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CORPORATE & COMMERCIAL ALERT

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A suspensive condition in an agreement refers to a certain action which must take place in order for such agreement to come into effect.

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Do living annuities fall into a spouse's estate on divorce or death?

The nub of Mr Montanari's case was that the ownership of the capital value of the living annuities vested in the insurer, and that he was only entitled to annuity income.

Living annuities are very popular investment products. But how should they be dealt when a marriage ends?

The Supreme Court of Appeal (SCA) was called upon to answer this question in the case of *Montanari v Montanari* (1086/2018) [2020] ZASCA 48 (5 May 2020). The facts in the case were relatively simple: The parties were married out of community of property with the accrual system. Over a number of years, Mr Montanari had purchased three living annuities from a long-term insurer. Mr Montanari subsequently sued for divorce. In addition to a claim for spousal maintenance, he sought a declaratory order that the living annuities, which provided his monthly source of income, were not assets in his estate and were consequently not subject to Ms Montanari's accrual claim.

The nub of Mr Montanari's case was that the ownership of the capital value of the living annuities vested in the insurer, and that he was only entitled to annuity income.

In adjudicating the matter, the SCA started by assessing the precise nature of a living annuity investment in the light of relevant legislation, previous court cases, and the evidence of experts called by the parties during the trial.

The SCA found as follows: The capital under a living annuity belongs to the insurer and is not available to the annuitant. The member can direct in which investments the amount paid to the insurer will be placed. However, the annuitant's only contractual right is to be paid an annuity in an amount selected by him. There is no obligation on the insurer to repay the capital paid for the annuity; it is merely obliged to pay the agreed annuity. The annuitant can choose the level of income and the income frequency between a pre-defined minimum of 2,5 per cent and a maximum of 17,5 per cent level as prescribed by the Minister of Finance in the Government Gazette under the Income Tax Act 58 of 1962. The annuitant may change the income percentage on the anniversary date.

In summary, the SCA held that the capital of a living annuity did not fall within the annuitant's estate and, accordingly, found in favour of Mr Montanari on that issue.

Crucially, however, the enquiry did not end there. The SCA asked whether the findings above meant that Ms Montanari had no claim whatsoever in respect of Mr Montanari's living annuities. The SCA referred to what it considered to be an analogous case, *De Kock v Jacobson & another* 1999 (4) SA 346 (W). In that case the parties were married in community of property. One spouse had a right against a pension fund which had two components, namely, a right to a cash payment and a right to monthly payments by way of pension. The spouse in that case conceded that the right to a cash payment fell within the joint estate. As to the monthly pension, the court in the De Kock case concluded that there was no logical or legal reason why the cash component should not also form part of the of the community of property existing between the parties prior to the divorce.

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Do living annuities fall into a spouse's estate on divorce or death?*...continued*

If a spouse holds a living annuity at the time of divorce or death, the legal position is that, while the capital of the annuity is not an asset in his or her estate, the future annuity revenue stream is an asset in his or her estate, and should be valued.

In the *Montanari* case, the SCA aligned itself fully with that reasoning and saw no reason why it could not be extended to the case at hand. Mr Montanari had a clear right to the investment returns yielded

by his capital re-investment with the insurer, in the form of future annuity income. The court held that the right was an asset in Mr Montanari's estate for purposes of determining the accrual, and that the right could be valued.

The SCA accordingly ordered that Mr Montanari's right to future annuity payments in respect of his three living annuities was an asset in his estate for purposes of calculating the accrual in his estate. The court also ordered that the matter be remitted to the trial court for the admission of evidence on the value the right.

To sum up: If a spouse holds a living annuity at the time of divorce or death, the legal position is that, while the capital of the annuity is not an asset in his or her estate, the future annuity revenue stream is an asset in his or her estate, and should be valued.

As an aside, it would be interesting to know on what basis such a revenue stream would be valued. In the case of an ordinary (life) annuity the annuitant receives a fixed amount annually. However, in the case of a living annuity, the annuitant receives a variable amount annually, depending on the percentage (currently between 2,5 per cent and 17,5 per cent) which the annuitant annually elects to withdraw. A valuer would need to make quite a few assumptions. The actuary who gave evidence for Ms Montanari suggested that regard would be had to variables such as the investment return assumptions, the level of contributions, and the annuitant's mortality.

Ben Strauss

Registration of Major B-BBEE Transactions and implications of COVID-19

It is important to note that the definition does not provide that the transaction entered into must be for the specific purpose of obtaining or improving a company's scoring on the ownership element of its B-BBEE scorecard.

On 9 June 2017, the Department of Trade and Industry published a notice in the Government Gazette (DTI Notice) stating that all major broad-based black economic empowerment (B-BBEE) transactions with a transaction value equal to or exceeding R25 million should be registered with the B-BBEE Commission.

But what exactly is a *"Major B-BBEE Transaction"* and when must it be registered? Also, does COVID-19 have an impact on Major B-BBEE Transactions which have already been registered?

What is a *"Major B-BBEE Transaction"*?

A *"Major B-BBEE Transaction"* is defined as *"any transaction between entities/parties that results in Ownership Recognition in terms of Statement 100 [of the Codes of Good Practice, 2013]"*. Transactions in terms of Statement 103 (Equity Equivalent Programmes undertaken by Multinationals) are excluded from this definition.

It is important to note that the definition does not provide that the transaction entered into must be for the specific purpose of obtaining or improving a company's scoring on the ownership element of its B-BBEE scorecard. The definition is formulated widely enough so that transactions which are entered into by parties for reasons other than B-BBEE ownership recognition, but which nonetheless have this consequence, will be included in its scope.

This, for example, may occur where an acquiring company (in a share transaction) has a higher percentage B-BBEE ownership than the current shareholders of a measured entity and as a consequence of the share transaction (depending on the provisions thereof), the target company (measured entity) will be entitled to claim such higher percentage B-BBEE ownership on its B-BBEE scorecard.

Once it has been determined that the transaction in question results in ownership recognition under the B-BBEE Codes of Good Practice, 2013 (B-BBEE Codes), the DTI Notice requires that the value of the transaction must be equal to or exceed R25 million. Where the transaction is entitled to recognition in terms of Statement 102 of the B-BBEE Codes, the transaction value will be the value of the sale of the asset, business or equity instrument.

If the purpose of the transaction is to improve the B-BBEE ownership recognition of the measured entity (target), then, typically, the shares or assets of such measured entity are sold at a discounted price. Such a discount may have the consequence that although the value of the shares or assets being acquired is equal to or in excess of the R25 million threshold, the purchase consideration payable under the transaction, falls below such threshold. In such cases, where a discount is applied, parties must make use of the actual value of the shares or assets being acquired to determine whether the threshold for the registration of the transaction as a Major B-BBEE Transaction has been met or not.

When must a Major B-BBEE Transaction be registered?

The Regulations published in terms of the B-BBEE Act (B-BBEE Regulations) provide that a party that enters into a Major B-BBEE Transaction shall, within 15 days

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Registration of Major B-BBEE Transactions and implications of COVID-19*...continued*

It is our view that the term *"concluding of transaction"* means the date upon which the suspensive conditions are fulfilled and/or waived (as the case may be) as this is the date on which the transaction is actually concluded.

of concluding the transaction, submit the transaction for registration with the B-BBEE Commission. It must be noted that the time period indicates that registration must occur within 15 days meaning 15 calendar days and not 15 business days.

But when does the 15-day period start? The B-BBEE Regulations indicate that the calculation of the period commences upon the conclusion of the transaction, but no definition or explanation is provided as to when a transaction is considered as being concluded for B-BBEE purposes.

From our perspective, the agreement which gives rise to a transaction is usually subject to suspensive conditions, which have the consequence of suspending the implementation of such transaction. Therefore, up until such time as the suspensive conditions have been fulfilled and/or waived (as the case may be), the possibility exists that the transaction may fail.

As such it is our view that the term *"concluding of transaction"* means the date upon which the suspensive conditions are fulfilled and/or waived (as the case may be) as this is the date on which the transaction is actually concluded. However, it must be kept in mind that where the agreements provide for an effective date or a closing date which is beyond the date on which the suspensive conditions are fulfilled and/or waived (as the case may be), that it is the date of fulfilment or waiver of the suspensive conditions which is used as the date from which o calculate the time period in which documents are to be submitted to the B-BBEE Commission.

Registration process

The B-BBEE Regulations provide that upon receipt of the registration of a Major B-BBEE Transaction, the B-BBEE Commission must immediately acknowledge receipt of the registration in writing and within 10 days, issue a certificate of registration to the party that submitted the transaction if the requirements for registration have been met. From the B-BBEE Regulations it appears that the B-BBEE Commission has no discretion as to whether to issue a certificate of registration or not.

The B-BBEE Regulations further provide that it is only within a period of 90 days after the registration of the Major B-BBEE Transaction, that the B-BBEE Commission may assess the transaction to determine its compliance with the provisions of the B-BBEE Act. Once it has attended to such assessment (and presumably within the aforesaid 90-day period), the B-BBEE Commission will then communicate with the parties in respect of any concerns which it may have.

Although the B-BBEE Regulations provide for this 90-day period, it has been our experience that the B-BBEE Commission may provide its input even as far as a year after the Major B-BBEE Transaction has been concluded. This creates its own level of complexity where the B-BBEE Commission raises concerns which may only be resolved by amending certain of the transaction documentation or even revising the structure itself.

Registration of Major B-BBEE Transactions and implications of COVID-19*...continued*

Clients will need to take into consideration this notification requirement when making any changes to Major B-BBEE Transactions which were registered in the past.

Implications of COVID-19

It must be kept in mind that the B-BBEE Regulations not only address the registration of a Major B-BBEE Transaction, but also any amendments thereto. The B-BBEE Regulations specifically provide that the B-BBEE Commission must be notified of any material change to the broad-based black economic empowerment elements of the entity occurring after the registration of the Major B-BBEE Transaction, provided that such material change meets the registration threshold requirement of being a transaction value equal to or exceeding R25 million.

It is important to note that although a Major B-BBEE Transaction relates to those transactions resulting in ownership recognition, the requirement to notify the B-BBEE Commission in respect of any major change relates to all the elements on the relevant measured entity's scorecard. Accordingly, where there is a change, for example, in the Skills Development element which meets the abovementioned threshold, the measured entity will be required to notify the B-BBEE Commission of such material change.

With the occurrence of the COVID-19 epidemic and the lockdown of South Africa, many companies will be considering ways in which to restructure their organisations in order to reduce costs (including retrenching employees). These measures (as well as others) may have an impact on Major B-BBEE Transactions which have been previously registered with the B-BBEE Commission. For example, if a company undergoes a mass retrenchment of its staff complement as a result of COVID-19, this may have a negative impact on its Skills Development element, which (if it meets the relevant threshold) will need to be notified to the B-BBEE Commission.

The B-BBEE Regulations do not provide any detail as to the consequences of such notification to the B-BBEE Commission or whether it is merely a means for the B-BBEE Commission to update its records regarding Major B-BBEE Transactions. The latter seems unlikely as the notification is not only in respect of changes to the Ownership element of the measured entity's B-BBEE scorecard, but any other element where a major change (provided the threshold has been met) may occur. In addition, no indication is provided as to what the consequences are if the B-BBEE Commission is not notified of such major changes. However, it is our experience that it is better to comply with the requirements of the B-BBEE legislation in a timely manner in order to prevent lengthy consultation processes with the B-BBEE Commission in respect of non-compliance.

Clients will need to take into consideration this notification requirement when making any changes to Major B-BBEE Transactions which were registered in the past.

We are happy to assist with any queries which our clients may have with regards to the registering of Major B-BBEE Transactions as well as any material changes thereto.

Kendall Keanly

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The devil is in the detail: The battle between ordinary terms and suspensive conditions

The SCA was tasked with determining whether a provision set out in a settlement agreement constituted a suspensive condition which, on fulfilment, would give effect to an obligation by the appellants to make payment to the respondent, or whether the provision was simply a description of the method of payment agreed upon by the parties.

A suspensive condition in an agreement refers to a certain action which must take place in order for such agreement to come into effect. A common example of a suspensive condition in a commercial agreement would be the requirement for the parties to obtain all requisite approvals from the applicable regulatory authorities for the implementation of the transaction forming the subject matter of the agreement.

Drawing the distinction between the ordinary terms regulating an agreement and a suspensive condition, is a challenge that was faced by the litigants in the recent judgment of *Lomon Marè and Others v Trudie Marè*. The Supreme Court of Appeal (SCA) was tasked with determining whether a provision set out in a settlement agreement constituted a suspensive condition which, on fulfilment, would give effect to an obligation by the appellants to make payment to the respondent, or whether the provision was simply a description of the method of payment agreed upon by the parties.

The appellants and the respondent had entered into a settlement agreement, in terms of which, amongst other things, the appellants would pay to the respondent an amount of R5.5 million for the full and final settlement of any claims held by the respondent against the appellants. The agreement stipulated that payment of the settlement amount would be made upon the sale, by the appellants, of various game (consisting of sable antelope and buffalo) to a third party purchaser, which third party purchaser would then make payment of the settlement amount to the respondent on behalf of the appellants. A breakdown in price negotiations between the appellants and the third party purchaser resulted in the cancellation of the proposed sale and the appellants alleged that such cancellation rendered performance in terms of the settlement agreement (i.e. payment of the R5.5 million to the respondent) impossible. It was on the back of this alleged impossibility that the appellants argued before the SCA, that their obligation to make payment in terms of the settlement agreement had become notional.

Evidently, the distinction between an ordinary term and a suspensive condition proved critical to ascertaining whether the obligation to pay in terms of the settlement agreement would be obviated by non-compliance with the provision in question. In reaching its decision, the SCA embarked on the interpretation of the settlement agreement, guided predominantly by the context under which the agreement was concluded, as well as its purpose. At the outset, the SCA reiterated the established law of contract principle that, where a party to a bilateral agreement commissions a third party to perform its obligations in terms of said agreement, the commissioning party remains liable to perform if the third party fails to do so.

The devil is in the detail: The battle between ordinary terms and suspensive conditions...*continued*

The decision of the SCA signifies the importance of clearly defined terms and conditions in agreements.

Following an assessment of the facts and relevant case law, the SCA found that it could never have been the intention of the parties for the obligation to make payment to be qualified by the sale of the game, nor would such reasoning be applied by an "*officious bystander*" at the conclusion of the contract. The SCA held that the obligation to pay, at all material times, existed independently of the method of payment. It therefore follows that when the prescribed method of payment became "*impossible*", the obligation to pay would inevitably survive it.

The SCA held that, at best for the appellants, the clause relating to payment was ambiguous and warranted interpretation equitable to both parties. It found that an interpretation in favour of the appellants would result in the respondent walking away empty-handed which, within the context of the agreement and the settlement provided for therein, would be most inequitable to the respondent. Accordingly, the SCA ultimately found in favour of the respondent and the appellants remained obliged to make payment of the settlement amount in terms of the agreement.

The decision of the SCA signifies the importance of clearly defined terms and conditions in agreements. Parties to agreements are advised to effectively and clearly communicate any and all suspensive conditions (i.e. as not being part of the terms and conditions of the agreement but rather a step or action which needs to take place before such terms and conditions come into effect), so as to avoid the unfavourable interpretation of their agreements in the unfortunate event of litigation.

Roux van der Merwe, Murendeni Mashige and Lerato Malope

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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