



REPORTABLE

CASE NO: SA 27/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between

HANS-WILHELM SCHÜTTE

First Appellant

DOROTHEA JOHANNA SCHÜTTE

Second Appellant

HERBERT MAIER

Third Appellant

and

ASCAN SCHÜTTE

Respondent

CORAM: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 17 March 2021

Delivered: 13 April 2021

Summary: This appeal emanates from a dispute about the removal of the respondent as a trustee of a family trust known as the Schütte Trust (the trust). The appeal in the end turns on the interpretation of certain clauses dealing with the vacation of office of a trustee in the trust.

The first appellant and the respondent are brothers. The second appellant is their mother. They all have an interest as either trustees or beneficiaries of the trust. The

trust was established by the father of the first appellant and the respondent. The father died in 2014 and this left the appellants and the respondent as the only trustees.

During 2018, the respondent received an email from the first appellant in which he was informed that the remaining trustees had taken a resolution removing him from office as a trustee. The email further stated that that decision had been made in terms of clause 4.4.6 of the trust deed. Attached to the email was an amended Trust Certificate which did not reflect the respondent as one of the trustees. Aggrieved by this decision, the respondent brought an application in the High Court, among others, seeking an order compelling the appellants to reinstate him as trustee of the trust. Before the High Court, the respondent's principal objection to his removal was that the remaining trustees had no powers in terms of the trust deed to remove him as a trustee.

Clause 4.4 of the trust deed makes provision for the vacation of office of a trustee in the trust. Sub-clause 4.4.6 stipulates that 'the office of a trustee shall be *ipso facto* vacated if: the majority of the trustees shall in writing require him to resign.' Clause 6 regulates matters relating to trust meetings and resolutions taken at those meetings. Clause 7 outlines the numerous powers vested in the trustees in the administration and management of the trust.

After hearing arguments in support of and in opposition to the application, the High Court granted, with costs, the application and ordered the reinstatement of the respondent as a trustee. The court based its decision on two main findings, first; that the remaining trustees did not take a resolution requiring the respondent to resign but simply took a resolution removing him as a trustee. According to the court, that action was not in the spirit of the trust deed. Secondly, the action by the remaining trustees also offended the principle to act fairly and reasonably and to comply with the requirements of the common law or legislation as contemplated in Article 18 of the Namibian Constitution.

On appeal, the sole question for determination was whether the High Court misdirected itself in the interpretation of certain clauses in the trust instrument dealing with the vacation of office of a trustee.

Held that, a trust set up by a living founder – also known as trust *inter vivos* - is created by way of a contract for a third person or a transfer to a trusted friend on specified terms. The terms of the trust instrument govern the appointment of the trustees and may prescribe circumstances in which the trustee may vacate office.

Held that, the trust concerned is a trust *inter vivos* created by contract to which the appellants and the respondent were parties.

Held that, the use of the phrase '*ipso facto*', in the introductory part of clause 4.4 in the trust deed simply meant that if any of the enumerated facts or circumstances set out in sub-clauses 4.4.1 to 4.4.6 were to exist, by that fact itself or by the mere fact of that circumstance, the office of a trustee shall become vacated.

Held that, the trustee's rights relating to the vacation of office in an *inter vivos* trust, are determined purely with reference to the provisions of the trust deed. In this instance, there was no requirement to constitute a meeting of the trustees to act in accordance with clause 4.4.6. All that was required was a writing issued by the majority of the trustees to the affected trustee. Such writing constitutes an act by the majority.

The Court thus found that the High Court misdirected itself in coming to its decision by applying public-law principles as the issues should have been considered entirely within the realm of contractual settings informed by the terms of the trust deed.

The appeal was upheld with costs.

APPEAL JUDGMENT

SHIVUTE CJ (HOFF JA and FRANK AJA concurring):

Introduction

[1] This appeal concerns the interpretation of certain clauses in the trust instrument dealing with the vacation of office of a trustee in a family trust known as the Schütte Trust (the trust). The trust was founded on 3 September 2001 when the deed of trust was signed in Windhoek on that date. The first appellant and the respondent are brothers, being the children of the late Mr Florenz Dietrich Schütte and his surviving spouse, the second appellant, jointly referred to hereinafter as ‘the parents’. The parties to the trust deed were the parents, the first and third appellants as well as the respondent. They were all designated in the deed of trust as the first trustees. The trust was founded as an investment holding trust with the vesting date being the date of the death of the parents. Mr Schütte senior died on 17 October 2014 and so in terms of the relevant clause of the trust deed, his position as trustee had been vacated. This development was recorded by the remaining trustees, including the respondent, in a resolution signed by them on 20 January 2015.

[2] The respondent, who lived in Germany, alleged that by August 2017 when he did not receive notices and/or minutes of the meetings of trustees, he demanded through telephone calls made and email messages addressed to, among others, the first appellant to be furnished with annual reports and/or financial statements relating to the trust as well as the minutes of trust meetings. After several attempts to obtain a response, he ultimately received an email from the first appellant. Attached to the email was an amended Trust Certificate that did not reflect the respondent’s name among the list of trustees.

[3] The amended trust certificate was accompanied by a letter dated 22 January 2018, in which the respondent was informed that on 18 June 2017, 'the remaining trustees' had taken a resolution, 'which included your removal as a trustee from the trust'. According to the letter, the removal from office was made pursuant to clause 4.4.6 of the deed of trust. The respondent followed up on the correspondence by addressing a letter to the first appellant asking for the reasons for the change in the composition of trustees. After he failed to get answers, he instructed his legal practitioners to write a letter to the appellants in which it was contended that the clause in the trust deed relied upon as the basis for the respondent's removal from office of trustee only provided that the other trustees could in writing require a trustee to resign and that it was up to the affected trustee to decide whether or not to comply. It was further contended that the trust deed did not at all authorise the removal of a trustee from office.

[4] Suffices it to say that the respondent subsequently brought an application in the High Court, on notice of motion, in which he sought orders compelling the appellants to reinstate him as trustee and to pay the costs of the application. The appellants relied on clause 4.4.6 of the trust deed for the contention that in terms of the trust instrument, the office of trustee was automatically vacated once the majority of the trustees required a fellow trustee to resign. It was further argued that clause 4.4 of the trust deed was a special provision dealing specifically with the removal of a trustee from office and that this provision overrode not only any general provision in the trust deed, but also the general principle that trustees were required to act jointly in a meeting.

[5] The appellants subsequently alleged in their answering affidavit that a letter, dated 18 June 2017, was also sent, by post, to the respondent's residential address in Germany. In the letter, the respondent was notified that the remaining trustees required of him to resign as a trustee in terms of clause 4.4.6 of the trust instrument and 'that such resignation is deemed to have taken effect on the date of this notice'.

[6] The respondent denied that the letter of 18 June 2017 had been sent to him. He in fact disputed that it was written on the date on its face value, describing the letter as 'a fabrication after the event'. He correctly pointed out that the letter of 18 June 2017 was not referred to in any of the prior correspondence between the parties and that the allegation of its writing or existence only emerged from the answering affidavit. The respondent also contended that the letter was in any event 'irrelevant' as it would have required of him to resign 'long after the event'. It would have thus not given him an opportunity to respond to it in writing.

The High Court's approach

[7] The High Court held that the 'most sensible and reasonable interpretation' of clause 4.4.6 of the Trust Deed was that where the majority of the trustees wanted a trustee to vacate the office of trustee, they must first request the affected trustee to resign his or her office. The court noted that the respondent was not invited to the meeting where the decision to remove him as trustee was taken. It also found that the majority of the trustees did not take a resolution requiring the respondent to resign as a trustee. On the contrary, they simply took a resolution to remove him from office.

[8] The court held that clause 6.3 of the trust deed required that all resolutions of the trustees should be taken, to the extent possible, by a unanimous decision. The failure to invite the respondent to the meeting was therefore not in the spirit of the trust deed and the resolution to remove him as trustee was not in accordance with its terms and was therefore invalid. Additionally, so the High Court reasoned, the majority of the trustees could not remove the respondent from office without furnishing him with reasons for his removal or at the very least without giving him an opportunity to persuade them why he must not be removed. The court accordingly made an order granting the application to reinstate the respondent and directing the appellants to pay the costs of the application.

[9] Aggrieved by the judgment and order of the High Court, the appellants lodged an appeal before this Court. They attacked the judgment of that court on multiple grounds, including the contentions that the High Court erred: in not applying the correct canons of interpretation in its rendering of the relevant clauses of the trust deed; in failing to define the phrase '*ipso facto*' in clause 4.4.6 of the trust deed; in not upholding the appellants' contention that clause 4.4 of the trust deed was a special contractual provision which specifically dealt with the vacation of office of trustee and which thus overrode any general provision in the trust deed; in not finding that the letters addressed to the respondent dated 18 June 2017 and 22 January 2018 constituted written notification by the remaining majority of the trustees and thus amounted to compliance with clause 4.4.6 of the trust deed; in holding that the appellants failed to invite the respondent to a meeting at which his vacation of office would be discussed as no such meeting was required by the terms of the trust deed, and in not finding that Art 18 of the Namibian Constitution was not engaged,

because the vacation of office did not constitute the taking of an administrative action or decision and as such the matter should have been considered entirely within the realm of a contractual setting informed by the terms of the trust deed.

Positions of the parties in this court

[10] In this court, the parties stuck to their arguments advanced in the High Court, with the appellants arguing in favour of the contentions made in the grounds of appeal and the respondent counter arguing that he was unlawfully removed from office as the procedural formalities allegedly set out in the trust deed had not been complied with. The respondent contended that the principle of *audi alteram partem* rule should have been extended to him so that he could be given an opportunity to consider whether or not to resign as trustee. Some of the respondent's other pertinent submissions will be referred to and considered in the discussion that follows.

Relevant legal principles relating to trusts

[11] There are many ways in which a valid trust may be formed. One such a way is by means of contract. A trust set up by a living founder, known as a trust *inter vivos*, is created by way of a contract for a third person or a transfer to a trusted friend on specified terms.¹ In the case of a trust *inter vivos*, the terms embodied in the trust instrument govern the appointment of the trustees and may prescribe circumstances in which the trustee may vacate office.²

¹ E Cameron et al ... *Honore's South African Law of Trusts*, 5 ed (2002) Juta Law, pp.34 – 35.

² Op. cit., p. 226.

[12] In the present case, it is common cause that the trust was created by contract to which the appellants and the respondent were parties. Although the parties raised a number of issues in their papers, the issues that fell for determination were ultimately narrowed down at the case management conference in the High Court.

[13] By way of a summary, the parties agreed that all that was required in the application was for the court to: (a) interpret the terms of the trust deed and decide whether there was any term in the trust deed authorising the trustees to remove a fellow trustee; (b) determine the meaning and effect of clause 4.4 of the trust deed (inclusive of its subparagraphs, particularly sub-clause 4.4.6) and decide whether, in the event of the majority of the trustees in writing requiring a trustee to resign, such an act would have had the effect of the affected trustee *ipso facto* vacating his or her office as trustee or whether the trustee in question had a choice whether or not to resign; (d) decide whether to direct the respondent's reinstatement as trustee of the trust, and determine which party should pay the costs of the application. The parties further agreed that the dates on which the respondent might have been notified of his removal as trustee and 'other ancillary matters' were not of the moment as the matter essentially concerned the interpretation of the terms of the trust deed.

[14] The approach to the interpretation of text, including contracts, has undergone a paradigm shift in recent years, with context being placed at the core of the interpretation of a contract in all circumstances and not only when there appears to be ambiguity in the language used in the document. In Namibia, this approach was first acknowledged and applied by this court in *Total Namibia (Pty) Ltd v OBM*

*Engineering and Petroleum Distributors CC*³ where O'Regan AJA, speaking for the court, set out the approach as follows:

'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.'⁴

[15] Turning now to the interpretation of the trust deed, it was common cause between the parties that the respondent was appointed trustee in terms of clause 4.1.5 of the deed of trust and that after the death of the donor there remained only four trustees, including the respondent. The trust deed is a typical example of an *inter vivos* trust which is formed by way of an agreement. As previously noted, this is done where the trustees contractually agree to take ownership of the assets which will then be held and administered by them on behalf of the beneficiaries.⁵ Hence the creation and revocation of such trusts and the acquisition of rights by the beneficiaries under them are regulated by the rules of the law of contract. It also follows that the basis of the trustees' rights and obligations are founded in contract and not in public-law. As emphasised in *Trusts - Law and Practice*⁶:

'The trust deed of an *inter vivos* trust is drafted in the form of an agreement, because the Appellate Division has on various occasions declared that an *inter vivos* trust is in

³ 2015 (3) NR 733 (SC).

⁴ Para 24. See also the admirable summary of the approach given by Damaseb DCJ in *Egerer & others v Executrust (Pty) Ltd & others* 2018 (1) NR 230 (SC) paras [34] - [35].

⁵ W Geach & J Yeats (2008) *Trusts - Law and Practice*, Juta, p.26.

⁶ PA Olivier *et al...* *Trust Law and Practice*, Service Issue 6, Lexis Nexis, para 9.2.1.

essence a contact between the founder and trustees, and more especially, a stipulation in favour of a third party.'

[16] In the instant case, clause 4.4 of the deed of trust enumerates the circumstances in which the office of trustee 'shall be *ipso facto* vacated'. These include: resignation (clause 4.4.1); becoming 'unfit or incapable of acting' as a trustee (clause 4.4.2); becoming of unsound mind and mentally incapable of managing own affairs (clause 4.4.3); insolvency or assignment of one's estate for the benefit of creditors (clause 4.4.5). However, the cause for the loss of office that is pertinent in the present context is one provided for under clause 4.4.6 of the trust deed, which reads as follows:

'The office of a trustee shall be *ipso facto* vacated if:
the majority of the trustees shall in writing require him to resign.'

[17] The appellants contend that the respondent vacated the office of trustee in terms of this clause when he was informed of the decision of the majority of the trustees in the letters dated 18 June 2017 and 22 January 2018. The respondent counter argued, in the first place, that the trustees did not have the power to dismiss one of their number by majority decision, and secondly that the majority decision did not in any event comply with clauses 6 and 7 of the trust deed. The respondent went on to argue that as the clause dealing with the vacation of office by a trustee is ambiguous, whatever interpretation to be adopted must be one taking into account clauses 6 and 7 of the deed of trust. This, according to the respondent, is so because clause 6.3 enjoins the trustees to, if possible, take all decisions unanimously, which in the respondent's submission meant that all trustees should be

invited to all decision-making trustee meetings, especially at a meeting where the resignation of a trustee is to be considered. The respondent characterised such a decision as 'probably the most important decision ever taken in the administration of a trust during its lifetime'.

[18] The respondent further argued, that the use of the words 'require him to resign' in clause 4.4.6 of the trust deed are an indication that the affected trustee has to be asked to resign first and he or she has a choice whether or not to do so. Moreover, as clause 7 of the trust deed requires that trustees must work 'in the best interest of the trustee and beneficiaries', the removal from office of a trustee would not be in the best interest of the trust or of the beneficiaries. The respondent therefore contends for the interpretation of the trust deed that is 'more humane and reasonable' or 'equitable' given that the trust in question is a purely family trust where the balance of power in the representation of trustees should be maintained. This, so contends the respondent, would be in accordance with the intention of the donor that his two sons should both be trustees. According to the respondent, the interpretation contended for by the appellants would undermine that balance and seriously impede the equitable administration of the trust. The respondent therefore supports the judgment and reasoning of the High Court.

[19] In light of strong reliance on clauses 6 and 7 of the trust deed by the respondent, it has become necessary to have a closer look at these clauses. Clause 6 deals with the conduct of meetings of the trust and the taking of resolutions for the dispatch of the trust business. Sub-clause 6.1 thereof provides that the trustees may meet for the dispatch of business, adjourn and otherwise regulate their meetings as

they think fit. Sub-clause 6.2 provides that in giving effect to the terms and conditions of the trust deed, the trustees must adopt such procedures and take such administrative steps as necessary. Sub-clause 6.3 requires that all decisions of the trustees shall, if possible, be taken unanimously and that in the event of disagreements the matter in question must be decided by a simple majority on show of hands.

[20] Clause 7 on the other hand deals with the powers of the trustees in the management of the affairs of the trust 'in the best interest of the trust and the beneficiaries'. The trustees' wide-ranging powers have been enumerated in 32 sub-clauses of that clause.

Analysis

[21] It would appear to me that the appellants are correct when they contend in effect that the strong reliance on clauses 6 and 7 of the trust deed by the respondent is untenable. This is so, because as forcefully argued on behalf of the appellants, clause 4.4 is a special provision which overrides general provisions in the trust deed. Clause 4.4 deals with specifically enumerated circumstances in which the office of trustee '*ipso facto*' becomes vacated, while clauses 6 and 7 are provisions dealing with matters of a general nature. The appellants undoubtedly are also correct in their submission that the principle of *generalia specialibus non derogant* (general words do not derogate from special ones) finds application in the circumstances.

[22] As explained by Christie, this maxim requires that the parties to a contract cannot have intended that general provisions should apply to matters covered by

special provisions.⁷ Although the maxim is ordinarily used in the interpretation of statutes, there is no reason why it should not be employed in the interpretation of contracts as well given that there is no difference in approach to interpreting legal documents.⁸ As the clauses relied upon by the respondent concern general matters, they should be distinguished from the special provision contained in clause 4.4 that exclusively governs the vacation of office of trustee. It is important to note, as the appellants rightly submitted, that as a special provision, clause 4.4 is not overridden or qualified by the general provisions contained in clauses 6 and 7. Those clauses do not refer to clause 4.4 at all.

[23] A careful analysis of clause 4.4 read with its 6 sub-clauses, especially clause 4.4.6 establishes that the clause, in the first place, deals with the proposition that the office of the trustee 'shall be *ipso facto* vacated' if one of the six enumerated circumstances arise. The meaning of '*ipso facto*' is significant in the interpretation of the trust deed, particularly clause 4.4.6. The term '*ipso facto*' has been defined in *Black's Law Dictionary*⁹ as 'by the fact itself; by the very nature of the situation.' Hiemstra and Gonin¹⁰ similarly define '*ipso facto*' as 'by the mere fact; by the very fact'.

[24] The use of the phrase '*ipso facto*', in the introductory part of clause 4.4 therefore simply means that if any of the enumerated facts or circumstances set out in sub-clauses 4.4.1 to 4.4.6 were to exist, by that fact itself or by the mere fact of that circumstance, the office of a trustee shall become vacated. In terms of clause

⁷ GB Bradfield 7 ed (2016) *Christie's Law of Contract in South Africa*, Lexis Nexis, p 261.

⁸ Id. A statement approved in *Consolidated Employers Medical Aid Society & others v Leveton* 1999 (2) SA 32 (SCA) at 41A-C. See also *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) para 11.

⁹ A. Garner 11 ed (2019) *Black's Law Dictionary*, Thompson Reuters, 2019, p. 992.

¹⁰ *Trilingual Legal Dictionary*, 3 ed at 212.

4.4.6, the very nature of the situation that will cause the office of trustee to automatically become vacated is 'if the majority of the trustees shall in writing require [the trustee] to resign'. Once this has occurred, there does not appear to be any additional requirement for such trustee to consent or agree to the resignation.

[25] To read into the clause the requirement of consent of or agreement by the affected trustee would indeed defeat the purpose of the clause, which is that the office shall be vacated by the very fact of the affected trustee being asked by the majority in writing to resign. Clause 4.4.6 also does not - as the respondent vigorously submitted - contemplate a request for the affected trustee to resign. The vacation of office follows once the trustee has been required in writing by the majority of the remaining trustees to resign. The interpretation contended for by the respondent that consent of the affected trustee is required completely ignores the phrase '*ipso facto*' and appears to equate the word 'require' with 'request'.

[26] The transitive verb 'require' is defined¹¹ in one sense as 'lay down as an imperative' (with the following example given for its use in this sense: '*did all that was required by law*'). In yet another sense it is said to mean 'command; instruct (a person etc.)'. Similarly, it has also been defined in another sense as 'order; insist on (an action or measure)'. To 'require' a trustee to resign in the context that word is used in clause 4.4.6 therefore means to 'command', 'instruct' or 'order' the trustee to resign. It also means to 'insist on an action or measure' on the part of the trustee, in this case the measure or action being to resign. It would seem therefore that the trustee so required to resign does not have much of a choice other than to obey the command or instruction.

¹¹ In *The Concise Oxford Dictionary*, 9 ed at 1169.

[27] The combined use of the words 'shall be *ipso facto*' and 'shall in writing require him to resign' in clause 4.4.6 strongly establishes that the office of trustee becomes vacated by the mere fact of the majority of the trustees in writing having commanded or ordered the affected trustee to resign. The clause essentially contemplates a forced resignation. This interpretation accords with the universally applied golden rule of interpretation and the principle of freedom of contract or *pacta sunt servanda* (agreements are to be observed) and does not result in absurdity or inconsistency as argued by the respondent. The principle of *pacta sunt servanda* has been described by this court as a 'profoundly moral principle, on which the coherence of society relies'.¹² As pointed out by Ngcobo J in the Constitutional Court of South Africa in *Barkhuizen v Napier*:

'Public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted [e.g. *Brisley v Drotosky* 2002 (4) SA 1 (SCA)] gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, *even to one's own detriment*, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.' (Emphasis is mine).

[28] In this appeal, it is not in dispute that the trust deed was signed freely and voluntarily by the respondent. The one dispute that initially existed between the parties centred on the date on which the respondent was notified of his removal from

¹² *Namibia Wildlife Resorts (Pty) Ltd v Ingplan Consulting Engineers and Projects* 2019 JDR 1308 (NmS) para 28 (adopting the dictum in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 87). See also *Old Mutual Life Assurance Company (Namibia) Ltd v Symington* 2010 (1) NR 239 (SC) para 26.

office. However, as earlier observed, the parties agreed at the case management conference that such date did 'not really matter as the issue in the proceedings relate to an interpretation of the terms of the trust deed'. In this court, the respondent appeared to have resurrected the dispute by arguing that there was no proof that the respondent had received the letter of 18 June 2017. Nothing much turns on this submission as the real issue concerns the interpretation of the trust deed as agreed to by the parties at the case management conference by which time it was clear to the respondent from the affidavits filed in the application that the majority of the trustees required him to resign.

[29] The respondent also argued, as earlier noted, that there ought to have been held a constituted meeting of trustees to which the respondent should have been invited. I agree with the appellants that the command for the vacation of office did not require an action by the trustees as a body. There is also no requirement for a constituted meeting of the trustees to act in accordance with clause 4.4.6. Nor does the principle that the trustees should act jointly find application. All that was required was a writing issued by the majority of the trustees. Such writing constitutes an act by the majority.

[30] The argument advanced by the respondent based on notions of alleged procedural rights - and reference to examples of the rights enjoyed by employees in the context of employment contracts - cannot be sustained as such considerations do not find application. Such matters were not only part of the case the appellants were required to meet, but more so, as a general proposition, the rights of employees in labour law are regulated by statute and contractual arrangements.

They do not extend to a trustee. In the case of the trustee in an *inter vivos* trust, the rights of vacation of office are purely determined by contractual provisions considered within the context of the trust deed.

[31] As a final point, the finding by the court *a quo* of alleged non-compliance with the Namibian Constitution on account of the failure to give reasons for the forced resignation and to afford the respondent an opportunity to persuade the other trustees otherwise cannot be accepted as correct. A careful consideration of the trust deed shows that there were no additional requirements for reasons to be provided or opportunity for persuasion. Furthermore, as earlier alluded to, the exercise of the power under clause 4.4.6 of the trust deed by the trustee did not concern the taking of an administrative action or decision within the context of Art 18 of the Namibian Constitution or a decision taken in the employment setting. It follows that the High Court misdirected itself by applying public-law principles to a matter that should have properly been considered entirely within the realm of contractual setting informed by the terms of the trust deed.

[32] As the wording of clause 4.4.6 in the context of the trust deed is unambiguous, it is not necessary to deal with the other arguments advanced by the respondent based on equitable or reasonable interpretation of the trust deed. It follows that the appeal must be upheld.

[33] As a post-script, counsel for the respondent has filed supplementary heads of argument subsequent to the hearing of the appeal responding to a question posed by a member of the court, which he omitted to address during the hearing. The

question was whether the respondent's forced resignation had affected his status as a beneficiary. Counsel for the respondent says in the heads of argument that the respondent had since been removed as a beneficiary of the trust. Doubtless, the submission concerns an escalation in the family rift. However, as the issue of removal as a beneficiary is not part of the appeal before us, we expressly refrain from expressing any view on it. Our concern is more about the course of conduct adopted by counsel for the respondent to unilaterally file documents after the hearing of the appeal. The filing of documents in that fashion without the leave of the court and the consent of the appellant's practitioners was recently¹³ deprecatingly referred to by this court as being improper. That strong admonition applies with equal force to the procedure adopted by counsel for the respondent in this case. It remains to briefly consider the issue of costs.

Costs

[34] The appellants employed two instructed counsel to argue the appeal. In their written heads of argument, the appellants have prayed for a costs order to include the costs of two instructed counsel. However, in oral argument counsel left the decision as to the costs of two instructed counsel to the discretion of the court. In my view, although the appeal raises novel issues of interpretation of a document, the real issues for decision are fairly confined and the record consists of only one volume. The magnitude of the case is such that it does not justify the employment of two instructed legal practitioners. The costs order should therefore be limited to the employment of one instructed legal practitioner.

Order

¹³ In *MA & others v AG* (SA72-2019) 2021 NASC (10 March 2021) para 48.

[35] In the result, the court makes the following order:

(a) The appeal is upheld with costs, such costs to include the costs of one instructing legal practitioner and one instructed legal practitioner.

(b) The order of the court *a quo* is set aside and substituted for the following order –

‘The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.’

SHIVUTE CJ

HOFF JA

FRANK AJA

APPEARANCES

APPELLANTS: R Totëmeyer (with him D Obbes)

Instructed by Ellis Shilengudwa Inc.

RESPONDENT: A Vaatz

Of Andreas Vaatz & Partners