



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 607/2024

In the matter between:

LENETTE JANSE DE WIT

First Appellant

LENETTE JANSE DE WIT N O

Second Appellant

MARYKE SMIT

Third Appellant

and

TOERIEN DE WIT N O

First Respondent

PHILIP RALL N O

Second Respondent

TOERIEN DE WIT

Third Respondent

PHILIP RALL

Fourth Respondent

KARMIEN KRUTH

Fifth Respondent

ELBERT DE WIT JR

Sixth Respondent

THE MASTER OF THE HIGH COURT, CAPE TOWN

Seventh Respondent

Neutral citation: *Lenette Janse De Wit & Others v Toerien De Wit N O & Others*
(607/2024) [2026] ZASCA 23 (06 March 2026)

Coram: MOLEMELA P and KEIGHTLEY and KOEN JJA and CHILI and
MODIBA AJJA

Heard: 29 AUGUST 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 06 March 2026 at 11h00.

Summary: Trust Property Control Act – section 13 – application to terminate trust and appoint receiver to distribute trust assets – whether appellant satisfied jurisdictional requirements for relief.

ORDER

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

- 1 The appeal is dismissed.
- 2 The first, second and third appellants are directed to pay the costs of the respondents jointly and severally, the one or more paying the others to be absolved, which costs shall include those of senior counsel where so employed.

JUDGMENT

Keightley JA and Modiba AJA (Molemela P and Koen JA and Chili AJA concurring):

[1] This appeal lies against the judgment and order of the Western Cape Division of the High Court, Cape Town (the high court), handed down on 10 April 2024. The high court dismissed an application by the appellants for relief in terms of s 13 of the Trust Property Control Act 57 of 1988 (the TPCA). The appeal is with the leave of the high court.

[2] All but the seventh respondent, the Master of the High Court, and the fourth respondent, Philip Rall (Philip), are members of the De Wit family. The first appellant, Lenette De Wit (Lenette), is the surviving spouse of the late Elbert De Wit Snr (Elbert Snr) who passed away in February 2019. Elbert Snr was the founder of the De Wit Family Trust (the trust). The third appellant, Maryke Smit (Maryke), the third respondent, Toerien De Wit (Toerien), the fifth respondent, Karmien Kruth

(Karmien), and the sixth respondent Elbert De Wit Jnr (Elbert Jnr) are Lenette and Elbert Snr's children. Toerien is also cited as the first respondent in his capacity as a trustee of the trust. Lenette and Philip are also cited in their capacity as Trustees of the trust as the second applicant, and the second respondent respectively. Another person who features prominently in this application but is not cited as a party is Koos Smit (Koos) who is married to Maryke.

Background

[3] Elbert Snr established the trust as a discretionary trust in 1995. Together with Elbert Snr, Philip has been a trustee since the formation of the trust. Toerien became a trustee in 2015. In terms of Elbert Snr's will, Lenette replaced him as the third trustee. In terms of the trust deed, Elbert Snr, Lenette and their children are income beneficiaries. Elbert Snr nominated Lenette and the children as capital beneficiaries in his will.

[4] Elbert Snr was a burgeoning entrepreneur. He started a scrap metal business in Worcester in 1967. In the ensuing years, he became a successful businessman. In about 2014 he became seriously ill. At that stage, Elbert Snr requested Toerien, who is a chartered accountant, and who was living in the United States of America, to return to South Africa and to become involved in the businesses. As noted above, he was also appointed by Elbert Snr as a trustee. At about the same time, with Toerien's assistance, the businesses were restructured, for tax and estate planning purposes, into a holding company, De Wit Group (Pty) Ltd (DWG), and its subsidiaries, Route 62 Investments (Pty) Ltd (Route 62) and Gasvoorsieners Boland (Pty) Ltd (Gasvoorsieners). Koos holds 50% of the shares in Gasvoorsieners, with DWG holding the balance.

[5] Collectively, these entities are referred to as the De Wit Group. The trust holds all the shares in the holding company. Therefore, the shares in and assets of the entities constitute, directly and indirectly, trust assets. Except for Gasvoorsieners, which is a cash business, the assets of the other subsidiary companies are largely in the form of immovable properties. Some of the businesses conducted within the group operate from these immovable properties. Other immovable properties are occupied by Lenette and Maryke as their homes. In the immediate term, because of the investment in immovable properties, DWG has limited returns on investment. Since the trust derives its income from the dividends declared by the companies in the group, this has an adverse effect on the liquid reserves of the trust.

[6] Before Toerien returned to South Africa, Elbert Snr largely managed the companies with Koos. After Toerien returned to South Africa, realising that Koos and Toerien approached business differently, Elbert Snr put them in charge of different aspects of the business to avoid any potential conflict. As director, Koos took charge of Gasvoorsieners, while Toerien became a director and the CEO of DWG and Route 62.

[7] Elbert Snr remained seriously ill and, from January 2017 to February 2019, he engaged in a series of discussions with Toerien, Philip and the other family members about the future of the trust and, consequently, the companies, after his death. What was discussed and, importantly, Elbert Snr's expressed wishes, are recorded in several emails and memoranda that were compiled over this period. It is unnecessary to analyse them in any detail. Suffice to say that they demonstrate that Elbert Snr wanted an equal distribution of trust capital between beneficiaries. He did not want a liquidation of assets to achieve this purpose. He stated that he wanted the businesses to continue to operate. Elbert Snr's preference was for Toerien to build

the businesses so that there could be sufficient liquidity for Toerien to ‘buy out’ the remaining beneficiaries. At this stage, the value of the DWG group was over R100 million. However, as indicated earlier, most of the value was tied up in immovable property. Elbert Snr accepted that his plan might take time to come to fruition. He stated that the goal was that there should be a distribution between beneficiaries as soon as reasonably possible.

[8] As part of the discussions between the family, Elbert Snr asked that each beneficiary should indicate whether they were interested in a particular trust asset, or whether they would prefer a distribution in cash. There was some divergence between the beneficiaries: Karmien preferred a cash payment, whereas Maryke preferred specific assets. It is important to note that these discussions were never elevated to a formal distribution proposal to the trustees. The appellants originally averred that a trust capital distribution plan was agreed upon and that all that remained was for its implementation. However, in separate proceedings before the high court, instituted by Karmien, it was subsequently found that no distribution decision had been made.

[9] Notwithstanding that none of the companies had declared annual dividends since inception, at a meeting in November 2018, Elbert Snr directed that dividends should be declared for purposes of maintaining the trust beneficiaries. No dividends were implemented, nor have the subsidiary companies declared dividends since Elbert Snr passed away.

[10] Much acrimony developed after Elbert Snr’s death between the appellants and Toerien. The acrimony is ongoing and has spawned litigation between the parties in addition to the application that is the subject-matter of this appeal. Maryke and

Karmien, with whom Lenette is aligned, have pressed for the trustees to declare a vesting date and to distribute the capital of the trust. Lenette is the only trustee to support this course of action. However, the majority, being Toerien and Philip (the majority trustees), disagree. As, in terms of the trust deed, decisions of the trustees are decided by a majority vote in the event of a disagreement, Lenette's view has not found traction.

In the high court

[11] It was this impasse that led to the application before the high court. The appellants applied for an order: terminating the trust in terms of s 13 of the TPCA; appointing an identified receiver to take control of trust property; and giving the receiver specified powers, including the power to liquidate and distribute trust assets. In the alternative, the appellants sought an order removing Toerien and Philip as trustees and according to Lenette, the power to appoint alternative trustees.

[12] The appellants' complaint focused on clauses 1.8 and 7.3 of the trust deed (the impugned provisions). The former clause defines¹ 'vesting date' as:

'The date which the trustees may determine as [the] vesting date, which shall indicate the time at which [the] beneficiaries shall acquire vested rights with respect to the net trust assets.'

[13] Clause 7.3, which falls under the heading 'utilisation of capital', provides that the trustees:

'shall be entitled, *in their sole discretion, to continue the trust indefinitely*, but upon termination thereof, [and] subject to the constraints imposed herein, shall allocate the capital to the beneficiaries in accordance with clause 1.6 hereof. . .' (Emphasis added.)

¹ The trust deed was written in Afrikaans. The English translation contained in this judgment is as per that provided in the appeal record.

[14] The nub of the appellants' case in the high court was that the impugned provisions were being used by the majority trustees to continue the trust indefinitely, rather than to determine a vesting date and distribute the trust assets to the beneficiaries. According to the appellants, the majority trustees' reliance on the wide discretion accorded to them under these clauses has caused a breakdown in relationships among the family, and conflict between the trustees. These are consequences that they averred the founder, Elbert Snr, did not foresee or contemplate.

[15] Further, according to the appellants the breakdown in family relations was hampering the objectives of the trust. Clause 3 of the trust deed defines these objectives as follows:

‘3.1 The expansion of the trust benefits and the creation of sources of income for the Beneficiaries.
3.2 To pay such funds from the income of the Trust to the various Beneficiaries as may be reasonable and desirable in the opinion of the Trustees and in accordance with the guidelines set out in clauses 6 and 7.’

[16] Clause 6 deals with trust income and gives the trustees the entitlement ‘to use the trust income in their discretion for the following purposes’. One of these purposes is expressed in clause 6.6, which reads:

‘The trustees shall be entitled to pay to any of the Income Beneficiaries, in their sole discretion, before payment to any such Beneficiaries of any part of the capital assets, such amounts from the income as the Trustees in their sole discretion may deem reasonable and desirable; provided that the provisions of clauses 7.7 and 7.8 shall apply to the disbursement of Trust income.’

[17] Clause 7, as noted above, deals with the utilisation of the trust capital. Clause 7.1 gives the trustees, ‘in their sole discretion’ the entitlement to make capital

allocations ‘subject to the trustees acting in accordance with the provisions set out herein when making such allocations.’

[18] To bolster their case, the appellants relied on the events, described above, that transpired in the period prior to Elbert Snr’s death. They averred that these demonstrated that before he died Elbert Snr contemplated that there would be a valuation of trust assets and a fair distribution among the beneficiaries. The appellants contended that the majority trustees were using their powers under the impugned provisions to extend the lifespan of the trust, contrary to Elbert Snr’s express wishes, and the objectives of the trust. This, they submitted, is what was causing the breakdown within the family which, they say, Elbert Snr did not foresee.

[19] They also contended that under the directorship of Toerien and his co-directors of DWG, Messrs Mostert and Beyer, the companies in which the trust assets are held have not declared dividends. As a result, the trust had not derived any income, with the result that it could not fulfil its duty to maintain trust beneficiaries. The averments went further. The appellants accused Toerien of acting in concert with Philip and his co-directors, to run the trust and the businesses for his own benefit. It is for that reason that the appellants sought Toerien and Philip’s removal as trustees, in their alternative relief.

[20] The respondents denied these allegations and submitted that the appellants had failed to satisfy the requirements for an order in terms of s 13 of the TPCA. In the answering affidavit filed on the respondents’ behalf, Toerien disputed the factual averments relied on by the appellants. He averred that he and Philip were doing no more than acting within the powers accorded to them in the trust deed to further the objectives of the trust. What the appellants wished to achieve, he contended, was not

possible: given the current absence of liquid trust assets, Karmien's wish for a cash capital distribution was irreconcilable with Maryke and Lenette's wish for a distribution of trust assets in kind. As the beneficiaries could not agree on how to achieve an equitable distribution, Toerien averred, the objectives of the trust were properly served by delaying the determination of a vesting date.

[21] The high court considered whether the appellants had satisfied the requirements for the grant of relief under s 13 of the TPCA. That section provides:

‘Power of Court to vary trust provisions

If a trust 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 the 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 an order which such court deems just, including an order whereby a particular trust property is substituted for particular other trust property, or an order terminating the trust.’

[22] The high court considered the two jurisdictional requirements inherent in s 13. These are: first, whether the impugned provisions had brought about consequences which the founder of the trust had not foreseen or contemplated; and, second, whether the impugned provisions had any of the three consequences listed in subparagraphs (a), (b) or (c).

[23] As to the first jurisdictional requirement, it found that the appellants had established that the impugned provisions had brought about the family breakdown, which was not foreseen or contemplated by Elbert Snr. It concluded that the cause

of the appellants' dissatisfaction (and hence the breakdown in relations) was that the majority trustees:

'have not given effect to Elbert Snr's wishes, even if it means doing so in the alternative manner, namely selling Trust assets and, instead, have simply continued to manage and operate the Trust in terms of their discretionary powers which allow them to do so indefinitely.'

It was these discretionary powers that were the source of the family rift, according to the high court, because they permitted the trustees to resist the appellants' attempts to persuade the majority trustees to fix the vesting date and distribute the net assets. In the high court's view, the appellants were justified in expecting this to occur once it became clear that Elbert Snr's alternative plan was not achievable.

[24] With respect to the second jurisdictional requirement, the high court found that the appellants were required to establish that there was a causal relationship between the family breakdown and the non-achievement of the trust objectives, or prejudice to the beneficiaries. This they had failed to do on a balance of probabilities. The high court found that, as a result, the jurisdictional requirement under s 13(a) or (b) had not been satisfied and the court's discretionary power was not triggered.

[25] The high court went further in finding that even if it was wrong in this conclusion, it would not be appropriate, in the exercise of its discretion, to terminate the trust. Termination of a trust was an extraordinary remedy which, according to the high court, should only be invoked as a last resort. The high court declined to consider the alternative relief because it found it had no power to do so under the auspices of s 13.

In this Court

[26] The appellants contend that the high court correctly found that the impugned provisions had brought about consequences that Elbert Snr had not foreseen. They submit that there is thus no basis for interfering with the high court's finding that the first jurisdictional requirement of s 13 was satisfied. Where the high court had erred, contend the appellants, was in its finding that there needs to be a causal link between the family breakdown and the non-achievement of the trust objectives, or prejudice to the beneficiaries. The appellants submit that the high court erred in its interpretation of the jurisdictional requirements of s 13 in this regard. They contend that on the common cause facts, the high court ought to have found that the second jurisdictional requirement of s 13 had been met and that terminating the trust is the appropriate remedy. They expressly abandoned their alternative prayer for the removal of the trustees which they had sought in the high court.

[27] The respondents take issue with the high court's finding that the appellants satisfied the first jurisdictional requirement. They contend that the appellants presented no facts to support the conclusion that the impugned provisions have brought about consequences that the founder did not foresee. In addition, they submit that the high court was correct in finding that the appellants did not satisfy the requirements of s 13(a) or (b). On the contrary, according to the respondents, the trust objectives, as set out in the trust deed, continue to be achieved. They also contend that the high court correctly found that the termination of the trust would not be an appropriate remedy.

[28] At the heart of the appeal is the question whether the high court erred in its interpretation and application of s 13 of the TPCA. This section has expanded the limited powers to vary trust provisions.² The limitation of this power under the

² Cameron et al *Honoré's South African Law of Trusts* 5ed (2002) at 517 (*Honoré*).

common law was founded on the public interest element of giving due respect to the intention of the trust founder.³ Despite the wider powers of courts under s 13, the importance of the founder's intention is preserved. This is evident from the two jurisdictional requirements that must be satisfied before a court may exercise its discretionary power to vary or terminate.

[29] This Court, in *Snyman v De Kooker N O and Others*⁴ (*Snyman*), identified the first criterion as the 'anchor jurisdictional factor'. This means that the inquiry into the three requisites under subparagraphs (a), (b) or (c) can only ensue if the court is satisfied that the impugned provisions have unforeseen consequences.⁵ This reflects a deliberate choice by the Legislature to steer a middle path between the founder's underlying intention, on the one hand, and what may be in the beneficiaries' interests on the other.⁶ The Legislature has chosen 'to respect the founder's intentions to the extent that the public interest or that of the beneficiaries prevails over the trust instrument only when the court decides that the founder did not foresee the untoward consequences that have arisen from its terms.'⁷

[30] Thus, it is not enough to show that the variation sought will better serve the interests of the beneficiaries. Even if this is so, if the founder foresaw or contemplated the consequences of the impugned provisions, the beneficiaries must live with the consequences. It follows that courts must be astute to respect and give proper weight to the intentions of the founder. To do otherwise risks undermining the underlying nature of a trust, in terms of which the rights of beneficiaries in the

³ Ibid at 515.

⁴ *Snyman v De Kooker N O and Others* [2024] ZASCA 119; [2024] 4 All SA 47 (SCA); 2024 (6) SA 136 (SCA).

⁵ Ibid para 42.

⁶ *Honoré* at 517.

⁷ Ibid.

trust property are determined by, and subject to, the terms of the trust deed. It is important, too, to appreciate that the founder's intention is that evinced in the trust deed.

[31] Section 13 involves a factual inquiry into several relevant factors. These include the background to the creation of the trust, the intention of the founder, the purpose of the trust and its provisions.⁸ It is for the applicant to establish, on a balance of probabilities, that the requirements of s 13 are met.⁹ Absent the jurisdictional requirements in s 13 being met, it is not competent for a court to exercise its statutory powers.¹⁰ It is apparent from these general principles that, while courts have a wide discretion to order appropriate relief under s 13, its discretionary power may only be exercised if all the requirements of the section are satisfied.

[32] To succeed in this appeal, the appellants must demonstrate that the high court erred in finding that they had failed to satisfy all the requirements of s 13. If they succeed on this leg of the appeal, they will have to satisfy this Court, in addition, that the high court committed a misdirection in the exercise of its discretion by refusing to grant an order terminating the trust.

The anchor jurisdictional factor

[33] As regards the anchor jurisdictional factor, the high court found that the cause of the family breakdown was the majority trustees' reliance on the impugned provisions. Instead of abiding by Elbert Snr's wish that there be a vesting and distribution of trust assets, the majority trustees were continuing the trust and

⁸ *Snyman* para 43.

⁹ *Gowar and Another v Gowar and Others* [2016] ZASCA 101; [2016] 3 All SA 382 (SCA); 2016 (5) SA 225 (SCA) para 34.

¹⁰ *Ibid* para 35.

postponing the vesting date. The high court accepted that these were consequences that Elbert Snr had not foreseen.

[34] The first difficulty, in our view, is that the high court started from the incorrect premise in reaching this conclusion. It focused its inquiry on Elbert Snr's wishes as expressed between January 2017 and February 2019. This was erroneous. As we observed earlier, the intention of a trust's founder is critical to the question whether the anchor jurisdictional factor has been satisfied. However, the relevant intention is that reflected in the trust deed, not what the founder may have said decades later.

[35] The overall scheme of the trust as recorded in the trust deed envisages that it may continue in existence at the discretion of the trustees. Significantly, the lifespan of the trust is deliberately open-ended: the founder did not tie its continued existence to any specific date or event, such as his death, or the children reaching a certain age. On the contrary, it is the trustees who have the sole discretion to determine, among many other things, if, and when, a final distribution should be made.

[36] This is consistent with the objectives set out in clause 3: to expand trust benefits and sources of income and to pay funds from the income of the trust to beneficiaries. These objectives align with a trust that will potentially continue in existence. So, too does clause 6.7, which specifies that trust income not utilised shall be added to the capital for purposes of increasing it and earning further income. An additional important feature of the trust is the very wide discretion accorded to the trustees, which extends beyond that identified in clauses 1.8 and 7.3. The impugned provisions are characteristic of, and consistent with, this scheme as a whole.

[37] As founder, Elbert Snr, too, was bound by the terms of the trust deed. He had no power to alter the trust deed merely by an expression of verbal wishes. Nor did Elbert Snr take steps to effect any formal variation of the terms of the trust deed to fix a vesting date or otherwise limit the discretionary powers of the trustees.

[38] Thus, it must be accepted that he retained the intention, as expressed in the trust deed, that it lay within the sole discretion of the trustees to determine the vesting date. He contemplated that they would exercise their discretion reasonably, taking account of all relevant circumstances. He understood that the trustees, and not the beneficiaries, had the power to make that determination. He also contemplated that not all trustees would agree when it came to decision-making. For this reason, the trust deed provides for a majority decision to prevail.

[39] This intention of Elbert Snr, as clearly reflected in the trust deed, ought not easily to be overridden. Where the high court erred was in its assumption that Elbert Snr's wishes, as discussed with his family, were determinative. The high court assumed that these prevailed over the trust deed. This resulted in it reaching the erroneous conclusion that the majority trustees had used their powers under the impugned provisions in a manner that Elbert Snr had not contemplated or foreseen.

[40] The high court erred further in accepting that the appellants were justified in expecting that the remaining two trustees would be persuaded to determine a vesting date and distribute the trust assets. Under the scheme of the trust as constituted in the trust deed, none of the appellants, as beneficiaries, have any right to insist that the trustees exercise their discretion under the impugned provisions to declare a vesting date. This was never the intention of the founder. The terms of the trust deed leave this solely to the discretion of the majority trustees. The beneficiaries have no

vested rights yet in the trust assets and thus no authority to insist that a vesting date be fixed. Nor does Lenette have rights as a minority trustee to insist that her fellow trustees decide trust matters in a particular manner. The high court's approach was based on an incorrect legal premise in this respect as well.

[41] It was also based on an incorrect factual premise. Even if Elbert Snr's verbal wishes were relevant to the inquiry, the minutes of meetings and communications relied on by the appellants do not support an unequivocal desire by Elbert Snr that the trust ought imminently to be terminated. The evidence in this regard demonstrates that Elbert Snr did not wish assets to be sold and that he wished the businesses to keep operating. It is common cause that he appreciated that any distribution process would not be speedy. He also desired that Toerien should grow the business to amass sufficient cash reserves in the trust to permit a gradual distribution of trust assets so that ultimately, Toerien would acquire the businesses.

[42] What is more, in the answering affidavit, Toerien explains what lies behind the majority trustees' resistance to the appellants' attempts to persuade them to fix a vesting date now. In his later years, Elbert Snr focused on property-owning assets that, while they held lower risk, also had a lower return on investment for the trust. The main objectives of the trust, as we have observed, are to expand trust benefits and create sources of income, rather than to distribute trust assets. To achieve this, Toerien explains, it became necessary to grow the commercial entities held in the trust, and develop new ones, to increase its income-producing capital base.

[43] Toerien returned to South Africa, on Elbert Snr's invitation, to assist his father, and ultimately to take over running the trust businesses. They focused on developing income-generating businesses. Some of these are still in the process of

growing into profitable businesses. Significantly, Toerien states in the answering affidavit that it is not financially prudent at present for these businesses to be sold as their optimal value will only be achieved later. He avers that were trust assets to be distributed now, this would not be to the benefit of the beneficiaries for this reason.

[44] The answering affidavit also explains that the financial position of the trust businesses, and hence of the trust, at present makes it impossible to meet the distribution demands of Maryke and Karmien. Their competing demands cannot both be accommodated. According to Toerien, it is this that is causing the fall-out between the beneficiaries. He indicates that he and Philip are willing to consider different proposals for a possible distribution of trust assets in the future, but that the current proposals are not feasible.

[45] The appellants present no substantiated evidence to refute the factual averments regarding the financial position of the trust businesses and the inability of the trust to meet the distribution demands of Maryke and Karmien. The averments are not far-fetched, nor untenable. On the application of the trite principles that apply to disputes of fact in motion proceedings,¹¹ Toerien's averments must be accepted.

[46] The fact of the matter is that the distribution that the appellants contend the majority trustees are irrationally resisting is objectively not possible, or prudent at present. Moreover, a liquidation of trust assets, in the form of the current businesses, will also not achieve an optimal return on investment for the trust, and hence the beneficiaries, were this to be effected now for purposes of a distribution. The

¹¹ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 at 634G-635D.

majority trustees' present position, which is to decline to fix a vesting date, accords with the objectives of the trust.

[47] Consequently, the appellants' contention that it is the majority trustees' conduct, using their powers under the impugned provisions, that is causing the breakdown in family relations is unsustainable. It is not the existence, or exercise of the powers under clauses 1.8 and 7.3 that is causing the unhappiness: it is the current financial position of the trust, which makes it impossible, at this stage, to effect the distribution that the appellants are seeking, that has given rise to the breakdown in relations. Viewed differently, it is the appellants' demands, which are legally and factually untenable, that are causing this.

[48] Furthermore, in declining to fix a vesting date in the circumstances prevailing, the majority trustees are acting in accordance with what is expected of them under the trust deed: they are acting as contemplated by the founder. What did not lie in the contemplation of the founder is that the beneficiaries would purport to enforce rights they do not yet have to pressurise the trustees to declare a vesting date, particularly where this would undermine the achievement of the trust objectives. Elbert Snr would have contemplated that the beneficiaries would appreciate that they had no right to insist on a vesting date, contrary to the decision of the majority trustees. He would have expected them to accept the decision of the trustees, in accordance with the clear terms of the trust deed. It is the appellant's response to the decision of the trustees, and not any provision in the trust deed, that is causing the family dispute and litigation.

[49] For these reasons, we find that the high court erred in concluding that the appellants had satisfied the anchor jurisdictional factor. On the contrary, they failed

to establish that the impugned provisions have brought about consequences which Elbert Snr did not contemplate or foresee. This, on its own, is grounds enough to dismiss the appeal. However, for the sake of completeness, we proceed to consider whether the appellants satisfied the remaining requirements of s 13.

Did the impugned provisions hamper the trust objects or prejudice the interests of the beneficiaries?

[50] It was contended by the appellants that the high court incorrectly found that s 13 requires a link to be established between both the impugned provisions and the unforeseen consequences, on the one hand, and the second jurisdictional requirement, identified in subparagraphs (a), (b) or (c), on the other. They submitted that it was sufficient to show that the impugned provisions had one of these effects, and that they had satisfied this requirement.

[51] In our view, not much turns on this point. In *Snyman*, this Court observed that: ‘Although s 13 has two components, the enquiry into the presence of the anchor jurisdictional factor is intertwined with the requisites of s 13 (a), (b) and (c). In other words, it could well be that a finding on the anchor jurisdictional factor indicates the presence of one or more of the requisites of s 13 (a), (b) and (c). Even among the requisites in s 13 (a), (b) and (c), there might be factors which satisfy one or more of the requisites. ... As a result, it might not always be practical, nor desirable to have a discrete and isolated enquiry into each factor.’¹²

[52] This is one of those cases where the different components of s 13 are inextricably intertwined. As we have noted, on the objective evidence, it would not be in the interests of the beneficiaries at present for the trustees to determine a vesting date and proceed to distribute the trust assets. First, it is not possible to give effect

¹² *Snyman* para 42.

to the competing wishes of different beneficiaries. Second, the beneficiaries cannot agree on a different distribution mechanism, which puts the trustees in a difficult position. Third, and importantly, if a distribution were to be effected now, the returns on investment for the trust, and ultimately the beneficiaries, would not be optimal. Contrary to the contentions of the appellants, they have failed to satisfy the requisites of s 13(b).

[53] Nor can it be concluded that clauses 1.8 and 7.3 hamper the achievements of the trust. The discretion accorded to the trustees in these provisions mirrors similarly wide discretionary powers identified elsewhere in the trust deed. For example, they have the power to determine whether and if so, how much, of the income shall be paid to beneficiaries (clause 6.6); or to make capital allocations to capital beneficiaries prior to the vesting date (clause 7.4). The discretionary nature of the trust is one of its cardinal features. As noted earlier, whatever Elbert Snr's verbally expressed wishes may have been before he died, he took no steps to limit these discretionary powers.

[54] It cannot be said that the exercise by the majority trustees of their discretion under clauses 1.8 and 7.3, in the circumstances described above, hampers the achievement of the trust objectives. The trust deed leaves it to the trustees, by way of a majority vote, to determine whether a vesting date should be fixed. The majority trustees, for rational reasons, have determined that as matters stand, this should not yet be done. This accords with the aims identified in the trust deed, to expand trust benefits and create sources of income.

[55] It follows that the high court correctly found that the appellants had not satisfied the second jurisdictional requirement. This, too, is a sufficient basis to

dismiss the appeal. But even if this were not so, for the reasons set out below, the appellants would nonetheless fail in establishing that the high court committed a misdirection warranting an interference by this Court in the exercise of the high court's discretion under s 13.

The exercise of the discretion under s 13

[56] We agree with the submission by the respondents that s 13 establishes a discretion in the true, or strict, sense, involving for the court a choice between different but equally permissible alternatives.¹³ It is trite that in such a case, it would ordinarily be inappropriate for an appellate court to interfere unless the lower court has not exercised its discretion judicially.¹⁴ The high court, correctly in our view, acknowledged that the termination of a trust under s 13 is an extraordinary remedy and is only to be applied as a last resort.¹⁵ It declined to make an order to this effect, primarily for the reason that to force a termination of the trust would be antithetical to the wishes of Elbert Snr as expressed in the trust deed.

[57] In our view, the high court cannot be found to have failed to exercise its discretion judicially in reaching this conclusion: it was an entirely appropriate conclusion to draw based on the applicable law and the facts of the case. Much was made in the oral submissions before this Court of Toerien's alleged conflict of interest in managing the trust businesses and in being one of three trustees. This was to boost the averments in the appellants' supporting affidavits that Toerien effectively controlled both the trust businesses and the trust.

¹³ *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (AD) at 800E.

¹⁴ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) para 88.

¹⁵ *Nair NO v Nair NO and Others* [2019] ZAKZPHC 23 para 40.

[58] Careful scrutiny of Toerien's answering affidavit and of his supplementary answering affidavit put paid to the correctness of these broad and unsubstantiated averments. He is one of several directors of the trust companies and has no sole control over them. In Toerien's supplementary affidavit, he records that Koos abandoned his high court action in which he sought the removal of the additional directors appointed after Elbert Snr's death. This development undermines the appellants' case that Toerien exercises effective control over the trust businesses. Toerien also disclosed the income he receives from the trust companies: it does not appear *prima facie* to be out of sync with what a chief executive officer in his position might expect to earn. The appellants provide no evidence to the contrary. Moreover, Toerien is also not the only beneficiary to receive income from trust businesses: Maryke receives a salary as an employee of Gasvoorsieners. Karmien received a lump sum when she required cash relief and receives a monthly allowance on an ongoing basis from the trust. Toerien is only one of three trustees. Philip has been an independent trustee from inception and there is no evidence to support the appellants' contention that he has been unduly influenced by Toerien.

[59] As noted earlier, Toerien's version prevails. Clearly, the appellants are unhappy about the way the majority trustees are exercising their discretion as trustees, but this is not a justifiable reason to terminate the trust. In our view, the appellants have failed to establish a basis to interfere in the high court's refusal to grant an order terminating the trust. Even if the appellants have genuine concerns about the present impasse between Lenette and the majority trustees, this is not something that the Court can rectify as matters stand. As noted earlier, the appellants abandoned their prayer for alternative relief in the form of a removal of Toerien and Philip as trustees. That avenue is thus not open for consideration in this appeal.

Conclusion

[60] We conclude that the appeal fails on all possible bases. There is no reason why the costs of the appeal should not follow the result.

[61] We make the following order:

1. The appeal is dismissed.
2. The first, second and third appellants are directed to pay the costs of the respondents jointly and severally, the one or more paying the others to be absolved, which costs shall include those of senior counsel where so employed.

R M KEIGHTLEY
JUDGE OF APPEAL

L T MODIBA
ACTING JUDGE OF APPEAL

Appearances:

For Appellant: R F van Rooyen SC (with M M van Staden & L K Farmer)

Instructed by: Mostert & Bosman, Bellville
McIntyre van der Post Inc, Bloemfontein

For 1st to 4th & 6th Respondents: P A van Eeden SC (with P Gabriel)

Instructed by: Marais Muller Hendricks Inc, Cape Town
Symington De Kok, Bloemfontein.