**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case No: 641/2019

In the matter between:

**ZORAH BANOO KHAN** **APPELLANT**

**and**

**SALIM MOHAMED SHAIK** **RESPONDENT**

**Neutral citation:** *Khan v Shaik* (641/2019) [2020] ZASCA 108 (21 September 2020)

**Coram:** CACHALIA, SALDULKER and NICHOLLS JJA and MATOJANE and SUTHERLAND AJJA

**Heard**: 4 September 2020

**Delivered**: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 September 2020.

**Summary**: Division of fruits of a universal partnership – claim to division is based on a personal right and not a real right – claim in respect of a universal partnership prescribes after three years from the termination of the universal partnership in terms of s 11*(d)* of the Prescription Act 68 of 1969 – termination date of universal partnership is a fact-specific issue; sometimes it may coincide with the termination of the consortium but not necessarily – claim prescribed as it was instituted more than three years after the universal partnership terminated.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Johannesburg (Weiner J sitting as court of first instance):

The appeal is dismissed with costs.

## JUDGMENT

**Sutherland AJA** (Cachalia, Saldulker and Nicholls JJA and Matojane AJA concurring):

### Introduction

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

[2] Ms Khan, the appellant, was the applicant a quo. She sought a declarator that she and Mr Shaik, the respondent, were in a universal partnership and that, because they had parted company, upon that premise, a liquidator be appointed to value the fruits of the partnership and distribute the value in equal shares to the partners. The application was dismissed. The basis for the dismissal was that her claim, if she had one, had prescribed. No finding was made that a universal partnership had actually

come into being.[1] The existence of the universal partnership was assumed purely for the purpose of deciding the prescription issue.

[3] Three critical findings were made by the court a quo. First, that the claim had been instituted six years after the consortium between the parties had terminated.[2] Second, that concomitantly, the universal partnership had terminated at the moment the consortium had ended. Third, that because such a claim fell within the provisions of ss 10(1) and 11*(d)* of the Prescription Act, the claim had prescribed after an elapse of three years from the date upon which the consortium ended.

[4] The counter proffered to these findings, as advanced on behalf of the appellant is twofold: first, that her claim was based on a real right which would not have prescribed within three years, and, second: in any event, even if a personal right, prescription of a claim in respect of a universal partnership cannot begin to run until a court pronounces a dissolution.

[5] Accordingly, the controversy requires these questions to be addressed:

(1) What is the character of the rights in a universal partnership possessed by a partner?

[1] It was, in any event, not open to the court a quo to have made a firm decision on the existence of a universal partnership because the facts averred to found such a claim were hotly disputed and therefore, had it been necessary to make such a firm decision, the matter was inevitably bound for referral to oral evidence or to trial. The appellant averred that they spent 20 years together as man and wife and that she was materially instrumental in building up a business owned by the respondent. He denied these averments.

[2] It was not part of the appellant's case that she and the respondent were married, whether in terms of a *Nikah* or otherwise. This was the case despite an allegation made by the respondent under oath that he and the appellant were 'common law spouses' and an admission by the respondent that he made that affidavit under pressure from the appellant.

(2) Is a claim to divide the fruits of a universal partnership based on a real or a personal right?

(3) Is the share claimed in a universal partnership a debt as contemplated by the Prescription Act?

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

(5) Is a court order necessary to terminate a universal partnership?

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

[6] The label 'universal partnership' in our law, refers to the *societas universorum bonorum* of the Roman-Dutch Law.[3] The elements of a relationship between two persons that evidences the existence of this species of partnership were most recently affirmed by this Court in *Butters v Mncora*:[4]

'I now turn to the relevant legal principles. As rightly pointed out by June Sinclair (assisted by Jaqueline Heaton), *The Law of Marriage* vol 1 274, the general rule of our law is that cohabitation does not give rise to special legal consequences. More particularly, the supportive and protective measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period (see eg *Volks NO v Robinson* 2005 (5) BCLR 446 (CC)). Yet a cohabitee can invoke one or more of the remedies available in private law, provided, of course, that he or she can establish the requirements for that remedy. What the plaintiff sought to rely on in this case was a remedy derived from the law of partnership. Hence she had to establish that she and the defendant were not only living together as husband and wife, but that they were partners. As to the essential elements of a partnership, our courts have over the years accepted the formulation by Pothier (RJ 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

[3] *Lawsa* vol 19 2 ed para 259ff.
[4] *Butters v Mncora* [2012] ZASCA 29; 2012 (4) SA 1 (SCA); [2012] 2 All SA 485 (SCA) para 11; see too: *Ponelat v Schrepfer* [2011] ZASCA 167; 2012 (1) SA 206 (SCA); [2012] 1 All SA 532 (SCA) paras 19-20.

(A) at 783H-784A; *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634C-F; *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 390A-C). The three essentials are, firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money or labour or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts (see eg *Bester v Van Niekerk* supra at 784A).'[5]

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

[8] 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 contributory efforts to building wealth.[6] A tacit agreement suffices.[7]

[5] The third element has been qualified in our law so that the objective may reach beyond profit making: *Butters v Mncora* para 18.
[6] *Butters v Mncora* paras 11 and 18; *Mühlmann v Mühlmann* 1984 (3) SA 102 (AD).
[7] *Butters v Mncora* para 18.

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

[9] In *Absa Bank Limited v Keet,* Zondi JA held:

'. . . the solution to the problem of the prescription is to be found in the basic distinction in our law between a real right (*jus in re*) and a personal right (*jus in personam*). Real rights are primarily concerned with the relationship between a person and a thing and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right.'[8]

[10] A claim based on a contract is, plainly, a personal not a real right. Because, as indicated, a claim to one's share in a universal partnership is, in truth, a demand that the partners account to one another and that one pay the other a portion, such a claim is inconsistent with asserting a real right.

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

[8] *ABSA Bank Limited v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA); [2015] 4 All SA 1 (SCA) para 20.

[12] The contention advanced on behalf the appellant that the concept of a universal partnership and the concept of community of property are indistinguishable is untenable. Reliance is place on a passage in *Booysen v Stander*[9]. That Court was called upon to decide whether a universal partnership had come into being. It cited the passage *in Butters v Mncora* at paras 11 and 18, part of which is cited above in this judgment, as setting out the applicable legal principles. Thereupon the Court stated that:

> '[75] As previously stated, a universal partnership is similar to a marriage in community of property. It is trite that the nature of the relief which parties can claim when married in community of property is either an order for division of the joint estate or an order for forfeiture of the benefits of the marriage in community of property. It is furthermore trite that each spouse automatically shares in the assets that are accumulated during the subsistence of the marriage. The moment spouses enter into a marriage in community of property they become co-owners of everything that either of them owned prior to the marriage. Furthermore, a marriage in community of property not only results in community of assets, but also in community of liabilities.
>
> [76] These fundamental legal principles therefore reinforce my view that the plaintiff's claim based on *actio communi dividundo* cannot be sustained as it is near impossible to untangle the threads of interwoven narratives of life partners, which have layered complexities akin thereto, in the advancement of a joint household.' (Underlining supplied)

On the basis of the underlined sentence it is contended on behalf of the appellant that this case is authority for the proposition that partners in a universal partnership are co-owners of property. It is unlikely that this was the meaning which the Judge sought to express in that passage because such a meaning would directly contradict the passages cited from *Butters v Mncora*. A better reading of this passage is that a comparison was drawn between a universal partnership and community of property

[9] *Booysen v Stander* 2018(6) SA 528 (WCC) at paras 75-76.

in order to remark that in both instances there was a need to divide up the assets upon a termination, rather than to state that a joint ownership of the assets existed. If the Judge did intend to state that partners in a universal partnership are joint owners of assets that statement of the law would be incorrect.

[13] In addition, a number of cases were cited of behalf of the appellant to offer purported further support for the contention that the appellant was asserting a real right. However, all the cases cited are examples of joint ownership of assets. Therefore, reliance on them avails the appellant not at all.[10] In any event, in this case, the appellant has not purported to formulate a vindicatory claim; rather, the relief sought is a declaratory order that the universal partnership existed, an order dissolving it, and the appointment of a liquidator to determine the assets in the 'joint estate of each party'[11], liquidate them and distribute equal shares to the partners.[12] Lastly, as held, in this Court, in *Carmel Trading Co Ltd Commissioner, South African Revenue Services & Others,* 'a former partner has no *proprietary* claim in respect of the property of the dissolved partnership'.[13]

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

[14] The provisions in the Prescription Act relevant to a contractual claim are these:

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[10] *Staegeman v Langenhoven* [2011] ZAWCHC 302; 2011 (5) SA 648 (WCC); *Mbalo v Makhosonke* [2015] ZAWCHC 91; *Salaman v Salaman* [2008] ZAKZHC 61.

[11] The articulation of each partner having a 'joint estate' is of course a misnomer; it is however correct that the estate of *each* partner would be a contributor to the universal partnership.

[12] Notice of Motion: Record, page 1-2, prayers1-4. See *Staegeman v Langenhoven* where it was held that the *rei vindicatio* (a claim based on a real right) was not a 'debt' contemplated by s 10 of the Prescription Act.

[13] *Carmel Trading Co Ltd v South African Revenue Services & Another* 2008 (2) SA 433 (SCA) at para 15.

'**10. Extension of debts by prescription**

(1) . . . a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

. . .

**11. Periods of prescription of debts**

The periods of prescription of debts shall be the following:

. . .

*(d)* save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[15] Thus, a claim by one partner against the other to account for a share in a universal partnership, which claim is based on a contract, is therefore a claim to enforce a personal right which is a debt as contemplated by the Prescription Act.

[16] The scope of the term 'debt' in the Prescription Act has been the subject of clarification. Most recently, in *Off Beat Holiday Club & another v Sanbonani Holiday Spa Shareblock Ltd*[14], the Constitutional Court affirmed the dictum in *Makate v Vodacom Ltd*[15] that the scope of a 'debt' is that as formulated by Holmes JA in *Escom v Stewarts and Lloyds of South Africa*[16]*: '* ...a debt is - that which is owed or due; anything (as money, goods or services) which one person is under an obligation to pay or render to another*'* A claim founded on contract is such an obligation, of which, a universal partnership is an example.[17] It was argued that there is a similarity between the claim to share in a universal partnership and the circumstances in *Makate v Vodacom Ltd.* This idea is untenable. In *Makate* v *Vodacom Ltd*, it was recognised that a contract had not yet come into being and thus

[14] 2017(5) SA 9 (CC) at para 44
[15] 2016 (4) SA 121 (CC) at para 93
[16] 1981(3) SA 340 at p344E- G
[17] See too, eg: *Robson v Theron* 1978 (1) SA 841 (AD) at pp 848Hff and esp at p 849D: 'The *actio pro socio* was a personal action which arose from the partnership agreement (*ex contractu societatis*)'

a debt had not yet arisen. A claim to share in a universal partnership is squarely founded on a contractual debt which has fallen due and payable.

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

[17] Section 12 of the Prescription Act provides that: 'prescription shall commence to run as soon as the debt is due.' Accordingly, a claim to share in a universal partnership prescribes after three years from the moment the claim arises, ie, the termination of the universal partnership.

[18] It is necessary to determine what significance to attach to the moment the consortium ends as an appropriate date to signal the end of the universal partnership.

[19] Before the court a quo it was common cause that the claim had been instituted six years after the termination of the consortium. The consortium ended when the respondent left the common home never to return, whereupon he took up with another woman whom he later married. The affidavits are quite explicit about this event. The appellant alleged that the respondent left the common home in 2009 and the respondent confirmed this, adding that: '…I took all my moveable assets with me and the [appellant] kept all her moveable assets. When we separated in 2009, we divided the assets and the relationship was finalised and terminated.' The appellant in a replying affidavit, agreed with that assertion adding the allegation that the respondent '…intended to leave me with the immovable property to be my sole and exclusive property'.

[20] Thereafter the partners had no dealings with one another either intimately or in the business to which the appellant says she contributed. Save for the conflict that flowed from the respondent's endeavours to evict the appellant from the former common home which had been, by then, registered in the name of his wife, they had no further contact.

[21] The court a quo concluded that the claim arose upon the termination of the consortium. On that premise, the prescriptive period of three years had elapsed before summons was issued.

[22] In reaching this result, the Court a quo relied on the decision of the Western Cape High Court in *Schrepfer v Ponelat.*[18] In that case the conclusion was reached that the consortium and the universal partnership ended simultaneously. This dictum in *Schrepfer v Ponelat* is baldly stated and it is not entirely clear that it was intended to *equate* the end of the consortium with the end of the universal partnership.[19] The matter went on appeal to this Court where the finding as to the date upon which the universal partnership ended was neither disturbed nor commented upon. However, what was noted was that after the termination of the consortium, the defendant made payment to the plaintiff of a monthly sum of R1500 for the next 22 months.[20] This fact was not considered pertinent to the determination of the date of the termination of the universal partnership in either judgment.

[18] *Schrepfer v Ponelat* [2010] ZAWCHC 193 para 31.

[19] Ibid.

[20] *Ponelat v Schrepfer* para 15.

[23] The decision of the Western Cape High Court in *Schrepfer v Ponelat* was also relied on in argument on behalf of the appellant to excuse the six-year delay because the plaintiff in that case had instituted her claim four years after the claim arose. However, this aspect of the case is unhelpful to the argument because in that case the Court was not called upon to address a question of prescription. A court has no competence to raise the issue of prescription mero motu.[21]

[24] The decision in *Schrepfer v Ponelat* can be contrasted with the decision in *Cloete v Maritz II*,[22] 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.[23]

[25] What follows from a consideration of these examples is that there is no magic in the date the consortium ends for the purposes of determining the ending of the universal partnership nor, axiomatically, the date for computing the beginning of the running of prescription of a claim in respect of a universal partnership. On appeal in *Ponelat v Schrepfer*, Meer AJA had this to say:

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[21] See: Section 17 (1) A court shall not of its own motion take notice of prescription.(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.

[22] *Cloete v Maritz* (2014) ZAWCHC 108 (*Cloete v Maritz II*). A related dispute is the subject matter of a separate judgment: *Cloete v Maritz* [2013] ZAWCHC 69; 2013 (5) SA 448 (WCC) (*Cloete v Maritz I*).

[23] *Cloete v Maritz II* paras 11, 18 and 100.

'A universal partnership exists if the necessary requirements for its existence are met, and this is regardless of whether the parties are married, engaged or cohabiting.'[24]

[26] Therefore, the findings in *Schepfer v Ponelat,* in *Cloete v Maritz II* and in the court a quo, must be understood to be findings of fact, not statements of principle.

[27] In the court a quo, the circumstances described by the appellant showed that the joint enterprise between her and the respondent indeed ended at the same time the consortium ended. In *Cloete v Maritz* the opposite was evidenced. In *Schrepfer v Ponelat*, the payment of what was in effect a miserly maintenance allowance did not give rise to an inference of a continuation of any joint enterprise; their joint efforts had been extensive and related to successive enterprises, which activity ceased simultaneously with the ending of the consortium.

[28] Accordingly, as alluded to earlier, because the substance of a universal partnership is a pooling of risk and reward, although the commonplace rationale to engage in such a joint effort may be rooted in a romantic relationship and indeed sustained by it, the consortium is not the substratum of the legal relationship of a universal partnership nor its alter ego. As ever, the date when prescription starts to run is a fact-specific determination.

[24] *Ponelat v Schrepfer* para 22; see too *Butters v Mncora* para 11: 'cohabitation does not give rise to special legal consequences.'

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

[29] A further contention was advanced on behalf the appellant that a partnership is extinguished only at the time a court so orders. It was conceded that an agreement between the partners could also dissolve a partnership. Moreover, the argument runs on to posit that even an order of dissolution is not the actual moment of dissolution because that can only occur when the assets are distributed – a proposition which seems inconsistent with the earlier contention. The supposed force of this thesis is that prescription cannot run until the liquidation of the partnership and because, as in this case, a liquidation has not yet happened, albeit many years later, prescription has yet to begin to run. Such a proposition is tantamount to saying that a claim to share in a universal partnership is not susceptible to prescription at all. This proposition is advanced on the premise that the claim is based on a personal right.

[30] The thesis is unsustainable even on its own terms. The executory acts required to identify assets, determine value for the purposes of the partners accounting to one another and effecting a physical distribution have no bearing on the date that the partnership terminated. Such happenings are, by definition, possible only after the date of dissolution of the partnership has been determined. The allusion to s 13(1)*(d)* of the Prescription Act,[25] which inhibits a debt owed by one partner to another during

[25] **"**Section 13 (1) If-

> (a)….(c)
> (d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship;….
> (e) ….(h)
> (i) and, the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph *(a), (b), (c), (d), (e), (f), (g)* or *(h)* has ceased to exist,
> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph *(i).*

the existence of the partnership, cannot have any bearing on the running of prescription after the partnership has ended. The example proffered in support of the argument on behalf of the appellant is that in *Van der Merwe v Sekretaris van Binnelandse Inkomste*[26] where the remark was made that for the purposes of the liquidation the partnership continued to exist. The case is plainly unhelpful to the argument. The circumstances there were that a partner in a commercial partnership had died. Axiomatically, there had to an accounting of what was due to his estate at the moment of death. Revenue from work–in–progress was calculated and paid to the estate. That exercise took time. Plainly for the purposes of that calculation, the *corpus* of the partnership remained *in esse*.

**Conclusions**

[31] Accordingly:

(1) A claim to share in a universal partnership is based on a personal, not a real right.

(2) Such a claim prescribes after three years from the termination of the universal partnership in terms of s 11*(d)* of the Prescription Act.

(3) 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.

(4) In this case, the universal partnership did terminate at the same time as the consortium and more than three years elapsed before a claim was instituted; therefore, the appellant's claim had prescribed.

[26] 1977 (1) SA 472(AD) esp at p 473F

## The Order

The appeal is dismissed with costs.

**ROLAND SUTHERLAND**
**ACTING JUDGE OF APPEAL**

APPEARANCES:

| | |
|---|---|
| For the appellant: | Attorney Y Omar, |
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