CG CASE NO: 511/88

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ROELOF HOEKSMA 1st Appellant

HENDRIKJE TERBLANCHE 2nd Appellant

and

RIEKELE HOEKSMA Respondent

CORAM: JOUBERT, SMALBERGER JJA, NICHOLAS, FRIEDMAN et NIENABER AJJA

HEARD: 23 MARCH 1990

DELIVERED: 30 MARCH 1990

JUDGMENT

NIENABER AJA

This appeal is the sequel to a feud between siblings about the will of their father.

Clause 2 of the will provides:

> "Ek bemaak aan my seun Riekele Hoeksma 1500 (een duisend vyf honderd) vierkante meter van plot 27 in die dorpsgebied Buccleuch synde ŉ gedeelte waarop die woonhuis staan. Die restant van plot 27 in die dorpsgebied Buccleuch sal deel van die restant van my boedel (wees?) waarna verwys word hieronder."

Clause 8, following upon a number of further legacies, continues as follows:

> "Ek bemaak die restant van my boedel van welke aard ookal, aan my drie kinders
> Riekele Hoeksma
> Hendrikje Terblanche (geb Hoeksma)
> Roelof Hoeksma
> in gelyke dele."

Riekele Hoeksma, the present respondent, was the successful applicant in the Court below. He was awarded certain relief against the Master of the Supreme Court, the first respondent in the Court below; against the executor dative, an attorney, who was the second

respondent; and principally against his brother, Roelof Hoeksma and his sister, Hendrikje Terblanche (born Hoeksma), the third and fourth respondents respectively. The Town Council of Sandton was cited as a **pro forma** fifth respondent because the property in question is situated within its municipal boundaries and any sub-division thereof would require its consent.

Roelof Hoeksma is now the first and Hendrikje Terblanche the second appellant. Riekele Hoeksma is the sole respondent. The remaining parties do not figure as such in this appeal.

The root of the problem was clause 2, both as to its meaning and implementation.

The respondent resided on the property in question. He and his family had done so for several years before the will was executed and his father died. In his founding affidavit he said (and this was not challenged):

> "The property was improved by the erection of a dwelling house, in which I live, outbuildings, a garden and an orchard. All of those items were constructed on approximately half the property, which was that portion of the property that was utilized by me. The remaining half of the property was not utilized by me and although there were certain buildings of no real value on same that portion of the property remained unused."

The entire property, according to the founding affidavit, measured 12916 m^2. The portion occupied by the respondent and his family extended well beyond 1500 m^2. He went on to explain that

> "... the positioning and size of the house on the property is such that an area totalling 1500 square metres could not be excised from the property so as to include the main house itself without cutting off portion of the outbuildings and garden. It was my view that my father who was a man of extremely advanced years at the time that he made the Will did not understand same and that what he intended to leave me was that western half of the property which had at all material times been occupied by me and which was demarcated by a fence."

Although this statement was not denied on the papers, his brother and sister, the present appellants,

plainly did not share his views about their father's intention. One can appreciate their scepticism. Clause 2 is unquestionably ambiguous. What, one may well ask, was it intended to convey: that the respondent was confined to a mere 1500 m^2 surrounding the house (as counsel for the appellants contended); or that he was entitled to the fenced area occupied by him, which the testator sought to describe generally with the words "synde ŉ gedeelte waarop die woonhuis staan", but which he erroneously estimated to be only 1500 m^2 in extent? And if the appellants are correct, how was the clause to be implemented? What were the boundaries of the 1500 m^2? Unless the beneficiaries could find common ground, these problems could only be resolved by a court after hearing evidence, and even then the possibility would remain that the clause might have to be disregarded if it should be found to be incapable of implementation. (cf CORBETT AND OTHERS, THE LAW OF SUCCESSION IN SOUTH AFRICA, 484-489.)

These uncertainties led to protracted negotiations between the parties "in an effort to avoid litigation". One consequence of the ensuing friction was that all of them were removed as executors and that an attorney (the second respondent in the Court below) was appointed in their stead.

It was in the latter's office that the three beneficiaries, duly assisted by their respective attorneys, eventually arrived at a settlement of the dispute. This was on the 20th November 1986. The terms of this settlement were recorded in a letter dated 26th November 1986, which the respondent's attorney addressed to all the other parties concerned. The gist of the agreement was that the respondent would receive, as his exclusive domain, an area demarcated on a prepared sketch plan, on which the house, outbuildings and garden were situated, and consisting (according to the letter) of 6202 m^2; in addition the respondent would receive

1141,50 m^2 adjacent to the demarcated area allocated to him, while the remainder would accrue to the two appellants in undivided shares.

It all boiled down to this: the entire property would be so divided that each (i.e. the respondent on the one side, and the first and second appellants on the other) would have an exclusive claim to one part of the plot and would relinquish any claim to the other.

Sadly, this eminently sensible arrangement did not prevail. The appellants reneged on it, for reasons which need not now be discussed. The respondent continued to maintain that the agreement was a binding one and insisted that it be implemented. The executor, in common with the appellants, took the line, as they still do, that the agreement was invalid for want of compliance with the provisions of the Alienation of Land Act, 68 of 1981.

The executor thereupon drew a Second and Final Liquidation and Distribution account in which he recorded, apropos of the property in question:

> "Die titelakte word in terme van Artikel 39 van Wet 66/65 geëndosseer aangesien die bepaling van die testament klousule 2, nie tot uitvoering gebring kan word nie en die erfgename nie tot 'n vergelyk kan kom deur middel van 'n herverdelingsooreenkoms nie."

The effect of that endorsement, according to a letter dated the 30th October 1987, which the executor addressed to the Master, was that a caveat was placed against the transfer of the property until such time as the beneficiaries arrived at an effective internal solution as to its sub-division.

The executor misconstrued section 39 of the Administration of Estates Acts, 66 of 1965. The section has nothing whatsoever to do with the present situation, as counsel for the appellant readily conceded, nor does it make any provision for a caveat of the sort

devised by him.

The respondent, rightly so, objected to the account but the Master overruled the objection without furnishing any reasons for doing so. The respondent accordingly had no option but to apply to the Transvaal Provincial Division for relief. The application was successful and the Court below made the following order:

> "1. The decision of the first respondent (the Master) rejecting the applicant's objection to the second and final liquidation and distribution account submitted by the second respondent to first respondent in the estate of the late Roelof Hoeksma, estate No. 3341/82, is set aside.
> 2. It is declared that the oral agreement entered into between the applicant and the third and fourth respondents on 20 November 1986 is valid and binding.
> 3. The second respondent is ordered to take all necessary steps to implement the terms of the said oral agreement.
> 4. The third and fourth respondents are ordered to pay the costs of the application jointly and severally the one paying the other to be absolved."

It is against that order that the present

appellants, with leave of the Court a quo, now appeal.

They did not file any answering affidavits in the Court below. Their entire opposition, in the Court below, as in this Court, rested on a single law point, contained in a notice in terms of Rule 6(5)(d)(iii), which read:

> "(a) The oral redistribution agreement relied upon by the applicant constitutes an alienation of land as envisaged by section 1 of the Alienation of Land Act, No 68 of 1981;
> (b) The oral redistribution agreement relied upon by the applicant is not contained in a Deed of Alienation signed by the parties thereto or by their agents acting on their written authority;
> (c) The said oral redistribution agreement is therefore in terms of section 2(1) of Act 68 of 1981 of no force or effect."

Section 2(1) of Act 68 of 1981 provides as follows:

> "No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written

authority."

"Land" is defined in section 1 as including:

"(i) any unit;
(ii) any right to claim transfer of land;
(iii) any undivided share in land."

The same section also defines "alienate". It means

"sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and 'alienation' has a corresponding meaning".

The oral agreement was clearly not a sale or donation. The question, indeed the only real question in this appeal, is whether it entailed an exchange.

"Exchange" is not defined in the Act. It therefore bears its ordinary meaning. In its most rudimentary form exchange (barter, ruil, permutatio) marks a transaction between two people whereby each gives to the other, as his own, one thing in return for another. (DE GROOT Inl. 3. 31. 6.; VOET 19. 4. 1.).

Exchange differs from sale, historically its precursor and now its counterpart, in the nature of the reciprocal consideration which is promised for the res sold or exchanged: with sale the agreed co-ordinate is essentially the payment of money; with exchange it is the delivery or transfer of another asset. But just as, in sale, the res sold must be an identified or identifiable asset (cf CLEMENTS v SIMPSON 1971 (3) SA 1 (A) at 7C-G), so too, in exchange, the commodities exchanged must both be capable of proper identification. If not, the transaction, whatever else it might or might not be, would not be an exchange.

The appellants' approach is that the oral agreement perfected an exchange by the parties of the rights they derived from the will (to claim transfer of a portion or undivided shares in a portion of the property) for the corresponding rights which they defined in the agreement itself. But the difficulty with this approach,

even assuming it to be correct, is that one simply cannot tell, from the terms of the will itself, exactly what those rights were. As a contemplated exchange the oral agreement, as the Court **a quo** pointed out, lacked the required degree of certainty.

Indeed, it was for that very reason, viz. to circumvent the uncertainties of the will, that the parties came to terms with one another. Their manifest intention was not to engineer a trade-off of their rights to various parts of the property, but to adjust their respective claims - to make better sense of the will; to avert litigation about its terms; to facilitate its implementation and, by dispensing, as between the appellants on the one hand, and the respondent on the other, with a joint holding in undivided shares, to avoid future confrontation.

In my view, therefore, the oral agreement, for all that it may have involved a measure of give and take,

was never intended by the parties either to constitute or to incorporate a contract of exchange. The intention of parties is a relevant factor in determining the true nature and classification of a contract. (See, for instance, ZANDBERG v VAN ZYL 1910 AD 302 at 309 and, in relation to the distinction between sale and exchange where the consideration is partly in money and partly in kind: VOET 18. 1. 22. and MOUNTBATTEN INVESTMENTS (PTY) LTD v MAHOMED 1989 (1) SA 172 (D) at 174-178, where the relevant case law is collected and discussed.) The present agreement was conceived not as an exchange but as a compromise - and, not being an exchange, did not have to comply with the provisions of the Act in order to be valid.

Counsel for the appellants rightly did not contend that the oral agreement amounted to a "family arrangement" which, on the authority of BYDAWELL v CHAPMAN NO AND OTHERS 1953 (3) SA 514 (A), was assailable

as an attempt to alter the devolution in terms of the will. Here, all the rights (to claim transfer) had vested in the beneficiaries, none of them minors (cf <u>GREENBERG AND OTHERS v ESTATE GREENBERG</u> 1955 (3) SA 361 (A) at 364G-366A) - although the nature and extent of those rights admittedly remained in contention - so that it was legitimate for the beneficiaries to seek to re-arrange the assets of the estate to suit themselves.

> "In <u>Ex parte GRANT</u> the parties to the agreement, all of full capacity, disposed of their vested rights. The parties did not purport to alter or modify the provisions of the will; they compromised on the assets coming to each in the process of **schichten en deelen**, as they have been competent to do according to Roman-Dutch Law for centuries."

(per Van den Heever JA in <u>BYDAWELL'S</u> case, supra, at 523A.) What appellants' counsel did contend was that the oral agreement constituted a redistribution agreement. He relied in particular on a **dictum** of Clayden J in <u>KLERCK NO v REGISTRAR OF DEEDS</u> 1950 (1) SA 626 (T) at

629:

> "I agree with the argument on behalf of the appellant that in every redistribution there must be involved sale, exchange, or donation between one heir and another, or between the heir and the surviving spouse."

Because it was a redistribution agreement, and did not involve a sale or donation, therefore, so the argument proceeded, it must be an exchange.

The short answer is of course that this approach begs the question - the issue is not whether the agreement can be described as a redistribution agreement but whether it amounted to an exchange. In my judgment, for the reasons already discussed, it did not. Nor do I consider that the appellants can derive any real support from the **dictum** of Jansen J in RABIE v DIE MEESTER VAN DIE HOOGGEREGSHOF EN ŉ ANDER 1960 (3) SA 848 (T) at 850G:

> "Dit ly geen twyfel aan nie dat 'verdeling' ŉ 'vervreemding' uitmaak nie."

That may be so, generally speaking, but "alienate" in the

Act has a circumscribed meaning. Whereas "land", for instance, is defined as "including" certain categories, "alienate" is defined as "meaning": "sell, exchange or donate", no more, no less. To the extent that the present agreement is not an exchange it accordingly does not qualify, for the purposes of the Act, as an "alienation".

For these interrelated reasons - because the parties contemplated change and not exchange; because the assets to be "exchanged" were uncertain; and because the oral agreement was essentially a settlement to resolve these uncertainties - I believe the Court a quo to have been right in holding that the agreement concluded on the 20th November 1986 and recorded on the 26th, was not an "exchange" and accordingly was not invalidated by the provisions of the Alienation of Land Act, 68 of 1981.

The appeal is dismissed with costs.

P M NIENABER AJA

JOUBERT JA)
SMALBERGER JA)
NICHOLAS AJA)
FRIEDMAN AJA)