MATTHEW ROSENFELDT

Versus

THE BRACKENHILLS TRUST

And

M. G. LONG

And

G. N. MLOTSHWA

And

T. MATEMAVI

And

H. MAHACHI

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 7 November 2023 & 6 November 2024

Opposed application for a declaratur

T. Mpofu with *I. Chagonda* for applicant
K. Kachambwa with *S. Noormohammed* for the respondents

CHILIMBE J

INTRODUCTION

[1] This matter took unduly long to conclude. It was initially intercepted by a robustly contested point *in limine* challenging the court`s exercise of jurisdiction. The ensuing interlocutory arguments resulted in the decision of *Matthew Rosenfeldt v The Brackenhill Trust & 4 Ors* HH 348-23. That matter dealt extensively with the issue of definition of a commercial dispute.

[2] The success of the point *in limine* saw the court adjourning to hear this matter exceptionally *ex* Division. A further spirited disputation on the merits then followed leading to this present judgment. That background notwithstanding, an apology is extended to the parties for the delay experienced.

THE DISPUTE

[3] Applicant seeks a declaratory order pronouncing him a beneficiary of first respondent, a trust established at the instance of his late natural father, Mr. John Arnold Bredenkamp. Applicant was born on 22 February 1988 in London, England to the said Mr. Bredenkamp and a Briony Rosenfeldt.

[4] In bringing this application, applicant essentially anchors his claim on the following; - firstly, he contends that he qualifies as a beneficiary of first respondent trust in terms of its trust deed. Secondly, applicant claims that his status as beneficiary of the said trust was further confirmed by Mr. Bredenkamp himself in a will, letter and minutes of a certain meeting that took place on 15 August 2019.

[5] Applicant also filed a supporting affidavit deposed to by Mr. Lawrence Majuru.I will address the further import of this affidavit in the succeeding paragraphs. Mr Majuru nonetheless, endorsed applicant`s claim.

[6] The application was opposed by the first to fifth respondents. Second to fifth respondents being trustees of first respondent. Hazvinei Chipo Mahachi, ("Mahachi"), the fifth respondent, deposed to the opposing affidavit. She was backed by her three fellow trustees- second, third, and fourth respondents being Messrs M.G. Long, G.N. Mlotshwa and T. Matemavi respectively who filed each a supporting affidavit.

[7] Further, Mrs Jennifer Lee Bredenkamp, ("Mrs Bredenkamp"), the surviving widow of the late Mr. Bredenkamp, also filed an affidavit endorsing the opposition. So too did a Mr Colin Richard Blythe-Wood, a former trustee of first respondent who held office from 1998 to 2016.

[8] The respondents disputed applicant`s entitlement to the donation as claimed. Their position was that firstly, applicant was in fact deliberately excluded as a beneficiary of first respondent trust in the trust deed. Secondly, they dismissed as otiose, the wills, letters and other documents attributed to Mr Bredenkamp and relied upon by applicant.

FACTUAL BACKGROUND

[9] I now set out the fuller background to the matter hereunder. Mrs Bredenkamp, deposed, on 22 January 2022, to an affidavit in case number HC 540/22.This matter HC 540/22 though related, is not immediately relevance to the present proceedings. But the contents of Mrs Bredenkamp`s affidavit are. The facts deposed therein were largely accepted by both sides as an accurate account of the background to present dispute.

[10] It is common cause that Mr and Mrs Bredenkamp got married at Que-Que, Rhodesia in 1962.The marriage was blessed with three children; - Caron Lee Palmer (nee Bredenkamp), Sarah Lee Lambourne (also nee Bredenkamp) and Gavin Scott Bredenkamp (referred to hereinafter as "Caron", "Sarah", and "John"). To these children were born 7 grandchildren.

[11] As at 27 January 2022, (when Mrs Bredenkamp swore to her affidavit), two of the grandchildren, Victoria Jennifer Vickerman and Ella Clara Vickerman had attained majority status whilst 5 others were still minors. Applicant wishes to join the children and grandchildren of Mr. Bredenkamp and lay claim to the (presumably) munificent bequeathments due from first respondent trust.

[12] Mr. Bredenkamp died on 18 June 2020.One may safely describe him as having been a wealthy man during his lifetime. He had established first respondent trust on 9 August 1989 by a notarial deed of donation settled by one Christopher John Strong. Mahachi attempted to make an issue out the creation of first respondent trust. She dismissed as incorrect, applicant`s averment that the trust was "formed at the instance and initiative of my late father John Arnold Bredenkamp".

[13] Mahachi`s objection on this aspect was ill taken. A reading of the trust deed does confirm that first respondent was set up in the interest of the late Mr. Bredenkamp, his wife, children, grandchildren and other persons and concerns associated with him. Apart from the original donation of $1000 from Mr Strong upon inception, it may be safely inferred from the papers that the trust subsequently received further donations from Mr. Bredenkamp.

[14] The contestation by Mahachi that Mr. Bredenkamp was not first respondent`s "de facto" settlor was however, effectively abandoned by the respondents. I will thus accept, as the parties clearly did, that materially, the court is concerned with a trust established by Mr. Bredenkamp. In fact, both parties liberally referred to Mr. Bredenkamp as the settlor. I will also, on the basis of that consensus, apply that appellation to him.

[15] Mrs Bredenkamp also confirmed in her affidavit that first respondent trust was created to address the financial needs of Mr and Mrs Bredenkamp, their children and grandchildren. Applicant agreed with that averment save where the deponent excluded him from the list of Mr. Bredenkamp`s children-beneficiaries. Applicant insisted, instead, that he was also a child of Mr. Bredenkamp.In that respect, he belonged to the second category of beneficiaries comprising of his half-siblings Caron, Sarah and John.

[16] The definition and formula to identify "beneficiaries" to first respondent trust are found in clause 5 of the trust deed. This clause is important. The disposal of this dispute will depend on the interpretation of this clause. It provides as follows: -

> "That after declaring all costs and expenses incurred in the operation and administration of the Trust and after making such provisions and establishing such reserves as they in their discretion may determine the Trustees shall, until the capital of the Trust has been finally and completely paid over to the beneficiaries entitled thereto in accordance with this Deed, distribute so much of the income and/or capital of the Trust among the beneficiaries and in such amounts or proportions as they may determine in their absolute discretion. For the purposes of this settlement the term "the beneficiaries" shall include all or any of the following persons or classes of persons provided that they reside in Zimbabwe and/or any of the following charities in respect of their operations in Zimbabwe;

a) JOHN ARNOLD BREDENKAMP and his wife JENNIFER LEE BREDENKAMP;
b) the children of the said JOHN ARNOLD BREDENKAMP;
    - Caron Lee Bredenkamp
    - Sarah Lee Bredenkamp
    - John Scott Bredenkamp
c) the grandchildren (including adopted grandchildren) of the said JOHN ARNOLD BREDENKAMP now born or to be born hereafter;
d) such further person or persons, charitable, religious, sporting, educational health, welfare or conservation organisations or institutions as the said JOHN ARNOLD BREDENKAMP shall by will or deed executed before his death declare to be amongst the beneficiaries under this settlement." [underlined for emphasis].

APPLICANT`S CASE

[17] Applicant`s case in summary went thus; -the interpretation of paragraph 5 of the trust deed was that it clustered beneficiaries into two categories; - named persons and unnamed classes of persons. The named beneficiaries included Mrs Bredenkamp the spouse, and her three children. The unnamed but defined class of persons scoped in present and future grandchildren. Applicant claimed that he fell into the category of defined but unnamed beneficiaries. He took the position that his status as a child born to the late Mr Bredenkamp was not disputed. In that

regard he qualified automatically as a beneficiary in terms of clause 5 (b) dealing with "…the children of the said John Arnold Bredenkamp".

[18] Buttressing his claim, applicant averred that "Indeed, at all material times during his lifetime, my late father has (sic) always regarded me as beneficiary of the trust."[1] In that regard, applicant referred to, and attached to his affidavit documents confirming this intent on the part of the late Mr. Bredenkamp being; -

i. Last will and testament of John Arnold Bredenkamp executed on 16 June 2011
This document proclaimed by clause 2.1 thereof, the "beneficiaries of his estate to be "Caron Palmer, Sarah Lambourne, Gavin Bredenkamp, Matthew Rosenfeldt and their respective children and remoter issues per stirpes."

ii. "Letter of Wishes" written by John Arnold Bredenkamp dated 30 January 2013.
This letter was allegedly addressed by Mr. Bredenkamp to Maitland Trustees in the Virgin Islands. Its purpose being to express his "wishes in relation to the Trusts". Trusts was defined in paragraph 1.1 of that letter to mean all or any trusts set up by him for the benefit of named "Beneficiaries". These were in turn, defined to include Mrs Bredenkamp and her three children Caron, Sarah and John. The applicant was also specifically named as one of the "children". Present and future grandchildren were provided for.

iii. Minutes of a meeting held on 15 August 2019 ("hereinafter referred to simply as "the minutes"
This document tabulated a total of 17 items recording wide-ranging discussions of a business nature. Consistent with its title as a "note", the minutes carried the informal tone of a communication between parties privy to the subject matter. Item 17 under "LOWS" indicated that JAB (John Arnold Bredenkamp?) intended to provide for his children Caron, Sarah, John and applicant, as well as their offspring.

iv. Affidavit of Lawrence Majuru
Mr Majuru deposed to an affidavit supporting the applicant. The import of his deposition being to confirm authenticity of the minutes of 15 August 2019 as a true record of discussions captured thereon.

RESPONDENTS` CASE

[1] Paragraph 15 of the founding affidavit at page 10 of the record.

[19] Materially, the respondents` opposition went thus; -they disputed the correctness of applicant`s interpretation of the trust deed on the definition and identification of beneficiaries. In essence, they insisted that applicant was specifically excluded as a beneficiary of second respondent trust. This conclusion was confirmed, according to Mahachi, by the exclusion of applicant against the inclusion of his three half-siblings in paragraph 5 of the trust deed. The exclusion and inclusions respectively constituted deliberate decisions on the part of the settlor.

[20] Further, Mahachi urged the court to take note of the fact that applicant was born on 22 February 1988. The first respondent trust was established on 9 August 1989. Mahachi reasoned that there was no explanation, apart from the settlor`s deliberate decision, for applicant`s exclusion from the list of beneficiaries. His three half-siblings were specifically mentioned in the trust deed.

[21] Additionally, Mahachi drew attention to the fact that although first respondent trust was formed in 1989, Mr Bredenkamp survived until 2020. He had ample opportunity during the intervening period, to amend the trust deed and make specific provision for applicant. He declined to so because such was not in fact, his intention. Similarly, Mahachi dismissed applicant`s two cluster interpretation of the trust deed`s definition and identification of beneficiaries as an attempt to mislead the court.

[22] As for the will, Mahachi contended that such could not avail applicant. It related to a different class of assets (those in South Africa), it bequeathed same to Mrs Bredenkamp and did not proceed so far as to specifically name additional beneficiaries “by will or deed” as envisaged in the trust deed.

[23] Mahachi impugned the letter of wishes in the following terms. It was unsigned and therefore of questionable authenticity. It was addressed to the Maitland Trust settled in the Virgin Islands, rather than first respondent trust established in Zimbabwe. The letter made no mention of first respondent, but referred to other trusts set up in Zimbabwe by Mr Bredenkamp or at his instance. In any event, first respondent was established by Mr Strong and not by Mr. Bredenkamp she repeated.

[24] Lastly, Mahachi discounted both the minutes of 15 August 2019 and their endorsement by Mr. Lawrence Majuru`s affidavit as inconsequential. The minutes related to different trusts and companies. They did not constitute a “will or deed” as required by clause 5 (d) of the trust deed. The minutes (in item 17 thereof) purported to instruct Mr. Lawrence Majuru to confirm the

trustees, protector and beneficiaries of first respondent trust. Such instruction was, according to Mahachi, "legally and factually" incompetent. Mr. Lawrence Majuru was not a trustee of first respondent. As such, he stood in no position to reasonably discharge the tasks necessary to carry out the instruction.

THE LEGAL ARGUMENTS IN WRITTEN AND ORAL SUBMISSIONS

[25] Counsel from both sides were aligned on the applicable factual issues and resultant legal principles. The dispute could be resolved by interpretating the trust deed to establish whether or not applicant qualified as a beneficiary of first respondent. And in interpreting the trust deed whose settlor was deceased, the court was obliged to resort to the same principles applicable in interpreting a will.

[26] Both counsel cited the decisions of *Ex Parte Easton N. O* 1948 (2) SA 530 (C) and *Dinson N. O and Ors v Hoffmann & Ors NNO* 1979 (4) SA 1004 (A). In the former decision, the court was confronted with the interpretation of a donor`s wishes regarding termination of a trust and distribution of its corpus. The court traversed at length and breadth of the trust deed, exploring various possibilities in trying to establish the deceased settlor` s intention. SEARLE JA held as follows regarding the proper interpretational considerations at 540; -

> "A deed of donation such as the one under consideration should be construed on the same principles as a will and accordingly effect should be given to the donor's wishes by reconciling, if possible, the conflicting provisions in accordance with the general intention *expressed in the deed* (vide Steyn on Wills, p. 35). The dominating motive of the disposition must prevail - vide *Estate King v The Master* (1935 CPD 67 at p. 70), and it is only when it is completely impossible to arrive at any conclusion as to what was the donor's intention that the donation will be declared void for uncertainty - vide *Ex parte Baker's Executors* (1939 CPD 287). A provision is not implied unless it is a necessary implication - vide *Ex parte Estate Graaff* (1947 (4) S.A.L.R. 496), but in the present case an implication is unavoidable as reconciliation of the provisions is only possible if the Court either construes the daughters' rights to income for life as terminated on the youngest grandchild attaining 21 years, or interprets the provision as to the termination of the trust and the distribution of the corpus as postponed till after the death of the daughters."[underlined for emphasis]

[27] In the second case of *Dinson N. O and Ors v Hoffmann & Ors NNO (supra),* the court set out the rules applicable to interpretation of a will. These being the same rules which both counsel in the present dispute agreed could be deployed to aid the construction of the trust deed of first respondent. The court in *Dinson* held as follows at page 1008:

> "Every will must be its own dictionary. See *Gordon's Bay Estates v Smuts* 1923 AD at 169; *Gisborne v Gisborne* (1887) 2 AC 310 (HL). The cardinal rule of construction is directed at assessing the intention of the testator in the particular will under consideration. All other rules, aids to interpretation and presumptions must be subordinate to this cardinal rule."

[28] Mr *Mpofu* for the applicant, urged the court to adopt, in seeking to accurately establish the donor`s intent, the "settlor`s armchair. He went beyond the two authorities cited above and invited the court to adopt the intrepid interpretational approach taken in the South African decisions of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)[2], *University of Johannesburg v Auckland Park Theological Seminary & Anor* [2021] ZACC 13, and *Old Mutual & Ors v Moyo* 2020 (2) All SA 261.

[29] The court in those decisions regarded, according to Mr. *Mpofu*, interpretation as "…a holistic exercise in which the court considered the triad of text, context and purpose". Further, counsel cited a lengthy passage from *Dinson v Hoffmann* stressing the need for a court to take into account the surrounding circumstances in seeking to establish the intention of the settlor. In that regard, it was counsel`s submission that the trust deed clearly evinced Mr. Bredenkamp`s intent to provide for applicant.

[30] The trust deed utilised, in clause 5 (b) the wording- "the children of the said John Arnold Bredenkamp…". This phraseology fixed a formula for the identification of the donor`s progeny. Had the purpose been to exclude applicant, such wording would have been avoided. The three siblings Caron, Sarah and John could simply have been cited by name. It was beyond issue that applicant was Mr Bredenkamp`s child.

[31] Mr. *Mpofu* submitted that additionally, the circumstances showed that the settlor cared for the welfare of applicant and took steps to secure it. Counsel referred to what he termed "contemporaneous documentation" as further evidence of the relevant factual circumstances

[2] The *Endumeni Municipality* case was cited with approval in the Supreme Court decision of *Zambezi Gas (Pvt) Ltd v N.R. Barber & Anor SC 3/20*

necessary for the court to consider. These comprised of the last will and testament, the letter of wishes as well as the minutes of 15 August 2019. In urging the court to accept and take these documents (and their contents) into account, Mr. *Mpofu* argued that respondent`s contestation of them was baseless.

[32] None of the documents had been properly discredited by the respondents. The letter of wishes and will were not exposed as forgeries. The minutes of 15 August 2019 had been authenticated by the sworn statement of Mr Lawrence Majuru.Important, according to counsel, was the fact that the will and letter of wishes in particular, were not being proffered to confirm fulfilment of clause 5 (d) of the trust deed.

[33] This was because, in the first instance, applicant did not need an amendment of the deed in order to assert his status as beneficiary. The wording of the trust deed sufficiently catered for applicant as a beneficiary. Similarly, and in that respect, references to applicant in the letter, the will and the minutes did not amount to an attempt on the part of Mr Bredenkamp to add applicant as a beneficiary "by will or deed".

[34] The documents were instead, being tendered to fortify proof of the settlor`s intention to include applicant in his legacy. They confirmed, so submitted Mr. *Mpofu*, the extraneous circumstances demonstrating Mr. Bredenkamp`s keenness to ensure that applicant was provided for. Counsel also took the point that first respondent had to be recognised for what it was; a bewind trust which commenced life as a donation *inter vivos*.

[35] It transcended into a testamentary trust *mortis causa* upon the decease of Mr. Bredenkamp. The relevance of that history being that during Mr. Bredenkamp`s lifetimes, the trust was inactive. This being partly explanatory of the further mention of applicant in the letter of wishes, will and minutes.

[36] On the issue of the trust deed`s conditionality that in order to qualify as beneficiaries, aspiring persons had to be resident in Zimbabwe, Mr *Mpofu* reiterated his "*inter vivos-mortis causa*" argument. The conclusion issuing therefrom being that question of residence was due to assume relevance at only at distribution of the donation.

THE RESPONDENTS` ARGUMENT

[37] As noted above, respondents` counsel, Mr. *Kachambwa*, associated with the position taken by his colleague on the key principles. The court, he agreed, had to interpret the trust deed

based on the guidance set out in *Ex Parte Easton* and *Dinson v Hoffman* (both supra). Counsel also cited the decision of *Harvey v Crawford* 2019 (2) SA 153 (SCA), which referred with approval, to the following dictum in *Moosa v Jhavery* (1958 (4) SA 165 (N) wherein it was held that;

> "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." (at 169D-F)

[38] Mr. *Kachambwa* submitted that a plain meaning had to be given to clause 5 of the trust deed. In doing so, the court was urged to consider the age-old implication of exclusion and inclusion in interpretation. The rule *expressio unius est exclusion alterius* applied to the document before the court and had to be employed to the exclusion of applicant as beneficiary.

[39] In particular, counsel drew emphasis to the fact that, as held in *Harvey v Crawford* (supra), the court had to pay heed to circumstances precedent, rather than subsequent to the establishment of the first respondent trust. Apart from dismissing the authenticity and relevance of the "contemporaneous documents" on the basis earlier laid in the founding affidavit, Mr. *Kachambwa* argued that those subsequent attempts to endorse applicant as beneficiary to first respondent trust fell short of the requirements stipulated in clause 5 (d). They did not amount to an amendment of the trust deed to add a beneficiary by execution of a will or deed.

[40] He similarly, attacked the manner in which applicant had pleaded his case. Applicant had, according to Mr. *Kachambwa*, not addressed the issue of residence, neither had he established the factual basis for the ancillary relief to the declaratory order. Counsel dwelt on this point considerably in his written submissions, citing the following authorities; -*Quarrying Enterprises (Pvt) Ltd v Stonezim (Pvt) Ltd & Anor* HH 37-22 and *Mukarakate v Commissioner General of Police & Anor* HH 6-20 among others.

ANALYSIS OF THE ARGUMENTS: DECLARTORY RELIEF

[41] To begin with, before the court is presented with an application for a declaratur. This application was brought in terms of section 14 of the High Court Act [Chapter 7:06]. The requirements of declaratory relief were articulated in the well-established authority of *Johnsen v AFC* 1995 (1) ZLR 65 (S) at page 72 as follows; -

"The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an ―interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction. See *Ex parte Chief Immigration Officer* 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (ZS) at 376G-H; *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) and the cases cited. It was rightly not in contention before the court a quo that the appellant was an interested person. Accordingly, the first stage in the determination of whether it was competent to grant a declarator was met.

At the second stage of the enquiry, the court is obliged to decide whether the case before it is a proper one for the exercise of its discretion under s 14 of the Act. *It must take account of all the circumstances of the matte*r. See Reinecke v Inc Gen Insurances Ltd 1974 (2) SA 84 (A) at 95C; Dyson v A-G Page 73 of 1995 (1) ZLR 65 (H) [1911] 1 KB 410 (CA) at 417; Burghes v A-G [1911] 2 Ch 139 at 156. What, in the end, constitutes a proper case is where some tangible and justifiable advantage to the applicant is shown to exist. See Adbro Invtm Co Ltd v Min of Interior & Ors 1961 (3) SA 283 (T) at 285B-C; Reinecke v Inc Gen Insurances Ltd supra at 93D-E." [Underlined and italicised for emphasis]

[42] In considering the requirements stated above, the obvious fact is that the court is faced with a claim targeting first respondent trust`s donation. A declaration of rights is sought against it. The claim is different from that aimed at a deceased person`s estate under the various applicable causa. The rights and interest being claimed herein flow from a contract; -the trust deed. They differ from those accruing in terms of say the Deceased Persons Family Maintenance Act [Chapter 6:03] or related legislation.

[43] Applicant is pursuing a formally constituted donation together with its administrators. A donation whose objects are regulated by a trust deed, apart from the broader prescription of the

law. A donation too, administered by trustees appointed in terms of the law. I would therefore venture out to say that the circumstances of this matter suggest that if applicant passes the first hurdle set in *Johnsen v AFC* (supra), victory will be almost his for the taking.

[44] If the trust deed is read to be construed in his favour, I would envisage no impediment to the exercise of this court`s discretion in granting him the declaratur sought. (Apart of course the issue of the ancillary relief which would require him to overcome the opposition raised) Having so opined, I turn now to the interpretation of the trust deed based on the principles set out in the authorities cited.

[45] Before doing so, I must comment on the practical implementation of the said principles of interpretation based on "text, context and purpose". The purpose of such interpretation being to (i) specifically to establish the meaning of "children of the said John Arnold Bredenkamp", (ii) the extra-jurisdictional impediment and (iii) generally as to whether applicant qualified as a beneficiary of the first respondent trust.

[46] First, one must obviously commence with the "text" aspect and examine the trust deed itself. This will be done against consideration of the "context", followed by the deductive process to establish "purpose". Context must naturally emanate from (or be confined to) the matters pleaded in the affidavits. Those matters constitute evidence placed before the court.

[47] That evidence must thus be subjected to the usual tests centred on relevance and reliability. In other words, the evidence must be credible inasmuch as it must constitute facts supportive of the causa and defence respectively. For these reasons, I shall approach the interpretational arguments on the law and facts with these basic rules in mind. I now turn to the arguments.

[48] Mr. *Mpofu* adhered to the liberal interpretation approach. This scoped in the broader context relevant to the issuance, purpose, parties, settlor and other aspects related to the donation. That context included evidence in the form of the will, the letter of wishes and the minutes of 15 August 2019.And such evidence, per Mr. *Mpofu*, pointed indisputably to a father who displayed an intention to provide, consider and include his son the applicant, as a beneficiary of that father`s legacy.

[49] I must state that although Mr. *Kachambwa*, agreed with the contextual approach, he did so only just. Because he effectively contradicted that approach in his next breath. He gravitated toward the approach taken in *Moosa v Jhavery.* My understanding of his argument is that the

interpretation had to take the form of a still shot taken "*at the time of its* [the trust] *execution*", rather a motion picture that included subsequent developments.

[50] On that basis, counsel urged the court to consider the fact that applicant was specifically excluded from the list of beneficiaries at inception of the first respondent trust on 9 August 1989. As such, the subsequent evidence presented by applicant in the form of the will, the letter and minutes of 15 August 2019, ought not override original provision in the trust deed.

[51] On "text" *Donson v Hoffman* it was held that "every will must be its own dictionary". Herein, the "dictionary" must be the trust deed and one must commence with it. And the golden rule of interpretation must be applied in construing this document. Is it couched in plain, unambiguous language whose grammatical meaning does not lead to absurdity? Or obscure and subvert the intention of the settlor? This instrument may be described as of the type and standard commonly encountered in this jurisdiction. Its sets out the purpose of first respondent trust and deals with the appointment, retirement and replacement of the trustees. It also outlines the duties, powers and privileges of the said trustees.

[52] It proceeds to provide for matters incidental to administration of the trust. Typically, it then addresses how the trust shall be wound up once the objects have been fulfilled or frustrated by fate. In addition, the trust deed of course takes the moment to define who or what are the donation`s "beneficiaries". And what their entitlement is.

[53] Clause 5 of the trust deed is the critical provision primarily providing for definition and identification of beneficiaries. Mr. *Mpofu* argued that it defined beneficiaries specifically and generally. In its own wording the trust deed stated in clause 5 that "…*the term "the beneficiaries" shall include all or any of the following persons or classes of persons*…". The qualifier "all or any" must then be applied to the succeeding subclauses.

[54] Clause 5 (a) lists Mr.and Mrs Bredenkamp. There is no question of there being no other "persons or class of persons" falling under this clause. I may skip the contentious clause 5 (b) dealing with children, in order to quickly dispose of clauses 5 (c) and (d). These two clauses quite clearly carry a formula for identifying "persons or classes of persons". Returning to clause 5 (b), it is necessary to reproduce it once again; -

b) the children of the said JOHN ARNOLD BREDENKAMP;
    - Caron Lee Bredenkamp
    - Sarah Lee Bredenkamp

- John Scott Bredenkamp

[55] So the issue on clause 5 (b) is; -who are the "persons or classes of persons" falling into this category? The persons are actually stipulated in that clause. They are Caron, Sarah and John. That list excludes applicant. The question is; -does he get automatically included, as argued by Mr, *Mpofu,* under the qualifier "children of the said John Arnold Bredenkamp"? Before giving a definite answer, I return once again to the legal arguments and authorities cited.

[56] In doing so, I may comment that the interpretational discourse in *Harvey v Crawford*, could have further enriched argument herein had it been granted fuller attention. I also take the view that neither counsel`s duty was made any lighter by certain shortcomings in pleading aspects of the causa and defence. I shall point such out in the succeeding paragraphs.

STATUTE, CONTRACT, WILL AND DEED-THE INTERPRETATIONAL OPTIONS

[57] The South African Supreme Court in *Harvey v Crawford* explored, in a majority and dissenting decision, interpretational approaches to construct a trust deed placed before it. Having asserted the right to testamentary freedom, the court proceeded to consider various rules of interpretation as they differently or commonly applied to statues, contract, wills and deeds. In the matter before it, the various definitions of "children", "issue", "descendants" and "legal descendants" were considered.

[58] Herein, by comparison, argument on the interpretational approaches did not explicitly distinguish the instrument under review-statute, contract, will or deed. Secondly, the issue of definition of "children" did again not extend to the various options-natural, progeny, legal, illegitimate or issue. Neither the founding nor opposing papers raised the definition of "children" as basis to support the inclusion or exclusion of applicant as a beneficiary of the trust.

[59] The term "children" formed a core term in contention. It was necessary that it be fully articulated in the pleadings and argument. But the parties applied it casually if not loosely. (The court may have been lured unwittingly into this trap). A more technical interpretation could have aided the "persons or classes of persons" interpretation in clause 5 (b). In the absence of a cogent articulation of the term "children", I am unable to agree that by implication, applicant automatically fell into the closed or locked category of those persons listed in 5 (b).

[60] I am further persuaded in that regard because the list in clause 5 (b) is restricted and specific. Yet it occurs in a trust deed that deliberately created open-ended classifications in the very next two subclauses. Clause 5 (c) recognised grandchildren "now born or to be born thereafter". Similarly, clause 5 (d) provided for inclusion of additional beneficiaries by specific or general stipulation through amendment to the trust deed by "will or deed". It is therefore safe to conclude that the intention of the settlor was clear. He mentioned those persons or classes of persons whom he intended to provide for by name or class. Applicant does not fall into either category.

THE "CONTEMPORANEOUS DOCUMENTS"

[61] I now proceed to establish if the contemporaneous documentation can intrude and reverse this initial conclusion. In that regard, how do the contemporaneous documents stand as interpretational tools to decode the trust deed? I will side-step for now; the authenticity challenge mounted against the documents and take their worth at first value. The argument by Mr. *Mpofu* that the will demonstrates that the late Mr. Bredenkamp acknowledged, recognised and endorsed applicant as a beneficiary becomes correct on the face of it.

[62] It therefore becomes clear from the contemporaneous documents, that Mr. Bredenkamp intended to provide for applicant. The question is why did neither Mr. Bredenkamp nor his esteemed trustees take steps to ensure that applicant`s case was addressed with clarity? Why did they not specifically amend the trust deed to include applicant if the contemporaneous documents expressed Mr. Bredenkamp`s wishes?

[63] Mr. Bredenkamp made, according to the story borne in the contemporaneous documents, consistent efforts to assert applicant`s rights. He was an important man, wealthy and commanding an impressive coterie of lawyers, accountants and other experts. Why did he not simplify matters by providing for applicant with clarity? Have the contemporaneous documents helped provide an answer?

[64] My conclusion is that not quite. Firstly, I believe that the trustees and their settlor were well-aware of the existence of applicant, at the inception of first respondent trust on 9 August 1989, or thereafter. They deliberately excluded him from the trust deed`s list or classes of beneficiaries, again at inception and thereafter. This, as mentioned in preceding paragraphs, was a trust lawfully set, administered and governed by its instrument as well as the law. No suggestion of impropriety is made by applicant. In any event, the trustees themselves have

spoken. They disowned applicant, prior to institution of these proceedings by letter dated applicant as a beneficiary.

[65] The herein second to fifth respondent trustees were not part of the original trustees, they were (i) lawfully appointed, (ii) supported by former trustee Mr Colin Richard Blythe-Wood and (iii) Mrs Bredenkamp. The relevance of these objections is that though coming from interested (if not conflicted) parties, they form part of the broad considerations around the "triad of text, context and purpose". My conclusion in that even taking the contemporaneous document at face value, they do not offset the position stated by the trustees.

[66] The second reason why I carry the view that the contemporaneous documents have not aided the interpretation process is as follows; - one must take a closer look at these documents. I commence with the will. This document reflects Mr. Bredenkamp' s testamentary dispositions. These related, as correctly noted by Mr. *Kachambwa*, to assets and property separate from the trust. The will did not apply to the first respondent donation.

[67] Whilst it specifically mentioned applicant as a "beneficiary", the will did not amount to a variation in terms of clause 5 (d) of the trust deed to include applicant as a beneficiary in first respondent. Further, applicant did not furnish additional detail associated with this will. What transpired after the will was deposed to? Did applicant pursue his rights and entitlement thereunder?

[68] Who brought it to his attention? Under what circumstances? Similarly, the letter of wishes was addressed to a third party. In that regard, it lacked specific instructions requisite to fulfil the condition of applicant`s inclusion as a beneficiary in terms of clause 5 (d) of the trust deed. It must also be recognised that, relevant to the present matter, all that this letter did was mention applicant`s status as a beneficiary.

[69] The relationship between the third-party recipient of that letter-Maitland Trust-and first respondent is not clear from the letter. Nor did applicant again, plead further facts regarding the action taken after the letter was written. The same fate ought to befall the minutes of 20 August 2019 and Mr. Lawrence Majuru`s supporting affidavit. I note, in conclusion, that apart from the contemporaneous documents, the founding affidavit did not advert to any further facts to found the contextual background helpful to the interpretation process.

[70] Overally, the applicant relayed a rather sterile story. It disclosed practically nothing of his relationship with the late Mr. Bredenkemp are unaware of how applicant related with Mr.

Bredenkamp if at all. There was nothing regarding whether or not Mr. Bredenkamp provided for applicant`s upkeep. Applicant was 22 years when his father died. Yet not a smidgeon of personal interaction issues from his tale apart from references in the contemporaneous documents.

THE CONDITION IN CLAUSE 7 OF THE TRUST DEED: "RESIDENT IN ZIMBABWE"

[71] It is necessary that I address an additional argument raised by the respondents. It was contended that applicant faced a second hurdle in his quest to assert beneficiary status. The trust deed provided that "For the purposes of this settlement the term "the beneficiaries" shall include all or any of the following persons or classes of persons *provided that they reside in Zimbabwe."*

[72] Applicant is a confirmed peregrine. He is resident in England in the United Kingdom where he was born. The proviso in the above excerpt stands to disqualify him as a beneficiary, argued the respondent. Mr. *Mpofu* disputed this conclusion, submitting, in the process, that the issue of residence did not automatically disentitle applicant. It was a matter that stood to be considered only at the stage of donation distribution. This argument was raised as a legal interpretation of the trust deed`s clause 5.

[73] The trust deed uses the term "for purposes of this settlement" in clause 5. The wording is preceded by a description of how first respondent`s trustees may, carry out a final disbursement of the capital or residue of the donation. It is thus unclear as to whether the term "settlement" refers to the first respondent trust itself, the trust deed, or process of distribution. This observation takes the issue of the peregrine status out of the realm of pure legal considerations.

[74] Especially given that applicant is pursuing declaratory relief. The claim is based on rights created by clause 5. I believe the issue of residence ought to have been pleaded as it impacted the suite of rights which applicant claimed he possessed. Applicant did not do so. In paragraph 8 of his founding affidavit, applicant claimed that the three siblings Caron, Sarah and John were, like him, also resident out of Zimbabwe. That is the only reference he made to the issue of residence. Additionally, clause 7 of the trust deed which provided as follows; -

> "7. That notwithstanding anything hereinbefore contained should there no longer be any legal restriction on payment from Zimbabwe to foreign residents under exchange control or any other legislation any restriction in this Deed requiring beneficiaries to be resident in Zimbabwe shall cease to have effect."

[75] There was no comment on whether or not applicant qualified for the exemption stated in clause 7. There was no exploration of this matter especially the applicable exchange control regime to establish if they extended a reprieve to applicant. Nor did the respondents advert to the condition in this clause in furtherance of their defence. On that basis, I find that applicant tendered (i) ought to have pleaded the matter of extra-jurisdictional disqualification and (ii) effectively tendered no feasible explanation on the facts to offset the impediment created in clause 5 of the trust deed.

DISPOSITION

[76] The aforegoing findings are dispositive of the matter. The applicant failed to meet the first stage of the requirements of a declaratur. As such it is not necessary that I wade into the discussion on ancillary relief so vigorously contested by Mr. *Kachambwa* in his written submissions. I note too, that in the same written submissions, the respondents abandoned their earlier claim for costs on a higher scale. In that regard, the following order is issued; -

> It is hereby ordered that the application for declaratory relief be and is hereby dismissed with costs.

Atherstone & Cook- applicant`s legal practitioners
Ahmed & Ziyambi-respondents` legal practitioners

[CHILIMBE J___6/11/24]