THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1086/2018

In the matter between:

CHARMAINE HELEN MONTANARI **APPLICANT**

and

EMILIO PIETRO VALFREDO MONTANARI **RESPONDENT**

Neutral citation: *Montanari v Montanari* (1086/2018) [2020] ZASCA 48 (5 May 2020)

Coram: Maya P and Wallis, Mokgohloa and Dlodlo JJA and Eksteen AJA

Heard: 7 November 2019

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 10:00 am on 5 May 2020.

Summary: Divorce – accrual – value of annuitant spouse's right to future annuity payments in respect of a living annuity as defined in s 1 of the Income Tax Act 58 of 1962, read with General Note 18 of the Second Schedule to the said Act, is an asset in his estate and is subject to accrual.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Keightley and Modiba JJ and Sardiwalla AJ sitting as court of appeal):

1 The application for special leave to appeal is granted and the appeal is upheld with costs.

2 The order of the Full Court of the Gauteng Division, Johannesburg is set aside and replaced with the following:

'(a) The appeal is upheld with costs.

(b) The value of the respondent's right to future annuity payments under Personal Portfolio Living Annuities 002419307, 003491172 and 004662953 (the living annuities) from Glacier Financial Solutions (Pty) Ltd, a member of the Sanlam Group is an asset in his estate for purposes of calculating the accrual in his estate.

(c) The matter is remitted to the trial court for the admission of evidence on the value of the respondent's right to receive future payments from Sanlam in respect of the living annuities.'

JUDGMENT

Maya P: (Wallis, Mokgohloa, Dlodlo JJA and Eksteen AJA concurring):

[1] This is an application for special leave to appeal which was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.[1] The

[1] In terms of which the Judges considering an application for leave to appeal may, inter alia, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed.

applicant, Mrs Charmaine Helen Montanari, seeks to challenge the judgment of the Full Court of the Gauteng Division of the High Court, Johannesburg (Keightley J, Modiba and Sardiwalla JJ concurring). The full court dismissed the applicant's appeal, brought with Victor J's leave, against her judgment in the divorce action instituted by the applicant's husband, the respondent, Mr Emilio Pietro Valfredo Montanari. The full court affirmed the trial court's decision, on the strength of this Court's judgment in *ST v CT*,[2] that the respondent's living annuities do not form part of his estate for purposes of calculating an accrual.

[2] The relevant factual background to the matter is briefly the following. The parties married in December 1999, out of community of property and subject to the accrual system as defined in the Matrimonial Property Act 88 of 1984. In July 2008, the respondent used a portion of his pension benefit, which arose from his employment, to purchase a Personal Portfolio Living Annuity 002419307 from Glacier Financial Solutions (Pty) Ltd, a member of the Sanlam Group (Glacier by Sanlam). In March 2012, he used the remainder of the proceeds of his pension benefit, which he cashed upon retiring from his employment in November 2011, to make another purchase with Glacier by Sanlam, Living Annuity 003491172. In circumstances that do not appear from the record, he purchased a further living annuity 004662953 on 7 January 2015.[3] I refer to these collectively as 'the living annuities'.

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[2] *ST v CT* [2018] ZASCA 73; [2018] 3 All SA 408 (SCA); 2018 (5) SA 479 (SCA), which was delivered before the hearing of the matter by the full court.

[3] This living annuity was purchased two weeks before the notice of amendment of the plaintiff's claim, dated 28 January 2015. but is curiously not mentioned in that document. It was, however, included in the respondent's Summary of Portfolio and was included in the respondent's asset pool furnished to the applicant's expert witness, an actuary, Mr Immerman, for the purposes of his valuation of the respondent's assets. There is, therefore, no reason to exclude it from this judgment.

[3] In 2014, the respondent instituted divorce proceedings against the applicant. In addition to a claim for spousal maintenance, he sought a declaratory order that the living annuities, which provide his monthly source of income, were not assets in his estate and were consequently not subject to the applicant's accrual claim. The applicant did not contest the dissolution of the marriage but lodged a counterclaim seeking an order against the respondent for the payment 'of an amount equal to half of the difference in the accrual of the respective estates of the parties, alternatively . . . full particulars and a statement of his estate in order to determine the accrual in his estate, the debatement thereof . . . and . . . payment . . . of an amount equal to half of the difference in the accrual in the respective estates of the parties'.

[4] At the commencement of the trial, the parties agreed to separate the issues for decision. The question whether the living annuities acquired by the respondent form part of his estate for purposes of calculating the accrual would be resolved ahead of the merits of the action. The essence of the respondent's case was that the living annuities were not subject to accrual because on a proper interpretation of the relevant legislation, they were not a pensionable interest as defined in the Divorce Act 70 of 1979, a view which the appellant rightly endorsed.[4] Furthermore, the ownership of the capital value of the annuities vests in the insurer, Sanlam, and the respondent is entitled only to the annuity income.

[5] The respondent called three expert witnesses to support his case, Mr William Herbert Hunter Thyne, an attorney specialising in banking and finance, including pension funds and insurance; Dr Elizabeth Lear, an asset consultant on pension and provident funds; and Ms Deirdre van Niekerk, a certified financial planner in

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[4] *ST v CT* ibid para 107.

investments and estate planning with long-time experience in the field. The applicant, on the other hand, led the evidence of a benefit valuation actuary, Mr Ryan Immerman.

[6] The essence of the evidence of the respondent's witnesses was that the capital of a living annuity belongs to the provider of the benefit and not the annuitant. Thus, it does not form part of the annuitant's estate. According to Mr Thyne, the purpose of converting a pension fund into a living annuity was to continue to make the capital inaccessible to an annuitant; to ensure that there is a benefit in the fund to pay an income upon the annuitant's retirement. An annuitant may switch the underlying investment vehicles of the living annuity to another fund. But his entitlement in the scheme is only to 'an income based on the amount the pension fund paid to the insurer which then becomes an insurer's asset . . . a right to an income stream', which he may elect to draw down at any rate between 2,5 per cent and 17,5 per cent per annum. To support his view, he also referred to s 29(4) of the Income Tax Act 58 of 1962, which requires that an annuity must be placed in '[a] fund, to be known as the Untaxed Policy Fund Holder Fund, in which shall be placed assets having a market value equal to the value of liabilities determined in relation . . . to any annuity contracts entered into by it in respect of which annuities are being paid'.

[7] Ms Van Niekerk agreed with Mr Thyne's opinion and adduced testimony that was similar to that given by Dr Lear. She confirmed the parties' agreed view that a living annuity is not a pension interest as defined in the Divorce Act and is, therefore, not deemed to be an asset under those provisions. She described it as 'a ring-fenced' asset held on the annuitant's behalf by the insurer in an untaxed policy holder's fund to provide him with a regular annuity income. But, the underlying capital amount of

the annuity never accrues to the annuitant during his lifetime. Whilst an annuitant may nominate a beneficiary to the living annuity to whom the insurer must pay the value of the underlying capital upon his death, the beneficiary has a right to continue with the annuity payments and receive income or exercise a commutation of the cash value of the capital amount. A non-member spouse would only be able to access the annuity or income when it accrued to the annuitant by way of a maintenance order.

[8] Mr Immerman, on the other hand, testified only on the computation of the actuarial value of a pool of assets, including the living annuities, that was based on the assumption that they belonged to the respondent. He disavowed any expertise on the question of the actual ownership of living annuities. However, he did venture an opinion when pressed, that if the living annuities were found not to be assets in the respondent's estate, a market value could still be placed on the income stream they generate at any given time. To that end, regard would be had to variables such as the investment return assumptions, the level of contributions and the annuitant's mortality.

[9] The trial court found that respondent's witnesses possessed 'the necessary expertise in the field of living annuities' and provided 'background information of what living annuities mean in the industry'. In its view, Mr Immerman had 'the necessary expertise in the field of calculating the actuarial value of an income stream'. The court determined that the overriding consideration was whether 'within the context of the statutory framework of living annuities and its strict regulation, the capital can be said to be vested in the [applicant] for purposes of calculating the accrual'. The court accepted the respondent's version that the annuities belonged to the insurer and did not form part of his estate for the calculation of accrual. Its

reasoning was that a contrary finding would defeat the purpose of a living annuity – to provide an income stream so that pensioners do not become a burden on the State. This was so because an annuitant 'could hypothetically be placed under severe financial pressure to pay' an amount from the annuities that would constitute part of the accrual and 'be left without any income at all'. The court concluded that the monthly or periodical payment of the living annuities was relevant and could be taken into account to assess the applicant's future maintenance needs.

[10] This court's judgment in *ST v CT* had been delivered before the appeal to the full court was heard. The applicant accepted in the full court that the decision meant that the appeal had to be dismissed and this is what occurred without any additional consideration of the applicable legal principles.

[11] The applicant raised a number of contentions on appeal before us. Her case, in the main, was that the court a quo erred in fact and in law in finding that ownership of the funds invested in the annuities belonged to Sanlam and that the annuities did not form part of the respondent's estate for purposes of accrual. To illustrate the point, it was argued that a consequence of that finding was that a married person who had accumulated R100 million before a divorce could invest the whole amount in a living annuity. This would bear the untenable result of denuding his estate to the detriment of his spouse because the value of his estate for purposes of calculating accrual would diminish by that sum. Moreover, there was no indication in the contracts concluded between the respondent and Sanlam that ownership of the invested funds would vest in the insurer.

[12] The applicant relied squarely on the judgment of the full court in *Commissioner, South African Revenue Service v Higgo*,[5] which she argued the trial court misinterpreted. She also relied on the provisions of the Financial Institutions (Protection of Funds) Act 28 of 2001 (the Financial Institutions Act) which, she contended, apply to the living annuities as they constitute 'trust property' as defined in that Act. She argued that the attention of this Court was obviously not drawn to these authorities in *ST v CT* as it would otherwise not have found that the annuities belonged to the insurer. We were further urged to decide a question left open in *ST v CT,* namely whether a married annuitant's right to future annuity payments is an asset which can be valued and included in his or her accrual upon divorce.

[13] Before I deal with the merits of this matter, it is necessary to foreshadow an error that derailed the separated enquiry and led to these proceedings. The issue that the parties sought to be adjudicated by the trial court seems to have been mischaracterised. Notwithstanding repeated judgments from this court establishing the necessity for any separation of issues to be properly and clearly formulated in an order by the trial court, this was not done, with the result that there was never clarity as to the real issue before the trial court.

[14] As is apparent from the pleadings, the applicant merely sought to identify the assets in the respondent's estate and their values so that she could quantify her accrual claim in the divorce action. In his answering affidavit in the application for leave to appeal, the respondent said that the issue to be determined was 'the status of the living annuities'. Thus, the purpose of the separated enquiry was simply to determine determine whether the living annuities should be included in the

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[5] *Commissioner, South African Revenue Service v Higgo* 2007 (2) SA 189 (C).

calculation of the accrual of the respondent's estate and on what basis that should be done.

[15] However, as pointed out, the parties failed to define the issue properly and the trial court's judgment and declaratory order perpetuated the misunderstanding that the applicant's target was solely the underlying capital value of the annuities. Another worrisome feature of the trial proceedings is the court's adjudication of the matter without having sight of the living annuity contracts, which were not produced as they should have been if their terms and effect were in dispute, as they were.

[16] It also requires mention at the outset that the issue of the ownership of the living annuities in respect of which the respondent's expert witnesses testified and explained in the context of the various statutory provisions to which they referred, is a question of law. Its determination, therefore, fell strictly within the trial court's domain. The trial court held that it considered such evidence 'as providing expert background information of what living annuities mean in the industry'. But the record indicates otherwise and the evidence clearly went beyond that scope. The witnesses were pertinently questioned and gave their opinion on where the ownership of the living annuities lay. This includes the applicant's own witness, Mr Immerman who, as I noted, was called merely to provide the value on a pool of the respondent's assets and had to proclaim his lack of expertise in this area.

[17] An example may be found in Mr Thyne's evidence, which was peppered with various references to statutory provisions and his interpretation thereof. He invoked s 5 of the Pension Funds Act 24 of 1956 for his opinion that Sanlam owned the respondent's annuities and rounded off his evidence in re-examination as follows:

'Question: So just to tie up very briefly Mr Thyne. In your opinion do the living annuities form part of the plaintiff's estate for the purposes of an accrual?
Answer: No again I will reiterate, what the annuitant is entitled to is an income stream . . . in terms of which one has to look at GN 18, where it talks about the liability [that] has been transferred . . . the fourth paragraph [which] says . . . I have already gone through the provisions of the Pension Funds Act to say all assets of the pension fund belong to the pension fund. What is happening here is the liability is being transferred from the pension fund to the insurer. Why would SARS or the regulator say there is going to be a change in the ownership, it has to be the insurer who owns the asset as the funds owns the asset and the insurer then pays the annuity based on the underlying asset.'

Needless to say, to the extent that the trial court's reasoning may have been guided by the expert witnesses' impermissible foray into the interpretive exercise of the relevant law on the question before it, it committed a misdirection.

[18] Turning to the merits, a convenient starting point for determining whether a living annuity is susceptible to an accrual claim is assessing the precise nature of this type of investment. Section 1 of the Income Tax Act defines it as follows:

'"living annuity" means a right of a member or former member of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund, or his or her dependant or nominee, or any subsequent nominee, to an annuity purchased from a person or provided by that fund on or after the retirement date of that member or former member in respect of which–

(a) the value of the annuity is determined solely by reference to the value of assets which are specified in the annuity agreement and are held for purpose of providing the annuity;

(b) the amount of the annuity is determined in accordance with a method or formula prescribed by the Minister by notice in the *Gazette*;

(c) the full remaining value of the assets contemplated in paragraph (a) may be paid as a lump sum when the value of those assets become at any time less than an amount prescribed by the Minister by notice in the Gazette;

(d) the amount of the annuity is not guaranteed by that person or fund;

(e) on the death of the member or former member, the value of the assets referred to in paragraph (a) may be paid to a nominee of the member or former member as an annuity or lump sum or as an annuity and a lump sum, or, in the absence of nominee, to the deceased's estate as a lump sum; and
(f) further requirements regarding the annuity may be prescribed by the Minister by notice in the *Gazette*.'

[19] There was no dispute that the living annuities were contracts complying with the requirements of the Income Tax Act. It follows that they were contracts providing for Glacier by Sanlam to pay annuities, ie regular amounts at regular intervals, to the respondent. The value of the annuities was determined by the value of the assets delivered to Glacier by Sanlam in terms of the annuity agreements and held by them for the purpose of providing the annuities. The full value of the assets would only be payable to the respondent if their value fell below a figure prescribed by the Minister of Finance. The respondent would have no other claim to those assets. As it happens, this description accords with the evidence of the respondent's witnesses as well as a description in a document titled "Glacier Investment – Linked Living Annuity – Personal Portfolio Living Annuity (Technical Guide for Personal Portfolio Living Annuity April 2018). That document was placed before us by the applicant in a 'core bundle' produced three days before the hearing without the consent of the respondent. But it merely confirmed what was already apparent.

[20] The terms of the respondent's annuities are described as Personal Portfolio Living Annuities, which are investment-linked and can be purchased only with compulsory funds coming from a contractual pre-retirement product. They are administered by Glacier by Sanlam. They are member-owned ie they were purchased from a registered South African Insurer in the name and on the life of the member, the respondent in this case. They are non-commutable, payable for and based on the lifetime of the retiring member and may not be transferred, assigned, reduced,

hypothecated or attached by creditors as contemplated by the provisions of ss 37A and 37B of the Pension Funds Act read with General Note 18.[6]

[21] The member can direct in which investments the amount paid to the insurer will be placed (with options including offshore collective investment funds and offshore shares) and has the right to draw an income and, to a limited extent, manage the underlying funds by altering the investments once a year. The member has a right to the income and can give instructions and nominate beneficiaries. The income is not guaranteed but depends on the performance of the underlying investment options and the draw-down rate selected by the annuitant. The annuitant can choose the level of income and the income frequency between a pre-defined minimum of 2,5 per cent and a maximum of 17,5 per cent level as prescribed by the Minister of Finance in the Government *Gazette* under the Income Tax Act. The annuitant may change the income percentage on the anniversary date.

[22] The annuity contracts state that once a living annuity is purchased the underlying capital in it is no longer accessible to the annuitant. The proceeds or annuity income do not fall within the ambit of 'pension interest' as defined in the Divorce Act, hence the parties' agreement in this regard. Thus, an annuitant cannot give part or all of the living annuities to an ex-spouse in terms of a divorce order or agree to split the annuity income with the ex-spouse. Glacier by Sanlam pays the annuity to the member spouse, who is taxed on it at his or her marginal rate and then

[6] General Notes Second Schedule to the Income Tax Act 1962 General Note 10 (Issue 2 with effect from 1 September 2008), which contains the definitions of the Pension Fund and Provident Fund and specifically, provides for 'annuities on retirement from employment'. General Note 18 replaced General Note 12 'so as to allow retirement funds to purchase an annuity from a South African registered insurer in the name and on the life of a member who is retiring from employment (a member owned annuity)'.

left to sort out any payment of maintenance to the non-member spouse in accordance with the divorce order under his own steam.

[23] There is another listed class of annuities; the conventional life annuities, which are completely different from the member-owned living annuities. They are described as fund-owned and are purchased from an insurer by the fund on behalf of the member. In their case, the trustees, and not the annuitant, sign all transfer documentation. They may override the annuitant's nominee options for a dependant and can appoint beneficiaries. These annuities pay a guaranteed income for life. The income is based on the life expectancy of the annuitant, who cannot choose the level of the income, which ceases upon his death or at the end of the guaranteed term.

[24] In the applicant's submission, the distinguishing features of this class of annuities supported her view that the respondent's living annuities are not owned by the insurer. She took issue with what she described as a failure by Dr Lear and Ms Van Niekerk to address the differences between the two classes of annuities. These witnesses merely stated in their identical statements that '[b]oth the life and living annuity options would provide the member with a certain regular income until death … are still "owned" by either the retirement fund or insurer on behalf of the member and cannot be attached for eg. insolvency … exactly the same reason that these annuities cannot be assigned (and the deeming provisions built into the Divorce Act)'.

[25] I deal first with the question whether *ST v CT* was wrongly decided as contended by the applicant. There, the living annuity under consideration was a Sanlam Glacier product similar to the ones in this matter, from which the annuitant

also drew a monthly income. This Court accepted that the annuity qualified as a living annuity for income tax purposes as it complied with the requirements set out in s 1 of the Income Tax Act read with Government Notice 290 of 11 March 2009.[7] It also endorsed the parties agreement that the provisions of the Divorce Act dealing with a spouse's pension interest are not applicable as his pension interest had become payable to him before the divorce.[8] The Court further recognised the general principle in the pension fund industry that the provisions of ss 37A to 37D of the Pension Funds Act apply to a living annuity purchased in the name of a former member of a retirement annuity fund.[9]

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[7] 'Notice in terms of paragraph (B) of the definition of "Living Annuity" in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962) *GG* 32005, GN 290, 11 March 2009.

[8] Sections 7(7) and 7(8) of the Divorce Act 70 of 1979. See also, *Eskom Pension and Provident Fund v Krugel* 2012 (6) SA 143 (SCA); 2011 (3) BPLR 309 (SCA) 314; [2011] ZASCA 96 para 12; *Saunders v Eskom Pension Fund and Provident Fund* 2013 JOL 30305 (PFA).

[9] These provisions read, in relevant part:

'37A Pension benefits not reducible, transferable or executable

(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.

37B Disposition of pension benefits upon insolvency

If the estate of any person entitled to a benefit payable in terms of the rules of a registered fund (including an annuity purchased by the said fund from an insurer for that person) is sequestrated or surrendered, such benefit or any part thereof which became payable after the commencement of the Financial Institutions Amendment Act, 1976 (Act 101 of 1976), 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 be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors, notwithstanding anything to the contrary in any law relating to insolvency.'

[26] Regarding the question whether the capital invested in the living annuity formed part of the annuitant's divorce accrual, the Court said:[10]

'Having regard to the nature of the Glacier contract, we are of the view that its supposed capital value cannot be included as part of the appellant's accrual. The capital belongs to Sanlam, not the appellant. The appellant's only contractual right is to be paid an annuity in an amount selected by him within the permissible range specified by law. His right to receive any particular annuity instalment is subject to a condition of survivorship, ie that he should be alive on the date on which the next annuity instalment becomes payable. If he does not survive to the next date, the fate of the capital will be determined by whether or not he has nominated a beneficiary. The capital may or may not be paid to his estate, depending on whether or not there is such a nomination.'

Explaining the rationale for this view, the Court continued:[11]

'If the supposed capital value of the Glacier contract were included in the appellant's accrual, one would have the anomalous outcome that he would be obliged to pay half its value to the respondent in circumstances where he has no right to claim half the capital from Sanlam. He would have to satisfy this part of an accrual award from other assets. While in the present case the appellant may have other assets from which to make payments, the question is one of principle. If the Glacier contract is to be included in the appellant's accrual, it would have to be included in the accrual of any spouse with a comparable annuity contract, even though the contract were such spouse's only "asset". The outcome would be even more anomalous if the spouse's interest in the annuity contract was exempt from attachment in terms of s 37A of the Pension Funds Act, because then there would be nothing for the other spouse to attach in satisfaction of the accrual award.'

[27] As I have mentioned, the appellant relied, inter alia, on *Higgo* for his challenge against the above decision, in *ST v CT*. In that matter the full court held that on the facts of the case, the provider of a living annuity, Momentum Life Ltd, was not a beneficial owner of the capital that was paid to it by the annuitant's pension fund for

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[10] *ST v CT* fn 2 para 108.
[11] *ST v CT* fn 2 para109.

re-investment.[12] In the full court's view, the money was received by the insurer on the annuitant's behalf and for his benefit and was held by the insurer to cover its obligation to the pensioner until that obligation was entirely fulfilled.[13] As the full court put it:

'The money which had been transferred . . . to Momentum and used to purchase the "underlying assets was not merely the measure of the cash payments which Momentum was obliged to make" . . . but was the guarantee for payment to [the annuitant] of that to which he, and after his death his dependants, were entitled.'

[28] The applicant's reliance on *Higgo* is, however, beset by the simple problem that the case is distinguished by its own circumstances. As appears from the stated case set out in the judgment of the Cape Income Tax Special Court,[14] it concerned what was described in the stated case as a 'life annuity', but incorrectly referred to in the judgment as a 'living annuity'. The contract was concluded before the definition of a 'living annuity' was introduced into the Income Tax Act in 2008 and allowed the taxpayer a free hand throughout the year to manage the investment of the funds with the assistance of a financial adviser, whose fees he sought to set off against the income generated by the life annuity. That is impermissible with a living annuity under the present definition. The judgment is thus of no assistance in this case because it dealt with a contract that was not a living annuity of the type now regulated by the Income Tax Act. Its characterisation of the contract in issue cannot apply to the living annuities in this case. *Higgo* is, therefore, not authority for the applicant's contentions and does not assist her case.

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[12] At 196I.
[13] At 196H-197D.
[14] ITC 11135 (2005) 96 SATC.

[29] I turn to deal with the second arrow in the applicant's bow. This is the contention that the underlying capital of the respondent's living annuities constituted 'trust property' as envisaged in the Financial Institutions Act and therefore remained his asset held by Glacier by Sanlam on his behalf. This statute provides for and consolidates the laws relating to the investment, safe custody and administration of funds and trust property by financial institutions. It defines 'trust property', in s 1, as 'any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person … hereinafter referred to as the principal'. Chapter 1, ss 4.4 and 4.5 provide as follows in relevant part:

'A financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal.

Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company.'

'Financial institution' is defined in s 1 of the Financial Services Board Act 90 of 1990 and includes, in s 1(vi), any 'registered insurer' as defined in s 1(1) of the Insurance Act 27 of 1943.

[30] The only basis advanced by the applicant for her contention that the living annuities constituted trust property was the evidence of the respondent's expert witnesses; that the annuities were owned by the insurer which held them on behalf of the annuitant to provide him with regular annuity income. The applicant challenged the notion of owning something on behalf of another having regard to

the incidence of ownership or dominium, ie the right to possess, use, take the fruits of, destroy or alienate a thing.[15]

[31] But, the applicant's argument overlooked Mr Thyne's uncontested evidence that the underlying capital is owned by the insurer and is accordingly reflected in the insurer's balance sheet, and the annuitant is entitled only to the annuity income.[16] The annuity, and not the capital, is the asset that would be reflected in his or her balance sheet. And whilst the living annuity enjoys the protection provided by ss 37A and 37B of the Pension Funds Acts, s 1 of the Income Tax Act nonetheless stipulates that the amount of the annuity is not guaranteed by the person or fund from whom the annuity is purchased.

[32] This is replicated in the Glacier documents in which the insurer disavows any responsibility for the preservation of the underlying capital of the annuity and specifies that the 'underlying capital, and the income, is not guaranteed by Glacier in any way'. Therefore, there is no obligation on the insurer to repay the capital paid for the annuity, merely the agreed annuity. And in the case of a breach by the insurer, 'the cause of action of the annuitant will lie in damages for breach of contract', subject of course to the terms of the annuity.[17] This is by virtue of the contractual right to annuity payments held by the annuitant against the insurer.

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[15] Wille *Principles of South African Law* 5ed at194.

[16] This is stated as follows in the Technical Guide for Personal Portfolio Living Annuity, under the heading 'Maintenance orders':
Upon entering into a living annuity contract, the annuitant becomes entitled to an annuity income only. The annuitant is not entitled to the underlying capital providing the annuity. The annuitant's legal interest is therefore limited to the receipt of an annuity income on the basis stipulated in the annuity contract, but always subject to the relevant legislation, the most important being that the living annuity may not be commuted for a single payment other than in very limited circumstances as prescribed in terms of the Income Tax Act No. 58 of 1962. Accordingly, there is no statutory mechanism to dip into the underlying capital for a lump sum payment.'

[17] See, *ANZ Savings Bank Ltd v FCT* 25 ATR 369 at 392.

[33] It is also instructive to have regard to the nature of Sanlam. It is an unambiguously profit-driven business entity, which is required by law, inter alia, to:

'. . . maintain its business in a financially sound condition by –

(a) having assets;

(b) providing for its liabilities and capital adequacy requirement; and

(c) generally conducting its business,

so as to be in a position to meet its liabilities and capital adequacy requirements at all times.'[18]

All relevant indications are therefore that the insurer's relationship with the annuitants is purely contractual in nature.

[34] There is no indication in any of the legislation that applies to living annuities ie, the Pension Funds Act (in ss 37A and 37B), and the Income Tax Act (which defines a living annuity), the Financial Institutions Act itself and the Glacier contracts concluded between the parties, that the living annuities are regarded as 'trust property'. Neither is there even a hint of a fiduciary relationship between the parties in these legal instruments. The provisions of the Financial Institutions Act add nothing to the applicant's case.

[35] But do these findings disentitle the applicant from any claim whatsoever in regard to the respondent's annuities? I think not. In an analogous decision, *De Kock v Jacobson*,[19] the court determined whether a pension that the husband was receiving was an asset in the joint estate of a couple married in community of property. Upon his retirement, prior to the divorce, he ceased to be a member of the pension fund to which he had belonged and his pension interest was converted into a pension. His

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[18] Section 29 of the Long-term Insurance Act 52 of 1998.

[19] *De Kock v Jacobson & another* 1999 (4) SA 346 (W).

right against the pension fund had two components; a right to a cash payment (which he conceded fell within the community of property) and a right to monthly payments by way of pension.

[36] The court answered the question in the affirmative stating:

'The question then remains whether the right to the pension is part of the community of property. There is to my mind no reason in principle why the accrued right to the pension should not form part of the community of property existing between the parties prior to the divorce. Community of property is defined in Hahlo *The South African Law of Husband and Wife* 5th ed at 157 - 8 in these terms:

"Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares.'

See Grotius *Jurisprudence of Holland* 3.21.10.

A spouse's salary falls within the community of property. See *Hahlo (op cit* at 161), where he says:

"The joint estate consists of all the property and rights of the spouses which belonged to either of them at the time of the marriage or which were acquired by either of them during the marriage."

…

See also *Voet* 23.2.68, 69.'

[37] The court cited with approval two judgments. First was *Clark v Clark*,[20] in which the court accepted that a spouse's interest in a pension which had not yet accrued did indeed form part of the community estate, as did a pension right which had accrued. The second one was a case of this Court, *Commissioner for Inland Revenue v Nolan's Estate*,[21] which reaffirmed that the right to a pension is a right which vests in the parties to a marriage in community of property in undivided shares. The court in *De Kock* concluded that there was no logical or legal reason why

[20] *Clark v Clark* 1949 (3) SA 226 (D).
[21] *Commissioner for Inland Revenue v Nolan's Estate* 1962 (1) SA 785 (A) at 791C – E.

both the cash component and the accrued right to the pension should not form part of the community of property existing between the parties prior to the divorce.[22]

[38] I align myself fully with this reasoning and see no reason why it cannot extend to the case at hand. The respondent has a clear right to the investment returns yielded by his capital re-investment with Sanlam, in the form of future annuity income which he draws from the agreement. Such annuity income is evidently an asset which can be valued, as was testified to by Mr Immerman. The trial court actually took that evidence into account, correctly so in my view. But then it erroneously considered the annuity income relevant only for purposes of a maintenance claim. It should have found it to be an asset in the respondent's estate, which is subject to accrual, and allowed Mr Immerman to provide a valuation of that income stream. This it failed to do. The court a quo perpetuated the misdirection by dismissing the appeal. Thus, there is no basis to deviate from the judgment in *ST v CT*. The application for special leave to appeal must be granted and the appeal allowed so that the error may be righted.

[39] In the result the following order is made:

1 The application for special leave to appeal is granted and the appeal is upheld with costs.

3 The order of the Full Court of the Gauteng Division, Johannesburg is set aside and replaced with the following:

'(a) The appeal is upheld with costs.

(b) The value of the respondent's right to future annuity payments in respect of Personal Portfolio Living Annuities 002419307, 003491172 and 004662953 (the

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[22] At 349G.

living annuities) from Glacier Financial Solutions (Pty) Ltd, a member of the Sanlam Group is an asset in his estate for purposes of calculating the accrual in his estate.

(c) The matter is remitted to the trial court for the admission of evidence on the value of the respondent's right to receive future payments in respect of the living annuities.'

MML Maya

President of the Supreme Court of Appeal

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