IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

APPEAL CASE NUMBER: A5036

CASE NO: 2009/21232

DATE:18/03/2011

In the appeal matter between:

RADEBE, BOBOZA ALPHEUS	First Appellant
RADEBE, NOMSA	Second Appellant
And	
SOSIBO, SIPHOSENKOSI EMMANUEL N.O.	First Respondent
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA (SGHC) N.O.	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent

JUDGMENT

SATCHWELL J:

Introduction

1. This is an appeal against a decision in this division (per Kekana AJ) which found that the applicant ("Mr Sosibo") is the heir to the entire intestate estate of his late wife ("Mrs Sosibo"). Accordingly the court *a quo* ordered that the final liquidation and distribution account prepared by the Master of the High Court be

set aside and that Mr Sosibo was entitled to take transfer of certain immovable property from the deceased estate.

2. At issue is the status and import of certain provisions in an antenuptial contract entered into by Mr and Mrs Sosibo prior to their marriage and which provisions excluded the immovable property in question from the accrual system arising from their intended marriage as well as the impact, if any, of such property exclusion clause on the disposition of the intestate estate of the late Mrs Sosibo.

3. The parents of the late Mrs Sosibo, the appellants, (Mr and Mrs Radebe) contend that they are entitled to take transfer of the immovable property which was registered in the name of their late daughter which she had excluded from the matrimonial marital regime in the antenuptial contract and which, it is submitted, she had bequeathed or donated to them during her lifetime.

Background

4. Mr and Mrs Sosibo were married on 11th November 2006. Their matrimonial regime was one of out of community of property subject to the accrual system. Mrs Sosibo died on the 28th December 2006. She left no written last will and testament.

5. Subsequent to Mrs Sosibo's death, her husband was appointed executor of her estate. He instructed the firm , ' Accounting and Taxation Consulting CC', run by one Mr Van Vyk, to attend to administration of the deceased estate. A first and final liquidation and distribution account was prepared but was rejected by the Master of the High Court[1] (Second Respondent in this Appeal) on the basis that the account had failed to calculate the accrual claim (if any) having regard that the immovable property was excluded therefrom. The relevant portion of the report reads:

> 'kindly take note that under the accrual system there is not division of assets when a marriage is dissolved, calculate a possible accrual claim and amend cause for distribution. In terms of clause 4 of the antenuptial contract dated 27 October 2006 provide that immovable property is excluded from the accrual system. Take note that your application in terms of section 45 (1) of the Deeds Registries Act 47 of 1937 reflects that the parties were married in community of property. Section 45 (1) has been rejected (Pg 111).'[2]

6. It must be noted that the Master did not, as submitted on behalf of Mr and Mrs Radebe, reject the account because it had failed to provide for transfer of the immovable property into their name.

7. Thereafter, a further final liquidation and distribution account was prepared acceptable to the Master which indicated transfer of the contested immovable property into the names of the late Mrs Sosibo's parents, Mr and Mrs Radebe.

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[1]

[2] The Masters Report dated 20 April 2008

8. It is the disposition of this asset in the deceased estate, the immovable property, which has given rise to the present dispute. Mr Sosibo contended that he is the sole heir in his late wife's intestate estate and accordingly that the liquidation and distribution account was incorrect and that transfer of the immovable property to his late wife's parents, Mr and Mrs Radebe, should not have taken place. In the court *a quo* his application was upheld, the liquidation and distribution account was set aside and transfer into Mr Sosibo's name was ordered. The parents of the late Mrs Sosibo, Mr and Mrs Radebe (respondents in the court below) now appeal that decision.

Antenuptial Contract

9. Prior to their November 2006 marriage, the intending spouses took legal advice from an attorney in October with regard to the appropriate marital regime. Acting on advice received they gave separate Powers of Attorney to this attorney who was not himself qualified or authorised to prepare or register an antenuptial contract.[3] The attorney, then attended before a Notary Public and the attorney signed and the Notary Public attested an antenuptial contract. This antenuptial contract was registered in the Deeds Office on 7th November 2006.

[3] In Ex Parte Moodley and another; Ex Parte Iroabuchi and Another 2004(1) SA 109 W, I commented on the undesirability of unqualified persons, viz attorneys who are not Notariees Public, providing advice concerning and preparing antenuptial contracts.

10. In the antenuptial contract it was agreed between Mr and Mrs Sosibo that there should be neither community of property nor community of profit or loss between them. Accordingly, the accrual system of matrimonial regime as provided for in Act 88 of 1984 automatically came into operation.

11. In order to calculate the accrual or profits arising from and in the course of the marriage, the intended spouses indicated the nett values of their separate estates at the commencement of the intended marriage: that of Mr Sosibo being R5000 and that of the intended Mrs Sosibo being R368 000.

12. A clause was inserted into the antenuptial contract which has given rise to the present dispute reads as follows:

> '(4) For the purpose of Section 4 (1) (b) (ii) of the Act, 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.'

The Accrual Regime

13. The accrual system applicable to the matrimonial regime of Mr and Mrs Sosibo was automatically applicable once they were married out of community of property, profit and loss. The right of either of them to share in the accrual of the other spouse's estate only arose on dissolution of the marriage. Dissolution occurs either by death or divorce. In the present case death intervened.

14. The accrual system has been described as "a deferred community of property' or " a deferred sharing of the profits of spouses married out of community"[4]. On dissolution of marriage, whether by death or divorce, the nett increases in their respective estates are notionally added up and then divided equally. The accrual is thus the difference between the nett of the estate of commencement, properly escalated, and the nett value at dissolution. At dissolution of marriage a calculation is made by allowing to the spouse whose estate has no or a smaller accrual a claim against the other spouse or her estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses. In short, the accrual of each separate estate is first established, the accruals are added together and then divided in half. Each spouse is to receive the half so established and the one that has more than that amount is obliged to pay the difference to the other.

[4] Sinclair *The Law of Marriage* 142

15. Accordingly, in the present case, the first step to be taken was determination of the accrual in each of the separate estates of both Mr and Mrs Sosibo and then to calculate what claim, if any, either spouse of their executor had against the estate of the other. The liquidation and distribution account in the estate of the late Mrs Sosibo indicates the nett assets available for distribution (after payment of debts and administration fees) to be in the region of R1 200 000. Since that includes an amount of R480 000 in respect of the immovable property which property has been wholely excluded from any accrual, it would seem that the accrual in the estate of the late Mrs Sosibo was in the region of some R 720 000. Thereafter the accrual in the estate of the surviving Mr Sosibo should have been calculated. Only by comparison between the two estates and the two accruals (if indeed there are such) would it be possible to ascertain whether or not and the amount by which Mr Sosibo has a claim to a share in the accrual in the estate of his late wife.

16. However, taking into account that the financial position of the spouses could scarcely have changed significantly during the very short period of their marriage, it is most probable that Mr Sosibo does indeed have a claim upon the accrual in the estate of the late Mrs Sosibo.

17. It is only once these 'profits' have been divided between the spouses that the question of testate or intestate succession arises.

The Accrual Regime and Succession

18. The accrual of the estate of the deceased spouse is determined before effect is given to any testamentary disposition, donation *mortis causa* or succession to any portion of that estate in terms of the law of intestate succession[5].

19. The Matrimonial Property Act has made it clear that the matrimonial regime chosen by the spouses has no bearing on any right to succession by a surviving spouse from the estate of the first dying[6].. The application of the accrual system and the calculation of any accrual has no bearing on the right of either spouse to inherit from the other, either by way of intestate succession or under a will.

20. The fact that certain asset(s) have been excluded from the accrual in a marriage governed by that regime does not mean that the remainder of an estate, ie the portion not included in the accrual, must be dealt with in any manner other than *ab intestato* or by right of a will.

Intention of the Deceased

21. Much reliance has been placed by both parties on their purported comprehension of the 'intention' of the late Mrs Sosibo.

[5] Section 4 (2) of the Matrimonial Property Act
[6] Section 4 (2) of the Matrimonial Property Act

22. Mr and Mrs Radebe (the appellants) submit that the clear intention of their daughter in excluding this immovable property from the marital regime was to 'prevent it from devolving upon' Mr Sosibo on her death. This intention of the late Mrs Sosibo is supposedly extracted from her instructions to the attorney that the immovable property should be excluded from the accrual system created in the antenuptial contract; the averment that there was advice on the part of the attorney that such exclusion in the antenuptial contract 'would sufficiently prevent a devolution' upon Mr Sosibo in the event of either of the spouses dying without a will; the averment that, whilst alive, Mrs Sosibo had expressed the desire that this property should become the property of her parents.

23. There is a dearth of first hand information concerning the pre marriage consultation involving attorney Etienne Cloete[7], Mr Sosibo and the late Mrs Sosibo. In the founding affidavit Mr Sosibo goes no further than to state that "during the consultation the deceased and I had the said Etienne Cloete, he also advised us to prepare and execute a last will and testament. We inquired what the position would be should either of us die intestate and the legal position was explained to us by the said Etienne Cloete. Both of us decided that we deemed it unnecessary to execute a last will and testament under the circumstances."[8] Mr

[7] With whom the parties consulted; to whom they gave a Power of Attorney; who appeared before a Notary Public on their behalf and who executed the written antenuptial contract; who now represents Mr Sosibo, applicant in the court *a quo* and first respondent in this appeal.
[8] Para 8 of the Founding Affidavit

Sosibo also states that he has been advised by his attorney that "in his opinion I am the sole heir in the estate of the deceased and that I am entitled to inherit and take transfer of all or any assets in this estate. This was the same advice that the said Etienne Cloete gave the deceased and I IN October 2006"[9] Sosibo gives no indication of what explanation the said Etienne Cloete gave the intending spouses as to their legal position should either of them die intestate.

24. Mr and Mrs Radebe further contend that both family ties and financial interdependency lead to the making of a number of loans over a three year period both from the family business**,** Osizwenzi CC, and from Mr and Mrs Radebe to the late Mrs Sosibo in an account of approximately R450 000. It is averred that, during her lifetime, the late Mrs Sosibo confided in her sister, Patience Radebe, that she would want the immovable property which she had acquired to pass on to her parents if she were to die before them 'for reason that the loans that they and family business had made to her, enabled her to purchase that property'[10].

25. In addition, during her lifetime, the late Mrs Sosibo is said to have informed her parents, Mr and Mrs Radebe, that she wished them to become the owners of 'her house (the immovable property) and that that should be formalised by attorneys should she pass away before them.'[11] These expressions of wishes are confirmed

[9] Para 16 of the Founding Affidavit
[10] Para 6.17 of the Answering Affidavit
[11] Para 6.9 of the Answering Affidavit

by the affidavit of the sister, Patience Radebe, as also the parents, Mr And Mrs Radebe (the appellants).

26. However, for purposes of this appeal, it is not necessary to make any finding as to the credibility of the evidence deposed to by Mr Sosibo or members of the Radebe family.

27. Family recollection does not have to be relied upon because the appellants submissions are founded upon the meaning and the import of the property exclusion clause in the antenuptial contract. The appeal appears to be based upon a two fold argument: Firstly, Mrs Sosibo did not die wholly intestate because, insofar as the immovable property is concerned, she made a testamentary disposition in the antenuptial contract which meant that the house does not devolve upon Mr Sosibo by intestate succession. Secondly, the property exclusion clause is proof of either a donation or bequest to her parents. These two scenarios appear to be interchangeable in appellants argument and the wording variously used ranges from " bequest inter vivos", "transaction inter vivos", "donation mortis causa", "contract for the benefit of a third party".

Testacy or Intestacy of the late Mrs Sosibo

28. It is accepted that an estate may be partly testate and partly intestate in that a deceased may have left a valid will disposing of only portion of his or her assets. These assets then pass by testate inheritance, whereas the balance of the assets, not dealt with in the will, would pass by intestate inheritance.

29. Part of the appellant's argument appears to be that Mr and Mrs Radebe inherit by through some form of testatmentary provision in the ante nuptial contract. The property exclusion clause excludes the immovable property from the accrual between Mr Sosibo and the late Mrs Sosibo is some form of testamentary disposition when it is combined or read in the context of the evidence of members of the Radebe family..[12].

30. I comprehend that Mr and Mrs Radebe contend that exclusion of the immovable property from any prospective accrual reflects their understanding of their daughter's wishes that Mrs Sosibo did not wish her house to become the property of her husband, Mr Sosibo. They rely upon inclusion of this clause in the antenuptial contract to buttress the averment that, during her lifetime, Mrs Sosibo expressed the wish that the house should become the property of her parents.

[12] They might have done better to have considered the argument that Mr and Mrs Radebe inherit the immovable property by way of intestate succession, the property being excluded from Mrs Sosibo's total estate by reason of the property exclusion clause in the antenuptial contract. I shall consider this possibility.

31. However, I have much difficulty in accepting that the clause contained in the antenuptial contract contains any testatmentary disposition of this property to Mr and/or Mrs Radebe.

32. It has long been accepted that an antenuptial contract may contain provisions relating to the devolution of property on the death of one of the spouses which would be valid and constitute an exception to the rule that a *pactum successorium* is invalid.

33. However, there 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. I find no assistance to the appellants in the cases cited at footnote 12 of counsel's heads of argument.. While an antenuptial contract may certainly contain a succession clause, any such clause would have to comply with the formalities prescribed for wills. The formalities prescribed in the Wills Act 7 of 1953 as amended include a written document, signed on each page by the testator, each signature witnessed by two persons, nomination of heirs or legatees. 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.

34. Even if there were a reference to the death of the late Mrs Sosibo and the naming of legatees, there is certainly not compliance with the Wills Act. This antenuptial contract has not been signed on any page by the late Mrs Sosibo and there can therefore be no witness to her signature. The power of attorney whereby she authorised an attorney to attest to an antenuptial contract on her behalf constitutes even less compliance.

35. It does not avail the appellants to submit that a court must t exercise great caution when asked to set aside a will which has been accepted by the Master especially when a considerable period has elapsed since death. The authorities to which reference are made provide no assistance. In the present case there is no will. Moreover, a proper reading of the Master's report reveals that the Master never purported to accept any portion of the antenuptial contract as a will.

36. I can see no merit in the submission that Mrs Sosibo did not die intestate. There is no document extant which purports to dispose of her estate or part thereof on her death to named heirs or legatees.

Inter vivos bequest or donation mortis causa

37. Appellants counsel has attempted to argue that some kind of bequest or donation to Mr and Mrs Radebe is to be found either in the antenuptial contract or in the wishes verbally expressed by their daughter during her lifetime or in combination.

38. It is difficult to untangle the exact nature of the argument. However, on whatever basis it is presented I can find no merit therein.

39. Firstly, whilst it might formerly have been a frequent practice that an antenuptial contract would also include a contract between one or both of the spouses and one or more third parties in favour of either the spouses or the third party, in the present case there are no third parties who are either named in the antenuptial contract or who have entered into and concluded this contract.

40. Secondly, whilst it would have been permissible for the late Mrs Sosibo to have specified in the antenuptial contract that third parties not a party to the antenuptial contract, such as her parents, would be beneficiaries of a gift or settlement - she has not so done. A *stipulation alteri* would have to intend to create rights for Mr and/or Mrs Radebe, operate as an offer to them which they could accept and would have to comply with the formalities applicable to the nature of the rights on offer – in this case those prescribed in the Alienation of Land Act .

41. Thirdly, I do not understand what is meant by a "bequest inter vivos" but if by that phrase is intended a bequest made during her lifetime to take effect on her death, then I comment, once again, that there must be compliance with the provisions of the Wills Act. The reference to various authorities in appellant's heads are have not been particularly helpful.

42. Fourth, where it is argued that there was a "*donatio mortis causa"* then again there is neither a written document signed by the late Mrs Sosibo[13] in which she indicates that she makes a donation (in contemplation of death[14]) to her parents . There is still no compliance with the Wills Act[15].

43. Fifth, any divesting by Mrs Sosibo of her interest in the immovable property during her lifetime would necessarily require compliance with the provisions of the Alienation of Land Act 698 of 1981 [16].

44. Finally, insofar as it is suggested that the evidence of family members is to the effect that the late Mrs Sosibo made a donation to her parents during her lifetime

[13] Section 5 of the General Law Amendment Act 70 of 1968
[14] Oost v Reek and Snideman NNO 1967(1) SA 472 T 478E.
[15] Jordaan v De Villiers 1991 (4) SA 396 C
[16] Section 2 of the Alienation of Land act 68 of 1981 provides that "no alienation of land shall be of any force and effect unless it is contained in a deed of alienation signed by the parties thereto". As to donations of land contained in an antenuptial contract see Dockrat v Willemse et al 1989 (1) SA 480 N at 493F

which is reflected in the property exclusion clause in the antenupial contract, this is clearly not the case. There is no indication that the late Mrs Sosibo divested herself of the property during her lifetime and did not intend to enjoy the benefit of the property while she lived. I have already pointed out the absence of compliance with any of the prescribed formalities.

CONCLUSION

45. The distress of the Radebe family is understandable. The family was interdependent and provided financial assistance to the members thereof including the late Mrs Sosibo. She acquired a house of some value during her lifetime. Her family expected to benefit from her estate should she predecease any of them, particularly her parents. She then married Mr Sosibo. Barely a month later she died. Their grief and their loss has been compounded by the fact that an outsider, the very new husband, has benefited from their daughter's death.

46. It would seem that the only avenue available to the Radebe family has been to attach a claim to some portion of their daughter's estate by reliance upon the clause excluding the immovable property from the accrual in this marriage.

47. This reliance has been totally misplaced.

48. Appellants' legal representatives have lost sight of the fact that this antenuptial contract is primarily a contract between the two intending spouses, Mr Sosibo and his intended wife then Ms Radebe. They were seeking to arrange their matrimonial property regime.

49. Appellants' legal representatives have failed to have regard to the fact that the right of Mr Sosibo to share in any accrual in the estate of the late Mrs Sosibo would arise on dissolution of the marriage - by death or divorce - or if the court ordered otherwise. The late Mrs Sosibo concluded this antenuptial contract as an intending spouse. If she had not excluded this immovable property, her home, from the accrual in her estate she may well have found herself obliged to share the value of or the house itself with her spouse if and when they became divorced. If the immovable property had not been excluded from the accrual, then Mr Sosibo could have laid claim to some portion of the property representing an increase in the net value, ie the accrual, in the estate. By excluding the property itself from the accrual, Mrs Sosibo protected not only the property but also its increase in value by reason of additions, alterations, extensions and simply the increase in the value of immovable property. The effect of this property exclusion clause was, inter alia, to protect her own interests as a potentially divorcing spouse.

50. Parties choose different matrimonial regimes for a multiplicity of reasons. Intending spouses choose to exclude assets from the accrual for a similar variety of reasons – one need only think of insolvency, divorce, concern for children of previous marriages, the ability to dispose of an entire (rather than shared) asset by way of will and so on.

51. By excluding the immovable (or any other) asset from the accrual in the antenuptial contract, the late Mrs Sosibo did not give any indication that she divested herself of that asset in favour of her parents or anyone else nor did she give any indication that she bequeathed that asset to her parents or anyone else upon her death. This is not a divesting or transferring or devolving clause at all.

52. .This approach explains why there is no reference to Mr or Mrs Radebe in this antenuptial contract. It explains why there is no compliance with any of the formalities prescribed by the Wills Act or the Alienation of Land Act.

53. In the present case much distress and financial embarrassment could have been avoided had the intending spouses executed separate last Wills and Testaments at the time they consulted with regard to their antenuptial contract. It is appreciated that there are costs involved in embarking upon two legal processes – the antenuptial contract requiring consultation and advice from a Notary Public and the costs of registration of such contract; the will requiring advice and drafting

from and by an attorney. However, litigation such as this could have been avoided had Mr Sosibo and his late wife taken these steps.

COSTS

54. Mr Sosibo, the respondent in this appeal, has asked for costs to be awarded on a the punitive scale.

55. It is correct that this litigation should never have been required and this appeal should never have been embarked upon. However, I do not lose sight of the circumstances of the dispute – bereavement, attachment to the assets of the lost daughter, incredulity that parents are excluded from their daughter's assets in favour of a newly married spouse. All these understandable emotional considerations militate against any punitive order.

ORDER

56. In the result I would make an order as follows:

    a. The appeal is dismissed with costs.

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SATCHWELL J

I agree

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WILLIS J

I agree

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MONAMA J

DATED AT JOHANNESBURG THIS 18 MARCH 2011

K. SATCHWELL
Judge of the High Court