THE REQUIREMENTS FOR A VALID PACTUM SUCCESSORIUM IN AN ANTENUPTIAL CONTRACT: THE CURIOUS CASE OF *RADEBE v SOSIBO NO*

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INTRODUCTION

This note discusses some remarks made in *Radebe v Sosibo NO* 2011 (5) SA 51 (GSJ) (hereafter the *Radebe* case) — a matter heard on appeal in the South Gauteng High Court. The case dealt, in essence, with the question whether a contextual reading of a 'property exclusion clause' in an antenuptial contract could be construed as a valid pactum successorium (succession agreement or pactum de succendo) when one of the parties to the contract died intestate.

A judicially acceptable description of the pactum successorium has been given on a number of occasions. The definition most commonly cited is the one found in *Borman en de Vos v Potgietersrusse Tabakkorporasie* 1976 (3) SA 488 (A) at 501A–B, namely:

> ''n ooreenkoms waarin die partye die vererwing (*successio*) van die nalatenskap (of van 'n deel daarvan, of van 'n bepaalde saak wat deel daarvan uitmaak) van

een of meer van die partye ná die dood (*mortis causa*) van die betrokke party of partye reël.'

Based on deeply embedded common law principles such as private ownership and the freedom to dispose of one's property by means of a will, the pactum successorium has long been treated as a 'step-child' in South African law (see Christa Rautenbach 'Die *pactum successorium*: Stiefkind van die Suid-Afrikaanse reg' (1999) *Koers* 357 and the sources cited therein).

The aversion to succession agreements in contemporary South African law stems from the old authorities. In the 1960s, Joubert discussed the development, scope and nature of the pactum successorium in a succession of six scholarly articles that remain relevant even today (see C P Joubert '*Pactum Successorium*' (1961) 24 *THRHR* 18, 106, 177 and 250; (1962) 25 *THRHR* 46 and 93). The aversion to the pactum successorium in Roman law systematically seeped into Roman-Dutch law and finally into contemporary South African law (see Christa Rautenbach *Die Pactum Successorium in die Suid-Afrikaanse Reg* (unpublished LLM thesis, Potchefstroom University, 1994) 18–19).

The old authorities' dislike of the pactum successorium is demonstrated in general by Voet's remark in his *Commentarius* at 2.14.16 that

'agreements framed in regard to the future succession to a definite third party who is still alive, [are invalid] on the ground that they involve a longing for the contrivance of his death and are fraught with most gloomy and hazardous possibilities; and that they destroy the power of testation, or at least involve a base hastening and anxiety over the inheritance from another . . .' (Johannes Voet *The Selective Voet Being the Commentary on the Pandects* vol 1 (1955) 429 (translation by Percival Gane)).

Two exceptions to the general rule exist: a donatio mortis causa (a donation in contemplation of the death of the donor) and pacta successoria in an antenuptial contract are regarded as valid. Voet (ibid) concedes further that

'nowadays there so far appears to have been a departure everywhere from the well-known provision of Roman law to the extent that in dotal agreements [antenuptial contracts] terms are rightfully made as to the future succession of the spouses to each other, as also of the spouses to the property of a third party or of a third party to that of the spouses . . .'.

In addition, Voet (*Commentarius* 23.4.60) reiterates this departure by stating:

'It is true that from the favour shown to marriage and in agreement with the Canon law future succession can nowadays be effectively dealt with by dotal agreements [antenuptial agreements]. . . .'

Groenewegen (*Cod* 5.14.5) similarly remarks that '[n]owadays the future succession of spouses can be arranged in antenuptial agreements' (Simon A Groenewegen van der Made *A Treatise on the Laws Abrogated and no Longer in Use in Holland and Neighbouring Regions* 3rd rev & Aug ed (1984) (edited and translated by Ben Beinart)).

It is trite that a donatio mortis causa must comply with testamentary formalities in order to give it some sort of authenticity (*Meyer v Rudolph's*

Estate 1918 AD 83). On the other hand, a pactum successorium contained in an antenuptial contract does not have to comply with testamentary formalities, but only with the formalities of an antenuptial contract: or so we thought. . . .

In the *Radebe* case (para 33) Satchwell J remarked as follows (emphasis supplied):

> '[T]here is no merit in the submission that it is not necessary that there be compliance with the formalities prescribed in the Wills Act 7 of 1953 because an antenuptial contract is not a testamentary act. . . . While an antenuptial contract may certainly contain a succession clause, any such clause would have to comply *with the formalities prescribed for wills*.'

The court pointed out that the antenuptial contract had not been signed on any page by the late Mrs Sosibo and therefore there could not have been any witnesses to her signature. The power of attorney in terms of which she authorised an attorney to attest to an antenuptial contract on her behalf constituted another example of a lack of compliance with the formalities required for wills (para 34).

These remarks seem to contradict the general understanding of the formalities to which a pactum successorium in an antenuptial agreement must adhere, and it is against this background that the facts of the *Radebe* case will be discussed. It is not our intention to be overly-critical of the remarks by the court, which we shall argue were obiter dicta and not binding, but to investigate the position and to confirm the requirements for a valid pactum successorium contained in an antenuptial contract.

THE FACTS AND THE JUDGMENT IN *RADEBE*

Mr and Mrs Sosibo married each other out of community of property and subject to the accrual system on 11 November 2006. The antenuptial contract contained the following property exclusion clause, which was also the cause of the dispute before court (see para 12 of the judgment):

> '(4) For the purpose of Section 4(1)(b)(ii) of the Act [Matrimonial Property Act 88 of 1984], the parties declare that the following MILLICENT JABULILE RADEBE's assets, namely — Immovable property situate at 1263/4 Milkwood Street, Ormonde Extension 24 Township registered in the name of MILLICENT JABULILE RADEBE is excluded from the accrual system and the value of such assets and the extent of any liabilities existing in relation thereto, have been ignored for the purpose of arriving at the nett commencement values of the estates of the said SIPHOSENKOSI EMANUEL SOSIBO and the said MILLICENT JABULILE RADEBE.'

One month after their wedding Mrs Sosibo died without a valid will; in other words, she died intestate. Mr Sosibo (the first respondent) was appointed as the executor of her estate and he, in turn, appointed another firm to liquidate the estate. The Master rejected the firm's first and final liquidation and distribution account on the basis that the account had failed to calculate the value of Mr Sosibo's accrual claim (if any). The further final

liquidation and distribution account indicated transfer of the immovable property (as indicated in the exclusion clause) to the parents of the deceased, Mr and Mrs Radebe (the appellants). Mr Sosibo was not satisfied with this transfer and he approached the court a quo for an order to set aside the liquidation and distribution account and to have the relevant property transferred to him as the only intestate heir. His application was successful, but Mr and Mrs Radebe were in turn not happy with this outcome. They then appealed the decision to the South Gauteng High Court. It is this appeal that is the subject of this note. They averred, inter alia, that a contextual interpretation of the property exclusion clause, together with the evidence by the family members that it was the deceased's intention that they (the parents) should inherit the immovable property, meant that the clause was some form of 'testamentary disposition' (para 29).

According to the evidence of the deceased's family members, Mr and Mrs Radebe loaned money to the deceased to buy the immovable property and she expressed her intention during her life, both to her parents and other family members, that they would inherit the immovable property upon her death. This, according to Mr and Mrs Radebe, meant that the immovable property should not pass to Mr Sosibo through intestate succession, but to them in terms of the testamentary disposition. The court interpreted the specific clause not to constitute a 'testamentary disposition' and held (para 33):

> 'In the present case there is no indication in the document that upon death Mrs Sosibo (then Ms Radebe) bequeathed the named immovable property to either Mr or Mrs Radebe or both of them. There is simply no reference to devolution of the property in the event of an anticipated death or the naming of a beneficiary or beneficiaries.'

In addition, the court remarked that the effect of the property exclusion clause was, inter alia, to protect Mrs Sosibo's interests in the event that Mr and Mrs Sosibo might divorce in future. By importing a property exclusion clause into the antenuptial contract, the deceased merely excluded the immovable property from the accrual system. By doing so, the deceased did not give any indication that she divested herself of that property in favour of her parents (Mr and Mrs Radebe) nor that she had bequeathed it to them (paras 49–51). This, according to the court, was not 'a divesting or transferring or devolving clause at all' (para 51).

This conclusion would have sufficed. The court, however, continued to find that even if there had been a reference in the antenuptial contract to the death of the deceased and the naming of legatees (notionally, Mr and Mrs Radebe), there had been no compliance with the applicable testamentary formalities. It is clear that the court regarded the compliance with the formalities of an antenuptial contract as not being sufficient for the validity of a testamentary disposition (pactum successorium) within such a contract — a matter to be discussed in the next part of this note below. Arguments that the exclusion clause constituted some kind of inter vivos bequest or donatio

mortis causa were also rejected by the court (paras 37–44) and the appeal was ultimately dismissed. Although the eventual outcome of the case is correct, since Mr Sosibo was the sole intestate heir of Mrs Sosibo, the views of the court regarding the requirements of a succession clause contained in an antenuptial contract warrant some scrutiny.

SUCCESSION CLAUSES (PACTA SUCCESSORIA) IN ANTE-NUPTIAL CONTRACTS

As pointed out above, the court in the *Radebe* case found that an antenuptial contract may contain a succession clause, but any such clauses (and thus by implication the antenuptial contract) would have to comply with the formalities for a valid will prescribed in the Wills Act 7 of 1953 (paras 33–4). It is not clear from the facts of the case on what authority this statement of law made by the court was based. Until now the general impression has been that a succession clause in an antenuptial contract is not a will and, although it has succession implications, it does not have to comply with testamentary formalities.

This position seems to be in accordance with the views of the old authorities. Voet (*Commentarius* 23.4.58) points out that it was customary for a variety of succession agreements to be included in antenuptial contracts, especially in Holland. These agreements were considered valid unless fraud could be proven. Groenewegen (*Cod* 5.14.5) also discusses the issue of revocation of a succession agreement but he is silent on the question whether it must comply with testamentary formalities. Nowhere do Voet or Groenewegen mention any additional requirements for antenuptial contracts (containing succession agreements) similar to those for wills. A possible inference which can be drawn is that there were no additional requirements.

A perusal of earlier case law confirms our contention. As far back as 1896 it was decided in *In re Intestate Estate of JF Manisty* (1896) 17 NLR 149 at 150 that spouses had the power to enter into an antenuptial contract making provision for the devolution of property with the following wording:

> '[I]n the absence of any last will or other testamentary disposition the survivor or any child or children of the intended marriage shall respectively be or be not entitled to inherit in the estate of the deceased according to the laws of inheritance in force in England.'

Besides requiring a 'duly registered contract', the court did not call for any additional requirements, such as testamentary formalities, to be complied with. The issue again came to the fore 19 years later in *Ladies' Christian Home v SA Association* 1915 CPD 467 where the court stated (at 472, emphasis supplied):

> 'By our law an antenuptial contract may contain valid provisions in regard to property which are to take effect upon the death of either of the intended spouses; but *such a disposition of property, although it may resemble a testamentary act, does not deprive the antenuptial contract of its character of an agreement between the parties, and does not give it the character of a last will and testament*.'

The relevant succession clause in the antenuptial contract of the spouses provided that if the husband predeceased his wife, certain property had to devolve in a specific order upon the death of the wife. First it had to devolve upon the children of the marriage and, if there were no children, to such a person or persons as she appointed in her will and, failing such appointment, to the relatives of the husband according to the law of intestate succession. It is clear that the court did not require additional testamentary formalities to validate the succession clause. As a matter of fact, it held that the character of the antenuptial contract does not change into a will merely because it contains a succession clause by pronouncing that 'an antenuptial contract is not a testament nor a codicil, nor can it be regarded as a testamentary act simply because one or more dispositions in it serve the purpose of a last will' (ibid).

Joubert (op cit at 94–5) supports this argument that an antenuptial agreement containing a succession clause is not a 'testamentary act' in terms of s 1 of the Wills Act 7 of 1953. He submitted that the Wills Act 7 of 1953 did not amend the common law position that an antenuptial agreement containing a succession clause does not have to comply with the testamentary requirements.

In another case, *Ex Parte Executors Estate Everard* 1938 TPD 190 at 192, the deceased named his wife in an antenuptial contract 'to be the sole heiress of one half of his estate, movable and immovable, wherever situate, at the time of his death'. Before his death the deceased executed a will which contradicted the terms of the contract. Upon his death the court was approached for a declaratory order regarding the revocability or not of the pact (agreement) and the respective rights of the surviving wife and their two minor children. The court referred to a number of old authorities, such as s 29 of the Political Ordinance of 1580 and the writings of Roman-Dutch law scholars (see above where the viewpoints of the old authorities are discussed) which point out that intestate succession can be excluded not only by will, but also by antenuptial contracts. In a finding similar to the *Ladies' Christian Home* case (supra), the court rejected the argument that a succession agreement in an antenuptial contract equates the contract with a will; in fact, it regarded a succession agreement in an antenuptial contract as 'manifestly distinct from wills (*Everard* (supra) at 197). There was no doubt in the mind of the court as to the validity of an antenuptial agreement making provision for succession (ibid at 194). The court also pointed out that a succession clause in an antenuptial contract does not change the character of the latter and made the following firm statement (ibid at 199, sources omitted):

> '[S]uch [a] provision [a succession clause], despite its resemblance to a testamentary act, does not deprive the antenuptial contract of its character of an agreement between the parties and does not give it the character of a last will and testament. The mere fact that the benefit is directed to accrue after the first-dying's death does not make it his testamentary disposition — the presumption is, I think, in favour of construing the provision as to succession in the antenuptial contract as an immediate gift or settlement of a right to property

> at a future date rather than a testamentary bequest or a *donatio mortis causa*, and this though the actual amount of the benefit remains uncertain until such date. It is a matter of contract, and not . . . a matter of unrestricted testamentary capacity.'

A particularly interesting case is *Ex Parte Oosthuizen* 1964 (1) SA 174 (O), where the spouses added, amongst other items, the following succession clause to their antenuptial contract (at 176):

> 'Die genoemde Frederik Johannes Oosthuizen het verklaar dat hy ter wille van die voorgenome huwelik aan die genoemde André Steinberg (gebore Roode) die volgende skenkings doen: (i) As 'n '*donatio mortis causa*' ('n skenking ter sake des doods) 'n lewenslange vruggebruik oor een onverdeelde helfte van die volgende eiendomme: . . . .'

The court came to the conclusion that, although the words donatio mortis causa were expressly used in the antenuptial contract, the bequest was not a donatio mortis causa, but merely a gift in contemplation of the marriage and that the words 'donatio mortis causa' only indicated when the giving of the gift should take place, namely after the death of the promissor (ibid). This finding is in accordance with the well-established principle that technical terms should be interpreted in terms of their legal-technical meaning unless the intention of the testator proves otherwise (see *Troitz v Trotsky's Executrix* 1924 WLD 53).

However, determining the exact time when a vesting of rights occurs in the case of a donatio inter vivos and a pactum successorium is no easy matter. One argument is that rights vest immediately in the beneficiary in the case of a donatio inter vivos, although the actual giving of the gift may take place at a later stage, while rights vest only after the death of the promissory in the case of a donatio mortis causa (see Dale Hutchison 'Isolating the pactum successorium' (1983) 100 *SALJ* 227). There is nothing wrong with this argument. However, to determine when rights are vested and when not, especially in the case where the giving of a gift has been postponed to a later date, can be extremely difficult. The whole debate regarding the difference and nature of vested and contingent rights has proven to be fairly complicated (see the discussion of the issues involved by D V Cowen 'Vested and contingent rights' (1949) 66 *SALJ* 404), and one should steer away from having to go through this exercise.

In addition, it is not always easy to determine if a clause in an antenuptial contract has to do with succession (pactum successorium) or merely a donation between the spouses (donatio inter vivos) that is postponed until after the death of one of the spouses, or a donation between spouses and a third person (stipulatio alteri) that is also postponed until after the death of one of the spouses. In order to distinguish between a pactum successorium and a donatio inter vivos, some courts have developed the so-called 'vesting test' (*Keeve v Keeve* 1952 (1) SA 619 (O) at 623F–G; *Varkevisser v Estate Varkevisser* 1959 (4) SA 196 (SR) at 198G–199G; *Costain and Partners v Godden* 1960 (4) SA 456 (SR) at 460A–C; and *Jubelius v Griesel* 1988 (2) SA

610 (C) at 623–6. For a discussion of the facts of the latter case, see Dale Hutchison 'More light on the pactum successorium' (1989) 106 *SALJ* 1). The test also received the approval of the Supreme Court of Appeal in *McAlpine v McAlpine NO* 1997 (1) SA 736 (A) (for a discussion of the facts of this case, see Christa Rautenbach 'Die bedoeling van die kontrakspartye as maatstaf vir die *pactum successorium*' (1998) 61 *THRHR* 652–3) and will undoubtedly keep on playing a prominent role in the determination of pacta successoria. As was pointed out in the *Jubelius* case ((supra) at 623F–G):

> 'Waar ingevolge die ooreenkoms die oorgaan van die reg onmiddellik of ten minste voor die dood van die gewer plaasvind, geskied die oorgang *inter vivos* en kan dus nie vertolk word as 'n *pactum successorium* nie, selfs al word die gebruik daarvan uitgestel tot na die gewer se dood.'

The vesting test was confirmed in *Van Aardt v Van Aardt* 2007 (1) SA 53 (E) para 5 where the court also referred with approval to the viewpoint of Hutchison (loc cit) and that of the *McAlpine* case (supra).

Although the vesting test has the general approval of some of the judiciary, its application is not always without complications. As highlighted by the minority opinion in the *McAlpine* case (ibid at 755F), the vesting test is selective in that it ignores the intention of the testator in determining the nature of an agreement. Instead of trying on each separate occasion to determine whether or not a clause in an antenuptial contract is a donatio inter vivos with a postponed date for the giving of the gift or a succession agreement (pactum successorium), it is much easier to aver that any clause with even a hint of successory consequences is valid if the antenuptial contract complies with the formalities prescribed for it. Such an argument is also in line with the viewpoints of the old authorities. Contemporary writings of legal scholars follow this trend of regarding a succession clause in an antenuptial contract as part and parcel of the latter, with the result that these clauses need not comply with the Wills Act 7 of 1953 but, instead, with s 87 of the Deeds Registries Act 47 of 1937, which requires notarial execution. Joubert points out that the Roman-Dutch law did not require additional formalities, such as testamentary formalities, if a pactum successorium was contained in an antenuptial contract ((Joubert op cit at 50–1. See also M J de Waal & M C Schoeman-Malan *Law of Succession* 4 ed (2008) 51n219; The Hon M M Corbett, Gys Hofmeyr & Ellison Kahn *The Law of Succession in South Africa* 2 ed (2001) at 35). Corbett et al, for example, conclude (ibid):

> 'A testamentary document is the result of a unilateral act by the testator. A contract, on the other hand, is based upon the agreement of the parties. The execution of an antenuptial contract, a trust *inter vivos* or a *donatio mortis causa* containing provisions in relation to the disposal of property to take effect upon the testator's death are not testamentary acts and a document embodying any one of these transactions will not constitute a will or codicil.'

De Waal & Schoeman-Malan (op cit at 219) also agree that the inclusion of testamentary provisions in an antenuptial contract does not transform the

contract into a will. It is thus not necessary to execute the contract in accordance with the formalities for a valid will in order to invest the testamentary provisions in it with legal force. The provisions of s 87 of the Deeds Registries Act 47 of 1937 that require notarial execution and registration are applicable to such a contract. Section 87(1) of the Deeds Registries Act 47 of 1937 states:

> 'An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.'

It is thus our contention that compliance with this provision should be enough to render any succession clauses in an antenuptial contract valid.

THE POTENTIAL DANGERS OF A POWER OF ATTORNEY

Finally, in passing we would like to comment on the practice, which occurred in the *Radebe* case (para 34), of giving a power of attorney to an attorney to attest to an antenuptial contract on a party's behalf. As we pointed out in the introduction, the court in *Radebe* also found that the power of attorney in terms of which Mrs Sosibo authorised an attorney to attest to an antenuptial contract on her behalf, constituted another example of a lack of compliance with testamentary formalities. Although we are of the viewpoint that the power of attorney need not comply with the formalities of a will, we do contend that there are some inherent dangers associated with the practice to giving a power of attorney to someone else to attest to an antenuptial contract on one's behalf.

The two conflicting cases on the question whether antenuptial contracts (in general) executed on the strength of a power of attorney are valid or should be rejected are well documented (*Ex Parte Moodley; Ex Parte Iroabuchi* 2004 (1) SA 109 (W) and *Ex Parte Cheng* 2004 (1) SA 118 (W)). It is trite law that a testator cannot have a will executed on his behalf through a power of attorney to another (see s 2(1)*(a)*(i) of the Wills Act 7 of 1953). Even though succession arrangements in an antenuptial contract do not make such arrangements or transactions a will, it has the same *effect* as a will in that it deals with the disposal of property upon the death of a party to the contract.

For the purposes of legal certainty, and to ensure that the antenuptial contract containing succession arrangements embodies the true and proper intention of the parties as to how the assets should devolve, it is our contention that the above practice (the use of a power of attorney) should (at least) be abolished in the case of an antenuptial contract containing succession arrangements. Why should this practice be allowed for an antenuptial contract containing succession arrangements, but not for a will? The validity of an antenuptial contract containing succession arrangements is already an exception to the general rule that succession by contract is invalid, one of the reasons being that it boils down to an evasion of the formalities for a valid will.

Formalities are provided to ensure authenticity and to eliminate false or forged wills. We argue that the practice of providing a power of attorney, which constitutes a further deviation from the formalities, should be abolished. It should be a requirement that parties are present for notarial execution before a notary. Such an abolition will lead to legal certainty for the parties concerned regarding the contents of the agreement/antenuptial contract in so far as the devolution of assets are concerned, especially in the case where the contents have never been explained to them afterwards by the notary or agent.

In the *Ex Parte Moodley* case ((supra) at 116G) Satchwell J, the same judge as in the *Radebe* case under discussion, made the following statement: 'It is essential that the notary public assure himself or herself that the document drafted reflects the wishes, the understanding and the intent of both parties.' This statement certainly holds even more truth in the event of an antenuptial contract containing succession arrangements. In *Ex Parte Moodley* (supra) the antenuptial contract, concluded through a power of attorney, did not contain any succession arrangements. One wonders, however, to what extent possible succession arrangements might have been discussed with the agent and if a case for (possible) rectification could not have been established. The question to what extent the antenuptial contract was discussed with the parties by the agent or notary prior or afterwards is also left unanswered.

CONCLUDING REMARKS

The outcome of the *Radebe* case is correct. We agree with the court's finding that the exclusion clause in the antenuptial contract is not tantamount to a pactum successorium. The remark of the court, though, that a pactum successorium in an antenuptial contract has to comply with testamentary formalities to be valid, came as a surprise. Such a point of view does not correspond with a long line of decisions, old authorities, or the opinions of contemporary legal scholars that a testamentary disposition in an antenuptial contract does not have to comply with testamentary formalities (provided, however, that the antenuptial contract does observe the formalities prescribed for it).

Considering the fact that the stare decisis principle applies in South African law, the rippling effect of such a case has the potential to distort common law principles quite considerably if the decision is not properly analysed and understood. Courts have the responsibility to apply the common law correctly and a deviation from the rules can be justified only if there is a need to develop the common law, as referred to in ss 39 and 173 of the Constitution of South Africa, 1996. There was no need in the *Radebe* case to suggest a development of the common law in the case of a succession agreement contained in an antenuptial contract. On the contrary, it was not necessary for the court to voice a view on the particular issue, as it was not in dispute. Those who read and refer to the *Radebe* case should therefore understand Satchwell J's comments on the matter as obiter dicta, and not as

binding precedent. It is thus important to confirm: a pactum successorium contained in an antenuptial contract need not comply with the testamentary formalities as set out in s 2 of the Wills Act 7 of 1953. Such a clause is valid if the antenuptial contract is valid. The practice, however, of allowing such an antenuptial contract to be concluded through a power of attorney should, in our view, be discouraged.