Case No 299/95

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

GILROY CLEMENTS McALPINE..... Appellant

versus

PENNY McALPINE N O.....1st Respondent

and

STAND 37 ANDERBOLT
EXTENSION 11 (PTY) LTD..... 2nd Respondent

CORAM: CORBETT CJ, NIENABER, HOWIE, OLIVIER
et SCOTT JJA.

DATE OF APPEAL: 16 September 1996

DATE OF JUDGMENT: 12 November 1996

J U D G M E N T

/ CORBETT CJ: . . .

CORBETT CJ:

Ian McAlpine and Gilroy McAlpine (the appellant) were brothers. On 5 May 1981 they entered into a written agreement ("agreement A") in terms of which Ian McAlpine sold to the appellant for the sum of R55 000 50 per cent of the issued share capital of a company known as Stand 37 Anderbolt Extension 11 (Pty) Ltd ("the company"). The company was at the time, and still is, the registered owner of a piece of immovable property, portion 7, Pretoria Road, Vlakfontein ("the property"), 5 morgen in extent. The property constitutes the only asset of the company.

Attached to agreement A was a diagram representing the property and showing it divided into two portions, portion 1 (marked ABCD on the diagram) and portion 2 (marked EFGH on the diagram), separated by a narrow strip (demarcated BEGD on the diagram). In terms of agreement A (clause or point 3) the 50 per cent shareholding

in the company which appellant was to acquire would entitle him to the "exclusive use for his own profit" of portion 1 of the property, while Ian McAlpine's 50 per cent shareholding was to entitle him to "the exclusive use for his own profit" of portion 2. The strip BEGD was to be used for the construction of roads to provide access to the two portions. It was indicated in the agreement that the brothers intended to develop their respective portions.

The agreement further provided that neither party was permitted to pledge his shareholding to any third party for any reason whatsoever (clause 7); and that should either party wish to dispose of his shareholding it should first be offered to the other party at whatever price was offered by any third party (clause 8). The remaining provisions of the contract are not material for present purposes.

On 22 May 1981 the brothers signed a second agreement

("agreement B") designed to "clarify" certain points in agreement A "so that no disagreement or misunderstanding" should arise. Clause 1 of agreement B reads:

> "With regard to point 3 [in agreement A] 'agreed that the 50% shareholding of Gilroy shall entitle Gilroy to an exclusive use for his own profit of the portion of the property marked ABCD. Similarly Ian's 50% shareholding shall entitle him (Ian) to an exclusive use for his own profit of certain portion of that property marked EFGH'. What is meant here is that only Ian or only Gilroy can benefit from this company, we being the two parties taking the risk. In the event of either parties death, the other party will get 100% of the shares in the company Stand 37 Anderbolt Extension 11 (Pty) Ltd - in other words, the deceased parties shareholding will go to the one remaining alive."

At the time when these agreements were signed the appellant was about 32 years of age and Ian McAlpine in his "middle thirties". They were both in a good state of health.

In due course the sale contained in agreement A was duly performed and the appellant took transfer of his 50 per cent shareholding in the company. Development of the property proceeded.

In June 1988, when 42 years of age, Ian McAlpine unexpectedly (lied. Subsequently appellant claimed transfer of Ian McAlpine's shareholding in the company to himself. The estate refused to admit the claim and appellant then instituted action in the Witwatersrand Local Division, citing as defendants the first respondent, Mrs Penny McAlpine (the widow of Ian McAlpine and the sole executrix in his estate), and the second respondent, the company. In the particulars of claim it is pleaded that on a proper construction of agreements A and B, read together, the appellant and Ian McAlpine agreed that, on the death of the first-dying of either appellant or Ian McAlpine, the survivor was entitled to transfer of the first-dying's 50

per cent shareholding in the company "for no consideration". In the first alternative, it was alleged that there was an implied term to this effect. In the second alternative, it was alleged that the agreements should be rectified to make provision for such a term. And in the third alternative, a collateral oral agreement incorporating such a term was pleaded. The appellant sought orders rectifying the agreements, compelling the defendants to transfer the 50 per cent shareholding to appellant and for the payment of costs by the first respondent. The action was contested by the first respondent, but second respondent appears to have adopted a passive role.

On trial (before Blieden J) the due execution of agreement A was common cause. First respondent initially put in issue the existence of agreement B, but during the course of the trial and after certain evidence had been given by the appellant and another witness first respondent did not (in the words of the trial Judge)

"seriously contest" the existence of agreement B. Because the original of agreement B could not be found, appellant tendered a photocopy thereof. This led to a contention on behalf of the first respondent that the best evidence rule had not been complied with. After hearing evidence about this, the learned Judge ruled that the photocopy was admissible. This ruling has not been disputed on appeal.

In regard to the words of clause 1 of agreement B Blieden J held that they could have no meaning other than that the shareholdings concerned would be transferred free of charge: and that there was consequently no need for the agreements to be rectified to reflect this. Nor was there any need to deal with the alleged oral agreement.

The main defence raised by the first respondent was to the effect that the relevant provisions in the agreement relating to the

transfer of shareholdings constituted a pactum successorium (strictly two pacta successoria) and were on that ground invalid. Blieden J upheld this defence and accordingly dismissed appellant's claim for the transfer of the shareholding. He awarded first respondent the costs of this action, but directed that such costs be limited to what would have been claimable had the matter been heard on exception. He did so because it was his view that the first respondent should have excepted to the appellant's particulars of claim and that it was not necessary for the matter to have gone to trial.

The only issue raised by appellant on appeal was whether or not the relevant portions of the agreements constituted pacta successoria which in our law are invalid contracts. If they did, then clearly the trial Judge was correct in non-suiting the appellant. The leading judgment on the pactum successorium is that of Rabie JA in Borman en De Vos NNO en 'n Ander v Potgietersrusse

Tabakkorporasie Bpk en 'n Ander 1976(3) SA 488 (A), in which the learned Judge of Appeal stated (at 501 A) –

> '"n Pactum successorium (of pactum de succedendo) is, kort gestel, '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 na die dood (mortis causa) van die betrokke party of partye reël. (Kyk die artikel 'Pactum Successorium' deur C.P. Joubert, in Tydskrif vir Hedendaagsee Romeins-Hollandse Reg, 1961, bl. 18,22: 1962, bl 47, 99). 'n Voorbeeld van so 'n ooreenkoms is waar A en B met mekaar ooreenkom om metoor oor en weer as erfgenaam in te stel;of waar A en B met mekaar ooreenkom dat A sy nalatenskap (of 'n deel daarvan) aan B sal bemaak; of waar A en B met mekaar ooreenkom dat A sy nalatenskap (of 'n deel daarvan, of 'n bepaalde saak wat aan horn behoort) aan C sal bemaak. (Kyk in die algemeen die gemelde artikel van Joubert in Tydskrif 1961, bl. 21, 22; 1962, bl. 95-98; Nieuwenhuis v. Schoeman's Estate, 1927 E.D.L. 266; James v. James' Estate, 1941 E.D.L. 67; Van Jaarsveld v. Van Jaarsveld's Estate, 1938 T.P.D. 343; Ahrend and Others v Winter, 1950 (2) SA. 682 (T)).

> 'n Ooreenkoms van hierdie aard druis in teen die algemene reël van ons reg dat nalatenskappe ex testamento of ab intestato vererf, en word as ongeldig beskou (Joubert, Tydskrif 1961, bl. 19; 1962, 1)1. 47-48; 93-103; Voet, 21.4.16; Van der Keessel, Praelectiones,ad Gr, 3.1.41 (Prof Gonin se vertaling, band 4, bl. 33), behalwe in die geval waar dit in 'n huweliksvoorwaardekontrak beliggaam is (Joubert, Tydskrif, 1962, bl. 48, 58-64; 93 e.v.; Voet, 23.4.60; Van der Keessel, Praelectiones,ad Gr, 3.1.41; Ladies' Christian Home and Others v S.A. Association, 1915 C.P.D. 467 op bl. 471-172; Ex parte Executors Estate Everard, 1938 T.P.D. 190 op bl. 194)." (My emphasis.)

It is generally accepted that today the reasons for such an agreement being visited with invalidity are that it fetters the freedom of testation of the party conferring the asset in question upon another, and that it constitutes an evasion of the formalities required in respect of testamentary instruments (see Ahrend and Others v Winter 1950 (2) SA 682 (T), at 685; Borman case, supra, at 501 H).

I have emphasized the example given above in the passage quoted from the Borman judgment (at 501 B) of an agreement in terms of which A and B agree between themselves to appoint one another as heir. It is not clear what factual situation is here contemplated. In an interesting and penetrating article entitled "Isolating the Pactum successorium", in (1983) 100 SALJ 221, at 222, Prof Dale Hutchison draws a distinction between two types of pactum successorium, viz, first, pacts or contracts which relate directly to the contents of a will and, second, contracts which, while making no reference to a will, nevertheless purport to bind a party to a postmortem disposition of his property. (For convenience of reference I shall call the first type the "direct pactum successorium" and the second type the "indirect pactum successorium".) Prof Hutchison goes on to remark that it was the direct pactum successorium which the Court had in mind when defining the pactum successorium in the

Borman case, supra, at 501 A-B, and when giving the examples which it did at 501 B-C (including the one that I have emphasized); and that this constitutes the "classic form of pactum successorium".

I am not sure that in thus defining pactum successorium and giving these illustrative examples Rabie JA intended to confine what he was saying to the direct pactum successorium. The references given by him, after the definition and the examples, to the article by Dr (later Mr Justice) C P Joubert, in (1961) 24 THRHR 18 and (1962) 25 THRHR 46, and to certain decided cases seem to support the view that he did not so intend. At 20-1 the article reads:

> "Deurdat die pactum successorium 'n kontrak of ooreenkoms is, is dit soos alle ooreenkomste of kontrakte 'n tweesydige regshandeling (bilateral juristic act) wat uit die ooreenstemmende wilsverklarings van twee of meer kontraktante bestaan. By die pactum successorium is daar tussen die kontraktante wilsooreenstemming (consensus) ten aansien van die vererwing van een of

> meerdere kontraktante se nalatenskap(pe), of 'n deel daarvan, na die dood van die betrokke kontraktant(e). Soos alle ooreenkomste of kontrakte kom 'n pactum successorium inter vivos tot stand omdat dit die ooreenstemmende wilsverklarings van die kontraktante ten grondslag het, maar dit bevat 'n beskikking of beskikkings mortis causa ten aansien van die vererwing van 'n kontraktant of kontraktante se nalatenskap(pe) na die dood van die betrokke kontraktant of kontraktante. Byvoorbeeld, kontraktante A en B kom met mekaar ooreen dat hulle mekaar oor en weer as erfgename instel."

And at 22-3 the learned author, in discussing the different forms of pacta successoria, states:

> Pacta successoria muta (mutual successory pacts) 'n Pacta successorium is wederkerig waar die kontraktante mekaar oor en weer as erfgename van hul nalatenskappe, of gedeeltes daarvan, instel, byvoorbeeld A en B sluit met mekaar 'n ooreenkoms waarvolgens kontraktant A vir kontraktant B as erfgenaam instel, terwyl kontraktant B insgelyks kontraktant A as erfgenaam instel. Die effek hiervan is dan dat wie ookal langslewende kontraktant is, van die eerssterwende

kontraktant erf."

These quotations from die article by Dr Joubert indicate that he probably had in mind both types of reciprocal pactum successorium, i e both the case where A and B agree to reciprocally appoint one another as heir in their respective wills, and the case where in terms of the contract itself A and B agree to reciprocally appoint one another as heir.

Of the decided cases quoted, Nieuwenhuis. James and Van Jaarsveld all deal with agreements to leave property by will, but Ahrend is a case of a contract disposing certain rights to property upon the disponent's death.

It is true that at p 502 B the judgment in Socman's case reads:

"Dit blyk ook dat die onderhawige ooreenkoms nie gedek

> word deur die omskrywing van 'n pactum successorium wat hierbo gegee is nie, aangesien dit nie 'n ooreenkoms is waarin 'n lid van die maatskappy ondemeem om sy belang in die ledebelangefonds in sy testament aan iemand na te laat nie."

But lower down the page the following passage appears (at 502 D):

> "In die geval wat binne die omskrywing val, het 'n mens 'n ooreenkoms om 'n saak aan 'n bepaalde persoon na te laat; in die onderhawige geval het 'n mens 'n ooreenkoms om nie 'n testament te maak waarin die betrokke belang aan iemand gelaat word nie."

Be that as it may and whatever the intended ambit of this definition of pactum successorium was, I am of the opinion that the classic form of pactum successorium, as described by the Roman-Dutch authorities, included the reciprocal appointment of heirs of the indirect type, i e where in terms of the contract itself and without reference to wills A and B agree to appoint one another as heir to their

respective estates. This appears clearly from Voet, Commentarius ad Pandectas, 2.14.16. Having dealt with agreements for succession to a definite third party still alive, Voet continues:

> "Quemadmodum nec paciscentibus jus tribuit conventio, qua duo inter se paciscuntur, ut is, qui supervixerit, alterius rebus potiretur, nisi id inter milites actum esset".

This passage is translated by Gane to read (see vol 1, p 429):

> "In the same way a covenant by which two persons mutually agree that he who may be the survivor shall possess the property of the other gives no right to the parties to the agreement, unless the arrangement should have been made between soldiers."

The words "shall possess" are a translation of "potiretur" in the original. "Shall obtain" or "shall acquire", might, in the context, be a preferable rendering. (Cf James Buchanan's translation at 348.) This example clearly does not predicate the intervention of a will or

an obligation undertaken by contract to frame a will in a particular way. It appears to contemplate a contractual disposition having effect past mortem. This is confirmed if reference be had to the authority cited by Voet, viz Code 2.3.19. The same example is also referred to in, for instance, Van Leeuwen, Censura Forensis 1.iv.3.15; Vinnius, Tractatus de Pactis 19.2 (Du Plessis translation, p 161); and Van der Keessel, Praelectiones and Grotius 3.1.41 (Gonin translation, vol 4, at 31-2).

Moreover, it seems to me that the same principle would apply, irrespective of whether the reciprocal agreements related to the whole of or merely to a single asset in each contracting party's estate (see Borman case, supra, at 501 A-B).

The present case appears to me to fall squarely within this classic form of pactum successorium. What the parties have reciprocally agreed to is, in effect, that should the appellant survive

Ian McAlpine, the latter's shareholding in the company should go to the appellant; and, alternatively, that should Ian McAlpine survive the appellant, the latter's shareholding in the company should go to Ian McAlpine. In other words, depending on who dies first the survivor becomes entitled to the shares of the deceased.

It was argued, however, on behalf of the appellant that the Court a quo had in effect (without expressly saying so) construed clause 1 of agreement B as constituting reciprocal donations by the brothers of the share in the company respectively held by them, provided only that they both still owned their shares at the time of the death of the first-dying. On that basis, so the argument proceeded, the correct approach was then to determine whether such donations were inter vivos or mortis causa, i e whether the rights conferred by the donations vested at the time agreement B was concluded, though enjoyment thereof was postponed until after the death of the first-

dying, or whether the rights would vest only upon the death of the first-dying. Appellant's counsel submitted that in this instance the rights vested at the time of the agreement and that, therefore, the donations were infer vivos and were not hit by the rule invalidating pactum successoria

The two agreements must clearly be read together. Clause 1 of agreement B must accordingly be seen in the context of a fairly wide-ranging contract, including a sale. Whether in the circumstances the agreements contained in that clause can be regarded as proceeding from "sheer liberality" or "disinterested benevolence" (a requirement of a donation in the strict sense - see Ex parte Calderwood NO: In re Estate Wixley 1981 (3) SA 727 (Z), at 730 C - 732 A and the authorities there cited, to which may be added CIR v Estate Hulett 1990 (2) SA 786 (A)) is at least open to some doubt, but this does not seem to me to matter. A donatio mortis

causa is, in my view, simply a species of pactum successorium and it is not suggested that the agreements in this case meet the special requirements for validity of a donatio mortis causa, namely unilateral revocability and compliance with testamentary formalities. (See 8 LAWSA, paras 283-5.)

However, whether they be donations or not, in my opinion the basic determinant as to whether or not the reciprocal promises in clause 1 of agreement B constitute pactum successoria is the so-called vesting test. This test is applied by asking in a particular case whether the promise disposing of an asset in favour of another (whether by way of donation or other form of contract) causes the right thereto to vest in the promisee only upon or after the death of the promissor (which points to a pactum successorium);or whether vesting takes place prior to the death of the promissor, for instance, at the date of the transaction giving rise to the promise (in which case it

cannot be a pactum successorium)

Counsel were agreed that this is the appropriate test to be applied. It is the test which has been applied in a number of cases in this country (see Keeve and Another v Keeve N O 1952 (1) SA 619 (O), at 623 C - 624 G; Erasmus vHavenga 1979 (3) SA 1253 (T), at 1259 E - H; Jubelius v Griesel N O en Andere 1988 (2) SA 610 (C), at 623 C-H) and in Zimbabwe (see Varkevisser v Estate Varkevisser and Another 1959 (4) SA 196 (SR), at 199 A-G; Ex parte Calderwood NO: In re Estate Wixley, supra, at 735 A-B). In Borman's case Rabie JA referred (at 505 B-E) to the vesting test, apparently with approval - certainly without disapproval. (See also Joubert (1962) 25 THRHR at 102; Hutchison, op cit, at 227-30.) In his article Prof Hutchison, after having referred to other criteria for identifying a pactum successorium, states (at 227):

"A far more useful criterion relates to the time at

> which the right to the promised benefit divests from the promisor and vests in the promisee. Where, in terms of the agreement, the devolution of such right is to occur immediately (or, at any rate, before the death of the promisor), the disposition takes effect inter vivos and can therefore not be construed as a pactum successorium, even if enjoyment of the right is postponed until after the promisor's death. On the other hand, where such devolution is to occur only after the promisor's death, the agreement will probably (but, as we shall see, not necessarily) be construed as a pactum successorium. In other words, provision for a post-mortem devolution of a right to a benefit is a necessary, but not a sufficient, condition for the agreement to be classed as a prohibited successory pact."

It would seem that Prof Hutchison's reservation ("not necessarily") is motivated by the consideration that even where the vesting occurs on the death of the promissor the agreement may not interfere with the promissor's freedom of testation. In this regard he states at p 231:

> "Since adherence to freedom of testation is the major

> reason today for the invalidity of pacta successoria, a succession agreement which in no way interferes with that freedom should not automatically be struck down. There seems little reason in modem law for refusing to uphold either the pactum de non succedendo or the pactum de hereditate tertii viventis. A properly executed donatio mortis causa is a good example of a succession agreement which, being unilaterally revocable, does not curtail the donor's testamentary freedom and is accordingly accepted as valid. Likewise, any other succession agreement which is made unilaterally revocable at the instance of the party purporting to effect a post-mortem disposition should not be treated as a prohibited pactum successorium – indeed, this was decided in the Calderwood case.'

Since none of the considerations here mentioned apply in the present case, it is not necessary to consider the correctness of this approach.

The pactum successorium occupies a somewhat shadowy position between contract and testation. It is frowned upon by the law because it tends to inhibit freedom of testation and because, if

allowed, it would result in the circumvention of the rules relating to the formal execution of wills. But for these reasons it is only a contractual disposition which, like a testamentary one, vests the right in question in the promisee upon or after the death of the promissor that should fall foul of the rule which invalidates pactum successoria. Accordingly it seems only logical that vesting should be the litmus test for identifying a pactum successorium.

The application of this test involves the distinction drawn in our jurisprudence between vested and contingent rights. In the case of Jewish Colonial Trust Ltd v Estate Nathan. 1940 AD 163, this Court discussed this distinction in the testamentary context. Watermeyer JA explained (at 175-6) that the word "vest" bears different meanings according to its. context. In terms of one meaning, the word is used –

". . . to draw a distinction between what is certain and

what is conditional; a vested right as distinguished from a contingent or conditional right. When the word 'vested' is used in this sense Austin (Jruisprudence, vol. 2, lect. 53), points out that in reality a right of one class is not being distinguished from a right of another class but that a right is being distinguished from a chance or a possibility of a right, but it is convenient to use the well-known expressions vested right and conditional or contingent right.

Now whenever a bequest is made in words which indicate that the right bequeathed is not to be enjoyed or exercised until some future date (that is some date after the testator's death), then the question always arises whether the words indicating future enjoyment were inserted for the purpose of making the bequest conditional or merely for the purpose of postponing the enjoyment of the bequest. The answer to that question depends ultimately upon the intention of the testator as gathered from the terms of the will, but there are many rules of construction which assist in the decision of the question. If the bequest is unconditional, then the legatee acquires a vested right in the bequest from the date of the death of the testator (dies cedit) though he cannot enjoy it until the time arrives for enjoyment (dies venit); if on the other hand the bequest is conditional, he acquires no

> vested right – see Voet (36.2), who follows the Roman law, which can be found fully explained by writers such as Goudsmit, Pandects. para. 63; Thibaut, para. 93; Salkowsky (1.1.19) and (3.3.183)/'

(See also the further remarks of Watermeyer JA in Durban City Council v Association of Building Societies 1942 AD 27, at 34.)

These concepts of vesting - dies credit and dies venit-arise also in the law of contract. (See Voet 36.2.1; In re Allen Trust 1941 NPD 147, at 155, 156; Commissioner for Inland Revenue v Smollan's Estate 1955 (3) SA 266 (A), at 272 E-H.) It may be that the incidents of vesting or non-vesting are not always the same in contract as they are in succession. For instance, Voet (36.2.1) states, with reference to stipulations in contract (see Gane's translation, vol 5, at 448):

> "When he [the stipulator] has stipulated subject to a condition, neither the vesting day nor the due day arrives

> while the condition is pending, but nevertheless a prospect of obligation arises, and it is also transmitted to heirs if death overtakes the stipulator before the condition is fulfilled."

This possible difference has no relevance, however, on the facts of the present case because the condition upon which the appellant's right to acquire Ian McAlpine's shareholding depends is that he should survive Ian McAlpine. Had he pre-deceased Ian McAlpine the condition would have become impossible of fulfilment, he could never have acquired any right to the shareholding and there would have been no "prospect of obligation" to be transmitted. In fact the alternative disposition of the appellant's shareholding in favour of Ian McAlpine would have taken effect. In my view, for the reasons given the vesting test is an eminently appropriate one for determining whether or not a contract amounts to a pactum successorium.

In speaking of "conditional" or "contingent" rights, as

opposed to vested rights, the authorities to which I have referred obviously had in mind rights subject to a suspensive, as distinct from a resolutive, condition. (See Prof Hutchison in (1989) 106 SALJ 1, at 6-7.) In the realm of contract a suspensive condition suspends the full operation of the obligation and renders it dependent on the occurrence of an uncertain future event; whereas in the case of a resolutive condition the normal consequences flow from the contract, but on the happening of an uncertain future event these consequences are annulled (see 5 LAWSA, first reissue, paras 191 and 192 and the authorities there cited).

I now return to the argument of appellant's counsel to the effect that in this instance appellant's rights to Ian McAlpine's shares vested at the time the agreement was entered into and that therefore it was a transaction inter vivos and did not constitute a pactum successorium. As indicated by Watermeyer J A in the Jewish Colonial

Trust case, supra, whether in a particular case words of futurity postpone vesting or merely enjoyment depends ultimately on intention, in this case the intention of the parties to the agreement. Where, however, the right of the promisee is conditional upon his surviving the promissor, an uncertain event, it seems to me that there is a strong presumption that, in the absence of indicia of a contrary intention, the parties intended vesting to be postponed until the death of the promissor. (Cf Wynn N O and Westminster Bank Ltd N O v Oppenheimer and Others 1938 TPD 359, 364-5). The condition here referred to is, of course, a suspensive one.

The present case is, in my view, a clear instance of a right conditional upon survivorship, an uncertain event. Moreover, I can find no indication to counter or contradict the resulting presumption that the parties intended vesting to be postponed until the death of the first-dying. On the contrary, the terms of clause 1 and particularly

the words "will get" and "will go" (which have reference to the date of the death of the first-dying) tend to reinforce the notion of a vesting postponed to such death.

In support of his general contention that vesting took place inter vivos at the time of the conclusion of the agreements, appellant's counsel submitted that the rights conferred by the agreements were not conditional on a future, uncertain event since (in the absence of a common calamity) in due course one of the brothers had to die and predecease the other. This argument misses the point. As I have already explained, one must view the provisions of clause 1 as constituting two alternative dispositions, only one of which would, depending on which of the brothers died first, take effect. The disposition in favour of appellant was conditional on his surviving Ian McAlpine: clearly an uncertain future event since he might well predecease Ian McAlpine, in which case the disposition would fall

away. And conversely the disposition in favour of Ian McAlpine was conditional on his surviving the appellant, an equally uncertain future event, and in the event of Ian McAlpine dying first the disposition in his favour would fall away. Thus in each case the disposition was contingent upon survivorship, an uncertain event.

Finally, appellant's counsel submitted that the condition in question was a resolutive rather than a suspensive one and that, therefore, vesting took place at the time when the agreements were entered into. I have already referred to the distinction between suspensive and resolutive conditions. The condition of survivorship in this case is, to my mind, clearly a suspensive one. It made the disposition dependent for its operation on the occurrence of an uncertain future event. It did not allow of the normal consequences of the disposition to flow from the contract, subject to annulment upon the happening of an uncertain future event.

In argument some point was made of the fact that, by reason of the provisions of clause 8 of agreement A (the first refusal clause), the dispositions were also contingent on the relevant shareholding still being held by the promissor on his death. I am not sure that clause 8 helps to resolve the problems in this case. Depending upon the time of vesting it might be construed as either a suspensive or a resolutive condition.

For these reasons, I hold that the agreement in terms of which appellant claimed Ian McAlpine's shares from his estate amounted in law to an invalid pactum successorium and that for this reason his claim cannot succeed. Whether this is a satisfactory result is an issue upon which lawyers may hold differing views. Some of the arguments for and against the continued existence in our law of the rule invalidating pacta successoria have been presented by Prof Hutchison in his aforementioned article at 237-9. Where the pactum

forms part of a larger commercial transaction between the parties, a case could be made out for the relaxation of the rule. This is a matter that should perhaps engage the attention of those responsible for initiating law reform.

The appeal is dismissed with costs.

M M Corbett

HOWIE, JA)
OLIVIER, JA) CONCUR
SCOTT, JA)

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CORAM: CORBETT CJ, NIENABER, HOWIE, OLIVIER ef
SCOTT JJA

DATE OF APPEAL: 16 September 1996

DATE OF JUDGMENT: 12 November 1996

J U D G M E N T

/NIENABER JA:

NIENABER JA:

Since this is a minority judgment I propose simply to state my position and to do so with a minimum of elaboration:

1. The classic form of pactum successorium occurs when the agreement in question is intended to regulate the process of succession, by effecting or affecting it: when, for example, A agrees with B that B or C will henceforth be his heir or legatee; or when he undertakes to name B or C as his heir or legatee in his will; or when they agree that A will refrain from making or changing his will; and of course where A and B reciprocally agree that each will be or will institute the other as his heir or legatee. The examples can be multiplied. Agreements of this nature will not be enforced, principally for two reasons: firstly, if the agreement is to take precedence it will prevent, or at the very least inhibit, a testator from making a will; and secondly, it will, in appropriate cases, enable a prospective testator to evade the prescribed testamentary formalities by the expedient of entering into an informal agreement with someone else.

2. With one notable exception the cases in which an agreement was struck down as a pactum successorium were all cases slotting comfortably into this narrow category. (Cf Salzer v Salzer 1919 EDL 221 at 227; Niewenhuis v Schoeman's Estate 1927 EDL 266; Van Jaarsveld v Van Jaarsveld's Estate 1938 TPD 343; James v James's Estate 1941 EDL 67; Ahrend and Others v Winter 1950 (2) SA 682 (T) at 684-686 ("a promise to leave property by will is unenforceable"); Grobbelaar v Grobbelaar 1959 (4) SA 719 (A) at 723D-724A; Schauer No v Schauer 1967 (3) SA 615 (W); Narshi v Ranchod No and Another 1984 (3) SA 926 (C).)

3. The exception is of course Borma en De Vos NNO en 'n Ander v Potgietersrusse Tabakkorporasie Bpk en 'n Ander 1976 (3) SA 488 (A). In some respects this was an unfortunate judgment (cf Hutchison, Isolating the Pactum successorium (1983) 100 SAW 221 at 223; Van Warmelo (1977) 40 THRHR 184). Its ratio decidendi is not easy to discern: at times it appears to be the fettering of the promisor's freedom of testation; at other times the emphasis is on the concept of vesting, two considerations which, as will appear

later, are not complementary. At 501A-B, following Joubert (1961) 24THRHR 18, 22-23; (1962) 25 THRHR 47, 99, it is said:

> "'n Pactum successorium (of pactum de succendo)is, kort gestel, 'n ooreenkoms waarin die partye die vererwing (successio) van die natenskap (of van 'n deel daarvan, of van 'n bepaalde saak wat deel daarvan uitmaak) van een of meer van die partye na die dood (mortis causa) van die betrokke party of partye reël."

This formulation, with its emphasis on "oorerwing", is descriptive of the classic form of the pactum successorium. A close reading of the reasoning in the judgment reveals that the agreement in question was held to be an attempt, firstly, to dispose of the member's interest in the fund at his death and, secondly, to impede or curtail his capacity to do so in his will (cf 502C-F; 503E; 504B; 508C-E). An agreement concerning an inheritance which is intended to deny a testator his freedom of testation falls squarely within the compass of a true pactum successorium.

4. Yet the judgment itself appeared to accept that it was breaking new ground (at 502A-B) and in the majority judgment (in the present case) it is

interpreted as supporting the view that the scope of the pactum successorium was widened to embrace any agreement binding a party to a post-mortem disposition of his property. It is at this point that my views begin to depart from those of the majority. I do not read the articles of Joubert, on which reliance is placed in the majority judgment, as supporting a wider concept. Throughout his entire series of articles Joubert places due emphasis on the aspect of "vererwing" and he consistently refers to "erfgename" in the passages cited. Nor do the excerpts from the old authorities quoted in the majority judgment and in the references cited do so. There is, therefore, no need to create an enlarged neo-classic form of the pactum successorium. The issue is whether the facts of this case fall within the recognized classic form.

5. Where A and B agree that B will henceforth be A's heir, to take effect on A's death, the position is straightforward: this is clearly a manoeuvre to achieve a form of succession by contract - and that the law will not allow. The situation becomes more problematical when the parties agree that B is to be A's legatee in respect of a particular asset. In principle that is also pactum

successorium. How is that situation to be distinguished from the one where the parties, without mentioning succession as such, agree that B will be entitled to the asset on A's death? In both instances B may claim the property only on A's death. The view favoured in the majority judgment, based on the concept of vesting, is that the agreement is in order if the asset is to become B's property before A's death even though he may only claim its enjoyment on A's death, but that it may not be in order if it is only to become B's property on A's death, and that it is decidedly not in order if B is to survive A in order to claim it. This is the second point at which my views depart from those of the majority. In my view that approach, with respect, accentuates manifestation and not intent. Non-vesting, irrespective of the underlying intention of the parties to the pactum, is identified by the majority as the one diagnostic feature of a pactum successorium.In my respectful view that approach is too selective. As with any agreement the dominant feature remains the intention of the parties. Here too, in order to decide whether the agreement is an unenforceable pactum successorium the intention of the parties must be examined, taking account of

all permissible material which may have a bearing on what they truly had in mind. When parties agree on what in the law of succession would be termed an immediate "vesting", their agreement clearly is not pactum successorium not because of the vesting but because the promisor cannot have intended a bequest if the property is to pass to the promisee before his death. Where there is vesting in that sense the agreement can accordingly never be a pactum successorium;non constat that it is a pactum successorium where there is no vesting. The answer to that question will depend on a broader issue: was it A's intention, as embodied in the agreement, to arrange for and regulate the succession of the asset upon his death? There is, in my view, a difference between the passing of property and its succession. The difference lies in the intention of the promisor, as expressed in the agreement. Did the promisor, in binding himself by agreement, have his own succession in mind? If yes, the agreement must be struck down. But if the true purpose and intention was not a form of succession but something else, the agreement, all other things being equal, should stand. Admittedly it may not always be easy, because the test is

subjective and not objective, to differentiate between various nuances of intention, especially where the passing of the property is to coincide with the promisor's death, but that is the sort of difficulty frequently encountered when agreements are to be assessed and interpreted. In case of doubt the tendency should always be to uphold the agreement rather than to strike it down.

6. Another criterion sometimes employed to determine whether the agreement is pactum successorium is the revocability of the promise. So, for instance, it was said by Murray CJ in Costain and Partners v Godden NO 1960

(4) SA 456 (SR) at 459-60:

> "It is clear that in each of those cases the test applied to the particular agreement was whether the undertaking of the party conferring the right was or was not revocable by him, for, if it was, it was regarded as an agreement to regulate the succession to his estate and it had the characteristic of a testamentary disposition on the basis that omnis voluntas de successione ambulatoria est."

Revocability may thus serve as a pointer to the intention of the promisor (see, too, Schauer v Schauer, supra, at 617B; D'Angelo v Bona 1976 (1) SA 463 (O) at 467F-468E; and Erasmus v Havenga 1979 (3) SA 1253 (T) at 1258F-

1259C).

Once again the converse, contrary to what was intimated in these cases, does not necessarily apply: it does not follow that the covenant is not a pactum successorium simply because the promise is not revocable. Hutchison, supra, at 226, is right in criticising that line of thought. True, where the promise is revocable it would not interfere with the promisor's freedom of testation. But freedom of testation is the rationale, not the rule. The real solvent, in my view, is the animus testandi of the parties to the agreement. If the intention is to establish a form of succession by agreement, the agreement will be flawed regardless of whether the promise is retractable at or by will.

7. It is this factor, the animus testandi, in the sense described above, which in my opinion is the common denominator and the underlying reason why the agreements were struck down in the cases referred to in para 2. above but upheld, whatever the professed reasoning (be it vesting or revocability) in cases such as Keeve and Another v Keeve 1952 (1) SA 619 (0); Varkevisser v Estate Varkevisser and Another 1959 (4) SA 196 (SR); Costain and Parters v Godden NO and Another, supra, Ex Parte Calderwood NO:In re Estate

Wixley 1981 (3) SA 727 (Z); D'Angelo v Bona,supra;Erasmus v Havenga, supra; and Jubelius v Griesel NO en Andere 1988 (2) SA 610 (C) (in which the conclusion was at odds with the reasoning). That is also, I believe, the true reason why insurance policies and provident, benefit and pension funds, all of which may involve a contractual post-mortem disposition of property in favour of a nominated beneficiary, are not regarded as pactam successoria. (The reason suggested in Borman's case, supra, at 506A-507B for distinguishing this type of situation from a pactam successorium is, with respect, unconvincing: regardless of whether the property is that of the contributor or of the entity administering the distribution of the assets, the agreement binds one of the parties to a post-mortem disposition of his property.)

8. On that approach the emphasis in determining whether the agreement is to be enforced or not, is squarely placed on the intention of the parties rather than on the nature of the right. Vesting, in the sense in which that concept is understood in the law of succession, may then be a factor, an aid to interpretation, but it will not be the ultimate determinant. Vesting in any event

does not dove-tail with the rationale that the agreement is not to hamper a party's freedom of testation. Take these examples: (a) A promises B a particular asset to be claimed in a year's time; A dies before the year has elapsed; (b) A promises B the asset to be claimed on A's death; (c) A promises B the asset to be claimed on A's death, provided B survives him. As I understand the majority judgment the agreement in (a) is not a pactum successorium; the one in (b) may or may not be; and the one in (c) definitely is a pactum successorium. Yet in none of these three instances is A's freedom of testation affected: the agreement, even if enforced, cannot prevent him, unlike in the case of a pactam successorium properly so called, from making a will in which he leaves the asset to C. It will then be for A's executor to decide whether he will honour the agreement or face the consequences of its breach. Moreover, a right subject to a suspensive condition, as opposed to a mere expectation or ,spes, does vest in a contractual sense: it is a right which is capable of cession, which (depending on how the condition is framed) does not terminate on the death of the debtor or the creditor, and which, pending

fulfilment of the condition, can be infringed. Whether the right flowing from the agreement is conditional or not and if so, whether the condition is suspensive or resolutive, is not in my view the appropriate cipher for uncoding the pactum successorium. Any rule of law which is predicated on such subtleties must be suspect (cf Joubert (1962) 25 THRHR 93 at 101, Hutchison, supra, 238).

9. The true touchstone, in my opinion, is the intention of the parties. The issue is then a matter of fact, not a question of law. And if the intention of the parties is to prevail, as to whether they intended a form of reciprocal succession, the present agreement is clearly not a pactam successorium.It did not fetter the freedom of testation of either of the brothers. Nor was this an attempt to circumvent the formalities prescribed for testamentary succession. They did not, in the sense described above, act animo testandi. It was an ordinary although comprehensive commercial agreement between two brothers who, through the medium of a company of which they were the sole shareholders, sought to provide contractually for various foreseeable eventualities relating to their co-ownership; more particularly, to ensure that

each party would be protected should the other mortgage or sell his shares or pre-decease him. The agreement was effective immediately. It was not gratuitous. Neither party could withdraw without the leave of the other. What was stated by Murray CJ in Costain and Partner v Godden NO and Another, supra, at 459 is, mutatis mutandis, of application to the facts of this case:

> " ... I am unable to see how by any stretch of language the option can be regarded as intended to regulate, or in any way regulating, the testamentary succession to the property of the joint estate or to the first-dying's portion thereof. It is part of an ordinary straightforward commercial contract, which part, in the light of the above views as to the nature of an option, immediately in 1954 gave Costain a right of purchase at his election, but subject to certain time limits, a right which could not be revoked by the grantor. Obviously nothing further was required of Lee to perfect Costain's position: and if during the currency of the option Lee had either expressly repudiated it or disabled himself (e.g. by transfer of the property to a third person) the joint estate would have been liable in damages to Costain even though the latter had not exercised the option (Boyd? v.Nel, 1922 A.D. 414). It was more than a mere revocable offer by Lee to sell. The facts that the death of the first-dying spouse was given as the date before which the option could not be exercised, and that a duty was placed on either Lee, if the survivor, or his executor if Lee was the first dying, to notify the option holder and give effect to the option, do not to my mind affect the position. A person can validly make

a contract in which he binds his executor to the performance of obligations undertaken in the contract."

10. As in many of the cases quoted in para. 7 above, dealing with partnership or co-ownership or other instances of a close personal commercial relationship where it is in the interest of the parties concerned to maintain, as far as possible, the status quo and to exclude strangers even after the demise of one of the parties, the clause under attack is designed to regulate, with immediate legal effect, their future affairs. There is clearly a need to recognize agreements of this sort. In cases of doubt the courts should be astute to support rather than to frustrate the parties in their intention.

I would uphold the appeal with costs.

P.M.
Nienaber
Judge of
Appeal