REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 21/37617
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
1 July 2022

In the matter between:

CRAWFORD, LLOYD SEVREN Applicant

and

GOODMAN, LESLIE ALEXANDER Respondent

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an application whereby the applicant seeks to rely on the *actio communi dividundo* to terminate the joint ownership of an immovable property situated [....] A [....] Street, N [....], Benoni ('the property'). The applicant also seeks to appoint a receiver and liquidator with specific functions to effect the termination.

[2] The respondent has opposed the application and has raised two points *in limine*.

[3] The first point *in limine* is that there is no cause of action and as a result, the applicant cannot rely on the *actio communi dividundo*. The respondent contends that the joint ownership of the property arises out of a universal partnership between the applicant and the respondent, which to date has not been dissolved.

[4] The second point *in limine* arises from the fact that the applicant was aware of the existence of a material dispute of fact prior to launching the application and accordingly should not have proceeded by way of motion.

[5] The respondent also objects to the appointment of a receiver and liquidator.

[6] The crisp issue for determination is whether a universal partnership existed and whether it has been dissolved. Furthermore, whether the applicant's election to invoke the *actio communi dividundo* by way of motion, is the correct procedure.

[7] Condonation is granted in regard to the late delivery of the respondent's answering affidavit.

BACKGROUND

[8] The parties were in a romantic relationship. According to the applicant this began during August 2017, whereas the respondent contends it commenced in June 2017.

[9] The parties decided to live together and agreed to purchase the property. The applicant contends the parties commenced living together in 2018, whereas according to the respondent, the parties agreed in November 2017 to live together and were cohabitees from 1 December 2017 at another property in Benoni.

[10] The property was purchased on 18 February 2018 and transfer of the property took place on 6 June 2018. The applicant and the respondent are joint registered owners in undivided half shares of the property.

[11] The relationship broke down irretrievably and as per the applicant's version, the respondent vacated the property during February 2020. The respondent contends that the romantic relationship ended on 21 August 2019, however, he continued to frequent the property on a few occasions between the dates 21 August 2019 and January 2021, after which the relationship ties ended.

[12] The applicant resides at the property and wishes to terminate the joint ownership of the property. The respondent refuses to terminate the joint ownership. The parties are unable to amicably agree on a *modus* of terminating the joint ownership. As a result, the applicant seeks to proceed in terms of the *actio communi dividundo* to divide the property and proposes that Johannes Hendricus Du Plessis, who has 34 years experience, be appointed as a receiver and liquidator.

[13] The respondent contends that the applicant is not entitled to rely on the *actio communi dividundo*, as the universal partnership subsists and has not been dissolved. In addition, the applicant has failed to disclose all material facts pertaining to the creation, operation and dissolution of the universal partnership, resulting in a dispute of fact.

LEGAL PRINCIPLES

[14] The *actio communi dividundo* is well established in our law. The underlying rationale as expressed in the matter of *Robson v Theron* [1] is that every co-owner of property may insist on a partition of the property at any time. Even if there is an agreement to constitute perpetual joint ownership, the co-owner may demand partition at any time. If the co-owners cannot agree on the manner in which the property is to be divided, then the Court is empowered to make an order which appears to be fair and equitable.

[1] *Robson v Theron* 1978 (1) SA 841 (A) at 855A

[15] The Court may order the property to be sold and the proceeds to be divided amongst the co-owners according to their share of the property. [2] One well recognised mode of doing this is a sale by public auction and a division of the proceeds. [3] A private auction may also be held, restricted to the co-owners, and the net proceeds divided between them. [4]

.

[16] The principles relating to the *actio communi dividundo* were summarised by the Supreme Court of Appeal in the matter of *Robson* [5] as follows:

> (a) No co-owner is normally obliged to remain a co-owner against his will.
>
> (b) 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.
>
> (c)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.
>
> (d) 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.
>
> (e) 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.
>
> (f) 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.

EVALUATION

---

[2] *Rademeyer v Rademeyer* 1968 (3) SA 1 (C)
[3] *Estate Rother v Estate Sandig* 1943 AD 47 at 53
[4] *Kruger v Terblanche* 1979 (4) SA 38 (T)
[5] *Robson* (note 1 above) at 856 to 857

[17] The parties are in agreement that the romantic relationship between them has ended. The respondent contends that the relationship ended either in August 2019 or January 2021, whereas the applicant contends the relationship ended in February 2020. Although there is a discrepancy regarding the date, it is common cause that the parties no longer live together as the applicant has now changed the locks, disallowing the respondent access to the property. On the respondent's version, the applicant pertinently said to him that he wants to cut all ties with him. This was uttered in January 2021. As to the different dates as to when the relationship ended, this is immaterial as it is common cause it has ended.

[18] From a cursory reading of the affidavits, it is apparent that the parties are unable to agree to either:

(a) A termination of their joint ownership of the property; or

(b) On a methodology to give effect to the termination of their joint ownership of the property. This is further illustrated by the respondent's opposition of this application.

[19] The Supreme Court of Appeal in the matter of *Khan v Shaik* [6]stated that:

> '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.'[7]

> 'Plainly, 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; the poorer partner becomes the richer partner's creditor. Accordingly, it is the contract that is the foundation of the universal partnership, not the mere fact of the consortium and the mere

[6] *Khan v Shaik* (641/2019) [2020] ZASCA 108 (21 September 2020), para 7
[7] Ibid para 7

contributory efforts to building wealth. A tacit agreement suffices.' [8] [my emphasis]

[20] The Supreme Court of Appeal in the matter of *Khan* [9] referred to two cases namely *Schrepfer v Ponelat* [10] and *Cloete v Maritz* [11] and stated:

'The decision in *Schrepfer v Ponelat* can be contrasted with the decision in *Cloete v Maritz* II, where the date the consortium ended was found not to be the effective date for the end of the universal partnership. In this case the parties ended a long-standing romantic relationship but continued for several months to collaborate in several business ventures, in which they had both previously participated, and they deliberated on how to extract value therefrom. This course of conduct eventually ended. It was held that the latter date, when their commercial dealings ended, was the date the universal partnership ended.' [12] [my emphasis]

'The termination of the consortium is often simultaneous with the termination of the universal partnership, but whether or not this is so, in each case, is a question of fact.' [13]

Whether the partnership has terminated and whether the *actio communi dividundo* may be utilized.

[21] The respondent's counsel contends that the applicant in his founding affidavit made no mention of the universal partnership in any form or manner which is a material fact in the circumstances. Furthermore, the applicant did not allege or prove that such universal partnership had been dissolved or terminated. The respondent's counsel contends that the founding affidavit failed to make out a case which is limited to the romantic relationship between the parties and same coming to an end.

[8] Ibid para 8
[9] *Khan* (note 6 above)
[10] *Schrepfer v Ponelat* [2010] ZAWCHC 193 para 31
[11] *Cloete v Maritz* (2014) ZAWCHC 108
[12] *Khan* (note 6 above) para 24
[13] Ibid para 31

The respondent's counsel argued that by mentioning the universal partnership in the replying affidavit the applicant attempts to remedy the position in his replying affidavit by mentioning the universal partnership. The respondent's counsel also referred to a letter dated 4 October 2021, from the applicant's attorney, where the suggestion is made that a partnership never existed.

[22] The respondent's counsel is correct in stating that in the founding affidavit no mention is made of a universal partnership, however, it is incorrect for the respondent's counsel to assume that the applicant is of the contention that no universal partnership existed. In an email addressed by the applicant's attorney to the respondent's attorney dated 18 February 2021, the applicant's attorney expressly stated at paragraph [4] that:

> 'My clients instructions are that the respective Parties entered into a relationship in approximately August 2017. The Parties decided to live together and to pursue this purpose, bought the premises at [....]A [....] St., N [....], Benoni, ("the property"), which transfer was registered on the 6th of June 2018, with the intention of entering into a universal partnership with both parties contributing to the partnership with intention of making a profit.' [my emphasis]

Further at paragraph [5]:

> 'One of the conditions of entering such partnership was that should the partnership ever disintegrate, your Client would transfer his half share in the Property to my client, your Client, having two other residences into which he could move. My Client will pay him the market value of his half share, less your client's portion of what is outstanding on the bond, both Parties having contributed equally to the partnership.'

[23] From the above e-mail it is common cause that a universal partnership existed.

[24] The respondent's attorney replied on 12 March 2021 to the later dated 18 February 2021 and stated at paragraph [3]:

> ‘Our client is not going to comment to all the allegations made in your email and it should not be construed as admitting same, in fact it should be accepted as denied.’ [my emphasis] From the contents of the respondent’s letter, it is the respondent’s attorney who has refrained from mentioning the universal partnership.

[25] The respondent’s counsel argued that the applicant has attempted to ‘save the day’ in so far as the applicant’s cause of action is concerned, in that the applicant seeks to rely on the bald and blanket denial as stated in the respondent’s letter dated 12 March 2021 as an excuse why no mention was made of the universal partnership in the founding affidavit. The applicant has justified this by stating that it is the respondent who disavowed the existence of the universal partnership, which denial the applicant accepted.

[26] This Court does not condone the behaviour of the applicant for failing to mention the universal partnership in the founding affidavit, however, it is clear from the contents of the letter dated 18 February 2021 that the applicant asserted the existence of a universal partnership. Neither does this Court condone the election of the respondent’s attorney to make a bald and blanket denial in his reply dated 18 March 2021. Had the respondent confirmed the existence of the universal partnership, such confusion as to the existence of a universal partnership would not have arisen.

[27] Whether or not the applicant accepted the denial of a universal partnership by the respondent or not, the fact remains that both parties are *ad idem* that it existed. Accordingly, the only issue that remains to be resolved is whether the universal partnership has been terminated or not.

[28] It is trite law that a person cannot be forced to remain a co- or joint owner. For this reason, any co-owner has a right to have his or her ownership terminated by placing reliance on the *actio communi dividundo*.[14]

---

[14] *Robson* (note 1 above)

[29] It is common cause that the romantic relationship between the parties terminated when the respondent vacated the property. The applicant contends that the ending of the romantic relationship also terminated the partnership agreement, whereas the respondent contends that that the partnership did not terminate upon the romantic relationship coming to an end and that the partnership remains in place until its dissolution. The respondent's counsel argued that the applicant has not alleged any facts regarding notice of termination of the universal partnership.

[30] In the matter of *Butters v Mncora* [15] the Supreme Court of Appeal held that:

'As to the essential elements of a partnership our courts have over the years accepted the formulationby Pothier (R J Pothier *A Treatise on the Law of Partnership* (Tudor's Translation 1.3.8) as a correct statement of our law (see eg *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 783H-784A; *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634C-F; *Pezzutto v Dreyer* [1992] ZASCA 46; 1992 (3) SA 379 (A) at 390A-C). The three essentials are, firstly, that each of the parties brings something into the partnership or bind 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.' [16]

> '…The requirements for a partnership as formulated by Pothier had become a well-established part of our law. Those requirements have served us well. They have been applied by our courts to universal partnerships in general and universal partnerships between cohabitees in particular. I therefore cannot see the necessity for the formulation of special requirements for the latter category.' [17] [my emphasis]
>
> 'In this light our courts appear to be supported by good authority when they held, either expressly or by clear implication that:

[15] *Butters v Mncora* (181/2011) [2012] ZASCA 29 (28 March 2012)
[16] Ibid para 11
[17] Ibid para 17

(a) Universal partnerships of all property which extend beyond commercial undertakings were part of Roman Dutch law and still form part of our law.

(b) A universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties.

(c) The requirements for a universal partnership of all property, including universal partnerships between
cohabitees, are the same as those formulated by Pothier for partnerships in general.' [18] [my emphasis]

[31] From the above passage, it is clear that a tacit agreement to end the universal partnership suffices. In the matter *in casu* the tacit agreement is evident from the conduct of both parties. Accordingly, this Court finds that the universal partnership terminated when the romantic relationship between the parties ended and the respondent vacated the property. This termination is self-evident, as the parties are currently living apart and are no longer involved in a relationship. As a result, the parties have stopped pooling their resources and are not contributing capital, labour or skill to a venture, which was during the subsistence of the partnership being conducted both for a profit as well as for the parties' joint benefit.

[32] A party claiming termination of co-ownership has to allege and prove:

'(a) the existence of joint ownership;

(b) refusal of the other owners to agree to termination of joint ownership; inability to agree on the method of termination; order

[18] Ibid para 18

agreement to terminate and the other owners' refusal to comply with it; *Ntuli v Ntuli* 1946 TPD 181

(c) facts upon which the Court can exercise its discretion as to how to terminate the joint ownership. The general rule is that the court will follow the method that is free and equitable to all parties.' [19]

In the matter *in casu,* the applicant has shown the existence of all three requirements.

[33] The common law is that the *actio* is always available in the case of free co-ownership and never available in bound co-ownership. Due to the different forms of co-ownership, it is necessary to first identify which form of co-ownership is applicable.

[34] The Supreme Court of Appeal in the matter of *Robson* [20] did not draw a distinction between free and bound co-ownership. The distinction between the two types of co-ownership became apparent in the judgment of *Municipal Employees Pension fund and Others v Chrisal Investments (Pty) Ltd and Others* [21]. The Supreme Court of Appeal stated that in a free co-ownership any co-owner may demand, at any time, that the co-ownership be terminated and that the co-owned property be divided among the coordinates. In a bound co-ownership, the co-ownership can only be dissolved with when the primary relationship is terminated. The Supreme Court of Appeal held further that:

'…the distinction between free and bound co-ownership is that in the former the co-ownership is the sole legal relationship between the co-owners, while in the latter there is a separate and distinct legal relationship between them of which the co-ownership is but one consequence. Co-ownership is not the primary or sole purpose of their

[19] *Amler's Precedents of Pleadings*, 8th Edition p224
[20] *Robson* (note 1 above)
[21] *Municipal Employees Pension fund and Others v Chrisal Investments (Pty) Ltd and Others* (792/19) [2020] ZASCA 116 (1October 2020)

relationship, which is governed by rules imposed by law, including statute, or determined by the parties' themselves by way of binding.' [22]

[35] In considering the *actio communi dividundo* the Supreme Court of Appeal in the matter of *Municipal* [23] stated that:

> 'There is no closed list of instances of bound co-ownership. If the relationship gives rise to bound co- ownership the co-ownership will endure for so long as the primary extrinsic relationship endures. Once it is terminated then, as in [*Ex Parte Menzies et Uxor*] 1993 (3) SA 799 (C) at 810-811G] and *Robson v Theron,* it will become free co-ownership and be capable of being terminated under the *actio*.' [24] [my emphasis]

[36] The applicant's counsel argued that this is a situation where a free co-ownership exists, whereas the respondent's counsel argued that this is a case of bound co-ownership, disentitling the applicant from claiming relief in terms of the *actio communi dividundo*. The respondent's counsel argued that the co-ownership in respect of the property arose from and is one consequence of the universal partnership.

[37] The supreme Court of Appeal in *Municipal* [25] stated that in respect to the *actio communi dividundo* it was not available during the existence of the partnership '….until the relationship giving rise to the tie had itself been terminated'. [26] [my emphasis]

[38] Taking into consideration the fact that the romantic relationship was the 'tie' between the parties and due to it coming to an end and that the parties were no longer living together, that any situation of bound co-ownership became a free co-

[22] Ibid para 46
[23] *Municipal* (note 21 above)
[24] Ibid para 48
[25] *Municipal* (note 21 above)
[26] Ibid para 43

ownership. This is because the primary extrinsic relationship and 'tie' between the parties had terminated.

[39] In light thereof, the relief afforded by the *actio communi dividundo* has correctly been utilized by the applicant.

[40] In regard to the first point *in limine*, this is dismissed with costs.

Whether there is a factual dispute on the papers

[41] There are numerous written communications between the legal representatives of both parties referring to an institution of an action. However, neither party proceeded to issue summons.

[42] Historically the *actio communi dividundo* has been brought by way of action or application. Examples where the *actio* was invoked by way of motion are the cases of *Municipal* [27]and *Matadin v Parma and Others* [28]. The decision to proceed by way of motion instead of an action has been utilised more frequently due to it being less expensive and more favourable in obtaining an expeditious order. The party suing is *dominus litis* as he or she chooses the procedure to be used. The deciding factor which procedure to use is whether there is a dispute of fact. If there is a dispute of fact, the appropriate procedure is by way of action. [29]

[43] Accordingly, a court will be less inclined, when there are genuine disputes of fact on material issues, to decide the matter on motion on a mere balance of probabilities, as would be ordinarily done in an action.

[44] In the matter of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [30] the Supreme Court of Appeal stated that:

---

[27] *Municipal* (note 21 above)
[28] *Matadin v Parma and Others* (4638/2009) [2010] ZAKZPHC 18 (7 May 2010)
[29] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd* 1949 (3) SA 1155 (T) page 1161
[30] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (2) All SA 366 (A)

> '…where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.' [31]

[45] The court should dismiss the application where there are fundamental disputes of fact on the papers and the applicant failed to make out a case for the relief claimed. [32] In fact, an application should be dismissed with costs when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into the disputed facts not capable of easy ascertainment as this is the subject of an ordinary trial action. [33]

[46] This notion was supported by the Supreme Court of Appeal in the matter *of Lombaard v Droprop CC and Others* [34] where it was stated that:

> '…if a party has knowledge of a material and *bona fide* dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed.' [35]

[47] The respondent's counsel argued that there was a material dispute in respect to the termination of the universal partnership, prior to the application being launched and that the applicant had knowledge about this dispute on the facts and ought to have foreseen that a dispute of fact would arise on the papers.

[48] In my view, there is no dispute of fact. The existence of a universal partnership and the termination thereof is capable of resolution on the papers. There is no need for extrinsic evidence or a protracted enquiry to determine when the universal

---

[31] Ibid page 368
[32] *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (A) at 368C-D and 368G-H
[33] *Room Hire* (note 29 above) page 1162
[34] *Lombaard v Droprop CC and Others* 2010 (5) SA 1 (SCA)
[35] Ibid page 11

partnership existed or ended. Accordingly the second point *in limine* is dismissed with costs.

[49] Apart from opposing this application, the respondent has offered no solution as to the division of this property. The proposal of the applicant to appoint a receiver and liquidator with specific powers and functions, seems to be the most equitable method of terminating the joint ownership.

[50] If the co-owners cannot agree on the manner in which the property is to be divided between them, the Court is empowered to make such order as appears to be fair and equitable in the circumstances. One well recognized mode of doing this is by appointing a receiver and liquidator with powers to divide the proceeds.

[51] The applicant has demonstrated, having regard to the facts as set out hereinabove, that he is entitled to an order in the terms sought.

COSTS

[52] The only remaining issue is related to the creation of costs of the application.

[53] The applicant seeks a punitive cost order against the respondent.

[54] A Court will order a litigant to pay the costs of another on the basis of attorney and client, if special grounds are present, for example, the litigant has been guilty of dishonesty or fraud, or the motives have been vexatious, reckless, malicious or frivolous. [36]

[55] Despite the submissions made by the applicant's counsel, this Court does not find that this case warrants the awarding of punitive costs in favour of the applicant.

ORDER

[56] In the result, I make the following order;

---

[36] *Waypex (Pty) Ltd v Barnes* 2011 (3) SA 205 (GNP) at 205 I – 207 G.

1. The parties' joint ownership of the property situated at erf 4533, N [....] extension 3, Benoni, with corresponding street address [....] A [....] Street, N [....] Extension 3, Benoni, ('the property') is terminated.

2. Johannes Hendricus Du Plessis is appointed as a receiver and liquidator with the following powers and functions:

2.1 to sell the property to either of the parties for a purchase price that he deems to be the true market price of such property;

2.2 to sell the property either by public auction or private treaty, on such terms and conditions, as they seem to him most beneficial;

2.3 to afford both parties the opportunity to make presentations to him about any matter relevant to these duties and to order the manner in which the proceeds of the joint property should be divided;

2.4 to sell the property provided that he has given both parties four weeks' notice of his intention to do so;

2.5 to sign any documents as may be necessary to effect transfer of the property sold from the persons in whose name it is registered to the purchaser thereof;

2.6 to afford both parties personally or duly represented, the opportunity to make representations to him about the identity of any purchaser, as well as a purchase price of the property, including but not limited to:

2.6.1 the time and or manner in which the property should be realised;

2.6.2 the prize for which the property should be realised; and

2.6.3 the sequence in which the property should be realized;

2.7 to engage the services of any suitably qualified person or persons to assist him in determining the true market value of the property, and to pay such person, the reasonable fees which may be charged by him/her;

2.8 to call upon either party to produce any books, statements, invoices, records and documentation which he may reasonably require;

2.9 to pay all debts in respect of the property;

2.10 to distribute the net proceeds accruing from the sale of the property, between the parties, in equal shares, alternatively as he deems fit based on any representations made to him by the respective parties;

2.11 to be entitled to apply to the above honourable court for any further directions that he may consider necessary;

2.12 to pay the reasonable fees of the receiver as per the tariff as prescribed in the Insolvency Act and to apportion such fees between the parties, in equal shares.

3. The respondent is ordered to pay the costs of the application.

D DOSIO

JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 1 July 2022

Date of hearing:	3 May 2022
Date of Judgment:	1 July 2022

Appearances:

On behalf of the applicant:	Adv. N. Lombard
Instructed by:	P.S Geddes Attorneys
On behalf of the respondent:	Adv. R. Kriek
Instructed by:	Mr CG Grove of Grove Attorneys