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Calculating the bare dominium value of a property subject to successive usufructs

by Franscois van Gijsen
CFP, FPSA, MTP(SA)TM
Director Legal Services, Finlac Risk and Legal Management and Tax Consultant at VGV Attorneys

This article set out to determine who in the example, between the mother (as the first usufructuary) or the daughter [as the contingent (or succeeding) usufructuary] could be said to be the person "entitled" to the usufruct, as envisioned by section 5(1)(f)(i) of the Estate Duty Act when calculating.

There is a well-known practice among estate planners whereby the estate owner is advised to bequeath the *bare dominium* in a property to the heir or legatee in his estate subject to successive usufructs. The prevalence of this scheme is such that the Minister of Finance, as he was at the time, Trevor Manuel, announced measures to close the scheme in the Budget Review of 2009.[3] The idea behind such a bequest is an attempt to save estate duty in the estates of the estate owner and the first usufructuary.

The scheme is made possible because the value of a usufruct or other limited interest is, for estate duty purposes, tied to the period to which the immediate successor to the right is entitled to the enjoyment thereof.[4] Traditionally, the first of these usufructs would be granted to the usufructuary for life, while the second, or succeeding usufruct, is granted to the usufructuary for a limited period only, e.g. for a one- or a two-year period. Ordinarily the recipient of the *bare dominium* is a family trust or a child of the estate owner, while the first usufructuary is the estate owner's spouse and the succeeding usufructuary is a child or some other descendant of the estate owner.

The saving in the estate owner's estate, if it is to be found, is usually the result of the deduction allowed for bequests to spouses contained in section 4(*q*) of the Act.[5] The proposed saving in respect of the first usufructuary results from the fact that the value of the usufruct to be included in his or her estate is to be calculated, in terms of section 5(1)(*b*) of the Act, on the lesser period of time for which the right of enjoyment is received by the second, or succeeding, usufructuary.

But consider the following scenario: John Jr inherited a property from his father, John Sr, which property was made subject to the lifelong usufruct of his mother, Janet, and subject further to the succeeding usufruct of his sister, Margaret, for a period of two years. John Jr, as the *bare dominium* holder in the property, passes away before both his mother and his sister. How does one calculate the value of the *bare dominium* in John Jr's estate? (The question also highlights a mistake that is frequently made by estate planners when advising their clients, namely to assume that the parties and beneficiaries involved in such a plan will pass away in a specific order).

It is suggested that the relevant section of the Act to be applied is section 5(1)(*f*), which determines that where property is subject to a "usufructuary or other like interest" the value of property to be included in a deceased person's estate is the amount by which the fair market value of the property exceeds the value of such interest. This can be restated in the following formula: *Bare dominium* value = fair market value of property less value of usufruct.

This value, according to subsection 5(1)(*f*)(i) and provided that the Commissioner does not apply a lower rate in terms of section 5(2), is to be calculated

by capitalizing at twelve per cent, the annual value of the right of enjoyment of the property subject to such usufructuary interest over the expectation of life of the person entitled to such interest, or if such right of enjoyment is to be held for a lesser period than the life of such person, over such lesser period.

Ordinarily, assuming for the moment that the property was made subject only to the lifelong usufruct of Janet (with no succeeding usufruct passing to Margaret), the calculation would look as follows:

On the death of John Jr the fair market value of the property is R1 500 000. Janet at the time is aged 63 (64 a.n.b. – female).

Usufruct value

Annual value	=	0,12 × R1 500 000	=	R180 000
PV of R1 p.a. over Janet's life expectancy is 6,95537				
Usufruct	=	R180 000 × 6,95537		
	=	R1 251 966		

***Bare dominium* value**

Bare dominium	=	R1 500 000 – R1 251 966	=	R248 033,40

However, to answer the question resulting from the scenario above, we need to determine: Who between mother and daughter can be said, for the purpose of section 5(1)(*f*)(i), to be entitled to the usufructuary interest at the time of John's death? The question regarding the entitlement is obviously important in respect of the life expectancy of the usufructuary concerned and consequently in respect of the value that is placed on R1 capitalised over that person's life expectancy. Consider the difference where the usufructuary at the time of John's death holds the right for two years only.

On the death of John Jr the fair market value of the property is R1 500 000. At that time the usufructuary, Margaret, is aged 33 (34 a.n.b – female). However, she has the usufruct for two years only. The calculation now looks like this:

Usufruct value

Annual value	=	0,12 × R1 500 000	=	R180 000
PV of R1 p.a. over two years is 1,6900				
Usufruct	=	R180 000 × 1,6900		
	=	R304 200		

***Bare dominium* value**

Bare dominium	=	R1 500 000 – R304 200	=	R1 195 800

The question as to which one of the two usufructuaries are entitled to the property for the purposes of section 5(1)(*f*), is particularly important in the context of the *bare dominium* holder's estate, as the short period of time for which the right is granted results in the value of the usufruct being less and the *bare dominium* value being much higher.

This article will endeavour to determine who of the two potential usufructuaries are, for the purposes of section 5(1)(*f*), entitled to the usufruct, by considering:

- The nature of rights in property;
- The nature of the rights of heirs and legatees to their inheritance; and
- The contingent nature of the succeeding usufructuary's rights.

The nature of rights in property

Rights in property can be distinguished between "real rights" and "personal rights". A personal right is a right entitling a person to claim against another that some act be done or that the other refrain from doing some act. If the right is enforceable against the owner of property, not in his capacity as owner but in his personal capacity, it is a personal right. If a right is enforceable against a particular owner of

property in his capacity as owner, and therefore also against his successors in title to that property, it is a real right.[6]

The most complete of all the real rights in land is absolute ownership, which entitles the owner to use, possess, alienate and even destroy what he owns – full *dominium*. However, it is possible for absolute ownership to be broken up into the various real rights of which it is comprised. Most of these constituent rights can be owned by a person other than the owner and thus it diminishes the owner's rights of ownership. It is said to subtract from the *dominium*. The owner of land subject to a servitude holds such a diminished form of ownership, for it can be exercised only subject to the rights of the servitude owner.[7]

A usufruct is a personal servitude that gives the usufructuary a limited real right to use the property of another and to use the fruits thereof for either a defined period or for the life of the usufructuary, and with the concomitant duty to eventually return the property to the owner thereof, without causing any diminution or deterioration thereof. Further, it is trite law that more than one usufruct cannot simultaneously exist over the same property (this is not to say that two people, such as a husband and wife, cannot jointly own a usufruct over a property).

Also, it is a requirement in terms of section 63(1) of the Deeds Registrations Act[8] for the creation of a usufruct over immovable property, that it must be registered in the Deeds Registry. Van der Walt and Pienaar[9] states the following in this regard:

> Die verskil tussen 'n serwituut wat deur registrasie ontstaan het en 'n ongeregis-treerde (serwituut) ooreenkoms is dat die gebruiks- en genotsbevoegdehede in die eersgenoemde geval voortspruit uit 'n beperkte saaklike reg en dus 'n las op die saak teen die eienaar, alle daaropvolgende eienaars en alle derdes afdwing-baar is, terwyl dit in die laasgenoemde geval voortspruit uit 'n vorderingsreg en daarom slegs teen die eienaar persoonlik (en nie daaropvolgende eienaars nie) afdwingbaar is.

Furthermore, section 66 of the Deeds Registries Act forbids the registra-tion of any personal servitude of usufruct, *usus* or *habitatio* extending beyond the lifetime of the *person* in whose favour it is created. A transfer or cession of such a personal servitude to any person other than the *owner* of the *land* encumbered thereby, may also not be registered.

From the above, it seems clear that Margaret, as the succeeding usufructuary, cannot yet have anything more than a personal right to, upon the death of the first usufructuary, claim registration of the usufruct in her name for the following reasons:

- the right is not registered in her name and as such does not, yet, exist as a real right;
- the Deeds Registries Act specifically forbids its registration in her name, quelling any claim that she has an existing real right; and
- it cannot be argued that she and the first usufructuary has a simultaneous real right – firstly because it is a legal impossibility and, equally as important, because of the wording of the testator's Will in which he gave a usufruct to his wife and a succeeding usufruct to his daughter.

The nature of the rights of heirs or legatees to their inheritance

An heir or a legatee in the modern law of succession, in contrast with the Roman and Roman Dutch Law, does not acquire a real right in property, merely by reason of his appointment as such in the deceased's Will.

However, it has in the past been accepted by our courts that an heir or legatee acquired *dominium* in the property bequeathed. In the case of *Rosenberg v Dry's Executors*[10] the Appellate Division held that the heirs in terms of a joint, massed Will of spouses who were married in community of property, acquired a real right to the half-share of the first-dying spouse, but only a personal right to the half-share of the survivor. This decision that heirs acquire *dominium* of the property bequeathed without transfer to them, was also later approved in the case of *Receiver of Revenue v Hancke*.[11]

However, *Meyerowitz*[12] argues that these judgments do not take sufficient cognisance of the fact that the position of an heir under our modern system is very different from that of an heir under Roman Law. He points to the fact that the executor today, in as far as (1) the authority to deal with the assets of the estate, (2) to deliver ownership of estate property, and (3) where the liquidation of the estate is concerned, has taken the place of the heir and this is also seen in later decisions of the Appellate Division.

In the case of *CIR v Estate Crewe*[13] Centlivres JA says:

> But this cannot mean that the heirs are vested with the ownership of specific assets in the estate, for what is vested in the heirs is the right to claim from the deceased's executors at some future time, after confirmation of the liquidation and distribution account, satisfaction of their claims under the account.

Also, in *Greenberg v Estate Greenberg*[14] where it was said that under the modern system of administration of estates, when a testator bequeaths property to a legatee he does not acquire *dominium* immediately upon death, but a vested right to claim from the testator's executors at some future date delivery of the legacy, ie after confirmation of the liquidation and distribution account in the estate of the testator. If, for instance, immovable property is bequeathed, the legatee does not acquire *dominium* until it is transferred to him by the executor; if it has to be sold to pay debts, the legatee may never acquire *dominium*.

The principle was once again confirmed in the case of *Borman en De Vos, NNO v Potgietersrusse Tabakkorporasie Bpk en 'n Ander*:[15]

> Eers na die dood van die testateur en na bekragting van die boedelrekening verkry 'n bevoordeelde 'n vorderingsreg teen die eksekuteur om sessie van die bemaakte vorderingsreg te eis.

It seems then, based on the above, that Margaret as the succeeding usufructuary, does not as yet have any real right in the property, or in this case the rights in property bequeathed to her.

The conditional nature of the succeeding usufructuary's right

The above of necessity leads one to the conclusion that the rights of Margaret, the succeeding usufructuary, is contingent upon the fact that she must be alive to claim her rights at the time that her mother, Janet, passes away. Should she not be alive at such time, then the bequest to her would fail. As such, she has no vested right in the property.

HS Nel[16] deals with sections 63(1) and 66 of the Act[17] and specifically with the creation of successive usufructs in terms of a Will in some detail. He namely states:

> The contingent usufruct cannot be registered as such because there is no provision in the Act for registering it – it is contingent and may never materialize. Coupling it with the registration of A's usufruct (A being Janet, the mother, in our example above) would infringe on section 66 as regards extending a usufruct beyond the lifetime of the registered usufructuary.

In order for Margaret to claim delivery to her of the usufruct, she has to be alive at the time of the death of her mother, Janet, the first usufructuary. Only then can she claim from her brother, the *bare dominium*-holder, cession of the usufruct in her name. Should she not live to see her mother's death, then she will have had no real right in property and her personal right having been contingent upon her being alive to claim performance in terms thereof (which performance would give rise to a real right in property, namely the usufruct), will die with her.

Conclusion

This article set out to determine who in the example, between the mother (as the first usufructuary) or the daughter [as the contingent (or succeeding) usufructuary] could be said to be the person "entitled" to the usufruct, as envisioned by section 5(1)(*f*)(i) of the Estate Duty Act[18] when calculating the value of the *bare dominium* over the property in the *bare dominium*-holder John's estate, should John as the *bare dominium*-holder have predeceased both his mother Janet, as the usufructuary and his sister Margaret, the contingent usufructuary?

From the above, I believe, it is clear that the daughter, as the contingent (or succeeding) usufructuary cannot be deemed to be the person "entitled" to the usufruct as intended by the Estate Duty Act, because:

- In terms of our law of succession she has no real right vesting in her;[19]
- the Deeds Registries Act, in section 63(1), expressly requires registration of a servitude in the Deeds Registry as a requirement for the creation thereof;
- the Deeds Registries Act, in section 66 thereof, expressly prohibits regis-tration of the usufruct in her name before the original usufructuary passes away; and
-

exercise thereof on her still being alive when Janet, the first usufructuary, passes away.

This leaves me to conclude that the only person who, in the circumstances envisioned by the example above, can be said to be "entitled" to the usufruct at the time of the *bare dominium*-holder's death, would be Janet. The correct way of calculating the value of her usufruct, for the purposes of determining the value of the *bare dominium* in the estate of John Jr, would be to capitalise at 12% the annual value of the right of enjoyment of the usufruct, over her life expectancy at the time of John's death.

Footnotes

3 Annexure C: Summary of additional tax proposals for 2009/10: p 185 – The proposed amendments to the Act were not proceeded with. The writer is of the opinion that this is because the scheme does not result in a loss of revenue to the fiscus by reason thereof that the use of limited interests have the effect of reducing the base cost of an asset for CGT purposes. The CGT effect of this scheme will be discussed in a follow-up article.

4 Sections 5(1)(*b*) and (*f*) of the Estate Duty Act, 45 of 1955.

5 Estate Duty Act, 45 of 1955.

6 Elliot: *The South African Notary*. Sixth ed. 1995, Chapter 12.

7 Jones on *Conveyancing in S.A.* Fourth ed. 1995, Chapter 10 – with reference to *Lief NO v Dettmann* 1964 (2) SA 252 (A) and *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O).

8 47 of 1937.

9 *Inleiding tot die Sakereg*. 1st ed. 1996, Chapter 17, p 321.

10 1911 AD 679.

11 1915 AD 64.

12 *Meyerowitz Administration of Estates and Estate Duty 2010* at 18.12.

13 1942 AD 364 at 383.

14 1955 (3) SA 361 (AD).

15 *Borman en De Vos, NNO en 'n Ander v Potgietersrusse Tabakkorporasie Bpk en 'n Ander* 1976 (3) SA 492C (A).

16 Jones *Conveyancing in South Africa*. pp 213 and 214.

17 Deeds Registries Act, 47 of 1937.

18 45 of 1955.

19 Refer the case of *Greenberg* referenced above.