An illustration of the erroneous application of selected law of succession principles and statutory measures in recent case law

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Mini dissertation accepted in partial fulfilment of the requirements for the degree *Master of Laws in Estate Law* at the North-West University

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Graduation: June 2025

ABSTRACT

The law of succession, a fundamental component of private law, governs the transfer of assets and rights from deceased individuals to beneficiaries, relying on both common and customary legal principles. While several statutory measures, such as the *Wills Act* 7 of 1953, *Intestate Succession Act* 81 of 1987, and others, guide its application, recent judgments have highlighted consistent erroneous applications or misinterpretations. These mistakes can lead to disputes among beneficiaries, underscoring the need for a rigorous understanding and correct application of succession law principles. This dissertation aims to analyse these errors in recent case law, exploring specific areas such as the formalities prescribed in the *Wills Act* regarding witnesses, the recognition of testamentary provisions in antenuptial contracts, and the intricate relationship between matrimonial property law and succession. Through an in-depth analysis of pertinent cases, the study seeks to bridge current knowledge gaps, reinforce the importance of continuous learning for legal professionals, and contribute to the discourse on succession law principles. The overarching research question is: To what extent has recent case law demonstrated instances of erroneous application or misinterpretation of selected succession principles and statutory measures?

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LIST OF ABBREVIATIONS

MPA	Matrimonial Property Act 88 of 1984
PER	Potchefstroomse Elektroniese Regsblad
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Wills Act	Wills Act 7 of 1953

Chapter 1 Introduction

1.1 Problem statement

1.1.1 Background

The law of succession comprises both common law principles and, where applicable, customary law principles and statutory measures. These principles govern *inter alia* the transfer of assets and rights from a deceased individual to his or her beneficiaries. Furthermore, the law of succession also outlines the rights and obligations that individuals may have concerning the estate of the deceased.[1] It is therefore is a crucial element of private law.[2] As highlighted, the principles guiding the law of succession are usually shaped by a combination of common and customary law principles, along with specific statutory provisions, such as the *Wills Act*;[3] *Intestate Succession Act*,[4] *Reform of Customary Law of Succession and the Regulation of Related Measures Act,*[5] the *Administration of Estates Act*;[6] and the *Matrimonial Property Act*.[7]

However, recently there have been several judgments where principles and statutory measures pertaining to the law of succession have been erroneously applied (be it in *obiter dicta* or in *rationes decidendi)*. These errors in application can lead to unintended consequences. It can trigger disputes among the beneficiaries and adversely affect their entitlements and their rights. Thus, examining and comprehending these cases is crucial for enhancing the practical application of the law of succession.

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1 Jamneck and Rautenbach *et al The Law of Succession in South Africa* 25. Also see 1.1.3 of Hofmeyr and Paleker *et al Law of Succession in South Africa*.

2 Jamneck and Rautenbach *et al The Law of Succession in South Africa* 25. Also see 1.1.3 of Hofmeyr and Paleker *et al Law of Succession in South Africa*.

3 7 of 1953 (hereafter the *Wills Act*).

4 81 of 1987.

5 11 of 2009.

6 66 of 1965.

7 88 of 1984 (hereafter the *MPA*).

1.1.2 Motivation

This study delves into and critically analyses recent cases where specific principles and statutory measures of the law of succession have been applied incorrectly. By meticulously evaluating these cases, the study aims to illuminate existing gaps in the comprehension and application of selected aspects of succession law principles and statutory measures. Moreover, this study aims to emphasise the significance of a profound understanding of the principles of succession law and the imperative for legal practitioners to continually refresh their expertise in this field. Furthermore, by pinpointing these issues, the study aims to enrich the ongoing dialogue about the development and practical application of succession law principles. This study aspires to contribute to the advancement of the legal profession and ensure that the principles of succession law are appropriately applied in the future.

The study focuses on the erroneous application of the following selected principles and statutory measures: (a) the testamentary formalities outlined in section 2(1) of the *Wills Act* as they pertain to witnesses. This will include an examination of their application in cases such as *Ferrington v Key*;[8] *Yokwana v Yokwana*;[9] *Westerhuis v Westerhuis*;[10] and *Karani v Karani;*[11] (b) recognition of testamentary provisions in an antenuptial contract as a valid *pactum successorium,* analysing the cases *Radebe v Sosibo*;[12] and *Vermeulen v Vermeulen*;[13] and (c) the relationship between matrimonial property law and the adiation or repudiation of an intestate or testate benefit as per section 15(3)(b)(iii) of the *MPA,* with a focus on *Gounden v The Master of the High Court*;[14] and *Govender v Gounden*.[15]

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8 2011 JDR 1332 (GNP).
9 [2013] ZAWCHC 22.
10 2018 JDR 0951 (WCC).
11 [2018] 1 All SA 156 (GJ).
12 2011 5 SA 51 (GSJ).
13 [2022] JOL 53048 (FB).
14 [2015] JOL 32896 (KZN).
15 2019 2 SA 262 (KZD).

1.2 Research question

To what extent has recent case law demonstrated instances of erroneous application or misinterpretation of law of selected succession principles and statutory measures?

1.3 Aims and objectives of the study

The primary aim of this study is to address the research question provided above by identifying and highlighting errors that have recently been made in case law, either in the application or the interpretation of the law of succession principles and statutory measures. The objectives are:

a) to provide an overview of the prescribed formalities for the execution of a will in terms of section 2(1) of the *Wills Act* with specific reference to the requirements applicable to the witnesses to the will;

b) to analyse the following cases in light of the formalities referred to above, namely *Ferrington v Key*;[16] *Yokwana v Yokwana*;[17] *Westerhuis v Westerhuis*;[18] and *Karani v Karani*;[19]

c) to determine whether an antenuptial contract has to adhere to testamentary formalities to qualify as a valid form of *pactum successorium*;

d) to analyse the following cases with reference to the above-mentioned determination as to the *pactum successorium: Radebe v Sosibo*;[20] and *Vermeulen v Vermeulen*;[21]

e) to discuss the matter of spousal consent as required in section 15(3)(b)(iii) of the *MPA* when adiating or repudiating an inheritance; and

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16 2011 JDR 1332 (GNP).
17 [2013] ZAWCHC 22.
18 2018 JDR 0951 (WCC).
19 [2018] 1 All SA 156 (GJ).
20 2011 5 SA 51 (GSJ).
21 [2022] JOL 53048 (FB).

f) to analyse the following cases with reference to the spousal consent and section 15(3)(b)(iii) of the *MPA: Gounden v The Master of the High Court*;[22] and *Govender v Gounden*.[23]

1.4 Research methodology

As part of the research methodology for this study, a literature review was conducted to critically analyse published sources on the topic of interest. The literature review identifies, analyses and discusses relevant, recent, and authoritative sources related to the research question.

In conducting the literature study, two main categories of sources were considered: primary and secondary sources. The primary sources considered were the common law, legislation and case law. The secondary sources analyses, interprets, and evaluates the primary sources. They include journal articles, books and literature reviews that analyse primary sources to provide a broader understanding of the research topic.

1.5 Structure

To fulfil the previously stated aims and objectives, this study explores multiple areas within the law of succession. Each area is individually addressed, focusing on the relevant principles inherent to the law of succession. Additionally, instances where case law may have incorrectly interpreted or applied these principles, are examined. The formalities applicable to witnesses attesting to the execution of a will, receive attention in Chapter 2. Testamentary provisions in an antenuptial contract as a valid form of *pactum successorium* are addressed in Chapter 3, followed by the matter of spousal consent to the adiation or repudiation of an inheritance in Chapter 4. Concluding remarks and recommendations are provided in Chapter 5.

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22 [2015] JOL 32896 (KZN).
23 2019 2 SA 262 (KZD).

Chapter 2 Formalities applicable to witnesses attesting to the execution of a will

2.1 Introduction

The sanctity and integrity of a will, a document of immense personal and legal significance, are largely determined by the meticulous observance of the formalities outlined in the *Wills Act*. Section 2 of the *Wills Act* provides a comprehensive framework detailing the nuances and prerequisites for drafting, signing, and witnessing a will to ensure its formal validity. This legislative framework has been established not merely as a formality, but as a protective measure to guard against potential fraud, misinterpretation, and disputes posthumously. However, the interpretation and application of the *Wills Act's* stipulations in practical legal scenarios have often been a subject of debate, contention, and varying judgements, as seen in recent case law. The cases that follow unveil a panorama of interpretations concerning the signing of wills by the testator, the role and responsibilities of attesting witnesses, and the overarching emphasis on ensuring that the true intent of the deceased is captured and respected. Through a detailed exploration of these cases, this discussion aims to place the spotlight on the current landscape of legal thought on the matter, to identify potential ambiguities, and emphasise the critical need for consistent, clear, and precise interpretation of the *Wills Act*. The objectives of the chapter are accordingly: (a) to provide an overview of the prescribed formalities for the execution of a will in terms of section 2(1) of the *Wills Act,* with specific reference to the requirements applicable to the witnesses to the will; and (b) to analyse the following cases in light of the formalities referred to above, namely *Ferrington v Key*;[24] *Yokwana v Yokwana*;[25] *Westerhuis v Westerhuis*;[26] and *Karani v Karani*.[27]

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24 2011 JDR 1332 (GNP) (hereafter the *Ferrington* case).
25 [2013] ZAWCHC 22 (hereafter the *Yokwana* case).
26 2018 JDR 0951 (WCC) (hereafter the *Westerhuis* case).
27 [2018] 1 All SA 156 (GJ) (hereafter the *Karani* case).

2.2 Testamentary formalities

Formalities are traditionally considered the cornerstone of a validly executed will, serving as precautionary and protective measures to verify the legitimacy of the document expressing the testator's wishes.[28] In terms of guarding against potential fraud or forgery, the significance and value of these formalities are paramount, acting as safeguards to prevent deception and uphold the solemnity of the process.[29] For a will to be recognised as valid and legally binding, it is essential that it adheres to the stipulations outlined in the *Wills Act*. The *Wills Act* provides the necessary guidelines and formalities associated with the drafting and signing of a will. Specifically, section 2 of the *Wills Act* delineates the protocols regarding *inter alia* the witnesses of the will and the requirement of their signatures.[30] It highlights the prescribed obligations of the testator and the witnesses.

2.2.1 Overview of prescribed formalities for the execution of a will as per section 2(1) of the Wills Act

As previously mentioned, section 2(1)(a) of the *Wills Act* lays down several critical formalities that ensure the formal validity of the document.[31] As per section 2(1)(a) of the *Wills Act*, no will executed on or after 1 January, 1954, shall be considered valid unless it meets specific criteria.[32]

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28 Schoeman-Malan 2015 *TSAR* 127.
29 Schoeman-Malan 2015 *TSAR* 127.
30 Section 2 of the *Wills Act.*
31 Section 2(1)(a) of the *Wills Act* reads as: "2. Formalities required in the execution of a will (1) Subject to the provisions of section three bis— (a) no will executed on or after the first day of January, 1954, shall be valid unless— (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and (iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page."
32 Section 2(1)(a)(i) of the *Wills Act.*

2.2.1.1 Testator's signature

As per section 1 of the *Wills Act*, "sign" is defined as follows:

> 'sign' includes the making of initials and, only in the case of a testator, the making of a mark, and 'signature' has a corresponding meaning;[33]

In accordance with section 2(1)(a)(i) of the *Wills Act*, the will should ultimately be signed by the testator. Alternatively, another individual can sign on behalf of the testator (an *amanuensis*), provided it is done in the testator's presence and under their direction.[34] Furthermore, if an *amanuensis* is used or the testator signs by means of a mark, all the formalities should be done in the presence of a Commissioner of Oaths.[35]

2.2.1.2 Acknowledgement and witnesses

The signature of the testator, or the individual signing on the testator's behalf (*amanuensis*), should be made or acknowledged in the presence of at least two competent witnesses. These witnesses should be present simultaneously.[36]

2.2.1.3 Witnesses' attestation

The requirements regarding witnesses are pivotal. A witness to a will must be competent to act as a witness.[37] These competent witnesses must not only attest, but also sign the will. As mentioned in paragraph 2.2.1.1, *"sign"* as defined in section

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33 Section 1 of the *Wills Act.*

34 Section 2(1)(a)(i) of the *Wills Act.*

35 Section 2(1)(a)(v) of the *Wills Act* reads as: "(v) if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies: Provided that— (aa) the will is signed in the presence of the commissioner of oaths in terms of subparagraphs (i), (iii) and (iv) and the certificate concerned is made as soon as possible after the will has been so signed; and (bb) if the testator dies after the will has been signed in terms of subparagraphs (i), (iii) and (iv) but before the commissioner of oaths has made the certificate concerned, the commissioner of oaths shall as soon as possible thereafter make or complete his certificate, and sign each page of the will, excluding the page on which his certificate appears."

36 Section 2(1)(a)(ii) of the *Wills Act.*

37 Section 1 of the *Wills Act* defines "competent witness" as: "a person of the age of 14 years or over who at the time he witnesses a will is not incompetent to give evidence in a court of law."

1 of the *Wills Act* include the making of initials and, only in the case of a testator, the making of a mark. Therefore, witnesses cannot sign by means of a mark.[38] This act of signing must occur in the presence of the testator, each other, and, if the will is signed by the testator by means of a mark or an *amanuensis* is used, also in the presence of a Commissioner of Oaths and the *amanuensis* (if applicable).[39]

2.2.1.4 Signature on multiple pages

If the will extends beyond a single page, each preceding page (apart from the last) should be signed by the testator or the *amanuensis*. This signature can be placed anywhere on these pages.[40]

In essence, while the testator's signature is vital, the role of the witnesses is equally crucial. Their presence, attestation, and signatures ensure the will's credibility and validity.

2.2.2 Prescribed formalities for the witnesses attesting to the execution of a will

According to clauses 2(1)(a)(iii) and 2(1)(a)(iv) of the *Wills Act*,[41] while the witnesses are mandated to sign the will, there's a specific requirement for the testator or the amanuensis to sign each individual page if the will spans multiple pages.[42] However, it is important to note that the *Wills Act* does not prescribe the same requirement for the witnesses. This implies that while the testator's (or *amanuensis*) signature must appear on every page of the will, the signatures of the witnesses are not subject to this same stipulation.

However, there is no mention of the requirement for witnesses to sign every page, reference must be made to the position prior to the amendment of section 2 of the

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38 Section 1 of the *Wills Act*.

39 Section 2(1)(a)(iii) and (v) of the *Wills Act.*

40 Section 2(1)(a)(iv) of the *Wills Act.*

41 Section 2(1)(a)(iii) and (iv) of the *Wills Act* reads as: "(iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and (iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page."

42 Section 2(1)(a)(iii) of the *Wills Act*.

Wills Act, for sake of clarity. Prior to the amendment in terms of the *Law of Succession Amendment Act,*[43] section 2(1)(a)(iv) read as follows:

> if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person and by such witnesses anywhere on the page;[44]

This section clearly states that witnesses are also required to sign every page in the case where there is more than one page. However, since the amendment, the words "and by such witnesses" are no longer stipulated.[45]

2.3 Analysis of case law in light of the prescribed formalities

2.3.1 Ferrington v Key[46]

2.3.1.1 Facts of the case

The case revolved around a disputed document, referred to as Annexure C, which was alleged to be a codicil to the last will and testament of Johan Georg Dormehl (the deceased).[47] The deceased was hospitalised, and the plaintiff, one of his daughters, claimed that Annexure C is a valid and enforceable codicil.[48] The plaintiff's ex-husband, Mr Ferrington, testified that the deceased, while in the hospital, expressed concerns about his debts and requested a "Power of Attorney" to address them.[49] He prepared the document, which included clauses 5.1 and 5.2, and the deceased signed it.[50] The witnesses initialled the first and second pages and next to clause 5.2 on the third page. The witnesses signed by writing their full names at the bottom left corner on the third page.[51] However, the defendant, the

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43 *Law of Succession Amendment Act* 43 of 1992.
44 Section 2(1)(a)(iv) prior to the amendment of the *Wills Act*.
45 Section 2(1)(a)(iv) of the *Wills Act*.
46 *Ferrington* case.
47 *Ferrington* case paras 1–3.
48 *Ferrington* case para 4.
49 *Ferrington* case paras 5–6 and 12.
50 *Ferrington* case paras 7–9.
51 *Ferrington* case para 36.

deceased's grandson and executor of his estate, argued that Annexure C is a general power of attorney, not a codicil.[52]

2.3.1.2 Legal questions

1. Does annexure C meet the legal requirements to be considered a valid codicil to the deceased's will?[53]

2. Was annexure C properly signed and executed in accordance with the *Wills Act*?[54]

Question 2 is relevant to this discussion.

2.3.1.3 The court's decision

The court carefully considered the evidence presented during the trial and raised several critical points in reaching its decision. The witnesses signed by writing their full names in the bottom left corner of the third page.[55] However, these signatures were not consistent with the signatures that appeared in the bottom right corner of the second page. This lack of consistency raised doubts about the validity of the document.[56] The court referred to the provisions of the *Wills Act* (specifically, section 2) that prescribe formalities for the validity of a will or codicil.[57] It highlighted that the plaintiff failed to prove, on the balance of probabilities, that Annexure C complied with these formalities.[58]

The court emphasised that the signatures on Annexure C, purportedly those of the deceased and witnesses, were inconsistent.[59] The alleged initialling by the deceased next to clauses 5.1 and 5.2 did not meet the formalities set out in section 2(1)(b)(i)

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52 *Ferrington* case para 3.
53 *Ferrington* case para 29.
54 *Ferrington* case para 29.
55 *Ferrington* case para 36.
56 *Ferrington* case paras 36–38.
57 *Ferrington* case paras 31, 35, 37 and 39.
58 *Ferrington* case para 39.
59 *Ferrington* case paras 36–37.

of the *Wills Act*, which requires the amendment in a will to be identified by the signature of the testator.[60]

The court raised concerns about the insertion of clauses 5.1 and 5.2, suggesting that these were added after the deceased had signed the Power of Attorney.[61] Mr Ferrington's failure to provide a satisfactory explanation further contributed to the court's doubt about the document's authenticity.[62]

The court considered the opinions of handwriting experts.[63] While there were differing opinions, the court leaned towards the views of Mrs Buckley and Mrs Van Wyk, who indicated inconsistencies and a possible element of forgery in the signatures.[64]

Based on these considerations, the court concluded that the plaintiff failed to establish, on the balance of probabilities, that Annexure C was a valid codicil.[65] Therefore, the court dismissed the plaintiff's claim, and the defendant was awarded costs.[66]

2.3.1.4 Commentary on *Ferrington v Key*

2.3.1.4.1 Court's reference to the *Harpur* case

The court, in the *Ferrington* case, referred to *Harpur NO v Govindamall,*[67] which clarified that a signature could include writing one's name or making a mark. However, the court determined that initials do not qualify as a signature in ordinary usage. Moreover, the terms "sign" and "signature" do not extend their primary meanings to encompass "initial" and "initials."[68] However, the court in this case said that if someone consistently uses initials as their signature, then those initials can

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60 *Ferrington* case paras 33–35.
61 *Ferrington* case paras 40–41 and 46.
62 *Ferrington* case para 41.
63 *Ferrington* case para 47.
64 *Ferrington* case para 47.
65 *Ferrington* case para 39.
66 *Ferrington* case para 48.
67 *Harpur NO v Govindamall and Another* 1993 4 SA 751 (A) (hereafter the *Harpur* case).
68 *Ferrington* case para 33.

be considered as their signature. Whether someone makes a mark, uses initials, or writes their full name, consistency is key.[69] It is important to note that the *Harpur* case is no longer of any force.

Regarding the case in question, the alleged signatures of the deceased appeared on the first, second, and third pages of the will, while initials appeared next to specific clauses. The purported signatures of the deceased, thought to be authentic, were found on the first page near a handwritten insertion of his name and also in the bottom right corner of both the second and third pages. The contention arose from the claim that the deceased "identified" certain clauses by placing initials next to the insertions. However, the court held the view that this alleged initialling does not comply with the formalities outlined in section 2(1)(b)(i) of the *Wills Act*, which explicitly requires amendments in a will to be identified by the signature of the testator for validity.[70] The court further stated:

> [36] I noted that the witnesses signed by writing their full names at the bottom left corner of the third page. The witnesses initialled the first and second pages and next to clause 5.2 on the third page.
>
> [37] Section 2(1) (a) (iii) provides that no will executed on or after the first day of January 1954 shall be valid unless.... (iii) such witnesses attest and sign the will in the presence of the testator …" The witnesses' "signatures" appearing on first and the bottom of second pages respectively, are not consistent with their signatures that appear on the bottom left corner of the third page.
>
> [38] In Harpur, the court held that the virtue of a signature lay in the fact that no two persons had the same handwriting. It is further held that the word "sign" should be interpreted so as to exclude signing by initials or initialling.
>
> [39] In my view, the witnesses did not comply with the formalities of section 2(1) (a) and (b) (iii). On this leg alone, the plaintiff failed to prove on the balance of probabilities that the codicil complies with the formalities.[71]

Reference should be made to the definition of "sign" and "signature" in the *Wills Act* as quoted under paragraph 2.2.1.1 of this study, namely:

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69 *Ferrington* case para 34.
70 *Ferrington* case para 34–35.
71 *Ferrington* case paras 36–39.

> 'sign' includes the making of initials and, only in the case of a testator, the making of a mark, and 'signature' has a corresponding meaning;[72]

Based on this definition, initials indeed qualify as signatures. The court's application of the *Harpur* case's stance, which did not view initials as legitimate signatures, was misguided. Section 2(1)(b)(iii) holds that,

> (b) no amendment made in a will executed on or after the said date and made after the execution thereof shall be valid unless—
>
> (iii) the amendment is further identified by the signatures of such witnesses made in the presence of the testator and of each other and, if the amendment has been identified by the signature of such other person, in the presence also of such other person;[73]

When examining section 2(1)(a) (as quoted previously) along with section 2(1)(b)1(iii) above, it is clear that there is no mandate for witness's signatures to be consistent in appearance.

2.3.1.4.2 Amendments to section 2 of the *Wills Act*

In the *Ferrington* case, the court stated that the *Wills Act* mandates that a will is valid if all the stipulations outlined in section 2 are met. Both the testator and the witnesses must sign the will.[74] While the testator can make a mark to sign, the witnesses cannot. Additionally, any changes made in a will needs the testator's signature for validation and must be identified by the witnesses' signatures as well.[75]

Under paragraph 2.2.2 above, the amendment of the *Wills Act* was highlighted; specifically in section 2(1)(a)(iv) which indicates that witnesses are not required to sign every page. Section 2(1)(b)(iii) does not specify the signing method or insist that the signature matches the one on the last page. In this case, the court's interpretation seemed to be based on its own assumptions, leading to erroneous

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[72] Section 1 of the *Wills Act.*

[73] Section 2(1)(b)(iii) of the *Wills Act* reads as: "(b) no amendment made in a will executed on or after the said date and made after the execution thereof shall be valid unless— (iii) the amendment is further identified by the signatures of such witnesses made in the presence of the testator and of each other and, if the amendment has been identified by the signature of such other person, in the presence of such other person."

[74] *Ferrington* case para 38.

[75] *Ferrington* case para 38.

conclusions. The court did not accurately apply the *Wills Act's* relevant sections to the facts of the case before it.

2.3.2 Yokwana v Yokwana[76]

2.3.2.1 Facts of the case

The applicant sought an order under section 2(3) of the *Wills Act* or common law, directing the Master to accept a document purportedly signed by Ms Fete as her will. Relief under the *Wills Act* was unavailable because the document was not the original will, allegedly signed by Ms Fete.[77] However, common law jurisdiction allowed the court to direct the Master to accept a reconstructed will if it accurately reflected the testator's intentions.[78] Ms Yokwana opposed the application, asserting that their mother died intestate. The second respondent was cited as the Master, who has submitted a report stating the inability to accept a copy of the alleged will, as opposed to the original or an original duplicate. This rejection is due to non-compliance with the prescribed formalities, particularly the absence of signatures by the testatrix and the witnesses on each page, as required by section 2(1)(a)(iv) of the *Wills Act*.[79] The document bequeathed properties and movable assets to the applicant and respondent. The Gugulethu property where Ms Fete lived, became a focal point.[80] The applicant and respondent, historically in conflict, were embroiled in disputes after Ms Fete's death. The existence of the will came to light during community meetings, leading to legal proceedings.[81] Ms Ndamane, a potential beneficiary, was considered after her waiver to be joined as a party.[82]

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76 *Yokwana* case.
77 *Yokwana* case paras 1–3.
78 *Yokwana* case para 1.
79 *Yokwana* case para 3.
80 *Yokwana* case paras 4–6.
81 *Yokwana* case paras 7–8.
82 *Yokwana* case para 6.

2.3.2.2 Legal question

The legal question was: Does the will in question comply with the formalities of the *Wills Act*?[83]

2.3.2.3 The court's decision

Concerning the authenticity of the document, the court acknowledged the testimony of Zama Yokwana and Nceba Ngesi, who asserted that Ms Fete had expressed a desire to make a will and had done so at an attorney's office.[84] The respondent, in questioning the authenticity of the signature, alleged a connection between Ms Scott and the applicant, implying potential forgery.[85] The court, however, determined that the applicant bore the onus of proving the authenticity of the signature.[86]

The court accepted the admissible opinion of the handwriting expert, Ms Yvette Palm, who, despite limitations due to the absence of the original signature, concluded that the questioned signature was probably that of Ms Fete.[87] Ms Palm's analysis focused on both inconspicuous and conspicuous details, emphasising the unlikelihood of a forger replicating the mix of features observed.[88] The court found Ms Palm's evidence compelling and supported it with direct testimony from witnesses and the filing of the document at the attorney's office.[89] The court concluded that, on a probability basis, the document had indeed been signed by Ms Fete, affirming her testamentary intentions.[90]

Furthermore, the court stated that the content of the document itself characterises it as her final will and testament.[91] However, the court confirmed the Master's decision that its qualification as a will is hindered solely by its failure to adhere to

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83 *Yokwana* case paras 2–3, 26.
84 *Yokwana* case para 13.
85 *Yokwana* case para 13.
86 *Yokwana* case para 14.
87 *Yokwana* case para 16.
88 *Yokwana* case paras 17–23.
89 *Yokwana* case para 25.
90 *Yokwana* case paras 25–26.
91 *Yokwana* case para 26.

the formalities mandated by the *Wills Act* regarding the witnesses to the will not signing every page.[92]

The issues related to property registration did not affect the validity of the testamentary intentions or other bequests in the document.[93]

2.3.2.4 Commentary on *Yokwana v Yokwana*

The *Yokwana* case revolved around the validity of a second will made by the deceased. One factor in determining its validity was whether it conformed to the prescribed formalities of the *Wills Act,* specifically the witnesses required to sign every page*.* The Master was involved in the case as the second plaintiff;

> The Master has filed a report stating that she is unable to accept a copy of the alleged will, as distinct from the original, or an original duplicate. She is also prevented from doing so because the document allegedly executed by the late Ms Fete is non-compliant with the prescribed formalities, in particular in that each page thereof was not signed by the testatrix and the witnesses as required in terms of s2(1)(a)(iv) of the Wills Act.[94]

The court further approved this decision reached by the Master;

> The document by its tenor describes itself as her last will and testament and but for the non-compliance with the formalities prescribed in terms of the Wills Act would have qualified as such.[95]

The Master, as well as the court, erred in applying the section 2(1)(a)(iv), which clearly states:

> (iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page.[96]

It does not mention that witnesses should meet the same requirement as the testator in this subsection. This section only stipulates prior to the amendment that

92 *Yokwana* case paras 3 and 26.
93 *Yokwana* case para 27.
94 *Yokwana* case para 3.
95 *Yokwana* case para 26.
96 Section 2(1)(a)(iv) of the *Wills Act.*

witnesses must also sign every page. In terms of the *Law of Succession Amendment Act*,[97] section 2(1)(a)(iv) read as follows:

> if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person and by such witnesses anywhere on the page;[98]

This section clearly stated that witnesses are required to sign every page in the case where there is more than one page. However, since the amendment, the words "and by such witnesses" are no longer stipulated.[99] Therefore, it can be deduced that this is no longer in force and has no effect on witnesses anymore.

2.3.3 Westerhuis v Westerhuis[100]

2.3.3.1 Facts of the case

The case involved the disputed will of a deceased woman, Mrs Jannetje Haasnoot.[101] She was part of a close-knit family of European refugees in South Africa.[102] The case involved two conflicting wills, the "first will" dated January 2013 and the "second will" dated October 2013, which appointed different executors and beneficiaries.[103] There was also an amendment to the second will that raised questions about its validity.[104] Mrs Haasnoot's physical and financial condition declined in the years leading up to her death in November 2013. After her death, a legal dispute arose between family members regarding the validity of her wills.[105] The case went to trial, where it was decided that the second will was valid but that the amendment concerning a property was not.[106] The parties then sought leave to appeal the judgment, and the matter went before the court in early 2018.[107] The parties agreed on a procedure for the hearing of oral evidence, focusing on key issues related to

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97 *Law of Succession Amendment Act* 43 of 1992.
98 Section 2(1)(a)(iv) prior to the amendment of the *Wills Act*.
99 Section 2(1)(a)(iv) of the *Wills Act*.
100 *Westerhuis* case.
101 *Westerhuis* case para 6.
102 *Westerhuis* case paras 1–2.
103 *Westerhuis* case paras 6–7.
104 *Westerhuis* case para 9.
105 *Westerhuis* case paras 9–10.
106 *Westerhuis* case para 10.
107 *Westerhuis* case paras 11–12.

the validity of the second will and the amendment.[108] They limited the witnesses who could testify to those who had already provided affidavits.[109]

The court highlighted the procedural complexities and the limitations of relying on affidavit evidence during the legal proceedings.[110] The case involved various family members and their interests in the estate, with the court examining the validity of the deceased's wills and the related amendment. There was a dispute over two wills of the deceased.[111] Both parties agreed that the first will complies with the legal provisions of the *Wills Act*, and if the second will should be found invalid, the deceased's estate would be administered according to the first will.[112] The second will contained various signatures, including the deceased's and two witnesses (police officers). The respondents disputed the authenticity of the deceased's signature and relied on a handwriting expert's testimony.[113] The second will had a manuscript alteration in clause 1.2, which was signed only by the deceased and not countersigned by the witnesses.[114] The alteration was ineffective under the law unless the court exercises its discretion to accept it.[115]

Furthermore, the deceased’s will should have been signed by her at the end of the document. This signature should have been witnessed by at least two competent individuals who observed the testator signing the document in their presence, with each witness present at that moment.[116] Subsequently, the witnesses were obligated to attest to and sign the will in the presence of both the testator and each other. Since the will comprised more than one page, both the testator and the witnesses were required to sign at the bottom of each page.[117]

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108 *Westerhuis* case para 18.
109 *Westerhuis* case paras 13–15.
110 *Westerhuis* case paras 15–18.
111 *Westerhuis* case para 9.
112 *Westerhuis* case para 19.
113 *Westerhuis* case para 19.
114 *Westerhuis* case para 19.
115 *Westerhuis* case para 19.
116 *Westerhuis* case para 46.
117 *Westerhuis* case para 46.

2.3.3.2 Legal questions[118]

The following legal questions arose:

1. Is the second will valid, or is it invalid due to issues with the signature, the alteration, and the absence of countersigning by the witnesses?
2. Should the court exercise its discretion to accept the alteration to clause 1.2, making it effective?
3. Does the deceased's estate fall under the provisions of the first will if the second will is deemed invalid?
4. Did any improper influence or misconduct by certain family members, particularly Freddie, influence the deceased's decisions and the validity of the second will?

Question 1 is relevant to this discussion.

2.3.3.3 The court's decision

The court discussed the applicable legal principles regarding the execution and amendment of a will. The relevant legal principles include the formal requirements for a valid will, as prescribed by the *Wills Act*.[119] These requirements involved the testator signing the will, witnessed by two or more competent persons, with signatures on each page if the will has more than one page.[120] Amendments to a will must also be identified by the testator's signature and witnessed in the presence of all witnesses.[121] The court may have condoned non-compliance with these formalities under specific circumstances, but focused on the testator's intention at the time of drafting or executing the will.[122] The evidence presented in the case revolved around the second will, which was allegedly signed by the deceased, Mrs

118 *Westerhuis* case para 19.
119 *Westerhuis* case para 46.
120 *Westerhuis* case para 46.
121 *Westerhuis* case para 47.
122 *Westerhuis* case paras 48–50.

Haasnoot, in the presence of the appellants and witnesses, including police officers.[123] There is also mention of a codicil and powers of attorney signed by Mrs Haasnoot while she was ill.[124] Additionally, the mental condition of Mrs Haasnoot in the months leading up to her death and property transactions was considered. The evidence presented by the respondents includes a handwriting expert's opinion, statements from a detective, and testimony from family members challenging the validity of the second will.[125] The case's outcome hinged on the assessment of whether the second will was valid, considering the legal requirements and the presented evidence.[126]

The court concluded that the trial court made an error in upholding the validity of the second will, except for the handwritten alteration to it.[127] Therefore, the deceased's immovable property should not have passed on to her heirs through intestate succession.[128] Since it was established that the first will was valid, the correct order should have been to grant the principal relief sought by the plaintiffs in their declaration, dismiss the counterclaim of the first and second defendants, and make an appropriate costs order.[129]

There were additional prayers in the declaration for Freddie and Catherine to vacate the property within 30 days and deliver the keys and movable property to the executors of the deceased's estate.[130] However, it was stated that this issue could be resolved once the executors were duly appointed by the Master, and no specific order was necessary.[131] The first will designated Jan and John Westerhuis as executors of the deceased's estate, but no provision was made for substitute executors.[132] Since John had passed away, it was suggested that Derick, executor

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123 *Westerhuis* case paras 51–53.
124 *Westerhuis* case para 53.
125 *Westerhuis* case paras 53–54.
126 *Westerhuis* case para 55.
127 *Westerhuis* case para 85.
128 *Westerhuis* case para 85.
129 *Westerhuis* case para 86.
130 *Westerhuis* case para 87.
131 *Westerhuis* case para 87.
132 *Westerhuis* case para 88.

of John's estate, might be considered as a substitute. However, the court did not make this appointment, leaving it to the discretion of the Master if necessary.[133]

In terms of costs, the court noted that neither side sought an order for the estate to bear the costs. Given the circumstances, the court decided that Freddie and Catherine's conduct was deplorable, and they should be ordered to jointly and severally bear the costs in the trial court due to their actions throughout the case.[134]

2.3.3.4 Commentary on *Westerhuis v Westerhuis*

In the *Westerhuis* case, the court dealt with various issues to ascertain the validity of the deceased's new will. The signing procedure of the will by the testatrix herself, witnessed by two qualified individuals, was among the key factors evaluated. The court stated the following with regarding to the signing of the new will:

> [46] The point of departure is the Act which prescribes the formalities for a valid will. In terms of s2(1)(a) thereof the will of Tannie Jannie was to have been signed by her (or by some other person in her presence and under her direction) at the end of the document. That signature must have been witnessed by 2 or more competent persons who must have witnessed the testator placing her signature on the document in their presence with each such witness being present at that time. Thereafter, the witnesses were required to attest and sign the will in the presence of the testator and each other, and since the will consists of more than one page, the testator and the witnesses were each required to sign at the foot of each page, once again in the presence of each other and the testator.[135]

Reference is made to the last sentence of paragraph 46 above, where the court mentioned that the will should be signed by the testatrix and the witnesses, and that all three parties (testatrix and two witnesses) were required to sign each additional page as well. Furthermore, the will should be signed at the foot of each page. The court made two errors in applying the *Wills Act*, the first being that the witnesses were required to sign every page; according to section 2(1)(a)(iv) of the *Act* it is only mandated for the testator to sign each page, it makes no reference to witnesses in this regard. However, it was the position prior to the amendment of

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133 *Westerhuis* case paras 88–89.
134 *Westerhuis* case paras 90–91.
135 *Westerhuis* case para 46.

section 2(1)(a)(iv) that witnesses were also required to sign every additional page where there is more than one page. It is no longer the position of the *Wills Act*.[136]

Secondly, contrary to the court's insistence on signatures by the testator (and the witnesses) at each page's foot, the law clearly states that the testator can sign "anywhere on the page." [137] Regarding the witnesses, they are not obliged to sign on every page, never mind the foot of the page.

2.3.4 Karani v Karani[138]

2.3.4.1 Facts of the case

The legal matter at hand originated from an order by Brother Spilg J in June 2015, referring the matter to trial. The fourth defendant remained neutral in the proceedings.[139] The central dispute revolved around the validity of the contested will purportedly executed on 7 February 2013. The plaintiff sought a declaration of nullity for this will and validation for a previous one dated 15 September 2006. Additionally, the plaintiff sought costs from the second and third defendants.[140] The key persons include the testatrix, Rukeya Karani, the plaintiff's direct brother, and the second and third defendants, who are nephews.[141] Evidence was presented by various family members and experts, with conflicting accounts from the plaintiff and defendants.[142] The case involved multiple wills, dated 1994, 2006, and 2013, each with different beneficiaries and executors, adding complexity to the proceedings.[143]

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136 Section 2(1)(a)(iv) of the *Wills Act;* also see para 2.2.2 above regarding the position prior to the amendment of the *Wills Act*.

137 Section 2(1)(a)(iv) of the *Wills Act* reads as: "(iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page."

138 *Karani* case.

139 *Karani* case para 1.

140 *Karani* case para 2.

141 *Karani* case para 3.

142 *Karani* case para 4.

143 *Karani* case paras 6–10.

2.3.4.2 Legal questions[144]

The followed legal questions arose:

1. Is the will dated 7 February 2013 a valid will?

2. Should the witnesses to the contested will sign every page of the will?

3. Is the contested will a forgery?

Only questions 1 and 2 are relevant to this chapter.

2.3.4.3 The court's decision

The court, in examining the legal formalities for the execution of a will, particularly under section 2(1)(a) of the *Wills Act*, meticulously evaluated the contested will dated 7 February 2013.[145] The court highlighted the peremptory nature of the formalities outlined in the *Act*, emphasising that these regulations are in place to safeguard against false or forged wills.[146] It specifically focused on the requirement for two or more witnesses to sign the will in the presence of the testator and each other, as well as the necessity for signatures on each page.[147]

The court addressed the testimony and evidence presented by both parties, acknowledging the common cause facts, including the lack of signatures by Mr Abudakr Cujee in the presence of the testatrix and Mrs Sarah Bulewan, a violation of the *Wills Act* provisions.[148] Furthermore, the court delved into the circumstances surrounding the drafting of the contested will in Canada by the third defendant, its transmission to the second defendant *via* electronic mail, and subsequent signing by the testatrix and witnesses.[149]

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144 *Karani* case paras 2 and 11.
145 Section 2(1)(a) of the *Wills Act*.
146 *Karani* case para 12.
147 *Karani* case para 12.
148 *Karani* case para 13.
149 *Karani* case para 14.

The judgment thoroughly considered the legal arguments, stating that the contested will failed to comply with the requirements of the *Wills Act*, rendering it invalid.[150] The court rejected the defendants' assertions of compliance and accepted the plaintiff's contention that the signature on the contested will was a forgery.[151] The court noted the importance of the contested will as a vital document and emphasised the strict requirements imposed by the law to ensure its integrity.[152]

In evaluating the expert testimonies, the court scrutinised the qualifications and objectivity of both experts, favouring the opinion of Ms Lourika Buckley, the plaintiff's expert witness.[153] The court found her analysis, which deemed the signature on the contested to be a forgery, to be credible and reliable.[154] In contrast, the court expressed scepticism regarding Mr Yossi Vissoker's findings, deeming them unsubstantiated and improbable, particularly in relation to the testatrix's age, health, and linguistic challenges.[155]

Ultimately, the court concluded that the plaintiff successfully discharged the burden of proving that the testator’s signature on the contested will was a forgery.[156] In contrast, the defendants failed to establish compliance with the *Wills Act* requirements.[157] As a result, the court issued a comprehensive order, declaring the contested will invalid, instructing the Master of the High Court not to act in terms of said will, confirming the will dated 15 September 2006 as the only valid last will of the testatrix, and directing the first, second, and third defendants to bear joint and several responsibility for the costs of the application proceedings and the costs of the suit.[158]

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150 *Karani* case paras 30–32.
151 *Karani* case para 41.
152 *Karani* case para 32.
153 *Karani* case paras 33–35.
154 *Karani* case para 35.
155 *Karani* case para 36.
156 *Karani* case para 41.
157 *Karani* case para 41.
158 *Karani* case para 41.

2.3.4.4 Commentary on *Karani v Karani*

In the *Karani* case, the court's task was to ascertain if the will in dispute adhered to the prescribed formalities of the *Wills Act*. The question arose whether witnesses of a will need to sign every page, given that in this contested will, the witnesses' signatures appeared only on the final page. The court stated the following:

> The Wills Act is silent on the issue of whether witnesses are required to sign each page or only the last page and our courts have accepted that witnesses only sign the last page of a will containing a Testatrix's signature. In my view, the Act that requires the signature must be interpreted widely to mean that each and every page must be signed by all. To hold otherwise would lead to an anomaly. If witnesses do not sign each and every page of Will, it creates the risk whereby anyone can amend pages to a Will which no longer safeguards against fraud and legal uncertainty. The Contested Will does not comply with the requirements stipulated in Section 2 of the Wills Act in more than one way.[159]

The court's interpretation of the *Wills Act* was flawed in this context. While the judge acknowledged the *Harpur* case,[160] where it was generally accepted that witnesses need only sign the last page, he deviated by interpreting the *Wills Act* differently. The *Harpur* case was decided prior to the amendment of section 2(1)(a)(iv) of the *Wills Act*, where the position was that a witness is required to sign every page.[161] The *Wills Act* as it currently stands unambiguously indicates that only the testator/testatrix is required to sign every page if the will spans multiple pages, so the court's conclusion was erroneous.[162]

The judge did clearly justify why he was of the opinion that the witnesses should sign every page. He also acknowledged that the *Wills Act* is silent on this matter, and then stated that he is of the opinion that witnesses should sign every page to safeguard against fraud and legal uncertainty. In this matter the judge knowingly made the decision to interpret the *Wills Act* differently and add in his view. In the other cases discussed above, the courts made *bona fide* mistakes. Here, the judge took it upon himself to decide how to apply section 2(1)(a)(iv), adding a requirement

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159 *Karani* case paras 30-32.
160 *Harpur* case.
161 See para 2.2.2 above.
162 Section 2(1)(a)(iv) of the *Wills Act.*

where the *Wills Act* was silent on it. The judge added a requirement outside of the wording of the section and in essence developed the law on this matter. It is not the duty of the judiciary to develop the law, and furthermore, it is not permitted for the judiciary to amend and develop the law.[163] There is a separation of powers for a reason; namely the Judiciary, the Executive, and the Legislature. Each sphere of government should act within its own domain and not interfere with another sphere. It is the legislature that creates and develops the law.[164]

2.4 Conclusion

The legal framework meticulously outlined by the *Wills Act* has the overarching aim of safeguarding the legitimacy and reliability of wills, providing clear stipulations for their drafting and execution. This structured framework pays special attention to delineating the roles of both the testator and witnesses in the process, with explicit requirements set forth for the signing of the testamentary document.[165] However, a nuanced analysis of recent case law reveals a myriad of interpretations and applications of these stipulations, resulting in judicial decisions that at times deviate from the original intent of the *Wills Act*.

Two notable cases, *Karani v Karani* and *Yokwana v Yokwana*, serve as poignant illustrations of the witnesses' roles in attesting a will. Their presence, attestation, and signature play critical roles as safeguards against potential disputes, fraudulent activities, and ambiguities inherent in the testamentary process. Nevertheless, a point of contention arises when considering whether witnesses are mandated to sign every page of a will or only the final one. While the *Wills Act* mandates the testator's signature on every page, it does not explicitly extend the same requirement to the witnesses.[166] Unfortunately, this lack of absolute clarity in the *Wills Act* has resulted in varied interpretations manifesting in legal judgments.

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[163] Chapter 8 of the *Constitution of the Republic of South Africa*, 1996.
[164] Chapter 4 of the *Constitution of the Republic of South Africa*, 1996.
[165] Section 2(1)(a) and (b) of the *Wills Act.*
[166] Section 2(1)(a)(iv) of the *Wills Act.*

Cases like *Ferrington v Key*[167] and *Westerhuis v Westerhuis*[168] illustrate varying judicial interpretations, particularly of signatures and their placement on the will. Meanwhile, in the *Karani v Karani*[169], the court's interpretation deviated from established legal precedents, emphasising the inherent complexities and potential for erroneous interpretation associated with the formalities outlined in the *Wills Act*. It is paramount to highlight the significance of adhering to the formalities of a will, underscoring that their inclusion is not just beneficial but essential. In instances where an independent party, such as an attorney, is not able to authenticate the validity of a will, disputes often escalate into protracted legal proceedings, laying bare the private matters of the family to public scrutiny. In such scenarios, a judge may find themselves tasked with the responsibility of determining the authenticity of the will.[170]

Consequently, while the *Wills Act* provides a foundational framework for the execution of wills, it is becoming increasingly evident that the precise interpretation of its formalities remains an area of uncertainty among certain presiding officers. This underscores the imperative need for legislative amendment, a call to action to clarify existing uncertainties and ensure that the true intent of the *Wills Act* is upheld consistently. Such amendments are vital to securing not only the sanctity of wills but also the faithful execution of the wishes articulated by the deceased, thereby fortifying the legal foundation governing testamentary matters.

167 *Ferrington* case.
168 *Westerhuis* case.
169 *Karani* case.
170 Schoeman-Malan 2015 *TSAR* 149.

Chapter 3 Testamentary provisions in an antenuptial contract as a valid form of *pactum successorium*

3.1 Introduction

A *pactum successorium* refers to an agreement concerning succession, which is generally unenforceable in law.[171] However, there are two exceptions to this rule; namely when such an agreement is contained in an antenuptial contract and a *donatio mortis causa* that complies with testamentary formalities.[172] In this chapter the objectives are firstly to determine whether testamentary formalities must be adhered to in an antenuptial contract to qualify it as a valid form of *pactum successorium*; and secondly, to analyse the following cases with reference to the above-mentioned determination as to the *pactum successorium*, namely *Radebe v Sosibo*;[173] and *Vermeulen v Vermeulen*.[174] The objectives are vital to understand the legal intricacies surrounding the validity and enforceability of *pacta successoria* in antenuptial contracts and their practical implications in the mentioned caselaw. A general background and cursory discussion follows to better understand what a *pactum successorium* is, what it entails, and whether it should comply with the formalities of a will. This is followed by a discussion on each case, as well as a critical analysis in light of the first objective. These issues revolve around compliance with testamentary formalities, interpreting agreements in antenuptial contracts, and determining whether they constitute valid *pacta successoria*.

3.2 Pactum successorium

As mentioned in the paragraph above, a *pactum successorium* refers to an agreement concerning succession. Typically, these agreements are not upheld by the law. The two exceptions lie in an antenuptial contract containing such an agreement and a *donatio mortis causa*. While a will operates as a unilateral legal

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171 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.2. Also see Schoeman-Malan and De Waal *Erfreg* 223-227.

172 Para 5.2 of Hofmeyr and Paleker *et al Law of Succession in South Africa*. Also see Schoeman-Malan and De Waal *Erfreg* 223-277.

173 2011 5 SA 51 (GSJ) (hereafter the *Radebe* case).

174 [2022] JOL 53048 (FB) (hereafter the *Vermeulen* case).

action, a *pactum successorium* functions as a bilateral legal act.[175] It outlines succession provisions while the testator is still alive (*inter vivos*), where they pledge to bequeath their entire estate or a portion to another upon their death.[176] In the case of *Borman en De Vos NNO v Potgietersrusse Tabakkorporasie BPK*,[177] the court characterised a succession agreement as an agreement where involved parties set the succession terms for one or more parties' estates following their death. A *pactum successorium* was defined as follows in the *Borman* case:[178]

> A *pactum successorium* (or *pactum de succedendo*) is, in short, an agreement in which the parties agree to the succession (*successio*) of the estate (or of a part of it, or of a specific matter that forms part of it) of one or more of the parties after the death (*mortis causa*) of the relevant party or parties rule. An example of such an agreement is where A and B agree with each other to appoint me as heir again and again; or where A and B agree with each other that A will bequeath his legacy (or part of it) to B; or where A and B agree with each other that A will bequeath his legacy (or a part of it, or a particular thing belonging to him) to C. An agreement of this nature conflicts with the general rule of our law that beneficiaries inherit *ex testamento* or *ab intestato*, and is considered invalid (except in the case where it is embodied in a antenuptial agreement).

This definition was cited in *inter alia McAlpine v McAlpine*.[179]

3.2.1 Invalidity of pacta successoria

In general, contracts that aim to regulate matters of succession are considered invalid. The reasons why a *pactum successorium* is prohibited are: (a) it restricts freedom of testation; and (b) it can circumvent testamentary formalities.[180] A *pactum successorium* relates to succession rights that are associated with death, and may involve restrictions on freedom of testation.[181]

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175 Van Heerden and Skelton et al *Family Law in South Africa: Private Law* para 7.3.4.3.
176 Van Heerden and Skelton et al *Family Law in South Africa: Private Law* para 7.3.4.3.
177 1976 3 SA 488 (A) (hereafter the *Borman* case).
178 *Borman* case 501.
179 *McAlpine v McAlpine* 1997 1 SA 736 (A) 746–747 (hereafter the *McAlpine* case).
180 *McAlpine* case 747 reads as: "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." Also see *Ahrend and Others v Winter* 1950 2 SA 682 (T) 685 and the *Borman case* 501.
181 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.6.

A successory agreement is invalid, whether it relates to the entire succession or just a specific legacy.[182] It is invalid whether the promise is gratuitous or made for consideration.[183] A *pactum successorium* can be invalidated if it is irrevocable. If it is revocable, it does not restrict the promisor's freedom of testation.[184] Whether an agreement is revocable can be independently relevant to its validity.[185]

Some historical concerns about *pacta successoria* aimed at someone's death are considered less relevant in modern law.[186] Such agreements often depend on a third party's actions and do not infringe on the principle of freedom of testation.[187] However, specific cases may be subject to legal scrutiny, as seen in *pactum de non succedendo* where a beneficiary waives their right to claim an inheritance in a testator's will.[188]

3.2.2 Valid forms of a pactum successorium

As previously mentioned, there are two exceptions. A *pactum successorium* can be valid if it constitutes a *donatio mortis causa* (gift made in contemplation of death).[189] It can also be valid if a provision for one spouse to succeed to property upon the death of the other is contained in an antenuptial contract.[190] Such provisions cannot be revoked unilaterally by one of the parties.[191]

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182 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.8.
183 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.8.
184 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.7. Also see para 3.2.5 below regarding the revocability test.
185 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.7 and 5.5.9; the question of whether *pacta successoria* is *contra bonos mores* (against good morals) and illegal or merely unenforceable is not settled.
186 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.10. Also see Voet *The Selective Voet Being the Commentary on the Pandects* vol 1 (1955) 429 para 2.14.16 reads as: "agreements framed in regard to the future succession to a definite third party who is still alive, [are invalid] on the ground that they involve a longing for the contrivance of his death and are fraught with most gloomy and hazardous possibilities; and that they destroy the power of testation, or at least involve a base hastening and anxiety over the inheritance from another…" Also see Groenewegen A Treatise on the Laws Abrogated and no Longer in Use in Holland and Neighbouring Regions 1984 para 5.14.5 (edited and translated by Ben Beinart): "[n]owadays the future succession of spouses can be arranged in antenuptial agreements."
187 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.10.
188 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.10.
189 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.2.
190 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.2.
191 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.2.

3.2.3 Two categories of pacta successoria

Pacta successoria can be divided into two categories; namely contracts related to the succession rights of one or both of the contracting parties; and contracts related to an expected succession to a third party by one of the contracting parties.[192] In the first category, common examples include a promise to make a bequest in another person's favour in a will, or a contract in which one party purports to dispose of property to another upon their death.[193] These agreements are invalid, as they may restrict the right of freedom of testation or evade legal requirements for the execution of a will.[194] The usual example of a succession agreement falling within the second category is where A and B enter into a contract in relation to a bequest that one of them expects under the will of C.[195]

3.2.4 Vesting rights

Whether a *pactum successorium* is valid depends on whether it confers vested or contingent rights. The parties are known as the promisee and a promiser in the bilateral act.[196] If the promisee confers a vested right to the property before the death of the promisor, it is considered an *inter vivos* disposition, not *mortis causa*, and is not invalid.[197]

It is important to note the difference between vested rights and contingent rights, which were defined in the *McAlpine* case. A vested right is defined as a right with a title that is fully and unconditionally established.[198] A contingent right is subject to a suspensive condition, distinct from a resolutive one.[199] In the context of contracts, a suspensive condition delays the full execution of the obligation, contingent upon the happening of an uncertain future event.[200] On the other hand, in the case of a

192 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.3.
193 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.3.
194 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.4.
195 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.10.
196 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.5.
197 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.5.
198 *McAlpine* case 742.
199 *McAlpine* case 752. Also see Hutchison 1989 *SALJ* 67.
200 *McAlpine* case 752.

resolutive condition, the standard consequences of the contract take effect, but they are nullified upon the occurrence of an uncertain future event.[201]

In the *McAlpine* case, the court referred to the vesting test, asserting that the pivotal factor in determining whether the reciprocal promises in the agreement constituted a *pactum successorium* and whether they would be regarded as donations or not, relied on the application of the vesting test.[202] This test revolves around the timing of when the right to a promised benefit transitions from the promisor to the promisee.[203] Specifically, it examines whether this right vests in the promisee only upon or after the death of the promisor, which would indicate a *pactum successorium*.[204] On the other hand, if the vesting occurs before the promisor's death, such as at the time of the transaction giving rise to the promise, it cannot be classified as a *pactum successorium*.[205] A more practical criterion relates to when the right to the promised benefit shifts from the promisor to the promisee.[206] If the agreement stipulates that this transition occurs immediately or before the death of the promisor, it constitutes an *inter vivos* disposition and cannot be categorised as a *pactum successorium*, even if the enjoyment of the right is deferred until after the promisor's death.[207] On the other hand, if the devolution of this right is set to happen only after the promisor's death, the agreement is likely, though not necessarily, regarded as a *pactum successorium*.[208] In summary, the provision for post-mortem transfer of a right to a benefit is a necessary condition, but not a sufficient one, for the agreement to be labelled as a prohibited successory agreement.[209]

The vesting test was reaffirmed in *inter alia Van Aardt v Van Aardt*.[210]

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201 *McAlpine* case 752. Also see *LAWSA* vol 5 first reissue paras 191–192.
202 *McAlpine* case 750.
203 *McAlpine* case 750.
204 *McAlpine* case 750.
205 *McAlpine* case 750.
206 *McAlpine* case 750.
207 *McAlpine* case 750.
208 *McAlpine* case 750.
209 *McAlpine* case 750.
210 Van Aardt v Van Aardt 2007 1 SA 53 (E) para 5 reads as: "The most commonly used test for this is whether or not the right to acquire the property becomes vested in the party upon whom it devolves prior to the death of the party from whom it devolves. Do the terms of this contract divest the seller of his right to dispose of the property during his lifetime? Do they confer a right

3.2.5 Other tests used

Different tests have been applied in cases to determine whether an agreement is a *pactum successorium*. In the minority judgment of the *McAlpine* case, Judge Nienaber referred to a few other tests.[211] Firstly, the "intention" test; where Judge Nienaber stated that a distinction exists between the transfer of property and its succession. The variation lies in the promisor's intention, as articulated in the agreement.[212] The critical question is whether the promisor, in obligating themselves through the agreement, had their own succession in mind. If the answer is affirmative, the agreement should be invalidated.[213] Conversely, if the true purpose and intention were not succession but something else, the agreement, all other factors being equal, should be deemed valid. Admittedly, distinguishing between nuances of intention, especially when property transfer coincides with the promisor's death, can be challenging due to the subjective nature of the test.[214]

Secondly, there is the revocability test, another factor sometimes used to determine if an agreement qualifies as a *pactum successorium* is the revocability of the commitment.[215] In the case of *Costain and Partners v Godden*,[216] it was said:

> 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*.

Although there are other tests, the vesting test is the predominant one as it was used as the deciding test by the (then) Appellate Division of the High Court in the *McAlpine* case.[217]

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to acquire the property which becomes vested in the property which becomes vested in the purchaser during the lifetime of the seller? This is a matter of interpretation of the agreement."

211 *McAlpine* case 755–757.

212 *McAlpine* case 755.

213 *McAlpine* case 755.

214 *McAlpine* case 755–756.

215 *McAlpine* case 756.

216 *Costain and Partners v Godden* 1960 4 SA 456 (SR) 459.

217 *McAlpine* case 750 reads as: "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…"

3.2.6 Presumption of disposition inter vivos

There is a presumption in favour of a disposition *inter vivos* (between the living) rather than *mortis causa* (upon death).[218] When in doubt about the validity of an agreement, the court will tend to interpret it in a way that makes the agreement operational.[219]

3.3 Analysis of recent case law dealing with the pactum successorium

3.3.1 Radebe v Sosibo[220]

3.3.1.1 Facts of the case

Mr and Mrs Sosibo married on 11 November 2006 out of community of property and subject to the accrual system.[221] Their antenuptial contract contained a property exclusion clause specifying that an immovable property at 1263/4 Milkwood Street, owned by Milicent Jabulile Radebe (Mrs. Sosibo), was excluded from the accrual system[222]. Mrs Sosibo died intestate one month after the wedding. Mr Sosibo was appointed executor of her estate and delegated the liquidation to another firm. The Master of the South Gauteng High Court (second respondent in this case) rejected the initial liquidation and distribution account due to the absence of Mr Sosibo's accrual claim calculation. Subsequently, a revised liquidation and distribution account suggested the transfer of the immovable property to the deceased's parents, Mr and Mrs Radebe.[223] Contrary to this, Mr Sosibo disagreed with the transfer, approached the court to set aside the account and to transfer the property to him as the sole intestate heir, wherein his application was successful.[224] Mr and Mrs Radebe then appealed to the South Gauteng High Court, suggesting a contextual interpretation of the property exclusion clause based on the deceased's intentions and loans. Furthermore, the deceased had borrowed money from her

218 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.6.
219 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 5.5.6.
220 *Radebe* case.
221 *Radebe* case para 4.
222 *Radebe* case para 12.
223 *Radebe* case paras 4–7.
224 *Radebe* case para 8.

parents (Mr and Mrs Radebe) to buy the immovable property and had expressed a desire for her parents to inherit the property upon her death.[225]

3.3.1.2 Legal questions[226]

The following questions arose:

1. What is the status of the provisions in the antenuptial contract entered into by Mr and Mrs Sosibo?
2. What is the significance of those provisions that excluded the immovable property from the accrual system arising from their marriage?
3. How does the property exclusion clause in the antenuptial contract affect the disposition of the intestate estate of the late Mrs Sosibo?

All three questions are relevant to this discussion.

3.3.1.3 The court's decision

The court did not interpret the clause in the antenuptial contract as a "testamentary disposition", meaning it did not suggest any succession agreement for the property upon Mrs Sosibo's death.[227] The court noted that the property exclusion clause's purpose was primarily to safeguard Mrs Sosibo's interests in the event of a potential future divorce.[228] Furthermore, Mrs Sosibo did not indicate in the antenuptial contract that she was transferring the property to her parents or had bequeathed it to them. The court further stated that even if there were references to the deceased's death and beneficiaries were named in the antenuptial contract, it would still not be compliant with the formalities required for a testamentary disposition.[229] In conclusion, the court rejected arguments suggesting that the exclusion clause was an *inter vivos* bequest or a *donatio mortis causa*.[230] The appeal by Mr and Mrs

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225 *Radebe* case paras 3 and 8.
226 *Radebe* case para 2.
227 *Radebe* case para 31–35 and 52.
228 *Radebe* case paras 49–51.
229 *Radebe* case paras 31–35.
230 *Radebe* case paras 41–44.

Radebe was dismissed, affirming that Mr Sosibo was the sole intestate heir of Mrs Sosibo.[231] The court emphasised that the requirements for a succession clause in an antenuptial contract need careful consideration.[232]

3.3.1.4 Commentary on *Radebe v Sosibo*[233]

The court stated the following:

> 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, that would be valid and constitute an exception to the rule that a *pactum successorium* is invalid… While an antenuptial contract may certainly contain a succession clause, any such clause would have to comply with the formalities prescribed for wills.[234]

The court correctly identified that a *pactum successorium* clause is valid if it is contained in an antenuptial agreement as established in paragraph 3.2 above. However, the court further stated that although succession can take place *via* an antenuptial agreement as a valid form of *pactum successorium*, the clause that contains the *pactum successorium* must comply with the formalities of a will as set out in the *Wills Act*.[235] This in turn includes the antenuptial contract itself and must

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231 *Radebe* case paras 36 and 56.

232 *Radebe* case paras 33–35 and 52.

233 *Radebe* case paras 31–32 and 34 reads as: "[31] However, I have much difficulty in accepting that the clause contained in the antenuptial contract contains any testamentary 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, that would be valid and constitute an exception to the rule that a *pactum successorium* is invalid. [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."

234 *Radebe* case paras 32–33.

235 *Radebe* case para 33 reads as: "[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 for 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, nominating 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."

also comply with the formalities. The exception to the rule that an antenuptial contract is the one of two valid forms of a *pactum successorium*, does not further require that it must comply with any testamentary formalities, besides the actual provisions that are required to be contained in a valid antenuptial contract.[236] According to Rautenbach and Van der Linde:[237]

> ...an antenuptial contract is not a testament nor a codicil, nor can it be regarded as a testamentary act simply because one or more dispositions in it serve the purpose of a last will.

In *Ladies' Christian Home v SA Association,* the court clearly stated the position of a successor provision contained in an antenuptial contract:[238]

> By our law an antenuptial contract may contain valid provisions in regard to property which are to take effect upon the death of either of the intended spouses; but such a disposition of property, although it may resemble a testamentary act, does not deprive the antenuptial contract of its character of an agreement between the parties, and does not give it the character of a last will and testament.

In the case *Ex Parte Executors Estate Everard*,[239] the court dismissed the argument that a succession agreement contained in an antenuptial contract equates to treating the contract as a will. Instead, the court distinctly recognised a succession agreement in an antenuptial contract as being fundamentally different from wills.[240] The court left no room for doubt regarding the legitimacy of an antenuptial agreement that includes provisions for succession.[241] Furthermore, the court emphasised that the inclusion of a succession clause in an antenuptial contract does not alter the nature of the contract and made an unequivocal declaration to that effect.[242]

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236 Rautenbach and Van der Linde 2012 *SALJ* 27.
237 Rautenbach and Van der Linde 2012 *SALJ* 27.
238 *Ladies' Christian Home v SA Association* 1915 *CPD* 472.
239 *Ex Parte Executors Estate Everard 1938 TPD* 197.
240 *Ex Parte Executors Estate Everard* 1938 *TPD* 197.
241 *Ex Parte Executors Estate Everard* 1938 *TPD* 194.
242 *Ex Parte Executors Estate Everard* 1938 *TPD* 199 reads as: "[S]uch [a] provision [a succession clause], despite its resemblance to a testamentary act, does not deprive the antenuptial contract of its character of an agreement between the parties and does not give it the character of a last will and testament. The mere fact that the benefit is directed to accrue after the first-dying's death does not make it his testamentary disposition — the presumption is, I think, in favour of construing the provision as to succession in the antenuptial contract as an immediate gift or

Rautenbach and Van der Linde[243] explain the position of an antenuptial contract as opposed to a will:

> A testamentary document is the result of unilateral act by the testator. A contract, on the other hand is based upon the agreement of the parties. The execution of an antenuptial contract, trust *inter vivos* or a *donatio mortis causa* containing provisions in relation to the disposal of property to take effect upon the testator's death are not testamentary acts and a document embodying any one of these transactions will not constitute a will or codicil.

The only requirements that should be followed in terms of the antenuptial contract (which contains the *pactum successorium*) are set out in section 87(1) of the *Deeds Registries Act*,[244] namely:

> An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.

Therefore, there is no need to adhere to the formal requirements of a valid will to give legal validity to the testamentary provisions (*pacta successoria*) in the antenuptial contract. It can be deduced, in as far as the antenuptial contract complies with the requirements of the *Deeds Registry Act*, there should be no reason why it cannot be valid and enforceable. The court in the *Radebe* case erred in relying on applying the formalities of a will for the *pactum successorium* to be valid. The court was, however, correct in stating that the antenuptial contract in this case made no reference to any form of succession. Although the court's decision was in fact correct, it made the erroneous reference to a *pactum successorium* in an antenuptial contract needing to comply with the prerequisites of a will when it was not necessary to refer to this issue at all. It was not relevant to the facts in the case in front of the court. To conclude, the courts should be weary to include interpretations of legal concepts in a case where it does not find relevance,

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settlement of a right to property at a future date rather than a testamentary bequest or a donatio mortis causa, and this though the actual amount of the benefit remains uncertain until such date. It is a matter of contract, and not . . . a matter of unrestricted testamentary capacity."

243 Rautenbach and Van der Linde 2012 *SALJ* 29. Also see Corbett *et al The Law of Succession in South Africa* 35.

244 Section 87(1) of 47 of 1937.

moreover, where this legal concept is erroneously defined and described, as it can have a rippling effect in other cases, due to *stare decisis* system.[245]

3.3.2 Vermeulen v Vermeulen[246]

3.3.2.1 Facts of the case

In this matter, on 10 June 2004, JG Vermeulen and the first respondent formalised an antenuptial agreement, which stipulated that if Vermeulen died before Gertruida Sophia Cronje (the first respondent), she would have a maintenance claim against his estate, starting at R500 000 for the first year of their marriage, with an additional R100 000 for each subsequent year.[247] The agreement also stated that the first respondent would inherit the vehicle the deceased used daily at the time of his death.[248] Furthermore, the deceased made two wills in his lifetime, the first in 2014, which bequeathed his daily-use vehicle to his daughter, and the second in 2018, which excluded the bequest from the first will.[249] The deceased acquired the contested vehicle, an X-Trail, in 2008, and in 2010 he bought a Mercedes Benz S320 for the first respondent. Due to health issues, the deceased stopped driving the X-Trail in 2020, which was then used daily by the first respondent. Despite communications, the parties (two of whom are the co-executors of the deceased estate) had contrasting views about the ownership and rights to the vehicle, which led to litigation.[250]

3.3.2.2 Legal questions

The following questions arose:

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245 Rautenbach and Van der Linde 2012 *SALJ* 31. Legal principle of determining points in litigation according to precedent.
246 *Vermeulen* case.
247 *Vermeulen* case paras 2–3.
248 *Vermeulen* case paras 2–3.
249 *Vermeulen* case para 4.
250 *Vermeulen* case para 5.

1. Does the *Administration of Estates Act*[251] require that the estate assets, such as the X-Trail in this case, be under the exclusive control and custody of the executor and not the claimant irrespective of their claimed rights?[252]

2. How should contracts be interpreted? Should the emphasis be on the plain language used, considering the rules of grammar and syntax?[253]

3. Does the antenuptial agreement constitute a will, especially regarding the motor vehicle in question?[254]

4. Was there was a real and genuine dispute of fact arising from the affidavits? Given the disputes, should the court resort to oral testimonies (*viva voce* evidence) for a resolution, or should it decide based on the written submissions and affidavits alone?[255]

Questions 2 and 3 are relevant to this discussion.

3.3.2.3 The court's decision

The court asserted that the deceased's intention in the antenuptial agreement was evident.[256] Even though the first respondent did not own the X-Trail when the agreement was made, it was the vehicle she was using daily on his death.[257] According to the antenuptial agreement, it should go to the first respondent. The applicants posited that the intention of the deceased was to provide the first respondent with a vehicle, as fulfilled when he bought the Mercedes Benz S320 for her.[258] However, the court rejected this, stating that the antenuptial agreement was explicit about the deceased's vehicle at the time of his death.[259] Moreover, where the two wills conflicted, the later will should be given precedence.[260] The applicants'

251 66 of 1965.
252 *Vermeulen* case para 6.
253 *Vermeulen* case para 7.
254 *Vermeulen* case paras 8 and 9.
255 *Vermeulen* case para 10.
256 *Vermeulen* case para 19.
257 *Vermeulen* case para 19.
258 *Vermeulen* case para 19.
259 *Vermeulen* case para 21.
260 *Vermeulen* case para 20.

arguments were found lacking in substance and basis. The court concluded that the antenuptial agreement's intention was clear and that the X-Trail should belong to the first respondent, as she was using it daily at the time of the deceased's death. Due to the application's failure, the court ruled that the costs should be borne by the losing party (the applicants).[261]

3.3.2.4 Commentary on *Vermeulen v Vermeulen*[262]

With reference to a *pactum succesorrium*, the court stated the following:

> The exception to the rule is that the succession agreement incorporated in the antenuptial agreement is valid provided it complies with the prerequisite of the testamentary formalities. In this matter, it is conceded, although not expressly, that the antenuptial agreement does qualify as a valid testamentary document.[263]

This court came to the same conclusion, as in the *Radebe* case discussed in paragraph 3.3.1 of this study, namely, that a *pactum successorium* is valid when contained in an antenuptial contract and that it must comply with the formalities of a will. Moreover, the court based its decision on the fact that the antenuptial contract did qualify as a valid testamentary document. Although the *pactum successorium* is valid in this case, the criteria the court used in reaching this decision is incorrect. As an antenuptial contract containing a *pactum successorium* is still a

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261 *Vermeulen* case paras 21 and 25.

262 *Vermeulen* case paras 16–17 reads as: "[16] Counsel for the applicants advanced argument that the provisions of the antenuptial agreement registered on 24 June 2004 constitutes an indirect pactum successorium. This legal concept was defined by Gubbay J in Ex parte Calder Wood NO: In Re Estate Wixley in the following terms: "I think these cases show that a *pactum successorium* is an agreement relating to the succession to an estate, or a portion thereof, or to a specific asset or benefit belonging thereto, which postpones the devolution of personal rights until the death of the owner and which prevents the latter from bequeathing his estate or property to another person when otherwise he would be entitled to do so. It is the deprivation or curtailment of testamentary freedom that justifies the prohibition of such an agreement. [17] As a general rule *pactum successorium* is invalid and not enforceable. The main reason is that these agreements infringe the freedom of testation and courts are reluctant to uphold such agreements which chiefly infringe that principle. The main point, it seems, that if allowed it would result in the circumvention of the formal execution of wills. The exception to the rule is that the succession agreement incorporated in the antenuptial agreement is valid provided it complies with the prerequisite of the testamentary formalities. In this matter, it is conceded, although not expressly, that the antenuptial agreement does qualify as a valid testamentary document."

263 *Vermeulen* case para 17.

contract, it must only comply with the requirements of the *Deeds Registry Act*.[264] It does not qualify as a testamentary document and therefore need not comply with the prerequisites of the *Wills Act*.[265] Seeing as this is a fairly recent case, the courts must act with caution, as it may create an erroneous precedent for future cases.[266] It is crucial to again emphasise that a *pactum successorium* in an antenuptial contract does not have to meet the testamentary formalities outlined in section 2 of the *Wills Act*.

3.4 Conclusion

A *pactum successorium*, a concept rooted in common law, fundamentally denotes an arrangement related to succession clauses embedded in a contract, traditionally lacking enforceability under legal norms. However, one of two exceptions to this general principle arises when such an agreement is incorporated in an antenuptial contract. In the context of this chapter, two primary objectives were delineated. The first objective was to determine the necessity of adhering to testamentary formalities in an antenuptial contract to qualify it as a valid form of *pactum successorium*. The second objective involved an in-depth analysis of cases pertinent to the first objective's determination of the *pactum successorium*, specifically examining cases such as *Radebe v Sosibo* and *Vermeulen v Vermeulen*. These objectives were pivotal in gaining insight into the legal intricacies surrounding the validity and enforceability of a *pactum successorium* in antenuptial contracts, coupled with their practical implications as evidenced in the aforementioned cases.

To establish a comprehensive foundation, the chapter commenced by presenting a general overview and exploration, elucidating the nature of a *pactum successorium*, its inherent characteristics, and the query of whether it must conform to the formalities associated with wills. The achievement of the first objective marked the start of subsequent discussions, delving into each case with a meticulous examination in alignment with the initial objective. These discussions included

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[264] See para 3.3.1.4 above and section 87(1) of the *Deeds Registry Act* 47 of 1937.
[265] See also para 3.3.1.4 above and section 2 of the *Wills Act.*
[266] *Ex Parte Executors Estate Everard* 1938 *TPD* 192. Also see Rautenbach and Van der Linde 2012 *SALJ* 32.

matters related to conformity with testamentary requirements, the interpretation of clauses in antenuptial contracts, and the determination of whether they qualify as valid *pacta successoria*. The conclusive determination was that a *pactum successorium* is deemed valid in an antenuptial contract if said contract adheres to the formalities prescribed in the *Deed Registry Act*.[267]

It is imperative to underscore the significance of confirming that a *pactum successorium* contained in an antenuptial contract is not obliged to comply with the testamentary formalities outlined in section 2 of the *Wills Act*.[268] This distinction underscores the unique legal status and requirements associated with *pacta successoria* within the specific context of antenuptial contracts, thereby contributing to a nuanced understanding of their legal implications.

[267] 47 of 1937.
[268] Rautenbach and Van der Linde 2012 *SALJ* 32.

Chapter 4 Spousal consent to the adiation or repudiation of an inheritance

4.1 Introduction

Marriages in community of property is also referred to as marriages in community of profit and loss.

> In their modern form, such marriages operate on the premise of equality of the spouses with respect to their powers of administration of their joint estate.[269]

The combined estate includes all the assets owned by either spouse at the commencement of their marriage, along with any assets acquired by either of them throughout the marriage, subject to specific limited exceptions.[270] Hence, each spouse possesses extensive authority to independently make decisions concerning the shared estate without the need for consultation with the other spouse. However, when spouses are married in community of property, they need the consent (tacit or written) of their spouse when dealing with certain assets in the joint estate. This is set out in sections 15(2) and (3) of the *MPA*.[271] The objectives of this chapter are, firstly, to discuss the matter of spousal consent as required in section 15(3)(b)(iii) of the *MPA* when adiating or repudiating an inheritance by first giving general background into section 15(3)(b)(iii), consent between spouses married in community of property, and adiation and repudiation. Furthermore, the analysis delves into the concepts of adiation and repudiation, as well as the intricate aspects of "*dies cedit*" and "*dies venit*." Understanding these terms is fundamental to unravelling the legal complexities related to inheritance and bequests, which hinge on the certainty of designated dates. This distinction is crucial and underpins the legal arguments surrounding inheritance cases. The second objective is to analyse the following cases with reference to the spousal consent and section 15(3)(b)(iii)

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269 Section 14 of the *MPA* reads as: "Subject to the provisions of this Chapter, a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act." Also see Wood-Bodley 2020 *SALJ* 214.

270 Wood-Bodley 2020 *SALJ* 215.

271 Sections 15(2) and (3) of the *MPA*.

of the *MPA*, namely *Gounden v The Master of the High Court*;[272] and *Govender v Gounden*.[273] The former centres around the interpretation of section 15(2) and (3) of the MPA and whether the renunciation of an inheritance without the consent of the deceased or their executor is valid. In contrast, *Govender v Gounden* hinges on whether a spouse, married in community of property, requires the consent of the other spouse to renounce an intestate inheritance.

4.2 Section 15(3)(b)(iii) of the MPA

Section 15(3)(b)(iii) of the *MPA* reads:

> (3) A spouse shall not without the consent of the other spouse –
>
> (b) receive any money due or accruing to that other spouse or the joint estate by way of –
>
> (iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;[274]

Therefore, the 'money' that a spouse is entitled to as the beneficiary in a will or according to intestacy rules cannot be transferred to the other spouse without the consent of the beneficiary spouse. However, the inheritance still constitutes a part of the shared estate.[275] The transfer of ownership of inherited assets to the joint estate occurs only upon the executor of the estate delivering them to the beneficiary in a manner consistent with the principles of property law at the conclusion of the estate winding-up process.[276]

In certain scenarios, the *MPA* mandates that one spouse must obtain the consent of the other spouse, without specifying additional formalities. Consequently, verbal or even unspoken agreements would meet the statutory prerequisite.[277] It is also plausible for spouses to provide their approval at a later time, effectively validating the legal act after one of them has executed it.[278] This category includes transactions

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272 [2015] JOL 32896 (KZN) (hereafter the *Gounden* case).
273 2019 2 SA 262 (KZD) (hereafter the *Govender* case).
274 Section 15(3)(b)(iii) of the *MPA.*
275 Wood-Bodley 2020 *SALJ* 215.
276 Wood-Bodley 2020 *SALJ* 215.
277 Van Heerden and Skelton *et al Family Law in South Africa: Private Law* para 6.5.3.1*.*
278 Van Heerden and Skelton *et al Family Law in South Africa: Private Law* para 6.5.3.1.

such as receiving funds owed to the other spouse that may originate from various sources, including an inheritance, legacy, donation, prize or bursary in monetary form due to the other spouse.[279]

The question at hand concerns whether a spouse, married in a community of property, needs the consent of their partner in the marriage to effectively decline the benefits of an inheritance that would otherwise become part of their entitlement and/or the shared marital estate. In the *Gounden* and *Govender* cases (which are discussed in detail below), the resolution to this matter was contingent on the provisions of the *MPA*, specifically as stipulated in section 15(3)(b)(iii). It was determined that the spouse who has a legitimate claim to the inheritance has the authority to receive and manage that inheritance, either for their sole benefit or the benefit of the marital estate, without involving their spouse, unless they willingly agree to the other spouse's participation in it. In the absence of such consent, the spouse who is entitled to the inheritance possesses the legal right to legitimately renounce the inheritance or, in the relevant circumstances, the right conferred upon them following the testator's passing.[280] Certain phrases should first be defined before analysing the court cases.

4.2.1 Adiation and repudiation

Adiation means acceptance, and repudiation means renunciation.[281]

4.2.2 Dies cedit and dies venit

Firstly, it is important to understand what *dies* is. An heir or legatee may be designated to receive their inheritance or bequest on a certain date following the testator's death. The key aspect of this designated date, known as *dies,* is its certainty.[282] It can either be a specific or an indefinite date.[283]

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279 Van Heerden and Skelton *et al Family Law in South Africa: Private Law* para 6.5.3.1.
280 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 2.3.8.
281 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 2.3.1. Also see Wood-Bodley 2020 *SALJ* 216.
282 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.1.
283 Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.1.

Secondly, there are two types of *dies,* namely *dies cedit* and *dies venit*. In cases where an inheritance or bequest is made payable on a definite future date, the actual payment is deferred until the scheduled day (referred to as *dies venit*).[284] However, unless other provisions in the will make the inheritance or bequest contingent upon the beneficiary's survival, the right to the inheritance or bequest becomes effective immediately upon the testator's death (referred to as *dies cedit*).[285] This is the case regardless of whether the specified date is certain to occur during the beneficiary's lifetime.[286]

The same principle applies when the *dies* is indefinite but assured to happen during the beneficiary's lifetime, or when a future, indefinite date is specified for the transfer of ownership rights, with an interim interest of a usufructuary nature.[287] However, a different scenario arises when the *dies* is indefinite and not guaranteed to happen within the heir or legatee's lifetime, and there is no intervening interest, or if the intervening interest is of a fiduciary nature.[288] In such cases, the institution or bequest must be considered as being conditional upon the heir or legatee's survival until the arrival of the specified date.[289] As a result, there is no immediate vesting of the inheritance or bequest when the testator passes away; instead, the vesting is postponed until the specified date, as only then can it be determined whether the heir or legatee is still alive.[290]

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[284] Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.2.
[285] Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.2.
[286] Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.2.
[287] Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.2.
[288] Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.2.
[289] Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.2.
[290] Hofmeyr and Paleker *et al Law of Succession in South Africa* para 10.3.2.

4.3 Analysis of recent case law on section 15(3)(b)(iii) of the MPA

4.3.1 Facts of the cases

4.3.1.1 *Gounden v The Master of the High Court*[291] and *Govender v Gounden*[292]

The first applicant (Lutchmi Gouden) was married in community of property to the deceased (Gopaulsamy Gounden) on 2 October 1974, and they had one child together, namely Rianna Gounden. Mrs Gouden and the deceased subsequently separated, but after 35 years of separation they never formally divorced.[293] The deceased and Miriam Bibi Abdul Raman had a child (Mohamed Faraad Gounden), who is also a party to the case.[294] The deceased died intestate on 6 March 2012, and the estate was represented by the third and fourth respondents. All the parties, except the first respondent (Master), were beneficiaries in the estate of the deceased.[295] The first applicant's sister's (Sivalutchmi Somnaidoo) estate is represented by the second respondent, and the first applicant is one of the intestate beneficiaries of her estate. The liquidation and distribution account in the estate of the first applicant's sister has not been finalised, and objections were raised by the applicants and the third and fourth respondents.[296] The Master ruled that the first applicant's renunciation of her benefits in her sister's estate was invalid without the consent of the deceased or his executor.[297]

4.3.2 Legal question

In both *Gounden v The Master of the High Court*[298] and *Govender v Gounden*[299] the legal question was the same; whether a spouse married in community of property requires the consent of the other spouse to validly renounce the benefits of an

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291 *Gounden* case.
292 *Govender* case.
293 *Govender* case para 2.
294 *Gounden* case 1–2 and *Govender* case para 3.
295 *Gounden* case 2 and *Govender* case para 5.
296 *Gounden* case 2.
297 *Gounden* case 2.
298 *Gounden* case.
299 *Govender* case.

intestate inheritance that would otherwise accrue to them or the joint community estate?[300]

4.3.3 The courts' decision

Both courts considered certain aspects, namely, the distinction between *dies cedit* and *dies venit*; the importance of this distinction for a beneficiary to exercise their right to adiate or repudiate the inheritance; and the implications for the joint estate of spouses married in community of property.[301]

4.3.3.1 *Gounden v The Master of the High Court*[302]

The court at the initial level had to examine the interpretation of section 15(3)(b)(iii) of the *MPA* because one party argued that this subsection barred Mrs Gounden from receiving her inheritance without the deceased's consent, suggesting that she also needed his approval to disclaim her inheritance.[303] While the court agreed that the subsection required Mrs Gounden to obtain her husband's consent for an inheritance belonging to the joint estate, it concluded that section 15(3)(b)(iii) did not apply to the specific situation at hand.[304] According to the court, this was because the joint estate was not the heir. The court at the initial level also expressed the opinion that it would be a significant intervention to assert that renouncing an inheritance likewise necessitated the consent of the other spouse. Consequently, the court at the initial level did not find a resolution to the issue in section 15(3)(b)(iii).[305]

Failing to find a resolution within section 15(3)(b)(iii) of the *MPA* for the existing problem, the court at the initial level sought guidance elsewhere on whether Mrs Gounden needed her husband's concurrence (or that of his executors) to reject her inheritance. The court believed that the answer lay in the judgment in *Eyssell v Barnes* NO [2009] JOL 23413 (N).[306] Mrs Gounden herself, and not the joint estate

300 *Gounden* case 2 and *Govender* case para 1.
301 Gildenhuys *PER* 2020 4.
302 *Gounden* case.
303 *Gounden* case 5.
304 *Gounden* case 5.
305 *Gounden* case 5. Also see Wood-Bodley 2020 *SALJ* 218.
306 *Gounden* case 4.

with her late husband, was considered the heir to her sister's estate. The inheritance, the court asserted, would only become part of the joint estate after the estate accounts had been available for inspection without objection.[307] Relying on the precedent set in *Eyssell*, the court concluded that until that point, the decision to accept or reject the inheritance rested solely with Mrs Gounden.[308] The deceased's concurrence or the joint estate executors' approval was not necessary during this pending period.[309]

Judge Pillay considered the common law position regarding the vesting of rights,[310] the difference between adiation and repudiation of an inheritance,[311] as well as relevant provisions regarding the distribution of matrimonial property, specifically section 15(3)(b)(iii) of the *MPA.*[312] His decision was that the inheritance had not yet vested or accrued to the joint estate, as the Master had not approved the liquidation and distribution account.[313] The court granted the application in favour of the first applicant. The first applicant's written repudiation of 11 July 2013, without the consent of the deceased or his executors, was consequently still in time and the Master was ordered to consider such written repudiation as valid, binding and enforceable.[314]

4.3.3.2 *Govender v Gounden*[315]

Mrs Gounden filed an application to adduce further evidence on appeal, which was opposed by the first and second appellants.[316] The court determined that the issue of whether Mrs Gounden's renunciation was filed out of time was not a ground of appeal, and it was not raised before the court *a quo*. Therefore, it was not an issue in the appeal.[317] The court considered the provisions of the *MPA*, specifically section

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307 *Gounden* case 5.
308 *Gounden* case 5.
309 *Gounden* case 5. Also see Wood-Bodley 2020 *SALJ* 219.
310 *Gounden* case 3–4.
311 *Gounden* case 4–5.
312 *Gounden* case 2, 5–6.
313 *Gounden* case 6.
314 *Gounden* case 6 and Gildenhuys *PER* 2020 8.
315 *Govender* case.
316 *Govender* case para 16.
317 *Govender* case para 20.

15(3)(b)(iii), and concluded that the consent of Mrs Gounden, not the deceased, was required for a valid renunciation of her inheritance.[318] The court, aligning with the court *a quo*, agreed that Mrs Gounden did not require her husband's consent to validly reject her inheritance from her sister.[319] However, despite this shared conclusion on the validity of the repudiation, the court strongly disagreed with the rationale presented by the court *a quo*, especially regarding the interpretation of section 15(3)(b)(iii).[320] The court stated that the court *a quo's* interpretation of section 15(3)(b)(iii) was flawed in two key aspects. First, the court *a quo* was mistaken in thinking that the subsection mandated Mrs Gounden to obtain the deceased's consent (or that of his executors) for receiving the inheritance.[321] The court clarified that the 'other spouse' referred to in the subsection was Mrs Gounden, implying that the subsection required her consent for the deceased (or the executors) to receive her inheritance. The deceased's consent was not necessary if Mrs Gounden chose to accept the inheritance.[322] Secondly, the court *a quo* erred in concluding that section 15(3)(b)(iii) of the *MPA* only applied to the receipt of an inheritance and was irrelevant to its repudiation.[323] In contrast, the court held that the subsection was indeed relevant to repudiation, granting Mrs Gounden, as the heir, the exclusive authority to decide whether to reject the inheritance.[324]

Apart from rejecting the court's interpretation in the *Gounden* case, of section 15(3)(b)(iii) of the *MPA*, the court also disagreed with the statement by the court *a quo* that 'until *dies venit* occurs, she was free to dispose of her inheritance as she pleased'.[325] The court expressed disagreement with the suggestion that Mrs Gounden's power to repudiate was confined to the period pending *dies venit* (confirmation of estate accounts).[326] The court emphasised that Mrs Gounden had the exclusive right to receive, renounce, or deal with her inheritance, and no consent

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318 *Govender* case para 40.
319 *Govender* case para 45.
320 *Govender* case paras 30-31.
321 *Govender* case para 42.
322 *Govender* case para 42.
323 *Govender* case para 42.
324 *Govender* case para 42.
325 *Gounden* case 5.
326 *Govender* case para 44. Also see Wood-Bodley 2020 *SALJ* 221.

from the deceased was required.[327] The appeal was dismissed, and the costs were to follow the result. The court granted Mrs Gounden's request for the withdrawal of her application to adduce further evidence and stated that the consent of the court was not required for such withdrawal.[328] Each party was ordered to pay its own costs regarding the application to adduce further evidence, its opposition, and the appellants' objections to the withdrawal of the application.[329]

4.3.4 Commentary on the cases

In both cases the court arrived at the same conclusion, which is that the deceased (Mr Gounden) did not have to consent in order for repudiation of the intestate inheritance to take place. However, there is a disparity between the judgments regarding the interpretation of section 15(3)(b)(iii) of the *MPA*.[330]

While the court in the *Gounden* case believed that section 15(3)(b)(iii) of the *MPA* obligated both spouses to seek each other's consent for receiving an inheritance accruing to the joint estate and was unrelated to consent for repudiation, the court in the *Govender* case held that the subsection did not require the beneficiary spouse to obtain the non-beneficiary spouse's consent for receiving an inheritance.[331]

Moreover, the full bench contended that the section governed repudiation, leaving the decision solely to the beneficiary spouse. Mrs Gounden's repudiation was deemed valid, leading to the dismissal of the appeal.[332]

4.3.4.1 *Gounden v The Master of the High Court*[333]

Judge Pillay's interpretation of section 15(3)(b)(iii) asserts that the deceased qualifies as the "other spouse," and under this interpretation, the first applicant (Mrs Gounden), being the spouse, would require his consent to accept the inheritance.

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327 *Govender* case para 44.
328 *Govender* case para 50.
329 *Govender* case para 50.
330 Gildenhuys *PER* 2020 33.
331 Wood-Bodley 2020 *SALJ* 220.
332 *Govender* case para 48.
333 *Gounden* case.

Nonetheless, Judge Pillay highlights that the case pertains to the repudiation of an inheritance, and since section 15(3)(b)(iii) solely pertains to the adiation of an inheritance, the need for the deceased's consent was deemed unnecessary.[334] This decision went on appeal, where it was corrected.

4.3.4.2 Govender v Gounden[335]

In summary, the court upheld the Mrs Gounden's right to renounce her inheritance without the consent of the deceased and dismissed the appeal while addressing the application to adduce further evidence and related costs.[336]

Judge Koen correctly interpreted section 15(3)(b)(iii); and applied it to mean that Mrs Gounden is identified as the "other spouse," distinct from the deceased. Consequently, it was incumbent upon Mrs Gounden, the spouse entitled to an inheritance, to grant approval prior to the deceased being able to obtain those funds. However, this was not the scenario at hand.[337]

> It, however, illustrates that the intention behind s 15(3) is that only the first respondent as 'the other spouse' could 'receive' and hence deal with any such inheritance which might be due to or accrue to her or the joint estate. As with remuneration, earnings, bonus, allowance, royalties, pension or gratuity or damages for lost income arising from a profession, trade, business or services rendered by her, which only she could receive unless she consented to her spouse receiving same, she would 'receive' any inheritance and be entitled to deal with it to the exclusion of her spouse.[338]

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334 *Gounden* case 5–6 and Gildenhuys *PER* 2020 30.

335 *Govender* case.

336 *Govender* case paras 48-50.

337 *Govender* case paras 41–42 and Gildenhuys *PER* 2020 31.

338 *Govender* case para 42 reads as: "Receive' is defined in the Oxford English Dictionary 3 ed as 'to get or accept something that somebody has given or sent'. Whether the meaning of 'receive' is confined to a physical detention, or whether it extends to receiving for the purposes of holding the dominium thereto, the late Mr Gounden could not 'receive' any money 'due or accruing' from the inheritance or legacy, regardless of whether for himself or the joint estate. If he did so contrary to the provisions of s 15(3), that is, without the consent of the first respondent, his conduct could on the strength of this statutory prohibition probably be interdicted. If already disposed of to a third party, as contemplated in ss (9), and the joint estate suffers a loss as a result of that transaction, an adjustment would have to be effected in favour of the first respondent upon the division of the joint estate. None of that of course happened. It, however, illustrates that the intention behind s 15(3) is that only the first respondent as 'the other spouse' could 'receive' and hence deal with any such inheritance which might be due to or accrue to her or the joint estate. As with remuneration, earnings, bonus, allowance, royalties, pension or gratuity or damages for lost income arising from a profession, trade, business or services

Not all decisions go on appeal. This can be due to many reasons, mainly due to a lack of financial means to carry on with litigation, which can lead to erroneous precedents being created. Had this case not further gone on appeal, the interpretation of section 15(3)(b)(iii) of the *MPA* in the *Gounden* case would have been the precedent in future cases of this nature. This appeal case has fortunately rectified the interpretation of section 15(3)(b)(iii) of the *MPA* and thankfully the correct precedent was set.

4.4 Conclusion

The joint estate encompasses all assets owned by either spouse at the start of their marriage, in addition to any assets acquired by either of them during the marriage, with specific limited exceptions.[339] Each spouse holds significant autonomy to make independent decisions regarding the shared estate without the requirement for consultation with the other spouse. Within the established legal framework governing marriages in community of property, the imperative for spousal consent in specific asset transactions in the joint estate is expressly outlined in sections 15(2) and (3) of the *MPA*. This chapter was underpinned by dual primary objectives, each contributing substantively to the broader discourse. The initial aim was to offer a comprehensive discussion on the intricate topic of spousal consent, specifically as mandated by section 15(3)(b)(iii) of the *MPA*, which pertains to the adiation and repudiation of inheritances. The exposition commenced by providing a contextual backdrop to the nuances of section 15(3)(b)(iii) of the *MPA*, emphasising the paramount significance of spousal consent in the context of marriages in community of property. It further explicated the complex concepts of adiation and repudiation, shedding light on their implications in the legal landscape.

Moreover, the chapter delved into the intricacies surrounding *dies cedit* and *dies venit*, indispensable for a comprehensive understanding of the legal complexities surrounding inheritance and bequests, where the precision of specified dates is

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rendered by her, which only she could receive unless she consented to her spouse receiving same, she would 'receive' any inheritance and be entitled to deal with it to the exclusion of her spouse."

339 Wood-Bodley 2020 *SALJ* 215.

pivotal. This differentiation forms the bedrock of the legal arguments in inheritance cases, elevating the scholarly discourse.

The secondary objective centred on a meticulous analysis of relevant cases within the purview of spousal consent and section 15(3)(b)(iii) of the *MPA*, with a specific emphasis on *Gounden v The Master of the High Court*;[340] and *Govender v Gounden*.[341] The former subjected the interpretation of Section 15(2) and (3) of the *MPA* to rigorous scrutiny, evaluating the validity of renouncing an inheritance without the consent of the deceased or their executor. In contrast, the latter case focused on the critical query of whether a spouse, married in community of property, required the consent of their partner to renounce an intestate inheritance. This analytical exploration played a pivotal role in unravelling the legal complexities and nuances inherent in these cases and, by extension, in the broader context of spousal consent under the *MPA*.

Notably, the *Gounden* case proceeded to appeal, and there was a subsequent rectification. It is worth emphasising that not all decisions are subject to appeal, often due to various reasons, primarily financial constraints preventing continued litigation. Such constraints can inadvertently lead to the potential establishment of erroneous precedents. Had the *Gounden* case not been further appealed, the interpretation of section 15(3)(b)(iii) of the *MPA* in that specific instance would have set a precedent for future cases of a similar nature. Fortunately, the court in the *Govender* case rectified the interpretation of section 15(3)(b)(iii) of the *MPA*, ensuring that the correct precedent has been established for the benefit of future legal considerations in this domain.

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340 *Gounden* case.

341 *Govender* case.

Chapter 5 Conclusion and final remarks

This study explored the law of succession by considering common law, statutory measures, and recent cases that have demonstrated misapplications of these principles. The law of succession governs the transfer of assets and rights from a deceased person to beneficiaries, delineating rights and responsibilities related to the deceased estate.[342] This makes it an integral component of private law.[343] Recent judgments have highlighted instances where erroneous applications of succession law principles and statutory measures have occurred, leading to unintended conseq54uences and disputes among beneficiaries. The motivation for this study was to analyse these cases, identify gaps in understanding and application, and emphasise the importance of continuous expertise development in succession law for legal practitioners.

The research methodology involved a comprehensive literature review, incorporating primary sources such as common law, legislation, and case law, as well as secondary sources like journal articles and books. The study was structured to address specific aspects of the law of succession, examining the erroneous application of principles in the testamentary formalities of the *Wills Act*, the acknowledgment of testamentary provisions in antenuptial contracts as a valid *pactum successorium*, and the relationship between matrimonial property law and the adiation or repudiation of an inheritance under section 15(3)(b)(iii) of the *MPA*.

Each chapter of the study focused on a distinct aspect, starting with an introduction as background, motivation, and objectives, to in-depth analyses of specific areas, including the formalities applicable to witnesses, testamentary provisions in antenuptial contracts, and spousal consent to the adiation or repudiation of an inheritance. The concluding chapter summarises the findings, highlighting the achievement of objectives and answering the research question, aiming to

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342 Jamneck and Rautenbach *et al Law of Succession in South Africa* 25.

343 Jamneck and Rautenbach *et al Law of Succession in South Africa* 25. Also see chapter 1 of Corbett *et al Law of Succession in South Africa* and chapter 1.1.3 of Hofmeyr and Paleker *et al Law of Succession in South Africa* and Van der Merwe and Rowland *Die Suid Afrikaanse Erfreg* 1-20.

contribute meaningfully to the development and practical application of succession law principles in the legal profession.

The primary aim of this study was to address the following research question, namely: "To what extent has recent case law demonstrated instances of erroneous application or misinterpretation of law of selected succession principles and statutory measures?"

Various objectives were addressed to answer this question, namely:

Firstly, to provide an overview of the prescribed formalities for the execution of a will in terms of section 2(1) of the *Wills Act* with specific reference to the requirements applicable to the witnesses to the will. This was achieved by discussing the importance of complying with the formalities as set out in in the *Wills Act,* as well as what these requirements are and how they should be applied*.* The *Wills Act* establishes a legal framework to ensure the legitimacy and reliability of wills, outlining specific requirements for their drafting and execution, with a notable emphasis on the roles of the testator and witnesses. This prevents fraud and the forgery of wills and ensures testamentary wishes are complied with.

The second objective was to analyse the following cases in light of the formalities referred to above, namely *Ferrington v Key*;[344] *Yokwana v Yokwana*;[345] *Westerhuis v Westerhuis*;[346] and *Karani v Karani*.[347] This was achieved by analysing these cases and how the courts interpreted the formalities contained in the *Wills Act*. The recent case law, such as *Karani v Karani* and *Yokwana v Yokwana*, underscored the crucial role of witnesses in safeguarding wills against disputes and fraud. However, conflicting interpretations arose regarding whether witnesses need to sign every page of a will, a point not explicitly clarified in the *Wills Act*. Cases like *Ferrington v Key* and *Westerhuis v Westerhuis* highlighted diverse judicial interpretations,

344 *Ferrington* case.
345 *Yokwana* case.
346 *Westerhuis* case.
347 *Karani* case.

indicating the inherent complexities and potential for misinterpretation associated with the *Wills Act's* formalities.

In the *Karani* case the judge introduced a condition beyond the explicit language of the section 2, essentially shaping the law on this issue. It is not the role of the judiciary to evolve the law; the separation of powers exists for a specific reason. Each branch of government should operate within its designated sphere and refrain from encroaching on the domain of another. The responsibility of creating and evolving the law lies with the legislature. Despite providing a foundational framework, the *Wills Act's* lack of absolute clarity has led to uncertainties in legal judgments. Consequently, legislative amendment is imperative to ensure consistent interpretation, uphold the *Wills Act's* true intent, and secure the sanctity of wills and the wishes of the deceased.

The third objective was to determine whether testamentary formalities must be adhered to in an antenuptial contract to qualify it as a valid form of *pactum successorium*. This was achieved by exploring the concept of a *pactum successorium,* which involved a succession-related arrangement in a contract and is generally unenforceable under legal norms. However, one of two exceptions arise when the *pactum successorium* is included in an antenuptial contract. An antenuptial contract does not have to comply with testamentary formalities for a *pactum successorium* to be valid. There are various tests that can be used to determine whether a clause is in fact a *pactum successorium* the main one being the vesting test.

The fourth objective was to analyse the following cases with reference to the above-mentioned determination as to the *pactum successorium*, namely *Radebe v Sosibo*;[348] and *Vermeulen v Vermeulen*.[349] This was achieved by analysing the relevant cases in relation to the above objective. The focus was on understanding the legal complexities surrounding the validity and enforceability of a *pactum successorium* in antenuptial contracts, drawing practical insights from the specific

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348 *Radebe* case.
349 *Vermeulen* case.

legal cases. The conclusion was that a *pactum successorium* is valid in an antenuptial contract if it adheres to the formalities specified in the *Deed Registry Act*[350], and importantly, it does not need to comply with testamentary formalities outlined in section 2 of the *Wills Act*.[351]

The fifth objective was to discuss the matter of spousal consent as required in section 15(3)(b)(iii) of the *MPA* when adiating or repudiating an inheritance. This was achieved by examining the necessity for spousal consent in joint estate transactions under sections 15(2) and (3) of the *MPA*. A comprehensive discussion followed on spousal consent, particularly under section 15(3)(b)(iii) regarding adiation and repudiation of inheritances. It explored contextual background, emphasising the importance of spousal consent and explaining adiation, repudiation, and essential concepts like *dies cedit* and *dies venit*.

The last objective was to analyse the following cases with reference to the spousal consent and section 15(3)(b)(iii) of the *MPA*, namely *Gounden v The Master of the High Court*;[352] and *Govender v Gounden*.[353] This was achieved by providing an in-depth analysis of the relevant cases. The *Gounden* case assessed the validity of renouncing an inheritance without consent, while the *Govender* case delved into the necessity of a spouse's consent to renounce an intestate inheritance. This analysis unravelled legal complexities, contributing to a broader understanding of spousal consent under the *MPA*. The *Gounden* case fortunately went on appeal and the outcome was rectified. However, not all cases go on appeal, which has the consequence of leading to erroneous precedents. Had this case not been appealed, it would have resulted in an incorrect legal precedent being set on how courts should interpret section 15(3)(b)(iii) of the *MPA*. Courts can now rely on the correct interpretation from the *Govender* case.

After delving into the recent case law and analysing it in light of the succession principles and statutory measures, it has been clearly illustrated that erroneous

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350 47 of 1937.
351 Section 2 of the *Wills Act*.
352 *Gounden* case.
353 *Govender* case.

application and misinterpretation of these selected principles have occurred to a quite noticeable extent, which can have a significant effect on the decisions made by courts and the precedents set in these cases.

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