



## THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

### **MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

**Gavin Charlton Harvey NO & others v Georgina Elizabeth Crawford NO & others (1016/2017)**  
**[2018] ZASCA 147 (17 October 2018)**

**From:** The Registrar, Supreme Court of Appeal

**Date:** 17 October 2018

**Status:** Immediate Release

***Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.***

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Today, the Supreme Court of Appeal (SCA), in its majority judgment, dismissed an appeal against a judgment of the Western Cape Division of the High Court, Cape Town (the high court), in the matter of Gavin Charlton Harvey NO and others (appellants) v Georgina Elizabeth Crawford NO and others (respondent).

The appeal concerned the interpretation of a Notarial Deed of Trust (the Trust Deed). In particular, the SCA was tasked with determining whether a donor, by using the words 'children', 'issue', 'descendant', 'legal descendant' in the Trust Deed intended to benefit adopted children.

In January 1953, Mr Louis John Druiff (the donor) executed the Trust Deed in terms of which he nominated his four children, and upon his children's death, his grandchildren, as beneficiaries. One of his daughters, Ms Dulcie Helena Harper (Ms Harper) was married but did not have any children. Subsequent to the donor's death, Ms Harper lawfully adopted two children. Upon the respective deaths of Ms Harper's three siblings, their shares of the capital of the Trust Deed duly devolved upon their children. When it became evident that there was uncertainty as to whether her two adopted children would, upon her death, receive their share of the capital, Ms Harper and her two adopted children decided to approach the high court for relief.

In essence, the appellants in the high court argued that the Trust Deed should be interpreted to include adopted children and not merely the donor's biological descendants. They argued that an interpretation that would have the effect of the donor's biological descendants being the only ones benefiting from the Trust Deed would bring about consequences that the donor did not contemplate or foresee.

The respondents contended that the donor enjoyed legal assistance in the execution of the Trust Deed and in spite of that, he did not take steps to make express provision for the inclusion of adopted children in the Trust Deed.

Having had regard to the accepted dictionary meaning of the words 'descendant', 'progeny' and 'issue', the high court held that the Trust Deed had the effect that only the biological descendants of the donor's children were beneficiaries of the Trust. The high court was satisfied that that was the clear intention of the donor.

On an analysis of the facts and the law, the SCA, in a majority judgment written by Ponnar JA and concurred in by Tshiqi JA, Zondi JA and Dambuza JA, upheld the decision of the high court. The majority reasoned that in terms of the provisions of s 71(2) of the 1937 Children's Act, which was operative at the time that Trust Deed was executed, it was necessary for the Trust Deed to have clearly conveyed an intention to include adopted children, which it did not do. If the donor had intended to include adopted children he would presumably have been advised of the need to expressly include them. His omission to do so was indicative of the fact that he had no such intention. Nor, could it be said that such a construction was contrary to public policy. In deciding the matter of costs, the majority judgment rejected the argument that the trust should bear the costs as had been submitted on behalf of the appellants and accordingly dismissed the appeal with costs.

In a dissenting judgement, Molemela JA reasoned that when a broader and more holistic interpretation is given to the Trust Deed - paying special focus to factors such as the use of the phrase 'legal descendant' in describing intended grandchildren, the fact that no special category of persons was explicitly excluded as beneficiaries, the donor's knowledge of a potential adoption of children by his daughter Ms Harper as well as the cultural attitudes about adoption that prevailed at the time of the execution of the Trust Deed, as well as the approach for the interpretation of s 71(2) of the 1937 Children's Act as laid down in a 1975 judgment - that the intention of the donor was to benefit all the descendants of his children, including adopted children. Molemela JA stated that she would have upheld the appeal with costs and would therefore have granted an order declaring that the words '*children*', '*descendants*', '*issue*' and '*legal descendants*' in the Trust Deed of the donor included the adopted children.

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