FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO : 062/2005

PARTIES: Van Aardt v Van Aardt and Others

REFERENCE NUMBERS -

- Registrar: 550/05

DATE HEARD: 26/05/05

DATE DELIVERED: 21/07/05

JUDGE(S): Plasket J

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Applicant(s)/Appellant(s): AD Schoeman
- for the accused/respondent(s): A Beyleveld

Instructing attorneys:

- Applicant(s)/Appellant(s): Nolte & Smit
- Respondent(s): Netteltons

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: 550/05
DATE DELIVERED:21/7/05
REPORTABLE

In the matter between:

STEPHANUS CORNELIUS VAN AARDT	**Applicant**
and	
JACOBUS VAN AARDT	**1st Respondent**
R. VON HOLDT	**2nd Respondent**
THE REGISTRAR OF DEEDS, CAPE TOWN	**3rd Respondent**

Application to interdict the sale of immovable property -- It was common cause that the applicant and the first respondent had entered into a deferred sale agreement in respect of the property prior to the first respondent purporting to sell it to the second respondent. The first respondent attacked the validity of the deferred sale agreement on the basis of it being a *pactum successorium* and because, he argued, its operation was dependent on the continued existence of a partnership agreement between him and the applicant, their partnership having been dissolved prior to the sale to the second respondent – Held that because the deferred sale vested rights in the applicant immediately, and because it was not contingent on the uncertain event as to which of the

parties died first, it was not a *pactum successorium* – Held further that the deferred sale agreement could not be interpreted to include a tacit term to the effect that its existence was dependent on the continued existence of the partnership between the applicant and the first respondent – The agreement of sale between between the first and second respondents was declared to be invalid and the first respondent was interdicted from taking any steps to sell the disputed property to the second respondent or to register it in the name of the second respondent or a trust that he had formed for the purpose.

JUDGMENT

PLASKET J

[A] INTRODUCTION

[1] In this urgent application, the applicant seeks orders declaring invalid a contract of sale of immovable property between the first and the second respondent, and interdicting the first respondent from taking any steps to sell the property to, or to register the property in the name of, the second respondent.

[2] The applicant and the first respondent are brothers. The property in issue (to which I shall refer as the disputed property) comprises of two pieces of agricultural land described in the Notice of Motion as 'Outspan Niekerksberg, Brakfontein en Greilings Kraal, ook bekend as Outspan of Radyn' (which is 637.6833 hectares in extent) and 'Brakfontein en Outspan Niekerksberg, ook bekend as Niekerksberg' (which is 492.2407 hectares in extent).

[3] It is the applicant's case that the disputed property and other pieces of

property were sold to him by the first respondent on 23 September 2003 in what he termed 'n uitgestelde koopkontrak' in terms of which 'die oordrag in my naam van die gemelde plaaseiendomme en die betaling van die koopprys uitgestel word tot afsterwe van die verkoper, die eerste respondent'. This deferred sale agreement was entered into at a time when the applicant and the first respondent farmed in partnership. Their partnership was dissolved on 28 February 2005. In the face of the deferred sale agreement – the applicant avers – the first respondent later purported to sell the disputed property to the second respondent.

[4] It is not in dispute that the deferred sale between the applicant and the first respondent was, indeed, agreed to by them. It is also not in dispute that the first and second respondents entered into a contract of sale in respect of the disputed property. The first respondent states in his answering affidavit that he and the second respondent have subsequently agreed that the disputed property would be transferred, not to the second respondent, but to the Gables Way Trust, a trust established by the second respondent.

[5] The first respondent – the only respondent to oppose the relief claimed – has, however, raised various defences, certain of which can be dealt with summarily at this stage. In the first place, the first respondent attacks the urgency of the matter. The point is taken that no attempt was made at all by the applicant to comply with the forms and procedures prescribed in the Rules, and that in any event, the urgency is self-created.

[6] I am of the view that there is no merit in the attack based on a lack of urgency. The applicant has made out a case for urgency, he took steps to launch the proceedings with due haste after learning of the agreement between the first and second respondents, there is no suggestion that the applicant's non-compliance with Rule 6(12) amounts to an abuse of process and there is no prejudice to the first respondent.

[7] Secondly, it was argued that the deferred sale was invalid because the property was not described with sufficient clarity. Once again, I am of the view that there is no merit in this argument. What is required for compliance with s 2(1) of the Alienation of Land Act 68 of 1981 is that the 'land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus'[1] and that 'a faultless description of the property sold couched in meticulously accurate terms' is not required for the validity of such a sale.[2] In this case, the property that is the subject matter of the deferred sale is, in my view, described with the requisite precision.

[8] Two further defences require more detailed treatment. They are the arguments that the deferred sale is invalid because it is a *pactum successorium* and that the deferred sale was contingent, for its validity, upon a resolutive condition to the effect that, at the time of the death of the first respondent, a partnership agreement between him and the applicant be still in existence. It is to these defences that I now turn.

[B] THE VALIDITY OF THE DEFERRED SALE AGREEMENT

(a) The Terms of the Agreement

[9] The first respondent takes the point that the deferred sale constitutes a *pactum successorium* and is therefore unenforceable. He states that this is so because it 'not only restricts my right to free testation but also purports to do by contract what can only be done by will'.

[10] The starting point in determining whether the first respondent is correct is the contract itself. It is headed 'Uitgestelde Koopkontrak' and names the

1 *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA), 1008J-1009A.
2 *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A), 989.

applicant 'of sy regsopvolgers (nasate)' as the purchaser, and the first respondent as the seller. Clause 1 provides that the purchaser 'of sy regsopvolgers (nasate) koop alle vaste eiendom vanaf die verkoper by wyse van ŉ uitgestelde koopooreenkoms'.

[11] Clause 2 provided for the determination of the purchase price. It recorded that the parties had agreed that 'die koper of sy nasate by die datum van afsterwe van die verkoper die eiendom deur ŉ Landbankwaardeerder sal laat waardeer en dat ŉ prys gelykstaande aan die waardasie van die Landbankwaardeerder en/of die opbrengs van Liberty Polis, Polisnommer 58963404700, welke polisopbrengs nie die Landbankwaardasie van die eiendom sal oorskry nie, as koopprys vir die eiendom aanbied'.

[12] Clause 3 provided that 'indien daar ŉ balans oorbly op die Liberty Polis nadat die Landbankwaardeerder die grond waardeer het en die opbrengs van die polis aangewend is om in the verkoper se boedel in te betaal, die balans daarvan aan die koper oorbetaal sal word'.

[13] These provisions were subsequently amended by way of an addendum that stated:

> '1. Geen Landbankwaardeerder of ander waardeerder sal meer die eiendomme wat in bogemelde kontrak te sprake is, waardeer nie; en
>
> 2. Die finale koopprys van die tersaaklike eiendomme in bogemelde kontrak sal die volle opbrengs van Liberty Polisnommer 58953404700 wees.'

[14] The parties provided in clause 4 for the eventuality of the purchaser predeceasing the seller. In this event, the policy would be kept in existence 'deur die Van Aardt Broers se gesamentlike rekening totdat die verkoper afsterf' and that any payment of premiums out of this account 'afgeskryf sal

word teen die leningsrekening wat aan die koper deur die Van Aardt Broers verskulding is'.

[15] Clause 5 sets out the domicilium of the respective parties for purpose of the agreement and clause 6 deals with breach. It provides:

> 'Die partye kom ooreen dat indien enige van die partye in breuk is van die kontrak, die party wat nie in breuk is van die kontrak nie, viertien (14) [dae] kennis aan die party wat in breuk is van die kontrak kan gee om sy gebrek in die kontrak te herstel. Indien sodanige party nie die gebrek binne die genoemde periode herstel nie, sal die benadeelde party spesifieke nakoming kan eis en/of die kontrak kanselleer en skade eis.'

[16] The final clause, clause 7, describes the property that is the subject matter of the contract as 'twee eenhede van saamgestelde eiendomme bekend as Kranzkloof en Niekerksberg in Somerset-Oos Distrik'.

(b) *Pacta Successoria*

[17] A *pactum successorium* or succession agreement is an agreement that purports to 'regulate matters of succession'[3] Such an agreement is invalid[4] because it conflicts with public policy on account of its infringement of the right of freedom of testation and because it seeks, through contract, to evade the formalities required by the law of succession.[5]

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3 Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2 ed) Cape Town, Juta and Co: 2001, 36. See too Christie *The Law of Contract* (4 ed) Durban, Butterworths: 2001, 415-416, who defines a *pactum successorium* as 'a contract whereby a person curtails his freedom of testation by promising to bequeath or not to bequeath property to the promisee or a third party'. (This work will be referred to below as Christie.) See further, Hutchinson 'Isolating the *Pactum Successorium*' (1983) 100 *SALJ* 221, 231, who says that 'a *pactum successorium* is an agreement which purports to limit a contracting party's freedom of testation by irrevocably binding him to a post-mortem devolution of the right(s) to an asset in his estate'. (This article will be referred to below as Hutchinson.)

4 *McAlpine v McAlpine NO and another* 1997 (1) SA 736 (A), 746I.

5 Christie , 416. *McAlpine v McAlpine NO and another* supra, 747E-F.

[18] As every contract of sale has the effect of divesting a person's estate of assets, and taking them out of reckoning for purposes of succession, it may often be difficult to distinguish between a valid commercial contract, on one hand, and an invalid *pactum successorium* of the type referred to by Corbett CJ in the *McAlpine* case as an indirect *pactum successorium*,[6] on the other. In this respect, Fagan J had the following to say in *Jubelius v Griesel NO en andere*:[7]

> ''n *Pactum successorium* (opvolgingsbeding) is basies 'n ooreenkoms wat poog om 'n persoon sy testeervryheid te ontneem. Dit is 'n beginsel van ons reg dat persone tot hulle dood die vryheid moet hê om te besluit hoe hulle oor hulle bates sal beskik. Daar is grondige kritiek in te bring teen hierdie beginsel maar dit is nie tans ter sake nie. Waar 'n persoon dus voor sy dood met 'n ander ooreenkom dat hy met sy bestorwe boedel op 'n sekere wyse sal handel, is die ooreenkoms ongeldig.
>
> Aan die ander kant het ons reg groot waarde aan die vryheid van individue om ooreen te kom soos hulle wil. Daar word derhalwe traag ingemeng met ooreenkomste wat deur partye bereik is. In die algemeen is daar dus niks wat 'n persoon belet om enigiets wat hy besit te verkoop nie. Indien 'n persoon iets verkoop, verloor sy boedel wel daardie besondere bate, maar daar is gewoonlik geen sprake daarvan dat hy besig is om wat hy gaan nalaat te reël en aldus sy testeervryheid aan bande te lê nie. Op die oog af lyk dit asof daar nooit 'n probleem kan ontstaan in verband met koopooreenkomste nie. Daar is 'n hemelbreë verskil tussen die gewone koopooreenkoms en 'n ooreenkoms om vererwing te reël. Die probleem ontstaan wanneer 'n koopooreenkoms ongewone terme bevat wat dit laat beweeg in die rigting van 'n ongeoorloofde *pactum successorium* -- die probleem is dan om te bepaal wanneer die koopooreenkoms die skeidslyn oortree

6 At 747H. Such *pacta successoria* are ones in which contracts, while not making reference to a will, 'nevertheless purport to bind a party to a post-mortem disposition of his property'.
7 1988 (2) SA 610 (C), 620I-621C. See too Hutchinson, 222-223.

> en 'n verbode *pactum successorium* word.'

[19] Because of the similarities between testamentary instruments and contracts that have an effect of one form or another after the death of one of the parties, courts have at times experienced difficulty in ascertaining the answer to the central question, namely 'which characteristics of a testamentary instrument must an agreement display before it will be regarded as constituting a prohibited *pactum successorium*?'[8]

[20] The essence of a *pactum successorium* is that it 'purports to effect a post-mortem disposition of an asset in the estate of a contracting party by providing for a devolution of the right to that asset from the party, after his death, to another person' and that it 'seeks to prevent the contracting party from revoking the disposition, either by testament or by act inter vivos'.[9] The vesting of the contractual right post-mortem gives the agreement in question a testamentary character, while its irrevocability is what makes it objectionable.[10]

[21] In *McAlpine v McAlpine NO and another*,[11] Corbett CJ, after citing Hutchinson's article (which he described as an 'interesting and penetrating article'[12]) held that the test for a *pactum successorium* was whether the agreement concerned vested rights in the party benefiting from it at the time of the agreement or only after the death of the other party. He held:[13]

> '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

8 Hutchinson, 225.
9 Hutchinson, 237.
10 Hutchinson, 237.
11 Supra.
12 At 747F-G.
13 At 751C-D. See too *Jubelius v Griesel NO en andere* supra 623C-I.

> 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 *pacta successoria*. Accordingly, it seems only logical that vesting should be the litmus test for identifying a *pactum successorium*.'

[22] If, in other words, rights vest prior to the death of the party whose death is contemplated by the agreement, that agreement will not be a *pactum successorium*: the asset involved will cease to be an asset in his or her estate prior to his or her death and will, instead, become an asset in the other party's estate. If, on the other hand, the agreement contemplates the asset only ceasing to form part of the party's estate on his or her death and vesting in the other party then, the contingent right that the latter enjoys will not be good enough. The agreement will be a *pactum successorium*, and it will be invalid.[14]

(c) Vesting and the Deferred Sale Agreement

[23] The question to be answered is whether rights are vested in the applicant by the terms of the deferred sale agreement, or whether all he has acquired from it is a contingent right or rights. In order to answer this question, it is necessary first to set out certain characteristics of the agreement.

[24] First, the disposition of all of the first respondent's immovable property is irrevocable. Secondly, the disposition of the property is made for consideration, even if the purchase price will only be ascertainable and payable after the death of the first respondent. Thirdly, the agreement makes specific provision for its continued existence in the event of the applicant

14 *McAlpine v McAlpine NO and another* supra, 751E-752D.

predeceasing the first respondent. It does so by providing that the purchaser (who I have, for the sake of convenience but not entirely accurately, referred to as the applicant) is in fact the 'koper of sy regsopvolgers (nasate)'. It thus cannot be said that the sale is conditional on the uncertain event of the seller predeceasing the purchaser.

[25] The deferred sale is thus not contingent on the happening of a future uncertain event: the first respondent as seller will die before die 'koper of sy regsopvolgers (nasate)' because, even if the applicant predeceases him, there will always be a 'regsopvolger' of the applicant to survive the first respondent. There is, consequently, a vesting of rights that occurred immediately upon the conclusion of the agreement, and not, as in *McAlpine*, merely contingently upon the future uncertain event of which of the parties would die first.

[26] I conclude, on this basis, that the deferred sale agreement is not a *pactum successorium*, and is consequently not invalid on that account, as was argued by Mr Beyleveld on behalf of the first respondent.

[C] IS THE DEFERRED SALE AGREEMENT SUBJECT TO A RESOLUTIVE CONDITION?

[27] It was also argued by Mr Beyleveld that it is a resolutive condition of the deferred sale agreement that a partnership be in existence between the applicant and the first respondent.

[28] This argument rests principally on clause 4 of the agreement, which states that in the event of the purchaser predeceasing the seller, 'die polis instand gehou sal word deur die Van Aardt Broers se gesamentlike rekening totdat die verkoper afsterf' and that it was agreed that 'enige betaling van die polis wat gemaak word uit die Van Aardt Broers se gesamentlike rekening

afgeskryf sal word teen die leningsrekening wat aan die koper deur die Van Aardt Broers verskuldig is'.

[29] The agreement contains no such resolutive condition as an express term. In my view it cannot be said that a tacit resolutive condition was within the contemplation of the parties. Clause 4 postulated nothing more than a convenient way of ensuring that the premiums were paid in the event of the applicant predeceasing the first respondent. I am strengthened in this interpretation by the five factors which I list below.

[30] First, clause 4 must be viewed against the background of the applicant's evidence that, while the first respondent's loan account was in debit in the amount of R1 255 496.00, the applicant's loan account was in credit in the amount of R343 586.00.

[31] Secondly, it is noteworthy that, when the first respondent raised this point in his answering affidavit, he did not say that it was the common, although unexpressed, intention of the parties that the dissolution of their partnership would have the effect of bringing to an end the deferred sale agreement. Instead, he stated:

> 'I am advised by my attorneys that the three references in paragraph 4 of the "uitgestelde koopkontrak" to "Van Aardt Broers" are indicative of the parties' intention that the partnership must still be in existence as at the date of my death'.

[32] Thirdly, my conclusion that no resolutive condition was contemplated is strengthened by evidence that appears to be common cause, namely that the parties were motivated by a desire to keep the land within the Van Aardt family (although the first respondent's statement that the eventual aim was for his son and the applicant's son to farm as partners simply cannot be accepted because of his earlier statement that his son 'is permanently in an institution

and will never be able to run a farming operation').

[33] Fourthly, my conclusion is strengthened further by the fact that even if the partnership had not been dissolved at the end of February 2005, it would have ended in the event of the applicant's death, if he were to predecease the first respondent. Yet clause 4 expressly postulates the continuation of the deferred sale by providing for the continued payment (out of 'die Van Aardt Broers se gesamentlike rekening') of premiums in respect of the insurance policy which would, in due course, constitute the purchase price for the subject matter of the deferred sale agreement.

[34] Finally, interpreting clause 4 in the way contended for by the first respondent would have the effect that – to quote the first respondent – the deferred sale agreement would be void for its failure to contain the resolutive condition. In other words, because of the failure to record in writing a material term of the deferred sale, the agreement would not comply with the requirements of s 2(1) of the Alienation of Land Act 68 of 1981, because there can be no doubt that such a term would be a material term.[15] In circumstances such as this, in which the interpretation argued for by the first respondent would lead to the agreement being invalid, while the interpretation contended for by the applicant would not, the latter interpretation should be preferred – all things being equal.[16]

[35] I do not consider that there is, as contended for by Mr Beyleveld, a genuine dispute of fact on the issue of whether the continued existence of the partnership was a tacit resolutive condition. The defence to this effect and the related defence that this term was omitted from the written contract, both fail.

[D] COSTS AND ORDER

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15 *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A), 20H-21C.
16 See Christie, 250 -251.

[36] The matter was postponed by agreement on 22 April 2005 and the costs were reserved. Both Mr Schoeman, who appeared for the applicant, and Mr Beyleveld have submitted that the costs of that postponement should be costs in the cause.

[37] As the applicant has succeeded in making out a case for the relief that he sought in the Notice of Motion, I make the following order:

a) The agreement of sale entered into between the first and second respondents in respect of the properties described in paragraph 2.1 of the Notice of Motion is declared to be invalid.
b) The first respondent is interdicted from taking any steps to sell those properties to the second respondent or to the Gables Way Trust, established by the second respondent, or to register those properties in the name of either the second respondent or the Gables Way Trust
c) The first respondent is directed to pay the costs of the application, including the costs of the postponement of the matter on 22 April 2005.

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C. PLASKET

JUDGE OF THE HIGH COURT