LOVE AND NO MARRIAGE: REALITY CHECK IF YOU ASSUME SHARED WEALTH

Khan v Shaik (641/2019) [2020] ZASCA 108 (21 September 2020)

Cohabitation and jointly working towards creating wealth are elusively akin to a civil marriage in many respects. As this judgment shows, it is legally a dangerous illusion. Assets in such a 'partnership' are not owned jointly without more, and claims for division of partnership assets can prescribe.

The Judgment can be viewed here.

FACTS

This case is about whether or not a claim to divide the benefits (fruits) of a universal partnership can prescribe in terms of the Prescription Act 68 of 1969.

Ms Khan approached the High Court, Johannesburg for a declaratory order that herself and Mr Shaik were in a universal partnership and that, because they had parted company, a liquidator be appointed to value the fruits of the partnership and distribute the value in equal shares to the partners. Assuming she had such a claim, the application was dismissed on the basis that the claim had prescribed.

In dismissing the claim, the court *a quo* found that: (i) the claim had been instituted six years after the *consortium* (the companionship with one's husband or wife) between the parties had terminated; (ii) concomitantly, the universal partnership had terminated at the moment the *consortium* had ended; and (iii) because such a claim fell within the Prescription Act, the claim had prescribed after an elapse of three years from the date upon which the *consortium* ended.

Ms Khan appealed the judgment and argued: (i) that her claim was based on a real right which would not have prescribed within three years; and (ii) secondly, even if it was a personal right, prescription of a claim in respect of a universal partnership cannot begin to run until a court pronounces a dissolution.

The questions before the court were the following:

1) What is the character of the rights in a universal partnership possessed by a partner?
2) Is a claim to divide the fruits of a universal partnership based on a real or a personal right?
3) Is the share claimed in a universal partnership a debt as contemplated by the Prescription Act?
4) How is the date upon which prescription commences to run to be determined in respect of a claim to share in a universal partnership?
5) Is a court order necessary to terminate a universal partnership?

HELD

The character of a partner's rights in a universal partnership

- The general rule of our law is that cohabitation does not give rise to special legal consequences. More particularly, the supportive and protective measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period.

- A cohabitee can invoke one or more of the remedies available in private law, provided that he or she can establish the requirements for that remedy.

- The label 'universal partnership' in our law, refers to the *societas universorum bonorum* of the Roman-Dutch Law and is based on the law of partnership. Hence, Ms Khan had to establish that she and Mr Shaik were: (i) not only living together as husband and wife ('the consortium), but also (ii) that they were otherwise 'partners' as this term is understood in partnership law*.* (There are three essentials to prove the latter, namely: (i) that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, labour or skill; (ii) the partnership business should be carried on for the joint benefit of both parties; and (iii), the aim of the partnership must be to make a profit.)

- In practical terms, a controversy about the existence of a universal partnership arises only when it ends, whether by death or by the parting of ways by the partners. To prosecute a claim to share in the benefits of a disputed partnership, a claimant must thus obtain a declarator that the partnership existed.

- The essence of the concept of a universal partnership is an agreement about joint effort and the pooling of risk and reward. Upon termination of the universal partnership, what follows is an accounting to one another. *Accordingly, it is the contract that is the foundation of the universal partnership*, not the accompanying fact of the *consortium* and the mere contributory efforts to building wealth. A tacit agreement suffices.

Is a claim to share in a universal partnership a real or a personal right?

- A claim based on a contract is, plainly, a personal not a real right.

- Accordingly, a partner in *a universal partnership cannot have a direct claim to an asset owned by the other partner*. This attribute distinguishes joint ownership of assets from a universal partnership. The clearest contrast is a marriage in community of property. In such an example, the marriage is the juristic foundation for joint ownership of everything the spouses jointly own. A universal partnership, unlike a marriage in community of property does not cause the partners to be joint owners of assets.

Is the share claimed by a partner in a universal partnership a debt as contemplated by the Prescription Act?

- The provisions in the Prescription Act relevant to a contractual claim are these:

  '10. Extension of debts by prescription
  (1) . . . a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.
  . . .
  11. Periods of prescription of debts
  The periods of prescription of debts shall be the following:
  . . .
  (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

- Thus, a claim by one partner against the other to account for a share in a universal partnership, which claim is based on a contract, is therefore a claim to *enforce a personal right* which is a debt as contemplated by the Prescription Act, and prescribes within three years.

- The scope of a 'debt' is "that which is owed or due; anything (as money, goods or services) which one person is under an obligation to pay or render to another". A claim founded on contract is such an obligation, of which, a universal partnership is an example.

How is the date upon which prescription starts to run to be determined in respect of a claim to share in a universal partnership?

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- Section 12 of the Prescription Act provides that ‘prescription shall commence to run as soon as the debt is due.’ Accordingly, a claim to share in a universal partnership prescribes after three years from the moment the claim arises, i.e. the termination of the universal partnership.

- It is necessary to determine what significance to attach to the moment the consortium ends as an appropriate date to signal the end of the universal partnership; *consortium* and the universal partnership being separate considerations. (The distinction to be made in this context between the term *consortium* and the term ‘universal partnership’ is that *consortium* refers to a spousal-type relationship/association; whilst universal partnership a business relationship/association. The latter does not necessarily exist in a cohabitation arrangement, and the facts will show whether, apart from the cohabitation, there was also an explicit or tacit agreement to form a universal partnership. The existence of a universal partnership must therefore be proved, by putting facts before the court, as listed above.)

- In the present matter it was common cause that the claim had been instituted six years after the termination of the consortium in 2009 when Mr Shaik left the common home never to return. Thereafter the partners had no dealings with one another either intimately or in the business to which Ms Khan says she contributed.

- The court *a quo* concluded that the claim arose upon the termination of the *consortium*. This was incorrect. There is no magic in the date the *consortium* ends for the purposes of determining the ending of the universal partnership nor, axiomatically, the date for computing the beginning of the running of prescription of a claim in respect of a universal partnership. This is because the universal partnership exists if the necessary requirements for its existence are met, and this is regardless of whether the parties are married, engaged or cohabiting. The correct date to measure the commencement of the running of prescription is therefore the date that the partnership ended, and not the *consortium*.

- The circumstances described by Ms Khan showed that the joint enterprise between her and Mr Shaik indeed ended at the same time the consortium ended.

Is a Court order of dissolution required to terminate a universal partnership?

- No

CONCLUSION

The appeal was unsuccessful.

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