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***Modus*, suspensive conditions and resolutive conditions in wills and trusts – confusion may reign**

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1 Introduction

- *modus*
- suspensive condition
- resolutive condition
- *nudum praeceptum*
- *bewind* trust

2 The *modus*

“a kind of shadowy and embarrassed (or embarrassing) place in Roman-Dutch law”

(McGregor (1913) 30 *SALJ* 277)

“the *modus*, like the East, has acquired a mystical quality”

(Van der Merwe and Rowland 281)

Definition:

“...a provision in a will whereby the testator imposes upon a person to whom property has been bequeathed the charge of employing it or its value, wholly or in part, for a certain specified purpose or the duty of doing something else which restricts or diminishes the extent of the bequest.”

(Corbett *et al* 337)

- modus: example 1

“I bequeath my farm to my son A, but A must pay R500 000 to my daughter B.”

therefore: *dies cedit* has arrived for A

- modus: example 2

“I bequeath R250 000 to my daughter A, but she must use the money to buy herself a new VW Polo.”

- *modus*: example 3

“I bequeath R1 million to my son A, but he must use the money to erect a fountain in the town park in my honour. The rest of the money he can use for his own benefit.”

- modus: example 4

“To my son Robert Graham MacDonald I ... bequeath the business concern known as Sport Aviation together with all its assets and liabilities.”

Gradus v Sport Helicopters also known as Sport Aviation

([2012] ZAWCHC 365 (28 November 2012))

3 The *modus* and the suspensive condition

- *modus*: example 1

“I bequeath my farm to my son A, but A must pay R500 000 to my daughter B.”

- suspensive condition: example 1

“I bequeath my farm to my son A if he pays R500 000 to my daughter B.”

“...a [suspensive] condition postpones but does not oblige, a *modus* obliges but does not postpone.”

(Corbett *et al* 144)

4 The *modus* and the resolutive condition

- resolutive condition: example 1

“I bequeath my farm to my son A. If A stops farming on the farm within three years after my death, A will forfeit the farm and it must go to my sister B.”

- resolutive condition: example 2

“I bequeath my farm to my son A. If A stops farming on the farm within three years after my death, A will forfeit the farm.”

nudum praeceptum

5 Possible confusion: incorrect terminology and a combination of institutions

Webb v Davis NO and Others

(1998 (2) SA 975 (SCA) 975)

- example 1

“I give and bequeath to my son Rodney...my Trading Station [and all other assets],...but subject to the condition...that he shall effect payment to my son Gary of the sum of R70 0000 [in seven annual instalments of R10 000 each]...and register a first mortgage bond over the Trading Station in favour of Gary. I direct that in the event of my son Rodney failing to comply with the terms and conditions as set out above, then...the aforesaid bequest shall fall away, and then I appoint my sons Rodney and Gary to be the sole and universal heirs...”

modus plus resolutive condition:

- example 2

“I bequeath R250 000 to my daughter A, but she must use the money to buy herself a new VW Polo. Should A fail to use the money for this purpose within one year after my death, she will forfeit the money and it must go to the Western Province Rugby Union.”

*Wessels v DA Wessels en Seuns (Edms)
Bpk*

(1987 (3) SA 530 (T))

“op voorwaarde” (“on condition”)

*Kommissaris van Binnelandse Inkomste v
Van Blommenstein*

(1999 (2) SA 367 (SCA))

- example 3

“I bequeath my farm to my son A if he obtains his LLB degree within five years after my death. On acquiring the farm, A must pay R500 000 to my daughter B. If A fails to pay the money to my daughter within two years after acquiring the farm, A will forfeit the farm and it must go to my brother C.”

suspensive condition + *modus* + resolutive condition + *fideicommissum*

6 Problems in the context of the *bewind* trust

- *bewind* trust: example 1

“I bequeath all my assets to my son A, to be managed for his benefit by my trustee B until A reaches the age of 25 years. Until reaching the age of 25 years, A will only be entitled to a monthly income as determined by my trustee in her sole discretion.”

- *bewind* trust: example 2:

“I bequeath all my assets to my son A, to be managed for his benefit by my trustee B until A reaches the age of 25 years. Until reaching the age of 25 years, A will only be entitled to a monthly income as determined by the trustee in her sole discretion. **Should A fail to abide by the terms of the trust, he will forfeit the assets and they will go to the XYZ Family Trust.**”

*Morley and Others v Standard Bank Trustees
Department*

(1970 (4) SA 299 (W))

7 Concluding remarks

