IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Appeal Case No. 28/99

In the matter between

PETER RODERICK DUNSEITH N.O. Appellant

And

JOSEPHINE DZELIWE CORDELIA CHAMBERS

(BORN HLETA) 1st Respondent

PAUL CHAMBERS 2nd Respondent

FAITH SAMPSON 3rd Respondent

MARIA DANDANYANE CHAMBERS 4th Respondent

CORAM BROWDE, J A

Van Den HEEVER, J A

SHEARER, J A

JUDGMENT BROWDE, J A

On 5th October, 1984 Morris Victor Chambers ("the deceased") married the first respondent in this appeal who was the applicant in the court a quo. Their marriage was dissolved on 14th December, 1989. No children were born of the marriage. It had been his second marriage. He had grown children from a former marriage who lived in the United Kingdom to which he returned at some stage after the divorce; and where he died.

Prior to the marriage the deceased and the first respondent had entered into an antenuptial contract clause 8 of which reads:-

"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 their (sic) not being any issue the same property shall devolve in trust for Josephine Cordelia Dzeliwe Hleta, in terms of such trusts to be regulated by the will of Morris Victor Chambers."

In the founding affidavit in the court a quo the first respondent referred to a will of the deceased which was executed in 1974 which, of course, made no reference to the trust or trusts mentioned in Clause 8. The appellant before us is Mr. Dunseith an attorney who was cited as the first respondent in the court below in his capacity as executor in the estate of the deceased. To a supplementary affidavit filed by him the appellant attached a will which is in manuscript. The appellant identified the handwriting as being that of the deceased. The will is dated 17th February 1988 and it, too, makes no mention of a trust or trusts.

The first respondent claimed the following relief (which is the only matter relevant to this appeal) namely:-

"(an order) that the applicant is entitled to receive transfer of the property"

(i.e. plot 2501 have referred to above) ".....in trust as provided for in clause 8 of the ante-nuptial contract....."
The appellant opposed the relief sought inter alia on the basis that the rights conferred on the first respondent was as beneficiary under a trust to be regulated by the will of the deceased. As no will was made regulating the purported trust, so the argument went, the terms of clause 8 were so vague as to be unenforceable. The appellant went on to state that if the first respondent acquired any rights in terms of clause 8 it would be solely as a trust beneficiary and she would not be entitled to take transfer of the said property in her own right.

The matter was argued in the court a quo before Sapire, CJ. In his judgment he states that:-

"the applicant (the first respondent) 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 terms of the ante-nuptial contract .....to have the property transferred from the estate to a trustee who is to hold the property for her benefit."

After consideration of the authorities the learned Chief Justice concluded by stating that he was satisfied

"that in this case.... 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."

It is against that order that the present appeal is brought before us.

The dispute between the parties clearly involves the interpretation of clause 8. It seems to me that the clause indicates clearly that the deceased did not intend the first respondent to become the owner of the property. If there had been children of the marriage the plot was to devolve in trust for their benefit. It is to be observed that the clause expressly refers to their "ownership" in the case of the issue of the marriage attaining the age of 21 years. The concept of owner is, however, not referred to in respect of the first respondent. In the absence of children the property was to devolve in trust for her. To interpret the clause as entitling her to ownership the second sentence of clause 8 would have to be re-written to read:- " In the event of there not being any issue the same property shall devolve upon (instead of "in trust for") Josephine Cordelia Dzeliwe Hleta ", and deleting the rest of the sentence. And it is not without significance that had there been children of the marriage the first respondent would not have been entitled even to a usufruct over the property pending transfer of ownership to the children in terms of the trust. It seems clear that the deceased's intention was to keep open his testamentary options — perhaps to see how the marriage turned out. As it happens it was of short duration and the manuscript will made shortly before the divorce makes no mention of the first respondent.

Mr. Shilubane, who appeared for the respondents, submitted that clause 8 was a pactum successorium and being contained in an antenuptial contract it was valid and enforceable. A full exposition of the meaning of the pactum successorium is given in

the judgment of Corbett, C.J. in McAlpine vs McAlpine N.O. and Another 1997 (1) SA 736. The learned Chief Justice makes it clear that the essence of the pactum is that it vests the

right in question in the promisee upon or after the death of the promissor - that vesting is the "litmus test" for identifying a pactum successorium (p 751 C - D).

In considering this test's applicability to clause 8 Sapire C J. states in his judgment that "applying the prescribed test one cannot escape the conclusion that the provision in question is intended as a pactum successorium." He then goes on to say .

"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."

I cannot agree with that interpretation of the clause. As I have already said it involves rewriting the second sentence of the clause.

In dealing with the trust provisions in clause 8 Mr. Flynn, on behalf of the appellant, referred to the finding of the learned Chief Justice that the first respondent was entitled to receive the property as her own free of any restriction because there was no trustee nominated by the deceased, there were no terms of the trust mentioned in any will, no ultimate beneficiary was appointed and no direction was given as to what was to become of the property at the termination of the trust. Counsel submitted, however, that because there was no stipulation in the trust regarding the beneficiaries and the objects of the trust the entire disposition failed in that the trust property has not been effectively disposed of.

We were referred in this regard to Corbett Law of Succession in South Africa P413 and in re Estate Grayson 1937 AD 96; Arkell v Carter 1971(3) SA 243®. I agree that the trust referred to in clause 8 was dependant for its validity on its being properly defined in the deceased's will. That did not happen and therefore the trust must fail and the property must pass to his heir or heirs. That being so and because there is nothing in clause 8 to indicate an intention that the first respondent should become the owner of the property - the facts point the other way - the appeal must succeed.

The appeal is upheld with costs and the order of the court a quo is altered to read "The application is dismissed with costs."

Browde J. A.

I AGREE

Van den HEEVER, J. A.

I AGREE

SHEARER, J.A.

DATED AT MBABANE THIS 3rd DAY OF DECEMBER, 1999