



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 171/23

In the matter between:

SHEPSTONE AND WYLIE ATTORNEYS

Applicant

and

ABRAHAM JOHANNES DE WITT N.O.

First Respondent

R[...] E[...] V[...] N.O.

Second Respondent

S[...] S[...] V[...] N.O.

Third Respondent

T[...] P[...] V[...] N.O.

Fourth Respondent

Neutral citation: *Shepstone and Wylie Attorneys v De Witt N.O. and Others* [2025] ZACC 14

Coram: Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Rogers J, Theron J, Tolmay AJ and Tshiqi J.

Judgment: Tolmay AJ (unanimous)

Heard on: 22 August 2024

Decided on: 1 August 2025

Summary: Trust law — whether trust bound by suretyship agreement — decision made at quorate meeting in absence of one trustee —

interpretation of trust deed — distinction between unanimous-decision trusts and majority-decision trusts

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following order:
 - “(a) The appeal is upheld with costs.
 - (b) The order of the High Court is set aside and replaced with the following:

‘The special point *in limine* relating to the alleged invalidity of the deed of suretyship is dismissed with costs.’”
4. The respondents are ordered to pay the costs of the applicant in this Court.

JUDGMENT

TOLMAY AJ (Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Rogers J, Theron J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against the whole judgment and order of the Supreme Court of Appeal. The applicant is Shepstone and Wylie, a law firm.

The respondents are the trustees for the time being of the Penvaan Property Trust (Trust).

[2] The Supreme Court of Appeal dismissed Shepstone and Wylie's appeal against a High Court order dismissing their application to hold the Trust liable in terms of a deed of suretyship signed on 25 May 2013. The deed of suretyship bound the Trust in favour of Shepstone and Wylie for the personal indebtedness of Mrs M[...] P[...] V[...] (Mrs V[...]) in respect of legal fees incurred in her divorce from Mr T[...] W[...] V[...] (Mr V[...]). Mr and Mrs V[...] were at that time trustees of the Trust. At issue is whether the Trust can be bound to the deed of suretyship where the Trust Deed includes a quorum clause and the decision to enter into suretyship was made at a quorate meeting, but where one of the trustees was absent. The High Court was only required to decide this issue as a point *in limine* (preliminary point). At the centre of the dispute is the question whether two trustees were authorised to enter into the suretyship agreement with Shepstone and Wylie.

Factual background

[3] The Trust is a property trust founded in 1994. In terms of its Trust Deed (Trust Deed), its beneficiaries are Mr V[...], Mrs V[...] and Mr V[...]’s descendants.

[4] The Trust Deed further includes the following relevant provisions:

- (a) Clause 4 requires the Trust to have at least two trustees (before the 2001 amendment of the Trust Deed, it required a minimum of three trustees).
- (b) Clause 11 empowers the trustees to deal with trust property and trust income for the Trust's benefit and purpose. This clause furthermore provides that the powers will include the powers stated in the appendix to the Trust Deed (appendix).
- (c) Clause 13 regulates trustee meetings. Clause 13.2 requires a quorum of two trustees at trustee meetings (before the 2001 amendment of the Trust Deed, a quorum of three trustees was required). Clause 13.4

provides that a written resolution signed by all trustees “shall be as effective as a resolution taken at a meeting of trustees”.

- (d) Clause 14 states that all documents required to be signed on the Trust’s behalf must be signed by at least two trustees.
- (e) Clause 16 headed “disagreement between trustees” requires the trustees present at a meeting to elect a chairperson, and states that Mr V[...] shall be the chairperson for as long as he is a trustee.
- (f) Clauses 23 and 24 provide that the trustees shall use the trust’s income and property for “the welfare of all or any one or more of the beneficiaries”.

[5] The appendix further sets out specific powers of trustees, including the power in item 16 to guarantee the obligations of any beneficiary.¹ Item 26 of the appendix reads:

“Provided the Trustees unanimously agree, to conduct business on behalf of and for the benefit of the Trust, and to employ Trust property in such business.”

[6] In May 2013, the trustees were Mr and Mrs V[...] and Mr Abraham Johannes de Witt (Mr de Witt). At that time, the Trust and its trustees were involved in two court actions. First, the Penvaan group of companies (the Penvaan Group), in which the Trust (and Mr and Mrs V[...]) had shareholdings, was being wound up and one of the Penvaan Group’s creditors, FirstRand Bank

¹ The introduction of the appendix and item 16 thereof reads:

“POWER TO THE TRUSTEES

Without prejudice to the generality of any of the provisions of the accompanying deed constituting the above Trust the Trustees shall have the following powers which shall be exercisable in their sole and absolute discretion for the purposes and benefit of the Trust, namely:

...

16. To guarantee the obligations of any beneficiary and/or any company of which the Trust and/or beneficiary is a shareholder and to bind the Trust as collateral security for any such obligation undertaken by the Trust, to mortgage, pledge or hypothecate any asset forming part of the trust property.”

Limited (FirstRand), sought to recover the money that it lent the Penvaan Group by sequestrating the Trust, on the basis of deeds of suretyship that Mr V[...] alone had purported to sign on behalf of the Trust for all of the Penvaan Group's debts to FirstRand.² Second, Mr and Mrs V[...] were divorcing, and Mrs V[...] was incurring legal fees from her divorce attorneys, Shepstone and Wylie.

[7] On 16 May 2013, Mrs V[...] gave notice to the trustees of an urgent trustee meeting to consider two matters. First, whether the Trust should oppose an application by FirstRand to sequester the Trust (and to instruct Shepstone and Wylie to be the Trust's attorneys in the matter). Second, whether the Trust should sign a suretyship for Mrs V[...]’s debts to Shepstone and Wylie for the legal fees she was incurring in her divorce action.³ The meeting was scheduled to be held on Thursday, 23 May 2013, in Tweedie, KwaZulu-Natal. On Tuesday, 21 May 2013, Mr V[...] responded by email to her notice, stating that while in principle he had no problem with the meeting, he was unable to attend any trustee meeting that week, due to the short notice. He also objected to the meeting being held in Tweedie, saying that it was too far, and suggested the meeting rather be held in Penvaan, Vryheid, which was closer to his home. He also requested to be given proper advance notice of a trustee meeting so that he could give the other trustees dates well in advance. In response, and on the same day, Mrs V[...], postponed the trustee meeting to Saturday, 25 May 2013, and moved it to Vryheid to accommodate Mr V[...], but she also gave notice that if Mr V[...] did not attend, the meeting would proceed without him.

[8] Mr V[...] did not attend the trustee meeting on 25 May 2013, but Mrs V[...] and Mr de Witt did. At the meeting, the two trustees resolved that the Trust would oppose its sequestration by FirstRand, and that it would act as surety for Mrs V[...]’s legal fees to Shepstone and Wylie in her divorce action against Mr V[...]. The two trustees

² See the High Court judgment on the Trust's sequestration, *First Rand Bank Ltd v Thomas Wilhelm Volker N.O.*, unreported judgment of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, Case No 4035/2013 (20 March 2013) (sequestration judgment) at para 1.

³ *Shepstone and Wylie Attorneys v De Witt N.N.O.* [2023] ZASCA 74; 2023 (6) SA 419 (SCA) (Supreme Court of Appeal judgment) at para 4.

also signed the deed of suretyship in favour of Shepstone and Wylie. Following the 25 May 2013 resolutions, the Trust opposed its sequestration by FirstRand. While the matter before this Court concerns the Trust's resolution for the Trust to be surety for Mrs V[...]’s legal fees, the resolution to oppose the Trust's sequestration was the other resolution on the day of 25 May 2013, and the trustees rely in this Court on the High Court's sequestration judgment dismissing FirstRand's sequestration application.

[9] FirstRand raised a point *in limine* that without Mr V[...], the other two trustees lacked authority to pass a resolution to oppose the sequestration. This point was rejected by the High Court in the sequestration judgment. It was held that the two trustees were duly authorised to oppose the Trust's sequestration and the point *in limine* was dismissed.⁴ The Court held that the fact that the suretyships were signed on behalf of the Trust only by Mr V[...] was not in accordance with clause 14 of the Trust Deed's requirement that documents must be signed by at least two trustees. The suretyship was therefore void *ab initio* (from the beginning).⁵ FirstRand's application to sequester the Trust was therefore dismissed.

[10] Years later, the other resolution made at the 23 May 2013 meeting became contested. This is the matter before us. By 2019, Mrs V[...]’s legal fees incurred in her divorce remained unpaid.⁶ Her debt to Shepstone and Wylie amounted to R2 589 208. So, like FirstRand, Shepstone and Wylie sought to claim payment of Mrs V[...]’s debts to it from the Trust and relied on the 25 May 2013 deed of suretyship when it sued the Trust in the High Court.

Litigation history

[11] In the High Court, Shepstone and Wylie claimed payment of Mrs V[...]’s legal fees from the Trust on the basis of the deed of suretyship. The Trust opposed the

⁴ Sequestration judgment above n 2 at para 4.

⁵ Id at paras 6 and 10.

⁶ Supreme Court of Appeal judgment above n 3 at para 6.

application on the ground that the deed of suretyship, signed only by the two trustees, was not duly authorised by the Trust and was therefore legally incompetent. Only this issue was determined by the High Court as a point *in limine*.⁷

[12] In a judgment delivered on 10 June 2021, the High Court (Bezuidenhout AJ) disagreed with the sequestration judgment's finding that Mr V[...] had participated in the meeting. The High Court stated that "[t]he deed of suretyship potentially imposes a significant obligation on the [T]rust in that it accepts liability as surety and co-principal debtor for Mrs V[...]’s debts to [Shepstone and Wylie]",⁸ and that Mr V[...]’s views regarding the deed of suretyship, which was attached to the notice of the meeting, were not known.⁹

[13] The Court referred to *Parker*,¹⁰ and held that it was reaffirmed by the Supreme Court of Appeal in that case that the principle that trustees must act jointly is part of our common law. The High Court held that here only two of the three trustees acted jointly.¹¹ The Court also cited *Honoré’s South African Law of Trusts*,¹² which addressed the question of whether substantive decisions can be governed by majority decision if the trust instrument does not expressly state as much.¹³ The High Court reasoned that, on an external matter such as the signing of the suretyship agreement, the trustees were obligated by the Trust Deed to act jointly.¹⁴

⁷ *Shepstone and Wylie Attorneys v De Witt N.N.O.* [2021] ZAKZPHC 38 (High Court judgment) at paras 2 and 51.

⁸ *Id* at para 28.

⁹ *Id*.

¹⁰ *Land and Agricultural Development Bank of South Africa v Parker* [2004] ZASCA 56; [2004] 4 All SA 261 (SCA); 2005 (2) SA 77 (SCA) at para 15.

¹¹ High Court judgment above n 7 at para 34.

¹² Cameron et al *Honoré’s South African Law of Trusts* 6 ed (Juta & Co Ltd, Cape Town 2018).

¹³ High Court judgment above n 7 at para 35.

¹⁴ *Id* at paras 38 and 48.

[14] As far as the interpretation of item 26 of the appendix is concerned, the High Court concluded that the word—

“‘provided’ appears to have been used as a conjunction, meaning generally ‘on condition that’ or ‘on condition or understanding that’ . . . and the question will be whether it relates to all the powers set out in the preceding clauses or simply to what is contained in the remainder of [item] 26 [of the appendix].”¹⁵

[15] In the High Court’s view, it was clear from the wording of the heading of clauses 16.1 and 16.2 of the Trust Deed that the latter itself provides that the view of the majority shall prevail only in the event of a disagreement between the trustees.¹⁶ The Court stated that there was “. . . no indication that the trustees had disagreed on the issue of the signing of the deed of suretyship”, which was not referred to in the email written by Mr V[...] on 21 May 2013, and there was no indication that he chose to abstain from the decision. He simply did not participate in the trustee meeting.¹⁷

[16] The High Court also relied on *Le Grange*,¹⁸ which stated, with reference to the decision of *Van der Merwe*,¹⁹ that if the majority of trustees arrive at a decision without participation of all the trustees, unless the Trust Deed authorises otherwise, a decision by the majority of trustees is not binding on the trust. The High Court held that the trustees had to act unanimously when it came to exercising a power which had the effect of making the Trust liable for Mrs V[...]’s debts.²⁰ The High Court stated that even if its view was wrong, and item 26 was not applicable to the exercise of the trustees’ powers in this regard, in the absence of any other clauses in the Trust Deed,

¹⁵ Id at para 44.

¹⁶ Id at para 45.

¹⁷ Id at para 46.

¹⁸ *Le Grange v Le Grange* [2017] ZAKZPHC 2.

¹⁹ *Van der Merwe N.O. v Hydraberg Hydraulics CC; Van der Merwe N.O. v Bosman* [2010] ZAWCHC 129; 2010 (5) SA 555 (WCC).

²⁰ High Court judgment above n 7 at para 48.

the general principle prevails, namely that decisions must be reached unanimously, and the trustees must act jointly.²¹

[17] According to the High Court, this was not the case with that particular decision. Since there was no indication of a disagreement, “clause 16 did not come into play”.²² The High Court was of the view that the deed of suretyship was not duly authorised, dismissed the point *in limine* and declared that the deed of suretyship signed by Mrs V[...] and Mr de Witt was not duly authorised.²³

[18] Shepstone and Wylie unsuccessfully applied for leave to appeal against this order and judgment.

Supreme Court of Appeal

[19] Aggrieved, Shepstone and Wylie appealed to the Supreme Court of Appeal with the leave of that Court. They argued that the 25 May 2013 trustee meeting was consistent with the Trust Deed, as reasonable notice was given and the meeting was quorate. Relying on *Van der Merwe* and *Le Grange*, Shepstone and Wylie contended that a majority decision is competent if adopted by a majority of trustees present at a quorate meeting and where proper notice was given of the meeting.²⁴ They say that these requirements were met.

[20] Shepstone and Wylie further contended that the High Court misdirected itself in finding that item 26 of the appendix required unanimous joint action by the trustees in executing the deed of suretyship. It submitted that item 26, which requires that trustees must unanimously agree to conduct business on behalf of the Trust and to employ Trust property in such business, was only relevant if the Trust wished to

²¹ Id.

²² Id.

²³ Id at para 51.

²⁴ *Le Grange* above n 18 at para 16 and *Van der Merwe* above n 19 at para 16.

conduct business in a commercial sense. Instead, the relevant provision was clause 11 of the Trust Deed, which defines trustees' general powers.²⁵ A unanimous decision on the suretyship was not required, as clause 16 allowed for majority decisions.²⁶

[21] The Trust, on the other hand, agreed with the High Court's reading of item 26 as requiring unanimous resolutions to bind the Trust. Since Mr V[...] did not express his views on the suretyship, or abstain from voting, the 25 May 2013 resolution was invalid.²⁷ Further, the two trustees had no power to sign the deed of surety, as it was not for the Trust's benefit or any of its beneficiaries' welfare.²⁸

[22] The Supreme Court of Appeal produced two judgments.²⁹ Both agreed that Shepstone and Wylie's appeal should be dismissed but differed on the reasons for a dismissal.

Supreme Court of Appeal majority

[23] The Supreme Court of Appeal majority (per Mbatha JA, with Zondi JA and Mocumie JA concurring) noted the trite principles in *Thorpe*,³⁰ *Coetzee*³¹ and *Nieuwoudt*³² that trustees are co-owners of a trust's assets, and so, unless the Trust Deed has a specific majority clause, they must make resolutions jointly to bind the trust.³³ The majority cited *Blockpave*³⁴ to hold that, while trustees can internally disagree on matters, externally they cannot disagree, and all trustees must participate

²⁵ Supreme Court of Appeal judgment above n 3 at para 14.

²⁶ Id at para 16.

²⁷ Id at para 17.

²⁸ Id at para 18.

²⁹ Supreme Court of Appeal judgment above n 3.

³⁰ *Thorpe v Trittenwein* [2006] ZASCA 30; 2007 (2) SA 172 (SCA).

³¹ *Coetzee v Peet Smith Trust* 2003 (5) SA 674 (T).

³² *Nieuwoudt N.N.O. v Vrystaat Mielies (Edms) Bpk* [2003] ZASCA 128; 2004 (3) SA 486 (SCA).

³³ Supreme Court of Appeal judgment above n 3 at paras 20-23 and 25.

³⁴ *Steyn N.N.O. v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB).

in external matters.³⁵ It was noted that the trustees all received notice of the urgent meeting, but Mr V[...] did not attend or participate via proxy. His emails to Mrs V[...] expressed no view on the resolutions to be passed.³⁶ Regarding the reasonable notice requirement contained in clause 13.1 and the requirement of a quorum in clause 13.2, it was found that the two trustees signing the deed of surety was contrary to the clause 13.4 requirement that all trustees signs written resolutions.³⁷

[24] The Supreme Court of Appeal majority purportedly applied *Parker*. It concluded that where a Trust Deed requires trustees to act jointly to bind the trust, a majority decision will not bind the trust if a trustee did not participate in the decision-making. This was said to be imperative when the decision involves trust assets.³⁸ It considered it significant that Mr V[...] did not participate in the 25 May 2013 decisions. The participation requirement was not met merely because he received reasonable notice of the meeting. On this aspect, it concluded that the High Court was correct in holding that the trustees did not act jointly in resolving to execute the deed of suretyship.³⁹

[25] The Supreme Court of Appeal majority further held that Shepstone and Wylie's reliance on the alleged majority clause in clause 16 of the Trust Deed was misplaced, as the clause only applies in instances of disagreement between trustees. It noted the fact that there was no disagreement on the 25 May 2013 decisions.⁴⁰ It relied on *Honoré's South African Law of Trusts* as authority for the principle that important decisions are to be taken unanimously and found Shepstone and Wylie's reliance on *Le Grange* and *Van der Merwe* to be misplaced.

³⁵ Supreme Court of Appeal judgment above n 3 at para 22.

³⁶ *Id* at para 24.

³⁷ *Id*.

³⁸ *Id* at para 26.

³⁹ *Id* at para 27.

⁴⁰ *Id* at para 28.

[26] The majority confirmed the High Court's finding that the powers in the Trust Deed had to be read with those in the appendix. This led to the finding that item 26 of the appendix, with its requirement of unanimity among trustees, provided a caveat on the exercise of all of the trustees' powers, including the power in item 16 of the appendix to guarantee a beneficiary's obligations.⁴¹

[27] It was further held that the Trust Deed does not envisage that a suretyship should be concluded on behalf of a trustee or a beneficiary for their personal debts, as the Trust Deed states at clause 11, and in the appendix's preamble, that trustee powers must be exercised for the purpose and benefit of the Trust.⁴² The wide terms of the deed of suretyship gave absolute protection to Shepstone and Wylie, which could not be for the Trust's benefit. Accordingly, the Supreme Court of Appeal majority dismissed the appeal with costs, including costs of two counsel.

Supreme Court of Appeal minority

[28] The Supreme Court of Appeal minority (Kathree-Setiloane AJA, with Weiner JA concurring) found that the Trust Deed does not explicitly provide that the decisions of the trustees may be taken by majority vote.⁴³ It found that following settled law, the trustees had to act jointly to bind the trust, in the absence of a provision that a decision may be taken by a majority vote.⁴⁴ It rejected Shepstone and Wylie's reliance on *Van der Merwe* and *Le Grange*, by finding that both cases were distinguishable.⁴⁵ The trust deeds in those instances had majority vote clauses, whereas the Trust Deed expressly required unanimity through item 26 of the appendix.⁴⁶

⁴¹ Id at para 29.

⁴² Id at para 30.

⁴³ Id at para 35.

⁴⁴ Id.

⁴⁵ Id at para 36.

⁴⁶ Id at paras 36-7.

[29] The minority relied on *Endumeni*⁴⁷ to interpret the Trust Deed as a whole.⁴⁸ It found that the appendix's preamble required trustees' powers to be exercised for the purpose and benefit of the Trust.⁴⁹ The wording of item 26 made it clear that it was a proviso. It held that since clause 11.1 of the Trust Deed mentions the appendix, the trustees' exercise of power under this clause was also subject to the appendix's item 26 proviso.⁵⁰ Accordingly, all powers of the trustees had to be exercised jointly and unanimously as per item 26, which is why the Trust Deed did not mention a majority vote.⁵¹

[30] The minority rejected Shepstone and Wylie's interpretation of clause 26's reference to "unanimous agree[ment] to conduct business" as meaning that unanimity is only required where the Trust is conducting business in a narrow commercial sense. It reasoned that this ignored the wording of item 26. The minority held that the term broadly referred to exercising the powers in items 1 to 25 of the appendix, that is conducting the business of the Trust.⁵² It found that this interpretation led to a sensible business-like result and protected the interests of the Trust and its beneficiaries.⁵³

[31] The minority held that any exercise of the appendix powers by the trustees must be both unanimous and for the Trust's benefit in order to bind the Trust.⁵⁴ The 25 May 2013 decisions by the two trustees to execute the deed of suretyship in favour of Shepstone and Wylie was not unanimously made by the trustees, and therefore the Trust was not bound by the decision. The minority thus found it unnecessary to

⁴⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

⁴⁸ Supreme Court of Appeal judgment above n 3 at para 39.

⁴⁹ *Id* at para 40.

⁵⁰ *Id* at para 42.

⁵¹ *Id*.

⁵² *Id* at para 43.

⁵³ *Id* at para 44.

⁵⁴ *Id* at para 43.

consider whether the deed of suretyship was for the Trust's benefit.⁵⁵ They agreed with the majority's order that the appeal should be dismissed with costs, including costs of two counsel.

Applicant's submissions in this Court

Jurisdiction

[32] In respect of jurisdiction, Shepstone and Wylie points out that the Supreme Court of Appeal majority concluded that the proviso in item 26 of the appendix which "places a caveat on the exercise of those powers", refers to all of the powers set out in the appendix.⁵⁶ The Supreme Court of Appeal minority adopted the same approach.⁵⁷ Shepstone and Wylie submits that, while the Supreme Court of Appeal held that the Trust Deed was comparable to the Trust Deed in *Coetzee*, the Trust Deed in that case "contained no provision at all as to whether decisions had to be unanimous or could be taken by less than all trustees acting together". Shepstone and Wylie submits that this reinforces the unavoidable conclusion that the Supreme Court of Appeal has now authoritatively stated that the quorum and other provisions in the Trust Deed apply only to "internal" matters, that is those relating to distribution of funds to beneficiaries, but that those provisions have no effect in relation to "external" dealings, such as agreements with banks, contracts, appointing attorneys to represent the trust, and so forth.

[33] According to Shepstone and Wylie, the Supreme Court of Appeal majority judgment represents a material deviation from the law as previously expressed in the Supreme Court of Appeal, and is wrong. The effect of the judgment is potentially very wide, given that, excluding this Court, all courts in the country will be bound to follow it. Thus, Shepstone and Wylie submits that the matter raises an arguable point

⁵⁵ Id at para 45.

⁵⁶ Id at para 29.

⁵⁷ Id at para 41.

of law of general public importance which ought to be considered by this Court in terms of section 167(3)(b)(ii) of the Constitution.

Leave to appeal and merits

[34] Shepstone and Wylie submits that the judgment of the Supreme Court of Appeal has far-reaching consequences not only for itself, but for other parties that have concluded ostensibly valid contracts with trusts. The argument is that the Trust Deed stipulates that legal documents needing execution must be signed by at least two trustees and implicitly not by all three, as long as reasonable notice is given to each trustee. If only two trustees arrive for the meeting, they form a quorum and can make legally binding decisions. According to Shepstone and Wylie, the Supreme Court of Appeal's ruling will significantly impact trust transactions that have already been concluded and those that are still in the process of being concluded nationwide and will drastically change the body of current legal precedent.

[35] Shepstone and Wylie argues that *Parker* did not hold that, in order for the decision to be valid and binding on a trust, all trustees have to sign the resolution reflecting the decision or actively attend and participate in the meeting. It submits that the Supreme Court of Appeal's majority and minority conclusions – that the wording of the additional power in item 26 of the Trust Deed's appendix requires a unanimous vote of all trustees in order to exercise any of the powers listed in the Trust Deed's other clauses – are incorrect. Lastly, it is contended that an appeal to this Court is the only way to correct the Supreme Court of Appeal's judgment.

Respondents' submissions in this Court

Jurisdiction

[36] The Trust submits that neither this Court's constitutional nor its general jurisdiction is engaged. On general jurisdiction, the Trust submits that the issue whether the Trust Deed authorises two of the three trustees present at a Trust meeting, in the absence of the third trustee, to validly authorise the signing of a deed of

suretyship involves no points of law; it merely involves the interpretation of the specific Trust Deed's provisions. This, it submits, is a factual question. It contests Shepstone and Wylie's submissions that the Supreme Court of Appeal judgment will affect other trusts or that the matter is of general public importance, as each trust deed has its own peculiar provisions and purposes. It submits that there is no evidence that other trusts or institutions dealing with trusts will be affected. Shepstone and Wylie's application does not request that any legal principle be revisited or that the test for the interpretation of documents, as applied by the Supreme Court of Appeal, be revisited.

Leave to appeal

[37] The Trust submits that Shepstone and Wylie's application lacks prospects of success, so it is not in the interests of justice to grant leave to appeal.

Merits

[38] The Trust aligns itself with the Supreme Court of Appeal judgment. It relies on a line of cases, including *Parker*, *Thorpe* and *Nieuwoudt*, saying it is trite that to bind a trust in dealings with outside persons, all trustees must act jointly. It quotes *Honoré's South African Law of Trusts*, where it is said that "as the facts of the *Parker* and *Van der Merwe* cases illustrate, a trust will consequently not be bound if (for example) two trustees of a three trustee complement simply ignore the third trustee in taking a decision".⁵⁸

[39] The Trust argues that the Trust Deed is silent on how trustee decisions are to be taken in meetings and whether a decision by the majority of trustees can bind the Trust. It submits that the clause providing for two trustees to constitute a quorum does not empower the quorate trustees to pass trust resolutions. In fact, the Trust submits, the following Trust Deed provisions require unanimous agreement by the trustees to bind the Trust:

⁵⁸ Cameron et al above n 12 at 382.

- (a) clause 13.4, which requires resolutions to be signed by all trustees, indicating that all trustees must act jointly (the Trust submits that there is no difference between a written resolution and a resolution taken at a meeting);
- (b) clause 13.1, which requires reasonable notice of meetings to all trustees;
- (c) clause 16.1, which requires Mr V[...] to chair trustee meetings, indicating that without his presence at meetings no valid resolution could be passed by the Trust;
- (d) clause 16.2, a majority clause which did not apply to the 25 May 2013 meeting, given that there was no disagreement; and
- (e) item 26 of the appendix, being an all-encompassing caveat to all trustee powers that expressly requires trustee unanimity. The Trust further submits that the word “provided” in item 26 of the appendix favours its reading that unanimity is required for all exercises of trustee power.

[40] The Trust agrees with the Supreme Court of Appeal that it is not empowered to be surety for Mrs V[...]’s debts to Shepstone and Wylie in her divorce, as the Trust’s purpose is to acquire property and other assets, and clause 11 of the Trust Deed requires trustees’ powers to be exercised for the Trust’s purpose and benefit. Seemingly for the first time, it now contests the reasonableness of the notice of the 25 May 2013 meeting. The Trust therefore argues that leave to appeal should be refused with costs.

Analysis

Issues to be determined

[41] The following issues need to be decided:

- (a) whether this Court’s jurisdiction is engaged;
- (b) whether leave to appeal should be granted;
- (c) whether the Supreme Court of Appeal misstated the law; and

- (d) whether, on a proper interpretation of the Trust Deed, two out of three trustees could, at a duly convened meeting of trustees, resolve to bind the Trust to a deed of suretyship despite the absence of the third trustee from that meeting.

Jurisdiction and leave to appeal

[42] Shepstone and Wylie’s ground for invocation of this Court’s jurisdiction is that the Supreme Court of Appeal changed trust law and thereby contradicted its own authority.⁵⁹ The consequence, so it is argued, is that everyone, especially financial institutions that contracted in good faith with trusts, will now be in a position that a trust is not bound by a contract unless all the trustees consented to it.

[43] Reliance is placed by Shepstone and Wylie on section 167(3)(b)(ii) of the Constitution. This section can be divided into two components. First, whether the matter raises an arguable point of law and, second, whether the arguable point of law is one of general public importance, which ought to be considered by this Court. Shepstone and Wylie says that this Court’s jurisdiction is engaged, because of an arguable point of law – the point being that the Supreme Court of Appeal altered the existing jurisprudence in relation to trusts, contradicting even its own jurisprudence.

[44] The argument is that until now it was well-established that—

- (a) the rule that all existing trustees must act unanimously can be altered by a trust deed;
- (b) a trust deed may allow for decisions to be made at a quorate meeting by only the trustees present; and
- (c) adequate notice of the meeting and the opportunity to participate afforded to all trustees is sufficient. It is clear from the affidavits and argument before us that the arguable point of law and the public interest

⁵⁹ See *Parker* above n 10; *Le Grange* above n 18; *Van der Merwe* above n 19; *Thorpe* above n 30 and *Nieuwoudt* above n 32.

component only arose after the Supreme Court of Appeal had spoken. The consequence is that the jurisdictional threshold must be determined at this point.⁶⁰

[45] This Court explained in *Paulsen*⁶¹ that to engage this Court’s jurisdiction a point must be one of law; it must be arguable; and it must not be one of fact.⁶² *Paulsen* went further to say that for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interests of a significant part of the general public.⁶³ It was also held that the words “which ought to be considered” rest on the well-established interests of justice criterion.⁶⁴ This approach was later confirmed in *Tiekiedraai*⁶⁵ where importantly the following was said:

“Tiekiedraai cannot be correct that the contractual interpretation before the High Court and the Supreme Court of Appeal raises an arguable point of law of general public importance. The sole issue in clause 21 is the interpretation of its specific wording. Nothing of general or wider importance flows from it. It might be different if the lease had been a standard form document in widespread use, affecting a large number of consumers; but Tiekiedraai did not and could not make this case.”⁶⁶

⁶⁰ On jurisdiction being a “threshold” requirement, see *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) at para 11; *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 35; *Loureiro v Invula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 31; *Tuta v The State* [2022] ZACC 19; 2023 (2) BCLR 179 (CC) at para 91 and *S v Liebenberg* [2023] ZACC 33; [2024] 1 BLLR 1 (CC); 2024 (1) BCLR 132 (CC); 2024 (2) SACR 269 (CC) at para 34.

⁶¹ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

⁶² *Id* at para 20.

⁶³ *Id* at para 26.

⁶⁴ *Id* at para 30.

⁶⁵ *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd* [2019] ZACC 14; 2019 (7) BCLR 850 (CC).

⁶⁶ *Id* at para 13. See also *Big G Restaurants (Pty) Ltd v Commissioner for the South African Revenue Service* [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC).

[46] *Paulsen*⁶⁷ also considered the interests of justice and the Court noted that this Court has not always been consistent in the case of appeals emanating from the Supreme Court of Appeal.⁶⁸ Can one then conclude that the requirements of public interest or interests of justice are met when the Supreme Court of Appeal got the law wrong? Where the incorrect statement of the law would have lasting consequences, the question should be answered in the affirmative. It must be in the interests of justice and of general public importance that there is clarity regarding the applicable legal principles pertaining to this feature of trust law. Uncertainty or a change in the long-established legal principles regarding the law will have an effect on any party who enters into an agreement with a trust. As a result, the matter will have far reaching consequences which will be much broader than the narrow interests of the parties.

[47] In this instance, the interests of justice will be rooted in the misstatement of trust law by the Supreme Court of Appeal as explained above.⁶⁹ If this stands uncorrected, lower courts will in future be bound by that misstatement.

[48] In *Jiba*,⁷⁰ where this Court dealt with the administration and application of the Admission of Advocates Act,⁷¹ it was held that the interpretation and application of that Act did not establish a basis for this Court's jurisdiction. Regarding an arguable point of law of general public importance, the following was said:

“It may well be that the majority in the Supreme Court of Appeal here has erroneously interfered with the discretion of the High Court. However, this does not raise an arguable point of law of general public importance. As outlined above, the error here lies in the factual assessment. A decision that is based on wrong facts does

⁶⁷ *Paulsen* above n 61 at para 15 and fn 52.

⁶⁸ *Id* at fn 52.

⁶⁹ At [46] above.

⁷⁰ *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC).

⁷¹ 74 of 1964.

not amount to an arguable point of law. The enquiry that is undertaken to correct it remains factual.”⁷²

[49] The Court further held that:

“The wrong application of an established legal test too does not constitute an arguable point of law. All that is required to be determined in such a case is whether the court whose judgment is subject to an appeal has correctly applied the test to the facts. This issue ordinarily illustrates the presence of reasonable prospects of success. It does not generate an argument on the content or scope of the legal principle itself but indicates an incorrect application of that principle. This is relevant to the interests of justice inquiry which differs from jurisdiction.”⁷³

[50] *Jiba* emphasises that it is not a mere misapplication of the law to the facts that engages this Court’s jurisdiction. This Court held that a misapplication of the law to the facts does not amount to an arguable point of law which ought to be considered by this Court. *Jiba* is clearly distinguishable from the matter at hand, as in this instance there is not merely a misapplication of the law to the facts but a misstatement of the law, which does indeed amount to an arguable point of law, that ought to be considered by this Court.

[51] In *Olesitse*,⁷⁴ this Court held that both the High Court and the Supreme Court of Appeal “adopted an incorrect ‘legal standard’ by applying the ‘once and for all rule’ to facts to which the rule does not apply”.⁷⁵ This Court held that this does not amount to a misapplication of the law but instead to an error of law.⁷⁶ The Court further held:

⁷² *Jiba* above n 70 at para 58.

⁷³ *Id* at para 59.

⁷⁴ *Olesitse N.O. v Minister of Police* [2023] ZACC 35; 2024 (2) BCLR 238 (CC).

⁷⁵ *Id* at para 34.

⁷⁶ *Id*. See also *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC); 2024 (1) SA 331 (CC) at paras 64-8.

“In *Villa Crop*, it was held that an error of law which infringes upon the rights of litigants to enjoy access to the courts, contrary to section 34 of the Constitution, raises a constitutional issue which engages the jurisdiction of this Court. By parity of reasoning, a misapplication of the law which has the same effect, must perforce raise a constitutional issue which engages the jurisdiction of this Court.”⁷⁷ (Footnotes omitted.)

[52] Where the Supreme Court of Appeal misstates the law, the same reasoning should apply. Whether this did indeed occur will be dealt with in the paragraphs that follow. In principle, however, this Court’s jurisdiction is engaged when such a misstatement occurs. Leave should be granted.

Merits

[53] The question now is, did the Supreme Court of Appeal majority indeed get the law wrong? The answer is yes. The Supreme Court of Appeal majority stated that it is trite that “trustees must act jointly in taking decisions and resolutions for the benefit of the Trust and beneficiaries thereof, *unless a specific majority clause provides otherwise*”.⁷⁸ In terms of *Parker*⁷⁹ and *Nieuwoudt*,⁸⁰ however, the principle is that a trust deed can provide for something other than joint action by trustees, and it can do so through a majority clause. The Supreme Court of Appeal majority therefore construed the principle narrowly with no authority for doing so.

[54] The Supreme Court of Appeal introduced an unwarranted distinction between decisions of trustees in relation to internal and external matters, and in so doing placed an incorrect restriction on the proposition that the requirement of joint action can be modified by a trust deed. The Supreme Court of Appeal also misconstrued provisions which are routinely encountered in trust deeds, even if precise formulations vary.

⁷⁷ Id.

⁷⁸ Supreme Court of Appeal judgment above n 3 at para 20 (emphasis added).

⁷⁹ *Parker* above n 10 at para 15.

⁸⁰ *Nieuwoudt* above n 32 at para 16 of Harms JA’s judgment (the second judgment).

[55] The Supreme Court of Appeal majority conflated two distinct actions: the signing of the deed of surety by the two trustees, and a written (round robin) resolution authorising the signing of the deed of suretyship. The majority stated that the resolution of the two trustees at the 25 May 2013 trustee meeting and the signing of the deed of surety were—

“contrary to the provisions of clause 13.4 of the trust deed, which provides that a written resolution signed by all trustees for the time being or their respective alternates or proxies shall be as effective as a resolution taken at a meeting of trustees.”⁸¹

[56] Contrary to what the Supreme Court of Appeal majority said, the resolution to sign the deed of surety was not a written resolution in terms of clause 13.4. It was a resolution taken at a quorate meeting of trustees in terms of clause 13.1. The resultant signing of the deed of surety by the two trustees was not a resolution. It was merely the execution of the deed following the resolution. Clause 14 of the Trust Deed provides that such execution can be done by “at least two trustees”. That the resolution was not a clause 13.4 resolution is clear from the fact that the resolution is recorded in the minutes of the 25 May 2013 meeting. *Honoré’s South African Law of Trusts*⁸² states in this regard that *Blockpave*—

“sought to draw a distinction between trustee decisions (as reflected in, for example, the minutes of trustee meetings) and formal ‘resolutions’ signed by the trustees. The judgment creates the impression that only the latter would bind a trust. *However, there is no rule of trust administration that requires such a degree of formality.*”⁸³
(Emphasis added.)

⁸¹ Supreme Court of Appeal judgment above n 3 at para 24.

⁸² Cameron et al above n 12.

⁸³ Id at 378.

[57] This takes us to another error in the Supreme Court of Appeal majority's analysis of trust law. After relying on *Le Grange*, the Supreme Court of Appeal majority stated that "[e]ven when the Trust Deed provides for a majority decision, the resolution must be signed by all the trustees".⁸⁴ This is plainly in conflict with the principle expressed in *Nieuwoudt* and *Parker* that a trust deed can provide for decision-making other than by joint action. The apparent reliance on *Le Grange* is misconceived. *Le Grange* stated that resolutions signed by trustees are "usually" a manifestation of trustees' joint decision.⁸⁵ The Court went on to say that where (as on the facts of that case) the majority (being two trustees) had signed a resolution and the third abstained, it would be placing "form over substance" to insist on having the third trustee's signature on the resolution.⁸⁶

[58] The majority seemingly failed to appreciate the important distinction between unanimous-decision trusts and majority-decision trusts. What we have here is of the latter. Thus, in a trust of this type, where the Trust Deed includes a freestanding majority vote clause (as was the case in *Van der Merwe* and *Le Grange*), the trustees must act *jointly* but are not required to act *unanimously*. Absent a freestanding majority clause (as was the case in *Parker*), the trustees must act not only jointly but also unanimously.

[59] The Supreme Court of Appeal majority recorded that the High Court had stated that *Honoré's South African Law of Trusts* "authoritatively confirms that all important decisions are to be taken unanimously."⁸⁷ However, the High Court actually quoted *Honoré's South African Law of Trusts* as stating that "unless the trust instrument so provides – as it usually does – it is doubtful whether matters of substance can be regulated by majority decisions".⁸⁸ The important part of the

⁸⁴ Supreme Court of Appeal judgment above n 3 at para 25.

⁸⁵ *Le Grange* above n 18 at para 14.

⁸⁶ *Id* at para 23.

⁸⁷ Supreme Court of Appeal judgment above n 3 at para 28.

⁸⁸ High Court judgment above n 7 at para 35.

principle, namely that a trust deed can provide for decisions to be taken by fewer than all trustees, was overlooked by the Supreme Court of Appeal majority. The reliance on *Blockpave* is also misplaced. *Blockpave* is clearly wrong when it states that “externally trustees cannot disagree” and that in the external sphere a trust “functions by virtue of resolutions, which have to be supported by the full complement of the trust body”.⁸⁹ As has now been stated repeatedly, trust law allows for a trust deed to provide for majority or quorate decision-making.

[60] The Supreme Court of Appeal majority’s misstatement of the principles set out in *Nieuwoudt* and *Parker* and its reliance on the principle set out in *Blockpave* have the potential of changing trust law if uncorrected. That will lead to the consequences envisaged by Shepstone and Wylie.⁹⁰

[61] The central issue that needs to be decided now is whether the deed of suretyship signed by the two trustees in favour of Shepstone and Wylie was duly authorised by the Trust and the suretyship agreement could be entered into by two trustees. In order to answer this question, an interpretation of both the Trust Deed and the appendix is required.

[62] There is no clause in the Trust Deed that speaks directly to this issue. The heading of clause 11 is “Powers of the Trust”. Clause 11.1 provides that:

“Any trustee shall have the power to use the Trust property and income for the benefit of the Trust and for which purpose they are granted all necessary powers and authority including (but without limitation) the powers stated in the Appendix.”

[63] Clause 11.2 empowers the trustees to ratify, adopt or reject in their discretion contracts made on behalf of the Trust. The important provisions are clauses 13 and 16.2. Clauses 13 and 16 read thus:

⁸⁹ *Blockpave* above n 34 at para 38.

⁹⁰ At [42] above.

“MEETINGS OF TRUSTEES.

- 13.1. The Trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Any Trustee shall be entitled on reasonable written notice to the other Trustees to summon a meeting of the Trustees. All Trustees for the time being in the Republic of South Africa shall be given reasonable notice of any meeting of the Trustees.
- 13.2. Subject to 5 above, the quorum necessary at any such meeting shall be two Trustees.⁹¹
- 13.3. A Trustee may be represented at a meeting of Trustees by a proxy appointed as such in writing.
- 13.4. A written resolution signed by all Trustees for the time being or their respective alternates or proxies shall be as effective as a resolution taken at a meeting of Trustees.

...

DISAGREEMENT BETWEEN TRUSTEES

- 16.1. At and for each meeting of Trustees, the Trustees present, in person or by proxy, shall elect a Chairperson; provided for as long as T[...] W[...] V[...] is a Trustee, he shall be Chairperson.
- 16.2. In the event of any disagreements arising between the Trustees at any time the view of the majority shall prevail. Should there be an equality of votes, the Chairperson shall have a second or casting vote.”

[64] Clauses 13.1 to 13.4 and clause 16.2 are modelled on clauses 73, 75 and 76 of the Table B articles of association that were contained in Schedule 1 to the now repealed 1973 Companies Act.⁹² These provisions of the Table B articles were, in

⁹¹ Clause 13.2 originally read “three”, however, it was amended to read “two” by an amendment signed on 26 June 1998 and registered in January 2000.

⁹² 61 of 1973. Clauses 73, 75 and 76 read:

- “73. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In the event of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time convene a meeting of the directors.

turn, modelled on substantially similar standard provisions in England and elsewhere. In terms of clause 13.1, the trustees may meet to “despatch business”. On the face of it, there is no qualification on the business they may despatch at a meeting. In terms of clause 13.2, the quorum necessary “at any such meeting”, that is, a meeting for the “despatch of business”, is two trustees. This does not mean that the third trustee does not need to be given reasonable notice, but it does mean that if reasonable notice is given and the third trustee does not attend, the other two may meet and “despatch business”.

[65] Clause 16.1 deals with the chairing of meetings. Since only a person present at a meeting may chair it, the provision for Mr V[...]’s chairmanship could only apply to those meetings at which he was present. If he did not attend the meeting, those present could choose someone else to chair it. In the context of clause 16.1, clause 6.2, which provides that the view of the majority shall prevail, is referring to disagreement among those attending the meeting. (This is even clearer in clause 73 of the standard articles previously mentioned.) Only the views of those who attend a meeting can be relevant for purposes of a decision taken at such meeting. So, if a meeting of trustees is properly constituted by the presence of two trustees, and those two trustees are in agreement on a particular matter, clause 16.2 plays no part, since there is no disagreement.

[66] Clause 13.4 is a standard round-robin provision that permits decisions to be taken without a meeting (its counterpart in the standard articles was clause 76). The policy behind the requirement that all trustees must sign such a resolution is that, because a meeting is being dispensed with, a trustee who might disagree with a

...

- 75. The quorum necessary for the business of the directors, unless there is only one director, may be fixed by the directors, and unless so fixed shall, when the number of directors exceeds three, be three and when the number of directors does not exceed three, shall be two.
- 76. Subject to the provisions of the Act, a resolution in writing, signed by all the directors, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held.”

proposed decision is deprived of the opportunity at a meeting of persuading his or her fellow trustees. If, however, all the trustees agree on a course of action, the holding of a meeting would be superfluous.⁹³ In short, clause 13.4 is irrelevant where a decision is taken at a meeting.

[67] Subject, therefore, to the provisions of the appendix to the Trust Deed, the position is clear. Business, including a decision to sign the suretyship, could be despatched at a duly convened meeting of two trustees. The meeting in this case was duly convened. Neither the High Court nor the Supreme Court of Appeal held otherwise. It is common cause that after Mr V[...]’s indication that he could not attend the meeting, the meeting was moved to his preferred location. However, his second request that he be given reasonable notice and dates to choose from was ignored and the meeting was held only two days later than planned. However, this issue was not raised in the High Court or the Supreme Court of Appeal and was only raised for the first time in the written submissions. This is not an issue properly before this Court and should, therefore, not be entertained. Since the two trustees at the meeting agreed that the Trust should conclude the suretyship, there was no disagreement engaging clause 16.2. And because the decision was taken at a meeting, clause 13.4 was irrelevant.

[68] Is there anything in the appendix that justifies a different conclusion? Clause 11.1 of the Trust Deed, headed “Powers of Trustees”, states that the trustees have the power to deal with the trust property and income for the benefit and purpose of the Trust in their discretion, and that for this purpose “they are granted all necessary

⁹³ See McGuinness *Canadian Business Corporations Law* 2 ed (LexisNexis, Canada 2007) at 833-4 and Gower *The Principles of Modern Company Law* 3 ed (Stevens & Sons, London 1969) at 138. (I have cited an old edition of Professor Gower’s well-known work, since he was there dealing with standard provisions corresponding with the Table A articles of our 1973 Companies Act.) See also *Hood Sailmakers Ltd v Axford* [1996] 4 All ER 830 (QB) at 833g-834g, dealing with regulation 106 in the standard Table A in Schedule 1 of the English Companies Act, 1948. As appears from this case at 832j-833b, regulations 98, 99 and 106 were substantially the same as clauses 73, 74 and 75 of the Table A articles in our repealed 1973 Companies Act. Regulation 106 was the round-robin clause.

powers and authority including (but without limitation) the powers stated in the Appendix”. The appendix is a list of powers introduced thus:

“Without prejudice to the generality of any of the provisions of the accompanying Deed constituting the above Trust the Trustees shall have the following powers which shall be exercisable in their sole and absolute discretion for the purposes and benefit of the Trust.”

[69] The 28 numbered items that follow are thus the express powers conferred on the trustees. They seem to encompass everything that the trustees of such a trust might ever wish to do; but in case the drafters missed anything, the introduction makes it clear that the list is without prejudice to the generality of the powers conferred in the Trust Deed. Each item on the list must be understood as a separate power. Item 16 is the power to guarantee obligations of any beneficiary of the Trust. The only itemised power which is prefaced by a requirement of unanimity is item 26 – the power “to conduct business on behalf of and for the benefit of the Trust, and to employ Trust property in such business”.

[70] It is quite impossible to construe item 26 as encompassing all the things that the trustees might ever decide to do, including the things listed in items 1 to 25 of the appendix. Each item in the appendix is a discrete power. If item 26 had been intended to cover all the activities and transactions listed in items 1 to 25, it would not have featured as a separate item but would have been built into the introduction preceding the listing of the powers. In other words, the phrase “provided the Trustees unanimously agree” would have been inserted at the end of the current introduction, before the word “namely”. Item 26 must thus be separate and distinct from other powers. The only meaning of which item 26 is sensibly capable is that, provided the trustees are unanimous, they may embark upon a business in the sense of a commercial venture.

[71] Although this is perfectly clear from an examination of the appendix on its own, it is reinforced when regard is had to clauses 13 and 16 of the Trust Deed. The

universal requirement of unanimity by all trustees holding office would deprive clauses 13 and 16 of any sensible field of operation: no business could then be despatched at a quorate meeting of two trustees, and no decision of a majority could prevail in the event of disagreement at a meeting.

[72] The conclusion that must ineluctably follow is that the two trustees were duly authorised to sign the agreement on behalf of the Trust and the Trust did enter into a valid agreement with Shepstone and Wylie. As a result, the appeal must be upheld.

Costs

[73] Shepstone and Wylie has been substantially successful and is therefore entitled to costs.

Order

[74] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following order:
 - “(a) The appeal is upheld with costs.
 - (b) The order of the High Court is set aside and replaced with the following:
 ‘The special point *in limine* relating to the alleged invalidity of the deed of suretyship is dismissed with costs.’”
4. The respondents are ordered to pay the costs of the applicant in this Court.

For the Applicant:

S R Mullins SC instructed by
Shepstone and Wylie Attorneys

For the Respondents:

M G Roberts SC and E Roberts
instructed by Moolman and Pienaar
Incorporated