IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 5348/2017

In the matter between:

HAMILTON JANNIE & 1 OTHER Applicants

and

BADENHORST ENGELA HELENA & OTHERS Respondents

HEARD ON: 15 FEBRUARY 2018

DELIVERED ON: 29 MARCH 2018

RAMPAI, J

[1] He died on 17 January 2017. His death ripped his family apart. The family feud spawned from a will and testament which he and his spouse jointly executed and assented to. Central to the family feud is the validity of an unsigned and unregistered trust deed prepared and drawn up by an attorney on the instructions of

his broker

[2] Lourens Hendrikus Bardenhorst was born on 6 November 1929. The first respondent is his surviving spouse. She is the executrix of the joint will. Three children were born of their marriage,namely Hester, Engel and Anette. The couple lived on a farm, Eben-Hauser, district Koppies Province Free State.

[3] His daughter Hester Johanna Scheepers (ex) Bardenhorst was cited as the third respondent. His daughter Engela Helena Bardenhorst was cited as the fourth respondent. His daughter Anette was not before me. She predeceased him. She died at Nigel on 15 July 2011.

[4] Anette Bardenhorst was married. Her surviving husband is Jan Petrus Hamilton, the second applicant. Their son is Jannnie Hamilton, the first applicant. The first applicant is the deceased testator's grandson and the second applicant is the testator's son-in-law. Therefore, the applicants are related to the first respondent in the same way. The first applicant is a lawyer. The second applicant is a pastor. They currently live at Benoni in Gauteng

[5] His surviving spouse, Engela Helena Bardenhorst, the first respondent, was cited as in her personal capacity. She was testamentarily nominated his executrix. By virtue of her office she was also cited in her representative capacity as the second respondent.

[6] The matter came to court by way of motion proceedings. The relief sought is twofold. The primary relief is declaratory in nature. The ancillary is mandamus in nature. The application is opposed by all the respondents with the exception of the fifth respondent, The Master of the High Court, Bloemfontein. He abides.

[7] The primary relief which the applicants seek is to have "the last will and testament" of Lourens Hendrikus Bardenhorst declared valid in its entirety and capable of execution,Notice of motion.

[8] It is common cause that the aforesaid deceased testator's will has been lodged with the fifth respondent that it has been accepted that the second respondent has been issued with the required letters of executorship. The decision of the fifth respondent whereby he accepted the will and the testamentary nomination of the 1st respondent as the executrix has never been challenged by anyone. Hardly anyone even questioned the master about it.

[9] The primary relief does not purport to constitute a declaratory order or a review of the aforesaid decision. Certainly it cannot be interpreted as such. It neither seeks to define the rights of the parties nor does it seek to have the executrix ordered to take or refrain from taking any steps to the detriment of the applicants.

[10] In view of the above considerations, I am persuaded that the primary relief sought by the applicants is tantamount to brutum fulmem. This completes my consideration of the first leg of the notice of motion.

[11] The ancillary relief sought by the applicants is to have the parties authorized to take all the necessary steps in order to have the proposed trust registered in terms of a “draft trust deed” marked “anx fa7” appended to the founding affidavit.

[12] The choice of the words “the parties be authorized” was inappropriate. The words suggested that the parties were willing and able have the proposed trust registered on the terms and conditions contained in “anx fa7” but were hamstrung by a legal impediment of some sort. Of course, that was not the case. The hard fact of the matter is that the parties are of loggerheads. Whatever the common family dream about the the creation of a trust they might have been prior to 17 January 2017, it was shattered by the death of the testator.

[13] His death was a defining moment. To register or to register the proposed trust poshumously became a devastatingly divisive matter. The granting of the ancillary relief as particularised in 2 notice of motion , will certainly fuel the family fraud. It will inevitably lead to further expensive and stressful litigation. The rift between the feuding family factions will rapidly widen and the void of animosity will deepen.

[14] The final relief sought by applicants is to have the immovable properties as fully referred to in clause 4.1.1 of the will, “anx aa3”, transferred to the Eben –Hauser Trust by the 2nd respondent the executrix as the executrix of “The Deceased Estate: Late L.H Bardenhorst in accordance with the testamentary precepts of clause “4 anx aa3”.

[15] The grant of the third leg of the substantive relief sought will depend on the adjudicative outcome of a critical analysis of the second leg.

[16] As I have already said, these are motion proceedings. Motion proceedings have their own perculiar principles. That being the case , it is only proper to consider the impact of some legal principles applicable to motion proceedings on the current application.

[17] The basic principles in motion proceedings is that an applicant stands or falls by the **averments** he makes in the founding affidavit. **Brayton Carlswald (Pty) Ltd and Another v Brewis** 2019 (5) SA A98 (SCA) par [29] **Betlane v Shelly Court cc** 2011 (1) SA 388 (cc) par [29].

[18] In motion proceedings the affidavits filed in support of the application or in opposition **thereto** serve a dual purpose. They are regarded and treated both as the foundational pleadings and as the supporting evidence. **De Lange v Presiding Bishop, Methodist Church (SA) and Another** 2015 (1) SA 106 (SCA). **Transnet Limited v Rubenstein** 200 (1) SA 591 (SCA).

[19] As a general rule, and save in exceptional circumstances, disputes of fact arising on affidavits in motion proceedings, cannot be finally determined on papers. This is trite.

[20] The rule concomitant to the above is that, in the event of material factual dispute arising an affidavits in motion proceedings, the applicant can only succeed in those exceptional circumstances if, and only if, the respondents version of the disputed facts can safely be rejected on the papers as being farfetced or unattenable. **Plascona-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (SCA) at 634E-C. Put differently, in motion proceedings, as a general rule, decisions concerning factual disputes cannot be grounded on a consideration of probabilities unless, of course,the court is satisfied that there is no real and genuine dispute on the facts in question or that the one party's factual allegations are so far-fetched or clearly unitenable as to warrant their rejection merely on the papers as they are. **Administrator, Transvaal and Another v Theletsane and Others** 1991 (2) SA 192 (A) ax 197A.

[21] In motion proceedings a respondent is required to meet (and refute) only those specific allegations of fact as were put forward by an applicant. He is not required to anticipate and refute possible but unstated allegations of fact subsequently raised and contiended for, **Theletsane *supra***, at 196C-I.

[22] In dealing with the equivocality of contentions in a respondent's affidavit, it is impermissible for a court to base factual findings concerning such contentions on a mere weighing- up of possibilities. **Theletsane, *supra*** at 196I-J.

[23] As regards the salient features of the applicant's case, I turn to the founding affidavit . At this juncture, it is imperative to consider whether the applicants have, in their founding affidavit, made out a case for the relief they seek. I proceed to summarise their case.

[24] The decased testator had previously executed a will . He revoked the previous will by executing the current will. The previous will was executed on pretty much the same testamentary structure as foreshadowed in the current will save in one respect. In his previous will, the deceased testator's wish was to bequeath fixed assets to a testamentary trust. In his current will, he wished to bequeath fixed assets to an inter vivo trust.

[25] During June 2016, the deceased testator convened a family meeting. The meeting was attended by all the parties at the invitation of the decased testator. He informed the parties that he intended to amend his previous will by creating an inter vivo trust as opposed to a testamentary trust he had created in his previous will. He further informed them that his broker had advised him of the financial advantages of the inter vivo trust.

[26] Subsequent to the family meeting and pursuant to the broker's financial advice, the deceased testator went ahead and executed the current will - see "anx fa 6". A more legible copy thereof is "anx aa3". Clause 4.1 thereof provides:

> "Ons bemaak aan die te stigte **Inter Vivos** Trust, bekend as **EBEN-HAESER** TRUST, die volgende bates om bestuur te word volgens die bepalings van die TRUST AKTE"

The will was co-signed at Koppies on 10 August 2016.

[27] Subsequent to the execution of the deceased testator's last will, (anx fa6), the broker contacted, among others, the first applicant during August 2016 for a copy of his identity document. The broker was collecting personal information concerning the deceased testator's next-of-kin in order to pass it on to the attorney. The attorney required such information for the purpose of drafting a trust deed in accordance with the deceased testator's current will.

[28] The attorney drafted the trust deed in due cause. The terms and conditions of the contemplated trust were embodied in a 53 page document, attached to the founding affidavit and labelled "anx fa7". The relief sought as per prayer 2 notice of motion is informed by this document. The entity would be known as Eben-Haeser Trust. The creation of the trust inter vivo was backed up by all the parties, in other words, the first applicant and his father as well as the first respondent and her daughters.

[29] During November 2016 a family meeting was convened by the decased testator. The meeting was attended by all parties as before. At that particular meeting the draft trust deed was tabled and discussed. During the deliberations, not one voice of dissent was heard in connection with the proposed creation of an of inter vivo trust. There was an unquestionable acceptance by all and

sundry that the draft trust deed would be signed and registered in due course. It was in the minds of all concerned that all that would be accomplished during the cause of January 2017. However, the testator died on 17 January 2017 before the signing and registration. The founding deponent could find no formal correspondence wherein any of the parties previously joined issue with the terms of "anx fa6". On the contrary, he found cellular whatsapp messages which not only suggested otherwise but rather lent favourable support for the idea of creating a trust and urgently finalizing the legal process.

[30] According to the provisions of the draft trust deed, the landed properties had to be transferred to the trust. After the testator's death the respondents sommersaulted. They no longer wanted to sign the draft trust deed in order to have the trust formally executed and registered. They adopted the incorrect view that it was properly impermissible in law to have property transferred to an entity that did not exist.

[31] The aforesaid view of the respondents offends the express wishes of the deceased testator as set out in his last will and testament. Given their prior consent and willingness to have the Eben-Haeser Trust created, the respondents were precluded from sommersaulting and singing a different tune now. This completes my summary of the applicants' case.

[32] **In their answering affidavit**, the respondents told a different story. Now I proceed to accordingly summarise the essential features of their answer.

[33] They maintained that there was no mutual family agreement as regards the purported draft trust deed, “anx fa7”, as alleged by the applicants or at all. They pointed out that “anx fa7” did not exist before 1 December 2016. It will be recalled that the applicants heavily rely on “anx fa7” in support of the second relief - see 2 notice of motion. According to them “anx fa7” was only drafted on 20 January 2017, three days after the demise of the testator, on 17 January to be precise. Therefore, they denied the allegation by the applicants that “anx fa7” was discussed at a family meeting held early during November 2016. They specifically denied the following allegations made by the applicants; that a family meeting was held; that it was attended by all the parties to the dispute that any document was presented to the family attendees and that any consensus concerning that document was reached.

[34] Attorney Jappie Coetzee, acting on the instructions he received from Matty Lotter, the testator’s broker, amended a draft trust deed. Having done so, he sent the amended document to the broker. He did so on 4 November 2016. The draft trust deed in question was evidenced by “anx aa9”. However, the first respondent, the testator’s wife, was not prepared to be either a donor or a trustee of any trust as proposed in “anx aa9”.

[35] Although it was further proposed, in the disputed draft trust deed “anx fa7”, that the fourth respondent be appointed as one of the proposed trustees she did not and still does not have the mental and physical capacities to act. She suffers from delibit cerebral

palsy. As a result of such ailment, she is mentally and physically impaired.

[36] None of the relevant family members of the deceased testator liked Matty Lotter. In the disputed draft trust deed, “anx fa7”, provision was made for his appointment as one of the trustees. Everyone was against his appointment. Anyway, Matty Lotter has since died. Due to his death, his appointment as a trustee has practically become impossible.

[37] The case of the respondents, as I understand, is that there has been no consensus in respect of “anx fa7” as pleaded or at all given that:

- The contemplated trust does not exist;
- The contemplated trust did not exist at the time the alledged founder or creator died, on 17 January 2017 to be precise;
- The first respondent does not want to donate any of the farms to any trust;
- The first respondent never really consented to be a donor in favour of any trust;
- The persons whose names have been put foraward as
  The founding trustees are either incapable or unable or unwilling to act as such.
- The draft trust deed, “anx fa7”, was not a true reflection of the deceased testator’s wishes.

These are, in my view, material considerations.

[38] Now, the second leg of the relief sought by the applicants is to have an inter vivo trust created and registered. An inter vivo trust is purely contractual according to our law. **Crooks NO and Another v Watson and Others** 1956 (1) SA 277 (A); **Hofer and Others v Kevitt NO and Others** 1998 (1) SA 382 (SCA) and **Potgieter and Another v Potgieter NO and Others** 2012 (1) SA 637 (SCA).

[39] The authors, Cameron et alii in their work. **Honore's South African Law of Trusts,** fourth edition page 557 have this to say about inter vivo trusts:

"**They are created by contract**, by statute or by the court. No question can arise as regards the validity of a trust created by statute nor is one likely to arise when the court sets up a trust. Should it do so, the proper law would clearly be that of the court's area. **So far as trusts created by contract are concerned they will not be valid unless the contract creating them is itself valid**. As regards capacity a person capable of contracting by the law of the place of contracting (*lex loci contractus*) is regarded as having the necessary capacity, and possibly capacity by the law of the parties *domicile* is also sufficient. The contract is formally valid if it satisfies the law of the place of contracting or the proper law of the contract"

(the highlights are mime)

[40] In the instant matter, it is undisputed that the accepted Inter vivo trust whose registration is sought was created by contract; that the contractants thereto had to be the creator and the trustees; that the creator has since died; that all those contracting parties had to have the requisite capacity to contract; that the fourth respondent suffers

from delibitating cerebral palsy; that such ailment has mentally and physically impaired her ability to act as a trustee and that, she declined her nomination on account of her incapacity.

[41] It follows, therefore, that according to the *lex loci contractus* the fourth respondent was incapable of contracting. That being the case, the contract for the formation of the trust, in which she was involved, if she ever was, was rendered invalid by her lack of capacity to contract **Cameron *et* ali, *supra***. It was incumbent upon the applicants to prove that essential elements for the formation of a valid inter vivo trust were present. They failed to discharge the onus. It is our law and it has always been our law that an inter vivo trust created by contract will not be valid unless the contract whereby it is created is itself valid – **Cameron *et alii, supra***.

[42] The fourth respondent's lack of mental capacity aside. It is also common cause that apart from the deceased creator, one of the supposed parties to the disputed trust agreement has since died. At this moment in time the reality is that two of the five would be trust contractants are dead, two are disinterested and one is legally incapable to enter into valid contract.

[43] **In their replying affidavit** the applicants raised the following pertinent issues: that the bottom line of the testator's wish was to create a trust and that it was, therefore, of no moment whether his last will provides for the creation of

an inter vivo trust or testamentary trust; that, at any rate, whether he intended to create the one or the other type of a trust entity was a distinction without a difference; that the intention of the deceased testator was to bequeath the farms to the Eben-Hauser Trust and that nothing else could be deduced from the will; that he did not wish to transfer them to the first respondent; that the dying wishes of the deceased testator were overriding considerations and that they should be carried out notwithstanding lack of consent on the part of the respondents to have a trust established in accordance with such final wishes; that the unyielding attempt by the respondents to show that they did not want consent to the establishment of a trust was an irrelevant criteria.

[44] Mr Snellenburg argued that the aforesaid pertinent aspects of the applicants' reply showed that they had changed tact in their replying affidavit because the case they sought to make in their founding affidavit had been comprehensively widely refuted by the respondents. I am of the view that there was substance in the argument.

[45] The deceased testator had by way of his previous but now revoked will, initially intended to bequeath the three farms to a mortis causa trust. However , he subsequently revoked the previous will. He then decided, by way of his last will, to bequeath the same farms to an inter vivo trust. He did so pursuant to a financial advice given to him by a broker, the late MS Lotter, aka Matty

[46] It was given to understand, by both counsels, that the shift from mortis causa trust to inter vivo trust was the real major difference between the previous will and the current will. The deceased testator elected to change the vehicle through which the farms were to be transferred to the ultimate beneficiary. Certainly the change was cosmectic but fundamental. It was express election deliberately and purposefully made. The deceased testator, by exercising such an election, consciously renounced his previous intention to bequeath the farms to a testamentary trust. As I see it, if creative change from a testamentary trust to an *inter vivo* trust was a mommental paradigm shift in the founder's mindset. It was certainly not a meaningless exercise.

[47] The deponent for the applicants, Attorney Jannie Hamilton, had this to say about the two types of trust entities:

> "What was foreshadowed in the will is the bequest of the farm to the trust. **Whether it is treated as an inter vivos trust or a testamentary trust (given the terms of the trust deed) is a distinction without a difference**."

(my emphasis)

[48] I do not share that view, with respect. There is a fundamental difference between an inter vivos trust as foreshadowed in the final will and a testamentary trust as foreshadowed in the previous will. The contention by the applicants that there is no fundamental diference between the two types of legal instruments is materially flawed. As a result of their misconceived contention, I deem it necessary to unpack the distinctive featres of the two types of trust.

[49] As regards a trust mortis causa, it can be created in the will of a testator. It is also commonly known as testamentary trust. It essentially constitutes a testamentary disposition. As such the testamentary instrument whereby a trust mortis causa is created has to be validly executed in accordance with the requisite prescripts and formalities prescribed by sec 2 Act No 7 of1953, the Wills Act.

[50] Since a trust mortis causa is provided for and embodied in the will, it is a voluntary and a unilateral minute of a testator's final wishes and directions concerning the ultimate disposal and distribution of his assets after his death. It follows, therefore, that being a mode of testamentary disposition, the creation of a trust mortis causa is a purely unilateral act by the testator based on the doctrine of freedom of testation. Put differently, it is not a bilateral legal act or contract.

[51] As regards a trust inter vivo, it is cretated by means of of a bilateral act. It essentially constitutes a contractual mode of disposition. As such the contractual instrument whereby a trust inter vivo is created has to be validly executed in accordance with the requisites and prescripts of the Trust Property Act in particular and the law of contracts in general.

[52] Because a trust inter vivo is a bilateral agreement, it is provided for in a separate document outside a will. It was described by the court as something akin to *stipulation alteri* in other words a contract for the benefit of a third party. **Joubert v van Rensberg** 2001 (1) SA 753 (w) 768A-C between the founder

and the trustees for the beneit of the specific beneficiaries **Crookes NO v Watson** 1956 (1) SA 277 (A) **Potgieter v Potgieter**, *supra* and **Hofer and Others v Kevitt NO *supra***.

[53] Given the aforesaid comparative and distinct elements of a trust mortis causa on the one hand vis-à-vis a trust inter vivo on the other hand , it cannot be concluded, as the applicants did, that the distinction between the two types is a distinction without a difference. Consequently, they are precluded from contending that what was foreshadowed in the final will as was in the previous will was the creation of a trust irrespective of whatever type it might be contention. Their founding contention was that the deceased testator, acting on the financial advice of the broker, ultimately wished and decided to create a trust inter vivo as mirrored in "anx fa6". That was the pith and narrow of their founding case. To that case they have to be held since their replying contention is at odds with their founding contention. They are blowing hot and cold. According to the motion rules of engagement, it is impermissible to do so.

[54] It has been opined that even a valid "will" will fail to the extent that:

"a) A beneficiary is incapable of taking a benfit under it;
b) The testator revokes it before his death;
c) A disposition contained in it is a *nodum praeceptum*, illegal, impossible, uncertain or subject to an unfulfilled condition; or
d) A beneficiary does not adiate."

See Joubert: The Law of South Africa Vol 31 p171.

[55] The beneficiary's capacity to benefit under the provisions of a will must exist at the time of vesting, and also at the time of accepting the benefit so bequeathed. Anyone, natural or juristic, born or unborn , is capable of accepting or taking, a benefit bequeathed to him or her it in terms of a will unless such beneficiary does not exist at the time of the vesting of such interest on the beneficiary LAWSA *supra* p165.

[56] In this instance, it was contemplated that Eben- Haeser Trust would become a beneficiary of a trust inter vivo; that there would be a creative founder; that there would be willing and capable trustees; that the founder and the trustees would agree on a range of terms and conditions essential for the formation of such a trust inter vivo. The founder to be died before such agreement was concluded. It follows, as a matter logic, that absent such a bilateral agreement between the contracting parties, the contemplated trust inter vivo has yet to come into existence.

[57] Consequently, at the time of vesting, being the day the testator or founder died, Eben-Haeser Trust, as the unborn beneficiary to be, did not legally exist. It had no capacity to benefits because it did not exist. Therefore, it cannot,in law, receive any benefit in terms of the deceased testator's last will. We are not talking of a beneficiary who exists but for some reason is incapable of taking benefits. What we have here is nothing but a fiction. In the absence of a beneficiary, founder, and trustee and a bilateral contract, it is absurd to seek the relief as set out in 2 notice of motion.

[58] The intention of the deceased testator does not, and did not, clothe the fictitious trust with the legal capacity it did not have in law to benefit in terms of the will in view of the absence of a bilateral agreement. Given all the material considerations, I am of the view that the distinction between trust mortis causa and trust inter vivo is so fundamentally profound that it cannot be ignored or underplayed. The contention of the applicants in this connection was misplaced. The legal position expounded above dictates that the bequest of the immoveable farming properties to the trust should fail.

[59] In **Potgieter** , supra, the court *a quo* ventured to give effect to the deceased testator's wishes at all costs. There the trust deed and the deceased testator's testament were demonstrably in conflict. The court a quo reckoned it should have the power to circumvent the trust deed on the ground that the testamentary intent should override the trust instrument.

[60] Writing for the unanimous court on appeal, Brand JA cautioned the courts against seeking authority to avoid failure of a testamentary bequest where the inevitable result in law is that the deceased testator's intention cannot be given effect to He wrote:

"In addition, the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. If judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge."

[61] The applicants also relied on the *ad pias causa* principle in support of the second leg of the relief they sought. Mr Viljoen argued

"Such contention would in any event have been contrived our courts have regularly dealt with a bequest to a non existent entity. Although such bequest may be said to ordinarily fail, the Courts will try to avoid such result when the bequest is *ad pias causas*."

In Ex Parte Estate Burnand 1949 (3) SA 432, the bequest was made to a certain Children's T.B Hospital and Our Dumb Friends League, Durban. The executor could not find any institution able to answer to such name. The Court held that this is not an insurmountable hurdle in the path of devolving such bequest on a similar institutions, in honouring the deceased wishes.

In Ex Parte Blum : In Re Estate Kalson 1964 (2) SA 643, a Similar situation presented itself. The Court allowed the bequest to devolve upon a similar charity. The Courts reasoning was to devote the money to a particular purpose, rather than a particular institution, in seeking to give effect to the wishes of the deceased."

[62] I have considered the above authorities. However, I came to the onclusions that the facts of the instant matter were distinguishable from those of the decided cases relied upon. This was so because:

62.1 In this matter the will does not provide for a testamentary disposition to a charitable organization. For that reason the *cy-pries doctrine* is not applicable to the facts of the instant matter.

62.2 The supreme decision in **Kohlberg v Burnett NO and Others** 1986 (3) SA 12 (A) at 15C-E is dispositive of the applicants argument. The Court held:

> "Therefore, the court incorrectly equated "trusts created for the support and development of education institutions such as universities and schools" with an *inter* vivos trust. The former are essentially voluntary associations (whether incorporated or not) although, in certain cases, the administering body may be called "trustees". Furthermore, the instances mentioned by the Court *a* quo fall into the category of bequests ad pias causa"

62.3 Neither the facts nor the legal principles in the instant instant are comparable to those in the cases referred to and relied upon by the applicants. On the perculiar facts of this particular matter, there can be no serious debate that the deceased testator intended to create a *trust inter vivo*, not a *trust mortis causa* and not a bequest ad pias causa.

[63] In **Ex Parte Pienaar** 1972 (4) SA 19 (W) 20 the court wrote about the import of the *cy-partés doctrine*:

> "It is necessary first to establish what the overriding and transscendant purpose of the trust was in order to decide whether the *cy-prés doctrine* will apply. It can only be applied if the trust was one *ad pias causas*.

> "a term which, owing to the wider meaning it has acquired in the course of the lapse of centuries as above explained, might, I think now with advantage be superseded by the expression 'for charitable purposes."

[64] The purpose of the last will of the deceased testator was not to bequeath the farms to any entity for a charitable cause. This needs no debate. The applicants did not contend otherwise. The *cy-pries doctrine* can only find application where a testamentary bequest, intended to devolve upon a particular charitable organization, fails. A bequest may fail for various reasons. Among others, it may fail because, such organization has since been dissolved, and the court subsequently alters such a testamentary clause so that such bequest devolves upon another chartable organization with a purpose similar to that of the charitable organization for which the bequest was originally intended.

[65] It follows from the above that the *cy-pries doctrine* can only be applied and implemented when such other charitable organization with a similar purpose exists. In other words, the doctrine cannot be invoked and relied upon in order to make a bequest devolve upon a charitable organization which does not exist in law. Earlier on, I was at pains to demonstrate that a trust inter vivo by the name of Eben- Haeser Trust does not exist. The non- existence is due to lack of consensus among the would-be contractants thereto.

[66] Lastly, I deem it necessary to refer to clause 4.1.1.1 "anx aa3" or "anx fa7" if you will. It reads:

> "Die Testateure bepaal dat die Trustees van die te stigte Trust sal toesien dat die huisvesting gebruik sal word soos dit tans die geval is"

This clause is not entirely inconsistent with the contention that the deceased testator did not intend to bequeath the farms to the surviving spouse.

[67] Given the perculiar circumstances of this particular case, I am persuded that “anx fa7”, which is the same decoument as “anx aa3” cannot, for the reasons given above, be regarded and treated as a valid draft trust instrument. That being the case, it cannot now, by an order of court, be signed and registered. In the light of all the reasons already given, I am inclined to dismiss the application.

[68] The respondents have successfully resisted the relief sought. There is no sound reason why the general rule of costs Should not apply. The costs should, therefor follow success.

[69] Accordingly I make the following order

69.1 The application is dismissed;

69.2 The applicants are directed to pay the costs of the respondents including the costs consequent upon employment of two counsels.

MH RAMPAI, J

On behalf of the applicants:	Adv JC Viljoen
Instructed by:	Mcintyre Van Der Post
	Bloemfontein
On behalf of the respondent:	Adv N Snellenburg
with him	Adv S Tsangarakis
Instructed by:	Director of Public Prosecutions
	Bloemfontein