JOSEPHINE DZELIWE C CHAMBERS

V

PETER DUNSEITH NO.

and three others

Case No 1193/92

Coram	Sapire CJ
For Applicant	Mr. P Shilubane
For Respondent	Mr. P Flynn

JUDGMENT

This as appears from the case number is a long outstanding matter

The applicant seeks an order that

a) the applicant is entitled to receive transfer of the property described as Portion 20 of Farm No. 188 Dalreiach situate in the Hhohho district in trust as provided for in clause 8 of the ante-nuptial contract entered into by her with the late Morris Victor Chambers on the Second October 1984

b) the Master of the Supreme Court should not be authorised and empowered to appoint Bahngase Patrick Mzabalo Zwane to be the trustee for purposes of effecting transfer of the aforesaid property.

c) the costs of the litigation be paid from the estate of the late MORRIS VICTOR CHAMBERS.

The application commenced with a claim for an interdict pending the outcome of the application and a rule issued granting the interdict and calling on the Respondents to show cause why the relief claimed should not be granted. Without commenting on the propriety of seeking relief in this way, the matter was heard by me as an application for confirmation of the Rule granted by Rooney J more than five years ago.

The facts upon which the relief is claimed are not in dispute and are recited in the Applicant's founding affidavit.

The applicant describes herself as an adult woman, a divorcee residing in Mbabane

The First respondent is the executor in the estate of the late Morris Victor Chambers. The deceased was the applicant's husband. The other respondents are children of the deceased born of a previous marriage.

The applicant and the deceased were married to each other in England on 5th October 1984. The marriage was dissolved by order of an English Court on 14th December 1989. No children were born of the marriage.

The parties have not contended that the position of either of them is affected by the order of divorce. This position would seem to be justified and in accordance with authority.

See The South African Law of Husband and Wife H R Hahlo 4th Edition p 313

The claim arises from a term of the ante nuptial contract concluded and registered before the marriage of the applicant to the deceased.

The term for consideration reads as follows

> "That upon the death of MORRIS VICTOR CHAMBERS plot 250 Pine Valley, Dalriach Swaziland shall devolve in trust for the benefit of the issue of the marriage in equal shares and in ownership upon such issue attaining respectively the ages of twenty one years. In the event of there not being any issue the same property shall devolve in trust for JOSEPINE CORDELIA DZELIWE HLETA, in terms of such trusts to be regulated by the will of MORRIS VICTOR CHAMBERS"

The applicant contends that, there being no issue of the marriage, on the death of the deceased she became entitled as beneficiary of a trust referred to in the term of the ante nuptial contract quoted above, to have the property transferred from the estate to a trustee who is to hold the property for her benefit.

Mr. Shilubane argued that the omission to appoint or nominate a trustee was not fatal to this claim, and that it would be proper and competent, for the court to make its own nomination. This submission is made on the authority of cases such as The *Master v Edgecombe's Executors and Administrators 1910 TPD 263, Port Elizabeth Assurance Agency v Estate Richardson 1965(2) SA 936* and others quoted with approval in **The Law of Succession in South Africa,** Corbett Hahlo Hofmeyer and Kahn at page 415.

The respondent opposes the granting of the relief on two grounds. The first of these is that the provision of the Ante Nuptial contract quoted is a *pactum successorium* and as such unenforceable.

This in turn raises two questions. Is the term of the ante nuptial contract a pactum successorium? If so, is it invalid ? Mr. Shilubane on behalf of the applicant contended that being a term of a duly registered ante nuptial contract it is an exception to rule that such agreements were unenforceable.

The most recent pertinent case decided in the South African Appellate Division is

McAlpine v McAlpineNO and another 1997 (1) SA 736 (A)

This case is in the first place authority for the invalidity or unenforceability of such provisions or agreements. The case does not deal with the possible exception to the rule of a term in an ante nuptial contract.

The case does however review and resatate the test for the distinction between a pactum de successorium and a donation mortis causa. The relevant portion of the headnote reads as follows:

> "Per Corbett CJ; Howie JA, Olivier JA and Scott JA concurring; Nienaber JA dissenting.) It is generally accepted today that the reasons for the pactum successorium being visited by invalidity are that it fetters the freedom of testation of B the party conferring the asset in question upon another and that it constitutes an evasion of the formalities required in respect of testamentary instruments. (At 747E-F.) The classic pactum successorium described by the Roman-Dutch authorities includes not only the 'direct' pactum successorium (contracts which relate directly to the contents of a will), but also the 'indirect' pactum successorium where, in terms of a contract and without reference to wills, A and B agree to appoint each other as heir to their entire or to part of or to a single asset of their respective estates. (At 748I-J, read with 749E.) The most appropriate test for determining whether or not a contract amounts to a pactum successorium is the vesting test (at 752D/E), applied by asking whether the promise disposing of an asset in favour of another causes the right thereto to vest in the promisee only upon or after the death of the promisor (which points to a pactum successorium); or whether vesting takes place prior to the death of the promisor, for instance at the date of the transaction giving rise to the promise (in which case it cannot be a pactum successorium). (At 750C-E.)
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> The application of the vesting test involves the distinction being drawn between vested and contingent rights. (At 751D/E.) Whether in a particular case words of futurity postpone vesting or merely postpone enjoyment depends, ultimately, on intention. Where, however, the right of the promisee is conditional upon his surviving the promisor, an uncertain

> event, there is a strong presumption that, in the absence of indicia of a contrary intention, the parties intended that vesting be postponed until the death of the promissor. (At 752G/H-H/I.) "

Applying the prescribed text one cannot escape the conclusion that the provision in question is intended as a *pactum de successorium* . Clearly no rights in the property vested in the Applicant until the the death of deceased leaving no children born of the then intended marriage. It could I think have been argued with some force that there was a further condition, that being that the parties were still married to each other at the time of the deceased's death. This point was not taken.

At page 31 of **The Law of Succession in South Africa**, Corbett Hahlo Hofmeyer and Kahn the learned authors observe

> "Similarly a contract purporting to regulate matters of succession (pactum successorium) is invalid except where such contract constitutes a *donatio mortis causa* or where the provision for the right of one party to succeed to property on the death of the other is contained in an ante nuptial contract Provisions of the latter kind may not be revoked by one of the parties without the consent of the other"

In **Law of South Africa** (LAWSA) vol 16 page 151 the opinion is equally strongly expressed that pacta successiorum are not invalid if part of an ante nuptial contract.

So too in **The South African Law of Husband and Wife** 4th Ed. p 312 Professor Hahlo expresses the same view as to the effect of such a clause in an ante nuptial contract. His view is amply supported by the authority quoted.

There seem to be no doubt that on the authorities a *pactum successiorum* if provided for in an Ante nuptial contract is valid.

The remaining question is whether this particular provision is so inelegantly phrased and so confusedly expressed that it is void for vagueness. The intention is quite clear that the applicant was by agreement to succeed to the property if the deceased died before her and no children had been born of the marriage. The probabilities at the time of the marriage, having regard to the relative ages of the parties, were heavily in favour of the applicant outliving the deceased.

It is the introduction of the concept of a trust holding the property on applicant's behalf which gives rise to such uncertainty and ambiguity which Mr. Flinn has argued makes the whole clause invalid.

It is true that no trustee has been nominated or appointed. The terms of the Trust are nowhere to be found. No relevant trust is mentioned in any will of the deceased to which reference is made. No ultimate beneficiary has been appointed and there is no direction as to what is to become of the property at the termination of the trust. The authors of **The Law of Succession in South Africa**, previously referred to state at p411,

"One facet of the requirement that the beneficiaries of the trust must be indicated with reasonable certainty is the rule that a trust which fails to provide for the ultimate destination of the corpus of the trust or impresses property bequeathed with a trust without indicating in whose favor the restrictions inherent in the trust provisions are imposed, is a *mudum praeceptum* and of no force and effect."

In such a case the heir or legatee takes the property without any restriction. Op cit p413 and authorities there quoted. I am satisfied that in this case that effect will be given to the intention of the parties, both the Applicant and the deceased, if the applicant were to receive the property as her own free of any restriction.

The application accordingly succeeds with costs it being ordered that the property be transferred to the applicant