

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON RULE 90 APPLICATION

Case no: HC-MD-CIV-ACT-MAT-2017/03195

In the matter between:

M B

APPLICANT

and

D B

RESPONDENT

Neutral Citation: *MB v DB* (HC-MD-CIV-ACT-MAT-2017/03195) [2018] NAHCMD 266
(31 August 2018)

CORAM: PRINSLOO J

Heard: 02 August 2018

Delivered: 28 August 2018

Reasons: 29 August 2018

Flynotes: Partnership — Marriage out of community of property — Tacit universal partnership agreement — Whether antenuptial contract precluding conclusion of such

agreement — Evidence required for manifestation of conduct consistent with universal partnership — Court must be satisfied that it was more probable than not that agreement came into existence.

ORDER

a) The respondent is interdicted and refrained from instructing his legal practitioner of record and/or any other legal practitioner and/or person to pay out the proceeds of the sale of the immovable property situated at 16 Pretorius Street, Pioneers Park, Windhoek or any money emanating from the said sale to the respondent and/or to any other person or entity, pending the finalization of the action of divorce, currently pending between the parties;

b) That Anne-Doris Hans-Kaumbi of Ueitele & Hans Incorporated and/or Elmarie Visser of Harmse Attorneys and/or any other legal practitioner or other person involved in the transfer of the said immovable property be instructed by the respondent to retain the proceeds of the sale and/or any monies emanating from the sale of the immovable property situated at 16 Pretorius Street, Pionierspark, Windhoek in his or her trust account, alternatively that the respondent be ordered to instruct his legal practitioner of record and/or other person involved in the transfer of the said immovable property or monies emanating from the transfer of the said sale to the trust account of Delport Legal Practitioners, pending the finalisation of the action of divorce between the parties.

c) Issue of cost to stand over for determination in the main action.

Further conduct of the matter:

d) Matter is postponed to 13 September 2018 at 15:00 for Status Hearing.

RULING IN TERMS OF PD 61 OF THE PRACTICE DIRECTIVES

PRINSLOO J:

The pleadings

[1] In this application the applicant and the respondent are married out of community in terms of an ante-nuptial contract specifically excluding community of profit and loss.¹

[2] The divorce proceedings in this matter were instituted on 04 September 2017 and the applicant, who is the defendant in the main action, filed her counterclaim on 03 November 2017.

[3] In claim 2 of the applicant's counter claim, she pleads the existence of a universal partnership. She pleaded that during the subsistence of the marriage the parties commenced for their joint benefit a business venture, Danmar Transfers and that in respect of this joint business venture the parties would both contribute the labour, services and skills to the business. Neither of the parties would receive a fixed salary from the said business but would by mutual agreement draw money from the profits of the business for their joint benefit and for the benefit of the joint household.

[4] She further pleaded that at all material times an express, alternatively tacit, alternatively implied term of the partnership agreement was that the common home situated at 16 Pretorius Street, Pionierspark, would be maintained by the business in that all the bond repayments, utility charges, insurance and maintenance on the property would be settled by the proceeds generated by the business and as such the immovable property would form part of the universal partnership assets.

¹ Paragraph 5 of Antenuptial Contract: Pleadings Bundle page 9.

[5] The applicant therefore prayed in her counterclaim for a declaratory order declaring that a universal partnership existed between the parties and that the immovable property be declared as a partnership asset.² Further, should the declaration be made, the defendant accordingly prays that this court should simultaneously have the partnership dissolved effective from the date when the decree of divorce was granted.³

The application

[6] The bone of contention between the parties is the common home situated at 16 Pretorius Street, Pionierspark, as the respondent, in whose name the property is registered, sold the property to a third party and this caused the applicant to approach this court on 04 July 2018. Initially, the applicant sought on an urgent basis in terms of her notice of motion, an order comprising for provisional relief to restrain the respondent and/or his legal practitioner and/or the conveyancer attending to the transfer of the immovable property from paying out the proceeds of the sale of the immovable property pending finalisation of the action for divorce.

[7] However, on the said date, an undertaking was given by the respondent's legal practitioner not to proceed with the transfer of the matter, which caused the issue regarding urgency to fall away and the matter was postponed for subsequent hearing of the application.

[8] In considering the application, the court is mindful of the fact that as the parties are not married in community of property, the applicant has no vested rights in any of the assets invested or registered (as the case may be) in the name of the respondent, be it money, shares, movable or immovable property, or indeed any other item in, or portion of, his estate. However, as discussed above, there was reliance on a universal partnership in the action accompanied with the relevant prayers for dissolution of the partnership; a statement and debatement of account in respect of the commonly held

² Pleadings Bundle at page 18 ad claim 2 paragraph 5.

³ Pleadings Bundle at page 18 ad claim 2 paragraph 6.

assets; a division of those assets; and payment to the partners in accordance with their respective shares.

Burden of proof

[9] In order to succeed in her prayer for the relief *pendente lite*, the applicant must show that he or she has reasonable prospects of success in the main action. That requirement means that the applicant has to prove that he or she has a prima facie case.⁴

[10] In discussing the issue of burden of proof that rests on an applicant in a petition of this nature, it was held in the matter of *Hamman v Hamman*⁵ that:

'In order to decide whether a prima facie case has been made out in a petition of this character, the Court must ask itself whether, if all the allegations in the petition were proved, the applicant would succeed in the main action. The Court cannot speculate as to who is likely to succeed by nicely balancing the probabilities. Of course, where a respondent produces overwhelming proof (such as correspondence or documentary or equally convincing evidence) showing that there is no foundation at all for the allegations in the petition, the Court would be obliged to hold on the papers that a prima facie case had not been made out and the test set out above would not be applicable. Short of such evidence by the respondent, however, the Court will assume that the allegations in the petition are capable of proof and will consider whether the applicant would be entitled to judgment in the main case, if the facts set out in the petition were proved.'

The applicable legal principles

[11] A universal partnership was a concept that has gained recognition in our common law and was divided in two categories, namely: a *societas universorum quae ex quaestu veniunt* (parties intend that all they have acquired during the existence of the partnership, from any and every kind of commercial venture, formed part of the

⁴ *Muhlmann v Muhlmann* 1984 (1) SA 413 (W) at 417E; *Du Plooy v Du Plooy* 1953 (3) SA 848 (T) at 852B; *Hamman v Hamman* 1949 (1) SA 1191 (W) at 1193.

⁵ 1949 (1) SA 1191 at 1193.

partnership property) and a *societas universorum bonorum* (parties agree to put in a common stock all their property, both present and future, including all the acquisitions, whether from commercial endeavours or otherwise).⁶

[12] The applicant in the matter *in casu* relies on universal partnership *societas universorum quae ex quaestu veniunt* which was made clear from the papers on which the applicant was relying.

[13] The three essentials of a universal partnership that have been accepted by our courts are:⁷

- a) that each of the partners bring something into the partnership, whether it be money, labour or skill;
- b) that the business should be carried on for the joint benefit of the parties; and
- c) that the object should be to make a profit.⁸

[14] The applicant alleges that the universal partnership came into existence by tacit agreement. In this regard in *LM v JM and Others*,⁹ the court went further to outline what elements the respondent/plaintiff needs to prove in order to establish that a tacit universal partnership exists:

'As in all such cases, the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their

⁶ *AP v EP and Others* 2017 (1) NR 109 (HC).

⁷ *LM v JM and Others* 2016 (2) NR 603 (HC) para 11 wherein *Butters v Mncora* 2012 (4) SA 1 (SCA): dicta at 5E – G is approved; *Behrenbeck v Voigts* (I 746-2014) [2015] NAHCMD 72 (23 March 2015).

⁸ In essence therefore, a partnership is the carrying on of a business (to which each of the partners contributes) in common for the joint benefit of the parties with a view to making a profit.

⁹ *Supra* at footnote 7.

agreement. In any analysis of the evidence the most important considerations are thus whether either party said or did anything to manifest his or her intention and, if so, what the reaction of the other was. Where the tacit agreement that is relied on is one of universal partnership, the cardinal intention of both parties must be to share in the profits of the subject matter alleged to be covered by the agreement.'

[15] The respondent denied in his papers that a universal partnership existed between the parties but appears to be hot and cold in his averments in this regard.

[16] The following are common cause between the parties:

(a) that the joint business venture came into existence during the subsistence of the marriage;

(b) that the respondent contributed to the joint business venture by running the day to day aspects of the business whereas the applicant acted as bookkeeper for the business;

(c) that neither of the parties drew a salary but drew from the profits of the business for their joint benefit and for the joint household;

(d) that the following was also paid by the joint business venture:

- i. bond payments of the immovable property;
- ii. the short and long term insurance payments;
- iii. the utilities and maintenance of the immovable property. The utilities were however later on paid from the proceeds of the rental income received in respect of a flat that is situated on the property.

[17] The respondent alleged that the bond payments effected in respect of the immovable property was rent as the business venture was situated on the property which is registered in his name. However, the respondent failed to submit any proof of the rental agreement setting out the terms of the agreement.

[18] Contribution to domestic expenses does not in itself constitute a legal partnership however, the joint business venture was operated for profit. The respondent had access to the profits and both the parties could draw from the profits by mutual agreement.

[19] In his answering affidavit the respondent alleges that he received merely a salary as the applicant was the sole member of the CC.

[20] If one has regard to the affidavits of both parties, it is clear that they shared in the profits of the business venture by agreement and that the respondent did not earn a salary as alleged.

Conclusion

[21] I am of the view that where parties, even though married out of community of property, with the exclusion of community of property, profit and loss, carried on a *bona fide* business and the essentialia to create a partnership agreement are present, a partnership exists. I am further of the considered view that the applicant has proved the facts as set out in her founding affidavit that she would have reasonable prospects of success in the main action. I am thus satisfied that the applicant has proven that she has a prima facie case in respect of her petition and that the court should grant the relief sought in the Notice of Motion.

[22] My order is therefore as follows:

a) The respondent is interdicted and refrained from instructing his legal practitioner of record and/or any other legal practitioner and/or person to pay out the proceeds of the sale of the immovable property situated at 16 Pretorius Street, Pioneers Park,

Windhoek or any money emanating from the said sale to the respondent and/or to any other person or entity, pending the finalization of the action of divorce, currently pending between the parties;

b) That Anne-Doris Hans-Kaumbi of Ueitele & Hans Incorporated and/or Elmarie Visser of Harmse Attorneys and/or any other legal practitioner or other person involved in the transfer of the said immovable property be instructed by the respondent to retain the proceeds of the sale and/or any monies emanating from the sale of the immovable property situated at 16 Pretorius Street, Pionierspark, Windhoek in his or her trust account, alternatively that the respondent be ordered to instruct his legal practitioner of record and/or other person involved in the transfer of the said immovable property or monies emanating from the transfer of the said sale to the trust account of Delport Legal Practitioners, pending the finalisation of the action of divorce between the parties.

c) Issue of cost to stand over for determination in the main action.

Further conduct of the matter:

d) Matter is postponed to 13 September 2018 at 15:00 for Status Hearing.

J S Prinsloo
Judge

APPEARANCES:

APPLICANT:

H Garbers-Kirsten

instructed by Delport Legal Practitioners, Windhoek

RESPONDENT:

A Kaumbi

of Ueitele & Hans Inc., Windhoek