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CORPORATE & COMMERCIAL ALERT

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The nuance and pitfalls associated with conditions precedent

It is routine for agreements to contain conditions precedent (CPs) that suspend the validity and enforceability of certain provisions pending the occurrence of future uncertain events. The Supreme Court of Appeal provided further insight as to the interpretation and application of CPs in the recent judgment of *Chester v Snowy Owl Properties and Another* [2021] ZASCA 30.



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The nuance and pitfalls associated with conditions precedent

To most, the conclusion reached by the SCA in the *Chester* Case is an obvious one. This being said, the judgment (against the background of the protracted and, presumably, expensive legal battle) acts as a necessary reminder about the nuance and potential pitfalls associated with CPs.

It is routine for agreements to contain conditions precedent (CPs) that suspend the validity and enforceability of certain provisions pending the occurrence of future uncertain events. If the future uncertain events do not occur, the provisions in question never come into operation.

Typically, CPs will only suspend the legal effect of key commercial provisions of an agreement while the balance of the agreement will remain in full force and effect from the signature date.

The Supreme Court of Appeal (SCA) provided further insight as to the interpretation and application of CPs in the recent judgment of *Chester v Snowy Owl Properties and Another* [2021] ZASCA 30 (Chester Case).

The Chester Case concerned an appeal in relation to an agreement for the sale of immovable property (Sale Agreement) under which the appellant sought, among other things, an order compelling the transfer of immovable property.

In the court a quo, the first respondent asserted that clause 22.1 of the Sale Agreement, which contains the words "*[t]he whole of this agreement is subject to the following conditions precedent being met prior to the transfer date...*", constituted a CP that became impossible to fulfil and consequently the Sale Agreement was void, thereby releasing the first respondent from all concomitant obligations.

The appellant, advancing circumstantial evidence, opposed the first respondent's assertion but nonetheless pleaded in the alternative that if clause 22.1 of the Sale Agreement did constitute a CP, then the same was either:

- for the sole benefit of the appellant and was thus capable of waiver by them; or
- deemed to be fulfilled in accordance with the doctrine of functional fulfilment.

The SCA concurred with the court a quo in finding that on a straightforward interpretation of clause 22.1 of the Sale Agreement (read in context) the logical conclusion was that, absent fulfilment, there could be no valid and enforceable Sale Agreement.

The SCA held that to interpret the words that the Sale Agreement was "*subject to*" the CPs other than as contemplated by the parties, would give the clause a construction which was not commercially sensible.

To most, the conclusion reached by the SCA in the *Chester* Case is an obvious one. This being said, the judgment (against the background of the protracted and, presumably, expensive legal battle) acts as a necessary reminder about the nuance and potential pitfalls associated with CPs.

The nuance and pitfalls associated with conditions precedent

...continued

The Chester Case demonstrates that courts are inclined to adopt a sceptical view about circumstantial evidence advanced to contradict the literal interpretation of agreed and documented contractual provisions.

The SCA alluded to ubiquitous factors that should be considered when concluding an agreement subject to CPs, namely:

- an agreement should clearly state in whose favour CPs exist so as to create certainty about which party has the right to extend or waive the fulfilment thereof;
- the doctrine of fictional fulfilment is only enlivened when a party to an agreement, with the deliberate intention to repudiate, conducts themselves in a manner designed to prevent the fulfilment of a CP. Only in such circumstances will the doctrine provide the innocent party with an equitable remedy, whereby the CP is deemed to be fulfilled and the other person (who prevented its fulfilment) is bound by the relevant obligations;
- the common law *parole evidence* rule continues to exist as a part of our law. If parties intend for a document to constitute the complete record of an agreement between the parties, then (generally) extrinsic evidence should not be permitted to rebut the same; and
- *caveat subscriptor* (the rule that a signatory to a document signifies their assent to the content thereof) applies as a general principle in our law and a party who alleges a position contrary to the ordinary meaning and effect of the content of a document that they have signed, bears the onus of proving the same.

The Chester Case demonstrates that courts are inclined to adopt a sceptical view about circumstantial evidence advanced to contradict the literal interpretation of agreed and documented contractual provisions.

Darryl Jago and Nicola Stipinovich

2020 CONSISTENT LEADERS IN M&A LEGAL DEALMAKERS

2020

1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd by M&A Deal Value.
Catalyst Private Equity Deal of the Year.

2019

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

2018

1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

DealMakers

2017

2nd by M&A Deal Value.
1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
1st by General Corporate Finance Deal Value.
2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
2nd by BEE Deal Flow and Deal Value.



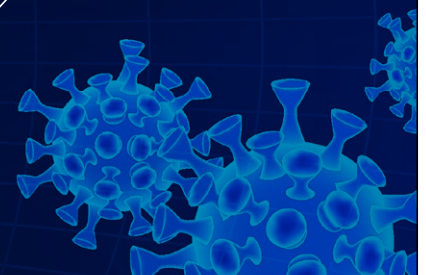
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- Ian Hayes** is ranked in the Hall of Fame in Corporate & Commercial and M&A in THE LEGAL 500 EMEA 2021.
- David Pinnock** is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Willem Jacobs** is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Justine Krige** is ranked as a Next Generation Partner in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Johan Latsky** is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Peter Hesseling** is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Rachel Kelly** is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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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