INTERPRETATION OF A TRUST DEED

Harvey v Crawford 2019 (2) SA 153 (SCA)

1 Introduction

Recently, in *Harvey v Crawford* (2019 (2) SA 153 (SCA)) (*Harvey*), the Supreme Court of Appeal had to consider whether the adopted grandchildren of a trust donor were beneficiaries in terms of a notarially executed deed of trust. Presently, an adopted child is for all purposes regarded as the child of the adoptive parent, and an adoptive parent is for all purposes regarded as the parent of the adopted child (s 242(3) of the Children's Act 38 of 2005) (the Children's Act)). This was also the case in 1953, when the deed of trust in *Harvey* was executed and when the Children's Act 31 of 1937 (the 1937 Act) regulated adoption. However, contrary to current legislation, the 1937 Act included a proviso with regard to property that was included in an instrument prior to the date of the adoption order: the instrument was required to display a clear intention that such property would indeed devolve upon an adopted child.

Upon interpretation of the deed in question, the court ruled that the adopted children were not entitled to benefit from the capital in the trust. In this regard, the majority opted for a rather restrictive approach, seemingly out of step with recent developments in the interpretation of contracts. The minority decision, on the other hand, came to the opposite conclusion, displaying a more balanced approach to the issue of interpretation. This decision raises some noteworthy issues regarding the interpretation of *inter vivos* trust deeds with specific reference to adoption. It is submitted that the court erred in its findings; the aim of this case discussion is to analyse the judgment.

2 Facts

In 1953, Mr Druiff (the donor) executed a notarial deed of trust in terms of which the trust fund had to be applied for the benefit of his four biological children, whom he referred to by name, and of any child or children of his biological children (thus grandchildren) who may be alive at that time (par 2). On the passing of each of his four children, the one-fourth capital share of each child had to be paid to his or her descendants *per stirpes*, in equal shares. If the whole of the capital had not yet been applied for the benefit of the beneficiaries, the trust deed would remain in force until the death of all four children of the donor (see par 3 of *Harper v Crawford* 2018 (1) SA 589 (WCC) (the court *a quo*)), at which stage clause 6 (the termination clause) would apply. Although this clause also provided for the donor's children, such references are irrelevant as the termination clause only came into

effect once they had all passed away. The relevant parts of the termination clause provided that each child's share devolved upon his or her legal descendants *per stirpes*. If a child had no legal descendants, such share had to be divided equally between the remaining legal descendants *per stirpes*, and if there were no legal descendants of such children, then the trustees had to divide the capital between such persons as may be nominated as the heirs in the will of the donor. On the same day he executed the trust deed, the donor also drafted a will in which he nominated his four children as his residual heirs, with their descendants inheriting in the event that any of them passed away before he did.

At the time that the trust deed was executed, the donor's children all had biological children of their own, except for his daughter, Ms Harper. At some stage, Ms Harper had informed the donor that she was considering adoption and, after his death, she adopted two children, a son and a daughter (the adopted children) (par 42). Sometime thereafter, Ms Harper approached the Western Cape Division of the High Court, seeking an order that her one-fourth share would upon her death devolve upon her two adopted children. At that stage, she was the only child of the donor still alive and, upon her death, the trust would expire.

3 Judgments

3 1 Court a quo

In the court *a quo*, the relief sought was based on the grounds that it was not evident from the trust deed that the donor had intended to exclude the adopted children from benefiting from the trust; that, in line with the spirit, purport and objects of the Bill of Rights and public policy, the trust deed should be interpreted to include adopted children; that the donor had been aware of Ms Harper's difficulties in carrying a pregnancy to term when he executed the trust deed; and that, in the alternative, the trust deed be varied in terms of section 13 of the Trust Property Control Act 57 of 1988 (par 5). The application was dismissed, essentially on the basis of the court's interpretation of the trust deed that the donor only intended biological descendants to benefit from the trust (par 26).

The matter then went on appeal. Before the appeal could be heard, Ms Harper passed away (par 10) and she was substituted by the executor of her estate, Mr Harvey, as the first appellant (par 43). The adopted children were the second and third appellants. The principal argument of the appellants was that the court *a quo* did not properly apply the rules relating to the interpretation of contracts (par 11). The respondents (the trustees, the Master of the High Court and the children of Ms Harper's siblings), on the other hand, argued that because the donor had made provision for the possibility of a beneficiary dying without issue, and that he had not made express provision for adopted children, despite being aware of Ms Harper's inability to have a biological child, he did not intend for adopted children to benefit from the trust deed (par 12).

The constitutional and public policy arguments, and variation of the trust deed in terms of section 13 of the Trust Property Control Act, were considered, but rejected by the court. The authors have not focused on the peripheral aspects of public policy and variation of the trust deed and mainly dwell on the central matter of interpretation on which the case turned. There is both a majority judgment (*per* Ponnan JA with Tshiqi, Zondi and Dambuza JJA concurring) and a dissenting minority judgment (*per* Molemela JA), which differ markedly in approach and outcome. At the outset, it may be mentioned that the authors prefer the minority decision for reasons that follow.

3 2 Majority judgment

Ponnan JA relies on *Cohen v Roetz In Re: Estate Late AJA Heyns* (1992 (1) SA 629 (AD)) (*Cohen*), where it was held (639E) that a child or grandchild "does not go beyond a testator's own child (his bloedkind) or an own child of such child" and that the word "descendant" in its "normal or usual meaning … includes only blood relations in the descending line and excludes adopted children" (640A). He also refers to *Brey v Secretary for Inland Revenue* (1978 (4) SA 439), where the court said (442H–443D) that the word "child" has been interpreted by our courts to refer to "a legitimate child only"; and he relies on the *Concise Oxford Dictionary* 9ed to conclude that the ordinary meaning of the word "issue" connotes blood descendants (par 47–48). Although he points out that the matter turns on the construction to be placed on the words "children", "descendants", "issue" and "legal descendants" in the trust deed (par 41) in order to "ascertain the intention of the donor" (par 47), Ponnan JA nevertheless fails to consider what was meant by "legal descendants". He indicates that the donor should have used express terms to include adopted children in the trust deed, that his omission in this regard indicated that he did not intend to include them (par 51), and that he only had in mind descendants through the bloodline (par 47–48). Consequently, the majority dismissed the appeal with costs (par 75).

3 3 Minority judgment

Determining the central issue to be the interpretation of the provisions of the trust deed (par 23–24), and deliberating whether the provisions revealed an intention to exclude adopted children (par 27), Molemela JA considers various judgments. Relying on the decision in *Boswell v Van Tonder* (1975 (3) SA 29 (A)) (*Boswell*), where the court held that adopted children were included under "children", but that the legal fiction of an adopted child being deemed to be a biological child is rebutted if the relevant instrument, read as a whole, reveals an intention to exclude the adopted child, she identifies the question in *Harvey* to be whether the application of "the ordinary rules of interpretation … reveals a testamentary intention that displaces or rebuts that legal fiction" (par 29). She points out that each document must be read as a whole and every will has to be interpreted according to its own language and context (par 30); that the founder used the neutral term "child"

which, according to the decision in *Boswell* (38), cannot be assumed to exclude an adopted child where an instrument was executed before the adoption (par 31); and that the use of the word "any" (where the beneficiaries of the trust were described as "[t]he child or any children" in the trust deed) lends an inclusive character to the class of grandchildren the founder had in mind, and thus included adopted children as income beneficiaries of the trust (par 32). She further supports her view with the context within which the trust deed had been executed – namely, that the donor had been aware of the possibility that Ms Harper might adopt (par 33). Molemela JA also distinguishes the position in *Harvey* from *Cohen* (which carries a lot of weight in the majority decision – see heading *5 4* below); the bequest in *Cohen* had to devolve upon the eldest child, whereas in *Harvey*, no one had been excluded from the trust deed (par 34). She further deduces that it is "highly improbable" that the founder would refer to biological grandchildren as "legal descendants" and that the addition of the prefix "legal" thus broadened the class of beneficiaries to include adopted children (par 33).

Molemela JA concludes that she could not find anything to indicate that the donor intended to exclude adopted children from benefiting from the trust deed; that the words "children", "descendants", "issue" and "legal descendants" in the trust deed should be interpreted to include adopted children; and that the appeal should succeed with costs (par 40).

4 Evaluation

4 1 Introduction

In terms of section 71 of the 1937 Act, an adopted child was "for all purposes whatsoever … deemed in law to be the legitimate child of the adoptive parent". An adopted child was thus treated in the same way legally as any biological child born to married parents and was entitled to any benefit to which such a biological child was entitled. The focus in this matter was not on the legality of the adoptions (all references to adopted children are to legally adopted children), but was on the proviso in section 71(2)(*a*) of the 1937 Act – namely, that an adopted child could not by virtue of the adoption

> "become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child".

The trust deed that is at the heart of this matter was such an instrument, and the question to be answered was whether it conveyed an intention that adopted children should benefit from it. The authors are of the opinion that there is ample evidence that the words used in the trust deed could be interpreted to include adopted children. Consequently, the authors believe that the majority erred in finding differently and their intention is to show that it is more than probable that adopted children were intended to be included

as beneficiaries. As background to the discussion, the authors first refer to the issue of adoption within the context of the wording of the trust deed, whereafter the central matter of interpretation and the disparity in approaches in this regard in *Harvey* are considered.

4 2 Adoption and context

Today, the Children's Act regulates adoption, but at the time that the trust deed was executed, the 1937 Act, which has long since been repealed, was in operation. As the Children's Act does not have retrospective effect (*Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA) par 23; *Shange v MEC for Education, Kwazulu-Natal* 2012 (2) SA 519 (KZD) par 31; Heaton *South African Law of Persons* (2017) 112), the court applied the provisions of the 1937 Act.

As previously indicated (see heading 2 above), the death of the last of the donor's children resulted in the termination of the trust deed. Ms Harper, the mother of the adopted children, was the last of the donor's children to pass away before the appeal was heard. This incident was extremely important for the interpretation of the terms of the trust deed, but it was not in any way considered in the judgment. As a result of Ms Harper's death, the other clauses in the trust deed and the beneficiaries mentioned in these other clauses were of no direct relevance. Although the trust deed in other clauses referred to descendants, children and issue, her death brought into effect the termination clause, which provided for the devolution of the last one-fourth share of the capital upon the "legal descendants" of the children (of the donor) *per stirpes*. Even if it is assumed that the majority's analysis with regard to "children," "issue" and "beneficiaries" as referred to in the trust deed is correct, the majority's failure to probe the meaning of "legal descendants" is not only unfortunate, but led the court in the wrong direction. In its endeavour to determine who the beneficiaries of the trust were, it is submitted that the court should have given due consideration to the appropriate beneficiaries as mentioned in the termination provision. This *lacuna* in the majority judgment is explored in the following paragraphs.

When Ponnan JA concludes that the adopted children were not included as beneficiaries, he explains that the donor should have used express terms in the deed to benefit them (par 51). The authors suggest that the donor did exactly this when referring to the beneficiaries in the termination clause as "legal descendants", but Ponnan JA does not acknowledge this term, nor the reason that the trust deed in this clause specifically referred to "legal descendants," nor the intention conveyed with the use of these words. In effect, the majority judgment thus gives no consideration to who the beneficiaries were at the trust deed's termination. The authors suggest that this was a crucial omission.

In her dissenting judgment, Molemela JA warns against relying purely on the dictionary definition of words, rather than also examining the language used in the document and the facts that provide context (par 23–24). Furthermore, she points out that the narrow interpretation of the wording in the trust deed was contrary to other tools of interpretation, such as context

and surrounding circumstances (par 37) and states that the addition of the prefix “legal” to the word “descendants” broadened the class of beneficiaries to include adopted children. She concludes that the trust deed provided for the adopted children to benefit from it. She bases this conclusion on context and on her assumption that it was “highly improbable” that the donor would refer to biological grandchildren as “legal descendants” (par 32–33). The authors fully support her conclusion that the relevant issue was the reference to the class of beneficiaries as “legal descendants” in the termination clause. Below, the authors explain their reasoning.

Adoption in South Africa is used to alter legal relationships (South African Law Commission Project 110 *Review of the Child Care Act* (2002) par 17.1). Adoption establishes a familial relationship between adoptive parents and adopted children created not by biology, but by law. Although it is trite that blood relationships cannot be created or dissolved (see further Louw “Adoption of Children” in Boezaart (ed) *Child Law in South Africa* (2017) 193), an adoptive family substitutes the biological family for all purposes in law. This is the crux of the matter. The appellants were biologically related to other persons, but as soon as the adoption orders for the appellants had been granted, the biological relationships were legally terminated. (In terms of s 71(3) of the 1937 Act, an adoption order terminated all rights and responsibilities existing between a child and his or her natural parents and their relatives, except the right to inherit from them *ab intestato*). The appellants became the *legal* (as opposed to biological) descendants of their adoptive parents.

Although reference to “legal descendants” in South African trust deeds and in wills is fairly common, and it was analysed in *Boswell* (which Molemela JA also refers to – see heading *3 3* above), the courts have not often needed to explore or analyse the meaning of the term in relation to adopted children. Foreign case law, on the other hand, has done exactly that in circumstances where the facts and the time frame were uncannily similar to the circumstances of *Harvey*. In an Alabama Supreme Court decision, *McCaleb v Brown* (344 So. 2d 485 (1977) (*McCaleb*), a donor executed various trust deeds in 1942, which included conveyance of property to the surviving descendants or legal descendants *per stirpes* of her children. After the donor’s death, her son legally adopted the plaintiff, who approached the court in 1977 for a declaratory judgment regarding her rights in property conveyed to her adoptive father. The court identified the only issue for resolution to be whether the plaintiff had been included in the class of beneficiaries described as surviving descendants and as legal descendants of the donor’s children (486). Jones J concluded (488) that the plaintiff was included “within the designated class of ‘descendants’ and ‘legal descendants’” of her adoptive father. The decision in *McCaleb* is quite striking in its simplicity but it nevertheless reflects sound reasoning and it is tempting to infer that the court’s approach was influenced by the notion that, generally, adopted children should for all intents and purposes be regarded as equal to biological children, unless specifically excluded in a legal instrument. Whereas Ponnan JA infers that the donor’s failure to include adopted children in express terms indicated that he had no such intention (par 51), the authors believe that *McCaleb* is further comparative affirmation

that the use of the term “legal descendants” in *Harvey* clearly broadens the class of beneficiaries to include the adopted appellants or constitutes, as Ponnan JA put it, the use of express terms to include them.

5 Techniques of interpretation and *Harvey v Crawford*

5 1 Introduction

The majority and minority decisions in *Harvey* display a striking contrast in approach and conclusions in their respective interpretations of the trust deed. The crucial question was whether the term “legal descendants” conveyed the clear intention that the property would also devolve upon adopted children. Both judgments refer to canons of construction at some length, but it is the approach adopted in the minority decision that the authors suggest is the more appropriate and in tune with recent developments in this regard.

It is trite that, on the one hand, the principles and rules of contractual interpretation generally apply to trusts *inter vivos* while, on the other, the rules pertaining to the construction of wills apply to trusts *mortis causa* (Cameron, De Waal and Solomon *Honoré’s South African Law of Trusts* (2018) 319). An *inter vivos* trust is established by contractual means and therefore should be interpreted accordingly (*CIR v Estate Crewe* 1943 AD 656; *Crookes v Watson* 1956 (1) SA 277 (A) 285E–287C). Although not all authorities entirely agree (see eg, Kerr “The Juristic Nature of Trusts *Inter Vivos*” 1958 *SALJ* 84 92–93), there is direct authority to the effect that the creation, variation and acquisition of rights by trust beneficiaries is regulated in terms of the law of contract, more specifically as a form of contract for the benefit of a third person (*stipulatio alteri*) (see eg, *Crookes v Watson supra* 285E–287C; see, however, De Waal “Die Wysiging van ‘n *Inter Vivos* Trust” 1998 *TSAR* 326 329–330). Nevertheless, irrespective of the exact juristic nature of the trust *inter vivos*, it remains clear that its interpretation is largely a contractual issue (see further eg, *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) par 19–24; *Potgieter v Shell Suid-Afrika (Edms) Bpk* 2003 (1) SA 163 (SCA) par 8–11; *Sea Plant Products Ltd v Watt* 2000 (4) SA 711 (C) 720–722; *Ally v Mohamed* [1998] JOL 3393 (D) 10). It therefore seems axiomatic that the principles of contractual interpretation should have been dutifully applied in *Harvey*, but as far as the majority decision is concerned, this was not entirely the case.

5 2 Construction of a will as opposed to a trust inter vivos

A will is a unilateral legal act and, subject to certain limitations pertaining to public policy, vagueness and some statutory restrictions, a testator has the freedom to make a will of his or her own choosing, which a court is required to enforce in accordance with the maxim *voluntas testatoris servanda est* (Jamneck “Freedom of Testation” in Jamneck & Rautenbach (eds) *The Law*

of Succession in South Africa (2017) 125). In accordance with this principle of freedom of testation, succession law regards the "golden rule" of interpretation to be the ascertaining of the wishes of the testator from the language used in a will (*Greyling v Greyling* 1978 (2) SA 114 (T) 118C; *Robertson v Robertson's Executors* 1914 AD 503 507 (*Robertson*)). Consequently, as Paleker ("Interpretation of Wills" in Jamneck & Rautenbach *The Law of Succession in South Africa* 230) puts it, "[a]ll the rules for the interpretation of wills are geared towards determining and giving effect to the intention of the testator". This essentially seems to be a subjective approach to will construction. A trust *inter vivos*, on the other hand, is in nature distinct from a will; the trust deed – as a species of contract – does not have to comply with the formalities required by law for the validity of wills (Jamneck "Testate Succession: General Rules" in Jamneck & Rautenbach *Law of Succession in South Africa* 53). This is the case even when a testator bequeaths benefits to a trust *inter vivos* in his or her will (*Kohlberg v Burnett* 1986 (3) SA 12 (A) 26A–B; Jamneck in Jamneck & Rautenbach *Law of Succession in South Africa* 53).

5 3 Developments in the construction of contracts

The South African law of contract strongly reflects elements of both a subjective and objective approach to contractual liability (see Lubbe & Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 106; Pretorius "The Basis of Contractual Liability in South African Law (2)" 2004 *THRHR* 383 383–388; Kritzinger "Approach to Contract: A Reconciliation" 1983 *SALJ* 47) and this has influenced the manner in which contractual instruments are construed. Consequently, on the one hand, there is authority supporting a subjective approach to contractual interpretation, or rather a "factual or historical-psychological approach" (see Lubbe & Murray *Farlam and Hathaway Contract* 451) (see eg, *Concord Insurance Co Ltd v Oelofson* 1992 (4) SA 669 (A) 671D–E 672D–G 673G–674B 675B–D; *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) 828A–B; *Russell and Loveday v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) 129G–H; *Jones v Anglo-African Shipping Co (1936) Ltd* (1972 (2) SA 827 (A) 834D; *Joubert v Enslin* 1920 AD 6 37–38). On the other hand, there are also indications of a generally objective approach to contractual interpretation (see eg, *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) 66–67; *Fiat SA v Kolbe Motors* 1975 (2) SA 129 (O) 137; *Nelson v Hodgetts Timbers (East London) (Pty) Ltd* 1973 (3) SA 37 (A) 45; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) 479; *Worman v Hughes* 1948 (3) SA 495 (A) 505).

The tension between the subjective and objective approaches has been apparent in South African contract law for some time, but a detailed discussion of this is not necessary for present purposes (see further Pretorius "Mistake/Absence of Consensus" in Hutchison & Pretorius (eds) *The Law of Contract in South Africa* (2017) 93ff). However, it may further be mentioned that the subjective approach to contractual construction is nevertheless heavily dependent on objective factors to prove what the

intention of the parties is, creating a somewhat paradoxical situation (Maxwell "Interpretation of Contracts" in Hutchison & Pretorius *The Law of Contract in South Africa* 283). It is also quite apparent that the latter approach bears more than a superficial resemblance to the manner in which wills are interpreted.

Traditionally (see generally Cornelius *Principles of the Interpretation of Contracts in South African Law* (2016) 78–85), in the case of a written contractual instrument, the courts favoured a textual, layered approach to interpretation that focused on the language used in the document in accordance with its grammatical and ordinary meaning. There was also a differentiation between evidence regarding background circumstances explaining the genesis and purpose of the contract, which was permissible, and extrinsic evidence regarding surrounding circumstances pertaining to previous negotiations, correspondence and subsequent conduct of the parties, which was only permissible if the document was ambiguous (see *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) 768A–E).

The first definitive knell signalling a change in approach occurred in *KPMG Chartered Accountants (SA) v Securefin Ltd* (2009 (4) SA 399 (SCA) (*KPMG Chartered Accountants*)), where Harms DP concluded that the time had come to accept that there was no merit in distinguishing between "background circumstances" and "surrounding circumstances" (par 39). The distinction was artificial and both terms were vague and confusing; in consequence, courts tended to admit everything (see further, Maxwell in Hutchison & Pretorius *The Law of Contract in South Africa* 274–275). Harms DP preferred the terms "context" or "factual matrix." The implication of doing away with the aforesaid distinction is that the issue of ambiguity loses its relevance within the context of the admissibility of evidence in determining the meaning of contractual provisions (Cornelius *Principles of the Interpretation of Contracts in South African Law* 86; and see further Cornelius "Background Circumstances, Surrounding Circumstances and the Interpretation of Contracts" 2009 *TSAR* 767). The courts proceeded to apply this aspect of Harms DP's judgment in *KPMG Chartered Accountants* (see eg, *Unica Iron and Steel (Pty) Ltd v Mirchandani* 2016 (2) SA 307 (SCA) par 21; *National Health Laboratory Service v Lloyd-Jansen van Vuuren* 2015 (5) SA 426 (SCA) par 14; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) par 24).

The decision in *KPMG Chartered Accountants* provided much of the impetus for the eventual shift to a contextual approach to extrinsic evidence. Another significant step in this process was the judgment of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA) (*NJMPF*)), during which he observed:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. … The process is objective, not subjective. … The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the

> provision and the background to the preparation and production of the document." (par 18)

One of the salient features of this *dictum* is that it endorses an objective approach that considers what an objective bystander would have understood the parties to have agreed rather than what they subjectively intended (see further Maxwell in Hutchison & Pretorius *The Law of Contract in South Africa* 268*ff*). This also means that direct evidence of the parties' subjective intentions remains inadmissible – even from a contextual perspective. In this regard, the approach supports normative considerations underlying the parol evidence rule (see Lubbe & Murray *Farlam and Hathaway Contract* 463; Maxwell in Hutchison & Pretorius *The Law of Contract in South Africa* 276–277), which, in the case of a document purporting to be the exclusive memorial of a contract, renders inadmissible extrinsic evidence varying, contradicting or adding to the document's terms (*Johnston v Leal* 1980 (3) SA 927 (A) 943B; Van Huyssteen, Lubbe & Reinecke *Contract: General Principles* (2016) 303).

In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* (2014 (2) SA 494 (SCA) (*Bothma-Batho Transport*)), Wallis JA further affirmed the new contextual approach in the following terms:

> "Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'." (par 12)

It should, however, be mentioned that Harms DP previously cautioned in *KPMG Chartered Accountants* (par 39 with reference to *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) 455B–C) that, to the extent that evidence may be admissible to contextualise a document to establish its "factual matrix or purpose or for purposes of identification", it should be used as conservatively as possible.

5 4 Disparate approaches in Harvey v Crawford

Various further issues arising from the latest shifts in contractual interpretation do not need to be canvassed here (for a discussion of these issues, see eg, Hutchison "Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication" 2017 *SALJ* 296; Myburgh "Thomas Kuhn's Structure of Scientific Revolutions, Paradigm Shifts, and Crises: Analysing Recent Changes in the Approach to Contractual Interpretation in South African Law" 2017 *SALJ* 514). What is important is that the majority and minority decisions in *Harvey* tend to reflect different views on the construction of the trust deed in these circumstances.

The matter for determination by the court was not the donor's intention, but the intention as reflected in the instrument – in other words, the language

used within context (also see *Van Zyl v Van Zyl* 1951 (3) SA 288 (A) 291G–292A; *Robertson* 507).

Although Molemela JA at times also refers to the trust deed as a will, her dissenting judgment is spot on when she points out that this is not a will construction case (par 23); rather, the matter turns on the interpretation of the trust-deed provisions and specifically the interpretation given to the relevant phrases used to describe the beneficiaries (par 23–24). She tends to approach the matter of construction from the viewpoint of the law of contract, and duly takes note (par 25–26) of the decisions in *NJMPF* (par 18) and *Bothma-Batho Transport* (par 12). Molemela JA also relies on the legal fiction referred to in *Boswell* (see heading *3 3* above) to identify the question in *Harvey* to be "whether the application of ordinary rules of interpretation to the provisions of the donor's Trust Deed reveals a testamentary intention that displaces or rebuts that legal fiction" (par 29). Although she refers here to "testamentary intention", it is clear that the learned judge's construction of the trust deed in question leans heavily on the principles of contractual interpretation, including the background circumstances (par 33).

While confirming that a trust deed must be construed in accordance with the rules regarding the interpretation of written contracts (par 45), the majority nevertheless takes a much more restrictive approach to interpreting the trust deed. Unfortunately, in the process, the majority does not reflect on recent developments in contractual interpretation. The court refers to *Moosa v Jhavery* (1958 (4) SA 165 (N)), wherein it was said:

> "the trust speaks from the time of its execution and must be interpreted as at that time. It is the settlor's intention at that time that must be ascertained from the language he used in the circumstances then existing. Subsequent events (and in these are included statutes) cannot, I consider, be used to alter that intention." (169D–F)

Similarly, the majority seems to endorse the view that a will falls to be interpreted by giving words and phrases used by the testator the meaning that they bore at the time of execution (with reference to *Greeff v Estate Greeff* 1957 (2) SA 269 (A) par 46).

The majority then proceed to apply a somewhat textual approach to interpreting the trust deed in finding that adopted children were excluded as beneficiaries. The court prefers the line taken in *Cohen* (641F) that the test is "not whether they were specifically excluded by the will, but rather whether the will clearly conveyed an intention to include them (so that any property under the will might devolve upon them)" (par 50). In ascertaining the intention of the donor, the majority rely on the matter in *Cohen* (see heading *3 2* above) in concluding that the ordinary meaning to be ascribed to the words "descendants", "children" and "issue" has to be that the donor had in mind descendants through the bloodline (par 48). *Cohen* is also heavily relied on in finding that the word "descendant", in its normal or usual meaning, includes only blood relations in the descending line and excludes adopted children. One should, however, caution that this meaning, assigned by the majority, is not necessarily the same as the one for "legal descendant", which they do not consider, and which rather crucially was used in the termination clause of the trust deed.

The majority find a clear similarity between the language used in *Cohen* and that used in the trust deed in the present matter – hence the majority's partiality to that case. The court also states that the trust deed appeared to have been drafted by a professional person, probably an attorney, and surmises that if the donor had intended to benefit adopted children, he would presumably have been advised of the need to include such class of children in express terms in the deed. Ponnan JA accepts that his failure to do so indicated that he had no such intention (par 51). This does not quite follow in light of the factual circumstances existing at the time of execution of the deed; if that argument carried any weight, the donor could just as well have been advised to use the term "legal descendants" to make provision for the possibility of including legally adopted children as beneficiaries. It has already been argued that the prefix "legal" used in the trust instrument extended the class of beneficiaries. And if that is the case, any further conjecture about the donor's state of mind or the reason that he did not specifically use the words "adopted children" seems to be somewhat superfluous.

The line of construction taken by the majority seems to be very much the same as that used when interpreting a will and, as explained, it is submitted this was not the correct approach. The court appeared unwilling to look beyond the meaning of certain words in the trust deed, as previously interpreted – mainly in the matter of *Cohen*. There is little sign of the new approach to contractual interpretation in the majority decision and the authors suggest that this is regrettable.

6 Equitable interpretation and the Constitution

The authors have focussed on the issue of interpretation, which they view as being what the matter really turned on (as did Molemela J). However, if it were argued (contrary to our view) that the trust deed were ambiguous in relation to the question of adopted children as beneficiaries, it is quite apparent that a search for the intention of the donor in this regard could deliver conflicting results, depending on how the matter was approached. Despite the fact that extrinsic evidence, regarding the genesis and purpose of the deed and previous negotiations and correspondence between the parties, is admissible in accordance with the new contextual approach to contractual interpretation, a search for the real intention will in fact often be fruitless when it comes to a contractual document; as Brian CJ famously proclaimed in the 15th century, "the Devil himself knows not the intent of a man" (*Anon* (1477) YB 17 Ed 4).

Thus, the million-dollar question is what to do where there is ambiguity. Traditionally, it has been accepted that where a contract is tinged by ambiguity and does not reflect a "clearly expressed intention", a court should apply fairness, equity and good faith in determining the intention of the parties (see eg, *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 (3) SA 373 (C) 383E–F; *Mittermeier v Skema Engineering (Pty) Ltd* 1984 (1) SA 121 (A) 128A–C; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) 706–707; *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 330–331; *Trustee, Estate Cresswell &*

Durbach v Coetzee 1916 AD 14 19; *Van Rensburg v Straughan* 1914 AD 317; Lubbe & Murray *Farlam and Hathaway Contract* 468). In *South African Forestry Co Ltd v York Timbers Ltd* (2005 (3) SA 323 (SCA) 340I), the Supreme Court of Appeal reaffirmed that although a court may not "superimpose on the clearly expressed intention of the parties its notion of fairness", where there is ambiguity, "the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith".

In addition to the notion of good faith in contractual relationships, Cornelius places equitable interpretation in contemporary contract law squarely on the shoulders of the Constitution and states that courts are thereby required to exercise a "generally equitable jurisdiction". Consequently, the principles enshrined in the Bill of Rights must be taken into account when considering what is equitable or reasonable. He also mentions that the Constitution inclines more to promoting equality than liberty (Cornelius *Principles of the Interpretation of Contracts in South African Law* 112).

Even if our argument that beneficiaries under the trust deed included adopted children (in line with the minority decision) is open to criticism and it were accepted that the trust deed in *Harvey* was ambiguous in this regard, the authors suggest that it would nevertheless have been fair and equitable, and indeed in line with the spirit, purport and objects of the Bill of Rights, to include adopted children as beneficiaries thereunder. The approach of the minority in *Harvey* seems to be more in tune than the majority decision with our constitutional dispensation and the promotion of equality, including the equality of adopted children. Put slightly differently, in a sense the approach of the majority in *Harvey* does little to promote the equality of adopted children where there is or could be ambiguity as to children beneficiaries in terms of a trust deed.

7 Conclusion

The central issue in *Harvey* was the interpretation of a trust deed; the authors suggest that what the court had to determine was not the donor's subjective intention, but the intention as objectively construed from the instrument in its context. The majority favoured quite a limited approach to the issue that focused largely on a restricted interpretation of the words used in the trust deed. Some might even suggest that this was a strict literalist approach, which is regarded as outdated (see Cornelius *Principles of the Interpretation of Contracts in South African Law* 111).

The minority decision preferred a more nuanced and balanced approach, one that the authors suggest is more in keeping with current law and which dictated an outcome that is both fair and legally defensible. The mechanics of Molemela JA's interpretation of the trust deed have been ventilated above; in summary, it suffices to say she pointed out that a narrow interpretation of the wording in the trust deed was contrary to certain tenets of interpretation, such as context and surrounding circumstances. It requires little argument to show that the minority judgment displays an approach to

interpretation that is heavily contextualised and – if the term may be used – holistic. The authors also suggest that this approach is more in tune with modern developments in contractual interpretation and general shifts in law regarding the rights of adopted children.

In the American decision, *McCaleb*, when similarly urged to consider the intention of the donor, the court observed (488) that "[i]f we allow the luxury of speculation about intent, it is as reasonable to argue her love for an adopted child would have been as great as for a child of her blood". And furthermore, that it was "unwilling to base its opinion upon the rambling arguments of speculation" (488). Although foreign law, these sentiments seem entirely apposite within the circumstances of *Harvey*. The authors suggest that a strong case can be made for finding that the deed in question included adopted children as beneficiaries thereunder.

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