



**REPORTABLE**

CASE NO: SA 90/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**HANS WILHELM SCHÜTTE**

**First Appellant**

**DOROTHEA JOHANNA ELISABETH SCHÜTTE**

**Second Appellant**

**HERBERT MAIER**

**Third Appellant**

and

**ASCAN BERTHOLD SCHÜTTE**

**First Respondent**

**GESA SCHÜTTE**

**Second Respondent**

**Coram:** SMUTS JA, FRANK AJA and MAKARAU AJA

**Heard:** 3 November 2023

**Delivered:** 15 December 2023

**Summary:** A trust was established at the instance of Florenz Dietrich Schütte (Florenz), a man of considerable means which included a substantial portfolio of listed shares on the Johannesburg Stock Exchange. He created the Schütte Trust (the Trust) for purposes of divesting himself from the share portfolio which would have otherwise formed part of his estate in South Africa upon his demise and move it to a Namibian trust which offered the flexibility to continue dealing with his portfolio against the reach of the South African tax authorities (ie the application of inheritance tax of

investments in South Africa which could reach up to 20 per cent of his assets in excess of N\$1 million whereas there is no such tax in Namibia). The Trust beneficiaries comprised of Florenz, the father of the family and husband to Dorothea Johanna Elisabeth Schütte (Dorothea), the mother of the six children born from their marriage. Florenz and Dorothea were only income beneficiaries while all of the six children and their descendants were both income and capital beneficiaries. The first trustees were four family members and one outsider, ie Florenz, Dorothea, Hans Wilhelm Schütte (Hans) and Ascan Berthold Schütte (Ascan) and Mr Herbert Maier. On 30 April 2009, before Florenz passed on, the trustees unanimously agreed to remove Brigitte Elisabeth Schütte-Barry as a beneficiary from the Trust. Ascan denied that the decision was made during a meeting, but admitted he signed the relevant resolution which was forwarded to him with three signatures already in place and states that at the time he was presented with the document, it was already signed by his father and mother and he assumed Hans as well. He assumed that 'as the two senior trustees knew what they were doing' he signed it without considering the legality thereof. He stated that at the time 'my father was still alive and it was his initiative to remove Brigitte'. When Florenz passed away in October 2014, the remaining trustees continued with the management of the Trust without appointing a substitute for him (the Trust Deed requires a minimum number of three trustees). Florenz had assets in Germany which were disposed of in terms of a joint Will with Dorothea. Ascan was not happy with the provisions of the Will and commenced investigations into the family affairs involving the said Will, and questioned his mother's title to the house in which she resides in Windhoek. He further sought the removal of the executor of the Will. This led to discord and souring family relations.

The co-trustees forwarded to Ascan letters dated 18 June 2017 and 22 January 2018. The letters of 18 June 2017 informed Ascan that the other co-trustees required him to resign as trustee and contended that he was no longer a trustee and the other letter was addressed to him, Brigitte and Gesa informing them that they and their descendants have been removed as beneficiaries from the Trust. The issue of Ascan's removal as a trustee has already been dealt with in a separate appeal and will not feature herein except as background.

This matter deals with the removal of Ascan and Gesa (the respondents) and their descendants from the Schütte Trust by the trustees (the appellants) at the meeting of 18 June 2017. The respondents challenged their removal as beneficiaries in the court *a quo* and that court upheld their challenge and ordered that they be reinstated together with certain other relief relating to the financial affairs of the Trust. The court *a quo* found that on an interpretation of the Trust Deed, and the common law, the trustees did not have the power to remove the beneficiaries from the Trust Deed. The court *a quo* did not consider the question of the validity of the meeting of 18 June 2017, but it set aside the resolution by the trustees of 18 June 2017 ‘to the extent that it purported to remove the applicants as beneficiaries’. This appeal is against that judgment and order.

At the heart of this appeal lie the powers of trustees to amend a Trust Deed to remove beneficiaries mentioned therein. This Court must interpret and clarify clause 17 of the Schütte Trust Deed which provides that: ‘The provisions of this Deed of Trust may be varied in writing by all trustees acting jointly’. This Court must further address the issues of whether the trustees had and have the power to remove Ascan and Gesa as beneficiaries of the Trust and whether the meeting of 18 June 2017 was valid.

*Held that*, in terms of clause 6.1 of the Schütte Trust Deed, trustees may meet together for the dispatch of business and 48 hours’ notice of such meetings must be given to all the trustees. It follows thus that Ascan was entitled as a trustee to be invited to the meeting and to attend the meeting. Any resolution taken in terms of clause 17 at the meeting also required his assent to be valid and that, in the result, the decisions (other than the request in writing to him to resign) taken at the meeting of 18 June 2017 were invalid.

*Held that*, the position relating to the variation of a trust deed as laid out by Brand JA in *Potgieter & another v Potgieter* 2012 (1) SA 637 (SCA) in that, a trust deed can only be varied if the beneficiaries who have accepted their benefits under the trust consent to the variation, applies.

*Held that*, it can be inferred that the respondents’ interests or rights were similar to that of a contingent beneficiary, and as such have a protectable interest against

maladministration by the trustees. Upon acceptance of their status as beneficiaries in the Trust Deed, the abovementioned right, which is worthy of protection, arose. Their acceptance of the Trust Deed thus meant that they could not be removed as beneficiaries without their consent.

*It is held that*, the court *a quo* correctly interpreted clause 17 of the Trust Deed. This clause does not empower the trustees to remove beneficiaries from the Trust without their assent. The context in which the Trust was created and the other indicators considered are in the court's view destructive of the submissions in this regard which are solely premised on the wording of clause 17 in isolation without taking into account its inter relationship with the other clauses in the deed and the context in which the deed was created.

*Held that*, appellants' argument that the respondents had not accepted their benefits of the Trust prior to their removal as beneficiaries was correctly dismissed by the court *a quo*.

It thus follows that, clause 17 does not allow for the removal of the beneficiaries and that the beneficiaries have contingent rights and their rights can thus not be changed without their assent as they accepted the benefits in the deed.

The appeal partially succeeds with costs.

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## APPEAL JUDGMENT

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FRANK AJA (SMUTS JA and MAKARAU AJA concurring):

### Introduction

[1] At the heart of this appeal lie the powers of trustees to amend a trust deed to remove beneficiaries mentioned in the trust deed.

[2] In this matter, the trustees (the appellants) at a meeting removed the respondents and their descendants and one Brigitte Elisabeth Schütte and her descendants as beneficiaries from the Schütte Trust (the Trust). Brigitte Elisabeth Schütte is not before the court in these proceedings.

[3] The respondents challenged their removal as beneficiaries and the court *a quo* upheld their challenge and ordered that they be reinstated together with certain other relief relating to the financial affairs of the Trust which I deal with below.

[4] The appeal lies against this order of the court *a quo*.

[5] As all the parties relevant to the matter, save one, hail from the Schütte family I shall, for convenience sake, refer to them by their first names. The third appellant, Mr Maier, is the exception referred to and his role in this family saga that I deal with below was solely that of a trustee.

[6] The Schütte family relevant to the appeal are as follows:

(a) Florenz Dietrich Schütte (Florenz), the father of the family and the husband of Dorothea Johanna Elisabeth Schütte (Dorothea), the mother of the children born from their marriage. The couple had six children who, from the oldest to the youngest are:

(i) Brigitte Elisabeth Schütte-Barry (Brigitte), the oldest daughter;

(ii) Gesa Schütte (Gesa), the second child of the couple and the second applicant *a quo* and second respondent in this appeal;

- (iii) Dietlind Schütte (Dietlind), a son of the couple;
- (iv) Hans Wilhelm Schütte (Hans), the second son born to the couple;
- (v) Andrea Schütte (Andrea), a third daughter born to the couple; and,
- (vi) Ascan Berthold Schütte (Ascan) a third son born to the couple, the first applicant *a quo* and the first respondent in the appeal.

### The Schütte Trust

[7] Florenz was a man of considerable means which included a substantial portfolio of listed shares on the Johannesburg Stock Exchange, South Africa. Thus, during 2001, he in a hand-written note to Andrea (and Ascan) which accompanied a draft Trust Deed (relating to his assets on the Johannesburg Stock Exchange) informed these two children that he and Hans visited an attorney who provided them with the draft Trust Deed. According to the note, they at a meeting in the beginning of 2000 saw this lawyer 'to discuss the question of inheritance tax of investments on the Johannesburg Stock Exchange for Namibia'. He points out that the inheritance tax in South Africa could reach up to 20 per cent of his assets in excess of N\$1 million whereas in Namibia there is no inheritance tax. He then refers to the flexibility of Trusts which enables one to still deal with the assets in terms of purchases and sales, and donations of shares and 'also names can be changed'. He ends the note stating that 'thus we still talk about changes and finalisation of the Trust'.

[8] As is evident from the hand-written note from Florenz, the idea was to divest himself from the share portfolio which would form part of his estate in South Africa upon his demise and move it to a Namibian Trust which offered the flexibility to

continue dealing with his portfolio while protecting his it against the reach of the South African tax authorities.

[9] Subsequently, on 3 September 2001, the Trust was formed by the signing of the Trust Deed by all relevant parties. Ascan avers that the value of the Trust in September 2019, when he deposed to his affidavit, was between N\$70 million and N\$80 million and this value was not disputed by the trustees.

[10] The start-up capital of the Trust was donated by some of the Schütte family members namely Florenz, Dorothea, Ascan and Andrea. Ascan in the replying affidavit confirms that he paid funds into the Trust but that his father Florenz 'created the Trust and placed into the Trust virtually all the values and funds and shares that make up the value of the Trust'.

[11] The first trustees were four family members and one outsider, ie Florenz, Dorothea, Hans, Ascan and Mr Herbert Maier. The trustees were given wide powers to deal with the assets of the Trust in their discretion with the wider objective of managing the affairs of the Trust 'in such manner as will in their discretion be in the best interest of the Trust and the beneficiaries' (clause 7).

[12] The Trust provides that decisions of the trustees 'in terms of the powers conferred on them . . . shall be final and binding and there shall be no appeal therefrom and such decisions shall not be challenged under any circumstances whatsoever by any of the beneficiaries' (clause 11). 'The principle that the trustees' discretionary powers are 'complete and absolute' and cannot be challenged by a beneficiary also features in clause 1.13 of the Trust Deed. Upon establishment of the

Trust the beneficiaries were stated to be Florenz, Dorothea and their children, from eldest to youngest, i.e. Brigitte, Gesa, Dietrich, Hans, Andrea and Ascan and descendants of the mentioned siblings 'and such other persons as the trustees may unanimously, in their sole discretion decide' (clause 1.6).

[13] Save for Florenz and Dorothea (the parents) who were only income beneficiaries, the children are in terms of the deed both income and capital beneficiaries. The vesting date for the trust capital was defined to 'mean the date upon which both Florenz Dietrich Schütte and Dorothea Johanna Schütte have passed away' (clause 1.5).

[14] The Trust provides for the income of the Trust to be distributed among the beneficiaries in the absolute discretion of the trustees. This discretion also includes the determination of whether all or only some of the income should be distributed. In practice, and since the death of Florenz, it appears that Dorothea has been and is currently the main beneficiary when it comes to the income. It is important to note that after the death of Dorothea the trustees are to, in the exercise of their discretion in respect of the distribution of income, ' . . . pay or apply the whole or so much of the net income as they in their discretion consider advisable to or for the benefit of the beneficiaries referred to in clause 1.6.3 in equal shares and per stirpes' (clause 12.1).

[15] When it comes to capital distributions, the above principle of equality between the siblings is also applicable and the Trust stipulates that ' . . . the capital of the Trust shall be held by them (the trustees) until the vesting date whereupon the capital then still held in Trust shall vest in and be paid in equal shares, to the beneficiaries referred to in clause 1.6.3 . . . ' (clause 13.1).



[16] It is common cause that it was the wish of Florenz that his wife Dorothea would be the main income beneficiary after his demise. In response to an allegation in this regard by Ascan, Hans replied as follows in his answering affidavit:

'I admit that it was our late father's wish that our mother should have enough funds to live well, if he died first. It is for this reason that the remainder of the beneficiaries only receive a benefit upon the death of our mother.'

[17] When it comes to the office of a trustee the deed makes provision for the normal situations that would lead to a vacancy of the office of any trustee, such as, a written notice of resignation, incapable to act as trustee, unsound mind, insolvency but also stipulates that the office shall be '*ipso facto* vacated' if 'the majority of trustees shall in notice require' a trustee to resign (clause 4.4.6).

[18] The final clause of the Trust Deed (clause 17) under the heading – 'Variation of the Trust Deed' provides as follows:

'The provisions of this Deed of Trust may be varied in writing by all trustees acting jointly.'

#### Events subsequent to the establishment of the Trust

[19] It is clear from the establishment of the Trust and the background thereto that Florenz addressed the issue he had with his investment portfolio falling into his South African estate upon his demise with the concomitant inheritance tax (estate duty) payable. By establishing the Trust he moved his portfolio to a Namibian entity and hence it would attract no estate duty in South Africa on his demise. What was further

achieved is to retain the flexibility to deal with the share portfolio which remained in the hands of the trustees. The income of the Trust was available to the income beneficiaries which in practice meant him and his wife with the capacity to assist any of the children if the need arose and the capital of the Trust would devolve equally on their children upon the death of the last dying parent without any of the complications that would arise if he had bequeathed the capital in his Will which would have been part of a South African Estate.

[20] It needs to be pointed out that Ascan, at the time of the establishment of the Trust already resided in Germany where he still resides. He obviously on a regular basis visited Namibia, at least, while Florenz was still alive.

[21] The first event germane to the present matter is a decision taken by the trustees on 30 April 2009. The trustees at the time who were all those mentioned in the deed as indicated above unanimously agreed to remove Brigitte as a beneficiary from the Trust. Ascan denies that there was a meeting, but admits he signed the relevant resolution which was forwarded to him with three signatures already in place and states that at the time he was presented with the document, it was already signed by his father and mother and he assumed Hans and his father 'as the two senior trustees knew what they were doing' he signed it without considering the legality thereof. He states that at the time 'my father was still alive and it was his initiative to remove Brigitte'. I point out that in terms of clause 6.4 of the Trust Deed, a resolution signed by all trustees is regarded as valid even if no meeting took place.

[22] In October 2014, Florenz passed away and the remaining trustees continued with the management of the Trust without appointing a substitute for Florenz as the

Trust Deed requires a minimum number of three trustees. This meant that the Trust continued with the three appellants and Ascan as trustees.

[23] Florenz had assets in Germany and disposed of these assets in terms of a joint Will with Dorothea. Ascan was not happy with the provisions of this Will and started investigations into the family affairs involving the validity of the said Will and, among others, questioned his mother's title to the house in which she resides in Windhoek which was bought more than three decades ago. He further sought the removal of the executor of the Will. This led to the souring of the relationship between him, his mother and Hans and caused discord in the family. According to Hans, the conduct of Ascan ruined his relationship with the other family members. Hans states that the conduct of Ascan 'created acrimony and showed utmost disrespect to his parents'. Ascan received a 50 per cent share in a property in Germany (Hamburg) together with another sibling with the understanding that the parents could use a room on the property when they visit Germany which right was allegedly refused to Dorothea after the death of Florenz.

[24] It is not necessary to deal with the allegations and counter allegations as to what caused the rift in the family and who was responsible for this save to state that it is clear that the familial relationship soured and that, at least the appellants are of the view that the conduct of Ascan was and is the root cause of this issue.

[25] All the co-trustees per letters dated 18 June 2017 and 22 January 2018 and allegedly forwarded to him, informed Ascan that they required him to resign as trustee and contended that he was thus no longer a Trustee as he, in line with the Trust Deed, '*ipso facto vacated*' his position as trustee as provided for in the Trust Deed. Ascan

took issue with this contention and approached the High Court to have his removal as trustee rescinded. In the High Court he maintained that he did not receive the letters. However, at the case management conference prior to the hearing at the High Court, the parties agreed that the date on which he was informed of the request to resign did not really matter as the issue related to the interpretation of the Trust Deed. Whereas Ascan was successful in the High Court, the decision of the High Court was overturned on appeal by this Court which upheld the dismissal of Ascan as a trustee.<sup>1</sup>

[26] Two letters dated 18 June 2017 are of relevance. One is directed at Ascan and informs him of the requirement by his co-trustees that he should resign. The other letter is addressed to Brigitte, Gesa and Ascan informing them that they and their descendants have been removed as beneficiaries from the Trust. As Brigitte had already been removed, I assume, she received the letter to inform her that her descendants have now also been removed.

[27] From a resolution of a meeting of trustees held on 18 June 2017 it is apparent that at that meeting (where Ascan was not present), it was recorded that Ascan was required to resign per a notice dated 12 June 2017 and that his removal as trustee from that date was confirmed. A copy of this letter is according to the resolution, attached to the minutes but the letter attached is the one dated 18 June 2017 referred to above. Hans in his answering affidavit confirms that Ascan was removed as a trustee on 18 June 2017 and the date on the letter requiring him to resign was thus wrongly stated to be 12 June 2017 and it can be accepted that this letter was produced on 18 June 2017.

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<sup>1</sup>*Schütte & others v Schütte* (SA 27/2019) [2021] NASC (13 April 2021) para 28, in respect of the notice to resign.

[28] Further, at this meeting on 18 June 2017, the decision to remove Brigitte, Gesa, Ascan and their descendants as beneficiaries was taken. According to the minutes, 'The trustees hereby confirm that notices have been given to the abovementioned trustee(s) and beneficiaries who have been removed as trustee(s) and beneficiaries of the Trust, respectively, as per the attached notices'. Once again the attached notices are both dated 18 June 2017 as indicated above.

[29] According to Ascan, he became aware on 12 February 2019 of the removal as beneficiaries of himself and his mentioned sisters in response to a query from his erstwhile lawyer. He pointed out that on 18 June 2017, he was still a trustee and that he had not been notified of any meeting to discuss the removal of beneficiaries.

[30] According to the appellants, the notice removing the mentioned siblings with their descendants was sent to Ascan and was handed personally to Gesa by Dorothea. Further when Ascan visited Namibia during April 2017, Dorothea informed him that his behaviour and conduct was not in line with the family values and she was deeply disappointed in him and no longer trusted him. It is thus denied that Ascan only became aware of his removal as Trust beneficiary on 12 February 2019, as this was discussed with him in April 2017. It is also averred that regarding the decision to remove him as trustee, a letter signed by all the remaining trustees was forwarded to him via post to his postal address in Germany.

[31] Upon being informed of his removal as trustee and as beneficiary of the Trust, two applications were launched in the High Court: one by Ascan to set aside his removal as trustee and one with Gesa to set aside their and their descendants'

removal as beneficiaries of the Trust. The one to challenge the removal as trustee finally failed in this Court as mentioned above.

#### Application to be reinstated as beneficiaries

[32] The application to be reinstated as beneficiaries was instituted by Ascan and Gesa who (together with their descendants) were removed as beneficiaries at the trustees meeting of 18 June 2017. The relief sought in this application is as follows:

1. That the resolution passed by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents on the 18<sup>th</sup> of June 2017 be set aside;
2. That the Applicants be reinstated as beneficiaries of the Schütte Trust;
3. That copies of the financial statements of the Schütte Trust for the past five years be handed to each one of the Applicants;
4. That an independent auditor be appointed to do an audit on the financial matters of the Schütte Trust and that the costs of audit be paid by 1<sup>st</sup> – 3<sup>rd</sup> Respondents;
5. Interdicting the Respondents from amending or effecting any alterations to the Trust Deed of the Schütte Trust, which affects the rights or interests of the beneficiaries, except with the written approval of all beneficiaries first having been obtained.
6. That the Respondents pay the costs of this application jointly and severally, the one paying the other to be absolved.
7. Further and/or alternative relief.'

[33] The relief sought was premised on the following contentions:

- (a) that a trustee (Ascan) was not given notice of the meeting of 18 June 2017;

- (b) none of the siblings affected by the decision at the meeting of 18 June 2017 to remove them (and their beneficiaries) were given notice of the intention to remove them as beneficiaries;
- (c) that the trustees did not have the power to remove beneficiaries;
- (d) that the requirements of clause 17 of the Trust Deed were not complied with as it was not a decision 'by all the trustees acting jointly' as he (Ascan) was not present at the meeting; and,
- (e) from date of his removal he and Gesa were not furnished with annual financial statements of the Trust.

[34] In response, the appellants contended as follows:

- (a) as Ascan had been removed as trustee pursuant to clause 4.4.6 of the Trust Deed he had no entitlement to attend the meeting and hence no invitation or notification of the meeting had to be given to him;
- (b) as the remaining trustees, subsequent to giving Ascan the above-mentioned notice to resign, took the decision to remove beneficiaries the decision was in compliance with clause 17 which authorises a variation to the provisions of the Trust Deed 'in writing by all the trustees acting jointly'. They point out that Ascan should be aware of this power as he,

as trustee was a party to exactly such variation, to delete his sister Brigitte as a beneficiary.

- (c) the power to remove beneficiaries is contained in clause 17 of the Trust Deed;
- (d) as the applicants *a quo* had not accepted the benefits of the Trust, their removal as beneficiaries was warranted by clause 17 and the common law without notice to them, and;
- (e) as Ascan had been removed as trustee and also (with Gesa) as beneficiaries they had no entitlement to the financial statements of the Trust.

[35] The judge *a quo* summarised the position as follows:

‘ . . . , the only remaining issue for determination, in this matter, is whether the applicants were lawfully removed as beneficiaries of the Schütte trust. In the event it is found that they were unlawfully removed, the consequential relief sought will be granted.’

[36] The court *a quo* decided to deal with the question of whether the trustees had the power to remove beneficiaries from the Trust Deed and found, on an interpretation of the Trust Deed, and the common law, that they did not have such power and as this disposed of ‘the only remaining issue’ the judge *a quo* did not consider the question of the validity of the meeting of 18 June 2017, but set aside the resolution by the trustees of 18 June 2017 ‘to the extent that it purported to remove the applicants as



beneficiaries'. In addition, the other orders sought in paragraphs 2 to 6 of the relief set out above were also granted to the respondents.

#### Invalidity of meeting of trustees of 18 June 2017

[37] In terms of clause 6.1 of the Trust Deed, trustees may meet together for the dispatch of business and 48 hours' notice of such meetings must be given to all the trustees. The trustees should strive to reach unanimity but failing this, the majority vote will prevail (clause 6.3). Round Robin decisions are authorised on the basis that such decisions must be signed in writing by all the trustees (clause 6.4). A quorum for meetings are three trustees (clause 6.1) which is also the minimum number of trustees stipulated (clause 4.5). For decisions to vary the provisions of the Trust Deed the requirement is the written consent of all the trustees jointly.

[38] This Court in the application by Ascan to set aside his removal as trustee found against him as indicated above, but it did not determine when his removal took place as there was a dispute as to when he was informed of this decision by of his co-trustees. It was common cause that by the time he brought that application he had knowledge of the fact that his co-trustees required him to the resign in writing. By agreement between the parties, reached in the case management process, the court had to determine whether the power to force his resignation by trustees was valid and this Court found it was.

[39] Counsel for the appellants conceded that the written notice to Ascan requiring him to resign only became effective subsequent to him being informed thereof and that this obviously did not occur prior to the trustees meeting of 18 June 2017. It thus

follows that he was entitled as a trustee to be invited to that meeting and to attend that meeting. Any resolution in terms of clause 17 taken at that meeting also required his assent to be valid and that, in the result, the decisions (other than the request in writing to him to resign) taken at that meeting were invalid. I have little doubt that the concession was correctly made.

[40] At the meeting of 18 June 2017, apart from the decisions to remove the beneficiaries, a decision to change the definition of 'vest' in the Trust Deed was also taken. This decision was not set aside by the court *a quo* which expressly stated that 'the resolution passed on 18 June 2017' to the extent that it purported to remove the applicants as beneficiaries are set aside'. There is no cross appeal against the failure of the court *a quo* to set aside the amendment in the definition of 'vest' in the Trust Deed. It is no doubt correct that in normal circumstances, this Court will not and should not set aside a decision against which an appeal or counter-appeal is not noted. However, as all the decisions at the meeting are invalid for the reasons already mentioned, it would create an anomaly if one of the decisions, in respect of which it is common cause were invalid is allowed to stand but all the others are set aside on the basis that a proper notice of the meeting was not given. It is under these circumstances that the court cannot close its eyes to the common cause stance that all decisions taken at the meeting were invalid because the meeting was not properly called or constituted.

[41] In the result, all of the decisions (save the one requiring Ascan to resign as trustee) taken at the trustees meeting of 18 June 2017 will be set aside.

[42] The setting aside of the decisions mentioned above on the basis of the formal invalidity of the meeting of 18 June 2017 does not address the real issue of dispute between the parties, namely, whether the trustees had and have the power to remove Ascan and Gesa as beneficiaries of the Trust. I agree with counsel for both parties that this issue needs to be determined so as to guide the trustees on whether they can call a fresh meeting, (without Ascan as he has in the meantime been lawfully removed as Trustee), and take the same decisions or whether they would act *ultra vires* their powers as trustees if they remove beneficiaries (especially Ascan and Gesa and their descendants).

#### Amendments and variations to the Trust Deed relating to trust beneficiaries

[43] When regard is had to the Trust Deed, the primary duty of the trustees is to give effect to the Trust Deed, and in the present matter this is stated to exercise their discretion when managing the Trust 'in the best interest of the Trust and the beneficiaries'.<sup>2</sup> It goes without saying that trustees cannot take decisions that are designed for the Trust to fail to meet its objectives. This duty is in any event implied in all trusts.

[44] When regard is had to the objectives of the Trust it must be borne in mind that the Trust is essentially a family arrangement, which is a fairly common occurrence, where the family wealth is placed in trust to support the parents while alive and thereafter the assets of the Trust are divided among the children. The advantage of this in the present case was to preserve the assets optimally, allow the trade in such assets to continue, avoid South African estate duty, support the parents (and the

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<sup>2</sup> *Ex parte Mostert: In re Estate Late Mostert* 1975 (3) SA 312 (T). Also see clause 7 of the Schütte Trust Deed.

surviving spouse) and after the death of the surviving parent to distribute the Trust assets equally between the children. This was clearly the whole objective of the main founder (ie the person contributing the bulk of the Trust assets) of the Trust, the father, Florenz.

[45] 'Revocation' is a process by which the founder, with or without the occurrence of the trustees and beneficiaries brings to an end the trust that had already been set up. 'Variation' consists in the alteration of the terms of the trust by the founder, the trustees, the beneficiaries, the court or combination of these.<sup>3</sup> What is important from the above definitions is that a distinction is made between variation and revocation and it goes without saying that no revocation is possible without the consent of the founder(s). This means that once a founder has passed away, a Trust Deed can no longer be revoked. This is important when it comes to the present matter as the intention of the main founder, at the inception of the Trust, was to divide the assets among his children equally upon the demise of the surviving spouse and apart from the removal of Brigitte as beneficiary which was at his initiative, there is no indication that he sought the removal of any other beneficiaries during his lifetime.

[46] A question that arises in the present context is whether the removal of Ascan and Gesa did not, for all practical purposes, mean the revocation of the Trust from their perspective and whether this situation was, among others, catered for in clause 17 of the deed under 'Variation of the Trust Deed'.

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<sup>3</sup> E Cameron, M De Waal, B Wunsh, P Solomon and E Khan *Honoré's South African Law of Trusts* 5 ed (2002) at 491.

[47] Failing a specific provision in the trust deed, ordinarily trustees have no power to revoke or vary a trust deed. In addition, unless a founder has reserved for himself or herself the power to revoke the trust unilaterally, he cannot do so without the consent of the trustees.<sup>4</sup>

[48] Even where the trust deed permits the power to trustees to vary the provisions of a trust deed or the power to remove beneficiaries there are instances where these powers cannot be exercised and this is where the beneficiaries have already acquired vested rights or protectable interests in and to the trust income or trust capital. In such a case the income or capital relevant to such vested right or protectable interest will provide a bar to the trust deed being varied so as to adversely affect such beneficiaries' rights.

[49] In *Potgieter & another v Potgieter*<sup>5</sup> Brand JA writing on behalf of the Supreme Court of Appeal puts the position relating to the variation of a trust deed as follows:

'As I see it, the legal principles that find application are well settled and I did not understand any of the parties to contend otherwise. I believe these principles can be formulated thus: a trust deed executed by a founder and trustees of a trust for the benefit of others is akin to a contract for the benefit of a third party, also known as a *stipulatio alteri*. In consequence, the founder and Trustee can vary or even cancel the agreement between them before the third party has accepted the benefits conferred on him or her by the trust deed. But once the beneficiary has accepted those benefits, the trust deed can only be varied with his or her consent. The reason is that, as in the case of a *stipulatio alteri*, it is only upon acceptance that the beneficiaries acquire rights under the Trust, (see for example *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A) at 285F; *Ex parte Hulton* 1954 (1) SA 460 (C) at 466A – D; *Hofner and*

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<sup>4</sup> *Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust* 1993 (2) SA 697 (C) and *Ex parte Orchison* 1952 (3) SA 66 (T) at 78-79.

<sup>5</sup> *Potgieter & another v Potgieter* 2012 (1) SA 637 (SCA) para 18.

*Others v Kevitt NO and Others* 1998 (1) SA 382 (SCA) ([1997] 4 All SA 620) at 386 – 387E; *Cameron, De Waal, Kahn, Solomon & Wunsh Honoré: South African Law of Trusts* 5 ed (2002) para 304.)’

[50] In *Potgieter*, a family Trust had two capital beneficiaries, namely, the children of the founder, whose interest would vest upon the death of the founder or on a date to be declared by the trustees which date could not be prior to the youngest child turning 21 and not later than the 25<sup>th</sup> birthday of the youngest child. This clause was varied to add the children of the founder’s second spouse as well as the second spouse as capital beneficiaries and to further change the existing clause to allow the trustees the discretion as to how the capital will be distributed between these (now) five beneficiaries. The trustees had the absolute discretion to select capital beneficiaries from this class of five beneficiaries. The vesting date was also altered to be determined in the absolute discretion of the trustees.

[51] As the original beneficiaries (the children of the founder) had accepted the benefits as stipulated in the original trust deed, the court held that the beneficiary clauses of the trust deed could not be varied without their consent. The court did this in the following terms:

‘I do not think that it can be gainsaid that at the time the variation agreement on 21 February 2006, the appellants enjoyed no vested rights to either the income or the capital of the Trust. They were clearly contingent beneficiaries only. But that does not render their acceptance of these contingent benefits irrelevant. The respondents referred to no authority that supports any proposition to that effect and I cannot think of a reason why that would be so. The import of acceptance by the beneficiary is that it creates a right for the beneficiary pursuant to the trust deed, while no such right existed before. The reason why, after that acceptance, the trust deed cannot be varied without the beneficiary’s consent, is that the law seeks to protect the right thus created

for the first time. In this light, the question whether the right thus created is enforceable, conditional or contingent should make no difference. The only relevant consideration is whether the rights is worthy or protection, and I have no doubt that it is. Hence, for example, our law affords the contingent beneficiary the right to protect his or her interest against maladministration by the Trustee (see *Gross and Others v Pentz* 1996 (4) SA 617 (A) ([1996] 4 All SA 63) at 628I – J) . . .<sup>6</sup>

[52] Counsel on behalf of the appellants submitted that as the trustees have the right to vary any of the provisions of the Trust Deed, which according to him, included the power to remove beneficiaries. The mentioned beneficiaries had no rights but only a *spes* or hope that they will still feature in the Trust Deed when the time for vesting arises.

[53] It is correct that in *Potgieter* reference is made to beneficiaries with vested rights and those with contingent rights and it was accepted that the beneficiaries in that case had contingent rights only and hence a protectable interest. However, as pointed out by Brand JA in the extract quoted above, this is not the crux of the matter. What needs to be determined is whether the mentioned beneficiaries were granted any rights in the Trust Deed that are worthy of protection. Thus, a contingent beneficiary has the right to protect his or her interest against maladministration by the trustees. This follows in law with the creation of a Trust with contingent beneficiaries. In short, whether the right created in a trust deed is 'enforceable, conditional or contingent' is of no moment. The question is whether it is worthy of protection.

[54] When regard is had to the Trust Deed prior to the decision to remove Ascan and Gesa as beneficiaries the following appears:

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<sup>6</sup> *Potgieter* para 28.

- (a) They were contingent beneficiaries who would become entitled to the Trust assets on the death of their last surviving parent.
- (b) They were entitled to demand that the trustees manage the Trust in the best interest of the Trust 'and the beneficiaries'. This would be so in terms of the common law and clause 7 of this Trust Deed.
- (c) They were, pursuant to clause 8.5 of the Trust Deed entitled to, on request, be handed a 'true copy of the annual financial statement' of the Trust.

[55] From the aforesaid three indicators in the Trust Deed, I am of the view, that it can be inferred that their interests or rights were similar to that of a contingent beneficiary, namely to protect their interest against maladministration by the trustees. Upon acceptance of their status as beneficiaries in the Trust Deed, the abovementioned right which is worthy of protection arose. Their acceptance of the Trust Deed thus meant that they could not be removed as beneficiaries without their consent.

[56] The last two indicators mentioned above, in my view, in any event give rise to a protectable interest in respect of the mentioned beneficiaries. They had a right to insist that the trustees take decisions which are to the benefit of the mentioned beneficiaries. Surely it cannot be said that because of a general variation clause, trustees do not have a duty to act for the benefit of the mentioned beneficiaries and the Trust must be managed by the trustees as if there are no beneficiaries until the vesting date arrives. Who can then hold the trustees accountable for the administration of the Trust? The Trust Deed entitles beneficiaries to, on request, be



handed the financial statements. Surely this is to allow the beneficiaries the opportunity to detect maladministration and to ensure the Trust management is for the benefit of the Trust which in turn is also for the benefit of the beneficiaries. It seems to me that this clause is intended for the benefit of the mentioned beneficiaries to stay abreast of what is happening with the Trust. To suggest that the possible alteration of beneficiaries in the future means that the current mentioned beneficiaries cannot insist on this right to the financial statement would be absurd. That would render the clause meaningless. This is so because then the ultimate beneficiaries, if the current ones do not have the right, will only be known when the vesting date arrives and the capital must be distributed. At that stage, what use would the annual financial statements be as the position will be what it is irrespective of how the Trust was managed. It thus follows that the beneficiaries mentioned in the Trust Deed did obtain protectable interests when accepting the Trust Deed. These are at least twofold, to protect them against maladministration of the Trust (entitlement to the financial statements) and to ensure that decisions made by the trustees are for the benefit of the mentioned beneficiaries as well as the Trust.

[57] Even assuming that their protectable interests were conditional on their remaining beneficiaries, it is not certain that the power to vary any provision of the Trust Deed in the present matter extended to the removal of beneficiaries.

[58] First: the power to vary could not have overridden the requirement inherent to all trusts that decisions must be made in the best interest of the Trust and the beneficiaries. It may be contended that the removal of beneficiaries was neutral when it comes to the Trust as this did not involve any distribution of Trust assets or a

change of management strategy in respect of such assets. The removal of the beneficiaries, and with it the removal of all hope for them or their families to eventually receive millions from the Trust cannot, in any manner whatsoever, be justified as being in their interest.

[59] Second: the removal of beneficiaries from their perspective amounted to the revocation of the Trust and not a variation of the provisions of the Trust. As I pointed out above, the concepts of revocation and variation are not the same when used in the context of Trusts and thus it is clear that the power to vary does not necessarily include the power to revoke.

[60] Third: the clause in the Trust Deed (clause 1.6) stipulating the beneficiaries is a stand-alone clause in the sense that the beneficiaries are in essence bystanders when it comes to the management of the Trust and the powers exercised by the trustees pending the vesting date. It is clear from this clause that the question of further or other beneficiaries was considered, who out of necessity had to come from persons outside the immediate family. The Trust Deed in clause 1.6.4 indicates, who in addition to the siblings could be considered as beneficiaries, and states the position as 'such other persons as the trustees may unanimously in their sole discretion decide'. It is clear that the primary beneficiaries were the children of Florenz and Dorothea and then their descendants and then such other persons as the trustees unanimously agreed upon. Despite clearly considering substitutes for the children (the grandchildren), and even additional persons there was clearly unanimity in respect of the principal beneficiaries. If this possibility of the removal of the 'natural heirs' was

contemplated at all, this would have featured in this clause where it would logically fit in and not in a general variation clause.

[61] Fourth: the court *a quo* held that clause 17 is a general clause empowering the trustees, acting jointly, to vary the Trust Deed but that clause 1.6.4 which gave the trustees the power to add beneficiaries by virtue of the *maxim expressio unius est exclusio alterius* excluded the power to remove beneficiaries. Counsel for appellants submits that the court *a quo* wrongly applied the maxim because powers to remove beneficiaries are not found in clause 1.6.4 but in clause 17. Clause 1.6.4 provides for unanimous decision by trustees to add beneficiaries. This presupposes a meeting of trustees which would mean one where a quorum (three trustees) were present whereas clause 17 requires variation to be 'in writing by all the trustees acting jointly'. According to counsel for appellants, the variation clause is thus more stringent and the fact that the addition of beneficiaries can be done at a meeting (albeit unanimously) cannot, by relying on the maxim, negate the provisions of clause 17. The alternative (*alterius*) that it implicitly prohibited is a unanimous decision at a duly constituted meeting of trustees and not a decision by all of the trustees to vary the Trust Deed. Whereas the criticism may be valid at a theoretical level, it does not mean the maxim loses all its force. It is an indication only that the removal of beneficiaries was not contemplated in the Trust Deed. It must of course be interpreted in the context of the whole of the Trust Deed so as to determine whether the deed empowers the removal of beneficiaries.<sup>7</sup>

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<sup>7</sup> *Chotabhai v Union Government & another* 1911 AD 13 at 28, *Rex v Vlotman* 1912 AD 136 and *Consolidated Diamond Mines of South West Africa Ltd v Administrator S.W.A & another* 1958 (4) SA 572 (A) at 648.

[62] Fifth: I have already referred to the fact that the beneficiary clause in the deed is a stand-alone clause which, on the face thereof, comprehensively deals with the issue of beneficiaries. Normally, a later general provision is not taken to override a prior special provision; in other words, clause 17 (the general provision) is not, as a matter of course, taken to override clause 1.6 (the special provision). The maxim in this regard is *generalia specialibus non derogant*. Once again whether this maxim applies must be considered in context and not in isolation.<sup>8</sup>

[63] Sixth: the court *a quo* in reference to the context and background to the creation of the Trust points out that the Trust was intended for the benefit of the explicitly named beneficiaries and it obviously intended that these mentioned persons would benefit and not some other persons not mentioned by the founders in the deed and based on the general scheme of things that trustees are mandated to manage the Trust in the best interest of the beneficiaries. Ascan, for example, was a founder of the Trust and made a donation to it and it would fly in the face of logic to argue that he had the intention that he and his descendants might sometime in the future be removed as beneficiaries. The same obviously applies to Andrea who was also a founder of the Trust. I cannot fault the reasoning of the court *a quo* in this regard. It is further fortified by the fact that the main donor and founder envisaged the Trust as the vessel through which he would eventually pass on the family wealth in equal shares to his children. To suggest that, in this context, there was indeed an intention to allow trustees in the future to remove beneficiaries seems to be highly unlikely.

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<sup>8</sup> See *Rex v Gusantshu* 1931 EDL 31, *Jeffries v Commissioner of Customs and Excise* 1954 (2) SA 528 (E) at 530, *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 (AD) 367 and *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 603.

[64] I thus agree with the conclusion of the court *a quo* that clause 17 of the Trust Deed does not empower the trustees to remove beneficiaries from the Trust without their assent. The context in which the Trust was created and the other indicators mentioned above are in my view way destructive of the submissions in this regard which are solely premised on the wording of clause 17 in isolation without taking into account its inter relationship with the other clauses in the deed and the context in which the deed was created.

[65] In conclusion on this aspect, the position seems to me to be this. As clause 17 does not allow the removal of beneficiaries, it follows that the beneficiaries have contingent rights and their rights can thus not be changed without their assent provided that they accepted the benefits in the deed (I deal with this latter aspect below). It then becomes academic whether their protectable interests (if not a contingent one) only extends to the avoidance of maladministration or whether it includes also their interest as potential beneficiaries.

#### Acceptance of benefits by Ascan and Gesa

[66] A defence raised by the appellants against the application *a quo* instituted by Ascan and Gesa was that they had not accepted the benefits of the Trust prior to their removal as beneficiaries and hence had no right to bring their application for reinstatement as beneficiaries.

[67] The reason that acceptance is a requirement is because it is the acceptance of the benefits stipulated in the Trust Deed 'that creates the right for the beneficiary pursuant to the Trust Deed, while no such right existed before'.<sup>9</sup>

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<sup>9</sup> *Potgieter* as quoted in para [51] above.

[68] The court *a quo* held that Ascan and Gesa accepted the benefits stipulated in the Trust. In respect of Ascan there can be no doubt whatsoever. He was a founder, donor and trustee. He thus was aware of the contents of the Trust Deed, partook in the decision making relating to the Trust as trustee, and was forced to resign as trustee. In addition, he stated that while his father was alive he thanked him on more than one occasion for his decision to create a Trust which ensured an equitable distribution of the family assets between the siblings. His discussions with his father were not effectively disputed nor can it be disputed that he was a founder, donor and trustee. It seems to be that it is abundantly clear that he accepted the Trust Deed and the suggestions to the contrary are without any merit. In an attempt to counter Ascan's acceptance, reliance was placed on the evidence of Dorothea who simply stated that Ascan did not discuss the Trust matters with Florenz as this is not indicated in the latter's diary. These allegations were correctly found to be of little value as Dorothea was obviously not present at all discussions between Ascan and Florenz and as is evident from the initial note from Florenz to Ascan and Andrea mentioned above, even prior to the Trust being established it is clear that Florenz did discuss Trust matters with Ascan, and furthermore, there must have been some communication with regard to the Trust affairs when Brigitte was removed as a beneficiary. It is highly unlikely that this issue was not discussed between the members of the family.

[69] As far as Gesa is concerned, she expressed her gratitude to her father and also looked after her parents out of gratitude for what would eventually come her way via the Trust. Apart from insulting her by responding that her parents were looking after her and not the other way around, her evidence is not really disputed either. Whether

the parents financially assisted Gesa is not the issue but whether Gesa cared for them in kindness and assistance while they went along in their ordinary manner so as to indicate her appreciation for what they have done and planned for her is the issue. There is little doubt that Gesa knew she was a beneficiary. There was a discussion in the family about the reason for the creation of the Trust and the situation where Brigitte was removed as a beneficiary was probably also a subject of discussion in the family. Why would Gesa not accept her appointment as a beneficiary which was without onerous conditions? She said she did and acted in accordance by caring for her parents. The bare denial in this regard was correctly dismissed by the court *a quo*. Where a beneficiary in a Trust stands to benefit to the tune of millions without any onerous conditions, why would such beneficiary not accept such benefit? Maybe the time has come when knowledge of the fact that one is a beneficiary of a Trust should be regarded as acceptance and it would then be for the party disputing this to indicate on what basis that benefit was not accepted or was repudiated. Be that as it may, I am satisfied that Gesa established her acceptance of the Trust Deed.

#### Consequential relief

[70] The Court *a quo* granted the relief sought in prayers 3, 4 and 5 on the basis that it flowed from the order reinstating Ascan and Gesa as beneficiaries. Prayer 3 clearly flows from the reinstatement of Ascan and Gesa as beneficiaries. As pointed out the Trust Deed expressly provides for the financial statements of the Trust to be provided to the beneficiaries at the latter's request.

[71] The relief set out in prayers 4 and 5 of the application do not follow necessarily as a consequence of the reinstatement of Ascan and Gesa as beneficiaries. A basis

for those prayers had to be established independent of the relief to be reinstated as beneficiaries.

[72] No basis was laid for the appointment of an independent auditor to do an audit on the existing financial statements to be paid by the appellants personally. It is common cause that the Trust appointed an independent auditor for the purpose of settling its financial statements and that was done for a number of years already. No criticism whatsoever is made with regard to the methodology used or the accounting practices followed in the creation of the financial statements. If such issues arise subsequent to the financial statements being handed to Ascan and Gesa, they may have a basis to seek the relief they sought in prayer 4. Currently, they have no basis for such relief and it does not follow necessarily from their reinstatement as beneficiaries. It was thus not correct to regard this as a consequential relief.

[73] The same comments made in respect of prayer 4 apply to prayer 5. It is not consequential relief and thus could only have been granted on an independent basis being established for such relief. Once again, no basis was established for the interdictory relief. The removal of beneficiaries was a single act which occurred in the past.<sup>10</sup> Interdicts are generally required to prevent wrongful conduct in the future. There is no suggestion whatsoever in the papers that if the court *a quo* gave an order ordering Ascan and Gesa to be reinstated as beneficiaries that the appellants would somehow not adhere to the order and not regard the *ratio decidendi* binding on them. They would also probably be acting in contempt of the order if they do not adhere to it which would also be one of the remedies available to Ascan and Gesa in such case. To simply submit that the unlawful conduct of the appellants will continue if the

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<sup>10</sup> *Francis v Roberts* 1973 (1) SA 507 (SA) at 512G–513E.



intended interdict is not granted is so lacking in specificity that it can be disregarded and is more indicative of the distrust Ascan and Gesa have in respect of the appellants than any reasonable apprehension of unlawful conduct in the face of a court order.<sup>11</sup> It was thus also not correct for the court *a quo* to regard the interdictory relief as consequential upon the reinstatement of Ascan and Gesa as beneficiaries. The fact is that the requisites for a final interdict were not nearly established.

[74] It follows that the relief sought in prayers 4 and 5 of the application *a quo* was not 'consequential relief' in the sense that it followed automatically in the train of events once the beneficiaries were reinstated. A case had not been made out for the relief independent of the reinstatement of the beneficiaries. It thus follows that such relief should not have been granted but should have been declined.

### Conclusion

[75] From what is stated above it follows that the appeal will be partially successful only. Counsel were at *ad idem* that costs should be dealt with on the basis that it should follow the result and include the costs of one instructing and two instructed counsel.

[76] What was in dispute was the interpretation of the Trust Deed which was in need of clarification. Here it must be borne in mind that Brigitte was removed on an earlier occasion with reference to clause 17 of the Trust Deed which was accepted by all concerned. If this is taken into account it means that the trustees' actions cannot be described as totally unwarranted. Furthermore, as is evident from my discussion

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<sup>11</sup> *Grant-Dalton v Win* 1923 WLD 180 at 183 and *Naango & others v Kalekela & others* 2017 (1) NR 66 (HC) paras 40–41.

relating to the interpretation of clause 17 it was not an easy matter, especially in circumstances where clause 17 was used previously to remove beneficiaries without demur, to know that clause 17 did not have the wide meaning its purely grammatical meaning in isolation indicated.

[77] In the above circumstances, I am of the view that I should follow the approach of this Court in *Egerer & others NO v Executrust (Pty) Ltd & others*<sup>12</sup> and order that the costs should be borne by the Trust. I take it that the appellants who feature in this case in their capacities as trustees used funds of the Trust to cover the legal expenses incurred in respect of this matter in both the court *a quo* and in this Court. Insofar as it may be necessary, I shall authorise this conduct. The practical result will be that the Schütte Trust will be liable for all the legal costs occasioned by this litigation.

[78] In the result, I make the following order:

The appeal succeeds to the extent set out below:

'1. The order of the High Court of 22 September 2021 is set aside and substituted with the following order:

- (a) Save for the decision confirming the removal of Ascan Berthold Schütte as trustee contained in the 'Written Resolutions of the trustees of the Trust' dated 18 June 2017, all the other resolutions recorded in the said Written Resolutions document are declared invalid and set aside.

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<sup>12</sup> *Egerer & others NO v Executrust (Pty) Ltd & others* 2018 (1) NR 230 (SC).

- (b) The applicants (and their decendants) are hereby reinstated as beneficiaries of the Schütte Trust.
  - (c) The trustees of the Schütte Trust are to furnish the applicants with the financial statements of the Trust for the last 5 years, calculated retrospectively from the date of this order.
  - (d) It is declared that clause 17 of the Trust does not empower the trustees of the Trust to delete beneficiaries who have accepted the Trust Deed without the assent of such beneficiaries nor to alter the benefits of such beneficiaries without their assent.
  - (e) The costs of the applicants are to be borne by the Schütte Trust and shall include the costs occasioned by the employment of one instructing and two instructed counsel.'
2. The costs of respondents on appeal are to be borne by the Schütte Trust and shall include the costs occasioned by the employment of one instructing and two instructed counsel.
  3. The appellants in this Court (respondents in the court *a quo*) are authorised, insofar as it is necessary, to pay all legal costs incurred in this matter both in the court *a quo* and in this Court from the resources in the Schütte Trust.
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**FRANK AJA**

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**SMUTS JA**

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**MAKARAU AJA**

APPEARANCES

APPELLANTS:

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RESPONDENTS:

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