THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 9168/2018

Before the Hon. Mr Justice Bozalek
Hearing: 14 March 2019
Delivered: 10 May 2019

In the matter between:

PAUL JOZUA JOUBERT	***1st Applicant***
LIESEL DE CANDIA	***2nd Applicant***
CHRISTIAAN JOHANNES JOUBERT	***3rd Applicant***
MADRI JOUBERT	***4th Applicant***

and

SONIA JOUBERT	***1st Respondent***
PAUL JOZUA JOUBERT N.O.	***2nd Respondent***
(in his capacity as trustee for the time being of the Chris Joubert Trust – No. IT4455/96)	
JURGENS JOHANNES TUBB N.O.	***3rd Respondent***
(in his capacity as trustee for the time being of the Chris Joubert Trust – No. IT4455/96)	
C2M TRUST MANAGEMENT SERVICES (PTY) LTD	***4th Respondent***
(Registration no: 2008/026792/07)	
Represented by:	
CAREL GERT STEENKAMP N.O.	***5th Respondent***
(in his capacity as trustee for the time being of the Chris Joubert Trust – No. IT4455/96)	
JURGENS JOHANNES TUBB N.O.	***6th Respondent***
(in his capacity as executor of the estate late CHRISTIAAN JOHANNES JOUBERT	
MASTER OF THE HIGH COURT, CAPE TOWN	***7th Respondent***

JUDGMENT

BOZALEK J

[1] In this matter a trustee and three beneficiaries of an inter vivos trust seek certain declaratory relief relating to the trust, principally that a resolution of the trustees taken in September 2014 introducing a further beneficiary is null and void.

[2] The trust in question, the Chris Joubert Trust, was established in July 1996 and the trust deed was duly registered with the Master. The founder of the trust was the late Paul Jozua Joubert (senior) ('the founder') and the initial trustees were his son, the late Christiaan Johannes Joubert (hereinafter 'the testator') and the latter's son, Paul Jozua Joubert (junior) ('the first applicant'), as well as Mr Oscar De Vries, a so called independent trustee and a partner in a firm of accountants, Greenwoods.

[3] The trust deed initially provided that the income and capital beneficiaries would be the testator, the first applicant and his siblings, Liesl Joubert, Christiaan Joubert and Madri Joubert, who are the second, third and fourth applicants, respectively.

[4] In terms of the disputed resolution the testator's then wife, Mrs Sonia Joubert, the applicants' step mother, was added as a capital income and capital beneficiary.

[5] Mrs Sonia Joubert is cited as the first respondent, the remaining respondents being the existing trustees of the Chris Joubert Trust ('the trust'), namely, Mr Paul Joubert N.O., Mr Jurgens Tubb N.O., C2M Trust Management Services (Pty) Ltd (represented by Mr Carel Steenkamp N.O) and Mr Tubb in his capacity as executor of the testator's estate. The sixth respondent is the Master of the High Court, Cape Town who abides the judgment of the Court.

[6] The first respondent opposes the declaratory relief sought; whilst the remaining respondents, the present day trustees (apart, of course, from the second respondent who is

also the first applicant), abide the judgment of the Court. Affidavits setting out the views of Messrs Tubb and Steenkamp were filed.

[7] The declaratory relief sought is threefold: firstly, that the purported amendment of the trust deed by means of a resolution of some of the trustees dated 19 September 2004 was null and void and of no force and effect and that the applicants, being the original beneficiaries, are the only beneficiaries under the trust deed; secondly, that the first respondent is neither an income nor capital beneficiary of the trust and, thirdly, that the founder did not have the power or authority in terms of clause 19 or any other provisions of the trust deed to determine the manner in which the income derived from the assets of the trust should be divided or applied. This last prayer was not opposed by the first respondent, it being common cause that the testator did not have the power in question.

Background

[8] The three original trustees accepted their appointments on the terms and conditions set out in the trust deed. The initial beneficiaries of the trust were the testator and the second to fourth applicants who are the only natural children of the testator, although born from different mothers. In the preamble to the trust deed it is recorded that the founder intended to make an irrevocable donation to the beneficiaries for which purpose the founder intended to create a trust on the terms and conditions contained therein.

[9] The trust deed provided further that the capital of the trust was to be retained by the trustees until the termination date when the capital still in the trust would vest and be paid in the proportions as determined in the last will and testament of the testator.

[10] Clause 23 deals with variations to the trust deed and provides that its terms could

be amended by the trustees at any time during the lifetime of the testator in any manner or on any condition that the testator in his discretion consented to. It further provides that after the death of the testator the terms of the trust deed could be amended on condition that the trustees and the beneficiaries unanimously consented thereto.

[11] On 19 September 2014, at which stage both the founder and the testator were still alive, the trustees purported to pass a written resolution in the following terms:

> *'Daar is besluit dat in terme van paragraaf 23* ***Wysiging van die trustakte*** *van die trustakte gedateer 05.09.1966 soos volg te wysig:*
> *Paragraaf 1.1.2 word as volg gewysig 'Begunstigdes' sal beteken: 'Inkomste en Kapitaal Begunstigdes'*
> *(a) Christiaan Johannes Joubert;*
> *(b) Paul Jozua Joubert (jnr);*
> *(c) Liesl Joubert;*
> *(d) Christiaan Johannes Joubert,*
> *(e) Madri Joubert;*
> *(f) Sonia Joubert;*
> *(g) Al die kinders gebore van die begunstigdes in paragraaf a - e of enige Trust gevorm met enige een van die begunstigdes genoem in paragraaf a - e as bevoordeeldes;*
> *(h) Die genoemde Begunstigdes sal begunstigdes wees teen (sic) opsigte van beide Inkomste en Kapitaal'.*

[12] The effect of this resolution was to add the testator's then wife, the first respondent, as an income and capital beneficiary on the same footing as the testator and his four children had been in terms of the original trust deed, but to exclude the first respondent's children as beneficiaries. The resolution reflects the signatories thereto as being the founder, the testator in his capacity as trustee/beneficiary, the first applicant in the same capacities and two further trustees, Mr JJ Tubb and C2M Trust Management

Services (Pty) Ltd, the latter represented by Mr A Nel.

[13] The applicants' challenge to the validity of the resolution rests on two legs. Firstly, they contend that the resolution did not constitute a valid variation of the trust deed because although the trust deed prescribed a minimum number of three trustees, the purported appointment of two of the trustees who were signatories had been invalid, with the result that the remaining two trustees in office lacked the capacity to pass the resolution. Secondly, inasmuch as the benefits conferred by the trust deed had been accepted by or on behalf of the original beneficiaries before 19 September 2014, the trust deed could thereafter only be amended with their consent, which consent three of the original beneficiaries, namely, that of the second, third and fourth applicants, had not been provided.

The issues

[14] The first set of main issues which arises therefore are whether the trust deed requires a minimum of three trustees at any given time, whether all the signatory trustees were properly appointed and, if not, the consequences thereof for the validity of the resolution. The second main issue is whether it was necessary for the second, third and fourth applicants, as original beneficiaries, to consent to the variation to the trust deed sought to be affected by the disputed resolution.

Was the resolution passed with the necessary quorum of trustees?

[15] In order to deal with the first set of issues it is first necessary to trace the sequence of the appointment process of trustees since the trust's inception.

[16] The testator and the first applicant, father and son, accepted their appointment as trustees when the trust was created. The testator remained a trustee until his death on 16

December 2016. The first applicant has continued to occupy the office of trustee since the inception of the trust. The first so-called independent trustee was Mr De Vries, but it is not clear from the papers when his term of office ended. Similarly, it is not clear what happened regarding the independent trustee office until 2010 when, according to a Master's certificate, C2M Consult Trust Management Services (Pty) Ltd ('C2M'), represented by Mr I Van Niekerk, was authorised to act as a trustee. In October 2011, according to another Master's certificate, Mr Van Niekerk was replaced by Mr Els as representative of C2M. In November 2012 C2M effected a minor change in its name, with Mr Els continuing to act as its representative.

[17] On 22 May 2014 the trustees resolved that Mr Jurgens Tubb be appointed as a trustee, that Mr Els would resign as representative of C2M and that a Mr A Nel would serve in his place as representative of C2M. Documentation to this effect was presented to the Master from which it appeared that Mr Els had tendered his resignation with effect from 30 June 2014. On 22 September 2014 the Master issued letters of authority in terms of sec 6(1) of the Trust Property Control Act, 57 of 1988, certifying that the testator and the first applicant were authorised to act as trustees of the trust as well as C2M, represented by Mr Nel and, as a fourth trustee, Mr Jurgens Tubb. However, these letters of authority were issued by the Master three days after the disputed resolution was passed bearing the signatures of the founder, the testator, the first applicant and Messrs Tubb and Nel, the latter representing C2M. If, as a result of this timing, either Mr Tubb or C2M was not authorised to act as trustee when the resolution was adopted on 19 September 2014, its validity may be called into question.

[18] The starting point is section 6(1) and 6(4) of the Trust Property Control Act, 57 of

1988 ('the Act') which provide as follows:

> *'6. Authorisation of Trustee and Security*
>
> *(1) any person whose appointment as trustee in terms of a trust instrument, s 7, or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master ...*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) If any authorisation is given in terms of this section to a trustee which is a corporation, such authorisation shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorisation.'*

[19] In *Simplex v Van Der Merwe*[1] it was held that trustees appointed in terms of a trust deed who accepted appointment as such, but whom the Master had not yet granted statutory authority to act in that capacity, could not validly conclude a contract so as to bind the trust. Acts performed without the Master's written authorisation were null and void and could not be cured retrospectively by the trustees themselves after receiving authorisation, or by the Master or the Court. Goldblatt J pointed out that the whole scheme of the Trust Property Control Act *'is to provide a manner in which the Master can supervise trustees in the administration of trusts properly and section 6(1) is essential to that purpose'*. That decision was referred to with approval in *Lupacchino v Minister of Safety and Security*[2] and must be taken to be our law. Accordingly Mr Tubb was not authorised to act as a trustee as at 19 September 2014 and his role in the passing of the resolution must be disregarded.

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[1] 1996 (1) SA 111 (W).
[2] 2010 (6) SA 457 (SCA).

[20] Turning to the position of the independent trustee, C2M, Mr Muller SC, on behalf of the first respondent, sought to distinguish its position from that of Mr Tubb based on the fact that there was no real dispute that C2M had been a trustee at all material times. He founded his argument on an interpretation of the judgment in *Metequity and Another v NWN Properties Ltd and Others*.[3] In that matter van Dijkhorst J had to deal with a situation in which a trust with two corporate trustees had instituted action in their names for the recovery of monies allegedly due to the trust. The defendants raised a preliminary objection that the plaintiffs had no standing, since in terms of section 6(4) of Act 57 of 1988 only the nominees of the corporate trustees could institute action. The Court held that the argument that only natural persons could be trustees was without merit as all companies acted through their directors and officials and duties imposed upon companies necessarily had to be complied with by the natural persons involved in acting on their behalf.

[21] The Court held further that the provisions of section 6 of the Act provided as a regulatory and control measure that such existing trustee could not act without the Master's authorisation; furthermore that the fact that in the case of corporate trustees the authorisation was given in the name of the nominee did not detract from the fact that section 6(4) by the words *'to a trustee which is a corporation'*, recognised that the trustee was the corporation itself. In this regard the Court stated:

> *'The fact that the authorisation to act is given in the name of a nominee does not detract from this fact. This provision is an efficacious measure to enable the Master to direct enquiries and issue directives to a specific natural person rather than grope about in the mist of corporate anonymity.'*

[22] Based on this last passage, Mr Muller submitted that the nominee requirement in

[3] 1998 (2) SA 554 (T).

section 6(4) was intended primarily for the administrative benefit of the Master, in contrast to section 6(1), which was aimed at the protection of third parties who may interact with the trust. He also pointed to the fact that section 6(4) does not prescribe – in the clear prohibitory language of section 6(1) – that the corporation shall act as trustee only through a nominee named in the authorisation or endorsement thereof. He relied also on the fact that at the time of the 19 September 2014 resolution, C2M, acting through its directors, intended for Mr Nel to act as C2M's functionary on the board of trustees and furthermore that the other two trustees accepted Mr Nel as such. He contended that inasmuch as at 19 September 2014 the Master had authorised C2M to act as trustee, and Mr Nel, as C2M's representative, had signed the resolution, it had to be taken as adopted unanimously and validly by all three authorised three trustees.

[23] I am unable to agree with this argument for which there appears to be no direct or analogous authority. By virtue of the provisions of section 6(4) of the Act, and judging also by the various Master's certificates issued in the present case, the Master does not issue a letter of authority to act as a trustee to a corporate trustee without stipulating the name of the person who will represent such trustee. Given the provisions of section 6(4), this is entirely understandable since once the Master formally authorises that person as the corporation's nominee, it is legally liable for his or her actions. Furthermore, if the identity of the nominee is not known or is in doubt this could have far-reaching consequences as regards the validity of actions purportedly taken by corporate trustees and the consequences thereof for external parties dealing with the trust. In my view the reasons relied on by the Court in *Simplex v Van Der Merwe supra*[4] for holding that a trustee, not yet granted statutory authority to act by the Master, cannot validly conclude a

[4] Note 1 above.

contract so as to bind the trust, apply equally to the position of a corporate trustee whose nominee is not formally or properly authorised by the Master. These reasons include the factor that the whole scheme of the Act is to ensure that the Master can effectively supervise trustees and, furthermore, that section 6(1) (and by extension section 6(4)) does not exist solely for the benefit for the beneficiaries of the trust. Their provisions serve also the public interest by ensuring proper written proof is available to outsiders of the identity and authority of trustees and, in the case of a corporate trustee, indicating the identity of its authorised representative.

[24] In my view, for reasons analogous to those underlying the ratio in *Simplex*, a corporate trustee cannot validly act until such time as its chosen nominee has been authorised by a letter of authority issued by the Master. In particular, a corporate trustee cannot be a valid signatory to a resolution of a trust until such time as its nominee has been duly authorised by the Master in terms of section 6(4). To give any other interpretation to the relevant provisions of section 6 of the Act would be to invite disputes or, at the least, confusion regarding whether a corporate trustee had validly acted in that capacity. This could have prejudicial consequences both for third parties and for the Master who must oversee the actions of corporate trustees. Such difficulties are illustrated in the present matter. If the interpretation contended for on behalf of the first respondent were adopted, the validity of the resolution would turn on questions such as whether the existing trustees accepted Mr Nel as the representative of the corporate trustee, whether Mr Nel was acting *bona fide*, and a number of other possible considerations.

[25] It bears repeating that a corporate trustee can only act through an authorised

nominee and in order for the validity of the corporate trustee's actions to be considered, the identity of its authorised nominee must be clear and objectively determinable. The logical key to this question is, as in the case of natural persons appointed as trustees, whether the Master has issued a letter of authority recognising the properly nominated representative of the trustee.

[26] The next issue to be determined is what the consequences of this finding are vis-a-vis the corporate trustee's action in purporting to pass the disputed resolution of 19 September 2014.

[27] As at 19 September 2014, a letter of authorisation in respect of C2M's new nominee, Mr Nel, had not yet been issued by the Master. Furthermore, its previous authorised representative, Mr Els, had tendered his resignation with effect from 30 June 2014 and he played no role in the passing of the resolution in question. In my view, as at 19 September 2014, C2M was an appointed corporate trustee but was unable to act as such since it had no authorised representative by reason of Mr Els' resignation and the fact that the Master had yet to appoint Mr Nel as its authorised nominee. It follows further that when the resolution was adopted only two trustees validly participated in that decision, namely, the testator and the first applicant.

[28] The next question is what quorum was necessary for the resolution to be validly adopted given that only two trustees participated in the decision. The argument advanced on behalf of the applicants was that a quorum of at least three trustees was necessary for the valid passing of a resolution. The first respondent, on the other hand, contended that no such quorum was required.

[29] It is important to note, firstly, that the trust deed nowhere prescribes a minimum

number of trustees. As was pointed out on behalf of the first respondent, most reported cases dealing with the question of the quorum necessary for valid action by trustees – a capacity defining condition – involve trust deeds with express provisions stipulating the quorum requirements for trustees in office. Neither counsel was able to refer to any precedent in which a trust deed which did not expressly provide for a quorum of trustees was nonetheless interpreted by a Court to mean that a minimum number of trustees was required in order for decisions to be validly taken on behalf of the trust.

[30] It is appropriate to construe the provisions of a trust deed in accordance with the well-known rules regarding the interpretation of written contracts. These are summarised in *Endumeni*[5] as follows:

> *'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.'*

[31] On behalf of the applicants, Mr Olivier SC's arguments for a minimum quorum of three relied on a reading of clause 1.1.7 of the trust deed read with clauses 5.2, 5.3 and 7. Clause 1.1.7 defines *'the trustees'* to mean and include the first trustees or their successors in title from time to time. As mentioned, three trustees were initially appointed, namely, the testator, the first applicant and Mr De Vries. Clause 5.2 provides that trustees are empowered (*'bevoeg'*) to nominate a person to be appointed as trustee to replace any trustee who has vacated his or her position. It reads in full as follows:

> *'5.2. Die Trustees sal bevoeg wees, onder skriftelike dokumente om 'n person te*

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[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

nomineer om as Trustee aangestel te word om enige Trustee te vervang wat sy amp as Trustee mag verlaat het vir enige rede hoegenaamd. Die Trustee (sic) sal die reg hê om by die daaropvolgende skriftelike dokument enige nominasies so gemaak te verander of te wysig, voordat effek aan sodanige nominasie gegee is. Die Trustees sal verplig wees om sodanige aanstelling as wat nodig mag wees, om effek to gee aan sodanige nominasie in terme van hierdie sub-klousule, te maak'.[6]

[32] Clause 5.3 and 5.6 are also relevant and read as follows:

'5.3 Die Trustees, nieteenstaande enige iets tot die teendeel hierin vervat, sal te alle tye die reg hê om sodanige verdere Trustee of Trustees te nomineer en aan te stel as wat hulle mag bepaal.'[7]

'5.6. In die geval van die oorlye of versuim andersins van Oscar Peter Alexander de Vries om as Trustee op te tree, sal enige van die vennote van die firma van Rekenmeesters, Greenwoods, ten tye van sodanige oorlye of versuim, aangestel word om onmiddelik op te tree as Trustee ten opsigte van hierdie Trustakte.'[8]

[33] In my view clause 5.2 is an empowering provision which, on its clear wording, does not oblige the trustees, subject to the provisions of clause 5.6 to which I will return, to replace every trustee who has vacated his office for whatever reason. The obligatory provisions in clause 5.2 relate to the procedure to be followed where there has been a proper nomination of a replacement trustee by the existing trustees. Clause 5.3 provides

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[6] Agreed English translation
"5.2 The Trustees shall have the power, under written documents, to nominate a person to be appointed as Trustee to replace any Trustee why may vacate his office as Trustee for any reason whatsoever. The Trustee (sic) shall have the right to vary or amend by subsequent written document any nominations so made prior to any effect having been given to such nomination. The Trustees shall be obliged to make such appointment as may be necessary to give effect to such nomination in terms of this sub-clause."

[7] Agreed English translation
"5.3 The Trustees, notwithstanding anything to the contrary contained herein, shall at all times have the right to appoint such further Trustee or Trustees as they may determine."

[8] Agreed English translation
"5.6 In the event of the death or failure otherwise of Oscar Peter Alexander de Vries to act as Trustee, any of the partners of the firm of Accountants, Greenwoods, at the time of such death or failure, shall be appointed to act immediately as Trustee in respect of this trust deed."

for the appointment of multiple trustees but makes no direct reference to a minimum quorum.

[34] Clause 5.6 stands as an exception to the dispensation which I have set out above. Seen in context it amounts to a stipulation by the founder and the original trustees of the trust that there must always be an *'independent'* trustee. The sub-clause speaks in peremptory terms of the appointment of a replacement in the event that Mr De Vries vacated his position as a trustee. Such interpretation is borne out by the fact that an *'independent'* trustee i.e. non family trustee, appears to have served ever since the trust was established. Although not entirely clear, it would appear that at some point in time C2M became the independent trustee successor to a Greenwoods partner.

[34] Another provision relied on by the applicants was clause 5.3 which provides that the trustees at all times retain the right to nominate further trustees as they may consider appropriate in their discretion. Notably, however, clause 5.3 is couched in permissive terms. Finally, Mr Oliver called in aid clause 7 which reads as follows:

> *'7. Besluite van die Trustees*
> *Geen besluit deur die Trustees geneem sal geldig wees nie, tensy die trustees by wyse van meerderheidsbesluit daartoe toegestaan het.'*[9]

[35] Having regard to all these provisions it would appear that the founder and the original trustees initially envisaged that there would be at least two trustees one of whom would at all times be an *'independent'* trustee. More than this cannot be sensibly read into the provisions of the trust deed. In my view, looking at the trust deed as a whole, there is no room to interpret it as impliedly requiring a minimum of three trustees at all

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[9] Agreed English translation
"7. No decision taken by the Trustees will be valid, unless the Trustees agreed thereto by majority decision."

times and, in particular, for valid resolutions to be passed.

[36] I have found that, although the trust deed does not make provision for a minimum quorum of three trustees, when the disputed resolution was passed there were in fact three properly appointed trustees, namely, the testator, the first applicant and C2M, the corporate trustee. Since two of these trustees endorsed the resolution in question there was compliance with clause 7 of the trust deed which requires any decision of the trustees to be passed by a majority. In the light of these findings it is unnecessary to address Mr Muller's alternative argument on behalf of the first respondent, namely that the Master's endorsement of the authority granted to C2M to also reflect a substitution of its nominee was not a prerequisite for C2M to validly act as a trustee. As I have indicated, however, in my view this does not correctly reflection the legal position. Whilst C2M was a validly appointed trustee at the relevant date, and recognised as such by the Master, it was unable to act as such at the trustees' meeting because of a lack of an authorised nominee formally recognised by the Master through a letter of authority.

Acceptance of the benefits by the beneficiaries

[37] This leaves the remaining issue, namely, whether the resolution passed by the two trustees on 20 September 2014 lacked validity inasmuch as the existing beneficiaries had accepted the benefits provided by the trust but had not consented to the amendment of the trust deed.

[38] It is well established that the founder of an inter vivos trust i.e. one created between living persons, may reserve a right to revoke or vary the terms of the trust deed during his or her lifetime. The founder may also confer on trustees inter vivos the right to vary the trust, at least within limits. See Honore the South African Law of Trusts, 5th ed,

page 492 and the authorities cited in footnote 4.

[39] The power of a founder to revoke or vary the terms of a trust deed with the consent of the trustees is established in two decisions of the Appellate Division namely, *Commissioner for Inland Revenue Appellant v Estate Crewe and Another Respondent* [10] and *Crookes N.O. and Another v Watson and Others*.[11] However a founder's power, with the consent of the trustee or trustees, to revoke or vary an inter vivos trust is limited when a beneficiary has already accepted benefits conferred under the trust. In reaching this conclusion in *Crookes* Centlivres CJ reasoned that: *'A trust deed executed by a settlor and a trustee for the benefit of certain other persons is a contract between the settlor and trustee for the benefit of a third person ... and the settlor and the trustee can cancel the contract entered into between them before the third party has accepted the benefits conferred on him under the settlement since the beneficiary has no right until acceptance*'.

[40] This issue was raised in the matter of *Potgieter and Another v Potgieter NO and Others*.[12] That matter too concerned an inter vivos trust with the central issue in the appeal being the question of whether a purported variation of a trust deed pursuant to an agreement between the founder and the trustees of the trust was legally binding.

[41] Brand JA on behalf of the Court stated as follows in paragraph 18:

> *'Logic dictates that I deal with the cross-appeal first. This is so because, if the variation agreement were found to be valid and enforceable, that would be the end of the matter. ... As I see it, the legal principles that find application are well settled and I did not understand any of the parties to contend otherwise. I believe*

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[10] 1943 AD 656.
[11] 1956 (1) SA 277 (A).
[12] 2012 (1) SA 637 (SCA).

these principles can be formulated thus: a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a stipulatio alteri. In consequence, the founder and trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed. But once the beneficiary has accepted those benefits, the trust deed can only be varied with his or her consent. The reason is that, as in the case of a stipulatio alteri, it is only upon acceptance that the beneficiaries acquire rights under the trust (see, for example, Crookes NO and Another v Watson and Others 1956 (1) SA 277 (A) at 285F; Ex parte Hulton 1954 (1) SA 460 (C) at 466A – D; Hofer and Others v Kevitt NO and Others 1998 (1) SA 382 (SCA) ([1997] 4 All SA 620) at 386G – 387E; G Cameron, De Waal, Kahn, Solomon & Wunsh Honoré: South African Law of Trusts 5 ed (2002) para 304).'

[42] The Court in *Potgieter* dismissed the respondent's argument that the original beneficiaries had not accepted the benefits conferred upon them in the original trust deed. In making this finding the Court was primarily influenced by a provision in the preamble to the original trust deed which reads as follows: '*and whereas the beneficiaries have indicated* (Afrikaans – 'aangedui') *their acceptance of the benefits conferred upon them in terms hereof*'. In so doing the Court found that the *'clear meaning'* of the second pronouncement thus recorded, was that the deceased, who was their father and natural guardian as they were still minors at the time, had indicated his acceptance of the benefits conferred upon them, as the sole capital beneficiaries, on their behalf.

[43] In the present matter clause 23 of the trust deed provides for amendments and reads as follows:

'23. Die terme van die Trustakte mag gewysig word deur die Trustees te enige tyd en te enige wyse op voorwaarde dat sodanige wysiging toegestem word toe deur CHRISTIAAN JOHANNES JOUBERT (the testator) in sy diskresie en op

voorwarde dat hy op die tyd van sodanige wysiging nog lewe. In die geval dat CHRISTIAAN JOHANNES JOUBERT reeds oorlede is, mag die terme van hierdie Trustakte gewysig word te enige tyd op voorwaarde dat sodanige wysiging eenparig toegestem word toe deur die Trustees en die Begunstigdes in esse.'[13]

[44] The testator was a trustee at the time the resolution was passed and was a signatory thereto. As I have as already found, since two of the three authorised trustees were signatories to the resolution it would appear on the face of it that the amendment was validly effected in terms of the trust deed. However, on behalf of the applicants, it was contended that this was not the case since the trust's beneficiaries had by then accepted the benefits under the trust or had such benefits accepted on their behalf. This raises the issue of whether in fact the beneficiaries had accepted their benefits at the relevant date.

[45] In support of his argument that all beneficiaries had accepted their benefits under the trust deed, Mr Olivier cited its preamble recording that the founder intended to make an irrevocable donation to the beneficiaries by means of the trust and that the trustees accepted the benefits granted in terms of the trust deed both in their own right and, in the case of the testator, as a representative for other beneficiaries. This is, however, not what the preamble records since it reads as follows:

'Weshalwe die Skenkers (sic) *'n onherroepbare skenking wil maak tot voordeel van die Skenkers* (sic) *se begunstigdes, soos hierin verwys na en soos hierna meer volledig uiteengesit, tot welke doeleinde die Skenkers (sic) van voorneme is om 'n Trust tot stand te bring op die terme en voorwaardes soos hieronder uitgeensit;*

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[13] Agreed English translation

"23 The terms of the trust deed may be amended by the Trustees at any time and in any manner on condition that such amendment is consented to by CHRISTIAAN JOHANNES JOUBERT in his discretion and on condition that he is still alive at the time of such amendment. In the event that CHRISTIAAN JOHANNES JOUBERT has already passed away, the terms of this trust deed may be amended at any time on condition that such amendment is consented to unanimously by the Trustees and the Beneficiaries in esse."

Weshalwe CHRISTIAAN JOHANNES JOUBERT (the testator), PAUL JOZUA JOUBERT (JNR) EN OSCAR PETER ALEXANDER DE VRIES toegestem het om op te tree as Trustees en die voordele aan hulle hiervolgens verleen te aanvaar'.

[46] Accordingly, as I read these provisions, at best for the applicants, the testator and the first applicant accepted the benefits conferred upon them in terms of the trust deed. There is no reference in the trust deed, express or implied, to the testator's three other children, Liesl Joubert, Christiaan Johannes Joubert (Jnr) and Madri Joubert (the second, third and fourth respondents) accepting any benefits or to the testator accepting such benefits on their behalf.

[47] At a factual level, it was stated by the first applicant that at the time the trust was established the third and fourth applicants were minors. An attempt was made by the applicants to rely on a loan allegedly made by the trust to the fourth applicant according to the 2014 financial statements, but the first respondent's opposing affidavit established conclusively that no such loan had been made. Apart from that, no detail was furnished as to how the second to fourth applicants accepted the benefits or how these may have been accepted on their behalf when they were minors.

[48] The high water mark of the applicants' case regarding the acceptance of benefits by the beneficiaries was the statement in the first applicant's founding affidavit that *'the benefits conferred by the trust deed were accepted by or on behalf of the original beneficiaries before 19 September 2014'*. This broad and unsubstantiated claim was denied by the first respondent in her opposing affidavit. In the face of this denial the applicants were only able to riposte, in the first applicant's reply, that *'there is no indication that the benefits were not accepted by the testator for or on behalf of the minor beneficiaries'*. As I have already pointed out, the preamble to the trust deed is equivocal

at least as far as an acceptance of benefits by or on behalf of the second, third and fourth applicants is concerned.

[49] Accordingly the applicants have failed to establish, at least vis-à-vis the second, third and fourth applicants, that they indeed accepted the benefits conferred upon them by the trust deed. At best for the applicants, two of the five beneficiaries, namely, the testator and the first applicant accepted their benefits by virtue of their appointment as founding trustees and the terms of the preamble to the trust deed. However, both of them consented to the variation by signing the September 2014 resolution in their capacities as trustees and beneficiaries. In both cases each of their signatures appears above the description of their capacity, namely, *'Trustee/Begunstigde'*. It was the second, third and fourth applicants who did not consent to the variation effected by the resolution but no evidence was presented of any of them having accepted their benefits prior to 19 September 2014.

[50] In the result, accepting that it was of legal prerequisite that the consent of any beneficiary who had accepted his or her benefits under the trust deed was necessary before the 19 September 2014 variation to the trust deed, no case has been made out that the second to fifth applicants, who now object to the variation, had accepted their benefits by the relevant date.

[51] Had the evidence indicated that the second to fourth applicants accepted their benefits under the trust deed prior to the 19 September 2014 resolution, the interesting question would arise whether the consent of such beneficiaries to the resolution was in fact necessary. There is a persuasive argument – based on the terms of the trust deed, the

principles underlying *a stipulati alteri*, and apparently supported by *Potgieter's* case[14] - that such consent was not necessary.

[52] In the first place clause 23 of the trust deed specifically reserved to the testator and the trustees a wide power to vary its terms during the former's lifetime. The further provision in the clause that, after the testators death, any variation to the trust deed can only be effected with the consent of all beneficiaries, would appear to emphasise that their consent was not necessary during the lifetime of the testator.

[53] Secondly, it is in the very nature of a *stipulation alteri* that the third party who accepts the benefit of the contract between the *stipulans* and the *promittens* cannot do so selectively, but subject also to any limitations and/or onerous provisions. Thus, in the present circumstances, where the founder bestowed certain benefits on members of his family through the trust deed but reserved to the testator and trustees a wide power of variation of its terms, the beneficiaries would accept their benefits subject to that limitation i.e. their benefits could be diminished, or perhaps even lost, pursuant to a subsequent variation in the trust deed where this carried the approval of the testator and the trustees.

[54] In regard to *Potgieter's* case, Professor Claassen has argued that it is not authority for the proposition that, even where the trust deed empowers the trustees and/or founder to amend the deed, the common law requirements for such amendment must still be met where the beneficiaries have accepted their benefits.[15] Professor Claasen contends that *Potgieter* turned entirely on the common law and not on the question of whether the

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[14] Supra

[15] Die Wysiging Intervivos – Trust Aktes: Evalueerende Perspektief op die Potgietersaak, Acta Juridica 201 (4), page 243.

common law should also be complied with where the trustees have amended the trust deed in accordance with the power of amendment they enjoyed in terms of the deed. Professor Claasen concludes that in such circumstances the founder or trustee enjoying an express power of variation, can exercise same to the detriment of a beneficiary notwithstanding that such person has accepted their benefits under the trust deed since this is the contract to which the beneficiary became party by "accepting" his or her benefits.

[55] However as I have stated, given the finding that the second to fourth applicants failed to prove that they accepted their benefits under the trust deed, this question does not need to be determined.

[56] In the result, the conclusion is inescapable that the resolution of 19 September 2014 in terms of which the first respondent was added as a capital and income beneficiary, is unassailable. In short, not only did the testator agree to the variation of the trust deed but first applicant, in his capacity as a trustee, was also party to the resolution which was validly taken by a majority of the trustees. Even assuming that consent to the variation of those beneficiaries who had accepted their benefits was necessary, the second to the fourth applicants have failed to make out a case they had so accepted their benefits in circumstances where this was put in dispute.

[57] The relief sought by the applicants in terms of prayer 1.1 and 1.2, namely, that the purported amendment of the trust deed must be declared null and void and a declaration that the first respondent is neither an income nor a capital beneficiary of the trust, must therefore be dismissed. The relief sought in prayer 1.3, namely that, notwithstanding the provisions in his will to the contrary, the testator did not have the power or authority in

terms of the trust deed to determine whether the income derived from the assets of the trust should be divided or applied was never in contention and was not disputed by the respondents. This conclusion is borne out by the clear provisions of the trust deed. The first respondent did not object to such an order being made provided there were no cost implications

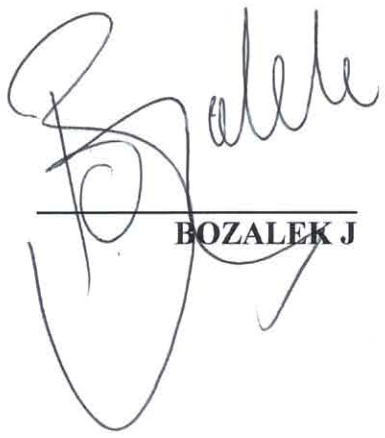
[58] Costs must follow the event and be awarded to the first respondent. In this regard I can see no justification for an order that the costs should be costs in the estate.

[59] In the result the following order is made:

1. The application for the relief in prayers 1.1 and 1.2 of the notice of motion is dismissed with costs

2. Such costs are those incurred by the first respondent and are to be borne by the applicants jointly and severally, the one paying the others to be absolved, and shall include the costs of two counsel where so employed. These costs will include the costs of the postponement on 16 November 2018.

3. The declaratory relief sought in paragraph 1.3 is granted.



BOZALEK J

For the Applicants	:	*Adv L Olivier (SC)*
For 1st Respondent	:	*Adv J Muller (SC)* *Adv H Du Toit*