



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: AR452/2015

In the matter between:

**HAROLD GOVENDER N.O.
(EXECUTOR ESTATE LATE
GOPALSAMY GOUNDEN)**

FIRST APPELLANT
(Third Respondent in
the Court *a quo*)

**SHAHINA MAHARAJ N.O.
(EXECUTRIX ESTATE LATE
GOPALSAMY GOUNDEN)**

SECOND APPELLANT
(Fourth Respondent
in the Court *a quo*)

MIRIAM BIBI ABDOOL RAHMAN

THIRD APPELLANT
(First intervening Party
in the Court *a quo*)

MAHOMED FARHAD GOUNDEN

FOURTH APPELLANT
(Second intervening
Party in the Court *a quo*)

and

LUTCHMI GOUNDEN

FIRST RESPONDENT
(First Applicant in the
Court *a quo*)

RIANNA NIVEDITA GOUNDEN

**SECOND
RESPONDENT**
(Second Applicant in
the Court *a quo*)

**MASTER OF THE HIGH COURT,
DURBAN**

THIRD RESPONDENT
(First Respondent in
the Court *a quo*)

**FREDERLIKE ARTHEMIS LIASIDES N.O.
(EXECUTRIX ESTATE LATE SIVA
LUTCHMEESOMNAIDOO**

**FOURTH
RESPONDENT
(Second Respondent
In the Court *a quo*).**

Coram: K Pillay, Koen and Ploos Van Amstel, JJ

Heard: 30 July 2018

Delivered: 24 August 2018

O R D E R

1. In respect of the first respondent's application to adduce further evidence on appeal by affidavit, the opposition thereto, the first respondent's withdrawal of that application, and the appellants' objection to that withdrawal contained in the appellants' notice in terms of uniform rule 30 read with uniform rule 41(1)(a), the following orders are granted:
 - (a) Insofar as the consent of this court might be required for the withdrawal of that application, such consent is granted;
 - (b) The parties will each be liable for their own costs of the application to adduce further evidence, the opposition thereto, and the dismissal of the appellants' notice in terms of uniform rule 30 read together with uniform rule 41(1)(a).
2. The appeal is dismissed with costs.

J U D G M E N T

Koen J (K Pillay and Ploos van Amstel JJ concurring)

Introduction

[1] The crisp issue arising in this appeal is whether a spouse who is married in community of property requires the consent of the other spouse to that marriage to validly renounce the benefits of an intestate inheritance which would otherwise accrue to such spouse and/or the joint community estate.

Relevant background

[2] The first respondent was married to Mr Gopalsamy Gounden ('Mr Gounden') on 2 October 1974. One child, the second respondent, was born of that marriage. The first respondent and Mr Gounden subsequently separated. They thereafter led separate lives for approximately 35 years, but never formally divorced.

[3] After his separation from the first respondent Mr Gounden lived with the third appellant as his life partner. From that relationship the fourth appellant was born.

[4] The first respondent's sister, Siva Lutchmi Somnaidoo ('the deceased') died intestate on 19 August 2008. The first respondent is an intestate heir in the estate of the deceased.

[5] Mr Gounden died testate on 6 March 2012. The first and second appellants are the duly appointed executor and executrix to the estate of the late Mr Gounden and the first respondent.

[6] The first respondent has renounced the inheritance from the deceased's estate. The formal renunciation in writing was signed by the first respondent at Isipingo on 11 July 2013 and records that she renounces 'any inheritance or bequests due to me as an intestate heir from the estate of the late Siva Lutchmee Somnaidoo, estate number 17603/2008 DBN'. It appears that this document was executed as it was formally required, but that the actual renunciation had occurred informally and that the intention to do so had been formed well prior to that date, although the exact date is not specified. It

is that renunciation which gave rise to the application and judgment forming the subject of this appeal.

[7] The Master of the High Court Durban, is the third respondent. The third respondent appointed the fourth respondent as the executrix in the estate of the deceased on 25 May 2012.

[8] On 21 September 2012 a first liquidation and distribution account in the estate of the deceased was lodged. It was examined by the third respondent and queries were raised. Further amended accounts were lodged subsequently. On 5 December 2012 a further amended account was lodged and examined. On 3 January 2013 the third respondent granted permission to advertise the account in terms of s 35(5)(a) of the Administration of Estates Act 66 of 1965.

[9] An objection was then lodged to the account by the executors of the Estate Gounden. The basis of their objection is that the amount awarded to the first respondent vested in the joint estate of Mr Gounden and her, and subsequent to his death in the joint estate of the late Mr Gounden and the first respondent as his surviving spouse, which they administer. An objection was also raised by the first respondent based on her renunciation which was not given effect to in the accounts.

[10] The third respondent ruled on the objections and on 20 August 2013 determined that the 'inheritance due to [the first respondent] ...forms part of her joint estate with her husband who has subsequently died'. The third respondent was not prepared to accept the renunciation signed by the first respondent alone as a valid renunciation.

[11] As a result of these rulings, the first and second respondents brought an application against the third respondent¹, the fourth respondent,² and the

¹ The first respondent in the court a quo.

² The second respondent in the court a quo.

first and second appellants³ as the executors in the estate of the late Gounden, claiming the following relief:

- '1. That the letter of renunciation by Lutchmi Gounden,⁴ Annexure 'C' to the founding affidavit is declared valid and binding and enforceable in respect of the estate of the late Sivalutchmee Somnaidoo, estate No. 17603/2008/DBN;
2. That the First Respondent⁵ is hereby directed to accept the aforesaid renunciation as valid and binding and enforceable.
3. That the First Respondent is ordered to pay the costs of this application, alternatively, the First Respondent is ordered to pay these costs jointly and severally with the Second, Third and Fourth Respondents in the event of the Second, Third and Fourth Respondents opposing this application.
4. Further and/or alternative relief.⁶

[12] In the application the first respondent explained the events giving rise to her renunciation as follows:

'12

- 12.1 In the event that I accept the benefit from Siva Lutchmee's estate, such benefit would, by virtue of my marriage to Gopalsamy, accrue to the joint estate of myself and Gopalsamy (Gopalsamy's estate since his deceased).
- 12.2 Since Gopalsamy bequeathed his estate to his son⁷ and to Miriam⁸ and others the net result would be that half of the benefit that I am to receive from my sister, Siva Lutchmee would go to Gopalsamy's beneficiaries.
- 12.3 For obvious reasons I am opposed to that.

13.

- 13.1 In order to avoid the benefit from my sister's estate accruing to the community of property estate of myself and Gopalsamy, I renounced my benefit from the estate Siva Lutchmee.⁹
- 13.2 A copy of the letters of renunciation is annexed hereto marked "C".'

³ The third and fourth respondents in the court a quo.

⁴ The first respondent in this appeal.

⁵ In that application the Master was the first Respondent.

⁶ The third and fourth appellants subsequently successfully intervened as parties to that application.

⁷ The fourth appellant in this appeal.

⁸ The third appellant in this appeal.

⁹ The motive for renouncing the benefits is irrelevant to the application. There must however be a valid renunciation.

[13] On 19 November 2014, D Pillay J granted the relief claimed in paragraphs 1 and 2 of the notice of motion and directed that the costs of the application be borne by the appellants jointly and severally, one paying the other to be absolved.

[14] The present appeal lies against that judgment. The grounds of appeal relied upon are as follows:

- '2.1 The learned Judge erred in finding that an inheritance vests in an intestate heir when *dies venit* occurs.
- 2.2 The learned Judge ought to have found that an inheritance vests in an intestate heir when *dies cedit* occurs.
- 2.3 The learned Judge should have found that when *dies cedit* occurs the inheritance not only vests in the intestate heir but in the joint estate where the intestate heir is married in community of property.
- 2.4 The learned Judge should have found and erred in not finding that when *dies cedit* occurs the consent of the other spouse where the parties are married in community of property is required in order to renounce any inheritance.
- 2.5 The learned Judge erred in applying a strict interpretation of the provisions of S 15(4)(ii) of the Matrimonial Property Act 88 of 1984.
- 2.6 The learned Judge ought to have interpreted the aforesaid section so as to read in the words "or reject (renounce)" in order to give the said section a sensible and business like interpretation.
- 2.7 The learned Judge should have found that it was an implied provision of the aforesaid section that if the consent of a spouse is required to receive an inheritance such consent must be required to reject or renounce an intestate inheritance.'

The application to lead further evidence on appeal

[15] Subsequent to the appeal being noted, the first respondent filed an application 'for leave to adduce further evidence by way of affidavit' at the hearing of the appeal. She alleges that the need for adducing such further evidence arises from the first and second appellants, in their heads of argument for the first time, introducing the argument that the renunciation was filed out of time, although that was not raised before the court a quo and was not a ground of appeal. The affidavit records that although the 'alleged

lateness is not an issue before this hearing' it was 'imperative' that the first respondent explain 'the apparent lateness of the renunciation.' She then explains that the fourth respondent was personally informed on more than one occasion that she had elected to renounce her intestate benefit long before the estate account was drawn, and that the liquidation and distribution accounts should have been amended to take account of that decision, but that the fourth respondent refused to do so. Her allegations in this regard were confirmed by her brother Krishna Naidoo in a confirmatory affidavit.

[16] The application to adduce further evidence was opposed by the first and second appellants. They contend that the appeal court was not precluded from considering whether the first respondent's renunciation was filed out of time and whether the claim of a renunciation was inconsistent with various arguments advanced by the first respondent. They submit that the renunciation was designed purely for the purposes of defeating the valid claim of her late spouse, Mr Gounden, or his estate.

[17] In an affidavit filed by the fourth respondent she explains that the intestate estate of the deceased was previously administered personally by the first respondent's brother who on 9 January 2012 instructed her to attend to the finalization thereof. On or about 1 June 2012 he instructed her to prepare a liquidation and distribution account on the basis that the first respondent had renounced her intestate inheritance in favour of the second respondent. The fourth respondent however refused to do so based on her belief that the consent of the first respondent's spouse, Mr Gounden was required and he had not presented a written renunciation by the first respondent, with the necessary spousal consent. It is in this affidavit that the fourth respondent refers to having perused certain bank statements relating to the estate of the deceased and records that she queried with the first respondent's brother a payment of R700 000 made on 20 October 2010 and four payments of R400 000 made on 22 June 2011 from the estate funds. The bank statements annexed by her reflect these withdrawals from the estate account but do not reflect to whom payment was made. These payments, she said, were explained by the first respondent's brother as payments already

paid to heirs of the deceased as a portion of their inheritance. She concludes that she felt she had to bring these to the attention of the court 'with regard to the renunciation'. She however does not explain how exactly these payments are linked, if at all, to the renunciation of any benefit by the first respondent.

[18] In her replying affidavit in the application to adduce further evidence the first respondent denies having received any payment from the estate, or that she had adiated. Her evidence in this regard was confirmed in a confirmatory affidavit by her brother. There is nothing to gainsay that evidence. The first respondent further confirms that her daughter, the second respondent did receive a payment from the deceased's estate, explaining that such payment was 'on the grounds of her, the first respondent's repudiation'/renunciation.¹⁰ She concludes by submitting that the contention by the appellants that she had adiated and had received a benefit from the deceased's estate, is incorrect.

[19] When the appeal was initially set down, it was adjourned sine die. Subsequently and before the appeal was set down again, the first respondent, by notice dated 13 February 2017, withdrew her application to adduce further evidence. No tender of costs was contained in that notice. In response, the appellants, on 21 February 2017, filed a notice in terms of uniform rule 30 read together with uniform rule 41(1)(a) complaining that the first respondent's notice of withdrawal of her application constituted an irregular step in terms of uniform rule 30, in that:

- '(a) The First Respondent requires the consent of the parties, which has not been obtained;
- (b) The First Respondent requires the leave of the court, to withdraw her application referred to above.'

The appeal was thereafter on 24 November 2017 again set down for the date that argument was heard by us.

¹⁰ This would appear to be the effect in law of the renunciation in terms of s 1(7) of the Intestate Succession Act 81 of 1987.

[20] The validity of the First Respondent's renunciation was never attacked before the court *a quo* on the basis that it was 'late' or that the First Respondent had previously adiated by accepting benefits from the deceased's estate which might preclude a renunciation. Not surprisingly, the grounds of appeal make no reference thereto. Accordingly, it is not an issue in this appeal. Mr Naidoo, on behalf of the first and second appellants, and Mr Gunase, on behalf of the third and fourth appellants, however urged us to reject the first respondent's withdrawal of the application to adduce further evidence as irregular, and to admit the evidence contained in the affidavits in that application, particularly the answer of the fourth respondent regarding the payments she found to have been made from the estate bank account. This, it was submitted, was essential to allow a 'proper and full ventilation of the issues in dispute' and would be 'in the interests of justice', specifically as it might show that the first respondent had elected to adiate, which might preclude a subsequent change to elect to renounce the benefits from her late sister's estate.

[21] For evidence to be adduced on appeal, apart from it being required that a satisfactory explanation must be provided why such evidence was not adduced in the application at the appropriate time, the relevance and materiality of such evidence to the issues in dispute must, at least *prima facie*, be established. On the affidavits filed there is not even a suggestion that the R700 000 and R400 000 payments were made to the first respondent, hence potentially pointing to an election to adiate which would be in conflict with the intention to renounce the benefit. Indeed the contrary is the case.

[22] The evidence contained in the answering affidavits to the application to adduce further evidence on appeal has no material bearing on the issues in the main application which would justify that evidence being received.

[23] The withdrawal of the application to adduce further evidence furthermore occurred prior to the appeal being enrolled for the present appeal hearing. There was no impediment to the first respondent withdrawing that application without the consent of the appellants. But even if I was wrong in

that regard, and the previous set down of the appeal when it was adjourned sine die was to constitute the 'set down' for the purposes of uniform rule 41(1)(a),¹¹ then the application could nevertheless be withdrawn, even in the absence of consent by the appellants, with the leave of this court.

[24] The further evidence sought to be adduced would serve no material purpose. There would be no purpose to 'cause' that evidence to be introduced by refusing leave to withdraw the application to adduce such evidence, if the consent of this court was in fact required for a valid withdrawal of that application.

[25] Insofar as the consent of this court might be required for a valid withdrawal of the first respondent's application to adduce evidence, such consent should be, and is hereby granted. The appellants' objections contained in their notice in terms of uniform rule 30 read together with uniform rule 41(1)(a) accordingly fall away as academic. If not, then it should in any event simply be dismissed.

[26] In the exercise of my discretion on the issue of the costs of the application to adduce further evidence and the opposition thereto I conclude that each party must pay their own costs.

Was the consent of the first respondent or his estate required for a valid renunciation?

[27] In *De Leef Family Trust & others v Commissioner for Inland Revenue*¹² the Appellate Division held that:

'... according to our modern system of administration of deceased estates, the heir or legatee of an unconditional bequest obtains a vested right (*dies cedit*) to be entitled to the bequest on the death of the testator (*a morte testatoris*). Such a right is

¹¹ The relevant part of uniform rule 41(1)(a) provides that:

'A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; ...'

¹² *De Leef Family Trust & others v Commissioner for Inland Revenue* 1993 (3) SA 345 (A) at 358C-D

transmissible but his claim is enforceable *only at some future time* when the executor's liquidation and distribution account has been confirmed (*dies venit*). He then has an enforceable right to claim payment, delivery or transfer of his bequest (*ius in personam ad rem acquirendam*).'

[28] In this case, the estate accounts have not been approved by the Master. Accordingly, an incorporeal vested right (*dies cedit*) to the bequest had accrued on the death of the deceased, but that right had not yet been transformed into an enforceable right to claim payment, delivery or transfer of the inheritance.

[29] The learned judge in the court a quo, in my view correctly, considered that the answer to the question whether the first respondent's renunciation without the consent of Mr Gounden (or the first and second appellants) was valid should 'be sourced from the Matrimonial Property Act', specifically s 15(3)(b)(iii).

[30] She went on to conclude that:

(a) as regards s 15(3)(b)(iii) of the Matrimonial Property Act¹³:

'... the express text is unambiguous. It is only the receipt of an inheritance that accrues to the joint estate that requires the consent, informal as it might be, of the other spouse. The joint estate is not the heir to Somnaidoo (the deceased) and therefore the consent of the deceased, (Gounden) was not required. Counsel for the Third and Fourth Respondents requested that one should read into the text of S 3(b)(iii) words to the effect that consent of the other spouse should be required to not only receive but also 'reject or renounce' any inheritance, is a far reaching intervention that cannot be entertained in the circumstances of this case. This case clearly exposes and takes into account why it is necessary to allow the heir to retain the power of acceptance or rejection of an inheritance. That is part of our common law and cannot be varied for the convenience of some parties'; and

(b) until '*dies venit* occurs the [first respondent] was free to dispose of her inheritance as she pleased.'

¹³ Act No 88 of 1984.

[31] Although I agree with the order granted by the learned judge, I respectfully disagree with her reasons set out in the preceding paragraph. I shall deal with the extent of my disagreement when setting out what I consider to be the legal position below.

[32] Subject to certain limited exceptions,¹⁴ the legal effect of a marriage in community of property is that all assets held by the spouses, and liabilities, whether subsisting at the time of the marriage or acquired or incurred *stante matrimonio*, form a single joint estate held by the spouses in co-ownership, in equal undivided shares. The assets of the joint estate consist of all the assets of both spouses (movable or immovable, corporeal or incorporeal)¹⁵ and would include the vested right the first respondent acquired on the death of the deceased to inherit, and the inheritance itself once the estate accounts have been confirmed.

[33] In the past, prior to 1 November 1984 when the provisions of the Matrimonial Property Act came into operation, all these assets of a joint community estate were administered solely by the husband, his wife occupying the position of a minor in law subject to the marital power¹⁶ of her husband. The Matrimonial Property Act in Chapter III introduced a system of joint administration in respect of marriages in community of property.

[34] Section 14 of the Matrimonial Property Act provides for the equal power of spouses married in community of property, in the following terms:

‘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.’

[35] Either spouse could thereafter in generally deal with assets of the joint estate *vis-à-vis* third parties. S 15(1) of the Matrimonial Property Act provides:

¹⁴ *Santam Insurance Limited v Meredith* 1990 (4) SA 265 (Tk) at 269.

¹⁵ *Nedbank v Van Zyl* 1990 (2) SA 469 (A) at 476.

¹⁶ The marital power was abolished in terms of s 11 of the Matrimonial Property Act.

'Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.'

[36] Section 15(1) must however be read subject to inter alia s 15(2) and (3).

[37] Section 15 (2) provides for certain acts in relation to the assets of the joint estate which a spouse may not perform without the written consent of the other spouse. Included in these are, for example the alienation and mortgage of immovable property, entering into any contract for the alienation, mortgaging, burdening with a servitude or conferring any other real right in immovable property forming part of the estate, and the like.

[38] Significant for the present appeal are the following provisions of s 15:

- '(3) A spouse shall not without the consent of the other spouse –
- (a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate;
 - (b) receive any money due or accruing to that other spouse or the joint estate by way of –
 - (i) remuneration, earnings, bonus, allowance, royalty, pension or gratuity, by virtue of his profession, trade, business, or services rendered by him;
 - (ii) damages for loss of income contemplated in subparagraph (i);
 - (iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;
 - (iv) income derived from the separate property of the other spouse;
 - (v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse;
 - (vi) the proceeds of any insurance policy or annuity in favour of the other spouse;
 - (c) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to the provisions of subsection (2) or paragraph (a) of the subsection.

- (4) The consent required for the purposes of paragraphs (b) to para (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds registry, also be given by way of ratification within a reasonable time after the act concerned.
- (5) ...
- (6) ...
- (7) ...
- (8) In determining whether a donation or alienation contemplated in subsection (3) (c) does not or probably will not unreasonably prejudice the interests of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the opinion of the court should be taken into account.
- (9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and –
 - (a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;
 - (b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.’

[39] The provisions of the Matrimonial Property Act have amended materially the common law in regard to the legal capacity of women in a marriage in community of property to deal with assets of the joint estate *vis-à-vis* third parties, and also the legal capacity of the spouses *inter se*, by imposing limitations on the powers of spouses to deal with certain categories of assets and monies due or forming part of a joint estate at common law.

[40] S 15(3)(c)(iii) contains the answer to this appeal. I however respectfully disagree with the court a quo's interpretation thereof. On my interpretation of s 15(3)(b)(iii), the prohibition is against 'a spouse' receiving 'any money due or accruing' to the 'other spouse', 'without the consent of the other spouse' in respect of 'an inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse.' The 'other spouse' in that provision on the facts of this case is the first respondent, and it is the written consent of the first respondent as 'the other spouse' which is a pre-requisite to the late Mr Gounden (or the first and second appellants) as 'a spouse' becoming entitled to 'receive' (being the operative verb in the provision) 'the inheritance or legacy bequeathed, made or awarded' to the first respondent as 'the other spouse'. It is therefore not the consent of the late Mr Gounden as the judgment of the court a quo appears to suggest which is required by the first respondent to 'receive' any inheritance or legacy, nor would it be his consent that would be required to also 'reject or renounce' any inheritance (by reading in those words, if that were competent).

[41] It has never been suggested that the first respondent gave any such consent to Mr Gounden. Accordingly Mr Gounden, or the first and second appellants after his death, could not receive any 'money due or accruing to that other spouse [ie, the first respondent] or the joint estate by way of ... inheritance...'.

[42] 'Receive' is defined in the Oxford dictionary, third edition, 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 subsection (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 rendered by her,¹⁷ 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.

[43] The same considerations as above will apply, a fortiori, to the incorporeal vested right which accrued to the first respondent and the joint estate immediately on the death of the deceased (*dies cedit*), before it matures into an enforceable claim for delivery of the actual inheritance once determined (*dies venit*).

[44] The learned judge in the court a quo also concluded that until '*dies venit* occurs the [first respondent] was free to dispose of her inheritance as she pleased.' If the learned judge's statement meant that the first respondent's right to renounce was determined by whether *dies venit* had occurred or not, a valid renunciation post *dies venit* not being competent, then I respectfully disagree. Most renunciations will probably occur pre *dies venit*, but in the absence of conduct inconsistent with an election to renounce, there is probably no bar to a renunciation post *dies venit* within a reasonable time.

[45] Accordingly, Mr Gounden could not receive any assets constituting an inheritance to which the first respondent became entitled, although it would become part of the joint estate, without the first respondent's consent. Likewise he could not 'receive' the vested right which accrued to the first respondent (and the joint estate) on the death of the deceased unless she consented. It follows that if the first respondent wished to renounce the benefit

¹⁷ Section 15(3)(b)(i) of the Matrimonial Property Act.

of receiving such inheritance (or the vested right to claim such an inheritance) then it was for the first respondent and for her alone, and not Mr Gounden as well, to decide.

[46] Although the inheritance, or the right to claim same would be an asset of the joint estate as regards outsiders like creditors, the provisions of s 15(3)(c) of the Matrimonial Property Act do not in my view find application as the first respondent did not ‘donate to another person any asset of the joint estate or alienate such an asset without value.’ Although the act of renunciation amounts to giving up a right to or an asset, there is no donation ‘to another person’ as contemplated by the provision. The renunciation simply entails that the bequest then falls to be dealt with in accordance with the provisions of the Intestate Succession Act. Whatever devolution of the assets comprising the inheritance might follow after the renunciation, arises by operation of law, and does not arise from any decision to ‘donate to another person’.

[47] Section 15(3)(c) also contains a prohibition against any attempt to ‘alienate such an asset without value’. It seems that that phrase might have been included in s 15 (3)(c) to cater for the situation where the heir is insolvent and the issue arises whether a renunciation might amount to a disposition without value in terms of s 26 of the Insolvency Act.¹⁸ In that context, it was found by Goldblatt J in *Kellerman NO v Van Vuuren & others*¹⁹ that, although there was much to be said for the argument that on the death of the deceased *dies cedit* the right to inheritance vested, repudiation therefore possibly constituting a disposition without value of an asset in his estate, the law had been settled by the Full Cape Court in *Van Schoor’s Trustees v Executors of Muller*²⁰. In *Van Schoor* it was held, relying on Voet 42.8.16, that a repudiation of an inheritance to avoid it going to creditors was ‘not considered in law an alienation in fraud of creditors; as there can be no alienation of what is omitted to be acquired’. Goldblatt J found the passage in

¹⁸ Act No 24 of 1936.

¹⁹ *Kellerman NO v Van Vuuren & others* 1994 (4) SA 336 (T) at 337.

²⁰ *Van Schoor’s Trustees v Executors of Muller* (1858) 3 Searle 131 at 137.

Voet to be in full support and said that 'it would be wrong for ... a single Judge, to disturb the law of this land, as it has now stood for some 150 years, and it would take ... a higher Court to do such a thing.'²¹

[48] In the circumstances then I conclude that the order of the court a quo was correct, albeit for different reasons. The appeal accordingly falls to be dismissed.

Costs

[49] As regards the costs of the appeal, there is no reason why the costs should not follow the result.

Order

[50] The orders granted are accordingly as follows:

- (a) In respect of the first respondent's application to adduce further evidence on appeal by affidavit; the opposition to that application; the first respondent's withdrawal of that application, and the appellants' objection to that withdrawal of the application contained in the appellants' notice in terms of uniform rule 30 read with uniform rule 41(1)(a), the following orders are granted:
 - (i) Insofar as the consent of this court might be required for the withdrawal of that application, such consent is hereby granted;
 - (ii) The parties will each be liable for their own costs of the application to adduce further evidence; the opposition thereto, and the dismissal of the Appellants' notice in terms of uniform rule 30 read together with uniform rule 41(1)(a).
- (b) The appeal is otherwise dismissed with costs.

²¹ *Kellerman* at 338I; see also *Klerck and Scharges NNO v Lee & others* 1995 (3) SA 340 (SE) where Melunsky J criticised a contrary finding in *Boland Bank Bpk v Du Plessis* 1995 (4) SA 113 (T) as De Klerk J had not referred to Voet 42.8.16, stating the proposition that 'not to acquire is not to alienate'. These decisions have been criticised by Professor Sonnekus in his article JC Sonnekus 'Adiasie, insolvensie en historiese perke aan die logiese' (1996) TSAR 240 as reflecting the position in a system of universal succession which obtained when Voet wrote and which is not in accord with the present day position. Like Goldblatt J, I am however not prepared to disturb the statement by Voet even confined to the proposition that 'not to acquire is not to alienate'.

Koen J

Appearances

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