

# Exploring Universal Partnerships and Putative Marriages as Tools for Awarding Partnership Property in Contemporary Family Law

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## Abstract

Following upon the Supreme Court of Appeal's judgment in *Butters v Mncora* 2012 4 SA 1 (SCA), which broadened the criteria and consequences of universal partnerships in cohabitation relationships, this article investigates the potential of universal partnerships and putative marriages to allocate rights to share in partnership property in other intimate relationships. It traverses several instances in which marriages are not recognised - bigamous marriages, Muslim and Hindu religious marriages and invalid customary marriages - examining whether the wives in these marriages could use universal partnerships and putative marriages to claim a share in property. It then considers the use of universal partnerships to obtain a share of property in civil marriages out of community of property. It concludes by pointing out several issues which are in need of clarification and where the common law should be developed to give effect to fundamental constitutional rights.

## Keywords

Universal partnerships; customary marriage; putative marriage; Muslim marriage; Hindu marriage; bigamy; marriage out of community of property.

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## 1 Introduction

In a 2015 article<sup>1</sup> I examined a series of cases culminating in *Butters v Mncora*,<sup>2</sup> which progressively eroded the *sui generis* common law remedies for breach of promise, while simultaneously extending universal partnerships to cohabiting couples who were engaged to be married. In this way the courts awarded rights to share in partnership property<sup>3</sup> to cohabitants. This is a significant development, since the common law did not extend rights to partnership property to engaged couples, but rather awarded contractual damages for both actual loss (or wasted expenses) and prospective loss (the loss of financial benefits expected from the future marriage) together with sentimental damages.<sup>4</sup> The conditions under and the extent to which the common law remedies remain available are now in flux, but will doubtlessly be clarified in future cases. Nevertheless, this use of universal partnerships provides an avenue by which poorer partners – usually women - can share in the assets which were generated during an intimate relationship.

Most significant for the achievement of gender equality in asset distribution are, firstly, the Supreme Court of Appeal's explicit pronouncement that a universal partnership between intimate partners can be concluded either expressly or tacitly – by way of conduct - and that it can exist while partners are also engaged or married.<sup>5</sup> Second, the majority in *Butters* held that partnership assets could also encompass non-financial benefits and that those non-financial contributions, like child-care and homemaking, which women typically make, should also be taken into account in determining the existence and extent of a universal partnership.<sup>6</sup> Indeed, Brand JA expressly mentioned the "greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families".<sup>7</sup>

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<sup>1</sup> Bonthuys 2015 SALJ 76.

<sup>2</sup> *Butters v Mncora* 2012 4 SA 1 (SCA) (hereafter the *Butters* case).

<sup>3</sup> I use the term partnership property throughout this piece to refer to property which had been amassed during the intimate relationship or marriage.

<sup>4</sup> *Bull v Taylor* 1965 4 SA 29 (A).

<sup>5</sup> *Ponelat v Schrepfer* 2012 1 SA 206 (SCA) para 22 (hereafter the *Ponelat* case).

<sup>6</sup> *Ponelat* case paras 18-22.

<sup>7</sup> *Ponelat* case para 22.

While the cohabiting couples in these and subsequent cases<sup>8</sup> were engaged to marry, there are now precedents for using universal partnerships to award assets to cohabitants who are not engaged.<sup>9</sup> In *Paixão v Road Accident Fund*, which involved a contractual duty of support rather than a universal partnership, it was argued that the duty of support should be recognised only for cohabitation relationships in which the parties were engaged to be married, rather than extending it to all cohabitants. The court rejected this contention, holding that it would constitute an arbitrary and unjustified limitation on the duty of support. Rather than focussing on whether or not the parties had been engaged, the enquiry should be whether the parties had established a legal duty of support in "a relationship akin to marriage".<sup>10</sup> The same reasoning should apply to distinguishing between universal partnerships where parties are engaged and those in which they are not engaged. I therefore do not propose to deal with cohabitation relationships in any further depth.

Instead, this article continues where the previous one ended by exploring the potential use of universal partnerships to redistribute property in other relationship forms.<sup>11</sup> Because some cases use putative marriages and universal partnerships interchangeably, and because putative marriages may exist in certain cases where universal partnerships can be claimed, I consider both. I am particularly interested in ameliorating the financial disadvantage suffered by women as a result of the rigid legal distinctions between marriage, on the one hand, and relationships which do not qualify as marriage, on the other hand. Flowing from these distinctions is a system of rules which privilege the married above the unmarried, including those whose marriages are regarded as defective through no fault of their own.<sup>12</sup> To clarify this somewhat bewildering array of relationships I have divided the discussion into three categories: first, I refer to "the inadequately married" to describe women in invalid marriages, including Hindu and Muslim religious marriages and customary marriages which don't comply with customary requirements; second, women in bigamous marriages and coterminous customary and civil marriages, which I call "the simultaneously married"; and finally women in civil marriages which

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<sup>8</sup> *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA) (hereafter the *Paixão* case); *Cloete v Maritz* 2014 JOL 32110 (WCC) (hereafter the *Cloete* case).

<sup>9</sup> This was argued but not established by the evidence in *McDonald v Young* 2012 3 SA 1 (SCA) (hereafter the *McDonald* case) and *Steyn v Hasse* 2015 4 SA 405 (WCC).

<sup>10</sup> *Paixão* case paras 38-39.

<sup>11</sup> Smith "Dissolution of a Life or Domestic Partnership" 389, 436-442.

<sup>12</sup> For a critique of this, see Bonthuys *Patchwork of Marriages*.

exclude both community of property and the accrual system, but who do not qualify for redistribution orders – "the unwisely married".

The discursive connection, both in law and popular culture, between marriage and partnership has long been established. On the one hand, Henning<sup>13</sup> traces the legal institution of partnership to family agreements to cooperate for the common good in ancient times. The *societas universorum bonorum*, in particular, has been linked with cooperation between family members, specifically relationships between spouses in marriages without ante-nuptial contracts, where the joint estate has frequently (albeit technically inaccurately) been described as a universal partnership.<sup>14</sup> Hahlo,<sup>15</sup> for instance, refers to the marriage in community of property as "a universal economic partnership". The terms "life partnership" and "civil partnership" in the *Civil Union Act*<sup>16</sup> also express the close association of marriage with the idea of a partnership encompassing the material, social and affective aspects of life.

We can therefore argue that there is a strong conceptual link between family life and partnerships, specifically the two forms of universal partnerships which form the subject matter of this article. Universal partnerships are distinguished from partnerships which relate to particular assets only and comprise two forms. The *societas universorum bonorum* – which encompasses *both existing and future property* - can, according to the *Butters* case, include *both financial and non-financial goods and contributions* – while the *societas quae ex quaestu veniunt* includes *all property and profits that have been acquired during the subsistence of the partnership*.<sup>17</sup> The latter tends to be associated with particular business enterprises and would presumably exclude non-financial contributions and gains.

Both forms of universal partnerships have historically been used to supplement the common law in certain established areas – where there was a defective marriage ceremony, as a mechanism to distribute property equally between spouses in putative marriages, and to provide some property sharing in Hindu and Muslim religious marriages. There are also cases which deal with bigamous marriages and marriages out of

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<sup>13</sup> Henning and Snyman-Van Deventer "Partnership" para 253.

<sup>14</sup> Henning and Snyman-Van Deventer "Partnership" paras 257, 44-48; Erasmus *et al Family, Things and Succession* para 80. *Ex parte L (also known as A)* 1947 3 SA 50 (C) 59 (hereafter the *Ex parte L* case), referring to *Voet* (23.2.68/69) and *Grotius* (3.21.10).

<sup>15</sup> Hahlo *South African Law of Husband and Wife* 157.

<sup>16</sup> Section 1 of the *Civil Union Act* 17 of 2006.

<sup>17</sup> Henning and Snyman-Van Deventer "Partnership" para 256.

community of property. Those cases which grant rights to share in property use Pothier's well-known requirements for the establishment of a legal partnership, formulated as follows in *Butters*:<sup>18</sup>

firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts.

For the purposes of this article Pothier's fourth requirement, which we could term legality or lawfulness, is particularly relevant in certain situations.

In the *Butters* case the Supreme Court of Appeal held that, given the general acceptance of Pothier's criteria and their application to intimate relationships, it was unnecessary to add *Felicius-Boxelius'* three additional requirements of cohabitation, freedom of accounting and sharing of profits.<sup>19</sup>

## **2 Universal partnerships and putative marriages for the inadequately married**

In this section I will consider the use of universal partnerships and putative marriages, to award property rights to women whose marriages are not recognised, either because of substantive or procedural defects, or because the marriages have historically not received full legal recognition, like Hindu and Muslim marriages. I will also consider invalid customary marriages, which represent an area of significant legal neglect.

Cases decided before the advent of the *Marriage Act* 25 of 1961 often dealt with marriages conducted by religious officials who had not been properly appointed as marriage officers. The first reported South African case which uses the universal partnership to redistribute property in family law is *Moghrabi*,<sup>20</sup> where the marriage ceremony, conducted by a rabbi, was invalid. The court held that, since the parties intended to be married in community of property, there had been a universal partnership, to which both contributed equally. The wife was therefore entitled to half of the combined assets. In a similar situation, the court in *Ex parte L (also known as A)*<sup>21</sup> held that a wife in a putative marriage had the right to half of the

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<sup>18</sup> *Butters* case para 11.

<sup>19</sup> *Butters* case paras 16-17.

<sup>20</sup> *Moghrabi* 1921 AD 274.

<sup>21</sup> *Ex parte L* case 60.

deceased husband's estate upon his death. Although the court relied upon the decision in *Moghrabi*, the many references to putative marriages<sup>22</sup> indicate that these early decisions did not draw rigid distinctions between universal partnerships and putative marriages.<sup>23</sup> Instead, it seems that the universal partnership was regarded as an appropriate legal vehicle to award half a share of the partnership property to the *bona fide* (usually female) spouse in a putative marriage. In some situations, therefore, it appears that wives could rely either on universal partnerships or putative marriages to establish a right to share in partnership property.

Technically the consequences of putative marriages should, however, be different from those for universal partnerships. For instance, Sinclair and Heaton describe the proprietary consequences of putative marriages as follows:<sup>24</sup>

If both parties were *bona fide* and they did not enter into an antenuptial contract, it must be assumed that they intended to be married in community of property, and they must be treated accordingly. If only one of the parties was *bona fide*, community takes place if this is to the advantage of the innocent party, but not otherwise.

This would mean that in a putative marriage the legal relief would be tailored to suit the financial interests of the innocent party. If the innocent party would benefit from community of property, she would simply be entitled to half of the partnership property instead of having a court assess the extent of her contribution in order to determine her share, as in the case of a universal partnership.<sup>25</sup> The requirements for putative marriages are also different from those for universal partnerships,<sup>26</sup> with no need to prove Pothier's three elements.<sup>27</sup> Because of these differences, using universal partnerships as vehicles to award assets in putative marriages may not be the best solution in every case. It may therefore be strategic to consider whether to formulate claims for partnership property as universal partnerships or putative marriages. This distinction, although not made in

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<sup>22</sup> *Ex parte L* case 58, 59, 60.

<sup>23</sup> Also see *Annabhay v Ramlall* 1960 3 SA 802 (D) (hereafter the *Annabhay* case) 805E-F to the effect that "It would appear, therefore, that save in the case of a lawful marriage or a putative marriage, a partnership *universorum bonorum*, in so far as it may still be recognised by our law, can only be entered into expressly". This statement (although substantially incorrect) illustrates the way in which courts tended to treat putative marriages and universal partnerships as interchangeable or equivalent. Also see *Moola v Aulsebrook* 1983 1 All SA 278 (N) 280 (hereafter the *Moola* case); *Sepheri v Scanlan* 2008 1 SA 322 (C) 338C-D.

<sup>24</sup> Sinclair and Heaton *Law of Marriage* 408. This is based on Hahlo *South African Law of Husband and Wife* 115 which, in turn, relies on Roman-Dutch sources. Also see Smith 2011 *SALJ* 560, 568.

<sup>25</sup> See for instance *Ponelat* case 206; *Cloete* case 32110.

<sup>26</sup> See Clark *Family Law Service* A63, A64.

<sup>27</sup> See *M v M* 1962 2 SA 114 (GW).

the older cases, is supported by the Supreme Court of Appeal in *Ramatshimbila v Phaswana*<sup>28</sup> in which an exception was lodged against a simultaneous claim for both a putative marriage and a universal partnership. Zondi JA held that:<sup>29</sup>

The difficulty with the plaintiff's main claim is that it contains two causes of action which are mutually inconsistent as the legal consequences flowing from a putative marriage and universal partnership are different. They cannot be rolled up into a single claim ...

Hindu and Muslim religious marriages do not qualify as putative marriages when the spouses do not have a *bona fide* belief that they have conducted a valid civil marriage.<sup>30</sup> Unable therefore to rely on the mechanism of putative marriage to obtain a share of their husbands' property, wives in these marriages have sought to establish the existence of universal partnerships instead.

In some respects the 1949 judgment in *Isaacs v Isaacs*<sup>31</sup> anticipates the *Butters* decision. The parties had been in a Muslim religious marriage for 28 years. Together they founded and operated several businesses in which the wife took an active part, in addition to caring for the home, her husband and their ten children. The court held that she had proven the existence of a tacit universal partnership, the purpose of which was "to provide the necessaries of life and such a measure of comfort and security as could be obtained for the common welfare in the home and the upbringing and education of their children".<sup>32</sup> To the husband's argument that the wife's domestic duties precluded her from making a substantial business contribution, the court replied that it could never have been their intention that the profits of their ventures should accrue to the man only<sup>33</sup> and that, because the joint venture included provision for the family's wellbeing, the wife's household work formed part of her contribution to the partnership.<sup>34</sup> The use of a universal partnership to bring about common benefit beyond purely commercial ventures was subsequently confirmed in another Muslim marriage in the case of *Ally v Dinath*.<sup>35</sup>

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<sup>28</sup> *Ramatshimbila v Phaswana* 2014 ZASCA 117 (19 September 2014) (hereafter the *Ramatshimbila* case).

<sup>29</sup> *Ramatshimbila* case para 8.

<sup>30</sup> *Isaacs v Isaacs* 1949 1 SA 952 (C) 958 (hereafter the *Isaacs* case); *Solomon v Abrams* 1991 4 SA 437 (W); *Ngubane v Ngubane* 1983 2 SA 770 (T) (hereafter the *Ngubane* case). Putative marriages have, however, been held to exist when the parties were *bona fide*, as in the *Moola* case 687.

<sup>31</sup> *Isaacs* case 952.

<sup>32</sup> *Isaacs* case 961.

<sup>33</sup> *Isaacs* case 961.

<sup>34</sup> *Isaacs* case 962.

<sup>35</sup> *Ally v Dinath* 1984 2 SA 451 (T) 455A-C.

*Ratane v Maharaj*<sup>36</sup> concerned a Hindu marriage between an illiterate fourteen-year-old girl and an older, educated man. After 20 years, during which the wife took care of the household and eight children, while also assisting in the husband's shop, the marriage was formally registered, together with an antenuptial contract excluding community of property. After the husband's death, all the property was appropriated by his brother, leaving the wife in penury. The main issue was whether the wife had signed the antenuptial contract as a result of her husband's undue influence,<sup>37</sup> but the court also held that, if a universal partnership "the object of which was to provide for the household" had been established before registration of the marriage, the wife would not have forfeited her rights to a share of the partnership property by entering into a binding antenuptial contract at a later stage.<sup>38</sup> This case therefore repeated the idea in *Isaacs* that the aim of the universal partnership could have been the maintenance of the family unit rather than a business venture. Also important is the fact that the wife, who only occasionally assisted in her husband's business, could establish a universal partnership. The *Butters* decision that the object of the universal partnership could be both financial gain and the maintenance of family members, and that wives' non business-related contributions must be taken into account, therefore did not come out of the blue, but is presaged by the decisions in these cases.

Another vehicle for awarding property rights in Muslim marriages is the enforcement of premarital contracts. In *Ismail v Ismail*<sup>39</sup> the Appellate Division held that it would be contra *bonos mores* to enforce a premarital contract which would countenance a potentially polygynous marriage. Subsequently, in *Ryland v Edros*<sup>40</sup> the Cape Provincial Division held that the enforcement of marriage contracts in *de facto* monogamous Islamic marriages could no longer be regarded as contra *bonos mores* in the light of the non-discrimination clauses in the Bill of Rights.<sup>41</sup> In this particular case the contract provided simply that the marriage would be governed by Islamic law. Although the expert witnesses agreed that wives have rights to be maintained for the whole duration of their marriages, in this case the wife was prevented by prescription from claiming the full sum of the spousal maintenance which had accrued during the marriage.<sup>42</sup> The court

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<sup>36</sup> *Ratane v Maharaj* 1950 2 SA 538 (D) (hereafter the *Ratane* case).

<sup>37</sup> *Ratane* case 547-552.

<sup>38</sup> *Ratane* case 546.

<sup>39</sup> *Ismail v Ismail* 1983 1 SA 1006 (A).

<sup>40</sup> *Ryland v Edros* 1997 2 SA 690 (C) (hereafter the *Ryland* case). Also see Moosa "Dissolution of a Muslim Marriage" 282, 334-335.

<sup>41</sup> *Ryland* case 709C-D, 711B-D.

<sup>42</sup> *Ryland* case 713H-I.



also found that she had failed to establish the existence of a clear and undisputed Islamic custom which would allow her an equitable share of her husband's property on the basis of her contribution to the marriage.<sup>43</sup> She was, however, entitled to a gift to console her for her husband's unjustified termination of the marriage. Depending on its terms, therefore, enforcing the marriage contract would not necessarily provide a wife with rights to share in property accumulated during the marriage.

The wider question which this case raises, however, is whether the existence of an Islamic marriage contract would preclude a Muslim wife from relying on a universal partnership. It could be argued that the express marriage contract, with its implication of separate spousal estates, would render the conclusion of a tacit universal partnership agreement unlikely. On the other hand, this issue has not been raised in the numerous cases involving Muslim marriages and universal partnerships. Moreover, the jurisprudence holding that a universal partnership *quae ex quaestu veniunt* can co-exist with an antenuptial contract excluding community of property, as discussed below,<sup>44</sup> could also apply to Muslim marriages.

One result of the provision, in the *Recognition of Customary Marriages Act*, that a valid customary marriage "must be negotiated and entered into or celebrated in accordance with customary law"<sup>45</sup> has been an ever-increasing number of challenges to the validity of customary marriages on the basis that they do not comply with customary requirements relating to the handing over of brides, payment of *lobolo* and so forth.<sup>46</sup> The obvious point is that in each customary marriage which is declared invalid, a woman who had throughout the relationship considered herself a wife loses her rights to share in partnership property if the marriage was in community of property, or her right to an equitable redistribution of marital property where the marriage was out of community of property.<sup>47</sup> Mwambene and Kruuse's critique of the detrimental effects of this increasingly "formal or definitional approach to customary marriages" upon customary wives is apt indeed.<sup>48</sup> They also highlight the research which documents how officials from the Department of Home Affairs sometimes refuse to register customary marriages without valid grounds, which

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<sup>43</sup> *Ryland* case 718G-H.

<sup>44</sup> See the discussion in para 4 below.

<sup>45</sup> Section 3(1)(b) of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>46</sup> See for instance *Mabuza v Mbatha* 2003 4 SA 218 (C); *Ndlovu v Mokoena* 2009 5 SA 400 (GNP); *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ). Also see for a general discussion of this problem Kovacs, Ndashe and Williams 2013 *Acta Juridica* 273.

<sup>47</sup> *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) (hereafter the *Gumede* case).

<sup>48</sup> Mwambene and Kruuse 2013 *Acta Juridica* 292.

makes it more difficult and sometimes impossible for wives to prove the existence of their marriages and gives opportunities to men and their families to confiscate matrimonial property to which wives should have been entitled.<sup>49</sup> This is in addition to the numbers of customary wives whose marriages are invalid because they co-exist with civil marriages, as discussed below.<sup>50</sup>

Mwambene and Kruuse suggest that wives in these invalid customary marriages should be afforded legal relief by regarding their relationships as putative marriages.<sup>51</sup> This would enable them to claim for half of the partnership property, if they can prove that they were *bona fide*. As far as I have been able to ascertain, the common law concept of putative marriage has not yet been applied to customary marriages<sup>52</sup> and I agree that it should be developed to apply to these marriages.<sup>53</sup> Another potential solution would be to argue that the spouses in invalid customary marriages had established universal partnerships entitling wives to share in the partnership property. The wider definitions of partnership property and contributions set out in *Butters* would assist customary wives to make the argument and would go some way towards protecting them from the negative results of an invalid marriage. The co-existence of putative marriages or universal partnerships with other valid marriages in

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<sup>49</sup> Mwambene and Kruuse 2013 *Acta Juridica* 293. Also see De Souza 2013 *Acta Juridica* 239; Kovacs, Ndashe and Williams 2013 *Acta Juridica* 278-282.

<sup>50</sup> Para 3 below.

<sup>51</sup> Mwambene and Kruuse 2013 *Acta Juridica* 314-316. Also see Janse van Rensburg 2003 *TSAR* 585, who makes the same suggestion at 588-589 to solve the problem of invalid customary marriages where the male partner had died. Monareng and Zoumenou 2007 *Agenda* 122, 128 suggest that this should be brought about by statutory amendment. The *Ramatshimbila* case, by not specifically indicating that a claim for a putative customary marriage would be excipiable, could be said to support the view that this may be possible. However, that may read too much into the case.

<sup>52</sup> In both the *Ngubane* case and *Zulu v Zulu* 2008 4 SA 12 (D), which involve putative marriages by African spouses, the parties had conducted civil, not customary marriages.

<sup>53</sup> One issue which could prevent such a development is whether (as it has to be in order to qualify as a putative marriage) the marriage ceremony was "performed by a marriage officer" as required in the *Ngubane* case 774 and followed in *Solomon v Abrams* 1991 4 All SA 437 (W), or whether it is sufficient that the marriage was "contracted openly and in accordance with the customary rituals and ceremonies" as required in the *Moola* case 281. If the view in the *Moola* case were adopted, then customary marriages which are invalid because they don't comply with customary requirements would also not qualify as putative marriages. However, customary marriages which are invalid because they co-exist with other civil or customary marriages may qualify as putative marriages if they follow customary marriage requirements. Space does not permit further analysis of this issue here, but it should be explored in more depth.

community of property could, however, be problematic. This is discussed in the next section.

### 3 Universal partnerships and putative marriages for the simultaneously married

The prohibition of bigamy means that, while a valid civil marriage subsists, no subsequent marriages or intimate relationships will give rise to legal rights. In several of the earlier cases courts classified the second, bigamous marriages as putative marriages in order to hold that children from those marriages were legitimate.<sup>54</sup> Oddly enough, given the potentially beneficial financial consequences of a putative marriage for the *bona fide* party, I have been unable to locate any older cases in which *bona fide* putative spouses claimed a share of the partnership property in bigamous marriages.<sup>55</sup> Cases apply the doctrine of putative marriage only to declare children from these marriages legitimate. The only case in which financial compensation was claimed was *Arendse v Roode*<sup>56</sup> in which the plaintiff wife in a bigamous marriage claimed and was awarded damages for seduction and impairment of her *dignitas* and *fama*. This case was therefore based in delict rather than on a putative marriage or a universal partnership.

*V (aka L) v De Wet*<sup>57</sup> was brought by a woman who had knowingly cohabited with a married man for 21 years, during which time they had had two children and had jointly operated a painting and decorating business. Upon his death she claimed half of his estate. The applicant would not have been able to establish a putative marriage because she was aware that the deceased had been married. The court applied Pothier's requirements<sup>58</sup> to rule that a *societas quae ex quaestu veniunt* had existed between the applicant and the deceased. Most interesting, however, is the court's failure to apply Pothier's fourth requirement, that the contract should be "legitimate" or legal.<sup>59</sup> The most obvious objection to a partnership contract in these circumstances is that it would be *contra bonos mores* or contrary to public policy, for undermining the institution of

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<sup>54</sup> *H (wrongly called C) v C* 1929 TPD 992; *Potgieter v Bellingan* 1940 EDL 264; *Prinsloo v Prinsloo* 1958 3 SA 759 (T); *Ngubane* case 770.

<sup>55</sup> See the discussion of *Zulu v Zulu* 2008 4 SA 12 (D) in this paragraph below.

<sup>56</sup> *Arendse v Roode* 1989 1 SA 763 (C) (hereafter the *V* case). In the *Ramatshibila* case, the Supreme Court of Appeal held that a delictual claim by a customary wife where there was already a subsisting civil marriage was not allowed.

<sup>57</sup> *V (aka L) v De Wet* 1953 1 SA 612 (O) (hereafter the *V* case); the *Arendse* case 612.

<sup>58</sup> Discussed in para 1 above.

<sup>59</sup> The court in the *Butters* case para 11 held that this was not unique to partnerships but applied equally to all contracts.

marriage.<sup>60</sup> This case was decided in 1953 when courts would perhaps have been more concerned with the protection of the institution of marriage than they are now. The omission of this aspect from the judgment is therefore particularly significant. Instead, the court held simply that if a couple who were married out of community of property could establish a *societas quae ex quaestu veniunt*,<sup>61</sup> then "there would seem to be no lawful obstacle to a mistress of a man establishing a similar contract in a similar manner".<sup>62</sup> Equally interesting in this case is the lack of information about the matrimonial property system in the marriage. A marriage out of community of property would not have presented an obstacle to a universal partnership, but if the existing marriage had been in community of property, the universal partnership could be problematic.

In *Zulu v Zulu*<sup>63</sup> the application for a share of a universal partnership was brought by a woman who was in a bigamous marriage with a man whose existing marriage was in community of property. The matter was argued on the basis of a putative marriage (since the applicant did not know of the existence of the first marriage) and alternatively on the basis of a universal partnership. Dealing first with the putative marriage, the court referred to the lack of authority on the patrimonial effects of a putative marriage where the pre-existing marriage was in community of property. However, on the general principle that the joint estate belongs to both spouses in undivided shares and that one spouse could therefore not alienate or transfer her or his share of the joint estate, the court held that there was no property which could become part of a joint estate in the putative (second) marriage. Only those assets which had been excluded from the joint estate of the (first) legal marriage could have formed part of a joint estate in the putative marriage.<sup>64</sup> Smith criticised this reasoning as "untenable in that it flies in the face of the entrenched *raison d'être* of the putative marriage by not protecting the bona fide 'spouse'" and suggests that the case represented a rare opportunity to develop the common law on the proprietary effects of a putative marriage in order to protect the financial interests of the *bona fide* putative spouse.<sup>65</sup>

Moving on to the existence of a universal partnership, the court held that the pre-existence of a valid marriage would render a subsequent universal

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<sup>60</sup> *Maseko v Maseko* 1992 3 SA 190 (W); *Claassen v Van der Watt* 1969 3 SA 68 (T); *Lloyd v Mitchell* 2004 2 All SA 542 (C).

<sup>61</sup> See the cases discussed in para 4 below.

<sup>62</sup> V case 615H-616A.

<sup>63</sup> *Zulu* case 12.

<sup>64</sup> *Zulu* case 15B-H.

<sup>65</sup> Smith 2011 SALJ 569, 570.

partnership unlawful<sup>66</sup> and that, in any event, the requirements for a universal partnership had not been proven. The rationale for holding that the universal partnership was unlawful was not further explained, but the argument that any assets of the bigamous spouse would have fallen into the joint estate in the first marriage, raised in relation to the putative marriage, would similarly have applied to the universal partnership.

Even though it deals with the duty to support rather than a right to share in partnership property, the case of *Paixão* is interesting in this respect. The deceased man was a spouse in a marriage which had been concluded in Portugal in accordance with Portuguese law, when he started to live with another woman in South Africa in 2003. His marriage was dissolved in June 2007 only six months before he died in a car accident on 2 January 2008. Considering various factors indicating the marriage-like nature of the cohabitation relationship, the court held that the cohabitant had established the existence of a tacit agreement to maintain her, which existed even while the deceased was still married to his Portuguese wife.<sup>67</sup> Unless the Portuguese marriage was for some reason not fully recognised in South Africa (of which the case gives no hint), it would constitute a complete legal impediment to a spouse entering into an engagement or another marriage<sup>68</sup> and would, on the reasoning in *Zulu*, render the agreement to support unlawful. Nevertheless, Cachalia JA appears to have minimised the significance of the Portuguese marriage, mentioning that the deceased had faced "the obstacle of his having to be 'officially' divorced in Portugal"<sup>69</sup> and that "he *felt constrained* not to marry before his divorce was also concluded and recognised in Portugal".<sup>70</sup> In certain cases like *V* and *Paixão*, courts appear to be unwilling to engage with the issue of legality, which needs to be clarified by future litigation or legislation.

It is furthermore unclear whether a universal partnership would usually include a duty to maintain or whether a separate agreement is needed to establish a right to support. In *Mc Donald v Young*,<sup>71</sup> the Supreme Court of Appeal, relying on the decision in *Volks v Robinson*,<sup>72</sup> stated unequivocally that outside of marriage a duty of support arises as a result of an express or tacit agreement only.<sup>73</sup> The male cohabitant argued, on the one hand, for the existence of a joint venture (which I take to mean a partnership) in

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<sup>66</sup> *Paixão* case 16A-B.

<sup>67</sup> *Paixão* case 20.

<sup>68</sup> See the *Ngubane* and *Zulu* cases.

<sup>69</sup> *Paixão* case 21, my emphasis.

<sup>70</sup> *Paixão* case 9, my emphasis.

<sup>71</sup> *McDonald v Young* 2012 3 SA 1 (SCA).

<sup>72</sup> *Volks v Robinson* 2005 5 BCLR 446 (CC).

<sup>73</sup> *McDonald* case 16, 19.

relation to a particular piece of land, the purpose of which was said to be to provide him with financial independence. Simultaneously he argued that the respondent had tacitly undertaken a duty to support him. The court held that the two agreements were mutually incompatible in the sense that if the parties had concluded a joint venture agreement in order to render the appellant financially independent from the respondent, then they would not also have had the intention to create a legal duty of support towards him.<sup>74</sup> But herein lies the rub. The court held that he had failed to prove the existence of a joint venture, but that his claim for a tacit maintenance agreement was still precluded by the evidence that there was an express joint venture agreement. The court cannot have it both ways. Either there was a joint venture, which then precluded the existence of an agreement to maintain, or, if there was no evidence of a joint venture, then this (non)evidence could not be used to negate the existence of an agreement to maintain. The evidence that the respondent had in fact supported him financially for seven years was also held not to prove the existence of a tacit contract to maintain on the argument that where parties perform in terms of a non-existent contract, that does not establish a contract, since they may erroneously have assumed there to have been a contract.<sup>75</sup>

Even though it never states that a partnership cannot coexist with a tacit agreement to maintain, the nature of the reasoning in this case could impede women's abilities to prove *both* tacit contracts of support and tacit universal partnerships, or alternatively to prove tacit contracts in which partners agree both to maintenance and asset sharing. This line of argument would be based on the premise that the aim of the universal partnership is to render the poorer spouse financially independent. That is not necessarily the case. An equally plausible aim of a partnership agreement may well be the equitable distribution of the fruits of both parties' labours and there is no logical reason to why this should be incompatible with a mutual undertaking to support each other financially.

All of the preceding cases in this paragraph dealt with civil marriages. However, the possibility of co-existing customary marriages is probably even stronger and the consequences potentially more complicated. Even though polygyny is an inherent feature of customary marriages, and it could therefore not be argued that universal partnership agreements which co-exist with customary marriages are unlawful for undermining the

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<sup>74</sup> *McDonald* case 22.

<sup>75</sup> *McDonald* case 22.

institution of customary marriage, there are other obstacles. In *MM v MN*<sup>76</sup> the Constitutional Court held that a Tsonga customary marriage concluded without the permission of existing customary wife was invalid. The judgment specifically declined to formulate a general rule for all customary marriages, but, as Himonga and Pope argue, the nature of the court's reasoning in this case and its emphasis on gender equality would inevitably influence future cases about the issue.<sup>77</sup> If this is indeed so, all subsequent customary marriages which have been concluded without the permission of the existing customary wives could be invalid and wives from these marriages left without any rights to partnership property. Himonga and Pope point out that, given the reality that customary marriages are seldom registered, subsequent customary wives have no way of ascertaining whether their husbands are also spouses in other customary marriages and that they would need permission from the first wives.<sup>78</sup> The authors also criticise the judgment for failing to develop customary law to protect the rights of subsequent wives.<sup>79</sup> Two potential avenues for such development are to apply the common law concept of putative marriage to the subsequent marriages, or to hold that there were universal partnerships between the second wives and their husbands.

Whether universal partnerships and putative marriages could serve this purpose depends in turn upon *Gumede v President of the Republic of South Africa*,<sup>80</sup> which held that customary marriages which are not subject to antenuptial contracts, including those entered into before the commencement of the *Recognition of Customary Marriages Act*, are in community of property. If the reasoning in *Zulu v Zulu* is followed, a first marriage in community of property would effectively preclude proof of universal partnerships or putative marriages in all subsequent customary marriages. It would also mean that there can be no universal partnerships or putative marriages in cohabitation relationships which co-exist with customary marriages in community of property because property which already forms part of a joint marital estate cannot form part of a universal partnership with another person.

The same problem exists when customary or Muslim religious marriages are concluded after valid civil marriages or civil partnerships in terms of the *Civil Union Act*. In these cases the inherently monogamous nature of

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<sup>76</sup> *MM v MN* 2013 4 SA 415 (CC). Also reported as *Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC).

<sup>77</sup> Himonga and Pope 2013 *Acta Juridica* 318, 323.

<sup>78</sup> Himonga and Pope 2013 *Acta Juridica* 333.

<sup>79</sup> Himonga and Pope 2013 *Acta Juridica* 338.

<sup>80</sup> *Gumede* case 152.

civil marriage would render the subsequent customary or Muslim religious marriages invalid.<sup>81</sup> Civil marriages concluded while there are existing customary marriages are invalid.<sup>82</sup> Where the existing marriages are in community of property, the arguments from *Zulu* would prevent any reliance on a putative marriage or universal partnership to obtain property rights for the subsequent wives.

The problems in simultaneous marriages are therefore first, whether universal partnerships which co-exist with civil marriages would undermine the institution of marriage and would therefore be unlawful and, second, whether universal partnerships and putative marriages can co-exist with marriages in community of property. Another issue is whether agreements to maintain can co-exist with universal partnerships. Neither of these questions has been fully canvassed or convincingly justified, especially in the light of the constitutional prohibitions of discrimination on the bases of marital status and gender. Another issue which has not been the subject of litigation yet is whether universal partnerships or putative marriages can co-exist with existing marriages to which the accrual system applies.<sup>83</sup> Accrual means that during the marriage the spouses have separate estates and the bigamous spouse should therefore be free to dispose of these assets, including in a universal partnership with a third party. Nevertheless, this could influence the amounts available for sharing by the first spouse under the accrual system.

#### **4 Universal partnerships for the unwisely married: Civil marriages out of community of property without accrual**

The lack of a general judicial discretion to distribute property equitably when spouses have concluded an antenuptial contract which precludes all sharing has been a concern ever since the enactment of s 7(3) of the *Divorce Act*, and it has become more pressing as ever-decreasing numbers of women qualify for the limited redistributive discretion provided in the legislation.<sup>84</sup> Despite widespread academic critiques,<sup>85</sup> there has been no legislative intervention. Litigants have therefore tried to use the

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<sup>81</sup> Section 10(4) of the *Recognition of Customary Marriages Act* 120 of 1998.

<sup>82</sup> Section 3(2) of the *Recognition of Customary Marriages Act* 120 of 1998. *Netshituka v Netshituka* 2011 5 SA 453 (SCA); *Kambule v The Master* 2007 3 SA 403 (EC).

<sup>83</sup> *Andrew v Andrew* 2012 ZAWCHC 126 (13 January 2012), involved the question of a universal partnership in a marriage subject to the accrual system, but the court held that no partnership was proven.

<sup>84</sup> The *Gumede* case has created such a judicial discretion in customary marriages, which are therefore not discussed in this paragraph.

<sup>85</sup> For a summary see Barratt 2013 *SALJ* 689-692.



universal partnership, particularly the *societas quae ex quaestu veniunt* (partnership relating to a particular business venture) to ameliorate the financial inequities of marriages out of community of property by allocating some share of (usually) the husbands' assets to their wives upon death or divorce.<sup>86</sup> Whether or not this is legally permitted remains unclear in the light of the contradictory jurisprudence.<sup>87</sup> Obviously, the doctrine of putative marriage cannot apply to parties who have been married out of community of property. This section deals, therefore, only with universal partnerships.

In *Fink v Fink*<sup>88</sup> the court held that there was a tacit universal partnership (probably *societas quae ex quaestu veniunt*) to which both spouses contributed money, property and labour in respect of a dairy business run mainly by the wife, while the husband was engaged in full-time employment. The Supreme Court of Appeal decision in *Mühlmann v Mühlmann*<sup>89</sup> confirmed that a universal partnership, probably in the form of *societas quae ex quaestu veniunt*, could exist in a marriage out of community of property where the spouses conducted an electro-plating business together since the start of their marriage. Neither judgment expressly addressed the question of how a universal partnership could coexist with an antenuptial contract excluding community of property, instead simply proceeding on the basis that this was possible.

This willingness to hold that universal partnerships existed in marriages out of community of property was brought to an abrupt halt by two decisions by Milne JA in 1989. In the first, *Kritzinger v Kritzinger*,<sup>90</sup> the husband of a wealthy and successful businesswoman argued that he was entitled to a redistribution order in terms of section 7(3) of the *Divorce Act* because he had sacrificed opportunities for advancement in his own profession to ensure the success of his wife's career. He also argued, and the trial court agreed, that his contributions to the common home proved the existence of a universal partnership, in which he had a 50% share. In the Appellate Division, however, Milne JA emphasised that apart from both contributing to the common home, the spouses both had careers, separate bank accounts and essentially separate financial lives. He held that the sharing of domestic expenses did not in itself constitute a legal partnership and that in this case there was no evidence "of the home being regarded

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<sup>86</sup> *Beira v Beira* 1990 3 SA 802 (W) 805D-E.

<sup>87</sup> See Heaton "Proprietary Consequences of Divorce" 57, 98-100, 115.

<sup>88</sup> *Fink v Fink* 1945 WLD 226. Also see *Ex Parte Sutherland* 1968 3 SA 511 (W).

<sup>89</sup> *Mühlmann v Mühlmann* 1985 3 SA 102 (A).

<sup>90</sup> *Kritzinger v Kritzinger* 1989 1 SA 67 (A) (hereafter the *Kritzinger* case).

as a joint business run for a profit".<sup>91</sup> This therefore distinguishes the earlier decisions in *Isaacs*, *Rataneë* and *Ally v Dinath*, in which the maintenance of the joint household and the education of the children were regarded as indicators of a universal partnership.<sup>92</sup>

In the same year Milne JA also handed down judgment in *Katz v Katz*,<sup>93</sup> in which a very wealthy wife relied on a letter written to her by her husband eight years before the case was brought, shortly after *she* had discovered that *he* had been committing adultery. In the letter the husband stated that "I have always considered our marriage a universal partnership and I should imagine that is how you have seen it".<sup>94</sup> Unlike the trial court, which regarded this as proof of a universal partnership, Milne JA pointed to the circumstances in which this letter had been written, and the fact that *the wife* had now committed adultery, to hold that the terms of the letter were not legally considered to be a universal partnership, even though the husband had been an attorney and should, presumably, have understood the legal nature and consequences of the term.<sup>95</sup> The division of property could therefore not be based on a universal partnership between the spouses. The effect of these two Appellate Division judgments was to halt the stream of jurisprudence which was becoming ever more sympathetic to finding universal partnerships in marriages out of community of property. Both of these cases related to the *societas universorum bonorum* and they could therefore be read as not extending to the possibility of the *societas quae ex quaestu veniunt* in a marriage out of community of property.

The next case on this issue, *JW v CW*,<sup>96</sup> was handed down twenty years later in September 2010, therefore preceding by two years the Supreme Court of Appeal's most recent developments relating to universal partnerships. A farmer's wife claimed that a universal partnership relating to the husband's farming enterprise was concluded immediately after the marriage, and that she had made substantial contributions to the partnership. In order to distinguish this case from *Mühlmann*, Olivier J held that the claim was for *societas universorum bonorum*, rather than *societas quae ex quaestu veniunt*,<sup>97</sup> but the basis for this distinction is nowhere explained in the judgment. The situation was also distinguished from that

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<sup>91</sup> The *Kritzinger* case 77E.

<sup>92</sup> See the discussion of these cases and the extent of universal partnerships in para 1.

<sup>93</sup> *Katz v Katz* 1989 3 SA 1 (A) (hereafter *the Katz case*).

<sup>94</sup> The *Katz* case 8I.

<sup>95</sup> The *Katz* case 9F-G.

<sup>96</sup> *JW v CW* 2012 2 SA 529 (NCK) (hereafter *the JW case*). It was reported two years after being handed down.

<sup>97</sup> *JW case* para 33.

in *Fink* by holding that in *Fink* the universal partnership was entered into two years after the marriage and excluded the husband's immovable property, while in this case it was alleged to have included the farm and to have been entered into straight after the marriage, in other words, very soon after the conclusion of the antenuptial contract. Given that in *Mühlmann* the Appellate Division found that a partnership *quae ex quaestu veniunt* was concluded immediately after the wedding, the distinction between a partnership concluded immediately after the marriage and one concluded two years later could be said to be somewhat arbitrary. A further reason was that the terms of the antenuptial contract precluded a reliance on a universal partnership, specifically clause 4, in which "it was agreed to act in the spirit of the antenuptial contract when it came to, *inter alia*, the property of the parties".<sup>98</sup> The judgment does not contain any further detail of the contents of this clause. It could be argued that acting in the "spirit of the contract" is nothing more than the behaviour normally expected of contracting parties and that this clause should not make any material difference to the outcome of the case.

Nevertheless, the main basis for the court's decision must be taken seriously, especially as it had not been raised in previous cases. 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,<sup>99</sup> this informal method of variation of the antenuptial contract could not be allowed. It held that the only method for changing the antenuptial contract would be through a joint application to a court.<sup>100</sup> If this reasoning is correct, then the consequence must be that no tacit universal partnerships *universorum bonorum* can exist in marriages subject to antenuptial contracts. It does, however, leave the door open for universal partnerships *quae ex quaestu veniunt*. Moreover, it could also be argued that section 21 of the *Matrimonial Property Act* should be generously interpreted to allow courts to give effect to universal contracts at the end of marriages out of community of property.

In *EA v EC*<sup>101</sup> the same arguments were raised where a wife relied on a universal partnership which had been concluded either before or simultaneously with an antenuptial contract excluding community of property and the accrual system. The wife alleged that the parties agreed that the antenuptial contract would operate only as against third parties,

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<sup>98</sup> *JW* case para 11.

<sup>99</sup> *JW* case paras 22, 25.

<sup>100</sup> *JW* case para 29. See s 21 of the *Matrimonial Property Act* 88 of 1984.

<sup>101</sup> *EA v EC* 2012 ZAGPJHC 219 (25 October 2012) (hereafter *the EA case*).

but that between them the spouses would have a *societas universorum bonorum*. Following *JW*, the court held that a partnership *universorum bonorum* would directly contradict the terms of the antenuptial contract and was therefore not permitted without a formal amendment of the antenuptial contract.<sup>102</sup> Moreover evidence of such an agreement would be excluded by the parol evidence rule which determines that when parties had reduced their agreement to writing, evidence of verbal agreements which contradict the document is inadmissible.<sup>103</sup>

The facts of *SB v RB*<sup>104</sup> illustrate clearly the iniquity of the current legal situation. Although the parties were married out of community of property, they agreed to alter their matrimonial property system to a marriage in community of property, as reflected in a letter by the husband to the wife. However, they were wrongly advised by their lawyer that this could not be achieved without divorcing and re-marrying. When the marriage ended, the wife relied on their agreement to the effect that the marriage would be in community of property, alternatively that there was a universal partnership *quae ex quaestu veniunt* between them. Her first cause of action failed because of the principle of immutability whereby parties can change their matrimonial property system only by using the existing statutory mechanisms.<sup>105</sup> Despite criticising the effect of this principle as constituting discrimination on the basis of marital status, the court held that it had no choice but to apply it to deny the wife's claim.<sup>106</sup> The claim for a universal partnership also failed because it was incompatible with the evidence that the parties had agreed to be married in community of property.<sup>107</sup>

The latest reported case was *RD v TD*,<sup>108</sup> decided in the Gauteng North division. The court distinguished the case from *JW v CW* by holding that the *JW* case applied only to *societas universorum bonorum*, while the fish farming business started by the spouses in *RD* three years after the marriage constituted a *societas quae ex quaestu veniunt*, as in *Mühlmann* and *Fink*. The court held that in this case there was nothing in the antenuptial contract which prevented the parties from concluding a *bona fide* partnership contract for the purpose of a joint commercial venture.<sup>109</sup>

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<sup>102</sup> *EA* case para 11.

<sup>103</sup> *EA* case para 22. This argument was rejected in the *JW* case para 25.

<sup>104</sup> *SB v RB* 2014 ZAWCHC 56 (16 April 2014) (hereafter the *SB* case).

<sup>105</sup> Sections 20 and 21 of the *Matrimonial Property Act* 88 of 1984.

<sup>106</sup> The *SB* case paras 33-37.

<sup>107</sup> The *SB* case para 45.

<sup>108</sup> *RD v TD* 2014 4 SA 200 (GP) (hereafter the *RD* case).

<sup>109</sup> *RD* case para 31.

A survey of the case law thus reveals the need for an authoritative determination of the possibility of a *societas universorum bonorum* in civil marriages out of community of property and the exact nature of the terms in antenuptial contracts which would preclude a reliance on such partnership contracts. 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. The issue of the constitutional tenability of this situation, which was raised in *SB v RB*,<sup>110</sup> has not been resolved. Ultimately, however, as Smith points out, the universal partnership contract is not the best way to resolve inequities which arise at the end of marriages which exclude the sharing of partnership property, because it has to be done on a case-by-case basis.<sup>111</sup> Until the incorporation of a general judicial discretion to redistribute assets, it is nevertheless the most promising vehicle, at least for those parties who can afford the costs of legal representation and possibly litigation.

## 5 Conclusion

In *EA v EC*<sup>112</sup> Kathree-Setiloane J remarked that:

One sincerely hopes that women have transcended the belief in the unrealistic and naïve notion that they will marry, have children and be supported for the rest of their lives by their husbands. The vast majority of women, today, do not fit this mould. Most women, today, are strong, intelligent, educated and independent. They share equally in the support of their homes and families – and will stand for nothing but equality in their marriages – regardless of their socio-economic circumstances. To the extent, however, that some women may not be fully apprised of their rights – surely the solution does not lie with interfering with the parole evidence rule, but rather with introducing programmes to educate and empower women to transcend any discrimination which they may still face on marriage, or upon divorce

Given the fact that in the cases which I surveyed all the claimants bar two were women, it is difficult to dispute the gendered dimension of claims for universal partnerships and putative marriages, which in turn point to the detrimental consequences of the current legal rules for the division of property for women. Although these rules are couched in gender-neutral terms and treat men and women alike, they operate in social, cultural and religious contexts which are anything but egalitarian.

Non-legal norms and rules determine that *women* are the ones who do the unpaid, caring work, and who give up or curtail their careers in favour of

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<sup>110</sup> *RD* case paras 34, 37.

<sup>111</sup> Smith "Dissolution of a Life or Domestic Partnership" 440.

<sup>112</sup> *EA* case para 27.

partners and children. A conspicuous feature of the cases is the way in which social norms dictate that women must "assist" in their partners' economic ventures, but that their contributions are disparaged and undervalued when relationships end. Social norms are translated into lower pay for what is regarded as "typically women's work" like cleaning and caring, and women get paid less even when they do the same work as men. Social norms within families dictate that women's earnings are often used to cover day-to-day expenses, while men's earnings are invested in shares and immovable property which appreciate in value. "Common sense" and "convenience" dictate that immovable property is registered in men's names only, with the result that most often women are the ones left penniless at the end of their relationships.

These women are not ignorant of their rights, nor are they necessarily uneducated or foolish. They are simply behaving according to the gendered scripts required of them by their families, their communities, their churches, and all of their cultures. To suggest otherwise is naïve. Proposing educational programmes as a panacea in the face of a patriarchal family law system and extra-legal norms is unrealistic. The current family law system is deeply embedded in patriarchy, and the strong chances that the validity of customary marriages will be successfully challenged and the failure thus far to extend common law remedies like universal partnerships and putative marriages to women whose customary marriages are invalid means that family law systematically fails African women, especially those who are poor and live in rural areas. Common law therefore urgently needs to develop to afford all women equal rights to partnership property, and I hope that I have illustrated some possible avenues in this article.

Particularly beneficial could be a sustained development of the rules relating to putative marriages, insofar as they regulate the division of property. Since the concept and consequences of illegitimacy have been done away with, fewer cases rely on putative marriages, and the archaic rules relating to the distribution of property are particularly underdeveloped. Wives in customary marriages who find, at divorce or upon the death of their spouses, that their marriages were never valid because of a failure to comply with a customary formality are in dire need of legal relief. The putative marriage offers an avenue for achieving this. It may also assist wives in simultaneous civil and customary marriages, but the courts will have to craft egalitarian measures where there is an existing marriage in community of property. The irony of the present situation, where only one wife is recognised and is awarded rights to property, is

that the man, who is often the only person who is aware of the simultaneous marriages, has guaranteed rights to partnership property. A three-way distribution of property is conceivable, as is the idea of reducing or even eliminating the "guilty" party's property entitlement.

The other avenue to award rights to partnership property is an extension of the existing rules relating to universal partnerships. They have been particularly useful to ameliorate the effects of the absolute separation of property in civil marriages which don't qualify for redistribution in terms of the *Divorce Act*, but there are important issues which need to be clarified. The first is whether a *societas universorum bonorum* is available in a marriage out of community of property and under which conditions a *societas quae ex quaestu veniunt* would be possible. Another question relates to the simultaneous existence of a universal partnership and an agreement to maintain outside of marriage. The legality of a universal partnership contract which co-exists with a valid legal marriage is another outstanding issue, as are the evidential requirements to prove such an agreement.

Although I have not included this in the current discussion, Rule has pointed out the need to investigate the extent to which laws relating to partnerships apply during the existence of universal partnerships in intimate relationships. Could, for instance, parties insist on *uberimae fidei* and accounts from one another during the relationship? Could both be held liable for debts?<sup>113</sup> None of the cases applying universal partnerships have considered these issues and they are unlikely to arise while these relationships remain functional. Another unconsidered issue is the calculation of the shares in universal partnerships at the end of relationships, which seems to be limited to the net surplus value but not the debts. This appears to be akin to the calculation of the accrual during marriage, rather than partnership.

Although I advocate developments to both universal partnerships and putative marriages, it is important that courts keep the requirements and consequences of these two common law legal forms separate, instead of simply using universal partnerships to distribute property in putative marriages as was done in earlier cases. The reason is that putative marriages may provide legal relief where universal partnerships are not technically applicable and vice versa. Ultimately, however, the time is ripe for an extensive overhaul of our matrimonial property system, including the

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<sup>113</sup> Rule *Square Peg in a Round Hole?*

rights of unmarried partners, which have fallen by the wayside along with the second part of the Draft Bill on Domestic Partnerships.

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- Cloete v Maritz* 2014 JOL 32110 (WCC)
- EA v EC* 2012 ZAGPJHC 219 (25 October 2012)
- Ex parte L (also known as A)* 1947 3 SA 50 (C)
- Ex Parte Sutherland* 1968 3 SA 511 (W)
- Fink v Fink* 1945 WLD 226
- Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC)
- H (wrongly called C) v C* 1929 TPD 992
- Isaacs v Isaacs* 1949 1 SA 952 (C)
- Ismail v Ismail* 1983 1 SA 1006 (A)
- JW v CW* 2012 2 SA 529 (NCK)
- Kambule v The Master* 2007 3 SA 403 (EC)
- Katz v Katz* 1989 3 SA 1 (A)
- Kritzinger v Kritzinger* 1989 1 SA 67 (A)
- Lloyd v Mitchell* 2004 2 All SA 542 (C)
- M v M* 1962 2 SA 114 (GW)
- Mabuza v Mbatha* 2003 4 SA 218 (C)
- Maseko v Maseko* 1992 3 SA 190 (W)
- Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC)
- McDonald v Young* 2012 3 SA 1 (SCA)
- MM v MN* 2013 4 SA 415 (CC)
- Moghrabi* 1921 AD 274

*Moola v Aulsebrook* 1983 1 All SA 278 (N)  
*Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ)  
*Mühlmann v Mühlmann* 1985 3 SA 102 (A)  
*Ndlovu v Mokoena* 2009 5 SA 400 (GNP)  
*Netshituka v Netshituka* 2011 5 SA 453 (SCA)  
*Ngubane v Ngubane* 1983 2 SA 770 (T)  
*Paixão v Road Accident Fund* 2012 6 SA 377 (SCA)  
*Ponelat v Schrepfer* 2012 1 SA 206 (SCA)  
*Potgieter v Bellingan* 1940 EDL 264  
*Prinsloo v Prinsloo* 1958 3 SA 759 (T)  
*Ramatshimbila v Phaswana* 2014 ZASCA 117 (19 September 2014)  
*Ratanev v Maharaj* 1950 2 SA 538 (D)  
*RD v TD* 2014 4 SA 200 (GP)  
*Ryland v Edros* 1997 2 SA 690 (C)  
*SB v RB* 2014 ZAWCHC 56 (16 April 2014)  
*Sepheri v Scanlan* 2008 1 SA 322 (C)  
*Solomon v Abrams* 1991 4 SA 437 (W)  
*Steyn v Hasse* 2015 4 SA 405 (WCC)  
*V (aka L) v De Wet* 1953 1 SA 612 (O)  
*Volks v Robinson* 2005 5 BCLR 446 (CC)  
*Zulu v Zulu* 2008 4 SA 12 (D)

### **Legislation**

*Civil Union Act* 17 of 2006  
*Divorce Act* 70 of 1979  
*Marriage Act* 25 of 1961  
*Matrimonial Property Act* 88 of 1984  
*Recognition of Customary Marriages Act* 120 of 1998

### **List of Abbreviations**

SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg