

**THE INVALIDITY OF THE BUY-AND-SELL AGREEMENT AS A *PACTUM
SUCCESSORIUM* IN SOUTH AFRICAN LAW**

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INTRODUCTION

The Latin words “*pactum successorium*”, translate to English as a succession agreement. Simply put it is an agreement which regulates the succession of the estate of a person upon their death and these succession agreements or *pacta successoria* are invalid in law.¹

Buy-and-sell agreements are widely used in the financial planning industry as a practical and effective way to implement the succession plan of business partners in the event of the death or disability of one of the partners. A buy-and-sell agreement invariably requires a partner to sell their business interest upon death to the surviving partners.² It is an agreement which may be seen to regulate the succession of the estate of the dying partner upon their death and as such it could be found to be a succession agreement or *pactum successorium*. These are very simple definitions, and the research will analyse the leading judgments and the views of legal academics on the law relating to the classification of an agreement as an invalid *pactum successorium*, and to consider whether the buy-and-sell agreement used in financial planning contains the criteria necessary to be classified as a *pactum successorium*.

It seems that a buy-and-sell agreement may fall within the scope of the prohibited *pactum successorium* and if so, the invalidity of the agreement could lead to serious consequences for the business itself, the surviving partners as well as for the family of the deceased. Ironically, the intention of implementing a buy-and-sell agreement is to remove the uncertainty in the event of the death or disablement of a business partner. There is a need for buy-and-sell agreements to be recognised as valid agreements, as they do have several benefits for the business itself as well as for all individuals involved.

If the buy-and-sell agreement is found to be an invalid *pactum successorium* on application of the current law, then the question is why and how does the law need to be developed to recognise these agreements as being valid and enforceable? In order to reach a practical conclusion, the following aspects will be addressed in this research. The definition of a *pactum successorium* and why it is invalid. The definition of a buy-and-sell agreement and the benefits of using such an agreement in business succession planning as part of financial planning. An analysis of the buy-and-sell agreement

¹ Hutchison D 1983: 221

² Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

with specific consideration of the identifying characteristics of a *pactum successorium*. And finally, how the uncertainty surrounding the validity of buy-and-sell agreements should be addressed.

1. The *Pactum Successorium* in South African Law

In the leading judgment in South African case law a *pactum successorium* is described as:³

“In Pactum successorium (of pactum de succedendo) is, kort gestel, 'n ooreenkoms waarin die partye die vererwing (successio) van die nalatenskap (of van 'n deel daarvan, of van 'n bepaalde saak wat deel daarvan uitmaak) van een of meer van die partye ná die dood (mortis causa) van die betrokke party of partye reël.”

The *Borman* case has set out the law relating to the *pactum successorium* and the approach of the courts to such agreements, namely that the courts will not uphold an agreement which infringes on the principle of freedom of testation and in this regard Rabie J stated as follows in the *Borman*⁴ judgment:

“In die Romeinse reg is 'n pactum successorium weens hoofsaaklik twee redes as contra bonos mores en ongeldig beskou: die eerste is omdat gevrees is dat so 'n ooreenkoms die begeerte kon laat ontstaan om die dood van die erflater wat as kontraktant opgetree het, te bewerkstellig, en die tweede is omdat gemeen is dat so 'n ooreenkoms die betrokke kontraktant sy testeervryheid ontnem, of dit inperk.”

In striking down the agreement in the *Borman*⁵ case, the Court held that certain of the provisions of the agreement in question restricted and limited the freedom of testation of the deceased and accordingly the agreement was declared to be invalid. The *Borman*⁶ judgment was handed down in 1976 by the Appellate Division, as it was then known, and as such it became legal precedent in South African Law confirming the Roman Law principle that a *pactum successorium* is invalid.

In 1983, Professor Hutchison authored an article titled *Isolating the Pactum Successorium*⁷ in which he expands on the law as determined in the *Borman* case to “determine exactly when a contract ceases

³ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 23

⁴ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander*: 23

⁵ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander*: 30

⁶ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander*

⁷ Hutchison D 1983: 221

to be an ordinary commercial contract and, by impinging on the principle of freedom of testation, becomes in effect a prohibited *pactum successorium*.” This article has since been referenced with favour in several judgments⁸ where the issue to be determined by the court was whether a particular agreement constitutes a prohibited *pactum successorium*. This article includes an analysis of the tests that have previously been applied by our courts when determining whether a contract is a *pactum successorium* or not. Hutchison⁹ points out that the tests applied were not always satisfactory and were in fact sometimes inconsistent with each other.

In order to determine whether buy-and-sell agreements used in financial planning do meet the criteria of an invalid *pactum successorium*, it is essential to determine the tests that have been employed by our courts. Unfortunately there has not been a consistent approach which has resulted the need to differentiate between those tests which have been followed by the Appellate Division, as it was then known, which has set a legal precedent from the tests that have been incorrectly applied with subsequent criticism.

1.1 The tests previously employed by the courts:¹⁰

The first test is the ‘absence of consideration’ test, which is applied by determining whether the agreement in question provides for a *quid pro quo* or a consideration to be given in exchange for the disposition received. If there is a *quid pro quo* or consideration given, then the agreement cannot be classified as a *pactum successorium*.¹¹

The second test is the ‘revocability of the promise’ test, which is applied by determining whether the promisor has the right to revoke the promise.¹² If the promisor does retain the right to revoke, then the agreement in question is a *pactum successorium*. If the promise is irrevocable, then the agreement cannot be classified as a *pactum successorium*.

The third test is the ‘vesting’ test, which is applied by ascertaining the moment that rights to claim the object of the agreement vest in the promisee.¹³ If vesting occurred *inter vivos* during the lifetime of

⁸ *Jubelius v Giesel NO en andere* [1988] 1 All SA 136 (C): 144; *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 269; *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

⁹ Hutchison D 1983: 225

¹⁰ Hutchison D 1983: 225

¹¹ Hutchison D 1983: 225

¹² Hutchison D 1983: 226

¹³ Hutchison D 1983: 227

the deceased, then the agreement cannot be classified as a *pactum successorium*. Whereas if vesting occurred *post mortem* after the death of the deceased then the agreement is most likely a *pactum successorium*.

The fourth test is the 'restriction of testamentary freedom' test, which is applied by ascertaining whether the terms of the agreement restrict the contracting party's right to freedom of testation.¹⁴ If the terms of the agreement do infringe on a contracting party's right to freedom of testation then the agreement is a *pactum successorium*. If there is no infringement of the right to freedom of testation then the agreement cannot be classified as a *pactum successorium*.

What follows is a consideration of each of the four tests in the context of the manner that they were applied by our courts, and from this analysis it will be submitted that the first and second tests were applied incorrectly, whereas the third and fourth tests are compatible with each other in determining whether an agreement is a *pactum successorium*.

1.1.1 Absence of Consideration

According to this test, an agreement which is a *pactum successorium* is invalid, unless in terms of the agreement there is a *quid pro quo* or a consideration given in exchange for the disposition received.¹⁵ This test is incorrect and should not be applied to determine whether an agreement should be classified as a *pactum successorium* for the reasons which follow below.

In the case of *Schauer NO v Schauer*¹⁶ the agreement in question was entered into between one PJR Marais and one HS Schauer. In terms of the agreement, there was an option to purchase milk rounds and equipment owned by Mr Marais. The agreement also contained a clause stating that in the event of the death of Mr Marais, Mr Schauer shall inherit the milk rounds and no compensation shall be paid or payable to his estate. In his judgment, Claassen J sets out the 'absence of consideration' test and its application to the facts in the following passage:¹⁷

"It is a bilateral contract and if it is a true pactum successorium it is invalid, unless it can be established that a quid pro quo had been accorded to the promissor. I think I need not

¹⁴ Hutchison D 1983: 230

¹⁵ Hutchison D 1983: 225

¹⁶ *Schauer NO v Schauer* 1967 (3) SA 615 (W)

¹⁷ *Schauer NO v Schauer* 1967 (3) SA 615 (W): 618

go further into the authorities than quote from the head-note in *Van Jaarsveld v Van Jaarsveld's Estate*, 1938 T.P.D. 343:

'a promise to leave property by will, though unenforceable, is not illegal or *contra bonos mores*. Where a person has given consideration for such a promise, which has not been carried out by the promisor, he is not debarred from seeking restitutionary relief'."

From the abovementioned passage, it would appear that the *Schauer*¹⁸ case is authority for the principle that an agreement would escape invalidity as a *pactum successorium* if there is a *quid pro quo* or a consideration given. However, Hutchison¹⁹ points out that the *Van Jaarsveld*²⁰ case quoted by Claassen J does not support this contention and that it does not matter if the disposition is made gratuitously or for consideration, a *pactum successorium* is still invalid even if there is a *quid pro quo* or consideration given.

In the case of *Van Jaarsveld v Van Jaarsveld's Estate*²¹ the validity of the agreement was not an issue, the agreement in that case was without doubt invalid. The issue to be determined by the court was whether the agreement is also illegal or *contra bonos mores*, as this would prevent the parties from claiming restitutionary relief.²² In contract law, restitutionary relief is available when an agreement is invalid and the parties are required to restore or return whatever was received as a result of the contract²³ or to attempt to place the parties back in the position that they were in before entering into the agreement.

Accordingly, the presence or absence of a *quid pro quo* or consideration given for the disposition as applied in the *Schauer*²⁴ case is not a valid test to be applied in determining whether an agreement is a *pactum successorium* as confirmed by the Appellate Division, as it was then known, in the case of *McAlpine v McAlpine NO and another*.²⁵

¹⁸ *Schauer NO v Schauer* 1967 (3) SA 615 (W)

¹⁹ Hutchison D 1983: 225

²⁰ *Van Jaarsveld v van Jaarsveld's Estate* 1938 TPD

²¹ *Van Jaarsveld v van Jaarsveld's Estate* 1938 TPD

²² *Van Jaarsveld v van Jaarsveld's Estate* 1938 TPD

²³ Van Rensburg A, Lotz J and Van Rhijn T 2014: Par 427

²⁴ *Schauer NO v Schauer* 1967 (3) SA 615 (W)

²⁵ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 277

1.1.2 Revocability of the Promise

Another proposed test to be applied to the agreement in determining whether an agreement is a *pactum successorium* is whether the undertaking is revocable by the party conferring the right, and if it is revocable then the agreement is a *pactum successorium* whereas an irrevocable undertaking would not constitute a *pactum successorium*.²⁶ This revocability test is also incorrect and should not be applied for the reasons which follow below.

The 'revocability of the promise' test was applied in the case of *Costain and Partners v Godden NO and Another*.²⁷ In this case the agreement in question contained *inter alia* a clause whereby the seller granted to the purchaser the option to purchase certain land for £15,000 in cash with payment to be made against transfer of ownership, subject to the condition that such option cannot be exercised until the death of the first dying of the seller or the seller's wife. The application of the 'revocability' test is set out by Murray CJ in the following passage:²⁸

"Whether an agreement is a binding contract or merely a pactum successorium, i.e. an agreement regarding the succession to the estate of one of the contracting parties or of a third person depends obviously in the first instance on the construction of the particular agreement in issue. Counsel for the excipients relied on two cases, van Wyk v. van Wyk, 5 S.C. 1, and Ahrend and Others v. Winter, 1950 (2) S.A. 682 (T). It is clear that in each of those cases the test applied to the particular agreement was whether the undertaking of the party conferring the right was or was not revocable by him, for, if it was, it was regarded as an agreement to regulate the succession to his estate and it had the characteristic of a testamentary disposition on the basis that omnis voluntas de successione ambulatoria est. If, however, the undertaking was an irrevocable one it escaped the stigma of a pactum successorium. This was recognised in the judgments in those two cases even though in the particular facts and the particular language employed the respective undertakings were held to be unenforceable as pacta successoria. As against these cases reference must be made to Keeve and Another v. Keeve N.O., 1952 (1) S.A. 619 (O), which was approved and followed in this Court by Quènet, J., in Varkevisser v. Estate Varkevisser and Another, 1959 (4) S.A. 196 (S.R.), where the particular agreement in each case was held to be enforceable because it was irrevocable."

²⁶ Hutchison D 1983: 226

²⁷ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR)

²⁸ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR): 140 - 141

According to Hutchison²⁹ none of the four authorities that were relied upon in the quoted passage directly support this proposition and goes further to state even if any of them were to support the proposition, it would still have to be rejected, as the contention that only a revocable agreement can be a *pactum successorium* is in fact the exact opposite of the true situation.

The first case relied upon is *Van Wyk v Van Wyk's Executor*.³⁰ In this case the two documents in question contained the terms of donations in cash which could only be claimed after the death of the respective promisors. The court held that the documents in question were intended to be a testamentary writing and were not intended to be irrevocable, and in order for a testamentary writing to be valid there must be compliance with S3 of Ordinance 15 of 1845 (Cape), which required that the documents be witnessed.³¹ The documents in question were not witnessed and accordingly the court found that the documents were invalid as they did not comply with the Ordinance.³² The case of *Van Wyk v Van Wyk's Executor*³³ does not refer to *pacta successoria* at all and the documents in question were not held to be unenforceable as *pacta successoria*. Accordingly the case of *Van Wyk v Van Wyk's Executor*³⁴ is not authority for the findings made by Murray CJ in the *Costain*³⁵ case.

The second case relied upon is *Ahrend and Others v Winter*³⁶ in which the agreement in question contained an offer by a father to transfer certain property to his son on condition that the son pays the costs of transfer. It was contended by the son that this offer remained open for acceptance until after the death of both his parents. De Wet AJ was of the opinion that in order for the offer to be valid it would have to be embodied in a properly executed will.³⁷ A further issue with the son's contention was raised by De Wet AJ³⁸ namely that if the offer was not an irrevocable one then it must be considered to have been revoked by the terms of the father's will. Accordingly, because the offer was not contained in a properly executed will, De Wet AJ³⁹ held that the offer was unenforceable for the same reasons that testamentary pacts are not enforceable. There was no finding that if the offer had

²⁹ Hutchison D 1983: 226

³⁰ *Van Wyk v Van Wyk's Executor* (1887 - 1888) 5 SC 1

³¹ *Van Wyk v Van Wyk's Executor* (1887 - 1888) 5 SC 1: 4

³² *Van Wyk v Van Wyk's Executor* (1887 - 1888) 5 SC 1: 4

³³ *Van Wyk v Van Wyk's Executor* (1887 - 1888) 5 SC 1

³⁴ *Van Wyk v Van Wyk's Executor* (1887 - 1888) 5 SC 1

³⁵ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR): 140 - 141

³⁶ *Ahrend and Others v Winter* [1950] 2 All SA 346 (T)

³⁷ *Ahrend and Others v Winter* [1950] 2 All SA 346 (T): 350

³⁸ *Ahrend and Others v Winter* [1950] 2 All SA 346 (T): 350

³⁹ *Ahrend and Others v Winter* [1950] 2 All SA 346 (T): 350

been irrevocable then it would have escaped the stigma of a *pactum successorium* as stated in the quoted passage from the *Costain*⁴⁰ case.

The third case relied upon is *Keeve and Another v Keeve NO*.⁴¹ In this case, the agreement in question was a written agreement between parents and children in terms of which the children agreed to care for their parents until the death of the last dying parent and in exchange the parents agreed to give to the children certain assets and rights to property. The issue to be determined was whether the children acquired the rights set out in the agreement *inter vivos* while the parents were still alive or *mortis causa* after the death of the parents. The court found that the rights had vested *inter vivos* and that the agreement was irrevocable, accordingly the court held that the agreement could not constitute a *pactum successorium*.⁴² Although the court did uphold the agreement in the *Keeve* case, the judgment provides no direct authority for the contention that the agreement was enforceable as it was irrevocable.⁴³

The fourth case relied upon is *Varkevisser v Estate Varkevisser and Another*.⁴⁴ In this case, the agreement in question granted certain rights to two farms. In his judgement, Quènet J⁴⁵ found that there was an immediate devolution of rights in terms of the agreement, and it is in this context that Quènet J referred to the case of *Keeve and Another v Keeve NO*.⁴⁶ Accordingly the agreement was found to be enforceable as the rights to the farms had passed *inter vivos*. In this case the revocability of the agreement was not raised and therefore it should not have been cited in the *Costain*⁴⁷ case as authority for the contention that the agreement was enforceable as it was irrevocable.

Since the *Costain*⁴⁸ case, the issue of revocability in respect of a *pactum successorium* was addressed in the following passage from the judgment in the matter of *Ex Parte Calder Wood NO: In Re Estate Wixley*:⁴⁹

⁴⁰ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR): 140 - 141

⁴¹ *Keeve and Another v Keeve NO* [1952] 1 All SA 244 (O)

⁴² *Keeve and Another v Keeve NO* [1952] 1 All SA 244 (O): 248

⁴³ *Keeve and Another v Keeve NO* [1952] 1 All SA 244 (O)

⁴⁴ *Varkevisser v Estate Varkevisser and Another* [1959] 4 All SA 161 (SR)

⁴⁵ *Varkevisser v Estate Varkevisser and Another* [1959] 4 All SA 161 (SR): 164

⁴⁶ *Keeve and Another v Keeve NO* [1952] 1 All SA 244 (O)

⁴⁷ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR): 140 - 141

⁴⁸ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR)

⁴⁹ *Ex Parte Calder Wood NO: In Re Estate Wixley* [1981] 4 All SA 389 (Z): 397

“The foundation of a pactum successorium is that the person who contracts with regard to his own succession purports to bind himself to that contract. He does not seek to retain the unilateral right to revoke his promise. Should he do so, then the contract is not one which conflicts with the general rule of our law that inheritances must devolve extestamento or ab intestato.”

Hutchison⁵⁰ explains that revocability is a major characteristic of a testamentary instrument, but the reason that a *pactum successorium* is invalid and unenforceable is due to the restriction on freedom of testation, and a promise which is unilaterally revocable by the promisor cannot restrict his freedom of testation. The revocability test applied in the *Costain* case was not followed in the matter of *Jubelius v Griesel NO en andere*,⁵¹ and the *Costain*⁵² case is specifically mentioned by Nienaber JA in his dissenting minority judgment given in the *McAlpine*⁵³ case where he states:

“...it does not follow that the covenant is not a pactum successorium simply because the promise is not revocable. Hutchison, supra, at 226, is right in criticising that line of thought.”

Accordingly, it is submitted that the ‘revocability of the promise’ test as applied in the *Costain*⁵⁴ case should not be followed in determining whether an agreement is a *pactum successorium*.

1.1.3 Post-mortem Devolution of the Right to Benefit

The test to be applied in determining whether an agreement is a *pactum successorium* is to determine when the rights to the object of the agreement vest, and if vesting takes place *inter vivos* then the agreement cannot be a *pactum successorium* however if vesting occurs *mortis causa* then the agreement could be classified as a *pactum successorium* provided the other criteria for identification of a *pactum successorium* are also present.⁵⁵

⁵⁰ Hutchison D 1983: 226

⁵¹ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 146

⁵² *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR)

⁵³ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 277

⁵⁴ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR)

⁵⁵ Hutchison D 1983: 227

In the two cases of *Keeve and Another v Keeve NO*⁵⁶ and *Varkevisser v Estate Varkevisser and Another*⁵⁷ the agreements in question in each of these cases escaped classification as *pacta successoria* because in both matters vesting of rights to the object of the agreement occurred *inter vivos*, even though enjoyment of the rights was postponed until after the promisor's death. In the *Borman*⁵⁸ case the Appellate Division, as it was then known, acknowledged these two earlier decisions and the test that was applied to determine whether the agreements constituted *pacta successoria*. Since the *Borman*⁵⁹ case, the Appellate Division, as it was then known, has undoubtedly applied the vesting test to determine whether an agreement is a *pactum successorium* and the following extract from Corbett CJ's majority judgement in the *McAlpine*⁶⁰ matter illustrates this as well as the test to be applied:

"However, whether they be donations or not, in my opinion the basic determinant as to whether or not the reciprocal promises in clause 1 of agreement B constitute pacta successoria is the so called vesting test. This test is applied by asking in a particular case whether the promise disposing of an asset in favour of another (whether by way of donation or other form of contract) causes the right thereto to vest in the promisee only upon or after the death of the promisor (which points to a pactum successorium); or whether vesting takes place prior to the death of the promisor, for instance, at the date of the transaction giving rise to the promise (in which case it cannot be a pactum successorium)."

Accordingly, it is submitted that the vesting test should be applied in determining whether an agreement is a *pactum successorium*.

1.1.4 Restriction of Testamentary Freedom

The test to be applied is to determine whether the terms of the agreement have restricted the contracting party's right to freedom of testation.⁶¹ This test was applied in the *Borman*⁶² case where the agreement in question was in the form of the articles of the Potgietersrusse Tabakkorporasie

⁵⁶ *Keeve and Another v Keeve NO* [1952] 1 All SA 244 (O)

⁵⁷ *Varkevisser v Estate Varkevisser and Another* [1959] 4 All SA 161 (SR)

⁵⁸ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 27

⁵⁹ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A)

⁶⁰ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

⁶¹ Hutchison D 1983: 230

⁶² *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 27

Limited, a co-operative society registered in terms of the Co-operative Societies Act.⁶³ At the time of his death, the late Cornelis Stefanus de Vos owned shares in and was a member of the Potgietersrusse Tabakkorporasie Limited. The articles of the Potgietersrusse Tabakkorporasie Limited contained provisions which stated that upon the death of a member, the balance of the amount held in the member's interest fund would be paid to the widow of the deceased member or to the beneficiaries of the estate of the deceased member. The articles were found to be invalid because the balance of the member's interest fund is an asset in the estate of the member which can be bequeathed by the member during his lifetime, and as such the articles infringed or limited the deceased's right to freedom of testation.⁶⁴

The right to freedom of testation has been specifically recognised as a right protected under the Constitution of the Republic of South Africa Act No. 108 of 1996.⁶⁵ One of the ways in which the law protects this constitutional right is the rule that freedom of testation may not be restricted contractually.⁶⁶

According to Hutchison⁶⁷ freedom of testation is the power to dispose, *mortis causa*, of the assets which remain in one's estate at the time of death and accordingly an *inter vivos* disposition will not infringe on a party's testamentary freedom. The *Borman*⁶⁸ case clearly recognised the principle of the vesting test as applied in the cases of *Keeve and Another v Keeve NO*,⁶⁹ *Varkevisser v Estate Varkevisser and Another*⁷⁰ and *Costain and Partners v Godden NO and Another*,⁷¹ however in the *Borman*⁷² case the agreement was found to be invalid because it infringed or limited the deceased's right to freedom of testation and there was not a direct application of the vesting test. Hutchison⁷³ explains with reference to the *Borman*⁷⁴ case that:

⁶³ Co-operative Societies Act No. 29 of 1939

⁶⁴ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 27 & 30

⁶⁵ *Ex parte* BOE Trust Ltd NO & others [2010] JOL 26193 (WCC): 4

⁶⁶ De Waal M 2012: 3g7

⁶⁷ Hutchison D 1983: 230

⁶⁸ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 27

⁶⁹ *Keeve and Another v Keeve NO* [1952] 1 All SA 244 (O)

⁷⁰ *Varkevisser v Estate Varkevisser and Another* [1959] 4 All SA 161 (SR)

⁷¹ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR)

⁷² *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 30

⁷³ Hutchison D 1983: 230

⁷⁴ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 27

“...it is not necessary to state that, to constitute a *pactum successorium*, an agreement should both (i) vest the right to the benefit *mortis causa*, and (ii) restrict the freedom of testation; for, as defined, the second requirement incorporates the first: only if an agreement vests the right *mortis causa* can it limit freedom of testation. Hence the overriding importance attached to testamentary freedom in *Borman's* case is quite compatible with the requirement that the agreement should vest the right to the benefit *mortis causa* in order to qualify as a *pactum successorium*.”

It is submitted that the vesting test and the freedom of testation test overlap with one another and are compatible in determining whether an agreement is a *pactum successorium*. According to Hutchison, the *pactum successorium* is: “an agreement which purports to limit a contracting party's freedom of testation by irrevocably binding him to a post-mortem devolution of the right(s) to an asset in his estate.”⁷⁵

1.2 Characteristics of a *pactum successorium*

From the four tests considered above, the ‘absence of consideration’ and the ‘revocability of the promise’ tests were discredited due to a misinterpretation of the authorities relied upon in the *Schauer*⁷⁶ and *Costain*⁷⁷ cases respectively. The ‘post-mortem devolution of the right to benefit’ and the ‘restriction of testamentary freedom’ tests have been followed and applied by the Appellate Division⁷⁸ and were also preferred by Hutchison.⁷⁹

Hutchison⁸⁰ came to the following conclusion in respect of the identifying characteristics of a *pactum successorium*, namely:

“(a) that it purports to effect a post-mortem disposition of an asset in the estate of a contracting party by providing for a devolution of the right to that asset from the party, after his death, to another person; and

⁷⁵ Hutchison D 1983: 230

⁷⁶ *Schauer NO v Schauer* 1967 (3) SA 615 (W)

⁷⁷ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR)

⁷⁸ See *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A) and *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

⁷⁹ Hutchison D 1983: 231

⁸⁰ Hutchison D 1983: 237

(b) that it seeks to prevent the contracting party from revoking the disposition, either by testament or by act inter vivos.”

Since the publication of *Isolating the Pactum Successorium*⁸¹ in 1983, the explanations and content of this article have been specifically referenced, approved and applied by our courts when determining whether an agreement is a *pactum successorium*.⁸² Accordingly, a *pactum successorium* is an agreement in which the parties seek to control the succession of the inheritance (or part thereof, or of a particular thing that forms part thereof) of one or more of the parties after death (*mortis causa*) of the party or parties concerned.⁸³ In order to determine whether an agreement is a *pactum successorium*, Hutchison’s⁸⁴ two identifying characteristics namely the post mortem disposition of an asset which is not revocable either by testament or act *inter vivos* are correct.

1.3 Reasons for invalidity of *pacta successoria*

In the decision of the Appellate Division, as it was then known, in the *McAlpine*⁸⁵ case which was reported in 1997, Corbett CJ states the following with reference to the invalidity of a *pactum successorium*:

*“It is generally accepted that today the reasons for such an agreement being visited with invalidity are that it fetters the freedom of testation of the party conferring the asset in question upon another, and that it constitutes an evasion of the formalities required in respect of testamentary instruments (see *Ahrend and others v Winter* 1950 (2) SA 682 (T) at 685; *Borman case*, supra, at 501H).”*

The quote above references the *Ahrend*⁸⁶ and *Borman*⁸⁷ cases, which provide as follows in respect of the reasons for the invalidity of a *pactum successorium*, in *Ahrend and Others v Winter*⁸⁸

⁸¹ Hutchison D 1983: 221

⁸² *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 144; *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 269; *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

⁸³ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 23

⁸⁴ Hutchison D 1983: 237

⁸⁵ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 269

⁸⁶ *Ahrend and Others v Winter* [1950] 2 All SA 346 (T)

⁸⁷ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A)

⁸⁸ *Ahrend And Others V Winter* 1950 (2) SA 682 (T): 349

“The view taken by this Court in Ex parte Everard's Executors (1938 TPD 190) and in van Jaarsveld v van Jaarsveld's Estate (1938 TPD 343) is that the objectionable features of a successory pact are firstly that such a pact fetters the donor's freedom of testation and, secondly, that such a pact is an evasion of the formalities required in respect of testamentary instruments. There is a third feature where such a pact is made verbally, namely that the Court will be called upon to decide whether the alleged promise has been made without having the benefit of the evidence of the alleged donor.”

...and in *Borman*⁸⁹

“Die eerste oorweging, soos lank gelede reeds gesê is (kyk Van der Keessel, Praelectiones, ad Gr., 3.1.41), kan kwalik nog 'n rede vir die inhoud van die verbod op pacta successoria wees, maar die oorweging dat sodanige ooreenkomste 'n erflater se testeervryheid aan bande lê, geld steeds as regverdiging vir die behoud van die verbod (Van der Keessel, Praelectiones, ad Gr. 3.1.41; Van Jaarsveld v Van Jaarsveld's Estate, 1938 T.P.D. 343 op bl. 346; Ahrend and Others v Winter, 1950 (2) SA 682 (T) op bl. 685).”

It is clear from the cases of *Borman*⁹⁰ and *McAlpine*⁹¹ that the Appellate Division, as it was then known, has confirmed that the principle of freedom of testation is established in South African Law and that a *pactum successorium* is invalid as it infringes on the principle of freedom of testation. These two cases were decided prior to the enactment of the Constitution,⁹² however the Supreme Court of Appeal has confirmed in the *Ex Parte BOE Trust Ltd*⁹³ case that the right to freedom of testation is recognised as a right protected under the Constitution.⁹⁴

In the *McAlpine*⁹⁵ case the Appellate Division, as it was then known, confirmed an additional reason for invalidity namely that a *pactum successorium* “constitutes an evasion of the formalities required in respect of testamentary instruments”. Testamentary instruments must comply with the formalities set

⁸⁹ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A):23

⁹⁰ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A)

⁹¹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

⁹² Constitution of the Republic of South Africa Act No. 108 of 1996

⁹³ *Ex parte BOE Trust Ltd NO & others* [2010] JOL 26193 (WCC): 4

⁹⁴ Constitution of the Republic of South Africa Act No. 108 of 1996

⁹⁵ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 273

out in the Wills Act⁹⁶ in order to be valid and in terms of section 1 of the Wills Act,⁹⁷ a will includes a codicil or any other testamentary writing. For example a *donatio mortis causa* must comply with the formalities required in the Wills Act.⁹⁸

1.4 Conclusion

A *pactum successorium* is an agreement in which the parties seek to control the succession of the inheritance (or part thereof, or of a particular thing that forms part thereof) of one or more of the parties after death (mortis causa) of the party or parties concerned.⁹⁹

The identifying characteristics of a *pactum successorium* are:

“(a) that it purports to effect a post-mortem disposition of an asset in the estate of a contracting party by providing for a devolution of the right to that asset from the party, after his death, to another person; and

*(b) that it seeks to prevent the contracting party from revoking the disposition, either by testament or by act inter vivos.”*¹⁰⁰

A *pactum successorium* is invalid as it infringes on the principle of freedom of testation and it constitutes an evasion of the formalities required in respect of testamentary instruments.¹⁰¹

For a buy-and-sell agreement to be declared invalid as a *pactum successorium*, the agreement must display these identifying characteristics. Should it be shown that a buy-and-sell agreement does in fact constitute a *pactum successorium*, then it must follow that the agreement is invalid and unenforceable due to its infringement on the principle of freedom of testation and non-compliance with the formalities required in respect of testamentary instruments.

⁹⁶ Wills Act No. 7 of 1953

⁹⁷ Wills Act No. 7 of 1953

⁹⁸ Harms L 2017: Par 39

⁹⁹ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A): 23

¹⁰⁰ Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

¹⁰¹ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A) and *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

2. The Buy-and-Sell Agreement used in Financial Planning

In the South African context, the buy-and-sell agreement is defined and discussed in terms of its use in financial and estate planning in the financial planning industry. The concept of a buy-and-sell agreement has been recognised and applied in the United States of America for a number of years, for example American lawyer, Arthur Berger penned an article in 1952 on the topic of the practical aspects of buy-and-sell agreements and he states that:¹⁰²

“The term “business buy-and-sell agreement” refers to any agreement which contemplates the sale of an interest in a business at the death of its owner. Generally, it is a reciprocal arrangement among parties all of whom own interests in the business, so that the identification of buyer and seller depends upon the order of death. The business is generally a “closed” one, and the agreement may be between a sole proprietor and his employees, partners, or shareholders, or it may be between a partner and his partnership or shareholders and their corporation. It can be a fixed commitment by one party to sell and the other to buy, or it can be an option. The option can be exercisable by either the seller or the buyer.”

Although Berger’s description applies to American jurisprudence, the concepts are the same for South Africa in that a buy-and-sell agreement is a type of a commercial contract which is generally used to record the terms of agreement relating to the sale of a business interest in the event of the death of an owner.¹⁰³ There are many different variables in the types and structures of business entities, the manner of ownership thereof as well as the fact that both natural and juristic persons are capable of owning an interest in a business. There are also many variables in the way that a buy-and-sell arrangement can be structured and this research will focus on buy-and-sell agreements between natural persons where the agreement contemplates the sale of an interest in the business upon the death of an owner.

2.1 Definition of a buy-and-sell agreement

¹⁰² Berger A 1952: 277

¹⁰³ Owner for the purposes of this research includes a member of a close corporation, shareholder in a private company, a partner in a partnership and a sole proprietor.

The type of buy-and-sell arrangement at the centre of this analysis is described according to Botha *et al*¹⁰⁴ as having two *essentialia*, namely:

- “- a definite agreement made by the partners obligating each partner to sell, at death, their interest to the surviving partners, and committing the surviving partners to purchase the deceased partner’s interest; and*
- a method of valuing each partner’s interest and an agreement on the price to be paid based upon valuation, is subject to periodic review.”*

From these two *essentialia*, it is clear that the intention of a buy-and-sell agreement is to ensure that there is absolute certainty as to what will happen in the event of the death of an owner, namely an obligation on the deceased to sell, an obligation on the survivor to purchase and agreement on the method of valuation and price. Access to liquid funds could be an obstacle to giving effect to such an arrangement. It is therefore common for the parties to agree to the taking out of life cover policies on each other’s lives to ensure that there is certainty that the necessary funds are available to meet the obligation to purchase at the agreed price when required.¹⁰⁵ As pointed out by Berger,¹⁰⁶ a buy-and-sell agreement could be entered into between a sole proprietor and an employee, or partners, or shareholders and in the South African context, members of a close corporation.

2.2 The benefits of a buy-and-sell agreement

The description of the owner of a business will differ according to the type of entity involved and accordingly the terms “partner”, “member” and “shareholder” will be used interchangeably. A buy and sell agreement is used *inter alia* to give effect to the business succession wishes of the partners and to protect the business structure itself against the risk of the untimely death or disability of a partner. The purpose of a buy-and-sell agreement is to minimise and address the risks which would arise in the event of the death of a partner. There are also compelling reasons or benefits for the business owners and their families or dependents in the use of a buy-and-sell agreement. Due to the differences in the legal nature and law applicable to partnerships, close corporations and private companies, the potential risks of each structure as well as the potential benefits of a buy-and-sell agreement differ slightly.

¹⁰⁴ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

¹⁰⁵ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

¹⁰⁶ Berger A 1952: 277

A partnership is established by agreement between the partners comprising it, and it cannot stand alone as an entity separate from its members.¹⁰⁷ Furthermore, upon the death of a partner the partnership is dissolved or terminated, and even if the remaining partners decide to continue with the business this will be considered a new partnership.¹⁰⁸ Unlike partnerships, both close corporations and private companies stand alone as legal entities separate from its members and shareholders respectively which allows for perpetual succession in that close corporations and private companies are not dissolved or terminated upon the death of a member or shareholder.¹⁰⁹

Upon the death of a member of a close corporation, section 35 of the Close Corporations Act¹¹⁰ applies and in terms of this section, the executor of the deceased member's estate must deal with the member interest subject to the terms of association agreement. Failing such provisions in an association agreement, the member's interest can only be transferred to an heir or legatee if they qualify to become a member and if the remaining members consent to the transfer, and if consent is not received within 28 days then the executor must sell the member's interest of the deceased member to the corporation, the remaining members or an outsider on the same terms as in the case of insolvency.¹¹¹

One of the essential elements of a buy-and-sell agreement, is the arrangement whereby the business owners (which could be partners, members or shareholders) agree with each other that upon the death of an owner, the deceased owner agrees to sell and the remaining owners agree to purchase the deceased owner's interest in the business. This arrangement can substantially mitigate or avoid some of the practical and commercial risks to the business as a result of the death of an owner.

Upon the death of a partner, the partnership is terminated and the deceased partner's estate is entitled to the value of the deceased's interest in the business. By implementing a buy-and-sell agreement the surviving partners will utilise the proceeds from the life cover that was taken on the life of the deceased to pay the deceased partner's estate for the value of the deceased's business interest. The advantages of a buy-and-sell agreement in this instance are *inter alia* the following:

¹⁰⁷ Henning J 2016: Par 281

¹⁰⁸ Henning J 2016: Par 312

¹⁰⁹ Henning J 2013: Volume 1 Par 1.06 & Volume 2 Par 1.04

¹¹⁰ *The Close Corporations Act* No. 69 of 1984

¹¹¹ Section 35 of *The Close Corporations Act* No. 69 of 1984 and Henning J 2013: Volume 1 Par 3.19

- 2.2.1 To avoid the forced sale of partnership assets.¹¹² The surviving partners will not be forced to sell business assets to raise the funds needed to pay the deceased partner's estate. This makes it possible for the surviving partners to take over the assets and goodwill of the business thereby ensuring that the business can continue albeit in the form of a new partnership structure.
- 2.2.2 To protect the liquidity and cash flow of the business.¹¹³ The surviving partners will not be forced to use cash flow from the business to pay the deceased partner's estate. This is also essential to ensure that the surviving partners can continue with the business.
- 2.2.3 To avoid encumbering the capital resources and partnership assets.¹¹⁴ The surviving partners will not be forced to bond or otherwise encumber the partnership assets to pay the deceased partner's estate.
- 2.2.4 It is evidence of the terms of the agreement between the deceased and the surviving partners.¹¹⁵
- 2.2.5 To avoid taking in new business partners, being either the heirs of the deceased or a third party purchaser.¹¹⁶ The surviving partners could be forced to take on a new partner who will be entitled to a share of the profit, but could be lacking the necessary skills, knowledge or ability to become involved in the business. This will be a sensitive and stressful time for the business and this is not conducive to the development of a new business relationship. A buy-and-sell agreement ensures that the deceased's business interest is not sold or inherited by a third party.
- 2.2.6 The avoidance of a conflict of interest between a new owner and existing owners.¹¹⁷ This can arise in a private company where a new shareholder is not going to be actively involved in the business and would be inclined to want to withdraw any available profit as dividends, as opposed to existing shareholders who may seek to re-invest any profit in the growth and

¹¹² Botha M 2017: Chapter 13.5

¹¹³ Meyer E 2015: 238

¹¹⁴ Meyer E 2015: 238

¹¹⁵ Meyer E 2015: 238

¹¹⁶ Botha M 2017: Chapter 13.5

¹¹⁷ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1030

expansion of the business. A buy-and-sell agreement ensures that the deceased's business interest is not sold or inherited by a third party.

The benefits mentioned are by no means a complete record of the potential benefits of a buy-and-sell arrangement. The potential benefits will vary depending on the specific circumstances of the party's and the business. In chapter 6 of *Notes on Estate and Financial Plans Meyer on Case Studies – 2015*, Meyer¹¹⁸ provides an in-depth practical example of how a buy-and-sell arrangement can be used in financial planning together with the potential risks and potential benefits, including the tax implications and impact on estate planning.

2.3 Implementation of a buy-and-sell agreement

The buy-and-sell agreement is utilised in the financial planning industry as part of the business succession plan. The financial planner facilitates the process by advising the partners or shareholders in a business in respect of the need to regulate the succession of the ownership of the business specifically in the event of the death or disability of a partner or shareholder. The buy-and-sell agreement contains the essential terms which would include the obligation for a partner to sell at death, their business interest to the surviving partners and committing the surviving partners to purchase the business interest.¹¹⁹ The agreement also records the method for determining the value of each partner's interest and the price to be paid based on the valuation.¹²⁰

The partners effect policies on each other's lives so that upon the death of a partner, the surviving partners will receive the proceeds of the policy on the life of the deceased which will be utilised to purchase the deceased's business interest. The assured will not be the owner and will not pay the premiums in respect of the policy on their own life, the premiums will be paid by the other partners on each other's lives. This can be illustrated through an example with 3 partners A, B & C:

A & B will be the owners and pay the premiums in respect of a policy taken on the life of C.

A & C will be the owners and pay the premiums in respect of a policy taken on the life of B.

B & C will be the owners and pay the premiums in respect of a policy taken on the life of A.

¹¹⁸ Meyer E 2015: 194 - 259

¹¹⁹ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

¹²⁰ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

The structure of the agreement including the life policies is important as there are potential tax consequences which flow from the proceeds of life cover policies. For the purposes of calculating estate duty liability, the proceeds payable under any policy of insurance which is a domestic policy upon the life of the deceased is to be included as deemed property unless the requirements of section 3(3)(a) (i), (iA) or (ii) of the Estate Duty Act¹²¹ have been met in which case the policy proceeds will not be included as deemed property. Section 3(3)(a)(iA) of the Estate Duty Act¹²² is applicable to a buy-and-sell arrangement and this section applies if:

“(iA) the Commissioner is satisfied that the policy was taken out or acquired by a person who on the date of death of the deceased was a partner of the deceased, or held any share or like interest in a company in which the deceased on that date held any share or like interest, for the purpose of enabling that person to acquire the whole or part of—

(aa) the deceased’s interest in the partnership concerned; or

(bb) the deceased’s share or like interest in that company and any claim by the deceased against that company,

and that no premium on the policy was paid or borne by the deceased; ...”

If the buy-and-sell agreement and the structuring of the life cover policies do not meet the requirements of Section 3(3)(a)(iA) of the Estate Duty Act¹²³ it will result in the inclusion of proceeds of the policy as deemed property in the estate of the deceased for the purposes of calculating liability for estate duty. Accordingly, the structuring of the agreement and the policies is important if the parties are to avoid an adverse tax implication in the form of estate duty.

2.4 Potential Risks of a Buy-and-sell Arrangement

While the buy-and-sell agreement offers some significant benefits in respect of the regulation of business succession planning, the absence of such an agreement could lead to significant consequences for the parties involved as well as for the business itself. These consequences are

¹²¹ Estate Duty Act No. 45 of 1955

¹²² Estate Duty Act No. 45 of 1955

¹²³ Estate Duty Act No. 45 of 1955

essentially the converse to the benefits which ordinarily flow from the implementation of a buy-and-sell agreement and can be summarised as follows:

- 2.4.1 The forced sale of partnership assets in order to raise the necessary funds to pay the deceased partner's estate in respect of the deceased's business interest.
- 2.4.2 A strain on the cash flow of the business in order to raise the necessary funds to pay the deceased partner's estate in respect of the deceased's business interest.
- 2.4.3 The surviving partners may be forced to encumber the capital resources and partnership assets to raise the necessary funds to pay the deceased partner's estate in respect of the deceased's business interest.
- 2.4.4 The surviving partners may be forced to allow a sale of the deceased's business interest in which case they will have to take in a new business partner. Alternatively, the surviving partners may be forced to take in the heirs of the deceased as a new business partner.
- 2.4.5 The potential for a conflict of interest between a new owner and the surviving partners.
- 2.4.6 In general, the continuation of the business itself could be in jeopardy if any of these potential risks are encountered.

In order to avoid the uncertainty which would otherwise be encountered, the buy-and-sell agreement must be structured correctly. Meyer¹²⁴ points out that an assessment of the risk profile of the surviving shareholder is important as it is the surviving shareholder who will ultimately decide whether they are prepared to pay the price for the deceased's shares and it is important that the valuation method will not result in an over valuation of the shares. A buy-and-sell arrangement has the potential to benefit all parties as well as the business involved. As with all agreements, logic dictates that there will be no dispute between the affected parties in respect of an agreement provided that the terms of the agreement result in a fair outcome which makes economic sense to all parties involved.

So as long as the implementation of a buy-and-sell agreement is fair and makes economic sense there is no reason for a dispute and accordingly no reason to test the legal validity and enforceability of the

¹²⁴ Meyer E 2015: 237

underlying agreement. A potential risk to the implementation of a buy-and-sell arrangement is the misalignment of the fair value of the shares, the life cover proceeds and the price to be paid and there are numerous factors which could cause a discrepancy. As stated by Botha *et al*¹²⁵ the method of valuing the shares and the purchase price must be subject to periodic review which would limit the potential for a discrepancy even due to factors outside of the control of the parties such as the state of the economy, or the environment of the particular industry involved.

The problem is what happens when there is a misalignment of the values. An overvaluation of the shares would mean that the proceeds available to the surviving partners would not be sufficient to pay the purchase price for the deceased's share. Whereas an undervaluation of the shares would mean that the deceased's estate would not receive a fair price. The alignment or misalignment of the values is most likely lead to the crux of the predicament between the financial planning industry's utilisation of a buy-and-sell agreement and the potential legal invalidity of the agreement as a *pactum successorium*. Even where the values are aligned and fair, what would happen if the surviving partners decide to keep the proceeds of the life policy and to exit the business, or where the family of the deceased decide to take ownership of deceased's share. Would our courts be prepared to come to the assistance of a party who seeks to enforce the terms of a buy-and-sell agreement.

In the case of *Hewan v Kourie NO and Another*,¹²⁶ the facts of the case were as follows:

“Convac CC had two members. The one was the late Mr W J Jenkins. He had an 80% interest. The other member, the present appellant, had a 20% interest. In terms of an agreement entered into during early 1989, the two members agreed that, in the event of the death or disability of either, the other member would be obliged to purchase such member's interest. They further agreed that each would insure the life of the other. The proceeds of such insurance would then, in terms of the agreement, be utilised to pay the purchase price of the interest to be purchased. (The agreement was referred to as a 'buy/sell' agreement.) Pursuant to the buy/sell agreement, the appellant insured the life of the deceased for R320 000. The deceased in turn insured the life of the appellant for R80 000. The two policies were issued on 20 April 1989.”

¹²⁵ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

¹²⁶ *Hewan v Kourie NO and Another* [1993] 4 All SA 227 (T): 227

In the *Hewan* case,¹²⁷ the executor of the late Mr Jenkins instituted action claiming the full proceeds of the policy which were paid out to the surviving member, Mr Hewan *in lieu* of the purchase price to be paid to the deceased estate by Mr Hewan for the deceased's interest.¹²⁸ It was common cause that the value of the deceased's interest in the business was substantially less than the proceeds of the policy.¹²⁹ The agreement in question was not signed by the members of the CC and the issue to be decided by the court was limited to the admissibility of evidence as to the actual terms of the agreement. This case is an example of the risk involved in ensuring that the values of the business interest and policies are aligned, and the potential for a dispute to arise if they are not. Unfortunately for the purposes of this research, the issue of the validity of the agreement in light of the prohibited *pactum successorium* was not raised in the *Hewan* case¹³⁰ and the court did not make any finding in this regard.

The potential risk of a buy-and-sell agreement being declared unenforceable as a *pactum successorium* does not seem to have received much attention in the financial planning industry until recently. Meyer¹³¹ does refer to the *pactum successorium* in the context of buy-and-sell agreements and the importance to ensure that there will be a genuine reason for the parties to comply with the terms of the agreement. In the 2017 edition of Botha *et al's* *The South African Financial Planning Handbook*¹³² mention is now made of the differing views as to whether a buy-and-sell agreement is a valid and enforceable contract nor not. The validity and enforceability of the buy-and-sell agreement is vital to achieving its essential purpose, namely to create a definite agreement. Accordingly, the buy-and-sell agreement must be considered against the law as applied by our courts in respect of *pacta successoria*.

2.5 Conclusion

A buy-and-sell agreement used in financial planning is:

"- a definite agreement made by the partners obligating each partner to sell, at death, their interest to the surviving partners, and committing the surviving partners to purchase the deceased partner's interest; and

¹²⁷ *Hewan v Kourie NO and Another* [1993] 4 All SA 227 (T): 227

¹²⁸ For the sake of convenience the parties are referred to by name.

¹²⁹ *Hewan v Kourie NO and Another* [1993] 4 All SA 227 (T): 227

¹³⁰ *Hewan v Kourie NO and Another* [1993] 4 All SA 227 (T)

¹³¹ Meyer E 2015: 242 - 244

¹³² Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2017: Par 40.9.3.2.2

- a method of valuing each partner's interest and an agreement on the price to be paid based upon valuation, is subject to periodic review."¹³³

The intention of a buy-and-sell agreement is to ensure that there is absolute certainty as to what will happen in the event of the death/retirement of a partner. Provided the arrangement is implemented correctly and in accordance with good financial planning principles, it can be beneficial to all parties concerned including the business itself. The agreement regulates the position in the event of the death of a partner and there is a risk that it could be seen to interfere with the right to freedom of testation which could result in the agreement being declared to be an invalid *pactum successorium*.

¹³³ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

3. Invalidation of the Buy-and-sell agreement: the test to identify a *pactum successorium*

The assessment of this question is not as straight forward as it may seem. As we are not dealing with one specific buy-and-sell agreement, there are no precise terms and conditions to be interpreted. A buy-and-sell agreement can be entered into between juristic entities, or persons that do not even own an interest in the business and furthermore the sale could be upon the death, disability, or retirement of a party to the agreement or some other agreed date. Depending on the variables involved and the terms included in a particular agreement, there will naturally be different consequences, including the tax implications and the validity of the agreement itself.

Buy-and-sell agreements have been recognised and used in the United States of America,¹³⁴ however American attorney, Currie¹³⁵ had the following to say in respect of the validity of a buy-and-sell agreement:

“One of the first questions that is sure to arise in the mind of a practitioner when for the first time he is requested to draft a buy and sell agreement in which the sale is not to be consummated until after the death of the seller - in fact, the death of the seller is to be a condition precedent to there being a sale - is whether such an agreement is not testamentary in character and therefore void. However, most courts which have passed on the question have held that these agreements are not testamentary, and are valid and enforceable against the administrator or executor of the estate of the deceased.”

In the American context, the validity of the buy-and-sell agreement is something which has according to Currie,¹³⁶ been considered and upheld by the courts in most states. In terms of the approach taken by South African courts, it has already been established from the cases of *Borman*¹³⁷ and *McAlpine*¹³⁸ that the Appellate Division, as it was then known, has confirmed that the principle of freedom of testation is established in South African Law and that a *pactum successorium* is invalid as it infringes

¹³⁴ Berger A 1952: 277

¹³⁵ Currie G 1950: 12

¹³⁶ Currie G 1950: 12

¹³⁷ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A)

¹³⁸ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

on the principle of freedom of testation. According to Hutchison,¹³⁹ South African law has taken the principle of the right to freedom of testation further than any other Western legal system and further by far than Roman law took it.

The research will focus on and assess the concept of a buy-and-sell agreement as used in financial planning and the outcomes which this type of agreement seeks to achieve. In respect of the *pactum successorium*, the correct definition together with the tests as have been applied in our courts as set out above will be applied.

3.1 The *essentialia* of a Buy-and-sell Agreement

According to Botha *et al*¹⁴⁰ there are two *essentialia* of a buy-and-sell agreement, namely:

“- a definite agreement made by the partners obligating each partner to sell, at death, their interest to the surviving partners, and committing the surviving partners to purchase the deceased partner’s interest; and

- a method of valuing each partner’s interest and an agreement on the price to be paid based upon valuation, is subject to periodic review.”

The latter element relates to the method of valuing the business interest in order to determine the price to be paid and the periodic review thereof, which is important as one of the contracting parties will be deceased at the time that the terms of the agreement is enforced. This element is very important to bring certainty to the value and price, however it is not directly relevant to determining whether the agreement meets the definition of a *pactum successorium*. For this reason, no more focus will be given to this *essentialia* of the agreement. The former *essentialia* will be discussed.

If the former *essentialia* is broken down and summarised, a buy-and-sell agreement consists of the following:

3.1.1 A definite agreement made by the partners.

¹³⁹ Hutchison D 1983: 239

¹⁴⁰ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

This reference to partners means partners in a business partnership, co-members in a close corporation or co-shareholders in a company. It is also possible for a person who is not an owner to enter into a buy-and-sell agreement with an owner.

A definite agreement entails that there is certainty in respect of the terms and the enforceability of those terms. Upon acceptance of an offer, there is a general rule that the terms of the offer can no longer be revoked or withdrawn.¹⁴¹

3.1.2 An obligation on a deceased partner to sell their interest to the contracting party.

The reference to “interest” would include a partnership interest, member’s interest or shareholding depending on the type of business entity.

The agreement seeks to create an obligation to sell, not a choice to be exercised to decide whether to sell the business interest. With regard to the effect of the death of a party on the enforceability of a contract, Bradfield explains that:¹⁴²

“The question, of course, is whether any particular contract is enforceable by and against the estate (represented by the executor) or whether the deceased’s death discharged it without liability on either side by a process akin to supervening impossibility. The question may be answered by the contract itself, which may expressly provide for its discharge on the death of one or either of the parties, or may bind the executor to perform or may make some other special provision. Failing such express provision the nature of the rights and duties arising from the contract must be examined, together with the surrounding circumstances, in order to see whether there is any indication of a delectus personae or an intention that the rights and duties should not be transmitted by death. In the absence of any such indication the general principle is that they are so transmitted and are enforceable by or against the executor.”

Accordingly, the validity of the buy-and-sell agreement as a contract and the reciprocal rights and obligations which flow from the agreement are not affected by the death of a partner.

¹⁴¹ Bradfield G 2016: 63

¹⁴² Bradfield G 2016: 583 - 584

The terms of the agreement can be enforced by or against the executor of the deceased estate and the death of a partner does not discharge the obligations to be performed. If necessary, the executor must exercise their discretion whether or not to bring or defend an action based on a contract entered into by the deceased.¹⁴³ In order to create the obligation on the deceased to sell, the buy-and-sell agreement can expressly provide that the agreement is binding on the executor of the deceased and as provided above, if the agreement is silent on this point then the general principle is that it will be binding on the executor.¹⁴⁴

3.1.3 An obligation on the surviving partners to purchase the deceased's interest

There is not a choice for the surviving partners to decide whether to make an offer to purchase. The surviving partners are obliged to purchase in terms of the buy-and-sell agreement and the executor of the deceased estate may enforce the terms of the agreement.¹⁴⁵

3.1.4 The obligations to sell and to purchase arises upon the death of a partner.

The buy-and-sell agreement is not itself a restriction on the partners' ownership while they are alive. There could be restrictions on ownership which apply as a result of another agreement such as partnership agreement in the case of a partnership, the Memorandum of Incorporation and shareholders agreement in terms of the Companies Act,¹⁴⁶ or an Association Agreement in terms of the Close Corporations Act,¹⁴⁷ or as a result of legislation itself such as the Companies Act¹⁴⁸ and Close Corporations Act.¹⁴⁹

3.2 Application of criteria to identify a *pactum successorium*

The identifying characteristics of a *pactum successorium* are:

¹⁴³ Bradfield G 2016: 583

¹⁴⁴ Bradfield G 2016: 583 - 584

¹⁴⁵ Bradfield G 2016: 583 - 584

¹⁴⁶ *The Companies Act* No. 71 of 2008

¹⁴⁷ *The Close Corporations Act* No. 69 of 1984

¹⁴⁸ *The Companies Act* No. 71 of 2008

¹⁴⁹ *The Close Corporations Act* No. 69 of 1984

“(a) that it purports to effect a post-mortem disposition of an asset in the estate of a contracting party by providing for a devolution of the right to that asset from the party, after his death, to another person; and

(b) that it seeks to prevent the contracting party from revoking the disposition, either by testament or by act *inter vivos*.”¹⁵⁰

Botha *et al*'s¹⁵¹ *essentialia* for a buy-and-sell agreement are almost an exact embodiment of Hutchison's¹⁵² identifying characteristics of a *pactum successorium*.

With regard to the first characteristic involving a post-mortem disposition, the timing of the vesting of rights will depend on the terms of the agreement. In the context of vesting or vested rights in determining whether an agreement is an invalid *pactum successorium*, this issue was considered in the case of *Jubelius v Griesel NO en andere*¹⁵³ where the facts of the case were briefly as follows.¹⁵⁴ The plaintiff was Johannes Jubelius, the nephew of the late Reinier Jubelius who passed away on 19 May 1985 and the executor of his deceased estate was the first defendant. Johannes obtained an agricultural qualification and joined his father's farming operation in the Jansenville district. Johannes had a good relationship with his uncle Renier and he assisted his uncle with sheering and ploughing on his uncle's farm Grootfontein in the Uniondale District. Johannes' father planned to purchase a farm near Burgersdorp with the intention that Johannes would farm on this land. The late Reinier Jubelius had a son who was not interested in farming and a daughter who was still in school. Furthermore, the late Renier Jubelius was not in good health and could not continue to farm alone, but he did not want to sell his farm and wanted it to remain in the Jubelius family name, so he proposed that Johannes should join him in farming on Grootfontein rather than going to Burgersdorp. Johannes accepted the offer in 1964 and he joined his uncle Reinier on the farm Grootfontein. In 1965, Johannes and his uncle entered into two written agreements to regulate the arrangement between them, namely a partnership agreement in respect of the farming business and a sale agreement in respect of the farm land, the farming equipment in respect of the partnership and the interest in the partnership. In terms of the sale agreement the purchase price was payable on registration of transfer of the fixed property and possession of the property was postponed until the death of Renier Jubelius.

¹⁵⁰ Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

¹⁵¹ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

¹⁵² Hutchison D 1983: 237

¹⁵³ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 136 & 137

¹⁵⁴ For ease of reference the parties to the case are referred to by name.

In 1969 the partnership between Johannes and Renier was dissolved. Upon the death of Renier Jubelius, the executor awarded the farm Grootfontein to the daughter of the deceased in terms of the deceased's last will and testament. As a result, Johannes instituted action against the executor claiming transfer of the farm Grootfontein into his name. The executor opposed the matter arguing that the sale agreement was conditional upon the partnership still being in existence upon the death of the deceased and alternatively that the sale agreement constituted an invalid *pactum successorium*.

With regard to the effect of the dissolution of the partnership on the sale agreement, Fagan R found that the sale of the farming assets in the partnership and the interest in the partnership had fallen away, but the sale in respect of the farm land still stood.¹⁵⁵ In considering whether the sale agreement constituted an invalid *pactum successorium*, Fagan R supported the view of Hutchison that the appropriate test to be applied is a vesting test to determine whether rights to the assets vested immediately or at least prior to the death of the promisor.¹⁵⁶ In applying the vesting test to the terms of the agreement, Fagan R stated that:¹⁵⁷

“Ingevolge die koopooreenkoms, koop eiser die plaas en verkry besit op datum van dood van oorledene. Indien die ooreenkoms daar geëindig het, sou dit 'n geval gewees het waar daar onmiddellik 'n reg in eiser gevestig het om die plaas te eis op datum van oorledene se dood. Die plaas sou dan met kontraksluiting opgehou het om 'n bate te wees in oorledene se boedel, sy testeervryheid sou nie geaffekteer gewees het nie en die ooreenkoms sou nie 'n pactum successorium kon gewees het nie.”

However, the sale agreement contained a clause which provided that the sale agreement would lapse in the event that the purchaser predeceased the seller, which meant that Johannes' right to claim transfer of the farm in terms of the sale was subject to a resolutive condition.¹⁵⁸ The court considered whether the plaintiff's right had vested prior to the death of the deceased and in concluding that the rights had not vested prior to death, Fagan R stated that:¹⁵⁹

“Eiser se reg om die plaas te eis was onderworpe daaraan dat hy sy oom oorlewe. Tot die dag van oorledene se dood was dit onseker of hy ooit daardie reg sou verkry aangesien hy

¹⁵⁵ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 144

¹⁵⁶ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 146 & 147

¹⁵⁷ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 147

¹⁵⁸ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 148

¹⁵⁹ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 149

voor oorledene kon sterf. Dat die voorwaarde in die koopoooreenkoms 'n ontbindende een was, en nie 'n opskortende voorwaarde (condicio suspensiva) nie, verander nie die posisie wat vestiging aangaan nie. Dit is eers op die dood van oorledene dat eiser se reg bepaald en seker (fixed and certain) sou word. Die koopoooreenkoms het dus nie 'n gevestigde reg (om die plaas te eis na oorledene se dood) op eiser oorgedra nie. Aan die vereistes van die "vestigings"toets is daar dus nie voldoen nie."

The court then considered the sale agreement in light of the deceased's right to freedom of testation and in this regard, Fagan R reasoned as follows:¹⁶⁰

"Die vraag is of die effek van die koopoooreenkoms was om oorledene se testeervryheid aan bande te lê, of, anders gestel, of daar genoeg regte na eiser oorgegaan het en van oorledene ontnem is deur die koopoooreenkoms, dat die plaas beskou kon word as genoegsaam buite oorledene se boedel om nie sy testeervryheid wesenlik te raak nie.

Waar 'n persoon 'n bate verkoop, val die bate buite sy boedel en sy testeervryheid word nie geaffekteer nie. Dit maak geen verskil of die bate gelewer sou word en voor betaal sou word gedurende of na die dood van die verkoper nie. Ingeval 'n ooreenkoms sou lui dat lewering sou geskied na die verkoper se dood, sou die verkoper gedurende sy leeftyd verhoed kon wees om die bate te vervreem deur die koper.

Kyk De Wet en Yeats (supra) 135 met goedkeuring aangehaal in Tucker's Land and Development Corporation v Strydom 1984 (1) SA 1 (A) 24.

Die onderhawige geval verskil in net een opsig van laasgenoemde voorbeeld, naamlik dat die koper se regte sou verval indien hy voor die verkoper sou sterf. Die koper sou egter net soos in die voorbeeld, die verkoper kon verhoed om die plaas te vervreem. Hy sou sy voorwaardelike reg regtens kon beskerm. Oorledene sou dus nie by magte gewees het om die plaas te vervreem terwyl eiser gelewe het nie. Die plaas, alhoewel 'n bate in oorledene se boedel omdat eiser se reg daartoe nog nie gevestig het nie, was in effek nie 'n bate nie vanweë eiser se voorwaardelike reg daarop."

¹⁶⁰ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 149 & 150

The court held that the sale agreement did not comply with the vesting test, but the agreement was still upheld as a valid and binding agreement as it did not constitute an infringement on the deceased's freedom of testation, as for all practical purposes the farm had ceased to be an asset in the estate of the deceased.¹⁶¹ Accordingly, the plaintiff was successful in claiming transfer of ownership of the farm. The *Jubelius* case¹⁶² can be considered to be very important in considering the legality of a buy-and-sell agreement for the following reasons:

- a) The court agreed with Hutchison¹⁶³ that it makes no difference whether a consideration is payable or not in exchange for the promise in determining whether the agreement infringes on the principle of freedom of testation.¹⁶⁴ This supports the view that the test applied in the *Schauer*¹⁶⁵ case should not be followed, namely that an agreement would escape invalidity as a *pactum successorium* if there is a *quid pro quo* or a consideration given.
- b) The court agreed with Hutchison¹⁶⁶ that the revocability of the promise cannot be used as a test to determine whether the agreement infringes on freedom of testation.¹⁶⁷ This supports the view that the test applied in the *Costain* case¹⁶⁸ should not be followed.
- c) The court agreed with Hutchison¹⁶⁹ that the appropriate test to be applied is a vesting test.¹⁷⁰
- d) If the partnership had still been in existence at the time of death of the late Renier Jubelius, then the sale agreement in the *Jubelius* case¹⁷¹ would have included the deceased's interest in the partnership which would mean that the agreement would have contained elements of a buy-and-sell agreement, *albeit* a one-sided arrangement as opposed to a reciprocal arrangement.

¹⁶¹ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 150

¹⁶² *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C)

¹⁶³ Hutchison D 1983: 225

¹⁶⁴ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 146

¹⁶⁵ *Schauer NO v Schauer* 1967 (3) SA 615 (W)

¹⁶⁶ Hutchison D 1983: 226

¹⁶⁷ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 146

¹⁶⁸ *Costain and Partners V Godden NO and Another* [1960] 4 All SA 137 (SR): 140 - 141

¹⁶⁹ Hutchison D 1983: 227

¹⁷⁰ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 146

¹⁷¹ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C)

As a result of the judgment handed down in the *Jubelius* case,¹⁷² Professor Hutchison penned a further article on the subject of *pacta successoria* to explain that while he agreed with the outcome of Fagan R's judgment in upholding the agreement as being valid, the reasoning applied by the court in coming to this decision was not correct.¹⁷³ In Hutchison's view, the court should have arrived at its decision in the *Jubelius* case¹⁷⁴ by following a correct and proper application of the vesting test without having to apply a separate test in respect of freedom of testation.¹⁷⁵ According to Hutchison,¹⁷⁶ the effect of a suspensive condition in an agreement is to be treated differently from the effect of a resolutive condition when it comes to determining the question of vesting of rights and it is in this respect that Fagan R went wrong when he held that:¹⁷⁷

“Eiser se reg om die plaas te eis was onderworpe daaraan dat hy sy oom oorlewe. Tot die dag van oorledene se dood was dit onseker of hy ooit daardie reg sou verkry aangesien hy voor oorledene kon sterf. Dat die voorwaarde in die koopooorenkoms 'n ontbindende een was, en nie 'n opskortende voorwaarde (condicio suspensiva) nie, verander nie die posisie wat vestiging aangaan nie. Dit is eers op die dood van oorledene dat eiser se reg bepaald en seker (fixed and certain) sou word. Die koopooorenkoms het dus nie 'n gevestigde reg (om die plaas te eis na oorledene se dood) op eiser oorgedra nie. Aan die vereistes van die "vestigings"toets is daar dus nie voldoen nie.”

In dealing with vested rights and contingent rights, Fagan R¹⁷⁸ refers to an article by Professor Cowen¹⁷⁹ for an explanation of the difference between the two. Cowen explains that:¹⁸⁰

“Every legal right is a consequence attached by law to a fact or combination of facts which the law defines; such fact or combination of facts being familiarly described in jurisprudence as the "title" of the right. It is this idea of a title of a legal right which is the key to the nature of the distinction between vested and contingent rights in the technical sense.”

¹⁷² *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C)

¹⁷³ Hutchison D 1989

¹⁷⁴ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C)

¹⁷⁵ Hutchison D 1989: 6

¹⁷⁶ Hutchison D 1989: 6

¹⁷⁷ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 149

¹⁷⁸ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 148

¹⁷⁹ Cowen D 1949: 404

¹⁸⁰ Cowen D 1949: 404 - 405

"It frequently happens that the title of a right is complex in the sense that the facts which are necessary to give rise to the right occur successively over a period of time.

Now, in all cases where only part of the investitive facts of a complex title have occurred, the rest of the investitive facts may either be certain to occur in the future, for example, where A promises to pay B £50 at a fixed future date, or on B's death; or, alternatively, it may be uncertain whether or not they will occur in the future, for example, where A promises to pay B £50 upon B's marriage. In the former case the right is certain to come into existence, whereas in the latter case, the creation of the right is merely a matter of hope or expectancy, being dependent upon the occurrence of a future uncertain event (i.e. a condition).

It is with the latter class of case, where the title may never be completed and the prospective right may, therefore, never come into existence, that the idea of a contingent right in the strictly technical sense is associated. The case where all of the investitive facts are certain in the ordinary course of nature to occur in the future stands in sharp contrast. Thus, in Romanistic jurisprudence generally, and in South African law in particular, investitive facts which have yet to occur but are certain to do so, are, as a general rule, deemed to have occurred, and the title, and consequent right, are regarded as complete. When all of the investitive facts which are necessary to create a right have occurred, then, in what is commonly regarded as the strictly technical sense of the term, the right is said to be "vested" -a vested right in the technical sense being, simply, one the title of which is complete and unconditional. By contrast, where, to quote Austin, "one or more of (the investitive facts) has already happened, but one or more has not yet happened, and may never happen", the prospective right is contingent in the technical sense of that term."

Fagan R¹⁸¹ also refers to the authority of Corbett *et al* with the following quote:¹⁸²

"In legal parlance the terms 'vest', 'vested' and 'vesting' bear different meanings depending on the context in which they are used. When used in connection with rights of succession, they indicate what is fixed and certain as distinct from that which is conditional or contingent.

¹⁸¹ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C): 148 - 149

¹⁸² Corbett M *et al* 1980: 133

Thus an inheritance, bequest or other interest in a deceased estate is said to 'vest' in the heir, legatee or other beneficiary concerned if and when the right thereto has become unconditionally fixed and established in such person. A vested interest of this nature is normally transmissible to the heirs or representatives of the beneficiary upon his death or insolvency and forms an asset in his estate. This is not so in the case of a conditional or contingent interest: it confers no transmissible right upon the beneficiary unless and until the condition is fulfilled."

Hutchison¹⁸³ points to two further commonly referenced authorities in respect of contingent and vested rights, namely the case of *Jewish Colonial Trust Ltd v Estate Nathan*¹⁸⁴ and also the case of *In Re Allen Trust*.¹⁸⁵ According to Hutchison, the writers referenced by Fagan R above and the judges in the *Jewish Colonial Trust* case and the *In Re Allen Trust* case all had in mind suspensive conditions where a right cannot vest until the condition is fulfilled.¹⁸⁶ However in the case of a resolutive condition the right is complete and has vested as all the investitive facts have already occurred and the contingency relates to the continued existence of the right where if the contingency should occur then the right will be lost.¹⁸⁷ In other words, according to Hutchison, when the condition is a suspensive one then the concepts of vested rights and conditional rights are mutually exclusive in that while the condition remains unfulfilled, the right cannot be vested.¹⁸⁸ In the case of a resolutive condition, the rights are vested and conditional at the same time in that the right vests immediately and upon the fulfilment of the condition, the rights are lost.¹⁸⁹ If applied to the facts of the *Jubelius* case,¹⁹⁰ the court accepted that the condition in clause 7 of the sale agreement which made the sale conditional on Johannes surviving his uncle was a resolutive condition and not a suspensive condition. Accordingly, the right to the farm in terms of the sale agreement vested in Johannes (the Applicant in the *Jubelius* case) immediately which means that the disposition was made *inter vivos* and accordingly the agreement cannot be a *pactum successorium*.

Hutchison's views in respect of the difference in the vesting of rights in terms of a suspensive condition as opposed to a resolutive condition appear to have been approved by the Appellate Division, as it

¹⁸³ Hutchison D 1989: 6

¹⁸⁴ *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163: 175

¹⁸⁵ *In Re Allen Trust* 1941 NPD 147: 156

¹⁸⁶ Hutchison D 1989: 6 - 7

¹⁸⁷ Hutchison D 1989: 7

¹⁸⁸ Hutchison D 1989: 7

¹⁸⁹ Hutchison D 1989: 7

¹⁹⁰ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C)

was then known, in the *McAlpine* case.¹⁹¹ The explanation by Hutchison is also supported by the definitions of suspensive and resolutive conditions in a contract, namely that a suspensive condition in an agreement suspends the full operation of the obligations by making it dependent on the happening of an uncertain future event.¹⁹² A resolutive condition does not suspend the operation of the contract and the normal consequences flow from the contract, however the agreement is annulled upon the happening of the uncertain future event.¹⁹³ Hutchison's views are referenced by and consistent with the conclusion reached by van der Merwe¹⁹⁴ in explaining the phrase 'vested right' as follows:¹⁹⁵

"A vested right indicates that its beneficiary is the holder of a complete real or personal right. A complete right is one that has all the parts necessary to allow for its full operation and for all consequences flowing from it. A right will not be complete when it is subject to a suspensive condition. However, ownership of the benefit, and the transmissibility and immediate enjoyment of the right are not requirements for its vesting."

In conclusion, a suspensive condition in an agreement only results in vested rights upon the happening of the uncertain future event, whereas a resolutive condition results in the vesting of rights immediately, however the vesting is annulled upon the happening of the uncertain future event. In the context of a buy-and-sell agreement, it means that where the sale is suspended until the death of a party then vested rights have not been acquired *inter vivos* which would point towards a *pactum successorium*. Where the sale is completed but the payment and or enjoyment of the asset is postponed until the death of the seller, and the agreement is subject to the condition that the purchaser survives the seller then the condition is resolutive and rights vest immediately but the agreement is annulled should the purchaser predecease the seller.

The vesting test was applied in the Appellate Division case of *McAlpine v McAlpine NO and another*,¹⁹⁶ where the agreements in question were between two brothers, namely Ian and Gilroy McAlpine, who each owned a 50% shareholding in a company together. In an agreement signed on 22 May 1981 the two brothers included the following clause:¹⁹⁷

¹⁹¹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 274

¹⁹² Van Rensburg A, Lotz J and Van Rhijn T 2014: Par 362

¹⁹³ Van Rensburg A, Lotz J and Van Rhijn T 2014: Par 363

¹⁹⁴ Van Der Merwe B 2000: 322

¹⁹⁵ Van Der Merwe B 2000: 329

¹⁹⁶ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

¹⁹⁷ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 268

“In the event of either party's death, the other party will get 100% of the shares in the company Stand 37 Anderbolt Extension 11 (Pty) Ltd in other words, the deceased party's shareholding will go to the one remaining alive.”

The ‘vesting test’ as applied in the *McAlpine v McAlpine NO and another*¹⁹⁸ entails asking in a particular case whether the promise disposing of an asset in favour of another (whether by way of donation or other form of contract) causes the right thereto to vest in the promisee only upon or after the death of the promisor (which points to a *pactum successorium*); or whether vesting takes place prior to the death of the promisor, for instance, at the date of the transaction giving rise to the promise (in which case it cannot be a *pactum successorium*).¹⁹⁹ The concepts of vested and contingent rights and of resolute and suspensive conditions in the context of a *pactum successorium* are also set out in the decision of *McAlpine v McAlpine NO and another*.²⁰⁰ Corbett CJ²⁰¹ confirmed the decision of *Jewish Colonial Trust Ltd v Estate Nathan*²⁰² in determining whether vesting of rights occurred immediately or was postponed until death, and the following is stated in the judgement:

“As indicated by Watermeyer JA in the Jewish Colonial Trust case, supra, whether in a particular case words of futurity postpone vesting or merely enjoyment depends ultimately on intention, in this case the intention of the parties to the agreement. Where, however, the right of the promisee is conditional upon his surviving the promisor, an uncertain event, it seems to me that there is a strong presumption that, in the absence of indicia of a contrary intention, the parties intended vesting to be postponed until the death of the promisor. (Cf. Wynn NO and Westminster Bank Ltd NO v Oppenheimer and others 1938 TPD 359, 364365.) The condition here referred to is, of course, a suspensive one.”

In a buy-and-sell agreement, the sale of the business interest is not intended to take place immediately, as it is one of the essential terms that the sale will only take place at death. It is therefore submitted that the terms of a buy-and-sell agreement are subject to a suspensive condition, namely the condition that the purchaser survives the deceased and accordingly vesting only occurs *mortis*

¹⁹⁸ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

¹⁹⁹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

²⁰⁰ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 273 - 274

²⁰¹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 274

²⁰² *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163

causa. A buy-and-sell agreement contains the first of Hutchison's²⁰³ identifying characteristics of a *pactum successorium*.

Although it is not expressly an essential term of a buy-and-sell agreement to prohibit the parties from revoking the agreement, either by testament or by act *inter vivos*, it would defeat the purpose of a buy-and-sell agreement if the parties could unilaterally revoke the agreement. It is essential for a buy-and-sell agreement to result in a definite agreement and it is submitted that a right to unilaterally revoke the agreement would not result in a definite agreement. The purpose of a buy-and-sell agreement is to bring certainty in the event of the death of a partner. Accordingly a buy-and-sell agreement also contains the second of Hutchison's²⁰⁴ identifying characteristics of a *pactum successorium*.

According to Hutchison²⁰⁵ the freedom of testation is the power to dispose, *mortis causa*, of the assets which remain in one's estate at the time of death. In terms of a buy-and-sell agreement the business interest remains an asset in the estate of the partner until death and it is only upon death that the surviving partners become entitled to acquire the deceased's business interest. If the terms of the buy-and-sell agreement were to be enforced, it would prevent the deceased partner from disposing of the business interest *mortis causa*, which is a restriction of freedom of testation. It is clear that the parties to a buy-and-sell agreement intended to regulate the disposition of the business interests in the event of death and accordingly, they were fully aware of the consequences of the agreement upon the principle of freedom of testation. If the parties knew that they were restricting their freedom of testation and expressly wanted to do so, then why should freedom of testation matter in the enforceability of the agreement? This question is answered in the *McAlpine*²⁰⁶ case where the Appellate Division, as it was then known, confirmed an additional reason for invalidity namely that a *pactum successorium* "constitutes an evasion of the formalities required in respect of testamentary instruments". With regard to a testamentary instrument, any document which contains the intention of a party in respect of the property bequeathed, the extent of the interest bequeathed and the beneficiary is a testamentary writing which is required to be executed in accordance with the Wills Act²⁰⁷ in order to be valid.²⁰⁸ A bequest or legacy may comprise of anything capable of being alienated,

²⁰³ Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

²⁰⁴ Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

²⁰⁵ Hutchison D 1983: 230

²⁰⁶ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

²⁰⁷ *Wills Act* No. 7 of 1953

²⁰⁸ De Waal M, Erasmus H, Gauntlett J and Wiechers N: Par 252

whether movable or immovable, corporeal or incorporeal.²⁰⁹ Accordingly, to uphold an agreement containing and which is intended to give effect to a *post mortem* disposition of an asset would be to allow an evasion of the formalities in the Wills Act.²¹⁰

3.3 Conclusion

The buy-and-sell agreement as envisaged by the description of Botha *et al's*²¹¹ *essentialia* of such an agreement constitute an invalid *pactum successorium* as defined by Hutchison²¹² and in terms of the law relating to the identification of *pacta successoria* applied by the Appellate Division, as it was then known.²¹³

There are differing views which do assert that a buy-and-sell agreement is not a *pactum successorium* and there are also instances where a buy-and-sell agreement would not constitute a *pactum successorium*. In order to validate the conclusion that the buy-and-sell agreement as described by Botha *et al*²¹⁴ is invalid, the opposing views and assertions that buy-and-sell agreements are valid must be tested. It would also be prudent to set out the instances where a buy-and-sell agreement does not constitute a *pactum successorium*.

²⁰⁹ De Waal M, Erasmus H, Gauntlett J and Wiechers N: Par 334

²¹⁰ *Wills Act* No. 7 of 1953

²¹¹ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²¹² Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

²¹³ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A) and *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

²¹⁴ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

4. Arguments supporting the view that Buy-And-Sell Agreements are not *Pacta Successoria*

In the preceding chapter, the conclusion was reached that the buy-and-sell agreement as envisaged by the description of Botha *et al's*²¹⁵ *essentialia* of such an agreement constitute an invalid *pactum successorium* as defined by Hutchison²¹⁶ and in terms of the law relating to the identification of *pacta successoria* applied by the Appellate Division, as it was then known.²¹⁷ There are instances where a buy-and-sell agreement will not constitute a *pactum successorium* and these instances must be acknowledged and explained. The arguments which support the view that a buy-and-sell agreement is valid and can be distinguished from a *pactum successorium* are considered and tested below.

4.1 Instances of valid buy-and-sell agreements

The primary reason for using a buy-and-sell agreement is to a large extent to overcome the uncertainty in the succession of ownership as a result of the death of an owner. However, ownership of a business interest is not limited to private individuals only as is apparent from the authorities which follow.

It is permissible for private individuals as well as legal entities to enter into a partnership agreement with each other.²¹⁸ The Close Corporations Act²¹⁹ does restrict ownership of a members interest in a close corporation to natural persons or to a trust provided that the requirements of either section 29(1A) or 29(2)(b) have been met. The Companies Act²²⁰ does not restrict ownership of shares in a company to natural persons and as such natural persons, trusts and legal entities may own shares in a private and a public company.²²¹ Close corporations and companies have perpetual succession in that they continue to exist apart from the private individuals who are members or shareholders respectively.²²² Where a company is the owner of a business interest, there is already an element of

²¹⁵ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²¹⁶ Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

²¹⁷ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A) and *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

²¹⁸ Henning J 2016: Par 272

²¹⁹ Act No. 69 of 1984

²²⁰ The Companies Act No. 71 of 2008

²²¹ For the purposes of this research, the primary focus will not include public companies as shares in public companies are traded publicly.

²²² Henning J 2013: Volume 1 Par 1.06 & Volume 2 Par 1.04

certainty in respect of the succession of ownership as no change of ownership is required in the event of the death of a shareholder.²²³

A buy-and-sell agreement that is entered into by business partners who are not natural persons would be valid as the business interest does not constitute an asset in the estate of the deceased, and furthermore vesting does not occur upon the death of a contracting party, very simply because the contracting party cannot die. Take for example a situation whereby company A and company B each own a 50% shareholding in private company C. Company A and B could agree that upon the death of the managing director of company A, the shareholding owned by company A will be purchased by company B and *vice versa*. The shareholding of company C is not owned by the managing directors of company A or company B personally and accordingly in the event of the death of a managing director there cannot be an infringement of freedom of testation as the shares were not owned by the deceased.

It must be noted that if the party to a buy-and-sell agreement is not a natural person, then Botha *et al's*²²⁴ essential criteria for a buy-and-sell agreement cannot be met, namely that each partner is obliged to sell at death, as the partners cannot die.

It is also possible for a buy-and-sell agreement between private individuals to be valid, for example if the sale or vesting of rights does not occur upon the death of a contracting party. This would be the case where the contracting parties agree to sell upon one of the parties becoming disabled or retiring. Similarly, this would result in the absence of one of Botha *et al's*²²⁵ *essentialia* for a buy-and-sell agreement, namely that each partner is obliged to sell at death.

A buy-and-sell agreement between private individuals which is executed in accordance with the formalities required in the Wills Act²²⁶ would be valid and escape the definition of a *pactum successorium*, because the agreement would be revocable by either party and would thus not infringe on the party's freedom of testation. Where the parties entered into an agreement in compliance with the Wills Act²²⁷ it would constitute a testamentary writing and as such, each party would then be entitled to revoke the agreement unilaterally and without the consent or knowledge of the other

²²³ Beuthin R and Luiz S 1999: 10

²²⁴ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²²⁵ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²²⁶ Wills Act No. 7 of 1953

²²⁷ Wills Act No. 7 of 1953

parties.²²⁸ In this case the agreement would be valid, but there would be no definite agreement as it is unilaterally revocable and therefore it would not remove the uncertainty in the event of death and accordingly it would not give effect to the purpose intended in a buy-and-sell agreement.

It is submitted that the agreements described under this heading would not fall foul of the criteria for an invalid *pactum successorium*, but it must also be noted that none of them would fit a strict interpretation of what constitutes a buy-and-sell agreement according to Botha *et al.*²²⁹

4.2 Opposing views and arguments in support of the contention that a buy-and-sell agreement is not an invalid *pactum successorium*

In 2007, the case of *Van Aardt v Van Aardt*²³⁰ was reported and seems to have caused the financial planning industry to reconsider the validity of buy-and-sell agreements in light of the possibility that these agreements may be unenforceable and invalid as *pacta successoria*. Botha *et al.*²³¹ refer to the differing views on whether a buy-and-sell agreement is valid and enforceable and that Meyer, Strydom and Frank²³² are of the view that a buy-and-sell agreement is unenforceable as it is a *pactum successorium* while Van Gijsen and Van Vuren²³³ hold a contrary view. The reasons for holding the view that a buy-and-sell agreement is not a *pactum successorium* must be tested.

4.2.1 A buy-and-sell agreement is not a *pactum successorium* as it is a form of option agreement, and not an agreement of sale

According to Van Gijsen and Van Vuren²³⁴ a buy-and-sell agreement has as its intention the conclusion of a valid sale, however a buy-and-sell agreement itself is not an agreement of sale but rather an unusual form of option agreement. The argument is that the agreement is a form of option agreement in terms of which the right to claim performance from one another has vested and accordingly the agreement is valid and enforceable. These views are not correct for the reasons which follow.

²²⁸ De Waal M, Erasmus H, Gauntlett J and Wiechers N 2011: Par 390

²²⁹ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²³⁰ *Van Aardt v Van Aardt* 2007 (1) SA 53 (E)

²³¹ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2017: Par 40.9.3.2.2

²³² Meyer E, Strydom S and Frank S 2016

²³³ Van Gijsen F and Van Vuren L 2015

²³⁴ Van Gijsen F and Van Vuren L 2015: Par 8

Van Gijsen and Van Vuren²³⁵ refer to the definition of an option provided by Schreiner JA in the case of *Hersch v Nel*.²³⁶ There is no reason to disagree with the aforesaid definition provided by Schreiner JA and nothing turns on the actual definition of an option. Van Rensburg, Lotz and van Rhijn²³⁷ state the following in respect of an option:

“It is now settled law that an option is to be construed as comprising two distinct parts: one an offer made by the offeror (grantor of the option) to the offeree (option holder), and the other a separate contract, a so-called pactum de contrahendo, between grantor and holder in terms of which the grantor undertakes to keep the offer open for a period of time.

During the subsistence of the option the grantor may be interdicted from doing anything which might prevent his or her performance of the principal contract should the holder exercise the option by accepting the offer.”

An offer is a statement of intention which contains the terms essential to a contract and it envisages that upon acceptance it will constitute a binding contract.²³⁸ Accordingly an option is an offer together with agreement to keep the offer open for acceptance for a period of time. Van Gijsen and Van Vuren allege that a buy-and-sell agreement is a ‘slightly unusual form of option agreement’ in that:

“[i]t differs from an ordinary option agreement (be it an option to buy or to sell) where only one party is obligated to a performance and the other acquires only a right in that all parties acquire both rights and obligations. It is an agreement both to buy and to sell.”²³⁹

Meyer, Strydom and Frank do not agree with the view that a buy-and-sell agreement can be labelled as an option agreement,²⁴⁰ which is correct for the reasons which follow. From Botha *et al*'s²⁴¹ *essentialia* of a buy-and-sell agreement it is clear that each party is obligated to sell at death and the survivors are obligated to purchase, so it can be said that all parties acquire both rights and obligations. A buy-and-sell agreement is not an option agreement as it does not relate to whether an option

²³⁵ Van Gijsen F and Van Vuren L 2015: Par 8

²³⁶ *Hersch v Nel* 1948 3 All SA 427 (A)

²³⁷ Van Rensburg A, Lotz J and Van Rhijn T 2014: Par 302

²³⁸ Van Rensburg A, Lotz J and Van Rhijn T 2014: Par 301

²³⁹ Van Gijsen F and Van Vuren L 2015: Par 8

²⁴⁰ Meyer E, Strydom S and Frank S 2016: Par 9

²⁴¹ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

agreement is capable of simultaneously creating rights and obligations for all parties. An option agreement is not capable of achieving the essential objective of a buy-and-sell agreement, namely to compel a party to sell at death and simultaneously committing the survivors to purchase. If a buy-and-sell agreement is an option agreement as alleged, then it would follow that the parties would first have to exercise the option by accepting the offer in order to create a binding sale agreement. Van Gijzen and Van Vuren clearly accept that the option must be exercised as they specifically refer to the need to ensure that the agreement contains the essentials of a sale so that upon its exercise it will give rise to a valid sale.²⁴²

If a party must still accept an offer in order to give rise to a valid sale agreement, it follows that the party has a choice whether or not to create valid sale agreement. It is submitted that a choice whether or not to create a binding sale agreement would defeat an essential purpose of a buy-and-sell agreement, which according to Botha *et al*²⁴³ is to obligate each partner to sell at death and to commit the surviving partners to purchase the same interest at the death of the contracting party.

Another aspect of an option agreement which is in direct conflict with the purpose of a buy-and-sell agreement relates to the rights of the parties while they are all alive. In terms of Botha *et al*'s²⁴⁴ *essentialia* of a buy-and-sell agreement, each party is obligated to sell at death and the survivors are obligated to purchase from the deceased. The buy-and-sell agreement is not itself a restriction on ownership while the parties are alive. Van Gijzen and Van Vuren specifically refer to the fact that the parties may continue dealing with their business interests and may even sell, provided they first offer the shares to the other shareholders.²⁴⁵ One of the natural consequences of an option agreement is that the grantor of the option cannot do anything which may prevent performance of the principal agreement which would include for example selling, damaging, destroying or alienating the subject matter of the principal agreement.²⁴⁶ An option agreement is therefore an immediate restriction on ownership, which is in conflict with the intention of the parties to a buy-and-sell agreement who intend for the obligation to sell and to purchase to arise only upon the death (or disability or retirement) of a party.

With regard to what constitutes a sale agreement, Kerr and Glover²⁴⁷ have the following to say:

²⁴² Van Gijzen F and Van Vuren L 2015

²⁴³ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²⁴⁴ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²⁴⁵ Van Gijzen F and Van Vuren L 2015: Par 8

²⁴⁶ Van Rensburg A, Lotz J and Van Rhijn T 2014: Par 302

²⁴⁷ Kerr A and Glover G 2010: Par 1

“When parties who have the requisite intention agree or appear to agree that the one, called the seller or the vendor, will make something, called the thing sold or the res vendita or merx, available to the other, called the buyer or the purchaser, in return for the payment of the price, the contract is a sale.”

The only difference between this definition and Botha *et al*'s²⁴⁸ *essentialia* of a buy-and-sell agreement is that a buy-and-sell agreement contains a condition suspending the sale and purchase until the death of a party. Accordingly, a buy-and-sell agreement cannot be defined as an option agreement. A buy-and-sell agreement is a sale agreement, *albeit* a suspended or deferred sale agreement.

Van Gijsen and Van Vuren further their view that a buy-and-sell agreement is not an agreement of sale, but rather a form of unusual option agreement, in terms of which rights and obligations are vested which therefore means that the agreement complies with the vesting test and accordingly a buy-and-sell agreement is not an invalid *pactum successorium*.²⁴⁹ If Van Gijsen and Van Vuren are correct in describing a buy-and-sell agreement as an unusual option agreement, their description of a buy-and-sell agreement would not avoid the characteristics of a *pactum successorium* as argued by them thus the agreement would still be invalid for the reasons which follow.

In considering the vesting test as applied in the McAlpine case²⁵⁰ against a buy-and-sell agreement, Van Gijsen and Van Vuren state the following:

*“To return then to our vesting test, what vested are not rights which entitle the parties to the agreement to any rights in the shares that form the subject matter of the eventual sale. Rather, what vested are the rights to claim performance from one another in terms of the provisions of the buy-and-sell agreement.”*²⁵¹

It is clear that Van Gijsen and Van Vuren are not contending that rights in respect of the shares have vested and their argument is that contractual rights to claim performance have vested immediately or at least prior to death. Meyer, Strydom and Frank do not agree with the application of the vesting

²⁴⁸ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²⁴⁹ Van Gijsen F and Van Vuren L 2015: Par 8

²⁵⁰ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

²⁵¹ Van Gijsen F and Van Vuren L 2015: Par 8

test by Van Gijsen and Van Vuren, as they are of the view that the vesting test applies to the owner's rights to the promised item.²⁵²

In the McAlpine case, Corbett CJ sets out why the vesting test is appropriate for identifying a *pactum successorium*, namely that:²⁵³

“The pactum successorium occupies a somewhat shadowy position between contract and testation. It is frowned upon by the law because it tends to inhibit freedom of testation and because, if allowed, it would result in the circumvention of the rules relating to the formal execution of wills. But for these reasons it is only a contractual disposition which, like a testamentary one, vests the right in question in the promisee upon or after the death of the promisor that should fall foul of the rule which invalidates pacta successoria. Accordingly it seems only logical that vesting should be the litmus test for identifying a pactum successorium.”

It is clear that the vesting test relates to determining whether the contract inhibits freedom of testation. According to Hutchison²⁵⁴ freedom of testation is the power to dispose, *mortis causa*, of the assets which remain in one's estate at the time of death and accordingly an *inter vivos* disposition will not infringe on a party's testamentary freedom. The vesting test as confirmed and applied to identifying a *pactum successorium*²⁵⁵ and specifically applied in the McAlpine case²⁵⁶ is to determine whether rights to the asset vested upon or after death which could indicate a *pactum successorium* or whether vesting takes place prior to death which cannot be a *pactum successorium*. If vesting has taken place prior to death, it means that there will not be an infringement on freedom of testation as the owner's right to the asset has already vested in favour of another.²⁵⁷ Accordingly, the vesting of rights which prevents a *pactum successorium* must be in relation to the actual asset so that the owner will lose the power to dispose, *mortis causa*, of the said asset at the time of death, which avoids an infringement on freedom of testation.²⁵⁸

²⁵² Meyer E, Strydom S and Frank S 2016: Par 9

²⁵³ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 273

²⁵⁴ Hutchison D 1983: 230

²⁵⁵ See for example *Keeve and Another v Keeve NO* [1952] 1 All SA 244 (O); *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C); *Varkevisser v Estate Varkevisser and Another* [1959] 4 All SA 161 (SR) and *Ex Parte Calder Wood NO: In Re Estate Wixley* [1981] 4 All SA 389 (Z)

²⁵⁶ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

²⁵⁷ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

²⁵⁸ Hutchison D 1983: 230

The view of Meyer, Strydom and Frank is supported in that the vesting test cannot be divorced from the rights to the promised item.

4.2.2 A buy-and-sell agreement is not a *pactum successorium* as it does not confer a right to inherit

Kobus Barnard²⁵⁹ is of the view that a buy-and-sell agreement is not an invalid *pactum successorium* as there is no disposition without value and there is no limit on the contracting parties to dispose of the proceeds of the sale in terms of their respective wills. As authority for this, Barnard refers to the Schauer case²⁶⁰ and makes specific reference to Claassen J where he stated that:²⁶¹

“It is a bilateral contract and if it is a true pactum successorium it is invalid, unless it can be established that a quid pro quo had been accorded to the promissor.”

As authority for this proposition by Claassen J in the *Schauer* case, the Judge referred to the headnote of the case of *Van Jaarsveld v Van Jaarsveld’s Estate*.²⁶² Hutchison²⁶³ points out that *Van Jaarsveld’s* case does not support Claassen J’s proposition. In the case of *Van Jaarsveld v Van Jaarsveld’s Estate*²⁶⁴ the validity of the agreement was not an issue, the agreement in that case was without doubt invalid. The issue to be determined by the court was whether the agreement is also illegal or *contra bonos mores*, as this would prevent the parties from claiming restitutionary relief.²⁶⁵ In contract law, restitutionary relief is available when an agreement is invalid and the parties are required to restore or return whatever was received as a result of the contract²⁶⁶ or to attempt to place the parties back in the position that they were in before entering into the agreement. Accordingly, the presence or absence of a *quid pro quo* or consideration given for the disposition is not a valid criteria or test to be applied in determining whether an agreement is a *pactum successorium*. According to Hutchison,²⁶⁷ the absence of a consideration will result in a more pronounced testamentary character, however a *pactum successorium* is invalid regardless of any consideration given. Although the Schauer case was

²⁵⁹

http://www.fpi.co.za/Documents/BusinessSolutionCentre/EstatesAndTrusts/Articles/Is_a_buy_and_sell_agreement_a_pactum_successorium_Version_1_03.pdf (accessed on 10/09/2017)

²⁶⁰ *Schauer NO v Schauer* 1967 (3) SA 615 (W)

²⁶¹ *Schauer NO v Schauer* 1967 (3) SA 615 (W): 618

²⁶² *Van Jaarsveld v van Jaarsveld’s Estate* 1938 TPD

²⁶³ Hutchison D 1983: 225

²⁶⁴ *Van Jaarsveld v van Jaarsveld’s Estate* 1938 TPD

²⁶⁵ *Van Jaarsveld v van Jaarsveld’s Estate* 1938 TPD

²⁶⁶ Van Rensburg A, Lotz J and Van Rhijn T 2014: Par 427

²⁶⁷ Hutchison D 1983: 226

not specifically referred to by Fagan R, it is clear that he agrees with Professor Hutchison from the judgement in the Jubelius case:²⁶⁸

“Ek is dit met prof Hutchison eens dat dit geen toets is of daar 'n teenprestasie vir die belofte was nie, bv dat betaling beloof is vir die erflating. 'n Teenprestasie kan immers geen verband hou met die effek van die ooreenkoms as synde beperkend op testeervryheid al dan nie. Kyk ook Corbett, Hahlo en Hofmeyr The Law of Succession in South Africa 33n33; en I.B. Murray in 1967 Annual Survey of South African Law 198-201.”

With regard to the proceeds of the sale, it is submitted that the fact that a party is able to dispose of the proceeds in terms of their will does not mean that there is no infringement of freedom of testation. According to Hutchison²⁶⁹ freedom of testation is the power to dispose, *mortis causa*, of the assets which remain in one's estate at the time of death. In order for there to be no infringement of freedom of testation, the parties must retain the power to dispose of the assets in their estate at the time of death. In terms of a buy-and-sell agreement, the obligation to sell only arises at death and accordingly the business interest is still an asset in the estate of the deceased at death. The infringement of freedom of testation does not relate to whether the deceased's estate receives consideration or not, it relates to the ability to dispose of the business interest at death.²⁷⁰

Accordingly, the consideration received for the business interest in terms of a buy-and-sell agreement does not exempt the agreement from being invalid as a *pactum successorium*.

4.2.3 The acceptance and application of buy-and-sell agreements have become part of our common law

Kobus Barnard²⁷¹ is of the view that buy-and-sell agreements have been recognised in accepted into our common law. The only authority provided by Barnard is a reference to the Estate Duty Act.²⁷²

²⁶⁸ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C)

²⁶⁹ Hutchison D 1983: 230

²⁷⁰ Hutchison D 1983: 230

²⁷¹

http://www.fpi.co.za/Documents/BusinessSolutionCentre/EstatesAndTrusts/Articles/Is_a_buy_and_sell_agreement_a_pactum_successorium_Version_1_03.pdf (accessed on 10/09/2017)

²⁷² Estate Duty Act No. 45 of 1955

With regard to the provisions of the Estate Duty Act,²⁷³ its purpose is ‘to impose an estate duty on the estates of deceased persons, to repeal the Death Duties Act, 1922, and to provide for matters incidental thereto’. For the purposes of calculating estate duty liability, the proceeds payable under any policy of insurance which is a domestic policy upon the life of the deceased is to be included as deemed property unless the requirements of section 3(3)(a) (i), (iA) or (ii) of the Estate Duty Act²⁷⁴ have been met in which case the policy proceeds will not be included as deemed property. Barnard refers specifically to section 3(3)(a)(iA) of the Estate Duty Act²⁷⁵ which applies if:

“(iA) the Commissioner is satisfied that the policy was taken out or acquired by a person who on the date of death of the deceased was a partner of the deceased, or held any share or like interest in a company in which the deceased on that date held any share or like interest, for the purpose of enabling that person to acquire the whole or part of—

(aa) the deceased’s interest in the partnership concerned; or

(bb) the deceased’s share or like interest in that company and any claim by the deceased against that company,

and that no premium on the policy was paid or borne by the deceased; ...”

The exception in section 3(3)(a)(iA) of the Estate Duty Act²⁷⁶ only determines whether or not the proceeds of a policy that funds the underlying buy-and-sell agreement should be included as deemed property in the estate of the deceased for the purposes of calculating estate duty. The South African Revenue Service (SARS) has issued an external guide titled ‘*Estate Duty Implications on Buy-and-sell Arrangements, Where Shares are Held in Trusts*’.²⁷⁷ Neither the Estate Duty Act,²⁷⁸ nor the SARS external guide²⁷⁹ refer to the actual terms of an underlying agreement, only that the policy must have

²⁷³ Estate Duty Act No. 45 of 1955

²⁷⁴ Estate Duty Act No. 45 of 1955

²⁷⁵ Estate Duty Act No. 45 of 1955

²⁷⁶ Estate Duty Act No. 45 of 1955

²⁷⁷ <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/GEN-ED-01-G01%20-%20Estate%20Duty%20Implications%20on%20Buy%20and%20Sell%20Agreements%20-%20External%20Guide.pdf> (accessed 17/09/2017)

²⁷⁸ Estate Duty Act No. 45 of 1955

²⁷⁹ <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/GEN-ED-01-G01%20-%20Estate%20Duty%20Implications%20on%20Buy%20and%20Sell%20Agreements%20-%20External%20Guide.pdf> (accessed 17/09/2017)

been taken out with the purpose of enabling the purchaser to acquire the deceased's business interest. Even if it is implied that there must have been a prior agreement between the deceased and surviving partner, there are a number of ways that this could be achieved without using a buy-and-sell agreement, for example:

- A valid bequest subject to payment of a bequest price contained in the deceased's will, although this does not create certainty as the intended legatee has the right to either accept the bequest subject to the condition of payment or the legatee may reject the bequest.²⁸⁰
- Exercise of an option in terms of a shareholders or partnership agreement.

The Estate Duty Act²⁸¹ which only regulates the tax situation at death, cannot be seen as authority for the validity or invalidity of a buy-and-sell agreement.

4.3 The time of vesting depends on the intention of the parties as recorded in the agreement, so could the agreement be deliberately worded to avoid the characteristics of a *pactum successorium*

The identifying characteristics of a *pactum successorium* are:

“(a) that it purports to effect a post-mortem disposition of an asset in the estate of a contracting party by providing for a devolution of the right to that asset from the party, after his death, to another person; and

(b) that it seeks to prevent the contracting party from revoking the disposition, either by testament or by act inter vivos.”²⁸²

With regard to the revocability of the disposition, it is submitted that it would not give effect to the purpose intended in a buy-and-sell agreement if a party is entitled to revoke the agreement unilaterally and without the consent or knowledge of the other parties. A revocable agreement would not address the uncertainty in the event of death and accordingly it would not give effect to the purpose intended in a buy-and-sell agreement, namely a definite agreement whereby each partner is

²⁸⁰ Pace R and Van Der Westhuizen W 2016: Par A53

²⁸¹ Estate Duty Act No. 45 of 1955

²⁸² Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

obliged to sell at death.²⁸³ It would appear that an agreement which does comply with the second characteristic of revocability, would then conflict with the essential purpose of a buy-and-sell agreement.

The issue is the conflict between the essential purpose of a buy-and-sell agreement namely to create obligations only upon the death of a party²⁸⁴ so that it does not result in a restriction of ownership during their lifetime, as opposed to one of the identifying characteristic of a *pactum successorium* namely a devolution of the right to the asset from the party after their death.²⁸⁵ The research has shown that a buy-and-sell agreement which contains the *essentialia* described by Botha *et al*²⁸⁶ will be declared to be invalid as a *pactum successorium* upon an application of the vesting test.²⁸⁷ Could a buy-and-sell agreement be worded in such a way as to provide for the devolution of rights in the business interest before the death of the deceased partner, and still retain the essential purpose of a buy-and-sell agreement? Consider a clause in a buy-and-sell agreement along the lines of the following:

“In the event of the death of any shareholder, such shareholder shall, on the day immediately preceding his death be deemed to have sold his/her shares and loan account in the company to the remaining shareholder(s) in proportion to the total number of issued shares held by the purchaser(s).”

The clause quoted above specifically provides that the sale is deemed to take effect on the day immediately preceding the death of the party, which appears to be an attempt to retain the idea that there is no restriction of ownership during the lifetime of the parties at least until the day preceding the death of the deceased shareholder. Furthermore, it appears that rights to the business interest have vested in the surviving shareholders on the date of the sale which is deemed to be on the day prior to the death of the deceased party. The proceeds of the sale would be available for distribution in the estate, so while the actual business interest would not be available, the value of the interest in the form of liquid funds can be utilised and distributed in the estate of the deceased partner. If an agreement results in the devolution of rights to the asset prior to the death of the deceased then the

²⁸³ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²⁸⁴ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²⁸⁵ Hutchison D 1983: 237

²⁸⁶ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²⁸⁷ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

agreement cannot be a *pactum successorium*.²⁸⁸ In order to apply a vesting test as per the *McAlpine* case²⁸⁹ the question to be asked is:

“...whether the promise disposing of an asset in favour of another (whether by way of donation or other form of contract) causes the right thereto to vest in the promisee only upon or after the death of the promisor (which points to a pactum successorium); or whether vesting takes place prior to the death of the promisor, for instance, at the date of the transaction giving rise to the promise (in which case it cannot be a pactum successorium).”

The timing of the vesting of rights will depend on the terms of the agreement. It has been established in this research that a suspensive condition in an agreement only results in vested rights upon the happening of the uncertain future event, whereas a resolutive condition results in the vesting of rights immediately, however the vesting is annulled upon the happening of the uncertain future event.²⁹⁰ In the context of a buy-and-sell agreement, it means that where the sale is suspended until the death of a party then vested rights have not been acquired *inter vivos* which would point towards a *pactum successorium*. Where the sale is completed but the payment and or enjoyment of the asset is postponed until the death of the seller, and the agreement is subject to the condition that the purchaser survives the seller then the condition is resolutive and rights vest immediately but the agreement is annulled should the purchaser predecease the seller.

In a buy-and-sell agreement the sale is subject to the purchaser surviving the seller, however whether this condition is suspensive or resolutive will depend on the intention of the parties and this is confirmed by Corbett J in the *McAlpine* case²⁹¹ who stated that:

“As indicated by Watermeyer JA in the Jewish Colonial Trust case, supra, whether in a particular case words of futurity postpone vesting or merely enjoyment depends ultimately on intention, in this case the intention of the parties to the agreement. Where, however, the right of the promisee is conditional upon his surviving the promisor, an uncertain event, it seems to me that there is a strong presumption that, in the absence of indicia of

²⁸⁸ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

²⁸⁹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

²⁹⁰ Hutchison D 1989: 7

²⁹¹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 274

a contrary intention, the parties intended vesting to be postponed until the death of the promissor.”

If we return to our example of the wording used a clause in a buy-and-sell agreement, namely:

“In the event of the death of any shareholder, such shareholder shall, on the day immediately preceding his death be deemed to have sold his/her shares and loan account in the company to the remaining shareholder(s) in proportion to the total number of issued shares held by the purchaser(s).”

In the example, the wording used indicates that on the day prior to death, a deceased shareholder shall be deemed to have sold his shares and loan account to the remaining shareholders in proportion to the number of shares held by the purchasers. In this example, as with the essential terms of a buy-and-sell agreement according to Botha *et al*²⁹² the sale is subject to a suspensive condition rather than a resolutive condition. It is a suspensive condition as the sale is not immediate, but is deferred until the happening of an uncertain event. If it were a resolutive condition, there would be an immediate reciprocal sale between all of the parties subject to the annulment of the sale upon the happening of the uncertain event, which it is submitted is clearly not the intention in the above example.

By deeming the sale to take place on the day prior to death, it seems to indicate that vesting of rights occurred prior to death, and if vesting did occur prior to death then the agreement is not an invalid *pactum successorium* according to the vesting test.²⁹³ Although the sale may be deemed to be on the day prior to death in the example, rights will not vest prior to death because the sale is subject to a suspensive condition, and in order for vesting to occur the condition must be fulfilled.²⁹⁴ The suspensive condition will be fulfilled upon the happening of the uncertain event.²⁹⁵ Provided that the shareholders are natural persons, then the death of a party is not uncertain, however the death of the seller is not the uncertain future event which must occur to fulfil the suspensive condition, as the sale is conditional upon the survival of the remaining shareholders and it is the survival of the purchaser which is the uncertain future event.²⁹⁶ Accordingly, a sale agreement which is conditional upon the purchaser surviving the seller, as is the case in a buy-and-sell agreement, if the parties suspend the

²⁹² Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1027

²⁹³ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

²⁹⁴ Hutchison D 1989: 7 and Van Der Merwe B 2000: 329

²⁹⁵ Van Rensburg A, Lotz J and Van Rhijn T 2014: Par 362

²⁹⁶ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 274

sale by making the condition a suspensive condition, then vesting cannot occur until the purchaser has survived the seller, which can only be determined at the time of the seller's death. If the parties intended vesting to occur prior to death, then the condition that the purchaser must survive the seller needs to be a resolutive condition so that vesting can occur immediately subject to the potential divesting in the event that the purchaser does not survive the seller.

4.4 Conclusion

Where a buy-and-sell agreement is between natural persons in such a way that the sale is suspended pending fulfilment of a suspensive condition, namely the survival of the purchaser then vesting of rights occurs only after the death of the seller, it constitutes the first identifying characteristic of a *pactum successorium*.²⁹⁷ In terms of the second identifying characteristic, if the agreement does not allow for the seller to revoke the sale, then the agreement is a *pactum successorium*.²⁹⁸

²⁹⁷ Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

²⁹⁸ Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

5. Developments required to recognise a buy-and-sell agreement as a valid and enforceable contract

The South African Courts have continued to enforce the concept of the *pactum successorium* in striking down agreements which are identified as such.²⁹⁹ There has been widespread criticism of the manner in which what appear to be commercially sound agreements are declared invalid as *pacta successoria* and these criticisms include the Appellate Division itself as well as legal academics, is included in the research below. While there are conflicting views as to when an agreement can be said to constitute an invalid *pactum successorium* and specifically whether a buy-and-sell agreement should be classified as such, there is seemingly a consensus that the strict approach taken by our courts relating to *pacta successoria* should be relaxed. This becomes evident once the reasons for the enforcement of the law relating to *pacta successoria* is analysed.

5.1 The complexity of the law

The purpose of Hutchison's article "Isolating the *pactum successorium*"³⁰⁰ was an attempt to bring clarity in respect of determining when an agreement can be said to be a *pactum successorium* in light of the law as applied in the then recent case in the Appellate Division, as it was then known, namely the *Borman* case.³⁰¹ In his article, Hutchison describes the *pactum successorium* as 'an extremely elusive concept' which is not easily defined and which has 'severely tested the analytical ability of our judges'.³⁰²

After concluding his analysis and setting out the criteria for determining whether an agreement has the necessary characteristics to be classified as a *pactum successorium*, Hutchison makes the following criticisms of the current law, namely:

"First, it is submitted that, in adhering so devotedly to the principle of freedom of testation, the law has become excessively complicated and technical, so that the line between pacta

²⁹⁹ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A), *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A) and *Van Aardt v Van Aardt* 2007 (1) SA 53 (E)

³⁰⁰ Hutchison D 1983: 221

³⁰¹ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A)

³⁰² Hutchison D 1983: 225

successoria and similar, but enforceable, agreements is drawn on grounds that would not readily be understood by the layman.

Secondly, the very technicality of the law may at times produce a sense of artificiality. If one disregards technical arguments and looks at the substance of the matter, it appears that many contracts which are technically valid do indeed purport to regulate succession on death. Consider, for example, a common form of inter vivos trust, in terms of which a settlor or founder settles upon trustees a portion of his estate and gives detailed instructions for its disposal after his death. Even if the agreement vests rights in the beneficiaries only after the settlor's death, it is technically not a pactum successorium, since the settlor alienates the property to the trustees inter vivos. It can hardly be denied, however, that a contract is being employed to serve the purposes of a will.

Thirdly, and more fundamentally, it is an extremely doubtful proposition that all pacta successoria are necessarily undesirable. Take, for example, the succession clauses in the partnership agreements that were discussed earlier. Such provisions are commercially useful and serve a need in modern society; to strike them down for the sake of preserving complete freedom of testation would be to allow dogma to override common sense. And there must be many other such examples."

It is submitted that all three of Hutchison's criticisms of invalidating agreements as *pacta successoria* are directly relevant to a buy-and-sell type agreement. In order to avoid an agreement, such as a buy-and-sell agreement from being classified as an invalid *pactum successorium*, an in-depth understanding is required of the vesting of rights in relation to suspensive conditions as opposed to resolute conditions in a contract. There have been several judgments where incorrect criterion have been applied in respect of identifying an agreement as a *pactum successorium*.³⁰³ There have also been instances such as in the *Jubelius* case,³⁰⁴ where the court seemingly arrived at the correct decision even though there was an improper application of the vesting test.³⁰⁵

Hutchison's third criticism above is a reference to clauses in partnership agreements where the parties intend to ensure that the surviving partner is protected in the event of the death of the first dying

³⁰³ Hutchison D 1983:225 - 227

³⁰⁴ *Jubelius v Griesel NO en andere* [1988] 1 All SA 136 (C)

³⁰⁵ Hutchison D 1989: 6

partner.³⁰⁶ This type of clause in a partnership agreement is very similar to a buy-and-sell agreement in respect of the objective to protect the surviving partners in the business and at the same time to ensure that the deceased's estate receives a fair value for the deceased's interest in the business. Hutchison's point, with particular reference to the clauses in partnership agreements, is that '*a consistent application of the principles underlying the Borman decision may sometimes produce unpalatable results*'.

5.2 An infringement of the right to freedom of testation

Notwithstanding Hutchison's suggestion to reconsider the absolute protection of the right to freedom of testation, the Appellate Division, as it was then known, in the *McAlpine* case declared the agreement between the McAlpine brothers to be an invalid *pactum successorium* rather than to uphold and give effect to the intention of the parties as recorded in the agreement.³⁰⁷ In the minority judgment handed down by Nienaber JA, he upheld the agreement between the McAlpine brothers and in doing so, preferred an approach where the so-called classic form of the *pactum successorium*³⁰⁸ is to be differentiated from the widened form of *pactum successorium* as applied by the Appellate Division in the *Borman* case and in reference to the *Borman* Judgment, Nienaber JA states as follows:³⁰⁹

"Yet the judgment itself appeared to accept that it was breaking new ground (at 502AB) and in the majority judgment (in the present case) it is interpreted as supporting the view that the scope of the pactum successorium was widened to embrace any agreement binding a party to a post-mortem disposition of his property. It is at this point that my views begin to depart from those of the majority. I do not read the articles of Joubert, on which reliance is placed in the majority judgment, as supporting a wider concept. Throughout his entire series of articles Joubert places due emphasis on the aspect of "vererwing" and he consistently refers to "erfgename" in the passages cited. Nor do the excerpts from the old authorities quoted in the majority judgment and in the references cited do so. There is, therefore, no need to create an enlarged neoclassic form of the pactum successorium. The issue is whether the facts of this case fall within the recognised classic form."

³⁰⁶ Hutchison D 1983: 235

³⁰⁷ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 264

³⁰⁸ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 275

³⁰⁹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 276

Nienaber JA holds the view that the vesting test as applied in the majority decision is too selective and that the dominant feature to be tested is rather the intention of the parties and if the intention of the parties is for an immediate vesting, then the agreement is not an invalid *pactum successorium* because the promisor could not have intended to make a bequest if the property is to pass prior to death.³¹⁰ According to Nienaber JA, the test is whether the promisor intended to regulate their succession and if they did, the agreement must be struck down, but if the purpose and intention was not a form of succession then the agreement should stand, and in doubt the tendency should be to uphold the agreement rather than to strike it down.³¹¹ The right to freedom of testation is not infringed according to Nienaber JA, as nothing prevents a party from making a will leaving the asset in question to another and in such event the executor of the deceased's estate can either decide to "*honour the agreement or face the consequences of its breach*".³¹²

According to Hutchison³¹³ the freedom of testation is the power to dispose, *mortis causa*, of the assets which remain in one's estate at the time of death. Notwithstanding the very technical and somewhat artificial nature of the law relating to the *pactum successorium*, if a person enters into an agreement to sell their business interest can there really be an infringement on the right to freedom of testation? According to the law as applied by the Appellate Division,³¹⁴ yes there is an infringement, but it is submitted that the infringement is technical and artificial in that the infringement is only present if the agreement is subject to a suspensive condition whereas a resolutive condition is not considered to be an infringement. If we consider two buy-and-sell agreements, the first of which is subject to a suspensive condition with the sale suspended until the death of the partner and the second agreement subject to a resolutive condition with an immediate sale of the business interest, but transfer of ownership and payment delayed until the death of a partner. In both agreements there is an agreement to sell the business interest with transfer of ownership and payment delayed until the death of a partner. Aside from potential tax consequences, the end result would be the same if both agreements were enforced, yet the first agreement is considered to be an invalid *pactum successorium* as it infringes the right to freedom of testation which is *contra bonos mores*, whereas the second agreement is valid and enforceable.

³¹⁰ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 276 & 277

³¹¹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 275

³¹² *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 278

³¹³ Hutchison D 1983: 230

³¹⁴ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A), *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A) and *Van Aardt v Van Aardt* 2007 (1) SA 53 (E)

Hutchison concluded with a suggestion that the time had come to reconsider the absolute protection of freedom of testation and in the context of the buy-and-sell agreement and wider concept of the *pactum successorium*, his concluding remarks remain relevant today, namely:³¹⁵

“Has the time not arrived for a reappraisal of the principle of complete freedom of testation? Our law takes that principle further than any other Western legal system - further, by far, than Roman law took it. The hardship which is thereby caused to the unjustly disinherited or 'forgotten' widow is well known. In regard to pacta successoria, our devotion to the principle is all the more strange in view of the obvious conflict with the principle of freedom of contract. Many legal systems - including some based on Roman law - are prepared to enforce succession agreements, and protect their laws of testamentary succession, where it is thought necessary, by means of a requirement of formal execution. Our law would be a lot simpler, and perhaps even more equitable, if it were to adopt a similar approach.”

5.3 Constitutional rights: freedom of testation versus freedom of contract

The Constitution of the Republic of South Africa³¹⁶ was promulgated on 18 December 1996 and the effective commencement date was on 4 February 1997. This was long after the Appellate Division, as it was then known decided the Borman case³¹⁷ in 1976, and although the McAlpine case³¹⁸ was decided in 1997, the facts of that case go back to Ian McAlpine’s death in June 1988. Since the commencement of the Constitution,³¹⁹ the right to freedom of testation has been recognised as a right protected under the Constitution³²⁰ and in the *Ex Parte BOE Trust Ltd* case Mitchell AJ states in paragraph 9 that:³²¹

“In so far as it may be necessary to seek confirmation that the right to freedom of testation remains protected under the Constitution, reference may be made to section 25(1) of the 1996 Constitution. In my opinion, it is clear that the right to property includes the right to give enforceable directions as to its disposal on the death of the owner.”

³¹⁵ Hutchison D 1983: 239

³¹⁶ Act No. 108 of 1996

³¹⁷ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A)

³¹⁸ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

³¹⁹ Act No. 108 of 1996

³²⁰ Act No. 108 of 1996

³²¹ *Ex parte BOE Trust Ltd NO & others* [2010] JOL 26193 (WCC): 4

In the case of *In re BOE Trust Ltd*,³²² the Supreme Court of Appeal recognised that the right to property in terms of Section 25(1) of the Constitution.³²³ According to De Waal³²⁴ the most important ways that the South African Law protects the freedom of testation includes the strict formalities required for the execution of wills; the rule that the freedom cannot be contractually restricted; the measures aimed at ensuring a free testamentary expression; the general rule against the delegation of testamentary power; the rule that a will remains revocable until death; and, all the different rules of rectification and interpretation aimed at ensuring that the intention of the testator or testatrix is given effect to. That freedom of testation may not be contractually restricted is most relevant in considering buy-and-sell agreements.

The common law principle of *pacta sunt servanda* generally seeks to ensure that parties to an agreement must comply with their contractual obligations provided that the undertakings have been freely and voluntarily undertaken.³²⁵ This common law principle is also constitutionally recognised which could conflict with the protection of the other constitutional rights including the right to freedom of testation. In the *Barkhuizen* case³²⁶ decided in the Constitutional Court, Ngcobo J was of the view that:

“..., the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.”

The Constitution does envisage and allow for the limitation of protected rights in certain circumstances and in this regard Christie explains that the purpose of section 8 of the Constitution and in fact the Constitution as a whole is to achieve justice and equity and according to Christie:³²⁷

³²² *In re BOE Trust Ltd and Others* NNO 2013 (3) SA 236 (SCA)

³²³ Act No. 108 of 1996

³²⁴ De Waal M 2012: 3g7

³²⁵ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC): 707

³²⁶ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC): 700

³²⁷ Christie R 2006: 3H6

“...it seems clear that the court must weigh each provision of the Bill of Rights against any other right that may, on the facts of the case, compete with it. Whenever the competing right happens to be a contractual right it will almost certainly come under the umbrella of freedom of contract or pacta sunt servanda. One party to the contract will almost certainly be relying on these principles for the enforceability of the contract while the other party will be relying on a provision of the Bill of Rights to challenge its enforceability.”

Unfortunately, at the time that the *McAlpine* case³²⁸ was decided in 1997 there was no application of the abovementioned constitutional provisions to determine whether the continued strict enforcement of the law relating to the *pactum successorium* is in line with the general constitutional provisions of achieving justice and equity. The minority judgment by Nienaber JA is especially relevant to the purpose of the buy-and-sell type agreement and in this regard, Nienaber JA stated as follows:³²⁹

“...dealing with partnership or co-ownership or other instances of a close personal commercial relationship where it is in the interest of the parties concerned to maintain, as far as possible, the status quo and to exclude strangers even after the demise of one of the parties, the clause under attack is designed to regulate, with immediate legal effect, their future affairs. There is clearly a need to recognise agreements of this sort. In cases of doubt the courts should be astute to support rather than to frustrate the parties in their intention.”

Had the Appellate Division followed the approach of Nienaber JA’s minority judgment, this would have created a very different precedent for upholding and enforcing commercial agreements such as a buy-and-sell agreement. Even though the agreement was struck down in the majority judgment, the suggestion is made that perhaps there should be a relaxation of the rule and in this regard Corbett CJ states as follows:³³⁰

“For these reasons, I hold that the agreement in terms of which appellant claimed Ian McAlpine’s shares from his estate amounted in law to an invalid pactum successorium and that for this reason his claim cannot succeed. Whether this is a satisfactory result is an issue upon which lawyers may hold differing views. Some of the arguments for and against the continued existence in our law of the rule invalidating pacta successoria have been

³²⁸ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

³²⁹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 279

³³⁰ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 275

presented by Prof Hutchison in his aforementioned article at 237 - 239. Where the pactum forms part of a larger commercial transaction between the parties, a case could be made out for the relaxation of the rule. This is a matter that should perhaps engage the attention of those responsible for initiating law reform."

Although the agreement in the *McAlpine* case³³¹ was held to be an invalid *pactum successorium*, it is clear that the Appellate Division recognises the need for the rule to be relaxed particularly where the agreement is of a commercial nature such as a buy-and-sell type arrangement.

5.4 Escaping the formalities for a valid will

In the *McAlpine*³³² case the Appellate Division confirmed an additional reason for invalidity namely that a *pactum successorium* "constitutes an evasion of the formalities required in respect of testamentary instruments".

In the context of a buy-and-sell agreement, the agreement between the parties is invariably reduced to writing and witnessed. While this does not ensure compliance with the Wills Act,³³³ Rautenbach³³⁴ points out that the strict requirements are somewhat watered down in light of section 2(3) of the Act which allows for a court to condone non-compliance with formalities so that a document may be accepted as a will.

5.5 Conclusion

It is submitted that buy-and-sell agreements are invalid as they are a form of *pactum successorium* in terms of the current law as applied by the Appellate Division, as it was then known. Although there was a minority judgement in the *McAlpine* case,³³⁵ it is clear that there was a definite consensus in the view that the strict enforcement of the rule relating to the *pactum successorium* should be reformed. This supports the views of Hutchison,³³⁶ who suggested the reappraisal of the principle of complete freedom of testation. The need to recognise and give effect to succession clauses found in partnership

³³¹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

³³² *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

³³³ *Wills Act* No. 7 of 1953

³³⁴ Rautenbach C 1999: 360

³³⁵ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 264

³³⁶ Hutchison D 1983: 239

agreements was specifically mentioned by both Hutchison³³⁷ and the Appellate Division in the *McAlpine* case.³³⁸

Meyer, Strydom and Frank³³⁹ believe that the solution to the invalidity of buy-and-sell agreements is to be found in legislative amendments and they suggest the enactment of legislation to recognise and validate buy-and-sell agreements together with formality requirements similar to the Deeds Registries Act.³⁴⁰ This view is supportive of final comments made by Corbett CJ in the *McAlpine* case³⁴¹ that there should be a relaxation of the rule in respect of the prohibition against *pacta successoria* and that this should be considered by those responsible for law reform.

³³⁷ Hutchison D 1983: 239

³³⁸ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 275

³³⁹ Meyer E, Strydom S and Frank S 2016: 7

³⁴⁰ No. 47 of 1937

³⁴¹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 275

CONCLUSION

In the United States of America, the question regarding the validity of a buy-and-sell type agreement has been specifically considered and most courts found that this type of agreement is not of a testamentary nature and is therefore valid.³⁴² In South African law, it is clear from the cases of *Borman*³⁴³ and *McAlpine*³⁴⁴ that the Appellate Division, as it was then known, has confirmed that the principle of freedom of testation is established in South African Law and that a *pactum successorium* is invalid as it infringes on the principle of freedom of testation. The Supreme Court of Appeal has since confirmed that the right to freedom of testation is recognised as a right protected under the Constitution of the Republic of South Africa Act No. 108 of 1996.³⁴⁵ In a South African context, our law protects the right to freedom of testation and according to Hutchison, our law takes this principle further than any other Western legal system and further by far than Roman law.³⁴⁶ The majority judgment of Corbett CJ³⁴⁷ and particularly the minority judgment of Nienaber JA in the *McAlpine* case³⁴⁸ is as close as our courts have come to relaxing the rule in respect of the *pactum successorium* to recognise buy-and-sell type agreements which deal with partnership or co-ownership in order to regulate affairs in the event of the death of a party.

Where a buy-and-sell agreement is between natural persons in such a way that the sale is suspended pending fulfilment of a suspensive condition, namely the survival of the purchaser then vesting of rights occurs only after the death of the seller, and if the agreement does not allow for the seller to revoke the sale, then the agreement is a *pactum successorium*.³⁴⁹ If vesting did occur prior to death then the condition is resolutive and the agreement is not an invalid *pactum successorium* according to the vesting test.³⁵⁰

³⁴² Currie G 1950: 12

³⁴³ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A)

³⁴⁴ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

³⁴⁵ *Ex parte* BOE Trust Ltd NO & others [2010] JOL 26193 (WCC): 4

³⁴⁶ Hutchison D 1983: 239

³⁴⁷ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 275

³⁴⁸ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 279

³⁴⁹ Hutchison D 1983: 237 and see further *Van Aardt v Van Aardt* 2007 (1) SA 53 (E): 55

³⁵⁰ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 272

The use of a buy-and-sell agreement has several recognised benefits, including that it avoids the sale of business assets to raise capital,³⁵¹ it protects of the liquidity and cash flow of the business,³⁵² it prevents the encumbrance of capital resources and business assets,³⁵³ it avoids taking in new business partners³⁵⁴ which also avoids a conflict of interest between new and existing partners³⁵⁵ and generally it brings certainty in the event of the death, disability, or retirement of a partner. The need to recognise a buy-and-sell agreement is supported,³⁵⁶ which includes the Appellate Division in the *McAlpine* case.³⁵⁷

Taking into account the manner in which our courts have protected the right to freedom of testation³⁵⁸ in respect of an agreement which is a *pactum successorium*, and the recognition of this right as one that is protected under the Constitution of the Republic of South Africa Act No. 108 of 1996,³⁵⁹ there is not a reasonable prospect that our courts will deviate from the law as applied in the *Borman* and *McAlpine* cases.³⁶⁰ In conclusion, there is a need for the buy-and-sell agreement to be recognised as a valid and enforceable agreement and as suggested by Corbett CJ³⁶¹ and the suggestion by Meyer, Strydom and Frank³⁶² that the solution is to be found in legislative amendments to reform the law.

³⁵¹ Botha M 2017: Chapter 13.5

³⁵² Meyer E 2015: 238

³⁵³ Meyer E 2015: 238

³⁵⁴ Botha M 2017: Chapter 13.5

³⁵⁵ Botha M, Rossini L, Geach W, Goddall B and Du Preez L 2016: 1030

³⁵⁶ Hutchison D 1983: 225; Rautenbach C 1999: 374; and Meyer E, Strydom S and Frank S 2016: 9

³⁵⁷ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 275 & 279

³⁵⁸ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A) & *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

³⁵⁹ *Ex parte* BOE Trust Ltd NO & others [2010] JOL 26193 (WCC): 4

³⁶⁰ *Borman En De Vos, NNO en 'n ander v Potgietersrusse Tabakkorporasie BPK en 'n ander* 1976 (4) All SA 18 (A) & *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A)

³⁶¹ *McAlpine v McAlpine NO and another* [1997] 1 All SA 264 (A): 275

³⁶² Meyer E, Strydom S and Frank S 2016: 7

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