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

CASE NO. 15 493/2014

In the matter between:

NICOLENE HANEKOM	**APPELLANT**
AND	
LIZETTE VOIGHT N.O.	**1ST RESPONDENT**
LIZETTE VOIGT	**2ND RESPONDENT**
JANENE GETRUIDA GOOSEN N.O.	**3RD RESPONDENT**
JANENE GETRUIDA GOOSEN	**4TH RESPONDENT**
LINDA MARAIS N.O.	**5TH RESPONDENT**
LINDA MARAIS	**6TH RESPONDENT**
THE MASTER OF THE HIGH COURT, CAPE TOWN	**7TH RESPONDENT**
ELIZABETH RENE MARAIS	**8TH RESPONDENT**

CORAM: BOZALEK, J et DLODLO, J et RILEY, AJ

JUDGMENT DELIVERED ON 13 August 2015

DLODLO, J

INTRODUCTION

This is an appeal emanating from an application which served before Cloete J on 10 December 2014. This matter came to Court consequent upon a dispute between four sisters, namely, the Appellant and the individuals cited as the First to Sixth respondents who are both trustees and the beneficiaries of the Dr Marais Trust registration number MT3990/86. The Appellant appeals against certain findings made by Cloete J. The necessary leave to appeal was granted on 2 February 2015.

The Appellant initially only applied for a declaratory in connection with the validity of an amendment to the original Trust Deed of the Dr Willie Marais Trust ("the 1980 Trust Deed"). Thus there appears to be suggested that the two trust deeds relevant in this appeal are: (a) the trust deed which is attached to the Last Will and Testament by means of which the 1980 Trust Deed was created and (b) a document with the heading *"Memorandum van Ooreenkoms"* signed in 2001 ("the 2001 Memorandum").

The Respondents answering to the Appellant's application for the abovementioned declarator in connection with the validity of the 2001 memorandum as an amendment to the 1980 Trust Deed, brought a counter-application for the removal of the Appellant as a trustee of the trust. The Appellant then amended her notice of motion to provide for the removal of all four trustees of the trust (including herself) and for the appointment of four independent trustees in their stead.

The findings and orders made by the Court a quo which to a greater extent form the crux of this appeal are that (a) the Master of the High Court, (the Seventh Respondent) carried out an administrative action during 2001 by making a formal decision that the 2001 Memorandum is valid and, as a consequent thereof that the Appellant did not bring an application for the review of the Master's administrative action, the 2001 Memorandum stands as the trust deed, valid since 2001; and (b) both the Appellant's application for the removal and substitution of all the trustees and the Respondents' application for the removal of only the Appellant as a trustee, was referred to trial. Thus this Court is not called upon to make any decision regarding those applications. The only question before this Court for determination is whether the 2001 Memorandum constituted a valid amendment of the 1980 Trust Deed. It is only helpful to first set out the background to the dispute over the Trust Deed.

BACKGROUND FACTUAL MATRIX

It is common cause that there is a long standing dispute between the parties (with the Appellant in one camp and the First to Sixth Respondents in the other). This dispute is captured in the following averment contained in the Respondents' Answering Affidavit, namely:

"Die dispute en meningsverskille het vele fasette maar sentreer veral rondom die lotgevalle van wat tans die waardevolste bate van die Trust daarstel, naamlik 'n Kaap-Hollandse woning in Eversdal, wat oorspronklik 'n plaas-opstal was ("die postal").

Die Applikant probeer ten alle koste verhoed dat die opstal aan 'n buitestaander verkoop word (selfs teen 'n prys wat ongetwyfeld die markwaarde daarvan weerspieël), maar aan die ander kant het sy al herhaaldelik probeer of aangebied om self (en in die mees onlangse geval via haar familietrust) die opstal te koop. Dit alles geskied teen die agtergrond daarvan dat die Trust likiditeitsprobleme het – die resultaat van die feit dat die Trust aan die een kant geen noemenswaardige inkomstegenererende aktiwiteite huisves nie, maar aan die ander kant noemenswaardige lopende kostes het, sodat 'n gunstige verkoping van die opstal tot die voordeel van alle belanghebbendes sal wees. Ek sal later in hierdie eedsverklaring die Trust se finansiële posisie in meer detail behandel."

On 8 December 1980 one Willem Daniel Marais, the grandfather of hte sisters (trustees in the 2001 Memorandum) signed his Last Will and Testament in terms of whch one half of his estate was bequeathed to Dr Willie Marais Trust. The last mentioned Trust is now known as the 1980 Trust Deed and it stands central in this appeal. Perhaps it should be mentioned that hte Appellant's case is that it is the 1980 Trust Deed which governs the affairs of the trust. On 7 March 2000 after the demise of Willem Daniel Marais, his son (father of the four sisters) was appointed as the only trustee of the 1980 Trust. On 5 April 2001 before the death of the father to the four sisters, the five trustees (the present four sisters and their father) signed a document with the heading "Memorandum van Ooreenkoms". This is the document playing a pivotal role in these proceedings and which assumes the name of "the 2001 Memorandum". The Respondents' contention is that the 2001 Memorandum constitutes a valid amendment to the 1980 Trust Deed. The Applicant contends differently.

The 1980 trust Deed (in its original form) although created in the Last Will and Testament of the sisters' grandfather (a) is clearly substantially a product not of the latter's violation but is rather the wishes of their father who was then still alive and (b) who, as far as its contents (assets) are concerned, had an initial make-up which differed substantially from the make-up at the time of the conclusion of the 2001 Memorandum.

It is common cause for instance that the assets representing the subject-matter of the dispute (especially including the manor house) did not come from the sisters' grandfather and were in no sense disposed of via his testament. They were instead derived, subsequently to the death of the grandfather, from theestate of the sisters' father or from the entities controlled by him.

IS THE 2001 MEMORANDUM A VALID AMENDMENT TO THE 1980 TRUST DEED

The Trust Deed was created by the grandfather of the current trustees is attached to the Last Will and Testament of Willem Daniel Marais. The 1980 Trust Deed provides *inter alia* that the trust should be kept and used for the benefit of the children of Johannes Linde Beyers Marais (father of the sisters) as the beneficiaries. The assets of the trust would vest “in die adminstrateur”. Johannes Linde Beyers Marais was the only administrator or trustee of the trust. Clause D (d) of hte1980 Trust Deed provides that if there are more than one trustee, any decision taken by them should be unanimous (“moet hulle besluite eenstemming wees”). Clause 1 deals with the continuation of the trust and it provides as follows:

“VOORTSETTING VAN TRUST:

Indien ‘n begunstigde te sterwe kom voor beëindiging van die trust, sal die begunstigde se afstammelinge en by ontstentenis aan afstammelinge sy erfgename in di eplek en stede van die afgestorwe begunstigde tree as begunstigde”.

It is accepted thatthe 2001 Memorandum does differ from the 1980 Trust Deed in several respects. For instance (a) whereas the 1980 Trust Deed provides that the four sisters are to be the only beneficiaries of the trust and in the event of one of them passing away before the termination of the trust, such deceased sisters’ descendents would become beneficiaries in her stead, the 2001 memorandum (in contrast) broadens the group of income beneficiaries and capital beneficiaries. In the 2001 Memorandum the group of beneficiaries is added to include “aanverwante van die kapitaal begunstigdes”. (b) Whereas the 1980 Trust Deed requires unanimous decisions by the trustees, the 2001 Memorandum provides that a simple majority is all that is required for valid decisions by the trustees, save for certain exceptions.

Thus in Mr Coetsee’s submission the descendants of the sisters identified n the 1980 Trust Deed as potential beneficiaries in the event of their mother passing away are prejudiced or are in a worse position if the 2001 Memorandum is to be held as valid particularly because the group of beneficiaries is added to by way of the 2001 Memorandum. I do not of course agree with Mr Coetsee in this regard amendments to a trust deed is that the trustees and the beneficiaries can amend a trust deed. I also accept tht where minor beneficiaries or unborn beneficiaries are concerned ordinarily a Court order is required for a valid amendment of a trust deed. In boltering his contention herein Mr Coetsee relied heavily on ***Ex parte Watling and Others*** 1982 (1) SA 936 (CPD) a judgment by Tebbut J in which he concluded as follows:

> *"In the present case the applicant's sons have agreed with the applicant to postpone their rights to the capital of the trust until her death. They can do so but they cannot in this way alter the scheme of devolution set out by the testator. As stated by Schreiner J in the Loewenthal case supra:*
>
> *'...it is not merely the rights of the beneficiaries" (ie the applicant's sons' rights) "that are involved but the right, if it can be called such, of the testator to have his plan carried out'."*
>
> *That plan, in the present case, involves the minor grandchildren of the testator. They are not before the Court. The Court cannot, therefore, approve a variation which may affect their rights. In any event, if it were to do so it would have to give its consent to the agreement on their behalf in its capacity as the uppermost guardian of minors. I would not be prepared to do so as the variation sought may well adversely affect them. Moreover, there may also be beneficiaries not yet* in esse. *The Court cannot give its consent on their behalf as it is not the uppermost guardian of that which does not exist (see Ex parte Odendaal 1928 OPD 218; Ex parte Swanepoel 1953 (1) SA 280 (A): Ex parte Leandy and*

> *Another (supra at 366 D-H)). This ground for the variation sought must therefore also fail."*

Strictly speaking the ***Ex parte Watling*** case *supra* is not relevant in the instant mater. At 939A of the judgment the following appears:

"The general rule is that, save in exceptional or peculiar circumsances, the courts will not authorise the variation of the provisions of a will which are capable of being carried out and are not contrary to law or public policy.".

Another case on which Mr Coetzee placed reliance is ***Bydawel v Chapman N.O. and Others*** 1953 (3) SA 514 (AD) dealing with family agreement (whether it can constitute a valid amendment of a Last Wil and Testament. Talking to this apsect the Appellate Division (per Van der Heever AJ) made the following finding:

"But it must be plain that any rights acquired under the agreement are contractual and cannot affect the devolution of the testator's estate; in other words they may contract to render toeach other the fruits of the dvolution, if any when they mature or accrue, but cannot alter the devolution by contract. Moreover in the present case non constat we have before us all the beneficiaries or that the agreement had the consent of all concerned".

It is helpful to point out that the headnote of ***Bydawel v Chapman N.O. and Others*** *supra* makes it rather clear that it does not address itself to stuations such as obtaining in the instant matter. Perhaps for purposes of completeness I should set out *infra* the headnote referred to above:

"Whereas the testator had withheld the adminsitration of his estate from his two daughters, the agreement purported to give one daughter the unfettered administration thereof. Whereas the testator had directed that the corpus of his estate should be finally distributed only after the death of the survivor of his

daugters, the agreement sought to anticipate this date and to provide for the final distribution upon the death of one of the daughters, thereby jeopardising the potential rights of heirs ab intestato".

There was no evidence to show that all the beneficiaries were before Court or that they consented tothe agreement. The same cannot be said about the instant matter. In mr Coetsee's contention the absence of permission by the descendants of the sisters and in the absence of a Court order authorising the amendment of the 1980 Trust Deed by the substitution thereof by the 2001 Memorandum is fatal to the validity of the 2001 Memorandum.

The Trust Property Control Act 57 of 1988 contain the statutory backdrop to the process in terms of which the Master authorises a trustee in writng in order that the latter might validly act in that capacity. There is a distinction between the appointment of a trustee (occurring in terms of the trust deed) and his or her written authorization b the Master (in terms of Master's statutory powers) but the point of importance is that the act through which the Master authorises a trustee to act as such must necessarily take place against the backdrop of the particular trust deed. One of the reasons for the distinction referred to *supra* is the very fact that the trust deed is the "defining source" of hte trustees' powers. See in this regard Honore's **South African Law of Trusts** 5th edition at pages 219-220 where the author *inter alia* explains as follows:

"The Act reconizes and preserves the distinction between the appointment of a trustee, whch occurs in terms of hte trust instrument, and a trustee's written authorisation, which derives from the Master by virtue of statutory powers. The trust instrument remains the defining source of the trustee's power and may have to be consulted by persons dealing with the trustee. While the creation of a trust in general thus remains a private act, the authorization of a trustee ceases to do so. Statutory authorization is added for two purposes: not only in

theinterests of the benficiaries, so as to reinforce the requiremet of security, but to serve to outsiders as written proof of incumbency of theofficeof trustee".

Of relevance is also Section 6 (1) of theTrust Property Control Act providing *inter alia* that:

"Any person whose appointment as trustee in terms of a trust instrument, s7 or a Court.....shall act in that capacity only if authorized thereto in writing by the Master".

The clear implication is that the Master's authorization of a trustee presupposes the existence of a particular undelying trust deed which seves or must serve as the *fons et origo* of such authorization.

The abovementioned principle ordinarily assumes particular importance in a case such as the instant one where a choice must in effect be made between two trust deeds. In the situation such as the present one, the Master simply must make a choice or at the very least acquiesce in the choice already made by the parties involved. His actions are not a mere "rubber stamping". The important fact is that even of the situation were regarded as a mere "rubber stamping", the outcome would still be that the Master in effect chose or preferred one trust to another. One must reason so since in the absence of any decision or judgment as to which trust deed is applicable, the Master would and could not even putatively have authorized the relevant person to act as trustee.

In truth in appropriate circumstances the Master may even have a duty to make such a decision. By necessary implication it is part and parcel of the Masters' powers to authorize persons to act as trustees. Posing a question whether the Master has specifically been given the powers to determine the "validity" of an "amendment" is not a helpful tool to employ. The position is simply (as Le Grange contended) that where the Master is required to authorize a trustee and where he has been specifically asked to make a judgment call regarding the content of the proposed trust deed, he must necessarily apprise himself of the underlying trust deed.

It is true that the 2001 Memorandum was regarded by all concerned including the Master as the relevant trust instrument (in comparison with the 1980 Trust Deed). The sisters' authorization to act as trustees (an also their appointment) simply occurred in terms of the 2001 Memorandum. It was found in ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*** 2004 (6) SA 222 (SCA) that Certain permission granted by the Administrator was unlawful and invalid from inception. But the Supreme Court of Appeal proceeded to hold as follows:

"Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked...No doubt is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside".

The above has come to be known as the ***Oudekraal*** principle. In simple language this says the consequences of those actions remain, regardless of whether they wee correct or not. Therefore the only question is against the backdrop of which trust deed the appointment of the additional trustees (and therefore also their authorisation by the Master) occurred in fact. In passing it may be mentioned that section 6 of the Act pre-supposes that authorization of a trustee can occur only in terms of a particular trust deed. The true position is that in order for the Master to authorize a person to act as a trustee there must be a specific underlying trust deed and where there is a choice between two or more the Master must as a necessary pre-condition to authorization know in terms of which trust deed the underlying appointment of that person as trustee occurred. Authorization without an implicit acknowledgement of the trust deed in terms of which the underlying appointment occurred is infact legally untenable and could clearly not be what the Legislature intended. The decision in ***Groeschke v Trustee, Groeschke Family Trust and Others*** 2013 (3) SA 254 (GSJ) at para [19] talks to this, thus:

"[19] It is in my view quite clear that the lodgement of a deed of trust and the documents amending that deed is required under ss 2 and 4 of the Act simply in order to facilitate, for example, the identification of the terms of a trust and powers, rights and obligations that flow from them".

In ***Ex parte Watling*** *supra*, a decision by Tebbut J relied on heavily by Mr Coetsee, the Judge also referred to what was stated by Smuts J in ***Ex Parte Marais***, namely

"Dit is ....duidelik dat die Hof geen inherente diskressie besit om die erfvolging wat deur 'n testator beplan is te wysig slegs op grond van die toestemming van alle belanghebbendes nie".

Indeed an amendment to the old trust deed (the 1980 Trust Deed) would not have been impossible in the circumstances of the instant mater. I am in agreement with the submission made by Mr Le Grange that the question whether the 1980 Trust Deed could validly have been amended in 2001 Memorandum ought (from a fundamental point of view) not to be adjudicated with reference to the co-incidence that the 1980 Trust happens to be of testamentary origin. In the above regard it may be helpful to refer to PA Olivier *et al* Trustreg en Praktyk 2nd ed Lexis Nexus para 2.9.2.1 where the following rather convincing argument is advanced:

"Omdat 'n testamentêre trust sy oorsprong in 'n testament het, is die oorheersende toepaslikheid van die reël voluntas testatoris servanda est ewe van toepassing gemaak op so 'n trust. Dié soort trust word dus, met verwysing na wysigings, met 'n testament gelykgeskakel wat, ons insiens, nie geregverdig kan word nie."

The argument proceeded in the same paragraph as follows:

"Die trust is wel in 'n testament vervat, maar wanneer die bedoel (sic) afgehandel is, skuif die trust as volwaardige entiteit uit die testament uit en verlaatas't ware die erfreg en neem s plek in die ry van regsfigure as 'n selfstandige nuwe regsfiguur. Vanaf daardie oomblik moet daar trustregtelik geoordelik en beoordeel word en dit kan slegs aan die hand van die essensiële elemente van 'n trust gedoen word....Ons stem saam met die volgende pleidooi wat Guantlett voor die promulgering van Wet 57 vna 1988 gelewer het:" [...] There is a distinction between best serving the intention of the settler and a primal obeisance to the dead hand. More important, the present position is undesirable. It is based on a simplistic equation of a settler – whether inter vivos or mortis causa –with a testator, attributing to him a foresight beyond the dreams of most mere mortals and it petrifies at one arbitrary moment in a tumultuous age what should be a supple, living institution."

I fully agree with the above quoted reasoning.

In the instant matter it is not only common cause that the deceased estate of the sisters' grandfather has been long since been finalised, but in addition thereto the make-up of the Trust assets at the time of the conclusion of the 2001 Memorandum was substantially different from such make-up at the time of the testator's death – with the assets at issue here having been placed in the Trust only after his death and from other sources. This makes it even more absurd to treat the trust deed as it was in 2001 as if it were nothing more than a testamentary document.

In order to illustrate the point Mr Le Grange gave the following though experiment which I find very telling:

"(a) Suppose a testator (T) bequeathes certain assets (X, Y, Z) in trust mortis causa.

(b) The beneficiaries of the Trust are A, B and C.

(c) Long after the finalisation of T's deceased estate the trustees, complying strictly with the trust deed, distribute the assets (X, Y and Z) to A, B and C.

(d) Shortly thereafter, and without the Trust having been dissolved in the meantime, A donates a valuable income-producing asset (W) to the Trust. At that stage and thereafter it represents the only asset of the Trust.

(e) Subsequently D, A's son, appears on the scene. All the beneficiaries (A, B and C), and the trustees, are in favour of amending the trust deed by adding D, in addition to A, B and C, as a discretionary beneficiary of the Trust."

The question is (regard being had to the above thought experiment) ought our law to set its face without more against such a proposed amendment merely because the Trust originated (historically speaking) in a testament? The law is a dynamic instrument. The answer is a simple no. The Appellant relied on the general rule expressed in cases described as an unwillingness to interfere with the devolution of the testator's estate as per the expression of intent inhis testament. Compare for an example ***Ex Parte Jewish Colonial Trust Ltd: In re Estate Nathan*** 1967 (4) SA 397

(N) 408E where the following is recorded:

"The Court cannot make, or re-make a testator's will for him; it cannot vary the will he has made. It cannot change the devolution of his estate as he has directed it, nor add to or subtract from the benefit he has conferred upon each of the beneficiaries. They must be content to take what they are given, when and on the terms on which it is given. The Court will interpret the will in order to ascertain who are the beneficiaries and the extent to which each benefits and in interpreting it will give consideration to what may properly be implied into the will. The rights of the beneficiaries are determined by the will properly interpreted."

Ordinarily, where one is no longer dealing with the testator's estate (in the sense of the material benefits to be derived out of the estate) clearly the only judicial basis for an objection against an amendment of the trust deed also falls away in accordance with the maxim *cessante ratione legis cessat ipsa lex.* In any event one must also have regard to the provisions of clause H of the 1980 Trust Deed. It reads as follows:

"H: BEËINDIGING VAN TRUST: Dit word in die diskresie van die Administrateur gelaat om te besluit wanneer die Trust beëindig moet word."

1. The aforementioned clause gives arather wide discretion to the "administrateur". On a proper interpretation of the provisions of clause H it is clear that the view of the "administrateur" (trustee) counts and that the attitude of others (including the beneficiaries) could not stand in the way of the application of the provision. See ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) para 18.

The provision of clause H of the 1980 Trust Deed must by necessary implication allow an amendment to the 1980 Trust Deed. I say so because the power to dissolve a trust goes beyond the mere power to amend it. See also in this regard Cameron *et al* ***Honoré's South African Law of Trusts*** 5th ed Juta 2002 at 506, where the authors state that those who can terminate a trust can necessarily also amend it. The authors *inter alia* postulate the following:

"... [i]t follows that they can in effect vary the trust, because they can use the trust property to set up a new trust that differs from the old."

See also ***Ex Parte Knight and Others*** 1946 CPD 800 811; ***Ex parte Hulton*** 1954 (1) SA 460 (C) 468 where the following formulation appears:

"*the possession of the greater power sanctions the exercise of something less than the whole*".

Accepting the fact that the administrator of the 1980 trust Deed could validly terminate that trust, he could thus achieve an "amendment" via the termination of the old trust and the creation of a new trust. I, however, think that it is not necessary to engage in the alternative argument postulated in Mr Le Grange's head of argument in this regard. It suffices to quote from the judgment of the Supreme Court of Appeal in ***Peters and others NNO v Schoeman and others*** 2001 (1) SA 872 (SCA) at 879:

"There are two classes of 'simulated' transaction known to our law. The first is one in which the parties have set out to conceal the real agreement by dressing it up in the guise of another. The second is one in which the parties have mistakenly characterised their real agreement as something which, when juristically analysed, it is not. In the first, the simulation is deliberate; in the second, it is unwitting. In both instances a court will have regard to the true nature of the agreement and disregard the description given to it by the parties."

See also ***Registrateur van Aandelebeurse v Aldum h/a Onecor Group en ander besighede*** 2002 (2) SA 767 (SCA) 772-773.
I thus fully agree with the stance adopted by Le Grange that the Court will not necessarily be guided by the name which the parties gave to their transaction but will, instead, in characterising the transaction, have regard to whatever proves (in objective terms) to have been the parties' intent.

Perhaps the point must be made that the relief sought in prayer 3 of the notice of motion is quite unrealistic and totally inappropriate on an administrative law basis. No court of law can willy-nilly set aside various legal acts with the consequences where these have not been indentified apart from the description "which were not unanimously reached". Such legal acts may very well affect a range of parties who have been given no notice of any such relief being sought. Those decisions must stand until they are individually set aside.

WHAT BENEFITS SHALL APPELLANT OBTAIN

Before engaging in further discussion I need to mention that on behalf of the Respondents a point *in limine* was taken by Le Grange SC. In truth this appeal is premised upon the notion that the 1980 Trust Deed (requiring a unanimous decision-making) is valid and the 2001 Memorandum (allowing decision-making by majority) is invalid. Mr Le Grange contended that even of the above were to be assumed to be correct it would not avail the Appellant. In his view even if the situation were governed by the 1980 Trust Deed the Appellant could in the circumstances not be allowed to cast a vote in connection with the manor house based on the breach of her fiduciary obligation. The above assertion is correct even though it plays a lesser role in the determination of the legal question before Court, namely whether the 2001 Memorandum is valid. In passing it needs to be mentioned that the fiduciary obligations of a trustee such as the Appellant include exercising the care, diligence and skill which can reasonably be expected from a person who manages the affairs of another. See: **section 9 (1)** of the Trust Property Control Act 57 of 1988; ***Tijmstra NO v Blunt-Mackenzie NO and others*** 2002 (1) SA 459 (T) 472-73; 473-74. Of course this duty does include particularly the duty of trustees to avoid a situation where their fiduciary duties come into conflict with their private interests or where they position themselves in such a manner that their personal interests clash or merely might clash with their responsibilities and duties towards the trust and the beneficiaries. See ***Hoppen v Shub*** 1987 (3) SA (C) 201 210; ***Jowell v Bramwell-Jones and Others*** 2000 (3) SA 274 (SCA) para 16; ***Afrisure CC and Another v Watson NO and Another*** 2009 (2) SA 127 (SCA) para 54-56. The rule against conflicts of interest is a rather strict one that leaves little room for exception. It applies even if the person in question acted honestly and *bona fide*. See ***Phillips v Fieldstone Africa (Pty) Ltd and Another*** 2004 (3) SA 465 (SCA) para [31]. Persons occupying a fiduciary position also must not exercise their powers for improper or collateral purposes, thereby in effect fettering their discretion. See in this regard ***Afrisure CC and Another v Watson NO and Another*** 2009 (2) SA 127 (SCA) para 54-56.

2. Indeed the fiduciary obligations owed by a trustee to the trust and its beneficiaries are equivalent to, and not less onerous than the fiduciary obligations owed by a company director to a company. See: ***Afrisure CC and Another v Watson NO and Another*** *supra* para 54. Thus a trustee wishing to purchase a trust asset as the Appellant apparently does finds himself in, a precarious position and his conduct in this regard will have to be subjected to strict and close scrutiny and shall be measured against the strictest possible ethical standards. See: ***Sibex Construction (SA) (Pty) Ltd and another v Injectaseal CC and Others*** 1988 (2) SA 54 (T) 67E). The aforegoing discussion is in line not only with the elementary principle that a director may not vote in connection with a contract or any

other matter in which he is personally interested but also with the position which now applies statutorily to company directors who have a personal interest in a transaction to be entered into by the company. See: ***Trek Tyres Ltd v Beukes*** 1957 (3) SA 306 (W) 310). I end this aspect with the following important and telling commentary by FHI Cassim *et al* **Contemporary Company Law** (2nd edition Juta p 571 (commentary concerns the applicable provisions of the Companies Act, 71 of 2008):

"Having made the disclosure, the director, if present at the meeting, must leave the meeting immediately thereafter and may not take part in the consideration of the matter, save to disclose to the meeting any material information and any observations or pertinent insights relating to the matter ... (s 75((5)(d) and (e). These provisions embody the ... "disclose and recuse" approach. The director's departure from the meeting does not affect the quorum for the meeting as he or she is deemed for this purpose to be present at the meeting. But for voting purposes and for determining whether the resolution has sufficient support for its adoption, he or she is regarded as being absent (s 75(5)(f)(i) and (ii)."

The above finds support in the so-called doctrine of the abuse of rights which is applied in our law in appropriate circumstances. See: ***Regal v African Superslate (Pty) Ltd*** 1963 (1) SA 102 (A) 107-109; and see the general discussion in Boberg ***The Law of Delict*** vol 1 Juta 1984 206-210. In the instant matter it would appear that the Appellant exceeded the proper bounds of any "right" which she might have had to insist on unanimous decision-making (in terms of the 1980 Trust Deed).

CLOSING REMARKS

The appeal before us lacks merits and it stand to be dismissed. At the risk of repeating what has been mentioned already, it is emphasised that the estate of the grandfather was rather limited. It essentially consisted of two empty plots and a house in Bergvliet. It is important to bear in mind that the two trust created by the grandfather were very much the product of the thinking of his two sons. It is the sons that went to attorneys and instructed them to draw up such trusts. These were, in turn put infront of the old man (grandfather to the sisters). The grandfather as an interested party must have been happy to sign these off. The beneficiaries identified then remain the same even to date, namely the four sisters. Regard being had to the background facts in this matter, it is highly artificial to view the initial trust (the 1980 Trust Deed) as solely or principally a testamentary trust and to artificially dictate that its whole structure must be determined by the provisions that in the event that one of the sisters (daughters) predeceasing his great grandchildren would be beneficiaries. These great grandchildren remain amongst the potential beneficiaries but now as things stand that is dependent upon what the four sisters in their capacities as trustees decide.

When the grandfather founded the 1980 Trust Deed, there were no provisions for the four sisters to become trustees. His (grandfather's) son was then the only trustee. In these circumstances the provisions that any decision that the trustees make had to be unanimous were understandable and practical. But when the only "administrateur" (father to the four sisters) took a decision to seek the appointment of all four of the beneficiaries (his daughters) as trustees the question of a potential deadlock and/or lack of unanimity presented itself. The provision contained in the 2001 Memorandum stipulating that a majority decision had to prevail. The father to the four sisters gave himself a veto power (which applied for as long as he was alive).

It would be problematic to now resurrect the unanimity clause contained in the 1980 Trust Deed. Circumstances have completely changed in a manner which was not envisaged by the grandfather. Huge assets to which the grandfather did not contribute and which did not and may not have been in existence when he died are now the crux of the trust. I do not agree that the provisions contained in the 2001 Memorandum ignore the scheme of devolution proposed by the original founder of the 1980 Trust Deed. In my view, this case presents factual scenario that call upon the courts to adopt a realistic and practical approach and avoid to let the dead hand of the testator rigidly prescribe how the corpus of the trust must be dealt with some thirty five years later under completely changed circumstances. It is not my understanding that the original testator (the grandfather) created a trust to last forever and which would ultimately include as beneficiaries the great grandchildren. The latter's interests merely came into play if one of the sisters died or should die before the trust had been wound up or discontinued. None of them have died. In the circumstances as mentioned earlier on this appeal lacks merits.

ORDER

I would make an order in the following terms:

(a) The 2001 Memorandum constituted a valid amendment to the 1980 Trust Deed.

(b) The Appeal is dismissed with costs which are to include costs occasioned by the employment of two counsel.

(c) Costs shall be paid by the Appellant in her personal capacity.

DLODLO, J

I agree

BOZALEK, I

I agree

RILEY, AJ