

# Corporate & Commercial

ALERT | 28 February 2024



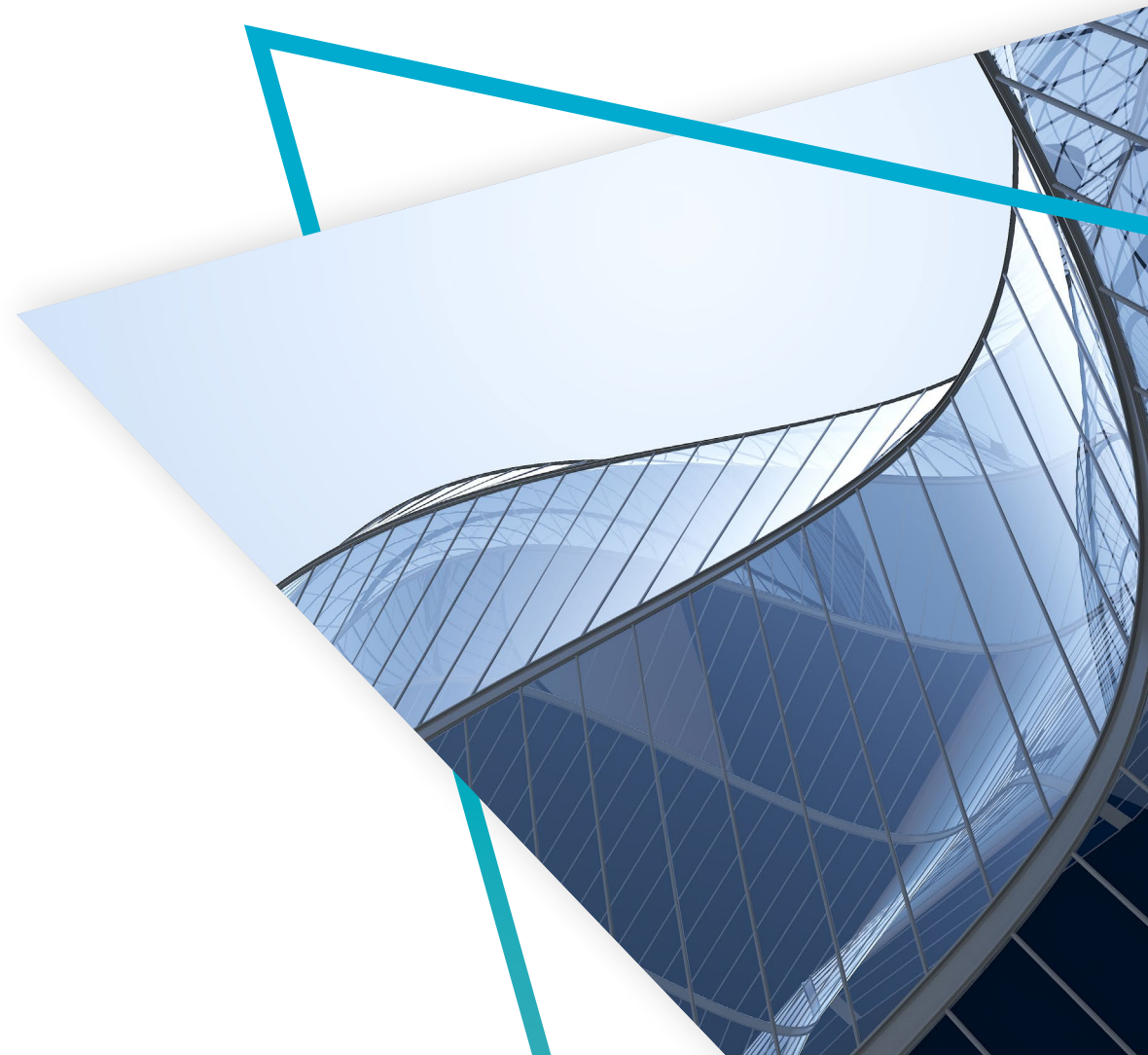
## In this issue

### SOUTH AFRICA

- To survive, or not to survive? Some conditions precedent pitfalls to look out for



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## To survive, or not to survive? Some conditions precedent pitfalls to look out for

One of the important aspects of written agreements being subject to the fulfilment or waiver of certain agreed conditions precedent, or suspensive conditions, (CPs) before the substantive provisions of the agreement become of force and effect, is the so-called “*surviving provisions/clauses*” (also known as “*immediately effective provisions/clauses*”). In the ordinary course, the crux of the transaction contemplated in such an agreement and the clauses relating to it are suspended from the signature date until all of the CPs are fulfilled or waived (if permissible and applicable) by an agreed date or dates (fulfilment date). If all of the CPs are not fulfilled or waived by the fulfilment date, the agreement effectively falls away and will be of no force or effect. However, it should be borne in mind that the parties to an agreement with CPs may very well intend for certain of the clauses in the agreement to come into force and effect from the signature date of the agreement and to survive the falling away of the substantive provisions due to non-fulfilment of the CPs.

Such surviving provisions usually include the actual CPs clause, where parties have certain obligations to procure fulfilment of the CPs and which also provides for the scenario where all of the CPs are not timeously fulfilled or waived. Surviving provisions also include certain

fundamental protections for the respective parties, such as general authority and capacity warranties, domicile provisions, breach provisions, general boiler type provisions (for example, costs, signing of the agreement in counterparts, severability, governing law and the like), which protections the parties wish to retain and survive the substantive provisions falling away.

One of the considerations often overlooked in this scenario is the inclusion in the surviving provisions of the dispute resolution clause in the agreement, which will, in most commercial type contracts (such as a sale agreement), provide for any dispute pertaining to the surviving provisions to be resolved in terms of arbitration as opposed to the courts, such as in the event of a dispute regarding whether or not a particular CP has in fact been fulfilled or whether or not a party complied with its obligations to procure fulfilment of a particular CP within its sole control. Not only should the dispute resolution clause be included in the surviving provisions, but the actual wording of the clause should make it clear that the dispute resolution clause also applies to any dispute or difference as to the validity or otherwise of **the agreement itself**, or as to the enforceability of the agreement – i.e. it should also apply in the case of any dispute regarding the validity or otherwise of the surviving provisions and their enforceability.

### Separate arbitration agreements

Over a decade ago this issue reared its head in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] (5) SA 1 (SCA), and another good example of the importance of the above considerations is the recent Supreme Court of Appeal (SCA) judgment in

## To survive, or not to survive? Some conditions precedent pitfalls to look out for

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*Remo Ventures & Others v Cecil van Zyl and Others* (Case no 1262/2022) [2024] ZASCA 09 (26 January 2024). In this matter, the SCA set aside an order of the High Court and replaced it with one nullifying a separate arbitration agreement entered into, including its proceedings, as well as the appointment of the arbitrator in terms of the separate arbitration agreement.

On 3 April 2017, the appellants (Remo Ventures (Pty) Ltd, Ekuzeni Supplies (Pty) Ltd and Nthabiseng Segoale – being the purchasers), and the second and third respondents (Susan Leonora Meintjies and Cecile Van Zyl – being the sellers) concluded a written sale of shares agreement (sale agreement) in terms of which the agreed purchase price of R50 million for the subject matter shares was payable in tranches, with the first tranche of R10 million being paid on 16 March 2017. The second tranche of R20 million was payable on the effective date, which was described in the sale of shares agreement as 21 June 2017. However, on 20 July 2017, after the agreement had already lapsed due to the non-fulfilment of certain of the CPs, the parties to the sale agreement concluded a so-called 'date agreement' in terms of which the date for payment of the second tranche was extended to 26 July 2017. Payment of the second tranche was effected on 31 August 2017, and accepted by the sellers, with the transfer of the shares being effected on the same day.


The sale agreement was subject to a number of CPs, including that one of the purchasers (Segoale) was to cede a life insurance policy to the sellers to the value of R15 million on or before the effective date of 21 June 2017. Clause 3.4 of the sale agreement provided that if any of

the CPs were not timeously fulfilled and not waived, then the **whole** of the sale agreement would be of no force or effect (i.e. the sale of shares agreement did not provide for any surviving provisions). Clause 22 of the sale agreement, however, did provide for dispute resolution proceedings through arbitration under the rules of the Arbitration Foundation of South Africa.

By 21 June 2021, Segoale did not fulfil his obligations to pay the remainder of the purchase price and to cede the life insurance policy to the sellers in terms of the sale agreement. As a result of this breach, Clause 3.4 was triggered and the sale agreement became void **in its entirety**. However, the parties disregarded this non-compliance and carried on as if the sale agreement was still valid. On 31 July 2018, the sellers proceeded to demand payment of the final purchase price tranche. On 20 February 2019, the parties concluded a separate arbitration agreement which was predicated and dependent upon the existence and validity of the sale agreement. The parties entered into privately conducted and administered arbitration proceedings and appointed the third respondent (Judge Neels Claasen, a retired judge of the Gauteng Local Division of the High Court) as their own arbitrator. When the matter proceeded to the High Court, the purchasers pleaded that the sale agreement was a nullity due to the fact that all of the CPs were not fulfilled within their stated timeframes. As such, the arbitration agreement was also a nullity which, in turn, also made

## To survive, or not to survive? Some conditions precedent pitfalls to look out for

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**Corporate, Commercial/M&A 2023 Rankings**

**Corporate & Commercial practice is ranked in Tier 1.**

**CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.**

**Leading Individuals:**  
Willem Jacobs | David Pinnock

**Recommended Lawyers:**  
Vivien Chaplin | Peter Hesseling  
Sammy Ndolo | David Thompson  
Roxanna Valayathum | Njeri Wagacha

**Hall of Fame:**  
Ian Hayes

the decision of the arbitrator a nullity. The respondents' defence was that the arbitration agreement was independent and not related to the sale agreement.

### Before the SCA

The issue before the SCA was whether, despite the non-fulfilment of all of the CPs, the sale agreement could be interpreted in such a manner as to allow for the existence of the separate arbitration agreement. The SCA found that the arbitration agreement was void as the non-fulfilment of the CPs rendered the sale agreement to be non-existent in its entirety. As such, the respondents could not rely on any of the provisions that were contained in the lapsed sale agreement – this was the express consequence of non-fulfilment of the CPs in terms of the sale agreement. Because the sale agreement did not survive the effective date by virtue of the non-fulfilment of all of the CPs, the arbitration agreement was a nullity as it referred to another agreement that was non-existent. There was also mooted argument around whether the separate arbitration agreement tacitly “reinstated” the sale agreement, but this also failed as this would contradict the express provision in the sale agreement that it lapsed

**in its entirety** upon non-fulfilment of CPs – one cannot tacitly infer something which goes against an express clause in a contract.

Accordingly, the SCA upheld the appeal and replaced the order of the High Court with one nullifying the arbitration agreement, including its proceedings, as well as the appointment of the arbitrator in terms of the arbitration contract.

This judgment serves to highlight the importance of giving careful consideration to the requirement, or not, of appropriate surviving provisions where an agreement is made subject to the fulfilment or waiver of CPs and, should the parties to the agreement prefer to go the arbitration route as opposed to the courts in the event of a dispute, the inclusion of an appropriate dispute resolution clause (mediation, arbitration, or both) as a surviving provision and, most importantly, to make it clear in such clause that it also applies to any dispute or difference as to the validity or otherwise, or as to the enforceability, of **the agreement itself**.

**Roux van der Merwe and Yaniv Kleitman**

## CONSISTENTLY EFFECTIVE

### 2023

1<sup>st</sup> by M&A Listed Deal Flow.  
2<sup>nd</sup> by M&A Unlisted Deal Flow.  
by M&A Unlisted Deal Value.  
by M&A Listed & Unlisted BEE Deal Flow.  
by General Corporate Finance Deal Value.  
4<sup>th</sup> by General Corporate Finance Deal Flow.

### 2022

1<sup>st</sup> by M&A Listed Deal Flow.  
3<sup>rd</sup> by M&A Listed Deal Value,  
M&A Unlisted Deal Value,  
M&A Unlisted Deal Flow  
and General Corporate  
Finance Deal Value.

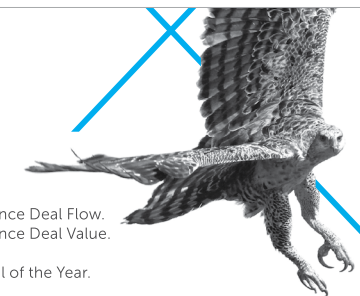
### 2021

1<sup>st</sup> by M&A Deal Flow.  
2<sup>nd</sup> by General Corporate  
Finance Deal Flow.  
2<sup>nd</sup> by BEE Deal Value.  
3<sup>rd</sup> by General Corporate  
Finance Deal Flow.  
3<sup>rd</sup> by BEE Deal Flow.  
4<sup>th</sup> by M&A Deal Value.

## DealMakers

### 2020

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





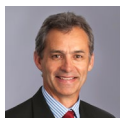
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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