IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2018/14155

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes

19 February 2019

(Signature)

In the matter between:

CHRISAL INVESTMENTS (PTY) LTD	**First Applicant**
TAKOU INVESTMENTS (PTY) LTD	**Second Applicant**
PROCROPS 60 (PTY) LTD	**Third Applicant**
ADAMAX PROPERTY PROJECTS MENLYN (PTY) LTD	**Fourth Applicant**

and

MUNICIPAL EMPLOYEES' PENSION FUND	**First Respondent**
AKANI RETIREMENT FUND ADMINISTRATORS	

(PTY) LTD	**Second Respondent**
AKANI PROPERTIES (PTY) LTD	**Third Respondent**
THE REGISTRAR OF PENSION FUNDS	**Fourth Respondent**

Heard on 20 November 2019

Delivered on 19 February 2019

JUDGMENT

DE VILLIERS, AJ:

Overview of the parties and the contracts

[1.] There are several issues in this matter.

[2.] On the one side of the divide, one finds:

[2.1.] The first applicant: a property-owning company ("***Chrisal Investments***");

[2.2.] The second applicant: a property-owning company ("**Takou Investments**");

[2.3.] The third applicant: a property-owning company ("***Procrops***");

[2.4.] The fourth applicant: seemingly a holding company ("***Adamax Property Projects***") of the first three applicants ("***the Adamax co-owners***"). Only the first three applicants, the Adamax co-owners, are co-owners of the shopping centres in issue;

[2.5.] Mr T Christodoulou ("***Mr Christodoulou***");

[2.6.] Christodoulou Real Estate CC ("***Real Estate CC***");

[2.7.] Mr M Mervitz ("***Mr Mervitz***"); and

[2.8.] Mervitz & Malan Accounting & Secretarial Services (Pty) Ltd, now known as Greenpen Accounting Services (Pty) Ltd ("***Greenpen Accounting***").

[3.] At all material times Mr Christodoulou and/or Mr Mervitz represented the applicants in their dealings with the respondents, and especially with the Pension Fund.

[4.] On the other side of the divide in this matter, one finds:

[4.1.] The first respondent: the Municipal Employees' Pension Fund ("***the Pension Fund***";

[4.2.] The second respondent: the administrator of the Pension Fund ("***Akani***");

[4.3.] The third respondent: a property management company ("***Akani Properties***");

[4.4.] Mr Z Letjane ("***Mr Letjane***"): who is the managing director of Akani and of Akani Properties, and who previously was the executive principal officer of the Pension Fund. He deposed to the answering affidavit.

[5.] When I refer to the respondents herein, I refer to the first three only. The reason is that the fourth respondent is that the fourth respondent, the then Registrar of Pension Funds (replaced with Financial Sector Conduct Authority before the hearing), plays no role in these proceedings and did not oppose the relief sought.

[6.] The battle lines in broad strokes are drawn as follows:

[6.1.] The Adamax co-owners sold an undivided share of 55% in three shopping centres to the Pension Fund in 2011;

[6.2.] The three shopping centres are situated relatively near each other in Faerie Glen and Moreletta Park in Pretoria East: the Parkview, Glen Village South, and Glen Village North shopping centres. I refer to the parties' investments as "***the shopping centre investment***";

[6.3.] The relationships have soured and there are numerous disputes to management matters. This has reached a stage of some dysfunctionality with negative consequences for the shopping centre investment;

[6.4.] Several court and arbitration proceedings have been instituted between the parties;

[6.5.] The Adamax co-owners seek to liquidate their remaining 45% investment in the shopping centre investment through the *actio communi dividundo* by selling the shopping centres, the owners to divide the proceeds;

[6.6.] The Pension Fund denies that such relief is available to the Adamax co-owners mainly as a contract, properly interpreted, is argued to exclude the remedy, and that the Adamax co-owners do not meet three alleged Common Law prerequisites for relief under the *actio communi dividundo*. The respondents had an all-or-nothing approach. They only seek a dismissal of the application and did not present an alternate case of what a proper order would be if I were to find that the applicants are entitled to relief under the *actio communi dividundo*.

[7.] There are three written contracts in issue, all three concluded on the same day, 9 November 2011:

[7.1.] The original sale agreement in respect of the shopping centres investment ("***the original sale contract***"). The Pension Fund acquired its 55% share of the shopping centre investment in terms of this agreement;

[7.2.] A co-ownership contract in respect of the shopping centre investment ("***the co-ownership contract***"). The respondents rely on this contract for their defence that an agreement, properly interpreted, excludes the *actio communi dividundo*; and

[7.3.] A property management contract ("***the property management contract***"). The parties to this contract were the Pension Fund, Akani, Adamax Property Projects, Real Estate CC and Greenpen Accounting. This agreement is only of peripheral importance in this matter, but several disputes between the parties in broad terms relate to the impact of this contract.

Introduction

[8.] The matter came before me as a special motion, as the papers are voluminous.

[9.] I needed to keep this judgment to a manageable length. I inter alia did so by taking some liberty in referring to parties during my judgment. Where identities are not material, I refer to "*the parties*", or to "*the applicants*", or to "*the respondents*", whether or not each of such parties for instance concluded a particular contract, made a demand, sought relief, etc. Accordingly, my shortened references herein do not constitute findings about rights and obligations pertaining to entities or persons who are not parties to the contracts in issue.

[10.] Not all disputes remained in the forefront, but I still had to make several findings. I deal with them in this order:

[10.1.] Is the answering affidavit admissible?

[10.2.] Do material factual disputes stand in the way of a decision?

[10.3.] Should a striking-out application succeed?

[10.4.] What are the requirements for relief under the *actio communi dividundo*?

[10.5.] Does the co-ownership contract exclude the *actio communi dividundo*?

[10.6.] Should relief be granted to the applicants or should the application be dismissed?

Is the answering affidavit inadmissible?

[11.] The applicants argued that the answering affidavit is inadmissible as it was not served timeously.

[12.] It is not clear to me that in fact the affidavit was served late, as the Deputy Judge President at a conference on 21 June 2018 seems to have stipulated periods for service and that these were adhered to. I make no ruling on the status of such a determination.

[13.] If the answering affidavit indeed were served late, I condone such late service.

[14.] The High Court regulates its own procedures. Matters ought to be heard as expeditiously and as cost-effectively as possible. A replying affidavit has been served in this matter, and the applicants were not prejudiced by any delay. I received paginated papers in good time and could prepare for the hearing. It would have been a waste of time to insist on a condonation application, or even worse, to postpone the matter for such an application to be brought.

[15.] The applicants also argued in their heads of argument that the deponent to Mr Letjane had no authority to depose to the answering affidavit. No such authority is needed even on the facts of this matter. See **Eskom v Soweto City Council** 1992 (2) SA 703 (W).

Do material factual disputes stand in the way of a decision?

[16.] The respondents allege that there are material facts in issue and that the matter cannot be determined on affidavit. It is true that the parties disagree on many matters. There are disputes about matters such as the authority to conclude new leases, alleged tardiness in registering fuel rights, alleged derailing the conclusion of new leases, and several more personal matters. In

the view that I take of the matter, these disputes do not have to be resolved by me.

[17.] The main thrust of the respondents' argument was that alleged common cause facts about the breakdown in the relationships were not common cause. Under the Common Law I do not have to make a finding that the relationship has broken down irretrievably, and consequently also not on the reasons for a breakdown. In any event, on the objective facts, the relationship has broken down. It is hostile. One simply could have regard to the allegations and counter-allegations of bad faith and dishonesty, the extensive correspondence by lawyers, and the litigation already instituted, and the day-to-day management conflict (dealt with in many pages of the affidavits) to conclude that the relationship between the parties has irretrievably broken down (had it been relevant).

[18.] In my view factual disputes do not stand in the way of findings on the two big issues for decision:

[18.1.] First, the facts on context are not seriously contested. No factual disputes stand in the way of the interpretation of the co-ownership contract;

[18.2.] Second, I have enough factual material before me to decide if the requirements for the *actio communi dividundo* have been met or not.

[19.] I decline to dismiss the application based on genuine and material disputes of fact.

Application to strike out

[20.] The respondents brought an application to strike out numerous paragraphs from the founding affidavit. The grounds were stated in the founding affidavit. The respondents in a fourth affidavit, the so-called responding affidavit, also sought the striking out of more material, but did not bring a formal application to strike them out.

[21.] Due the view that I take of the matter, the disputes about the admissibility of averments also do not have to be resolved by me.

[22.] The respondents allege that the averments complained off are scandalous, vexatious or irrelevant, and are prejudicial.

[23.] First, on the ground "relevance", the argument centred on the question if the co-ownership relationship has broken down irretrievably or not. As I have already indicated, it is not a finding that I must make. In my view the respondents approached the application/request to strike out on too narrow a basis of relevance. Relevance in this case would also be determined by reference to context, but more importantly in considering equitable relief. In addition, in my view no one has been prejudiced by alleged irrelevant evidence.

[24.] I make one exception, clearly hearsay evidence is as a rule inadmissible, and I disregarded any hearsay evidence in this matter.

[25.] Second, the two other grounds relied upon by the respondents are "*scandalous and vexatious*" as a reason to strike out matter. These are matters after the fact, in a lengthy record. Resolving the dispute would have drawn me into deciding in detail the numerous allegations and counter-allegations, all of which are largely peripheral. I may have had to hear oral evidence to decide if the use of a word was proper, or not. The fact of the matter is that the two sides accuse each other of foul conduct in a hostile relationship. In my view no detailed analysis of each instance is called for. In my view no one has been prejudiced by the tone and language used. If the respondents (or the applicants) still feel that boundaries of what is proper were exceeded, they have remedies that include an action for defamation and/or complaints to professional bodies. As this may happen, I refrain from expressing any further views on the robustness of the accusations by the two sides.

[26.] As such, I dismiss the application to strike out and decline to consider the request.

What are the requirements for relief under the *actio communi dividundo*?

[27.] The respondents alleged that the Common Law required of the applicants to show three prerequisites for relief and that they failed to do so:

[27.1.] One, the applicants must show that the application is bona fide;

[27.2.] Two, the applicants must show that they have endeavoured to agree on a method of division under the *actio communi dividundo* before approaching a court for relief; and

[27.3.] Three, the applicants must show how accounting would take place for profits enjoyed or expenses incurred in connection with the co-owned property, and a court must make the findings on the adjustment between the parties in the same proceedings where it brings the co-ownership to an end. The respondents argued that this should include resolving all other disputes between the parties, including claims for damages.

[28.] The leadings case on the division of co-ownership is **Robson v Theron** 1978 (1) SA 841 (A). **Robson** dealt with the case where a partnership between two partners had been dissolved, but one partner retained the goodwill. The retiring partner could sue for half the value of such goodwill under both the *actio pro socio* or the *actio communi dividundo*. Both remedies are discussed in the judgment with "*separate and distinct legal remedies, each having its own legal characteristics.*"

[29.] At 854H-855F in **Robson** Joubert JA (Wessels JA, Trollip JA., Corbett JA and Klopper AJA concurring) reflected the underlying principle as follows (underlining added):

> "*Here again the expression "Personal items of payment" is the translation of praestationes personales. The actio communi dividundo has a two-fold purpose, viz. to claim division of joint property and payment of praestationes personales relating to profits enjoyed or expenses incurred in connection with the joint property. Van der Linden, 1.15.15; Voet, 10.3.3 Van Leeuwen, Censura Forensis, 1.4.27.2,4.*

The basic notion underlying the actio communi dividundo is that no co-owner is normally obliged to remain such against his will. ***Van Leeuwen***, ***Censura Forensis***, *1.4.27.1. Accordingly when co-owners are desirous of having their joint property divided and the share of each allotted to them in severalty, they may agree to the division among themselves without having recourse to judicial proceedings.*

> *"Where there are co-owners who have agreed to divide then the only relief that one can claim from the other is an action for specific performance in terms of that agreement. Secondly, if there is a refusal on the part of one of the co-owners to divide then the other co-owner can go to Court and ask the Court to order the other to partition. Again, if the parties agree that there is to be a partition but the parties cannot agree as to the method or mode of partition, the Court is asked to settle the mode in which the property is to be divided"*

*(**Ntuli v Ntuli**, 1946 T.P.D. 181 at p. 184, per BARRY, J.P.).*

The Court has a wide equitable discretion in making a division of the joint property, having regard, inter alia, to the particular circumstances, what is most to the advantage of all the co-owners and what they prefer. ***Bort***, ***Advyssen***, *19;* ***Van Leeuwen***, ***Censura Forensis***, *1.4.27.5;* ***Voet***, *10.3.3. It is interesting to note that the modes of division referred to by the Roman-Dutch jurists are substantially identical to the modes of distribution of partnership assets as described by* ***Pothier***. *Cf.* ***De Groot***, *3.28.6. Thus where it is impossible, impracticable or inequitable to make a physical division of the joint property, the court in exercising its equitable discretion may award the joint property to one of the co-owners provided that he compensates the others, or cause the joint property to be put up to auction and the proceeds divided among the co-owners.* ***Voet***, *10.3.3, read with* ***Voet***, *10.2,22 - 28;* ***De Groot***, *3.28.8;* ***Van Leeuwen***, *R.H.R., 4.29.3;* ***Van Zutphen***, ***Practyke de Nederlantsche Rechten***, *sub voce scheydinge no. 7;* ***Wassenaar***, ***Practyck Judicieel***, *cap. 7. no. 45;* ***Pause***, ***Observationes Tumultuariae Novae***, *vol. 1, no. 77. Cf.* ***Estate Rother v Estate Sandig***, *1943 AD 47 at pp. 53 - 54;* ***Drummond v Dreyer***, *1954 (1) SA 306 (N).""*

[30.] Joubert JA in **Robson** at 856H-857C records the law (underlining added):

> *"(B) The principles of the common law applicable to the actio communi dividundo may be briefly summarised as follows:*
>
> *1. No co-owner is normally obliged to remain a co-owner against his will.*

2. *This action is available to those who own specific tangible things (res corporales) in co-ownership, irrespective of whether the co-owners are partners or not, to claim division of the joint property.*

3. *Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division. Since a partnership asset is joint property which is held by the partners in co-ownership, it follows that a partner may as a co-owner bring this action for the division of a partnership asset where the co-partners cannot agree to the method of its division. This would obviously cover the position where, after dissolution of a partnership, a continuing partner as a co-owner retains possession of an undivided partnership asset. A retiring partner as a co-owner would accordingly be entitled to institute this action against the continuing partner as co-owner to compel a division of the partnership asset in question.*

4. *It is for purposes of this action immaterial whether the co-owners possess the joint property jointly or neither of them possesses it or only one of them is in possession thereof.*

5. *This action may also be used to claim as ancillary relief payment of praestationes personales relating to profits enjoyed or expenses incurred in connection with the joint property.*

6. *A court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode of distribution of partnership assets among partners as described by Pothier."*

[31.] **Robson** in my view contradicts the three alleged prerequisites relied upon by the respondents.

[32.] It is under the *actio pro socio* that an account must be prepared as a first step, not the *actio communi dividundo*. See **Robson** 853D-E and 856G.

[33.] **Robson** was preceded by **Estate Rother v Estate Sandig** 1943 AD 47 where De Wet CJ (Tindall JA and Centlivres, JA concurring) held at 23 to 54:

> "*Various authorities were quoted to us on the principles to be followed in making a division of joint property. It seems to me that the effect of these authorities is fairly summed up by DE VILLIERS, C.J., in* ***Dickson v Stagg*** *(3 SC 115), as follows:*

> *"It is quite true that under the ordinary law one of two or more co-proprietors is entitled to claim a partition of the land, but that rule is subject to exceptions, one of these exceptions being that where it was impracticable or inequitable to allow such a partition, the Court would in such a case make such an order as the justice or the equity of the case might require."*
>
> *The discretion of the Court is a wide one and one of the recognised modes of division is a sale by public auction. See* ***Groenewegen's*** *note to* ***Grotius*** *3.28.8;* ***Schorer*** *note 444;* ***van Leeuwen, R.H. Recht****, 4.29.3;* ***Censura Forensis*** *1.3.27, 5 and 7;* ***Voet*** *10.3.3 and 10.2.22."*

[34.] **Estate Rother** did not address the alleged three prerequisites relied upon by the respondents. I also found no other case listing the alleged three prerequisites.

[35.] A useful summary of the topic is in **Things**, **LAWSA** Volume 27 Second Edition, by professor CG v an der Merwe.

[36.] Before referring to the *actio communi dividundo*, **LAWSA** in Para 269 makes a very important point relevant to the interpretation of the co-ownership contract. The remedies under the *actio communi dividundo* are in addition to the Common Law right of a co-owner to dispose of his/her share of the common property (footnotes omitted and underlining added):

> *"Although the co-owners are joint owners of the common property, each owner is entitled to dispose independently of his or her share in the common property. As each share is considered to be an independent legal object, each co-owner is entitled to exploit his or her share or a portion of it freely without the co-operation of his or her fellow co-owners or even against their will. A co-owner may, for example, alienate his or her share, burden it with a real right or bequeath it to his or her heirs. ..."*

[37.] Regarding the *actio communi dividundo*, **LAWSA** inter alia contains the following relevant extracts.

[37.1.] Para 270 (footnotes omitted and underlining added):

> *"No co-owner is obliged to remain a co-owner against his or her will. In the absence of an agreement to the contrary any co-owner may consequently demand partition of the common property at*

> *any time. This possibility serves as a corrective for a situation in which co-owners cannot see eye to eye on the exploitation of the common property. An agreement excluding partition of the common property for a certain period of time is permitted but not an agreement excluding a partition in perpetuity.*
>
> *Before any co-owner can claim partition the co-owners must first endeavour to agree on the terms of the partition. Once such an agreement is reached either expressly or tacitly, the agreement is binding on the parties and on third parties who have notice of it. Each co-owner is entitled to claim performance under it, but co-ownership is only terminated if delivery of the agreed portion or registration of it in the name of a co-owner has taken place.*"

[37.2.] Para 271 (underlining added):

> "*The institution of the actio communi dividundo does not entail partition only but also an adjustment of the various claims amongst the co-owners. (**Grotius** 3 28 9; **Oosthuyzen v Plessis** (1887) 5 SC 69; **Fryer v Engelbrecht** 1910 CTR 863; **Runciman v Schultz** 1923 TPD 4.) All extant expenses for necessary improvements, disproportionate gathering of fruits and losses suffered on account of the fault of a co-owner are set off against each other. (**Grotius** 3 28 9).*"

[38.] The learned author does not state in Para 271 that the adjustment must take place in one court proceeding. The authorities relied upon by the author also do not require this as a prerequisite for relief. I looked at **Grotius** 3 28 9 (I used Grotius, **Jurisprudence of Holland**, RW Lee, Oxford, 1926). I could not find **Oosthuizen v Plessis** (1887-1888) 5 SC 69. This case was not in my bundle of authorities, and my printed volume did not contain it. Digma separated the years 1887 and 1888 in two volumes and I looked in both to find the case, and could not. I searched LexisNexis on the internet as well, and could not find the case. I also considered **Fryer v Engelbrecht** 1910 CTR 863 and **Runciman v Schultz** 1923 TPD 4.

[39.] The respondents built their case about three alleged prerequisites for relief under the *actio communi dividundo* by referring to several authorities. I had regard to **Pretorius v Botha** [1961] 4 All SA 318 (T) [the case is also reported as 1961 (4) SA 722 (T)], **Nusca v Nusca and Another** 1995 (4) SA 813 (T) at

p 818B-C, **Milne NO v Abdoola** [1955] 4 All SA 359 (D) [the case is also reported as 1955 (2) SA 187 (D)], **Runciman v Schultz** [supra] 1923 TPD 45 at 49, 50, and 51, **Rademeyer and Others v Rademeyer and Others** 1968 (3) SA 1 (C) at 14B-C, **Matadin v Parma and Others** [2010] ZAKZPHC 18 (7 May 2010) Para 2 and 9, **Mbalo v Makhosonke and Others** (21021/2013) [2015] ZAWCHC 91 (22 June 2015), Para 46, **Mills v Mills** (13128/2006) [2008] ZAWCHC 121 (11 December 2008), Para 7 and 8 [my copy of the judgment is not so numbered], as well as especially **Ntuli v Ntuli** 1946 TPD 181.

[40.] I do not read these cases to confirm that the Common Law contains the three prerequisites the respondents rely upon. In my understanding, under the Common Law:

[40.1.] A co-owner is not obliged to remain a co-owner against his/her will. A co-owner may seek the dissolution of the co-ownership under the *actio communi dividundo* at his/her election;

[40.2.] Before approaching the court, such a co-owner must seek agreement from the other co-owner, but "*if there is a refusal on the part of one of the co-owners to divide then the other co-owner can go to Court and ask the Court to order the other to partition*", as held in **Robson**;

[40.3.] A court has a wide discretion in granting relief. It will consider the circumstances, what is most to the advantage of all the co-owners, and what they prefer. Examples of potential relief are:

[40.3.1.] A court could consider granting relief to give the parties time to resolve their substantial differences;

[40.3.2.] A court could consider granting a physical division of the assets is appropriate;

[40.3.3.] When physical division is impossible, impracticable, uneconomical or inequitable, a court could consider

awarding the joint property to one of the co-owners if it compensates the other;

[40.3.4.] A court could consider ordering that the joint property to be put up to auction and the proceeds to be divided among the co-owners.

[40.4.] It is common cause that the *actio communi dividundo* has as its aims division of the joint property and payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property. Relief about the latter does not have to be granted as a prerequisite for the division relief. In fact, **Robson** is clear that I may (have a discretion) to make such an order as ancillary relief. It seems to me that I must consider if an all-inclusive order would be appropriate as a factual issue and that it is not a prerequisite in law. In this regard I find the remarks by Selke J in **Drummond v Dreyer** 1954 (1) SA 306 (N) at 308B "(b)*ut it is obvious that the Court cannot perform miracles*, ..." The co-owners have rights as co-owners to share in the fruits of the property co-owned (and they are obliged to contribute to expenditure). They may also share in the proceeds of the property if sold. They do not lose those rights if the co-ownership is dissolved first.

[41.] Before I address the next topic, I must address two defences in law put up by the respondents.

[42.] The respondents argued in their heads of argument that I should not order the termination of co-ownership on the basis that the parties have a poor relationship with reference to **Coetzee v Coetzee** [2016] 4 All SA 404 (WCC). The relief that I may grant is not dependent on such a finding. In any event, in that case the court held that the poor relationship between the parties did not stand in the way of the court ordering the division of the co-owned property after which the parties would become neighbours (with a poor relationship). In my view, it does not reflect a finding that I may refuse relief in this case.

[43.] The respondents argued in their heads of argument that I should apply **O'Neill and Another v Phillips and Others** [1999] UKHL 24 to the effect that a partnership could continue in some cases where there is a breakdown in the relationship and loss of trust and confidence. Apart from stating that it must be an unusual partnership to survive, in our law, I do not have a discretion to keep a disgruntled co-owner against its will in a co-ownership arrangement.

How does one interpret the agreement in issue?

[44.] As must be clear from the above, in a relationship of co-ownership, the *actio communi dividundo* forms part of the implied rights of the parties (implied by law). The relief thereunder is part of the *naturalia* of their agreement, unless excluded contractually. See **Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974 (3) SA 506 (A) at 525H and further. See too **Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another** 2016 (1) SA 621 (CC).

[45.] The pleaded case in the answering affidavit was that only the written contracts governed the relationships between the parties and not the Common Law. The argument in essence was that the co-ownership contract meant that the parties could only exit co-ownership in terms of the contract. After dealing with the principles and referring to clauses 5.2, 22, 30.2, and 30.1 of the co-ownership contract, the following conclusions were submitted by the respondents-

> "*The intention of the parties is clear from the words of the co-ownership agreement: they will manage the property portfolio jointly, and when one of them wants to exit, it will do so in terms of the agreement. …"* ;
>
> and
>
> "*The respondents submit that it is clear from the above that the co-ownership agreement governs any exit by the applicants from the co-ownership, and that dissolution under the actio is excluded by the co-ownership agreement in these circumstances. Accordingly, the applicants were bound to comply with the terms of the co-ownership agreement if they wish to end their co-ownership agreement. They have*

not done so, nor have they demonstrated that they have genuinely attempted to do so."

[46.] I first state what the respondents' case is NOT:

[46.1.] Their case is NOT that a paragraph in the co-ownership contract has a clear, express term that precludes the *actio communi dividundo*;

[46.2.] Their case is NOT that a paragraph in the co-ownership contract is ambiguous and that it must be interpreted to preclude the *actio communi dividundo*;

[46.3.] Their case is NOT that the co-ownership contract does not reflect their consensus and must be rectified.

[47.] The respondents did not seek to interpret a clause or clauses, but to make an overall interpretation finding based on the co-ownership contract read as a whole. I have a difficulty with this approach.

[48.] It seems to me that the real defence is one of a tacit term, a term that would exclude the *actio communi dividundo*. Such a case has not been alleged and the facts for such a case has not been proven. I refer to extracts from three judgments:

[48.1.] See **Botha v Swanepoel** 2002 (4) SA 577 (T) at 582D-F a judgment by Basson J:

"*Dit is geyk dat 'n naturalium van 'n kontrak of ooreenkoms as geïmpliseerde term vanaf regsweë sy bestaansreg vind. Verder staan 'n naturalium op dieselfde grondslag as 'n uitdruklike bepaling van die ooreenkoms (sien die dictum in die* ***Cooper****-saak soos aangehaal in die* ***Bekker****-saak hierbo). Dit volg dus noodwendigerwys dat die naturalia van 'n kontrak of ooreenkoms slegs by wyse van wilsooreenstemming tussen die partye uitgesluit kan word. Dit is voorts van belang om daarop te let dat die naturalia van 'n kontrak geld vanaf regsweë, ongeag die bedoeling van die patye. Gegewe die aard van die naturalia van 'n ooreenkoms, volg dit myns insiens logieserwys dat wilsooreenstemming as 'n feit vereis word voordat die*

stilswyende bedoeling aan die partye toegedig kan word dat die naturalia uitgesluit word. "

[48.2.] See too **First National Bank of SA Ltd v Rosenblum and Another** 2001 (4) SA 189 (SCA) Para 6 a judgment by Marais JA (Navsa JA and Chetty AJA concurring):

"*Before turning to a consideration of the term here in question, the traditional approach to problems of this kind needs to be borne in mind. It amounts to this: In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. ...*"

[48.3.] See **City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO** 2006 (3) SA 488 (SCA) Para 19 a judgment by Brand JA (Howie P, Navsa, Van Heerden JJA and Cachalia AJA concurring (underlining added):

"*A discussion of the legal principles regarding tacit terms is to be found in the judgment of Nienaber JA in **Wilkins NO v Voges** 1994 (3) SA 130 (A) at 136H - 137D. These principles have since been applied by this Court, inter alia, in **Botha v Coopers & Lybrand** 2002 (5) SA 347 (SCA) at paras [22] - [25] and in **Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another** 2005 (6) SA 1 (SCA) ([2004] 1 All SA 1) at paras [50] - [52]. As stated in these cases, a tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so (see eg **Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974 (3) SA 506 (A) at 532H). It follows that a term cannot be inferred because it would, on the application of the well-known 'officious bystander' test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient*

> *and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time (see eg* ***Alfred McAlpine*** *(supra) at 532H - 533B and* ***Consol Ltd t/a Consol Glass*** *(supra) at para [50]). If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.*"

[49.] I cannot make a finding that it exists in the absence of a pleaded and proven case. In addition, tacit terms are not easily inferred. In addition, the alleged interpretation would serve to exclude a Common Law right to approach a court for relief thereunder. In my view the interpretation argument ends here.

[50.] There is a further difficulty with a tacit term. As will appear below, it was an express term of the co-ownership contract that the Common Law is retained. I do not want to speculate about the wording of a tacit term but if indeed the contract was the sole memorial of the parties' agreement, it is difficult to see how such extrinsic evidence could not have contradicted, added to or modified the term that included the Common Law in breach of the parol evidence rule. It seems to me that clause 30.2 of the co-ownership contract was intended (a) to make the written contract the sole memorial of the agreement and (b) to exclude reliance on oral representations:

> "*This document contains the entire agreement between the Parties and no Party shall be bound by any undertaking, representations, warranties, promises or the like not recorded herein.*"

[51.] Still, in order to ensure that I do not do the respondents an injustice, I examined the co-ownership agreement.

[52.] My first difficulty in interpreting the co-ownership agreement is that almost no context has been pleaded and proven. I know that three contracts were concluded on the same day, and I know that the shopping centre investment was a going concern. The applicants pleaded an overview of the shopping centre investment (geographical position, size, value, sources of income, daily

management demands, and the like.) The respondents sought in paragraph 66 of the answering affidavit to plead an objective of the Pension Fund in entering into the contracts, but such evidence about subjective intent would have been inadmissible. Apart from these facts very little information was placed before me. Searching the binder for words such as "*context*", "*factual matrix*", "*surrounding circumstances*", and "*background circumstances*" delivers almost no further results.

[53.] The original sale contract is of value as a contextual matter:

[53.1.] The original sale contract provides in clause 8.1 that a co-ownership agreement would be concluded-

> " *... the Parties undertake to enter into a co-ownership agreement which agreement will deal with, amongst other aspects, the following: ..* "

[53.2.] The items listed in clause 8.1 of the original sale contract all relate to management of the investment and/or distribution of income. The grounds upon which co-ownership would terminate was not listed as an item to be agreed upon in the co-ownership contract;

[53.3.] In fact, the original sale contract provided in clause 13 for cancellation in the event of breach of contract.

[54.] I then turned to the co-ownership contract to read it in context and considered first what the parties agreed to as to its limits. Clause 30.4 of the co-ownership contract reads:

> "*This agreement and all matter incidental thereto, including but not limited to the interpretation, application, and termination thereof, shall be governed by the laws of the Republic of South Africa.*"

[55.] This is the express retention of the Common Law referred to earlier, unless the clause is ambiguous. It is clear to my mind, based on its wording and based on the limited pleaded context. That the parties retained the Common Law is without doubt, as clause 1.2 (3) defines "*law*" to include the Common Law.

[56.] In my view this ends the interpretation dispute ends here as well.

[57.] I still had regard to the remainder of the co-ownership contract out of caution as interpretation is a unitary exercise. That exercise did not change my views.

[58.] If one considers the structure of the co-ownership contract, clause 5 deals with the duration of co-ownership: "*The Co-Ownership will commence with effect from the Effective Date and will terminate*:" It then lists three instances of termination, namely (a) termination in the event of the agreement not becoming effective (which is no longer applicable), (b) "*on the disposal of the "Letting Enterprise" by "the Co-Owners*", or (c) "*if either of the Co-Owners disposes of its share In the Letting Enterprise, subject however to the provisions of clause 22 hereof*".

[59.] In my view, in context of the contract, had the intention been to limit the grounds upon which co-ownership could be terminated, it would have been in this clause.

[60.] It has not been argued that clause 5.1 limits the grounds upon which the co-ownership may terminate to only the three grounds listed. Immediately the exclusion of cancellation referred to in the original sale contract is stark. One could think of other excluded grounds, such as the attachment and judicial sale of a share.

[61.] In my view clause 5 does not limit the termination of co-ownership to the stated three grounds and excluded the *actio communi dividundo:*

[61.1.] The wording is unambiguous;

[61.2.] Nothing in the context militates against an interpretation based on clear language;

[61.3.] In the context, the original sale contract did state that the co-ownership contract would limit the ground upon which co-ownership could be terminated;

[61.4.] The *actio communi dividundo* is an implied term and the Common Law has been retained in clear, express words;

[61.5.] I cannot read word "*only*" into the clause without adding another tacit clause or clauses;

[61.6.] The clause as it reads can be given commercial effect; and

[61.7.] There is at least an argument that the respondents' interpretation impermissibly would tie the co-owners together.

[62.] In fact. It seems to me that the respondents' main argument focussed on clause 22 and further and not on clause 5 where one would have expected in context to find the exclusion of the *actio communi dividundo* had it been agreed upon.

[63.] Clause 22 prohibits an owner to sell its undivided share (as it is entitled to do under the Common Law), "*.. without having complied in full with the terms and conditions of this Agreement, more particularly the pre-emptive rights referred to in clause 23 below.*" I am satisfied that the language used in the co-ownership contract is unambiguous.

[64.] The clause makes commercial sense too. One could understand that a co-owner sought a procedure to protect it against being saddled with a co-owner it does not want. Hence the parties agreed to a right of first refusal before an owner could sell its undivided share (clause 22), why they provided for purchasing rights in case of changes in shareholding (clause 23.3), and why they provided for purchasing rights in case of a winding-up (clause 25).

[65.] I can give effect to every word in accordance with the usual and ordinary meaning thereof. Nothing in the context militates against an interpretation that clause 22 deals with what it states it deals with, the sale of a share by a co-owner. It does not address the *actio communi dividundo*, or what process had to be followed before it could be invoked.

[66.] I do not know if not dealing expressly with the *actio communi dividundo* was an oversight or not. One or more parties may deliberately not have referred to the implied right. One or more parties may have overlooked it. I would not know. However, I cannot make an agreement for the parties because it would

have been prudent. Such a result is not interpretation of the agreement. I am not called upon to give the best commercial "interpretation" of the contract, I must interpret the contract and consider if my interpretation is commercially sensible or not.

[67.] In **Rainy Sky S. A. and Others v Kookmin Bank** [2012] 1 All ER 1137, [2011] UKSC 50, Lord Clarke SCJ (with whom Lord Phillips, Lord Mance, Lord Kerr and Lord Wilson agreed) held in Para 23:

> "*Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in* ***Co-operative Wholesale Society Ltd v. National Westminster Bank plc*** *[1995] 1 EGLR 97. The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlords sought in each case was the same. The court regarded it as a most improbable commercial result. Where the result, though improbable, flowed from the unambiguous language of the clause, the landlords succeeded, whereas where it did not, they failed. The court held that ordinary principles of construction applied to rent review clauses and applied the principles in* ***The Antaios (Antaios Compania Naviera SA v Salen Rederierna AB)*** *[1985] AC 191. After quoting the passage from the speech of Lord Diplock cited above, Hoffmann LJ said, at p 98:*
>
> *"This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement.""*

[68.] The above case is referred to inter alia in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA), **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** (2014 (2) SA 494 (SCA), **Novartis v Maphil** 2016 (1) SA 518 (SCA), and **The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association** (106/2018) [2018] ZASCA 176 (3 December 2018).

[69.] The court in **City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others** 2018 (4) SA 71 (SCA), a judgment

by Schippers AJA (Leach JA, Saldulker JA, Plasket JA and Tsoka AJA concurring) held in Para 26 (footnotes omitted):

> "*It is settled that words in a statute must be given their ordinary meaning unless to do so would result in an absurdity. Statutory provisions should always be interpreted purposively, in context and consistently with the Constitution. Stated differently, when interpreting legislation, what must be considered is the language used; the context in which the relevant provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production.*"

[70.] More recently in **Commissioner, South African Revenue Service v Executors, Estate Ellerine** 2019 (1) SA 111 (SCA), a judgment by Davis AJA (Navsa JA, Wallis JA, Mbha JA and Hughes AJA concurring), the court stressed in Para 31 that a court must consider the language used (footnotes omitted):

> "*Whatever debate may be developed with regard to the context urged upon this court by respondent's counsel, 'consideration must be given to the language used in the light of the ordinary rules of grammar and syntax'. While the intention of the speaker is a vital component of the interpretive inquiry, the basic unit of meaning remains the sentence employed.*"

[71.] I am satisfied on a proper interpretation of the agreement that the parties did not agree to exclude reliance on the *actio communi dividundo*. These findings are in addition to my findings that a tacit term was not alleged or proven, and that parol evidence would have created problems for an argument to the contrary.

[72.] The applicants are entitled to relief.

Relief

[73.] I am placed in a difficult position to grant relief. The Pension Fund has denied to bitter end that the *actio communi dividundo* is available to the applicants.

[74.] The Pension Fund has one desire only: it seeks to retain its co-ownership (and force the applicants to sell their share to it at the so-called minority discount). It has criticised the applicants' proposals on a way forward and have not

provided alternate proposals should I find that I must grant relief to the applicants.

[75.] I looked at my obvious options and at the facts of the matter:

[75.1.] I could give the parties time to reconcile their differences. It is not an option. The most recent attempt by the applicants dated 13 February 2018 to put three options on the table to terminate the co-ownership, was rejected allegedly because it was in accordance with the co-ownership contract. I do not think that time would lead to a resolution of the substantial differences;

[75.2.] A physical division of the assets is not appropriate. No one has given me a plan to do so, with or without compensation to the other co-owner(s);

[75.3.] There were a number of failed attempts by the applicants to sell their undivided share, including a purported sale based on the right of first refusal to the Pension Fund and other attempts that the Pension Fund rejected for not complying with the co-ownership contract;

[75.4.] The applicants are not prepared to acquire the Pension Fund's share;

[75.5.] The Pension Fund suggests that it might be able to acquire the applicants' share "*at the right price, on the right conditions*". What that price and what those conditions would be, were not stated. It seems to be common cause that regulation 28 of the Pension Fund Regulations could stand in the way of such a sale in that it limits the Pension Fund's investment by asset class. At the time when the original investment was made, the Pension Fund's investment portfolio was R7.2 Billion of which the maximum allowable percentage of 15% was held in non-listed property investments. This appears from an earlier affidavit by Mr Letjane attached to his answering affidavit as "AA24". I do not know if there has been a material change in the last few years. In the light thereof and in the absence of further facts placed before me the version by the Pension

Fund that it might have offered to purchase the applicants' share, seems coy;

[75.6.] It seems to me that the only relief is to put joint property to be put up to auction and to order that the proceeds to be divided among the co-owners in terms of their agreement. I am not alive to any real prejudice to the Pension Fund should its investment in this asset class be liquidated. The Pension Fund's current investment is a non-listed equity investment and seems to me to be in a fairly narrow spread of asset class based on geography and nature of the commercial property involved. No evidence has been placed before me about how easily available similar non-listed equity investments in the property sector are, or why preferable to listed investments. No evidence has been placed before me about how easily available listed equity investments in property are, or why they would be less attractive to a pension fund;

[75.7.] One concern is the destruction of value if fair value is not obtained at a public auction. The parties are not in agreement on the minimum market values of the three shopping centres. I cannot set a reserve price for a public auction. If common sense does not prevail between the parties, the back stop is a public auction without a reserve price;

[75.8.] The three shopping centres have to be managed until they are sold. There is only one option as the parties have proven themselves unable to work together. A liquidator will have to run the business for them (or a manager appointed by the parties);

[75.9.] The selling price will have to be divided between the co-owners in their pro rata shares. The issue would be the disputes about income and contributions. The parties agree that they are entitled to share in income and are obliged make contributions in their pro rata shares of 45% and 55%. (clauses 12.1 to 12.3 of the co-ownership contract). There are several disputes between the parties in this regard. Those claims accrued before dissolution (see **Van Staden v Venter** 1992

(1) SA 552 (A) at 560E-F for a comparison with a partnership). Many of these disputes seem to me to imminently suitable for resolution by an expert, but the respondents insist that this be done in court proceedings, as is their right;

[75.10.] I have found that that under the Common Law the adjustment disputes (of shared income and contributions) could be dealt with under subsequent proceedings;

[75.11.] Must the disputes about the adjustment be completed before distribution of the selling price? The applicants tendered that the proceeds be held in trust, but also asked me to put the parties on terms to institute their claims. I cannot deprive the respondents of their rights by putting them on terms. The respondents are insistent that all disputes be dealt with before I could order a dissolution. I am alive to some of the problems caused by long-term trust investments. I cannot do miracles. In a case referred to by the respondents, **Rademeyer and Others v Rademeyer and Others** (supra) 1968 (3) SA 1 (C), van Zijl J held at 14D that the proceeds of the sale by of the common property may not be paid to the co-owners until the account between them had been determined. Based on **Rademeyer** and the stance of the parties the proceeds of the sale must be kept in trust pending the finalisation of the adjustment disputes (of shared income and contributions);

[76.] I was not referred to an order in a comparable case to help me formulate my order. The facts in this matter seem uniquely complicated.

[77.] Selke J in **Drummond v Dreyer** (supra) 1954 (1) SA 306 (N) ordered (underlining added):

> "*1. That unless before November 21st next the parties to these proceedings shall have agreed otherwise, the property known as …, presently held respectively under deeds of transfer … , by … in equal undivided shares, shall be sold by public auction without reserve by such auctioneer, and upon such conditions, as the parties to these proceedings shall agree upon, such agreement*

to be reached not later than November 28th next; and failing such latter agreement, then by such auctioneer and upon such terms and conditions as the Master of this Court may appoint and direct, in which event: -

(a) The auction sale shall take place on or before February 1st, 1954.

(b) The conditions of sale shall include provision that: -

(i) Each of the parties to these proceedings shall be at liberty to bid for the property, and to purchase it at the sale, and

(ii) The respondent, if he is not himself the purchaser, shall, not later than March 1st, 1954, surrender to the purchaser occupation of so much of the premises as he now occupies.

(c) The expenses of advertising the property and of the sale shall be paid from the proceeds of the sale.

(d) The nett proceeds of the said sale shall be divided equally between the parties hereto who are hereby ordered to give transfer to the purchaser pursuant to the said sale.

2. That each of the parties shall bear his or her own costs of these proceedings."

[78.] I do rely in part on this formulation, but I believe that a liquidator should be appointed to give effect to the order. This makes some of the relief granted in **Drummond** superfluous. Another factor is that in the matter before me a business has to be managed as well in the interim.

[79.] In **Els v Smit** (356/07) [2008] ZASCA 119 (26 September 2008) Mhlantla AJA (Harms ADP, Scott, Lewis JJA and Leach AJA concurring), despite the matter being in issue, the court ordered:

> "*In the event the parties cannot agree on the calculation and/or division of the profit after the properties have been sold, the plaintiff is entitled to the appointment of a liquidator, which, in the event of disagreement must be nominated by the President of the Law Society of the Northern Provinces.*"

[80.] I point out that the court in **Els** confirmed that in the case of a partnership (and the same will apply in co-ownership) "*the termination of a partnership marked the beginning of a dissolution, liquidation and settling of accounts*".

[81.] In **Morar NO v Akoo** 2011 (6) SA 311 (SCA) Wallis JA (Brand, Mhlantla and Majiedt JJA and Meer AJA concurring) dealt with the wide equitable discretion given in the liquidation of a partnership under the *actio pro socio*. The court held in Para 16:

> "*I have found nothing in the old authorities to justify the notion that the court has a discretion to grant wide-ranging powers of administration to the liquidator of a partnership to be exercised in the course of liquidating the partnership. The leading writers on the topic of partnership among the old authorities barely mention the topic of the appointment of liquidators and their powers. The reason appears to be that in many places local ordinances provided that disputes about liquidation should be referred to arbitrators. ...*"

[82.] It seems to me that the adjudication powers of a liquidator foreshadowed in **Els** is no longer permissible relief.

[83.] The court in **Morar** further held in Para 18 to 20 that this court may only grant limited powers to a liquidator (underlining added):

> "*[18] When the court appoints a liquidator for a partnership it is remedying the failure of the partners to attend to the liquidation of the partnership by agreement. Such failure may arise from disagreement over the need to appoint a liquidator, or over the identity of the liquidator or the powers that the liquidator should enjoy. That being so it is logical to take as one's starting point the powers that the partners could themselves confer by agreement, if they were not in a state of hostilities. The court is then asked to do no more than resolve a dispute between the partners over the appointment of the liquidator or over the liquidator's powers. It does so in a way that the parties themselves could have done. The disagreement arises in consequence of the one partner refusing to agree to the liquidator being appointed or the liquidator having a particular power and that can be characterised as a breach of the obligations of cooperation and good faith that are central to all partnerships. The court is then merely enforcing the contractual obligations of the partners themselves.*

[19] Once the court is asked to go beyond this it is necessary to identify a source of its power to do so. That is central to the rule of law that underpins our constitutional order. Courts are not free to do whatever they wish to resolve the cases that come before them. The boundary between judicial exposition and interpretation of legal sources, which is the judicial function, and legislation, which is not, must be observed and respected. In this case no such source was identified.

[20] In argument it was submitted that the appointment and functions of the liquidator of a partnership are largely equivalent to those of the liquidator of a company under the old ***Companies Act****. However the analogy is false. Unlike partnerships, companies only exist under the legislation under which they are constituted, which governs their creation, operation and liquidation …"*

[84.] The reasoning in **Morar** about the powers of a liquidator is applicable to this case. Apart from the judgments that could serve as guidelines, the applicants sought relief with reference to section 386 of the **Companies Act** 61 of 1973 that sets out the powers of a liquidator in some detail, including powers of the Master, creditors, the members, and the court. I cannot apply such powers without modification based on **Morar** and because a liquidator is not on a solo mission but acts under the control of interested parties.

[85.] Although I have a wide and equitable discretion, I cannot give powers to a liquidator that are not (a) powers that the liquidator should enjoy by agreement if the parties were not in a state of hostilities, or (b) where do not without a legal basis retain the rights of co-owners to give instructions to the liquidator.

[86.] In formulating the relief, I considered the judgments, the powers under section 386 of the **Companies Act** 61 of 1973, the management contract, and the relief sought. The relevant relief sought in the Notice of Motion was that

"*2. Directing that:*

2.1 The co-ownership between the first, second and third applicants and the first respondent be dissolved;

2.2 The common properties ("the property portfolio") be disposed of by a liquidator;

2.3 *Mr Norman Klein, an insolvency practitioner of Westrust (Pty) Ltd, be appointed as the liquidator to take immediate control of the property portfolio;*

> [I must say something about this. Mr Klein was proposed by the applicants in the last attempt to resolve the matter, the letter of 13 February 2018, with no response thereto. They did so again in the founding affidavit. The respondents did not address this in the answering affidavit and took issue only in the fourth affidavit with Mr Klein's ability to manage the investment. They should have raised this in the answering affidavit to facilitate a reply. Raising the matter in the fourth affidavit is akin to litigation by ambush.]

2.4 *Mr Klein be vested with all such powers as may be required to dissolve the co-ownership and, pending the final dissolution, to operate and manage the letting enterprise conducted from the common properties;*

2.5 *That, in addition to any direction by the court, Mr Klein be vested with the general powers of a liquidator as envisaged in Section 386 of the 1973* ***Companies Act****;*

2.6 *That Mr Klein is directed to operate the letting enterprise to the best of his abilities until the letting enterprise can be sold to a third-party buyer either by private sale or by auction, which sale should take place post haste;*

[87.] A further draft order was proved to me wherein the applicants sought the relief set out next. It was contested as inappropriate litigation by ambush. In some instances, the relief is merely better formulated, but in others additional powers are suggested. I found it to have been of assistance but do not repeat it in full here.

[88.] My order sought to give the parties time to come to common sense arrangements, and to interfere as little as possible in their rights as co-owners. My attempts to formulate an order are constrained by the absence of input by the respondents on the terms of an appropriate order. I believe that both

camps have as their aim to protect the value of their investment and will act reasonably after receipt of my order. I endeavoured to provide for input in modifying my order by agreement in a manner that would serve their interests better than what I can.

[89.] It took me longer than anticipated to deliver this judgment due to my workload, the holiday period, and the work required to complete this judgment. I regret any inconvenience to the parties.

[90.] I make the following order:

Dissolution

1) The co-ownership between the first, second and third applicants and the first respondent ("***the co-owners***") is hereby dissolved and all property forming part of the co-ownership ("***the common property***") is to be sold;

General: Public auction

2) Mr Norman Klein of Westtrust (Pty) Ltd is hereby appointed as the liquidator to sell the common property by public auction without reserve and to give delivery of the common property, unless-

   a. The co-owners agree in writing not less than three weeks prior to the commencement of the public auction on a reserve price, in which case a sale at the public shall be subject to such reserve price;

   b. The co-owners accept in writing prior to the commencement of the public auction a written offer to purchase the common property by a third party, in which case the public shall be cancelled;

   c. The first, second and third applicants accept in writing prior to the commencement of the public auction a written offer from the first respondent to purchase their undivided

shares in the common property, in which case the public shall be cancelled;

d. The first respondent accepts in writing prior to the commencement of the public auction a written offer from the first, second and third applicants to purchase its undivided share in the common property, in which case the public shall be cancelled; or

e. The co-owners to come to a written agreement amongst themselves for the partitioning or disposal of the common property and instruct Mr Klein in writing not to proceed with the public auction;

3) The sale of the common property by Mr Klein by public auction shall take place without delay, but the auction shall not take place within three months from date of this order for the co-owners to come to a written agreement amongst themselves for the partitioning or disposal of the common property or undivided shares therein, unless -

a. The co-owners by written agreement waive the three-month period in which case the public auction shall take place without delay;

4) The public auction shall take place on such terms and conditions as the co-owners may agree upon in writing not less than six weeks before the date of the auction;

5) Should the co-owners fail to set the terms and conditions for the public auction as aforesaid, Mr Klein may set the terms and conditions including any further terms that the Master may direct to be included;

6) Mr Klein shall have the power to-

a. Execute in the name and on behalf of the co-owners all deeds and other documents to give effect to the sale by public auction;

b. Instruct an independent firm of attorneys to open an interest-bearing trust account ("***the trust account***");

7) Save for the powers as aforesaid, Mr Klein shall have the powers pertaining to the public auction as agreed to by the co-owners in writing;

8) Nothing in this order shall limit Mr Klein's right to seek an offer to purchase the common property by a third party and to submit such offer to the co-owners for acceptance;

General: Interim management

9) Mr Klein is hereby also appointed as the liquidator to take control of the common property forthwith and to carry on the business of the co-ownership for the beneficial dissolution of the co-ownership ("***to manage the common property***");

10) Mr Klein's appointment to manage the common property shall terminate on the date of transfer of the common property as envisaged above, unless -

a. The co-owners by written agreement terminate the appointment of Mr Klein to manage the common property and appoint a manager in his stead to manage the common property until the date of transfer of the common property as envisaged above;

11) Mr Klein shall have the power to:

a. Attend to the day-to-day management of the common property, subject to the limits set out herein;

b. Receive income due to the co-ownership;

c. Pay from such income all expenses that fall due by the co-ownership in the ordinary course of business in terms of existing agreements and arrangements and/or imposed by law;

d. Take reasonable measures for the protection of the affairs of the co-ownership and the common property as the trustee of an insolvent estate may take in the ordinary course of his duties without direction from creditors, which powers shall include -

i. Ensuring that the common property is clean and in good repair;

ii. Procuring prospective tenants and negotiating proposed lease agreements;

iii. Instructing staff and contractors;

iv. Appointing service providers;

but which powers not include the powers without prior written approval by the co-owners to-

v. Conclude lease agreements;

vi. Incur costs by service providers of more than R50 000.00 per agreement;

vii. Employ staff;

viii. Institute legal proceedings;

12) Save for the powers as aforesaid, Mr Klein shall have the powers as agreed to by the co-owners in writing;

General

13) Nothing in this order takes away a right by a co-owner to sue or obtain relief in another manner against the other co-owner(s) in pending proceedings or future proceedings, including without limitation under the *actio communi dividundo* in respect of an adjustment in respect of income derived from the common property or expenses incurred in respect thereof;

14) The money invested in the trust account shall remain so invested until such time as -

a. The co-owners agree in writing to the distribution of the money and instruct the independent firm of attorneys jointly in this regard; or

b. The court orders the distribution thereof upon an application or action brought by any of the co-owners.

15) Mr Klein is obliged to -

a. Carry out his duties independently, reasonably, and honestly;

b. Invest the proceeds derived from the sale(s) of the common property after payment of any taxes and/or commissions due for the sale thereof in the trust account;

c. Deposit in sperate account all income derived from carrying on the business of the co-ownership conducting the business of the co-ownership pending the sale of the common property;

d. Pay all debts due, owing and payable to third parties by the co-ownership from the co-ownership's funds;

e. Invest the net income derived from conducting the business of the co-ownership in the trust account upon

conclusion of his appointment to carry on the business of the co-ownership;

f. Keep proper accounting records in respect of the business of the co-ownership;

g. Account to the co-owners upon completion of his functions, including –

i. The proceeds derived from the sale(s) of the common property after payment of any taxes and/or commissions due for the sale thereof;

ii. Any and all expenses paid by him on behalf of the co-ownership;

iii. Any and all income otherwise derived from conducting the business of the co-ownership pending the sale of the common property; and

iv. Any fees due to him for so acting as the liquidator, which shall be the customary charges of liquidators of companies, unless otherwise agreed to in writing between Mr Klein and the co-owners;

16) The respondents are ordered to pay the costs of this application, including the costs occasioned by the employment of two counsel;

DP de Villiers AJ

On behalf of the Applicants: Adv M Maritz SC

	Adv DR Van Zyl
Instructed by:	Gildenhuys Malatji Inc
On behalf of the First to Third Respondents:	Adv A. E. Franklin SC
	Adv BL Manentsa
Instructed by:	Webber Wentzel