Massing of estates:
estate duty and
donations tax

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It has been thought (or rather hoped) by many estate planners that a testamentary “massing” can bring about fabulous savings of estate duty. The following may serve as an illustration: Mr and Mrs A are married by antenuptial contract. They execute a joint will in which they mass their estates and leave the massed estate to their children upon the death of the first-dying of them, subject to a usufruct in favour of the surviving spouse over the assets of the first-dying. Mr A dies, and Mrs A elects to adiate (ie accepts the benefits conferred on her in the joint will). Her estate passes to her children, and she acquires a usufruct over her late husband’s estate. The massing can have no estate duty advantage in Mr A’s estate; duty is payable on the dutiable amount of his estate. It was thought that there might be estate duty savings in the estate of the surviving spouse. If Mrs A acquires no assets after her husband’s death, the only property in her estate upon her death will be the ceasing usufruct over her deceased spouse’s assets. The full value of the ceasing usufruct is deductible in terms of s 4(m) of the Estate Duty Act 45 of 1955, with the result that the net value of her estate for duty purposes is nil. If her estate which passed to her children upon her husband’s death had a value of, say, R1 million, the estate duty saving lies in the fact that her estate, subject to considerations of capital appreciation or depreciation aside. The simple device of massing and adiation has brought about a diminution of her estate to the tune of R1 million (leaving considerations of capital appreciation or depreciation aside). It seems that in the realm of estate planning all good dreams sooner or later prove to be too good to be true. Massing is no exception: the dream has become a potential nightmare.

M G Fredman contended, with respect correctly, that massing and the subsequent adiation constitute a disposition for purposes of ss 3(4)(a) and 3(4)(b) of the Estate Duty Act. Section 3(4)(a) provides that “any disposition whereby any person becomes entitled to receive or acquire any property for a consideration which, in the opinion of the commissioner, is not a full consideration for that property, shall, to the extent to which the fair market value of the property exceeds the said consideration, be deemed to be a donation”. Donations are deemed to be property of the deceased for estate duty purposes. Section 3(4)(b) states that “any disposition of property to a trustee to be administered by him for the benefit of any beneficiary mentioned in the trust deed, shall be deemed to be a donation of that property to the trustee”. If the survivor by adiating surrenders property valued at R500 000 and acquires property (usually in the form of a limited interest) to the value of R100 000, the difference of R400 000 is deemed to be a donation for estate duty purposes in the survivor’s estate.

A G Derksen agrees that the survivor’s adiation constitutes a disposition in terms of s 3(4)(a) of the Estate Duty Act, and points out that the adiation may bring about a deemed donation under s 58 of the Income Tax Act 58 of 1962. Section 58 of the Income Tax Act substantially corresponds to s 3(4)(a) of the Estate Duty Act.

Until recently one did not know whether the commissioner would apply s 58 of the Income Tax Act and s 3(4)(a) of the Estate Duty Act, and attempt to levy donations tax or estate duty in circumstances where the survivor’s adiation could be construed as a deemed donation. However, one now knows of a case in which the commissioner invoked the provisions of s 58 and sought to levy donations tax. The taxpayer took the commissioner’s ruling on appeal to the Transvaal income tax special court. The case is no 7878 and judgment was given on 13 February 1984.

The appellant and his father massed their estates by their joint will, leaving the massed estate to three trusts of which the appellant and his three children were the beneficiaries. The appellant’s father died and the appellant adiated. The appellant’s estate was substantially larger than his father’s. The commissioner invoked the provisions of s 58 of the Income Tax Act, and assessed donations tax in the sum of R82 815 plus interest.

The appeal was dismissed, Melamet J holding that the appellant’s disposition (adiation) fell within the ambit of s 58. It was argued on the appellant’s behalf that a donation is a contract requiring offer and acceptance, that the trustees did not acquire the appellant’s property ex contractu but ex testamento, and that s 58 does not therefore apply. The learned judge held, with respect correctly, that the appellant could have elected to either adiate or repudiate, that he chose to adiate, and that it was his adiation which constituted a disposition in terms of s 58.

In our law a joint will does not constitute an agreement. It is the survivor’s adiation which renders the massing operative. Without adiation no effect can be given to the testamentary massing. As a result of this case the lustre on massing as an estate duty savings device has largely faded. The estate duty payable in the survivor’s estate will of course be reduced by the donations tax levied upon the survivor’s adiation.

Estate planners should in future take great care before advising massing where the sole or dominant purpose is that of estate duty savings. The reader will find Derksen’s calculations, based on hypothetical facts and figures, instructive in this regard.

Quite apart from the fiscal hazards attendant on massing, there are other considerations which render massing unattractive, unless it is employed to achieve a result which is desired from the succession point of view. “In a word, the survivor divests himself of his assets, to no real advantage to himself, since in his lifetime he will see none of the fruits of his self-sacrifice. It is true that he may thereby make his children heirs to a greater fortune than otherwise, but the survivor may well wonder why he worked so hard in his life, and why he has virtually put himself out into what is now his children’s pasture. It would be poor solace to say that the survivor may become a trustee. Qua owner he could have done as he liked with his assets. As a trustee, he has to exercise his

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*This case has not been reported and permission has been granted for publication.
possible to depluralize a plural society through assimilation or partition, they assert that its conflict can be democratically regulated, provided it is not done on the basis of majoritarian rule. The principles of consociationalism require alternative constitutional devices to the majoritarian features of the traditional liberal-democratic systems."

With this firm conceptual framework of consociationalism as his point of departure and predilection, Prof Boule then undertakes the task of enquiring into South Africa's constitutional background and analysing the government's 1977 constitution, the contribution of the President's Council in the constitutional process and, finally, the 1983 constitution itself. In particular interest and value is the separate and, indeed, excellent chapter on the "broader constitutional context" in which the author deals, from a consociational perspective, with the policies of the major political parties in South Africa as well as the constitutional experiences in South West Africa/Namibia, Zimbabwe and the former national states (ie Transkei, Bophuthatswana, Venda and Ciskei). In the same chapter, the findings of several commissions of enquiry which have made a contribution to constitutional debate and development (such as the Tomlinson, Theron, Wiedahn, Rekert, Schlebusch, Quail, Lombard and Buthelezi commissions) are researched with the same emphasis on establishing the depth and scope of consociational thinking in South Africa. In the words of the author himself, "although consociational democracy cannot be identified with any specific institutional arrangement, some constitutional frameworks are more conducive to its success than others". Applying this insight to the 1983 constitution, Prof Boule detects elements of consociationalism but also perhaps of excessive control. "Authentic consociationalism", he states, "would involve the termination of the government's constitutional control and political domination." For this reason, he is compelled to express his fears as well as his warnings about the future of our new constitution in the following way:

"In the light of South Africa's constitutional and political history, the most salient feature of the 1983 constitution from a consociational point of view is that neither power-sharing on general affairs nor segmental autonomy on own affairs is an institutional necessity. While consociationalism is ultimately a pattern of elite behaviour and cannot be reduced to institutional terms alone, in the South African context a favourable constitutional framework would be a necessary, albeit not sufficient, condition for consociational government. In the government's predication the essential factors of conciliation and compromise will emerge through organic developments and be sustained by constitutional convention and political custom. Yet the new system is not founded on the accommodation of legitimacy, mutual commitment to its underlying principles and inter-elite confidence which are necessary for their informal emergence. The prevalence of counter-consociational features assumes the continual breakdown of the normative procedures and the constitution conveniently permits the unilateral regulation of conflict. Despite the credibility needs of the system there will be temptations for the government to follow this line of lesser resistance in all matters which it identifies as politically or strategically important. To the extent that there is consensual and autonomous rule it is likely to be a concessionary and not a negotiated outcome, as was the new constitution itself."

Although the new constitution is included in its entirety as an appendix, the book by Prof Boule is not, in the strict sense of the word, a legal textbook, since it does not provide us with all the technicalities and information necessary for ordinary legal practice or formal legal study. However, for the lawyer and law student who want to grasp the essence and bases of our constitutional development in order to gain an understanding of the fundamentals of our legal systems, the study of this erudite and stylishly written book is an absolute priority.

Marinus Wiechers, University of South Africa.

Publications received

Property valuation in South Africa by A J Jonker

This book, in eight chapters, deals with the concept of value, potential, depreciation, method of valuation, the valuation of different kinds of properties, judicial influence on valuation, adjudication of values and ends with a chapter containing certain recommendations. The book has a strong legal content which makes it useful as a reference book for practitioners engaged in the field of property.

Commercial correspondence by Adam S Worth
Mildenhall Publications (Pty) Ltd P O Box 1022, Johannesburg. Price R85,00 incl. GST.

A file of ready-to-use letters, contracts and forms on topics such as debtor/creditor, purchase and sale of goods, employment, leases, immaterial property and cessions and assignments.

Editor.

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distribution of the deceased's estate in a way he never visualized and which he would have taken steps to avoid.

Footnotes

1 For further illustrations see A S Silke in (1976) 15 Income Tax Reporter 73-78, 173-178.
2 It is permissible in terms of s 37 of the Administration of Estates Act 66 of 1965 to confer upon the survivor a limited interest over the massed estate.
3 1979 MB 109.
4 1980 MB 1.
5 S 16(b) of the Estate Duty Act.
6 1980 MB 1.
7 M G Fredman in 1979 MB at 110.

Limitations of actions against the police – reform or repeal? (Continued from page 469)

[4] 1978 4 SA 79 (E) at 82E.
[7] In the event, the minister settled the plaintiff's claim by payment of R 458,00 plus costs.
[9] "Another example where the vagaries of the post resulted in the plaintiff being non-suited was in De Zuze v Minister van Justitie supra where in the end the plaintiff failed on time limits; see 1962 2 SA 302 (T).
[13] Cf Holmes JA in Melane v Santam Insurance Co Ltd 1962 4 SA 531 (A) at 532H.