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For her contribution entitled

Financial Planner acting as Trustee-
Is there a Conflict of Interest?

In reaching their decision, the judges have taken into account the technical correctness, how informative the article is, learning potential for the reader, method and effectiveness of transfer of relevant information, originality, practical applicability and potential for marketing opportunities.

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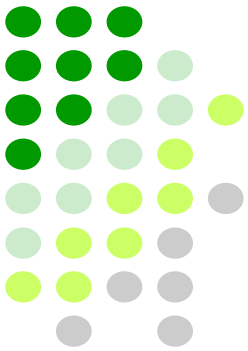

General

Giving Priority to your Duty of Care: Maintenance Matters Plan Responsibly

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Introduction

Both common law and legislation are clear that there is a duty of support towards children by their parents. This duty of support prescribes that parents will support their children when they are unable to do so themselves.

Such parents need not be in a permanent relationship with each other for such duty to be recognised.

While common law bases this duty of care on family relationships which involve responsibilities and notions of piety and affection, legislation on the other hand, outlined this duty of care in monetary terms and adds that this duty of care includes, but is not limited to, financial contributions towards the care, upbringing, and development of the child.

While love and affection are still extremely important, a child will not survive on love and care alone and excuses do not pay the bills. This article shall unpack the child's right to maintenance, and the value, importance, and impact of proper planning for this responsibility.

Being a parent comes with great responsibilities

In an ideal world, both parents contribute to maintenance regardless of whether that child was born in or out of wedlock, having a shared vision for their child's future and being prepared to work as a team.

The reality though, paints a very different picture. Maintenance disputes usually occur in relationships that have materially broken down and therefore all the more difficult to resolve. According to a Moneyweb article[1] 17.6% of South African marriages end in divorce, which means that approximately 1 in 5 marriages are not sustained. These statistics do not take into account parents that have never married, having committed to a domestic partnership or those children whose parents did not have a long-term relationship. Hence, many parents exercise their parental responsibilities separately.

[1] www. Moneyweb , April 2021 Changing marriage patterns and the impact on financial planning , Alwin Smith.

The birth of a child immediately creates an obligation to maintain that child by both parents as a shared responsibility, such financial responsibility is shared pro-rata and dependent on the financial stability and means available to a parent.[2]

Rules of Engagement

This notion of support is entrenched in various pieces of legislation, seeking to ensure that in all aspects of marriage, divorce, or partnership, the rights of a child are paramount.

- ***S15(3)(a) of the Maintenance Act 99 of 1998 , hereinafter referred to as The Maintenance Act, states:***

  15(3)(a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration–

  i) that the duty of supporting a child is an obligation which the parents have incurred jointly;

  ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and

  iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.

This section concludes the legitimacy of a child is not a consideration in the obligation to pay maintenance.

Case law has further qualified that this duty of care continues until a child is self-supporting[3]. This implies that the duty to support extends beyond the age of majority in South Africa. This position was confirmed by the Supreme Court of Appeal in *Bursay v Bursay*[4]

The Supreme Court of Appeal, in Bursay vs Bursay had to deliberate on the validity of a maintenance order for a child, who had attained majority.

[2] https://www.mondaq.com/southafrica/divorce/1206308/concerns-regarding-child-maintenance-in-divorce-and-post-divorce-proceedings
[3] Kemp v Kemp 1958 (3) SA 736 (D & CLD)
[4] 1999 (3) SA 33 (SCA)

On their divorce Mr. and Mrs. Bursay had entered into a consent arrangement in respect of their children and the maintenance in respect of such children, at the time of the divorce the children were minors and dependants. The Bursay's eldest son was a student at university.

Mrs. Bursay had custody of the children while Mr. Bursay as the non-custodial parent agreed to pay maintenance for the minor children until they became self-supporting.

Mr. Bursay stopped paying maintenance when his son John attained majority which lead Mrs. Bursay to make application to the courts for arrear maintenance.

The lower court held that Mr. Bursay had no further obligation to pay maintenance as John had attained majority, however on appeal, a full bench, the court held:

"The correct interpretation of the relevant clause in the consent paper was that Mr. Bursay had undertaken to pay maintenance for John until he was self-supporting even if that date was reached after majority. The Court examined the case law in detail and concluded that there was no reason why that obligation should not continue to be enforceable by the Appellant after John's majority."[5]

The Children's Act of 2005 S18(2)(d) confirms that the parental responsibilities and rights that a person may have in respect of a child, include the responsibility and right to contribute to the maintenance of the child.

Parental plans – a co-parenting solution

Section 33(1) of the Children's Act of 2005 provides that: "The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child." duly supported by divorce procedure

Parenting plans[6] are used to regulate access and maintenance. A co-parenting solution that is endorsed, especially in the case of minor children by the office of the Family Advocate, and negotiated , where the parents have an acrimonious relationship by a social worker , psychologist or mediator[7].

[5] Page 582 of (1997) 4 ALL SA 580(E)
[6] A parenting plan indicates the framework within which parents agree to raise their children.
[7] www.divorcelaws.co.za

The adult child, that is not economically independent will also have a right to such maintenance, the nature and extent of such maintenance however have been the topic of many an argument especially in South African court rooms.

In *Gliksman v Talekinsky* [1955] 4 All SA 306. (W) at 309, the court held that:

'A child who is a major and who has gone out into the world and established his or her own home and mode of life is not entitled to come back to the parent at any time in life and say, "I am your child and when I lived with you as a minor I lived in a rich home where I had everything provided, and in as much as you are still rich and able to support me on the basis, the legal position is that what you must pay me must be decided in accordance with your station in life, your standard of living and your means".

- ***The Divorce Act S12*** also ensures that the rights of minor children impacted by separation are given priority in terms of maintenance and welfare and further entrenched by the mediation in The Certain Divorce Matters Act 24 of 1987[8].

It is standard practice for maintenance to be evaluated and quantified, establishing the child's share of the common expenses in the household by a pro-rata calculation of one-part per child and two-parts per adult or older child[9]. The table below provides an illustration of the calculation of common expenses in the case where there is a parent and three children in the household. In this example, each child is allocated 20 per cent of the total expense shared by all members of the household[10]. Note only once the child's reasonable monthly needs have been determined will one be able to establish the contribution that each parent is required to make to meet those needs.

A child's exclusive, reasonable monthly needs would include but not limited to:

- School fees
- Uniform costs
- Clothing
- Extra-curricular activities

[8] See a full explanation under the heading "Consequence of divorce" infra
[9] Concerns Regarding Child Maintenance In Divorce And Post-divorce Proceedings, Natasha Tryens , June 2022
[10] Ibid.

(parent's gross income)		(child's needs)
(total gross income of both parents)	X	1

= Rxxx (parent's contribution)

The household standard of living and the child's needs will be a considered in the determining maintenance. While not a closed list, these financial contributions extend to contributions to food, accommodation, and medical costs.

The child's share of these costs is usually a pro- rata share and can be illustrated as follows in a household of a parent plus three children

Rent	R5 000.00
The rent allocation to the parent would be ¼	R 1 250.00
The rent allocation for the 3 children would be	R 3 750.00

The parents have a reciprocal duty to support their children and hence the above formula would be used to determine the pro-rata share of support for each parent as follows assuming that the custodial parent earns R20 000.00 per month and the non – custodial parent earns R50 000.00. In claiming maintenance from the non-custodial parent:

(parent's gross income)		(child's needs)
(total gross income of both parents)	X	1

R50 000		R 3 750.00
R80 000.00	X	1

= R 2 343.75 (non-custodial parents contribution to the children's rental requirements)

If a divorced parent should move on and remarry the responsibility of maintaining two households can weigh heavy. While difficult, maintenance must be a priority budgetary item and part of one's financial plan, at least while the children are still dependent, failing which one will find oneself with added legal costs, or worse yet, facing civil and or criminal proceedings.

Contributions quantified in monetary terms and recorded in a court order is not the only way maintenance and a duty of care are satisfied. The softer contributions to the maintenance and the obligation of a duty of care should not be given lesser importance.

The duty of care by the resident parent of everyday care, medical support and invaluable family time and interaction is unmeasurable or unquantifiable. Alternatively, if a non-custodial parent cannot pay maintenance in monetary terms, because of economic circumstances, but offers services in lieu of maintenance, will that that be an adequate set – off?

As an illustration, if an unemployed father of a child decided that, while he was unemployed and therefor unable to pay maintenance in monetary terms, he would ensure that he physically looked after the child and fulfil the duties of a full-time nanny or Au-pair, would that suffice?

Our current legislation unfortunately is not so accommodating which in turn has led to many a court case, both civil and criminal for the default in maintenance payments.

The current discussion paper 157 on the review of The Maintenance Act 99 of 1998 [11]is trying to consider reforms to the current maintenance obligations and will hopefully see positive reforms that protects the most vulnerable in South Africa, our children.

Often contribution to care cannot be measured in monetary terms alone. Usually, the parent who cares for the child on a daily basis indirectly contributes towards maintenance because of the time they spend together. Notwithstanding this, both parents still have a financial obligation to pay maintenance in accordance with their means, income and expenditures.

We should also take cognisance of the fact that maintenance may need to be adjusted regularly, depending on the changing and specific attributes of the child or the financial position of the parents.

The discussion paper 157 has placed mediation in maintenance matter as an agenda item for reforms to the current approach.

[11] Discussion paper 157 Maintenance Act 99 of 98 review

The domestic partner or not? The position of an unmarried parent

The duty to support your child is not linked to marriage. The 'duty of supporting a child is a duty common to both parents, according to their respective means, and it makes no difference whether such child is born in or out of wedlock' [12]

In terms of section 21 of the Children's Act 38 of 2005:

"A father qualifies for automatic Parental Responsibilities and Rights without the necessity of first having to approach the High Court for an Order in the following instances

- if he lived with the child's mother in a permanent life partnership at the time of the child's birth.
- Regardless of whether he lived with the child's mother in a permanent life partnership, he nonetheless still acquires full parental responsibilities and rights if he complies with the requirements set out in Section 21(1)(b).
- *In terms of Section 21(1)(b):*

  (a) he must be identified or consent to be identified as the child's father;

  (b) contributed or have attempted in good faith to contribute towards the child's upbringing; and

  (c) he must have contributed or attempted to contribute in good faith towards the child's maintenance for a reasonable period of time."[13]

This section is significant in that it ensured automatic parental responsibilities to unmarried fathers[14]

The consequence of Divorce

The Mediation in Certain Divorce Matters Act 24 of 1987, which came into force in 1990

- provides for mediation in certain divorce proceedings, and in certain applications arising from such proceedings in which the minor or dependent children of the marriage are involved, in order to safeguard the interests of such children; and
- amended the Divorce Act, in order to provide for the consideration by a court in certain circumstances of the report and recommendations of a Family Advocate before granting a

[12] *Lamb v Sack* 1974 (2) SA 670 (T) at 671F
[13] S 21 of the Children's Act 38 of 2005
[14] It is not the intention to be bias against males , the south African reality is that most mothers are the primary caregivers and often in a cultural context , a father does not take on parental responsibilities until certain customs have been satisfied, for example , the paying of damages to the mothers family when after she becomes pregnant out of wedlock. See S21 (4) of the Children's Act 38 of 2005

decree of divorce or other relief and to make the provisions of section 12 (1) and (2) of the said Act applies to an enquiry instituted in terms of this Act;[15]

Maintenance is a vital aspect which needs to be settled before a divorce is finally granted so much so that in a long drawn out acrimonious divorce, interim measures may be put in place pending the outcome of the divorce to ensure that the best interests of the child are considered.[16] If child maintenance is not dealt with in a divorce order, the custodial parent may approach the maintenance court for relief. Spousal maintenance, on the other hand is different, in that it is a general principle that neither spouse has a right to spousal maintenance at divorce. It is Section 7(2) of the Divorce Act that gives the court a discretion to make such an order based on the evidence before the court.[17]

Despite the various frameworks to ensure that the rights of children are protected, in certain circumstances, children still found themselves in a system that left them out.

The case of Faro and Esau[18], highlighted that the spouses in a Muslim marriage at divorce, do not automatically have any remedies available to them in respect of maintenance when it comes to themselves and their children. This is so as courts do not have automatic supervision of children in Muslim and certain other minority marriages, as those marriages are not recognised. As a result, these children and their custodial parent lack the benefit of a family advocates report and all the rights that is conferred on children in a recognised marriage. Disputes then will not be entertained in a neutral fair forum leading to the inability to have dispute resolved in a fair public hearing[19], immediately when a divorce occurs (S34 of the Constitution of South Africa). The custodian parent would then have to make application to a maintenance court and begin the maintenance procedure akin to that of parents that were never married. A procedure that is time consuming, hence postponing the payment of maintenance until such order of court is granted.

[15] S 6, S 7 and S 8 of the Mediation in certain Divorce Matters act 24 of 1987
[16] Rule 43 of the uniform court rule and S58of the magistrates court Act provides that litigants in divorce proceeding the opportunity to approach the court for an order granting them interim relief. Maintenance being one such aspect where interim relief may be requested.
[17] Act 70 of 1979
[18] *President of the Republic of South Africa v Womens Legal Trust Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau (case no 612/19) (2020) ZASCA 177*

[19] s34 of the constitution of South Africa

Our Constitution takes the right of a child further in S28[20] where the best interests of a child are entrenched as being of paramount importance in every matter concerning that child. This duty speaks first to a parent, however the Constitutional Court in Government of the Republic of South Africa v Grootboom and others 2001(1)SA 46 CC ruled that the state must provide the legal and administrative infrastructure necessary to ensure that children are given the protection as entrenched in S28 of the Constitution.

The constitutional court only recently confirmed that the non-recognition of Muslim marriages was a source of great hardship. There was no justification offered as to why children born of Muslim marriages should not enjoy the automatic oversight of a court, as set out in the Divorce Act, in relation to their care and maintenance.[21] The constitutional court has given the legislature twenty-four months to amend legislation giving Muslim marriages full recognition and to recognise the consequences arising from such legislation.[22]

The responsibilities to maintenance do not disappear. In the case of ***S A v J A and Others (7531/2020) [2020] ZAWCHC 155 (10 November 2020).*** *When a maintenance order is granted by divorce or by the powers of a maintenance court such order is considered a judgment debt, which debt, if not satisfied, will remain enforceable for a period of 30 years*[23]*. The debt collection procedure will be available to the custodial parent that obtained such an order*

The Impact of death

The death of a parent does not absolve a parent from the payment of maintenance. A valid order for maintenance will be a valid claim against the estate and a child who was supported by the deceased parent will have a valid claim against the deceased estate. Such a claim, with the exception of debt owed by the estate to creditors, is considered a preferred claim to other beneficiary's inheritances.[24]This means the assets in a deceased estate will only be capable of distribution once a maintenance claim has been satisfied.

[20] Section 28 of the Bill of Rights in our Constitution states that "every child has the right to basic nutrition, shelter, health care and social services, as well as the right to be protected from maltreatment, neglect, abuse or degradation".
[21] *President of the Republic of South Africa v Womens Legal Trust Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau (case no 612/19) (2020) ZASCA 177*
[22] www.mondaq.com/southafrica/divorce/1217932/sa-concourt-recognition-of-muslim-marriage-a-victory-for-women-and-children39s-rights
[23] The Prescription Act 68 of 1968
[24] https://www.moneyweb.co.za/in-depth/fisa/your-maintenance-obligations-dont-die-with-you/

Practically this can significantly delay the administration of the estate and more significantly if the maintenance claim is substantial, it could render your estate insolvent, or your named heirs may only receive a fraction of their actual inheritance.

In essence maintenance orders or claims constitute creditors of the estate and will only be settled in full once the child is self-supporting or the ex-spouse remarries or passes away. Hence, the distribution of assets to your legatees is delayed.

A suggested estate planning mechanism is the use of a testamentary trust. A lump sum cash bequest (actuarially calculated as the present value of the future obligations) is made to a testamentary trust with your children as beneficiaries. The funds in the trust will then be available to your trustees. Such a provision ensures that the deceased estate can be finalised and may protect the inheritance of your loved ones against further claims.

A bequest to the Trustees of the Trust will ensure that your maintenance obligations are satisfied, and the funds are properly managed and dispersed in line with the best interests of the child.

An example of your future maintenance obligation

Your maintenance obligation for your child per month is R 5 000.00, which amount is increased by inflation each year, and payable until your child is 25 years old.

Your will shall indicate that maintenance is payable to such child from your estate until age 25 on the above formula. At the time of your death you child is 10 years old.

A simple calculation would be as follows:
Present value: R 5 000.00 per month – payment (12 payment periods /year)
Inflation : 6%
Years to age 25 : 15
Lump sum (Future value) maintenance required for the child for a period of 15 years :
R 1 454 093 .56

It is this amount that will be bequeath to your trustees in trust for the benefit of your minor child.

This could typically be funded by a life policy, structured as follows:

Life assured:	The parent responsible for the contribution to maintenance
Owner and payer:	The parent responsible for the contribution to maintenance
The beneficiary:	The trust as created in the last will and testament of the parent for the benefit of the minor child, alternatively, if there is an intervivos trust set up specifically for that minor child, then such trust may be the beneficiary.

Please ensure that if your estate is larger than R3.5 million you make provision for estate duty on your policy.

Life cover R 1 454 093.56

Life cover with the provision for estate duty:

Cover amount would then be:

Initial cover required = cover required

1 – Estate duty rate

R 1 454 093.56 = **R 1 817 616.95**

1 – 0.2

Can a parents' estate be sequestrated due to non-payment of maintenance?

Insolvency is an extreme solution to the non-payment of maintenance and can have dire ripple effects. Despite the severity of the option, it is still available to a parent that is seeking enforcement of a maintenance order.

Only once the requirements for sequestration have been met, may an order for sequestration based on the non-payment of arrear maintenance be brought.

In a recent judgment handed down by the Eastern Cape High Court in the case of *AR v HR*[25], the estate of an unemployed father was sequestrated following an application which was brought by his ex-wife. The parties were divorced in 2010. The divorce was settled by agreement and such settlement agreement was made an order of the court. The father of the two minor children,

[25] Full citation AR v HR (3565/2018) [2020] ZAECPEHC 10 (19 May 2020)

agreed to pay the mother maintenance for the minor children in the amount of R3 000.00 per month per child.

The father defaulted and fell into arrears in the amount of R360 000.00. The mother of the children applied for judgment and the judgment was granted. The father indicated that he is unable to pay the amount as ordered and the mother proceeded to apply for the father's estate to be sequestrated. The father's defence to the application for the sequestration of his estate was inter alia that he was unemployed and had no source of income.

In satisfying the requirements for sequestration the mother had to satisfy Section 12(8) of the Insolvency Act 24 of 1936.

This section states that for a final sequestration order to be granted the court must be satisfied with the following:

8(1) that the sequestrating creditor has established a claim against the debtor of not less than R100.00 entitling him or her to apply for the sequestration of the debtor's estate. Safe to mention that in this case, that requirement was met as the arrears amounted to R360 000.00;

8(2) either the debtor has committed an act of insolvency, or the debtor is Insolvent. This requirement was also met, as will be detailed below; and

8(3) there is reason to believe that it will be to the advantage of creditors if the debtor's estate be sequestrated. Accordingly, this was also met.

Although the father's defence of unemployment was valid, the judge held that the judgment against him for the arrear maintenance stood as such order was never set aside by any court.

The judgment debt was considered valid, and the father is seen as a judgment creditor of the mother who had a valid judgment for a debt due owing and payable. This was considered a landmark decision, albeit extreme.

The Judge quoted *De Villiers NO v Maursen Properties (Pty) Ltd 1983(4) SA 670* [26] by stating that an "act of insolvency is a statutory concept which obviates the necessity of providing actual insolvency".

[26] at 676 E

Section 8 of the Insolvency Act stipulates the acts which a debtor must commit to be declared insolvent. Section 8(a) stipulates, "a debtor commits an act of insolvency if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts".

Seeming the Judiciary is leaving no place to hide, and the importance of proper planning can be helpful, especially to a wayward parent who wilfully ignores an order of court. To the self-employed parent, the ripple effects of such a judgment would impact a business as well as the ability to conduct business in the future.

An important ripple effect

Generally, S 37A (1) of the Pension *Funds Act 24 of 1956 prohibits the reduction, hypothecation, cession, transfer and attachment of retirement benefits, unless such is specifically permitted by the Pension Fund Act, Income Tax Act 58 of 1962 and the Maintenance Act. Retirement funds are empowered by s 37D of the Pension Funds Act to '(d) deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be –*

(iA) any amount *payable in terms of a maintenance order as defined in section 1 of the Maintenance Act'.*

The Maintenance Act in turn indicates where there is a valid judgment that orders an execution against a defaulting parent's property, that judgment amount will firstly attract interest and more importantly be executable against one's pension and annuity[27].

S26(4) of the Maintenance Act is clear in that 'any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued in order to satisfy a maintenance order'.

This section then is a warning that if arrear maintenance is large and there is no other means to satisfy such debt, that parents retirement benefit may be attached. A dire consequence that will last beyond your obligations to your child and will have a direct impact on the way that you plan your retirement.

[27] S26(4)

The above legislation specifically deals with maintenance in arrear where a judgment has been obtained, future maintenance is not addressed. The Court in *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* [2003] 7 BPLR 4870 (D), was innovative in their judgment in respect of securing the future maintenance of the children of Mr Mngadi .[28]

This court ordered the pension fund to retain their member's retirement benefits 'so as to make equitable and proper provision for the support and maintenance of the children, for such period as they are in need of such support and maintenance'[29] In this matter, the father resigned from employment to avoid paying maintenance hence the order for future maintenance was considered. It is uncertain what the court's decision would have been had the Mnagdi not resigned.

In *Magewu v Zozo and Others* 2004 (4) SA 578 (C), the court had to decide whether pension monies can be secured for future maintenance, where the parent was not in arrears.

The court held in *Magewu* case that:
'The Maintenance Act does not create a closed list of mechanisms available in law to assist children who have claims of maintenance and their specific situations are not expressly set out in the Act. Section 2(2) of the Maintenance Act provides that it may not be interpreted so as to derogate from the common-law duty of support relating to the liability of persons to maintain other persons. In this instance, it is clear that the mother's case may not fall flat due to the fact that the father is not currently in arrears.'[30]

The court also concluded and ruled "The attachment of pension fund benefits in respect of future maintenance claims *in casu* is a direct and effective means of ensuring that the rights of the child and the dignity of women are upheld. There is no reason why, in this instance, the pension fund should not be directed to withhold the withdrawal benefit to secure the future maintenance claims of the minor child"[31].

[28] At 4874
[29] At 4880
[30] At para 15
[31] At paragraph 24

Conclusion

It would be premature to think that the above scenarios settle the matter of maintenance in South Africa even though the judgments are sound. Legislative changes are required especially in a world of cross boarder relationships and maintenance obligations, rural and urban dynamics. The South African Law Reform Commission has introduced discussion paper 157 on the review of the Maintenance Act 99 of 1998. This discussion paper if converted to legislation will ensure a clearer framework for the implementation of a maintenance claim and the enforcement and monitoring of maintenance.

The far-reaching impact of maintenance on financial planning is important and should be part of a conversation, be it for retirement planning or lifestyle planning.

Catering for sufficient liquidity through investment, or life cover to provide for maintenance is a consideration, structuring your estate to ensure that your children's future maintenance is properly managed and distributed to their best interest is of paramount importance.

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Over-indebted – What Options are Available?

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Introduction

Due to the tough economic environment, retrenchments, closing down of businesses has put consumers under immense amount of pressure. Many consumers have had to make some tough decisions in terms of debt review and even possible sequestration of their estates.

This article aims to show the difference between debt review and sequestration, giving consumers a basic understanding of the two processes and enable them to decide which one will be most suitable for their situation.

To help familiarise with debt review, the debt review process with be highlighted. It will assist financial advisers to understand the process flows and be in a position to answer their client's questions in this regard.

What is debt review?[1]

According to an advertorial [2] published by the National Credit Regulator website, debt counselling is a debt relief measure available in South Africa as provided for in terms of the National Credit Act[3], as amended. This process intends to assist over-indebted consumers who are financially constrained through incorrect budget advice, agreements with credit providers for reduced payments and the restructuring of debts.

The terms debt counselling and debt review are used synonymously with each other, but for the purpose of this article the term debt review will be used for ease of reference [4]

What does it mean to be "over-indebted"?[5]

Some indicators of over-indebtedness are:

- ❑ The consumer's monthly expenses exceed their monthly income/salaries.
- ❑ The consumers incur debt e.g., borrows money to pay debt;
- ❑ The consumers tend to skip payments on some accounts to enable them to pay other accounts;
- ❑ The consumers use their credit card and overdraft facility to pay debts, living expenses;

[1] www.ncr.org.za, "Debt counselling explained"
[2] www.ncr.org.za, "Debt counselling explained"
[3] National Credit Act 34 of 2005, Section 86
[4] www.ncr.org.za; "Debt Counselling Frequently asked questions"
[5] www.ncr.org.za; "Debt counselling explained"

- ❑ The consumers receive letters of demand or summonses from creditors;
- ❑ The consumers have judgements passed against them;
- ❑ The consumers fall prey to financial scams and fraudulent schemes;
- ❑ The consumer regularly feels emotionally stressed about financial matters

When these indicators become apparent, the assets, liabilities and available income of the consumers should be assessed to enable a decision to be made to either sequestrate, or apply for the consumer to be placed under debt review.

Sequestration[6] is an expensive court process and best considered if the consumer has substantial debt[7].

Sequestration

A debtor's estate is sequestrated in one of two ways:

- ❑ The debtor themselves, may apply to court to surrender their estates[8] This is known as voluntary sequestration
- ❑ A creditor may apply to the High Court for the sequestration of the debtor's estate[9] This is known as compulsory sequestration

The procedure and requirements for each of the above differ in material aspects, even though the consequences of the sequestration order are the same in both instances.

Voluntary sequestration

The High Court may accept the surrender of a debtor's estate if it is satisfied:

i) The debtor's estate is in fact insolvent[10];
ii) The debtor owns property that can be sold/liquidated and is sufficient to cover all costs of the sequestration;
iii) Sequestration of the debtor's estate will be to the advantage of the creditors.[11]

Compulsory Sequestration

The court may grant an application for sequestration of a debtor's estate if it is satisfied that:

[6] Sequestration is taking legal possession of the estate of a debtor where the liabilities exceed the assets.
[7] Daleen Harris
[8] Section 3(1) of the Insolvency Act 24 of 1936. This is called voluntary surrender.
[9] Section 9(1) of the Insolvency Act 24 of 1936. This is called compulsory sequestration.
[10] Liabilities exceed assets.
[11] Section 6(1)

i) The creditor applicant has established a claim which entitles them in terms of section (6)(1) of the Insolvency Act 24 of 1936 (hereafter referred to as the Act) to apply for the sequestration of the debtor's estate;

ii) The debtor has committed an act of insolvency or is insolvent;

iii) There is reason to believe that it will be to the advantage of the creditors if the debtor's estate is sequestrated.[12]

Legal position of the consumer

Legal position of the consumer who applies for debt counselling[13]

Consumers that experience debt-related problems and have difficulty making their current monthly payments is eligible to apply for debt review. A consumer may either approach a debt counsellor directly, or may be referred by a magistrate court; the National Credit Regulator; or even by their creditor/s. The consumer should have a distributable income which will be used to offer reduced payments to the credit providers through the debt counsellor of choice.

Consumers who are under debt review will have a debt counselling indicator placed on their profile with the credit bureaux. This indicate that the consumers are over-indebted and therefore placed under debt review. It also prevents the consumers from being blacklisted while under debt review[14]. Consumer who are under debt review will however not qualify for more credit.[15] A consumer's application for debt review is not regarded as committing an Act of insolvency.[16]

Legal position of the consumer if sequestrated

Once sequestrated the consumer is an insolvent. Sequestration of an estate diminishes an insolvent's legal status, which restricts their capacity to contract, earn a living, litigate or the holding of office[17].

Sequestration does not deprive the debtor of his contracting capacity; however, it does impose certain restrictions on the debtor's capacity to contract.[18]

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[12] Section 12(1)
[13] www.ncr.org.za; "Debt Counselling Frequently asked questions"
[14] www.ncr.org.za; "Debt counselling explained"
[15] www.ncr.org.za; "Debt counselling explained"
[16] Insolvency Act, No 24 of 1936, Section 8A
[17] Director of a company or a trustee of an inter vivos trust.
[18] Cannot dispose of any property in his insolvent estate as that might be voidable by his trustee, but may enter into an employment contract, or with the consent of his trustee enter into any contract and it will be valid and binding on all parties.

An insolvent cannot hold certain positions such as a trustee of an inter vivos or testamentary trust[19] or be a director of a company[20].

A notice is placed at the credit bureaux to warn creditors of an insolvent's legal status. The insolvent consumer is prevented from entering into any credit agreements without the consent of the appointed trustee.

Vesting of the assets of the insolvent

Once the debtor's estate is sequestrated by a competent court with jurisdiction, a trustee is appointed by the Master of the High Court, and the assets in the estate will vest in the trustee. The trustee is to liquidate the asset at best value and distribute the proceeds amongst the creditors in order of preference as laid down by the Act.[21]

How does the consumer's marital regime affect indebtedness?

Debt review

When consumers are married in community of property, then a joint debt review application is necessary. If parties are married out of community of property only the indebted spouse can apply for debt counselling and does not require the consent from his/her spouse.

Sequestration

Where spouses are married in community of property both spouse's estates will be sequestrated. The assets of both will thus vest in the trustee, and be available to meet the claims of creditors. The court in *Badenhorst v Bekker NO and others*[22] ruled that even if a spouse inherited property and the clause in the will specifically exclude the property from such a marriage, the trustee would lay claim to such an asset.

Something not often seen in practice, which is interesting, is that even though if married out of community of property, the property of the solvent spouse will also vest in the trustee until the spouse can secure release thereof and regain full ownership.[23] This section was introduced to

[19] Section 20(2)(c) of the Trust Property Control Act 57 of 1988
[20] Section 218 Companies Act 71 of 2008.
[21] Sharrock et Hockly's Insolvency Law 167-169 deals with the rankings of creditors and when a creditor has a secured, preferent or concurrent claim.
[22] 1994(2) SA 155 (N).
[23] S21 of Insolvency Act

prevent collusion between spouses to the detriment of creditors of the insolvent estate.[24] The solvent spouse will have to prove that they owned the property before the marriage; or acquired through a marriage settlement agreement; or acquired with their own earnings or proceeds of her own personal property.

Debt Review Process[25]

1. The first step will be a consultation with a debt counsellor, The debt counsellor will explain to the consumer what debt review is, what the process entails, what information is needed by the debt counsellor, and that the counsellor will verify the information received. The consequences of applying for the debt review also needs to be discussed. The consumers may not enter into any further credit agreements or incur any further debt. Practically this means that the consumers must destroy their credit cards, garage cards and retail credit cards. The time period applicable to the debt review process need to be discussed with the consumer as well as the responsibilities of the consumer as well as the attorney's fees for referring the matter to court for a restructuring order or a consent order.

   Thereafter If the consumer elects to continue he/she will need to complete and sign Form 16. Form 16 is an application by the consumer for Debt Review in terms of Section 86 of the National Credit Act. [26]

   The debt counsellor will provide the consumer with proof of receipt of the application for debt review for which the debt counsellor will charge the consumer R50 (fifty rand)[27]. The debt counsellor will also complete a verification list during the first consultation[28].

2. The debt counsellor must, within 5 business days after the debt review application, notify the creditors of the consumer as well as every registered credit bureau of their application for debt review. This is referred to as Form 17.1 in terms of the Credit Act. [29] All major credit providers have Central Debt Review Centres to receive and handle all debt-review notices and

[24] Sharrock et al Hockly's Insolvency Law 71
[25] Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.3 The initial consultation with the debt counsellor
[26] Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.3 The initial consultation with the debt counsellor. Refer to annexure A
[27] Fee at the time of drafting this article
[28] Refer to annexure B to this article
[29] Section 86(4)(b) of the National Credit Act 34 of 2005

correspondence. The debt counsellor needs to verify the information that the consumer provided and communicate to the credit providers that if a credit provider fails to provide corrected information within 5 (five) business days, the debt counsellor may accept the information provided by the consumer as correct.[30]

3. The debt counsellor capture the consumer's details on the NCR Debt Help program, and the Debt Help program will forward the information then to the registered credit bureaux.

4. The debt counsellor must within 30 days from the application for debt review determine whether the consumer is over-indebted or not. If over-indebted the matter must be referred to the magistrate's court for debt restructuring. [31] The debt counsellor has at least 60 days from the debt review application to refer the debt restructuring to the magistrate's court.

5. The debt counsellor must assess whether the consumer will be able to satisfy all his/her obligations under all his/her various credit agreements. This assessment will be made according to the facts provided to the debt counsellor at the time the assessment is made. The debt counsellor needs to consider the following in terms of Regulation 24 (7)[32]:
   (a) "A consumer is over-indebted if his/her total monthly debt payments exceed the balance derived by deducting his/her minimum living expenses from his/her net income;
   (b) Net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment;
   (c) Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator."

6. After the debt counsellor has determined that the consumer is over-indebted, he must submit Form 17.2 [33] to all affected credit providers and all registered credit bureaux within 5 (five) business days, confirm that the application for debt review was successful and that the consumer's debt are in the process of being restructured.[34] It appears that a debt counsellor

[30] Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.4 Further steps after initial consultation with debt counsellor
[31] Section 86 (7)(c) of the National Credit Act 34 of 2005
[32] Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.5 The assessment
[33] See Annexure C with example attached Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.6 Further steps after completion of the determination
[34] Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.6 Further steps after the completion of the determination

will once he determined over-indebtedness, first contact the credit providers to propose debt-restructuring before he makes any recommendations to court.

7. The debt counsellor will make a proposal to the magistrate's court that the consumer's obligations are re-arranged. Examples of rearrangements could be the extension of the repayment period in terms of the agreement or to reduce the payment amounts, to recalculate the obligations of the consumer [35].

8. Once the consumer has fully satisfied all his debt under the credit agreements that was subject to the debt re-arrangement order, the debt counsellor will issue a clearance certificate called Form 19. [36]The debt review process is then terminated.

Benefits of debt review

An advertorial[37] on the website of the National Credit Regulator warns that debt review not be seen as a payment holiday or a means to save money by virtue of paying less to credit providers.

Debt review is a debt relief measure that aims to rehabilitate over-indebted consumers.
Some benefits to the debtor consumer are:

- ❑ The consumer's assets remain protected
- ❑ Affordable instalments are negotiated
- ❑ The debt counselling process helps the consumer to pay their debts
- ❑ The consumer does not have to borrow money to repay their debts

Practical questions:

Does interest accrue on the accounts when under debt review?

Yes, the interest on the consumer's accounts continues to accrue. [38] However, the lower interest rates are agreed to by the creditors.

What happens if consumer has a change in circumstances?

If a consumer experiences a change in circumstances e.g. a salary reduction, retrenchment of the consumer's partner or a temporary loss of income, the consumer is obligated to disclose this

[35] Section 86(7)(c) of the National Credit Act 34 of 2005
[36] Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.8 Fulfilment of debt re-arrangement obligations
[37] www.ncr.org.za; "Debt counselling explained"
[38] www.ncr.org.za; "Debt counselling explained"

to their debt counsellor. The debt counsellor follows the National Credit Regulator guidelines with regards to a change in circumstances. The debt counsellor will then negotiate new terms with the credit providers to allow for the change in the consumer's circumstances.

Are there any benefits to sequestration

If sequestration is chosen instead of debt review, an intention to apply for voluntary sequestration is published. All existing legal actions for debt collection are stayed[39] until the high court makes a decision. This includes any garnishee order against salary which will be cancelled with immediate effect. Interest on debt is frozen and pension fund money is excluded from the insolvent estate.

Wills drafting and deceased estates

The importance of knowing a client's financial position well when taking instructions to draft their will is evident. Establish whether the client or an heir is under debt review or is sequestrated. If the client has inherited from a deceased estate but is under debt review or sequestrated, the debt counsellor should be contacted. Determine whether it is the client's intention that their heir's inheritance be used for paying their debt, or if the client would rather want to provide a nest egg for their heir. Experience indicates the latter, but it could differ from client to client.

Utilising an inter vivos or testamentary trust is often recommended for an heir under debt review to receive their inheritance in, instead of receiving it directly. It is therefore necessary that the financial advisor ask the client whether any of the heirs are under debt review to direct them with regards to the contents of the will.

Repudiation of benefits

- Can an insolvent person who is a nominated beneficiary on a life policy, or a beneficiary in a deceased estate, repudiate such nomination or bequest?
- The court in *Kellerman v Van Vuuren,*[40] had to make a decision on whether a beneficiary who repudiated a bequest a week before he was sequestrated constituted a disposition of a right to property without value that can be set aside as per section 26 of the Act. In this instance, the court decided that as vesting of rights only takes place at the death of the deceased, and

[39] Placed on hold
[40] 1994 (4) SA 336 (T)

because the beneficiary repudiated before he was sequestrated it is seen as if it never belonged to him.

- The *Wessels v De Jager*[41] case followed a year later. The facts differ from Kellerman above as the beneficiary was insolvent as the time of the death of the testatrix. The beneficiary repudiated the bequest and an application was brought by the trustee to set aside such repudiation. The court confirmed even in this case that a beneficiary will only obtain a vested right in the inheritance if he adiates the bequest. Until that happens the beneficiary only obtains a competence, or hope, to adiate or repudiate a bequest.
- If one accepts the fact that vesting only takes place once the beneficiary has adiated, the question remains if a beneficiary has the legal capacity to act on such a competence to adiate or repudiate? Writers Corbett[42] and Sonnekus[43] are of the opinion that an insolvent person has limited contractual and legal capacity to act and therefore the right to elect to adiate or repudiate passes to the trustee of the insolvent estate. The fact is that case law is stronger than opinions but to avoid any uncertainty or misconceptions, it is vital that a proper will is drafted as mentioned above.

Termination of the debt review process

If a Magistrate has granted a debt rearrangement order, then Section 71 of the National Credit Act[44] regulates the only route to exit the debt review. This means that the consumer must repay all debt (excluding home loans) where a debt rearrangement order is in place, before the consumer can apply for a clearance certificate. [45]

Rehabilitation

Insolvency of a consumer comes to an end when rehabilitated, which can happen in one of the following ways:

If the insolvent is not rehabilitated by the court within a period of 10 years from the date of sequestration of his estate, the insolvent will be deemed automatically rehabilitated after lapse of the said period;

[41] 2000(4) SA924 SCA)
[42] Corbett et al The Law of Succession in South Africa (2001) Chapter x11 18-19
[43] Sonnekus Delatio en Fallacia in die Hoogste Hof 2000 TSAR 793
[44] National Credit Act 34 of 2005, Section 71
[45] Guide to the National Credit Act by JW Scholtz et al, Guideline 01/2021, Guidelines for the withdrawal from debt review

The insolvent can apply to court within the 10 year period. There are certain procedures to be followed, the trustee needs to lodge a report and it is not guaranteed that the court will grant the order.

On rehabilitation all debts against the estate are discharged and the consumer can start fresh.

Conclusion

Both debt review and sequestration have its place in financial planning. The best process will depend on the client's individual circumstances. It is important for financial advisers to take cognisance of the differences between debt review and sequestration especially where they need to advise the client when taking the client's instructions for their will or even when advising the client where beneficiaries are nominated on the client's policies.

Bibliography

Court Cases:

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Websites:

www.dcasa.co.za (Debt Counsellor's Association of South Africa)

www.lexisnexis.co.za

www.ncr.org.za (National Credit Regulator); Brochure *"Debt Counselling explained"*

www.ncr.org.za (National Credit Regulator); Brochure *"Debt Counselling Frequently asked Questions"*

Legislation:

Companies Act 71 of 2008

Guide to The National Credit Act by JW Scholtz

Insolvency Act 24 of 1936, Section 8 A

National Credit Act 34 of 2005, Section 71 and Section 86

Trust Property Control Act 57 of 1988

Annexure A: [46]

Form 16

(On the letterhead of the debt counselor)

APPLICATION BY CONSUMER FOR DEBT REVIEW
In terms of section 86 of the National Credit Act 34 of 2005

Please note that:

1. On receipt of this application the debt counselor will advise all credit providers and all registered credit bureaus that you have applied for debt review;
2. You will be listed with all registered credit bureaus that you have applied for debt review;
3. This form must be accompanied by a list of all credit providers as well as copies of all documents requested;
4. Should any documents not be submitted within 10 days of the Application being received by the Debt Counselor, your application will not be accepted.

PART 1- Personal Information

Full names and surname

Identity number

Physical Address

Postal Code

Postal Address

Postal Code

Telephone number (work) ( ) Telephone number (home) ( )

Cell phone number

E-mail address (if any)

Name of employer

Address of employer

[46] www.ncr.org.za, Form 16 Application by Consumer for Debt Review in terms of section 86 of the National Credit Act 34 of 2005

Form 16

PART 2 – Income

(Please attach a copy of your salary slip)

Gross salary	R
Deductions	
Tax	R
Medical Aid	R
Pension	R
Other deductions	
	R
	R
	R
	R
Total Deductions	R
Other income (specify the source)	
	R
	R
	R
	R
Total Income	R

PART 3 – Monthly Commitments

(Please list all monthly commitments other than outstanding debt, i.e. school fees, traveling costs, medical expenses, etc)

Commitment	Monthly expense

Form 16

PART 4 – Debt Obligations

(Please provide copies of all outstanding balances due)

Debt Commitment (i.e. personal loan)	Name of creditor	Total amount outstanding	Monthly Commitment

PART 5 – Declaration by the Consumer

I declare as follows:

1. I undertake to comply with all requests from the debt counselor to assist him/her to evaluate my state of indebtedness and the prospects for responsible debt restructuring;
2. I hereby consent to the submission of my information to all registered credit bureaus by the debt counselor;
3. I also consent that the debt counselor may obtain my credit record from any/all registered credit bureaus and any other registers which may contain any of my credit information;
4. I undertake not to enter into any further credit agreements, other than a consolidated agreement, with any credit provider until one of the following events has occurred:
   a. The debt counselor rejects my application;
   b. The court determines that I am not over-indebted; or
   c. All my obligations under credit agreements as re-arranged are fulfilled
5. I confirm that the information contained in this document is, to the best of my knowledge, true and correct.

Signed at [place] _____ on this [day] _____ of [month] _____ of [year] _____

Signature _____

Annexure B:

Verification List[47]

Consumer Name & Surname:
Consumer Identity Number:

Steps	Task	Done	Date	Details
1	Open a new bank account			
2	Destroy credit cards/store cards/garage card and provide proof			
3	If credit cards/store cards/garage cards have been handed back to the credit provider, consumer must provide in writing with signature confirmation of this action			
4	On your old account place a stop payment on all your debit orders			
5	Cancel all your stop orders on your old account			
6	Notify service provider or product house to cancel debit orders			
7	Advise your employer of your new banking details			
8	Advise your short-term insurance company of your new banking details			
9	Advise your life assurance company of your new banking details			
10	Advise your municipality of your new banking details if your rates and taxes are paid by debit order			
11	Advise your municipality of your new banking details if your water and lights are paid by debit order			
12	Advise the Receiver of Revenue of your new banking details if you are a registered taxpayer			
13	Advise your security company/tracker of your new banking details if payment is made by debit order			
14	Advise your cellphone service provider of your new banking details			
15	Advise your body corporate of your new banking details			
16	Advise the school of the new banking details			
17	If you receive maintenance, advise the payer thereof of your new banking details			

[47] Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.3 The initial consultation with the debt counsellor

18	Advise your church of your new banking details			
19	Advise the gym club of your new banking details			
20	See if your employer will permit you to sell some annual leave			
21	Contact the debt counsellor one day prior to pay day to establish the payment to each credit provider			
22	Apply for school fee exemption			
23	Manage your budget according to agreed Budget			
24	Contact your debt counsellor should you have any excess funds available to repay debt			
25	Contact your debt counsellor should your status change			
26	*Add any additional steps if need requires			

Annexure C[48]

Form 17.2

(On the letterhead of the debt counsellor)

TO:

(An individually addressed notification must be sent to credit department of each credit provider listed in application for debt review)

AND TO:

(An individually addressed notification must sent to each registered credit bureau)

FROM:

Name of Debt Counsellor

.....

NCR registration number

.....

Address

.....

Contact Number

.....

DATE:

.....

Full names and surname of Consumer

.....

Identity number of Consumer

.....

This notice serves to advise you that

(*a*)

the abovementioned consumer has applied for debt review in terms of Section 86 of the National Credit Act, 34 of 2005; or

(*b*)

the abovementioned consumer's application for debt review was successful and the debt obligations are in the process of being restructured; or

(*c*)

the abovementioned consumer's debt obligations have been restructured and a court/Tribunal order has been issued, the details of which are as follows:

[48] Guide to The National Credit Act by JW Scholtz, Chapter 14 A practical discussion of the debt-counselling process, 14.6 Further steps after completion of the determination

(i) Case Number;

(ii) (ii)Magistrates' Court for the district of ..... /Tribunal

All credit bureaus are advised to update the abovementioned consumer's record, within 5 days of receipt of this notice, as set out above.

Signed at [*place*] ..... on this [*day*] ..... of [*month*] ..... of [*year*] .....

Debt Counsellor .....

Whose Proceeds is it Anyway? The Unrehabilitated Insolvent as a Beneficiary on a Life Policy

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Legal Advisor Specialist
Personal Finance: Legal

Introduction

When a debtor's liabilities exceed their assets and they are unable to pay their debts when it is due, this is known as insolvency and the debtor can be declared insolvent by a high court which has the required jurisdiction in a process called sequestration.

This article will analyse the following scenarios:

a) The circumstances, under which an unrehabilitated insolvent can receive proceeds of a life cover where he/she was nominated as a beneficiary.
b) Is the life insurance proceeds that pay out in (a) an asset in the insolvent estate? Does the life insurance proceeds now vest in the trustee placing the proceeds in the reach of the creditors of the insolvent estate?
c) What is the position of the above in the event that a final liquidation and distribution account has been filed and accepted by the Master of the High Court?

The South African law of insolvency in a nutshell[1]

It is important to understand the basic laws as it pertains to the insolvent debtor. The Insolvency Act[2] regulates the sequestration process. It is an application that is brought in the High Court of South Africa by an attorney who is assisted by an advocate on behalf of a debtor, where the majority of the debtor's debts are settled in a compromise. An estate is under sequestration if the court has issued an order accepting the voluntary surrender of, or compulsory sequestration of the debtor's estate. This is known as a sequestration order. Voluntary surrender is when the debtor, out of his/her own accord, bring an application for sequestration. On the other end, if a creditor of the debtor brings the application for sequestration, it is called a compulsory sequestration.

First in the case of a voluntary surrender, the insolvency practitioner[3] must determine whether the debtor is indeed insolvent or if any other remedies, as provided under the National Credit Act[4], can be applied to the debtor's situation. In the case of a compulsory surrender, a creditor has to establish a claim against the debtor and also prover that a sequestration order against the debtor

[1] Insolvency Care (Pty) Ltd, 5 July 2022. What does the sequestration process entail? Available at https://www.insolvencycare.co.za/what-does-the-sequestration-process-entail/.
[2] Act 24 of 1936.
[3] Natural person who is appointed by the Master of the High Court to act on behalf of the debtor in the sequestration application.
[4] Act 34 of 2005.

will benefit all the creditors. A simple example to prove a benefit is where the debtor owns a property, which can be sold and the proceeds divided amongst the creditors.
Once the assessment is completed and the insolvency practitioner, together with the debtor and their sequestration attorney, decide that sequestration is the appropriate solution, the notice of intention to apply for sequestration is published simultaneously in the Government Gazette and a newspaper circulating in the district where the debtor lives or trades in business.[5] At the same time, a suitable court date should be obtained. The attorney will prepare a statement of the debtor's affairs, which contains, amongst other things, a list of the creditors as well as their outstanding debts and balances and the debtor's application. This statement must be submitted to the Master of the High Court where it will be available for the creditors to inspect during office hours for a period fourteen days from a date mentioned in the notice.[6]

The debtor is immediately covered under the provisions of the Insolvency Act from the date on which the notice of intention is published in the Government Gazette and the Newspaper. The effect of the legislation protection above is that the debtor is not allowed to make any further payments to their creditors, except in terms of existing garnishee orders.

Once the application is ready the matter will be set down with a court date and the application will be heard in the High Court. In the event that there are no objections (or objections have been dealt with), the application will be granted[7]. The Master of the High Court will appoint a trustee who will oversee the sale of assets on auction and the subsequent distribution of the proceeds to the creditors.[8]

Assets that the debtor owned before sequestration, and those acquired during or after sequestration form part of the insolvent estate and therefore administered by the trustee of the insolvent estate.[9] However, the matrimonial property of the debtor will determine if the debtor's spouse's assets will also be affected:

(a) If the debtor is married in community of property, then the spouses share a joint estate and all the assets in the joint estate will be subject to the sequestration order. For this reason the consent of the debtor's spouse is needed for an application for voluntary surrender.

[5] Section 4(1) of the Insolvency Act.
[6] Section 4(3) and (6) of the Insolvency Act.
[7] The court can grant an order for provisional sequestration in terms of section 10 of the Insolvency Act or an order for a final sequestration in terms of section 12. The court can also, in terms of section 9(5) dismiss, postpone or make such other order that it deems just.
[8] Section 18 of the Insolvency Act.
[9] Section 20(1).

(b) If the debtor is married out of community of property, each spouse has their own estate and the debtor's spouse's assets are therefore unaffected by the sequestration application. Since the accrual system only applies on death or divorce of spouses, the accrual has no effect on the voluntary sequestration process.

After all claims of creditors have been accepted, the trustee has to submit a distribution plan to the Master which is an indication of how the proceeds of the realized assets of the insolvent are going to be distributed to the creditors.[10] In terms of the process, the creditors of the insolvent estate are paid from the orderly and equitable distribution of the debtor's assets.

If, after confirmation of the final plan of distribution there is a surplus in the insolvent estate which is not required for the payment of claims, costs, charges or interest, the trustee shall pay that surplus over to the Master who shall deposit it in the Guardian's Fund, who shall pay it to the insolvent after rehabilitation.[11]

A Rehabilitated insolvent

Rehabilitation occurs when all the insolvent's creditors have been satisfied and discharged and a court declares that the insolvent can regain full control over their estate.[12] The effect of rehabilitation is that the insolvent's sequestration ends and his creditworthy status is restored. The insolvent can automatically be rehabilitated after a period of 10 years has passed.[13]. The insolvent can also bring an application for rehabilitation to the High Court during the 10 years since being declared insolvent, under certain circumstances.[14]

The various circumstances under which a sequestrated person can be rehabilitated, in terms of section 124, include:

(1) acceptance of a statutory composition by the creditors of the insolvent estate,
(2) elapsing of twelve months since confirmation the Master of the High Court of the first trustee's account in the estate,
(3) criminal offence committed in the insolvent estate,

[10] Section 91.
[11] Section 116(1).
[12] Section 25(1).
[13] Automatic lapsing after 10 years is just one of few ways in which an insolvent can be rehabilitated.
[14] The various circumstances under which a sequestrated person can be rehabilitated, in terms of section 124, include: (1) proven claims against the insolvent estate, (2) previous sequestrations, (3) criminal offence committed in the insolvent estate, (4) no claims have been proven and (5) full payment of claims.

(4) no claims have been proven against the estate, and
(5) full payment of claims.

Like a living person who is insolvent, a deceased estate can also be declared insolvent if the realized assets of the estate are insufficient to fully pay all the debts in the deceased estate. In this instance section 34 of the Administration of Deceased Estates Act [15] shall govern the administration of the insolvent deceased estate.

It is the executor of the deceased estate's responsibility to follow the correct process when a deceased estate is insolvent. The full discussion of this process falls outside the scope of this article.

Protection against insolvency

While all of the property has to be surrendered to the trustee of the insolvent estate for the benefit of the creditors, assets such as proceeds of life policies can be exempt from the reach of creditors in terms of section 63 of the Long Term Insurance Act:

The policy benefits under an assistance, life, disability, or health policy which has been in force for at least three years before sequestration in which the insolvent or his (or her) spouse is the life insured other than for a debt secured by the policy-not be liable to form part of his or her insolvent estate protection shall apply to policy benefits and assets acquired solely with the policy benefits, for a period of five years from date of benefits provided.

The life insurance policy and beneficiary nomination (*stipulation alteri*)

A life insurance policy with a nominated beneficiary is regarded as a contract in favour of a third party, also known as a *stipulatio alteri*.[16] In terms of this contract the insurance company agrees to pay out, a policy benefit directly to a third party nominated by the contracting party upon the death (or insured event). In exchange, the contracting party agrees to pay a monetary premium to the insurer.

The parties to this agreement are the contracting party and the insurer. The beneficiary of the policy remains an outside third party with only a hope of receiving the benefit. In order for the beneficiary to obtain a real right over policy proceeds, the insured event has to take place, e.g.

[15] 24 of 1936.
[16] Premiums and Problems, Article Edition 120, 2020, *L du Toit,* A46.

the insured life must pass away, and then the beneficiary has to accept or decline the nomination. Once the beneficiary accepts the benefit, they have a real right over the proceeds. The contracting party can revoke or amend the beneficiary nomination at any stage before the insured event; therefore, if it is a death benefit the beneficiary nomination can be revoked or amended at any time before the death of the insured life. Unless the beneficiary nomination is revoked during the lifetime of the insured life, there is a contract between the insurance company and the contracting party in terms of which the insurance company is obliged to honour the beneficiary nomination.[17] It is only the nominated beneficiary that may demand and accept or refuse the proceeds and not the trustees of his insolvent estate since the contractual obligations operate between the contracting party and the insurance company. [18] If a beneficiary dies before the life assured the beneficiary nomination falls away.

Supreme Court of Appeal (SCA) decisions

In the court cases below, which serves as precedent on this topic, the SCA considered the issue of an unrehabilitated as a beneficiary of a life insurance policy:

Pieterse vs Schrosbee[19]

The issue for the court to consider was whether the trustee of the insolvent deceased's estate is entitled to the benefit for distribution to the estate creditors or the nominated beneficiaries.

The appellant (Mr Pieterse) and his now deceased wife (Mrs Pieterse) were married out of community of property. Mr Pieterse's estate was sequestrated in 1995 and he was an unrehabilitated insolvent when Mrs Pieterse ended her life in September 2000. Mrs Pieterse's deceased estate was also finally sequestrated in March 2007 due to fact that she owed money to many people. Upon the death of Mrs Pieterse three policies, which were all in existence for less than three years, became payable to the nominated beneficiary, Mr Pieterse. The trustee of Mrs Pieterse's insolvent deceased estate sought a declaratory order from court that the policies belong to the insolvent estate as part of Mr Pieterse's assets. Mr Pieterse relied on the protection of section 63, but the court found that this is misplaced

The court explicitly held that the application of section 63 does not seek to divert the proceeds of the policy from the nominated beneficiary to the insolvent estate of the deceased

[17] Pieterse v Shrosbee [2004] ZASCA 129 (23 September 2004), par 8 to 12.
[18] Pieterse v Shrosbee [2006] 3 All SA 343 (SCA), par 31.
[19] [2006] 3 All SA 343 (SCA.

policyholder.[20] The trustee of the insolvent estate therefore did not have any valid claim to the proceeds.

Du Plessis v Pienaar NO and Others[21]

The appellant, who had a joint estate with her husband, had inherited a property from her father with a provision that it did not form part of the joint estate. She sought an order to declare that this property is excluded from the insolvent estate. She argued too that she can not be held liable for the claims against the insolvent estate stemming from debts incurred by the joint estate. Based on this reasoning, her "own separate estate" is shielded from the insolvency of the joint estate. Her argument was rejected by the court, which held that "debts are not incurred by a person's estate – the estate is merely the source from which debt is recovered."

Malcolm Wentzel v Discovery Life Limited and Others[22]

Mr Wentzel appealed a ruling of the previous court which held that he was not entitled to the proceeds of a policy on the life of his wife, where he was the nominated beneficiary. The facts of the case were: Mr and Mrs Wentzel were married in community of property in 2007 and owned a joint life cover policy, which covered them both. They were also each other's beneficiary on the policy over their life. In 2012 their joint estate was sequestrated and the final liquidation and distribution account accepted by the Master in 2014. Mrs Wentzel passed away in 2017 and the insurance company informed Mr Wentzel that they were going to pay out the proceeds to the trustees of the insolvent estate since he was still an unrehabillitated insolvent.

Mr Wentzel argued that the sequestration had been finalised since the Master had accepted the final liquidation and distribution account. The trustees of the insolvent estate in turn argued that although the account has been accepted, the estate remains vested in them until Mr Wentzel is rehabilitated.

The court found that upon the death of one spouse in a marriage in community, the joint estate is split and each spouse obtains their own estate. In this case, the joint insolvent estate is dissolved, but that this fact does not automatically release the surviving spouse from his insolvency. Only the process of rehabilitation as provided for in the Act can release an insolvent from insolvency. However, before assets from the dissolved marriage can be divided between the surviving

[20] Paragraph 12.
[21] [2002] 4 All SA 311 (SCA).
[22] [2020] ZASCA 121 (2 October 2020).

spouse and the decease estate, their liabilities first need to be settled and the balance paid over to the surviving spouse. When an order for insolvency is granted, the insolvent is divested of his estate and it vests in the Master until a trustee is appointment after which the estate vests with the trustee.[23]

In both cases of Du Plessis and Wentzel the court confirmed that while the death of an insolvent spouse dissolves the insolvent joint estate, it does not change the status of the surviving spouse who remains an insolvent until rehabilitation.

Conclusion

While the lengthy process of winding up of an estate can be circumvented by nominating a beneficiary on the policy which will ensure that the beneficiary is paid out directly by the insurer, it is clear from the above that the legal status of the beneficiary can be a decisive factor.

From the above discussion and case law it is clear should the beneficiary be insolvent at the time when the benefit becomes due, the benefit becomes an asset in his hands and is not protected from the reach of the creditors of the insolvent estate. The insurer has to pay out the claim in terms of the *stipulation alteri* that comes into existence when the nominated beneficiary accepts the nomination, but the insolvent is not able to receive any money in his own name while under sequestration. Unless proceeds qualify for protection under section 63, as discussed, the insolvent has hand over the proceeds to the trustees of the insolvent estate. If the insolvent fails to hand over the proceeds, the trustees of the insolvent estate have a claim against the insolvent to recover the benefit.

Furthermore, this restriction remains in place until the insolvent has been discharged of his sequestration by means of a court order and the insolvent rehabilitated. The fact that a final liquidation and distribution account has been accepted by the Master of the High Court does not mean that the trustees have completed their duties in the administration of the insolvent estate. In fact, the trustees could potentially be required to file a second (even third) final liquidation and distribution account.

[23] xSection 20(1)(a) of the Insolvency Act.

While it is impossible to predict what the financial circumstances of the beneficiary will look like in future, policyholders might want to consider nominating a testamentary trust (or inter vivos trust if there is one) as the beneficiary ensure that policy proceeds benefit their intended beneficiaries.

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Caution: Accepting a Nomination as an Executor and Trustee

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Introduction

An executor of a deceased estate and as a trustee of a testamentary trust, acts in a fiduciary capacity on the behalf of the testator/testatrix and beneficiaries respectively. Both these specific fiduciaries are nominated in a person's last will and testament("the will").

What are fiduciary duties? What are the risks involved if an executor or trustee does not act in line with the fiduciary duties imposed on him or her? Since it is common practice to nominate a family member in these roles, these very important questions are often overlooked and not taken seriously.

A duty of care arises at the acceptance of appointment as an executor or trustee. This is a fiduciary duty. Fiduciary duties are imposed by common law and legislation on those persons who are in a position of caretaking of the property or person of another. A specific degree of care, skill and diligence is required when dealing with the property for the benefit of another.

A person that acts in a fiduciary capacity and who does not act according to the fiduciary duties can be removed as executor and/or trustee and face possible legal action against him or her. A fiduciary that has a conflict between their own interest and the interest they oversee for another is clearly not supposed to be in the fiduciary position. Where a person is an executor of a deceased estate and an heir, a creditor, a trustee or a trust beneficiary the argument can be raised that a conflict of interest is present.

The recent judgement in *Bramble-Hannath v Hannath & Others* [1] brought the issue of objectiveness of executors and trustees to the forefront. This article will examine the specific fiduciary duties with a focus on the duty of conflict of interest as highlighted by the Bramble-Hannath-case

Fiduciary duties explained

The landmark case of *Robinson v Randfontein Estates Gold Mining Co Ltd*[2] held that "where one man stands to another in a position of confidence involving a duty to protect the interest of that other in a fiduciary relationship, he is not allowed to place himself in a position where his interests conflict with his duty". Examples of where fiduciary relationships comes into existence include, for

[1] 2021 ZAWCHC 102
[2] 1921 AD 168

example, a trustee of a trust, retirement fund trustees, a guardian of a minor, a director of a company, a curator of a person who can no longer manage his/her own affairs and many other legal relationships The executor of a deceased estates' fiduciary duties arise from either a nomination in the will of the deceased and subsequent appointment by the Master, or appointment by the Master in the case of intestate succession when the deceased passed away without a valid will.

In its essence a fiduciary is in a position of trust and is expected to manage the affairs of another with a certain degree of care, skill and diligence. The court held in *Bristol and West BS v Mothew*[3] that "*a fiduciary is someone who has undertaken to act for or on behalf of another in a particular manner.*"

In *Gross and Others v Pentz*[4] the court had to decide whether a beneficiary of a trust have the required *locus standi* to bring an action against a trustee for maladministration/breach of a fiduciary duty. The facts of the case were that the testator died and set up a trust in his will to pay maintenance to his surviving spouse who was also the executor. When she dies, the trust provided that the remaining capital must be paid in equal shares to the deceased's children. The trust they bought a 35% share in Nico Pentz Investment CC of which the attorney who is executor and trustee of the trust, Gross, was a member. The CC then sold property to another entity owned by Pieter Pentz, at a rate substantially below market value which resulted in a loss for the trust. It was argued that the actions of Gross constituted a breach of trust. It is accepted as a general rule that the proper person that has the authority to act in legal proceedings on behalf of a deceased estate is the executor. Usually, a beneficiary does not have the *locus standi* to bring an action to court. The court found that Pentz (the Plaintiff and trust beneficiary) is acting in a representative action, so an exemption must be found to prevent the general rule from applying. The court relied on the *Benningfiled exception*[5] which entails that when an executor cannot sue because his own acts, where the testator's estate are prejudiced, relief may be sought by a party beneficially interested in the proper performance of his duty. Gross had breached his fiduciary duties and the beneficiary was allowed to take legal action against him. In *Cowan v Scargill*[6] the defendant was the head of the mineworker's union and trustee of the pension fund of the miners. The pension fund had investments in South Africa and the oil industry.

[3] [1996] 4 All ER 698 711j. 10
[4] (414/95) [1996] ZASCA 78; 1996 (4) SA 617 (SCA); [1996] 4 All SA 63 (A)
[5] Benningfield v Baxter (1886) 12 AC 167 (PC) - http://www.bailii.org/uk/cases/UKPC/1886/1886_49.html
[6] 1985 CH.270

The defended proposed to withdraw his investment of the fund in oil companies because it is in direct competition with the coal industry that would, according to him, not be in the best interests of the beneficiaries of the fund. The court held that the trustee has a duty to maximise returns on the trust fund and it was not up to the defendant to reject the investment advice on the basis that he had personal objections to the investment. A trustee clearly has the duty to generate the best available return on the trust fund regardless of the other considerations.

In relation to executors and trustees, fiduciary duties derive from the common law, case law as discussed above, but has also been enacted into legislation in the Administration of Estates Act and the Trust Property Control Act[7].

A fiduciary duty is the duty to for example:
a) Look after the interests of another person;
b) Take proper care when dealing with the property of another;
c) act in the best interest of another in all dealings with the property and affairs of that other person;

Fiduciary duties exist to protect the interests of the persons where another is tasked with managing their affairs. A fiduciary is in a position of power that can be misused for their own advantage and to the detriment of the person of property that is looked after.

Trustees

Trustees are those who administer and control the assets of the trust for the benefit of the beneficiaries. The trustees of a trust acts in an official capacity, that is fiduciary in nature, and therefore must always act in the best interests of the trust beneficiaries. A trustee may be a natural person or a corporate entity such as a company. A trustee may be a beneficiary of a trust as long as the trustee is not the sole trustee and the sole beneficiary of the said trust. The minimum and maximum number of trustees required is usually specified in the trust deed. It was held in *Land and Agricultural Bank of South Africa v Parker*[8] and *Thorpe v Trittenwein*[9] that where the trustees of the trust are also the only beneficiaries of the trust and are also related to each another, it is important that an independent trustee be appointed to clearly distinguish between the control and management of the trust property, and the benefit of the trust property.

[7] 57 of 1988.
[8] 2005 (2) SA 77
[9] [2006] SCA 30

The common law fiduciary duties of trustees include that they must always act in good faith and they are jointly and severally liable for any damages. They must always observe the principles of the trust deed while exercising an amount of discretion.[10] They must always be impartial and not benefit one beneficiary above another. It is required of trustees to take possession of the trust property (furnish security to the Master if requested), make the trust property more productive, keep the trust property separate and preserve the trust property for the beneficiaries. The trustees must account to trust beneficiaries and transfer any income or capital to the beneficiaries in terms of the trust deed.

Section 9 of the Trust Property Control Act[11] further confirms the common law duty imposed on trustees to act with care, skill and diligence when dealing with the trust property. The statutory duty exists from the moment the trustee accepts his appointment and therefor goes even further than the common law duty of care. The degree of care diligence and skill required is that which can reasonably expected of a person who manages the affairs of another.[12] Section 9(2) provides that a trust instrument may not exempt or indemnify a trustee of any liability due to a failure to show the care, skill and diligence required of a trustee. Many trust deeds contain a clause stating exactly that. Trustees might think they are indemnified by such a clause and accepts a nomination to act as a trustee. If they knew that this is not actually the case, they might not have accepted the responsibility. Section 16 provides that the Master may request a trustee to account to the Master as to the administration and disposal of trust property. The Master may initiate further investigation and make an order for the trustee to comply with the Master's request or specific duty.[13] Section 20(2)(e) gives the Master the power to remove a trustee if he or she fails to perform any statutory duty imposed on him.

In the unreported case of Wiid v Wiid[14] made crucial observations regarding the duties of trustees. The trust beneficiaries bought a claim to court for damages against the trustees. The trustees in this case entered into rental agreements with a related person that provided that farms and livestock are rented from the trust at an amount significantly less than market value. It was the wish of the founder/deceased that these agreements be put into place and the trustees, by their own testimony, did not execute any independent discretion and let themselves be intimidated

[10] Liebenberg NO v MGK Bedryfsmaatskappy (Pty) Ltd 2003 2 SA 224 (SCA).
[11] 57 of 1988.
[12] Meyerovitz 23.3.
[13] Section 16(3).
[14] 157/2006

by the founder/deceased. HJ Lacock stated as trustees they had a duty to act in the best interests of the beneficiaries, that was not done.

A conflict of interest and/or a failure to act and decide independently from the founder (not as the founder intended) causes neglect and liability for losses, can result in the removal of trustees. Although many trust deeds provides the trustees with an unlimited or unfettered discretion as a standard stipulation, this does not mean trustees may do as they please. It is clear from the above that fiduciary duties are taken seriously by courts and should be adhered to in exercising discretion. Section 20(1) of the Trust Property Control Act states that application can be made to the Master to remove a trustee from office if the court is satisfied that such a removal will be in the best interests of the trust and the beneficiaries. The Master has the authority in terms of section 20(2) to remove trustees from office:

"*(a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or*

(b) if he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or

(c) if his estate is sequestrated or liquidated or placed under judicial management; or

(d) if he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act, 1973 (Act No. 18 of 1973), detained as a patient in an institution or as a President's patient; or

(e) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master."

The fact that section 20(2)(e) specifically refers to the duties imposed by the Master as a ground for removal of a trustees shows that fiduciary duties must be adhered to.

Executorship

When a person dies leaving his assets within South Africa an executor must be appointed to wind up the estate. An estate of a deceased person is dealt with when an executor is appointed by the Master of the High Court.[15] The Master will only appoint an executor if satisfied that the death

[15] Meyerovitz 8.1

notice has been lodged and the will of the deceased is accepted as valid. [16] Executors are responsible for reporting the estate to the Master, collecting outstanding debts, paying creditors, the relevant taxes this includes estate duty, rendering the Liquidation and Distribution accounts and distributing the property to the heirs and legatees. Where a testamentary trust has been created in the last will, the executor may not distribute the property but deliver it to the nominated trustees or cause an endorsement to be made as provided for by section 40 of the Administration of Estates Act[17]. In terms of common law and legislation, certain rights is given to an executor in connection with the liquidation and administration of the estate, but it is important to note that the executor also has certain duties to perform. These rights, duties and responsibilities launch once the Master issues the letter of executorship. Even though section 14 of the Administration of Estates Act[18] provides that a testator/testatrix has the power to nominate an executor of his or her choice, the Master is not likely to appoint a lay person as an executor unless assisted by a professional person. The reason for this is that the winding up of an estate is usually a complex exercise that requires some expertise. [19] When a person nominates, for example, their spouse as executor and the spouse is not a professional person, the spouse will have to find an attorney or other professional who they can wind up the estate. The prescribed executors fee of a maximum 3.5% (plus VAT) on the gross value of assets in an estate and 6% (plus VAT) on income accrued and collected after the death of the deceased will be payable by the deceased estate to the executor[20]. Financial advisors often take on the nomination of clients to be executor and trustee when they pass away without realising the duties placed on them that put them at risk.

Since the executor of an estate is responsible for managing the affairs of the decease, the executor also acts in a fiduciary role. In *Ex Parte Executor Testamentary Estate Late Arthur Storm*[21], the court had to decide whether the executor should have realised the assets of the estate immediately. In this matter the deceased left his assets to a testamentary trust for the benefit of his surviving spouse and daughter and specifically stated that his trustee is to invest in "recognised trust securities". The assets included shares in a company known as The Coronation Brick and Tile Company ("the company"). The executor applied for an order to sell the company shares to certain limited liability companies of which he was also the chairman and controlling shareholder

[16] Meyerovitz 9.1
[17] 66 of 1965.
[18] 66 0f 1965.
[19] Pace 82-83.
[20] Section 51(1) of the Administration of Estates Act 66 of 1965.
[21] 1943 NPD 279.

of. Although the surviving spouse and daughter, as beneficiaries, gave their consent to the transactions the court was not prepared to grant the order. Selke J stated that the transaction would result in the trustee deriving a personal benefit and that it would cause a conflict between his own interest and those of the beneficiaries. The court held that an executor is intended to possess, and in fact possesses, some degree of discretion as to which assets he will realise and when he will realise them. When exercising this discretion, an executor must have genuine and exclusive regard to the interests of the estate and the beneficiaries, and he must act as the ideal "prudent and careful man" would act under similar circumstances. The court highlighted the importance of considering the circumstances of each case, the nature of the investment in question and the best interest of the beneficiaries.

This specific standard of care imposed on an executor not only applies to situations where he has to exercise his discretion but in the administration the estate as whole and therefor since beginning to end.

The court in *Horn's Executor v The Master*[22] held that a person who stands in a fiduciary position must not participate in a transaction by which he or she would personally acquire an interest, which rule, it was said, extends to an executor.[23]

***Bramble-Hannath v Hannath & Others*[24]**

The general principle is clear: persons occupying fiduciary positions (such as an executor or trustee) are not permitted to place themselves in a position where there is a conflict of interest. As was the exact situation in the *Bramble-Hannath*-case, a recent Hight Court matter.

The facts of the case are as follows:

The applicant in this matter (S) brought the application to court for the removal of the first respondent (E) and second respondent (C) as executors in their late father's deceased estate. E and C are daughters of the deceased. S is the deceased's surviving spouse. The practical administration of the estate is done by an employee of the third respondent.

S submitted a claim under the Maintenance of Surviving Spouses Act[25] for an amount exceeding R6million. The will of the deceased did not provide for maintenance. Despite requests by the two

[22] 1919 CPD 48.
[23] Paragraph 51.
[24] 2021 ZAWCHC 102
[25] 27 of 1990.

daughters (E and C), no substantiating information was supplied as required by the provisions of the Maintenance Act[26]. The deceased's will, stipulated that S is to be awarded a lifelong right to inhabit and use the residence where she lived with the deceased. The residue of the deceased's estate was to be awarded to an inter vivos trust of which E and C was trustees and beneficiaries. Since S did not substantiate her claim, it was omitted in the liquidation and distribution account by the executrixes. S then lodged an application to remove the executrixes from office in terms of Section 54 of the Administration of Estates Act.

E and C, in their capacities as trustees of the trust (with one other co-trustee), instituted a claim of R4million against the estate of the deceased based on an alleged loan extended by the trust to the deceased to finance the purchase of the residence in question. When S requested them to provide her with proof of the existence of this loan, E and C, in return refused her access to the trust's records. In terms of paragraph 6, the alleged conflict of interest is said to arise from C and E's position as trustees and beneficiaries of the trust to which the testator left the bulk of his estate. In their capacities as trustees, they lodged a claim by the trust against the deceased estate in the sum of approximately R4,4 million grounded on the deceased's debit loan account. The trustees' claim is reflected as having been accepted by the executrixes in the liquidation and distribution account they lodged with the Master. S claims that the trust's apparent loan account claim against the deceased estate diminishes the funds available in the deceased estate to satisfy her maintenance claim.[27]

J Binns-Ward stated in paragraph 12:

"In the current case it falls to be remembered that an executor also has a duty towards creditors of the estate to exercise his or her powers bona fide and with objectivity. In dealing with a claim an executor is expected to assess its merits on a fair consideration of the facts and its legal merits.[28] Should an executor also be one of the creditors of the estate an unenviable situation will arise in which he or she will have to be the judge of his or her own claim. In my view it is generally undesirable that an executor should find him or herself in such a situation. It not only goes against basic principle that anyone should be judge in their own case, it also posits a potential conflict between the executor's interest as a creditor of the deceased estate and his or her fiduciary duty to administer it for the benefit of the beneficiaries."

[26] Section 3.
[27] Paragraph 17.
[28] *Van Niekerk v Van Niekerk and Another* [2010] ZAKZPHC 85 (17 December 2010), 2011 (2) SA 145 (KZP), [2011] 2 All SA 635, at para 11.

The application of S to remove E and C as executors was successful. Binns-Ward J made the following very important comment in Paragraph 17 of the judgement:

"… it is the existence of the conflict of interest by itself that renders it inappropriate that anyone charged with a fiduciary duty affected by the conflict should be the person called upon to fulfil the duty."

The fact that the daughters, E and C, was executors, trustees and beneficiaries of the trust is sufficient to establish a conflict of interest between their personal interests and their fiduciary roles. Section 54(1)(9)(v) of the Administration of Estates Act provides that an executor may be removed from their position if there is a conflict of interest. The Court thus found that an executor stands in a fiduciary relationship to the beneficiaries in respect of his/her administration of a deceased estate. Proof of misconduct is not required to remove an executor that has a conflict of interest.[29] The mere existence of the fact that an executor is in a conflicted position will generally be prima facie sufficient as a ground to remove an executor.[30] E and C was ordered to be removed as executors.

It is submitted that similar circumstances of nominations of fiduciaries, as in the Brimble-Hannath-case, must be revised to rule out possible future risks. Where an executor is also a creditor how can he/or she be fully objective when handling claims against the deceased estate? Financial planners often advice clients to nominate family members as executors when assisting clients with their wills. Those same family members are the client's heirs and legatees, they are involved in the business of the client, they might also be trustees and/or beneficiaries of the client's family trust. The presence of a conflict of interest is a risk because of possible legal battles, unnecessary cost implications, delay in the winding up of the estate, rifts in family dynamics and rendering the initial estate plan of the client futile. Financial planners who act as trustees on the trust of their clients and is nominated as the executor of the estate could arguably also be at risk of not adhering to their fiduciary duties in those roles. The financial advisor is often nominated in the same capacity by spouses that are both clients. When disputes arise a possible conflict of interest will also arise.

[29] Paragraph 16 and 17.
[30] Paragraph 12.

Conclusion

It is not uncommon for a testator/testatrix to nominate the same person(s) as an executor, trustee and beneficiary of a testamentary trust in their will. The choice as to who to nominate lies with the testator/testatrix but the choice may have unfavourable consequences. The fiduciary duties placed upon executors and trustees in terms of common law and legislation is often overlooked when the nomination is made, or later accepted. Although the Master will be wary of appointing a lay person as an executor, the appointment of a lay person as a trustee is very common in practise. The risks involved can be extensive and from a planning perspective of the testator/testatrix – not what was intended. Financial planners often volunteer to accept these nominations in fiduciary roles without knowing the risks. Independent trust/fiduciary institutions may arguably be the safest option to take on those roles. Unfortunately, many people do not want to make use of institutions due to high cost and poor service delivery. Ultimately, the pros and cons must be weighed up and a person must be able to make an informed decision as to who to nominate to take care of their affairs in the event of their passing. The same must be done when considering accepting such a nomination.

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Financial Planner Acting as Trustee- Is There a Conflict of Interest?

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Introduction

Financial planners/advisers/brokers ("Financial Planners") are often their client's most trusted business associates' and confidants'. It is therefore no strange phenomenon for a client to request that their Financial Planners also act as an independent trustee on their trust. Financial Planners should be made aware of the various pitfalls in this regard. Where a financial planner act as trustee and planner of the same trust the two roles might be in conflict.

The Trustee

The administration of a trust in South Africa resolves mainly around the management of the trust assets by the trustees in their fiduciary capacity to the ultimate benefit of the beneficiaries of the trust. The office of trustee is governed by the Trust Property Control Act[1] as well as common law. A trustee should act with due diligence, skill and care which can reasonably be expected from a person who manages the affairs of another.[2]

There are three main principles which govern the administration of trusts in South Africa according to Cameron[3] , namely:

"*(a)the trustee must give effect to the trust instrument, properly interpreted, as far as it is lawful and effective under the law of the place where the administration is to take place;*"

"*(b)the trustee must in the performance of duties and the exercise of powers act 'with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another'; and*"

"*(c)except as regards questions of law, the trustee is bound to exercise an independent discretion.*"

These golden rules are all part of a trustee's common law duties. The focus of this article will be on the third golden rule dealing with the important aspect of independence of discretion in respect of the common law powers of the trustees, among other things to keep the trust assets separate as well as dealing with the trustee's conflict of interest.

[1] Trust Property Control Act ,No. 57 of 1988
[2] Section 9(1) of the Trust Property Control Act ,No 57 of 1988
[3] Cameron(6th ed 305 et seq)

Trustee's conflict of interest

There is not much written in South African case law regarding trustees and conflict of interest. Much more information can be found in the UK and American Law. The first use of the written term "conflict of interest" was in 1860.[4] It was only in the 1970s that this term was incorporated in codes of good conduct in the USA and elsewhere. The concept of "conflict of interest "is as old as Religion itself- "Can a man have two masters?" [5] The rules to prevent conflict of interest in broad terms concerns the ethics of various professions and the good governance of all entities (including trusts) by all ,and , particular by trustees .

The term ***"conflict of interest"*** can in general be defined as follows:
"We can define a conflict of interest as a situation in which a person has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties as, say, a public official, an employee, or a professional"[6] or it is defined as "a conflict between competing duties (as in an attorney's representation of clients with adverse interests)" or "a conflict between the private and official responsibilities of a person in a position of trust"[7].

Bringing the definition closer to home with regards to a trustee's specific conflict of interest it was decided by a UK court in Tito v Waddell[8] that "A trustee has an obligation not to permit conflicts of interest either between two competing fiduciary duties or between the trustee's personal interests and the interests of the beneficiaries."

It is of significant importance to explore the "competing fiduciary duties" and therefore defining "fiduciary duty "is important. In terms of a trust, the fiduciary duty of a trustee means to be holding and managing trust assets to the benefit of the beneficiaries of a trust, irrespective if that beneficiary has a vested right or is a contingent beneficiary, whose right to trust income or capital will only vest at some future date or event.[9]The moment a person is appointed as a trustee of a trust that person is under a fiduciary duty to administer the trust property "on behalf of and in the interests of another". [10]

[4] www.merriam-webster.com
[5] Davis M & Starke A et al *Conflict of interest in the Professions* Oxford University Press 2001 15–17
[6] C & M McDonald & W Norman "Charitable Conflicts of Interest" *Journal of Business Ethics* 39:1-2, 67–74 August 2002 at p 68
[7] Merriam-Webster Dictionary
[8] *(no. 2)* [1977] 3 All ER 129
[9] Griesel NO v De Kock 2019(5) SA 396 (SCA)
[10] *Land and Agricultural Bank of SA v Parker* 2005 2 SA 77 (SCA) at §20

According to Du Toit F[11] there are essentially ***four fiduciary duties*** in respect of the general fiduciary duties of a trustee:

- A duty of care: A trustee has a fiduciary duty that arises from or is equivalent to his duty of care to manage the assets of the trust to the benefit of the trust beneficiaries. In *Sackville West v Nourse & Another r*[12]*Kotze JA in a unanimous judgement stated the position of the fiduciary duties or duties of care as follows: "The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the bonus et diligens paterfamilias . . ."*
- A duty of impartiality: A trustee must as far as possible avoid conflict between his private interests and his duty as trustee and must treat beneficiaries impartially. Du Toit[13] takes the definition of impartiality even a step further by stating that apart from a trustee avoiding conflict of interest with regard to his/her private interests, impartiality also prohibits a trustee from making undue profit from his trusteeship –essentially the duty of loyalty .
- A duty of independence: In Tijmstra v Blunt-Mackenzie[14] the dispute resolved around the administration of the trust by the trustees. The court decided to remove all the trustees due to the lack of proper administration by the trustees. One of the grounds the court based its decision on was the fact that some of the trustees did not act independently but merely accepted decisions of more senior trustees.
- A duty of accountability: In Doyle v Board of Executors[15] the question before the court was whether a contingent beneficiary in a trust could demand details from a trustee with regard to transactions by the trust. The court held that the duties of a trustee is similar to the duties owing by an agent to his principal. A trustee must hold proper account of transactions by the trust and must be in a position to report to the beneficiaries if requested to do so.

[11] Du Toit F *US LR* at 476 & Du Toit F "The Fiduciary Office of Trustee and the Protection of Contingent Trust Beneficiaries" *Stellenbosch Law Review* 2007 3 469 at 476
[12] *Sackville West v Nourse & Another* 1925 AD 516 at 534
[13] *Stellenbosch Law Review* 2007 3 469 at 476
[14] *Tijmstra v Blunt-Mackenzie 2002 1 SA 459 (T)*
[15] *Doyle v Board of Executors 1999(2) SA 805 (C)*

He is further of the opinion that a trustee should act with the required impartiality, which not only implies the avoidance of conflict of interest between a trustee's personal interests and those of the beneficiaries, but also prohibits a trustee to make any undue profit from his trusteeship.

The trustee has specific duties as well as certain obligations to the beneficiary of the trust. For a conflict of interest (actual or potential) to arise, there must be a relationship of trust between the trustee and the beneficiary. Davis & Starke [16] describe this as *"The relationship required must however, be fiduciary: that is, it must involve one person trusting (or at least, being entitled to trust) another to do something for her – exercise judgment in her service"*. If one needs to exercise judgement (not all relationships of trust require judgement), Davis & Starke is of the opinion *"judgment is the ability to make certain kinds of decision correctly more often than would a simple clerk with a book of rules and all, and only, the same information. .... When judgment is required, the decision is no longer routine. Judgment brings knowledge, skill and insight to bear in unpredictable ways."*[17]*In Coetzee v Financial Planning Institute of Southern Africa*[18] *the tribunal found that the applicant had failed to execute her mandate properly, diligently and professionally and that she had accordingly breached Principle 201 of the FPI Code of Conduct which stipulates that —an advisor shall exercise reasonable and prudent professional judgement in providing financial services and at all times act in the interest of the client." Coetzee provided financial advice to the Wagener Family Trust (the Trust) duly represented by Ms M. Wagener. Ms Wagener instructed the applicant, Ms Coetzee in 2005 to sell shares to the value of R30 million owned by the Trust. Wagener informed Coetzee that she feared losing her profit that she had seen how the share market could fall and the same had happened while her late husband used to manage the share portfolio of the Trust himself. She also informed Coetzee of the fact that has sleepless nights, worrying over such last share portfolio. She wanted the share portfolio to be invested in such a manner that the Trust would be protected from a loss. Coetzee invested the share portfolio in equal amounts in the Stanlib Managed Flexible Fund and the Stanlib Multi-*

Manager High Equity Fund

The written mandate furnished reflected the Trust's requirements as follows:

- *"Client wants to take profit on share portfolio to limit capital losses if stock market falls. Risk profile currently is too aggressive. Client wants more diversification in investment portfolio with more constant management and monitoring of portfolio by experts."*

[16] Davis M & Starke A et al *Conflict of interest in the Professions* Oxford University Press 2001
[17] (at 8)Davis M & Starke A et al *Conflict of interest in the Professions* Oxford University Press 2001
[18] Coetzee v Financial Planning Institute of SA(1079/13)[2014]ZASCA 205(28 November 2014

Wagener's complaint to the FPI was essentially two-fold .First, she believed that she was not adequately informed of the investment risk of the recommended portfolios and secondly that the commission earned by the applicant for the transaction(i.e. 3% or R 900 000)was not commensurate with the level and quality of financial advice she received.

According to the tribunal the issue at hand was whether the two recommended portfolios would have been able to protect the investments against a fall in the share market. This aspect was not put to Coetzee by the tribunal but the tribunal itself found the answer as contained in the record of proceedings using their qualifications and expertise. They concluded that having regard to the way the R 30 million had been invested it would have been clear to anyone who knew something about investments that it would have been impossible for the applicant to have fulfilled her mandate. The applicant did not exercise reasonable, prudent and professional judgement in providing financial advice to the Trust.[19]

The concept of conflict of interest and how it can lead to a breach in trust, is clearly illustrated from the judgement of Innes CJ in *Robinson v Randfontein Estates Gold Mining Company Limited: "Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty… There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent … Whether a fiduciary relationship is established will depend upon the circumstances of each case."*[20]

An important consideration is the fact that in most cases, the conflict of interest of a trustee begins with a potential conflict and not an actual abuse of the trustee's position at first. The courts have on numerous occasions warned that the actions of the trustee will always be scrupulously scrutinised, particularly in the case of potential conflict of interest. [21]

[19] Financial Planning Annual Refresher Workbook 2013 at 41-42
[20] *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 AD 168 at 177–178
[21] *Colonial Banking & Trust Co Ltd v Estate Hughes* 1932 AD 1 AT 16
Administrators, Estate Richards v Nichol 1999 1 SA 551 (SCA)
Kidbrooke Place Management Assoc et al v Walton et al 2015 4 SA 112 (WCC)

Practical examples of potential conflicts of interests

- *The* lines sometimes become very blurred, where a Financial Planner has a relationship with the client whereby he is acting as a trustee and also as financial planner .In his capacity as a Financial Planner he exercises his/her discretion, and invests in his/her own products, gaining the commission earned, compared to investing as trustee in someone else's products with proven higher yields and not earning the commission in his private capacity. The Financial Planner in his capacity as trustee should rather refer the client to another Financial Planner, totally independent. The advice and recommendations of the independent Financial Planner can then be scrutinized by the Financial planner and all the other trustees of the trust .This will allow the trustees to make an informed decision ;
- An *attorney* who is appointed as a trustee entering himself as a the Attorney of record in a litigation matter concerning the trust while there may be some other attorney/s who is/are far better equipped to handle the case on behalf of the trust ;
- An *Accountant* appointed as Accountant Trustee drafts the financial statements of the trust, while his/her own objectivity can become murky regarding sensitive accounting or tax matters of the trust of which he/she has initiated, done and concluded the transaction[22] ;
- a *trustee* is in the employment of a company (trust etc.) which is linked with a specific financial institution/investment company and the trustee is compelled by the employer company to only invest in products of such an investment company
- a trustee's personal interests/benefits are competing with those of the trust/beneficiaries in all kinds of *transactions* be it property purchase/sale/rental, business/farming, etc. Where a trustee for example enters into a rental agreement with regard to trust property in his private capacity and pays a rental amount that is not market related, he/she is effectively putting his personal interests before that of the beneficiaries of the trust. A trustee may not gain personally from the trust assets other than reasonable remuneration as prescribed by the trust deed. The trustee must as a minimum requirement keep his/her personal assets separate from that of the trust and must at all cost avoid a conflict of interest with the beneficiaries or the object of the trust.[23]

[22] *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 AD 168 at 177–178
Breetzke and Others NNO v Alexander NO and Others [2020] 4 All SA 374 (GP); 2020 6 SA 360 (SCA)
Kidbrooke Place Management Assoc et al v Walton et al 2015 4 SA 112 (WCC)

[23] Mofokeng v Master of the North Gauteng High Court[2013]

Guidelines when acting as a trustee

A trustee may be removed from office by the High Court on application by the Master of the High Court or any other interested party in terms of Section 20(1) of the Trust Property Control Act.[24] The Court must however be satisfied that such a removal will be in the best interest of the trust and the trust beneficiaries. The Master of the High Court may also remove a trustee in terms of Section 20(2) of the Trust Property Control Act[25] without applying to the Court when a trustee fails to satisfactory perform the duties placed on him/her by the Trust Property Control Act.[26] Since the Court may remove trustees from office when they place their personal interests above the interests of the trust beneficiaries [27] it is prudent for a Financial Planner to decide in advance, before accepting any trusteeship, whether there are any actual or potential conflict of interest that may arise and if there is a real chance of this happening, then the Financial Planner should not accept the trusteeship.

Lacock J, in *Wiid & Others v Wiid & Others*[28], laid down some guidelines regarding the conduct of trustees, particularly in respect of trustee conflict of interest, namely:

- *Trusteeship requires far more than respecting the sentiments of a deceased founder.*
- *Failure to act and decide independently from the founder causes neglect and liability for losses) and failure of this kind also caused the trustees to be removed.*
- *A* conflict *of interest also caused a trustee to be removed.*

In the event a Financial Planner is already acting as a trustee, what should be the guidelines the Financial Planner should adhere to, in order to avoid a potential conflict of interest?

King IV guidelines[29]

Apart from following the golden rules of trust administration as set out above trustees should always acknowledge the boundaries of their abilities and get hold of a set of good trust administration guidelines,i.e. a good textbook on trust administration and /or the King IV Report on good governance in South Africa. The King Report on Corporate Governance is a booklet containing guidelines for the governance structures and operation of companies in South Africa.

[24] Trust Property Control Act ,No. 57 of 1988
[25] Trust Property Control Act ,No. 57 of 1988
[26] Trust Property Control Act ,No. 57 of 1988
[27] Mofokeng v Master of the North Gauteng High Court[2013]
[28] *Wiid & Others v Wiid & Others* [2012] ZANCHC 9 (30 April 2012)
[29] *King IV Report on Corporate Governance for South Africa 2016* by The Institute of Directors Southern Africa – obtainable at http://www.iodsa.co.za

It is issued by the King Committee on Corporate Governance. Since 1994, three reports were issued, 1994 (King I), 2002 (King II), and 2009 (King III) and a fourth revision (King IV) in 2016. The Institute of Directors in Southern Africa (IODSA) owns the copyright of the King Report on Corporate Governance and the King Code of Corporate Governance. The King Report is a voluntary code seeking to set out the principles and best practices that companies and organisations follow in order to achieve good governance structures. The King Report is not a law .A law provides a legal framework that people must not transgress and if they do, certain sanctions will be imposed to address the specific transgression under the applicable law. Certain parts of a governance code may formally be integrated into legislation/regulation for example some elements of King III were incorporated into the new Companies Act.

The Report covers the entire spectrum of guidelines for good governance of any organisation. The Report defines "organisation" to also include a "trust". [30]

It contains ethical and moral values, common sense as well as behaviour- all of which form the basis of an ideal society of good governance and also trust administration.[31]
For good governance (administration /management) of any "organisation" or trust for purposes of this article, King IV guides us to a trustee's primary role and responsibility in four categories in order to comply with 17 principles as set out in the Report.[32] The trustees should lead ethically and effectively .An ethical culture should be established by the trustees and they should ensure that the trust is seen to be a responsible corporate citizen.

For example in respect of the first principle of ethical leadership ,the trustees should always act in good faith with integrity in the best interest of the trust ,avoiding any conflict of interest and clashes between self-interest and that of the trust and /or the beneficiaries. It is advisable that where a Financial Planner acts as trustee and renders financial advice to the trust, any conflict of interest or potential conflict of interest should be disclosed.

In respect of the second principle of creating an ethical culture, the trustees must always behave ethically, adopt and apply codes of good conduct and create an environment of an ethical culture where there is no place for "isms" such as nepotism, sexism, favouritism, etc.

[30] *King IV Report on Corporate Governance for South Africa 2016* by The Institute of Directors Southern Africa – obtainable at http://www.iodsa.co.za
[31] *King IV Report on Corporate Governance for South Africa 2016* by The Institute of Directors Southern Africa – obtainable at http://www.iodsa.co.za
[32] King IV

Professional Codes of Conduct

Although the Chief Master of the High Court of South Africa suggested in his Directive of March 2017[33] that an independent trustee *"may be a professional accountant, admitted attorney, an advocate who is affiliated to the relevant professional body or association, trust companies, boards of executors or fiduciary practitioners who are members of FISA and may even be chosen from the ranks of business associates;"*[34]*, the respective professional bodies' code of conduct and rules may disqualify a person from acting as a trustee while at the same time he/she is also fulfilling his/her professional role in the same trust* .

The very important question that arises is whether it is possible to be truly independent if you are receiving two forms of compensation for acting as a trustee while also being the financial planner, the attorney or the accountant of the same trust. For example where a Financial Planner acts as trustee of his/her client's trust and recommends certain investment products gaining the commission earned, compared to investing as trustee in someone else's products with proven higher yields and not earning the commissions in his private capacity or an attorney litigating in a matter where the trust is concerned while there might be some other attorney/s who is/are much better equipped to handle the case on behalf of the trust. Or the accountant trustee doing the financial statements of the trust where his/her objectivity becomes murky when advising on, sensitive tax or accounting matters and also concludes the transactions.

Financial Planners act as representatives under the licence of the Financial Service provider[35] and renders a financial service for or on behalf of the FSP in terms of the conditions of employment, agreement or mandate. In terms of Section 3 A (2)(a) of the General Code of Conduct "every provider, other than a representative , must adopt ,maintain and implement a conflict of interest management policy that complies with the provisions of the Act" [36]In terms of the General Code of Conduct a provider and representative must avoid, and where not possible ,mitigate the conflict of interest between the provider and the client or the representative and the client. In order to comply with this requirement the FSP must identify any and all conflicts of interest that are applicable to the business of the FSP and determine whether or not the said conflicts can be avoided given the financial service the FSP provides.

[33] Chief Master's Directive 2 of 2017
[34] Chief Master's Directive 2 of 2017
[35]Financial Advisory and Intermediary Services Act 37 of 2002 section 1
[36] Financial Advisory and Intermediary Service Act, No. 37 of 2002 Section 15

The conflict of interest management policy must provide mechanisms for the identification of conflict of interest. There is an obligation on all key individuals and representatives to apply their minds on an ongoing bases to the identification of potential or actual conflict of interests by asking the following questions:

- "Is there any situation that exists that will influence my objective performance of my obligations to my client?"
- Is there any situation that exists that prevents me to act in the best interest of my client?"
- Is there any situation that exists that will prevent me to render a fair and non-biased financial service to my client?"

Where a representative is a tied advisor and provides financial advice to clients under the licence of the FSP, the FSP can in terms of the conflict of interest policy require the financial planner to declare any such conflict of interest. If any of the above questions are answered in the positive by the financial planner it would be sufficient grounds for the FSP to decline a request by the financial planner to act as trustee on his/her client's trust.

If the financial planner acts as a trustee and the board of trustees need to make an investment decision based on the proposal by the financial planner, which hat will the financial planner be wearing when the decision is being made? Will the financial planner be objective when participating in the decision making? It will be very difficult for the financial planner not to be biased and to identify and manage conflicts of interest and exercise sound professional judgement when participating in the decision-making process. Therefore, the financial planner should rather refrain from acting as a trustee in a trust for which he/she also provides financial advice.

Although beneficiaries of a trust might have been prejudiced because of the existence of a conflict of interest where a financial planner fulfils his role as trustee and financial planner, it would not necessarily be sufficient ground for the beneficiaries to institute a claim for damages against the FSP of the tied advisor. The beneficiaries will be able to lodge a complaint at the Master Office or to bring an application to the High Court for the removal of the particular trustee.
Although the Financial Planning Institute of South Africa ("FPI") has not issued any formal communication regarding Certified Financial Planners (CFP's) fulfilling the role as trustee and financial planner it is clear that a potential or actual conflict of interest may exist when trying to fulfil both roles in the same trust.

The FPI Code of Ethics and Professional Responsibility sets out a number of relevant principles to consider when the financial planner considers their appointment as trustee.

FPI Code of Ethics and Professional Responsibility[37]

- *Principle 1 - Client First: Placing the client's interests first is a hallmark of professionalism and is a core value of any profession. It requires the FPI members to act honestly at all times and not place personal interest or advantage, in any form, before their clients' interests.*
- *Principle 2- Integrity: Integrity requires adherence to practices of honesty, fairness, consistency and candor in al professional matters.*
- Principle *3- Objectivity: Objectivity requires intellectual honesty and impartiality. Regardless of the services delivered or the capacity in which a FPI member functions, objectivity requires members to identify and manage conflicts of interest and exercise sound professional judgement.*
- Principle *5- Competence: Competence requires attaining and maintaining a high level of knowledge, skills and abilities in the provision of professional services. Competence also includes the wisdom to recognise one's own limitations, consulting with other professionals when in doubt and referring clients to other professionals should one not have the time, ability, or inclination to optimally respond to a client's needs. Competence requires the FPI member to make a commitment to continued learning and professional development. FPI members communicate their competence and limits to their competence when initially engaging with clients. Thereafter competence is demonstrated in every client interaction. If, at any time, FPI members doubt their ability to adequately fulfil their obligations to a client, they need to withdraw from that engagement either temporarily or permanently.*

Consequences of Trustee's Conflict of Interest

Where an actual conflict of interest of a trustee arise, it can lead to the breach of trust and the actual removal of the trustee from the trust as well as personal liability for the breach of trust or non-compliance with the fiduciary duty of the trustee. In *Sackville West v Nourse & Another*[38], the court unanimously, stated the position relating to the fiduciary duties of trustees as follows (at 534):

"It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own, for, while a man may act as he pleases with his own property, he is not at

[37] https://fpi.co.za/documents-and-other/
[38] Sackville West v Nourse & Another 1925 AD 516

liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the bonus et diligens paterfamilias . . ."

In *Wiid & Others v Wiid & Others*[39] the conflict between personal interests as beneficiary and trusteeship caused the trustees to be removed. In *Brimble-Hannath v Hannath and Others*[40] the court found a conflict of interests between trustees qua trustees where they instituted a claim as trustees against a deceased estate for which they were also the executors and removed them (the trustees) as executors.

Conclusion

When approached by your client to act as an independent trustee on his/her trust, you need to consider the various pitfalls and risks. Is it possible to be truly independent when receiving compensation for two different roles you fulfil as trustee and financial planner? Can you honestly say that there will be no potential or actual conflict of interest when acting as a trustee while simultaneously acting in a professional capacity for the trust?

If you cannot answer the above questions in the positive it is prudent not to accept the trusteeship on your clients' trust.

However, if you are already in the hot seat follow these guidelines:

- ❑ give effect to the trust *instrument* ;
- ❑ always act "with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another" See s 9(1)) of TPC Act[41] and
- ❑ be *bound* to exercise your discretion impartially / independently
- ❑ always evaluate, determine and acknowledge the boundaries of your abilities
- ❑ get hold of Good Trust Administration (Governance) guidelines i.e. A good text book on trust administration and/or the KING IV report on good governance which defines an "organisation" to also include a "trust"

[39] Wiid & Others v Wiid & Others [2012] ZANCHC 9 (30 April 2012)
[40] Brimble-Hannath v Hannath and Others (3239/2021) [2021] ZAWCHC 102 (25 May 2021)
[41] Trust Property Control Act

Finally, decide beforehand, before accepting trusteeship, of the potential conflicts that may arise and if really a reality then do not accept trusteeship.

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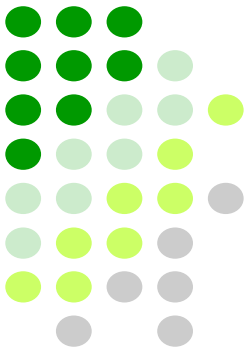

Estate Planning

Domestic Partnership: The Right to Inheritance and Maintenance of the Surviving Partner

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Introduction

There is a common misconception that if couples, specifically heterosexual couples, live together as if they were legally married, they automatically enter into a "common law marriage" and will therefore receive the same legal rights and obligations as married couples. This assumption is however incorrect. Common law marriages do not exist in South Africa and there is currently no legislation that deals with the proprietary consequences of such a relationship. Very simply explained, men and women who live together do not have the rights and duties that a marriage confers. In this article, we will explore what a domestic partnership means and if any legal rights are given to person that are in a domestic partnership specifically at the death of one of the partners.

Current Legislation

It is important to understand which marriages are regulated by legislation in South Africa:

- Civil marriages in accordance with the Marriages Act 25 of 1961. The Act recognises the voluntary union of one man and one woman to the exclusion of others while the union lasts;
- Civil unions in accordance with Civil Union Act 17 of 2006. The Act allows any two persons of the age of 18 or over to conclude a marriage relationship; and
- Customary marriages in terms of the Recognition of Customary Marriages Act 120 of 1998.

Domestic Partnerships

A domestic partnership refers to the relationship of a man and woman who live together as man and wife, without having gone through a legal ceremony of marriage.[1] The marriages set out above are the only recognised romantic partnerships in South Africa. Domestic partnerships are not regulated by legislation, however certain pieces of legislation make certain provisions for spouses, which may or may not include the parties to a domestic partnership. Let us explore some of these:

❑ Pension Funds Act

Section 37C of the Pension Funds Act[2] governs the distribution and payment of lump sum benefits payable on the death of a member of a retirement fund[3]. Section 37C places a duty on the trustees of the fund to investigate and determine who the dependant of a deceased member

[1] Howie *et al*., 2003: 8
[2] 24 of 1956
[3] Pension fund, provident fund, pension and provident preservation fund and retirement annuity fund.

are and to allocate and pay the benefit in a manner that is fair and equitable. Section 1 of the Pension Funds Act defines a dependant as:

(a) a person in respect of whom the member is legally liable for maintenance;

(b) a person in respect to of whom the member is not legally liable for maintenance, if such person –

i. was, in the opinion of the board, upon the death of the member in fact dependent of the member for maintenance;

ii. is the spouse of the member;

iii. is a child of the member, including a posthumous child, an adopted child or a child born out of wedlock.

(c) a person in respect of whom the member would have become legally liable for maintenance had the member not died.

The Pension Funds Act further defines a spouse as:

"a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, the Recognition of Customary Marriages Act, or the Civil Union Act, or the tenets of a religion;"[4]

A partner in a domestic partnership could therefore qualify as a dependant for the purposes of Section 37C, as long as they can prove that they were the permanent life partner of the deceased member.

It is important for partners in a domestic partnership to note that the trustees must consider certain factors when determining when to include a dependant in the distribution of the death benefits.

These factors[5] include, but are not limited to:

- the extent of dependency;
- the ages of the beneficiaries;
- the relationship with the deceased;
- the amount available for distribution;
- the financial status of each beneficiary, including the future earning capacity of each beneficiary; and

[4] Section 1 of the Pension Funds Act 24 of 1956

[5] As set out in the matter of *Sithole v ICS Provident Fund [2004] 4 BPLR 430 (PFA)* and confirmed in the matter of *Mohlomi v Evergreen Provident Fund and Others [2014] JOL 31440 (PFA).*

- the wishes of the deceased.

❑ Income Tax Act

In terms of the Income Tax Act[6] a spouse is defined[7] as, in relation to any person, a person who is the partner of such person –

(a) in a marriage or customary union recognized in terms of the laws of the Republic;

(b) in a union recognized as a marriage in accordance with the tenets of any religion; or

(c) in a same sex or heterosexual union which the Commissioner is satisfied is intended to be permanent.

Therefore, partners in a domestic partnership may enjoy the benefits given to spouses in terms of the Income Tax Act. Such benefits include, the donations tax exemption afforded to spouses for donations made between spouses as well as the capital gains tax exemption and rollover relief where assets are disposed of from one spouse to the other.

❑ Estate Duty Act

The definition of spouse in the Estate Duty Act[8] is similar to the above, where it is defined[9] as, in relation to any deceased person, includes a person who at the time of death of such deceased person was the partner of such person —

(a) in a marriage or customary union recognised in terms of the laws of the Republic;

(b) in a union recognised as a marriage in accordance with the tenets of any religion; or

(c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent.

Again, domestic partners will receive the benefits of a spouse as set out in the Estate Duty Act, such as:

- a deduction from estate duty for any asset that has been bequeathed to the surviving spouse[10] (in this instance, the domestic partner); and
- making use of any unused abatement that the predeceased spouse did not utilise[11].

[6] 58 of 1962
[7] Section 1 of the Income Tax Act 58 of 1962
[8] 44 of 1955
[9] Section 1 of the Estate Duty Act 44 of 1955
[10] Section 4(q) of the Estate Duty Act of 1955
[11] Section 4A of the Estate Duty Act of 1955

❑ Maintenance of the Surviving Spouses Act

The Maintenance of the Surviving Spouses Act[12] on the other hand does not make provision for the surviving partner in a domestic partnership. The surviving partner will therefore not be able to claim against the estate of the deceased partner for reasonable maintenance.

❑ Intestate Succession Act

Similarly, the Intestate Succession Act[13] does not include a definition of spouse. Through various court cases, the Constitutional Court has extended the status of spouse to the following persons:

- the surviving partner to a Muslim marriage[14]; and
- same-sex partners in a permanent life partnership in which the partners have undertaken reciprocal duties of support[15].

Based on the above, the surviving partner of a heterosexual domestic partnership does not carry the status of a spouse for purposes of the Intestate Succession Act and will therefore not be able to claim against the estate of the deceased partner where such partner dies without a valid will. It is important to note that in Volks v Robinson and Others[16], the Constitutional Court held that one cannot enjoy the rights of marriage if one chooses not to be married as there is no law that prohibits two heterosexual people to enter into marriage.

The good news is that change is on the horizon. The Constitutional Court confirmed the ruling of the Western Cape High Court in Bwanya v Master of the High Court, Cape Town and Others[17], that section 1 of the Intestate Succession Act, is unconstitutional in so far as it excludes life partners in a relationship intended to be permanent from the definition of "spouse":

Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51

The applicant, Bwanya and the deceased, Ruch met in February 2014 and they started living together in his house in June 2014. The undisputed evidence before the court was that Ruch treated Bwanya as his wife. To friends, with whom they mixed socially, their relationship at all times appeared to be that of a loving couple.

[12] 27 of 1990
[13] 81 of 1987
[14] Daniels v Campbell and Others (CCT 40/ 03) [2004] ZACC 14
[15] Gory v Kolver NO and Others (CCT 28/06) [2006] ZACC
[16] (CCT 12/04) [2005] ZACC 2
[17] (20357/18) [2020] ZAWCHC

Ruch prepared for the two of them to travel to Zimbabwe to meet Bwanya's family, negotiate lobola and prepare for a wedding. Ruch died unexpectedly in April 2016. Bwanya then lodged claims against the estate as an intestate heir, as Ruch's spouse, as well as under section 2 of the Maintenance of Surviving Spouses Act.

The second respondent, the executor of Ruch's estate, rejected both claims. The Master of the High Court upheld these rejections. Bwanya then brought forward the application that both section 1(1) of the Intestate Succession Act and certain provisions of the Maintenance of Surviving Spouses Act, are unconstitutional and invalid.

The court a quo[18] found that section 1(1) of the Intestate Succession Act was unconstitutional and invalid insofar as it excludes the life partners in permanent opposite-sex life partnerships who have undertaken reciprocal duties of support from inheriting in terms of this Act. The court held that this constituted unfair discrimination on the basis of gender and sexual orientation and that it is presumed to be unfair under section 9 of the Constitution, 1996. The court ruled that section 1(1) of the Intestate Succession Act should be read to include the words "or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support' after the word "spouse" wherever it appears. The court also held that as it stands, section 1(1) also impairs the dignity of such an opposite-sex life partner.

The Constitutional Court upheld the decision of the court a quo.

Regarding the Maintenance of the Surviving Spouses Act, the court a quo held that it is bound by the precedent set by the Constitutional Court in *Volks NO v Robinson and Others [2005] ZACC 2* in which the latter court held that the limitation of a claim under the Act to cases where a legal duty of maintenance existed, is not unconstitutional.

The Constitutional Court allowed an appeal against the ruling by the court a quo, that it cannot find that the provisions of the Maintenance of Surviving Spouses Act are unconstitutional because it is bound by the earlier decision by the Constitutional Court in Volks NO v Robinson and Others. The Constitutional Court found that whether or not a life partnership existed is a factual question and that it can, therefore, decide on the facts that it existed in the current matter. The court was

[18] The court in which the matter was first heard, or the court from which an appeal or review is being heard.

of the view that the decision in Volks NO v Robinson and Others does not bind it under all circumstances.

The court ordered, inter alia, that both section 1 of the Intestate Succession Act as well as section 2 of the Maintenance of the Surviving Spouses Act are unconstitutional and that it should be read to include a partner in a life partnership complying with the test of reciprocal duties of care, maintenance and support.

Parliament has yet to amend the Intestate Succession Act and the Maintenance of the Surviving Spouses Act to make provision for a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support.

Domestic Partnership Bill

In 2008, the Domestic Partnership Bill was drafted with the aim to provide legal recognition to domestic partnerships. The objectives of the Bill as set out in section 2, are to ensure the rights of equality and dignity of the partners in domestic partnerships and to reform family law to comply with the applicable provisions of the Bill of Rights, through the –

(a) recognition of the legal status of domestic partners;

(b) regulation of the rights and obligations of domestic partners;

(c) protection of the interests of both domestic partners and interested parties on the termination of domestic partnerships; and

(d) final determination of the financial relationships between domestic partners and between domestic partners and interested parties when domestic partnerships terminate.

The Bill also makes provision for the inclusion of domestic partners as "spouse" in the Maintenance of the Surviving Spouses Act and the Intestate Succession Act.

Single Marriage Statute

Following the Domestic Partnership Bill, The Protected Relationship Bill or The Recognition and Registration of Marriages and Life Partnerships Bill (name to be decided on) has been drafted to rationalise the marriage laws pertaining to various types of relationship. The Bill makes provision for the following:

- the recognition of marriages and life partnerships entered into by parties regardless of the religious, cultural or any other beliefs of the parties, or the manner in which the relationship was entered into;
- the requirements for entering into a protected relationship or a marriage or a life partnership;
- the registration of protected relationships or marriages and life partnerships;
- the legal consequences of entering into protected relationships or marriages and life partnerships; and
- for matters incidental thereto.

The Bill defines "protected relationships" as:

(a) any subsisting marriage concluded in terms of the Marriage Act, old order marriage legislation or any other prior legislation before the commencement of this Act; any subsisting union or marriage concluded in terms of the Civil Union Act, before the commencement of this Act; and any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act;

(b) any subsisting monogamous or polygynous marriage or relationship concluded or entered into in terms of the tenets of any religion or culture before or after the commencement of this Act; or

(c) any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other.

Therefore, parties to a domestic partnership will be classified as a protected relationship in terms of the Bill. The Bill provides that if a protected relationship was not solemnised by a marriage officer, the parties to the relationship have the duty to ensure that their relationship is registered.[19] In terms of paragraph 9 of the Bill, all parties in a protected relationship will have equal status and capacity. The Bill further provides that, whenever legislation or the common law attaches consequences to protected relationships, the relationships as defined in this Act are deemed to be referred to regardless of whether they have been registered in terms of this Act or the Marriage Act, the Civil Union Act or the Recognition of Customary Marriages Act[20].

[19] Paragraph 8
[20] Paragraph 12

Conclusion

It is clear that simply living together does not provide couples with any legal duties towards each other and no reciprocal duty of support. This leaves the couple at a financial risk in the event of death or dissolution of the partnership. While the ruling in the Bwanya-case holds great promise for the future of domestic partnerships, no partner should be dependent on court rulings to ensure that their rights are protected. The Domestic Partnership Bill and the Single Marriage Statute holds great promise for couples in a domestic partnership but couples will only be able to rely on the legislation once it's legislated, until then, couples need to find other ways to protect themselves.

How can partners in domestic partnerships protect themselves and their partners?

The first way is by appointing each other as the heirs to their respective estates in their wills. This will prevent a partner from being excluded as an heir as per the Intestate Succession Act.

Couples can also enter into a cohabitation agreement in which they can make any provision related to their relationship, as long as it is possible, legal and moral. Such provisions may include the undertaking to maintain each other during the existence of the relationship and even agree on the maintenance after separation. They may set out the ownership of property before and during the relationship. They may even agree on each partner's liability towards the household etc.

Another form of protection is to purchase assets jointly or by jointly entering into rental, lease or credit agreements. If assets are jointly owned, neither partner may exclude the other from using or controlling an asset.

Further to this, the parties should consider taking out life policies on the lives of each other to provide for the maintenance of the surviving partner.

Financial advisers should always advise their clients who are in a domestic partnership to record and document the principles of their relationship and make provision in the forms mentioned above, in order to avoid costly litigation when the relationship ends, whether by way of separation or death.

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Marriages Out of Community of Property Section 7(3)(a) of The Divorce Act – Greyling V Minister of Home Affairs and Others

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Introduction

South African law has an interesting history with regards to the development of its marriages and the recognition thereof. In the past only marriages concluded in terms of the Marriage Act, 25 of 1961 were recognized as legal marriages. However, through the years this changed due to changes in legislation and case law.[1] Currently the following marriages are recognized in South Africa:

- A marriage concluded between a man and a woman in terms of the Marriage Act.[2]
- A marriage concluded in the terms of the Civil Union Act.[3] These marriages are only legally recognized since 2006. It is not a requirement that parties to a civil union need to be of the same sex as persons from the opposite sex can also conclude a civil union.
- A Customary law marriage concluded in the terms of the Recognition of Customary Marriages Act[4]. This includes polygamous customary marriages.[5]

There are however also other types of marriages for example the traditional Muslim marriage, domestic partnerships and Hindu marriages, all of which are not recognized as formal marriages in terms of South African Law. Although the South African courts have provided some protection to Muslim spouses over the last few years,[6] Muslim and Hindu spouses remain largely without legal recourse.[7] The Constitutional Court determined in 2018 that the South African government must award Muslim spouses equal rights within two years by promulgating legislation to that effect.[8]

There is also the misconception that when two people live together for several years that they will have protection in terms of our law. This is however not the case as domestic partnerships are currently not recognized as a marriage in South African law. Domestic partners are only included as "spouses" in certain legislation.[9] There has also been recent case law[10] where the Constitutional Court has ruled that partners in a permanent life partnership should be included in the definition of "survivor" in the Maintenance of Surviving Spouses Act[11] and that such partners may also benefit from the provisions of this Act.

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[1] Brink A, REEN 1700 – Regulatory Environment Study Guide, UFS, 2022: Paragraph 3.2.1.
[2] Act 25 of 1961.
[3] Act 17 of 2006.
[4] Act 120 of 1998.
[5] Brink A, REEN 1700 – Regulatory Environment Study Guide UFS, 2022: Paragraph 3.2.1.
[6] Daniels v Campbell 2004 (7) BCLR 735 (CC) and Khan v Khan 2005 (2) 272 (T).
[7] Brink A, REEN 1700 – Regulatory Environment Study Guide, UFS, 2022: Paragraph 3.2.1.
[8] Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others [2018] ZAWHCH 109.
[9] Brink A, REEN 1700 – Regulatory Environment Study Guide, UFS, 2022: Paragraph 3.2.1.
[10] Bwanya v The Master of the High Court, Cape Town, Case CCT241/20.
[11] Act 27 of 1990.

Marital Regimes in South Africa

Now that we have established the types of marriages that are legally recognised in South Africa, it is necessary to determine what types of marital regimes are applicable to these marriages.

The Matrimonial Property Act, 88 of 1984 establishes and regulates the marital regimes applicable in South Africa. Currently the following three marital regimes exist:

❑ In Community of Property

A marriage in community of property is the default marital regime in South Africa, and if no antenuptial contract was entered into to exclude community of property, the marriage will be automatically in community of property. Each party to the marriage owns an undivided half share of the joint communal estate. This means that all assets and all liabilities in the estate are equally shared by the spouses in the event of death or divorce.

❑ Out of Community of Property

In a marriage out of community of property, after introduction of the Matrimonial Property Act,[12] the spouses need to enter into an antenuptial contract that specifically excludes any community of property. The parties also need to specifically exclude the accrual system in the antenuptial contract if they do not want the accrual system to apply to their out of community marital regime.[13] The spouses accumulate their own separate estates and in the event of death or divorce they only have a right to their own assets.

Where spouses were married out of community of property before the introduction of the Matrimonial Property Act,[14] Section 7(3) of the Divorce Act[15] provides the court granting a decree of divorce with a discretion to make a redistribution order to the effect that any asset, or sum of money, may be transferred from one spouse to another if the court should think it just and equitable.[16] This discretion is not available to a court with regards to marriages out of community of property concluded after the introduction of the Matrimonial Property Act.[17]

[12] Act 88 of 1984
[13] Matrimonial Property Act 88 of 1984, Paragraph 2
[14] Act 88 of 1984
[15] Act 70 of 1979
[16] Greyling v Master of the High Court of South Africa, Gauteng Division Pretoria, Case no: 40023/21, At paragraph 1
[17] Act 88 of 1984

❑ Out of Community of Property including the Accrual System[18]

The accrual system began after the Matrimonial Property Act[19] was amended in 1984 to make provision for this. At death or divorce, the spouse whose estate shows no or a smaller accrual than the estate of the other spouse, acquires a claim against that spouse for an amount equal to half of the difference between the accrual of the respective estates of the spouses.[20] This in effect means that the parties to the marriage shares in the growth of the assets in their estates after the conclusion of the marriage.[21]

Which marital system applies to which marriage?

Where a person gets married in terms of the Marriage Act[22] or the Civil Union Act[23], they will have to enter into an antenuptial contract if they want to get married out of community of property with or without the accrual system. If no contract is concluded, the marriage will automatically be in community of property.

A monogamous customary marriage entered into after the commencement of the Recognition of Customary Marriages Act[24] is by default a marriage in community of property. In the event that the spouses wish to change the marital regime from the default position of in community of property, they will have to enter into an antenuptial contract before they get married in order to exclude in community of property and include out of community of property with or without the accrual.[25]

The proprietary consequences of polygamous customary marriages in terms of the Recognition of Customary Marriages Act[26] concluded before the commencement of the Act is that the spouses in the marriage have joint and equal ownership and other rights over marital property.[27] These rights must be exercised in respect of all house property by the husband and wife of the house concerned, jointly and in the best interest of the family unit constituted by the house concerned.[28] In respect of family property, these rights must be exercised by the husband and

[18] Brink A, REEN 1700 – Regulatory Environment Study Guide, UFS, 2022: Paragraph 3.2.2
[19] Act 88 of 1984
[20] Matrimonial Property Act 88 of 1984, Paragraph 3
[21] Brink A, REEN 1700 – Regulatory Environment Study Guide, UFS, 2022: Paragraph 3.2.2
[22] Act 25 of 1961
[23] Act 17 of 2006
[24] Act 120 of 1998
[25] Section 7(2) of Act 120 of 1998
[26] Act 120 of 1998
[27] Section 7(1)(a) of Act 120 of 1998
[28] Section 7(1)(b)(i) of Act 120 of 1998

all the wives, jointly and in the best interest of the whole family constituted by the various houses of the family.[29] Each spouse however, retains exclusive rights over his or her personal property.[30] It also important to understand that the meaning of "marital property", "house property", "family property" and "personal property" for purposes of this Act have the meaning that is ascribed to them in customary law.[31]

A polygamous marriage entered into after the commencement of the Recognition of Customary Marriages Act[32] should be in community of property but due to the problems with the division of matrimonial property that arise with more than one wife, the Act[33] requires that an application to Court must be made by the husband who wishes to enter into further customary marriages to approve a contract which will regulate the future matrimonial property system of his marriage.[34] Where the husband was married in community of property or with the application of the accrual system before the application, the court must terminate the matrimonial property system which applies to the marriage and effect a division of the property.[35] The court must also take all relevant circumstances of the whole family groups into consideration[36] to ensure an equitable distribution.[37] The court may allow amendments or impose conditions to the contract that it seems fit. It may also refuse the application if it is of the opinion that the interests of the parties involved will not be sufficiently protected by the proposed contract.[38]

The current position with Muslim marriages is that spouses only have the right to claim maintenance from the estate and that they also have the right to inherit in terms of the Intestate Succession Act.[39] There are however further developments with regards to the recognition of Muslim marriages. The Supreme Court of Appeal recently declared certain sections of the Divorce Act and Marriage Act to be inconsistent with the Constitution due to the fact that they fail to fully recognise Muslim marriages and to regulate the matrimonial consequences of such

[29] Section 7(1)(b)(ii) of Act 120 of 1998
[30] Section 7(1)(c) of Act 120 of 1998
[31] Section 7(1)(d) of Act 120 of 1998
[32] Act 120 of 1998
[33] Matrimonial Property Act 88 of 1984, Paragraph 6
[34] Section 7(6) of Act 120 of 1998
[35] Section 7(7)(a)(i) of Act 120 of 1998
[36] Section 7(7)(a)(iii) of Act 120 of 1998
[37] Section 7(7)(a)(ii) of Act 120 of 1998
[38] Section 7(7)(b)(i) - (iii) of Act 120 of 1998
[39] Mpikwane E, Old Mutual Premiums and Problems Article Edition 124, 2022, Pages 227 - 236

marriages.[40] The Constitutional Court is currently considering the declaration of the constitutional invalidity by the SCA.

The situation is similar with Hindu and Jewish marriages in South Africa. Both of these marriages need to be registered in terms of the Civil Union Act[41] to be fully recognised as a marriage. Parties to these marriages can enter into an ante-nuptial contract to determine whether the marriages will be out of community of property or subject to the accrual system.

Greyling v Minister of Home Affairs and Others[42]

Prior to 1984, South Africa had only two marital regimes: in community of property and out of community of property. With the enactment of the Matrimonial Property Act[43] in 1984, the concept of accrual was introduced. A new section was also introduced into the Divorce Act[44] that gave judges of the High Court the discretion in the distribution of assets in marriages out of community of property which had be concluded before the enactment of Matrimonial Property Act.[45] Judges have the discretion to make a redistribution order to the effect that any asset, or sum of money, may be transferred from one spouse to another. This is however subject to Sections 7(4), (5) and (6) of the Act.[46] These sections determine that court must be satisfied that the party in which favour the order is given, contributed to the maintenance or the increase of the estate of the other party during the subsistence of the marriage.[47] The court must also take into consideration the existing means and obligations of the parties, donations between the parties or any other fact which, in the opinion of the court, must be taken into account.[48] The Divorce Act[49] however, does not allow a court to make a redistribution order regarding the distribution of assets for people married out of community of property, without accrual, after 1984. This leaves people, who are married out of community of property, without the accrual, after 1984 without any means to ask a court for a redistribution order of assets even if they contributed to the household or assisted their spouses to accumulate assets during the subsistence of the marriage.

[40] President of the RSA and Another v Women's Legal Centre Trust and Others, Minister of Justice and Constitutional Development v Faro and Others, Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177; [2021] 1 All SA 802 (SCA); 2021 (2) SA 381 (SCA) (18 December 2020).
[41] Act 17 of 2006.
[42] High Court of South Africa, Gauteng Division Pretoria, Case no: 40023/21.
[43] Act 88 of 1984.
[44] Section 7(3) of Act 70 of 1979.
[45] Broughton T, Judge makes landmark ruling on Divorce Act, 13 May 2022, www.groundup.org.za [Accessed 23 May 2022].
[46] Act 70 of 1979.
[47] Section 7(4) of Act 70 of 1979.
[48] Section 7(5) of Act 70 of 1979.
[49] Act 70 of 1979.

On the 11th of May 2022 Judge E van der Schyff in the Pretoria Division of the Gauteng High Court of South Africa gave a judgment in the case of Greyling v Minster of Home Affairs and Others.[50] The applicant, in this case, was Mrs. Greyling who was married out of community of property, excluding the accrual, in March 1988 to her husband, a wealthy farmer. The applicant asked the court to strike out certain sections of Section 7(3) of the Divorce Act.[51] The reason for application, the applicant argued, is because the law, as it currently stands, is arbitrary, irrational and discriminated against people married after 1984 out of community of property, without the accrual. It was further argued that if the applicant is not successful in her application, neither she nor other spouses in similar situations would be entitled to redistribution orders, irrespective of their particular circumstances and "no matter how stark the injustices they may face".[52] The court was not asked to make a redistribution order in this particular case but to determine whether it is constitutional for spouses married out of community of property with the exclusion of the accrual system after 1 November 1984 to be deprived of the relief provided for in Section 7(3) of the Divorce Act.[53] It was submitted by the advocate for the applicant that excluding spouses from the potential benefit of just and equitable redistribution constituted unfair discrimination based on sex, gender, marital status, culture, race and religion. As a result, it operates to trap predominantly women in harmful, and toxic relationships when they lack the financial means to survive outside the marriage.[54]

The Minster of Justice and Constitutional Development initially opposed the application but later indicated that he would abide by the Court's decision. The Minster indicated that the matter was already under review by the South African Law Research Commission for possible legislative amendments.[55] The Minster gave some reasons why parties are opposed to the extension of judicial discretion. This included the following:

- It does not respect parties' freedom to contract;
- Normal contractual remedies apply to antenuptial contracts entered into under coercion, an error in law, or fraud;
- There would be little of ignorance between contracting parties as the notary would have explained alternatives to the parties, and even if the notary failed to do so, "it has never been the object of the law to protect the foolish";

[50] High Court of South Africa, Gauteng Division Pretoria, Case no: 40023/21
[51] Act 70 of 1979
[52] Paragraph 2
[53] Act 70 of 1979
[54] Paragraph 11
[55] Paragraph 17 - 18

- A marital property system excluding any sharing is chosen deliberately, for clear and well considered reasons, and such reasons should be respected;
- The extension of the judicial discretion would encourage litigation, increase costs and extend the time of litigation;
- The extension of judicial discretion would encourage cohabitation;
- Judicial discretion creates uncertainty;
- The extension of judicial discretion would ignore the interest of creditors.[56]

The minister also pointed out some argument in favour of judicial discretion:

- Woman cannot be allowed to contract themselves and their children into poverty;
- Women entering into an antenuptial contract with, and express exclusion of the accrual system are seldom making an informed choice";
- There is a power imbalance between the parties;
- Our law recognises the imbalance between other contracting parties, such as employer and employee and has legislated to protect the weaker party.[57]

Judge Van der Schyff said in her ruling that the main disadvantage of a marriage out of community without the accrual is that no matter how long the marriage has endured, and how much the economically disadvantaged party has contributed to the other's economic and financial success, that party does not have the right to share in the other's gains and that this is wrong and discriminatory.[58] Judge Van der Schyff, therefore, ruled that Section 7(3)(a) of the Divorce Act[59] is inconsistent with the Constitution and that it is invalid in that the provision limits the operation of Section 7(3) of the Divorce Act[60] to marriages out of community of property entered into before the commencement of the Matrimonial Property Act, 88 of 1984. This section was struck from the Divorce Act [61] and it was referred to the Constitutional Court for confirmation.[62]

[56] Paragraph 19.
[57] Paragraph 20.
[58] Paragraph 42.
[59] Act 70 of 1979.
[60] Act 70 of 1979..
[61] Act 70 of 1979.
[62] Broughton T, Judge makes landmark ruling on Divorce Act, 13 May 2022, www.groundup.org.za [Accessed 23 May 2022].

If the Constitutional Court agrees with the ruling of Judge Van der Schyff and declare those sections of the Divorce Act unconstitutional, the sections will be struck from the Divorce Act.[63] Currently the position in law is still the same as before this judgment. This will only change if and when the Constitutional Court confirm the judgment by Judge Van der Schyff.

Conclusion

From the discussion above, it is clear that the application of Section 7(3)[64]is unfair to economically disadvantaged spouses who are married out of community of property without the accrual. People who are about to marry and are choosing their marital regimes do not always understand the financial implication of the martial regime that they are entering into. During the marriage, the financial impact of a marital regime do not necessarily manifest itself because of the shared financial obligations in the family. The impact only becomes clear at divorce, and the disadvantaged spouse finds out that their marital regime plays a very important role in how the assets are distributed between the divorcing spouses. Although one can argue that people need to make sure that they understand the consequences of their chosen marital regime when they get married, it is also true that most people do not have the knowledge to make an informed decision, or do not have access to resources to assist them to make an informed decision. Giving the courts the ability to intervene when an injustice is done to an economically disadvantaged spouse when they get divorced, is the correct approach. It is clear that this was already in the legislators mind when the current Section 7(3)[65] was introduced. The introduction of the accrual system in 1984 does not take away the inherent unfairness of Section 7(3) of the Divorce Act[66] towards spouses married out of community.

Whether these changes will lead to contractual uncertainty or more litigation remains to be seen. What is however certain is that some financially advantaged spouse will not benefit unfairly from the application of Section 7(3) when they get divorced anymore. The role that the disadvantaged spouse has played in the growth of the marital assets will now have to be acknowledged and compensated. Although most of the economically disadvantaged spouses are women, this is also rapidly changing. More men are staying at home, looking after their families, while their female spouses are working and accumulating the family's assets. These

[63] Act 70 of 1979
[64] Of Act 70 of 1979
[65] Of Act 70 of 1979
[66] Act 70 of 1979

changes do not see gender, and everyone will benefit, male or female. The opinions on this matter of the Justices of the Constitutional Court are eagerly awaited.

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Recognition of Customary Marriages Act 120 of 2008

Circumstances Under Which Maintenance Claims May Be Instituted

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Introduction

The obligation of maintenance to a child, former spouse or surviving spouse will take priority over one's freedom of testation if proper estate planning is not done. During the lifetime of a parent, there is a duty on them to support their children until the children are self-sufficient. When the parent dies, the maintenance obligation does cease to exist.

This article will examine the circumstances under which maintenance claims can be instituted against a deceased estate and propose financial planning considerations.

Definition of Maintenance

Before proceeding to look at the circumstances under which maintenance claims may be instituted, it is important to understand what maintenance entails. Section 15 of the Maintenance Act[1] provides the duty of parents to support their children. Section 15 (2) of the Act[2], specifically provides that, *the duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care, and education.* Maintenance is therefore the obligation to provide another person with housing, food, clothing, education, and medical care, or with the means that are necessary for providing the person with the said essentials. This legal duty to maintain is called 'the duty to maintain' or 'the duty to support'.[3]

Maintenance Claim by Surviving Spouse

The Maintenance of Surviving Spouses Act[4] provides a surviving spouse with an option to lodge a claim of maintenance against the deceased estate of a deceased spouse. To lodge a claim in terms of the Act[5], the surviving spouse must have been married to the deceased at the time of their death.

In the case of *Volks NO v Robinson and Others*[6], the Constitutional Court ruled that a surviving partner in a heterosexual life partnership, where no marriage was concluded, should not be regarded as a surviving spouse for purposes of the Maintenance of Surviving Spouses Act[7]. In the

[1] 99 of 1998.
[2] 99 of 1998.
[3] https://www.justice.gov.za/vg/mnt.html.
[4] 27 of 1990.
[5] 27 of 1990.
[6] 2005 (5) BCLR 446.
[7] 27 of 1990.

case of *Gory v Kolver*[8], the Constitutional Court held that partners in a same-sex relationship must be regarded as 'spouses' for purposes of the Intestate Succession Act.[9] The significant difference being that prior to 1 December 2006, partners in a same-sex relationship were not allowed to conclude a marriage.

It is therefore important to determine who qualifies as a spouse. The definition of a spouse is defined in the Income Tax Act[10] and Estate Duty Act [11] as follows: *A 'spouse', in relation to any person, means a person who is the partner of such person-:*

(a) In a marriage or customary union recognized in terms of the laws of the Republic;

(b) In a union recognized as a marriage in accordance with the tenets of any religion; or

(c) In a same sex or heterosexual union which the Commissioner is satisfied is intended to be permanent,

and ***'married'****,* ***'husband'*** *or* ***'wife'*** *shall be construed accordingly: Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be* deemed *to be a marriage or union without community of property."*

Therefore, a spouse that falls in the definition above, and whose marriage or union, has been dissolved by death has a claim for maintenance against the estate of the deceased spouse in terms of the Maintenance of Surviving Spouses Act.

As a common law principle, spouses owe each other a reciprocal duty of support during marriage. The person claiming the support must be in need, of it and the other spouse can provide it. This is a responsibility that rests on both spouses, which entails, for example, if a woman does not have the financial means to support herself, her husband has a legal obligation to support her, and vice versa. The support includes food, accommodation, clothing, necessities and must be weighed by the couple's social status, means of income and cost of living.[12] When the marriage comes to an end either by death or divorce, that duty ceases. Where the marriage has been dissolved by divorce the ex-spouse does not possess an automatic right to claim for maintenance against the deceased estate of their former spouse. The ex- spouse obtains a legal

[8] 2007 (4) SA 97.
[9] 81 of 1987.
[10] 58 of 1963.
[11] 45 of 1955.
[12] https://www.divorcelaws.co.za/maintenance.html.

right to claim maintenance from the former deceased spouse estate if a provision is made in a divorce settlement agreement. Section 7 of the Divorce Act[13] states the following:

7. Division of assets and maintenance of parties.—*(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.*

Section 7(1) of the Divorce Act[14] therefore makes provision for a Court to make a written agreement between the parties regarding the payment of maintenance an order of court. Parties are thus free to agree to bind their estates after death.[15] In the case of Kruger NO v Goss and another[16] at paragraph 16 the SCA upheld as follows:

"*[16] Of course a spouse is free to agree to bind his/her estate to pay maintenance after death. That is not what occurred in the present case. To allow maintenance claims of the kind encountered here against deceased estates might have all sorts of undesirable consequences. The legitimate claims to maintenance of minor children might be diminished or excluded. And, the rights of beneficiaries might be implicated....*"

Spousal claim for maintenance against estate of deceased spouse

Section 2 of the Act[17], stipulates the following:

2. (1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor form his own means and earnings.

The following factors may be considered for the determination of reasonable maintenance needs:

- ❑ The amount of funds in the estate of the deceased spouse that are available for distribution to heirs and legatees.
- ❑ The existing and expected means, earning capacity and financial needs of the surviving spouse; and

[13] 70 of 1979.
[14] 70 of 1979.
[15] https://www.glacier.co.za/mediacentre/media-category/media-releases/Maintenance%20Upon%20Divorce%20-%20What%20Happens%20When%20Your%20Ex-Spouse%20Dies.
[16] (603/08) [2009] ZASCA 105.
[17] 27 of 1990.

- ❑ The standard of living of the surviving spouse during the marriage; and
- ❑ The surviving spouse's age upon the death of the deceased spouse. The surviving spouse's claim for maintenance will have to be considered alongside all other claims against the estate of the deceased spouse.[18]

The right that the surviving spouse has to maintenance from the estate of the deceased will continue until the surviving spouse dies or remarries, in so far as they are not able to provide therefor from their own means and earnings, in terms of Section 2(1) of the Maintenance of Surviving Spouses Act.[19] The factors to be considered in such an instance will be the duration of the marriage, the age of the surviving spouse and their capacity to earn an income, the size of the deceased spouse's assets that can be divided or the standard of living of the surviving spouse before the death of their spouse. Provision for payment of maintenance can be made by taking out a life policy and nominating the surviving spouse as beneficiary, alternatively is to stipulate in the will that the proceeds of such a policy will be paid to a testamentary trust and the surviving spouse to benefit from the income. If the relevant product allows, the trust can be nominated directly as the beneficiary on the life policy.

The right the ex-spouse has against the deceased estate of the former spouse depends on the provisions of the divorce order. This amount would need to be quantified by considering the former spouse's maintenance obligations and calculating the number of years the former spouse will be required to pay maintenance.

Example:

A divorce order states that the ex-spouse will receive maintenance of R10, 000 per month for 10 years after our divorce, however the ex- spouse providing the maintenance dies in year 1, still owing 9 years left for maintenance obligation.

To quantify the former spouse's maintenance obligations, we will have to project the R10 000 monthly maintenance amount for 9 years, being the number of years, she would have received maintenance from the former spouse:

R10 000 x 12 = R120 000 (in this instance the amount is projected without taking inflation into consideration. The amount may be projected to make it inclusive of inflation)

[18] https://www.grocotts.co.za/2019/08/08/marriage-reciprocal-support-and-spousal-maintenance/
[19] 27 of 1990

R120 000 x 9 = R 1 080 000 (the amount that the former spouse would have been liable to pay for the next 9 years).

The maintenance obligation will need to be included in the former spouse's financial planning to avoid claims against his estate at death, this can be catered for in terms of a life cover that will be equal to the amount of maintenance that the former spouse would have been liable for had he not died. Depending on the wording of the divorce order, this amount can also increase in line with inflation.

Maintenance Claim by a Life Partner

A life partnership refers to a couple living together outside marriage in a relationship which resembles the characteristics of a marriage. Various other terms are used to signify this relationship the most common being a domestic partnership, cohabitation, living together, *de facto* marriage and common-law marriage.[20] Common law marriages are not regulated by law and thus does not receive the same protection as a marriage. There is no common law marriage in South Africa and the duration that couples spend living together does not mean that a marriage came into existence.[21]

The Maintenance of Surviving Spouses Act[22], did not always extend to life partners. Life partners, who were previously supported by their life partner were not afforded the right to institute a claim for maintenance against the deceased estate of their life partner. This was changed in the case of Bwanya v the Master and Other.[23]

The constitutionality of the Maintenance of Surviving Spouses Act[24] and the Intestate Succession Act[25], was challenged in the case of Bwanya v the Master and Other.[26] The applicant in this case prevented, both from inheriting and receiving maintenance from her deceased life partner's estate. The applicant and the deceased were living together and regarded themselves as being

[20] http://mamalan.co.za/2017/01/12/life-partnerships-cohabitation-in-south-africa/
[21] https://www.legalwise.co.za/help-yourself/quicklaw-guides/cohabitation#:~:text=There%20is%20no%20common%20law,a%20marriage%20came%20into%20existence.
[22] 27 of 1990.
[23] 2021 (1) SA 138 (WCC).
[24] 27 of 1990.
[25] 81 of 1987.
[26] 2021(1) 138 (WCC).

in a permanent life partnership. The applicant and the deceased were engaged but two months before the lobolo negotiations were finalised, the deceased died.

The Constitutional Court ordered that the definition of 'survivor' in the Maintenance of Surviving Spouses Act[27] must be read as if it includes a surviving partner of a permanent life partnership where the partners have taken a reciprocal duty of support. Furthermore, the court concluded that the denial of Section 2(1) maintenance benefit to permanent life partners constitutes unfair discrimination as far as it prevents permanent life partners who have taken a reciprocal duty of support.

Life partners, therefore, need to ensure that they protect themselves, to prove that they have agreed to a reciprocal duty of support. Life partners' rights and obligations can be protected by entering into a life partnership agreement. The agreement will regulate the relationship during the existence of the Life Partnership and after it has ended. Maintenance can therefore be included in the agreement.

The Constitutional Court also found that the Intestate Succession Act unfairly discriminates against heterosexual life partners and made an order that wherever the word 'spouse' appears in the Act,[28] there must be a read - in of the words *"or partner in a permanent opposite-sex life partnership in which the partners has undertaken reciprocal duties of support."*[29]

The judgment of the Bwanya v the Master and Other[30] therefore allows heterosexual permanent life partners that have taken a reciprocal duty of support to claim for inheritance and maintenance from the deceased partner's estate. Both heterosexual and same sex life partners can now claim maintenance benefits from their deceased life partner's estate.[31]

Same- sex and heterosexual life partners must ensure that there is proof that they have agreed to a reciprocal duty of support and will be entitled to put in a claim for maintenance. Same -sex life partners' rights and obligations can be protected by entering into a universal partnership agreement. A universal partnership is an agreement between two people, including same -sex

[27] 27 of 1990
[28] 81 of 1987
[29] 2021 (1) SA 1338 (WCC)
[30] 2021(1) 138 (WCC)
[31] https://www.couzyn.co.za/maintenance-claims-from-life-partners-estate/#:~:text=Now%2C%20both%20heterosexual%20and%20same,Maintenance%20of%20Surviving%20Spouses%20Act.

couples, who choose to live together in a permanent relationship without getting married, or married persons who enter into an express or tacit agreement relating to a particular asset, such as a business.[32] The agreement will therefore provide protection in the case of separation, whether it be in terms of death or divorce and thereby ensuring to make provision for maintenance in the agreement.

Maintenance Claim by Children

Parents have a duty to support their children until they become self-supporting.[33] Section 28 of the Constitution of the Republic of South Africa[34] defines a child as follows: *(3) In this section "child" means a person under the age of 18 years.*

The maintenance obligation extends to children born from a marriage, illegitimate children and adopted children.[35] In terms of the definition of a child in terms of the Constitution[36], a child is no longer considered a child if they are 18 years of age or above and they will be considered an adult. In the unfortunate position of a child being disabled and not having the ability to ever earn an income, even after reaching majority age, the duty to support revives.[37]

After the death of a parent, this duty continues. In terms of common law, a minor child can also have a claim against the estate of the deceased[38]. This right to maintenance applies until the child becomes self-supporting, regardless of whether he/she was born in or out of wedlock or was adopted by the deceased and is not terminated by the parent's death[39]. The legal guardian of the minor child will lodge the claim on behalf of the minor child. Children who are over the age of 18 can also institute a claim against the estate of a deceased parent, if they can prove that they are in need of the maintenance support.

It should be noted that the maintenance claim of a child ranks above all claims against the estate, including those of heirs and legatees, except for debts owed to creditor of the estate[40]. If

[32] http://www.karenbotha.co.za/Universal_Partnership.aspx#:~:text=A%20universal%20partnership%20is%20an,asset%2C%20such%20as%20a%20business.
[33] https://www.moneyweb.co.za/in-depth/fisa/your-maintenance-obligations-dont-die-with-you/
[34] No. 108 of 1996.
[35] https://www.moneyweb.co.za/in-depth/fisa/your-maintenance-obligations-dont-die-with-you/
[36] No. 108 of 1996.
[37] https://www.schindlers.co.za/2019/maintenance-majority/
[38] M Botha et al, The South African Financial Planning Handbook (2019), at 813.
[39] https://www.vandeventers.law/Services/Divorce-Attorneys-Family-Law/Maintenace/Maintenenace-Claims-on-a-Deceased-Estate.
[40] https://www.vandeventers.law/Services/Divorce-Attorneys-Family-Law/Maintenace/Maintenenace-Claims-on-a-Deceased-Estate.

there is a claim by a spouse and child for maintenance, both claims will rank in the same order of preference. If the child and surviving spouse lodge competing claims for maintenance, if necessary, both claims may be reduced proportionately.[41]

For children the best way to ensure that their maintenance needs are met, is by creating a testamentary trust in terms of a will. A life policy can be taken out and the proceeds of the life policy can be bequeathed to the testamentary trust, which will come into operation after your death. The proceeds will be used to generate an income for the beneficiaries of the trust, being the children. In this manner your maintenance obligation will be provided for after your death.

If provision was not made for maintenance in terms of a will, a claim for maintenance may be lodged to the Master of the High Court and the executor of the estate, in writing. Maintenance can be claimed by way of an application, using form J341 with supported quotations and accounts.[42] If you instruct an attorney to put in a maintenance claim on your behalf, attorney fees would become payable. Should an executor reject the maintenance claim and you want to appeal the decision, an alternative would be to approach the court which would then become a costly exercise.

Conclusion

Financial planners and clients should be aware that there is no statutory right to maintenance after divorce. The reciprocal right of support only exist during the existence of the marriage and comes to an end on the termination of the marriage whether by death or divorce. Couples can protect themselves by including in a settlement agreement. If it has been included in a settlement agreement, then this could affect a liquidity shortfall if a person does not make provision for the paying of the maintenance.

For life partners, they can protect themselves by including maintenance in the Universal Partnership or Life Partnership agreement and ensuring that proper financial planning is made and ensuring that there is sufficient liquidity in the person's estate who is obligated to pay maintenance.

[41] https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_9-2015_Claims_for_maintenance_against_the_estate_of_a_deceased_May2015.pdf.
[42] https://www.news24.com/parent/family/relationships/finance_legal/how-to-get-child-maintenance-from-a-deceased-estate-20191119.

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The court still has the discretionary power to make a maintenance award and this power includes the power to make no award at all. The spouses and partners bringing the claim need to ensure that they provide the court with proof for that there was a duty to maintain or support.

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VAT, the Tax that is Often Ignored During Estate Planning

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Introduction

Value added tax is often overlooked by financial advisors and planners when doing an estate plan. It can have various consequences, from the need for extra liquidity to the wishes of the client not being fulfilled. It goes without saying that it is of great importance that a financial advisor or a planner takes cognisance of value added tax (VAT)[1] and appreciates the implications that it may have on an estate.

This article will discuss the basic concepts of VAT, how distributions to heirs and legatees are treated for VAT purposes in a deceased estate and provide examples to illustrate the different scenarios that might present themselves to a planner.

Basic concepts

❑ What is VAT?

It is essentially a tax collected by registered businesses ("vendors"[2]) on the value added by conducting their activities.[3] A vendor must pay over to the South African Revenue Services the amount equal to the output tax collected by the vendor on its turnover less the input tax borne by the vendor on its purchases of goods and services.[4] VAT is currently levied at a rate of 15%or 0% of the value of the goods or services.[5] In broad terms all supplies of goods and services by a VAT vendor during his enterprise is subject to VAT.

❑ Enterprise

The term "enterprise" is one of the most important concepts in the VAT Act.[6] The concept is important because a person that does not conduct an enterprise cannot register for VAT and only supplies made during or in the furtherance of carrying on an enterprise are subject to VAT.[7] As will be seen later in this article it is extremely important for a planner to determine whether the supplies were in fact made as mentioned above and whether VAT is applicable or not.

[1] The acronym VAT will be used further in this article when referring to value added tax.
[2] A vendor is any person who is registered or required to register under the VAT Act 89 of 1991. It falls beyond the scope of this article to discuss the exact requirements of when a person must or can register as a VAT vendor.
[3] DM Davis, C Beneke & RD Jooste, Estate Planning at 8A-3 (Service Issue 51 2018).
[4] Id.
[5] The Minister of Finance can announce a change in the VAT rate from time to time.
[6] Act 89 of 1991.
[7] Value-Added Tax, VAT 413 - Guide for Estates at page 4 (March 2015 edition).

Quoted directly from the VAT 413 – Guide for Estates document an enterprise is defined as follows: *"An "enterprise" includes any activity carried on continuously or regularly by a person in (or partly in) South Africa whereby goods or services are supplied to another person for a consideration."*[8]

It is crucial to notice that anything done as part of the commencement or termination of an enterprise is deemed to be done in the course or furtherance of that enterprise.[9] For example, the distribution of assets to heirs by an executor in winding down the enterprise of a deceased person is conducted in the course or furtherance of the estate's enterprise.

A representative vendor[10] represents the estate of a ***"deceased VAT vendor"*** and must ensure that the estate complies with the VAT Act. The representative vendor has various duties which fall beyond the ambit of this article and can be found in chapter 3 of the VAT 413 – Guide for Estates.

❑ **Connected Person**

The term "Connected persons"[11] is crucially important as supplies between persons that are seen to fall within the ambit of this term will likely occur during the winding up of a person's estate. The term "connected persons" can be summarised as follows: A natural person will be a connected person to any relative of that person or any trust fund in which that person or a relative of that person is or may be a beneficiary.[12]

Determining whether a person is a "connected person" or not is important when the application of special time and value of supply rules need to be considered by an administrator when determining the VAT treatment of certain supplies made in that process.

Time and Value of Supply

The time and value of supply rules establish the date that a supply occurs and the tax period during which a vendor is liable to declare the output tax or entitled to deduct input tax (if the cost was incurred in the course or furtherance of the vendor's enterprise).[13] What is important is when a supply is made between connected persons for no consideration, or for consideration that is below the market value the consideration for the supply is deemed to be equal to the

[8] Id
[9] Id
[10] An executor acts on behalf of deceased persons and their estates.
[11] Connected persons is defined in section 1(1) of the VAT Act.
[12] Value-Added Tax, VAT 413 - Guide for Estates at page 5 (March 2015 edition)
[13] Value-Added Tax, VAT 413 - Guide for Estates at page 6 (March 2015 edition)

market value if the recipient would not have been entitled to a full input tax deduction on the goods or services acquired, had the market value been charged on the supply[14].[15]

The question now is what is consideration? Consideration is in layman's terms defined as the following:

- ❑ Value of the goods or services plus VAT equal consideration; therefore
- ❑ Consideration minus VAT equals the Value.

An example of consideration is when a farmer sells cattle for R 650 000 VAT included. The Value of the goods (the cattle) ex-VAT would then be R 565 217.40 and the amount of VAT would be R 84 782.60.

Distributions to heirs and legatees

The term distribution for VAT purposes is nicely defined by the VAT 413 – Guide for Estates as follows: "*The distribution of* any *asset in the form of a bequest or legacy is a supply of goods or services, except in the case of a monetary distribution as "money" is specifically excluded from the definitions of "goods" and "services" in section 1(1)*."[16] The planner should categorise the distributions to heirs and legatees in order to determine the VAT consequences thereof.

The following categories should be used:

- ❑ Assets which formed part of the deceased's enterprise;
- ❑ Assets which did not form part of the deceased's enterprise; or
- ❑ Assets which were used partially for purposes of the enterprise.[17]

The planner should also determine the relationship between the beneficiaries[18] and the deceased. This is to establish whether they should be regarded as "connected persons".[19] The Value-Added Tax – Guide for Estates contain examples of some of the relationships between different types of persons as set out in the definition of "connected persons" which are important.

[14] Section 10(4) of the VAT Act.
[15] Value-Added Tax, VAT 413 - Guide for Estates at page 6 (March 2015 edition).
[16] Value-Added Tax, VAT 413 - Guide for Estates at page 24 (March 2015 edition).
[17] Id.
[18] Heirs and legatees will be referred to as beneficiaries. There is no distinction between heirs and legatees for VAT purposes.
[19] See the definition of "connected persons" in section 1(1) of the VAT Act.

See the following section quoted from the guide:

"*A natural person is considered to be a connected person in relation to –*

- any *relative of that natural person, or*
- any trust *fund in which the natural person or relative is, or may be a beneficiary.*[20]

*The terms "natural person" and "*relative*" include the deceased or insolvent estate of that natural person or relative. A relative, in relation to any person, means:*

- *The* spouse *of that person;*
- *Anyone related to that person or his/her spouse within the third degree of* consanguinity*, or*
- *Any* spouse *of the relative.*"[21]

The estate is liable to account for VAT on the distributions of goods and services that formed part of the deceased's enterprise.[22] Therefore, no VAT is due in respect of assets distributed which did not form part of the deceased's enterprise.[23]

The output tax that the estate is liable to pay is calculated by applying the relevant tax fraction[24] to the consideration charged. In most cases when conducting estate planning the consideration will be nil where the assets are bequeathed to the beneficiaries without a bequest price. Therefore, even though VAT is levied on the distributions to beneficiaries, the VAT due to the South African Revenue Service may be nil. The tax fraction is multiplied by nil and thus the amount of tax owed is nil.

Planners must however remember the that the special value of supply rule for "connected persons" will also often apply in the context of distributions to a deceased's beneficiaries. In layman's terms section 10(4) of the VAT Act states that VAT must be accounted for on the open market value of goods, notwithstanding the fact that no consideration was payable. This is best explained at the hand of an example:

[20] Value-Added Tax, VAT 413 - Guide for Estates at page 5 (March 2015 edition)
[21] Id
[22] Value-Added Tax, VAT 413 - Guide for Estates at page 25 (March 2015 edition)
[23] Value-Added Tax, VAT 413 - Guide for Estates at page 24 (March 2015 edition)
[24] The relevant tax fraction for VAT is $\frac{15}{115}$ multiplied by the consideration received or deemed to be received.

Example 1:

David is the owner of Furniture Shop and conducts the business as a sole proprietor. He owns trucks that he uses to deliver the furniture that was bought at his shop. David's wish should he pass away is to bequeath the trucks to his daughter. His daughter is not registered for VAT and is not going to use the trucks to make a taxable supply for her enterprise. The rest of the assets in the furniture shop should be bequeathed to some of his friends that own similar businesses. These friends are not related to David. The rest of David's assets, which are private assets, should be bequeathed to his surviving spouse. The open market values[25] of these assets are as follows: [26]

- ❑ Trucks – R 6 500 000
- ❑ Furniture shop business assets – R 3 500 000
- ❑ Private assets – R 9 000 000

The question is what the VAT implications will be should David pass away now?

❑ **Connected person**

The bequest to his daughter is subject to the special rule of value of supply. She is a "connected person" and therefore the estate of David will be liable to account for VAT on the open market value of the trucks she will inherit even though the consideration is nil.

His daughter is not registered for VAT and is not going to use the trucks to make a taxable supply for her enterprise and thus the ***output tax due by David's estate on the bequest of the trucks will be R 6 500 000 x 15/115 = R 847 826.***

❑ **Not connected persons**

The bequest of the other business assets to his friends that are not connected persons to David will follow the general rule of value of supply. Consequently, the value of the supply (the bequest of the other business assets) is nil as his friends are not required to pay any consideration to acquire the assets. ***Output tax in respect of these assets is therefore nil, calculated as follows: R 0 x 15/115 = R 0.***

[25] "Open market value" in relation to the supply of goods or services, means the open market value thereof determined in accordance with the provisions of section 3 of the VAT Act.

[26] In terms of section 3(1)(b) of the VAT Act, the open market value already includes VAT. The tax fraction must therefore be applied to the open market value to calculate the VAT portion.

❑ **Private assets**

Davids private assets does not form part of his enterprise and the distribution thereof to his spouse is ***not subject to VAT.***

Special bequest

The VAT treatment of distributions to beneficiaries can be quite complex given the variety of potential bequests.[27] We will discuss some of the special bequests and the VAT implications they may entail.

❑ **Property owned by the deceased**

The distribution of an undivided share of land, a sectional title unit, a share block share or a time-share interest in immovable property therefore constitutes a taxable supply of fixed property for VAT purposes if the asset formed part of the deceased vendor's enterprise.[28] This means that if a VAT vendor used the above in his/her VAT enterprise it would be seen as a supply and subject to VAT.

❑ **Bequest price payable by beneficiaries**

A testator may stipulate that a beneficiary must pay a sum of money to the estate or other beneficiaries before a bequest may be distributed.[29] What a planner must know is that the bequest price will represent consideration for the supply. This is the case irrespective of whether the bequest price is paid to the estate or directly to the other beneficiaries.[30] If the beneficiary and the deceased estate are connected persons and the beneficiary is not entitled to a full input tax credit in respect of the acquisition of the goods or services, the output tax must be calculated based on the higher of the open market value or bequest price.[31] This will be explained by an example:

Example 2[32]

Johan is a cattle farmer and owns farms to the value of R 30 000 000 and cattle to the value of R 15 000 000. Johan's spouse is predeceased, and he has two sons Piet and Ernst. Johan's wish is

[27] Value-Added Tax, VAT 413 - Guide for Estates at page 26 (March 2015 edition).
[28] Any enterprise or activity carried on continuously or regularly in the Republic or partly in the Republic, and in the course or furtherance of which goods or services are supplied to another person for a consideration, constitutes an "enterprise".
[29] This is called a bequest price.
[30] Value-Added Tax, VAT 413 - Guide for Estates at page 27 (March 2015 edition).
[31] Id.
[32] For purposes of this article, it is implied that all fictitious persons in the examples are registered VAT vendors.

that his son Piet should inherit the farms and pay a bequest price of R 15 000 000 to Ernst. Ernst must inherit the cattle. Piet is a registered VAT vendor and conducts a farming enterprise. Ernst is not a registered VAT vendor and is also not going to use the cattle in a VAT enterprise. The question is once again ***what will the VAT implications be should Johan pass away?***

Firstly, the bequest to Piet and the payment of the bequest price. Because Piet a ***registered vendor (or even is he registers for VAT once his father passes away)*** and continues to use the farms wholly for enterprise purposes, the consideration for the supply would be equal to the amount of the bequest price. The estate of Johan would therefore have to account for output tax of R 1 956 522 (R 15 000 000 x 15/115).

Notice should be taken that ***if Piet were not registered as a VAT vendor and did not plan to register as a VAT vendor and use the farms for taxable purposes*** the value of the supply to him from his father's estate would have been equal to the open market value of the farms. This is because Piet is a "connected person". The output tax would then be R3 913 043 (R 30 000 000 x 15/115). If there was no bequest price payable by Piet the output tax would have been nil because the consideration would have been nil.[33]

The bequest to Ernst would entail output tax of R 1 956 522 (R 15 000 000 x 15/115), as Ernst is not a VAT Vendor and will not use the cattle in the furtherance of an enterprise.

There may be instances where the cash resources of the estate are insufficient to cover estate debts. In these instances, the executor may have to sell an asset or various assets bequeathed to an heir or legatee. Instead of selling the asset, the executor may request a cash contribution to "free" the estate from debt in order to distribute it to the person named in the deceased's will. The contribution is voluntary and is not regarded as payment for any supply made by the estate. As the testator could not have anticipated the shortfall, the amount would not be stipulated in the will.[34]

It may happen that only certain beneficiaries would provide a cash contribution, or all of the beneficiaries might have to contribute in order to proceed with the distribution of assets in terms

[33] This is due to the fact that Piet is a registered VAT vendor and will use the farms in the furtherance of a VAT enterprise.
[34] Value-Added Tax, VAT 413 - Guide for Estates at page 27 (March 2015 edition).

of the will. In both instances, the estate is not liable to account for output tax as the cash contributions do not constitute consideration for a taxable supply.[35]

Usufruct and the Bare Dominium

The bequest of an usufructuary interest in an asset can qualify as a supply of a going concern[36] if the same enterprise can be carried on by the usufructuary after the bequest, provided the usufructuary is registered as a VAT vendor. In the case where the usufructuary and deceased were connected persons and the usufructuary will use the usufruct to make taxable supplies, the estate of the deceased person will have to pay output tax on the open market value of the usufruct.[37]

The transfer of a bare dominium constitutes a supply which is subject to VAT at the standard rate, unless the property did not form part of the deceased's enterprise, in which case the supply of the property will not be subject to VAT.[38] The bare dominium holder will generally not be entitled to deduct input tax in respect of the acquisition of the bare dominium as the bare dominium can usually not be used to make taxable supplies. Output tax must be paid on the open market value of the bare dominium[39] of the property distributed to the beneficiary if that person and the deceased were connected persons in relation to each other.[40] The following example will explain it best:

Example 3

Edith owns a farm with vineyards. She bequeaths the farm to a family trust subject to the lifelong usufruct in favour of her spouse. Both her spouse and the family trust are "connected persons" for VAT purposes. The family trust is a registered VAT vendor and conducts a farming enterprise. Her spouse is not registered as a VAT vendor. ***What are the VAT implications of the usufruct and the bare dominium?*** The open market value of the farm is R 45 000 000 and the value of the usufruct is R 41 500 000.[41]

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[35] Id
[36] Section 11(1)(e) of the VAT Act read with IN 57.
[37] It is beyond the scope of this article to discuss how the value of an usufructuary interest is calculated. Please refer to the Estate Duty Act 45 of 1955.
[38] Value-Added Tax, VAT 413 - Guide for Estates at page 30 (March 2015 edition)
[39] The value of the bare dominium must be calculated by deducting the value of the usufruct from the open market value of full ownership of the asset.
[40] Section 10(4) of the VAT Act.
[41] Please take note that the amounts are purely for illustrative purposes and that no real calculation of the value of the usufruct was made.

The bequest of the usufruct to Edith's spouse will entail output tax of R 5 413 043 (R 41 500 000 x 15/115). This is because her spouse is a connected person and is not a registered VAT vendor that will use the usufruct in the course of the furtherance of his enterprise. If her spouse were registered as a VAT vender and would have used the usufruct in the course of the furtherance of his enterprise the output tax would have been nil (R 0 x 15/115).

The bequest of the bare dominium to the family trust is a taxable supply. The family trust is a connected person and is registered as a VAT vendor but will not be able to use the bare dominium in the in the course of the furtherance of the trust's enterprise and be used to make a taxable supply. Therefore, output tax of R 456 522 ((R 45 000 000 – R 41 500 000) x 15/115) will be payable by Edith's estate. If the trust were not a "connected person" the consideration would have been nil and thus the output tax would have been nil.

Conclusion

From the above examples, it is clear that VAT can have a detrimental impact on the liquidity of an estate. It could also cause that the wishes of the testator could not be followed and adhered to think of the instances where there is a shortfall in the estate and the executor is forced to sell off assets that were specifically bequeathed to heirs and legatees. Caution should also be taken when conditions such as bequest prices are used, and the planner must make certain that the testator understand the impact that it might have on the estate and especially the liquidity of the estate. It is advised VAT should be considered when conducting an estate plan and that expert advice should be sought before making any potential detrimental decisions.

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Testamentary Trusts or Guardian Funds: What Works Best For Protecting Your Children's Inheritance Trusts Simplified

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Introduction

When a South African person dies, the way the estate will devolve is governed by South African laws of Succession, in terms of which an estate either devolves with a last will and testament i.e., a testamentary/testate estate or without a last will and testament, known as intestate succession (*succession ab intestatio*).

In South Africa, we do not practice the principal of forced heirship. When a person dies with a will, they are referred to as a testator or testatrix (testator going forth). A testator has freedom of testation. Freedom of testation is a fundamental principle of our law of succession. It is enshrined in Section 25 of the Constitution, that is the right to Property.

Section 25(1) of the Constitution provides that no-one may be deprived of property. The view that section 25 protects a person's right to dispose of their assets as they wish, upon their death is well held. For if the contrary were to be held, a person's death would mean that the courts, and the state, would be able to infringe a person's property rights after he or she has passed away, unbounded by the strictures which are in place while that person is still alive.'[1]

This enables the testator to bequeath their assets to whomever they choose to, subject to certain statutory or common law limitations. Often, assets as well as cash is bequeathed to minor children either by way of testate succession or awarded by following the rules of intestate succession, as stipulated by the Intestate Succession Act, 1987.[2]

Parents from different walks of life and different backgrounds, are all sheltered under a common denominator, in that they want to make sure that their minor children are going to be taken care of upon their demise. In the unfortunate event of something occurring, parents would like to be rest assured knowing that their families, especially their minor children will be taken care of by somebody that they trust, depend on, and is fit and proper to make decisions that will be in the best interests of those children. Thus, drafting a will, nominating a guardian, and making provision for a testamentary trust is vitally important in unprecedented times like these.

A testamentary trust is created by a trust clause in the will. A trust is an agreement, where the assets intended for beneficiaries, in this case perhaps the minor children, is held in trust and

[1] Per Erasmus AJA in in re BOE Trust Ltd 2013 (3) SA 236 (SCA) § 26
[2] Income Tax Act 58 of 1962. Available at http:// www.gov.za

managed by the appointed trustees. The trustees have a fiduciary duty to manage trust assets in the best interest of the beneficiaries. [3] One of the many benefits of a testamentary trust is that the founder personally appoints the trustees to act on behalf of the minor child, thereby ensuring that decisions are made for the child by trustees that they consider competent. The trustees selected must have the necessary skill, knowledge, and ability, as they are bound by a fiduciary, common law, and statutory law duties.[4]

Since a trustee is given enormous responsibility, the trustee selected must be given careful consideration as they are bound by fiduciary, common law, and statutory law duties.

The trust will operate in accordance with the Trust Property Control Act 57 of 1988 [5] and cognizance must be taken of the fact that there are various other legislations that the trustees will be governed by, such as the Income Tax Act, the Trust Property Control Act, and the Tax Administration Act.[6]

This avenue of estate planning ensures that the testator have control of the minor child's inheritance. The feasibility of creating a trust is dependent on various factors.
When creating a testamentary trust, it is vital to ensure that the provisions are constitutional.

Cognisance must be taken of Section 13 of the Trust Property Control Act:

"If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which –

(a) hampers the achievement of the objects of the founder; or
(*b*) prejudices the interests of beneficiaries; or
(c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof

[3] When and how to set up a testamentary trust: - Available at https://www.moneyweb.co.za/financial-
[4] When and how to set up a testamentary trust: - Available at https://www.moneyweb.co.za/financial-
[5] Trust Property Control Act 57 of 1988 Available at https://www.justice.gov.za/legislation/acts/1988-57
[6] When and how to set up a testamentary trust: - Available at https://www.moneyweb.co.za/financial-

any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."[7]

To illustrate this, the Supreme Court of Appeal in the case of Curators ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal (510/09) [2010] ZASCA 136 (1 October 2010)[8] must be noted. On July 21, 1938, a charitable (educational) trust was created by the testator Sir Charles George Smith. It was named the Emma Smith Educational Fund. It was administered by the University of KwaZulu-Natal. The benefits of the Fund would only be reserved solely for white South African women who need financial support for a tertiary education.

The point at hand was whether this bequest was racially exclusive and unconstitutional. Section 13 of the Trust Property Control Act was taken into consideration: The SCA pointed out that guidance must be found in "the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism". The curators argued that the judicial amendment of a public charitable trust's provisions would have a chilling effect upon future private educational bequests, but the SCA did not agree. The SCA confirmed the decision of the court a quo and found that the fact that the benefits were restricted to white bursars was racially restrictive and thus in conflict with public policy."[9]

Thus, it is vital that when a testator or testatrix exercise the concept of freedom of testation, they must ensure that their instructions to the trustees adhere to the provisions set out in the Trust Property Control Act.

Based on the findings in regard to the case at hand, caution must be taken when exercising freedom of testation. If one intends to leave a financial legacy to a minor child, the correct structures and protection must be put in place, which must be in line with the Constitution and the various governing legislations, failing which, there is the risk that the Master of the High Court

[7] Trust Property Control Act 57 of 1988 Available at https://www.justice.gov.za/legislation/acts/1988-57.pdf
[8] Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal (510/09) [2010] ZASCA 136 (1 October 2010) Available at https://www.supremecourtofappeal.org.za
[9] Testamentary trust provisions must be constitutional: - Available on https://www.exceed.co.za/testamentary-trust-provisions-must-be-constitutional

may direct that such inheritances be transferred and administered by the state-run fund, known as the Guardian Fund.

The Guardian's Fund was established by section ninety-one of the Administration of Estates Act, 1913 (Act 24 0f 1913)[10],

"*(1) … and shall consist of all moneys-*

(a) in that fund at the commencement of this Act; or

(b) received by the Master under this Act or any other law or in pursuance of an order of Court; or

(c) accepted by the Master in trust for any known or unknown person.

(2) Whenever any money is so received or accepted by the Master, he shall open *in the books of the guardian's fund an account in the name of the person to whom that money belongs or the estate of which that money forms part: Provided that if it is not known to whom any such money belongs, or if it is more convenient, the account may be opened in the name of the person from whom that money has been received, or of the estate from which that money is derived, as the case may be.*"

The aim of the Guardian's Fund is to receive, protect, manage and administer the funds of: -[11]
Minors or unborn persons who have inherited funds in terms of a last will or by operation of intestate succession.

- Persons incapable or declared incapable of managing their own affairs;
- Missing persons; or
- Where the Master of the High Court directs that such person's funds be paid into the Fund

As stated above, the Guardian's Fund has been established to receive and manage cash on behalf of persons who are legally incapable or do not have the capacity to manage their own affairs. This includes minor children.

The money in the Guardian's Fund is invested with the Public Investment Commission. The Guardian's Fund is administered by the Master of the High Court and the operation of it is set out in Chapter V of the Administration of Estates Act.

[10]Administration of Estates Act 66 of 1965. Available at https://www.justice.gov.za/legislation/acts/1965
[11] What you need to know about the Guardian's Fund- https://www.schoemanlaw.co.za

"The moneys in the Guardian's fund shall be deemed to be deposits for the purposes of the Public Investment Commissioners Act, 1984 (Act 45 of 1984), and *the Master may from time to time pay out of any working balance retained at his or her disposal under the said Act, any amounts due and payable out of the said fund."*[12]

Accessing money from this fund *could* be a long process that involves strict procedures which could result in delays in payment.

"*The Master shall, upon the application of any person who has become entitled to receive any money out of the guardian's fund, pay that money to that person"*[13]

There are various costs that *can* be claimed from the Guardian Fund.[14]These costs can include, school and university fees, clothes, medical aid premiums, food, maintenance, and any other costs that can be motivated.

Claims are limited to R250 000 from the invested capital plus any interest earned. Documentary proof must be submitted before the Master of the High Court can authorize such payments.
Cognisance must be taken of the fact that any funds invested in the Guardian's Fund, that remains unclaimed for a period of 30 years, will be forfeited to the state. Before this takes place, notice must be advertised in the Government Gazette annually in the month of September.
It is *important* to note that, if the funds are transferred to the Guardian's Fund, the inheritance is not readily available. There are strict processes that need to be complied with before the funds can be released for the minor child's needs. There could be administrative delays that can prove to be frustrating.

The Guardian's Fund although altruistic in purpose, has been subjected to fraud and maladministration, and the question then arises is whether having minor children's inheritances transferred to such a fund is in their best interest.

Conclusion

A will, a simple document, so vital, yet many of us do not consider its importance, especially when intending to leave a financial legacy for minor children. Drafting a will and making provisions that

[12] Administration of Estates Act 66 of 1965. Available at https://www.justice.gov.za/legislation/acts/1965
[13] Administration of Estates Act 66 of 1965. Available at https://www.justice.gov.za/legislation/acts/1965
[14] Administration of Estates Act 66 of 1965. Available at https://www.justice.gov.za/legislation/acts/1965

those minor children's future inheritance is administered by someone that the parent trusts is of vital importance. Failure to do so, could have far reaching consequences, as those inheritances can now be governed by the Guardian's Fund by someone that the parent does not know.
There are various options available to individuals, in relation to drafting a will. Some people elect to draft their own wills. There are various advantages, but also disadvantages attached to this.

Drafting one's own will may be a cheaper option, but cognizance must be brought to the fact that, this option could carry considerable risks. Often a will is drafted by someone who does not have the necessary skill, knowledge, or expertise to ensure that the legal requirements of the Wills Act (7 of 1953) is adhered to. This in essence could render the will invalid and the estate will be distributed in accordance with the Laws of the Intestate Succession Act. There is a predetermined order of inheritance, and it may happen that the beneficiaries that was intended to inherit, may no longer inherit, due to the invalidity of the Will.

Since a Will is a legal document, it is always advisable to get assistance and advice from a professional. A basic non-compliance with the Wills Act, can invalidate the will partially or completely, which could be detrimental to the intended beneficiaries. The need to draft, revise or amend ones will is generally triggered by certain life events. Covid-19, and the unpredictability of this pandemic, is one such event that demands that one should review their will. Drafting a will is not planning for death but ensuring that the estate is in order and taken care of in the aftermath of an event if anything should come to pass in these disastrous times.

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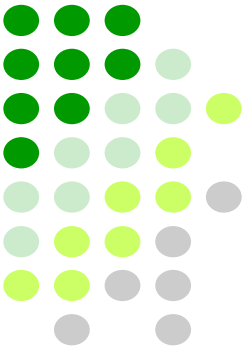

Retirement Planning

Payment of Retirement Fund Benefits to a Trust

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Introduction

Trusts have been and continue to be an important estate-planning tool. The essential purpose of trusts in their purest form is the protection of assets for the benefit of the beneficiaries of the trust. This dovetails with one of the objectives of the Pension Fund Act[1] and that is to protect and utilise retirement benefits for the benefit of dependants and nominees of a deceased member of a retirement fund. This article considers factors that are to be taken into account before trustees of an *inter vivos* or testamentary trust are nominated as a beneficiary to receive retirement benefits on behalf of a dependant or nominee who is also a beneficiary of the trust.

The board of trustees of a retirement fund

Every retirement fund in South Africa is governed by the Pensions Fund Act[2] (herein after referred to as "the Act"), which makes provision for the appointment of a board of trustees of the retirement fund (herein after referred to as the board of trustees). The trustees are responsible for allocating retirement fund benefits in terms of section 37C of the Act.[3] The intention of this section in the Act is to protect dependants, even over the clear wishes of the member. At its core, the Act serves a social function, striving to ensure that no one who was financially dependent on the member is left without support.[4]

The board of trustees of a retirement fund has a fiduciary duty to act with due care, diligence and good faith. "A fiduciary duty is an onerous, *legal obligation* (a duty of loyalty and care) of a person managing property or money belonging to *another* person to act in the *best interests* of such a person."[5] According to Phia Van Der Spuy, a trustee has to be more careful and cautious with the affairs of the trust than he would be with his own affairs. A person can take more personal risks in managing his own personal affairs than when dealing with trust assets.[6]

It was held in Doyle v Board of Executors,[7] that one of the principal characteristics of the office of trustee is that it is fiduciary in nature and that a trustee holds trust assets in that fiduciary

1Pension fund Act 24 of 1956
2 Ibid
3 Briers-Danks R, How can I ensure my life policies and pension get paid into a testamentary trust? (9 Feb 2021) available at https://www.moneyweb.co.za/qa/advisor-questions/how-can-i-ensure-my-life-policies-and-pension-get-paid-into-a-testamentary-trust/, accessed on 19 May 2022
4 Ibid at 3
5 Van der Spuy P, Demystifying Funds, 2 ed (2021) 398
6 Van der Spuy P, Trustees of a Trust have a fiduciary duty, (28 April 2020)available at https://trusteeze.co.za/article/trustees-of-a-trust-have-a-fiduciary-duty, accessed on 02 September 2022
7 Doyle v Board of Executors 1999(2) SA 805 (C)

capacity. The court held that a trustee's duty of "utmost good faith" towards all trust beneficiaries was pertinently founded on such trustee's occupation of a fiduciary office. This applies to trustees of a retirement fund in the same vein.

The board of trustees also have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund.[8] This fiduciary duty does not terminate once the board of trustees approves an allocation to the dependants or nominees. It is evident from the Pension Funds Act, that the duty extends further to ensure that the payment is made in a responsible manner to benefit the dependants or nominees. In other words, the benefit can be paid directly to the dependants and beneficiaries but only if they are capable of prudently managing the benefit. If not, the board of trustees can take a decision to make payment to a third party acting on behalf of, and in the best interest of the dependant or nominee.

The Act makes provision for the payment of a benefit by a registered retirement fund to be made to the following persons and it shall be deemed to be made to such dependant or nominee:[9]

i. A trustee as contemplated in the Trust Property Control Act[10], nominated by
   a. The member
   b. A major dependant or nominee
   c. A person recognised in law or appointed by a court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee or a major dependant or nominee not able to manage his or her affairs or meet his or her daily care needs.
ii. A person recognised in law or appointed by a court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee
iii. A registered beneficiary fund

It is evident from the above provision that due care and consideration must be given by the board of trustees on whether a beneficiary or nominee can manage the benefits due to them. Possible reasons for the board to decide against making payment to the dependant or nominee directly are:

8 Pension Fund Act 24 of 1956, section 7C(2)
9 Pension Fund act of 1956, section 37C(2) (a)
10 Trust Property Control Act 57 of 1988, section 1

- Where it is established that the dependant or beneficiary or, if a minor then his or her guardian does not have the financial acumen to prudently manage the benefits or
- Perhaps the dependant or nominee is involved in substance abuse, gambling or some other form of addiction or;
- Is living in a vulnerable environment.

The board of trustees may in such an instance, take a decision to have the benefits pay into a beneficiary fund or a trust for the benefit of the dependant or nominee. This is to ensure the benefits will be protected for the exclusive use of dependants or nominees.

If a dependant or beneficiary to a retirement benefit is also a beneficiary of a trust, having two income portals i.e. a beneficiary fund and a trust may not be necessarily be effective in terms of costs and management as having one income portal i.e. the trust. For this reason, the retirement benefit may be better off placed in the inter vivos or testamentary trust.

Concerns regarding payment into an Inter vivos or testamentary trust

Boards of trustees are at times sceptical about making retirement benefit payments to the trustees of an *inter vivos* or testamentary trust for the benefit of dependants or nominees. Perhaps if the beneficiary or dependant is a sole beneficiary of an inter vivos or testamentary trust the scepticism may be less or not exist. However, if there are other beneficiaries in the inter vivos or testamentary trust, the concern the board of trustees has is that the benefit, if paid into a trust, may become absorbed with other capital of the trust. The benefit could then be utilised by the trustees of the trust for the benefit of all or any beneficiary/ies mentioned in terms of the Deed of Trust, particularly if the trust is a discretionary trust. The latter will completely defeat the objective of the Pension Fund Act.

Vested trusts

An inter vivos or testamentary trust can be a *vested* trust. In this type of trust, the trustees administer and manage the assets in the trust, but the beneficiaries of the trust own the assets. The beneficiaries have vested rights in the assets and this gives them more certainty in knowing exactly what he or she can expect in the way of assets, income or benefits from the trust.[11] A vested right is defined as a right belonging completely and unconditionally to a person which

11 Geach W, Trusts Law and Practice, 1ed (2007), 20

cannot be impaired or taken away without the consent of the owner.[12] A vested right allows a beneficiary to enforce that right by calling upon the trustees to deliver to that beneficiary the benefit that is the subject matter of that right.[13] In view of this, a payment that is made by a retirement fund to the trustees of a vested trust on behalf of a dependant or beneficiary, who is also a beneficiary with vested rights in that trust, those benefits will be owned solely by that dependant or beneficiary. The trustees of the inter vivos or testamentary trust have a duty to administer and manage the benefit in the best interest of the beneficiary and in accordance with the terms of the trust deed. Once payment is made to the trustees of the vested inter vivos or testamentary trust, the board of trustees will be absolved from any further accountability in terms of the benefit. The trustees of the inter vivos or testamentary trust will assume all responsibility and accountability to the beneficiaries.

Discretionary trusts

It is very common for trusts to take the form of discretionary trusts where the vesting of benefits or assets in beneficiaries is at the discretion of the trustees. Vesting a benefit means awarding a beneficiary a 'vested right' over property interests. Until vesting occurs beneficiaries of a discretionary trust have a contingent right or merely a *spes* or hope[14] of receiving trust property or assets.

If vesting a benefit is at the discretion of the trustees of the *inter vivos* or testamentary trust, it stands to reason the concern the board of trustees of the retirement fund has in paying an allocated benefit of a dependant or beneficiary to a trust. This clearly presents a risk that the latter may not receive the benefits as expected.

In an article written by Jenny Gordon[15], she states that where a member has died, leaving the benefit to a trust, the board of trustees has the sole discretion to pay the benefit into the trust. If they do so, it would be subject to the trustees of the *inter vivos* or testamentary trust providing an undertaking to the board to immediately vest the benefit and all future income in the (dependant) nominee. They would have to set up a separate account for that nominee in respect of that benefit.[16]

12 Van der Spuy P, Demystifying Trusts, 2ed (2021) 32
13 Ibid
14 Supra note 11 at 20
15 Gordon J, Did You Know 26/2000
16 Ibid at 2

The author is of the view that whether a trust is a discretionary trust or not, and irrespective of whether the dependant or nominee is the sole beneficiary of the trust or not, a payment to a trust should be made on certain conditions:

i. Firstly, the board of trustees of the retirement fund must be satisfied, after due and proper examination of the deed of trust or testamentary instrument, that the trust can accept benefits from a retirement fund. Furthermore, that it will be possible for the objectives of the Pension Fund Act, and by extension the board of trustees, to be met if payment is made to the *inter vivos* trust or testamentary trust i.e. protection and utilisation of the benefit exclusively for the dependant or nominee. Furthermore, it is the author's opinion that should the deed of trust or a testamentary instrument remain silent on this point, then retirement benefits should be accepted by the trustees as the deed of trust of testamentary instrument, does not specifically state that retirement benefits may not be accepted by the trustees of the trust, or that assets may only be accepted from an estate.

ii. Secondly, a written undertaking to the board of trustees by the trustees of the *inter vivos* or testamentary trust, to immediately vest the benefit and all future income[17] in the dependant or nominee upon the trustees of the trust receiving the payment from the retirement fund. Furthermore, a separate account to be set up for that dependant or nominee for that benefit. A resolution signed by the trustees of the inter vivos or testamentary trust would also be acceptable.

This means that the benefit must be ring-fenced specifically and exclusively for the dependant or nominee to avoid the benefit from being absorbed with the rest of the trust's capital. If due care and diligence is not exercised in this regard, then at some point the benefits may be distributed to other beneficiaries of the trust who are not entitled to these retirement fund benefits.

Should the trustees not follow through with the undertaking (referred to in (ii) above), the board of trustees may apply to court in terms of the Trust Property Control Act[18] for an order directing the trustees of the *inter vivos* or testamentary trust to comply with such request or perform such duty. In practice however, this is unlikely to happen. Either the trustees of the trust will provide

17 Ibid at 2
18 Trust Property Control Act 57 of 1988 , section 20

the requested undertaking or resolution to the board of trustees or the board of trustees will refuse to make payment to the said trust.

Once the trustees of the trust provide the undertaking or resolution referred to in (ii) above and payment is made over to the trust by the retirement fund, the board of trustees are absolved from any accountability in respect of the benefits and the trustees of the trust become accountable for any failure to comply with the terms and conditions of the undertaking or resolution.

Capital vs Income beneficiaries

Beneficiaries are typically referred to as income beneficiaries and capital beneficiaries in a trust instrument, and they may have vested rights as one or both types of beneficiaries.[19] As the name suggests, an income beneficiary of a trust may only receive income from a trust whereas a capital beneficiary may only receive a capital pay out from a trust.

A problem could arise if the dependant or nominee is a capital beneficiary only, in terms of the trust deed. If this beneficiary requires income from the retirement benefit, then paying the retirement benefit to the trust will result in the trustees not being able to meet this obligation of paying an income to a capital beneficiary because the trustees are bound to manage and administer the trust in accordance with the terms and conditions of the trust deed or testamentary instrument. It is for instances such as this, that it is imperative the trust deed or the testamentary instrument be examined by the board of trustees of the retirement fund before making a decision to pay into a trust.

Furthermore, the trustees of the *inter vivos* or testamentary trust should not have such unfettered powers, in terms of the deed of trust or the testamentary instrument, to override or avoid the discretion exercised by the board of trustees of the retirement fund.[20]

It is advisable for financial advisors who have clients that want to nominate trustees of a trust as a beneficiary to accept retirement benefits on behalf of dependants or nominees:

i. Firstly, to make certain that the trust deed or testamentary instrument makes provision for the trustees of the trust to accept such retirement fund payments.

19 Supra note 5 at 32
20 Supra note 15 at 2

ii. Secondly, make certain there are no provisions in the trust deed or testamentary instrument giving powers to the trustees of the *inter vivos* trust or testamentary trust to override the decision made by the board of trustees of the retirement fund.
iii. Thirdly, necessary amendments be effected to an existing trust deed or testamentary instrument to incorporate provisions for the receipt of retirement fund payments.

These provisions must be clear that the retirement benefit will be ring-fenced for the specific dependants or nominees who are also beneficiaries of the trust. It is also advisable that in the case of a testamentary trust, the member should stipulate in his will, the name of the testamentary trust, which name can be used on beneficiary nomination forms as well.

The member of the retirement fund may want to consider writing a letter addressed to the board of trustees of the retirement fund. The reasons for nominating the trustees of the *inter vivos* or testamentary trust to receive the payment of the retirement benefits on behalf of the dependant or nominee can be set out, potentially including the background to a specific situation and a motivation to the trustees for such payment to the trust.[21] Although this does not guarantee that the benefit will be paid into the trust it does give the trustees some insight to help them make an informed decision.[22]

Trustee of the inter vivos or testamentary trust

After payment by the board of trustees and once the benefit vests in a beneficiary of a trust, in the event of death of the beneficiary prior to the payment of the vested amounts, the deceased beneficiary's interest must be included in their estate and can be transferred to their heirs.[23] The benefit may not be redistributed within the trust.[24]

In summary, where trustees of an inter vivos trust or a testamentary trust is nominated as a beneficiary to receive retirement benefits:

i. The trust deed or testamentary instrument should provide for the trustees to receive retirement payments. If not, necessary amendments must be made to the trust deed or testamentary instrument to incorporate such provision which cannot be overridden by the trustees of the *inter vivos* or testamentary trust

21 Supra note 3 at 3
22 Ibid at 3
23 Supra note 5 at 33
24 Supra note 15 at 2

ii. The board of trustees will exercise their discretion, once an allocation has been made in favour of a dependant or nominee, as to whether payment of the retirement benefit will be made into the *inter vivos* or testamentary trust or not. Due consideration will be given to the provisions of the trust deed or testamentary instrument.

iii. The board of trustees may agree to pay the retirement benefit to a trust subject to certain conditions. These conditions may include, but not be limited to, an undertaking or a resolution by the trustees of the *inter vivos* or testamentary trust receiving the retirement benefit on behalf of the dependant or nominee, to vest the benefit immediately upon receipt, in the dependant or nominee and to manage the retirement benefit separately from the rest of the trust capital.

iv. The board of trustees could decide that they are not satisfied that the purpose and objective of the Pension Fund Act, and by extension the board of trustees themselves, will be met by making payment of the retirement benefits to the trustees of the trust on behalf of the dependant or nominee. In this case, the board of trustees will exercise other options of payment such as a payment directly to the dependant or nominee, to a person recognised in law or appointed by the court to manage the affairs of the dependant or nominee or to a beneficiary fund.

v. Beneficiary nomination forms should not nominate the trust but trustees[25] of the *inter vivos* or testamentary trust to receive and manage the retirement benefit payment on behalf of a specific dependant or nominee. For example nominate ' The trustees of the XYZ trust or testamentary trust for and on behalf of John Smit'

Conclusion

It has been established in this article that when a retirement benefit payment is made to a trust, a key factor among others, is the immediate vesting of the benefit in the name of the dependant or nominee. In this way, the risk of the retirement benefit being absorbed with the rest of the trust capital is removed. Once a benefit in trust vests in a dependant or nominee who is also a beneficiary of the trust, this vested right cannot be taken away from the dependant or nominee. It is a personal right and the dependant or nominee will have personal right of action against the trustees of the trust to ensure they perform their duties.

25 Pensions Fund Act 25 of 1956 , s37C(2) (a)(i)

Considering all factors discussed in this article, an inter vivos or testamentary trust can provide the necessary protection of retirement benefits paid into it by a retirement fund for the exclusive benefit and use of a dependant or nominee who is also a beneficiary of the trust.

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Section 37C of the Pension Funds Act

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Introduction

Section 37C of the Pension Fund Act[1] provides that benefits payable on the death of a member of a retirement fund do not form part of the estate of the deceased but are to be dealt with in a manner prescribed by this section. The right and responsibility of allocating the death benefits paid out by a fund are allocated to the trustees of the particular fund.

According to the High Court[2], the application of Section 37C[3] is clear and leaves no room for interpretation. It overrides any law that is contradictory. The discretion that the trustees need to exercise overrides any other law. The Pension Fund Adjudicator has also confirmed this in Sithole v ICS Provident Fund[4] where it held that Section s7C takes precedence over any law, including even customary law.

It is of critical importance that financial planners and their clients understand the impact of the application of Section 37C – not only with regard to the distribution of a deceased's estate in terms of their testamentary objectives, but also understanding how this may impact the liquidity in the deceased's estate.

When is Section 37C applicable to a benefit?

Section 37C[5] applies to any benefit that becomes recoverable in consequence of membership of a retirement fund. It thus applies to the benefits that arise at the death of a member of a retirement fund that become payable as a result of the deceased's membership of that fund.

Section 37 C reads as follows. **Disposition of pension benefits upon death of member.** —

(1) *Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) (b) (i) and subject to the provisions of sections 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:*

[1] Act 24 of 1956
[2] Makume v Cape Joint Retirement Fund [2007] JOL 10000 (C)
[3] Act 24 of 1956
[4] [2000] 4 BPLR 430 (PFA)
[5] Act 24 of 1956

(*a*) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants.

(b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

(*b*A) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.

(c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.

(2) (*a*) For the purposes of this section, a payment by a registered fund for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to—

(i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by—

(aa) the member.

(bb) a major dependant or nominee, subject to subparagraph (cc); or

(cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee, or a major dependant or nominee not able to manage his or her affairs or meet his or her daily care needs;

(ii) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee; or

(iii) a beneficiary fund.

(*b*) No payments may be made in terms of this section on or after 1 January 2009 to a beneficiary fund which is not registered under this Act.

(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate, having regard to the fund return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.

(4) (a) Any benefit dealt with in terms of this section, payable to a major dependant or major nominee, may be paid in more than one payment if the dependant or nominee has consented thereto in writing: Provided that—

(i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and

(ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.

(b) If the agreement contemplated in paragraph (a) is cancelled the balance of the benefit shall be paid to the dependant or nominee in full.

(5) The provisions of subsections (3) and (4) do not apply to a beneficiary fund, and any remaining assets held for the benefit of a deceased beneficiary in a beneficiary fund must be paid into the estate of such beneficiary or, if no inventory in respect of the beneficiary has been received by the Master of the High Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.

Section 37C will apply to the following circumstances

- A member of a retirement annuity who dies prior to retirement
- A member of a pension fund, provident fund, pension preservation fund or provident preservation fund who dies prior to retirement
- A person who has already retired but who has elected to purchase a fund owned annuity (i.e it will not apply when a retirement fund member has retired and purchased an annuity in their own name)

General Principle of Section 37C

Section 37C contains a general rule that provides that if within 12 months of the death of the member, the fund becomes aware of a dependant(s) of the member, the member's benefit must be paid to such dependant(s) in a manner that the trustees deem equitable. This includes the way that the benefit will be paid. (Note: If a retirement fund's rules specify a benefit that pays to a spouse or child, such benefit is not subject to the discretion of the trustees[6] Section 13 of the Pension Fund Act specifies that the rules of a pension fund are binding on the fund itself, its board, its members and the participating employer. Anything that is done outside the rules of a fund are null and void.

In the event of a dispute arising, the aggrieved party can lodge a complaint with the Pension Funds Adjudicator.[7] The Pension Fund Act[8] .read with the Constitutional Court decision in Trencon Construction (Pty) ltd v Industrial Corporation[9]

[6] Section 37C(1)(a) of the Pension Fund Act 24 of 1956.
[7] The trustees are performing an administrative duty in distributing the deceased member's benefits - a functus officio. This means that the trustees may not reconsider their final decision. Their original decision will stand unless set aside by the Pension Fund Adjudicator
[8] Section 30E(1)(a)
[9] [2915](5)SA 245(CC)

Section 37C places a duty on the trustees to firstly actively trace the dependants of the deceased and secondly, investigate their level of dependency on the deceased member In Itumelang v SALA Pension Fund[10] it was found that the trustees would have to be proactive in tracing the dependant. In this matter the Pension Fund Adjudicator went suggested actions such as placing newspaper adverts in local papers as part of actively tracing dependants

By virtue of their nomination[11], a nominee qualifies for the benefit for which he has been nominated, but will only receive this full benefit if there are no existing dependants[12], the estate of the deceased is solvent,, the nominee is alive at the time the trustees exercise their discretion[13]and the nominated beneficiary did not cause the deceased's death[14] If there are both nominees and dependants, the board of trustees have to consider all relevant facts in deciding on an equitable distribution between the dependants and nominees.

An equitable distribution is not defined by the Pension Fund Act[15] so guidance must be sought from the courts. In Swart N.O. v Lukhaimane N.O. and Others[16] the following factors should be taken into consideration by the trustees when making their decision:

- Age of dependants;
- Relationship of dependants to the deceased member
- The extent of their dependency on the deceased member
- The wishes of the deceased member
- The earning potential and general financial affairs of the dependants
- The amount available for distribution

This list is not exhaustive, and each case must be considered based on its unique circumstances

Who qualifies as a dependant?

A 'dependant' is defined in the Pension Fund Act[17] and includes a person

- Whom the member is legally liable to provide maintenance for.(There must be a legal obligation to provide such maintenance – this would, for example, include a former spouse

[10] [2007] 3 BPLR 311 (PFA)
[11] Note that the Pension Fund Act does not define a 'nominee'
[12] As defined in section 1 of the Pension Fund Act 24 of 1956
[13] PPS Insurance Company v Mkhabeka (1959/2011) [2011] ZASCA 191
[14] Pension Fund Act Section 37C in South Africa explained, Micaella Snyders, February 2022
[15] Act 24 of 1956
[16] [2021]JOL 49952(GP)
[17] Section 1 of Pension Fund Act 24 of 1956

entitled to maintenance in terms of a maintenance order or a minor child[18] In Fourie v Central Retirement Fund[19] it was found that a legal duty exists to maintain his parents as long as the parent can prove that they are unable to support themselves),

- Whom the member is not legally liable to provide maintenance for, but
  - That person is factually dependant on the deceased member (for example, an elderly parent who is supported financially by their child – the person will need to provide factual evidence of financial dependence by way of regular (i.e. not once off) financial support). This support could include payment of school fees, providing free accommodation etc.);
  - Who is the spouse of the member.
  - Who is the child of the member (Note that 'child' refers to someone's offspring and does thus not only refer to minor children[20]
- In respect of whom the member would become legally liable to maintain had the member not died (i.e. future dependants such as elderly parents or even a person who has lodged an application for maintenance under the maintenance act but where the maintenance order is not yet granted at date of death).

Practically, this means that the trustees of the fund have a 12-month period to find any 'dependants' of the deceased member and have to consider them when making an equitable distribution of the deceased's retirement benefit – whether a beneficiary is nominated or not.

In Dobie NO v National Technikon Retirement Pension Fund[21] , the Pension Fund Adjudicator (PFA)clarified the period within which the death benefit must be paid out

In the case where there are no nominees and were the trustees are satisfied that all dependants have been identified within a shorter period, the distribution can be paid to the dependants as it was clarified that the 12-month period referred to in Section 37C(1)(a)[22] is the period available to the trustees to trace any dependants of the deceased member before making exclusive payment to any nominees. The 12-month period also doesn't compel the trustees to make a distribution at the end of the 12 -month period.

[18] Section 18 of the Children's Act 38 of 2005 provides that a parent has a legal duty to provide financial support for their minor child. A minor child includes an adopted child (Section 242)
[19] [2001]2z
[20]
[21] [1999] 9 BPLR29 (PFA)
[22] Pension Fund Act 24 of 1956

Further clarity was provided in this matter in that the PFA confirmed that, where there are only nominees who are not dependants and no dependants, the trustees can only make payment of the distribution after the expiry of the 12-month period.

In the event that the deceased member is survived by both dependants and nominees who are not dependants, payment must be made by the trustees within 12 months of the members death[23]

Where there are no dependants or nominees, payment is made to the estate of the deceased member – the Act[24] does not specify a timeframe for such payment, but it is generally accepted that the 12-month period should expire before such payment is made. Where there are no dependants and only nominated beneficiaries who are non-dependant (whether nominated for the full benefit or a portion thereof), the trustees must distribute the benefit between the nominated beneficiary and the estate – the trustees can only make this distribution after the 12-month period has expired.

It is interesting to note that in finding any 'dependants', it was found in Itumeleng v SALA Pension Fund[25] that the trustees have to be proactive in identifying dependants and cannot merely wait for dependants to lay claim to a benefit In this case, it was found that the board of trustees had failed to take reasonable steps to satisfy itself that the deceased had no dependants – the trustees paid the benefit to the deceased's estate as they 'were not informed' by the deceased's employer of the existence of a surviving spouse . Section 37C(1)(a)[26] places the duty on the trustees to conduct a diligent investigation – not on the participating employer. The duty is solely on the trustees to ensure that all dependants have been traced.

Sithole v ICS Provident Fund[27] and Mohlomi v Evergreen Provident Fund and others[28] set out the factors that the trustees must consider in determining whether a person qualifies as a 'dependant' or not.

[23] Section 37C(1)(bA) of the Pension Fund Act 24 of 1956
[24] PensionFund Act 24of1956
[25] [2007] 3 BPLR 311 (PFA)
[26] Pension Fund Act 24 of1956
[27] [2000] 4 BPLR 430 (PFA)
[28] [2014] JOL 31440 (PFA)

The list of factors is not exhaustive and will depend on the circumstances of each case, but will include the following:

- The extent of the dependency
- The ages of the potential dependants
- The relationship between the deceased and the person being considered
- The value of the benefit available for distribution
- The financial status of each potential dependant as well as their future earning ability
- The deceased member's wishes

Who qualifies as a Nominee?

There is no definition of a 'nominee' in the Pension Fund Act[29] but it is accepted that nominee refers to a person who has been nominated by the member to receive a portion of the member's benefit at his or her death. Such nomination must be in writing (this is normally by way of completion of the relevant fund's nomination form) and must clearly indicate who the nominated person is. The nomination must be communicated to the fund and must specify the portion of the benefit payable to the nominated person.[30]

The member of the retirement fund may not nominate his or her estate as a beneficiary (nominee). Section 37C(1)(c) provides that the benefit may only be paid into the estate of the deceased member if the trustees cannot trace a dependant within 12 months of the death of the member and there is no nominee. If there are no dependants, but there are nominees, the trustees must make an equitable distribution between the estate and the nominees (see Martin v Beka Provident Fund[31]).

It is important to note that a nomination of a beneficiary by the member of the retirement fund, is not binding on the trustees – it is merely a guideline that must be considered by the trustees when considering all other relevant factors that allow them to make an equitable distribution of the deceased member's retirement benefit. Further this, is important to note that the nominated beneficiary does not acquire any right to a benefit that becomes payable by the fund. The nominee merely has a hope or expectation (spes) that he or she will receive a benefit from the fund. Should the nominee predecease the member, the spes falls away as there is no real right

[29] Act 24 of 1956
[30] Momentum Legal Updates – Section 37C – Distribution of retirement fund lump sum death benefits.
[31] [2002]2BPLR 196 (PFA)

created by the nomination. This was confirmed in PPS Insurance Company v Mkhabela (1959/2011) [2011] ZASCA 191

There is a duty on the board of trustees to establish if the deceased member nominated a person to receive a portion of the benefit from the fund at his/her death. Where the deceased member nominated a person who is also a dependant of the deceased member, the trustees must follow Section 37C (1)a) as the nominee must be treated as a dependant in determining what is an equitable distribution of the retirement fund benefit.

Once the 'dependants' and nominees have been identified, the board of trustees is charged with the responsibility of making an equitable distribution between the dependants and nominees.

Section 37C makes provision for the following four scenarios when the deceased is survived by

- Dependants and no nominees;
- No dependants, only nominees;
- Dependants and nominees;
- No nominees or dependants whom the member is legally liable to provide maintenance for;
- Payment to a trust

The deceased member is survived by only dependants

Section 37C(1)(a) provides that if there is only one factual or legal dependant at the death of the member of a retirement fund, that dependant must receive the full fund benefit. In circumstances where there is more than one factual or legal dependant, the board of trustees will need to make an equitable distribution between them.

The deceased member survived by nominated beneficiaries only and no dependants

Section 37C(1)(b) dictates that where the deceased is survived by only nominated beneficiaries, the benefit must be paid to the nominated beneficiary in the proportions specified in the nomination (i.e. there is no decision by the trustees as to an equitable distribution). It is critical though, that the trustees have been proactive and taken all reasonable steps to ensure that they satisfied that there are no dependants.

The deceased member is survived by a dependant and there is a nominated beneficiary

Section 37C(1) (bA) dictates that where the deceased is survived by a factual or legal dependant and a nominated beneficiary, the benefit must be paid to the dependant and nominee in such proportions that the board of trustees deems equitable i.e. thee trustees must consider the circumstances of both the nominees and the dependants.

In Gowing v Lifestyle Retirement Annuity Fund[32] the PFA confirmed that a nominee is not required to prove dependence on the deceased fund member – the nominee has a right to receive a benfit by virtue of the fact that the deceased nominated them to receive a benefit.

The deceased member leaves no dependants and no nominated beneficiaries

In the case of the member dying without a nominated beneficiary or a legal or factual dependant, Section 37C(1)(c) dictates the benefit must be paid into the deceased member's estate as a lump sum.

Payment to a trust

Section 37C(2) allows for the payment of benefits that are payable on the death of a member of a retirement fund to be paid into a trust or beneficiary fund. The benefit paid to a trust contemplated in the Trust Property Control Act of 1988 shall constitute payment to the dependant or nominee.

How is the benefit paid

- Payment to a minor beneficiary

  In general, a minor's benefit is paid to the minor's legal guardian. In Beloyi v Ellerines Holding Staff Pension Fund[33] it was found that the payment to a minor's legal guardian should be affected in the normal course of events unless there are valid reasons for depriving the parent of the common law duty to administer the assets of a minor child. The Pension Fund Adjudicator also found that there may be circumstances where the minor's primary caregiver is not their guardian and, in such cases, it may be justified.

The Pension Fund Adjudicator[34] set out certain factors that need to be considered when the trustees are considering whether to pay the benefit due to a minor to the minor's guardian or not

[32] [2007] 2 BPLR 212(PFA)
[33] [2005] 7 BPLR 606 (PFA)
[34] Ramanyelo v Mineworkers Provident Fund 2005 1 BPLR 67 (PFA)

– the amount of the benefit, the guardian's qualifications to administer money and the ability to do so, whether the benefit can be utilised in a manner that can provide for the minor until the age of majority is reached.

Payment can also be made to a trust instead of the guardian – where, for example, the guardian has indicated that he/she intends using the benefit for purposes other than providing for the minor's need, trustees are correct in paying the benefit to trust[35].

- Payment to a major beneficiary
  Benefits due to major nominated beneficiaries or dependants are generally paid directly to that person.

The trustees have a duty to ensure that the payment of the benefit is done in the most appropriate manner. The trustees may give the nominees/dependants the option to take the full benefit as a lump sum, or as a combination between a lump sum and an annuity. Alternatively, the trustees may make the benefit available to the nominees/dependants in the form of a compulsory annuity.

Section 37C (3)[36] provides that the benefits payable to a minor dependant or nominee may be paid in more than one payment in amounts that the trustees deem appropriate and in the nominee/dependant's best interest. Reasonable interest (based on investment returns earned by the fund) must be added to the balance owing to the minor dependant/nominee. This is subject to the proviso that on death or the attainment of majority, whichever occurs first, the full balance owing shall be paid in full. Section 37C(4) provides that benefits due to a major dependant/nominee may also be made in more than one payment but only if interest is added and all terms consented to in writing. This arrangement needs to be reduced to a written agreement which may be cancelled by either party on written notice of 90 days. If cancelled, the remaining benefit must be paid to the dependant/nominee in full.

[35] Ramanyelo v Mineworkers Provident Fund 2005 1 BPLR 67 (PFA)
[36] Act 24of 1956

How is the death benefit taxed?

In this regard, a distinction is drawn between the taxation of a lump sum benefit received by a dependant or nominee and the taxation of an annuity payable to the dependant or nominee. Where an annuity is payable to the nominee or dependant, the annuity is taxed in the hands of the annuitant as they form part of gross income[37].

Paragraph 3 of the Second Schedule[38] deems a lump sum payable to a deceased member or past member, in consequence of membership or past membership of a fund, to have accrued to the deceased immediately prior to his/her death. As such, where a lump sum is payable to the dependant or nominee of a deceased member, the lump sum is taxed in the hands of the deceased member in terms of the Second Schedule[39].

The tax payable by the deceased is calculated on a cumulative basis in terms of the table in the Second Schedule which provides for the aggregation of the following lump sums:

- Retirement fund lump sum benefits accruing from 1 October 2007
- Withdrawal lump sum benefits accruing from1 March 2009
- Severance benefits accruing from 1 March 2011

Effectively, the above amounts must be added to the lump sum payable at death and this aggregated lump sum is taxed according to the table below. The tax calculated is then reduced by the tax calculated in accordance with this table on all lump sum that were accrued prior to the death lumpsum[40].

Taxable Income	Rate of Tax
R1 – R500 000	0% of taxable income
R500 001 – R700 000	18% of taxable income above R500 000
R700 000 – R1 050 000	R36 000 +27% of taxable income above R700000
R1 050 001 and above	R130 500 + 36%of taxable income above R1 050 000

Since payment to a trust can only be by way of a lump sum, a payment to a trust will be taxed as per the table above.

[37] Paragraph (a) of the definition of gross income in the Income Tax Act 58 of 1962
[38] Income Tax Act 58 of 1962
[39] Income Tax Act 58 of 1962
[40] Section 1 and Appendix 1 to the Income Tax Act

Is Section 37C unconstitutional?

Section 37C was introduced into the Pension Fund Act in 1976 and fundamentally changed the law of succession. Specifically, the principle of testamentary freedom was changed in that it removed the 'owner' of the benefit's rights to dispose of his or her property and placed the rights in the hands of a board of trustees.

It can thus be argued that Section 37C deprives individuals of their right to freely dispose of their property as they see fit and is such unconstitutional[41]

Further to this, its impact on spouses married in community of property should also be considered as It can be argued that is unconstitutional in that is unreasonably and unjustifiably limits surviving non-member spouse's rights to property and dignity[42].

Practical application of Section 37C

Scenario 1

Farmer Brown lost his wife to cancer many years and is now married to his second wife, Mrs Brown. He has two children from his first marriage – John and Jill and a child from his second marriage, Jane. His estate comprises of a very successful farming operation worth R15m, an RA worth R3m and life cover of R6m.

Farmer Brown intends for these assets to be distributed as follows:

- Farming operation bequeathed to John in terms of his will
- RA to Jill by way of beneficiary nomination
- Life policy to Mrs Brown and Jane by way of beneficiary nominations on the policy

In practice the following will result:

- John will inherit the farm
- Mrs Brown and Jane will receive the policy proceeds from the life policy
- The trustees of the RA fund will exercise their discretion in terms of Section 37C and will thus determine who the recipients of the benefits will be as well as what portion each of these dependants will be awarded. Jill may well qualify as a dependant but there is no certainty

[41] The Distribution of Retirement Fund Death Benefits – An Analysis of the Equitability snd Constitutionality of Section 37C of the Pension Fund Act 24 of 1956

[42] Pension law deprived most South Africans right to decide on inheritance

as to whether she will receive any benefit from the fund and if she does, what amount that will be.

Effectively, there is no guarantee that Farmer Brown's intentions with regard to the distribution of his estate will be given effect to as he has not direct control over who receives the benefit from his RA.

Only once Farmer Brown has retired from the RA and purchases a compulsory annuity in his own name will his beneficiary nomination be given effect to as the funds are no longer subject to the provisions of Section 37C.

Scenario 2

Mr Smith's is married and has two children who are university students. His accountant prepared an estate analysis for the client which shows that the liquidity need at Mr Smith's death is R3.4m.

In determining the amount of cash that is available to cover the liquidity need the following were taken into account:

- Mr Smith's life cover of R2.5m that pays to his estate
- R900 000 commutation from his RA which is 1/3 of Mr Smith's RA worth R2.7m (ignore Income tax implications for purposes of illustration)

Mr Smith is of the view that there will be sufficient liquidity available in his estate to settle the liabilities since the R900 000 will be available from his RA.
Practically, this is not what will result.

Firstly, the trustees will exercise their discretion in terms of Section 37C and determine who the dependants are that are entitled to benefit and then what percentage they are entitled to, secondly the dependant identified by the trustees will decide whether to commute their benefit into a lump sum or to purchase an income with their benefit.

What will result in Mr Smith's deceased estate is a liquidity shortfall. The implications of a liquidity shortfall arising in a deceased's estate speak for themselves.

It is important to note that it is not the executor who decides whether the benefit is to be commuted or not, but the dependant as identified by the trustees of the fund. Furthermore, if a dependant elects to commute their benefit, this benefit is not available to the deceased's estate. It is paid directly to the dependant for their use. Only where there are no dependants, as defined in Section 37 C and no beneficiaries nominated, will a benefit from a retirement fund be paid to the estate of the deceased.

The proceeds from an RA should thus not be taken into account as part of the liquid cash available by the estate to settle liabilities.

Conclusion

It can be argued that one's right to the freedom of testation is being limited by the provisions of Section 37C. It can, however, also be argued that the limitation is justified in that it ensures that the deceased member's benefit is used for the maintenance of the surviving spouse, children and other dependants.

Regardless of one's view on the above, Section 37C is currently applicable to the distribution of retirement fund benefits at death of a member and it is critical that financial advisors have a thorough understanding of the application thereof. A financial advisor has a duty to explain these implications to a client and to ensure that the client understands the different practical implications between a beneficiary nomination on a life policy and a beneficiary nomination on a retirement fund.

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The Two-Pot Retirement System: The Road So Far

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Introduction

During December 2021, National Treasury published a discussion paper entitled "Encouraging South African households to save more for retirement". One of the changes proposed in this document was the implementation of the Two-Pot System in relation to retirement savings. A lot of South Africans find themselves cash strapped due to the backlash of the Covid-19 pandemic and other economic factors. The rationale behind the proposal was to give members of South African retirement funds limited access to their retirement savings, without having to resign from employment to gain access to their accumulated investments in pension and provident funds. The proposals contained in the discussion paper were expounded in the Draft 2022 Revenue Laws Amendment Bill (RLAB)[1], which Bill proposes to amend the Income Tax Act[2] to make provision for implementation of the Two-Pot System. Further feedback was thereafter provided by National Treasury and the South African Revenue Service (SARS) in the "Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill[3] (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022)[4]". A summary of the position, as it currently stands, is discussed in this article.

Implementation date of the Two-Pot system

The Draft 2022 RLAB proposed the implementation date for the Two-Pot System to be 1 March 2023. Feedback received indicated that this date would not be feasible given system changes required to administer this system, and it was argued that retirement fund administrators would need a lead time of 12 months to make changes to their rules and facilitate systems and process changes. The FSCA would further require time to approve and register rule changes, and the Pension Funds Act[5] would need to be amended. The response in the Draft Response Document was that the implementation date would be postponed to 1 March 2024[6].

[1] Dated 29 July 2022
[2] No. 58 of 1962.
[3] Hereinafter referred to as the "Draft Response Document".
[4] Dated 20 September 2022
[5] No. 24 of 1956
[6] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 13.

Contributions to different "pots" in terms of the Two-Pot System

The naming convention of the "Two-Pot System" is, to a certain extent, an anomaly as proposed legislative amendments make provision for three "pots':

(i) The "Vested Pot"[7]

This "pot" would consist of all contributions made to retirement funds before 1 March 2024 plus growth thereon, i.e., growth before and after implementation date[8].

The Draft 2022 RLAB provides that no contributions may be made to the Vested Pot from 1 March 2024, except in respect of contributions by members of a provident funds who were 55 years of age or older on 1 March 2021. In my view there is an omission in the proposed section as the exception should only apply to a member of a provident fund who was 55 years of age or older on 1 March 2021, to the extent that such member remains a member of the same provident fund[9]. If such a member transfers to any other fund before 1 March 2024, contributions from 1 March 2024 should not form part of the Vested Pot. If such a member transfers to another fund on/after 1 March 2024, contributions made to the "new" fund from date of transfer should likewise not form part of the Vested Pot. This omission is likely just an oversight by the legislature.

Another question that was raised was whether provident fund members who were over the age of 55 on 1 March 2021 may participate in the Two-Pot System. Clarity was sought on whether participation in the Two-Pot System by members in this instance is automatic, or at the discretion of members, or simply not permissible. The reply[10] provided in the Draft Response Document was that the intent is for provident fund members who were 55 years of age or older on 1 March 2021 to be given the option to:

[7] Section 1(1)(z)(gg) of the RLAB
[8] Ibid, read with Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 13.
[9] If a member of a provident fund who was aged 55 or older on 1 March 2021, transfers to another retirement fund on or after 1 March 2021, all contributions made to the other retirement fund after date of transfer will be subject to the annuitisation regime.
[10] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 15.

(a) Continue contributing to the Vested Pot. In this instance 100% of contributions made will be allocated to vested pot if the member remains a member of same provident fund that he or she was a member of before 1 March 2021: or

(b) Participate in new Two-Pot System. If this option is exercised, one third of contributions will be allocated to the Savings Pot and two thirds to Retirement Pot from 1 March 2024.

A related comment received was that provident fund members who were 55 years of age or older on 1 March 2021 may have need for a savings pot, but that the Draft 2022 RLAB has, given their vested rights under the annuitisation reform, restricted their contributions to the "old order" provident funds, which do not have a savings pot. The response was noted, and an indication was given that provident fund members' preference will require a choice regarding their continued membership in the provident fund, which enjoys a full lump sum pay-out on retirement.

If a savings pot is preferred, then the member will need to select a new product with such a feature. The Draft 2022 RLAB will be amended to enable such transfers. This enablement can however not provide for early withdrawals from a savings pot together with a full withdrawal upon retirement, in the absence of preservation[11].

(ii) The "Retirement Pot"

From 1 March 2024, two thirds of total contributions (excluding charges and risk premiums) made to pension, provident and retirement annuity funds will be paid into the Retirement Pot. Growth on the two thirds of total contributions made from this date will also vest in the Retirement Pot[12].

(iii) The "Savings Pot"

One third of the contributions (excluding charges and risk premiums) made to pension, provident and retirement annuity funds will be paid into the Savings Pot from 1 March 2024. Growth on these premiums will likewise also vest in the savings pot[13].

The initial proposal contained in the Draft 2022 RLAB provided that, where a fund member made contributions exceeding the allowable tax deduction provided for in section 11F of the Income

[11] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 18.
[12] Section 1(1)(o) of the RLAB.
[13] Section 1(1)(a) of the RLAB.

Tax Act in a year of assessment, the contribution to the Savings Pot will be limited to the maximum tax deduction allowed. This proposal would have caused practical difficulties, as the administrators of a retirement fund would not have knowledge of the total taxable income or remuneration of fund members. It would thus have been impossible for fund administrators to calculate the section 11F deduction of all its fund members to ensure that the contributions to the savings pot do not exceed this amount. This would have even been more problematic where a person is a member of more than one retirement fund. Even if fund administrators could establish the taxable income of its members, they would not necessarily have details of contributions made to other retirement funds to ensure that the total contributions made do not exceed the allowable section 11F deduction.

After comments were received on the issue, it was indicated that this portion of the proposal will be withdrawn[14]. It would therefore appear that one this of the member's total contribution would be allocated to the Savings Pot, irrespective of whether the member's total contribution to one or more retirement funds exceeds the section 11F deduction or not.

A further comment received was that clarification should be made that all retirement funds must provide a savings pot and that members should not be given the option to contribute less than one third of their contributions to this pot. This comment was accepted in the Draft Response Document[15].

Clarity was also requested regarding the treatment of arrear (late) contributions to funds. The reply provided was that arrear contributions that relate to the post-implementation period (i.e., on or after 1 March 2024) will be allocated to the respective savings and retirement "pots", as discussed above. If the arrear contribution relates to a pre-implementation (pre-1 March 2024) period, the current pre-implementation dispensation will apply[16] - in this scenario the arrear contribution would be paid into the vested pot.

[14] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 17.
[15] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 14.
[16] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 16.

Fund member access to different "pots" before retirement or death

The proposal in respect of withdrawals from retirement funds prior to retirement or death from 1 March 2024 is as follows:

(i) The "Vested Pot"

Access to the Vested Pot in terms of allowable withdrawals will remain unchanged from the position as it was before 1 March 2024:

(a) Pension and Provident Funds

A member will have access to the full amount in the Vested Pot upon resignation, dismissal & retrenchment on or after 1 March 2024.

(b) Retirement Annuity Funds

A member will have access to the full amount in the Vested Pot if such member discontinues his or her contributions prior to retirement date, and:

- ❑ the total retirement interest in a retirement annuity fund is less than R15 000[17];
- ❑ the member emigrated from South Africa, and the emigration application was made before 1 March 2021 and approved before 1 March 2022[18]; or
- ❑ the member ceased to be South African resident for a continuous period of 3 years on or after 1 March 2021[19]; or
- ❑ the member leaves South Africa upon the expiry of a work or visitor's visa[20].

(c) Preservation Funds

A member will have access to the full amount in the Vested Pot if:

- ❑ The member makes the one allowable withdrawal if the retirement interest was transferred to the preservation fund from a pension or provident fund before such member had reached normal retirement age in terms of the rules of the pension or provident fund[21]; or

[17] Paragraph (x)(cc) of the of the definition of "retirement annuity fund" in section 1 of the Income Tax Act, read with Government Notice 474, Government Gazette No. 44640, dated 28 May 2021.
[18] Paragraph (x)(dd)(A)(AA) of the of the definition of "retirement annuity fund" in section 1 of the Income Tax Act.
[19] Paragraph (x)(dd)(A)(BB) of the of the definition of "retirement annuity fund" in section 1 of the Income Tax Act.
[20] Paragraph (x)(dd)(B) of the of the definition of "retirement annuity fund" in section 1 of the Income Tax Act.
[21] Paragraph (c)(i) of the definition of "pension preservation fund" and paragraph (c)(i) of the definition of "provident preservation fund" in section 1 of the Income Tax Act

- the member emigrated from South Africa, and the emigration application was made before 1 March 2021 and approved before 1 March 2022[22]; or
- the member ceased to be South African resident for a continuous period of 3 years on or after 1 March 2021[23]; or
- the member leaves South Africa upon the expiry of a work or visitor's visa[24].

A comment received in respect of access to the Vested Pot was that a lack of access to this pot on date of implementation of the Two-Pot System, in circumstances other than discussed above, may result in employees resigning to gain access to pension and provident fund savings. It was thus suggested that seeding be catered for from the accumulated vested pot into the savings pot to provide for immediate relief or withdrawals. The reply in the Draft Response Document was that Government was open to allowing once-off seeding capital, if it does not have adverse implications on liquidity, and the costs of such withdrawal is not imposed on members choosing not to withdraw. The mechanism to enable this will require consultation to take the relevant risks and benefits into account, as well as possible trade-offs on vested rights[25].

(ii) The "Retirement Pot"

The Retirement Pot cannot be accessed before retirement or death, except where the member ceased to be South African resident for a continuous period of 3 years on or after 1 March 2021 or leaves South Africa upon expiry of a work or visitor's visa[26].

A comment was received that consideration should be given to allow withdrawals from the retirement pot where a member resigns or is retrenched. This comment was partially accepted. The reply was that because retrenchment is beyond a fund member's control, Government proposes that limited income-based withdrawals be permitted from the retirement pot. These withdrawals will be subject to conditions, i.e., that the vested and savings "pots" have been fully utilised and that access to UIF benefits have been exhausted. Members will therefore be required

[22] Paragraph (c)(ii)(aa)(A) of the of the definition of "pension preservation fund" and paragraph (c)(ii)(aa)(A) of the of the definition of "provident preservation fund" in section 1 of the Income Tax Act.
[23] Paragraph (c)(ii)(aa)(B) of the of the definition of "pension preservation fund" and paragraph (c)(ii)(aa)(B) of the of the definition of "provident preservation fund" in section 1 of the Income Tax Act.
[24] Paragraph (c)(ii)(bb) of the of the definition of "pension preservation fund" and paragraph (c)(ii)(bb) of the of the definition of "provident preservation fund" in section 1 of the Income Tax Act.
[25] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 13.
[26] Section 1(1)(e), section 1(1)(k), section 1(1)(r), section 1(1)(x) and section 1(1)(z)(dd) of the Draft 2022 Revenue Laws Amendment Bill.

to prove that they have no other alternative income source. Such withdrawals will be provided for a limited period and as a form of an annuity, with a set maximum per year[27].

(iii) The "Savings Pot"

The Draft 2022 RLAB provides for the following access to funds from the Savings Pot before retirement:

- One withdrawal by a member in any twelve-month period before retirement or death, but the minimum allowable withdrawal amount is R2 000[28].
- If the member ceased to be South African resident for a continuous period of 3 years on or after 1 March 2021 or if the member leaves South Africa upon the expiry of a work or visitor's visa[29].

The following comments and responses are included in the Draft Response Document in respect of the proposals related to the Savings Pot and allowable withdrawals therefrom:

(a) Clarity is sought on how 12-month period is determined as far as it relates to withdrawals from the Savings Pot. The response was that the 12-month period is intended to be a rolling 12-month period. An amendment will be made to the legislation to make this clear[30].

(b) Clarity is required on whether the R2 000 minimum withdrawal is a gross (before tax) or net (after tax) amount. The reply was that it is the intent for it to be a gross amount – this will also be clarified in the legislation[31].

(c) Another comment received is that members who exit a fund and find themselves in instances where the balance in savings pot is less than R2 000, should be allowed to withdraw these amounts or have it automatically transferred into their retirement pot. The response was that the Draft 2022 RLAB will be amended to cater for commutation of small balances within Savings Pot where a member exits the fund[32].

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[27] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 16.

[28] The definition of "Savings withdrawal benefit" in section 1(1)(a) of the Draft 2022 Revenue Laws Amendment Bill.

[29] Section 1(1)(e), section 1(1)(k), section 1(1)(r), section 1(1)(x) and section 1(1)(z)(dd) of the Draft 2022 Revenue Laws Amendment Bill.

[30] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 14.

[31] Ibid

[32] Ibid

(d) It was further noted that it is not clear why the savings pot should be subject to the three-year waiting period when a taxpayer emigrates (Author's note: technically this should rather have referred to when a fund member ceases to be a resident, as the allowable commutation is not based on emigration anymore), as it is meant to be available at any time. SARS and National Treasury responded that amendments will be made to provide that withdrawals from savings pot are permissible if there is a period of at least 12 months between withdrawals and that a withdrawal in this instance will be taxed at marginal rates[33] (see the discussion on taxation of withdrawal amount in the following section).

The taxation of withdrawals from the various "pots" before retirement or death

It is proposed that the taxation of withdrawals from the various "pots" before retirement or death will be dealt with as follows from 1 March 2024:

(i) The "Vested Pot"

In respect of a withdrawal from the Vested Pot before retirement or death, the current taxation remains unchanged:

- The tax table applicable to retirement fund lump sum withdrawal benefits[34] will, under normal circumstances of a withdrawal be applied; but
- Where a fund member withdraws from the Vested Pot on retrenchment, the tax table applicable to retirement fund lump sum benefits[35] will be applied.

(ii) The "Retirement Pot"

In the event of an allowable withdrawal[36] from the Retirement Pot, the tax table applicable to retirement fund lump sum withdrawal benefits[37] will be applied[38].

[33] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 18.
[34] The tax table provided for in Paragraph 12(a)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R25 000 taxed at 0% etc.
[35] The tax table provided for in Paragraph 12(b)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R500 000 taxed at 0% etc.
[36] As discussed earlier in this article, a withdrawal from the Retirement Pot will only be allowable where the fund member has ceased to be a South African resident for a continuous period of 3 years on or after 1 March 2021, or where a fund member has left South Africa upon the expiry of a work or visitor's visa.
[37] The tax table provided for in Paragraph 12(a)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R25 000 taxed at 0% etc.
[38] The RLAB proposes that the definitions of pension fund, pension preservation fund, provident fund, provident preservation fund and retirement annuity fund be amended to make provision for the payment of a lump sum benefit as contemplated in paragraph 2(1)(b)(ii), (a retirement fund lump sum withdrawal benefit) in these circumstances.

(iii) The "Savings Pot"

Where a fund member makes a withdrawal from the Savings Pot, the amount withdrawn will constitute a "savings withdrawal benefit"[39] and be included in the gross income[40] of the fund member and ***taxed as normal tax*** in terms of the member's marginal tax rate for the year of assessment in which the Savings Pot withdrawal accrued to the fund member.

Such amount would not constitute a retirement fund lump sum withdrawal benefit or retirement fund lump sum benefit. A prior withdrawal from the Savings Pot will therefore not be aggregated with retirement fund lump sum withdrawal benefits or retirement fund lump sum benefits accruing to a fund member in at a subsequent date for purposes of calculating the tax liability of such member. The deductions provided for in paragraph 5[41] and 6[42] of the Second Schedule to the Income Tax Act will thus likewise not be applied against an amount withdrawn from the Savings Pot.

The following comments and responses are noted in the Draft Response Document:

(a) Tax withholding by fund administrators in respect of withdrawals from the savings pot would require enablement through the Fourth Schedule to the Income Tax Act. This comment was accepted, and changes will be made to allow for the administrative mechanism similar to the current applicable effective tax rates that are communicated by SARS to fund administrators in the case of taxpayers who receive more than one pension income[43].

(b) A further suggestion received in respect of contributions not allowed as a tax deduction or exemption to be apportioned between the savings and retirement "pots". This was not accepted as it would create new complications due to the different tax treatments of the "pots". SARS/Treasury holds the view that this would result in particularly generous tax treatment of over-contributions to the savings pot, especially relative to other tax-favoured

[39] Section 1(1)(a) of the Draft 2022 Revenue Laws Amendment Bill.
[40] Section 1(1)(b) of the Draft 2022 Revenue Laws Amendment Bill.
[41] Paragraph 5 of the Second Schedule to the Income Tax Act provides for deductions against retirement fund lump sum withdrawal benefits, e.g., contributions made to a pension, provident or retirement annuity fund that were not previously allowed as a deduction against normal income or lump sum benefits, or as an exemption in terms of section 10C.
[42] Paragraph 6 of the Second Schedule to the Income Tax Act provides for deductions against retirement fund lump sum benefits, e.g., contributions made to a pension, provident or retirement annuity fund that were not previously allowed as a deduction against normal income or lump sum benefits, or as an exemption in terms of section 10C.
[43] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 18.

savings vehicles that have annual limits [44]. The feedback was that non-deductible contributions will only be offset against future years' taxable income, lump sum payments from the vested pot or post-retirement annuity payments (via section 10C)[45].

(c) The suggestion that no tax be levied on withdrawals from the Savings Pot, or for withdrawals from this pot to be taxed as retirement fund lump sum withdrawal benefits[46] was also not accepted. The reason for this denial was that taxing at marginal rates is more appropriate and was supported by a number of commentators to the discussion paper. Tax tables applicable to retirement fund lump sum withdrawal benefits[47] could result in pre-retirement withdrawals attracting lower rates than other income sources. This is in addition to the deduction afforded in respect of contributions contribution deductions[48]. The main aim of retirement savings is income replacement to meet basic expenditure needs. The anticipated reforms effectively enable some level of income replacement before retirement. This means that withdrawals from the Savings Pot are taxed in the same manner as other sources of income when such withdrawals accrue the taxpayer. If withdrawals from the Savings Pot are paid when income is lost (e.g., retrenchment or resignation), such withdrawals that serve to replace lost income will likely attract the same tax rates as the lost income would attract, if not lower. If the withdrawal is made at a time when income is still intact, but expenditure rises unexpectedly, the aim is to ensure that the withdrawal still attracts the appropriate level of tax in respect of the income accruing to the taxpayer[49].

(d) Another comment was that withdrawals from the savings pot should be taxed at a flat rate, with rectification at assessment (at the end of the tax year). This was not accepted as it would likely lead to large tax debt for taxpayers on assessment at the end of the tax year[50].

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[44] Here it is assumed that reference was made to tax-free investments as contemplated in section 12T of the Income Tax Act.

[45] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 17.

[46] The tax table provided for in Paragraph 12(a)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R25 000 taxed at 0% etc.

[47] Ibid

[48] In terms of section 11F of the Income Tax Act

[49] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 17.

[50] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 18.

Member access to different "pots" on retirement

On implementation of the Two-Pot System, retirement fund members will have the following access to the different "pots" on retirement:

(i) The "Vested Pot"

The current position remains unchanged in respect of access to the Vested Pot on retirement:

- The general rule is that a maximum of one-third of the retirement interest in the fund may be commuted as a lump sum and balance must be used to purchase one or more compulsory annuities.
- However: Where two thirds of total retirement interest in the fund does not exceed R165 000 (i.e., if the total value of the retirement interest is R247 500 or less), the full retirement interest may be commuted as a lump sum.
- It must further be borne in mind that there will be vested rights in respect of persons who were members of provident funds before 1 March 2021.

An issue that was raised in the Draft Response Document was that the Draft 2022 RLAB is silent on the treatment of T-Day vested rights (pertaining to the annuitisation of provident funds) and the proposed Vested Pot. The reply in respect of the interaction between the T-Day vested rights and the new Vested Pot was that the intent is for the Vested Pot to contain all vested rights (i.e., the portion not subject to annuitisation) and non-vested rights (i.e., the portion subject to annuitisation) earned prior to the Two-Pot implementation date[51].

(ii) The "Retirement Pot"

Access to funds on retirement as far as the Retirement Pot is concerned, is similar to that of the Vested Pot:

- The general rule is that a maximum of one-third of the retirement interest in the fund may be commuted as a lump sum and balance must be used to purchase one or more compulsory annuities.
- However: Where two thirds of total retirement interest in the fund does not exceed R165 000 (i.e., if the total value of the retirement interest is R247 500 or less), the full retirement interest may be commuted as a lump sum.

[51] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 15.

A comment received in this regard was that clarity needs to be given on whether the R165 000 (two third) limit apply on a per-pot basis, or to the retirement interest as a whole[52]. The response was that this limit will apply on a cumulative basis (i.e., the whole retirement interest in the fund needs to be less than R247 500 in order to facilitate a full commutation of such retirement interest, and that amendments will be made to the Draft 2022 RLAB to reflect this intention[53].

(iii) The "Savings Pot"

The amount in the Savings Pot may be transferred to the Retirement Pot before retirement, in which case the rules set out in (ii) will apply or may be taken as a lump sum[54].

Access of dependants/beneficiaries to the different "pots" on death of the fund member

The options of dependants and/or beneficiaries in respect of the different "pots" on the death of the member can be summarised as follows:

(i) The "Vested Pot"

The status quo in this regard remains the same. On the death of a fund member, the dependants and/or beneficiaries may opt to take the benefit awarded as a lump sum, or annuity, or combination of a lump sum and annuity, if the fund rules allow for this.

(ii) The "Retirement Pot"

The treatment of benefits on the death of the fund member will be the same as in the Vested Pot, i.e., the dependant and/or beneficiary make opt to take the benefit as a lump sum, or annuity, or combination of a lump sum and annuity, if the fund rules allow for this[55].

(iii) The "Savings Pot"

The definition of "Savings Pot" in the Draft 2022 RLAB[56] provides that on death of the member or former member of a fund, the interest of the member in the Savings Pot must be deemed to be paid to a nominee or dependant of the member, former member or retired member as a lump

[52] The language used in section 1(1)(d), 1(1)(e), 1(1)(m), 1(1)(o), 1(1)q), 1(1)(r), 1(1)(z) of the draft 2022 RLAB is not clear on whether the value of R165 000 is calculated per "pot" or on the full retirement interest in the fund.
[53] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 14.
[54] Section 1(1)(a) of the Draft 2022 RLAB.
[55] The definition of "retirement pot" in section 1(1)(o) of the 2022 Draft RLAB.
[56] Section 1(1)(a) of the Draft 2022 RLAB.

sum benefit, and in the absence of a nominee or dependant, to the deceased's estate as a lump sum benefit contemplated in paragraph 2(1)(a) of the Second Schedule to the Income Tax Act.

A comment received in this regard is that the Draft 2022 RLAB envisages that upon the death or retirement the member or beneficiary of the fund will prefer a lump-sum payment from the remainder of the savings pot. The drafting should allow for a choice between a lump-sum or annuity payment. The response was that changes will be made to the Draft 2022 RLAB to allow for the option of an annuity payment from the savings pot, which will be taxed at marginal rates. Upon retirement members will also have the option of transferring the remainder of their Savings Pot to the Retirement Pot[57].

The taxation of withdrawals from the various "pots" on retirement or death

The same treatment in respect of the taxation of benefits received by a fund member upon retirement, or by dependants or beneficiaries in the event of a fund member's death is afforded to all three "pots":

(i) The "Vested Pot"

The taxation of benefits emanating from the Vested Pot remains unchanged:

(a) Upon retirement of the fund member:

- ❑ Retirement fund lump sum benefits accruing to the member will be taxed in terms of the tax tables applicable to retirement fund lump sum benefits[58]; and
- ❑ Where the fund member purchases a compulsory annuity, it will be included in the gross income of the member and taxed as normal income according to the member's marginal tax rates[59].

[57] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 17.

[58] The tax table provided for in Paragraph 12(b)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R500 000 taxed at 0% etc.

[59] An exemption in terms of section 10C will be afforded where the member had made contributions to retirement fund that were not previously allowed as a deduction or exemption.

(b) Upon death of the fund member:

- ❑ Retirement fund lump sum benefits payable to the dependants or beneficiaries of the member will be taxed in the hands of the deceased member[60] in terms of the tax tables applicable to retirement fund lump sum benefits[61]; and
- ❑ Where the dependant or beneficiary opts for a compulsory annuity, it will be included in the gross income of the dependant or beneficiary and taxed as normal income according to such dependant's or beneficiary's marginal tax rate.

(ii) The "Retirement Pot"

The taxation of benefits emanating from the Retirement Pot is as follows:

(a) Upon retirement of the fund member:

- ❑ Retirement fund lump sum benefits[62] accruing to the member will be taxed in terms of the tax tables applicable to retirement fund lump sum benefits[63]; and
- ❑ Where the fund member purchases a compulsory annuity, it will be included in the gross income of the member and taxed as normal income according to the member's marginal tax rates[64].

(b) Upon death of the fund member:

- ❑ Retirement fund lump sum benefits payable to the dependants or beneficiaries of the member will be taxed in the hands of the deceased member[65] in terms of the tax tables applicable to retirement fund lump sum benefits[66]; and
- ❑ Where the dependant or beneficiary opts for a compulsory annuity, it will be included in the gross income of the dependant or beneficiary and taxed as normal income according to such dependant's or beneficiary's marginal tax rates.

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[60] In terms of paragraph 3 of the Second Schedule to the Income Tax Act, a lump sum payable on death of a fund member is deemed to have accrued to such member immediately prior to his or her death.
[61] The tax table provided for in Paragraph 12(b)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R500 000 taxed at 0% etc.
[62] A retirement fund lump sum benefit may only be payable from the Retirement Pot on retirement of the member if the total retirement interest in the fund is R247 500 or less.
[63] The tax table provided for in Paragraph 12(b)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R500 000 taxed at 0% etc.
[64] An exemption in terms of section 10C will be afforded where the member had made contributions to retirement fund that were not previously allowed as a deduction or exemption.
[65] In terms of paragraph 3 of the Second Schedule to the Income Tax Act, a lump sum payable on death of a fund member is deemed to have accrued to such member immediately prior to his or her death.
[66] The tax table provided for in Paragraph 12(b)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R500 000 taxed at 0% etc.

(iii) The "Savings Pot"

The taxation of benefits emanating from the Retirement Pot is as follows:

(a) Upon retirement of the fund member:

- ❑ Retirement fund lump sum benefits accruing to the member will be taxed in terms of the tax tables applicable to retirement fund lump sum benefits[67]. Here it is important to note that a lump sum paid from the Savings Pot to the member on retirement will not be taxed as a normal income. The reason for this is twofold:
  - o The definition of "savings withdrawal benefit"[68] clearly provides that a withdrawal from the Savings Pot will only be taxed as a savings withdrawal benefit (i.e., as normal income at the member's marginal tax rate) upon withdrawal from this pot (i.e., before retirement or death); and
  - o The definition of "savings pot"[69] dictates that the interest of the member in this pot must be taxed as a lump sum benefit contemplated in paragraph 2(1)(a) of the Second Schedule (i.e., as a retirement fund lump sum benefit) when it is paid to the member on retirement; and
- ❑ Where the fund member purchases a compulsory annuity, it will be included in the gross income of the member and taxed as normal income according to the member's marginal tax rates.

(b) Upon death of the fund member:

- ❑ Retirement fund lump sum benefits payable to the dependants or beneficiaries of the member will be taxed in the hands of the deceased member in terms of the tax tables applicable to retirement fund lump sum benefits. The reason is again twofold:
  - o The definition of "savings withdrawal benefit"[70] clearly provides that a withdrawal from the Savings Pot will only be taxed as a savings withdrawal benefit (i.e., as normal income at the member's marginal tax rate) upon withdrawal from this pot (i.e., before retirement or death); and
  - o The definition of "savings pot"[71] dictates that the interest of the member in this pot must be taxed as a lump sum benefit contemplated in paragraph 2(1)(a) of the Second Schedule (i.e., as a retirement fund lump sum benefit) when it is paid to the dependants or beneficiaries upon the death the member on retirement; and

[67] Ibid.
[68] Section (1)(1)(a) of the 2022 Draft RLAB.
[69] Ibid.
[70] Section (1)(1)(a) of the 2022 Draft RLAB.
[71] Ibid.

- Where the dependant or beneficiary opts for a compulsory annuity, it will be included in the gross income of the dependant or beneficiary and taxed as normal income according to such dependant's or beneficiary's marginal tax rates.

Transfers between the different "pots" in the same retirement fund

The following transfers will be allowed from 1 March 2024 between the different "pots" in the same retirement fund:

(a) Transfers from the Savings Pot to the Retirement Pot[72]; and

(b) Transfers from the Vested Pot to the Retirement Pot. It is indicated in the Draft Explanatory Memorandum on the 2022 Revenue Laws Amendment Bill that such a transfer will be allowable[73]. Paragraph (d) of the definition of "Vested Pot"[74] in the Draft 2022 RLAB however does not reflect this intention as it provides as follows:

"*the member may, in accordance with the rules of the fund that exists immediately prior to 1 March 2023, elect to transfer the value of this pot into the member's vested pot of* ***another*** *pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund*;".

The provisions of the above definition are also reflected in the new proposed paragraph 6B[75] of the Second Schedule to the Income Tax Act, which allows for tax-free transfers between different "pots" in the same fund, in that this paragraph only allows for the tax-free transfer from the Savings Pot to the Retirement Pot in the same retirement fund[76].

The above definition read with the proposed paragraph 6B appears to indicate that such a transfer will only be allowed if the member transfers from the Vested Pot of one retirement fund to the Retirement Pot of another fund, and not from the Vested Pot of a retirement fund to the Retirement Pot of the same fund. It is my view that the definition of Vested Pot would need to be amended to cater for the transfer from the Vester Pot to the Retirement Pot in the same fund.

[72] Paragraph (c) of the definition of "savings pot" in section (1)(1)(a) of the 2022 Draft RLAB.
[73] The following is stated on page 6 of the Draft Explanatory Memorandum on the 2022 Revenue Laws Amendment Bill: "Transfers can be made into the "retirement pot" tax free from any other pot".
[74] Section (1)(1)(z)(gg) of the 2022 Draft RLAB.
[75] See discussion in the next section.
[76] The newly proposed paragraph 2(1)(d) of the Second Schedule includes the allowable transfer from one pot to another pot in the gross income of the fund member. Paragraph 6B allows for a deduction in these instances, thus effectively making such an allowable transfer between the "pots" tax-free.

The following transfers will not be allowed between the different "pots" in the same retirement fund:

(a) Transfers from the Vested Pot to the Savings Pot; and
(b) Transfers from the Savings Pot to the Vested Pot; and
(c) Transfers from the Retirement Pot to the Savings Pot; and
(d) Transfers from the Retirement Pot to the Vested Pot.

The impact of the Two-Pot System on transfers between the different retirement funds

The current allowable tax-free transfers between different retirement funds when the member has not yet reached normal retirement age remain unchanged:

Transferring fund	**Fund transferred to**
Pension Fund Provident Fund Pension Preservation Fund Provident Preservation Fund	Pension Fund Provident Fund Pension Preservation Fund Provident Preservation Fund Retirement Annuity Fund
Retirement Annuity Fund	Retirement Annuity Fund

The current allowable tax-free transfers between different retirement funds when the member transfers from one retirement fund to another on or after reaching normal retirement age also remain unchanged:

Transferring fund	**Fund transferred to**
Pension Fund Provident Fund	Pension Preservation Fund Provident Preservation Fund Retirement Annuity Fund
Pension Preservation Fund Provident Preservation Fund	Pension Preservation Fund Provident Preservation Fund Retirement Annuity Fund

The newly proposed paragraph 2(1)(d)[77] of the Second Schedule includes the allowable transfer from one pot to another pot in the gross income of the fund member. A new paragraph 6B[78] is however introduced into the Second Schedule of the Income Tax Act that allows for a deduction,

[77] Section 3 of the Draft 2022 RLAB.
[78] Section 4 of the Draft 2022 RLAB

and thus tax-free transfer between the different "pots" in relation to the transfers between different funds set out in the two tables above. The proposed paragraph 2(1)(d) and paragraph 6B appears not to make any distinction, as far as the allowable transfers between the different "pots" are concerned, between a transfer of the member before, or on/after reaching normal retirement age.

In terms of this proposal the following tax-free transfers are allowed for between different funds in relation to the different "pots":

(a) A transfer from the Savings Pot in a retirement fund into the member's Savings Pot or Retirement pot in another pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund; and
(b) A transfer from the Retirement Pot into the member's Retirement Pot of another pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund; and
(c) A transfer from the Vested Pot into the member's Vested Pot of another pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund.

The following table illustrates the allowable tax-free transfers between the various "pots", as contemplated in the proposed paragraph 6B[79] of the Second Schedule to the Income Tax Act:

"Pot" of transferring fund	**Pot of fund transferred to**
Savings Pot	Savings Pot Retirement Pot
Retirement Pot	Retirement Pot
Vested Pot	Vested Pot

A comment was received that consideration should be given to clarifying in the legislation that the various "pots" are components within the relevant fund. As such, when transferring from one fund to another, all "pots" need to be moved from the transferor fund to the transferee fund, i.e., it should be made clear that no "pot" may be left behind in the fund being transferred from. It was also noted that it needs to be clarified that transfers of any nature are only permissible when

[79] Ibid

fund membership is terminated. The response was that this comment is partially accepted. Clarification will be made in the 2022 Draft Revenue Laws Amendment Bill[80].

It was also suggested that the proposed amendments to the Second Schedule to the Income Tax Act are unnecessary as the current provisions sufficiently cater for all envisaged transfers. This suggestion was not accepted. Government holds the view that under the current provisions of the Second Schedule, no limits are imposed on the proportion(s) that can be transferred from one fund to another. As a result, members have the ability to split their retirement interest into smaller balances and transfer such balances into separate funds. Under the Two-Pot System, the full value in the transferor "pot" has to be transferred into the transferee pot (this value cannot be split into multiple smaller balances before effecting a transfer) when transferring from one "pot" to another pot. Therefore, the preference is to retain the proposed amendments.

The impact of the Two-Pot System on divorce of a fund member where a pension interest is awarded to a non-member spouse

The Draft Explanatory Memorandum on the RLAB provides that a division stipulated in a divorce order applies to each pot (Vested Pot, Savings Pot, and Retirement Pot)[81]. It would thus appear that the intent is that each pot will be proportionately reduced to comply with award of a pension interest to a non-member spouse in a divorce order. The issue of the effect of a divorce in relation to the Two-Pot System is however not addressed in the RLAB, and it is thus not certain on which basis this statement was made.

The following issue also needs to be addressed as far as divorce matters and the Two-Pot System is concerned:

(a) If the non-member spouse elects to transfer the divorce award to a retirement fund of his or her choice, it is not clear whether such award will also be transferred to in the same proportion to the Savings Pot, Retirement Pot, and Vested Pot of the elected fund.

(b) If the non-member elects to take the divorce award as a cash lump sum, the taxation thereof is not addressed in RLAB. The assumption is thus made that the current status quo will remain, i.e., the amount taken in cash will be taxed in the hands of the non-member spouse as a

[80] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 16.

[81] The Draft Explanatory Memorandum on the 2022 Revenue Laws Amendment Bill, page 5.

retirement fund lump sum withdrawal benefit[82]. The definition of "savings withdrawal benefit" that is taxed in hands of the member at marginal rates is proposed to be defined as "a right of a member of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund to a withdrawal from the savings pot provided by that fund". The definition then proceeds to limit such withdrawal to being accessed once in a twelve-month period and to a minimum amount of R2 000. It makes no mention of a divorce award paid from the Savings Pot a non-member, thus strengthening the assumption that the status quo of the taxation of divorce awards remains the same.

A comment received on this topic was that clarity is requested about the impact of the Two-Pot System on deductions allowed for in section 37D of the Pension Funds Act[83], i.e., pension backed housing loans, divorce order settlements, maintenance orders and amounts due by a fund member to an employer. The response was that Government acknowledges that changes will need to be made to section 37D of the Pension Funds Act to cater for the Two-Pot System and to ensure that section 37D deductions are catered for from the vested and retirement pot when membership from the fund is terminated or when divorce order settlements become due and payable[84].

Other comments contained in the Draft Response Document

Other comments discussed in the Draft Response Document are:

(a) Although the proposal to include public sector funds in the Two-Pot System is supported, further detail is required on how this system will apply to defined benefit funds, in light of the fact that the benefits of a defined benefit is determined based on a defined formula, without reference to contributions and investment performance. The reply was that a consultative process will be undertaken with the relevant defined-benefit funds and stakeholders to consider the options available in respect of public sector funds. Protective mechanisms will be explored, including increasing future contributions when a member withdraws an amount

[82] The tax table provided for in Paragraph 12(a)(i) of Schedule I of the Rates and Monetary Amounts and Amendment of Revenue Laws Act. No. 19 of 2022, i.e., R25 000 taxed at 0% etc.
[83] Act 24 of 1956
[84] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 16.

before retirement. The outcome of the consultative process will guide required legislative amendments[85].

(b) Clarity was requested with regards to whether participation in the Two-Pot System will be mandatory for all funds. The response was that the policy intent is for participation to be mandatory for all funds. The Draft 2022 RLAB will be amended to reflect this intention[86].

(c) Although the Draft 2022 RLAB is explicit on the fact that costs should be deducted from contributions, funds deduct costs from both contributions and fund values. Clarity should be provided as to how costs are to be deducted in instances where funds do not receive contributions, but rather receive transfers from other funds. It was further requested that the scope and nature of charges that are to be deducted from contributions or fund values is clarified and certainty is provided that such charges do not include subsequent administration and transactional fees. The reply was that clarification will be made in amendments to the Draft 2022 RLAB[87].

(d) Clarity was sought on whether the same investment strategy would be followed across all the "pots." It was also requested that it should be clarified whether compliance with Regulation 28 would apply on a per "pot" basis or across all "pots". The response was that this issue should be raised with and addressed by the Regulator, as tax legislation is not the appropriate mechanism to deal with this concern[88].

(e) A request was received that older ('legacy') retirement annuity products be exempted from participation in the Two-Pot System, as participation would require a redesign of historically acquired insurance policies together containing specified terms and conditions. The response was that a consultative process will be undertaken with the Regulator and stakeholders to assess the merits of this request[89].

(f) It was commented that the naming conventions utilised for the various "pots" in the proposal need to be reconsidered, as the current names run the risk of creating confusion. It was suggested that the addition of further new definitions may be required to mitigate the risk of causing confusion. The response acknowledged that what is referred to as "pots" in the Draft

[85] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 14.
[86] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 15.
[87] Ibid.
[88] Ibid.
[89] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 16.

2022 RLAB are for all intents and purposes components within the respective funds. An adjustment in the names to reflect their component nature will be considered. Additional definitions will, where necessary, be incorporated in amendments to the Draft 2022 RLAB[90].

(g) It was suggested that the current drafting of the Draft 2022 RLAB as relates to the definitions of "Savings Pot", "savings withdrawal benefit" and "Retirement Pot" require some re-working to ensure that the policy intent is correctly reflected in legislation. The response was that clarification will be made in amendments to the Draft 2022 RLAB[91].

Conclusion

The rationale of Government's proposal for the Two-Pot System is commendable. If it prevents employees from resigning from employment to have access to their pension and provident fund savings, it will assist in preventing, or reducing shortfalls of South Africans in retirement. The need for access to retirement fund investments in instances of dire financial circumstances is also understandable. The allowance of once-off seeding from the existing Vested Pot must however be carefully investigated, and limited conditions for allowing such access should be implemented to prevent fund members from squandering retirement savings for unwarranted purposes.

It is further evident that amendments will need to be made to the current proposals to reflect the true objective of the legislature, avoid unintended consequences, and clarify issues not addressed in the draft legislation. Cognisance should be taken in this regard of practical considerations, including swift finalisation of the amendments to afford retirement fund administrators an adequate timeframe to implement systems to cater for the intended changes.

[90] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 18.

[91] Draft Response Document on the 2022 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and 2022 Draft Revenue Laws Amendment Bill (Based on hearings by the Standing Committee on Finance in Parliament on 13 September 2022), page 19.

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SARS Binding Class Ruling BCR080: Tax Implications For Resident Beneficiaries Of A Foreign Pension Trust

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Introduction

Offshore pension trust schemes were discussed by the Davis Tax Committee in the Second and Final Report on Estate Duty, published in April 2016[1]. These schemes are often promoted as being exempt from donations tax, estate duty and income tax in South Africa[2]. The Davis Tax Committee held the view that such an arrangement is a concealment of the true relationship between South African taxpayers investing in these schemes and the offshore pension trusts, in that the taxpayer enjoyed a vested right in both the capital and income of the foreign pension trust[3]. The Committee was thus of the opinion that the income of a foreign pension trust is taxable in the hands of the South African resident and the capital should be included in such person's estate for estate duty purposes, or alternatively be subject to donations tax if it constituted a donation[4]. The Committee recommended that these types of arrangements should be investigated by the South African Revenue Service[5].

SARS Binding Class Ruling 080[6], dated 12 August 2022, provides guidelines on the tax and estate duty consequences of foreign pension trusts.

Description of the operation of the foreign pension trust

The applicant for the ruling indicated that the foreign pension trust (FPT) will operate as follows[7]:

(i) A South African resident investor will contribute cash or assets to the FPT. Such contribution may be once-off or on an as-and-when basis.

(ii) The investor will contribute on the basis of becoming a beneficiary/member of the FPT and receiving retirement benefits such as lump sums and/or annuities, subject to the trustees of the FPT exercising their discretion as per the scheme rules.

(iii) The investor will be a single member of the offshore retirement arrangement.

(iv) Each investor's retirement benefits will be determined in accordance with his/her contribution.

(v) The investor will be eligible to receive retirement benefits upon reaching the 'normal retirement date'.

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[1] https://www.taxcom.org.za/docs/20160428%20DTC%20Final%20Report%20on%20Estate%20Duty%20-%20website.pdf , page 45-46.
[2] Second and Final Report on Estate Duty, Davis Tax Committee, page 45.
[3] *Ibid*
[4] *Ibid*
[5] Second and Final Report on Estate Duty, Davis Tax Committee, page 46.
[6] https://www.sars.gov.za/wp-content/uploads/Legal/Rulings/BCR/Legal-R-BCR-2022-03-BCR-080-Tax-implications-for-resident-beneficiaries-of-a-foreign-trust.pdf
[7] SARS Binding Class Ruling 080, page 2-3.

(vi) Prior to the normal retirement date, an Investor will be eligible to receive –
  (a) 'discretionary distributions' of income or capital in the event of incapacity; and
  (b) retirement benefits from the age of fifty years, subject to approval from the trustees of the FPT.

(vii) The retirement benefits will be funded firstly from the capital contributed by the investor to the FPT, the growth on that contribution, and then from any income earned because of the contribution. Any income earned before the Investor reaches the normal retirement date will vest in the investor in the trustees' discretion only and will be subject to the scheme rules.

(viii) If the investor dies before reaching the normal retirement date, the designated dependants of the deceased may become beneficiaries of the FPT. These beneficiaries may receive annuity payments or lump sum payments from the FPT subject to the discretion of the trustees in terms of the scheme rules.

(ix) The FPT will remain intact if an Investor changes his or her country of tax residence.

(x) The view of the applicant was that Investors would not have beneficial control of the contributions made to the FPT or any growth thereon.

(xi) The FPT will provide protection from creditors and will not form part of the Investor's personal assets.

(xii) The contributions and growth thereon will not at any time be burdened by existing or potential liabilities of other investors.

(xiii) Investment choices would include most asset classes, including cash, quoted and unquoted shares, fixed interest securities, commercial and residential property, offshore insurance bonds and discretionary active managed or passive strategies.

(xiv) There will be no requirement for an investor to purchase an annuity and there will be no prescribed drawdown limit.

(xv) Investors are allowed to take a loan of up to 50% of the fund value before normal retirement date.

(xvi) An investor's assets may be passed to any nominated beneficiary or into a trust on death. Assets will not be subject to probate.

Ruling by the South African Revenue Service

SARS ruled as follows[8]:

(i) The FPT is not a "pension fund", "provident fund" or "retirement annuity fund" as defined in the Income Tax Act.

[8] SARS Binding Class Ruling 080, page 4-5.

(ii) The tax deduction provided for in section 11F will not be applicable to contributions made by investors to the FPT.

(iii) A contribution made by an investor will not constitute a "donation" as defined the Income Tax Act. The contribution will thus not be subject to donations tax.

(iv) An investor will, upon becoming a beneficiary/member of the FPT, acquire a personal right against the trustees of the FPT to administer the trust appropriately. Such investor will have a vested personal right to the income and capital of the FPT, subject to the time-based restrictions contained in the scheme rules.

(v) The base cost of an investor's personal right to the income and capital of the FPT will be equal to the contribution made by the investor. Paragraph 81 of the Eighth Schedule, which provides that a person's interest in a discretionary trust must be treated as having a base cost of nil, will not apply in respect of the personal right of an investor in these circumstances, as the right is not a contingent right but a vested right.

(vi) Section 7(1) of the Income Tax Act will apply to the Investors of the FPT. In the context of trusts, this means that, because the investor, as a trust beneficiary of the FPT, has a vested right to the income accrued in the FPT, such income will be taxed in the hands of the investor, despite the income being retained in the FPT. This is explained in as follows in Notes on South African Income Tax 2022, P Haupt & E Haupt, H& H Publications on page 818: "In other words, the beneficiary is certain to get the income at some time in the future, only his enjoyment of it has been postponed. If he dies before the income is paid out to him, it will go to his estate. Therefore, as the income is effectively the beneficiary's and nobody else's, he will be taxed on it." Although the benefits in the FPT could possibly be paid to a nominated beneficiary and not the estate of the deceased, it appears that the same principle will be applied.

(vii) When an investor dies before normal retirement date, the vested personal right will constitute "property" in his/her estate for estate duty purposes in terms of section 3 of the Estate Duty Act.

(viii) When an investor dies prior to normal retirement date, he or she will be deemed to have disposed of his or her vested personal right before his or her death for market value in terms of section 9HA(1) of the Income Tax Act. Where the requirements of paragraph 54(b) of the Eighth Schedule are not satisfied, the market value of the right will be treated as proceeds for purposes of paragraph 35(1) of the Eighth Schedule. The practical effect of this appears to be the following: If an investor dies, there will be a deemed disposal, equal to the value of the investor's personal right against the FPT for capital gains tax purposes. The only instance where the value of the difference between this personal right and the base cost of the

investment will not be subject to capital gains tax, is in the instance of a lump sum payable by an FPT which provides similar benefits under similar conditions to a South African pension, pension preservation, provident, provident preservation or retirement annuity fund (paragraph 54(b) of the Eighth Schedule to the Income Tax Act).

(ix) When an investor reaches normal retirement date as stipulated in the scheme rules, any annuity paid by the FPT to the investor will constitute an annuity for purposes of the Income Tax Act and will thus be included in the gross income of the investor.

(x) On the death of an Investor after normal retirement date, the right to an annuity will constitute "property" for estate duty purposes. The right to an annuity will fall within the dutiable estate of the deceased Investor.

(xi) On the death of an Investor after normal retirement date, the Investor will be deemed to have disposed of the right to an annuity for market value in terms of section 9HA(1). The Investor will also be deemed to have disposed of his or her right to lump sum benefits for market value where the requirements of paragraph 54(b) of the Eighth Schedule (discussed in (h) above) are not satisfied.

(xii) No ruling is made on the application of section 25B of the Income Tax Act (dealing with income distributions from trusts to beneficiaries) and paragraph 80 of the Eighth Schedule (dealing with capital distributions from trusts to beneficiaries) to the investors.

Analysis of the Ruling

My evaluation of SARS Binding Ruling 080 in relation to the tax and estate duty consequences of an investment by a South African resident investor in a FPT is as follows:

(i) Income tax implications of an investment in an FPT

(a) Before Retirement:

No tax deduction in terms of section 11F of the Income Tax Act will be afforded for contributions made by the South African resident investor to a FPT[9].

Income earned within the FPT (i.e., before retirement of the investor) will be included in the gross income of the South African resident investor in terms of section 7(1) of the Income Tax Act[10].

[9] SARS Binding Class Ruling 080, page 4, paragraph 7(b).
[10] SARS Binding Class Ruling 080, page 4, paragraph 7(f).

(b) After Retirement:

Annuity income received by the retired South African resident investor will included in the gross income of such investor in terms of paragraph (a) of the definition of "gross income" in section 1 of the Income Tax Act[11].

(ii) Capital gains tax consequences of an investment in an FPT

(a) Before Retirement:

Although not specifically discussed in the Ruling, mention is made of the base cost of the investor's personal right to the capital of the FPT[12], as well as a deemed disposal of this right on death[13].

If a South African resident investor has access to a lump sum payment before retirement, it therefore begs the question in whether this should not be regarded as a disposal, or part disposal of this right. If it is indeed treated in this manner and the requirements of paragraph 54(b) of the Eighth Schedule to the Income Tax Act[14] are not met, i.e., if the FPT does not provide similar benefits under similar conditions to a South African retirement fund, the payment of a lump sum would consequently trigger a taxable capital gain.

(b) Upon Retirement:

The issue of a lump sum payment on retirement is likewise not dealt with explicitly. However, the same principles, as discussed in paragraph (a) above could be applicable: If the requirements of paragraph 54(b) of the Eighth Schedule to the Income Tax Act are not met, it could be argued that the payment of a lump sum will be treated as a disposal (or part disposal) of the South African resident's vested personal right for capital gains tax purposes, thus triggering capital gains tax.

(c) Death before retirement:

The South African resident investor would be deemed to have disposed of his/her vested personal right in the FPT[15]. The difference between the value of this right and the base cost

[11] SARS Binding Class Ruling 080, page 4, paragraph 7(i).
[12] SARS Binding Class Ruling 080, page 4, paragraph 7(e).
[13] SARS Binding Class Ruling 080, page 4, paragraph 7(h) and page 5, paragraph 7(k).
[14] No 58 of 1962.
[15] SARS Binding Class Ruling 080, page 4, paragraph 7(h).

(value of contribution(s)) would, in my view, constitute a capital gain. Again, this gain would only be excluded If the requirements of paragraph 54(b), as discussed above, are met.

(d) Death after retirement:

The ruling provides that the retired South African resident investor would be deemed to have disposed of his/her right to an annuity at market value on death[16]. This seems to indicate that there may be consequences from a capital gains tax point of view, as reference is made to the right to the annuity. It is further indicated that such investor would also be deemed to have disposed of his/her right to a lump sum (here it is assumed that this will be the case where the FPT allows for a lump sum payment on death after retirement). In the event of a lump sum payment of a FPT that falls foul of paragraph 54(b), it should thus trigger a taxable capital gain.

It is however assumed that any amount, that must be or was already included in the gross income of a South African resident investor (for example income accrued in the FPT already taxed in the hands of such investor as a result of section 7(1)), will reduce the amount of proceeds for capital gains tax purposes, as provided for in paragraph 35(3)(a)[17] of the Eight Schedule of the Income Tax Act in order to prevent the same amount being subject to both normal tax and capital gains tax.

(iii) Estate duty implications of an investment in an FPT

(a) Death before retirement:

The vested right of the South African resident in the FPT will be included as property in his/her estate for estate duty purposes[18].

(b) Death after retirement:

The right to an annuity will be included as property in the estate of the investor for estate duty purposes[19]. The value of the annuity should be calculated by capitalising it over the life

[16] SARS Binding Class Ruling 080, page 5, paragraph 7(k).
[17] Paragraph 35(3)(a) of the Eighth Schedule of the Income Tax Act provides as follows:
(3) The proceeds from the disposal, during a year of assessment, of an asset by a person, as contemplated in subparagraph (1) must be reduced by—
(a) any amount of the proceeds that must be or was included in the gross income of that person or that must be or was taken into account when determining the taxable income of that person before the inclusion of any taxable capital gain;
[18] SARS Binding Class Ruling 080, page 4, paragraph 7(g).
[19] SARS Binding Class Ruling 080, page 4, paragraph 7(j).

expectancy of the beneficiary becoming entitled to the annuity, or if it is payable for a lesser period, over such period[20]. In the event of a trust becoming entitled to the annuity, the value should be capitalised over a period of 50 years[21], or if it is payable for a shorter period, over such period.

Conclusion

The application of tax and estate duty in relation to foreign pension trusts has been a contentious issue for several years. SARS Binding Class Ruling 080 has now provided some clarity on the uncertainty surrounding these structures. It will be interesting to see how the principles highlighted in the Ruling will be applied and enforced by SARS in practice.

It must be further borne in mind that SARS Binding Class Ruling 080 only pertains to foreign pension trusts as discussed in this article, and not to all foreign pension structures. The Ruling will, for example, not be applicable to a South African resident contributing to a bona fide retirement fund of a foreign employer whilst working abroad.

[20] Section 5(1)(c) of the Estate Duty Act, no. 45 of 1955.
[21] Section 5(3) of the Estate Duty Act, no. 45 of 1955.

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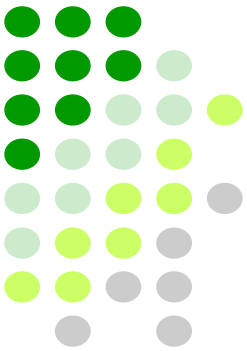

Income Tax

Offshore Transfers and Investing

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Introduction

Offshore investing has become more attractive to investors over the past few years. One can infer that this can be imputed to the exodus of professionals and skilled South African individuals to other countries. It can also be due to the weakening of our economy which has been compounded by flagrant corruption within our government.

The negativity surrounding our economy has certainly piqued the interest of the potential offshore investor, however, it is important to consider one's reasons for investing offshore and safeguard against making a purely emotional decision or a decision based entirely on grim economic forecasts.

In this article, we will examine the reasons for investing offshore, key offshore investment options, their potential tax and estate planning implications as well as investment strategies.

Reasons to invest offshore:

South Africa's economy is small when compared to the global economy. Our gross domestic product (GDP) is less than 0.5% of the world's GDP.[1] GDP is the most commonly used method to measure the economic growth of a country[2] and it refers to the total value of goods and services that are produced in an economy in a certain time period.

The stocks available on the Johannesburg Stock Exchange (JSE) represent less than 1% of global investment opportunities.[3] However, it should be noted that the JSE's top 10 companies comprise 50% of the JSE and that JSE listed companies generate approximately 65% of their revenue from global markets[4]. Therefore, investment in the JSE has incorporated offshore exposure resulting in effective rand hedging.[5]

Rand hedging means protecting one's investment against a weakening currency over time.

[1] South Africa: Percent of world GDP. Available at www.theglobaleconomy.com/South-Africa/gdp_share/# [Accessed 10 May 2022].
[2] Measuring South Africa's Economic Growth. Available at www.statssa.gov.za/economic_growth/15%20Measuring%20GDP.pdf [Accessed 10 May 2022]
[3] South Africa Economic Indicators. Available at www.theglobaleconomy.com/South-Africa/
[4] 15 things to know about offshore investing by Craig Torr- Crue Invest (Pty) Ltd 09 May 2022. Available at www.moneyweb.co.za/financial-advisor-views/15-things-to-know-about-offshore-investing/
[5] Offshore or Rand Hedge? Available at https://www.omwealth.co.za/pdfs/default/Articles/Offshore%20or%%20Rand%20hedge.pdf

By purchasing rand-hedge stocks investors gain international exposure by investing directly in foreign listed stocks.[6] The JSE is typically comprised of companies that are registered in South Africa and have their operations in the country and therefore acquire the majority of their earnings locally in Rands. There are however JSE listed companies that are dominated by offshore operations and derive a large part of their earnings from overseas operations.

Examples of companies that derive significant profits from outside South Africa are:

- Richemont
- Aspen Pharmacare Holdings Limited (APN)
- British American Tobacco PLC
- Naspers Limited
- Campagnie Financiere Richemont SA
- Mondi PLC

Protection of one's wealth should be a fundamental consideration before seeking higher investment returns. South Africa is classified as an emerging market making it higher risk with its characteristic volatility and currency swings as opposed to a developed or established market which offer the potential for more stable growth. [7] An emerging market economy (EME), includes the financial systems of countries that have some characteristics of a developed market[8] and are moving towards a mixed or free market.[9]

Investing offshore allows one to achieve more diversification and the lowering of risk affiliated with it. It enables you to access varied economies, wider election of companies and emerging markets, thereby facilitating the participation in global growth.

[6] How to diversify efficiently from South Africa by Tinoteda Mtemeri 12 June 2019. Available at www.allangray.co.za/latest-insights/offshore-investing/how-to-diversify-efficiently-from-south-africa/

[7] Think offshore investing by Michael Haldane – Global & Local Investment Experts. 10 December 2021 Available at www.moneyweb.co.za/financial-advisor-views/think-offshore-investing/

[8] 8 Characteristics of Emerging Markets. Available at www.indeed.com/career-advice/career-development/characteristics-of-emerging-markets 06 May 2021

[9] "A mixed economy is partly run by the government and partly as a free market economy, which is an economic system that includes no government intervention and is mainly driven by the law of supply and demand." Command vs Mixed Economy: What's the Difference? Available at www.investopedia.com/ask/answers/033015/what-difference-between-command-economy-and-mixed-economy.asp

It may therefore be prudent to consider externalising some funds as part of your investment portfolio in instances where an investor is considering emigration, retiring abroad or whose next generation may opt to further their education overseas.
An investor can acquire offshore exposure either directly or indirectly.

1. Direct Offshore Investment:

This entails moving your cash offshore via exchange control processes ie: converting your rands into the currency of the foreign jurisdiction and opening up an offshore bank account.

South African tax residents over the age of 18 are permitted to invest up to R11 million per year offshore. This is comprised of the R1 million Single Discretionary Allowance (SDA)[10] and the R10 million Foreign Investment Allowance (FIA).

Single Discretionary Allowance (SDA)

The R1 million SDA does not require a tax clearance certificate from SARS. One should bear in mind that the tax clearance certificate is valid for 12 months and this period may not coincide with the annual allowance which expires at the end of the calendar year ie: 31 December. [11]

The SDA can be utilised for any legal purpose abroad and includes the following: Travel Allowance – the individual's flight must originate from South Africa and the travel allowance purchase is permitted within 60 (sixty) days of the travel date.[12] It's important to note that if you do not spend all the funds on vacation expenditure you are not permitted to keep the funds offshore or buy offshore assets.[13] It includes any travel spend abroad such as credit card expenses[14]Monetary gifts and loans -these can be given to residents and non-residents who are temporarily abroad but excludes those residents who are overseas on holiday or business travel.

The gift or donation must be made to an individual natural person and not a legal entity. Annually a total of R100 000 can be given tax free and if the R100 000 tax free allowance is exceeded then donations tax will be payable on the balance.

[10] sB4(A) Currency and Exchanges Manual for Authorised Dealers
[11] www.resbank.co.za/en/home/what-we-do/financial-surveillance/FinSurvFAQ
[12] www.resbank.co.za/en/home/what-we-do/financial-surveillance/FinSurvFAQ
[13] www.exceed.co.za/more-about-single-discretionary-allowances/ More about single discretionary allowances by Michael Heath [Accessed 11 May 2022]
[14] Frequently Asked Questions Available at https://www.resbank.co.za/en/home/what-we-do/financial-surveillance

Study allowance – A letter from the institution abroad will be required to confirm that the individual is a full-time student. The fees are payable directly to the institution and do not form part of the SDA. However, the subsistence allowance will be deducted from the SDA and needs to be declared to SARS.[15]

Foreign Investment Allowance (FIA)

South African residents who are in good standing with SARS are entitled to utilise the R10 million foreign investment allowance pending a tax clearance certificate PIN which verifies one's tax compliance status. Investing more than the R10 million would require more stringent verification processes by SARS and you will have to apply for special approval from the Financial Surveillance Department (FSD).

The Special approval application is a two-step process. The first step is an application for a Tax Clearance PIN from SARS. This entails the submission of the required documentation, namely the signed application form and the source of funds supporting documentation. This process can range from 6 weeks to 3 months should further supporting documentation be required. Once the application is approved, a SARS PIN is issued for the application amount in excess of R10 million.

The second step is the application to the South African Reserve Bank (SARB). This requires a signed motivation letter, stipulating one's reasons for wanting to remit the funds offshore. This process is between 2 to 6 weeks for approval. The SARB requires an annual submission of a portfolio status to the FSD with statements reflecting asset classes and its values.[16]

Advantages of a Direct Offshore Portfolio:

- The investor has instant access to his investment and money which is available offshore and in hard currency.
- The investor also has a rich universe of stocks to select from.

Disadvantages of a Direct Offshore Portfolio:

- Income tax is levied at your marginal rate of tax. South African residents are required to pay tax in South Africa on their worldwide income. However, there are Double Tax Agreements (DTA) with many countries which may allow for credits where foreign taxes have been paid.

[15] Offshore Transfers Webinar by Currency Partners Available at www.fpi.learntech.co.za
[16] Regulatory Updates Offshore Transfers webinar available at www.fpi.learntech.co.za

- The purpose of a DTA between two countries is to protect or eliminate the risk of double taxation. It regulates the taxing rights that the countries to the agreement hold against their taxpayers.[17] A DTA will be applicable in instances where the taxpayer is earning income in South Africa as well as receiving a foreign income, or if the taxpayer is a South African tax resident and not earning income from a South African source but only from a foreign source. South Africans who are living and working abroad should refer to the DTA between South Africa and the country they're residing in, to assess the tax treatment of the income they are earning.[18]
- There may be situs tax implications. Situs can be defined as the place where something exists or originates.[19] It is also known as Inheritance Tax in the United Kingdom and Federal Estate Tax in the United States. In the event of death, South African residents are liable for estate duty based on their worldwide assets. Estate Duty is levied at a rate of 20% for net estates more than R3.5 million and less than R30 million and 25% for net estates more than R30 million. For example in the UK, situs tax is levied at a rate of 40% on situs assets over the value of £325 000. In the US situs tax is levied at a rate of 40% and the threshold is US $60 000.[20]
- There is a likelihood of probate. Probate is the word used to generally describe the legal and financial processes in dealing with the assets of a person who has passed away.[21] Probate also refers to the legal process of validating or approving a will and establishing that it is authentic. It is a procedure where your South African drafted will is validated by the foreign legal authority in order to administer one's foreign assets. This process can result in delays in winding up of the deceased estate thereby negatively affecting the heirs. Probate ordinarily takes 9-12 months to settle an estate[22], however, it can take longer if there are more complex issues to resolve such as realising property, Capital Gains Tax implications and income tax implications. It is generally advisable to draft a foreign will to deal with one's foreign assets to mitigate winding up delays.

[17] What is a Double Taxation Agreement? Available at www.taxconsulting.co.za/double-taxation-agreements/
[18] More Information on Double Taxation Agreements Available at www.taxconsulting.co.za/double-taxation-agreements/
[19] www.merriam-webster.com
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2. Indirect Offshore Investment:

Indirect offshore investment is straightforward as currency conversion is unnecessary. This is beneficial where investors cannot meet the prescribed minimum investment amounts for direct offshore investment. This can be effected by utilising asset swap funds on a local LISP platform.

An asset swap is when an investor purchases a rand denominated unit trust via a South African financial institution.[23] The LISP would use its foreign exchange capability to invest the funds offshore. An asset swap is an agreement between an investor and a financial institution whereby the financial institution holds an offshore asset on behalf of the investor. [24] This entails an investor investing his Rands with a local unit trust management company, who will convert it to foreign currency on the investors' behalf. This is known as an asset swap. The distinct advantages of utilising asset swaps would be the following:

- The investor would have instant access to their funds.
- There would be minimal administration in comparison to direct investment which would require treasury clearance, enabling investors to effectively utilise favourable market conditions to ensure their currency exposure
- Monthly contributions are allowed.
- There is no limit as to the amount being invested as the Foreign Investment Allowance does not apply.

The drawbacks of indirectly investing offshore are:

- It is rand denominated and therefore only payable in South Africa.
- An investor would have limited funds from which to choose.
- CGT is payable at 18% and income tax is payable up to 45%.

One can also invest indirectly offshore via exchange traded funds (ETF's). ETF's are passively managed investment products that track the performance of a particular basket of pre-determined assets.[25] It can be invested in stocks, bonds, commodities or a combination of assets.

[23] Offshore Investments in South Africa: how do they actually work? Available at www.netto.co.za [Accessed 13 May 2022]

[24] The benefits of asset swaps for hedging risk by Bianca Botes 25 July 2022. Available at www.fanews.co.za/article/investments/8/general/1133/the-benefits-of-asset-swaps-for-hedging-risk/35055

[25] https://www.jse.co.za/trade/equities-market/equities/exchange-traded-products/exchange-traded-funds

There are numerous benefits to investing via an ETF:

- Prices of ETF's vary during the trading day depending on supply and demand, allowing the investor to take advantage of price swings.
- It enables the investor to invest in a variety of asset classes via a single listed investment vehicle. Extensive research on individual companies or asset classes becomes unnecessary saving both time and money for the investor.
- All ETF's are exempt from Securities Transfer Tax (STT), which is a saving of 0.25%.

The downsides of ETF's are:

- There is no tax benefit on contributions or withdrawal unless structured within a tax- free investment account, which has its limitations.
- Investors need to be aware of the bid-ask spread. The spread is the difference between the bid price, which is the price at which the share could be sold and the ask price, which is the price they will pay for the share.[26] Low liquidity and low trading volumes may result in the bid-ask spread being too wide to be cost effective.
- Trading costs and management fee creep can be more expensive for the individual investor.

Conclusion

Including offshore investments whether directly or indirectly to your portfolio is a sapient option to a well-rounded financial plan. There are numerous factors to evaluate when deciding to invest offshore, including but not limited to:

- Diversifying one's portfolio by incorporating offshore exposure to either developed or emerging markets or both which hinges on risk profiling.
- Establishing if there is a DTA in place with the foreign country and understanding the impact it has on potential tax implications such as income tax and situs tax.
- Estate planning is imperative. Probate may prolong the winding up of an estate thereby frustrating the heirs. One needs to investigate the necessity of having two wills to deal with South African and foreign assets respectively. The rules of forced heirship should also be considered when deciding on which country to invest in.
- Navigating the offshore investment landscape is best achieved by consulting an accredited and experienced financial planning professional to assess the advantages and

[26] The Drawbacks of ETFs by Wiley Global Finance, available at www.fidelity.com/learning-center/investment-products/etf/drawbacks-of-etfs

disadvantages ensuring that all variables are considered as part of a holistic financial plan whilst adhering to the investors' wishes.

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CGT Considerations When Transferring an Immovable Property between a Resident and a Non-Resident Spouse

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Introduction

One of the commonly used estate planning techniques is to leave either a residue of the deceased estate, or specific assets to the surviving spouse. The benefits of this technique include postponement of capital gains tax and the reduction of estate duty by utilising the Section 4(q) deduction.[1] It may come as a surprise that the postponement of capital gains at death is not always available when an asset is bequeathed to a surviving spouse since the postponement is dependent on the tax residency of the surviving spouse.

This aspect of estate planning is becoming even more important due to an increase in South African residents moving abroad. It is not difficult to imagine a South African tax resident getting married to a non-resident and having to decide how to deal with assets that were left behind in South Africa, on the event of death.

Now suppose that a South African tax resident owns immovable properties in South Africa, in their own name for rental purposes. After moving abroad, they get married to a non-resident and start to raise a family in a foreign jurisdiction, without terminating their South African tax residency. A question arises whether the tax resident can defer capital gains liability on the immovable properties at death, by bequeathing the immovable properties to the non-resident spouse.

The discussion in this article is limited to the transfer of immovable properties between a resident and non-resident spouse and compares the capital gains outcomes of transferring a property to a non-resident spouse on death through a Will against a donation to a spouse during his or her lifetime.

A transfer of immovable property to a non-resident spouse through a Will

Section 9HA of the Income Tax Act No. 58 of 1962 (hereafter the Act) provides, subject to certain exceptions, that a deceased person is treated as having disposed of their assets at the date of death, for an amount equal to the market value of the assets.[2] The consequence of this provision is that death is a capital gains event, which may result in capital gains liability, depending on the nature of the assets held by the deceased.

[1] Section 4(q) of the Estate Duty Act 45 of 1955.
[2] Section 9HA (1) of the Income Tax Act 58 of 1962.

One of the exceptions to the disposal above applies if the assets are disposed for the benefit of the surviving spouse of the deceased.[3] In that event, the capital gains is postponed, and only considered at the death of the surviving spouse or at the disposal of the assets by the surviving spouse. An asset is disposed for the benefit of the spouse of the deceased if that asset is inherited by the surviving spouse in terms of a will or as a result of the application of in testation succession rules; or if the surviving spouse acquires the asset as a result of a redistribution agreement between the heirs and legatees of the deceased estate; or if the surviving spouse acquires the asset as a settlement of an accrual claim.[4]

If the assets are disposed for the benefit of the surviving spouse, the surviving spouse is placed in the shoes of the deceased spouse. This is achieved through section 9HA(2)(b)(ii) which provides that the deceased spouse is deemed to have disposed of the assets at the base cost.[5]

The essence of the provision is that the deceased spouse does not incur capital gains because the proceeds are equal to the base cost, resulting in zero capital gains. At the same time, a surviving spouse is deemed to have acquired the assets at the deceased spouse's base cost, notwithstanding that the market value of the assets may be higher than the base cost, at the time of acquisition. The capital gain tax that could have been collected at the death of the first dying spouse will only be collected at the death of the surviving spouse or if the surviving spouse disposes of the assets.

However, section 9HA(2) applies only in the event the surviving spouse is a South African tax resident.[6] Thus, even though a person may qualify as a spouse,[7] that person may not enjoy capital gains tax rollover relief on assets acquired from their deceased spouse, if that person is not a tax resident. Thus, a capital gains tax shall be payable on all assets that are subject to capital gains tax transferred to a non-resident spouse, at death. A natural person is a tax resident in South Africa if that person is an ordinary resident or if that person has met the requirements of the physical presence test[8].

[3] Section 9HA (1)(a) of the Income Tax Act 58 of 1962.
[4] Section 9HA (2)(a)(i)-(iii) of the Income Tax Act 58 of 1962.
[5] If the deceased spouse had acquired an asset for R 1 000 000, which at the time of death was valued at R 3 000 000; the surviving spouse is deemed to have acquired the asset at R 1 000 000. This is notwithstanding that the value of the asset at death was R 3 000 000.
[6] Section 9HA (2) of the Income Tax Act 58 of 1962 – introductory line.
[7] Definition of a "spouse", section 1 of the Income Tax Act 58 of 1962. Assuming that their marriage is recognised in South Africa – which is a separate topic by its own.
[8] Definition of a "resident" – section 1 of the Income Tax Act 58 of 1962.

The implications of the above is that if the deceased had not anticipated the capital gains tax liability at death and bequeathed their immovable properties to a non-resident spouse, the deceased estate may end up having to liquidate the properties in the course of winding up the estate to meet the unexpected capital gains tax liability. Now, the capital gain tax shall be due and payable by the deceased[9] This may result in the surviving spouse losing out on their intended inheritance. This also means that even if the surviving spouse was a resident of a country with a favourable double taxation agreement with South Africa, that agreement will not be applicable because the deceased estate will be a South African tax resident.

The next question to consider is whether there is another way that could ensure that the surviving spouse enjoys the capital gains tax rollover relief.

A transfer of immovable property to a non-resident spouse during the resident's lifetime

A solution may be found in section 9HB of the Act, which deals with transfer of assets between spouses during their lifetime.[10]

Section 9HB differs from section 9HA in that it does not apply a blanket exclusion of non-resident spouse from capital gains tax rollover relief.[11] Section 9HB provides for rollover relief if the asset transferred to a non-resident spouse is an immovable property located in South Africa, or an interest in immovable property located in South Africa or any assets connected to a permanent establishment of that non-resident in South Africa.[12]

Section 9HB differs from section 9HA in that it does not provide that the spouse receiving the property acquires it at the base cost of the disposing spouse.[13] Section 9HB(1)(b) provides that the spouse receiving an asset must be treated as follows:

- The receiving spouse must be treated as having acquired the asset on the same date that such asset was acquired by the transferor.[14] This means that if the disposing spouse had

[9] Section 9HA (1) of the Income Tax Act 58 of 1962. The deceased person makes a disposal, and the taxable capital gain arising is included in the taxable income of that deceased person's final tax return, in terms of Section 26A.
[10] Section 9HA (1) of the Income Tax Act 58 of 1962.
[11] SARS's Comprehensive Guide to Capital Gains Tax (Issue 9) page 565.
[12] SARS's Comprehensive Guide to Capital Gains Tax (Issue 9) page 565.
[13] Section 9HA (2)(b)(ii) of the Income Tax Act 58 of 1962 provides that the assets (other than trading stock) are acquired at base cost.
[14] Section 9HB (1)(b)(i) of the Income Tax Act 58 of 1962.

acquired the asset before the 1st of October 2001, the receiving spouse shall be deemed as having acquire the asset before this date.

- The receiving spouse is deemed to have incurred an amount of expenditure equal to the expenditure contemplated in paragraph 20 of the Eighth Schedule that was incurred by that transferor (disposing spouse) in respect of that asset.[15] Paragraph 20 of the Eighth Schedule lists expenses that must be considered in determining a base cost of an asset. This means that expenses such as acquisition costs and improvement costs incurred by the disposing spouse are deemed to be expenses incurred by the receiving spouse.
- The receiving spouse is deemed to have incurred that expenditure on the same date and in the same currency that it was incurred by the transferor.[16] Thus, even if the receiving spouse may not be a tax resident, that spouse will be deemed to have incurred the expenditure in ZAR if the disposing spouse incurred the expense in ZAR. In that case, there is no need to translate the expense into a currency of the receiving spouse.
- It is further assumed that the receiving spouse use the asset for the same purpose as the transferring (disposing spouse).[17] Thus, if the asset was a primary residence, the primary residence exclusion will be available on subsequent disposal of the asset by the receiving spouse – assuming no change of purpose from time of acquisition and the time of disposal by the receiving spouse.
- It is also assumed that the receiving spouse received an amount equal to any amount received by or accrued to that transferor in respect of that asset that would have constituted proceeds on disposal of that asset had that transferor disposed of it to a person other than the transferee.[18] This assumption deals with an instance where a person transfers an asset to their spouse, and that asset is itself subject is sold with a suspensive condition, which at the time of transfer to the spouse had not been fulfilled. In that instance, the sale is deemed to have been concluded by the receiving spouse (casually speaking), because the proceeds of that sale transaction are deemed to have been received by the receiving spouse.[19]

In a sense section 9HB does two things,

1) it provides that a person transferring an asset to their spouse must disregard the capital gain or capital loss arising from the disposal of such asset to their spouse and;

[15] Section 9HB (1)(b)(ii) of the Income Tax Act 58 of 1962.
[16] Section 9HB (1)(b)(iii) of the Income Tax Act 58 of 1962.
[17] Section 9HB (1)(b)(iv) of the Income Tax Act 58 of 1962.
[18] Section 9HB (1)(b)(v) of the Income Tax Act 58 of 1962.
[19] SARS's Comprehensive Guide to Capital Gains Tax (Issue 9) page 568.

2) It further places the receiving spouse in the same position as the disposing spouse in relation to the asset, through the assumptions listed above.

Section 9HB(5) provides that section 9HB must not apply in respect of the disposal of an asset by a person to their spouse who is not a resident, ***unless the asset disposed of is an asset contemplated in section 9J or in paragraph 2 (1) (b) of the Eighth Schedule.*** Assets contemplated under section 9J and paragraph 2(1)(b) of the Eighth Schedule ***are immovable assets or interests in immovable asset located in the Republic***.[20] The thinking seems to be that the capital gains not collected when a person transfers the asset to the non-resident spouse will be recovered when that spouse eventually disposes of that asset.

Since the rollover relief is limited to immovable property or interest in immovable property located in the Republic, it means that a transfer of any other assets that are subject to capital gains (for example shares in a company), from a tax resident to a non-resident spouse will result in a capital gains tax liability.[21]

Example

Tom left South Africa on a working visa to Canada in 2018. In 2019 he married his Canadian girlfriend, out of community of property without accrual. Tom owns two properties in Cape Town which are being leased out to students. Tom contracted Covid-19 in 2020, although he survived, his health has not been the same, due to underlying medical conditions. He is really worried about what will happen to his properties if he were to pass away. Tom is considering whether to bequeath the properties to his spouse in his Will, or to donate them to her now, to save on executor's fee, capital gains liability and estate duty. Assume that Tom has no other properties in South Africa and abroad.

Property	**Acquisition Date**	**Acquisition Costs**	**Market Value**
Property 1	1990	R 750 000	R 3 000 000
Property 2	2015	R 1 500 000	R 2 800 000

[20] Paragraph 2 (1) (b) of the Eighth Schedule to, read with section 9(J) of the Income Tax Act 58 of 1962.
[21] Section 9HB (5) of the Income Tax Act 58 of 1962. "This section must not apply in respect of the disposal of an asset by a person to his or her spouse who is not a resident, unless the asset disposed of is an asset contemplated in section 9J or in paragraph 2 (1) (b) of the Eighth Schedule."

Scenario 1: Bequeath property to the Canadian spouse

If Tom were to bequeath the properties to her spouse in a Will compliant with the South African law requirements, the following would happen at his death:

- He will be deemed to have disposed his property to his deceased estate. This is a capital gains event.
- His Will states that the properties should go to his Canadian spouse.
- The rollover relief that is often available when a person bequeath property to a surviving spouse will not apply, since his spouse is not a South African tax resident. This means that a capital gains tax liability will arise, which must be settled in cash with the tax authorities.
- The immovable properties will be properties in his estate and the executor fee of 3,5% plus 15% VAT will apply.
- Section 4(q) of the Estate Duty Act will apply, resulting in estate duty relief for the deceased estate.
- The net result is that despite bequest to the spouse, Tom will need to make cash provision for capital gains tax liability and executor fees.
- The capital gains on the property shall be calculated as follows (if Tom has no other properties)

Property	**Proceeds**	**Base Cost**	**Capital Gain**
Property 1	3 000 000	750 000	2 250 000
Property 2	2 800 000	1 500 000	800 000
Total	**5 800 000**	**2 250 000**	**3 050 000**
Exclusion at death			300 000
Net Capital Gain			**2 750 000**
Taxable Capital Gain	**inclusion at 40%**		**1 100 000**
Tax at 45% Marginal Tax	***Assumed marginal tax***		**495 000**

- Thus, Tom's estate shall be liable to pay R 495 000 in capital gains tax to the SARS, even though the properties were bequeathed to the surviving spouse. This is owing to the fact the surviving spouse is a tax non-resident.

Scenario 2: Tom donates the properties to his spouse

Now suppose Tom donates the properties to his spouse immediately, to avoid capital gains tax and executor fees as discussed in scenario 1 above.

- Section 56(1)(b) provides that donations tax shall not be payable in respect of the value of

- any property which is disposed of
- under a donation
- for the benefit of the spouse of the donor
- who is not separated from him under a judicial order or notarial deed of separation.[22]

The outcome being that there will be no donation tax payable on the donation between Tom and his spouse. Note how the spouse for donations tax is not qualified by the tax residency status.

- Since the properties being donated are immovable properties located in South Africa, section 9HB will apply, with the result that Tom must ignore the capital gain arising from the donation of the properties to his spouse.
- Tom's spouse will be deemed to have:
  - acquire property 1 in 1990 and property 2 in 2015 respectively,
  - incurred the costs that Tom incurred and in the currency that the costs were incurred in, in this case the Rand. The cost shall be R 750 000 plus R 1 500 000, and
  - used the property for the same purpose as Tom (the surviving spouse shall be deemed to have use the properties for rental purposes)
- Since there is no sale subject to suspensive condition, the last deeming provision, relating to the proceeds, does not apply.
- The outcome of the above, is that the assets are moved from Tom's estate, into the estate of the spouse. This in turn has the effect that if Tom were to pass away shortly after the donation, there will be no assets in Tom's estate, resulting in no capital gains and no executor fee payable.

Conclusion

This article shows that bequeathing a property to a spouse is not a magical solution in all the circumstances, and that care must be exercised when planning an estate of a South African resident who is married to a non-resident.

It highlights that there are different tax outcomes when an immovable property is transferred between a resident and non-resident spouse at death, compared to a transfer between them during their lifetime.

Two lessons are highlighted, being:

[22] Section 56(1)(b) of the Income Tax Act 58 of 1962.

- Where a resident spouse bequeaths an immovable property, located in South Africa, to a non-resident surviving spouse in their Will, at death that immovable property will be subject to capital gains tax. This is because of the operation of section 9HA which provides that capital gains rollover relief does not apply if the assets are bequeathed to a non-resident spouse.
- Where a resident transfers an immovable property, located in the South Africa, to a non-resident spouse, during the currency of their marriage, the resident must ignore the capital gain or capital loss arising from the transfer. There is thus no capital gains tax liability that arises. The non-resident spouse takes over the position of the resident spouse in respect of all aspects of the immovable property, i.e., the costs of acquisition; the currency in which the immovable property was acquired; the time when it was acquired and the purpose for which it was used.

Accordingly, a resident spouse married to a non-resident spouse may be able to achieve a maximum preservation of the immovable properties for the benefit of the surviving spouse through a transfer of the properties to the surviving non-resident spouse before death. This ensures that there is no capital gains tax and executor fees, relating to transferred properties at death of the resident spouse. Great care should be exercised when applying these provisions to parties that are married in community of property.

Please take notice that this strategy is aimed at saving capital gains and executor fees and does not apply to all the assets transferred to a non-resident spouse, only to the transfer of immovable property or interest in immovable property located in the Republic.

Take further notice that estate planning involving clients with cross-border assets is complex and cannot be resolved by a single strategy as the one highlighted here. However, it will not be prudent to employ capital gains rollover provisions at death as a mechanism to transfer assets between a resident and non-resident spouse, as if one were dealing with an ordinary case of two resident spouses.

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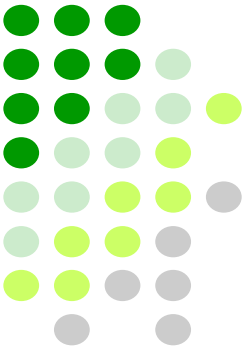

Investment Planning

Using an inter vivos trust to hold crypto assets

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Introduction

Cryptocurrency or crypto assets e.g. Bitcoin, Litecoin and the like, are seen as growth assets due to the significant gains these assets can attain. For this article the term Crypto assets will be used collectively for all like assets. Some investors use crypto asset platforms as part of their investment portfolios and therefore, an investor must take crypto assets in consideration when doing their estate planning.

For many years in South Africa crypto assets were viewed as being free from any regulations and for that reason seen as secret investments. This is no longer the case. Crypto assets have been under the scrutiny of both South African Revenue Service (SARS)and the South African Reserve Bank (SARB) for several years. It is prudent for current and prospective crypto asset investors to keep abreast of how SARS and SARB view it from a tax and regulatory point of view.

Crypto assets in an estate

One would need to consider what constitutes property according to the Estate Duty Act.[1] Section 3 of the Estate Duty Act defines trust property or property as:

*(2) "**Property**" means any right in or to property, movable or immovable, corporeal, or incorporeal, ..."*

The right in or claim an investor has over crypto currency is thus regarded as "property". At death, crypto assets are thus regarded as property of a deceased investor's estate and will therefore, be subject to estate duty. A skillfully drafted and set up inter vivos trust can be an effective estate planning tool for individuals who wish to accumulate and preserve wealth for generations to come.[2] Instead of holding growth assets in the investor's personal capacities, the inter vivos trust holds the asset. Therefore, from an estate planning perspective, it is relevant to determine whether crypto assets also qualify as being trust property and by implication whether the trustees of an inter vivos trust can invest in crypto assets.

This article will seek to answer this important question, with a specific focus on the provisions of The Trust Property Control Act[3] and to illustrate the advantages of using an inter vivos trust to invest in crypto assets.

[1] Estate Duty Act 45 of 1955
[2] Estate Planning: Davis Beneke Joost

What are crypto assets?

The South African Reserve Bank in its Position Paper on Crypto Assets (2020)[3] define crypto assets as follows:

"*A crypto asset is a digital representation of value that is not issued by a central bank, but is traded, transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology*".

What is trust property?

Section 1 of The Trust Property Control Act define trust property or property as:

" *Movable or immovable property, and includes contingent interest in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee*".[4]

To determine whether crypto assets qualify as being trust property writers have posed further questions[5] to determine whether crypto assets qualify as being trust property in terms of the Trust property act:

1. *Are crypto assets movable, immovable, corporeal, or incorporeal asset or group of assets?*
2. *Does South African legislation identify or define crypto assets as property?*
3. *Can an investor exercise ownership over crypto assets?*
4. *Can an investor sell or liquidate crypto assets?*

Movable/Immovable; Corporeal/ Incorporeal?

Cryptocurrencies are regarded by SARS as assets of an intangible nature.[6] Crypto assets is, according to Moosa[7], by nature incorporeal. Incorporeal property is a right in a property which cannot be touched or cannot be seen, but the rights in the said property is still enforceable by law.

[3] www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paper%20on%20crypto%20assets_Final.pdf
[4] Trust Property Control Act 57 of 1988
[5] Brandon Sylvester:An overview of the regulation and management of cryptocurrency in South African inter vivos and testamentary trust. 2021
[6] 6 April 2018 – SARS's stance on the tax treatment of cryptocurrencies & TLBA 2022.
[7] Moosa F Cryptocurrencies: Do they qualify as gross income? (2019) 44(1) Journal for Juridical Science 27.

Does South African legislation identify or define crypto assets as property?

While the SARB has provided their definition for cryptocurrency it does not address the question above, because the reference was only in discussion paper and not defined in legislation. In the absence of a definition provided for in legislation, one could inspect how SARS treats crypto assets from a tax point of view.

SARS has made it clear that crypto transactions will be taxed according to the existing South African tax laws.[6]. This means that crypto profits will either be taxed based on capital gains tax principals, or as revenue transactions. As discussed above, SARS consider crypto assets as assets of intangible nature. As a matter of interest, the tax return known as ITR12 includes crypto assets under the Capital Gain/Loss section and when listing local financial instruments. [7]

It is submitted that the above provides sufficient evidence that South African legislation recognise crypto assets as assets from an income tax point of view.

Can crypto assets be owned?

Yes, it can. Proving ownership however is somewhat unique. The most reliable way to prove ownership of cryptocurrencies is to sign a specified message with your Private Key. The Private Key is usually a combination of specific words. By doing so, the third-party can verify that the counterparty really knows the respective Private Key without the need of revealing the key or having to send a transaction[8] Private keys are essential to verify ownership and to access crypto assets.

SARS treat the gains on realisation of long-term cryptocurrencies investments as of capital nature and this results in the proceeds of such investments to be subject to capital gains tax.[9] The submission is that it is clear from the above discussion, that an individual enjoys the right to own crypto assets. Although a trust is not a legal person in South African law, the Income Tax Act treats a trust as a legal person for income tax purposes.

[8] Brandon Sylvester:An overview of the regulation and management of cryptocurrency in South African inter vivos and testamentary trust.
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Can crypto assets be subject to liquidation or sale

Many exchanges provide a platform for the buy and selling of cryptocurrencies. The treatment of SARS of cryptocurrencies as discussed above, also indicates that crypto assets can be sold or liquidated. Various platforms are widely used by individuals in South Africa to sell or to liquidate crypto assets.

Some benefits to using a trust for holding crypto assets

On death of an individual the estate of the individual must be reported at the Master. The Master will appoint an executor to wind – up the deceased estate.[10] The executor can only distribute the property of the estate once the winding – up process is finalised. Should the crypto assets be the property of an inter vivos trust, the crypto assets will not form part of the estate and the trustees of the inter vivos trust have immediate access to this property. The trustees can distribute the property or the proceeds immediately according to the stipulations of the trust deed.

The growth of these crypto assets will be in the trust and will therefore, no growth will take place in the estate of the individual. This can provide a saving in estate duty and executors fees for the estate of an individual.

In the instance where an inter vivos trust is the owner of the crypto assets, the trust provides the individual with privacy regarding his/her investments. Should the crypto assets be part of the individual's estate, the information will be part of public documents as soon as the estate is reported at the Master. Only the trustees of the inter vivos trust will have knowledge of the value of the crypto assets.

The trustees of an inter vivos trust can also assist the beneficiaries, who are sometimes unable to manage investments and crypto assets. The individual can in the form of a Letter of Wishes provide guidance to the trustees on aspects like maintaining, securing and the distribution of the crypto assets or the income from the crypto assets. The trustees will manage the crypto assets in the name of the inter vivos trust and therefore, information such as passwords to access these investments, the existence of the investments, where they exist, will be available to the trustees. Sometime the mentioned information is not always available. Without the information the family members cannot access the wealth that the investor created by investing in crypto assets.

[10] Administration of Estates Act 66 of 1965

Conclusion

The conclusion is that crypto assets can constitute trust property. Therefore, crypto assets can be transferred to a trust. Financial advisors must take these assets into consideration for estate planning purposes. The use of an inter vivos trust as an estate planning tool can provide various advantages for the heirs of an investor.

These advantages in summary are:

- The crypto assets in an inter vivos trust is available for distribution to the beneficiaries of a deceased investor. It is not necessary for the beneficiaries to wait for the winding – up of the estate before any distribution can be made to them.
- The growth of the crypto assets will be in the name of the inter vivos trust and not in the estate of the investor. This can contribute to saving in estate duty and fees.
- The inter vivos trust provides privacy for investors.
- The information success as passwords and how to manage the crypto assets as investments are available.

The specific points to be addressed when giving advice will be to ensure that:

- the trust deed enables the trustees to accept crypto assets in trust; and
- the trustees are authorized to invest in crypto assets; and
- the trustees can liquidate crypto assets; and
- the trust deed defines crypto assets as trust property.

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