THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1016/2017

In the matter between:

GAVIN CHARLTON HARVEY NO	**FIRST APPELLANT**
DAVID LOUIS AYSCOUGH WILKINSON	**SECOND APPELLANT**
AMANDA BRIDGET TRUTER	**THIRD APPELLANT**

and

GEORGINA ELIZABETH CRAWFORD NO	**FIRST RESPONDENT**
PETER DAVIS NO	**SECOND RESPONDENT**

(In their capacities as duly appointed trustees for the time being of the L J DRUIFF TRUST Registration No. T 1280)

ANNE-MARIE VIVIENNE STEVENS	**THIRD RESPONDENT**
GEORGINA ELIZABETH CRAWFORD	**FOURTH RESPONDENT**
GERALDINE MARLAND	**FIFTH RESPONDENT**
ANTHONY LEWIN	**SIXTH RESPONDENT**
MASTER OF THE HIGH COURT	**SEVENTH RESPONDENT**

RUTH JESSICA DRUIFF **EIGHT RESPONDENT**

JED MICHAEL DRUIFF **NINTH RESPONDENT**

JED MICHAEL DRUIFF **TENTH RESPONDENT**

PHILLIPA ANN CAMERON **ELEVENTH RESPONDENT**

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

Bench: Ponnan, Tshiqi, Zondi, Dambuza and Molemela JJA

Heard: 4 September 2018

Delivered: 17 October 2018

Summary: Trust Deed – interpretation of – whether 'children', 'issue', 'descendant', 'legal descendant' include adopted children.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Dlodlo J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Molemela JA:

[1] In January 1953, Mr Louis John Druiff (the donor) executed a Notarial Deed of Trust (the Trust Deed), which was subsequently amended in part. It would appear that on the same day, the donor also executed a Will (the Will).

[2] The salient provisions of the Trust Deed, as amended, are as follows:

'4. Duties of Trustees

A. The trustee or trustees shall stand possessed of the trust fund and shall invest and re-invest the capital of the trust fund, and the nett revenue and income derived therefrom, or part thereof, shall either be allowed to accumulate, and the amount so accumulated added to the capital of the trust fund, or the whole of the nett income and revenue, or part thereof, shall be applied for the benefit of all or any of the following persons, who may be alive at that time, namely:-

(a) Gladys Elizabeth Clark (born Druiff)

Married without community of property to Robert Bruce Clark.

(b) Nina Dorothy Lewin (born Druiff)

Married without community of property to Leo Lewin.

(c) Lester Philip Druiff.

(d) Dulcie Helena Wilkinson (born Druiff)

Married without community of property to Michael Ayscough Wilkinson.

(e) The child or any children of the said Gladys Elizabeth Clark (born Druiff).

(f) The child or any children of the said Nina Dorothy Lewin (born Druiff).

(g) The child or any children of the said Lester Philip Druiff.

(h) The child or any children of the said Dulcie Helena Wilkinson (born Druiff).

It shall be entirely at the discretion of the trustees as to how much of the revenue shall be accumulated and how much applied for the benefit of the aforesaid beneficiaries and no beneficiary shall be entitled to dispute the authority of the trustees in the exercise of the discretion hereby conferred upon them.

The trustees shall have the power in their absolute discretion at any time during the trust period to apply for the benefit of any beneficiary above referred to, part or the whole of the capital of the trust fund.

B. On the death of the said Louis John Druiff the discretionary powers set out above shall cease and the nett revenue and income shall be divided equally between and paid to the said four children of the donor. If any child has died at such time, his or her share shall devolve upon his or her descendants per stirpes.

5. Period of Trust

If the whole of the capital has not been applied for the benefit of the beneficiaries, as provided in paragraph 4 hereof, the trust shall remain in force for a period of one year after the death of the said Louis John Druiff.

6. Termination of Trust

At the expiration of the trust period as hereinbefore provided the trustees shall realise the capital, or balance of capital, and divide the amount so realised equally between the said four children of the said Louis John Druiff. In the event of any child dying prior to the termination of the trust, his or her share shall devolve upon his or her legal descendants per stirpes. If such child has no legal descendants, his or her share shall be divided equally between the remaining children or their legal descendants per stirpes. If at such time there are no children alive and no legal descendants of such children, then the trustees shall divide the capital between such persons as may be nominated as the heirs in the will of the donor, or if the donor has failed to make a will, between the next-of-kin of the said donor.'

[3] It is undisputed that at the time of execution of the Trust Deed, the donor had four children, three of whom already had children of their own. 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 siblings, their quarter shares of the capital duly devolved upon their children. When it became evident that there was uncertainty as to whether her adopted children would, upon her death, receive her quarter-share of the capital, Ms Harper decided to approach the Western Cape Division of the High Court (Dlodlo, J) (the court a quo) for relief. She was cited as the first applicant and her two adopted children as the second and third applicants (the second and third appellants). The trustees of the Trust (trustees) and the Master of the High Court (the Master) were cited as the respondents. The trustees opposed the application and the Master opted not to do so. The children of Ms Harper's siblings were later joined as co-respondents.

[4] Ms Harper, inter alia, averred in her founding affidavit that during the donor's lifetime she had confided in him about the fact that she had had two miscarriages and was therefore considering adoption. The donor had advised her not to make a hasty decision, as she was still young. The relief sought by Ms Harper and the second and third appellants in the court a quo was an order declaring that the words 'children', 'descendants', 'issue' and 'legal descendants' used in the Trust Deed, be interpreted so as to include the second and third appellants notwithstanding that they were adopted. They contended that excluding them would amount to unfair discrimination on account of their birth. The basis for the relief they were seeking was threefold: (a) that it was not evident from the Trust Deed that the donor intended to exclude adopted children from benefiting under the Trust (b) that the Trust Deed should be interpreted to include rather than exclude adopted children, which would be in line with the spirit, purport and object of the Bill of Rights, particularly s 9 of the Constitution[1] and public policy (c) that at the time the Trust Deed was executed, the donor did not know for sure that Ms Harper was unable to bear children.

[5] Before the court a quo, it was contended on behalf of the appellants that if the terms of the Trust Deed were interpreted only to include the donor's biological descendants, that interpretation would bring about consequences that the donor did not contemplate or foresee. It was argued that the exclusion of the second and third appellants would amount to unfair discrimination, thus falling foul of s 9(4) of the Constitution. The court a quo was accordingly requested to, in the alternative, grant an order varying the terms of the Trust Deed as contemplated in s 13 of the Trust Property Control Act.

[6] The respondents' opposition of the matter was essentially premised on the following grounds: (a) the *locus standi* of Ms Harper to launch this application; (b) that even if the donor was aware that adoption was an option for Ms Harper, this imputed knowledge did not justify the inference that the donor intended adopted children to be included as beneficiaries of the Trust: (c) that whereas the donor enjoyed legal

[1] Act No. 108 of 1996.

assistance in the execution of the Trust Deed and the subsequent Amendment to such Trust Deed, he did not take steps to make express provision for the inclusion of adopted children in the Trust Deed. The court a quo delineated the issues it had to determine as follows:

'(a) Whether or not the second and third applicants should be considered '*children',* '*descendants', 'issue'* or '*legal descendants* for purposes of the Trust Deed; or (b) Whether, upon the first applicant's death, her one-fourth share is to be dealt with as if she had died childless.'

[7] The court a quo dismissed the point in limine raised in respect of Ms Harper's locus standi. That finding has not been attacked on appeal. In respect of the merits, the court a quo reiterated that when interpreting a trust deed, consideration had to be paid to the ordinary meaning of the words, which must be read in the context of the whole trust deed. It also considered the circumstances existing at the time when the trust deed and its amendment were executed, as well as Ms Harper's averment that the donor was aware of the fact that she was considering adoption. Having examined previous cases where the courts were prepared to interfere with the provisions of the will, it found that all those cases related to trusts with a public purpose and nature. It concluded that the right to equality was, in those instances, of more importance than the present matter where the trust created is of a private nature.

[8] The court a quo found no basis for a conclusion that the Trust Deed brought about consequences that the donor could not have foreseen. The donor was aware that adoption was an option for Ms Harper and could have included adopted children as beneficiaries if that had been his intention. Having had regard to the accepted dictionary meaning of the words 'descendant', 'progeny' and 'issue', the court held that the Trust Deed under discussion had the effect that only the biological descendants of the donor's children were capital beneficiaries of the Trust. The court a quo was satisfied that that was the clear intention of the donor.

[9] The court a quo highlighted the protection under s 25 of the Constitution of a person's right to property, including the right to dispose of their assets as they wish

upon their death. It warned that inroads into freedom of testation are not to be made lightly. It stated that courts have no competency to vary the provisions of the donor's Trust Deed just as they have no power or authority to change a testator's will. Effect should always be given to the wishes of the testator. On the other hand the court a quo stressed that courts will refuse to give effect to a testator's directions where such are contrary to public policy.

[10] The court a quo stated that the Trust Deed must be interpreted in accordance with the intention of the donor. It held that the words used by the donor in the Trust Deed related to biological children but nevertheless found that this did not constitute discrimination against the appellants. It stated that insofar as it could be found that they indeed constituted discrimination, such discrimination as might be found to exist in this case, was not unfair. It also held that the requirements set out in s 13 of the Trust Property Control Act were not satisfied and that it could therefore not amend the Trust Deed. The application was dismissed, the effect of which was that Ms Harper's quarter share of the Trust property would devolve upon her nephews and nieces. With leave of the court a quo, the appellants now appeal against that decision. Ms Harper passed away before the hearing of this appeal and was substituted by the executor of her estate.

[11] Before us the appellants attacked all the findings of the court a quo except the one in relation to Ms Harper's locus standi in this matter. Their principal argument was that the court a quo did not properly apply the rules relating to the interpretation of contracts.

[12] It was argued on behalf of the respondents that the fact that the donor had made specific provision for an eventuality of a beneficiary dying without issue and that he did not expressly make provision for adopted children despite a discussion he had had with Ms Harper regarding her inability to carry a baby to term fortified the submission that the donor did not intend to benefit adoptive children.

[13] It is clear from the court a quo's delineation of the issues and the submissions made on behalf of the appellants and the respondents that this matter turns on the interpretation of the provisions of the Trust Deed. This court's task is to determine whether the donor, by using the words 'children', 'issue', 'descendant', "legal descendant" in the Trust Deed, intended to benefit the adopted children of his daughter (Ms Harper) within the contemplation of s 71(2) of the Children's Act 31 of 1937 (the 1937 Act). Put differently, the issue in this appeal is whether this court should declare the words 'children', 'issue', 'descendant', 'legal descendant' to include the second and third appellants.

[14] Before I interpret the Trust Deed, it is helpful to trace the development of the law pertaining to adopted children. The first statute that gave legal recognition to adoption of children in South Africa was the Adoption of Children Act 25 of 1923 (the 1923 Act). Section 8(1) of that Act provided as follows:

'8.(1) An order of adoption shall, unless otherwise thereby provided, confer the surname of the adopting parent on the adopted child and the adopted child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopting parent: Provided that, unless the contrary intention clearly appears from any instrument (whether such instrument takes effect *inter vivos* or *mortis causa*), such adopted child shall not by such adoption –

(*a*) acquire any right, title or interest in any property –

(i) devolving on any child of the adopting parent by virtue of any instrument executed prior to the date of such order of adoption:

(ii) burdened with a *fidei-commissum* in favour of the descendants of the adopting parent; or

(iii) devolving on the heirs *ab intestato* of any child of lawful wedlock of the adopting parent;

(b) become entitled to any succession (whether by will or *ab intestato*) *jure representationis* his adopting parent.'

[15] In *Cohen v Minister of Interior*,[2] the Transvaal Provincial Division (as it was then known) had occasion to interpret the effect of an adoption order as governed by the

[2] *Cohen v Minister of Interior* 1942 TPD 151 para 153–154.

1923 Act. I find it quite remarkable that, as far back as 1942, the court aptly described an adopted child in the following terms: 'Such a child has all the rights and all the liabilities appertaining to a child born in lawful wedlock subject to the exceptions which I have mentioned. As far as the law possibly can make it so, the law has in fact said: *that strange child you have adopted is in fact your own flesh and blood.'* (Own emphasis.)

[16] The 1923 Act was repealed by the 1937 Act, which was in force when the Trust Deed was executed. The 1937 Act simply defines a child as 'a person under the age of nineteen years and includes an infant. . . . '. There is no reference to blood ties.

[17] Section 71(2) of the 1937 Act, which is central to the issues in this appeal, provided as follows:

'Subject to the provisions of section 79, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: Provided that an adopted child shall not by virtue of the adoption –

(a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child;

(b) inherit any property *ab intestato* from any relative of his adoptive parent.'

This is the provision that was applicable when the Trust Deed was executed. I will revert later to this aspect.

[18] The 1937 Act was in due course replaced by the Children's Act 33 of 1960 (the 1960 Act). Section 74(2) of the 1960 Act re-enacted in identical terms s 71(2) of its predecessor, the 1937 Act. The 1960 Act was later replaced by the Child Care Act 74 of 1983 (the 1983 Act). The corresponding section in the 1983 Act to sections 71(2) and 74(2) of the 1937 and 1960 Acts respectively was s 20(2). The provisos that were attached to its predecessors were omitted, and s 20(2) simply read: 'An adopted child shall for all purposes whatever be deemed in law to be the biological child of the

adoptive parent, as if he was born of that parent during the existence of a lawful marriage.'

[19] The legal provisions regulating adoption were later embodied in chapter 4 of the 1983 Act. Several provisions of the 1983 Act were declared unconstitutional by the Constitutional Court. The Child Care Act was ultimately repealed and replaced with the Children's Act 38 of 2005 (the 2005 Act), which sets out rights and responsibilities in respect of matters concerning all children. The 2005 Act infuses a democratic and child-centred ethos into South African adoption law. Its constitutional compliance is most evident in s 242(3), which provides that 'an adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adoptive child.' This provision unequivocally places adopted children on the same footing as biological children.

[20] Section 2D of the Wills Act 7 of 1953 (the Wills Act) introduced a rule of interpretation which was aimed at addressing uncertainties arising in respect of *inter alia* adopted children. 2D1 reads:

'2D(1) In the interpretation of a will, unless the context otherwise indicates –

(a) An adoptive child shall be regarded as being born from his adoptive parent or parents and, in determining his relationship to the testator or another person for purposes of a will, as the child of his adoptive parent or parents and not as the child of his natural parent or parents or any previous adoptive parent or parents, except in the case of a natural parent who is also the adoptive parent of the child or who was married [3]*to the adoptive parent of the child concerned at the time of the adoption;'*

These provisions are not applicable to a will of a testator who died before the commencement of the 1992 Act (1 October 1992).

[21] I mention, for the sake of completeness, that insofar as intestate succession is concerned, the legislature has, in keeping with its constitutional imperative, recognised the right of adopted children and altered the law of intestate succession. In terms of s 1(4)(e) and 1(5) of the Intestate Succession Act 81 of 1987:

[3] Section 2D (1) of the Wills Act was added to that Act in terms of s 4 of the Law of Succession Amendment Act 43 of 1992.

'1(4) In the application of this Section –

. . .

(a) an adopted child shall be deemed –

(i) to be a descendant of his adoptive parent or parents;

(ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of adoption, married to the adoptive parent of the child.

(5) If an adopted child in terms of subsection (4)(e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.'

ANALYSIS

[22] It is appropriate to explain from the outset that I agree with the court a quo's exposition of freedom of testation as a deeply entrenched principle of our law. This court in *BOE Trust Ltd and another NNO*[4] held that freedom of testation enjoys protection not only under s 25 of the Constitution, but also in terms of the founding constitutional value of dignity. In the same judgment it was also recognized that one of the incidents of ownership is the right of the owner of property to dispose of their assets as they wish upon their death. It was further stated that the right to dignity allows the living and the dying the peace of mind of knowing that their last wishes will be respected after they have passed on. Indeed, dignity, like the right to equality is a core value of our Constitution. I share those sentiments. Certainly, even in this constitutional dispensation, the law recognizes that the testator or donor still has the freedom to dispose of his or her property as he or she wishes[5]. To the extent that there is no legal obligation on a testator or testatrix to make provision for their adult next of kin, they remain free to disinherit their adult biological child(ren). However, it is undeniable that as sacrosanct as freedom of testation may appear to be, it is not absolute. Courts have, in appropriate circumstances, interfered with the exercise of

[4] *BOE Trust Ltd NO and another (in their capacities as co-trustees of the Jean Pierre De Villiers Trust* 5208/2006) (846/11) [2012] ZASCA 147; 2013 (3) SA 236 (SCA) para 26.

[5] *Moosa NO and others v Minister of Justice and Correctional Services and others* [2018] ZACC 19; 2018 (5) SA 13 (CC) para 18.

such right, thereby limiting it within the contemplation of the provisions of the Constitution[6].

[23] The importance of testamentary freedom and the reluctance of the courts, internationally, to interfere with a clearly expressed intention of the testator is reflected in the soundly reasoned judgment of the Court of Appeals for Ontario in *Spence v BMO Trust Company.*[7] From my point of view, a significant factual aspect that makes that case distinguishable from the one under consideration is evident from the following passage of that judgment '. . . this is not a wills construction case. The terms of the Will gifting the residue of Eric's estate to Donna and her sons and disinheriting Verolin are unequivocal and unambiguous. *No interpretive question arises concerning the meaning of the Will*.[8]' In this matter, the interpretation of the provisions of the Donor's Trust Deed is the central issue for determination. The question whether a court interpreting a testamentary provision must always apply the law that was applicable when the will or trust deed was executed has already been answered by our courts[9]. The courts have indeed amended testamentary or trust provisions that were considered to be discriminatory and thus against public policy despite having been executed before the advent of the Constitution[10]. As correctly observed by the court a quo, a determining factor in the weighing up process in those specific cases was the public nature of the objectionable benefit. I agree that the matter under consideration is distinguishable as it pertains to a private trust for which no condition is applicable. As will appear from my reasoning later, the issue of public policy does not arise because the language of the Trust Deed and the surrounding circumstances do not reveal an intention to exclude adopted children and are thus not discriminatory in effect. I therefore do not deem it necessary to discuss all the cases in which the courts intervened on the basis of public policy in relation to conditional trusts of a public nature.

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[6] *Minister of Education and another v Syfrets Trust Ltd NO and another* [2006] ZAWCHC 65; 2006 (4) SA 205 (C); [2006] 3 All SA 373 (C); 2006 (10) BCLR 1214 (C).
[7] *Spence v BMO Trust Company* (2016) ONCA 196.
[8] *Spence v BMO* para 52 (Own emphasis).
[9] *Boswell en andere v van Tonder* 1975 (3) SA 29 (A); *Cohen NO v Roetz NO In Re: Estate Late AJA Heyns and others* 1992 (1) SA 629 (AD); *Pienaar and another v Master of the Free State High Court, Bloemfontein and others* [2011] ZASCA 112; 2011 (6) SA 338 (SCA).
[10] *Minister of Education and another v Syfrets* para 24. *Board of Executors v Benjamin Heydenrych Testamentary Trust and others* 2012 (4) SA 103 (WCC); *Canada Trust Co. v Ontario Human Rights Commission* (1990) CanLII 6849 (ON CA) at 495.

[24] As stated before, this matter turns on the interpretation to be given to the relevant phrases used by the donor to describe the capital beneficiaries of his Trust. In interpreting such phrases, a court must be careful not to follow an approach in terms of which it offers nothing more than the dictionary definition of the words used in order to support the result. It is a trite principle of our law that in order to determine what the author of a document intended, courts must examine the language used in the document, as well as all the facts which give it context. As correctly pointed out in *Novartis v Maphil*[11] in relation to the interpretation of contracts, courts must consider all the facts and context in order to determine what the parties intended. It is expected to do so whether or not the words of the contract are ambiguous or lack clarity[12].

[25] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[13] this Court stated as follows:-

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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.'

[26] The following remarks made by this Court in *Bothma-Botho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[14] are apposite*:*

'While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible

[11] *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA).
[12] *Novartis* para 27-28.
[13] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[14] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517; 2014 (2) SA 494 (SCA) para 12.

background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise. . . . '.

[27] With the principles enunciated in those cases in mind, I now turn to consider whether the provisions of the Trust Deed reveal an intention to exclude adopted children from benefitting from the donor's Trust Deed. As stated before, the Act that was in force at the time of the execution of the Trust Deed was the 1937 Act. The vexed question of determining the interpretation of the provisions of s 71(2) of the 1937 Act came to the fore in *Boswell en andere v van Tonder*,[15] where the court was tasked with determining whether the testator's usage of the word 'afstammelinge' in his description of his beneficiaries revealed an intention to include adopted children. That court pointed out that s 71(2) created a legal fiction in terms of which adopted children were deemed to be the biological children of their adoptive parents. The court inter alia stated as follows:

'The effect of this legal fiction of being a biological child can indeed bring about that, on the application of the provisions of an instrument, an adopted child can also be regarded as a "child" – not so much because of there being, by way of an extensive interpretation, a departure from the ordinary everyday meaning of "child" and an attachment of a wider meaning thereto, *but precisely because the adopted child must be deemed to be a biological child as a result of the legal fiction and consequently must be covered by the ordinary everyday meaning of the word "child" in the instrument.* A case like *Venter v. Die Meester en 'n Ander*, 1974 (4) S.A. 482 (T), where adopted children placed under the heading of "children born of the marriage of us the testators", must be declared as such on that basis. . . .

The proviso to s 74(2) does not detract from the main provision, but rather serves to support it. It is noteworthy that it is not here generally expressly determined that in instruments executed before adoption, the word 'child' must be read not to include an adopted child unless the instrument clearly expresses the contrary. The wording indicates that the legislature viewed the matter as follows: the legal fiction of being deemed to be a biological child should not benefit an adopted child where, in terms of the provisions of such instrument, according to the normal rules of interpretation, the biological child is entitled to the property of the adoptive parents. The legislature apparently did not wish to encroach on the intention (established by ordinary rules of interpretation) of those who, before the adoption, had disposed of property, hence the words "unless the instrument clearly conveys the intention that the property shall devolve upon the adopted child". …..*To rebut the presumption that the "legal fiction applies, it*

[15] *Boswell above.*

would be enough if the contrary intention appears by application of the rules of interpretation'[16]. (My emphasis.)

[28] The legal fiction referred to above was applied by this Court in *Cohen NO v Roetz NO and others*.[17] In that matter, the testators had executed a mutual will in 1947 in terms of which they bequeathed certain properties to their three (3) children subject to the following conditions: (a) If any of the said children predeceased the testators, without leaving descendants, the testators' surviving children or grandchildren would succeed in equal shares *per stirpes* to such deceased child's share. (b) The respective portions of the said farms would devolve on the eldest child of each of the three children after their death. The testatrix died in 1948 and the testator in 1973. The one-third share of the farm which devolved to the testators' son, Andries Johan Adam Heyns *(the "deceased"),* was transferred to him in 1949. The second respondent (born in 1956), was adopted by the deceased on 1 March 1967 under the provisions of the Children's Act 33 of 1960. The third respondent was born to the deceased and his wife on 6 May 1967 and was the eldest child born of their marriage. The court reiterated that the golden rule for the interpretation of wills is to ascertain the wishes of the testator from the language used. It further emphasized that in endeavouring to ascertain the wishes of the testator or testatrix, the will must in general be read in the light of the circumstances prevailing at the time of its execution. It considered the reference to the words "descendant" and "eldest child" to be some of the strong indicators that the testators only intended to benefit blood relations. It also took into account that the will was drafted by a professional person and reasoned that if the testators had intended the property to devolve to an adopted child, the drafter of the will would presumably have advised them to include same in express terms. It held that it was clear from the provisions of the will, applying the normal rules of interpretation, that the testators had not intended to include an adopted child within the meaning of 'eldest child'.

[29] As stated by this court in *Boswell,* the legal fiction of an adopted child being deemed to be a biological child is rebutted if the instrument, read as a whole, reveals a

[16] *Boswell* above para 38H-39D (Own translation).
[17] *Cohen* 2 above.

contrary intention, i.e. an intention to exclude the adopted children. In this matter, the question is whether the application of ordinary rules of interpretation to the provisions of the donor's Trust Deed reveals a testamentary intention that displaces or rebuts that legal fiction. The court a quo made the following findings in its judgment:

'In the light of the factual similarities to the Cohen decision it would be prudent (in any event) that a similar finding should follow for these reasons: (a) the initial beneficiaries of the Trust Deed were the Donor's own biological children; (b) the words *'descendants'*, *'children'* and 'issue' are used repeatedly their meaning being as described above; (c) the Donor had the professional assistance of an attorney and notary when executing both Trust Deed and Amendment thereto. In the light of the statutory provisions then in effect, the Donor might well be supposed to have been advised of the effect of the statutory provisions and of the need to include adopted children in express terms in the Trust Deed. In any event the Donor was already aware that the first applicant was having difficulty carrying a child to term. His subsequent omission expressly to include adopted children should, in my view, be held to indicate his intention not to include adopted children. Accordingly, the Trust Deed stands to be interpreted in accordance with authorities canvassed in para 24-26 above. It is pertinent that the Trust Deed under discussion has the effect that only the biological descendants of the Donor's children are capital beneficiaries of the Trust.'

I respectfully disagree with these findings for the reasons set out hereunder.

[30] In interpreting the donor's Trust Deed, it must be borne in mind that although other courts' decisions on the interpretation of words and phrases can be of assistance in the interpretation of another will, ultimately every will has to be interpreted according to its own language and context. In this regard, Innes CJ aptly remarked as follows: 'The truth is that a decision upon the meaning of one will is often of no assistance in ascertaining the meaning of another, in spite of surface similarities between the two. Each document must be read as a whole and must stand upon its own language'[18]. Another important consideration is that although indications and pointers must be sought in the instrument itself, it is permissible to interpret it in the light of the relevant circumstances existing at the time of its making.[19] The circumstances and other external facts which may be taken into consideration include the degree of the skill of the draftsman and other circumstances of which the donor or

[18] *Estate Kemp and others v McDonald's Trustee* 1915 AD 491 at 505.
[19] *Lello and others v Dales NO* 1971 (2) SA 330 (A) para 335D-335E.

testator was aware of and which were uppermost in his or her mind at the time of the making of the will.[20]

[31] In this matter, the donor used the neutral term 'child', which is the same term that would be used even if an adopted child was expressly included in a testamentary instrument.[21] There is no reason why the mere reference to the term 'child' should be regarded as being one of the pointers that leads to the conclusion that the donor intended to benefit the biological children only. With respect, the court a quo seems not to have sufficiently heeded the warning sounded in *Boswell that:* 'it is *not* here generally expressly determined that in instruments executed before adoption, the word 'child' must be read not to include an adopted child unless the instrument clearly expresses the contrary'[22] (own emphasis).

[32] I am also of the view that the court a quo paid no consideration whatsoever to the fact that the capital beneficiaries were described as follows in clause 4 of the Trust Deed: '*(e)* The child or *any* children of the said Gladys Elizabeth Clark (born Druiff). *(f)* The child or *any* children of the said Nina Dorothy Lewin (born Druiff). *(g)* The child or *any* children of the said Lester Philip Druiff. *(h*) The child or *any* children of the said Dulcie Helena Wilkinson (born Druiff) [Mrs Harper].' (Own emphasis). Notably, one of the meanings attributed to the word 'any' in the Oxford Dictionary is 'whichever of a specified class might be chosen'. In my view, the usage of the pronoun *any* as a prefix to the grandchildren lends an inclusive character to the class of grandchildren the donor had in mind at the time of execution of the Trust Deed. This, in my view is a clear pointer to inclusion of adopted children as income beneficiaries of the donor's trust.

[33] Furthermore, the background circumstances are key. As was correctly observed by this court years ago[23], 'context is everything'. Ms Harper had already had

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[20] *Dison NO and others v Hoffmann and others NNO* 1979 (4) SA 1004 at 1036. Corbett, Hahlo, Hofmeyer and Kahn *The law of Succession in South Africa* (1980) at 481.
[21] *Venter v Die Meester en 'n ander* 1971 (4) SA 482 (T).
[22] *Boswell* at 38.
[23] *KPMG Chartered Accountants (SA) v Securefin Limited and another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) para 39.

a conversation with the donor pertaining to a desire to adopt children, given that she was struggling to carry babies to term. His advice was that she must not be too hasty as she was still young. Ms Harper was at that stage 30 years old and therefore still of child-bearing age. There is no reason to consider the donor's advice as a reflection of any aversion towards benefitting adopted grandchildren. To my mind, the conversation between Ms Harper and the donor meant that at the time of the execution of the Trust Deed, the donor was aware of the possibility of Ms Harper adopting in the future. The use of the phrase *any child of* used in relation to the grandchildren must therefore be seen in that context. In other clauses of the Trust Deed, the donor refers to the latter class as 'descendants' and in one clause as 'legal descendants'. The usage of the term 'legal descendant' must also be considered in that context. I find it highly improbable that a donor would prefer to refer to his or her existing or future biological grandchildren and great-grandchildren as '*legal descendants'*. I am therefore of the view that the prefix *legal* in relation to descendants served to broaden the class of capital beneficiaries to include adopted children. Of crucial importance is the fact that the concept of adoption was not unknown in the era in which the donor executed the Trust Deed. Furthermore, there was no absolute bar to adopted children benefitting in terms of any instrument. On the contrary, a court had even gone to the extent of describing an adopted child using the phrase 'flesh and blood'[24].

[34] An equally important consideration is that the Trust Deed does not explicitly disinherit any person. The donor did not expressly exclude any person or class of beneficiaries from benefitting in terms of the Trust Deed. He used neutral words like 'children', 'issue', 'descendants' and 'legal descendants'. Unlike in *Cohen*, where the donor specified that the bequests were to devolve on 'the eldest child' right up to the fourth generation, here the donor did not show a preference for a specific child and named all his children as the income beneficiaries of the Trust. As correctly observed by the court a quo, on the same day on which the donor executed the Trust Deed, he executed a Will in terms of which he made several charitable bequests to various entities, including an orphanage. The Will stipulated that his four children were his residual heirs and further that *'(i)n the event of any of my said children predeceasing me, his or her share shall devolve upon his or her descendants* per *stirpes.*

[24] *Cohen v Minister of Interior* (supra).

Significantly, in the Trust Deed the donor stated that should all his beneficiaries not be available to take up the bequests, then the Trust benefits should devolve on the residual heirs he had appointed in terms of his Will. The residual heirs nominated in the Will happened to be the same people indicated in the Trust Deed.

[35] I disagree with the contention that the fact that the donor had made specific provision for an eventuality of a beneficiary dying without issue clearly showed his intent not to benefit adoptive children. In my view, the aforesaid phrase is included in many testamentary instruments to cater for instances where the nominated beneficiaries, for whatever reason, do not have surviving children at the time when the disposition vests upon them. It is not confined to instances where the nominated beneficiary was unable to bear biological children. This view is buttressed by the very words used by the donor: 'if *any* of the said four children of the donor dies without leaving issue. . . '. (own emphasis)

[36] The respondents' contention that the omission of the donor to expressly include adopted children in the Trust Deed despite his conversation with Ms Harper must be construed to imply that he did not want them to benefit from his Trust has no merit, as it fails to appreciate the instructive approach laid down by this Court in *Boswell.* That seminal judgment makes it clear that the mere fact that the donor did not make express reference to adopted children in his Trust Deed cannot, without more, lead one to infer that the donor did not intend to provide for adopted children. As stated by this court in that judgment and re-iterated in *Cohen,* the legal fiction created by the main provision in s 71(2) of the 1937 Act was that an adopted child was for all purposes deemed to be a biological child, and the effect of the proviso in that section was that the presumption in favour of the operation of that legal fiction could be rebutted by a contrary indication emerging from the will on an application of the ordinary rules of interpretation. Having applied the ordinary rules of interpretation, I am unable to find anything in the language used in the Trust Deed, read in the context of the surrounding circumstances, which indicates that the donor's intention was to exclude adopted children from benefiting from his Trust Deed. It follows that the words *'children'*, '*descendants'*, *'issue'* and *'legal descendants'* in the donor's Trust Deed,

which are not discriminatory by their nature, must be interpreted in such a way as to include adopted children. This finding is dispositive of the matter. Thus, on this ground alone, the second and third appellants ought to be successful in this appeal.

[37] Further, and in any event, a narrower interpretation purely on the basis that there was no express inclusion of the adopted children in the Trust Deed would be contrary to other tools of interpretation like context and surrounding circumstances, which have already been alluded to earlier in this judgment. Such an unduly restrictive interpretation would, in any event, be contrary to the *ratio decidendi* of *Boswell* which is so clearly captured in the passage quoted in para 27 of this judgment. The majority judgment inter alia states as follows in relation to s 71(2) of the 1937 Act: 'The effect of the first proviso thereto was clear. Adopted children were not entitled to any property unless 'the instrument clearly conveys the intention that the property shall devolve upon the adopted child'. With respect, the application of the legal fiction presented in *Boswell* (at 38D – 39D) is not evident from the majority judgment and neither is it clear what factors clearly served to rebut the presumption of the operation of that legal fiction. In my view, the approach adopted by the majority judgment is in fact stricter than that laid down in a pre-constitution authority (*Boswell*).

[38] An approach in terms of which neutral provisions of a Trust Deed are interpreted in a manner that discriminates against a class of beneficiaries (adopted children) when this was not the clear intention of the donor fails to take the provisions of s 39(2)[25] of the Constitution into account. It also flies in the face of all the statutes that have, over the years, placed adopted children on an equal footing with biological children. In expressing that view, I find persuasion in the judgment of the European Court of Human Rights in *Pla and Puncernau v Andorra*[26], where the court stated that the testamentary disposition as drafted by the testatrix made no distinction between biological and adopted children and held that "it was not necessary to interpret it in that way". It considered such an interpretation to be tantamount "to the judicial deprivation of an adopted child's inheritance rights". It further stated as follows:

[25] Section 39(2) of the Constitution enjoins courts to interpret legislative provisions in a manner that promotes the spirit, purport and objects of the Bill of Rights.
[26] (Appn no 6848/01) ECHR 13 July 2004 para 62. Article 14 of the Convention largely corresponds with the provisions of s 9 of our Constitution.

'The Court reiterates that the Convention, which is a dynamic text and entails positive obligations for States, is a living instrument, to be interpreted in the light of present-day conditions and that great importance is attached today in the member States of the Council of Europe to the question of equality between children born in and children born out of wedlock as regards their civil rights (see *Mazurek*, cited above, § 30). Thus, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death, namely in 1939 and 1949, particularly where a period of fifty-seven years had elapsed between the date when the will was made and the date on which the estate passed to the heirs. Where such a long period has elapsed, during which profound social, economic and legal changes have occurred, the courts cannot ignore these new realities. The same is true with regard to wills: any interpretation, if interpretation there must be, should endeavour to ascertain the testator's intention and render the will effective, while bearing in mind that "the testator cannot be presumed to have meant what he did not say" and without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law.'

[39] The approach laid down in the aforementioned dictum was applied by the High Court of Justice, Chancery Division in *Hand and another v George and another.*[27] In this matter the testator, Mr Henry Hand, had executed a will in 1946. At the time of its execution, the law relating to adoption in England and Wales was set out in the Adoption of Children Act of 1926. That Act provided that a child remained the child of his or her birth parents rather than becoming, in law, the child of their adoptive parents. The testator's will stipulated that his residuary estate was to be held in a trust. The income thereof was to be paid to his three children, Gordon, Kenneth and Joan, respectively and, upon their deaths, the remaining income and capital fell to be paid to their children (the testator's grandchildren). The testator died in 1947 and was survived by all his children. Kenneth and his wife subsequently adopted two children. After Kenneth's death, his adopted children lodged a claim in terms of which they sought to benefit from the will, arguing that they ought to be treated as equals with the

[27] *Hand and another v George and another* [2017] EWHC 533 (Ch).

biological grandchildren of the testator. They contended that the provisions of s 5(2) of the Adoption Act of 1926[28] violated their rights to equality and respect for privacy and family life as afforded to them in terms of the European Convention on Human Rights[29] (the Convention). Kenneth's nephews and nieces defended the claim, arguing that if the testator had wished to include adopted grandchildren as potential beneficiaries then he could have done so expressly. They contended that there was no justification for applying the Convention to interpret a will that was executed before the drafting of that Convention. They argued that doing so would subvert the intention of the testator. The Chancery Division of the High Court considered whether adopted children could be regarded as 'children' for the purposes of the will. That court allowed the adopted grandchildren's claim on the basis that the Convention guaranteed the adopted children's right not to be discriminated against by the application of a statute which caused the ambiguous reference in the testator's will to his grandchildren to be construed as excluding adopted grandchildren.

[40] For all the above reasons, I find that there is no basis for finding that the donor's manifest intention was to exclude adopted children from benefitting from his Trust. It follows that I would uphold the appeal with costs and would therefore grant an order declaring that the words '*children', 'descendants', 'issue'* and '*legal descendants'* in the Trust Deed of the donor include the adopted children (the second and third appellants).

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M B Molemela

Judge of Appeal

[28] Section 5(2) of the Adoption of Children Act of 1926 provided as follows: 'An adoption order shall not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under any intestacy or disposition, whether occurring or made before or after the making of the adoption order, or confer on the adopted child any right to or interest in property as a child of the adopter, and the expressions "child," "children" and "issue" where used in any disposition whether made before or after the making of an adoption order, shall not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child.'

[29] The claimants had relied on the provisions of Articles 8 and 14 of the European Convention on Human Rights. These provisions largely correspond with Articles 2 and 16 of the United Nations Convention on the Rights of a Child, 1989, which South Africa ratified on 16 June 1995. Similar provisions are also embodied in the African Charter on the Right and Welfare of the Child, 1990.

Ponnan JA (Tshiqi, Zondi and Dambuza JJA concurring):

[41] The question raised by this appeal is the extent to which freedom of testation, a fundamental principle of the law of succession, must yield to freedom from unfair discrimination enshrined in the equality clause of the Bill of Rights (s 9 of the Constitution). Resolving the question depends upon the construction to be placed upon the words 'children', 'descendants', 'issue' and 'legal descendants' in a Notarial Deed of Trust (the deed), executed on 28 January 1953 by the late Louis John Druiff (the donor).

[42] The donor created the trust 'for the benefit of his children and their descendants by reason of the love and affection which he bears for them.' The pertinent provisions of the deed - clauses 4, 5 and 6 – are set out in the judgment of Molemela JA.[30] At the time of the execution of the deed, one of the donor's beneficiaries, his daughter, the first applicant in the court *a quo*, Ms Dulcie Helena Harper, was childless. Ms Harper was then married to Michael Ayscough Wilikinson, who died during 1986. In 1993, she remarried and took the surname of her second husband, Harper. Although she had fallen pregnant on more than one occasion prior to the execution of the deed, she was unable to carry a baby to full term. She accordingly informed the donor that she was considering adoption. His response, so she stated, was that she was still young and should not rush into anything, rather she should wait to see what the future holds. As Ms Harper put it, '[t]he deceased therefore was aware at the time of the execution of the trust deed, that adoption was an option.' After the execution of the deed by the donor and his subsequent death, Ms Harper did indeed adopt two children, the second appellant, David Louis Ayscough Harper, in 1955 and the third appellant, Amanda Bridget Truter, in 1957.

[43] During May 2015 the appellants approached the Western Cape Division of the High Court, Cape Town for the following relief:

'3.1 Declaring that the words 'children', 'descendants', 'issue' and 'legal descendants' used in the notarial trust deed include second and third appellants; alternatively

[30] See paragraph 2 of the judgment of Molemela JA.

3.2 That in terms of s 13 of the Trust Property Control Act, 57 of 1998, the trust deed be amended, declaring the word 'children', 'descendants', 'issue' and 'legal descendants' used in the trust deed to read second and third appellants.'

Dlodlo J dismissed the application, but granted leave to the appellants to appeal to this court. On 10 December 2017, and after the grant of leave to appeal, Ms Harper died. She accordingly came to be substituted by the executor of her estate, Gavin Charlton Harvey NO, as the first appellant in the appeal.

[44] Molemela JA concludes that the appeal should succeed. She proposes that the order of Dlodlo J be set aside and substituted by: 'an order declaring that the words *'children, 'descendants', 'issue'* and *'legal descendants'* in the Trust Deed of the donor include the adopted children (second and third appellants)'. I regret that I cannot agree with my learned colleague.

[45] It is a principle of trust law that 'the trustee must give effect to the trust instrument, properly interpreted, as far as it is lawful and effective.[31] A trust deed must be construed in accordance with the well-known and time honoured rules regarding the interpretation of written contracts.[32] In *Sea Plant Products Limited and others v Watt* 2000 (4) SA 711 (C) at 720D-G, Van Heerden J (Hlophe JP and Motala J concurring) stated:

'As with the interpretation of a written contract, the point of departure in interpreting a trust deed is therefore the grammatical or ordinary meaning of the words used, read within the context of the trust deed as a whole.'

[46] Some sixty years ago, Caney J observed in *Moosa v Jhavery* 1958 (4) SA 165 (N) at 169D-F:

'In my opinion 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 that 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.'

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[31] Corbett, Hofmeyr & Kahn *The Law of Succession in South Africa* 2ed (2001) at 405 and 423; Kalshoven v Kalshoven NO 1966 (3) SA 466 (R) at 469A-B.
[32] *Ally v Mohamed NO and Others* [1998] JOL 3393 (D) at 10.

Likewise, a will falls to be interpreted by giving words and phrases used by the testator the meaning which they bore at the time of execution.[33]

[47] It is necessary to first ascertain the intention of the donor. The beneficiaries listed in clause 4 of the deed, were the donor's own biological children. Clause 4 then proceeds to list the 'child' or 'children' of the donor's biological children, in other words the grandchildren of the donor. As Smalberger JA observed in the context of a will in *Cohen NO v Roetz NO and others* 1992 (1) SA 629 (A) (*Cohen v Roetz)* at 639E, '[t]here is much to be said for the view that the ordinary meaning of the word 'child' or 'grandchild' does not go beyond a testator's own child (his bloedkind) or an own child of such child.' Indeed, as Vivier J pointed out in *Brey v Secretary for Inland Revenue* 1978 (4) SA 439 at 442H – 443D:

'Accordingly, in statutes and other instruments relating to the law of succession, the word "child" has been interpreted by our Courts as referring to a legitimate child only.'[34]

[48] Clauses 5 and 6 of the deed, employ the words 'descendants' and 'legal descendants'. According to *Cohen v Roetz* (at 640 A-C), the word 'descendant' in its 'normal or usual meaning, includes only blood relations in the descending line and excludes adopted children'. *Cohen v Roetz* did not deal with the meaning of the word 'issue'. One meaning of the word is 'children, progeny without the male issue'. 'Progeny' is defined as: '1. The offspring of a person or other organism. 2. A descendant or descendants. 3. An outcome or issue.'[35] The ordinary meaning of the word 'issue' thus also connotes blood descendants. Each of the words 'descendants', 'children' and 'issue' appear more than once in the deed. The donor was armed with the knowledge that Ms Harper might not be able to bear children when he executed the deed. Moreover, he made express provision in clause 6 for the eventuality that

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[33] *Greeff v Estate Greeff* 1957 (2) SA 269 (A).

[34] Vivier J added: '[T]he explanation for this restrictive interpretation of the word "child", when used in this context, and in relation to this subject-matter, is to be found in the rule of Roman-Dutch law that only a legitimate child succeeds intestate to his parent's estate. With regard to a mother, however, the general rule of Roman-Dutch law was that she "makes no bastard" so that any child of hers, whether born in or out of wedlock, succeeded to her *ab intestato*. In earlier law the illegitimate child's right of testamentary succession was limited. As Beadle J in *Todd's* case *supra* puts it (at 234), the illegitimate child was under the common law not regarded as his father's descendant. It was therefore held, *In* re *Russo* (*supra*), that notwithstanding the rule that a mother makes no bastard, the presumption is that generally speaking, in the absence of clear indications in the will of a different intention, the term "issue" or "children" when used in relation to a mother refers only to her legitimate issue or children.'

[35] Concise Oxford Dictionary 9ed.

one or more of his children might die without issue. Accordingly, the ordinary meaning to be ascribed to the words must be, as found in *Cohen v Roetz*, that the donor had in mind descendants through the bloodline.

[49] The Children's Act 31 of 1937 (the 1937 Act) was in force at the time of the execution of the deed. Section 71(2) of the 1937 Act provided:

'Subject to the provisions of s 79, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent:

Provided that an adopted child shall not by virtue of the adoption –

(a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that the property shall devolve upon the adopted child;

(b) inherit any property *ab intestato* from any relative of his adoptive parents.'

The 1937 Act was replaced by the Children's Act 33 of 1960, which contained an identically worded provision to that set out above.

[50] When the deed was executed, the provisions of s 71(2) of the 1937 Act were operative. The effect of the first proviso thereto was clear; adopted children were not entitled to any property unless 'the instrument clearly conveys the intention that the property shall devolve upon the adopted child.' The test, according to *Cohen v Roetz* (at 641F) is 'not whether they were specifically excluded by the will, but rather whether the will clearly conveyed an intention to include them (so that any property under the will might devolve upon them).'

[51] The similarity of the language used in *Cohen v Roetz* to that used in the deed in the present matter is clear. The deed appears to have been drawn up by a professional person, probably an attorney. If the donor had intended to benefit adopted children he would presumably have been advised of the need to include such class of children in express terms in the deed.[36] His omission to do so is indicative of the fact that he had no such intention. All of the above considerations lead ineluctably to the conclusion that by the employment of the words 'children', 'descendants', 'issue'

[36] *Kinloch NO and Another v Kinloch* 1982 (1) SA 679 (A) at 693H.

and ‘legal descendants’, the donor did not manifest an intention to benefit adopted descendants.

[52] It is the above intention that must be given effect to unless there are considerations that preclude this from happening. The appellants contend that the high court failed ‘to take into consideration the radical developments which have taken place in our law . . . which indicate an overall shift in public policy’. ‘Public policy’, so the argument proceeds, ‘has been shaped, since 1994, by the values incorporated into the Constitution’. The relief sought by the appellants is far-reaching. They seek to have a court intervene in the right of an owner to dispose of his property as he desires to a far greater extent than any court in this country has previously done. More importantly, they seek to do so by resort to a direct application of the Constitution.

[53] South African courts enjoy no general jurisdiction to authorize a variation of the terms of a will or trust deed. But it has always been recognised that effect will not be given to a provision that is contrary to public policy. Since the advent of our constitutional era, public policy is rooted in the Constitution and the fundamental values it enshrines. The Constitutional Court has stated that ‘the normative influence of the Constitution must be felt throughout the common law.’[37] Public policy has to be moulded to meet the conditions of an ever-changing world. Given its dynamic nature, present day notions of public policy, must be infused by constitutional values such as human dignity, equality and freedom. Thus some testamentary provisions that have been accepted as valid in the past, may no longer pass muster in light of our Constitution’s equality and non-discrimination imperatives.

[54] Professor Du Toit suggests that a proper evaluation of the limits imposed upon freedom of testation through the application of a constitutionally-founded boni mores criterion is indeed appropriate. In the last of his trilogy of articles on the subject, he observes (and here I loosely summarise): (i) where a litigant asserts an infringement of a particular constitutionally protected right the court must weigh the freedom of testation against the right in terms of section 36 of the Constitution; (ii) if the court finds that the particular constitutional right should prevail over the freedom of testamentary

[37] *NK v Minister of Safety & Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) para 17.

disposition, it must apply the common law in order to resolve the situation; (iii) where appropriate, the court can limit freedom of testation to give due effect to the countervailing constitutional right; (iv) in a direct challenge under the Bill of Rights, once a court has found that there has been unfair discrimination it is customary, in accordance with the provisions of the Bill of Rights, for the court to enquire whether it would nevertheless be justifiable in terms of the limitation clause (s 36(1)).[38]

[55] The appellants contend that the approach of the high court 'has endorsed unfair discrimination of the second and third appellants based on their birth, which falls foul of s 9(4) of the Constitution.' The Constitution's equality clause directs that discrimination on any one or more of the grounds stated in s 9(3) of the Bill of Rights is unfair unless it is established that the discrimination is in fact fair. In *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) para 54, the Constitutional Court distilled three criteria to guide the inquiry into fairness.[39] MC Wood-Bodley[40] asserts that the s 36(1) enquiry must take place before there can be a finding that a particular provision or part particular conduct is contrary to public policy. As Deputy Chief Justice Moseneke put it: 'When two constitutional rights . . . butt heads it is not a matter of determining which right is more deserving so that courts may declare a victor and jettison the loser.'[41]

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[38] François Du Toit '*The constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African law*' 2001 12 Stell LR 222.

[39] The criteria being:

a. Does the contested conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, the conduct violates the Bill of Rights' non-discrimination directive. However, even if the conduct bears a rational connection, it may nevertheless amount to unfair discrimination.

b. Does the differentiation amount to unfair discrimination? This question demands a two-stage analysis: First, does the differentiation amount to discrimination? If differentiation occurred on one of the grounds specified in the equality clause, then discrimination will have been established. If it did not occur on one of the specified grounds, then whether or not there is discrimination will depend on whether, objectively, the ground is based upon attributes and characteristics that have the potential to impair the fundamental human dignity of persons or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounts to discrimination in the aforementioned sense, does it amount to unfair discrimination? If the discrimination occurred on a specified ground, unfairness is presumed. If on an unspecified ground, the complainant must establish unfairness. The test in this regard focuses primarily on the impact of the discrimination on the complainant and others similarly situated.

c. If discrimination is found to be unfair, a determination must be made as to whether justification can be found under the Bill of Rights' limitation clause. (paraphrased)

[40] Michael Cameron Wood-Bodley '*Freedom of testation and the bill of rights: Minister of Education v Syfrets Trust Ltd NO*' 2007 SALJ 687.

[41] Deputy Chief Justice Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' 15 May 2015 available at http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/The-Media-CourtsandTechnology-Speech-by-DCJ%20Moseneke-on-15-May-2015.pdf; c/f *Van Breda v Media 24*

Instead, according to *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) para 9, 'where constitutional rights themselves have the potential to be mutually limiting - in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa - a court must necessarily reconcile them.' There can thus be no hard and fast rules, rather there has to be a careful analysis in each situation that arises and an appropriate balancing of the relationship between guaranteed rights, public policy and freedom of testation.[42]

[56] The right of ownership permits an owner to do with her thing as she pleases, provided that it is permitted by the law. The right to dispose of the thing is central to the concept of ownership and is a deeply entrenched principle of our common law.[43] Disposing of one's property by means of executing a will or trust deed are manifestations of the right of ownership. The same holds true under the Constitution. This court expressed the view that 'freedom of testation enjoys the protection not only of s 25 of the Constitution, but also the founding constitutional value of dignity.'[44] In *Moosa NO and others v Minister of Justice and Correctional Services & others* [2018] ZACC 19; 2018 (5) SA 13 (CC), the court was concerned with the constitutionality of s 2C(1) of the Wills Act 7 of 1953, which regulates the distribution of benefits renounced by the descendants of a testator. The Constitutional Court was invited to make a finding in the context of a polygamous Muslim marriage, that such renounced benefits should always be divided equally among the surviving spouses of the testator on the basis that this would advance the value of equality. It declined to do so. Holding, instead (para 18):

'But a ruling of this nature may infringe on the principle of freedom of testation, which is fundamental to testate succession. It would therefore be ill-advised for this Court to make any such pronouncement.'

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and Others; National Director of Public Prosecutions v Media 24 Limited and Others (425/2017, 426/2017) [2017] ZASCA 97 para 42.

[42] Above fn 40.

[43] In that regard South Africa is not unique. In a survey of English, Australian, Dutch and German legal systems, Professor Du Toit concludes that 'freedom of testation is regarded as the founding principle of the law of testate succession in all four systems. This freedom is supported by the recognition of private ownership and private succession in all four legal systems.' (François Du Toit '*The limits imposed upon freedom of testation by the boni mores: Lessons from Common Law and Civil Law (continental) legal* systems' 2000 11 Stell LR 358).

[44] *In re BOE Trust Ltd and others NNO* [2012] ZASCA 147; 2013 (3) SA 236 (SCA) paras 26-29.

[57] Other jurisdictions have also been grappling with the problem.[45] The Supreme Court of Canada has emphasised that testamentary autonomy, should not lightly be interfered with, but only to the extent the law requires.[46] In *Tataryn v Tataryn Estate* [1994] 2 SCR 807 the court was required to consider the principles to be applied to s 2(1) of the British Columbia Wills Variation Act. Under that section, if a testator failed to make adequate provision for the proper maintenance and support of a surviving spouse and children, including independent adult children, the court was authorized to order provision from the estate that it considered 'adequate, just and equitable in the circumstances'. Even when required to enforce a statutory requirement of that kind, *Tataryn* emphasised that the courts should be cautious in interfering with a testator's testamentary freedom:

'In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interest of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly buy only in so far as the statute requires.'

[58] However, despite its salutary social interest dimensions, Canadian courts have come to recognise that testamentary freedom can on occasion be constrained by public policy considerations.[47] In *Canada Trust Co v Ontario Human Rights Commission (C.A.)* 1990 CanLII 6849 (ON CA); 74 OR (2d) 481 (*Canada Trust*),[48] which was concerned with whether the terms of a scholarship trust were contrary to public policy. Robins JA held:

'In my opinion, the trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.

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[45] See, inter alia, François Du Toit above fn 43.
[46] *Spence v BMO Trust Company* 2016 ONCA 196 (*Spence v BMO Trust*) para 31.
[47] Id para 38.
[48] *Canada Trust Co. v Ontario Human Rights Commission (C.A.),* 1990 CanLII 6849 (ON CA); 74 OR (2d) 481; 69 DLR (4th) 321; 38 ETR 1; 12 CHRR 184; [1990] CarswellOnt 486; [1990] OJ No 615 (QL).

. . .

To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious.

. . .

The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these [discriminatory] lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.'

The learned judge took the view that those terms were antithetical to Canadian values and its continued operation was against the public interest. He accordingly concluded that the 'settlor's freedom to dispose of his property . . . must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.'

[59] *Canada Trust* thus endorsed the approach that contemporary values may be applied to instruments of the kind encountered here to impugn dispositions on grounds of public policy. The approach espoused in *Canada Trust* was echoed by this court in *Curators, Emma Smith Educational Fund v The University of KwaZulu-Natal* [2010] ZASCA 136; 2010 (6) SA 518 (SCA) (*Curators, Emma Smith Educational Fund).* In the latter matter the court was confronted with an application to amend a deed by the deletion of provisions that discriminated on the grounds of race and gender. It was submitted that the anti-discriminatory and equality provisions of s 9 of the Constitution, as also public policy, authorised the court to do so. This court took the view that:

'The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need, administered by a publicly funded educational institution such as the University, must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past.'

[60] It is important to emphasise that we are not concerned here with matters of the ilk of *Canada Trust* and *Curators, Emma Smith Educational Fund.* Those cases concerned charitable public trusts subject to overt discriminatory conditions based on race, religion and gender. As the former case made clear (per Tarnopolsky JA), the general rule is that in order to achieve charitable status, a trust must be wholly and

exclusively charitable and it must promote a public benefit. To satisfy the public benefit requirement, the trust must be beneficial and not harmful to the public and its benefits must be available to a sufficient cross section of the public. In the latter case, there are also repeated references to the public element involved in the trust and to the university as an institution funded by the public.[49] Notably, the court stated:

'In the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster.[50]

. . .

It bears repetition that the university is a publicly funded institution that is obliged to serve all sections of society and cannot be seen to associate itself with racially discriminatory practices.'[51]

[61] Importantly, *Canada Trust* did draw the following important distinction:

'A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection . . . This preferential treatment is justified on grounds that charitable trusts are dedicated to the benefit of the community. It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void.'

[62] Similar sentiments were expressed by this court in *Curators, Emma Smith Educational Fund* (at para 41):

'The curators argued that the judicial amendment of a public charitable trust's provisions will have a chilling effect upon future private educational bequests. I cannot agree. We are not called upon to decide the case of a testator who is a member of a congregation wishing to create a trust for members of his faith or a club member intending to benefit the children of fellow members.'

There is much to be said for public trusts being judged more strictly than private trusts. Unlike the dispositions in *Canada Trust* and *Curators, Emma Smith Educational Fund*, we are concerned here with what occurs in the private and limited sphere of the donor

[49] See paragraphs 30, 38, 42 and 43 of the judgment.
[50] Paragraph 38.
[51] Paragraph 43.

and his direct family. It affects a limited number of people, is of limited duration and is not manifestly discriminatory. Nor, can it be said that at the time when the deed was executed it was intended to infringe the dignity of the second and third appellants.

[63] According to Professor Thomas, 'the divide between public and private sphere should be the deciding factor if freedom of testation is to be taken seriously.'[52] He adds that the 'extension of the priority of equality over freedom in the private sphere will drastically limit the freedom of testation and the freedom to distribute your personal charity in accordance with your own personal wishes, foibles and prejudices.'[53] 'Regardless of the tenability of the public-private-divide', according to Professor Du Toit, 'adjudication of "private bequests" of the kind to which the court referred [in *Curators, Emma Smith Educational Fund* (para 41)] may well introduce additional or different, typically subjective, testator-centred considerations to the unfair discrimination discourse; factors that may tip the balance of the unfair discrimination inquiry in favour of testamentary freedom and away from its limitation on the ground of public policy.'[54]

[64] Freedom of testation, which is an important facet of the right to dignity, protects an individual's right not only to unconditionally dispose of her property, but also to choose her beneficiaries as she wishes. Hence, counsel for the appellants was constrained to accept that the donor in this case was free to expressly exclude adopted children, if he so desired. For that matter, he was equally free to expressly exclude one or more of his biological children. In any unfairness analysis the extent to which rights and interests have been affected is relevant. No beneficiary has a fundamental right to benefit. We are concerned here with free gifts to which no person has any entitlement. Benefitting a class necessarily entails excluding persons who do not belong to that class. But, there is a subtle, yet significant, distinction between making that sort of choice and discriminating against people who do not belong to that

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[52] Jan Hallbeek, Martin Schermaier, Rorberto Fiori, Enerst Metzger and Jean-Pierre Coriat *Inter Cives Necnon Peregrinos Essays in honour of Boudewijn Sirks; Phillip Thomas' The intention of the testator: from the causa Curiana to modern South African law* (2014) at 727-738.
[53] Id at 738.
[54] François du Toit '*Constitutionalism, Public Policy and Discriminatory Testamentary Bequests—A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdiction?*' Tulane European & Civil Law Forum [Vol 27 2012] 97 at 126.

class.[55] It has thus come to be suggested that 'a so-called out-and-out disinheritance can probably not be challenged on constitutional grounds and the testator's freedom of testation should have priority in such a situation.'[56]

[65] However, the same does not necessarily apply where a beneficiary has been included, but some or other condition is attached to the benefit. It is so that courts have recognised various categories of cases where public policy may be invoked to void a conditional testamentary gift.[57] A feature of those cases is that the conditions at issue required a beneficiary to act in a manner contrary to the law or public policy in order to benefit or obliged the executors or trustees to act in a manner contrary to law or public policy. Such conditions are treated as *pro non scripto.* Importantly, the setting aside of such a condition does not have the effect of disinheriting the beneficiary. The beneficiary receives the benefit free of the condition.[58] Prof De Waal[59] holds the view that where prescriptive conditions are attached that have the effect of influencing the conduct of the beneficiary in some way (for example, a condition that prohibits a beneficiary from marrying outside a particular race or religion), freedom of testation may have to yield to the right of equality.

[66] Here, despite the fact that no such conditions or stipulations have been imposed the appellants seek to extend that principle to this case. In *Spence v BMO Trust*, the Court of Appeal for Ontario dealt with argument that 'the courts have an overarching authority to examine the validity of a testamentary residual bequest on public policy grounds', in these terms: '[o]n their argument, this authority extends to cases where the terms of the bequest do not include discriminatory conditions but evidence is tendered that a testator's alleged motive in making the bequest offends public policy. I see no support in the established jurisprudence for the acceptance of

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[55] Above fn 40.
[56] De Waal & Schoeman-Malan *Law of Succession* 5ed at 136.
[57] As was pointed out in *Spence v BMO Trust*, these include cases involving: i) conditions in restraint of marriage and those that interfere with marital relationships, e.g., conditional bequests that seek to induce celibacy or the separation of married couples; ii) conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent; iii) conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation; and iv) conditions that incite a beneficiary to commit a crime or to do any act prohibited by law.
[58] Above fn 31 at 48.
[59] Prof MJ De Waal *Bill of Rights Handbook* edited by Mokgoro & Tlakula para 3G-10.

such an open-ended invitation to enlarge the scope of the public policy doctrine in estates cases.'

[67] The facts in *Spence v BMO Trust* were these: The appellant, Verolin and her son, AS, sought a declaratory order that the will of her late father, Eric, was void because it was contrary to public policy. Verolin asserted that her father, a Jamaican by birth, had disinherited the two of them because AS's father was a white. The court held:

'[73] . . . Here, assuming that Eric's testamentary bequest had been facially repugnant in the sense that it disinherited Verolin for expressly stated discriminatory reasons, the bequest would nonetheless be valid as reflecting a testator's intentional, private disposition of his property – the core aspect of testamentary freedom.'

[68] Prof De Waal argues persuasively that provisions of the kind encountered here are immune to attack. After reviewing the comparative German law, he concludes that where freedom of testation and equality are in conflict, the German law draws a distinction between dishersion, on the one hand, and conditions, on the other. That distinction is often decisive.[60] In cases where our courts have intervened thus far to eliminate discriminatory provisions in the deeds of charitable educational trusts of a public nature, the effect of the relief granted did no more than widen the pool of prospective applicants for bursaries. The relief granted did not take away benefits conferred on the selected beneficiaries, nor confer those benefits on other specified persons. The appellants ask this court to do exactly that in the context of a private family trust deed.

[69] It must not be forgotten that when the deed was executed in 1953, the terms were certain and valid and not contrary to public policy. It goes without saying that a blunt application of the right to equality could lead to a range of insurmountable practical difficulties. One can well imagine a host of deeds, which when executed were also certain and valid and not contrary to public policy.[61] If adopted children in this

[60] Id para 3G-8.

[61] In this regard, we may need to remind ourselves, as Middleton JA did in *Re Millar* [1936] OR 554, 'I take it for granted that a judgment dealing with questions of public policy would be regarded as unsatisfactory and incomplete if it made no reference to Chief Justice Hobart's unruly horse. I shall pay my respects to that animal by quoting from Burrough J. in Richardson v. Mellish (1824), 2 Bing. 229, at p. 252: "I, for one, protest . . . against arguing too strongly upon public policy; it is very unruly horse, and

instance, what about illegitimate children in the next? As illustrative of the insurmountable practical difficulties, Corbett et al state: 'Consider what might ensue were the validity of a will or a provision in it is open to challenge by A, as, say, turning out to institute only male children as heirs; or leaving legacies to grandchildren who happened to be white in appearance . . .'[62] Examples abound. Where is the line to be drawn? And, more importantly, what is the remedy to be? Must a court rewrite the deed by inserting those aggrieved as beneficiaries? 'In short', as Professor Thomas puts it, 'the enigma what the testators actually intended has been compounded by the anachronistic determinant of what they should have intended.'[63]

[70] In any balancing process, the principle of freedom of testation must be given appropriate weight. To once again borrow from Professor Du Toit: '[a] careful reading of the South African judgments . . . reveals that testamentary intent, motive or purpose still have a role to play to temper the rigidity that could result from an objective, normative, strictly policy-based approach to the limitation of freedom of testation in regard to discriminatory gifts and trusts . . . makes it explicit that South African testators still enjoy the freedom to accommodate differentiation in their dispository plans, as long as it does not occasion unfair discrimination in constitutional terms.'[64] We are not here concerned with a deed that contains gratuitously discriminatory provisions of an egregious kind.[65] That notwithstanding, the appellants would have us rewrite the deed, by instituting persons as beneficiaries, who have been excluded by the donor. I can find no juridical basis for us to do so. 'To conclude otherwise would undermine the vitality of testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.'[66] Public policy, it bears remembering, does not depend on the 'idiosyncratic inferences of a few judicial minds.'[67] Thus, although there are cases where the interests of society require a court's interference on the grounds of public policy, this is manifestly not such a case.

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when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.'

[62] Above fn 31 at 434.

[63] Above fn 52.

[64] Above fn 54 at 126.

[65] Above fn 40.

[66] *Spence v BMO Trust* para 75.

[67] Public policy should be invoked only in clear cases, in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds (per Crocket J, *In Re Millar* [1938] SCR 1 at 7, quoting Lord Atkin in *Fender v Milday* [1937] 3 All ER 402).

[71] The appellants rely in the alternative, on s 13 of the Trust Property Control Act 57 of 1988. That section headed 'Power of court to vary trust provisions' reads:

'If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which –

(a) hampers the achievement of the objects of the founder; or

(b) prejudices the interests of beneficiaries; or

(c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.'

[72] For a court to intervene, two requirements need to be met. First, the offending provision must bring about consequences which in the opinion of the court the founder did not contemplate or foresee. Second, the provision must either hamper the achievement of the object of the founder or prejudice the interests of the beneficiaries or be in conflict with the public interest. My earlier conclusion is destructive of the contention that the provisions of the deed bring about consequences which the donor did not contemplate or foresee. That means that the first requirement has not been met.

[73] As regards the second requirement: The object of the donor was clearly to provide income to his children and capital to their descendants. Since the language used in the trust deed has exactly that effect, it cannot be suggested that the relevant provisions hamper the achievement of that object. Nor, in my view, are the relevant provisions in conflict with the public interest. Finally, the relevant provisions plainly do not prejudice the interests of the beneficiaries. This requirement falls to be applied in relation to persons who are indeed beneficiaries. It is doubtful whether it is intended to be a means by which non-beneficiaries can seek to be made beneficiaries. The interests of the true beneficiaries are not prejudiced by the relevant provisions.

[74] There remains the question of the costs of appeal. Although the appellants failed in the court *a quo*, that court ordered that the costs should be borne by the trust. It was submitted on behalf of the appellants that, in the event of the appeal failing, a

similar approach should be followed by this court. I cannot agree. In *Abraham-Kriel Kinderhuis v Adendorff N.O.* 1957 (3) SA 653 (A) at 657A-C, Schreiner ACJ stated:

> 'It is well recognised that the fact that the obscurity of the testator's language has led to litigation often justifies an order, even in the absence of consent, that the costs of all parties should come out of the estate. But if the matter is taken on appeal different considerations arise. It may be reasonable to seek the decision of one Court, even if one's view is wrong, but unreasonable to persist in one's wrong view to the extent of appealing. Other parties interested in the estate should not be made to suffer for one's persistence. This distinction has often been recognised.'

In the circumstances costs should abide the result.

[75] In the result, I would dismiss the appeal with costs.

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V M Ponnan

Judge of Appeal

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