



**REPORTABLE**

CASE NO: SA 42/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**LUCIA WILHELMINE GETRUD EGERER**

**First Appellant**

**MANFRED EGERER**

**Second Appellant**

**MANFRED EGERER N.O**

**Third Appellant**

and

**EXECUTRUST (PTY) LTD**

**First Respondent**

**ALWYN PETRUS VAN STRATEN**

**Second Respondent**

**SARAH SUSAN ELIZABETH STAHL**

**Third Respondent**

**THE MASTER OF THE HIGH COURT OF NAMIBIA**

**Fourth Respondent**

**LIEZEL LOUWRENS**

**Fifth Respondent**

**VINCENT EDWIN HOLE**

**Sixth Respondent**

**MATHILDE APOLLONIA CHRISTIANA KAUTORORA**

**Seventh Respondent**

**CORAM: DAMASEB DCJ, MAINGA JA and HOFFJA**

**Heard:** 12 October 2017

**Delivered:** 06 February 2018

**Summary:** A wealthy testator (the late Mr Wolfgang Albrecht Emil Egerer since deceased) had, by contract with his wife, created a trust naming the wife (the first appellant), his sons and the grandchildren as trust capital beneficiaries. The trust nominated him and the first appellant as the first co-trustees. The late Mr Egerer by his last will and testament also nominated first to third respondents as additional trustees to assume the office of trustee after his death, purporting to act in terms of a power contained in the trust deed stating that he could 'appoint trustees of his choice in his will or during his lifetime to act in the place of a deceased trustee or to fill a vacancy' arising from resignation or removal by fellow trustees or a trustee becoming disqualified in circumstances stated in the trust deed 'and appoint additional trustees'.

The late Mr Egerer in his will instituted the trust as heir to the residue of his estate. He also in the will made monetary awards (the special bequests) to certain individuals (third, sixth and seventh respondents) to be paid from the 'capital' to be realised after the assets of the trust had been reduced to cash.

The nomination of the trustees and the special bequests were challenged by the appellants in the High Court as being *ultra vires* the trust deed. The nomination of the trustees was challenged on the ground that the testator exceeded his power under the trust deed which only permitted him to nominate one replacement trustee and that

although the empowering provision stated that he could appoint 'trustees' (in the plural), in context that meant he could appoint one trustee only to fill a vacancy arising either through death, resignation or if a trustee became disqualified or removed in the circumstances set out in clause 5.6 of the trust instrument.

The special bequests were impugned on two alternative grounds. The first, that the persons for whose benefit they were made were not in the employ of the Egerer Family Trust and therefore failed on that ground alone - the testator having stipulated that the benefit for the sixth and seventh respondents as employees only applied if on the date the trust terminated they were still in the employ of the trust; in the case of the third respondent if she survived the date of termination of the trust and on the trust's termination she is still its trustee. Alternatively, that the late Mr Egerer was not competent under the trust instrument to assign trust capital to persons other than those named as 'capital beneficiaries' under it.

The High Court dismissed the relief sought on either ground, with the costs of all parties to the litigation to be borne by the estate of the late Mr Egerer. The appellants appealed the order on the substantive relief while the respondents cross-appealed the order of costs on the ground that the estate was not a party to the proceedings and should not have been condemned in costs.

On appeal, held that the power to appoint trustees in the trust deed was wide enough to empower the testator to appoint additional trustees and not just one trustee to fill a

vacancy. Appeal dismissed in that respect. The appeal in respect of the special bequests to third, sixth and seventh respondents allowed on basis that on the 'vesting date' all assets of the trust to be reduced to cash would constitute 'trust capital' over which the testator no longer retained control and thus could not alienate as he pleased as he had divested himself over it.

As for the cross-appeal, held that although the late Mr Egerer's estate was not formally cited as a party, its centrality to the dispute was referenced in the founding affidavit of the first appellant *a quo*, demonstrating that the dispute related to the estate and was the product of the testator's will. Over all, justice of the case demanded that the costs of all the parties, both in the High Court and on appeal, be paid from the late Mr Egerer's estate.

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## APPEAL JUDGMENT

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DAMASEB, DCJ (MAINGA JA and HOFF JA concurring):

### Introduction

[1] A testator, the late Mr Wolfgang Albrecht Emil Egerer (Egerer Senior), died on 21 January 2015. He was married out of community of property to Mrs Lucia Wilhelmine Getrud Egerer (the first appellant). Egerer Senior had amassed a vast personal estate on our shores, comprising all manner of commercial interests, including a hotel called Thule. Apparently, Egerer Senior owed a debt of gratitude to certain individuals (third, sixth and seventh respondents) who had at one or other stage assisted him in building

up this estate, perhaps outmatched only by the wish to care for his wife, and his desire to make sure that she (their two sons and grandchildren) enjoy a comfortable standard of living after his death. By all appearances, Egerer Senior was also concerned about ensuring that he did not leave the management of the inheritance and welfare of the first appellant and his offspring entirely in their hands.

[2] On one level, the case is about whether the arrangements (through a trust) made by Egerer Senior for the management of the inheritance he wished to leave behind for the first appellant and his offspring had the effect he wanted to achieve. On the other level, it is about whether his desire to strike a balance between altruism towards third, sixth and seventh respondents on the one hand, and properly providing for his family on the other, must prevail.

#### The parties

[3] The first appellant is Egerer Senior's surviving spouse. The second appellant is Egerer Senior's surviving son. As in the court *a quo*, in this appeal, the third appellant, acts *pro forma* in his capacity as the natural guardian of Egerer Senior's surviving granddaughter. The first, second and third appellants will be referred to as the 'appellants'. The first respondent was nominated in Egerer Senior's last will and testament as an executor of Egerer Senior's estate. It was also nominated as a trustee for the Egerer Family Trust in that will. Soon after Egerer Senior's demise, in accordance with the latter's testamentary wishes, the second respondent was appointed by the Master of the High Court as an executor of Egerer Senior's estate and a trustee

of the Egerer Family Trust. The third respondent was similarly appointed executrix of Egerer Senior's estate and a trustee of the Egerer Family Trust. In addition, the third respondent is a beneficiary of a special bequest made by Egerer Senior in his last will and testament.

[4] The Master of the High Court was cited as the fourth respondent but no relief was sought against her. The fifth respondent is the accountant of the Egerer Family Trust. The appellants sought her assumption of office of trustee of the Egerer Family Trust on the premise that the nomination of the first to third respondents as trustees was incompetent and that, by default, as envisaged in clause 5.2 of the trust deed creating the Egerer family Trust, she should become the second trustee.<sup>1</sup> The sixth and seventh respondents were erstwhile employees of businesses owned by Egerer Senior and to whom he made monetary bequests in his last will and testament.

#### Basic facts

[5] The case is primarily about the interpretation of the trust deed constituting the Egerer Family Trust, and Egerer Senior's last will and testament. In so far as it is necessary to deal with the facts, the material facts are common cause and I will set them out next.

[6] On 21 January 1993, Egerer Senior as founder and donor, by contract between him and the first appellant, created a family trust (the Egerer Family Trust). Therein were nominated (and accepted) himself and the first appellant as the first co-trustees.

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<sup>1</sup> See more fully paragraph 15 below and fn 2.

On 2 December 2014, Egerer Senior executed his last will and testament' (the will) in which he addressed his mind to three important matters: The first was designating professional executors (first, second and third respondents) for his estate in the event of his death. The second was designating trustees for the Egerer Family Trust. The third was to make bequests to a chosen group of individuals. It is the last two actions on Egerer Senior's part that provoked the ire of his immediate family (especially the first appellant) resulting in the present litigation.

*Salient features of the Egerer Family Trust*

[7] I will now set out the salient features of the Egerer Family Trust in so far as it concerns the present dispute. The Egerer Family Trust deed creates two classes of beneficiaries: *capital beneficiaries* and *income beneficiaries*. It provides that the capital of the trust will devolve during the currency or termination thereof in terms of the provisions of the trust deed, and that the beneficiaries shall be selected by the trustees in their discretion from the ranks of Egerer Senior and the first appellant, their children and grandchildren, any trust created for the benefit of the above, and finally the testate or intestate heirs of Egerer Senior if none of the classes of beneficiaries named above are alive or in existence on the termination of the trust.

[8] The trust deed creates a 'trust fund' from which to meet the needs of the 'income' and 'capital' beneficiaries. The 'trust fund or trust capital' is defined as 'the capital of the trust, consisting of the trust fund and including any part of the net income which is not distributed and is accumulated to the capital but after deducting the aggregate of – (a)

the liabilities of the trust, both actual and contingent; and (b) the sum of all provisions for renewals or replacement of assets and for liabilities (actual or contingent) the amount of which cannot be determined with substantial accuracy’.

[9] The trust instrument reserves for Egerer Senior certain powers exercisable by will. He could by will determine the ‘vesting date’ (which is the date of termination of the trust) with respect to the trust or portion thereof, and prescribe the formula for the allocation and distribution of the trust fund amongst the capital beneficiaries on the vesting date. The deed goes on to state that ‘only the capital beneficiaries, and no one else, shall benefit from the powers conferred’ on the founder to determine the vesting date and to prescribe the formula for the distribution of the trust fund. In the event that the founder does not in his will prescribe the formula for the distribution of the trust fund amongst the beneficiaries, the deed prescribes a default formula for the distribution of the trust fund to only the ‘beneficiaries’ as defined in it.

#### *The will*

[10] Egerer Senior settled the will on 2 December 2014. In it, he addresses matters which have a bearing on the Egerer Family Trust. In clause 2.6 he nominated first to third respondents as trustees of the Egerer Family Trust. He also named certain persons the third, sixth and seventh respondents as beneficiaries under his estate. Both those provisions of the will are challenged by the appellants as being in conflict with the trust deed creating the Egerer Family Trust.



### Defining the dispute

[11] What powers Egerer Senior enjoyed as regards the appointment of the trustees of the Egerer Family Trust is one of the central disputes in the case. It is necessary, therefore, to comprehensively set out the applicable provisions of the trust deed:

‘5.2 There shall at all times be a minimum of TWO (2) trustees in office, provided that if there is only one trustee as a result of the resignation or death of a co-trustee, the remaining trustee will be authorized to exercise all the powers of trustees for the maintenance and administration of the trust fund until such time as another trustee has been appointed, which appointment the trustee so in office shall make within THIRTY (30) days of the resignation or death of his co-trustee. Should he fail to do so, the auditor or accountant of the trust for the time being, shall *ipso facto* become a second trustee, and shall either remain in office or appoint a suitable person to succeed him. While only one trustee is in office he shall not be entitled to pass a valid resolution for the distribution of the trust fund or portion thereof or for the variation of the trust deed.

5.3 The acting trustees shall have the right to nominate and appoint additional trustees of their own choices subject to the condition that WOLFGANG ALBRECHT EMIL EGERER shall be empowered to:

5.3.1 appoint trustees of his choice in his will or during his lifetime to act in the place of a deceased trustee or to fill a vacancy which has occurred by virtue of the provisions of paragraph 5.6 and appoint additional trustees;  
and

5.3.2 appoint a nominee of his choice in his will to exercise all or any of the powers vested in him in terms of paragraph 5.3...’ (Emphasis added).

[12] The provisions in which Egerer Senior makes monetary awards to the third, sixth and seventh respondents (the special bequests) are recorded in the will as follows:

‘2.9 I direct that all the assets of the EGERER FAMILY TRUST ... shall be reduced to cash to best advantage upon the death of my spouse LUCIA WILHELMINE GERTRUD EGERER. The trust shall terminate after all assets have been reduced to cash and the capital as it (sic) exists shall be awarded as follows:

2.9.1 A cash amount as a special bequest of N\$ 1,000,000 (One Million Namibian Dollars) to VINCENT EDWIN HOLE, subject to the conditions that he survives the date of termination of the trust and that he still is an employee of the trust at such termination date of the said trust. Failure of compliance of these conditions will cause this special bequest to lapse at which instance it will form part of the residue of the trust:

2.9.2 A cash amount as a special bequest of N\$ 500,000 (five Hundred Thousand Namibian Dollars) to MATHILDE APOLLONIA CHRISTIANA KAUTORORA (NEE BASSON WITH ID 69092300772), subject to the conditions that she survives the date of termination of the trust and that she still is an employee of the trust at such termination date of the said trust. Failure of compliance of these conditions will cause this special bequest to lapse at which instance it will form part of the residue of the trust.

2.9.3 A cash amount calculated at 3.5 % on the gross value of all the assets of the trust, after realization thereof as special bequests to SARAH SUSAN ELIZABETH STAHL (ID67012000252), subject to the conditions that she survives the date of termination of the trust and that she still is an appointed trustee of the trust at such termination date of the said trust. Failure of compliance of these conditions will cause this special bequest to lapse at which instance it will form part of the residue of the trust.’ (Underlining supplied for emphasis).

[13] Clauses 12 and 13 of the will direct the trustees to deal with the trust capital and income in their discretion; that until the death of the first appellant the income and capital of the trust be applied for the maintenance or other benefit of the first appellant - even if it causes the trust funds to be depleted prior to the first appellant's death. Egerer Senior specifically directed that of his many assets, the trustees should where possible continue to trade with Hotel Thule until in their discretion they wish to sell the business, liquidate it or stop trading. He expressed the 'wish' that in the event that Wolfgang Balzar resigns from the employment of Hotel Thule, he 'strongly recommend' that the trustees sell the business of the Hotel or stop trading with it. He then specifically stated in respect of Hotel Thule:

'I further direct that Hotel Thule will also be reduced to cash to best advantage upon the date of termination of the [Egerer Family Trust], if not already sold or closed down. I direct that my trustees shall award the amount of 3.5% ...to Wolfgang Balzar ...upon the date Hotel Thule is reduced to cash to best advantage, calculated on the net share value of my shares in Ploen Development (Pty) Ltd.' (My emphasis)

[14] The consequence is that in the will, Egerer Senior had appointed more than one additional trustee of the Egerer Family Trust, and bequeathed financial benefits to persons who do not fall under any class of beneficiary (capital or income) as defined in the trust deed.

### The pleadings

#### *Challenge to appointment of additional trustees*

[15] The first appellant (as first applicant *a quo*) deposed to an affidavit on behalf of all the applicants. The notice of motion sought an order that:

- (a) the nominations and appointments of Executrust (Pty) Ltd (the first respondent), Mr Alwyn Petrus Van Straten (the second respondent) and Ms Sarah Susan Elizabeth Stahl (the third respondent) as trustees of a Trust known as the Egerer Family Trust are void;
- (b) the first applicant and the fifth respondent are the only current trustees of the Egerer Family Trust'.<sup>2</sup>

### *Challenge to the special bequests*

[16] The notice of motion seeks an order that 'clause 2.9, 2.9.1, 2.9.2 and 2.9.3 of the will of the late Wolfgang Albrecht Emil Egerer (dated 2 December 2014), and the "special bequests" therein contained, are unenforceable, invalid and of no force and effect.' During the hearing of the appeal, when asked by the court why paragraph 2.9 should be declared void, Mr Farlam SC accepted on behalf of the appellants that such relief is misplaced. He accordingly abandoned that part of the relief.

### *The affidavits*

[17] In the founding affidavit the first appellant alleges that the impugned testamentary stipulations have the effect of amending the provisions of the trust deed

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<sup>2</sup> Paragraph (b) of the relief being premised on a provision in the trust deed which provides that '. . . there shall at all times be a minimum of TWO (2) trustees in office, provided that if there is only one trustee as a result of the resignation or death of a co-trustee, the remaining trustee will be authorized to exercise all the powers of trustees for the maintenance and administration of the trust fund until such time as another trustee has been appointed which appointment the trustee so in office shall make within THIRTY (30) days of the resignation or death of his co-trustee. Should he fail to do so, the auditor or accountant of the trust for the time being, shall ipso facto become a second trustee, and shall either remain in office or appoint a suitable person to succeed him.' (My underlining).

which were binding on the testator and which, to be effective, had to comply with clause 20 of the trust deed which provides that:

‘The trust deed may be amended by agreement between the founder and trustees and, if the founder is no longer alive, by agreement between the trustees and the beneficiaries.’

[18] The basis upon which the appellants sought the above relief in the court *a quo*, is that Egerer Senior misconstrued the trust instrument when he, in the will, nominated first, second and third respondents as trustees of the Egerer Family Trust; and made the special bequests. In a nutshell, according to the appellants, the implicated testamentary stipulations by Egerer Senior amount to an invalid unilateral change of the relevant provisions of the trust deed.

[19] Regarding the first issue, placing reliance on clause 5.3.1 of the trust deed, the appellants contend that, properly construed, the clause did not permit such nominations and appointments. The argument goes that the clause precluded Egerer Senior from appointing more than one trustee as only one vacancy was created by his demise.

[20] With respect to the second issue, the appellants contend that the special bequests stood to be disallowed because, in the first place, they were *ultra vires* the provisions of the trust as the intended recipients thereof were not (a) beneficiaries as defined in the trust deed and therefore not entitled to any benefits which were reserved for trust beneficiaries, and (b) were not, at the time of the conclusion of the trust, ‘still employed by the trust’ in the case of the sixth and seventh respondents.

[21] According to appellants, under clause 5.3.1 of the trust instrument, Egerer Senior could only replace one trustee that has died, resigned or become disqualified or removed as envisaged in clause 5.6 of the trust instrument. As for the special bequests, they maintain that the stipulations in the will conflict with the trust deed in that their purport was to benefit the third, sixth and seventh respondents from trust capital when they did not qualify as trust beneficiaries.

[22] In the answering affidavit deposed to by the second respondent and with which the other respondents make common cause, the first to third respondents maintain just as they did in the High Court that clause 5.3.1 of the trust deed, properly construed, permitted Egerer Senior to make their disputed nomination as trustees of the Egerer Family Trust.

[23] The case for the third, sixth and seventh respondents whose bequests are challenged, is that the special bequests made to them reflect Egerer Senior's intention to benefit them by imposing a *modus* subject to which the trustees of the Egerer Family Trust were to accept the institution of the trust under clause 5.2 of the will as heir to the residue of Egerer Senior's estate.

#### The High Court's approach

[24] The High Court dismissed all the relief sought in the notice of motion. It found that clause 5.3.1 of the Egerer Family Trust deed did not preclude Egerer Senior from

appointing the first to third respondents as trustees. It also held that it was competent for the testator to make the special bequests. As regards costs, it held that the costs of the application should be borne by the estate. Next, I briefly set out the High Court's reasoning for the decisions reached.

*Nomination of trustees in the will*

[25] In the court below, Ueitele J found that the purpose of the power to appoint trustees in the trust deed was to ensure that the Egerer Family Trust at all times has a minimum of two trustees in office; and that the clause makes plain that in addition to appointing a replacement trustee, the trustees in office may appoint additional trustees. The learned judge was satisfied that clause 5.3.1, if restructured through paragraphing to facilitate conceptualisation (a drafting technique attributable to Justice Crabbe<sup>3</sup>), contemplates one of three possible scenarios: (a) that Egerer Senior could by will nominate and appoint trustees of his choice to act in the place of a deceased trustee or to fill a vacancy arising from a trustee resigning or becoming disqualified or removed, (b) that Egerer Senior could during his lifetime nominate and appoint trustees of his choice to act in the place of a deceased trustee or to fill a vacancy arising from a trustee resigning or becoming disqualified or removed, and (c) in addition to the power he had to appoint a replacement trustee in his will or during his lifetime, Egerer Senior had the power to appoint additional trustees.

[26] The learned judge concluded that the clause in question was broader than simply Egerer Senior being able to appoint a replacement trustee. He said:

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<sup>3</sup> Crabbe VCRAC. *Crabbe on Legislative Drafting* 2<sup>nd</sup> Edition p 49. Also see Thornton G.C. *Legislative Drafting*. 4 ed p 61-65 where the learned author extols the virtues of paragraphing.

'Since the power to appoint a replacement trustee can be exercised in his will or during his lifetime the power to appoint additional trustees can also be exercised in a similar way. . . The precise modality of appointing the additional trustees by the late Egerer is not clear from the trust deed, but it cannot be said that on a reading of the trust deed the late Egerer was precluded from appointing additional trustees in his will.'

### *The will*

[27] Ueitele J found that the special bequests were valid and enforceable. He held that although under the Will the Egerer Family Trust inherited all the moveable and immovable assets that belonged to Egerer Senior at the time of his death, that was subject to the interest acquired by the third, sixth and seventh respondents arising from the special bequests which amounted to a permissible *modus* which the court held to be a 'qualification or obligation added to a gift or a testamentary disposition'.<sup>4</sup>

[28] As for costs, the learned judge held that the matter involved the interpretation of a will and that the normal rule was that the estate must bear the costs of the parties unless there are special considerations warranting a contrary award. He relied on *Cumings v Cumings* 1945 AD 201 and concluded that in the case before him such special considerations did not exist.

### Scope of the appeal

[29] The appellants appeal against the court a *quo*'s dismissal of their application with costs. What falls for determination in that regard is whether, on a proper construction of

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<sup>4</sup> Relying on Jamneck, *The Law of Succession in South Africa* 2<sup>nd</sup> ed p 134 and Corbett et al, *The law of Succession in South Africa* 2 ed p 448.



the Egerer Family Trust deed and the will, firstly, the nominations and appointments of first to third respondents as trustees was competent; and secondly, whether or not the special bequests are valid. The respondents cross-appeal the order that the costs of the application in the High Court be paid from Egerer Senior's estate. The basis of the cross-appeal is that:

- (a) the court *a quo* granted costs against a party (the estate) that was not party to the proceedings,
- (b) the court *a quo*'s not having ordered that costs follow the result, in light of the respondents' undertaking that costs against the appellants, jointly and severally, shall only be executed by the respondents against second appellant; and
- (c) the court *a quo*'s incorrect finding that the respondents' counsel made common cause that costs be borne from the late Egerer Senior's estate.

## Discussion

### A. *Nature of a trust in our law*

[30] A trust is a legal relationship created by a donor or trust founder in terms whereof he or she places assets under the control of trustees - either *inter vivos* or in a will. The assets that the founder bequests to beneficiaries under the trust do not belong to him or

her, but are held by the trustees for the benefit of trust beneficiaries.<sup>5</sup> Therefore, the defining characteristic of a trust is the transfer of ownership and control of trust assets from the donor or founder to one or more trustees who hold those assets not in their personal capacities or for their personal benefit, but for that of trust beneficiaries. Trust beneficiaries enjoy the benefits given under the trust even if the founder or one of the trustees dies.

[31] The constitution of a trust is the trust deed which sets out the framework in which the trust must operate. The trustees of a trust owe a fiduciary duty to the trust beneficiaries and they must administer the trust solely for the benefit of the trust beneficiaries. (*Sackville West v Nourse & Another* 1925 AD 516.)

[32] The vesting date of a trust is the date when the trust will conclude and the trustees must wind up the trust by distributing all of the trust assets to the beneficiaries.

**B. Were the trustees properly nominated?**

*The law on nomination of trustees*

[33] The wording of the trust deed is decisive as to whether the power to appoint additional trustees is qualified. A trust founder has the right to prescribe the mode of appointment of trustees. He or she may by contract reserve for himself or herself the

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<sup>5</sup> CIR v Estate Crewe 1943 AD 656; CIR v Smollan's Estate 1955 (3) SA 266 (A); Crookes v Watson 1956 (1) SA 277 (A), and the Trust Moneys Protection Act 34 of 1934, which in s 1 defines a trustee as 'a person appointed by written instrument either *inter vivos* or by way of testamentary disposition whereby moneys are settled upon him to be administered by him for the benefit, whether in whole or in part, of any other person'.

power to appoint additional trustees, or confer a power on trustees to appoint other trustees. The latter is referred to as the *power of assumption*. The power of assumption does not attach to the office of trustee by operation of law (*Smit v Van de Werke NO* 1984 (1) SA 164 (T) 169) and must be granted in the trust deed. It is trite that a power of assumption may be granted by a founder unconditionally or be limited, for example, to the filling only of a vacancy (*Ex parte Davenport* 1963 (1) SA 728 (SR)).<sup>6</sup> There is no rule of the common law that the power to appoint trustees by the founder or trustees is limited to the filling of a vacancy. A trust founder may therefore in a trust instrument grant himself or herself greater powers than those enjoyed by co-trustees. In fact, in *Roper & Bryce v Connock* 1954 (1) SA 65 (W),<sup>7</sup> the power of assumption was reserved for the founder-trustee only.

*The approach to the interpretation of the trust deed*

[34] In *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC), this court (O'Regan AJA) set out the proper approach to the interpretation of documents generally. I will paraphrase the *ratio*. The construction of a contract such as a trust deed is a matter of law, and not of fact. Its interpretation is therefore a matter for the court and not for witnesses. Interpretation is 'essentially one unitary exercise' in which both text and context are relevant to construing the contract. The court engaged upon its construction must assess the meaning, grammar and syntax of the words used; and the words used must be construed within their immediate textual context, as well as against the broader purpose and character of the document

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<sup>6</sup> Corbett 402.

<sup>7</sup> See also *Smit v Van de Werke NO* supra at 174.

itself. Consideration of the background and context is an important part of interpretation of a contract. Since context is an important determinant of meaning, when constructing a contract, the knowledge that the contracting parties had at the time the contract was concluded is a relevant consideration.

[35] Context is considered by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the document in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or one that undermines the apparent purpose of the document. The court must avoid the temptation to substitute what it regards as reasonable, sensible or unbusinesslike for the words actually used.

#### *Law to facts*

[36] The central plank of the appellants' argument is that the trust deed, properly construed, empowered Egerer Senior to appoint as many additional trustees whilst still alive; but limited him if he wished to make a trustee appointment in his will, to only one trustee to fill a vacancy created by his death. The appellant's case is that the power to appoint additional trustees in the founder's will was not specifically granted and therefore did not exist. They also maintain that the plural 'trustees' in clause 5.3.1 of the

trust deed was not intended to comply with the ordinary rules of grammar and that if the founder wished to appoint a succeeding or replacement trustee, he could only make as many appointments as vacancies existed arising from death, resignation or removal. According to Mr Farlam for the appellants, to the extent that the appointment of trustees in clause 2.6 of the Will, involved the appointment of more than one trustee, such an appointment was incompetent as a valid appointment of succeeding or replacement trustees. The argument goes that the power to appoint trustees under clause 5.3.1 of the trust deed was restricted to restoring the status *quo* prior to death, resignation or removal by the same number of trustees. According to counsel, the purported appointments made by Egerer Senior in clause 2.6 of the will also cannot be saved as a valid appointment of additional trustees as such power was not expressly granted in the trust instrument – a power which, it is said, is limited to the appointment of replacement or succeeding trustees.

[37] The appellants had to establish that the language of the Egerer Family Trust instrument, considered as a whole, the particular context in which the power of appointment is located and the purpose for which the power is granted, justifies a construction that limits the power to appoint trustees in the founder's will to the filling of a vacancy only and that the founder was not authorised by the trust instrument to in his will appoint additional trustees. As I have already shown, the High Court was satisfied that the founder's power to appoint trustees was not limited in that way. It took the view that the power to appoint both replacement and additional trustees was exercisable in

the Will or during the lifetime of the founder and that the founder was not precluded from appointing additional trustees in the founder's will.

*Disposal*

[38] The opening part of clause 5.3 of the trust instrument contains a general power to appoint trustees 'of their own choice' by all incumbent trustees. That such power is exercisable only during the lifetime of a trustee is obvious. There is an insurmountable hurdle facing the appellants in suggesting that there is no power in the subsequent clause 5.3.1 granting the founder the power to in his will appoint additional trustees. That is so because the opening empowering provision in 5.3 applicable to all trustees holding office, is subject to the special treatment accorded Egerer Senior *apropos* the appointment of trustees. The special regime in clause 5.3.1 reserved only for Egerer Senior states that he is empowered to appoint replacement or succeeding trustees of his choice in his will or during his lifetime; and in addition to appoint additional trustees.

[39] Since it is unmistakably plain that the general power granted to all trustees can only be exercised during their lifetime, the appellants' argument that the trust deed gives no express power to the founder to appoint additional trustees in his will, suggests that the power to appoint additional trustees as captured in the closing part of clause 5.3.1 is superfluous as it would, on that thesis, be a repetition only of the general power expressed in clause 5.3. Such an approach is untenable because each word used in the deed must be presumed to have been inserted for a purpose as superfluity or tautology of language is not presumed (*Wellworths Bazaars Ltd v Chandlers Ltd* 1947 (2) SA 37 (A) 43 approving *Ditcher v Denison* (1857) 14 ER 718 at 723).

[40] If one is to give full effect, as we must, to the language deployed in clauses 5.3 and 5.3.1 of the trust instrument, the special power reserved exclusively for Egerer Senior must be separate from and be in addition to the general power enjoyed by all the trustees holding office. On that construction, the empowering language ‘and to appoint additional trustees’ in the closing part of clause 5.3.1 is intended to give the founder the power to appoint additional trustees in his will since it is a power not subsumed in the general power applicable to all trustees holding office. It is not without significance that clause 5.3.2 of the trust deed reserves for the founder the exclusive and extraordinary power to ‘appoint a nominee of his choice in his will to exercise all or any of the powers vested in him in terms of paragraph 5.3’. In other words, it was open to the founder to in his will (to take effect upon his death) appoint a nominee with the power to appoint additional trustees – the very thing the appellants strenuously argue he could not himself do in his will. It would be incongruous that he could in the circumstances not have enjoyed such a power himself.

[41] On behalf of the appellants it was argued that there is no significance in the fact that clause 5.3.1 empowers the founder to appoint additional trustees (using the plural) as the definition clause of the trust instrument states that the singular shall include the plural and *vice versa*.

[42] I agree with Mr. Heathcote for the first to third respondents that where the noun (trustees) signifying the plural is used in the trust deed, ordinary rules of grammar

suggest that it denotes more than one person and that a singular will only be inferred from the use of a plural where clearly what is intended is the singular. As Crabbe observes, where in a definitions clause 'means' or 'includes' are used:

*'Means* restricts. It is explanatory. *Includes*, on the other hand, expands. It is extensive. It is exhaustive. It indicates that the word or expression defined bears its ordinary meaning and also a meaning which the word or expression does not ordinarily mean.'<sup>8</sup>  
(My underlining for emphasis).

[43] The drafting device (or technique) of 'singular shall include the plural and vice versa' has a very specific purpose. Its purpose is to ameliorate the rigor of the laws of grammar in so far as not doing so would produce a result not intended by the settlor. What is not in doubt, however, is that, in the first place, use of the plural assumes the normal (being the plural) to be the default position; that is to say, if the plural is used the presumption is *that* is what is intended. But where denoting the plural makes no sense at all viewed in context, the singular is not excluded. Secondly, the dominant purpose of such a clause is to reverse the limitation inherent in the use of the singular in order to allow for the greater number. Thirdly, unless a clear intention is discernable from the document read as a whole, the use of the plural cannot be construed, as suggested by the appellants, to reduce the greater to a lesser condition. More so because, as in the present case, the power of appointment under clause 5.3.1 is unconditional as to the number of trustees that may be appointed.

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<sup>8</sup> Crabbe V Crabbe on legislative Drafting 2<sup>nd</sup> ed p 94.



[44] I conclude, therefore, that the High Court did not misdirect itself in its interpretation of clause 5.3.1 as empowering the founder to in his will appoint additional trustees. The relief sought in the notice of motion towards that end was properly refused and the appeal on that score stands to be dismissed.

C. Are the special bequests to third, sixth and seventh respondents enforceable?

[45] The issue whether or not the sixth and seventh respondents were 'still employees' of the Egerer Family Trust only arises if we conclude that the special bequests to them (including the third respondent) were competent and not *ultra vires* the trust deed. I will therefore proceed to consider that issue.

[46] The High Court had concluded that it was clear from the language used in the will that Egerer Senior wished to benefit the three individuals by creating a *modus* subject to which the residue of his estate devolved upon the Egerer Family Trust. That finding is assailed on appeal. It is argued that what the court below failed to appreciate is that it was incompetent for Egerer Senior to, by testamentary disposition, add to the number of capital beneficiaries as he purported to do in the impugned clauses 2.9.1, 2.9.2 and 2.9.3 of the will.

[47] According to the appellants (and as I have already demonstrated to be the case at paragraphs [7]- [9] above), the trust deed determined a specific procedure and process through which (a) trust beneficiaries could be added or reduced, (b) the manner

in which trust capital is to be applied and for whose benefit and (c) the circumstances in which trust capital could be applied to persons who were not named as capital beneficiaries. In addition, that the prerogative of the trust founder capable of being exercised by testamentary disposition under clause 26 of the deed of trust was limited to determining the distribution formula.

[48] Mr. Heathcote's argument on this issue can be summed up briefly. He argued that Egerer Senior did, as he was entitled to, bequeath the residue of the estate to the Egerer Family Trust, less the special bequests. According to Mr. Heathcote, the special bequests stood on the same footing as any other obligation (for example municipal debts for rates and taxes) which had to be paid in respect of landed property from any proceeds realised from its sale. That approach accords with the conclusion reached by the High Court on that disputed issue. The Judge *a quo* held that Egerer Senior left his entire estate to the Egerer Family Trust subject to an obligation on the trust to pay certain amounts to the third, sixth and seventh respondents and that the obligation was a valid *modus*. According to Ueitele J, as a recipient of the inheritance, the Egerer Family Trust was the absolute owner of the Egerer estate subject to its personal obligation to perform the act which it was charged with, namely, to pay an amount of N\$ 1 000 000 to the sixth respondent, N\$ 500 000 to the seventh respondent and to third respondent 3.5 % of the cash value of the gross assets of the Egerer Family Trust once the assets have been reduced to cash.

*The law*

[49] At common law, a testator may institute as heir whomsoever he or she pleases.<sup>9</sup> As to the time of fulfillment, the directions of the testator are to be observed.<sup>10</sup> Therefore, unless a disposition is unlawful, impossible or be against public policy, a testator has absolute freedom to dispose of his or her assets as he or she wishes and the courts will enforce those wishes regardless of what the private wishes of the family are. It is equally trite that a testator is free to make any bequest subject to a *modus* (a condition) as long as it is not unlawful, contra *bonos mores* or impossible to perform. A *modus* must not just be a moral obligation but must be capable of being enforced in law. When a bequest is made subject to a *modus*, the vesting of the right of inheritance is postponed and made subject to its fulfilment. In that event, the named beneficiary is required to do or refrain from doing something and is not entitled to the benefit of the bequest without the accompanying obligation.

[50] The present appeal must succeed if the effect of the direction contained in clauses 2.9.1, 2.9.2 and 2.9.3 is to satisfy the special bequests from trust capital that formed part of the property of the Egerer Family Trust because, in that event, it would be tantamount to altering the settled terms of the trust. It is apparent from the discussion of the nature of a trust in our law<sup>11</sup>, that once property has vested in the trustees and accepted by them, it is not competent for the donor or founder to deal with it as he pleases or to dispose of it as he no longer has control over it. Thus, if the

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<sup>9</sup> Grotius' *Introduction to Dutch Jurisprudence*, 2.18.4.

<sup>10</sup> Voet, 28.7.24,25

<sup>11</sup> See paragraphs 30-32 above.

property from which Egerer Senior purported to make the special bequests had passed on to the trustees for the benefit of the beneficiaries of the trust, such disposition would be ineffective as being *ultra vires* the trust deed creating the Egerer Family Trust and, therefore, void.

[51] Given that the will cannot be read in isolation but against the backdrop of the trust deed creating the Egerer family Trust - which is binding on the founder - the present case is not about whether the court should, through a generous interpretation of the language used by a testator, give effect to his true intention<sup>12</sup> but rather whether Egerer Senior retained control over the property he purported to alienate in the form of the special bequests.

[52] Mr Heathcote is correct that, as a testator, Egerer Senior was perfectly entitled to bequeath the residue of the estate to the trustees of the Egerer Family Trust subject to a *modus* and that if they do not accept the condition *that* imposes, the bequest would fail. It was clear to me, however, that Mr Heathcote accepted that for Egerer Senior's testamentary stipulations to be valid they should not be in conflict with the trust deed. That is so because although Egerer Senior was at liberty to deal with his property in whatever way he chose by way of testamentary disposition, as a matter of law he could not thereby alter or diminish rights enjoyed by trust beneficiaries under a trust set up by him as founder. The task facing us, therefore, is to examine whether the testamentary

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<sup>12</sup> According to which ' . . . since time immemorial judges have adopted a benevolent approach towards the interpretation of wills. They will do their best to ascertain the testator's intention, however poorly expressed, and will not invalidate a disposition on grounds of uncertainty unless perplexity leaves them no other choice': *Standard Bank of SA Ltd v Council of the Municipality of Windhoek* [2015] NASC 24 (26 October 2015) at para 33.

stipulations pass muster, viewed against the relevant provisions of the trust deed creating the Egerer Family Trust. It is to that issue I turn next.

*Interplay between the will and the Egerer Family Trust*

[53] Two conditions must co-exist for the court to give effect to the special bequests. The first is that it must relate to assets over which Egerer Senior retained control at the time those legacies are to take effect. The second is that the property he sought to alienate in favour of the third, sixth and seventh respondents should not already have devolved upon the trust under the control of the trustees to be dealt with in terms of the trust deed.

[54] To repeat, in clause 2.5 of the Will, Egerer Senior directed as follows:

'I award the residue of my estate including all my business interest, shares, members' interest, loan accounts and any other right, title and interest shall be awarded to my trustees in trust of the Egerer Family trust. . .'

The court *a quo* had correctly concluded that the clause has the consequence that the Egerer Family Trust inherited all entities owned by Egerer Senior.

[55] And in clause 2.9 of the will, Egerer Senior directed that:

'[A]ll assets of the Egerer Family Trust ... shall be reduced to cash to best advantage upon the death of my spouse LUCIA WILHELMINE GETRUD EGERER. The trust shall terminate after all assets have been reduced to cash and the capital as it exists shall be awarded as follows [detailing the bequests to the third, sixth and seventh respondents].'  
(My underlining for emphasis)

[56] In effect, the direction in clause 2.9 of the Will sets the vesting date contemplated in clause 26.1.1 of the trust deed<sup>13</sup> (erroneously referred to as clause 27.1) as at the date of the death of the first appellant. The first appellant is still alive and the Egerer Family Trust will only terminate upon her passing. However, since Egerer Senior has died, clause 5.2 of the will takes effect instituting the Egerer Family Trust as heir to the residue of his estate. The property gifted in clause 5.2 of the will can only be administered by the trustees of the beneficiary trust in terms of the will as I set out at paragraph [13] above.

[57] Mr Heathcote's comparison of the special bequests to an obligation arising from a debt (such as municipal rates and taxes) is based on a misconception. In the first place, it fails to recognise that the special bequests can only assume the character of an enforceable obligation if they are not in conflict with the trust instrument. If they are in conflict they cannot constitute a binding obligation on the trust. In other words, the special bequests would be unenforceable if it arrogated to the testator a power greater than he enjoyed under the trust deed. In the second place, the argument ignores the plain wording of the testator's stipulation in clauses 2.9.1, 2.9.2 and 2.9.3 of the will

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<sup>13</sup> Clause 26.1 read with 26.1.1 of the trust deed reserves to Egerer senior the right by way of his Will to determine the vesting date with respect to the trust fund or portion thereof – in other words to terminate the trust.

which clearly sought to vary the terms of the trust deed. That is so because the effect of those provisions is to satisfy the obligations they impose (a) from trust assets gifted in the Will to 'my trustees in trust of the Egerer Family Trust' and (b) from trust capital which, upon the assets being reduced to cash, was bequeathed on the trust and subject to its terms.

[58] It is plain from clause 2.9 of the will that the trigger for the termination of the Egerer Family Trust is the death of the first appellant. Once she dies the assets of the trust 'shall' be reduced to cash and the trust be terminated. The reference to the 'capital as it exists' after the assets of the Egerer Family Trust had been reduced to cash can, in context, only mean trust capital as defined in the trust instrument – certainly not capital in the estate of Egerer Senior which could be the subject of a *modus*.

[59] From the discussion of the features of the Egerer Family Trust in paragraphs [7]-[9] above, it is clear that (a) Egerer Senior's power (as founder) to determine the vesting date could only be exercised for the sole benefit of trust beneficiaries, (b) the capital of the trust can only be applied for the sole benefit of trust beneficiaries, and (c) any power that Egerer Senior as the trust founder retained to prescribe how the trust capital or trust fund should be distributed was limited for the benefit of trust beneficiaries.

[60] The error committed by the court *a quo* is that it assumed that what was being reduced to cash was the property of the deceased before it passed on to the trust. On

that scenario, a *modus* was perfectly permissible. The problem is that clause 2.9 of the Will determines the vesting date for the Egerer Family Trust created under the trust instrument by converting all assets then held *by* the trust into cash. Once the assets which were held by Egerer Senior had passed from him to the trust, he lost the competence to alienate them by testamentary disposition. Since on his death the assets in his estate passed on to the trust that he created, it would fall under the exclusive jurisdiction of the trustees and the terms of the trust which the trustees alone (and not the donor) have control over. It was therefore not competent for Egerer Senior to alienate what had become the trust capital or trust fund for the benefit of the third, sixth and seventh respondents, however noble and morally praiseworthy his intention.

[61] Although it was not required to decide the issue, the court *a quo* had commented that the special bequests were no different to the bequest to Balzar<sup>14</sup> which the appellants had not challenged. On appeal the appellants suggested that it is different and that it was competent for Egerer Senior to make the bequest to Balzar in the manner he did. Since it is common cause that the Balzar bequest was not placed in issue in the proceedings now before appeal, no judicial decision was necessary on it. I therefore do not wish to express any view on the *vires* of the Balzar bequest in the event that the trustees in the exercise of their fiduciary duty choose, if so advised, to challenge it in order to protect the interests of the trust beneficiaries.

### The cross-appeal

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<sup>14</sup> See paragraph 13 above.



[62] I see no reason for interfering with the costs order made by the Judge below. The court a *quo*'s reliance on *Cuming v Cuming and Others* 1945 AD 201 at 216 finds resonance with the facts before us. In that case Davis AJA held that the general principle is that in disputes relating to the interpretation of a will, costs are ordered to come out of the estate. The only exception being if the special circumstances of a particular cases dictate otherwise. Relying on *Van Der Merwe and Others v Van Der Merwe's Executrix* 1921 T.P.D 114, the learned judge held that a distinction must be made between a case that involves a disagreement amongst the beneficiaries as to the true meaning of a will on the one hand, and the case where someone who is not a beneficiary, comes to court to claim property at common law, and not merely forces the beneficiaries to fight, but wishes to make them pay for his costs, as well as their own, even if they be successful.

[63] Unlike in the *Cuming* case, the present dispute is between nominated beneficiaries who, at the very least, are engaged in a controversy concerning the true meaning of the will of the founder of the Egerer family Trust. It does therefore not make sense to deviate from the general principle stated in *Cuming*.

[64] Mr. Heathcote's argument that because it was not cited as a party a costs order should not have been ordered against the estate of Egerer Senior places form above substance. As Mr Farlam for the appellants correctly pointed out, in the first appellant's founding affidavit (paragraphs 8.4, 9.5 and 10.5), the centrality of the estate in the dispute becomes apparent. In any event, although we have upheld the first to third respondents on the question of their nomination under the will as trustees, the special

bequests to the third, sixth and seventh respondents have failed. The appellants have therefore achieved success in a material way but it will not be just that the affected individuals be mulcted in costs. Although Egerer Senior's estate was not formally cited as a party in the proceedings, the litigation is the product of the Will which creates it. The court *a quo* therefore did not act on wrong principle. The cross appeal must therefore fail.

#### Costs in the appeal

[65] In the light of the outcome of the appeal, it would be otiose if on appeal we were to make an order different to the one made by the court *a quo*.

#### Order

[66] It is ordered as follows:

1. The appeal succeeds in part only and the judgment and order of the High Court is set aside and substituted for the following:
  - '1. Prayers 1 and 2 of the notice of motion are dismissed.
  2. Prayer 3 of the notice of motion is allowed and it is ordered that clauses 2.9.1, 2.9.2 and 2.9.3 of the Last will and Testament of the late Wolfgang Albrecht Emil Egerer (dated 2 December 2014) and the 'special bequests' contained therein, are invalid, of no force and effect and unenforceable.
  3. The costs of the parties shall be borne by the estate of the late Wolfgang Egerer, to include, in respect of all the parties, costs consequent upon the employment of one instructing and two instructed counsel.'

2. The costs of the appeal in respect of all the parties shall be borne by the estate of the late Wolfgang Albrecht Emil Egerer, to include, in respect of all such parties, costs consequent upon the employment of one instructing and two instructed counsel.

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**DAMASEB DCJ**

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**MAINGA JA**

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**HOFF JA**

**APPEARANCES:**

## APPELLANTS

Farlam SC (with him D Obbes)  
Instructed by ENSAFRICA|Namibia  
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Windhoek

## FIRST, SECOND AND

## THIRD RESPONDENTS

R Heathcote (with him SJ Jacobs)  
Instructed by Van Der Merwe-Greef-  
Andima-Inc., Windhoek