



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no. 819/2021

In the matter between:

PETER JOHN KUTTEL

Applicant

and

**MASTER OF THE HIGH COURT
(WESTERN CAPE DIVISION)**

First Respondent

JOY KUTTEL NO

Second Respondent

JOHN ADRIAN LEVIN NO

Third Respondent

FRANCOIS PAUL KUTTEL NO

Fourth Respondent

ADRIAN CHRISTOPHER KUTTEL NO

Fifth Respondent

BARRY LYNTON ADAMS NO

Sixth Respondent

GRACE INVESTMENTS THIRTY-TWO (PTY) LTD

Seventh Respondent

SOUTHERN ROPES (PTY) LTD

Eighth Respondent

Neutral citation: *Kuttel v Master of the High Court and Others* (Case no. 819/2021) [2022] ZASCA 156 (16 November 2022)

Coram: Van der Merwe, Molemela and Plasket JJA and Musi and Kgoele AJJA

Heard: 9 September 2022

Delivered: 16 November 2022

Summary: Trust and trustees – sale of shares owned by trust to company controlled indirectly by two trustees – whether sanction of court required for validity of sale – whether transaction open and bona fide – whether beneficiary who was not a trustee treated unfairly when not given opportunity to bid for shares.

ORDER

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

The application for leave to appeal is dismissed with costs, including the costs of the application to introduce further evidence on appeal.

JUDGMENT

PLASKET JA (VAN DER MERWE JA, MUSI AND KGOELE AJJA concurring)

[1] The applicant, Mr Peter John Kuttel, who I shall refer to as Peter, brought an application in the Western Cape Division of the High Court, Cape Town (the high court) for orders: (a) directing the first respondent, the Master of the High Court, Western Cape Division (the Master), to appoint him as a co-trustee of the Padjoy Trust (the trust); (b) alternatively, reviewing and setting aside the Master's decision not to appoint him as a co-trustee of the trust; and (c) declaring unlawful and invalid an agreement concluded between the second to sixth respondents, the trustees of the trust (the trustees), and the seventh respondent, Grace Investments Thirty-Two (Pty) Ltd (Grace Investments), for the sale of the trust's shares in the eighth respondent, Southern Ropes (Pty) Ltd (Southern Ropes), and the repayment of the purchase price.

[2] In the high court, Steyn J granted an application brought by the trustees to strike out certain matter contained in the applicant's replying affidavit. She then dismissed the main application with costs. She also dismissed with costs an application for leave to appeal. On petition to this court, however, an order was made referring the applicant's application for leave to appeal to oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. An application was filed by Peter in this court for the

admission of further evidence on appeal. That application was opposed by the trustees. As we are seized with only an application for leave to appeal, the application for the admission of further evidence does not require our attention: if leave to appeal is granted, the appeal court will decide it, and if leave to appeal is dismissed, it will be moot.

The background

[3] Mr Peter Clark Kuttel, known by the nickname ‘Padda’, was the father of Peter, the fourth respondent, Francois Kuttel (who I shall refer to as Francois), and the fifth respondent, Adrian Kuttel (who I shall refer to as Adrian). He was the husband of the second respondent, Ms Joy Kuttel. He died on 20 May 2019, after the launch of the application. We were informed from the bar that Joy Kuttel died about a week before the hearing of this application.

[4] On 5 March 1981, the trust was created with Padda Kuttel being the donor. He and his wife Joy named it the Padjoy Trust. They, plus a chartered accountant, were the original trustees. The purpose of the trust was to acquire and hold assets that were to be used for the maintenance of Padda and Joy after Padda’s retirement as a successful businessman. On the death of the last-dying of them – an event that has now occurred with Joy Kuttel’s recent death – the trust’s capital is to be distributed in equal shares to Peter, Francois and Adrian.

[5] The identity of the trustees has changed over time. Padda resigned as a trustee due to ill-health. Until recently, the trustees numbered five. They were Joy Kuttel, Francois, Adrian and two independent trustees, namely Mr John Levin, the third respondent (Levin), and Mr Barry Adams, the sixth respondent (Adams). Both Levin and Adams are attorneys of considerable experience and expertise, especially in commercial matters.

[6] While Peter is a beneficiary of the trust, he is not, like his brothers, a trustee. The principal reason for this seems to be that he lives in the United States of America and has done so for some 30 years. It is also no doubt so that the enmity that has existed between Peter and his father, in particular, as well as with the family more

generally, probably also contributed to him being the only beneficiary who is not a trustee.

[7] The trustees decided in about 2012 to re-structure the trust's assets as well as those of another, related trust. The process was concluded in mid-2013. The purpose of the exercise was, according to Levin in a letter to Peter dated 11 April 2017, to achieve five outcomes, namely to: (a) provide liquidity in the trust to fund Padda and Joy's retirement; (b) make certain cash distributions to Francois and Adrian, in accordance with Padda Kuttel's wishes, in order to equalize their benefits with those that Peter had previously received; (c) consolidate the rope-making businesses of three entities, including Southern Ropes, at their fair value, in Grace Investments; (d) sell a storage business to a company registered in Namibia; and (e) consolidate the remainder of the family's assets into the trust, which would ultimately be shared by the three brothers on the death of both of their parents.

[8] The restructuring of the trust's assets were, in the words of Levin, a restructuring of 'the family's various interests', the trustees having regard to 'the purpose for which the trust was established' and the wishes of Padda and Joy Kuttel, particularly those of Padda Kuttel as donor. The sale of the trust's shares in Southern Ropes to Grace Investments was thus one part of a bigger process of consolidation of the trust's assets. It was, however, only the validity of the Southern Ropes transaction that was challenged by Peter. In this transaction, the trust sold its 81.6 percent shareholding in Southern Ropes to Grace Investments for a purchase price of R32 386 866.19. Grace Investments is owned in equal shares by two Namibian trusts that were established for the benefit of Francois and Adrian respectively, and their families.

[9] The restructuring process also involved a second family trust, the Breemond Trust. The beneficiaries of this trust were Padda and Joy Kuttel, Peter, Francois and Adrian. It owned 81.6 percent of the shares of Marine Ropes International (Pty) Ltd (Marine Ropes) which, in turn, owned all of the shares of Samson Ropes (Pty) Ltd (Samson Ropes). Levin explained to Peter in the letter of 11 April 2017 that one of the objects of the restructuring process was to consolidate the rope-making businesses of Southern Ropes, Marine Ropes and Samson Ropes, at their fair value, into a new

company, Grace Investments. This object was achieved. The result was a zero-sum situation for the trust, one asset being substituted by another of equal value, with no prejudice to the beneficiaries.

[10] In order to understand the basis on which Peter challenged the validity of the transaction, it is necessary to consider his founding affidavit. The answering papers will then be considered.

The papers

[11] It is not in dispute that Peter was not informed of the trust's re-structuring at the time. He only found out about it, and the Southern Ropes transaction, in 2017. On making enquiries of the trustees, he was informed that the purchase price of the Southern Ropes shares was 81.6 percent of the average of two independent valuations procured for the very purpose of ascertaining their fair market value. He was also informed that the transaction had no effect on the trust's balance sheet as one asset had simply been substituted for another of equal value.

[12] Peter took exception to not having been informed of the transaction at the time. He said that had he known about the trust's intention to sell its shares in Southern Ropes, he would have made a 'counter-offer' to purchase the shares for himself. He asserted that despite the two independent valuations serving as the basis for the determination of the purchase price, the transaction was not an arms-length transaction.

[13] Despite having expressed an interest in making a 'counter-offer' to purchase the shares, he took issue with the wisdom of the trustees' decision to sell the shares. He claimed that their failure to notify him of the transaction at the time was 'disconcerting, unfair and inappropriate'. He asserted that the trustees should have obtained his consent to the transaction or, at the very least, they should have notified him of the transaction and the restructuring of the trust's assets.

[14] Within the context of Southern Ropes owning two immovable properties within which it conducted its business, he then stated:

'In any event, I am advised that by modern custom, the Court's confirmation is required for the purchase of immovable property by a trustee even when a co-trustee has confirmed that purchase. In the present instance, the sale of the majority shareholding in Southern Ropes to Grace Investments was in effect a sale of the immovable properties to Francois and Adrian, who are both trustees.'

[15] Peter began a process to have himself appointed as a trustee. (The relief claimed in relation to this aspect of his case has not been pursued in his application for leave to appeal.) He first approached the trustees and requested them to appoint him as a trustee. They refused to do so. He then raised his concerns with the Master about the administration of the trust and about the Southern Ropes transaction in particular. He focused, in this regard, on 'the failure of the Trustees to obtain the sanction of the Court given that the transaction effectively, and indirectly, facilitated the transfer of the immovable properties owned by Southern Ropes to two of the Trustees'. He expressed the view that it would be in the best interests of the trust if he was a trustee and he requested the Master to appoint him as a trustee, in terms of s 7(2) of the Trust Property Control Act 57 of 1988. By letter dated 25 April 2018, the Master responded to Peter's complaints. He dismissed them on the basis that, in terms of the wide powers afforded to the trustees in terms of the trust deed, 'the trustees have no obligation to notify the beneficiaries when exercising their said absolute powers'. The Master also decided against appointing Peter as a trustee.

[16] Finally, Peter reverted to the attack on the Southern Ropes transaction on the basis that a court's confirmation is required 'for the purchase of immovable property by a trustee and even when a co-trustee or co-trustees have authorized the sale' and that in this case the sale of the shares of Southern Ropes amounted to the sale of its immovable property. He then concluded:

'For this reason, the contract of sale is invalid at common law and falls to be set aside. If set aside, it follows that the shares must be returned by Grace Investments to the Trustees.'

[17] From the above, it can be concluded that the case made out by Peter in relation to the Southern Ropes transaction begins and ends with his reliance on what he termed the 'modern custom' of requiring a court's confirmation when a trustee purchases immovable property from a trust. He also made the bald allegation,

unsupported by any facts, that the transaction was not an arms-length transaction. For the rest, he complained of not having been informed of the transaction at the time, his objection being that this failure was 'disconcerting, unfair and inappropriate'; that, had he known of the transaction, he would have tried to purchase the shares for himself; and that his consent should have been acquired or, at the least, he should have been notified. None of these grounds were raised in relation to the validity of the transaction but to support his case, now abandoned, that he should have been appointed as a trustee.

[18] Levin, for the trustees, deposed to a comprehensive answering affidavit. He commenced his answering affidavit by explaining that Padda Kuttel's purpose in establishing the trust had been to create a vehicle to 'hold assets acquired or built up by the Kuttel family (and Padda in particular) for the benefit of himself and [Joy Kuttel] in the first instance, and subsequent to the death of the survivor of them, for the benefit of their children and their descendants'. To this end, the trustees were granted 'wide discretionary powers in order to act in the best interests of the beneficiaries and in the furtherance of the purposes for which the Trust was established'. He asserted that the trustees had always 'attempted to discharge their duties diligently, mindful of their fiduciary obligations and the provisions of the Trust deed, as well as the objects of the Trust'.

[19] Levin did not dispute that Peter had not been informed by the trustees of the restructuring and of the Southern Ropes transaction that was one part of that process. He stated, however, that they were not obliged to do so: the trust deed did not require that beneficiaries be notified or consulted when the trustees exercised their discretionary powers and, in any event, the shares in Southern Ropes were sold at fair market value, independently determined. The trustees were also not required to provide Peter with an opportunity to bid for the shares.

[20] Southern Ropes had generated what Levin described as 'reasonable profits' but this was, in Padda Kuttel's view, due largely to his own business acumen and experience. With the retirement of Padda and Joy Kuttel imminent, the trustees decided to sell the Southern Ropes shares and, in this way realise an asset that 'would ensure that Padda and Joy could live out their remaining years in comfort'.

[21] The decisions concerning the restructuring were not taken lightly. The trustees considered the issue with care and took legal and tax advice from a prominent firm of attorneys in South Africa and another in the United States of America as well. After having done so, the trustees applied their minds to such matters as their discretionary powers in terms of the trust deed, the purpose of the restructuring process, the purposes for which the trust was established – and they decided to sell the Southern Ropes shares ‘at an independently-determined market value’. They were satisfied that neither the trust nor the beneficiaries would be prejudiced by the trust selling the shares for fair value and investing the proceeds ‘with a well-regarded asset manager (Alan Gray)’.

[22] The trust had the power to sell the shares and invest the proceeds of the sale. This is evident from the trust deed. Clause 7(a), part of a clause headed ‘POWERS OF TRUSTEES’, provides that the trustees ‘shall be entitled to realise in such manner as they shall determine any asset or investment held by them in trust from time to time and to re-invest the proceeds in terms of the powers of investment hereinafter granted to them’. In terms of clause 7(b), the trustees are empowered to ‘make such investments as they shall in their sole and entire discretion from time to time determine’; and they also have the power to purchase both immovable and movable property and to sell, either by public auction or private treaty, ‘any immovable or movable property held in trust by them in such manner and at such times as they shall from time to time determine’.

[23] The breadth of the discretion granted to the trustees appears clearly from clause 25. It states that the discretionary powers vested in the trustees by the trust deed ‘shall be complete and absolute and any decision made by them pursuant to any such discretionary powers shall be unchallengeable by any Beneficiary affected thereby or by any other person’.

[24] As explained above, the trustees approached two independent valuers to value the Southern Ropes shares. The valuations differed to an extent – a not unusual occurrence – and so the trustees took the average of the two as the basis for determining the purchase price of the shares. The valuations were, as Levin said,

comprehensive and one of the valuers, Mr Christiaan Vorster of Business Growth Africa, explained fully in a letter to Levin how the immovable property owned by Southern Ropes was factored into the valuation – and why Peter’s assertion in the founding affidavit that they had not been taken into account was incorrect.

[25] The trust deed also makes provision for the possibility of a trustee purchasing property from the trust. Clause 30 provides:

‘No trustee shall be disqualified by his office from contracting with the trust nor shall any Contract entered into by the Trust in which any Trustee may be interested be invalidated or voided by reason of such interest nor shall any Trustee so contracting or being so interested or acquiring any benefit under any Contract entered into with the Trust be liable to account to the Trust for any profits or benefits realized by or under such Contract by reason only of his holding that office, provided that he shall have disclosed to the remaining Trustees the nature of his interest before the making of the Contract.’

[26] Levin dismissed the notion that Francois and Adrian may have abused their power in respect of Grace Investments’ acquisition of the Southern Ropes shares, and may thus have acted contrary to the interests of the beneficiaries. He said that ‘apart from the fact that Adrian and Francois Kuttel were, either alone or together, in no position to dictate what the Trust did, and also did not attempt to do so, [Peter’s] allegations against them overlook the powerful presence of Padda Kuttel, their father and donor, on the board of Trustees, as well as the roles of their mother, Joy Kuttel, and me, and the role of independent advisors such as ENS’. What is more, Levin said, Francois and Adrian ‘openly and in good faith disclosed their interests in the transactions before the agreements were concluded (their interests, in any event, already being known) and obtained the consent of all of the Trustees’.

The issues

[27] The application for leave to appeal is based on three grounds. The first is that the confirmation of a court should have been, but was not, obtained for the Southern Ropes transaction, with the result that the transaction is invalid. The second is that the transaction was, in any event, not open and bona fide. The third is that Peter was treated unequally and that, on account of this, the transaction is invalid.

Judicial confirmation of the transaction

[28] The only point taken by Peter on the papers, apart from the now abandoned attempt to be appointed as a trustee (or, alternatively, to review the Master's decision not to appoint him), was that the failure by the trustees to obtain the judicial confirmation of the Southern Ropes transaction resulted in its invalidity. The point is based on the following passage from the sixth edition of *Honore's South African Law of Trusts* in relation to the purchase of trust property by a trustee:¹

'By modern custom the court's confirmation is required, at least for the purchase of immovable trust property, even when a co-trustee has confirmed it.'

[29] It was argued that because Southern Ropes owned immovable property and because Grace Investments, the shares of which were owned by two trusts of which Francois and Adrian were the beneficiaries, acquired a majority shareholding in Southern Ropes, the sale of the shares was, in effect, the sale of the immovable property and the 'modern custom' referred to above applied to the transaction.

[30] In order to deal with this argument, it is necessary to commence with the legal position when a person in a fiduciary relationship purchases property in respect of which that relationship applies – such as, typically, when an executor of a deceased estate purchases property from the estate,² or when a trustee purchases property from the trust that they administer.³ In *Robinson v Randfontein Estates Gold Mining Co Ltd*,⁴ Innes CJ set out the position in general terms when he stated:

Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position.'

¹ Edwin Cameron, Marius De Waal and Peter Solomon *Honore's South African Law of Trusts* (6 ed) (2018) at 224.

² *Ex parte Lotzof and Others* 1948 (3) SA 992 (O); *Pledge Investments (Pty) Ltd v Kramer NO: In re Estate Selesnik* 1975 (3) SA 696 (A).

³ *Kidbrooke Place Management Association and Another v Walton and Others NNO* 2015 (4) SA 112 (WCC).

⁴ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178.

[31] The general rule in such cases was set out as follows by Theron J more than 60 years ago in *Peffer's NO and Another v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control*:⁵

'The general rule is that [the person in a position of trust] is incapable of binding the estate under his administration by such contracts. The authorities and decided cases in which this rule of our law is expounded deal for the most part with the incapacity of persons such as the tutors of minors or the executors of deceased estates – whose positions are analogous to those of administrators – to make valid purchases of assets belonging to the minors or the deceased estates, as the case may be; but the principle underlying the rule is equally applicable to any other kind of contract whereby a person in a fiduciary position may seek to acquire for himself rights in and to the assets placed under his control. This principle is, of course, the universally respected one that no transaction where interest and duty conflict should be recognised or countenanced by the law.'

[32] But, the learned judge continued, the general rule is not absolute and is subject to exceptions. He explained:⁶

'In certain exceptional cases, where the reason for the existence of the general rule to which I have referred does not apply, or rather does not apply to the same extent as in the normal case, the Roman and later the Roman-Dutch law has, however, always countenanced a relaxation of the rule. Thus it has always been accepted that a tutor can validly purchase his pupil's property where the sale to him takes place by or with the authority of another entitled to act on behalf of the minor: for instance, he can buy with the authority of the Court; or, where he has a co-tutor, he can buy from or with the consent of the latter, provided that he does so openly and in good faith (*palam et bona fide*). In the same way an executor can validly purchase the property of the deceased estate subject to his administration with the authority of the Court, or – where he is not the only one appointed to liquidate and distribute the estate – with the consent of his co-executor or co-executors, provided that he acted openly and in good faith.'

[33] The reason why a person in a position of trust is allowed to purchase property entrusted to them in these circumstances is apparent. It is that the safeguards set out above 'provide some guarantee that, despite his position, [the person in a position of trust] will be treated as if he were a stranger to the estate entrusted to him', as the

⁵ *Peffer's NO and Another v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* 1965 (2) SA 53 (C) at 56B-E.

⁶ At 56E-H.

‘circumstances are such as to diminish the possibility that the terms of the contract will be influenced by the conflict between the purchaser’s interest and his duty’.⁷ Theron J summarized the position thus:⁸

‘To sum up, then, the position is that despite the fact that the Courts tend to look askance at such contracts there is nothing in our law to prevent an administrator from concluding a valid contract for the acquisition of rights in and to the movable assets entrusted to him, provided the circumstances are such that he can really be said to have acted as a stranger to the estate – as, for instance, where he has openly and in good faith sought and obtained the consent of a co-administrator who was capable of bringing an independent mind to bear on the question as to whether the contract would be for the benefit of the estate.’

[34] There is a final, additional safeguard that applies in some cases. It is, Theron J said, that in South Africa, ‘the practice has grown up and become settled of requiring the confirmation of the Court in every case of the sale of immovable property belonging to a deceased’s estate to an executor’.⁹ In *Kidbrooke Place Management Association and Another v Walton NNO and Others*¹⁰ Binns-Ward J held that there was no reason why the same rule of practice should not apply when an executor purchases trust property, as there is ‘no material difference in the character of the fiduciary relationship involved’ in the two instances. And, in *Hoppen and Others v Shub and Others*¹¹ the principles set out in *Peffer* were affirmed in relation to the purchase of trust property by a trustee, including that if the transaction ‘involves the sale of immovable property, the practice is that the consent of the Court *must* be obtained’.¹²

[35] It is clear that the ‘modern custom’ (which is over a century old¹³) that is relied upon is a rule of practice that only relates to the purchase of immovable property. In order to attempt to bring the Southern Ropes transaction within the practice, it was argued on Peter’s behalf that the sale of shares, when the company concerned owns

⁷ At 56H.

⁸ At 58A-C.

⁹ At 57C-D.

¹⁰ Note 3 para 25.

¹¹ *Hoppen and Others v Shub and Others* 1987 (3) SA 201 (C) at 210A-G.

¹² At 210G.

¹³ See for example *In re Estate Black* 1918 CPD 603 at 604-605; *In re Estate Hough* 1919 CPD 160 at 161.

immovable property, is akin to the sale of the company's immovable property. This proposition is fundamentally flawed for two reasons.

[36] First, a share, according to s 35 of the Companies Act 71 of 2008, is movable property. As the practice sought to be relied on only applies to immovable property, that should put an end to the argument. Secondly, however, equating a shareholding in a company to acquisition or ownership of its property is also flawed. It is a fundamental principle of company law that the assets of a company belong to the company, and not its shareholders; and that the ownership of shares by shareholders only gives them a right to any dividend that the company may declare.¹⁴ That too disposes of this argument. The result is that there are no reasonable prospects of success on appeal in relation to this point.

Was the transaction open and bona fide?

[37] In cases in which a co-trustee obtains the consent of their co-trustee to purchase trust property, the sale must, in addition, be open and bona fide. Theron set out the terms of this requirement in *Peppers* as follows:¹⁵

'It need hardly be pointed out that before one of the executors can grant such consent to the acquisition of estate assets by the other as will serve to bring about a valid contract, he will have to embark upon an enquiry of the same kind as the Court has to pursue in the case to which I have just referred, for he, like the Court, must satisfy himself in regard to the bona fides of the transaction and the benefit of the estate.'

[38] In this instance, Levin has explained how the trustees took their decision. First, Francois and Adrian disclosed their interests and did so openly and in a good faith, although the other trustees obviously knew of those interests. Secondly, they took independent advice from a firm of attorneys in this country and in the United States of America. Thirdly, they obtained two independent valuations of the fair market value of the Southern Ropes shares and set the purchase price with reference to the average of the two valuations. Fourthly, the trustees applied their minds to their powers in terms

¹⁴ *Princess Estate and Gold Mining Co Ltd v Registrar of Mining Titles* 1911 TPD 1066 at 1079-1080; *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550-551; *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* [1993] ZASCA 167; 1994 (1) SA 550 (A) at 565I-566H; *Clicks Group Ltd and Others v Independent Community Pharmacy Association and Others* [2021] ZASCA 167; [2022] 1 All SA 297 (SCA) paras 23-26.

¹⁵ At 57B-C.

of the trust deed, the purpose of the restructuring and the purposes for which the trust had been established. Fifthly, having done so, they satisfied themselves that neither the trust nor the beneficiaries would be prejudiced by the transaction. Sixth, the trustees also satisfied themselves that neither Francois nor Adrian had abused their power by acting contrary to the best interests of the beneficiaries. Finally, having gone through this process, the trustees consented to the transaction.

[39] In *In re Estate Black*¹⁶ the court held that the 'question of the value of the property according to the authorities is relevant chiefly as a test of good faith'. I have explained how the purchase price was determined by the trustees. Peter's criticism of the valuations has been explained satisfactorily and there is no other basis put forward for an attack on the fairness of the valuations. I accept that the method employed reflects fair market value for the shares. The process that I have described above, and the method for the determination of the price, together establish that the trustees satisfied themselves, after due and proper enquiry, that the Southern Ropes transaction was open and bona fide. In my view, there are no reasonable prospects that a court of appeal will arrive at a different conclusion on this issue.

Was there unfair differentiation?

[40] In his founding affidavit, Peter alleged that he should have been informed of the Southern Ropes transaction and that the failure on the part of the trustees to do so was 'disconcerting, unfair and inappropriate'. The remedy he claimed on this account was an order appointing him as a trustee so that he could safeguard his own interests as a beneficiary. This relief is not the subject of Peter's application for leave to appeal.

[41] The point that Peter was treated unfairly has re-surfaced in a new guise. He now claims in his application for leave to appeal that it is a cause for the setting aside of the Southern Ropes transaction. This point is based on the following subparagraphs of his founding affidavit where he dealt with the review of the Master's decision not to appoint him as a trustee:

¹⁶ Note 13 at 161.

'45.2 It is submitted that the Trustees should have, in fairness, afforded all of the beneficiaries the opportunity to purchase the shares. I should have, at the very least, been notified of the proposed transaction given my vested interest in the Trust.

45.3 Had I been presented with the opportunity to purchase the shares in Southern Ropes, I would have been a willing buyer and, in all probability, I would have offered a higher purchase consideration for the shares than my brothers. At the very least, I would have questioned the Trustees' proposed sale given the income then being generated by Southern Ropes for the Trust. That decision is, for the reasons already articulated above, objectively irrational and unlawful. The Master failed to consider these relevant factors in the decision to reject my complaint.'

[42] I am prepared to accept that the above passage raised the issue whether Peter was treated unfairly by the trustees by not being informed of the Southern Ropes transaction so that he could bid for the shares (despite being of the view that the transaction was irrational and unlawful). In order to deal with this argument, it is necessary to consider the terms of the trust deed, the purpose of the restructuring and the effect of the Southern Ropes transaction.

[43] The trustees enjoy extensive powers to realise assets or investments 'in such manner as they shall determine';¹⁷ to invest assets 'as they shall in their sole and entire discretion' determine and to acquire and dispose of movable and immovable property 'in such manner and at such times as they shall from time to time determine'.¹⁸ In terms of clause 7(h), the trustees have 'the right to consent and agree to any reduction of capital, re-organisation or reconstruction of any companies, the shares or other securities of which are from time to time held by the Trust in such manner and upon such terms and conditions as they shall in their sole and entire discretion determine'. And in terms of clause 7(l) they have 'such ancillary and/or additional powers as shall be necessary or requisite to enable them from time to time to deal with all matters appertaining to the Trust in such manner as they shall deem advisable in the interest of the Trust'.

¹⁷ Clause 7(a).

¹⁸ Clause 7(b).

[44] The trustees are also given a virtually free hand as to how they perform their functions. Clause 8 provides:

Subject to them giving effect to the terms and conditions of this Trust Deed, the Trustees shall, in administering the Trust, adopt such procedure and take such administrative steps as they shall from time to time deem necessary or desirable.'

[45] Even in relation to the distribution of income prior to vesting, in terms of clause 20, the 'sole and absolute discretion of the Trustees' is emphasized throughout. The power of the trustees to pay capital to beneficiaries prior to vesting, in terms of clause 23, is also granted subject to the 'sole and entire discretion' of the trustees. Finally, the extent of the discretion vested in the trustees is exemplified by clause 25 which describes their powers as being 'complete and absolute'.

[46] It is apparent from the selection of clauses that I have referred to that Padda Kuttel's intention, when he created the trust, was to give the trustees, of which he was one for many years, as free a hand in the achievement of the objects of the trust as possible. In addition to their vast, untrammelled powers of administration, there is a complete absence throughout the trust deed of any obligation on the trustees to inform the beneficiaries of their intentions, much less to consult with them or obtain their consent. This is also apparent in relation to the sale of trust property to a trustee. Clause 30 does not require notice to or the consent of the beneficiaries. It only requires that the trustee concerned disclose their interest to the other trustees before any contract is concluded.

[47] I turn now to the purpose of the restructuring. I have explained above what the trustees intended to achieve and how. Essentially, they were engaged in a restructuring of the family business – and the rope-making businesses in particular. It is evident from this that the trustees never intended to offer an opportunity to either the world at large or the beneficiaries as a whole to bid for the shares in the rope-making businesses, including Southern Ropes. That would have undermined the purpose of consolidating the family's business interests. As Francois and Adrian were at the vanguard of the family's business interests in South Africa and Namibia, the objects of the restructuring could only have been achieved in the way it was carried out. As Peter's business interests were different to the family's, and located in the

United States of America, selling the Southern Ropes shares to him would not have achieved the purpose of the restructuring.

[48] From what I have set out above, it is apparent that the trustees had ample discretionary power to do what they believed was best for the trust and the beneficiaries, that they had the power to decide how to restructure the trust's assets and the power to decide with whom they wished to contract. Peter, as a beneficiary had no right to be informed of the trustees' plans or to be offered an opportunity to bid for the Southern Ropes shares. His rights were restricted to his equal share of the capital on vesting. That contingent right was safeguarded by the trustees by the open and bona fide nature of the Southern Ropes transaction, the fair process for determining the purchase price and the zero-sum effect of the transaction on the assets of the trust.

[49] To the extent that it may be said that Peter has been treated differently as a beneficiary, that differentiation was not unjustified in the context of the powers of the trustees, the purpose of the restructuring and the effect of the Southern Ropes transaction: as I have explained, Peter had no right to be given the opportunity to bid for the shares and no obligation was placed by the trust deed on the trustees to give him notice or seek his consent; the purpose of the restructuring did not allow for him to have purchased the shares because it was aimed at restructuring the family business; and the differentiation caused him, as a beneficiary, no prejudice, for the reasons I have explained. There was thus a rational reason why the shares were offered to Grace Investments, and not offered to Peter.

[50] It is necessary to deal with the case of *Griessel NO and Others v De Kock and Another*¹⁹ because it was relied upon by counsel for Peter to argue that he had been treated unfairly with the result that the Southern Ropes transaction was invalid. In my view, *Griessel* is distinguishable on the facts. Trustees had been given the power to identify to select beneficiaries from among a group of people described as 'potential beneficiaries'. All beneficiaries had the right to holiday, on a rotational basis, on a farm in respect of which the trust was the sole shareholder. De Kock was a beneficiary. As

¹⁹ *Griessel NO and Others v De Kock and Another* [2019] ZASCA 95; 2019 (5) SA 396 (SCA).

a result of acrimony developing between De Kock, on the one hand, and his family, on the other, he was removed as a beneficiary. Litigation ensued and was settled, with the result that De Kock was reinstated as a beneficiary. More litigation followed when the parties could not agree on whether the reinstatement meant that De Kock's right to holiday on the farm had also been restored. He applied for an order to the effect that his 'vested rights, as a beneficiary' in terms of the trust 'be reinstated', including his right of access to the farm.

[51] Molemela JA held that it was not necessary to determine whether De Kock's right to holiday on the farm was a vested right because 'even beneficiaries who have contingent rights are entitled to protection'.²⁰ She proceeded to hold:²¹

'In this matter, the privilege of having a vacation on a farm situated in a game reserve was taken away from the first respondent while the other potential beneficiaries continued to enjoy the same rights. That constituted differential treatment without a justifiable basis. This was evidently prompted by the attitude of the first respondent towards the development of the farm for commercial purposes, which, over the years, increased to the point that the first respondent considered the second applicant, his own mother, to be openly hostile towards him.'

[52] It is clear from the passage quoted above that Molemela JA found that De Kock, as a beneficiary, used to holiday on the farm. When that was taken away from him, but not from other beneficiaries, he was treated unfairly: he was denied his entitlement 'without a justifiable basis', as his alleged obstructive and contrarian behaviour did not suffice as a basis to justify this differentiation in treatment.²²

[53] For the reasons stated above, I conclude that to the extent that it may be said that Peter was treated differently to Francois and Adrian, that differentiation was justified, and hence not unfair. In the result, I do not believe that the ratio of *Griessel* applies to the specific facts of this case. There are no reasonable prospects of this point succeeding on appeal.

²⁰ Para 17.

²¹ Para 18.

²² Paras 18-19.

Conclusion

[54] I have found that none of the three grounds raised by Peter in his application for leave to appeal have a reasonable prospect of success on appeal. That being so, the application for leave to appeal must fail. As the striking-out application is ancillary to the merits of the application for leave to appeal, it is not necessary to deal with it save to say that no grounds are apparent to me on which the high court's exercise of discretion could have been assailed.

[55] I make the following order:

The application for leave to appeal is dismissed with costs, including the costs of the application to introduce further evidence on appeal.

C Plasket
Judge of Appeal

MOLEMELA JA

[56] I have read the judgment penned by my colleague, Plasket JA (the majority judgment). Regrettably, I am unable to agree with its reasoning and conclusion. As the background facts have already been set out in the majority judgment, I focus only on the salient facts which form the basis of my reasoning.

[57] I must state at the outset that the respondent did not abandon its jurisdictional point; it persisted with the argument that the high court did not have jurisdiction to adjudicate the matter on account of Grace Investments being a company registered in Namibia. From my point of view, that preliminary point regarding the high court's lack of jurisdiction has no merit, as the shares that were sold are the property of a company registered in South Africa. In any event, the impugned agreement was entered into in the Western Cape in South Africa. That being the case, the Western Cape High Court had the jurisdiction to adjudicate the matter. Thus, nothing stood in the way of the consideration of oral arguments pertaining to the application for leave to appeal.

[58] As regards the merits, I must mention that at the commencement of the hearing, counsel for the applicant informed us that the issue pertaining to the applicant's appointment as a Trustee was no longer being persisted with. This was because Joy Kuttel had passed away in the week preceding the hearing, the obvious result, based on the terms of the Trust Deed, being that the assets of the Padjoy Trust (the Trust) would vest in the beneficiaries within two weeks, thereby bringing an end to the Trustees' functions. It is for this reason that the issue concerning the applicant's appointment as a Trustee need not detain us.

[59] I consider it necessary to, without much ado, clear the air surrounding the creation of the Trust by underscoring the following cautionary remarks made by this Court in *Land and Agricultural Bank of South Africa v Parker and Others*:²³

'The core idea of the trust is the separation of ownership. . . . Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercised it on behalf of *and in the interests of another*. . . . [T]he English law trust, . . . were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead. . . . [T]he trustee is appointed and accepts office to exercise fiduciary responsibility over property *on behalf of and in the interests of another*.' (Own emphasis.)

There can hardly be any doubt that in exercising their fiduciary duties, Trustees have an obligation to consider the interests of *all* the beneficiaries.

[60] In *Raath v Nel*, this Court stated as follows:²⁴

'It is plain from the above that the trust is of the type which has become very popular for estate planning and tax purposes (as was the case in *Rudman*). It is undoubtedly a convenient and useful tax and estate planning vehicle, but the caution sounded by this court in the past is apposite here. In *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*, Harms JA raised a concern about business trusts where a trust is formed for estate planning purposes, or to escape the constraints of corporate law, and yet everything else remained as before. A similar concern was raised in *Land and Agricultural Bank of South Africa v Parker and Others*. There, as is the case here, the dispute revolved around a family trust. This court reaffirmed

²³ *Land and Agricultural Bank of South Africa v Parker and Others* 2004 ZASCA 56; 2005 (2) SA 77 (SCA) para 19-20.

²⁴ *Raath v Nel* [2012] ZASCA 86; 2012 (5) SA 273 (SCA) para 13.

that a trust estate, comprising of an accumulation of assets and liabilities, is a separate entity, albeit bereft of legal personality. . . .’

(Footnotes omitted.)

[61] It is also apposite to remind ourselves of what this Court unanimously held in *Breetzke NNO and Others v Alexander*²⁵ in the context of a direct action brought by a beneficiary arising from a breach of fiduciary duty, but equally apposite in the context of this matter. This Court said:

‘While the existence of a fiduciary duty in any given situation can only be determined after a close examination of the facts, there are certain situations, such as, a trustee dealing with the trust of which they are trustee, where the existence of a fiduciary duty will ordinarily arise. . . . *The fiduciary must place the interests of the other party to whom the duty is owed before their own.*’²⁶ (Own emphasis)

[62] In *Griessel NO and Others v De Kock and Another (Griessel)*,²⁷ this Court, in a unanimous judgment, held that Trustees have an obligation to treat all the beneficiaries even-handedly. This finding was made in the context of a Trust Deed that gave the Trustees wide discretionary powers, as is the case in the matter under consideration.²⁸ This Court observed that differential treatment of beneficiaries may be justified by the needs of a particular beneficiary. Notably, this Court held that even beneficiaries who have contingent rights are entitled to protection. Unquestionably, the principle that beneficiaries must be treated even-handedly is an important one.

[63] My allusion to the authorities quoted above is intended to sketch the backdrop against which the issues for consideration in this matter must be considered. Of critical importance is the trite principle that notwithstanding the wide powers given to Trustees by the Trust Deed, at the end of the day, those powers must still be exercised subject to the law. Thus, the fact that Padda was the driving force behind Southern Ropes does not detract from the fact that the assets of the Trust were separate from Padda’s personal estate. His position as Trustee was equal to that of the Trustees and could not be an overriding consideration when decisions regarding the assets of the Trust

²⁵ *Breetzke NNO and Others v Alexander* [2020] ZASCA 97; 2020 (6) SA 360 (SCA).

²⁶ *Ibid* para 10 and 36.

²⁷ *Griessel NO and Others v De Kock and Another* [2019] ZASCA 95; 2019 (5) SA 396 (SCA) para 17.

²⁸ This is evident from para 10 of that judgment.

were made. The Trustees were thus obliged to exercise their control over the Trust assets on behalf of all the beneficiaries. Thus, while clause 8 of the Trust Deed gives the Trustees the power to, in administering the Trust, 'adopt such procedure and take such administrative steps as they shall from time to time deem necessary and desirable', it did not give them carte blanche to treat the beneficiaries discriminately without justification.

[64] The respondents contended that the issue of unequal treatment of beneficiaries was obliquely raised. I disagree. To my mind, there can be no doubt that the applicant was aggrieved by what he deemed to be unequal treatment towards him, at the hands of the Trustees. The relevant averments are clearly set out in the founding affidavit. They are also alluded to in the replying affidavit (ie. in the parts that were not struck out). Notwithstanding that the high court did not pronounce itself on the issue of unequal treatment, there can be no doubt that it was squarely raised for determination. This is borne out by the following paragraphs of the founding affidavit:

'27. Upon receipt of the information, I became very concerned about the administration of the Trust as it was immediately apparent to me that my brothers, who are also Trustees, had substantially benefitted from the restructuring and, specifically from the transaction.

28.1. As a capital beneficiary of the Trust, I have a direct interest in the proper administration of the Trust.

28.2. Notwithstanding my direct interest, none of the Trustees thought it necessary to advise me of the transaction until 2017. Had I been aware of the transaction, I would certainly have submitted a counter-offer for the sale of Southern Ropes as it is, in my view, a highly successful and profitable business.

...

28.5. As stated above, the alleged primary purpose of the restructure was to fund my parent's retirement. If this is so then the decision to conclude the transaction was irrational in light of the fact that Southern Ropes had historically yielded a profit of approximately R9.5 million per annum after tax and accordingly the potential dividend, from that shareholding alone would have ensured that my parents' retirement could be funded more than adequately.

28.6. By virtue of the fact that my brothers are both beneficiaries and Trustees of the Trust, they were in a special and privileged position to ensure that the transaction was concluded at a time that was most beneficial to them.

28.7. The Trustees' failure to notify me of the transaction was disconcerting, unfair and inappropriate.

28.8. The Trustees should have obtained my consent prior to the conclusion of the transaction or, at the very least, notified me of the transaction and the restructure.

...

45.2. It is submitted that the Trustees should have, in fairness, afforded all of the beneficiaries the opportunity to purchase the shares. I should have, at the very least, been notified of the proposed transaction given my vested interest in the trust.

45.3. Had I been presented with the opportunity to purchase the Shares in Southern Ropes, I would have been a willing buyer and, in all probability, I would have offered a higher purchase consideration for the shares than my brothers. At the very least, I would have questioned the Trustees' proposed sale given the income then being generated by Southern Ropes for the Trust.'

It is clear from the foregoing averments that the respondent's contention that the assertion pertaining to unequal treatment was confined to the issue of the applicant's appointment as a Trustee, is devoid of merit.

[65] It is undisputed that Southern Ropes was a well-established income-generating company. The 81.6 per cent shareholding in Southern Ropes was undoubtedly one of the Trust's key assets. In my view, by not affording the applicant the same opportunity offered to his brothers, namely, to buy the 81.6 per cent shareholding in Southern Ropes, the Trustees denied the applicant the privilege of having a stake in the running of that company. As mentioned before, it is accepted that differential treatment of beneficiaries may be justified by the needs of a particular beneficiary. It is of significance that in casu, no plausible reason was advanced for offering the privilege of buying Southern Ropes' shares to Francois and Adrian but not the applicant, despite the Trust Deed having accorded the three of them the same status. Although Levin furnished reasons in a letter dated 11 April 2017, this letter did not provide a plausible explanation why the opportunity to buy Southern Ropes' shares was not offered to the applicant.

[66] On the contrary, Levin's letter tellingly paints a clear picture of the preferential treatment extended to Francois and Adrian. In that letter, he inter alia explained the restructuring of the Trust assets as follows:

'10 In implementing the restructure, the trustees of the Padjoy Trust and the Breemond Trust took legal and tax advice from a prominent firm of attorneys in South Africa, as well as attorneys in the United States and exercised their sole discretion in accordance with their

fiduciary duties, having regard to the purposes for which the Trusts were established and the wishes of your parents, particularly your father.

11 The steps of the restructure were as follows:

11.1 The Breemond Trust settled all of its liabilities and distributed its 81.6% shareholding to Grace Investments 32 as nominee for the two Namibian Trusts (established for the benefit of your brothers and their families) which each own 50% of the shares in Grace Investments 32.

...

Pursuant to the restructure

12.1 *Francois' and Adrian's Namibian Trusts now indirectly own Southern Ropes, MRI and Salmon Ropes;*

12.2 Padjoy Trust swapped its 81.6% shareholding in Southern Ropes for the aggregate of cash or near cash of R8.8 million and a loan claim against Southern Ropes of R23.6 million secured by a cession in *securitatum debiti* of 81.6% of the total issued shares of Southern Ropes. This transaction had no effect on the Padjoy Trust balance sheet in terms of actual values as one asset, namely the shares, was simply exchanged for another asset, namely the loan claim, at the same value. The loan claim has subsequently been repaid and the cession cancelled;

12.3 Francois and Adrian received the benefits of their distribution to their Namibian Trusts of:

12.3.1 cash ...;

12.3.2 investments;

12.3.3 Krugerrands; and

12.3.4 a loan claim of R23.6 million against Southern Ropes. The majority of these benefits were used to pay Padjoy Trust, as described above, which had the effect of providing liquidity in Padjoy Trust;

12.4 Padjoy Trust sold the storage business including its property to a new company registered in Namibia, the shares of which were owned by Adrian's Namibian Trust effectively at cost which was considered to be the market value;

12.5 The Breemond Trust was de-registered;

12.6 As indicated above, the Padjoy Trust now holds all the family assets, which are to be split between the three brothers on the passing of your parents.' (Own emphasis.)

[67] It is significant that Levin intimated that Padda's purpose in establishing the Trust had been to create a vehicle to 'hold assets acquired or built up by the Kuttel family (and Padda in particular) for the benefit of himself and [Joy Kuttel] in the first

instance, and subsequent to the death of the survivor of them, for the benefit of their children and their descendants'. Despite that stated purpose, the upshot of the restructuring was, by Levin's own admission, to allow only Francois, Adrian and their families to 'indirectly own Southern Ropes' without having afforded the applicant the same golden opportunity. This flies in the face of the principle laid down in *Griessel*, namely that a beneficiary has a right to be protected against arbitrary and discriminatory treatment.²⁹

[68] It bears mentioning that the sale of Southern Ropes' shares to Grace Investments, a company owned by a Trust established for the benefit of Francois, Adrian and their families, was by private treaty. The applicant stated that had he been aware of the opportunity to buy the Southern Ropes shares, he would have made a counter-offer. Quite apart from not being able to make a 'counter-offer' as he asserted, it is obvious that he was denied an opportunity of merely making an offer that matched or equaled that of his co-beneficiaries. To my mind, the failure to merely avail the same economic opportunity to the applicant constituted unequal treatment.

[69] I have not seen anything in the answering affidavit which comes even close to being a rational explanation for the unequal treatment set out above. The highwater mark of Levin's response was that there was no obligation for the Trustees to notify the applicant. Considering that the applicant is a capital beneficiary and that the provisions of clause 12 of the Trust Deed stipulate that subject to the powers conferred on the Trustees, 'the capital of the trust shall be held by the Trustees until the vesting date, whereupon the capital then still held in trust shall vest in and be paid to the Donor's children in equal shares', one could have expected that the applicant would, at least, have been notified about the sale of Southern Ropes; it was, after all, a significant multi-million rand transaction which gave his co-beneficiaries 'indirect ownership' of a capital asset of the Trust. This did not happen.

[70] The applicant's averments that there were enough assets to take care of Padda and Joy was not seriously disputed. Furthermore, the applicant's assertions that Southern Ropes had historically yielded profits amounting to millions of rands was not

²⁹ *Griessel* para 17.

denied. While, in terms of the provisions of the Trust Deed, its Trustees were entitled to redistribute assets to ensure that the needs of Padda, Joy and any other beneficiary were taken care of, it is equally clear from the evidence that the Trust was well-off, possessing several valuable assets, including cash on hand of approximately R8.5 million. Levin's statement that Southern Ropes generated reasonable profits accords with the applicant's statement that Southern Ropes' annual profit was about R10 million per year after tax and sufficient to sustain a comfortable lifestyle for Padda and Joy. Tellingly, the proceeds of the sale of shares were invested and not distributed to Padda and Joy for purposes of sustaining their lifestyle. Under the circumstances, the substratum of the respondents' assertion that the rationale for selling Southern Ropes was to cater for Padda and Joy's needs has disappeared. In any event, it remains unclear how the sale of the shareholding in Southern Ropes to two out of three beneficiaries could conceivably benefit Padda and Joy. The inference that the decision to sell the Trust's majority shareholding in Southern Ropes to Francois and Adrian's Namibian Trust was not motivated by Padda and Joy's needs, is ineluctable.

[71] All things considered, there can be no doubt that the three beneficiaries were not treated even-handedly. Rather, the evidence suggests that Francois and Adrian received preferential treatment. The respondents' argument that Francois and Adrian were, in their capacity as Trustees, not precluded from buying Trust assets misses the point – the fact that they were appointed as Trustees in addition to being beneficiaries did not entitle them to more privileges than the applicant. As Trustees, they ought to act even-handedly in exercising their control over the Trust's assets, in the interests of all the beneficiaries.

[72] What is discernible is that although the applicant's status as a beneficiary was the same as that of Francois and Adrian, the collective decision of the Trustees granted Francois and Adrian a benefit that was not made available to the applicant, namely, the ownership of the majority shares in Southern Ropes. As an aside, what can also be gleaned from the evidence is that at the time when Francois and Adrian were appointed as Trustees, there was already an unfortunate history of tensions among family members. Unfortunately, their inclusion as Trustees, and the decision to offer Southern Ropes' shares exclusively to Francois and Adrian seems to have exacerbated the acrimony that already existed, perhaps predictably so.

[73] It was submitted on behalf of the Trust that the applicant has not been adversely affected by the impugned transaction. It was argued that the sale of shares had a zero-sum effect on the assets of the Trust, in the sense that the Trust received compensation for the shareholding that it lost and the applicant would therefore benefit from the proceeds of the sale on Joy's death; that Francois and Adrian had paid a market-related price for the shares and that in terms of the provisions of clause 12 of the Trust Deed, the value of all capital assets which were distributed prior to vesting would be considered when vesting occurred. In my opinion, these contentions amount to cold comfort, as they fail to consider the well-established rights and privileges that come with being a majority shareholder. It is trite that the shareholders who own majority shares in a company are entitled to control the exercise of a majority of the voting rights associated with the shares of that company; they have the right to appoint or elect or control the appointment of directors;³⁰ they also have beneficial interest in the securities of the company.³¹ In a nutshell, they have a say in how the company is run because they have significant voting power when it comes to company decisions; they can materially influence the policy of the company. Levin's phraseology that Francois and Adrian 'indirectly own Southern Ropes' is consistent with the rights and privileges mentioned above. With a shareholding of 81.6 per cent in Southern Ropes, the Trust was practically seized with the running of Southern Ropes and could

³⁰ Section 2(2) of the Companies Act 71 of 2008 provides:

'(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if— (a) in the case of a juristic person that is a company— (i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or (ii) that first person together with any related or inter-related person, is— (aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or (bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; (b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation; (c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or (d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).'

³¹ The Companies Act defines 'beneficial interest' as follows: ', 'beneficial interest, when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to— (a) receive or participate in any distribution in respect of the company's securities; (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or (c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities, but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002).

essentially outvote all other shareholders combined. The enormity of the applicant's loss is plainly incontrovertible. The applicant's assertion that he would have submitted an offer to buy the shares had he been aware of the Trustees' decision to sell them, is therefore understandable. Without this Court's intervention, the applicant's loss will be irreversible.

[74] To sum up, the zero-sum argument and the submission that Francois and Adrian paid a market-related price to the Trust from which the applicant will benefit on Joy's death, are factors that do not detract from the applicant's loss of the privilege to, like his brothers, 'indirectly own Southern Ropes', and the consequent benefits of that ownership. All the aspects canvassed above lead me to conclude that the agreement pertaining to the sale of shares to Grace Investments, which benefitted two beneficiaries to the third beneficiary's detriment ought to be set aside. With respect, I am unable to agree with the majority judgment's conclusion (at para 49 of the judgment) that there was a rational reason why the shares were offered to Grace Investments. This is because in *Griessel*, where a beneficiary's privilege of having a vacation on a farm was taken away from him but the other potential beneficiaries continued to enjoy the same privilege, this Court held that such differential treatment was without justification. In casu, the applicant was deprived of a far more significant privilege: he was denied the privilege of being a beneficiary of a Trust owning majority shares in Southern Ropes while the other two beneficiaries, Francois and Adrian, continued to enjoy the same right, albeit as beneficiaries of a different Trust.

[75] In *Griessel*, this Court stated that discrimination may, under certain circumstances, be justified by the needs of a particular beneficiary. I have demonstrated earlier, in para 70 above that the assertion that the rationale for the sale of Southern Ropes shares was to cater for Joy and Padda's well-being during Padda's retirement is without foundation. It follows that need has not been established as the rationale for the differential treatment extended to the applicant. Since no plausible explanation for this differential treatment has been proffered by the Trustees, it follows, by parity of the reasoning adopted in *Griessel*, that this Court must find that such treatment is not justified. That being the case, the applicant had a right to be protected against arbitrary and discriminatory treatment.

[76] For all the reasons stated above, I am of the view that the applicant has good prospects of success on the merits of the appeal. I would therefore grant him leave to appeal against the judgment of the high court and order the respondents to pay the costs of this application.

MB Molemela

Judge of Appeal

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