REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 248/2015

In the matter between:

LUCIA WILHELMINE GERTRUD EGERER	1ST APPLICANT
MANFRED EGERER	2ND APPLICANT
MANFRED EGERER N.O.	3RD APPLICANT

And

EXECUTRUST (PTY) LTD	1ST RESPONDENT
ALWYN PETRUS VAN STRATEN	2ND RESPONDENT
SARAH SUSAN ELIZABETH STAHL	3RD RESPONDENT
THE MASTER OF THE HIGH COURT OF NAMIBIA	4TH RESPONDENT
LIEZEL LOUWRENS	5TH RESPONDENT
VINCENT EDWIN HOLE	6TH RESPONDENT
MATHILDE APOLLONIA CHRISTIANA KAUTORORA	7TH RESPONDENT

Neutral citation: *Lucia Wilhelmine Gertrud Egerer & 2 Others v Executrust (Pty) Ltd & 6 others (248/2015) [2016] NAHCMD 221 (22 July 2016)*

Coram: **UEITELE J**

Heard: **13 MAY 2016**

Delivered: **22 JULY 2016**

Flynote: Will - Construction - of -involves ascertaining the intention of the testator- *Modus*-a qualification or obligation added to a gift or a testamentary disposition.

Summary: During September 2015 the three applicants launched an application out of this court in terms of which they sought an order declaring: the nominations and appointments of the first respondent, the second respondent and the third respondent as trustees of a Trust known as the Egerer Family Trust as void; that the first applicant and the fifth respondent are the only current trustees of the Egerer Family Trust and clauses 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.

Held that interpreting a will involves ascertaining the intention of the testator. The intention of the testator is the most important aspect of the law of succession and runs like a golden thread through this branch of the law.

Held further that the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used, the court is bound to give effect to those wishes.

Held further that the trust inherited all the movables and immovable assets that belonged to the late Egerer on certain conditions.

Held further that the qualification to which the inheritance by the Trust was subjected, amounts to a valid and legal *modus* which the court must give effect to it.

Held furthermore that the late Wolfgang Albrecht Emil Egerer's clear intention was to benefit some of his faithful employees and he has named those employees.

Held that the applicants' claim cannot succeed and the application must be dismissed.

ORDER

1 The application is dismissed.

2 The costs of this application must be paid from the estate, such costs to include the costs of one instructing and two instructed counsel in respect of both the applicants and the respondents.

JUDGMENT

UEITELE, J

Introduction

[1] The central character in this matter is a man who, from the little information I gathered about him from the pleadings, was an extra - ordinary Namibian and who departed this world on 21 January 2015. I say he was extraordinary for the reason that he was industrious and cared for those who contributed to his success. The person I am referring to is the late Wolfgang Albrecht Emil Egerer (I will, in this judgment, refer to him as the 'late Egerer').

[2] When the late Egerer departed this world on 21 January 2015 he was survived by a wife who is the first applicant in this matter, two sons (one of whom is the second applicant in this matter) and three grandchildren. The second applicant acts on behalf of his minor daughter, who is one of the grandchildren of the late Egerer, as the third applicant.

[3] During September 2015 the three applicants launched an application out of this court in terms of which they, amongst other things, sought an order declaring 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 ; and

(c) clauses 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.

Background to Application

[4] The short background to this application is this. On 21 January 1993 the late Egerer and his surviving spouse, Ms. Lucia Wilhemine Gertrud Egerer (I will, in this judgment, refer to her as the first applicant) signed a Deed of Trust in terms of which they created a Trust known as the Egerer Family Trust and registered that trust with the Master of the High Court. That Trust bears the number T 30/1993 (I will, in this judgment, refer to it as the 'Trust'). During March 1998 they amended that trust deed and also filed the amended Deed of Trust with the Master of the High Court. The amended trust deed was attached to the applicants' founding affidavit as annexure 'LE 4'.

[5] Clause 5 of the trust deed deals with provisions concerning the number of trustees, the termination of office and succession of trustees. Clause 5, amongst other things reads, as follows:

'5.1 The first trustees of the trust are:
Wolfgang Albrecht Emil Egerer
Lucia Wilhemine Gertrud Egerer

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...'

[6] During the year 2008 the late Egerer met the second respondent, he thereafter enlisted the services of the second respondent for him (second respondent) to assist him (the late Egerer) with his estate planning. As a consequence the second respondent assisted the late Egerer to draft a Will. The Will drafted by the second respondent and accepted by the Master of the High Court (I will, in this judgment, refer to her as the Master) was signed by the late Egerer on 2 December 2014. The late Egerer passed away on 21 January 2015 that is, approximately thirty nine days after he signed his last Will and Testament.

[7] In his Will the late Egerer, amongst other things:

(a) Nominated the Trust as the heir of his estate.

(b) Nominated Executrust (Pty) Ltd and Sarah Susan Elizabeth Stahl as his trustees and executors of his estate.

(c) Nominated and appointed Executrust (Pty) Ltd, A P Van Straten and Sarah Susan Elizabeth Stahl as trustees of the Trust.

(d) Directed that the trustees of the Trust shall deal with the capital and income in their discretion in terms of the powers conferred upon them in the trust deed and the Will.

(e) Made a special bequests to Vincent Edwin Hole, Mathilde Apollonia Christiana Kautorora and to Sarah Susan Elizabeth Stahl. He furthermore directed that if Wolfgang Balzar resigned from the employment of Hotel Thule the trustees must consider liquidating the business of that hotel and award a percentage of the gross proceeds to Balzar.

[8] On 23 January 2015 the Master appointed the second respondent as a nominee of Executrust (Pty) Ltd and Sarah Susan Elizabeth Stahl as executors of the estate of the late Egerer. On 12 February 2015 the Master confirmed that Lucia Wilhemine Gertrud Egerer, the second respondent and Ms. Sarah Susan Elizabeth Stahl (I will, in this judgment, refer to her as 'Ms. Stahl') are the trustees for the time being of the Trust.

[9] Shortly after the late Egerer's death, Mr. Manfred Egerer (the second applicant who is the late Egerer's son) (I will, in this judgment, refer to him as 'Manfred') questioned Ms. Stahl and the second respondent's capacities to act as trustees. On 16 February 2015 Mr. Ruppel (a legal practitioner from the firm ENS Africa) addressed a letter to the second respondent in which letter Ruppel informed the second respondent that he (Ruppel) was appointed to represent Manfred who is the parent and natural guardian of one of the grandchildren of the late Egerer. He also requested copies of the trust deeds in respect of the Trust and the Egerer Family Trust which was registered in South Africa. On 19 February 2015 the second respondent, by electronic mail sent copies of the Trust's trust deed and the trust deed of the Egerer Family Trust which was registered in South Africa to Mr. Ruppel.

[10] On 2 June 2015 Ruppel addressed another letter to the second respondent, in which letter, he requested a complete set of all the documents relating to the Trust and to a certain investment known as the 'Goudina Belleging'. That letter was followed up by another letter dated 4 June 2015 written on the instructions of the first applicant in her capacity as trustee of the Trust. In the letter of 4 June 2015 Mr. Ruppel, amongst other things, conveyed to the

second respondent that the first applicant wanted to appoint a certain Mr. Harald Müseler as an additional trustee. To that letter there was annexed a resolution in terms of which the first applicant, the second respondent and Ms. Stahl would have resolved to appoint Müseler as an additional Trustee. The letter of 4 June 2015 was again followed up by a letter of 5 June 2015 in which Mr. Ruppel expressed the urgency for the appointment of the additional trustee of the Trust. It was again followed up on 8 June 2015 and he expressed his desire that the appointment of an additional trustee would be attended to without delay.

[11] On 8 June 2015 the second respondent responded to Ruppel's letters, indicating that he noted the request for the nomination and appointment of an additional trustee and advise that the matter of the appointment of an additional trustee be referred to the trustees for consideration at the next trust meeting. The second respondent followed up his letter of 8 June 2015 with another letter dated 11 June 2015. In the letter of 11 June 2015 the second respondent recorded that the late Egerer gave instructions that his property be realized, by a trust resolution dated 30 March 2015 the trustees approved that the second respondent and Ms. Stahl may sign all documentation relating to the realization of the property and that late Egerer did not nominate and appoint Mr. Müseler as a trustee of the Trust.

[12] On 3 July 2015 the second respondent addressed another letter to Ruppel in that letter the second respondent confirmed receipt of numerous letters from Ruppel in which Ruppel, amongst other things, registered objections in terms of s 35 (7) of the Administration of Estates Act, 1965 . The second respondent reiterated the fact they were nominated and appointed as trustees by the late Egerer to carry out his instructions and wishes regarding his estate and that the late Egerer did not nominate and appoint Mr. Müseler as trustee of the Trust, when he exercised his testamentary powers and prerogative to nominate and appoint trustees.

[13] On 24 July 2015 the trustees (that is, the second respondent and Ms. Stahl attended a trust meeting at Hotel Thule) the first applicant did not attend but her alternate, a certain, Simon Steyn attended on her behalf. At that meeting the Trustees proposed that the Trust continues to pay all the expenses of the applicant, the second respondent and Ms. Stahl voted in favour of the proposal whereas Mr. Steyn opposed the proposal allegedly on the basis that the proposal was fundamentally unfair.

[14] In the meantime and on 22 July 2015 Ruppel addressed a letter to Ms. Liezel Lauwrens (the fifth respondent, I will in this judgment, refer to her as Ms. Lauwrens) requesting her to attend the trustees meeting that was scheduled for 24 July 2015. When Ms. Lauwrens did not attend the trustees meeting Ruppel on 18 August 2015 addressed a letter to her enquiring why she did not attend the trustees meeting which was held on 24 July 2015. It appears that Ms. Lauwrens replied by email on the same date (i.e. 18 August 2015). Ruppel on 25 August 2015 addressed another letter to Ms. Lauwrens in which letter he stated the following:

> '...The reason for writing to you today concern your appointment –in your capacity as accountant of the Trust...in terms of clause 5.2 of the Substituted Trust Deed of the Egerer family Trust as a trustee of the Trust, and more specifically in the circumstances contemplated in that clause, and to enquire from you, whether you accept such appointment.
>
> For the present purposes we would ask you to accept that the trustee appointments the late Egerer had sought to effect under his will were invalid and ineffective and that Mrs. Egerer, the only then surviving trustee, did not make the appointment of another trustee in terms of that clause within the thirty day period of the death of her late husband,'

[15] It appears that, when the second respondent refused to appoint Müseler as an additional trustee the applicants, on 15 September 2015 launched these proceedings, *inter alia,* seeking the relief I have set out above. All the respondents with the exception of the Master opposed the application. On 26 February 2015, the first, second and third respondents gave notice to the applicants that they (respondents) will, on 23 March 2016 apply to this court for leave to file an additional affidavit. The applicants opposed the application for the filling of a further affidavit.

[16] On the day that the hearing of the interlocutory application (i.e. the application to file a further affidavit) was set down, the parties agreed that the applicants would (conditionally) reply to the allegations contained in the further affidavit sought to be introduced, but on the understanding that the filling of the replying affidavit in response to the affidavit sought to be filed was done without prejudice to the applicants' right to argue that the further affidavit should not be allowed. On 23 March 2016 I set down the main application for hearing on 13 May 2016.

The issue for determination.

[17] The following issues arise for determination:

(a) What is the proper approach to the interpretation documents which are the subject of this matter?

(b) Are the applicants correct that, properly interpreted, the trust deed, in respect of the Trust does not empower the late Egerer to appoint Executrust (Pty) Ltd, A P Van Straten and Sarah Susan Elizabeth Stahl as trustees of the Trust;

(c) Are the applicants correct that, clauses 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), are unenforceable, invalid and of no force and effect.

(d) Should the first, second and third respondents be granted leave to file an additional affidavit?

[18] I will now turn to the determination of the questions that confront me. In that process I will first deal with the question relating to the interpretation of the trust deed and thereafter to the questions relating to the interpretation of the Will of the late Egerer.

The Trust Deed.

Applicants' arguments

[18] Mr. Frank who appeared for the applicants submitted that the appointments of Executrust (Pty) Ltd, A P Van Straten and Sarah Susan Elizabeth Stahl as trustees of the Trust were ineffective and invalid. He argued that:

(a) Clause 5.1 of the trust deed makes provision for the first trustees of the Trust;

(b) Clause 5.2 of the trust deed makes provision for the filling of a vacancy which occurs in

the office of a trustee (he thus termed such a trustee a succeeding trustee or replacement trustee);

(c) Clause 5.3 of the trust deed makes provision for the appointment of additional trustees (he thus termed such a trustee an additional trustee);

(d) Clause 7 of the trust deed makes provision for the appointment of an alternative trustee, who is, a person, appointed by an existing trustee to act in his or her stead by reason of absence or inability (he thus termed such a trustee an alternate trustee).

He argued that the appointment of a first trustee and an alternate trustee is clear and not contentious. The question, however, so argued Mr Frank, arises in whom 'does the trust deed vest the power to appoint succeeding and additional trustees'. It is from this perspective, argued Mr Frank, that clause 5.3 needs to be approached and interpreted.

[19] Counsel for applicants argued that clause 5.3.1 deals with both replacement and additional trustees. In its very terms, the referral to succeeding/replacement trustees is to replace those who have died or resigned, the fact that the word "trustees" (plural) is used is of no significance because there may be more than one vacancy arising from death or resignation. He proceeded and submitted that it is clear that the provision relating to replacement trustees is aimed at restoring the *status quo* as it was prior to the death or resignation or a vacancy occurring as contemplated by clause 5.6 and implies filling the vacancy or vacancies by appointment of the same number of trustees. He proceeded and argued that a replacement trustee could be appointed by the deceased because the deceased was empowered in clause 5.3 to appoint trustees of his choice in his Will or during his lifetime to act in the place of a deceased trustee or fill a vacancy which has occurred by virtue of the provisions of paragraph 5.6.

[20] Counsel continued with his argument and submitted that the late Egerer, in his Will, appointed three trustees, namely Executrust (Pty) Ltd, A P Van Straten and Sarah Susan Elizabeth Stahl. He argued that that appointment (i.e. the appointment of the three trustees) in the Will cannot be understood and be given effect to as an appointment of a replacement or succeeding trustee as envisaged in the trust deed because there was only one vacancy,

namely replacement for the deceased. Mr Frank proceeded and argued that the question which thus arises is whether the provisions in the Will can be interpreted as authorising the late Egerer to, appoint additional trustees as contemplated in the trust deed. Counsel submitted that:

> 'Clause 5.3.1 of the trust deed deals with two categories of trustees, namely replacement trustees and additional trustees. Here it is of importance, we submit, that the two categories are separated by the conjunctive word "and". From this perspective, it should be noted that clause 5.3.1 comprises two noun phrases relating to the power to appoint replacement trustees and additional trustees. The conjunction "and" is clearly used to link equal and independent phrases expressing separate thoughts or meanings. This means that clause 5.3.1 must be read as follows –
>
> 1.1. With regard to the replacement trustee –
>
> "…. Wolfgang Albrecht Emil Egerer shall be empowered to:
>
> appoint trustees of his choice in his Will or in his lifetime to act in the place of a deceased trustee. ….
>
> "AND"
>
> 1.2. With regard to additional trustees –
>
> "….. Wolfgang Albrecht Emil Egerer shall be empowered to:
>
> appoint additional trustees."
>
> 2. As is evident from the above, the adverbial phrase relating to the appointment by Will is expressly made in connection with the appointment of replacement trustees only and not with reference to the power to appoint additional trustees.'

[21] He thus concluded by submitting that the attempt by the late Egerer to appoint Executrust (Pty) Ltd, A P Van Straten and Sarah Susan Elizabeth Stahl as trustees of the Trust in the Will is of no force and effect as they are not succeeding trustees as there was only one vacancy brought about by the death of the deceased and the trust deed did not empower the late Egerer to appoint additional trustees in his Will. The late Egerer could only appoint additional trustees during his lifetime argued Mr Frank.

Respondents' argument

[22] Mr. Heathcote who appeared for the respondents argued that applicants ignore the fundamental principles set out in the case of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*[1] which authoritatively lays down the principles applicable to the interpretation of documents and the definition of trustees as defined in the trust deed. Once the Supreme Court authority is followed, and the trust deed is interpreted in accordance with the authoritative principles laid down, it becomes abundantly clear that the late Egerer was empowered to appoint the three trustees he has appointed.

[23] Mr Heathcote argued that if one has to textually and contextually interpret the deed of trust that document is clear. It says in emphatic terms that acting trustees have the right to nominate and appoint additional trustees of their own choice, but that the deceased, despite the right of the other trustees to act jointly, retained the power to appoint trustees of his choice. The right to appoint *"trustees of his choice"* includes of course the right to appoint additional trustees as defined in the trust deed itself.

[24] Before I consider the meaning of clause 5 of the trust deed I will briefly reiterate the approach, as authoritatively stated by the Supreme Court that must be followed when interpreting written documents.

The proper approach to the interpretation of the trust deed.

[25] In the *Total Namibia*[2] matter O' Regan, at paragraph [18], who delivered the court's judgment accepted that:

> [18] 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided 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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent

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1 2015 (3) NR 733 (SC).
2 *Ibid.*

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 undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[26] The learned judge proceeded and said:

> [23] ... context is an important determinant of meaning. It also makes plain that interpretation is 'essentially one unitary exercise' in which both text and context, and in the case of the construction of contracts, at least, the knowledge that the contracting parties had at the time the contract was concluded, are relevant to construing the contract. This unitary approach to interpretation should be followed in Namibia. A word of caution should be noted. In accepting that the distinction between 'background circumstances' and 'surrounding circumstances' should be abandoned, courts should remember that the construction of a contract remains, as Harms JA emphasised in the KPMG case, 'a matter of law, and not of fact, and accordingly, interpretation is a matter for the court and not for witnesses'.
>
> [24] The approach adopted here requires a court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate textual context, as well as against the broader purpose and character of the document itself. Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears ambiguous. Consideration of the background and context will be an important part of all contractual interpretation.'

The interpretation of clause 5 of the deed of trust.

[27] I turn now to the interpretation of the Deed of Trust. Mr Frank submitted that that the interpretation which must be placed on clause 5.3.1 of the trust deed is that, textually the clause deals with the replacement of a trustee who has died or resigned or who has vacated office in circumstances contemplated in clause 5.6 and that this implies filling of the vacancy or vacancies by appointment of the same number of trustees. He thus submitted that if that

approach is adopted the reasonable meaning of clause 5.3.1 is that the late Egerer had the power to, during his life time or in his Will appoint a replacement trustee to fill the vacancy that has arisen in the office of trustees. He argued that since only one vacancy arose the late Egerer could not nominate and appoint more than one trustee. He also argued that if we have regard to the common rules of grammar and the syntax the conclusion is reached that the late Egerer did not have the power to, in his Will, appoint an additional trustee or trustees.

[28] The reasoning of Mr. Frank appears attractive, but what that reasoning losses sight of is the purpose to which the clause is directed. A reading of the clause 5, particularly 5.2 of the trust deed makes plain that it is concerned in the main with the fact that the Trust must at all times have a minimum of two trustees in office. Moreover, the trust deed makes it clear that in addition to appointing a replacement trustee the acting trustees may appoint additional trustees. I have quoted Clause 5.3.1 of the trust deed above but for purposes of following the grammar and syntax of that clause I will repeat it here. It reads as follows:

> '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.'

[29] Justice Crabbe[3] advices that, as a basic rule, a guide to clarity is to express only one main thought in each sentence. He further states that '[W]here there is a complicated piece of drafting, the device of paragraphing correctly used would make the meaning more precise.' Taking the guidance by Justice Crabbe paragraph 5.3 can, without doing violence to the rules of grammar and syntax, be restructured as follows to make reading and conceptualization easier:

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[3] Crabbe VCRAC. *Crabbe on Legislative Drafting*. 2nd Edition LexisNexis at p 49. Also see Thornton G.C. *Legislative Drafting*. Fourth Edition at pages 61-65 where the learned author extols the virtues of paragraphing.

'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:

(a) appoint trustees of his choice in his Will 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; or

(b) appoint trustees of his choice 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

(c) appoint additional trustees.'

[30] If the sentence in clause 5.3.1 is restructured as I have indicated above it contemplates one of three scenarios namely: First the late Egerer may by Will nominate and appoint trustees of his choice 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; Second, the late Egerer may during his lifetime nominate and appoint trustees of his choice 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. Third, in addition to the power he has to appoint a replacement trustee in his Will or during his life time the late Egerer has the power to appoint additional trustees. 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. I am thus of the view that the scenario contemplated by clause 5 of the trust deed appears to be broader than the scenario to which Mr. Frank refers.

[31] Accordingly, a reading of the full text of clause 5 of the trust deed suggests that the purpose of providing for replacement or additional trustees is to ensure that the Trust must at any given time, have more than one trustee in office. The precise modality of appointing the additional trustees by the late Egerer is not that 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.

[32] Given the suggested purpose contemplated in clause 5 of the trust deed as well as the fact that there is no textual basis in the trust deed that suggests that the late Egerer was precluded from appointing additional trustees in his Will, the applicants' argument that the late Egerer was only empowered to appoint additional trustees during his life time cannot be upheld.

The Will.

Applicants' arguments

[33] Counsel for the applicants argued that in terms of clause 2.9 of his Will, the late Egerer bequeathed trust capital to the sixth and seventh respondents (that is to Vincent Edwin Hole and Mathilde Apollonia Christiana Kautorora respectively, I will, in this judgment, refer to the sixth respondent as Hole and to the seventh respondent as Kautorora). Counsel further submitted that that bequeath is contrary to the provisions of the trust deed which does not mention any of the sixth and seventh respondents as either 'income' or 'capital' beneficiaries of the Trust nor did the trust deed empower the deceased to add new beneficiaries to it by way of Will. He argued that such bequests amounted to a unilaterally alteration of the trust deed.

[34] Counsel further argued that clause 17 of the trust deed makes provision for the termination of the Trust and the distribution of the trust funds, while clause 26 of the trust deed makes provision for testamentary reservation. He thus submitted that; the trust deed (and not the will) regulates the distribution of the trust funds on termination of the Trust. He argued that the prerogative reserved for the late Egerer in clause 26 to prescribe the formula for the allocation and distribution of the trust funds amongst the 'capital' beneficiaries does not extend beyond the prescription of the distribution formula. He thus argued that the late Egerer was not permitted to, for instance, change the definition of "capital beneficiaries" as provided for in the trust deed, or to add beneficiaries not provided for in the trust deed. He argued that any amendment to the trust deed requires compliance with clause 20 of the trust deed and the late Egerer did not, when he drafted clause 29 of the Will, comply with that clause (i.e. clause 20 of the trust deed). Only the capital beneficiaries (as defined in the trust deed) are entitled to benefit from the exercise of the power provided for in clause 26 of the

trust deed and the founder (late Egerer) was thus unable to make capital recipients of the persons named in clause 2.9 (i.e., Hole and Kautorora) of the Will.

[35] Counsel also argued that Hole and Kautorora were employees of a company known as Hamakari at the time the Will was attested to and not employees of the Trust. He thus contended that it goes without saying that the late Egerer could not appoint them in his Will as employees of the Trust because he was not the sole trustee and could not have done so (i.e. appoint Hole and Kautorora as employees of the Trust) without the permission of first applicant. The reference to those respondents "still" being employees of the Trust could thus only have become effective if the Trust appointed them prior to the death of late Egerer. Failing this, they would not fall within the parameters of the conditions as they were not employees of the Trust at the time of the death of the late Egerer. Accordingly, clauses 2.9, 2.9.1, 2.9.2 and 2.9.3 of the Will, and the "special bequests" therein contained, are unenforceable, invalid, and of no force and effect argued Mr. Frank.

Respondents' arguments.

[36] Mr. Heathcote for the respondents argued that it is not necessary for the court to determine what the legal effect of the bequests are, because the deceased testator (and not the deceased trustee) simply attached a perfectly lawful *modus* to the Trust's inheritance in his last will and testament (and not in the trust deed). He argued that the testator in his Will:

(a) Made the Trust the sole heir of his entire estate;

(b) Vested the inheritance immediately, he did not postpone it.

(c) Made bequests to the third, sixth and seventh respondents, subject to conditions to be ascertained at the termination of the Trust.

[37] He argued that when the late Egerer placed an obligation on the Trust to pay Hole, Kautorora and Stahl from the proceeds of its inheritance he added a *modus* to the bequests made to the Trust and the third, sixth and seventh respondents immediately became entitled to be paid the inheritance subject to them still being in the employment of the a Trust at the

date the Trust is dissolved. He proceeded to submit that this does not make Stahl, Hole and Kautorora *"capital beneficiaries"* under the trust but third parties who stand to benefit under the Will, subject thereto that the conditions are fulfilled. Counsel therefore implored this court to interpret the bequests in the Will, as an intention by the late Egerer to benefit Stahl, Hole and Kautorora by imposing a *modus* on the sole heir, being the Trust.

The proper approach to the interpretation of a Will.

[38] Both Mr. Frank and Mr Heathcote agree as to the approach which must be employed when interpreting a Will. De Waal[4] argue that:

> 'Interpreting a will involves ascertaining the intention of the testator. The intention of the testator is the most important aspect of the law of succession and runs like a golden thread through this branch of the law...
>
> Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the Court is bound to give effect to them ..." [5]

[39] The Supreme Court[6] confirmed that approach when it quoted Corbett[7] with approval and said:

> '...since time immemorial judges have adopted a benevolent approach in interpreting wills. They will do their best to ascertain the testator's true intention, however poorly expressed, and will not invalidate a disposition on grounds of uncertainty unless perplexity leaves them no other choice. It also explains why, in the interpretation of a will the courts will try harder to unravel the testator's subjective intention from its objective manifestation than in the interpretation of a contract. As Mr Justice Van den Heever put it in *Crookes NO v Watson*:

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4 MJ De Waal, M C Schoeman and NJ Wiechers *Law of Succession, Student's Handbook* Juta & Co, Ltd 1993 at p. 160.

5 *Supra* at p. 161; quoting with approval from *Robertson v Robertson's Executors* 1914 AD 53 507.

6 In the unreported judgment of *Standard Bank of South Africa Ltd v Council of the Municipality of Windhoek*, Case no: SA 11/2006 delivered on 26 October 2015.

7 Corbett *et al*, *The Law of Succession in South Africa*, 2 ed, (Juta 2001) at p 448.

> "In interpreting and putting into effect the provisions of a will the testator's wishes are of paramount importance . . . whereas a contracting party is sternly held to his intention as expressed."'

As *Jarman* said in words upon which it would be difficult to improve:

> "In the construction of wills the most unbounded indulgence has been shown to the ignorance, unskillfulness, and negligence of testators; no degree of technical informality, or of grammatical or orthographical error nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will and the whole carefully weighed together..."'

Having stated the principles applicable to the interpretation of Wills I now proceed to set out the clauses of the Will which are in dispute in the matter and see whether the *wishes of the late* Egerer are ascertainable from the language that he used.

The clauses of the Will that are alleged to be unenforceable.

[40] The clause which is at the centre of the dispute in this matter is clause 2 of the Will. I was tempted, but resisted that temptation, to quote the entire clause 2 of the Will. In clause 2.1, 2.2 and 2.3 of the Will, the late Egerer directs that some specific movable and immovable assets of his be reduced to cash (he in his Will also directs that certain Jaco Levin has the first right of refusal to purchase the assets mentioned in clauses 2.1 and 2.2) and that once the assets have been reduced to cash, the cash must be inherited by the Trust. In clause 2.5 of the Will the late Egerer provides as follows:

> '2, 5 I award the residue of my estate including all my business interest, shares, member's interest, loan accounts and any other right, title and interest shall be awarded to my trustees in trust of the EGERER FAMILY (REGISTRATION NO. T 30/93, NAMIBIA).

[41] It follows that every asset movable or immovable, corporeal or incorporeal that belonged to the late Egerer, that has not been sold as contemplated in clauses 2.1 and 2.2

of the Will) was inherited by the Trust. It follows that Hamakari, other entities owned by the late Egerer and Hotel Thule were inherited by the Trust (the only addition with respect to Hotel Thule is that even though the Trust inherits the Hotel, the trustees of the Trust may continue to trade with the Hotel). It thus follows that there is no distinction in my view between the inheritance by Balzar on the one hand and the inheritance by Hole and Kautorora on the other hand.

[42] In clause 2.9 and its sub-clauses of the Will, the late Egerer provides as follows:

> '2.9 I direct that all the assets of the EGERER FAMILY TRUST (REGISTRATION NUMBER T30/93, NAMIBIA) 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 bequests 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 bequests 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 a 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.'

[43] If the provisions of the Will are read in their whole context the following interpretation cannot be excluded, namely that the Trust inherited all the movable and immovable assets that belonged to the late Egerer on certain conditions. It thus follows that Hamakari and the other entities that were inherited by the Trust were inherited as going concerns, except the ones that he (the late Egerer) directed that they be sold. One of the conditions on which the Trust inherited those assets is that on the death of the late Egerer's surviving spouse, all the Trusts' assets must be reduced to cash and the Trust terminated and the persons mentioned in clauses 2.9.1, 2.9.2 and 2.9.3 must receive the inheritances given to them by the late Egerer. I therefore agree with Mr Heathcote that the qualification to which the inheritance by the Trust is subjected to amounts to a *modus.*

[44] I therefore pause here and consider what a *modus* is in our law. Jamneck[8] defines a *modus* as qualification or obligation added to a gift or a testamentary disposition whereby the person benefited is required to devote the property he receives or the value of the property he receives in whole or in part to a specific purpose. And Corbett[9], explains a *modus* as follows:

> '... In the testamentary sphere a *modus* may be defined as a provision in a will whereby the testator imposes upon a person to whom property has been bequeathed the charge of employing it or the value thereof, 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. A *modus* may be attached either to a simple bequest (*a legatum sub modo*) or to a *fiduciary* or *fideicommissary* interest bequeathed by the testator (a *fideicommissum sub modo*). It may be created in favour of a specified or ascertainable beneficiary and consist of an obligation to transfer property or pay a sum of money, either in a lump sum or periodically, to such person and/or perform some other act for the benefit of such person ...

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8 The *Law of Succession in South Africa* Second Edition at 134 and also Jamneck, J 'The *modus* in modern South African succession law' (2014) *AJ* 104.

9 *Supra* footnote 7.

A *modus* must be distinguished from a condition: a *modus* does not render the bequest to which it has been attached conditional. Consequently it does not cause any postponement of vesting and a simple legacy *sub modo* vests and takes effect immediately and is transmitted to the heirs of the legatee should the latter die after the testator but before fulfillment of the *modus*...

The *modus* itself may be conditional in the sense that in terms thereof an obligation imposed upon the heir or legatee arises only upon the occurrence of some uncertain future event. . .

A *modus* must also be distinguished from a simple wish or recommendation which the testator has made with reference to the utilization of his bequest. The latter leaves the heir or legatee free to act in accordance with the wish or recommendation or not, as he might see fit.

The recipient of an inheritance or legacy subject to a modus becomes the absolute owner of the property in question subject only to a personal obligation to perform the act with which he is charged. Where the *modus* is a personal one in favour of a third party the latter has a correlative personal right against the heir or legatee for the performance of the required act in his favour; and in the event of non-performance the third party can enforce his right by way of action. Voet says that a legatee who refuses to perform a modus may be compelled to hand back the legacy. . .'

[45] In his answering affidavit Mr. Van Straten who deposed to that affidavit on behalf of the respondents makes the following allegation:

'4.4 Mr. Egerer was a decisive man and his last wishes remained largely unchanged throughout the time I assisted him with his estate. Mrs. Egerer [the first applicant] was mostly present when we discussed estate matters.

4.4.1. Mrs. Egerer's maintenance and wellbeing was a concern of Mr. Egerer. He wanted to ensure that Mrs. Egerer would properly be maintained until her passing. The trust would be the main vehicle to achieve this.

4.4.2 ...

4.4.4 Mr Egerer was aware that he may die before Mrs Egerer. He therefore made provision for the shares of his business entities (also those in respect of which third, sixth, and seventh respondent rendered services) to be transferred to the trust, but subject to the provisions of his Will. This aspect is important. Although third, sixth and seventh respondent were always regarded by Mr Egerer as his employees, they were in fact employed by Mr Egerer himself, all his entities, as well as the trust. When his last will was drafted by me, both Mr Egerer as well as Mrs Egerer knew that, if Mr Egerer died before Mrs Egerer, those entities had to be transferred to the trust.

4.4.5 Mr. Egerer's instructions to me was that he wanted to reward a select few of his faithful employees. Foreseeing that he may die before Mrs. Egerer he wanted to ensure that those employees would continue to faithfully serve the businesses and the trust as employees until such time as Mrs. Egerer dies. As an incentive to do so, Mr. Egerer left cash bequests to them upon certain conditions. The conditions were aimed at retaining their business acumen and historic knowledge of the various businesses / entities which they served, until the death of Mrs. Egerer, also in circumstances where such businesses in which they were employed were transferred into the trust after his death, but preceding the death of Mrs. Egerer.'

[46] The first applicant in her replying affidavit replied as follows to the above allegations by Mr. Van Straten:

'5 Ad paragraph 4 of the answering affidavit:

5.1 I do not dispute the contents of paragraph 4.1 to 4.3 of thereof...

5.2 I cannot say whether I was mostly present when my late husband and the deponent {i.e. Mr. Van Straten] discussed estate matters as I was not informed about their meetings. I can confirm that that I was present on occasion...

5.4 I do not dispute the fact that my late husband intended to benefit some of his employees. I am, however, advised that the manner in which he attempted to do this was wrong and failed to achieve this object for the reasons set out in my founding affidavit....'

[47] It is now accepted that the interpretation of a Will involves ascertaining the intention of the testator. In as far as the intention of the late Egerer is concerned, his intentions are not in dispute. His intentions are confirmed by Mr. Van Straten, by his widow- the first applicant, and by clause 2.5 of the Will which I quoted above. One aspect that is clear is that the late Egerer wanted to benefit some of his faithful employees and he has named those employees they are: Wolfgang Balzar, Vincent Edwin Hole and Mathilde Apollonia Christiana Kautorora and Sarah Susan Elizabeth Stahl. The applicants simply alleged that the late Egerer has chosen the wrong route to carry out his wishes.

[48] I therefore have no doubt in mind that, the late Egerer, bequeathed the residue of his estate to the Trust and at the same time created an obligation on the Trust to pay an amount of N$ 1 000 000 to Hole, N$ 500 000 to Kautorora and 3.5 % of the cash value of the gross assets of the Trust once the assets have been reduced to cash to Sarah Suzan Elizabeth Stahl. The obligation which the late Egerer imposed on the Trust is in my view a valid and legal *modus* and I must give effect to it. I therefore do no find any merits in the applicants' complaints and manner in which they want the Will and trust deed interpreted.

Costs

[49] It remains to deal with the question of costs. At the hearing of this matter both Mr. Frank and Mr. Heathcote asked that all the costs be paid out of the testator's estate. The basic rule is that, except in certain instances where legislation otherwise provides, all awards of costs are in the discretion of the court[10]. In the matter of *Cuming v Cuming*[11] the Court there held that in a suit relating to the interpretation of a Will costs are ordered to come out of the estate except where there are special considerations.

[50] There are, however, in the instant case no special considerations - warranting the Court to depart from the general rule that the costs of proceedings of this character, when incurred because of obscurities in the will must be paid out of the testator's estate. Both

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10 *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC); *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

11 1945 AD 201 at p. 216.

counsel have also agreed that the complexity of the matter required the engagement of two instructed counsel.

[51] I accordingly make the following order:

1 The application is dismissed.

2 The costs of this application must be paid from the estate, such costs to include the costs of one instructing and two instructed counsel in respect of both the applicants and the respondents.

SFI Ueitele
Judge

APPEARANCES

APPLICANTS:	Mr. Frank TJ SC assisted by Mr. D Obbes. Instructed by ENS Africa, Windhoek
FIRST TO THIRD RESPONDENT:	Heathcote R, SC assisted by Jacobs S J Instructed by Van der Merwe Greef & Andima Inc, Windhoek
FOURTH TO SEVENTH RESPONDENT	No Appearance.