EX PARTE SPINAZZE AND ANOTHER NNO 1985 (3) SA 650 (A)

Citation 1985 (3) SA 650 (A)
Court Appellate Division
Annotations

CORBETT JA, CILLIÉ JA, HOEXTER JA, HEFER JA and VIVIER AJA

1985 *March* 11; *May* 24

Flynote : Sleutelwoorde

Husband and wife - Antenuptial contract - Execution and registration - Choice of law governing formal validity of - Antenuptial contract not only formally valid if it complies with forms required by lex loci contractus - Formally valid, also, if it complies as to form with lex causae, even though not complying with formal requirements of lex loci contractus - Semble: would appear to be desirable to adopt same approach in regard to formal execution of contracts generally.

Husband and wife - Proprietary rights - Antenuptial contracts - Execution and registration - Failure to register or improper registration of - Contract remains valid inter partes - Where one of parties has died, contract operative as between estate of deceased and surviving party or parties - Would determine, inter partes, their proprietary rights.

Headnote : Kopnota

Modern South African law should adopt a facultative approach to the wellentrenched rule that an antenuptial contract executed in accordance with the forms required by the *lex loci contractus* is formally valid, and hold that a contract which alternatively complies as to form with the *lex causae*, or

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proper law, is formally valid, even though it may not comply with the formal requirements of the *lex loci contractus*. Such an approach would maintain in South Africa a conformity to modern jurisprudential trends in the western world in this sphere of private international law. It also has the advantage that the reasonable expectations of the parties would not be defeated by the fact that, possibly fortuitously, the antenuptial contract was executed in a country which was in other respects unconnected with the transaction.

Semble: it would appear to be desirable to adopt the same approach in regard to the formal execution of contracts generally.

An antenuptial contract which has not been registered or properly registered, though of no force or effect against persons not parties thereto, is valid *inter partes*. Where one of the parties to the contract has died, then obviously the contract would be operative as between the estate of the deceased party and the surviving party or parties. It would determine, *inter partes*, their property rights.

The decision of the Transvaal Provincial Division in *Ex parte Spinazze and Another NNO*

1983 (4) SA 751 confirmed, but the order varied.

Case Information

Appeal from a decision in the Transvaal Provincial Division reported at 1983 (4) SA 751 (ESSELENJ). The facts appear from the judgment of CORBETT JA.

E Morris SC (with *E Zar*) for the appellants: Neither according to Italian nor according to English law is the office of the British vice-consul in Turin, where the contract was concluded, British territory so that the laws of the United Kingdom would prevail. *Radwan v Radwan* [1972] 2 All ER at 970*d* - *e*, 971*h* and 972*h* - 973*a*. As regards the status of the vice-consul, s 102 of the Deeds Registries Act 47 of 1937 defines "notary public" as "... in relation to any document executed outside the Republic, a person practising as such in the place where the document is executed". Cf Halsbury's *Laws of England* 4th ed vol 34 at 85 para 201, 87 para 206; *Ex parte Hoal* 1925 TPD at 30, 32. The British vice-consul does not come within the ambit of the statutory definition of "notary public". In Italy the British vice-consul was not competent to execute a "public act" (of a notarial nature). Such "public act" was a requisite of the execution of a valid antenuptial contract. Not having been properly executed, neither before a notary qualified to execute a public act nor with four competent witnesses, the antenuptial contract was null and void according to the law of Italy. The question arises whether such a contract executed outside the Union of South Africa nevertheless had validity within the Union. The invalidity does not result from a want of registration - the formality required to affect strangers - but from a failure to acquire validity in the State where the contract was purportedly entered into. The only contractual act between the parties was effected and intended to be effected only by signature of the document - there had been no prior oral agreement. As to the authorities cited by the *curator ad litem*, the question is whether the essential validity of a contract is governed by the *lex loci contractus*, the proper law, or (in the case of an antenuptial contract) the law of the husband's domicile. An antenuptial contract *validly* entered into abroad, has been recognised as binding in South Africa notwithstanding non-registration. *Way v Louw and Another* 1924 CPD at 453 - 4; *Johnson and Another v Registrar of Deeds* 1931 CPD at 229 *in fin*, 230 - 231; *Kahn* in Hahlo *The South African Law of Husband and Wife* 4th ed at 632 n 471. Where the contract is invalid abroad, it will

not be recognised in South Africa. See Forsyth and Bennett *Private International Law* at 252; Van der Kessel *Praelectiones* Th 39 (*Van Warmelo's* trans vol 1 at 123 - 5) and Th 229 (translated at 209 - 213). The proposition enunciated is consistent with the decisions of this Court in *Goldblatt* v Freemantle 1920 AD at 128 - 9; *Woods v Walters* 1921 AD at 305 - 6. These decisions are in the same terms as Grotius *Jurisprudence of Holland* 3.14.26 (*Lee's* trans) and Voet *Commentary on the Pandects* 5.1.73 (iv) (*Gane's* trans vol 2 at 88), 18.1.3 (*Gane's* trans vol 3 at 257), 18.1.24 (*Gane's* trans vol 3 at 279); 23.4.4 (*Gane's* trans vol 4 at 174 - 175). At 23.4.5 *Voet* states that antenuptial contracts can be entered into expressly or impliedly. See *Hahlo* (*op cit* at 261 n 1); Boberg *The Law of Persons and the Family* at 187 n 32. This presupposes an actual agreement between the parties. In the present matter there is a strong contraindication of a tacit or implied agreement - indeed of anything but an intention merely to constitute an agreement in writing. A tacit antenuptial contract would flow only from an express oral agreement. Cf *Ex parte Orford* 1920 CPD at 370 *in fin* - 372, 377 - 378; *Ex parte Von Klentz et Uxor* 1935 SWA at 77 - 79; *Ex parte Chater and Spouse* 1942 OPD at 109 - 110. See also Artzenius *Institutiones Juris Belgici de Conditione Hominum*

(trans *Van den Heever*) 2.5.8 - 10, 2.5.11 - 12, 2.5.25 and 2.5.90. The last paragraph states: "(8) If the antenuptial contract has not been executed according to the formalities prescribed by law. In that event it is null and void (Van den Berg *Advjsb* 4 at 540)". *Van den Berg (loc cit)* contains the following passage: "Welke trouwbeloften indien die buiten vrienden, Momberen of andere twee geloofwaardige perzoonen gecontraheert worden, in den zelven 4 art al mede genaam worden heimlyke Huwelyken; met deeze byvoeging, dat dezelve in deeze Landen geen plaatze grypen zullen." "*Trouwbeloften* " does not seem to accord with the translation of *Artzenius* 2.5.90 (8). Assuming that an oral agreement would be binding *inter partes* as indicated by the authors and authorities, if it be correct that the formal validity of an agreement is governed by the *lex loci contractus*, then an oral agreement entered into in Italy was not valid and cannot be held to be valid in South Africa. The contrary view would mean that the formal validity of a contract is not to be determined by the *lex loci contractus* but by the *lex domicili* or the proper law.

A J Kraut as *curator ad litem* (the heads of argument having been drawn by *M Selbst*): The function and duty of a *curator ad litem* is to present an argument in support of such order as will confer the maximum possible benefit upon the minors represented by him. *Ex parte Estate Ortlepp and Another* 1966 (1) SA at 812E - G; *Ex parte Glendale Sugar Millers (Pty) Ltd* 1973 (2) SA at 659F - 661A; *Trotter NO and Another v Pinetown Town Council* 1965 (2) SA at 262E. The maximum benefit to the minor heirs is obtained by upholding the judgment of the Court a quo. The first appellant (the wife) and the deceased (the husband) went through the motions of signing a document in the presence of the British vice-consul which was witnessed by two witnesses. Even assuming that there had been no prior discussion or negotiation about the document and that there had been no express or tacit oral agreement, the parties must have intended to bind themselves to whatever was contained in the document signed by them. Quite apart from the legal validity or enforceability of the

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act which they had performed, agreement was reached by their conduct and there was *consensus ad idem* to be bound by the terms of the document signed by them. The question arises whether or not the fact of such *consensus ad idem* acquires legal validity, such that it will be recognised in law as constituting a valid antenuptial contract. The Italian law disregards the signature of the document in the present circumstances, and treats the purported agreement as a nullity, for the reason that formalities were not observed. The South African law, which does not require formalities for a valid antenuptial contract *inter partes*, would regard the purported agreement as being valid as between the parties. If the contract had been concluded in accordance with the formalities required by Italian law (*lex loci contractus*), the contract would be valid. However, it is not only the *lex loci contractus* which determines the validity of a contract. Hahlo *The South African Law of Husband and Wife* 4th ed at 632 and the authorities cited therein. It could lead to absurd results if one were to limit the enquiry only to whether or not there was compliance with the formalities of the *lex loci contractus*. In English law, an antenuptial contract will be considered valid if it complies either with the formalities of the *lex loci contractus*, or the proper law. J H C Morris *The Conflict of Laws* at 397; *Van Grutten v Digby* (1862) 31 Beav at 569; *In re Bankes: Reynolds v Ellis* [1902] 2 Ch at 342 - 44. This Court should (following the English law) apply the proper law, in this instance being the South African law, as an alternative to the *lex loci contractus* in order to uphold the validity of the antenuptial contract *inter partes*.

Morris SC in reply.

Cur adv vult.

Postea (May 24).

Judgment

CORBETT JA: The late Mr Pietro Carlo Spinazze ("the deceased") married his wife, Antonia Spinazze (born Vignola), in Turin, Italy, on 5 May 1956. At the time of the marriage, which, according to Mrs Spinazze, "had been arranged through the post", the deceased had established his permanent home in Johannesburg and was domiciled and resident in South Africa; while Mrs Spinazze was domiciled and resident in Italy. The deceased came to Italy to marry her. Shortly after the wedding the couple proceeded to Johannesburg and continued to be permanently resident and domiciled there until the death of the deceased on 21 June 1980.

Shortly prior to the marriage, ie on 3 May 1957, the parties entered into an antenuptial contract in writing. This was signed before, and attested by, the British vice-consul in Turin. The execution of the contract was also witnessed by two witnesses, who appended their signatures. On 30 August 1957, after the deceased had returned with his bride to South Africa, the antenuptial contract was tendered for registration to the Registrar of Deeds, Pretoria, and registered by him.

The antenuptial contract was evidently executed upon a printed form of the type that can be purchased from stationery shops in South Africa. It contains the usual provisions regarding the exclusion of community of

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property and profit and loss between spouses and the exclusion of the marital power of the husband and includes a modest settlement of household furniture and wedding presents upon the wife. According to Mrs Spinazze there was no arrangement between them prior to the marriage as to "the matrimonial regime which would apply". The deceased simply arrived in Italy with the draft antenuptial contract and told her that they should go to the British consulate to sign the document. She accordingly accompanied him there and the document was signed in the manner described.

The deceased left a will in terms of which he bequeathed the whole of his estate to his executors and administrators in trust. According to the trust the administrators were to administer the assets and pay the income accruing thereon to Mrs Spinazze during her lifetime. On her death the assets of the estate were directed to devolve upon the children of the marriage. Mrs Spinazze and the deceased's brother, Oreste Spinazze, were appointed executors and administrators. The will contained various other supplementary directions, but the aforegoing is in essence what it provided. There were four children born of the marriage. At the time of the death of the deceased the younger three were minors.

The deceased left a very substantial estate. In terms of the liquidation and distribution account lodged by the executors with the Master the value of the assets of the estate amounted to R5 646 913,28. The dutiable amount of the estate for estate duty purposes

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was approximately R5m. During the course of the winding up of the estate the question arose as to whether the antenuptial contract was valid and as to whether the marriage between Mrs Spinazze and the deceased had been in or out of community of property. The executors, acting on legal advice, proceeded to wind up the estate and frame the accounts on the basis that the marriage was in community of property, ie on the supposition that the antenuptial contract was invalid. The Master, on the other hand, took the view that the antenuptial contract was valid and directed that the accounts be amended accordingly.

In consequence of this dispute the executors made application to the Transvaal Provincial Division for orders (according to the amended notice of motion):

"(1) (*a*) declaring that the marriage which formerly subsisted between Antonia Spinazze and her late husband, Mr Pietro Carlo Spinazze, was one in community of property; or alternatively,

(*b*) declaring that the marriage which formerly subsisted between Antonia Spinazze and her late husband, Mr Pietro Carlo Spinazze, was one in community of property as against and insofar as third parties are involved;

(2) granting alternative relief; and

(3) directing that the costs of the application be costs in the windingup and liquidation of the estate of the late Pietro Carlo Spinazze.

Inasmuch as two of the children of the marriage were still minors when the application was launched, Mr *Selbst* of the Johannesburg Bar was appointed as *curator ad litem* to represent them. The application was also served on the Master, the Registrar of Deeds and the Commissioner for

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Inland Revenue, the latter because of his possible interest in the dispute from the point of view of the incidence and *quantum* of estate duty. The Master and the Registrar of Deeds furnished reports. The Commissioner notified applicants' attorneys that he did not wish to file a report and abided the decision of the Court.

The matter came before ESSELEN J, who made the following order:

"1. That the marriage which formerly subsisted between Antonia Spinazze and her late husband Pietro Carlo Spinazze was, as between them and their heirs, out of community of property but insofar as third parties are involved their marriage was in community of property.

2. Authorising the Registrar of Deeds to cancel the antenuptial contract.

3. Costs of this application as between attorney and own client and costs of the *curator ad litem* on the same basis are to be costs in the winding-up and liquidation of the estate of the late P C Spinazze."

Leave to appeal was refused by the Court *a quo*, but granted by this Court. On appeal the executors (the appellants") seek an order in terms of claim 1 (*a*) of the notice of motion in

substitution for the order (1) granted by the Court *a quo*. In the event of their failing in this, they ask that certain words be deleted from order (1). They do not appeal against orders (2) and (3).

At the hearing before us it transpired that, during the pendency of the appeal, Mr *Selbst* had left the Johannesburg Bar and was now resident in Israel. Advocate *Kraut* of the Johannesburg Bar had been briefed by applicants' attorneys to take his place as *curator ad litem* and Mr *Kraut's* appointment as such was confirmed by this Court.

The central issue in this appeal is the formal validity of the antenuptial contract entered into between Mr and Mrs Spinazze in Turin, Italy, in May 1957; and, as I shall show, this in turn would seem to depend upon whether in terms of our rules of private international law relating to choice of law the formal validity of this contract is governed exclusively by Italian domestic law or whether it may, alternatively, be adjudged by the formal requirements for antenuptial contracts laid down by South African domestic law.

The position under Italian domestic law appears to be clear. According to expert evidence placed on record by way of affidavits, in 1957 Italian law requrred an antenuptial contract regulating the matrimonial property regime between intending spouses to be executed by "public act", as defined in s 2699 of the Civil Code. This section provided that a "public act" was one executed with required formalities before a notary public or, in certain instances, before certain other public officials authorised to give public force to the document. Furthermore, Italian law required such a contract to be executed before four competent witnesses, each of whom had to sign the document. An antenuptial contract which failed to comply with these formal requirements was, according to Italian law, null and void *ab initio* and of no force or effect, either *inter partes* or as against third parties.

The expert evidence was unanimous in advising that, according to Italian law, the British vice-consul in Turin was not a notary public or

other official qualified to execute a public act in Italy. Consequently the antenuptial contract entered into by the parties in Turin did not satisfy this basic formal requirement of Italian law. In addition, the execution of this contract had been before only two witnesses, instead of the four required by Italian law. On these grounds the antenuptial contract was null and void and of no force or effect, either *inter partes* or as against third parties if adjudged by the formal requirements of Italian law.

Reference was made in the papers to an English statute, the Commissioners of Oaths Act of 1889, in terms whereof (see s 6 (1)) various British ambassadorial and consular officers, including a vice-consul, when exercising their functions in a foreign country, are empowered to, *inter alia*, do any notarial act which a notary public can do within the United Kingdom and every such notarial act is made as effectual as if done before the lawful authority in the United Kingdom. It was common cause, however, that this statute did not affect the issues in the present case.

I turn now to South African law. According to the law of Holland, no particular formalities were required for the execution of antenuptial contracts. Not even writing was necessary, unless the parties had agreed that their agreement must be reduced to writing. A verbal

contract was valid and enforceable provided that it could be satisfactorily proved. In general, writing (and in practice most antenuptial contracts were executed in writing) was regarded as serving the object of providing easier proof of the existence of the contract and its terms and was not essential to the validity of the contract itself. The validity of a verbal antenuptial contract was established as early as 1599 by two decisions of the Hooge Raad (*Senatus*) referred to by Neostadius (C M van Nieustad) in his work *Observationes de Pactis Antenuptialibus*, see *obs* XVIII and obs XIX and the note to *obs* XXIII. Grotius *Inleiding* 2.12.4 (*Groenewegen's* note refers to *obs* XVIII and XIX); Van Leeuwen *Censura Forensis* 1.12.9; Voet *Commentarius* 23.4.2; Arntzenius *Institutes* 2.5.30; Van de Keessel *These Selectae* Th 229 and *Praelectiones ad Gr* 2.12.4; and *Schorer's* notes to *Grotius*, note XCIX, all affirm the validity of a verbal antenuptial contract according to the law of Holland. Most of them refer to *observationes* XVIII and XIX of *Neostadius*.

The decisions of the Hooge Raad mentioned above were to the effect that a verbal antenuptial contract, satisfactorily proved, was not only valid *inter partes*, but also effective against creditors of either party to the contract. Later Roman-Dutch authorities suggest, however, that to be effective against creditors and third parties the contract had to be entered into in writing and in a public manner (see eg Arntzenius *Institutes* 2.5.36; Van der Keessel *Theses Selectae* Th 229 and *Praelectiones ad Gr* 2.12.4). According to *Van der Keessel* (in the last-mentioned reference - see *Gonin's* translation at 213) this entailed execution before the schepene or before a notary and two witnesses or before blood relatives of bride and bridegroom. (See also *Fisher v Malherbe and Rigg and Another* 1912 WLD 15 where the common law authorities are reviewed; also *Fuller's Trustees v Fuller* (1883) 4 NLR 37, a decision of CONNOR CJ.)

The law of Holland did not require the registration of an antenuptial contract (see *Schnaider v Jaffe* 1916 CPD 696 at 700). A placaat of 30 July 1624 did indeed make provision for the registration of antenuptial

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contracts containing a fideicommissary or like clause relating to immovable property (see Groot Placaatboek vol 1 at 375), but, according to the authorities, from the outset this enactment was in fact never observed (see *Rechtsgeleerde Observatien obs* XLII and the authorities there cited, to which may be added Van der Keessel *Theses Selectae* Th 319 and *Praelectiones ad Gr* Th 319 (*Gonin's* translation at 423), Van der Linden *Institutes* 1.3.3; see also *Commissioner for Inland Revenue v Estate Graaff* 1935 AD 210 at 211 - 12 - judgment of the CPD).

In the early days at the Cape two legislative enactments (proclamation of 23 April 1793 and proclamation of 23 May 1905) provided for the registration of antenuptial contracts in the Debt Registry and ordained that conventional special hypothecs would have preference over antenuptial contracts which had not been so registered. These proclamations did not, however, affect the validity of non-registered antenuptial contracts or their effectiveness *vis-à-vis* simple contract creditors (see *Steytler v Dekkers* (1872) 2 Roscoe 98 at 106 - 8; *Way v Louw and Another* 1924 CPD 450 at 453). Shortly after the decision in *Steytler v Dekkers* the Cape Parliament passed the Antenuptial Contracts Act of 1875, which enacted that no antenuptial contract executed after the taking effect of the Act would be valid or effectual as against any creditor or creditors of either of the spouses unless it had been

registered in the Deeds Registry Office (s 2); and that in order to be registered an antenuptial contract executed in the Cape Colony had to be executed before a notary public (s 9). Similar legislation was passed in Natal (see Law 22 of 1863 s 2), Transvaal (see Law 5 of 1882 s 5; Proc 10 of 1902 s 37; Act 25 of 1909 s 34) and the OFS (see Law 7 of 1892 s 1). After Union there was enacted the Deeds Registries Act 13 of 1918, which repealed and replaced earlier laws concerning the registration of antenuptial contracts, made provision for the registration of antenuptial contracts and decreed that unregistered antenuptial contracts should be of no force or effect as against creditors in insolvency of either spouse (see s 28). This was followed by the Deeds Registries Act 47 of 1937 ("the Act"), which repealed and replaced Act 13 of 1918. Sections 86 and 87 (1) and (2) of the Act, as they were when the antenuptial contract in issue in this case was executed (in 1965 s 87 was substantially amended by s 30 of Act 87 of 1965), read as follows:

"**86. An antenuptial contract executed before and not registered at the commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in s 87, and unless so registered shall be of no force or effect as against any person who is not a party thereto.**

87 (1) An antenuptial contract executed in the Union shall not be registered unless it has been attested by a notary public and unless it has been tendered for registration in a Deeds Registry within two months after the date of its execution or within such extended period as the Court may on application allow.

(2) An antenuptial contract executed outside the Union shall not be registered unless it has been attested by a notary public or has been otherwise entered into in accordance with the law of the place of execution and unless it has been tendered for registration in a Deeds Registry within six months after the date of its execution or the commencement of this Act, whichever may be the later date, or within such extended period as the Court may on application allow."

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It is clear that in terms of s 86 of the Act an antenuptial contract not registered in the manner and within the time mentioned in s 87 is of no force or effect against any person who is not a party thereto. Having regard, however, to the common law and legislative background to the Act (which I have sketched above), an antenuptial contract which has not been so registered is valid and effective as between the parties thereto. (See Hahlo *Law of Husband and Wife* 5th ed (1985) at 261 - 2.) Indeed, it seems likely (though it is not necessary to decide this point and though ss 86 and 87 deal with written antenuptial contracts - see the use of the word "executed" in the English text and "onderteken" in the Afrikaans (signed) text - that even a verbal antenuptial contract, if properly proved, would have such validity *inter partes:* see *Pollard and Pollard v Registrar of Deeds* 1903 TS 353 at 356 - 7; *Fisher v Malherbe and Rigg and Another* (*supra* at 19); *Ex parte Kloosman et Uxor* 1947 (1) SA 342 (T) at 347; Hahlo (*op cit* at 261 - 2). The effect of registration is to give notice to the world of the existence of the antenuptial contract and thereby to bind persons who are not parties

thereto, including creditors: see *Kloosman's* case at 347; *Johnson and Another v Registrar of Deeds* 1931 CPD 228 at 231.

As to the manner and time of registration, s 87 distinguishes between antenuptial contracts executed in South Africa (ss (1)) and those executed outside South Africa (ss (2)). For the sake of brevity I shall refer to these, respectively, as "domestic" and "foreign" antenuptial contracts. As the antenuptial contract in question falls into the latter category, I concentrate on ss (2). This subsection lays down as alternative prerequisites for the registration of a foreign antenuptial contract (i) that it should have been attested by a notary public, or (ii) that it should have been otherwise entered into in accordance with the law of the place of execution. As regards the first of these alternatives, the term "notary public" in relation to a document executed outside South Africa is defined in s 102 of the Act to mean "A person practising as such in the place where the document is executed". In the instant case it is common cause that the antenuptial contract entered into between Mr and Mrs Spinazze in Turin did not comply with either of those prerequisites. It is clear that the British vice-consul in Turin was not a person practising as a notary public in Italy. Under the English statute already alluded to he had certain powers to do what a notary public could do in the United Kingdom, but this did not constitute him a notary public practising as such in Italy (cf *Ex parte Hoal* 1925 TPD 27). Consequently the antenuptial contract was not attested by a notary public in terms of s 87 (2). Furthermore, it is clear from what has been stated above in regard to the requirements of Italian law relating to the execution of antenuptial contracts that this antenuptial contract was not entered into in accordance with the law of the place of execution. It follows that the antenuptial contract, as a foreign contract, did not satisfy the formal requirements for registration laid down by s 87 (2) of the Act and originally ought not to have been registered.

If, however, the formal validity of the antenuptial contract in general be adjudged by domestic South African law, then, having regard to the principles stated above, it seems clear that it was valid and enforceable

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inter partes, but, not having been validly registered, it was of no force or effect as against any person not a party thereto. This is in contrast to the position under Italian domestic law, which would hold the antenuptial contract to be null and void and of no force or effect, either *inter partes* or as against third parties. Consequently the question is whether a South African Court, when seized with the issue as to what must be characterized as the formal validity of such an antenuptial contract, should have regard to Italian domestic law or South African domestic law. This depends upon what rules as to the choice of law are prescribed by South African private international law in regard to the formal validity of a foreign antenuptial contract. To this question I now turn.

The law of Holland generally accepted the principle that a contract executed in accordance with the forms required by the law of the place of execution should be recognized as being formally valid everywhere, even in a country where a different law obtained and where the contract, if executed there in the same way, would have been invalid. This was in conformity with the general approach, epitomised by the maxim *locus regit actum*, which was applied not only to contracts, but also to the formal requirements pertaining to other transactions *inter vivos* and to wills. Huber, one of the great writers on conflict of laws, stated the general

position as follows (see *Praelectiones* vol II *lib* I *tit* 3 (*De Conflictu Legum*), first published 1687):

Cuncta negotia et acta tam in judicio quam extra judicium, seu mortis causa sive inter vivos, secundum jus certi loci rite celebrata valent, etiam ubi diversa juris observatio viget ac ubi sit inita, quemadmodum facta sunt, non valerent.

(See also Rodenburg *De Jure Quod Oritur e Statutorum Diversitate* 11.3.1, published in 1653; Huber *Heedensdaegse Rechtsgeleertheyt* 1.3.8, published in 1686; J Voet *Commentarius* 1.4. App 13, published about 1698; Arntzenius *Institutiones* 1.2.27, published in 1783; Van der Keessel *These Selectae* Th XXXIX, published in 1800, and *Praelectiones* Th 39 (see *Gonin's* translation at 123), delivered 1793 - 1806.) The only limitations on this general rule appear to have been (i) where there was an express statute of the law of the *forum* denying validity to an act done outside the territory of the *forum* with other formalities; and (ii) where a person, in order to avoid the more troublesome and perhaps more expensive formalities of his domicile, had needlessly and in fraud of statute gone elsewhere to complete his contract and then returned. (See *J Voet* (*op cit* 1.4 App 14); Van der Keessel *Theses Selectae* Th XXXIX and *Praelectiones* Th 39 and 40 (*Gonin's* translation at 125 and 127).)

These general rules were applied specifically to antenuptial contracts (see *J Voet* (*op cit* 23.4.4); *Arntzenius* (*op cit* 1.2.27); Van der Keessel *Praelectiones* Th 39 (*Gonin's* translation at 125). In the passage cited *J Voet* states (*Gane's translation vol 4 at 174 - 5):*

"But as to the question what formalities are to be employed for dotal agreements, it seems that we should look at the custom of the place in which they have been framed in good faith, although there are immovables situated elsewhere which have to be governed by such agreements."

(In a footnote to this statement *Voet* refers back to 1.4 App 13 and 14 cited above.) This general rule as to the formalities relating to the execution of

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antenuptial contracts has been accepted by our Courts (see *Way v Louw* 1924 CPD 450 at 453 - 4; *Johnson and Another v Registrar of Deeds* 1931 CPD 228 at 230).

The critical question in this case, however, is whether or not the formal validity of an antenuptial contract is governed solely by the *lex loci contractus*. Huber *Praelectiones* vol II, 1.3.3 also stated, with approval, the converse proposition to that quoted above, viz:

***E contra, negotia et acta certo loco contra leges ejus loci celebrata, cum sint ab initio invalida, nusquam valere possunt* ;**

that is, that transactions and acts executed in any place contrary to the laws of that place, since they are invalid *ab initio*, can in no place be valid. He enunciated the same general proposition in *Heedensdaegse Rechtsgeleertheyt* 1.3.8. *Huber* further stated that the general rule, comprehending what I shall describe as both the positive and negative aspects of the *locus regit actum* principle, applies as much to persons who happen to be for a time in any country, as those who were born or permanently reside there (*Heedensdaegse*

Rechtsgeleertheyt 1.3.9 and Praelectiones vol II, 1.3.3). *Huber* thus appears to be a protagonist of a rigid and imperative rule that in general the formal validity of a transaction or act, including a contract, stands or falls by whether it complies with the law of the place of execution, in the case of a contract the *lex loci contractus:* if it does, it is formally valid everywhere (the positive aspect); if it does not, it is formally invalid everywhere (the negative aspect).

Other writers, however, adopted a less rigid, and what has been described as a "facultative", approach, viz that in certain instances formal validity could alternatively be tested by another system of law connected with the transaction or act in question. Thus, for example, *J Voet* (*op cit* 1.4 App 15) discusses the question whether an act done without complying with the formalities of the place of execution, but in compliance with the law of that person's domicile or of the place where the *res* is situated, is valid. *Voet* gives an affirmative answer to the question, comprehending within his reply both wills and contracts. Van der Keessel, in *Theses Selectae* Th 41, states that it should not be inferred from the rule in Th 39 (which states the positive aspect of the *locus regit actum* rule) that acts not executed according to the law of the place of execution, are nowhere valid. In the *Praelectiones* Th 41 Van der Keessel elaborates upon this. He rejects very forcibly ("*sed contrarium mihi verissimum videtur* ") the negative aspect of the *locus regit actum* rule, as advocated by *Huber*. He gives two examples: (i) a Frisian who makes a will in Overysel not in accordance with the law of Overysel, but in accordance with the solemnities laid down by the law of Friesland, and (ii) a citizen of Overysel who while in Holland binds himself to a fellow citizen on a written acknowledgment of debt, which according to the law of Holland must be sealed to be legally effective but which is in fact not sealed (no such requirement obtaining in Overysel). *Van der Keessel* has no doubt that the will is valid in Friesland and that the acknowledgment of debt may be sued upon in Overysel. In *Institutiones* 1.2.27, Arntzenius states (I quote from *Van den Heever's* translation at 9):

"If the formalities required by the place of execution are not observed, but those required by the place where the testator is domiciled or the property is situated are, Huber (*ad D* 31, *Hedend Rechtsg* 1.3.14 and 15) maintains that the

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act is invalid, since the lack of requisite formalities rendered it void *ab initio*. Other authorities have recourse to distinctions (see Rodenburg *De Jur Conjug* 45). To my mind such wills are valid by virtue of the principle of necessity as well as because the law favours testators."

In this section *Arntzenius* deals generally with the requisite formalities of juristic acts, including antenuptial contracts and wills. And even Huber (in *Heedensdaegse Rechtsgeleertheyt 1.3.15), while not deviating from his strict adherence to the locus regit actum* principle, cites a decision of (evidently) a Frisian court upholding a will executed by a Frisian in Overysel in accordance with formalities which were in conflict with the law of Overysel but in accordance with Frisian law, commenting that (I quote from *Gane's* translation vol I at 12):

"(this) conflicting decision appears to be founded upon this ground, that there was no reason to nullify and reject in Friesland a will made elsewhere by a Frisian, if it

was legal and regular according to Frisian law, even though it could not have held good at the place where it was made".

A facultative approach to the *locus regit actum* rule appears also to have been adopted in a limited sphere by Rodenburg *De Jure Conjugum, De Jure Quod Oritur e Statutorum Diversitate 2.3.2; see also Kollewijn Geschiedenis van De Nederlandse Wetenschap van Het Internationaal Privaatrecht tot 1880* (1937) at 66 - 7, 95; Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* at 15.

This brief reference to the Roman-Dutch writers of the 17th and 18th centuries shows, in my view, that there was a movement away from a strict adherence under all circumstances to the *locus regit actum* rule in the sphere of the formal validity of juristic acts, including contracts and that particular species of contract, the antenuptial contract, and towards a more facultative approach, which in certain circumstances permitted formal validity to be tested, in the alternative, by another relevant system of law. (See Kosters and Dubbink *Nederlands Internationaal Privaatrecht* at 448 - 9; cf *Van Rooyen* (*op cit* at 23 - 4, 137).)

As to modern South African law, there are the two cases, cited above, in which the positive aspect of the *locus regit actum* rule was accepted in respect of antenuptial contracts; and in Way v Louw (supra) an antenuptial contract executed in England with the formalities of English law (ie the *lex loci contractus*) was held to be valid and binding by South African law. There is, so far as I am aware, no decision in South Africa which holds that, where the formal validity of a foreign antenuptial contract is in issue in a South Africa Court, only the *lex loci contractus* may be looked to. Counsel were not able to refer to any such authority, and I have not been able to find any. (See also Hahlo *Law of Husband and Wife* 4th ed (1975) at 632.) Having regard to the state of the common law, I am of the opinion that it is open to this Court to decide whether an imperative or facultative approach should be adopted to the rule of our law to the effect that the formal validity of an antenuptial contract should be determined by reference to the *lex loci contractus;* and, if the latter (ie the facultative) be the proper approach, what alternative system, or systems, of law may be looked to when formal validity is in issue. In pursuing this enquiry, it will be instructive to see what the modern thinking on this topic is in other Western jurisdictions.

In the Netherlands, s 10 of the Algemene Bepalingen provides that:

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"De vorm van alle handelingen wordt beoordeeld naar de wetten van het land of de plaats, alwaar die handelingen zijn verrigt."

Evidently, for a long time s 10 was thought to be susceptible of an imperative interpretation only. In 1942, however, the Hooge Raad construed it as being facultative. In a case involving a contract which was concluded in the Netherlands through the post between parties in England and the Netherlands and which did not conform to the formal requirements of Dutch law, the Court held that s 10 did not preclude the formal validity of the contract being adjudged by English law, the *lex causae*, in terms of which it was formally valid. (See *Kosters and Dubbink* (*op cit* at 451 - 2).) A subsequent decision of the Hooge Raad followed the same course and the facultative approach is now generally accepted in the Netherlands. As to the merits of a facultative approach, *Kosters and Dubbink* (*op cit* at

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451 - 2), having referred to the argument advanced by others that an imperative application of the *locus regit actum* rule introduced certainty ("zekerheid"), ask:

"Maar welke zekerheid eist de internationale rechtsorde? Deze, dat de geldigheid van te goeder trouw verrichte handelingen zo veel mogelijk gewaarborgd wordt. De strekking van de regel '*locus regit actum* ' is verlichting, vergemakkelijking van het internationaal verkeer, dat er mede gediend wordt, als nietigheden naar de vorm zoveel mogelijk worden beperkt. Die regel wil geldigheid verschaffen aan hetgeen, zonder hem, nietig zou zijn. Maar hij zou bezwaring, belemmering met zich brengen, als hij krachteloos zou maken hetgeen zonder hem van waarde wezen zou. De rechtsbetrekkingen, waarom het gaat, vertonen aanknopingen met meer dan één land. Die aanknoping, bestaande met het land, waar de handeling plaats vindt, is, ook als zij niet beperkte is tot de enkele verrichting, meermalen niet gewichtiger, ja minder belangrijk, dan die met andere staten. Dan is er voldoende aanleiding om de handeling, bij nietigheid in de vorm volgens de *lex loci actus*, ook aan de vormwetten dier andere staten te toetsen en, bij voldoening aan die wetten, de geldigheid aan te nemen."

The same approach would, it seems, be adopted in regard to the formal validity of an antenuptial contract (*Kosters and Dubbink* (*op cit* at 454 - 5)).

In English law there is a paucity of clear authority on the question of the choice of law where the formalities of a contract are in issue. It is generally accepted, however, that the English Courts recognize as formally valid a contract entered into in accordance with the *lex loci contractus* (see Dicey and Morris *The Conflict of Laws* 10th ed (1980) at 784; Cheshire and North *Private International Law* 10th ed (1979) at 219 - 20; Graveson *Conflict of Laws* 7th ed (1974) at 439; Martin Wolff *Private International Law* 2nd ed (1950) at 446). But whether the observance of the *lex loci contractus* is essential to the formal validity of a contract is a matter upon which there is no clear authority, at any rate as far as commercial contracts are concerned. As regards a particular species of contract, viz the marriage settlement, it is the view of *Dicey and Morris* (*op cit* at 785), of *Cheshire and North (op cit* at 220) and *Martin Wolff* (*op cit* at 367) that the contract is formally valid if it complies with the requirements of either the *lex loci contractus* or the proper law of the contract. This view rests mainly upon the authority of the case of *Van Grutten v Digby* (1862) 31 Beav 561, in which a domiciled Englishwoman married a domiciled Frenchman in France. It was their intention to reside permanently in France. Prior to the marriage the parties executed in France a marriage contract, a deed in English form, in terms whereof movable property

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belonging to the woman (wife) and situated in England was settled upon English trustees to hold it in trust for the wife for life and, after her decease, for her husband for life; and, after the death of the survivor, to their children. The contract was formally invalid by French law, but valid by English law. ROMILLY MR held that the question to be considered was (see at 567 - 8):

"Which is the *forum contractus*, is it a French contract or is it an English contract? Whichever it may be the law of that country governs the contract. By this I do not

mean the mere place where the contract was made..."

Emphasizing that the contract was an English settlement relating to property situated in England, which was placed in the hands of English trustees, the learned MASTER OF THE ROLLS held that English law governed and that the settlement was valid. This decision was approved in *Viditz v O'Hagan* [1899] 2 Ch 569 at 574.

Van Grutten's case is generally interpreted as an application of the proper law of the contract to the question of the formal validity of a marriage settlement, although, as is remarked by Sykes and Pryles *Australian Private International Law* (1979) at 502, "the Court was probably quite unconscious of applying such a test." See also *Re Bankes: Reynolds v Ellis* [1902] 2 Ch 333, which appears to relate to formal as well as essential validity.

As regards contracts generally, *Dicey and Morris* (*op cit* at 784), *Cheshire and North* (*op cit* at 219 - 20) and *Martin Wolff (op cit* at 446 - 50) argue forcibly that English Courts would and should adopt the same approach, ie that the contract is formally valid if it complies with the requirements of either the *lex loci contractus* or the proper law of the contract. In fact *Dicey and Morris* (*op cit* at 784) formulate the rules in regard to the formalities of contracts thus:

"148.The formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*) or by the proper law of the contract.

(1) Any contract is formally valid which is made in accordance with any form recognised by the law of the country where the contract is made (which form is called the local form), whether or not it is made in accordance with the form prescribed by the proper law of the contract.

(2) Any contract is formally valid which is made in accordance with any form required, or allowed, by the proper law of the contract, even though not made in accordance with the local form."

Scots law appears to adopt basically the same approach as English law in regard to the formalities of contracts generally (see A E Anton *Private International Law* (1967) at 204 - 5) and, more particularly, in regard to marriage contracts. *Anton* (*op cit* at 448) states that the general rule is that a contract may be validly executed either in accordance with the forms of the place of contracting or in accordance with those of the proper law.

In Canada there is recent authority to the effect that a commercial contract is formally valid if it complies with the forms required by the proper law of the contract, even though it does not comply with the formal requirements of the *lex loci contractus* (see *Sharn Importing Ltd v Babchuk* (1972) 21 DLR (3d) 349; *Ward v Coffin* (1972) 27 DLR (3d) 280). Castel *Canadian Conflict of Laws* (1975) vol 2 at 546 accepts the view that the rule that the formal validity of contract is governed by the *lex loci contractus* is permissive, not imperative, and that a contract is also

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formally valid if it complies with the proper law. He points out that the justification for the rule referring the issue to the *lex loci contractus* is that the parties, as a matter of convenience,

should always be able to rely on the local law when making their contract; while the alternative of the proper law protects the reasonable expectations of the parties and is especially justified when the place of making is uncertain or purely casual or accidental, the transaction being in other respects totally unconnected with that place. As regards marriage contracts *Castel* states (at 418):

"The formalities required to make a valid marriage contract or settlement are governed by the *lex loci contractus* or its proper law. The rule is permissive. This is very important in Canada as in the province of Quebec such a contract is void unless made by notarial act."

As to Australian law, the commonly endorsed view is that a contract is formally valid if it satisfies the formalities of either the *lex loci contractus* or alternatively the proper law (see *Sykes and Pryles* (*op cit* at 352); Nygh *Conflict of Laws in Australia* (1976) at 221 - 2); and this rule embraces marriage settlements (*Sykes and Pryles* (*op cit* at 502); Nygh (*op cit* at 438)).

In the United States of America the general approach appears to be similar. According to the *Restatement (Second), Conflict of Laws 2d* vol 1 at 634 *et seq*, the rules are:

"(1) The formalities required to make a valid contract are determined by the law selected by application of the rules of paras 187 - 188.

(2) Formalities which meet the requirements of the place where the parties execute the contract will usually be acceptable."

Paragraph 187 has reference to the law of the State chosen by the parties to govern their contractual rights and duties and para 188, in the absence of an effective choice by the parties, to the law of the State which has the most significant relationship to the transaction and the parties thereto. In effect paras 187 and 188 denote the *lex causae* or proper law of the contract. The American case-law is not, however, as clear-cut as these rules would seem to indicate (see *American Jurisprudence 2d* vol 16 "Conflict of Laws" para 92; also Stumberg *Conflict of Laws* 2nd ed (1951) at 243 - 4; Leflar American Conflicts Law revised ed (1968) paras 145 - 9). According to *Leflar* (*op cit* para 238) an express premarital contract specifying what interests the prospective spouses shall have in each other's property is subject to the same tests as to what law governs as are other contracts.

Reverting to the continent of Europe, it would seem that according to French law the formal validity of a contract is governed either by the *lex loci contractus* or by the *lex causae* or proper law of the contract (see *Van Rooyen* (*op cit* at 127 - 9); G R Delaume *Bilateral Studies in International Law* 2nd ed (1961) at 119). This rule appears to apply to marriage settlements. Belgian law adopts the same rule in regard to contracts in general and in regard to antenuptial contracts (see G van Hecke *Bilateral Studies: American-Belgian Private International Law* (1968) at 49, 58 n 299). According to German law the formal validity of an international contract is governed primarily by the proper law, but compliance with the *lex loci contractus* also suffices. A marriage settlement is valid as to form if it complies with the requirements of either the law governing matters of marital property or the *lex loci contractus*. Matters of marital property are

generally governed by the husband's national law at the time of marriage (see Drobnig *Bilateral Studies: American-German Private International Law* 2nd ed (1972) at 94, 97, 243 - 4; *Van Rooyen* (*op cit* at 131 - 3)).

Having regard to the aforegoing, I am of the opinion that modern South African law should adopt a facultative approach to the wellentrenched rule that an antenuptial contract executed in accordance with the forms required by the *lex loci contractus* is formally valid, and hold that a contract which alternatively complies as to form with the *lex causae*, or proper law, is formally valid, even though it may not comply with the formal requirements of the *lex loci contractus*. Such an approach would maintain in South Africa a conformity to modern jurisprudential trends in the Western World in this sphere of private international law. It also has the advantage that the reasonable expectations of the parties would not be defeated by the fact that, possibly fortuitously, the antenuptial contract was executed in a country which was in other respects unconnected with the transaction. (And here I might just add that s 87 (2), by according registrability, and consequently formal validity, to a foreign antenuptial contract attested by a notary public, itself made inroads on the *locus regit actum* principle in cases, such as the present one, where this did not conform to the formal requirements of the *lex loci contractus*.) The survey which I have made would indicate the desirability of adopting the same approach in regard to the formal execution of contracts generally, but on the facts of this case it is not necessary to decide this point. Nor is it necessary, in this case, to determine what qualifications, if any, should be attached to the general rule.

Reverting to the facts of this case, I am of the opinion that the proper law or *lex causae* of the antenuptial contract in issue was unquestionably South African law. The contract was in South African form; it was entered into in order to avoid a matrimonial property regime, viz community of property, which obtained in South Africa at the time, but not in Italy (according to the expert evidence, in 1957 marriages governed by Italian law were out of community of property); at the time when the contract was executed the deceased was domiciled and resident in South Africa; and the parties to the contract obviously intended South Africa to be their matrimonial home and the country where the contract was to operate. These factors may be taken either as indicating a tacit choice of South African law or, at any rate, as showing that South African law was the system with which the contract had its closest and most real connection.

Consequently, adopting the facultative approach, I hold that the antenuptial contract in question is not vitiated by reason of the fact that it did not comply, when executed, with the imperative formal requirements of Italian law. Its formal validity may alternatively be adjudged by the *lex causae*, South African law, with the results that I have already indicated. It follows that the Court *a quo* was correct in refusing to make an order declaring that the marriage which formerly subsisted between Mrs Spinazze and the deceased was one in community.

As regards the order actually made by the Court *a quo*, appellant's counsel submitted that para 1 thereof went too far and that the words "... as between them and their heirs, out of community of property but"

should be deleted therefrom. Leaving aside for the moment the words "and their heirs", I see no reason why the passage referred to should be deleted from the order. It reflects the conclusion come to by the Court *a quo*, and this Court, as to the legal effect of the antenuptial contract and were it omitted the order would, in my opinion, be incomplete and, possibly, unclear.

As regards the words "and their heirs", I have already stated that an antenuptial contract which has not been registered or properly registered (as in this case), though of no force or effect as against persons not parties thereto, is valid *inter partes*. Where one of the parties to the contract has died, then obviously the contract would be operative as between the estate of the deceased party and the surviving party or parties. It would determine, *inter partes*, their property rights. In view of the position of the modern-day heir, who is in effect a residuary legatee (see *Estate Smith v Estate Follett* 1942 AD 364 at 383), I think that the order would have been more correct if it had contained the words "and their estates".

In regard to the costs of appeal, appellants' counsel submitted that, as was done in the Court *a quo*, the costs of the application and the costs of the *curator ad litem* be ordered to be costs in the winding-up and liquidation of the estate of the deceased. Mr *Kraut*, as *curator ad litem*, offered no objection to this course. At the same time it is conceded that pages 170 - 190 ought not to have been included in the record of appeal. It seems to me that this is an appropriate case to allow the costs of appeal to come from the estate, but this cannot include the costs incurred in regard to pages 170 - 190 of the record.

Accordingly, the following order is made:

(1) The appeal is dismissed.

(2) Paragraph 1 of the order of the Court *a quo* is amended by the substitution of the word "estates" for the word "heirs" therein.

(3) The costs of the appeal as between the attorney and own client and the costs of the *curator ad litem* on appeal (on the same basis) are, save as regards the costs relating to pages 170 - 190 of the record, to be costs in the winding-up and liquidation of the estate of the late Pietro Carlo Spinazze.

CILLIÉ JA, HOEXTER JA, HEFER JA and VIVIER AJA concurred.

Appellants' Attorneys: *Miller, Ackermann & Bronstein*, Johannesburg; *E G Cooper & Sons*, Bloemfontein.