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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO: 24545/2015

23/3/2018

In the matter between:

Z B K

Applicant

And

S M S

Respondent

JUDGMENT

WEINER, J:

[1] The applicant sought an order declaring that a universal partnership existed between the applicant and the respondent in which the parties held equal shares. She further sought the dissolution of the partnership and the appointment of one Mohamed Seedat as receiver and liquidator of the partnership estate to *inter alia* collect the assets, pay liabilities and distribute the residue of the joint estate in equal shares.

BACKGROUND

[2] The applicant alleged that she and the respondent lived together in a relationship "*likened to that of husband and wife*" from 1984 until 2009. She alleges further that the respondent bought her many rings as an indication of his commitment and that, in their community, they were treated as a married couple. She sets out the duties that she performed, *inter alia*, in regard to their domestic life.

[3] The applicant contends that during the early 1990s she persuaded the respondent to start a business known as Lumen Electrical and that they both contributed to the business in various ways.

[4] Accordingly she alleges that she contributed directly and indirectly to the maintenance and increase of the estate of the respondent and that the respondent's business became very successful due, *inter alia*, to her contribution.

[5] The applicant states that the respondent left the common home during 2009 and thereafter attempted to have her evicted from the common home. He then attempted to transfer the property into the name of his wife, Mrs F G and the relationship terminated in 2009.

[6] Applicant states that, as she and the respondent pooled their assets, income and labour, for their joint benefit, they expressly, *alternatively* tacitly, *alternatively* by implication entered into a universal partnership in equal shares. They accumulated a joint estate including a property which was registered in the name of the respondent and which was the common home for her and the respondent. She accordingly claims that she has a case for the declaration of a universal partnership, the dissolution thereof and after the receiver has performed his duties, a pay out to her of 50% of the residue of the estate.

[7] The respondent stated firstly that this application should not have been brought by way of motion in that disputes of fact were obviously anticipated.

[8] The respondent raised the question of prescription in his answering affidavit. However, the parties did not deal specifically with this point in their heads of argument and further heads of argument were requested from the parties which were filed in accordance with my direction.

PRESCRIPTION

[9] It is common cause that the relationship between the parties (whatever it may have been) terminated in 2009. The applicant has made no attempts since 2009 to obtain any relief in regard to the partnership which she claims.

[10] The respondent contends that the applicant claims a monetary amount in that she prays that a liquidator be appointed and that the determined value be paid to the applicant.

[11] It is common cause that the application was issued on the 1st April 2016.

[12] Section 10(1) read with section 11(d) of the Prescription Act¹ (the Act) provides as follows:

"10(1) Subject to the provisions of this Chapter and Chapter IV, 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. The periods of prescription of debt shall be the following:

' ...

(d) Save where an act of Parliament provides otherwise, three years in respect of any other debt."

[13] Section 12 of the Act provides that:

"(1) subject to the provisions of subsections (2) and (3) prescription shall commence to run as soon as the debt is due;

(2) ...

(3) a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have

¹ Act 68 of 1969

such knowledge if he could have acquired it by exercising reasonable care."

[14] The rationale behind the principle of extinctive prescription was dealt with by the Supreme Court of Appeal (SCA) in the matter of *KLD Residential CC v Empire Earth Investment 17 (Pty) Ltd*² where the following was stated:

"[13] One of the principal reasons for extinctive prescription is to provide certainty to a debtor - after a period of time when the creditor has been inert, the debtor should have certainty as to whether or not a debt is still owed. The three-year period over which prescription runs is regarded as being enough time for the creditor to enforce the obligation, and conversely, if it is not enforced within that time, the debtor may be certain that the obligation has ended. The debtor is protected save where the reasons for the principles underlying prescription fall away and the protection of a creditor is justified.

[14] This is clearly explained in Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1994(1)SA 571 (A) at 578 F-H where Grosskopf AJA said:

'Although many philosophical explanations have been suggested for the principles of extinctive prescription ... its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or if it did, whether it has been discharged. . . . The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc.

These sources of uncertainty are reduced by imposing a time limit on the existence of a debt, and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (s 11 of the Act).'

² 2017(6) 55 SCA

[15] The justifications for extinctive prescription are also to be found in *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC) and *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus & others* [2016] ZACC 49 paras 28 to 30. In *Mdeyide*, Van der Westhuizen J said (para 8):

'This Court has repeatedly emphasized the vital role time limits plays in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be able to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law.' have become lost, witnesses may no longer be able to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law."

[15] Although the term "debt" is not defined in the Act, it has been held that it refers to anything that is owed or due such as money, goods or services that a debtor is under an obligation to pay or render to a creditor. See *CGU Insurance Limited v Rumdel Construction (Pty) Limited*.³

[16] In *Desai NO v Desai and Others*⁴ the SCA held that the word "debt" is assigned and wide and general meaning which includes an obligation to do something or refrain from doing something. The word "debt" denotes whatever is due from any obligation. See also *Electricity Supply Commission v Stewarts & Lloyds of South Africa*.⁵

[17] Respondent accordingly contends that, in seeking an order to appoint a receiver and liquidator, and once he has collected all assets and discharged all liabilities, to pay the parties their share, amounts to an obligation which is included in the meaning of the word "debt". Therefore, the applicant's claim has

³ [2003] 2 All SA 597 (SCA).

⁴ 1996 (1) SA 141 (SCA) at 146/- 1 47A,

become prescribed. The applicant however submits that her claim is based on a right subject to acquisitive prescription as opposed to extinctive prescription. Her claim, it was contended, was one for ownership and is a real right subject to acquisitive prescription and not a debt for the purposes of extinctive prescription. She claims, according to the submissions of her counsel, a real right to the property that she and the respondent accumulated over the years, which claim is based on a real right as co-owner with the respondent of partnership assets and therefore extinctive prescriptive cannot arise.

[18] The applicant seeks to rely on cases where a court must issue an order dissolving the partnership before a claim arises. In *Mbalo v Makhosonke*⁶ the parties lived together in a relationship but did not marry. They bought a house together and became co-owners of same. At para [38] of the judgment the court found that *"claims flowing from a partnership are protected against the running of prescription until after dissolution thereof"*. Applicant accordingly contends that prescription can only arise after the partnership estate is dissolved.

[19] The distinction between the present case and the cases relied upon by the applicant are that, in all the authorities referred to by the applicant, the plaintiff was already a co-owner. In the present case, the applicant seeks the declaration that a universal partnership exists. She does not have a real right but only a personal right which is subject to the principles of prescription. In *Schrepfer v Ponelat*.

⁵ 1981 (3) SA 340 (A) at 344F-G.

⁶ Case Number 21021/13 Western Cape High Court

⁷ (17 318/2009)(2010] ZAWCHC 193 (26 August 2010)

Moosa J held that when the relationship came to an end, and the parties separated, the universal partnership terminated when the relationship ended. This finding was not disturbed on appeal.⁸

[20] The facts in this case are in line with those in the *Schrepfer* case. This is in contrast to the case of *Salaman v Salaman*⁹ where the parties who were married in community of property had divorced. It was held that when the joint estate was dissolved by the court in 1997, the decree of divorce which dissolved the parties' marriage did not dissolve co-ownership over the property.

[21] In *Cloete v Maritz*.¹⁰ The defendant argued that according to him, the relationship between the parties was terminated on 22 March 2009, after which, there was barely any contact between them. The evidence indicated that until June 2010, the plaintiff was still engaged in partnership business, even though the romantic relationship had ceased to exist, on the Defendant's version on or during March 2009. It was held that, the universal partnership continued to exist at least until June 2010, thus when her claim was made on 16 August 2012, it had not prescribed.

[22] This is, in contrast to the present case, where it is common cause that the relationship (romantic or otherwise) terminated in 2009.

[23] In *Mbalo v Makhosonke and Others*¹¹, Cloete J had to deal with the issue of prescription where the respondent "relied on the decision in *Claassen v Quenstedt and Others 1199/2011 [2014] ZAECPHC 18 (25 March 2014)*. There the court held that the *actio communi dividundo* distinguishes between a claim for termination of co-ownership flowing from a partnership and one which does not; and that accordingly only claims flowing from a partnership are protected against the running of prescription until after dissolution thereof in terms of s 13(d) of the Prescription Act 68 of 1969. The respondent thus argues that any amounts expended by the applicant on the property more than three years ago have prescribed in terms of s 11(d) of that Act."¹²

⁸ 2012 (1) SA 206 (SCA)

⁹ *Salaman v Salaman and Another (9058/2007) [2008] ZAKZHC 61 (29 August 2008)*

¹⁰ Case No:6333/2010 & 16433/2012 delivered 13 June 2014

¹¹ *supra*

¹² @[38]

[24] Cloete J held¹³ *"Having regard to the limitation clause ins 36 of the Bill of Rights it would in my view amount to unfair discrimination to find that where parties are co-owners but are not married to each other and do not have a partnership agreement, they do not enjoy the same protection under s 13. It is not difficult to envisage a situation where, as in Claassen, parties cohabit in a romantic relationship for years, and only once that relationship ends do they give any consideration to how their respective contributions to their joint property should be taken into account. If individuals in a partnership, whether it be universal or a commercial enterprise, and spouses are protected, so too should persons in far more vulnerable situations such as the applicant"*. He thus disagreed with the finding in Claassen in relation to the whether parties, not married, were protected.

[25] The present case is distinguishable as Cloete J was dealing with co-ownership. As stated above, the plaintiff is not a co-owner of the property. There is presently no partnership between the parties nor is there a co- ownership issue, which would affect the running of prescription.

[26] In my view the plaintiff's claim arose when the relationship terminated, on the common cause facts, in 2009, and the claim for the declarator and payment has therefore prescribed.

Accordingly, the following order is made:

1. The application is dismissed.
2. The applicant is to pay the respondent's costs.

S WEINER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

¹³ @[44]

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DATE OF JUDGMENT*

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