

May 2018

## TAX PLANNING – THE DEVIL IS IN THE DETAIL

*CSARS v The Executors of Estate Late Sidney Ellerin*

*(142/2017) [2018] ZASCA 39 (28 March 2018)*

The Supreme Court of Appeal was requested to consider whether the holder of a preference share was entitled to convert same to an ordinary share without the consent of the holders of 75% of the ordinary shares. The outcome would determine the valuation of the preference shares and the capital gain tax implications. The share capital of the Sidney Ellerin Trust (Pty) Ltd (the "**Company**") consisted of 600 issued ordinary shares of R1/share and 112 000 redeemable non-cumulative preference shares of R1/share (the "**Preference Shares**"). All the issued **Preference Shares** were held by the late Sidney Ellerin (the "**Deceased**").

SARS argued that the **Preference Shares** constituted 99.47% of the voting rights in the **Company**; and that the holder of the **Preference Shares** was entitled to convert same to ordinary shares any point in time – following approval by way of special resolution. If realised, the **Deceased** would have held 99.47% of the equity in the **Company**. SARS therefore argued that the value of the **Preference Shares** should be calculated at 99.47% of the market value of the **Company**. The executors for the **Deceased's** estate argued that there was a prohibition on the conversion of the **Preference Shares** in the form of a special resolution (i.e. that 75% of the issued shares of each class in the **Company** had to approve). It was argued on behalf of the executor that the **Preference Shares** could not be converted into ordinary shares out of the **Deceased's** own doing, and for that reason the **Preference Shares** must be valued at its par value.

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Pursuant to an express interpretation of the language of the **Company's** constitutive documents, the court found that the **Deceased** was clearly the holder of the majority of votes and could easily have converted the **Preference Shares** to ordinary shares. As such, SARS's valuation of R563 million at the date of the **Deceased's** death was upheld.

Clearly the intention of the parties and shareholders of the **Company** was not worded to perfection, despite the advice and guidance from skilled and experienced professionals. Estate planning with the purposes of mitigating estate duty and other taxes upon death should always be performed with perfection, and the guidance of skilled professionals, as the devil is always in the detail.



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