Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 19006/2015

Before: The Hon. Mr Justice Binns-Ward

Hearing: 1 March 2016

Judgment delivered: 1 March 2016

In the matter between:

THE DISTRICT GRAND LODGE OF SOUTH AFRICA (WESTERN DIVISION)	Applicant
and	
THE MASTER OF THE HIGH COURT, CAPE TOWN	First Respondent
THE TRUSTEES FOR THE TIME BEING OF THE CHARLES HARDING CHARITABLE TRUST	Second Respondent
NEDGROUP TRUST (PTY) LTD	Third Respondent
FREDERICK ENRIQUE KRÖHNERT	Fourth Respondent

JUDGMENT

BINNS-WARD J:

[1] The question for determination in this application is the meaning of clause 10 of the last will and testament of the late Charles Harding, who died on 30 May 1978.

[2] The will, which was dated 29 April 1975, provided for the creation of a charitable trust to be known as the Charles Harding Charitable Trust. The clause in contention was directed at providing for the appointment of the executors and administrators of the testator's estate and related matters.

[3] It reads as follows:

> I nominate and appoint SYFRET'S TRUST COMPANY LIMITED, and FINLAY McINTYRE, failing whom, a Nominee from time to time appointed by the Board of General Purposes of the District Grand Lodge of Southern Africa, Western Division, to be the Executors and Administrators of my Estate and direct that they shall not be required to furnish security for the due and proper execution of their duties in either capacity, notwithstanding the fact that one or more of them may fail to assume, or may relinquish the said Trust, or die, in which event, the remaining Appointee/s shall act alone without furnishing security.

Clause 10 was amplified in terms of a codicil executed by the testator on 11 August 1976, which, insofar as relevant, provided:

> I hereby alter my said will by amplifying Clause 10 to include the name of my nephew, DAVID CHARLES HARDING, as a Co-Executor and Co-Administrator or my Estate, directing that he shall not be required to furnish security for the due and proper execution of is duties in such capacity and that his appointment shall further be subject to all the terms and conditions as contained in such Clause.

Clause 6 of the will provided for the establishment of the Charles Harding Charitable Trust and for the co-executors and co-administrators of the deceased's estate to be its trustees. The free residue of the testator's estate was bequeathed in trust to the trustees of the trust.

[4] The will provided for the trustees of the trust to retain the bequeathed property in trust in perpetuity. The testator directed that the net income of the trust be distributed to '*various charitable organisations in such manner and in such proportions as* [the trustees] *from time to time decide*'. He did, however, record his wish that the trustees, in exercising their discretion, should '*remember the Marsh Memorial Homes of Rondebosch, the Ladies Christian Home of Vrede Street, Cape Town, the Masonic Education Fund of South Africa, the Blind, the Deaf and the Animals*'. Nearly forty years on from the testator's death, the trust continues to make quite substantial donations annually to a variety of charities.

[5] The District Grand Lodge of South Africa (Western Division) referred to in clause 10 of the will is an organisation of freemasons. It is described in the papers as being a non-profit organisation. It is the applicant in these proceedings.

[6] The testator was a freemason. He had held the office of District Grand Treasurer of the applicant. The evidence is that this is a senior position in freemasonry. The testator had also served as a member of the applicant's Board of General Purposes.

[7] The applicant has applied for the following substantive relief in terms of paragraphs 1-3 of the notice of motion:

> Orders:
>
> 1. Reviewing and setting aside the decision of the first respondent of 6th July 2015 that the applicant's Board of General Purposes does not have the right to nominate a trustee for appointment to the **CHARLES HARDING CHARITABLE TRUST;**
> 2. Declaring **IAN NORMAN PRINGLE** to be duly nominated by the applicant's Board of General Purposes as a trustee to the **CHARLES HARDING CHARITABLE TRUST;**
> 3. Declaring that the applicant's Board of General Purposes may nominate replacement trustees for appointment from time to time to replace such trustees of the **CHARLES HARDING CHARITABLE TRUST** as may fail to take up or relinquish their trusteeship or die.

[8] The applicant was constrained to institute these proceedings because of a difference of opinion between itself and the respondents as to whether clause 10 of the will authorised the applicant's Board of General Purposes to nominate a trustee. The first respondent is the Master of the High Court, Cape Town. The other parties cited as respondents are Nedgroup Trust (Pty) Ltd (the current name of the company referred to in clause 10 as 'Syfrets Trust Company Limited') and Mr F.E. Kröhnert, who is currently, as the nominee of that company appointed in terms of s 6(4) of the Trust Property Control Act 57 of 1988,[1] the only person holding letters of authority from the Master to administer the trust.

[9] The Master has filed a report, for which I express the court's appreciation. She abides the judgment of the court. The other respondents agree with the construction of the contested clause accepted by the Master in her report, but they also abide the judgment of the court.

[10] The applicant contends that upon a proper interpretation of clause 10 it is entitled to nominate a person for appointment as a trustee to the trust and, in the event of such person failing to take up the appointment, or having done so, thereafter vacating it, to nominate a

---

[1] Subsections 6(1) and (4) of the Trust Property Control Act provide:

> *(1) Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master.*
>
> *(4) If any authorization is given in terms of this section to a trustee which is a corporation, such authorization shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorization.*

replacement. The applicant's position therefore is that the trust currently falls to be administered by two trustees; one appointed upon nomination by its Board of General Purposes, and the other nominated by Nedgroup Trust (Pty) Ltd. This, indeed, is the manner in which the trust's administration has in practice been attended to since the death of Mr Finlay McIntyre in 1985.

[11] As provided in the will and codicil, Mr McIntyre assumed office as one of three trustees when the trust was established after the testator's death in 1978. The other trustees were one Wagner, who was nominated by Syfrets Trust Company, and the testator's nephew, David Harding. When McIntyre - who was a friend of the testator[2] and also a senior office bearer in the applicant organisation[3] - died, he was replaced by another senior freemason nominated by the applicant's Board of General Purposes, and when the replacement subsequently relinquished his position as a trustee, another senior freemason nominated by the Board of General Purposes took his place.

[12] In similar fashion, the trustee nominated by the trust company (Wagner) was replaced from time to time; Mr Kröhnert being the most recent such appointment. Mr David Harding is now deceased. It is not contended by anyone, correctly so in my judgment, that a trustee falls to be appointed in his stead. The reason why no-one fell to be appointed in David Harding's place was because, in contrast to the position that pertained to the other two appointments, there was no provision in the will, whether express or implied, for anyone to succeed to his position as a trustee.

[13] Nedgroup Trust (Pty) Ltd took counsel's opinion on the meaning of clause 10 when the applicant sought the appointment of Mr Ian Norman Pringle to replace Mr Peter Ransom Duckworth, who had acted as the trustee nominated by the Board of General Purposes from 2001 until 2014. In accordance with the advice furnished by counsel, it is the trust company's view that upon a proper construction of clause 10, the trust now falls to be administered by a sole trustee, being the person nominated thereto from time to time by it. The view now adopted by Nedgroup Trust and Mr Kröhnert is that the provision in the will that the applicant's Board of General Purposes should from time to time nominate a trustee was intended to apply only in the event of McIntyre *not* having assumed office when the trust was initially established. The Master is of the same opinion.

---

[2] McIntyre is acknowledged as a friend of the testator in clause 2 of the will.
[3] McIntyre was the District Grand Master, which is the most senior position in the applicant organisation.

[14] The rules of interpretation are well established. They apply in respect of the construction of all jural documents, including wills. The Supreme Court of Appeal's judgment in *Novatis v Maphil Trading* 2016 (1) SA 518 (SCA) sets out a useful distillation of the rules based on their treatment in recent jurisprudence.[4] It is therefore not necessary to rehearse them here at any length. It suffices for present purposes to say that they confirm that trying to discern the meaning of a document by peering at the words or phrases used in it in isolation is generally a futile exercise. Proper regard to the particular context in which the words and phrases used have been strung together is crucial to determining the proper construction of a document. When construing documents it should also be borne in mind that draftmanship can often be inept. That means that if the intended meaning is clear, the clumsy or inapposite use of language by the drafter should not be allowed to detract from or obscure the discernible intended meaning. 'Sophisticated semantic analysis' should not be permitted to negate an evident practical object that was clearly sought to be achieved by the provision which is being construed; see e.g. *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) at para. [14].[5] Due regard must be had to the factual matrix within which the document was executed. The consideration of all the contextual factors in the interpretative exercise must be an integrated one; the process of interpretation is not one that occurs in stages, but is essentially 'one unitary exercise'; see *Bothma-Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), at para 12, with reference to *Rainy Sky S.A. and others v Kookmin Bank* [2012] 1 All ER 1137 (SC), at para 21.[6]

[15] Clause 10 lends itself to being considered as comprised of two parts; the second part commences with the words '*notwithstanding the fact*'. The first part of clause 10 clearly reflects the intention of the testator that there should be two trustees. One of them would be a person nominated by the trust company to represent it. The other, initially, was intended to be Mr McIntyre. The testator plainly appreciated that McIntyre might, for whatsoever reason,

---

[4] At paras 24-31.

[5] In *Skilya Property* loc.cit., Conradie JA remarked '*Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by paragraph 1 of section IV. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by the incorporation provision*'.

[6] In *Rainy Sky* loc.cit., Lord Clarke held '*The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*'.

not take up the appointment and made provision, in that event, for the applicant's Board of General Purposes to nominate someone in his stead. Having regard to the testator's express intention that the trust endure in perpetuity, he must also have appreciated that whilst the trust company might be expected to endure in one or other form for the foreseeable future, McIntyre surely would not survive in perpetuity. It is therefore unsurprising that, while there is no provision for an alternative to the Syfrets Trust Company, there is indeed provision for an alternative to McIntyre. The words '*failing whom*' relate to McIntyre, not to the Syfrets Trust Company. That much is indeed common cause.

[16] The respondents' contention is that because the words '*failing whom*' relate to McIntyre, the words following thereafter have no current application because McIntyre did not fail to take up the appointment. If one peers at the words '*failing whom*' in the narrow context of the clause itself, without any regard to the other indications of the testator's scheme for the administration of the trust, the construction favoured by the respondents can give a plausible interpretation, albeit not the only possible one. The respondents' construction would, however, give rise to a peculiar result. Ignoring the effect of the codicil - which I think one may do for current purposes[7] - it would imply that the testator had intended that if McIntyre took office as a trustee there should be two trustees – McIntyre and the person appointed by Syfrets – but only for so long as McIntyre remained in office. After McIntyre ceased to be a trustee, however, there would be only one trustee – the person appointed by Syfrets from time to time. The respondents' construction posits that there would be two trustees on an on-going basis – one appointed by Syfrets from time to time, and the other appointed by the Board of General Purposes from time to time – only if McIntyre did *not* take office for any reason. Why should the testator have intended such an anomalous result with its very different potential consequences for the long-term administration of the trust? And why should he have provided such an arbitrary basis for the determination of which of the two potential paths to be taken? A sensible rationale does not suggest itself.

[17] The construction contended for by the respondents postulates a capricious and entirely unbusinesslike arrangement. Moreover, the result to which their contended interpretation would give rise would be inconsistent with the manner in which the mandate to the trustees in clause 6(b)(xiii)B of the will has been expressed. There, and indeed, in every other part of the

[7] A third trustee had not been contemplated when clause 10 was drafted. The only relevance of clause 10 to the codicil is that it applied also to release David Harding from any duty to furnish security and allowed the other two trustees to act without a third trustee in the event of David Harding failing to take up office as a trustee, or having taken up the office resigning from it or dying in office.

will, the testator conceives of '*the administrators*' of his estate in the plural. Notably, this includes the provisions in clause 5 of the will, which contain an instruction that after the death of the last dying of the testator's wife and his nephew, the aforementioned David Harding, the capital of the separate income trust established in their favour should revert to and form part of the residue of his estate, with the effect that it would fall to be administered in the Charles Harding Charitable Trust. This is indicative, when the will is read as a whole, that the testator conceived that even after the death of his nephew, David Harding, there would still be a plurality of trustees in office, for the administrators referred to in clause 5 are the same persons conceived of as trustees of the Charles Harding Charitable Trust in terms of clause 10. Having regard to their relationship as friends and apparent contemporaries and the respective dates of their deaths, in 1978 and 1985, it seems probable that the testator would not have expected McIntyre to outlive his nephew. (The nephew died in 2011.) Who then could have been the administrators appointed to administer the trust established in terms of clause 5 to endure until the nephew's death and thereafter to continue administering the Charles Harding Charitable Trust to which the capital of the first-mentioned trust was bequeathed upon the demise of the nephew? The only provision for such administrators is in clause 10 – namely, an administrator nominated by the trust company *and* an administrator nominated by the applicant's Board of Special Purposes. Contextual analysis in this and certain other respects to be described presently supports preferring the applicant's construction as being the correct one.

[18] That the testator should have intended there always to be a trustee to represent the values of the freemasons' organisation in the administration of the trust also finds support from a number of other features of the will. Apart from family members and a certain Miss Cornelissen and one, Ralph Nodder, whose connections to the testator are not specified, all the bequests in terms of the will, apart from those in terms of which the Charles Harding Charitable Trust was established, were to masonic charities in London and masonic lodges or chapters in England and South Africa and to the Masonic Benevolent Fund. Indeed, the largest out-and-out bequest in terms of the will was to the applicant. The evidence is that an important object of freemasonry is the undertaking of charitable work. The impression formed on a reading of the will as a whole is that it was the intention of the testator that after the needs of his surviving spouse and nephew and Miss Cornelissen had been addressed during their respective lifetimes, his considerable estate should be administered in perpetuity for the benefit of a variety of charities. I think a judge in this Division is entitled to take

judicial notice that Syfrets Trust Company was a corporation well known to and widely availed of by Cape Town society to administer testamentary trusts. It seems to me on a consideration of the will read as a whole that the most probable reason for the testator's choice of co-executors and co-administrators was to obtain the combined benefit of the corporate administrative expertise of Syfrets in respect of the investment of the trust's funds on the one hand and the personal input of his respected fellow senior freemason in the distribution of the trust's income on the other.

[19] There is nothing to suggest that the testator could have intended these evident considerations to apply only during McIntyre's lifetime or period in office as a trustee; alternatively, on an on-going basis, only if McIntyre should not take up appointment as a trustee. In this respect too, any scheme that a representative of the freemasons' values should inform the administration of the trust on an on-going basis only if McIntyre did *not* take up the office of trustee would not accord with the testator's apparent intention, nor, indeed, any notion of rationality or 'business common sense'.

[20] In any event it does not do violence to the ordinary meaning of the words '*failing whom*' in the peculiar context to construe them to mean '*in the absence of whom*', or '*in his stead should he not assume, alternatively, cease to hold office*'. The *Oxford Dictionary of English* gives the following definition for the word '**failing**': '*in the absence of; if not:* ***she longed to be with him and, failing that, to be alone***'. The words do not necessarily imply '*only if he fails to take up office*'. To the extent that they can give rise to different interpretations, they bear an element of ambiguity. The meaning that accords with the scheme of administration of the trust most probably intended by the testator is the one that should be ascribed to the words as they have been used in clause 10.

[21] It would appear from an internal email between officials in the Master's office, dated 6 July 2015, the contents of which were adopted for the purposes of the Master's report to the court, that the conclusion that the applicant's Board of General Purposes was not entitled to nominate a trustee from time to time when the position originally filled by Mr McIntyre fell vacant upon the latter's death was based on the perceived import of the following phrase in the second part of clause 10: '*…or may relinquish the said Trust, or die, in which event, the remaining Appointee/s shall act alone without furnishing security*'. In my judgment the wording in the second part of clause 10, following upon the words '*notwithstanding the fact…*', which is the introduction to the phrase highlighted by the Master, has nothing whatsoever to do with the vesting of a power to nominate trustees.

[22] The second part of the clause is badly worded. So, for example, the expression '*one or more of them may fail to assume, or relinquish* …etc.' posits a multiplicity of trustees, whereas the first part of the clause conceives of the appointment of only two trustees without any power of assumption. Where there are only two trustees, the expression '*one or the other*' would be a more accurate mode of expression. The reference to a failure by either of the trustees '*to assume*' makes no sense, if the provision is to be construed literally, in the absence of any provision in the terms of the will that the appointed trustees should have the power of assumption. On the contrary, the will expressly provides for the trustees to be replaced, not by existing trustees exercising a power of assumption, but by the trust company and the Board of General Purposes, respectively, nominating replacements. A sensible meaning for the word '*die*' is also impossible to find if one peers too narrowly and with a rigidly literalist approach at the individual words of the second part of the clause, rather than recognising that it is quite obviously ineptly worded and that its apparently intended effect therefore has to be determined from its general tenor fairly and broadly considered. Obviously, McIntyre, or failing him, any person appointed by the Board of General Purposes might die in office,[8] or resign from office before death thereby in a sense 'relinquishing the trust'. The same would apply to any trustee in office as the nominee of the trust company. Could the testator have intended that in that event the Board of General Purposes or the trust company, as the case might be, could not replace him, and that there should then be only one trustee? An affirmative answer would contradict the evident scheme intended to be created by the first part of the clause. It is most unlikely, for the reasons identified earlier, that that could have been the intention of the testator.

[23] If the clause is considered as a whole, it is clear enough that the problematically worded second part thereof was directed at two things. The first was to provide for a possible situation in which either of the two bodies responsible for the nomination of trustees chose not to fulfil the function. In other words, if Syfrets, or the applicant's Board of General Purposes, declined to accept the role of nominating a trustee conceived for them in terms of the first part of the clause. The intended effect of the second part of clause 10 was that in such an event the appointee of the other willing party should act alone. The second was to make it clear that should the situation arise where there was only one trustee, such trustee would still not be required to furnish security notwithstanding the absence of the checking effect of a co-trustee.

[8] Mr McIntyre did in point of fact die in office.

[24] For these reasons I have concluded that the interpretation of clause 10 contended for by the applicant is the correct one.

[25] The applicant has framed the relief sought in terms of paragraph 1 of its notice of motion as if these proceedings were an application for review in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). It seems to me, however, that all that the first respondent did in this matter was to express an opinion on the proper construction of clause 10 of the will. She did not make a decision falling to be characterised as 'administrative action' within the meaning of PAJA. She is not *functus officio* in respect of any decision to issue letters of authority to a person nominated by the applicant's Board of General Purposes. An order in the terms sought in paragraph 1 would therefore be inappropriate. Even if I were wrong in this respect, the relief that I propose to grant by way of alternative relief, declaring that the applicant's Board of General Purposes is entitled in terms of the will to appoint a trustee to the Charles Harding Charitable Trust from time to time to serve in office together with a trustee appointed from time to time in terms of the will by Nedgroup Trust (Pty) Ltd as its nominee, will serve the purpose the applicant sought to achieve by the relief sought in terms of paragraph 1 of the notice of motion. It will make it clear that, absent any extraneous basis reasonably to object to the suitability of the person proposed, the Master is required to issue letters of authority to the person nominated for appointment as trustee by the applicant's Board of General Purposes.

[26] The following orders are made:

1. It is declared that the applicant's Board of General Purposes is entitled, in terms of clause 10 of the last will and testament of the late Charles Harding, dated 29 April 1975, to appoint a trustee to the Charles Harding Charitable Trust from time to time to serve in office together with a trustee appointed from time to time in terms of the will by Nedgroup Trust (Pty) Ltd as its nominee, or failing the appointment by Nedgroup Trust (Pty) Ltd of a nominee, to serve in such office alone.
2. It is further declared that the applicant's Board of General Purposes may nominate replacement trustees for appointment from time to time to replace any trustee of the Charles Harding Charitable Trust who held office by virtue of having been nominated by the said Board.
3. It is also further declared that Ian Norman Pringle has been duly nominated by the applicant's Board of General Purposes as a trustee to the Charles Harding Charitable Trust.

4. The applicant's costs of suit in the application, as taxed or agreed, shall be costs in the administration of the Charles Harding Charitable Trust.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES:

Applicant's counsel:	**P.J. Berthold**
Applicant's attorneys:	**MacGregor Stanford Kruger Inc** ***Cape Town***