BEQUEST OF A "BUSINESS CONCERN TOGETHER WITH ALL ITS ASSETS AND LIABILITIES": SOME COMMENTS

[DISCUSSION OF *GRADUS V SPORT HELICOPTERS ALSO KNOWN AS SPORT AVIATION* (19879/2008) 2012 ZAWCHC 365 (28 NOVEMBER 2012)]

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1 Facts

In *Gradus v Sport Helicopters also known as Sport Aviation*[1] ("*Gradus*"), the cause of action arose from a helicopter accident which occurred on 23 February 2006.[2] During his lifetime, ESD MacDonald owned and operated a business known as Sport Aviation/Sport Helicopters. The main business of Sport Helicopters was to conduct scenic tours of the Cape peninsula for tourists. Sport Aviation/Sport Helicopters was a sole proprietorship owned by a certain ESD MacDonald. The business owned several helicopters. In the course of transporting tourists a helicopter crashed on the beach of the Cape Point Nature Reserve. The plaintiffs, all of whom were tourists and passengers in the helicopter, were injured.

ESD MacDonald (the deceased) died later that year on 9 December 2006 without any personal injury claims or other claims being instituted against the business. The deceased left a valid will and paragraph 5.5 of his will contained the following bequest:

> "To my son ROBERT GRAHAM MACDONALD I … bequeath the *business concern* known as Sport Aviation together *with all its assets and liabilities*." (Emphasis added.)

The plaintiffs (the tourists) issued summons on 28 November 2008. The deceased's estate was *not* cited as defendant. The action was brought against the beneficiary and son, Robert MacDonald.[3] They alleged that the beneficiary was liable for the damages arising from the helicopter accident as

[1] (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* <http://www.saflii.org/za/cases/ZAWCHC/2012/365.html> (accessed 27-06-2013).

[2] Para 5.

[3] In the particulars of claim the first defendant is described as "Robert MacDonald, an adult male … who is the proprietor of Sport Helicopters also known as Sport Aviation … First defendant inherited Sport Helicopters, including all of its assets and liabilities, from his late father, the former proprietor".

he "inherited Sport Helicopters, including all its 'assets and liabilities', from his late father, the former proprietor".[4]

The question before the court was whether Robert MacDonald, t/a Sport Aviation/Sport Helicopters (first defendant) inherited the delictual liability arising from the mentioned accident, or whether the deceased estate bore liability.[5] The essence of their argument was that shortly after the deceased's death, the executor gave effect to the bequest and that Robert MacDonald accepted or adiated the bequest.[6] The beneficiary commenced a sole proprietorship, Robert MacDonald t/a Sport Aviation a few days after the deceased died.

The claims against the first defendant were brought on the basis of breach of contract,[7] alternatively in delict.[8] The plaintiffs elected not to claim against the deceased's estate (which claims would in the meantime have prescribed). They submitted that a reading of the will left no doubt that the deceased intended the beneficiary to carry on Sport Helicopters as a going concern. They argued that the beneficiary accepted the benefit and that accordingly the liabilities, including the claims of the plaintiffs, passed to him.[9] Some documentary evidence was produced to indicate adiation of the inheritance by Robert MacDonald soon after his father's death.[10] Robert MacDonald and the executor denied this allegation and both testified in defence. The defence can be summarised as follows:

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4 *Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* paras 5-10. First defendant was cited as Sport Helicopters, also known as Sport Aviation, a firm, the proprietor of which is Robert MacDonald.

5 Para 8. This issue, namely whether the correct party has been sued was, by agreement between the parties, separated from other defences for determination *in limine* (para 1). The onus of proof was on plaintiffs to show that the liability had shifted from the deceased estate to Robert MacDonald (para 11).

6 Para 12.

7 Based on an oral agreement that plaintiffs be taken on a sightseeing tour; that the helicopter would be airworthy and that the pilot would exhibit the necessary expertise and diligence to ensure a safe flight *et cetera*. Plaintiffs undertook in return to pay the said fee. (See cls 11-16 of the summons retained from the case file).

8 Based on the argument, *inter alia*, that the crash landing was solely due to the unlawful and negligent action of the first defendant. (For further particulars see cls 8-20 of the aforementioned summons.) In so far as it could be ascertained that plaintiffs sustained injuries resulting in a claim for pain and suffering. First defendant's liability rests on him because of him inheriting all the assets and liabilities of Sport Helicopters (cl 20.4 of the summons).

9 *Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* para 25.

10 Paras 28-29. In response to a letter from an attorney of one of the various beneficiaries in the ongoing disputes about the estate, the executor, for example stated (para 28 (c)):

> "RG MacDonald het onmiddellik na dood die bates en laste van Sport Helicopters oorgeneem sodat die boedel onthef kan word om die koste van die laste van Sport Helicopters te diens, welke kostes die boedel nie kan betaal nie."

Later, in response to a question by the plaintiffs' attorneys with regard to the date Robert MacDonald took over the assets and liabilities, the executor replied (para 29):

> "Kindly note that the Liquidation and Distribution Account of the Estate Late Mr ESD MacDonald has not yet been finalized as there have been a number of objections lodged against it. I am currently waiting on further correspondence from the Master in that regard. As such, Mr R D MacDonald is not in position to receive any inheritance under the will."

In other words, at one stage the executor wrote that the business vested in Robert MacDonald on the date of ESD MacDonald's death, and at another stage he wrote that the business formed part of the estate of ESD MacDonald. Plaintiffs argued that the contrast in the two responses pointed to the executor trying to support the contention that Robert MacDonald did not receive his bequest soon after the death of ESD MacDonald. (Para 29). For the court's response see para 35.

(i) There was no adiation by Robert MacDonald of the business concern as such. After receiving the letters of executorship, the executor immediately entered into an oral agreement (referred to as a "preservation agreement") with Robert MacDonald concerning the helicopters. The executor did not have the expertise to take care of that aspect of the estate and it was cost-effective for Robert MacDonald to assume responsibility for the business. It was also stated that the estate experienced liquidity problems and did not have the cash to assume responsibility for maintaining and using the helicopters. The helicopters would eventually be transferred to the beneficiary when the estate was finally wound up.[11] In terms of this oral agreement Robert MacDonald had free use of the helicopters, in exchange for assuming the responsibility of running the business and everything that went with that.

(ii) A few days after entering into the preservation agreement Robert MacDonald established a sole proprietorship, RG MacDonald t/a Sport Aviation. To this end, he opened a new bank account, registered himself with the South African Revenue Service, entered into employment contracts with employees and negotiated a new lease with the V & A Waterfront for the helicopter business.[12] He took responsibility for the maintenance and insurance of the helicopters in exchange for being able to use them. His motive was that in the interim he would do the necessary to keep the business profitable until he took ownership when the estate was finally wound up.[13] At no stage, however, did Robert MacDonald ever agree to assume responsibility for the claims of the plaintiffs. He stated that he in fact knew nothing of the claims when he reached the agreement with the executor.[14] His understanding throughout was that *until the estate was finally wound up*,[15] he would only assume responsibility for the maintenance, insurance and running of the helicopters. Any additional expenses incurred by him would be recorded as a claim against the estate.[16] He rejected liabilities pre-dating the establishment of his sole proprietorship. These included auditor's fees and outstanding tax payments.[17] Robert MacDonald and the executor confirmed each other's testimony that the said oral agreement was an interim arrangement, pending the finalisation of the estate. They both stated that Robert MacDonald still had to decide whether he wanted to accept the bequest before the estate was finally wound up. The lack of acceptance of the inheritance was evident from the fact that the helicopters had not yet been transferred into Robert MacDonald's name.[18]

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11 Para 32.
12 Para 31.
13 Para 31.
14 See part 6 below.
15 See part 2 1 below.
16 *Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* para 31.
17 Para 32.
18 Para 33.

(iii) There was acrimony between the family members. One of the contentious aspects was the question as to what the assets of the business were. Six years passed and eight liquidation and distribution accounts were lodged with the Master of the High Court. However, objections were lodged against all of them, thus preventing the finalisation of the estate.[19] The executor testified that given the risk to him as executor, especially in light of the intense conflict between the beneficiaries and the size of the estate, he was reluctant and, in fact, did not pass ownership of the helicopters to Robert MacDonald.[20]

The court, per Matthee J held as follows:

(i) Being an astute businessman it made no sense that the beneficiary would have accepted responsibility for unspecified liabilities. On the other hand, it made sense that he would have accepted responsibility for "running" liabilities. Evidence that he entered into a "preservation agreement" in order to maintain assets which would hopefully become his, supports such a contention.

(ii) Even before Robert MacDonald was alerted to the present claims, he rejected liabilities which pre-dated the establishment of his sole proprietorship.[21] The probabilities support his version of events given the risk attendant on the executor of simply divesting the estate of the helicopters within a matter of days of commencing his duties as executor. To simply divest the estate of such significant assets before he had had an opportunity properly to assess the financial situation of the estate as a whole, is unlikely and improbable. The incorrect party had been sued and the claims against first defendant were dismissed with costs.[22]

Although the case was decided on the basis of a so-called "preservation agreement" between the beneficiary and the executor, this article addresses some related issues such as the possible impression that may exist, namely that the testator bequeathed liabilities as such.[23] The true nature of such a bequest is discussed.[24] As a matter of general interest, I will pursue some arguments or possible defences available to the beneficiary if the court had indeed found that he adiated the benefit. In this regard the probable intention[25] of the testator when making such a bequest and the meaning of the word "liabilities" are investigated. The question is also raised whether there are applicable presumptions that can be relied upon.[26] The possibility of adiation "in excusable ignorance of rights"[27] and the question whether

[19] Para 32.
[20] Para 32.
[21] Para 37.
[22] Para 46.
[23] Part 2 1 below.
[24] Part 2 2 below.
[25] Part 2 3 below.
[26] Part 2 4 below.
[27] Part 2 5 below.

the action for pain and suffering is passively transmissible are briefly considered.[28]

2 Discussion of some related legal principles

2 1 A bequest of "liabilities" *per se*: general remarks

A bequest of "liabilities", at first glance, may create the possible impression that the beneficiary is now, without more, liable for the liabilities of the deceased. Since this is not the case, some general remarks regarding the implications of such a bequest in respect of the law of succession and the administration of a deceased estate are necessary.

As in other civil law systems, the Roman-Dutch law of succession was based on the principle of universal succession. On adiation (acceptance), the heir stepped into the shoes of the deceased, succeeding, without any acts of transfer, delivery, cession or assumption being required, to the deceased's assets and liabilities.[29] Cape Ordinance 104 of 1833 replaced the Romanistic system of universal succession with the English system of executorship. In both testamentary and intestate succession, an executor (the "personal representative" of English law) acts as an intermediary between the deceased and the heir.[30] In terms of the law of succession a beneficiary thus never becomes owner of inherited assets immediately upon the death of the deceased.[31] This stems from our system of administration of estates that replaced the common-law system of universal succession (*successio in universitatem*). Succession is thus in itself not a mode of acquiring ownership.[32] The most that a beneficiary can acquire upon the death of the deceased (if vesting of rights has already occurred) is a claim (personal right) against the executor of the deceased estate. The content of this right is that upon completion of the process of administration of the estate, the executor must transfer the bequeathed assets to the beneficiary (assuming, obviously, that the liabilities of the estate do not exceed its assets).[33] Only upon transfer of the assets (in the appropriate manner) will the beneficiary become the owner of the assets.[34] *Greenberg v Estate Greenberg*[35] provides good reason to believe that a beneficiary's right vests automatically when the moment of vesting occurs.[36] However, this does not mean that a beneficiary is under an

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[28] Part 2 6 below.

[29] Grotius *Inl* 2 8 6; Van der Keessel *Praelectiones ad Gr* 2 8 6.

[30] *Fischer v Liquidators of the Union Bank (in liquidation)* (1890) 8 SC 46 51 52.

[31] *Greenberg v Estate Greenberg* 1955 3 SA 361 (A) 364G/H; *Commissioner, SARS v Executor, Frith's Estate* 2001 2 SA 261 (SCA) 270; MJ de Waal & MC Schoeman-Malan *Law of Succession* 4 ed (2008) 10.

[32] De Waal & Schoeman-Malan *Law of Succession* 10.

[33] *Greenberg v Estate Greenberg* 1955 3 SA 361 (A) 364G/H.

[34] 364G.

[35] 364G.

[36] De Waal & Schoeman-Malan *Law of Succession* 9. However, according to Van Heerden ACJ in *Wessels v De Jager* 2000 4 SA 924 (SCA) 928G, a testate or intestate beneficiary upon the death of the deceased obtains "only a power and not a right … [H]e obtains a right only once he accepts the benefit". For a critical discussion of *Wessels v De Jager* 2000 4 SA 924 (SCA) see JC Sonnekus "*Delatio* en *Fallacia* in die Hoogste Hof" (2000) *TSAR* 793.

obligation to inherit under all circumstances.[37] A beneficiary always has the right to accept the benefit (adiate) or to reject it (repudiate).

With the introduction of the concept of an "executor" into our law, the assets and liabilities of the deceased no longer devolve upon the heir but comprise the "estate", which falls to be administered by the executor by way of settling the deceased's debts and distributing the assets among the beneficiaries entitled to same.[38] The South African law of succession, therefore, does not provide for any disguised or "under cover" form of universal succession. Only those assets subject to distribution after all the liabilities have been settled by the executor can devolve. In the event of a business being a classical "sole proprietorship", without legal personality, the liabilities of the business can as a general rule not be separated from the liabilities of the deceased. The executor has no space or margin to manoeuvre. The business as such does not exist as a legal object that can be dealt with. The liabilities of the business and that of the estate at large have to be settled first and only then can the remaining assets (of the business) be distributed. A testamentary clause bequeathing "the business concern (owned by the testator) … together with all its assets and liabilities" *per se*, cannot change the rules and law pertaining to testate succession and administration of estates.[39] Based on the exposition above, a testator cannot bequeath liabilities as such. In view of the explanation in part 2 2 below, the bequest in *Gradus*' case is, arguably, a *modus* and therefore the beneficiary always has a choice to either adiate or repudiate the benefit.

In *Gradus*, the executor and Robert MacDonald reached a so-called "preservation agreement". In exchange for the use of the helicopters, Robert MacDonald only took responsibility for certain liabilities, such as maintenance, fuel, insurance, painting and financing. Other liabilities and claims against the business should, therefore, technically be settled by the executor from the assets in the estate (including, in my view, the helicopters which still remained estate assets since ownership of them was not transferred to Robert MacDonald). Only after the estate was finally wound up, would the remaining business assets be transferred to Robert MacDonald in ownership.[40] Adiation of the above-mentioned bequest in *Gradus* could thus in effect only have occurred just before the estate was finally wound up, or when it was clear that there was sufficient cash available to pay all other estate liabilities.[41]

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37 De Waal & Schoeman-Malan *Law of Succession* 9.

38 MM Corbett, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (2001) 33. This process of administration is regulated by the Administration of Estates Act 66 of 1965.

39 For cases in this regard confirming the legal position in respect of the deceased estate see *Estate Smith v Estate Follett* 1942 AD 364 383; *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656 692; *Greenberg v Estate Greenberg* 1955 3 SA 361 (A) 364.

40 This is in accordance with the testimony of the beneficiary that he wanted to be part of the preservation agreement as in effect he would be maintaining assets which eventually he "anticipated" would become his (*Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* para 37). For a detailed discussion of the meaning of the word "liabilities" and the probable intention of the testator in this regard, see part 2 3 below.

41 In accordance with this position, evidence was presented by the beneficiary (paras 31-32) that this preservation agreement was just an interim arrangement, pending the finalisation of the estate. He still had the choice to accept or repudiate the bequest before the estate was finally wound up.

Without adiation by the legatee, however, the liabilities of the business would have to be settled by the estate.

2 2 Nature of the bequest made by ESD MacDonald

Although the nature of the bequest in clause 5.5 was not discussed in the judgment, it can be argued that clause 5.5 constitutes a bequest of a business concern, burdened with the obligation to take it as a running concern or continuing business as it is, assets and liabilities included.[42] As indicated above,[43] this, in the event of sole proprietorship, only refers to those assets that remain after the estate liabilities in general have been settled. The concept of a bequest being "burdened" is commonly found in the context of the institution known as the *modus.* In the testamentary sphere a *modus* may be defined as a provision in a will in terms of which the testator imposes upon a person to whom property has been bequeathed the charge[44] of employing it or its value, wholly or in part, for a certain specified purpose, or the duty of doing something else which restricts or diminishes the extent of the bequest.[45] Although the court did not address the nature of the bequest, this in my opinion is indeed the effect of clause 5.5 quoted above.[46] The business assets are bequeathed to the beneficiary, subject to the obligation or duty to take responsibility for the liabilities of the business. Such a bequest is generally regarded as valid and reasonable.[47] However, the beneficiary has a choice whether to adiate or repudiate the bequest.[48] Upon acceptance, the beneficiary acquires a vested right with regard to the assets, but he also incurs the personal duty to stand in for the liabilities.[49] Evidence by Robert

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[42] The same terminology is found in *Katz v Gordon* 1958 4 SA 213 (W) 221A/B where Ramsbottom J submitted:

> "[W]ith that knowledge, he [the testator] bequeathed to the respondent 'all the assets' and did not *burden* him with liabilities." (Emphasis added).

The fact that the beneficiary is willing to take over the liabilities with regard to the business, does not mean that creditors automatically lose their claims against the estate. In the event of trade/business liabilities the parties can through negotiation come to an agreement regarding, for example, refinancing current lease and other agreements.

[43] Part 2 1.

[44] A duty, obligation or burden.

[45] *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 177 with reference to Goudsmit *Pandectas* para 64; *Ex parte Esterhuyse* 1971 4 SA 261 (O) 264H-265C; *Wessels v DA Wessels en Seuns (Edms) Bpk* 1987 3 SA 530 (T) 538C-F; *Webb v Davis NO* 1998 2 SA 975 (SCA) 981D; *Kommissaris van Binnelandse Inkomste v Van Blommenstein* 1999 2 SA 367 (SCA) 382D-H; Corbett et al *The Law of Succession in South Africa* 337; De Waal & Schoeman-Malan *Law of Succession* 141; J Jamneck "Content of Wills: Absolute Bequests, Conditions, the Modus and Estate Massing" in J Jamneck & C Rautenbach (eds) *The Law of Succession in South Africa* 2 ed (2012) 133 144.

[46] It was in my opinion also treated as such by the applicants and respondent since the issue of adiation was central to the dispute.

[47] *Katz v Gordon* 1958 4 SA 213 (W) 221G. Regard should be had to the presumption that provisions in a will are valid rather than invalid. This presumption is linked to the maxim *ut res magis valeat quam pereat* (an interpretation must rather tend towards validity than invalidity). According to Corbett et al *The Law of Succession in South Africa* 528 the *ratio* underlying this presumption is the following:

> "Until the contrary is proved, the law assumes, benevolently, that all people will act lawfully rather than unlawfully, morally rather than immorally, and reasonably rather than unreasonably."

[48] NJ van der Merwe & CJ Rowland *Die Suid-Afrikaanse Erfreg* (1990) 409; De Waal & Schoeman-Malan *Law of Succession* 194.

[49] *Jewish Colonial Trust v Estate Nathan* 1940 AD 163; *Ex parte Esterhuyse* 1971 SA 261 (O); De Waal & Schoeman-Malan *Law of Succession* 142; Corbett et al *The Law of Succession in South Africa* 145.

MacDonald and the executor indicated – and was accepted – that Robert MacDonald never adiated the bequest.[50] They merely reached a so-called "preservation agreement" regarding the use of the helicopters, in return for taking care of some of the expenses.[51]

Instances where the testator had bequeathed "his business" to a legatee have occurred in the past both locally and abroad. In *Katz v Gordon*[52] there was a bequest of "all the assets of the business". Since only "assets" of the business were bequeathed, Ramsbottom J found that the trade debts of the business were debts of the testator and that they naturally fall to be paid from the money in the hands of the executor before the nett residue is determined and distributed.[53] He also found that the testator was a businessman of long experience who obviously knew the difference between "assets" and "liabilities". He knew what the "liabilities" of the business were. They were clearly stated in the balance sheets, as were the "assets". With that knowledge he bequeathed to the legatee "all the assets" and did not burden him with the liabilities.[54] In view of this statement it seems as though a testator can indeed explicitly burden a legatee of a business/sole proprietorship with its liabilities, such a burden being seen as constituting a *modus*. The beneficiary will, however, have the choice to adiate or repudiate the bequest.[55] Ramsbottom J held that the decision would have been different if the testator had bequeathed to the legatee, not "all the assets" of the business, but the "business".[56] Had the latter been the case, this would have entailed a transfer of both assets and liabilities. In *Re Rhagg, Easten v Boyd*[57] it was held that the legatee was entitled to the whole of the testator's share in the business which, in the circumstances, included both assets and liabilities. Those remarks related to the bequest of a business which was being carried on by the testator and which the testator intended the legatee to carry on as a continuing business or "running concern".[58] In *Re White, McCann v Hull*[59] ("*Re White, McCann*"), the testator bequeathed "the business of a house furnisher at present carried on by me" and stated that "it is my wish that the said H shall carry on and

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[50] See, for example, *Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* para 37. In accordance with the discussion in part 2 1 he in any event could not have accepted it at that early stage upon the testator's death. The transfer of those assets was still subject to the payment of estate liabilities.

[51] The motive for and purpose of this agreement (para 31) was in the interim to do the necessary (by Robert MacDonald) to keep the business profitable *as at the end of the day he would be able to accept and take ownership of the legacy when the estate was finally wound up.* The executor felt that such an arrangement would remove a burden from the estate while ensuring the preservation of the helicopters *until the estate was wound up* (paras 32-33).

[52] 1958 4 SA 213 (W).

[53] 220H.

[54] 221A.

[55] Ramsbottom J (220H) went on to say:

"If the testator had meant the debts of the business to be paid by the respondent, one would have expected him to say so."

At 220B he also stated:

"The assets were not burdened with any encumbrance."

[56] 222C-G. If he were to adiate the bequest of a "business", he would also have to take responsibility for the (trade) liabilities.

[57] [1938] Ch 828 836, [1938] 3 All ER 314 319.

[58] This must in my opinion still be seen against the background of what has been argued in part 2 1 above.

[59] 1958 2 WLR 464, [1958] Ch 762, [1958] 1 All ER 379.

manage the business as she shall think fit". The intention of the testator was that the legatee should carry on the business. It was held[60] that the bequest of the business did not include the testator's bank balance, but included the stock-in-trade, the book debts and the freehold property. The bequest was held to be subject to the payment of the testator's trade liabilities at his death, but not the payment of the income tax payable in respect of the profits of the business upon his death. It was held that the business must be regarded as "an entity, and that the legatee took the business with its assets and trade liabilities".[61]

Some may hold the view that clause 5.5 constitutes a bequest subject to a suspensive condition, in other words, the beneficiary only acquires a vested right once he settles the liabilities. Such an interpretation is, in view of the case of *Webb v Davis NO*,[62] not supported. In *Webb v Davis NO* the testator had left his trading station to R in his will subject to the "condition that R pay to G the amount of R70 000 in instalments of R10 000 per annum". In the event of failure to accept the bequest or upon R failing to comply with the terms, the bequest would fall away and R and G would inherit the testator's estate in equal shares. Despite the use of the word "condition" the court regarded it as a *modus*[63] and stated:

> "[T]he business was [R's] only source of income from which he could pay the appellant. The testator must have known this. He and [R] had apparently enjoyed a close relationship. They had worked and lived together for some years. It is *obvious* that the testator intended that [R] would run the Trading Station and pay the appellant out of income generated from the business, *a set of circumstances that is inconsistent with the notion that vesting would be postponed until payment was made*."[64]

The court, furthermore, remarked that it was unlikely that the testator contemplated that R would have a mere *spes* and no vested right over the period of repayment, for during this period he would in the ordinary course be required to make important decisions for the proper conduct of the business.[65] Finally, the court referred to the possibility that if the testator's intention was open to doubt, various presumptions would operate in favour of the bequest being a *modus*. In this regard there are the presumptions in favour of an immediate as opposed to a postponed vesting; the presumption in favour of an unconditional bequest and the presumption that a provision attached to a bequest is a *modus* rather than a condition since it is seen as a disposition complete in itself (pure bequest).[66] The effect of the phrase "shall fall away" was merely that a resolutive condition was attached to the *modus*. This, however, had no bearing on the question of vesting (upon acceptance).[67]

In *Gradus*, similarly, the business was Robert MacDonald's only source of income from which he could pay the liabilities. The testator and Robert enjoyed a close relationship. They had worked together for some years. It

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60 [1958] Ch 762 763.

61 See, however, *Oliff v Oliff's Executors* 1924 NPD 413 where the court, in the absence of an explicit statement to this effect, was unwilling to include the trade liabilities in a bequest of a business.

62 1998 2 SA 975 (SCA).

63 982E-E/F; 982I/J-983A/B, 983F/G.

64 982H-J (emphasis added).

65 982J-983A.

66 983B; Corbett et al *The Law of Succession in South Africa* 145 with reference to Voet 35 5 12.

67 *Webb v Davis NO* 1998 2 SA 975 (SCA) 983H.

is obvious that the testator would have intended vesting to occur with the accompanying obligation to settle the liabilities, instead of the notion that vesting would be postponed until payment was made.

In summary, it is submitted that clause 5.5 constituted a bequest subject to a *modus* (obligation) and that it was, in itself, a reasonable and valid bequest. In terms of case law such as *Re White, MacCann* (in the absence of an indication to the contrary), such a bequest normally would mean that the beneficiary takes the business with its assets and its "trade liabilities".[68] However, it excludes the payment of the income tax payable in respect of the profits of the business upon the testator's death.[69] In view of what has been stated in part 2 1 above, the fact that a testator intended the legatee to carry on the business (sole proprietorship) as a "running concern" or that it should be regarded as an "entity" does not mean that the beneficiary can adiate immediately upon the death of the testator. He can in my opinion only adiate once it is clear that there is sufficient cash to pay other estate liabilities.

Even if it was found that Robert MacDonald indeed adiated the bequest at some stage, the question can be posed as to what the testator intended (in view of the position in the different cases sketched above) with the phrase "and the liabilities" in clause 5.5. It is submitted that a favourable outcome in such an event could still have been obtained in favour of Robert MacDonald on the basis and principles of the rules pertaining to the interpretation of wills. These principles hinge on ascertaining the true intention of the testator in the event of a latent ambiguity.

2 3 The intention of the testator: rules of interpretation

The question to be determined is what the testator intended with the word "liabilities".[70] The golden rule of the interpretation of wills is to ascertain the wishes of the testator from the language used.[71] The issue in interpretation is not what the words in the will mean, but what the testator meant (intended) by using particular words.[72] In *Cuming v Cuming*[73] ("*Cuming*") the court concluded its review of the authorities with the following statement:

> "A Court dealing with a will … cannot give effect to something which the words are wide enough to cover, *but which the probabilities of the case show that it did not intend*."

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[68] The facts in *Re White, McCann v Hull* [1958] Ch 762 clearly showed that the testator intended the beneficiary "to carry on and manage the business as she shall think fit". It is submitted that there is no difference between such a bequest and the one made by ESD MacDonald. By bequeathing a business concern, assets and liabilities included, ESD MacDonald surely also intended for his son to carry on and manage the business as he thought fit.

[69] *Re White, McCann v Hull* [1958] Ch 762 763.

[70] See in general *Re Ragg Easten v Boyd* [1938] Ch 828, [1938] 3 All ER 314; see also *Rogers v Rogers* (1910) 11 SRNSW 38; *Re White, McCann v Hull* [1958] Ch 762; *Mandeville v Duncan* 1965 SLT 246. See *Re Timberlake, Archer v Timberlake* (1919) 63 Sol Jo 286; Anonymous "Wills and Intestacy" in Lord MacKay (ed) *Halsbury's Laws of England 102* (2010) 262 para 289; JB Clark & JG Ross Martyn (eds) *Theobald on Wills* (1993) 300.

[71] *Robertson v Robertson's Executors* 1914 AD 503 507; *Cuming v Cuming* 1945 AD 201.

[72] *Cuming v Cuming* 1945 AD 201 206; see the exposition in *Katz v Gordon* 1958 4 SA 213 (W) 216; *Will v The Master* 1991 1 SA 206 (C).

[73] 1945 AD 201 213 (emphasis added).

Earlier in *Re Rowland: Smith v Russel*[74] Lord Denning remarked:

> "[I]n point of principle the whole object of construing a will is to find out the testator's intentions, so as to see that this property is disposed of in the way he wished. True it is that you must discover his intention from the words he used; but you must put upon his words the meaning which they bore to him. If his words are capable of more than one meaning, as they often are, *then you must put on them the meaning which he intended them to convey, and not the meaning which a philologist would put on them*."

As a general rule, words and phrases must be given the grammatical or technical meanings they had at the time of the making (execution) of a will.[75] However, as a will is ambulatory and speaks from the time of the testator's death,[76] the latter date may have to be considered as well in order to ascertain what a word *includes*. For purposes of interpretation the position at the time of the making (execution) of the will is (usually) decisive.[77] In accordance with the "armchair" rule, words and phrases used by the testator will *prima facie* be given the meaning which they bore at the time the will was executed.[78]

This means that in construing a will, a court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is taken to have used the words in the will.[79] The court then has to declare what the intention is, evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words.[80] In applying these general principles in order to interpret the will one has to consider: [81]

(i) The meaning of the phrase/words "with all its assets and liabilities".[82]
(ii) Interpreting those words with reference to all material facts and circumstances known to the testator with reference to which he is taken to have used the words in the will.

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74 [1962] 2 All ER 837 (CA) 841A-C (emphasis added).

75 *Troitz v Trosky's Executors* 1924 WLD 53 56; Corbett et al *The Law of Succession in South Africa* 458; De Waal & Schoeman-Malan *Law of Succession* 224.

76 *Randles Bros and Hudson Ltd v Estate Horner* 1936 NPD 193; *Greeff v Estate Greeff* 1957 2 SA 269 (A) 274-275; Corbett et al *The Law of Succession in South Africa* 458.

77 *Greeff v Estate Greeff* 1957 2 SA 269 (A) 274-275.

78 275C-D.

79 *Allgood v Blake* (1873) LR Exch 160 163 approved in *Cuming v Cuming* 1945 AD 201 213; Corbett et al *The Law of Succession in South Africa* 464. See the discussion in *Katz v Gordon* 1958 4 SA 213 (W) 217A.

80 As regards the admissibility of extrinsic evidence see *Allen NNO v Estate Bloch* 1970 2 SA 376 (C) 380A-E; *Dison NO v Hoffmann NNO* 1979 4 SA 1004 (A) 1035G-1036B; *Will v The Master* 1991 1 SA 206 (C) 210A.

81 Ramsbottom J in *Katz v Gordon* 1958 4 SA 213 (W) 217B-D, applying the principles laid down in *Cuming v Cuming* 1945 AD 201.

82 This phrase constitutes a typical "latent ambiguity", in the sense that the words may be equally applicable to two objects. The question to be answered is to what liabilities the relevant clause refers. See *Curren v Jacobs* 2000 4 All SA 584 (SE) and *Will v The Master* 1991 1 SA 206 (C) with regard to the type of evidence allowed to interpret such a latent ambiguity. Extrinsic evidence is admissible to solve such an ambiguity. In so far as other resources of interpretation have failed, it is suggested that even statements by the testator himself regarding his intention are admissible – see De Waal & Schoeman-Malan *Law of Succession* 226 n 40.

In *Gradus*, the testator appears to have been an astute businessman.[83] The business was carried on under a written lease of a certain premises. All the aircraft were leased. At the date of the will (2005) the testator was thus well aware of the state of his business, and he certainly knew that there were some general "trade" liabilities. He knew what the liabilities of the business were at that stage or ought to have been upon his death. With that knowledge he bequeathed to his son the business concern known as Sport Aviation "together with all its assets and liabilities". When the will was executed the accident in question had not even occurred. Being meticulous[84] in everything he did, the testator certainly would have included possible claims that might have arisen in future against the business of whatever nature, if he intended them to be included.[85] Such words and an intention to this effect were clearly omitted. In terms of *Cuming* (as referred to above), the court thus cannot give effect to something which the words ("liabilities") were wide enough to cover, but which the probabilities of the case show that the testator did not intend. Support for this contention is to a certain extent also found in clause 4.5 of his will which reads:

> "5.4 To my son ROBERT GRAHAM MACDONALD I also bequeath the house situate at 7 High Road, Sea Point, currently registered in the name of the Ernest Macdonald Trust. I direct that the outstanding bond on the house be settled from the proceeds of the sale of the *remainder* of my assets before transfer to him." (Emphasis added.)

In this instance he intended the outstanding bond to be settled by the estate. With regard to clause 5.5 (the business concern), however, he intended his son to carry on the business as a continuing business, (an entity) with its assets and normal "trade" liabilities.[86] Any other damage or loss would have been carried by his insurance.[87] In this regard he also wanted his son to have optimal benefit of the business and certainly not to be personally liable for the mentioned damage or loss.

Even if the plaintiffs' claims had existed at that stage (making of the will), or even at the time of death, which was not the case, there is an argument to be made that the claims should have been lodged against the estate and paid from the residue. Steyn[88] states the following principle in this regard:

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83 *Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* para 37. The date on which he started carrying on business as Sports Aviation was not supplied and is unknown.

84 His management style was described as "autocratic and he micromanaged all the employees and the business" (para 31).

85 In *Reuben v Master of the High Court* (586/09) 2011 ZAWCHC 456 (20 September 2011) *SAFLII* para 50 <http://www.saflii.org/za/cases/ZAWCHC/2011/456.html> (accessed 27-06-2013) it was stated that it is highly unlikely that a testator will leave a benefit in advance to a property that was not yet in existence at the time of making of the will. The argument can also be applied in the case under discussion. It is highly unlikely that the testator would have bequeathed a liability which was not even in existence at the time of making the will and in advance of the possibility of such liability even arising.

86 In *Re White, McCann v Hull* [1958] Ch 762; *Re Rhagg* [1938] Ch 828, [1938] 3 All ER 314.

87 According to *Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* para 14 the business was insured.

88 G Steyn *The Law of Wills in South Africa* 2 ed (1948) 118 (in *Katz v Gordon* 1958 4 SA 213 (W) 220A wrongly referred to as the third edition).

> "If the property bequeathed is burdened or encumbered by a mortgage, pledge, public tax or charge … of which the testator was aware, the executor must free the property of such burdens or charges out of other assets in the estate … unless a contrary intention is manifest from the will."

The author added:[89]

> "[T]his duty, according to *Grotius* (2:22:16) extends only to burdens and encumbrances of such a nature that the property *may be lost thereby,* so that if the encumbrance is of the nature of a servitude or an annual rent charge (e.g. quit rent) the legatee must be satisfied with the property so burdened, good or bad as it may be."

Claims of the current nature would certainly have led to the property being lost. The testator therefore needed to have dealt with them explicitly when he made the will if he wanted the beneficiary to be burdened or encumbered by them. The testator did not deal with them because they had not even existed at that stage. Drawing from clause 4.5 he would certainly have intended them also (like the mortgage) to be paid for by the estate (had they existed).

If one were then to consider the date of death in order to ascertain whether the word "liabilities" included the later claims, the answer would still be in the negative.[90] Although a possible cause of action did exist at that stage, the testator was unaware of any legal proceedings being considered by the plaintiffs. It is my submission that "liabilities" have the same meaning and content irrespective of looking at it from the moment the will was made or from the moment of the testator's death. In *Katz v Gordon*[91] ("*Katz*"), a bequest of "assets of the business" was regarded to be assets as per the balance sheet on *date of death* and did not mean only the assets after the liabilities had been settled. However, the situation would have been different if the testator left his "business" to a legatee. Such a bequest would have included the normal "trade liabilities" as per the balance sheet on date of death. In *Re White, McCann* it was held, as stated above, that in the case of a bequest of a "business", the business ought to be regarded as an entity and that the legatee took the business with its assets and its trade liabilities. The liabilities did not, as was said earlier, include the payment of the income tax payable in respect of the profits of the business on the testator's death. The liabilities, therefore, certainly could not include non-existing claims by the plaintiffs at the moment of execution of the will, or at the date of death. In *Re White, McCann* it was, furthermore, pointed out that the bequest must be construed in such a manner that the beneficiary must be able to carry on with the normal running of the business in the form of a "gift" from the testator in order for the wish to be achieved.[92] Such a construction implies optimal benefit for the beneficiary. This remark is also true for Robert MacDonald if one considers the will itself[93] and the surrounding circumstances which the testator knew about, or had in mind, or would have borne in mind when the will was drafted (in

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89 118 (emphasis added).

90 It was stated earlier in this part that the meaning of a word upon date of death may have to be considered in order to ascertain what a word "includes".

91 1958 4 SA 213 (W).

92 [1958] Ch 762 763.

93 The fact that it was dated November 2005 and the content of clause 5.4 of the will above.

November 2005).[94] However, in so far as the abovementioned interpretation of the intention of the testator is unconvincing, the use of certain presumptions may be helpful.

2 4 Presumptions against onerous provisions; presumptions in favour of minimum burden and maximum benefit

Presumptions may only be used if the intention of the testator cannot be ascertained in any other way.[95] The point of departure is evidently that the testator is a reasonable man and that he would not needlessly encumber the position of his heirs.[96] Clause 5.5 is in itself a burdensome provision. It contains a *modus* or obligation, upon acceptance of the bequest (the business) by the beneficiary, to take it with its assets and liabilities. In *Standard Bank Ltd NO v Trollip NO*[97] Steyn J, after referring to the presumption in favour of a direct, rather than a fideicommissary substitution, stated that it was not clear whether, upon interpreting the provisions of a burdensome condition, there is also a "presumption" against an interpretation which would tend to *increase the burden.* Corbett et al[98] submit that there is such a presumption, not only in respect of fideicommissa,[99] but generally. Such a presumption goes against an interpretation that the testator in *Gradus* bequeathed the business, not only subject to the (normal) "trade liabilities" upon date of death, but also subject to vague possible future civil claim(s) against him which, at the stage of drafting the will (November 2005), had not even been in existence. The presumption against an interpretation increasing the burden of an already burdensome bequest (*modus*) stands in support of such a contention.

2 5 Adiation made "in excusable ignorance of rights"

Once the beneficiary has exercised his choice to adiate, it is final. An exception is possible, however, if it can be shown that the beneficiary's choice was made "in excusable ignorance of his rights".[100] In *Van Wyk v Van Wyk's Estate*,[101] the applicant and her late husband, to whom she was married in community of property, had executed a joint will in which the testator purported to dispose of more than his share of the joint estate. On the death of the husband, the executor explained the terms of the will to the applicant,

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[94] Bearing in mind what was said earlier regarding direct statements (hearsay) by the testator during his lifetime regarding his intention, it would be of great importance to ascertain what he stated in this regard to perhaps family members or the attorney who drafted the will.

[95] See the discussion by De Waal & Schoeman-Malan *Law of Succession* 227. See *Webb v Davis NO* 1998 2 SA 975 (SCA) 983B.

[96] De Waal & Schoeman-Malan *Law of Succession* 228. Van der Merwe & Rowland *Die Suid-Afrikaanse Erfreg* 551 suggested that a fairly limited degree of ambiguity or lack of clarity in a will is sufficient to bring the presumption against onerous provisions into play.

[97] 1965 2 SA 175 (C) 178H-179B.

[98] Corbett et al *The Law of Succession in South Africa* 511. See Van der Merwe & Rowland *Suid-Afrikaanse Erfreg* 551 n 15.

[99] See *Ex parte Dell* 1957 3 SA 416 (C) 418H-419A.

[100] *Van Wyk v Van Wyk's Estate* 1943 OPD 117 126; *Oxenham's Executor v Executor Estate Oxenham* 1945 WLD 57 62-63; *Ex parte Estate Van Rensburg* 1965 3 SA 251 (C) 256A-E; *Van der Merwe v Die Meester* 1967 2 SA 714 (SWA) 724A-G; *Bielovich v The Master* 1992 4 SA 736 (N) 739H-J.

[101] *Van Wyk v Van Wyk's Estate* 1943 OPD 117.

but not the common-law right of election. With reference to Voet 22.6.2 and previous cases such as *Rooth v The State*[102] the court stated:[103]

> "I think it must be accepted that the Courts of South Africa have regarded it as a natural extension of the rule of equity that the strict rule of law – that ignorance of law affords no excuse – is not or may not be applicable to a case where the fact in issue is whether an election has been made or not."

In *Oxenham's Executor v Executor Estate Oxenham* the survivor under a mutual will adiated, but under the mistaken belief that he could dispose of his own property in the massed estate. Murray J stated as follows:[104]

> "Applying, however, what I understand to be the Roman Dutch law principles, regarding relief from the consequences of error, it seems to me that the applicant must fail. I assume that his ignorance of his legal rights under the joint will is an ignorance of *fact* and not of law, and that in the present instance he is not disqualified by the maxim *ignorantia juris haud excusat*. But the ignorance which he pleads must not be any form of ignorance – it is only just and probable ignorance of which he can avail himself. See *Voet, 22.6 passim*."

The court concluded[105] that the general rule laid down by Voet[106] appears to be that where a dispositive act has been performed and quite apart from contract, a party is ordinarily bound by his conduct. If that conduct constitutes a clear choice of one of two courses, he would normally be bound to accept all the consequences of the course he has chosen, even if he elected in ignorance of these consequences. He may in exceptional cases be accorded relief if the ignorance which led him to elect is in the circumstances just and probable.[107] Even if adiation by Robert MacDonald upon the death of ESD MacDonald did occur (which was denied and found not to be the case) another defence could, arguably, have been that he had no knowledge of any of the plaintiffs' claims against the estate and that he never intended accepting any unknown future possible claim against the business. Based on the above arguments,[108] a beneficiary normally accepts "trade liabilities" as per the balance sheet and obviously only those existing and known to him. If in *Gradus* the plaintiffs' claims were to be included in the concept "liabilities", adiation by Robert MacDonald would, arguably, have been based on ignorance of fact. Such ignorance would be regarded as "just and probable" under the circumstances.

It can even be argued that the facts in *Gradus* go further in the sense that there would have been no choice between two courses, in that Robert MacDonald did not even know about the pending claims.

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[102] (1888) 2 SAR 259 267.
[103] *Van Wyk v Van Wyk's Estate* 1943 OPD 117 126.
[104] 1945 WLD 57 62.
[105] 62-63.
[106] "For the rest this ignorance of the Civil Law cannot benefit those wishing to secure any gain, but it does not prejudice those seeking to recover or retain their own property and still less those taking action to avoid injury not yet suffered" as discussed in *Van Wyk v Van Wyk's Estate* 1943 OPD 117 126.
[107] *Oxenham's Executor v Executor Estate Oxenham* 1945 WLD 57 63. The said principles were also applied with regard to a repudiation in *Ex Parte Estate van Rensburg* 1965 3 SA 251 (C).
[108] Part 2 3.

2 6 Action for pain and suffering: passively intransmissible (on estate of testator or his heir)

Liability in the South African law of delict rests on three pillars: the *actio legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering.[109] The action for pain and suffering is actively as well as passively[110] heritable only after *litis contestatio*.[111] The claim, therefore, lapses if the plaintiff or the defendant dies before *litis contestatio*. In *Regering van die Republiek van Suid-Afrika v Santam Versekeringsmaatskappy Bpk*,[112] De Vos Hugo JP, with reference to *Hoffa NO v SA Mutual Fire and General Insurance Co Ltd* held as follows:[113]

> "Hier is ooreenkoms met die *actio iniuriarum* omdat die *solatium* wat daarmee [aksie vir pyn en lyding] verhaal kan word ook nie aktief[114] *of passief*[115] [dit wil sê, na die boedel van die delikpleger] oordraagbaar is nie."

The business run by the testator was not a separate legal persona, but identified with his own person (he was "trading as"). This, arguably, brings to the fore an additional reason why the action for pain and suffering (encompassing claims for pain, suffering, disfigurement, psychological lesion (shock), loss of life expectancy and loss of happiness), cannot pass to the deceased or his heir – namely, that such action is passively intransmissible (unless *litis contestatio* has already occurred, which is not applicable in the instant case).[116]

3 Conclusion

As indicated earlier[117] in the discussion, *Gradus v Sport Helicopters* was decided on the basis of a "preservation agreement" between the first defendant and the executor. No adiation of the bequest in clause 5.5 of the will had in fact taken place. This conclusion by the court is supported. This note, however, addresses some alternative arguments in favour of the first defendant's case had the court indeed found adiation to have occurred. These can be summarised as follows: Adiation by a beneficiary of a bequest of a "sole proprietorship" immediately upon the death of the testator is seemingly not possible since the assets will be subject to sale if there were to be insufficient funds in the estate to pay the estate debts or to cover certain cash legacies.

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[109] J Neethling, JM Potgieter & PJ Visser *Law of Delict* (2010) 253.

[110] Cf M Loubser & R Midgley (eds) *The Law of Delict in South Africa* (2012) 303.

[111] Closing of the pleadings. Neethling et al *Law of Delict* 253 with reference to *Hoffa NO v SA Mutual Fire and General Insurance Co Ltd* 1965 2 SA 944 (C) 950 955; *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T) 21-22.

[112] 1970 2 SA 41 (NC).

[113] 43B (emphasis added).

[114] If plaintiff dies before *litis contestatio* the action falls away and is not transmitted to his heirs.

[115] Action may not be instituted against the defendant's heirs if defendant dies before *litis contestatio*.

[116] Based on the abovementioned *dictum* in *Regering van die Republiek van Suid-Afrika v Sanlam Versekeringsmaatskappy Bpk* 1970 2 SA 41 (NC) 43B. Cf TJ Scott *Die Geskiedenis van die Oorerflikheid van Aksies op grond van Onregmatige Daad in die Suid-Afrikaanse Reg* LLD thesis Leiden (1976) 200; NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 249; Loubser & Midgley *The Law of Delict in South Africa* 303.

[117] Part 1 above.

Had the legatee at a later stage adiated those business assets that remained as well as the business liabilities, the question is what those business liabilities entailed. Clause 5.5 arguably constitutes a *modus* and is in itself a valid and reasonable bequest. The intention of the testator with the phrase "liabilities" of the business probably only pertains to "trade liabilities" as per the balance sheet on date of death. This is derived at from reading the will as a whole and from considering the surrounding facts and circumstances known to the testator. Certain presumptions are also supportive of such a conclusion. The bequest must be construed in such a manner that the beneficiary must be able to carry on with the normal running of the business (given) as a "gift", in order for such a wish to be achieved. Burdening it with vague, non-existing claims at that stage would run contrary to such an interpretation and would be regarded as unreasonable. The possibility of arguing that adiation, had it taken place, was made in "excusable ignorance of his rights", seems to be a sound one. Also, the action for pain and suffering cannot pass to the deceased's heir, because such an action, arguably, seems to be passively intransmissible. Lastly, it is clear that the claims (which have prescribed by now) should have been instituted against the estate of the testator, ESD MacDonald.[118]

SUMMARY

This article addresses the nature of a bequest in a will to a beneficiary of a "business concern together with all its assets and liabilities" in view of the facts in *Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* <http://www.saflii.org/za/cases/ZAWCHC/2012/365.html>. In the course of transporting passengers in terms of the business of Sports Aviation, a helicopter crashed. Soon after the accident the owner of the business died and bequeathed to his son ("the beneficiary") "the business concern known as Sports Aviation together with all its assets and liabilities". Two years later, passengers involved in the accident issued summons. The action was brought against the beneficiary. The question before the court was whether the beneficiary inherited the liability arising from the helicopter accident prior to the testator's death, or whether the deceased estate bore liability. Although the court found adiation of the benefit by the beneficiary not to have taken place, the article addresses some related issues, such as the possible impression that the testator bequeathed liabilities as such. As a matter of general interest the author also pursues some arguments or defences available to the beneficiary should the court indeed have found that he adiated the benefit. The conclusion is reached that the bequest above, arguably, constitutes a *modus* which is in itself a valid bequest. It is, however, argued that adiation by a beneficiary of the benefit (a "sole proprietorship") immediately upon the death of the testator is seemingly not possible since the (business) assets were subject to sale if there were to be insufficient funds in the estate (of the deceased) to pay the estate debts or to cover cash legacies. The probable intention of the testator when making such a bequest and the possible meaning of the word "liabilities" are investigated. Applicable presumptions, the issue of adiation "in excusable ignorance of rights" and the question whether the action for pain and suffering is passively transmissible, are briefly considered.

[118] *Gradus v Sport Helicopters also known as Sport Aviation* (19879/2008) 2012 ZAWCHC 365 (28 November 2012) *SAFLII* para 46.