

SOUTH AFRICA / JUDGMENT

**Schoonhoven N.O and Others v
Schoonhoven and Others (7608/2020) [2024]
ZAKZPHC 1; [2024] 2 All SA 250 (KZP); 2024
(4) SA 240 (KZP) (19 January 2024)
[2024] ZAKZPHC 1**

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

E Bezuidenhout

CASE / FILE NUMBER

7608/2020

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: 7608/2020

In

the matter between:

SAMUEL
ALFRED SCHOONHOVEN N.O.
FIRST APPLICANT
JOHANNES
FRANS ALFONSIES SCHOONHOVEN N.O.
SECOND APPLICANT
JEAN
JOHANNES SCHOONHOVEN N.O.
THIRD APPLICANT
FRANS
RIAAN MARX
N.O.
FOURTH APPLICANT
and
PIETER CORNELIUS
ANTONIUS SCHOONHOVEN
FIRST RESPONDENT
NANETTE
VENTER
SECOND RESPONDENT
ANTOINE
SCHOONHOVEN
THIRD RESPONDENT
JOHANNES BERNARDUS
ALPHONSUS
SCHOONHOVEN
FOURTH RESPONDENT
BREGDA ELIZABETH
SCHOONHOVEN
FIFTH RESPONDENT
CHANEL
VEATER
SIXTH RESPONDENT
BREGDA ELIZABETH
SCHOONHOVEN
SEVENTH RESPONDENT
MARISKA
MOUTON
EIGHTH RESPONDENT
ALFONS
SCHOONHOVEN
NINTH RESPONDENT
ANJE
SCHOONHOVEN
TENTH RESPONDENT
JANE
SCHOONHOVEN
ELEVENTH RESPONDENT
THE MASTER OF THE
HIGH
COURT,

PIETERMARITZBURG
TWELFTH RESPONDENT
LINDIE
ODENDAAL
THIRTEENTH RESPONDENT
ORDER

The following order is

granted:

1.
The application is dismissed with costs.

JUDGMENT

E Bezuidenhout J

Introduction

[1] The four applicants are the trustees of the Schoonies Familie Trust with registration number I[...] ('the trust'). The trust was registered in 1998 by its founder, Mr Johannes Bernardus Alphonsus Schoonhoven. The first three applicants are his sons. He passed away on 6 May 2015. The applicants seek the following declaratory relief:

'1. It is hereby declared that the capital beneficiaries of the Schoonies Familie Trust, I[...] 1[...] ('the trust'), shall be determined by the Trustees of the Trust as at the date of the Trust's termination.

2. It is further declared that the Trustees of the Trust as at the Trust's termination shall make the determination stated in paragraph 1 above, from the list of potential capital beneficiaries set out in paragraph 1.2(b)(i) to (vii) of the Trust Deed, under the heading "Woordoms krywings".

It is common cause that the trust will terminate in 2030.

[2] The first to eleventh respondents are described as 'potential capital beneficiaries' of the trust and are mainly related to the late Mr Schoonhoven ('the deceased'). The fifth respondent was the deceased's wife. The seventh respondent, who bears the exact same name as the fifth respondent is in fact her granddaughter, her father being the first applicant. The second, third, fourth, sixth, eighth, ninth, tenth and eleventh respondents are grandchildren of the deceased. The twelfth respondent is the Master of the High Court, Pietermaritzburg. The first respondent is the only respondent who opposes the application, and is the brother of the first and second applicants. He claims inter alia that not all interested parties have been joined as respondents and lists a further seven individuals, his descendants, who were not joined. One of them, his daughter, Lindie Odendaal, whom he had adopted, was subsequently joined as the thirteenth respondent, but his six grandchildren (the deceased's great grandchildren) have not been joined. I will deal with this issue later on.

[3] The main issue that requires determination is the interpretation of certain clauses in the trust deed, read together with the deceased's last will and testament ('the deceased's will'),

and ultimately whether the declaratory relief being sought by the applicants is consistent with what is contained in the relevant

clauses.

[4] The matter was allocated to me as my first language is Afrikaans and both the trust deed and the deceased's will were written in Afrikaans. The application papers have been drafted in English. The

second applicant, who attested to the founding affidavit on behalf of the trust, included a number of translations in the affidavit itself and furthermore attached what purports to be an English translation of the relevant portions of the trust deed done by his attorney and counsel. A sworn translation of the trust deed and the will of the deceased were subsequently attached to the replying affidavit and formed part of a separate bundle before me. I discovered to my dismay, whilst reading the papers and the heads of argument, that there was a dispute between the parties regarding the correct English translation of the relevant portions of the trust deed and the will. The first respondent, in his answering affidavit, supplied a translation done by his attorney, upon which he relied. The applicants' attorney apparently asked the first respondent's attorney to provide input regarding an acceptable translation on a number of occasions, which requests were allegedly ignored.

[5] At the commencement of the hearing, I indicated to counsel that I did not intend entertaining any argument on what the correct English translation of the relevant documents was as I understood the meaning

of the relevant portions and that I would convey that meaning in my judgment, which I intended writing in Afrikaans for the benefit of the parties, who themselves are Afrikaans speaking. Due to the logistical difficulties associated with producing a judgment in Afrikaans, which would have to be translated into English, it being the official language of record (as per a resolution by the Heads of Court in March 2017), I reconsidered my initial stance and have accordingly proceeded with the judgment in English. I will address the different interpretations in my judgment if and when necessary.

Background

[6] The relief being sought by the applicants has a direct bearing on the interpretation of very specific clauses of the trust deed, which trust deed has to be read in conjunction with the deceased's

will, in particular with regard to how the trust funds would be distributed amongst the capital beneficiaries when the trust terminates.

- [7] As mentioned, the trust was registered in 1998. The deceased was apparently advised about the benefits of a family trust, which included providing for the family in the future. The trust deed attached to the papers and which is the subject of the litigation is actually an amended trust deed, described as the 'Akte van Wysiging van Schoonies Familie Trust'. It was signed on 20 April 2006. It was inter alia stated in the preamble that the founder and the trustees wanted to effect extensive amendments to provide for changing circumstances. At that time, the trustees were the deceased, his wife and the first applicant. In the amended trust deed, the second and third applicants and the first respondent were appointed as trustees. The third applicant is actually the biological son of the first applicant but was subsequently adopted by the deceased and the fifth respondent as their adopted son.
- [8] It is clear from the papers that the relationship between the first and second applicants on the one hand, and the first respondent on the other hand, is strained, to put it mildly. The relationship between the first applicant and the first respondent appears to be particularly acrimonious. The affidavits filed on both sides contain an unfortunate amount of snide, sarcastic and insulting remarks, which should not be in court papers. Allegations of dishonesty,

adultery and the mismanagement of trust funds have been made which further contribute to the general unpleasantness evident from the papers. The first respondent was initially a trustee of the trust but was removed by way of a resolution on 25 March 2017. Litigation followed which culminated in an order granted by Seegobin J on 12 October 2018 in terms whereof the first respondent would no longer be a trustee. The first respondent, at the same time, instituted a counter-application seeking inter alia the removal of the first and second applicants as trustees and his reinstatement as a trustee, which counter-application has been referred to trial. It has, however, not yet been heard, despite the passage of some time.

- [9] It is common cause that the trust holds many assets and that it is the sole shareholder of a number of companies and a shareholder in another company. It is the first and second applicants' version

that they have been running the business of the trust since 2008 when the deceased moved to the Western Cape. This is disputed by the first respondent. He claims that the deceased exercised effective control over the business of the trust up until he fell ill again in 2014. He also alleges that the first and second applicants seized control of the trust after the deceased had passed away.

- [10] It is also common cause that the deceased was a strong-minded and astute entrepreneur who managed his business interests with close attention. Both the first and second applicants became directors of the various companies that made up the Schoonhoven family business. The first respondent was initially employed in the family business but went into early retirement during May 2011 and settled in the Western Cape. By this time, the relationship between the brothers had broken down. The first respondent remained a trustee of the trust until the events of March 2017. The first respondent receives a monthly payment of R87 000 from the trust.

- [11] The applicants allege that timeous arrangements would have to be made to ensure that the companies of which the trust is a shareholder, can continue to operate when the trust terminates in 2030. It will involve complex financial arrangements and the trustees will have to undertake financial planning and therefore need to be aware of how the capital beneficiaries would be determined.
- [12] As mentioned above, the trust holds shares in a number of companies. These companies hold land on which businesses like hotels, petrol stations, and office and mall developments are situated. The applicants allege that the businesses produce significant income and estimate that the combined value of the trust's assets are between R700 million and R800 million.
- [13] The deceased was diagnosed with cancer in 2010. He lost the use of his vocal cords but still communicated using a device. His cancer went into remission but returned in 2014. At the time, he was residing in the Western Cape. He returned to Richards Bay in April 2015 and passed away on 6 May 2015. The deceased allegedly wanted to make changes to his will, and in particular wanted to remove the nominated executor, a Mr Mandelstam and replace him with one Mr Soldat. He wanted to consult with his auditors but passed away before he could do so. I will return to the issues surrounding the deceased's will and its terms below.
- [14] As mentioned above, the applicants seek declaratory relief. They assert that on a proper interpretation of the trust deed, the trustees are entitled to determine the capital beneficiaries of the trust upon its termination from the list of 'potential' capital beneficiaries set out in the trust deed. They also contend that the trustees must determine who meets the trust deed description or definition of a capital beneficiary and who specifically are to be capital beneficiaries of the proceeds of the trust assets upon the trust's termination in 2030.

The trust deed

- [15] The trust deed is a lengthy document, comprising 39 pages. I will only highlight the relevant clauses. Clause 1 deals with the definitions

(woordomskrywings). Clause 1.2 contains the definitions of a number of words or phrases, but the definition of beneficiary or beneficiaries (begunstigde of begunstigdes) is of particular importance to the issues to be decided. 'Begunstigde' is

described as follows: 'verwys na inkomste – en/of kapitaalbegunstigdes na gelang', which I am of the view refers

to income and/capital beneficiaries, as and when required.[1]

- [16] The definition of 'begunstigdes' is quite lengthy and consists of various subparagraphs. It is best to quote it in full:

'Begunstigdes

- die uitdrukking begunstigdes in die trustdokument in 'n inkomste of kapitale konteks gebruik word, en sluit die volgende persone en trusts in:
 - (a) Inkomstebegunstigdes: Die begunstigdes wat, ingevolge die diskresionêre magte waarmee die trustees bekleed is, uit inkomste van die trust bevoordeel kan word, en welke begunstigdes gekies kan word uit die geledere van:
 - (i) Die kapitaalbegunstigdes;
 - (ii) Die bloed en aanverwante van die kapitaalbegunstigdes;
 - (iii) Enige trust geskep in enige land ten behoeve van enige begunstigde of groep van begunstigdes vermeld in (i) en (ii) hierbo;
 - (iv) Enige regspersoon in enige land waarvan enige begunstigde en/of sy gade en/of sy afstammeling al die aandele of die totale belang hou;
 - (v) Enige instelling wat belasting-vrystelling geniet ingevolge enige bepaling van die Inkomstebelastingwet Wet Nr. 58 van 1962, soos gewysig.
 - (b) Kapitaalbegunstigdes: Die begunstigdes aan wie die trustfonds gedurende die bestaan of by beëindiging daarvan, kragtens die bepalings van die trustakte oorgemaak sal word, en welke begunstigdes ingevolge die bepalings van die trustakte aangewys sal word uit die geledere van:
 - (i) Johannes Bernardus Alphonsus Schoonhoven (ID. 3[...])
 - (ii) Bregda Elizabeth Schoonhoven (ID. 4[...])
 - (iii)
 - 1. Samuel Alfred Schoonhoven
 - 2. Johannes Frans Alphonsus Schoonhoven
 - 3. Pieter Cornelis Antonius Schoonhoven
 - 4. Jean Johannes Schoonhoven
 - (iv) Die wettige afstammeling van die begunstigdes genoem in (iii);
 - (v) Enige trust geskep in enige land ten behoeve van enige begunstigde of groep van begunstigdes vermeld in (i) tot (iv) hierbo;
 - (vi) Enige regspersoon in enige land waarvan enige begunstigde en/of sy afstammeling al die aandele of die totale belang hou;
 - (vii) Die testate of intestate erfgename van Johannes Bernardus Alphonsus Schoonhoven en Bregda Elizabeth Schoonhoven, slegs indien geeneen van die begunstigdes vermeld in (i) tot (iv) hierbo op die vestigingsdatum van die trust in die lewe is of bestaan nie.'

In my view, the most obvious difference between the definitions of income and capital beneficiaries is the express reference in the definition of income beneficiaries to the trustees' discretionary power to choose income beneficiaries from the respective categories listed in paras (i) to (v), who could benefit from the income of the trust.

[17] As far as the translation of the above definition of beneficiaries is concerned, the first respondent disputed the applicants' translation of a number of the subparagraphs in the definition of income beneficiaries. His translation appeared as part of his affidavit. I will not deal with the alleged differences as they are not relevant to the issues to be decided. The first respondent also did not accept the applicants' translation of 'capital beneficiaries'. The applicants' translation of the first part, which is in my view the most important part, as it appears in the founding affidavit, reads as follows:

'(b) Capital Beneficiaries: The beneficiaries which/whom the Trustees may in terms of the Deed elect as recipients of the trust funds whether during the operation of the Trust or on termination of the Trust, which election shall be made from the following persons or categories...'

The sworn translation attached to the applicants' replying affidavit, however, contained a different, and in my view more

accurate translation. It reads as follows:

'The beneficiaries to whom the trust fund will be transferred during the existence or on termination thereof, in accordance with the terms of the trust deed, and which beneficiaries will be elected in accordance with the terms of the trust deed from the ranks of...'

The use of the word 'elected' as the translation of 'aangewys' is in my view clearly only one of a number of possible translations. In the Trilingual Legal Dictionary, the word 'aanwys' is described as follows: 'designate, indicate, point out, show; allot, assign, allocate; select'. [2] HAT describes 'aanwys... het aangewys' as follows: '...kies, benoem...'. In the Oxford Afrikaans-Engels Skoolwoordeboek, [3] the word 'kies' is described as 'choose, select'. In the Trilingual Dictionary, 'elect', in the context of heirs, is described as 'keuse/eleksie deur erfgename'. In the Oxford South African Concise Dictionary [4] 'elect' is described inter alia as 'chosen or singled out'.

[18] The first respondent's translation reads as follows:

'...The beneficiaries to whom the Trust Fund shall be transferred during its subsistence or at its termination, by virtue of the provisions of the Trust Deed, and which beneficiaries shall be appointed in terms of the stipulations of the Trust Deed out of the ranks of...'

The Trilingual Dictionary describes 'appoint' as 'aanstel, benoem; bepaal, vasstel, aanwys', 'appoint an heir 'n erfgenaam

benoem/instel'. In my view an appropriate translation of the word 'aangewys' in the present context is 'selected',

which means, according to Oxford, ‘carefully chosen as being the best or most suitable’.[5] I am, however, also of the view that the word ‘appointed’, used by the first respondent, is not entirely inappropriate, nor is the word ‘elected’ used by the applicants which indicates an action whereby certain persons are chosen or singled out, at the expense of others. Not much turn on the different translations of ‘aangewys’.

[19] None of the parties have said much in their affidavits about the meaning of the phrase ‘uit die geledere van...’, translated as ‘from or out of the ranks of...’, which is then followed by the seven categories listed in the trust deed. The use of these words alone indicate, in my view, a process whereby beneficiaries are chosen or selected from the ranks of the mentioned categories. I have not been able to find any specific authorities dealing with the meaning and practical implications of the phrase and its use in the context of trusts or wills, perhaps because it is so obvious. As far as the use of the phrase in legislation is concerned, a good example is found in the Constitution where in the Afrikaans text, section 178(1)(e) reads as follows:

‘(1) Daar is ‘n Regterlike Dienskommissie, wat bestaan uit-

...

(e) twee praktiserende advokate uit die geledere van die advokateprofessie benoem om die professie as geheel te verteenwoordig...’

The meaning of the phrase in this context is clear – two advocates from the ranks of the profession will be nominated, not all of the advocates. The use of the phrase in the definition of capital beneficiaries clearly shows an intention to select, appoint or elect beneficiaries from the ranks of the categories. What is not clear is who would be doing the selection.

[20] In returning to the trust deed, the word ‘kapitaal’, meaning capital, is described as being the capital of the trust consisting of the trust property. The word ‘inkomste’, referring to income, is defined by stating that it should be interpreted in a wide sense and includes all income or receivables which is not capital in nature.

[21] The powers of the trustees are set out in clause 11 and are very wide ranging in nature, as is the norm in most trust deeds. In terms of clause 11.1, the powers afforded to the trustees are inter alia to enable them to deal with the trust fund for the benefit of the beneficiaries and not for their own personal benefit. Clause 11.2 states that the trustees are empowered to at all times deal with the trust property in their sole discretion, and to do whatever they deem necessary to control the trust property for the best benefit of the beneficiaries.

[22] Clause 12 deals with the utilisation of capital (aanwending van kapitaal). Clause 12.2 is of relevance and reads as follows:

‘Die trustees is geregtig om in hulle absolute diskresie-

12.1 ...

12.2 te enige tyd tot met die beëindiging van die trust, dog onderhewig aan die uitoefening van die testamentêre voorbehoud in sub- paragraaf 27.1 geskep die geheel of enige gedeelte van die trustfonds aan te wend tot die voordeel van enige een of meer van die begunstigdes in sodanige verhouding of aandele, indien meer as een, en op sodanige wyse en onderhewig aan sodanige voorwaardes en beperkings as wat die trustees van tyd tot tyd mag bepaal en ook sonder om noodwendig die beginsel van gelykheid tussen begunstigdes te handhaaf. Die trustees se diskresie in die verband is finaal en bindend op begunstigdes...'

Clause 12.2 makes it clear in my view that the trustees' absolute discretion to utilise the trust fund for the benefit of the beneficiaries, is only permissible or available up until the termination of the trust and is also subject to the testamentary

proviso or reservation as set out in clause 27.1.

[23] Clause 17 deals with the termination of the trust and the distribution of the trust fund to the beneficiaries. Clause 17.1 reads as follows:

'17.1 Onderhewig aan die woordskrywing van VESTIGINGSDATUM geld die volgende bepalings by beëindiging van die trust:

Behalwe vir tussentydse kapitaaluitkerings wat die trustees na eie goeddunke mag maak, duur die trust voort tot by die VESTIGINGSDATUM en, onderhewig aan paragraaf 17.2 van die trustakte, word die trustfonds soos volg aan die begunstigdes oorgemaak:

17.1.1 indien voorskrifte kragtens die bepalings van paragraaf 27 gegee is, geskied die verdeling en oormaking van die trustfonds aan die begunstigdes in ooreenstemming met die voorskrifte;

17.1.2 by onstentenis van enige sodanige voorskrifte, word die trustfonds gelykop tussen die kapitaalbegunstigdes van die trust verdeel.'

In essence, clause 17.1 makes it clear that upon termination of the trust, the trust fund will be made over or transferred to the

beneficiaries. Clause 17.1.1 states that if directives have been made in accordance with clause 27, the trust fund is to be divided in accordance with those directives. Clause 17.1.2 deals with the situation where there is an absence of directives in accordance with clause 27. In that event, the trust fund is to be divided equally amongst the capital beneficiaries.

[24] Clause 20 deals with the amendment of the trust deed (wysiging van trustakte). It reads as follows:

'Die trustdokument kan deur ooreenkoms tussen die oprigter en trustees gewysig word, en, as die oprigter nie in lewe is nie, deur ooreenkoms tussen die trustees en die meerderjarige begunstigdes in lewe op daardie stadium.'

[25] Clause 27 is of particular importance. It reads as follows:

‘27.1 Daar word spesiaal bepaal dat Johannes Bernardus Alphonsus Schoonhoven die reg sal hê om by wyse van sy testament:

27.1.1 die vestigingsdatum ten opsigte van die trustfonds of enige gedeelte daarvan te bepaal;

27.1.2 die formule voor te skryf vir die verdeling van die trustfonds tussen die kapitaalbegunstigdes by die beëindiging van die trust, en sodoende aan te dui welke kapitaalbegunstigdes welke deel van die trustfonds moet ontvang en die toekennings hoef nie noodwendig gelyk in grootte, waarde of omvang te wees nie.

27.2 Indien die gemelde Johannes Bernardus Alphonsus Schoonhoven by wyse van sy testament sy prerogatief uitoefen soos in paragraaf 27.1 aan hom verleen, geniet die testamentêre voorskrifte, ondanks enige andersluidende bepalings van die trustdokument, by beëindiging van die trust voorrang en is bindend.

27.3 Indien geen voorskrifte ingevolge 27.1 gegee is nie, word die trustfonds verdeel in ooreenstemming met die bepaling in paragraaf 17 vervat.

27.4 Slegs die kapitaalbegunstigdes mag, by die beëindiging van die trust, uit die trustfonds bevoordeel word en die persoon wat oor die bogemelde bevoegdheid beskik kan dit nie aanwend om homself of sy boedel uit die trust te bevoordeel nie’.

[26] The meaning of clause 27 is in my view rather obvious. The deceased had the right by way of a testamentary directive or stipulation, to determine the vesting date of the trust fund and to direct (voor te skryf) how the trust fund was to be divided amongst the capital beneficiaries upon the termination of the trust. He also had the right to indicate which (welke) capital beneficiaries were to receive whatever portion of the trust fund, which portion did not have to be equal in size, value or extent. Importantly, in my view, it also stated that the testamentary directives, stipulations or instructions

were binding and enjoyed preference over any provisions of the trust deed. The words ‘testamentêre voorskrifte’ in clause 27.2 is translated as ‘testamentary prescriptions’ in the applicants’ sworn translation, which is in my view clearly a direct but perhaps inaccurate translation. The Trilingual Legal Dictionary defines ‘voorskrif’ as ‘direction, directive, instruction, precept, regulation, stipulation’. The word ‘voorskryf’ is defined as meaning ‘direct, order, command, stipulate, prescribe, lay down, enjoin...’.

HAT defines ‘voorskrif’ as ‘wat voorgeskryf is, rigsnoer, reël, instruksie...’. It also refers to a secondary meaning: a piece of paper containing a doctor’s prescription for medicine. The Trilingual Dictionary describes ‘stipulation’ as ‘in favour of a third party, beding ten behoeve van ‘n derde’. ‘Stipulate’

is described as ‘beding, bepaal, stipuleer, voorskryf’. In my view, the preferable translation for ‘testamentêre

voorskrifte’ is testamentary directives or stipulations.

The will

[27] The deceased attested to his last will and testament on 21 July 2010. As far as the deceased's will is concerned, it is common cause from the papers that the first and second applicants, as well as the fifth respondent, unilaterally decided to change the deceased's will. They did this by substituting the nominated executor, Mr Mandelstam, with Mr Soldat, who the deceased allegedly preferred. They also changed the date of the will by deleting 21 July 2010 and inserting 30 April 2015. The second applicant signed the will as if he was the deceased, in other words, he forged the deceased's signature. He alleges that the content of the will remained the same in all other respects. The first respondent was not initially aware of the fact that the first two applicants had altered the deceased's will. The true position was only established after the involvement of a handwriting expert. The first and second applicants eventually brought an application to set aside the forged will and to reinstate the 2010 will. The deceased's will established a testamentary trust, the Johan en Bessie Schoonhoven Trust and expressly nominated eight of his grandchildren as capital beneficiaries. It also contained the testamentary directives referred to in clause 27 of the trust deed. The will was furthermore a joint will of the deceased and his wife, who was referred to and signed the will as the 'testatrix' or testatrix.

[28] Clause 5 of the deceased's will deals with the trust. The relevant portions read as follows:

'In terme van die SCHOONIES FAMILIE TRUST (soos gewysig), IT 1667/1998 en wel klousules 5.3.2, 17 en 27 daarvan, het die Testateur die reg om sekere testamentêre opdragte te maak. Die Testateur gelas soos volg:-

5.1 ...

5.2 In terme van die bogemelde Trustakte en wel klousule 27 daarvan het die Testateur die reg om by wyse van testament die vestigingsdatum van die Trust te bepaal. Die Testateur bepaal hiermee dat die vestigingsdatum sal wees 15 (Vyftien) jaar vanaf datum van sy afsterwe.

5.3 Die Testateur het voorts in terme van klousule 27 van die gemelde Trustakte, die reg om voor te skryf die formule vir die verdeling van die Trustfonds tussen die Kapitaalebunstigdes by beëindiging van die Trust. Die Testateur bepaal hiermee dat die Kapitaalebunstigdes in gelyke dele die netto opbrengs van die Trust sal ontvang.'

The translation of clauses 5.2 and 5.3 are again relatively straightforward. In terms of clause 5.2, the deceased determined the

vesting date, as he was entitled to do, to be 15 years from the date of his death. In clause 5.3, the deceased exercised his right to prescribe the formula (die reg om voor te skryf) for the division or distribution of the trust fund between the capital beneficiaries upon termination of the trust. The deceased, in my view, however failed to indicate 'welke kapitaalebunstigde welke deel van die trustfonds moet ontvang'. The deceased simply determined that the capital beneficiaries shall receive (sal ontvang) in equal shares the net proceeds of the trust. The deceased's will did not contain a definition for capital beneficiaries. Such definition is only found in the trust deed.

The applicants' contentions and submissions

[29] The applicants submitted that instead of interpreting specific words or sentences, an interpretation exercise is required whereby the relevant portions in the trust deed and the deceased's will are understood in the greater context and purpose of the relevant documents. The second applicant states that the question that arises is not about the distribution of the trust funds but rather about the determination of the capital beneficiaries. He also drew the court's attention to the fact that the word 'trustees' does not appear in the Afrikaans text in the definition of capital beneficiaries, and submitted that the definition 'has in mind a clause 27 determination by the founder which would trump the trustees' power of selection'.

[30] The applicants submitted that the trust deed only sets out a list of 'potential' capital beneficiaries, the ambit of which included both natural and legal persons and that upon a proper interpretation of the deceased's will, read with the trust deed, the trustees have a discretion to determine the capital beneficiaries from the list of potential capital beneficiaries.

[31] The second applicant stated that on a literal reading of the trust deed, it provides that the trustees are to determine the capital beneficiaries to whom the trust capital will be paid in terms of the trust deed. In my view, a straightforward reading of the definition of capital beneficiaries gives no indication of any involvement of the trustees. It is, however, clear as mentioned above, that someone has to select or appoint the capital beneficiaries, from the ranks of the categories set out in subparagraphs (i) to (vii). The second applicant contended that the capital beneficiaries are defined as 'any of those persons listed in subparagraphs (i) to (vi) thereof'. He further stated that the trust deed then describes

'categories of potential beneficiaries and that the trustees would elect from these categories the ultimate beneficiaries'.

The second applicant further stated that the deceased, whom he described as an experienced businessman, who was well versed with the concept of a trust, was well aware of the open-ended nature of the definition of capital beneficiaries and that such a wide definition allows the trustees a great deal of latitude in distributing the trust's assets. The deceased, adopting a common-sense approach, determined that the final distribution would be to those who the trustees had stipulated as capital beneficiaries. The problem with this contention is that this so-called common sense approach is not borne out by the actual words of the deceased's will or the trust deed.

[32] The second applicant also stated that he and the first applicant had been trustees for over a decade and had successfully run the various businesses of the trust. The deceased was furthermore well aware of how they conducted the businesses and it is therefore not unusual that he elected to leave the determination of the capital beneficiaries in the hands of the trustees. The second applicant further stated that

‘at the level of interpretation, the absurdity of including all members of the categories on a head count is clear. A descendant would then increase his share by the expedient of creating say 50 shelf companies. Unless the Trustees are given the power to election from the classes, the outcome is perverse.’

The applicants’ counsel, Ms Olsen, argued along similar lines and submitted that any number of the deceased’s descendants or even his wife could start registering entities such as trusts or close corporations, which could lead to a debacle and whoever had the most entities would receive the biggest share. She submitted further that the trustees did not want to exclude certain persons but rather certain juristic entities.

- [33] It was submitted on behalf of the applicants that the first respondent’s contention that the capital beneficiaries comprised of all the capital beneficiaries listed in the trust deed and that the trustees’ powers were substantively curtailed, does not make commercial sense. It is also not what the trust deed, read with the will, states. It was submitted that once the trustees have decided which persons or entities shall be the capital beneficiaries of the trust, they would be obliged, on termination of the trust, to divide the capital assets equally ‘between those selected beneficiaries’ in terms of the deceased’s will. It was submitted that this interpretation would be true to the literal meaning of the words in the trust deed. It was also submitted that if one simply reads the definition of capital beneficiaries, they can be ‘elected’ from any one or more of those persons or entities listed. It was further submitted that the first respondent has failed to deal with the meaning of ‘uit die geledere van’ and in essence pretended that it did not exist and wanted the court to disregard it.
- [34] It was further submitted, with reference to the trustees’ powers as set out in clause 8.2 of the trust deed, that a unanimous decision of all the trustees is required for the distribution or division (verdeling) of capital or income. Failing a unanimous decision, the matter should be referred to a senior attorney or auditor for a decision. It was submitted that these ‘watchdog’ provisions would ensure that the trustees exercise their powers ‘diligently’. How effective these ‘watchdog’ provisions would be when the trustees themselves, or at least three of the four trustees, are also listed as capital beneficiaries in clause (iii) of the definition, is debatable.
- [35] It was also submitted that the deceased had provided the trustees with wide discretionary powers and had he wished to curtail their discretionary powers in relation to the nomination of capital beneficiaries, he could easily have done so by providing a so-called closed list of beneficiaries. The deceased was furthermore an experienced businessman, well conversant with the provisions of the trust in respect of the trustees’ powers and he specifically left it to the trustees to determine the capital beneficiaries. It is, however, by no means clear from the words of the trust deed that the trustees indeed have the power to nominate or to determine the capital beneficiaries.

[36] With reference to clause 27 of the trust deed, it was submitted that the deceased, by electing in his will to distribute the trust fund to the capital beneficiaries in equal shares, did not determine the identity of the capital beneficiaries, but relied upon the definition of capital beneficiaries in the trust deed, which provides for an election out of the ranks of various persons and entities. It was also submitted that notwithstanding the deceased being specific in his will by naming the capital beneficiaries by name: being his grandchildren, as well as the income beneficiary, his wife, he did not do the same in the trust deed. This is an indication that the deceased had a clear intention not to select the capital beneficiaries but to leave such election to the trustees with the stipulation that whomever they elected must receive an equal share of the trust fund. I am of the view that, bearing in mind that the trust was to only terminate 15 years after the deceased's death, and

the uncertainties that goes with that, the deceased possibly refrained from nominating or naming specific persons as capital beneficiaries, instead referring to 'capital beneficiaries', knowing it is defined in detail in the trust deed. The other more probable possibility is that the relevant clauses in the deceased's will dealing with clause 27 of the trust deed were drafted in a vague and somewhat sloppy manner, which did not live up to what was expected or anticipated, bearing in mind the wording of clause 27.1.2.

[37] It was further submitted that the text of the trust deed is clear in that the trustees have a discretionary power to appoint income

beneficiaries. When it comes to the election of the capital beneficiaries, the text is clear: they would be elected in accordance

with the trust deed from the ranks of the listed categories. This demonstrates that it is not a closed list but rather a list of

potential beneficiaries, in respect of which the trustees have a discretion. It was submitted that the implementation of the trust

deed by the deceased, in conjunction with the other trustees, culminated in the trust acquiring a vast number of assets which provides a clear indication that the deceased, as a reasonable businessman, was well aware of the powers conferred on the trustees

to elect capital beneficiaries due to the open-ended framing of the definition of capital beneficiaries. Reliance was placed on *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd*.^[6] I was also referred to Honoré's *South African Law of Trusts* where it is stated that '[i]f the class of beneficiaries is described by the testator in broad terms, the trustees have both a duty and a discretion to decide which particular individuals fall within those terms'.^[7] That in, my view, presupposes that the trustees do have the power to select those beneficiaries, which is not clear in the present matter.

[38] In conclusion, it was submitted that the trust deed was constructed with a design in mind, which allowed the trustees to manage the trust assets on behalf of the beneficiaries with maximum flexibility, and this included the discretion to elect the capital beneficiaries. It was submitted that the meaning of the words contained in the trust deed, properly understood in the context and purpose of the trust, clearly indicates that the trustees are entitled to elect the capital

beneficiaries.

The first respondent's contentions and submissions

[39] The first respondent submitted that the applicants have presented a materially altered definition of capital beneficiaries in their English translation, meant to favour their case and to support the relief sought. The first respondent also made it clear that there is no question as to who the capital beneficiaries are or should be as the trust deed, read with the deceased's will, is quite specific about the formula to be used for dividing the capital when the trust terminates.

[40] The first respondent contended that due significance needs to be attributed to the testamentary reservation in clause 27. The effect of the trust deed, as read with the deceased's determination in paragraph 5 of his will, is that the capital beneficiaries are the persons listed in the trust deed and include their legitimate descendants (which include adoptees) and who would all be entitled to share equally when the trust terminates. A further effect of the stipulation in the deceased's will is that the trustees no longer had a right to choose, select or exclude individual capital beneficiaries. The first respondent stated that the deceased was a very fair man who hated inequality and who would not have countenanced a situation in which any capital beneficiary was excluded or benefitted by the trustees. Whilst the first respondent describes the deceased as someone hating inequality, which is a very admirable trait, clause 12.2 of the trust deed permits the trustees in their absolute discretion, up until the termination of the trust fund, to utilise the trust fund for the benefit of any one or more of the beneficiaries, without regard to the principle of equality between beneficiaries.

[41] The first respondent also contended that the deceased executed his will in 2010, which is when he exercised his testamentary reservation and that the factors that he was aware of at that time must be taken into account. At the time, the deceased was aware of the animosity between the first respondent and the first applicant, was aware that the first and second applicants had 'ganged-up' against him, and were vying for his removal as a trustee. The first respondent alleges that the first applicant had an affair with his spouse, which led to his divorce, which allegations are denied by the first applicant. According to the first respondent, the relationship between him and the first applicant degenerated, ultimately to the

point of open hostility between the two of them.

[42] The first respondent further contended that the deceased ‘obviously’ anticipated that the first and second applicants would ‘redouble’ their efforts to rid themselves of him after the deceased’s

death and that they would take decisions calculated to prejudice him and his descendants and that the wording of the exercise of the testamentary reservation was informed by these aspects.

[43] It was submitted on behalf of the first respondent that the trust deed must be read as a whole and that the text, context and purpose must be considered as part of the unitary interpretive exercise. The reasons why the trust was founded, namely for the benefit of the family, and the exercise of the deceased’s testamentary reservation must be taken into account. Due weight must further be accorded to the equal distribution that the deceased decreed – which he did knowing of the animosity between the first respondent and the first and second applicants. It was submitted that the applicants, during the trust deed’s translation, reformulated the wording of the trust deed to create the false impression that the trustees are entitled to choose the capital beneficiaries.

[44] It was also submitted that the definition of capital beneficiaries must be read with clause 27, which empowered the deceased to determine the formula whereby the trust capital is to be divided. The deceased did not single out any of the capital beneficiaries for special treatment and instead stipulated that ‘the capital beneficiaries shall receive the net proceeds of the Trust in equal shares’. There is no indication that this direction did not include all the persons actually listed in the trust deed by name. It was also submitted that the definition of capital beneficiaries must be read with the definition of income beneficiaries. The trustees are empowered to select income beneficiaries and the same language could have been used in respect of the definition of capital beneficiaries, but it was not. It was submitted that the change of language occurs in the second of two consecutive paragraphs, both dealing with the same subject matter, in the same clause, in the same document. With reference to *Cradock v Estate Cradock*,^[8] it was submitted that a change of meaning was intended. When I enquired who should select the capital beneficiaries and what the

meaning was of ‘aangewys’, Mr Tredoux, appearing on behalf of the first respondent, submitted that it is the trust deed which has to indicate the capital beneficiaries but once the testator exercised its powers, that had to be followed. He also submitted that one has to look at the intention of the deceased and the original trustees. He urged me to have regard to what is stated in *Honoré* with regard to the interpretation and rectification of trust deeds.^[9] I will return to this later.

[45] It was lastly submitted that the deceased decreed that the capital beneficiaries should be treated equally and if the applicants were entitled to choose the capital beneficiaries, the deceased’s testamentary reservation would be rendered meaningless and have no practical purpose. This would be unbusinesslike, contrary to the ethos of the trust and simply unjust.

Approach to the interpretation of legal documents

[46] Both parties submitted that the trust is an inter vivos trust and that the rules and principles of contractual interpretation accordingly apply.[10] The courts regularly commence an interpretation exercise by referring to *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[11] which held that when interpreting a document, ‘the inevitable point of departure’ is the language used in the document. A court furthermore has to take the context and purpose into account when interpreting a contract.[12]

[47] Counsel for the applicants quoted liberally from *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others*,[13] where Unterhalter AJA, in dealing with the mechanisms of contractual interpretation, held that:

[25] . . . The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality* (Endumeni) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, “(t)he inevitable point of departure is the language of the provision itself”.

[26] . . . Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.’ (Footnotes omitted.)

[48] Unterhalter AJA also referred[14] to *University of Johannesburg* where ‘the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of extrinsic evidence

of context and purpose’. The Constitutional Court held as follows:[15]

‘Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court's recourse to extrinsic evidence is not limitless because “interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses”. It is also true that “to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible”. I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient

checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.’ (Footnotes omitted.)

[49] Unterhalter AJA in *Capitec* further held as follows:

[50] Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words

and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a

gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.’

Non-joinder

[50] As mentioned above, the first respondent raised the issue of non-joinder as none of his six grandchildren had been joined. He alleged that they are capital beneficiaries by virtue of being descendants (*afstammelinge*) as described in paras (b)(iii) and (iv) of the definition of capital beneficiaries in the trust deed. It was alleged that his grandchildren have a real and direct interest in the outcome of the application ‘which seeks to exclude them as capital beneficiaries of the Trust’ and they ought to have been joined. The applicants, of course, seek no such thing but the first respondent nonetheless contends that it was therefore a joinder of necessity.

[51] The second applicant dealt with this issue only very briefly in his replying affidavit. He confirmed that the applicants subsequently joined Ms Lindie Odendaal, the first respondent’s adoptive daughter, and accordingly his descendant and a ‘potential’ capital beneficiary in terms of subparagraph (iv) of the definition of capital beneficiaries.

[52] The second applicant then proceeded in the next paragraph to deny that Ms Odendaal is a capital beneficiary by virtue of the provisions of clauses 1.14 and 1.15 of the trust deed. There are no such clauses. He presumably instead meant to refer to clauses 1.1.4 and 1.1.5. The relevant parts read as follows:

‘1.1 In hierdie trustakte, tensy dit uit die samehang anders blyk:

1.1.4 Sluit kinders ook wettiglik aangenome kinders in en sluit afstammeling ook wettiglik aangenome afstammeling en hulle afstammeling in;

1.1.5 Verwys kinders en afstammeling na persone reeds gebore of wettiglik aangeneem of nog gebore of wettiglik aangeneem te word voor die vestigingsdatum.’

[53] The meaning of clause 1.1.4 is clear in my view. A reference to children includes legally adopted children. A reference to descendants also includes legally adopted descendants and their descendants.

[54] The second applicant denied that there was a need to join Ms Odendaal’s descendants, quite clearly on an incorrect understanding of what is meant by ‘descendant’. The meaning of clause 1.1.4 is furthermore in line with what has been found in a number of cases. In *Ex parte Sadie*[16] the following was said with regard to the use of the word ‘afstammeling’ as opposed to ‘children’:

‘The testator used the word “afstammeling” and not the word “kinders”, thus indicating that he had in mind remote and not merely immediate descendants of the appellant.’

See also *Ex parte Swanevelder*[17] where it was held that ‘afstammelings’ generally indicates ‘remote and not merely immediate descendants’.

In *Boswell en andere v Van Tonder*[18] it was held that “afstammelings” [dui op] bloedverwante in die dalende lyn’.

[55] Claassen’s Dictionary of Legal Words and Phrases describes ‘afstammeling’ as indicating ‘remote and not merely immediate descendants (kinders)’.[19]

[56] According to *Erasmus Superior Court Practice*,[20]

‘the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court’s order may affect the interests of third parties. The test is whether or not a party has a “direct and substantial interest” in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. A mere financial interest is an indirect interest and may not require joinder of a person having such interest.’ (Footnotes omitted.)

See also *SA Riding for the Disabled Association v Regional Land Claims Commissioner*[21] where the court dealt with the test when applicants seek leave to intervene.

[57] Although the first respondent’s grandchildren are in my view clearly descendants for the purpose of the definition of capital

beneficiaries and are accordingly part of the ranks from where capital beneficiaries can be selected, their parents, the second,

third, fourth and thirteenth respondents, are parties to the application. They have, however, not taken part in the proceedings.

One could assume that these respondents would have wanted to protect their children's interests if they considered it necessary or have, as I suspect, left it to the first respondent to take part in the application. This much was submitted by applicants' counsel in reply, namely that the first respondent's children could have raised the issue of non-joinder of their children. It was also submitted that the applicants' grandchildren were likewise not joined and that there was no intention to discriminate against anyone. This was, however, not the explanation given by the second applicant in his replying affidavit.

[58] I am not convinced that the issue of non-joinder is fatal to the application. I am, however, of the view that the second applicant's denial of the issue relating to the descendants is wrong and based on a misunderstanding of the meaning of 'afstammeling'.

Discussion and analysis

[59] Clause 5.3 of the will and clause 27 of the trust deed, read with the definition of capital beneficiaries, are at the centre of the issues to be decided.

[60] It is the applicants' case that on a proper reading of the definition of capital beneficiaries, the trustees are to decide who the capital beneficiaries are from the categories as set out in subparagraphs (i) to (vii).

[61] The first respondent, however, maintains that the deceased determined the formula for the distribution of the trust fund in his will, in terms of which all the capital beneficiaries would be entitled to share equally when the trust vests.

[62] There are a number of clearly distinguishable scenarios when considering the trust deed, in particular, what happens before the termination of the trust and what happens upon its termination and what the powers of the trustees are up to its termination and thereafter. The trust deed is very specific when it comes to the election or choosing of income beneficiaries. It cannot be clearer. The trustees in accordance with their discretionary powers can elect the beneficiaries from five stipulated categories. This is conveyed in no uncertain terms in the definition of income beneficiaries as well as in clauses 11 and 12. The trustees can furthermore do so up until the termination of the trust.

[63] The problem is, however, that the trust deed is silent on who is entitled to or required to appoint, select or elect the capital beneficiaries. As mentioned above, I am of the view that the words 'aangewys sal word uit die geledere van', clearly presupposes an election from the ranks of those persons listed in the categories set out in subparagraphs (i) to (vii). Only persons or entities falling within these categories would be eligible to benefit from the trust fund. The first respondent insists that in terms of the deceased's will, the capital beneficiaries, meaning all the

capital beneficiaries listed, shall receive equal shares of the net proceeds of the trust fund. The deceased's will does not define capital beneficiaries which brings us back to the definition as it appears in the trust deed. In my view, the deceased and the trustees at the time, one of them being the first applicant, possibly envisaged that the capital beneficiaries would be appointed or selected by the deceased in his will, when exercising the right granted to him in clause 27 of the trust deed. This, he, however failed to do properly or with any certainty. All of this is, however, pure speculation because the first applicant has failed to provide any evidence in respect of the context surrounding the amendment of the trust deed.

[64] It is difficult to determine whether the failure in the trust deed to specifically state who should appoint or elect the capital

beneficiaries was an omission or a deliberate decision. Regardless of the reason for failing to be specific, one thing is clear, someone will eventually have to make the selection. Both sides stressed the fact that the deceased was an astute businessman, who was well aware of how a trust functions. The trust deed was drafted in 2006, well before the troubles began between the first applicant and the first respondent. There would accordingly not have been a need for the deceased to protect the first respondent from his brothers' possible unfair actions. It was held in *Moosa v Jhavery*[22] by Caney J that

'... the trust speaks from the time of its execution and must be interpreted as at that time. It is the settlor's intention at that time which must be ascertained from the language he used in the circumstances then existing. Subsequent events (and in these are included statutes) cannot, I consider, be used to alter that intention.'

As mentioned above, there is no evidence from the first applicant or anyone else for that matter, involved in the drafting of the amended trust deed, as to the deceased's intention at the time. The deceased's will was signed by him in 2010, when relations had already soured between the three brothers, but yet the deceased, described as a fair man despising inequality, took no special precautions to ensure that there is no confusion over which capital beneficiaries were to share in the trust fund.

[65] Bearing in mind what was held in *Capitec*, it is not for me to pronounce on what the relevant clauses should be taken to mean from a vantage point not located in the text of the trust deed. I also cannot import meanings into the trust deed to make it better or more acceptable. It was submitted on behalf of the applicants that the trust deed was constructed with a design in mind, which is a clear reference to what was held in *Capitec*[23] but it was further held that 'interpretation begins with the text and its structure' and that 'context and purpose may be used to elucidate the text'. The first respondent furthermore makes a valid point when submitting that there was a

change of language from the express reference of the trustees' discretion to

choose income beneficiaries to no mention whatsoever of the trustees in the definition of capital beneficiaries. In my view, there are two possible reasons for this. Either the deceased intended for the trustees to select the capital beneficiaries from the stipulated

ranks, but failed to properly convey it or simply did not deem it necessary at the time to be specific or it was anticipated that the deceased would make a clear determination in his will in respect of the capital beneficiaries.

[66] The first respondent's fear or anticipation of unfair treatment by the first and second applicants is not unreasonable. They clearly are the dominant trustees making the decisions and control the trust's business. What is further of extreme concern to me is the fact that they are not only trustees but are also listed as possible capital beneficiaries as mentioned above. Honoré states that a trustee should avoid a position where his private interests conflict with those of trust beneficiaries.[24] It further states that where a trustee is also a beneficiary and acts in such a way as to benefit himself at the expense of other

beneficiaries, the trustee's acts 'will be very narrowly scrutinised'.[25] But this is perhaps an issue that will be fully dealt with in the first respondent's pending litigation.

[67] There is another issue to consider. If the trust instrument 'fails to express correctly the intention of the founder or the common intention of the founder and the trustees . . . the trustee, founder or other interested party . . . may apply for the rectification of the trust [deed]'.[26] It is unclear from the papers if the applicants gave any consideration to instituting an action to claim rectification and it was not raised before me, as it perhaps should have been. Christie's Law of Contract[27] deals with declarations of rights and the power of a high court to 'in its discretion, and at the instance of any interested

person, to enquire into and determine any existing, future or contingent right or obligation...'. It states further that

'A claim for rectification of a contract which, because of the necessity for full investigation of the facts, should be brought by action not by application, cannot be granted on an application that casts it in the form of a claim for a declaratory order, thereby concealing its true nature.'[28]

[68] Christie's placed reliance on *Hadiaris v Freeman and Freeman*[29] where it was held by Price J that a claim for rectification must be made by way of action. In that matter, the applicant, by way of petition, asked for a declarator that the petitioner should be declared entitled to exercise an option to renew a lease on certain

terms. The written agreement entered into between the parties did not accurately set out the true agreement between the parties. The court was of the view that it amounted to a rectification. The prayer was defective in that the petitioner should have asked for an order rectifying the agreement and for a consequential declaration in terms of the corrected or rectified agreement. The court also referred to the safeguards available in action proceedings, such as cross-examination and discovery, which is not available in application proceedings. It was held that '[i]f such contracts could be rectified on motion when the allegation of mutual mistake is not

admitted, the very foundation of the commercial structure would be shaken’.[30]

[69] In my view, the declaratory relief sought by the applicants amounts to a rectification of the trust deed, and in line with the authorities referred to above, I am of the view that they should have instituted an action to claim such rectification.

[70] In the event that I am wrong in this regard, I am in any event of the view that the applicants have failed to provide sufficient evidence to support their interpretation of the trust deed and will. The meaning they seek to ascribe to the definition of capital beneficiaries, by seeking to import a discretion by the trustees to determine the capital beneficiaries, is in my view not borne out by the words, context or purpose of the trust deed. There is in fact very little evidence, if any, to support their contentions. The application should accordingly be dismissed.

Costs

[71] As far as the issue of costs is concerned, it was contended by the first respondent that the trustees should be ordered to pay the costs personally, de bonis propriis, on an attorney and own client scale as the litigation was vexatious and had no prospects of success. The second applicant in reply stated that the trustees had to obtain clarity on the interpretation of the trust deed in respect of the determination of the capital beneficiaries. It is clear from the papers that there were attempts made to try to agree on the interpretation of the trust deed, without success. This matter was by no means easy to decide on and it was certainly not a given that the applicants had no prospects of success. In my view, and in exercising my discretion, there is no reason to deviate from the usual position that costs follow the result. I am further of the view that the particular facts of the matter do not justify a punitive costs order nor an order that the trustees pay the costs personally.

Order

[72] I accordingly make the following order:

E BEZUIDENHOUT J

Date of hearing: 17 March 2023

Date of judgment: 19 January 2024

Appearances:

For the applicants: Ms LK Olsen Mr S Murray Instructed by: Strauss Daly Inc 9 th Floor, Strauss Daly Place 41 Richemond Circle, Ridgeside Office Park Umhlanga Tel: 031 570 5605 Email: nvolschenk@straussdaly.co.za; nconradie@straussdaly.co.za c/o Botha & Olivier Inc 239 Peter Kerchhoff Street Pietermaritzburg Tel: 033 342 7190 Ref: Zelda For the first respondent: Mr P Tredoux Instructed by: JB Law 30 Caledon Street Somerset West Tel: 087 700 0710 Email: reception@jb-law.co.za Ref: BS 0283 c/o Hay & Scott Attorneys Top Floor, 3 Highgate Drive Redlands Estate 1 George Macfarlane Lane Pietermaritzburg Email: info@hayandscott.co.za

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- [1] HAT: Handwoordeboek van die Afrikaanse Taal 6 ed (2015) ('HAT') describes 'na gelang van' inter alia in the context of someone acting in accordance with the circumstances or as required in the circumstances, 'hy handel na gelang van die omstandighede'.
- [2] V G Hiemstra and H L Gonin Trilingual Legal Dictionary 3 ed (1992) ('Trilingual Legal Dictionary').
- [3] Oxford Afrikaans-Engels/English-Afrikaans Skoolwoordeboek/School Dictionary 2 ed(2017).
- [4] Oxford South African Concise Dictionary 2 ed (2010).
- [5] Ibid.
- [6] Comwezi Security Services (Pty) Ltd and another v Cape Empowerment Trust Ltd [2012] ZASCA 126 para 15.
- [7] Cameron et al Honoré's South African Law of Trusts 6 ed (2018) at 176 ('Honoré').
- [8] Cradock v Estate Cradock 1949
- (3) SA 1120 (N) at 1123 where reference was made to Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd 1947 (2) S.A.L.R 1269.
- [9] Honoré at 319-321.
- [10] Crookes, NO and another v Watson and others 1956
- (1) SA 277 (A) at 285E-287C; Wilkinson and another v Crawford NO and others
- [2021] ZACC 8; 2021 (4) SA 323 (CC); Sea Plant Products Ltd and others v Watt 2000 (4) SA 711 (C) at 720-722.
- [11] Natal Joint Municipal Pension Fund v Endumeni Municipality
- [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at 604C D ('Endumeni') para 18.
- [12] University of Johannesburg v Auckland Park Theological Seminary and another
- [2021] ZACC 13; 2021 (6) SA 1 (CC) para 66 ('University of Johannesburg').
- [13] Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others
- [2021] ZASCA 99; 2022 (1) SA 100 (SCA) paras 25-26 ('Capitec').
- [14] Capitec para 39.
- [15] University of Johannesburg para 68.
- [16] Ex parte Sadie 1940 AD 26 at 32.
- [17] Ex parte Swanevelder 1949
- (1) SA 733 (O) at 735-736.

[18] Boswell en andere v Van Tonder 1975

(3) SA 29 (A) at 35F-G; see also Cohen NO v Roetz NO and others

[1991] ZASCA 173; 1992 (1) SA 629 (A) at 640A-B.

[19] R C Claassen and M Claassen Claassen's Dictionary of Legal Words and Phrases (June 2023 – SI26).

[20] D E van Loggerenberg Erasmus: Superior Court Practice (RS 21, 2023) at D1-124 to D1-125.

[21] SA Riding for the Disabled Association v Regional Land Claims Commissioner and others [2017] ZACC 4; 2017 (5) SA 1 (CC) paras 9-11.

[22] Moosa and another v Jhavery 1958 (4) SA 165 (N) at 169D-E.

[23] Capitec para 51.

[24] Cameron et al Honoré's South African Law of Trusts 6 ed (2018) at 369-370.

[25] Ibid at 370.

[26] Honoré at 319-320.

[27] GB Bradfield Christie's Law of Contract 8 ed (2022) at 671.

[28] Ibid at 673.

[29] Hadiaris v Freeman and Freeman 1948 (3) SA 720 (W) at 724.

[30] Ibid at 727.

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