THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 629/2010

In the matter between:

JAN WILHELMUS POTGIETER	**First Appellant**
MAGDELL WOODWARD	**Second Appellant**
v	
ANNA-MARIE JULIANA POTGIETER NO	**First Respondent**
THERON WESSELS NO	**Second Respondent**
ANNA-MARIE JULIANA POTGIETER	**Third Respondent**
JANDRÉ VENTER	**Fourth Respondent**
RUAN VENTER	**Fifth Respondent**
THE MASTER OF THE NORTH GAUTENG HIGH COURT, PRETORIA	**Sixth Respondent**
THERON WESSELS	**Seventh Respondent**

Neutral citation: *Potgieter v Potgieter* (629/2010) [2011] ZASCA 181 (30 September 2011).

Coram: **NAVSA, BRAND, VAN HEERDEN, LEACH AND MAJIEDT JJA**

Heard: **20 September 2011**

Delivered: **30 September 2011**

Summary: **Trust – variation of trust deed by agreement between founder and trustees – invalid for want of consent by beneficiaries who had previously accepted benefits conferred upon them by original trust deed – effect of invalid variation agreement – trust deed enforceable in unamended form.**

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Bertelsmann J sitting as court of first instance):

The following order is made:

a. The appeal is upheld.

b. The cross-appeal is dismissed.

c. The costs incurred by the appellants and the respondents in both the appeal and the cross-appeal, including the costs of two counsel, where applicable, shall, save for the costs of the seventh respondent, be paid by the Buffelshoek Familie Trust on an attorney and client scale.

d. The order of the court a quo is set aside and replaced by the following:

‘1. The purported variation of the trust deed of the Buffelshoek Familie Trust on 21 February 2006 is declared to be invalid and set aside.

2. The costs incurred by the applicants and the respondents, including the costs of two counsel, where applicable, shall, save for the costs of the seventh respondent, be paid by the Buffelshoek Familie Trust on an attorney and client scale.’

JUDGMENT

BRAND JA (Navsa, Van Heerden, Leach and Majiedt JJA concurring):

[1] This appeal is about a trust, originally called the Buffelshoek Familie Trust and later renamed the V P J Trust, in which all the appellants and the

respondents, save for the sixth respondent, who is the Master of the High Court, have an interest of some kind or another. Since the Master took no part in the proceedings, I shall exclude him from any further reference to 'the respondents'. The central issue raised by the appeal is whether the purported variation of the trust deed pertaining to the Buffelshoek Familie Trust, pursuant to an agreement between the founder and the trustees of the trust, is legally binding. While the appellants contended that the variation was invalid and of no force, the respondents took up the contrary position that the variation agreement was valid and enforceable.

[2] Eventually the dispute gave rise to an application by the appellants as applicants in the North Gauteng High Court (Pretoria) for an order, in the main, confirming their position that the variation of the trust deed was invalid. When the matter came before Bertelsmann J, he agreed, despite the counter-arguments by the respondents, with the appellants' contention that the variation was invalid and without force. Normally this finding would have resulted in the implementation of the trust deed in its original, unamended form. But Bertelsmann J found this result in the circumstances, unpalatable, contrary to public policy and constitutionally unsound. In consequence he granted an order which effectively awarded one-fifth of the trust assets to each of the two appellants as their exclusive property, while the other potential beneficiaries retained their rights in terms of the amended trust deed in respect of the remaining three-fifths of the trust assets. This outcome satisfied neither the appellants nor the respondents. The appeal and cross-appeal that consequently followed are both with the leave of the court a quo. Apart from ancillary issues, there are two questions we have to determine: (a) was the purported variation of the trust deed invalid? and (b) if so, what should be the consequences of that finding?

[3] The opposing arguments bearing on these questions will be better understood against the factual background that follows. The founder of the trust

was Mr Victor Petrus Johannes Potgieter, a businessman of Mookgophong, who passed away at the age of 49 on 28 April 2008 (the deceased). The two appellants, Mr Jan Wilhelmus Potgieter and Mrs Magdell Woodward (born Potgieter) were the only children of the deceased. The first and second respondents are cited in their capacities as the two trustees of the trust. They are Mrs Anna-Marie Juliana Potgieter, who married the deceased after his divorce from the mother of the appellants, and Mr Theron Wessels who was the deceased's attorney. The third respondent is Mrs Potgieter in her personal capacity. The fourth and fifth respondents are Mr Jandré Venter and Mr Ruan Venter, the two sons of Mrs Potgieter from her previous marriage, while the seventh respondent is Wessels in his personal capacity.

[4] The trust was originally created under the name of the Buffelshoek Familie Trust, by means of a trust deed which was notarially executed on 1 June 1999. In terms of the trust deed the deceased was one of the original trustees. So was Wessels, who was his attorney throughout. The third original trustee, who was the deceased's accountant, Mr Nicolaas Louwrens Pretorius, resigned his position on 2 July 2001 before the occurrence of further events that are relevant to this case. A proper appreciation of the import of the impugned amendments that were to follow unfortunately requires a somewhat detailed rendition of the original terms of the trust deed.

[5] The original trust deed was in Afrikaans. According to my translation, its terms that turned out to be pertinent laid down the following:

(a) Clause 1.3.1 of the trust deed nominated the two appellants as the capital beneficiaries of the Buffelshoek Familie Trust. It provided that:

'"capital beneficiaries" are the following persons: Magdell Potgieter, born on 30 September 1982 and Jan Wilhelmus Potgieter, born on 15 June 1984: being the children of [the deceased] on the understanding that they will not receive any benefit from the trust during the life of [the deceased], unless the [the deceased] consents thereto in

writing'

(b) Clause 1.3.2 of the trust deed provided that the income beneficiaries of the trust were to be determined by the trustees in their discretion from a class consisting of the two capital beneficiaries or those related to them in consanguinity or affinity.

(c) Clause 1.6 defined 'vesting date' for the purposes of clause 13 as the first of the following dates:

(i) The date of death of the founder (the deceased);

(ii) The date determined at any time by the trustees as the vesting date on the condition that such date is not earlier than the date on which the younger of the capital beneficiaries reaches the age of 21, but in any event not later than the date on which the younger of the capital beneficiaries reaches the age of 25 years.

(d) Clause 13 provided, in turn, that:

(i) On the vesting date thus determined, the capital of the trust is to become the property of the capital beneficiaries set out in clause 1.3.1;

(ii) No capital not paid out or accumulated income will vest in any capital beneficiary before the capital beneficiaries reach the ages set out in clause 1.6.

(e) Typical of a discretionary trust, clauses 5 and 6 bestowed wide powers on the trustees with regard to the capital assets of the trust. These were limited, in essence, only by the general restrictions that the trustees should exercise their powers in accordance with the general principles of trust law and solely for the benefit of the beneficiaries. Within these broad parameters, the trustees were authorised, for example, to sell the assets of the trust and to invest the proceeds in any way they deemed fit.

(f) Clauses 12 and 14 afforded similar wide powers to the trustees with regard to the income of the trust. Again, within the same broad parameters, they were authorised to utilise the trust income for trust purposes and to distribute the

surplus amongst the income beneficiaries in any way they deemed fit.

(g) Clause 21 dealt with amendments to the trust deed with specific reference to the capital beneficiaries. It provided:

'21.1 The trustees may amend the capital beneficiaries of the trust. Their right to amend is, however, limited to the extent that:

21.1.1 No amendment may be executed after the death of the trustee [the deceased] and only with the consent of [the deceased] during his lifetime; and

21.1.2 Capital beneficiaries may be appointed only from the following persons:

21.1.2.1 the persons nominated as capital beneficiaries in clause 1.3.1 or their children in the event that they die before the vesting of the capital;

21.1.2.2 a member of the family or descendant of [the deceased].

This right of the trustees to amend the capital beneficiaries entails that the persons appointed as capital beneficiaries in terms of the provisions of clause 1.3.1 above can be excluded and another capital beneficiary can be appointed in accordance with the aforesaid procedure, in 21.1.

21.2 No amendment in respect of the capital beneficiaries may have the effect that the assets of the trust are used for the benefit of the founder of the trust (the deceased) or his estate.'

[6] In June 1999, when the deceased founded the Buffelshoek Familie Trust, both the appellants were still minors and the deceased was married to their mother. On 11 September 2003 that marriage was, however, dissolved by a decree of divorce. The divorce was preceded by a drawn out and bitter dispute. Part of the conflict stemmed from a claim by the appellants' mother that the assets of the trust be regarded as the assets of the deceased for purposes of the divorce proceedings. This led to a meeting of the trustees and the capital beneficiaries of the trust on 18 August 2003 regarding the alienation of a trust asset to the mother of the appellants, to which I shall presently return.

[7] After the divorce, the deceased married the first respondent, Mrs Potgieter, on 22 November 2003. As I have indicated, the fourth and fifth respondents were born of her previous marriage. On 25 January 2006 Mrs Potgieter became the third trustee of the Buffelshoek Family Trust together with the deceased and Wessels. This was the state of affairs when the impugned variation agreement was entered into on 21 February 2006.

[8] The variation agreement was a formal agreement between the founder and the trustees. The changes brought about to the original trust deed were substantial. In the main they comprised the following:

(a) The name of the trust was amended to the V P J Trust;

(b) The appellants were no longer the only capital beneficiaries. They were reduced to members of a class of potential capital beneficiaries. Other members of the class included Mrs Potgieter and her two sons. In addition, the trustees were afforded the absolute discretion to select the actual capital beneficiaries from that class. Nothing therefore prevented the trustees from excluding the appellants altogether as beneficiaries of the trust;

(c) The income beneficiaries of the trust were those selected by the trustees, in their absolute discretion, from the members of the same class;

(d) The date on which the rights of capital beneficiaries would vest was amended to the extent that it was in the sole discretion of the trustees when rights would vest (if at all); and

(e) Wessels resigned as trustee. The Best Trust Company (Jhb) (Pty) Ltd was appointed in his stead. To complete the picture – shortly thereafter the company, however, resigned and Wessels was reappointed in his capacity as trustee, together with the deceased and Mrs Potgieter.

[9] The appellants' first contention in the court a quo was that, apart from a variation in accordance with the provisions of clause 21 of the original trust deed, the deed could only be changed with their consent as capital beneficiaries.

Consequently, they further contended, the purported amendment to the trust deed on 21 February 2006, was invalid because it was neither in accordance with the provisions of clause 21, nor was it effected with their consent. The respondents admitted that the appellants did not consent to the variations brought about by the variation agreement and that, in fact, they had no knowledge of the agreement at the time. Their contention was, however, that the variation agreement was entered into before the appellants had accepted the benefits conferred upon them in terms of the original trust deed. Consequently, the respondents contended, the trust deed could, as a matter of law, be amended by agreement between the founder and the trustees without the co-operation of the appellants.

[10] The appellants, in turn, accepted the correctness of the legal proposition that the variation of a trust deed did not require the consent of beneficiaries who had not yet accepted the benefits conferred upon them. Their contention was, however, that as a matter of fact the benefits conferred upon them by the original trust deed had been accepted on their behalf by the deceased as their father and natural guardian as set out in the preamble to the trust deed. Moreover, so they alleged, the deceased (as founder) and the other trustees had acknowledged, at least by implication, that these benefits had previously been accepted on their behalf, by requiring their consent to the alienation of a trust asset at the meeting of 18 August 2003. The respondents disputed the correctness of both these factual allegations.

[11] Despite the respondents' objections, the court a quo decided both areas of factual dispute thus arising in favour of the appellants. As to the question whether the deceased accepted the benefits conferred upon the appellants in the trust deed, it held that acceptance to be established by the preamble to the trust deed. Moreover, the court agreed with the appellants' argument based on the minutes of the meeting which was held on 18 August 2003. In the event, the court also

agreed with the appellants' contention that, because of the acceptance of the trust benefits on their behalf, a variation of the trust deed outside the ambit of clause 21, could only be brought about with their consent. Consequently the court held that, in the absence of the appellants' consent, the purported amendment to the trust deed in terms of the agreement between the deceased and the trustees on 21 February 2006, was of no legal force and effect.

[12] Since the findings of the court a quo thus far are directly challenged in the cross-appeal, I shall return to them in due course. But before doing so, I propose to complete the chronicle of events by referring to the court's additional findings that gave rise to the main appeal. After acknowledging that its findings thus far would normally result in the implementation of the trust deed in its original form, the court a quo, as I have said, immediately proclaimed that result to be untenable. Implementation of the original trust deed, so the court reasoned, would mean that on the death of the deceased, all the assets of the trust would become vested in the two appellants to the total exclusion of Mrs Potgieter and the two sons of her previous marriage.

[13] This outcome, so the court held, would be in direct conflict with the obvious intention of the deceased as to the devolution of his assets upon his death. With regard to the deceased's intention, the court referred to the fact that the deceased had changed his will after the variation of the trust deed. Prior to the variation, his will in existence was one executed in February 2004. In terms of that will he bequeathed an amount of R1 million, together with his interest in a specified close corporation, to each of the appellants. The residue of his estate he left to a trust for the benefit of Mrs Potgieter and her two sons. Subsequent to the variation of the trust deed the deceased executed a new will on 6 June 2007. Apart from certain legacies to the deceased's employees, the new will provided for a bequest of all his assets to the V P J Trust. Exclusion of Mrs Potgieter and her sons from the trust, so the court a quo concluded, would therefore effectively

exclude them from any benefit deriving from the deceased's estate.

[14] Since enforcement of the trust deed in its original terms would be demonstrably in conflict with the deceased's intent, so the court a quo reasoned, it should have the authority to avoid that result. It then found that authority originating from two different sources: first, from the provisions of s 13 of the Trust Property Control Act 57 of 1988; and, second, from the values of the Constitution as applied to the principles of contract law and other private law structures, in accordance with the judgment of the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC). Relying on its authority thus established, the court a quo concluded that it had the power to grant an order which would give effect to what it regarded as the real intent of the deceased.

[15] In broad outline the court a quo's further reasoning, as appears from its judgment, proceeded along the following lines:

(a) The obvious way of giving effect to the deceased's intent would be to implement the terms of the variation agreement, despite the legal invalidity of that agreement.

(b) However, since the death of the deceased, the relationship between the appellants, on the one hand, and the first and second respondents as trustees of the trust, on the other, had deteriorated to the extent that the appellants have understandably lost any confidence in the willingness of the two trustees to treat them fairly and without partiality.

(c) A refusal of the application by the appellants for an order declaring the variation of the trust deed invalid would therefore simply lead to further conflicts, strife and litigation between the two opposing factions.

(d) The only equitable solution remaining was therefore to award one-fifth of the net value of the trust assets to each of the appellants and to order that the other potential beneficiaries retain their rights in terms of the amended trust deed, with regard to the three-fifths of the trust assets that remained in the V P J

Trust.

[16] In giving effect to these conclusions, the court a quo then formulated a fairly detailed order providing, inter alia, for the valuation of the trust assets and for the appointment of a valuer or an auditor, or both, for this purpose, and for the division of the assets of the trust. As to the costs of the proceedings before it, the court a quo ordered that the costs incurred by the appellants as well as the respondents should be paid by the trust on an attorney and client scale.

[17] In essence, the appellants' contention on appeal was that the court a quo rightly concluded that the agreement to vary the trust deed was invalid and without any legal effect. But, following upon that conclusion, so the appellants further contended, the court a quo had no option but to grant a declarator confirming the invalidity of the variation agreement, which was the order that they sought. The cross-appeal, on the other hand, was essentially based on the contention by the respondents that the court a quo had erred in not finding that the agreement to vary the trust deed was valid and enforceable. Alternatively and even if the variation agreement proved to be invalid, so the respondents further contended, the appellants' remedy was a claim for damages resulting from a breach of contract by the deceased and the trustees when they sought to vary the trust deed without the appellants' consent. Since the appellants brought no such claim, but sought an order declaring the variation agreement invalid, so the respondents' argument concluded, the court a quo had been bound to refuse the appellants' application with costs.

[18] Logic dictates that I deal with the cross-appeal first. This is so because, if the variation agreement was found to be valid and enforceable, that would be the end of the matter. In that event, the appellants' application for a declarator to the contrary should have been dismissed which would mean that the cross-appeal must succeed. As I see it, the legal principles that find application are well settled

and I did not understand any of the parties to contend otherwise. I believe these principles can be formulated thus: a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a *stipulatio alteri*. In consequence, the founder and trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed. But once the beneficiary has accepted those benefits, the trust deed can only be varied with his or her consent. The reason is that, as in the case of a *stipulatio alteri*, it is only upon acceptance that the beneficiaries acquire rights under the trust (see eg *Crookes NO v Watson* 1956 (1) SA 277 (A) at 285F; *Ex parte Hulton* 1954 (1) SA 460 (C) at 466A-D; *Hofer v Kevitt NO* 1998 (1) SA 382 (SCA) at 386G-387E; Cameron, De Waal & Wunsh *Honoré's South African Law of Trusts* 5 ed (2002) para 304).

[19] Relying on these principles, the appellants' main argument in their papers was that the benefits conferred on them in the original trust deed were accepted by the deceased on their behalf as reflected in the preamble of the trust deed itself. In relevant part the preamble provided:

'Whereas the founder desires to create the trust referred to in this deed for and on behalf of the named capital beneficiaries, subject to the terms and conditions more fully set out hereafter;

And whereas the beneficiaries have indicated (Afrikaans – 'aangedui') their acceptance of the benefits conferred upon them in terms hereof;

And whereas the trustees agreed to accept their appointments as such and to administer the trust created herein'.' (My emphasis.)

[20] The clear meaning of the second pronouncement thus recorded, so the appellants maintained, is that the deceased, who was their father and natural guardian, as they were still minors at the time, had indicated his acceptance of the benefits conferred upon them, as the sole capital beneficiaries, on their

behalf. These allegations of fact were disputed in the respondents' answering affidavit deposed to by Wessels on behalf of the respondents. It will be remembered that Wessels was the deceased's attorney at the time. In that capacity he prepared the original trust deed on the instructions of the deceased. According to Wessels' testimony, the pronouncement in the preamble relied upon by the appellants amounts to no more than 'a vague and loose statement'. In any event, he proceeded, this vague statement was without any meaning and was never intended to form part of the document. It unintentionally found its way into the draft, Wessels said, because he slavishly copied a precedent without realising that the statement was inapposite to the deed that he prepared. Had the deceased instructed him to record an acceptance of the benefits on behalf of his minor children, so Wessels said, the trust deed would have read quite differently. In that event he would, for instance, have incorporated the acceptance as an independent, self-standing term of the trust deed. In support of this version the respondents also relied on the rather laconic statement by Mr Nicolaas Pretorius, who was the third original trustee and hence a party to the original trust deed, that the deceased never expressly stated, when he signed the trust deed, that he intended to accept the benefits conferred upon the appellants on their behalf.

[21] The appellants' contention was, however, that Wessels' testimony is inadmissible. Since the trust deed was intended to provide a complete memorial of the agreement that it recorded, extrinsic evidence may not contradict, add to or modify its meaning. In support of this contention they relied on *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39. This argument found favour with the court a quo and I believe rightly so. However, as I see it, there is an even shorter answer to the respondents' case based on the testimony of Wessels. It is this. There is no reason to think that the deceased, who was by all accounts a careful and astute businessman, had realised that his attorney wanted him to confirm a meaningless statement in a formal document which was destined to be notarially executed. On the contrary, the fact that the deceased

had initialled every page of the document that was to be notarially executed, gave rise to the presumption of fact that he intended to confirm the pronouncement embodied in that document (see eg *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd* 1979 (3) SA 210 (T) at 216A-C, referred to with approval by Harms DP in *KPMG Chartered Accountants (SA) v Securefin Ltd supra* para 28). Moreover, common sense dictates that at that stage the deceased indeed intended to give effect to this essential purpose for the creation of the trust by accepting the benefits conferred upon his two minor children on their behalf. Absent any evidence to the contrary, it must therefore be accepted as an established fact that the deceased intended to confirm the contents of the document that he signed.

[22] In this light, the pronouncement in the preamble cannot be ignored. It must be given some meaning. That raises the question as to what meaning the pronouncement can possibly bear, other than confirmation by the deceased that he accepted the benefits conferred by the trust deed on behalf of his two minor children. Though the respondents contended that the contents of the pronouncement are vague, they could suggest no alternative meaning and I can think of none. After all, only two capital beneficiaries were expressly named in the trust deed. Confirmation that these beneficiaries had accepted the benefits conferred upon them could therefore refer to no-one else. As a matter of law, their father and natural guardian had authority to accept these benefits on their behalf and that is plainly what he intended to confirm. This is why I say that, in the circumstances, the pronouncement can have no other sensible meaning than the one contended for by the appellants. Thus understood, the laconic statement by Pretorius, that the deceased never expressly stated that he intended to accept the benefits on behalf of the appellants when he signed the trust deed, becomes meaningless. The real question is whether there is evidence that the deceased did not intend to do so and, as I have indicated, there is none.

[23] Assuming, however, for the sake of argument, that the respondents are correct in saying that the meaning of the pronouncement is vague and ambiguous, I agree with the appellants' argument that the interpretation for which they contend is supported by the minutes of a meeting which took place on 18 August 2003. These minutes were prepared by Wessels as a formal document and signed by those who attended. They reflected that:

(a) Apart from the three trustees at the time, it was attended by the first appellant in his capacity as one of the capital and income beneficiaries. Because he was still a minor at the time, so the minutes recorded, he was duly assisted by the deceased as his father and natural guardian.

(b) The second appellant, who by then had reached majority status through marriage, could not attend. But, so the minutes stated, as the other capital and income beneficiary, she was represented by the deceased and the deliberations and discussions at the meeting were conveyed to her telephonically.

(c) The deceased, purely for purposes of settling the divorce and without admitting any liability to do so, was prepared to accede to the claim of the appellants' mother that a trust asset, described as a portion of the farm Naboomspruit, be transferred to her.

(d) The deceased, for settlement purposes, was thus prepared to purchase that asset from the trust for R1 million.

(e) The issue of the sale of the trust property was 'intensely discussed' and 'the trustees decided, with the consent of the income and capital beneficiaries' to sell and transfer the property to the appellants' mother as soon as a settlement had been reached in the divorce whereupon the deceased would pay the R1 million to the trust.

[24] The respondents' answers to the appellants' reliance on these minutes are twofold. The first is founded is law and the second based on fact. For their answer founded in law, the respondents relied on the parol evidence rule. If Wessels' evidence with regard to the contents of the trust deed is inadmissible

for non-compliance with the parol evidence rule, so the respondents argued, the same must hold true for the minutes of the August meeting. I do not believe, however, that the comparison is valid. Unlike the evidence of Wessels, the minutes of the meeting are not introduced as evidence of direct intent, aimed at the avoidance or the variation of the express terms of the pronouncement in the preamble to the trust deed. On the contrary, the minutes are plainly introduced to demonstrate that the meaning of the pronouncement contended for by the appellants is supported by the subsequent conduct of the parties to the trust deed which is a well-recognised and admissible way of interpreting an ambiguous document (see eg *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 768A-E).

[25] The respondents' second answer, based on fact, again relied on the testimony of Wessels. According to his evidence there is no merit in the appellants' inference from the minutes of the meeting that the deceased and the trustees thought it necessary at the time to obtain the approval of the appellants, in their capacities as capital beneficiaries, for the alienation of a trust asset. The reason for their presence at the meeting, so he said, was something entirely different. It was because he, Wessels, had suggested to the deceased that the children should be made aware of the marked degree of acrimony generated by the divorce proceedings and the fact that their mother was in effect claiming an asset which the deceased regarded as part of the children's inheritance. He thought this advisable, Wessels said, so as to avoid later recriminations by anyone against the deceased.

[26] In my view Wessels' version does him no credit. In fact, I believe it is so untenable that it can be rejected with confidence on the papers, which is essentially what the court a quo did. The contents of the minutes clearly reflect that the deceased and the other trustees thought it necessary to obtain the consent of the appellants as beneficiaries to the alienation of a trust asset. That

is what was sought, obtained and formally recorded in the minutes. If Wessels and the deceased merely intended to ensure that the appellants knew what was happening in the divorce proceedings, there were many ways of doing so. Minuting a formal meeting which records the appellants' consent to the alienation of a trust asset, while no single negative comment is made about the conduct of their mother during the divorce proceedings, could hardly serve that purpose. In this light, I am in agreement with the court a quo's finding that the deceased accepted the benefits conferred by the trust deed on behalf of his minor children in the preamble of the trust deed and that this was confirmed by the deceased and the trustees at the August meeting.

[27] That brings me to the respondents' alternative argument that, even if the benefits conferred upon the appellants by the trust deed were held to be accepted on their behalf, it would not preclude the deceased and the trustees to vary the trust deed without the appellants' consent. This is so, the respondents' argument went, because, in accordance with the terms of the trust deed, the appellants could, in any event, be deprived by the trustees of all benefits conferred upon them in the deed. In support of this argument the respondents referred to the wide discretionary powers bestowed upon the trustees and to other provisions in the trust deed which rendered the position of the appellants extremely vulnerable and uncertain until the vesting date.

[28] I do not think it can be gainsaid that at the time of the variation agreement on 21 February 2006, the appellants enjoyed no vested rights to either the income or the capital of the trust. They were clearly contingent beneficiaries only. But that does not render their acceptance of these contingent benefits irrelevant. The respondents referred to no authority that supports any proposition to that effect and I cannot think of a reason why that would be so. The import of acceptance by the beneficiary is that it creates a right for the beneficiary pursuant to the trust deed, while no such right existed before. The reason why, after that

acceptance, the trust deed cannot be varied without the beneficiary's consent, is that the law seeks to protect the right thus created for the first time. In this light, the question whether the right thus created is enforceable, conditional or contingent should make no difference. The only relevant consideration is whether the right is worthy of protection, and I have no doubt that it is. Hence, for example, our law affords the contingent beneficiary the right to protect his or her interest against mal-administration by the trustee (see *Gross v Pentz* 1996 (4) SA 617 (A) at 628I-J). The respondents' alternative argument as to why the variation agreement was valid, is therefore, in my view, equally unsustainable.

[29] Arriving at the same conclusion, the court a quo held, rightly in my view, that it would normally lead to the finding that the variation agreement was invalid and that the provisions of the original trust deed must be applied in unamended form. But, as I have said, the court a quo found itself authorised to deviate from this usual outcome by granting an order which it regarded as equitable and fair. As the first basis for that authority the court a quo relied on the provisions of s 13 of the Trust Property Control Act 57 of 1988. This section provides in relevant part:

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

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

(b) prejudices the interests of beneficiaries; or

(c) is in conflict with the public interest,

the court may, on the application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just . . . '

[30] I do not agree that s 13 supports the authority assumed by the court a quo. I say this for two reasons. First, I find no provision in the original trust deed which brings about any consequence that could not be foreseen by the founder. The consequences which the court a quo found untenable were brought about by

an application of common law principles, not by any provision of the trust deed. My second reason is that no-one brought an application as contemplated by s 13. The explanation for this omission should probably be ascribed to my first reason, namely that there is no provision in the original trust deed that could be objected to and therefore no basis for an application under the section.

[31] As the second basis for its authority to deviate from common law principles, the court a quo relied on the majority judgment of the Constitutional Court by Ngcobo J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC). According to the court a quo's interpretation of that judgment, it provides authority for the following propositions:

(a) under our new constitutional dispensation it is part of our contract law that, as a matter of public policy, our courts can refuse to give effect to the implementation of contractual provisions which it regards as unreasonable and unfair; and

(b) the same principle should be applied in other spheres of private law.

[32] I find the court a quo's approach fundamentally unsound. I do not believe the two propositions from which it departs are supported by the judgment of Ngcobo J in *Barkhuizen*. Nor does the first proposition reflect the principles of our law of contract as they stand. Reasonableness and fairness are not freestanding requirements for the exercise of a contractual right. That much was pertinently held in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 53. As to the role of these abstract values in our law of contract this court expressed itself as follows in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27:

'[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the

law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.'
(See also eg *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 21-24 and 93-95; *Maphango v Aengus Lifestyle Properties* 2011 (5) SA 19 (SCA) paras 22-25.)

[33] In *Barkhuizen,* Ngcobo J first explained (para 80) what he meant by the notion of 'good faith', namely that it encompasses the concepts of justice, reasonableness and fairness. He then proceeded to express the principles of our law, as formulated by this court, inter alia in *Brisley*, in the following terms (para 82):
'As the law currently stands good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance good faith is given effect to by the existing common-law rule that contractual clauses that are impossible to comply with should not be enforced . . . Whether, under the Constitution, this limited role of good faith is appropriate and whether the maxim *lex non cogit ad impossibilia* alone is sufficient to give effect to the value of good faith are, fortunately, not questions that need be answered on the facts of this case and I refrain from doing so.'

[34] Unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this court, for example, in the cases of *South African Forestry, Brisley, Bredenkamp,* and *Maphango* which do not support the first proposition relied upon by the court a quo. As to the second proposition, it follows, in my view, that the supposed principle of contract law perceived by the court a quo cannot be extended to other parts of the law. In addition, the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the

personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge. (See also *Brisley* para 24; *Bredenkamp* para 38; P M Nienaber 'Regters en juriste' 2000 *TSAR* 190 at 193; J J F Hefer 'Billikheid in die kontraktereg volgens die Suid-Afrikaanse regskommissie' 2000 *TSAR* 143.)

[35] This danger, I believe, is illustrated by what happened in this case. The court a quo obviously thought that it was fair to award two-fifths of the trust assets to the appellants. But some may wonder whether that is necessarily so. Without more, it is hard to say. The mere fact that the appellants are two out of five potential trust beneficiaries can hardly, in itself, justify that apportionment. A decision on fairness requires more background facts which were not fully ventilated on the papers. Moreover, there are numerous factual disputes on the papers that may impact on the issue of what is fair. To give but a few examples. On the respondents' version the relationship between the deceased and his son, the first appellant, was not good. According to Wessels, the deceased regarded his son as a good for nothing who was unsuccessful in any business venture he turned to and who was quite willing to be maintained by his father. In stark contrast, the appellants' version, on the other hand, is that the first appellant was a successful businessman in his own right, who sold his own business ventures in order to join the business of his father, at the instance of the latter. Then there are the disputes surrounding the role of Wessels in the business and personal affairs of the deceased during his lifetime; the allegations about mal-administration by the two trustees since the death of the deceased; and the dispute as to whether or not the trustees were responsible for the marked decline in the financial position of the trust.

[36] But be that as it may, I do not believe that the court a quo had any option

but to follow the tenets of common law. Its decision to do otherwise in my view offended the principle of legality, which I regard as part of the rule of law, which in turn constitutes a founding value in terms of s 1 of our Constitution. I thus find myself in agreement with Harms DP when he said in *Bredenkamp* (para 39):

'A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.'

[37] As to the result dictated by the tenets of common law in this case, I can again only agree with what the court a quo itself said. Succinctly stated it is this: the variation of the trust deed was invalid for lack of consent by the beneficiaries who had previously accepted the benefits bestowed upon them in terms of the trust deed. Hence the original provisions of the trust deed, prior to the purported amendment, must prevail. Prima facie, the appellants were therefore entitled to a declarator confirming that conclusion, which was what they sought. The respondents' final argument as to why the appellants were not so entitled rested on two suppositions:

(a) that the appellants' claim was essentially for specific performance of the terms of the original trust deed; and

(b) that the appellants' claim for specific performance is based on the breach of contract by the deceased and the trustees when they agreed to vary the original trust deed without the appellants' consent.

[38] Departing from these suppositions, the respondents referred to the trite principle that courts have a discretion to refuse an order for specific performance where, for instance, it would lead to undue hardship on the part of a defendant. In this instance, so the respondents' argument went, implementation of the original trust deed would indeed give rise to undue hardship on the part of Mrs Potgieter and her two children, since they would be deprived of any inheritance from the deceased. Consequently, so the respondents' argument concluded, the

appellants should be satisfied with a claim for damages which would be represented by the value of the trust assets at the time of the variation agreement.

[39] I find this argument fundamentally flawed since both suppositions on which it is founded are unsustainable. The appellants' claim is not based on breach of contract. As a matter of law, the deceased and the trustees had no authority to amend the trust deed without the appellants' consent. Their attempt to do so can therefore not be categorised as breach of contract. As a matter of positive law, they had no power to do what they purported to do. Their agreement to do so was therefore without any force and effect. This means that the variation agreement was invalid. The proposition that what the appellants sought was an order for specific performance of a contract, is equally unfounded. What they sought was a declarator confirming the invalidity of the variation agreement. As I see it they were entitled to that order as a matter of law.

[40] In argument before us the appellants invited us to grant a further declarator confirming that, upon the death of the deceased, the assets of the trust became vested in the two appellants. I believe we must decline that invitation. In their notice of motion the only declarator sought by the appellants was for an order confirming the invalidity of the variation agreement. On the papers the searchlight therefore focussed exclusively on the validity of the variation agreement, leaving surrounding issues in obscurity. A shift in the focus of the searchlight may well result in a dramatic change of scenery. The respondents, on the other hand, made various assumptions, for instance, about the impact of the deceased's will on the trust and the effect of the invalidity of the variation agreement on the assets of the trust. For the same reason I make no pronouncement on the correctness of these assumptions. Again these issues were not properly ventilated on the papers or in argument before us.

[41] What remains are matters of costs. The court a quo held that the costs of both factions should be paid by the trust on an attorney and client scale. I agree with the considerations underlying that order. In my view they also hold true on appeal. The appellants, on the one hand, were substantially successful in both their application and on appeal. As to the respondents, on the other hand, it cannot be said in my view that the opposition by the first and second respondents in their representative capacities as trustees was either *mala fide* or unreasonable. It follows that an award of costs *de bonis propriis* against them would not be justified. With regard to the opposition by the respondents in their personal capacities, the appellants' counsel conceded, fairly in my view, that this did not result in any additional costs. In the result, I believe that all costs in the court a quo and on appeal should, save for one exception, be borne by the trust. The exception relates to the position of Wessels. His conduct during the proceedings was subjected to severe criticism by the court a quo. Suffice it to say, in my view, that I agree with this criticism. I am also of the view that his conduct did him no credit, particularly as an officer of the court. As a token of our displeasure I therefore propose to order that the costs he might have incurred as seventh respondent, ie in his personal capacity, will not be recoverable from the trust.

[42] In the result it is ordered:

a. The appeal is upheld.

b. The cross-appeal is dismissed.

c. The costs incurred by the appellants and the respondents in both the appeal and the cross-appeal, including the costs of two counsel, where applicable, shall, save for the costs of the seventh respondent, be paid by the Buffelshoek Familie Trust on an attorney and client scale.

d. The order of the court a quo is set aside and replaced by the following:

'1. The purported variation of the trust deed of the Buffelshoek Familie Trust on 21 February 2006 is declared to be invalid and set aside.

2. The costs incurred by the applicants and the respondents, including the costs of two counsel, where applicable, shall, save for the costs of the seventh respondent, be paid by the Buffelshoek Familie Trust on an attorney and client scale.'

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F D J BRAND
JUDGE OF APPEAL

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