partners, as this may not be

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4 Bonthuys 2017 (n 1) 267.

5 J Sinclair & J Heaton *The law of marriage* (1996) 274.

6 See Bonthuys 2017 (n 1) 264.

7 A Barratt 'Private contract or automatic court discretion? Current trends in legal regulation of permanent life-partnerships' (2015) 26 *Stell LR* 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'. Barratt suggested that a tacit universal partnership contract may be inferred based on an examination of the surrounding conduct and circumstances of the partners and provide contract-based relief to parties.

the intention of the parties, although they have agreed to mutually support each other and share in their joint property with one another.

Utilising the universal partnership in cases where it is not intended will inevitably lead to a degree of disappointment and frustration.[8] As mentioned by the court in *Chapendama v Chapendama*,[9] however unsatisfactory the application of the universal partnership concept may be, it is currently the only legal régime available in order to do justice to the parties. This amount of dissatisfaction is, however, lessened by the fact that without the contractual remedies offered by the partnership upon its dissolution, litigating parties would be left with barely any legal recourse.[10] 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.

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',[11] the LAC discussed some drawbacks to the use of a universal partnership as the basis for the division of assets between cohabiting partners. Although this paper is based on Namibian law and cohabitation, it is nevertheless relatable to South Africa, Botswana and Zimbabwe 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. Pothier's requirements for universal partnerships do not include any formalities and they are, therefore,

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8 Bonthuys 2017 (n 1) 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.'

9 1998 2 ZLR 18 (H) 27. Hereafter *Chapendama*.

10 *Booysen v Stander* 2018 6 SA 528 (WCC) 65 referred to the *Butters* case. 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).

11 https://www.lac.org.na/projects/grap/Pdf/cohabitationsummary.pdf (accessed 1 September 2019). It should be noted that the research done by the LAC is focused on cohabiting partners. It must be borne in mind that universal partnerships are not necessarily between cohabiting persons.

capable of being entered into orally or tacitly.[12] This means that proving the existence of the universal partnership is more burdensome and the courts may consider a range of further factors in addition to the plaintiff's evidence of an oral agreement.[13] Not only should the valid existence of the partnership be proven, it is crucial that the parties also prove their contribution. Bonthuys mentions that another serious problem with the universal partnerships' jurisprudence is the percentage of the partnership assets awarded to female plaintiffs.[14]

Secondly, the LAC mentions that if a cohabiting partner is married to someone else, it may be impossible to establish a universal partnership in respect of the cohabitation. This may not be as difficult to prove, as marriage does not prohibit the existence of a universal partnership, between the married spouses or between a spouse and a third party. Furthermore, it is evident from the case law that persons in an adulterous relationship may conclude a universal partnership. It is noteworthy that the matrimonial property regime may, however, exclude the existence of the universal partnership and render proving the existence thereof nearly impossible.[15]

The LAC continues to explain that the process of untangling which assets belong to the universal partnership and the community of property in the case where one of the cohabiting parties was married at the same time to another party in community of property, is very 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.[16]

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12 Bonthuys 2015 (n 1) 92.

13 Bonthuys 2015 (n 1) 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.

14 Bonthuys 2015 (n 1) 94.

15 See *EA v EC* (09/25924) 2012 ZAGPJHC 219 (25 October 2012) para 22; *JW v CW* 2012 2 SA 529 (NCK) para 36. Barratt 2013 (n 1) 689: 'This note considers the position of spouses married in terms of no-sharing antenuptial contracts under current South African matrimonial property law.'

16 In the case of *Botha NO v Deetlefs* 2008 3 SA 419 (N), the High Court found that there was no right to continued occupation of a couple's house by the surviving cohabitant after the death of the other partner. 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.

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 recourses to litigate in an action in the civil court. Consequently, the LAC mentions 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 limited by their expensive litigation structure.

6.2 Current issues

In South Africa, parties to Muslim, Jewish, Hindu or other religious marriages must register their marriages in terms of the Civil Union Act or the Marriage Act, 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 Recognition of Customary Marriages Act. 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 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.[17]

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.[18]

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17 South African Law Reform Commission (SALRC) 'Single marriage statute' Issue Paper 35, Project 144, 12 para 1.37 http://www.justice.gov.za/salrc/ipapers.htm (accessed 1 September 2019). See generally E Bonthuys 'Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law' (2016) 19 *PELJ* 1; Barratt 2013 (n 1) 688-704.

18 SALRC (n 17) 46 para 2.99.

In order to attempt a remedy to 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.[19]

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.[20] This single marriage statute may provide some harmonisation and remedy current legislative gaps and conflicts.

Although the legality and recognition of homosexual relationships are not the focus of this research, it is interesting to note that the Zimbabwean Constitution 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.[21] It is trite that the similarities and differences between the universal partnership and valid

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19 SALRC (n 17) 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.

20 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 also C Rautenbach (ed) & JC Bekker *Introduction to legal pluralism in South Africa* (2014) 110. See also *Volks No* (n 10) 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 E Cameron & MJ De Waal *Honoré's South African law of trusts* 5th Edition (2002) 110.

21 Sec 56 of the Zimbabwean Constitution does, however, prohibit discrimination based on sex and gender, but not sexual orientation. Art 10 of the Namibian Constitution only prohibits discrimination based on sex. Sexual orientation and gender are not included in this list. Sec 15 of the Botswanan Constitution 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' *Bloomberg* 11 June 2019 https://www.bloomberg.com/news/articles/2019-06-11/same-sex-relationships-decriminalized-by-botswana-s-high-court (accessed 1 September 2019). Attorney general Abraham Keetshabe is however of the opinion that the ruling of the High Court is incorrect and the government of Botswana intends on lodging an appeal against this ruling, see 'Botswana government to appeal against law legalizing gay sex' *The Guardian* 6 July 2019 https://www.theguardian.com/world/2019/jul/06/botswana-government-to-appeal-against-law-legalising-gay-sex (accessed 1 September 2019). See also M Keleboge 'Botswana appeals landmark pro gay high court ruling' *Sunday Standard* 7 July 2019 http://www.sundaystandard.info/botswana-appeals-landmark-pro-gay-high-court-ruling (accessed 1 September 2019).

marriages or unions are largely debated. Despite this debate, it is suggested that as these countries do not provide for same-sex marriages, the 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.[22] 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 emphasises the multidimensional use of this ancient contract form and its modern-day relevance.

In the following Chapter, the essence of the foreign-law research is reiterated, by summarising the most important lessons to be drawn therefrom. Chapter 7 concludes this research with a short concluding paragraph and some final remarks as to the importance of the universal partnership and the consequences of its dissolution.

22 See 'Anti-gay laws widespread in Africa despite gains' *News24* 10 June 2016 https://www.news24.com/Africa/News/anti-gay-laws-widespread-in-africa-despite-gains-20190610-2 (accessed 1 September 2019).

CHAPTER 7

7 Conclusion

7.1 Final remarks

The influence of the universal partnership is far-reaching, as it extends its influence from the reaches of commercial law, availing itself to persons in unregistered, putative or unrecognised religious marriages, to the depths of insolvency law. Despite the theories of its juristic nature, these gaps may be breached through legislative intervention and reconciliation between legislation and common law. This diverse partnership form offers probable solutions to complex problems.

Summarising the essence of 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 in this conclusion. The essence of the lessons to be drawn from the foreign-law research are summarised as follow:

a) The universal partnership may be treated as a separate legal entity or 'juristic ghost' which is distinct from the partners composing it for purposes of civil proceedings, especially upon insolvency;
b) Although a partnership may be deemed to be a separate legal entity, it is in effect nothing more than an aggregate of persons that compose it, confirming the common-law theory preferred in South Africa, Botswana, Namibia and Zimbabwe;
c) The new insolvency legislation of Zimbabwe offers valuable insight as to possible amendments to be made to the South African Insolvency Act, such as providing for the deemed 'revival' of a dissolved partnership, in order to settle unpaid debts of an already dissolved partnership;
d) 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;
e) The judicial discretion and duty to assist does not negate the requirements of a universal partnership and the *essentialia* thereof must be proven;
f) In order to prevent imposing on litigants a mindset which they did 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;

g) 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;

h) Although choice of law rules allow litigants to choose between customary law or common law, the basis for relying on the universal partnership should be made unambiguously;

i) 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;

j) 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;

k) 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.

7.2 Conclusion

'The *societas universorum bonorum* is alive and well in South African law'.[1]

The unique niche that the universal partnership has managed to secure in our multi-cultural pluralistic legal system is extraordinary. The extent to which the judiciary and the legislator have treated partnerships as either a legal entity or merely a collection of individuals and the legislative departure from the common law, has been largely debated in our jurisprudence. Our common law refuses to recognise a partnership as an entity that is distinct from the members composing it and this aggregate theory is so closely allied with the common law that it may be dubbed the common-law theory.

From the foreign-law research, it is clear that these foreign jurisdictions also prefer the aggregate theory which treats a partnership as a collection of individual partners or aggregate of persons, as opposed to an entity on its own. This research indicates that the insolvency legislation of these foreign jurisdictions have also created a statutory departure

[1] JJ 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) 77 *THRHR* 427 439.

from the common law by treating a partnership as a separate legal entity upon insolvency. It is important to remember that the aggregate and entity theories are mainly rooted in the debates of insolvency law and that the other grounds for dissolution of the partnership largely follow the aggregate (common-law) approach. Despite these dissimilar theories and debates, foreign courts have not been deterred from employing the universal partnership in appropriate cases in order to do justice.

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*[2] 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 litigating parties through appropriate employment the universal partnership in apposite circumstances. Development of the common law and the concept of the universal partnership may ultimately protect vulnerable litigants during the lacuna created by a lack of legislative recourse and remedies.[3]

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

3 See for example *Du Toit v Seria* 2006 (8) BCLR 869 (CC), where no civil marriage was concluded between a Muslim husband and wife, although they were married to each other in terms of personal law. In this case the court mentioned that our 'courts should enlarge the concept of tacit universal partnership by development of the common law to embrace situation of a divorced Muslim wife'. See E Bonthuys 'Domestic violence and gendered socio-economic rights: An agenda for research and activism?' (2014) 30 *SAJHR* 111, for a discussion on Muslim or Hindu law.

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