

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

Case number: 4024/2024

In the matter between:

PETER OTTO ALBERT GEES

Applicant

and

JOHN MARR REX DUTHIE

First respondent

ANTHONY CRAIG PARKER

Second respondent

THE MASTER OF THE HIGH COURT, CAPE TOWN

Third respondent

JUDGMENT DELIVERED ON 10 OCTOBER 2024

Delivered electronically via email

VAN ZYL AJ:

Introduction

1. The facts of this matter are largely common cause. On 17 May 2001 Jean-Mary Duthi,¹ as founder, executed the trust deed of the Woodbourne

¹ The parties refer to her as “Jean-Mary” in the papers, and I shall do the same.

Trust, together with Craig Ian Tingle (“Tingle”) and the first respondent (“Duthie”). The trust was duly registered by the third respondent. Duthie and the second respondent (“Parker”) are currently the two trustees of the trust.

2. On the day of the execution of the trust deed, 17 May 2001, Jean-Mary signed a declaration of appointment of the applicant as protector for the purpose of and subject to the provisions of clause 33 of the trust deed, which regulates amendments to the trust deed. I shall set return to the provisions of clause 33 and its proper interpretation.
3. On 9 July 2002 Jean-Mary in writing nominated the applicant as her successor as trustee, of the trust in terms of clause 4(b) of trust deed. She repeated that nomination in clause 11 of her will.² Clause 4(b) deals with the nomination of a person or persons to be appointed as a trustee or trustees on the death or vacating of office of an existing trustee.
4. On 1 December 2020 Jean-Mary and Duthie, in their capacities as trustees and beneficiaries of the trust, and Parker in his capacity as a trustee, concluded an agreement for the amendment³ of the trust deed.
5. Jean-Mary executed a last will on 2 October 2020, and died on 31 July 2023. The applicant is the executor of her deceased estate, having been appointed as such in her will. He brings this application in both his official and his personal capacity.
6. Two issues arise for determination: first, whether the applicant should be appointed as a trustee of the trust; and second, whether the amendment

² The formulation in the will is a wider one, nominating the applicant as her successor as trustee in respect of all trusts of which she is a trustee; but that obviously includes the Woodbourne Trust.

³ Entitled “Agreement of Variation”.

to the trust deed in 2020 was valid.

Principles of interpretation

7. The case turns on the proper construction of clauses 4(b) and 33(a) of the trust deed. The principles that apply to the interpretation of documents such as the trust deed are by now well-established. As appears from the relevant case law,⁴ the inevitable point of departure is the language of the provision itself, with meaning to be attributed to the language used in the light of the ordinary rules of grammar and syntax.
8. Regard must be had to the context in which the provision appears, and the apparent purpose to which it is directed. From the outset one considers the context and the language together. Context is provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence, including the parties' subsequent conduct.
9. The process of interpretation is objective, not subjective.
10. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The Court must however be alert to, and guard against, the temptation to substitute what it regards as reasonable, sensible or businesslike for the words actually used, that is, not to cross the divide between interpretation and creating a contract for the parties.

⁴ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras [18]-[19]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at paras [10]-[12]; *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at paras [61]-[64]; *University of Johannesburg v Auckland Park Theological Seminary and another* 2021 (6) SA 1 (CC) at para [68]; *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) at paras [47]-[50].

11. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of the words and sentences that comprise the contested provision as they fit into the larger structure of the document, its context and purpose. It is not a partial selection of interpretational materials directed at a predetermined result.
12. The issues in dispute are discussed against this background.

The applicant's nomination as trustee in the context of clause 4(b) of the trust deed

13. Clause 4(b) of the trust deed reads as follows:

"The Trustees shall be entitled, under a written instrument, to nominate the person or persons who shall be appointed as Trustee or Trustees to take the place of any Trustee dying or vacating office for any reason and to provide for the order of priority in which any persons so nominated shall be appointed. They shall further have the right by subsequent written instrument to change or vary any nomination so made before effect is given thereto. The Trustees shall make such appointments as shall be necessary to give effect to any nomination or nominations made in terms of this sub-clause."

14. Clause 4(b) of the trust deed entitles the trustees, in writing, to nominate the person or persons who shall be appointed as trustee or trustees to take the place of any trustee dying or vacating office. The trustees must make such appointments as shall be necessary to give effect to any nomination or nominations made in terms of the provision. There are accordingly two stages to the process of substituting a deceased trustee or one who has

vacated office. At the first stage, a replacement trustee is nominated. At the second stage, a replacement trustee is appointed.

15. The second-stage appointment is clearly to be made by the remaining trustees – this is indicated by the last sentence of clause 4(b). Self-evidently, the remaining trustees, acting collectively, are tasked with taking the steps necessary to give effect to a nomination.
16. What is in dispute between the parties is whether the first-stage nomination, too, must be made by the trustees collectively, or whether instead each trustee is entitled individually to nominate his or her successor, to which effect will be given by the remaining trustees once the office of the nominating trustee falls vacant. Duthie and Parker contend for the former interpretation. The applicant argues that, because of his nomination by Jean-Mary as trustee in her stead, on her death Duthie and Parker (the remaining trustees) were obliged to give effect to that nomination by appointing him as trustee in terms of clause 4(b).
11. It is necessary to look at the wider context appearing from the trust deed.
12. Clause 4(a) of the trust deed provided for the appointment as the first trustees of Jean-Mary, being the founder, of Duthie (who is one of Jean-Mary's four children), and of Tingle. Clause 19(b) of the trust deed provided⁵ that the trust beneficiaries were Jean-Mary, her children, and the grandchildren born or to be born of Jean-Mary and their further descendants. The first trustees thus comprised the founder, a trust beneficiary trustee, and an independent trustee.
13. In terms of clause 34 (the interpretation clause in the trust deed) the

⁵ Prior to an amendment in September 2001.

trustees are defined as meaning the trustees for the time being of the trust. In terms of clause 4(d), there shall at all times be not less than two trustees.

14. The powers of the trustees are set out in clause 7 of the trust deed. Clause 7(j) provides for wide residual powers:

“Without in any way derogating from the powers and authorities hereinbefore vested in the Trustees, they shall have such ancillary and/or additional powers as shall be necessary or requisite to enable them from time to time to deal with all matters appertaining to the Trust in such manner as they shall deem advisable in the interest of the Trust.”

15. It is a fundamental rule of trust law that, in the absence of contrary provisions in the trust deed, the trustees must act jointly if the trust is to be bound by their acts (referred to as the joint action requirement).⁶ The rule is of general application to the exercise of trustee powers. Thus, for example, the residual powers conferred by clause 7(j), absent any provision to the contrary, are to be exercised collectively by virtue of the joint action requirement.
16. In terms of clause 12 of the trust deed, in the event of any disagreement between the trustees, the decision of the majority of them shall prevail. In the event of an equality of votes, the matter under discussion shall be dropped.
17. If the language of clause 4(b) is the point of departure, the clause is clear and unambiguous. The trustees (plural) are empowered to nominate a person or persons to take the place of any trustee dying or vacating office.

⁶ *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para [15].

They (that is, the trustees) also have the right by subsequent written instrument to change or vary any nomination before effect is given thereto. The language is consistent with the joint action requirement.

18. The applicant contends, however, that clause 4(b) should be understood to mean that any trustee (individually) shall be entitled to nominate the person who shall be appointed as the trustee to take the place of the nominating trustee on the latter's dying or vacating office. He argues that the employment of the plural word "*Trustees*" at the beginning of the first sentence of clause 4(b) gives rise to two possible meanings. One is that all the trustees, acting jointly, are entitled to nominate a successor trustee. The other is that each of the trustees, acting singly, is entitled to nominate his or her successor trustee. The former meaning is, according to the applicant, contradicted by the immediate context, the wider context, and the purpose of the provision. It results in superfluity and absurdity. The latter meaning gives rise to none of those difficulties. It is accordingly to be preferred.
19. There is no dispute that the power of assumption or subrogation⁷ may be given to trustees. Where such power is conferred on trustees it is to be exercised by all of the trustees in office at the time of the assumption, unless the trust deed indicates the contrary.⁸ I agree, however, with the submission made by counsel for the respondents that the applicant's problem is textual: the applicant's interpretation would require a material reworking of clause 4(b) along the following lines (counsel usefully included a version in his heads of argument where strikethrough indicates deletion and underlining indicates addition, and I replicate his version here):

⁷ The power of assumption combined with the power of to resign from the trust: Cameron *et al* *Honor's South African Law of Trusts* (6ed) at p 218.

⁸ *Honore supra* at p 214.

~~"The Trustees~~ Any Trustee shall be entitled, under a written instrument, to nominate the person or persons who shall be appointed as Trustee or Trustees to take the place of ~~any~~ that Trustee dying or vacating office for any reason ~~and to provide for the order of priority in which any persons so nominated shall be appointed.~~ ~~They~~ He or she shall further have the right by subsequent written instrument to change or vary any nomination so made before effect is given thereto. The Trustees shall make such appointments as shall be necessary to give effect to any nomination or nominations made in terms of this sub-clause.'

20. The applicant argues that a construction based on the plain language of clause 4(b) as advanced by Duthie and Parker renders the nomination to which the trustee was to be a party meaningless, and has the result that clause 4(c) cannot co-exist with clause 4(b). Clause 4(c) provides as follows:

"Anything to the contrary hereinbefore contained notwithstanding, the Trustees shall at all times have the right to nominate and appoint such additional Trustee or Trustees as they shall determine."

21. I do not agree that clauses 4(b) and (c) cannot co-exist on the plain language construction preferred by Duthie and Parker. The purpose, respectively, of clause 4(b) and of clause 4(c) is different.
22. The applicant contends that on the respondents' interpretation clause 4(b) would be meaningless when regard is had to the second sentence of clause 4(b): *"They shall further have the right by subsequent written instrument to change or vary any nomination so made before effect is given thereto."*

23. The initial pronoun "[t]hey" of this sentence would, on the interpretation of Duthie and Parker, be a reference to the trustees collectively. But effect is only given to a nomination after a trustee has died or vacated office. Thus, by the time effect is given, the trustee who is to be replaced is no longer a trustee. On the interpretation favoured by Duthie and Parker, therefore, the nomination to which that trustee was a party is meaningless, as the remaining trustees can simply change such nomination before giving effect to it. If the clause is purposively interpreted, the purpose of clause 4(b) being to permit a trustee to nominate a successor, it means that each trustee may nominate his or her successor, and the remaining trustees must give effect to such nomination once that trustee has died or vacated office.
24. The applicant's argument seems to me to be a bridge too far given the clear wording of the clause. Clause 4(b) permits the trustees to nominate one or more replacement trustees, and to stipulate for the order of priority in which such persons are to be appointed. It provides for "succession planning" by nominating designated persons to replace the donor trustee, the beneficiary trustee, or the independent trustee. This is a power which must be exercised by the trustees collectively, in line with the joint action requirement.
25. Conferring a power to change or vary a nomination by subsequent written instrument before effect is given to it preserves a necessary power to change the succession plan, as circumstances may require. The only limitation on the power to change or to vary a nomination is that this must be done prior to effect being given thereto. Regarding the fact that clause 4(b) obliges the trustees to make such appointments as shall be necessary to give effect to any nomination, a variation can only be made prior to the death of or the vacating of office by the trustee in

question.

26. Clause 4(c) provides for the appointment of an additional trustee or trustees, as opposed to a replacement trustee or trustees. The trustees have the power to appoint additional trustees at any time during the existence of the trust, should it be necessary. The clause thus caters for a different situation. There is no reason why clauses 4(b) and 4(c) should not co-exist, given that they address different situations.
27. In these circumstances, there is no basis to contend, as the applicant does, that the ordinary language of clause 4(b) renders the nomination process meaningless. The presumption against superfluity⁹ does not come into play.
28. The applicant argues that, in the broader context, there is one fact of great significance: Jean-Mary twice nominated the applicant to succeed her as trustee, and acted alone in doing so. She therefore certainly was of the view that clause 4(b) authorised her to nominate her own successor. The importance of this lies therein that in seeking to ascertain the intention of the parties, a court must examine all the circumstances surrounding the conclusion of the contract - in this case the execution of the trust deed - *"including any relevant subsequent conduct of the parties"*.¹⁰
29. In *Kooij v Middleground Trading 251 CC and another*¹¹ the Supreme Court of Appeal held that:

"It is true that a Court can, when interpreting a contract, have regard to the

⁹ See *Wellworths Bazaars Ltd v Chandler's Ltd and another* 1947 (2) SA 37 (A) at 43.

¹⁰ *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash and Carry (Pty) Ltd and another* 2017 (2) SA 24 (SCA) at para [12].

¹¹ [2020] ZASCA 45 (23 April 2020) at para [16].

parties' subsequent conduct in order to determine what they intended. This Court has, however, made it clear that the use of such evidence is circumscribed. It laid down that such evidence may be accepted subject to three provisos. First, the evidence must be indicative of a common understanding of the terms and meaning of the contract. Second, the evidence may be used as an aid to interpretation and not to alter the words used by the parties. Third, that evidence must be used as conservatively as possible."

30. When considering the language of clause 4(b) in the context of the trust deed as a whole and the joint action requirement, I do not think that the way in which Jean-Mary saw her powers of nomination carries great weight. There is no evidence as to her understanding of the clause other than her unilateral nominations. She may well have done so mistakenly. As appears from the discussion below, she further acted on her own (without the assistance of the protector she had appointed under clause 33) on two occasions in amending the trust deed. Her conduct, whether in nominating her successor or appointing a protector, therefore does not add much of value to the debate.
31. In the circumstances, I find that Duthie and Parker are not obliged to appoint the applicant as trustee of the trust.

The December 2020 amendment of the trust deed

32. Clause 33 of the trust deed provides the following:

"AMENDMENT OF TRUST DEED

- (a) During the lifetime of the DONOR this Trust Deed may be amended

from time to time in such manner as shall be agreed upon between the DONOR or such person (hereinafter referred to as "the Protector") should the DONOR have appointed same during her lifetime per sub-clause 33(c) hereunder, as the case may be, and the Trustees.¹²

- (b) *After the death of the DONOR this Trust Deed may be amended from time to time in such manner as may be agreed upon between the Trustees and the Protector who shall be nominated in terms of the provisions of the next succeeding sub-clause.*
- (c) *The Protector shall be:-*
 - (i) *Such person as shall be nominated by the DONOR by written instrument during her lifetime or in her Last Will and Testament;*
 - (ii) *If the DONOR shall have failed during her lifetime to nominate the Protector then the Protector shall be nominated in writing by the Executors of the DONOR'S Estate;*
 - (iii) *The Protector nominated in terms of (i) or (ii) above shall be entitled by written instrument to nominate his successor and such successor and each subsequent successor shall similarly have the right to nominate his successor.*
- (d) *No amendment of the Trust Deed made pursuant to the above provisions shall be of any force or effect to the extent that:-*

¹² Emphasis supplied.

(i) *Any benefit shall be conferred by such amendment on the DONOR or her Estate or*

(ii) *Such amendment shall enable or make it possible for the Trustees to confer any benefit on the DONOR or her Estate.'*

33. As appears from the respondents' papers,¹³ on 28 September 2001 (four months after the execution of the trust deed) the then trustees of the trust, being Jean-Mary, Duthie and Tingle, resolved to distribute trust property to three of the beneficiaries, being Duthie's siblings Lynne, Caroline and Andrew. On receipt of this property, those siblings and their descendants would no longer participate in any further trust distributions. On the same day the trustees resolved to amend clause 19(b) of the trust deed by substituting clause 19(b) to provide that the trust beneficiaries would be Jean-Mary, Duthie, and Duthie's children ("the beneficiary resolution").
34. At no time relevant to the beneficiary resolution did Jean-Mary indicate to Tingle or Duthie as her co-trustees that she had nominated the applicant as the protector, or that it was necessary to obtain the protector's consent to the beneficiary resolution.
35. At the time of the trust deed amendment in December 2020 Jean-Mary, Duthie and Parker discussed the appropriateness of increasing the minimum number of trustees from two to three; the fact that provision for the appointment of a protector was no longer necessary, given changed circumstances, and in particular the fact that Duthie's siblings and their descendants were no longer trust beneficiaries. Again, Jean-Mary did not mention that the applicant had been appointed as protector, or that the protector had any role to play.

¹³ The applicant seeks final relief on motion: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

36. The applicant says that, because of his appointment as the protector, any amendment of the trust deed during Jean-Mary's lifetime required agreement between himself, as protector, and the trustees. This argument rests solely on the phrase "*as the case may be*" in clause 33(a). This phrase, so the argument goes, indicates that there may or may not be a protector: it depends on whether Jean-Mary has appointed one. If the case is that there is a protector, then the agreement to amend must be between the protector and the trustees.
37. I agree with counsel for the respondents, however, that the phrase does not have the effect contended for by the applicant. It seems to me that the phrase "*as the case may be*" in this context simply means "either/or". Thus, in terms of clause 33(a) amendments to the trust deed during Jean-Mary's lifetime may be done in two ways:
- 37.1. By agreement between Jean-Mary (as donor) and the remaining trustees; or
- 37.2. if a protector has been appointed, by agreement between the protector and the trustees.
38. There is no sensible reason why, at the time of establishing the trust and simultaneously signing the declaration of the applicant's appointment as protector, Jean-Mary would have intended that trust deed amendments should require not only the agreement of herself and the remaining trustees, but the agreement of the protector in addition. The sensible and businesslike construction of clause 33(a) is that the role of the protector, if appointed by the donor during her lifetime, was to participate in considering proposed amendments where this was considered necessary,

for example, in the case of a deadlock between two trustees.

39. The fact that when the agreement to amend was concluded, Jean-Mary was 92 years of age, does not advance the applicant's case. It is speculation to say that it would have been sensible for her to have the protection of the applicant. There is no evidence on record indicating that Jean-Mary required protection.
40. Irrespective of the competing constructions of clause 33(a), any participation of the protector in considering trust deed amendments would not be on the basis that his consent was a prerequisite for a trust deed amendment. The provisions of clause 12 of the trust deed¹⁴ would in any event apply to any consideration of an amendment by the trustees and the protector. In the present case, the trust deed amendment was approved by all three of the trustees, constituting the necessary majority, as well as the donor.
41. In the circumstances, the December 2020 amendment to the trust deed is valid.
42. As indicated, on the papers the applicant's appointment as protector on 17 May 2001 was never acted upon or communicated to the other trustees. It only came to the attention of Duthie and Parker after Jean-Mary's death. In fact, the protector did not take part in the amendment to the trust deed effected on 28 September 2001 (amending clause 19(b) in relation to beneficiaries), four months after his appointment.
43. The respondents argue that, for there to be an effective appointment of a

¹⁴ "In the event of a disagreement between the Trustees at any time, the decision of the majority of them shall prevail and be of the same force and effect as if it were a unanimous decision of the Trustees. In the event of an equality of votes, the matter under discussion shall be dropped."

protector by the donor during her lifetime in terms of clause 33(a), the nomination by the protector in terms of s 33(c)(i) must at least have been notified to the trustees. Failing this basic requirement, amendments to the trust deed might be agreed to by the trustees and implemented (as was the case here), only to be met with a hitherto undisclosed appointment of a protector made over 20 years previously.

44. I agree with this proposition, although it is not strictly necessary to decide given the interpretation that I regard as proper in relation to clause 33(a).

Parker's authority as trustee

45. In further support for the argument that the 2020 amendment to the trust deed was not validly done, the applicant challenges Parker's authority as trustee on the basis that, to the applicant's knowledge, no letters of authority had been issued by the Master to Parker prior to 5 May 2022. This was the date on which the Master had issued letters of authority to Jean-Mary, Duthie and Parker.
46. In the answering affidavit Duthie puts up a Master's certificate of 14 April 2014 authorising Parker to act as a trustee, together with Jean-Mary and Duthie after Tingle's resignation, such resignation being specifically noted. The certificate is dispositive of the challenge to Parker's authority.
47. In his replying affidavit the applicant speculates as to why the Master issued the letters of authority of 5 May 2022, and suggests that absent an explanation it may be inferred on the probabilities that Parker was not a duly authorized trustee at the time of the amendment of the trust deed in 2020. The applicant also strenuously criticizes the way in which Duthie dealt with the issue in the answering affidavit, effectively saying that

Duthie said too much when he could have gone straight to the 2014 certificate.

48. I do not think that the inference suggested by the applicant is justified. As counsel for the respondents pointed out, one obvious possible reason for the issuing of fresh letters of authority to the trustees collectively would have been because of the change in the composition of the trustees when Parker replaced Tingle. The 2014 certificate refers to Tingle's resignation; the 2022 certificate is simply issued to Parker, Duthie and Jean-Mary. Disputes of fact in motion proceedings are, in any event, not decided on the probabilities.¹⁵ Parker's evidence that he was authorized at the time is supported by the Master's certificate. His evidence, and Duthie's, in this respect is not so bald, sketchy or far-fetched as to fall to be rejected on the papers. On *Plascon Evans*, that is the end of the matter.
49. On the papers I find that Parker was duly authorized as trustee at the time of the December 2020 amendment of the trust deed.

Conclusion, and costs

50. In all of these circumstances, I am not inclined to find in the applicant's favour.
51. The applicant submits that, in the event of his application being unsuccessful, the costs of the application should be born by Jean-Mary's deceased estate. This is because his nomination as trustee was repeated in the will, and because Jean-Mary had appointed him as protector. His case is not frivolous, and he brought it to fulfill Jean-mary's wishes in relation to the trust as evident from her will.

¹⁵ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [26].

52. The applicant's claim for his appointment as trustee to the trust relies on the nomination of 9 July 2002 (albeit repeated in Jean-Mary's will), whilst his dispute about the amendment of the trust deed rested on his appointment as protector on 17 May 2001. These aspects involve the trust, and are not related to Jean-Mary's deceased estate. The applicant did not have to bring this application in his capacity as executor of the estate, and there is no reason why the estate should bear the costs.

Order

53. I accordingly make an order as follows:

53.1. The application is dismissed.

53.2. The applicant is to pay the costs of the application in his personal capacity, including the cost of counsel on Scale C.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant: E. Fagan SC and M. Smit, instructed by MacGregor Stanford Kruger Inc.

For the first and second respondents: S. P. Rosenberg SC , instructed by Kaplan Blumberg Attorneys Inc.