The Law of Succession Essay - Pacta Successoria (2014)

By Nicole Lee

The general principle in South African law, as was in Roman law, is that *pacta successoria*, are invalid because deceased estates must either devolve by will, or according to intestate succession law.¹ Hence, such *pacta* are typically prohibited in our law, as they were in Roman law, because they tend to contravene society’s predominant legal convictions. Nonetheless, attempts are made to devolve estates by way of such agreements in South Africa.² Our law does, however, make way for two exceptions, enabling certain *pacta successoria* to escape the prohibition. Prohibiting such *pacta* while making leeway for exceptions has been difficult, as our courts have contended with determining which agreements constitute *pacta successoria* and which of these are prohibited.³ Considering this, a critical discussion surrounding *pacta successoria* and their prohibition will be construed in this paper. The following will be dealt with: the features of such *pacta*, how they can be differentiated from other agreements, and why they are rejected; the prohibition’s origins and scope, and the practical problems it creates; the exceptions to the general principle in our law; and comparative law.

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*pacta successoria* are contracts that regulate the succession of contracting parties’ estates, upon either or both parties’ deaths, to one or both parties or to third parties. When parties leave their estates or parts thereof to each other, such *pacta* curtail the parties’ testamentary freedom. However, third parties’ testamentary freedom is not restricted when they are to receive benefits from the contracting parties because they are not bound to the contract and, therefore, can revoke their wishes anytime during their lifetime.⁴ These *pacta* can govern succession directly and indirectly, but more commonly indirectly, influencing the succession process, rather than the actual succession, by regulating a will’s contents. Here, property can be validly left to another, however the promissor becomes committed to not revoke her promise. Directly, these *pacta* disregard wills, affecting the succession themselves upon the promisor’s death.⁵ Initially, only indirect succession agreements not meeting the exceptions’ requirements amounted to prohibited *pacta successoria*. Only after *Borman en De Vos v Potgietersrusse Tabakkorporasie*⁶

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⁵ Reid *et al* op cit note 1.
⁶ *Borman en De Vos v Potgietersrusse Tabakkorporasie* 1976 (3) SA 488 (A).
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did direct succession agreements, not meeting the exceptions’ requirements fall within the prohibition’s scope. The agreement in Borman barred the deceased from disposing a monetary claim if he left a widow upon his death. The Court agreed unanimously that the agreement infringed the deceased’s testamentary freedom. Subsequently, it was invalid.

Flowing from pacta successoria being strictly prohibited in our law, several tests have been established to distinguish such pacta, which fall into the prohibition’s scope if they do not meet the exceptions’ requirements, from other agreements. The counter-performance test suggests that agreements are pacta successoria if the promissor was not granted a counter-performance. However, it has been accepted that a counter-performance is not a decisive factor in determining such pacta. The revocability test prescribes that agreements are pacta successoria if the promisor bound herself to the agreement irrevocably. If the agreement was revocable, her testamentary freedom would not have been limited because, being revocable, the agreement entitles her to continue disposing of her assets at her will until her death. The testamentary freedom test understands agreements to be pacta successoria if they limit the contracting parties’ testamentary freedom. The vesting test proposes that agreements are pacta successoria if they vest rights to beneficiaries upon or after a promisor’s death (dispositions mortis causa). Finally, the intention test, which explains that whether or not agreements are pacta successoria depends on the contracting parties’ intentions, as expressed in their agreement.

As can be noted, embodied in each test is a certain attribute associated with testamentary instruments, namely, a serious intention to confer a gratuitous benefit; revocability; testamentary freedom; and the vesting of rights to beneficiaries mortis causa. Seeing how the first and last of these attributes are prevalent in pacta successoria, shows why they have some testamentary character. Therefore, although a contract, a bilateral juristic act, could never be a testamentary instrument, a unilateral juristic act, it is able to portray various features of such an instrument. In grappling with the pactum successorium’s testamentary character, many of

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7 Reid et al op cit note 1 at 231.
8 Supra note 6.
9 Schauer v Schauer 1976 (3) SA 615 (W).
10 Jubelius v Griesel 1988 (2) SA 610 (K).
11 Varkevisser v Varkevisser 1959 (4) SA 196 (SR).
12 Hutchinson op cit note 3 at 1.
13 Supra note 6.
14 McAlpine v McAlpine 1997 (1) SA 736 (A).
15 Hutchinson op cit note 3 at 1.
16 Ibid at 4.
our courts, despite the prohibition, seemed disinclined to overturn agreements merely because they portrayed some testamentary character. Further, the courts that were less reluctant to avoid the prohibition would usually only apply one of the aforementioned tests, resulting in other factors, which may have been significant to the cases before them, being neglected. Thus how to determine pacta was still unclear. The vesting of rights to beneficiaries, being an essential determinant in identifying this pactum, was, however, one aspect that the courts were generally correct about.\textsuperscript{17}

The vesting test has been deemed appropriately reliable for distinguishing pacta successoria from other agreements, as it seemed the one most interrelated with testamentary freedom – a matter at the prohibition’s core.\textsuperscript{18} The reasoning for this is as follows: agreements disposing rights to assets during a promisor’s lifetime\textsuperscript{19}, even if the relevant beneficiary only comes to possess the assets on the promisor’s death (\textit{inter vivos} dispositions) cannot be pacta successoria, as testamentary freedom’s narrow definition is the freedom to dispose the remainder of one’s estate upon one’s death.\textsuperscript{20} Therefore, only agreements binding the promisor and disposing rights to her assets \textit{mortis causa} can be pacta successoria.\textsuperscript{21} The question then arises in a given case of when the disposition occurred, bringing vesting into being. Vesting refers to the time that a right to an asset is transferred from the promisor’s estate to that of the relevant beneficiary.\textsuperscript{22} There is a rebuttable presumption favouring \textit{inter vivos} dispositions that our courts apply when faced with these cases.\textsuperscript{23}

Our courts acknowledgment of the vesting test and the precedence afforded to it, calls for it to be more closely observed. On this test’s application, it is asked whether the relevant disposition vested \textit{inter vivos} or \textit{mortis causa}. As explained, agreements in which dispositions vest \textit{mortis causa} are pacta successoria that are invalid, unless an exception to the general principle can be applied.\textsuperscript{24} The answer is ascertained from the contracting parties’ intentions expressed in their agreement’s terms. If the times for receiving the right to claim the benefit and the benefit’s enjoyment are unrelated, the former determines when the vesting occurred.\textsuperscript{25} Applying this test

\textsuperscript{17} Reid \textit{et al} op cit note 1 at 229-30.
\textsuperscript{18} Supra note 14.
\textsuperscript{19} Corbett \textit{et al} op cit note 4 at 38.
\textsuperscript{20} Hutchinson op cit note 3 at 2.
\textsuperscript{21} Corbett \textit{et al} op cit note 4 at 38.
\textsuperscript{22} Reid \textit{et al} op cit note 1 at 232.
\textsuperscript{23} Ibid.
\textsuperscript{25} Reid \textit{et al} op cit note 1 at 233.
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in McAlpine v McAlpine\textsuperscript{26}, it was discovered that the parties intended to attach a suspensive condition to the clause in question because the disposition’s disposal in the clause depended on an uncertain future event’s occurrence. Thus, the respective agreement was a \textit{pactum successorium}.

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Vesting is crucial in distinguishing \textit{pacta successoria} from other agreements. Arguably, however, it is insufficient to regard it a sole determiner of these \textit{pacta} because dispositions vesting \textit{mortis causa} do not necessarily mean that the agreement in question limits testamentary freedom - a promisor may be able to revoke the agreement during her lifetime. Not curtailing her testamentary freedom, as explained, the agreement would not be a \textit{pactum successorium}. Therefore, agreements must vest rights \textit{mortis causa} and be irrevocably binding for them to be such \textit{pacta}.

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In Roman law, \textit{pacta successoria} were largely either unknown or prohibited. They were unknown because private ownership rights and rights that permitted individuals to deal with their private assets by validly drafting and executing wills existed. They were prohibited because, being juristic acts that fettered testamentary freedom, they were inconsistent with the lands’ prevalent law; and because the public feared that they would lure persons into wanting a promisor’s death.

In our law, persons guilty of bringing about promisors’ deaths are disinherited from receiving testamentary benefits.\textsuperscript{29} However, similarly to Roman law, a main objection for \textit{pacta successoria} in our law is that they limit testamentary freedom, contravening our deep-rooted legal principles and public policy, which is not a trivial matter seeing that economics and justice are at such policy’s core.\textsuperscript{30} Being a founding principle of our testate succession law, testamentary freedom has been awarded much significance: our courts are obliged to give effect to testamentary intent; and our property law affords owners the right to dispose their property at their will.\textsuperscript{31} Yet, these \textit{pacta} curtail the power to dispose freely of assets and that to change or revoke testamentary provisions.\textsuperscript{32} Other such objections in our law include that these \textit{pacta}

\begin{itemize}
  \item \textsuperscript{26} Supra note 14.
  \item \textsuperscript{27} Ibid.
  \item \textsuperscript{28} Reid \textit{et al} \op cit note 1 at 234.
  \item \textsuperscript{29} Christa Rautenbach ‘Succession by contract (\textit{pactum successorium})’ in Juanita Jamneck and Christa Rautenbach (eds) \textit{The Law of Succession in South Africa} 2 ed (2012) 231-41.
  \item \textsuperscript{30} Reid \textit{et al} \op cit note 1 at 101.
  \item \textsuperscript{31} Ibid at 69.
\end{itemize}
undermine the prerequisite formalities for executing valid testamentary instruments. The significance of this is that non-compliance with such formalities leaves persons dying wholly or partly intestate, which could be understood as being detrimental to those persons who had anticipated benefiting from the deceased’s estate.\(^{33}\) Furthermore, *pacta successoria* prevent courts from hearing oral evidence in disputes surrounding them, as these disputes would generally occur upon a contracting party being deceased. Finally, they cause the Receiver of Revenue to forfeit its claim on estate duties because assets disposed by *pacta successoria* do not form part of the deceased’s taxable estate, disregarding the Estate Duty Act.\(^{34}\)

Upholding the prohibition, however, has created certain practical problems. Giving testamentary freedom such high priority status can cause it to clash with contractual freedom, another freedom recognised as significant in our law. The problem is then whether it is acceptable to defend testamentary freedom at contractual freedom’s expense. Debatably, the solution could be for persons to decide, at liberty, which freedom should trump the other in a given situation.\(^{35}\) Another problem concerns direct succession falling within the prohibition’s scope, causing an abundance of useful ordinary agreements to possibly fall within this scope and be invalidated. As explained, this occurs when testamentary freedom’s curtailment is disregarded because any agreements seemingly effecting post-mortem dispositions could potentially be viewed as direct succession agreements.

While Roman law’s general principle regarding *pacta successoria* is firmly entrenched in our law, as mentioned, there exists two exceptions to this principle, which escape the prohibition. *Pacta successoria* incorporated into antenuptial contracts are valid, as are donations made in contemplation of death, or *donatio mortis causa*, provided these comply with the prerequisite testamentary formalities.\(^{36}\) Both do not fetter testamentary freedom because they still bestow upon contracting parties the power to amend or revoke their *pactum successorium*; and the latter are not inconsistent with our testate succession law, as they are executed in compliance with the prerequisite testamentary formalities.\(^{37}\)

Having seen the similar legal positions regarding *pacta successoria* in Roman and our law, perhaps these should be compared with a legal position slightly more divergent.

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\(^{33}\) De Waal op cit note 31 at 193.

\(^{34}\) Rautenbach op cit note 28 at 233.

\(^{35}\) Ibid at 235.

\(^{36}\) Hutchinson op cit note 3 at 227-8.

\(^{37}\) De Waal op cit note 31 at 194.
Scots law generally allows dispositions *mortis causa* to be regulated by agreements like *pacta successoria*. While it is unnecessary in Scots law to differentiate between such agreements - because they are legally acceptable - from ordinary ones, some of their features shall, nevertheless, be explored. Alike *pacta successoria*, these agreements can affect direct and indirect succession. Moreover, also associated with such agreements is vesting, although Scots law does not give it as much recognition as our law. In Scots law, like in our law, the intricacies between *inter vivos* dispositions and those *mortis causa* have to be made, as Scots law, like our law and most other legal systems have different arrangements for contracts as they do for testamentary instruments. This distinction is commonly needed when Scottish courts must determine whether a declaration of intent, found in a letter, conferring a benefit *mortis causa*, is a promise, which disposes rights to benefits *inter vivos*; or a legacy, which disposes rights to benefits *mortis causa*. This distinction is pivotal because there are different consequences attached to each of these. 38 Furthermore, as does our law, Scots law acknowledges *donatio mortis causa*, sitting tentatively between promises and legacies. Finally, like our law, Scots law recognises *inter vivos* agreements that take effect post-mortem. 39

Hence, although Scots law’s legal position is different to that of Roman and our law, the attributes relating to agreements that regulate succession *mortis causa* are very much alike.

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Succeeding the critical discussion of *pacta successoria* and their prohibition in our law, several aspects can be deduced. Such *pacta* are agreements irrevocably binding one to post-mortem dispositions of assets in one’s estate. Our law prohibits them because they conflict with our public policy and prevalent legal convictions, mainly by limiting testamentary freedom and disregarding the formalities required for executing valid testamentary instruments. Nonetheless, our law does not prohibit such *pacta* if they are integrated into antenuptial contracts or are *donatio mortis causa* executed in accordance with the aforementioned formalities. To alleviate the difficulties faced by our courts when differentiating *pacta successoria* from other agreements, several tests have been devised. The vesting test and that for testamentary freedom have been given particular importance. While these difficulties have tended to ease, practical problems still exist because of the prohibition. Finally, regarding comparative law, while Roman and our law abide by the principle that deceased estates may

38 Reid *et al* op cit note 1 at 239.
39 Ibid at 243.
only devolve by acts of testation or intestate succession, Scots law accepts that agreements similar to *pacta successoria* may be used to devolve such estates.
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