THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 791/2024

In the matter between:

SAMUEL ALFRED SCHOONHOVEN N O	**FIRST APPELLANT**
JOHANNES FRANS ALFONSIES SCHOONHOVEN N O	**SECOND APPELLANT**
JEAN JOHANNES SCHOONHOVEN N O	**THIRD APPELLANT**
FRANS RIAAN MARX N O	**FOURTH APPELLANT**
(In their respective capacities as Trustees of the Schoonies Family Trust (IT1667/1998/PMB)	

and

PIETER CORNELIUS ANTONIUS SCHOONHOVEN	**FIRST RESPONDENT**
NANETTE VENTER	**SECOND RESPONDENT**
ANTOINE SCHOONHOVEN	**THIRD RESPONDENT**
JOHANNES BERNARDUS ALPHONSUS SCHOONHOVEN	**FOURTH RESPONDENT**
BREGDA ELIZABETH SCHOONHOVEN	**FIFTH RESPONDENT**
CHANEL VEATER	**SIXTH RESPONDENT**
BREGDA ELIZABETH SCHOONHOVEN	**SEVENTH RESPONDENT**
MARISKA MOUTON	**EIGHTH RESPONDENT**
ALFONS SCHOONHOVEN	**NINTH RESPONDENT**

ANJE SCHOONHOVEN **TENTH RESPONDENT**

JANé SCHOONHOVEN **ELEVENTH RESPONDENT**

THE MASTER OF THE HIGH COURT, PIETERMARITZBURG **TWELFTH RESPONDENT**

Neutral citation: *Samuel Alfred Schoonhoven N O and Others v Pieter Cornelius Antonius Schoonhoven and Others* (791/2024) [2025] ZASCA 178 (28 November 2025)

Coram: SCHIPPERS, UNTERHALTER and COPPIN JJA and BLOEM and BASSON AJJA

Heard: 13 November 2025

Delivered: 28 November 2025

Summary: Trusts – discretionary trust – designation of capital beneficiaries – testamentary reservation – founder's right to designate – scope of the right – indeterminate classes – allocative inequality.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Bezuidenhout J, sitting as the court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Unterhalter JA (Schippers and Coppin JJA and Bloem and Basson AJJA concurring):

Introduction

[1] In 2006, Johannes Bernardus Alphonsus Schoonhoven (the founder) registered a discretionary trust, The Schoonies Family Trust (the Trust). The founder and his wife, Bregda Elizabeth Schoonhoven, on 21 July 2010, made a will (the Will). The founder died in 2015. A dispute has arisen as to whether the trustees enjoy a discretion to designate the capital beneficiaries of the Trust on the termination of the Trust. The appellants are the trustees of the Trust (the Trustees). The Trustees brought an application on behalf of the Trust. They sought a declaration: (a) that the capital beneficiaries of the Trust shall be determined by the Trustees as at the date of the Trust's termination; (b) the Trustees shall make this determination from the list of potential capital beneficiaries set out in paragraph 1.2(b)(i) to (vii) of the Trust Deed concluded between the founder and the Trustees on 20 April 2006 (the Trust Deed).

[2] The application was opposed by the first respondent (Mr Pieter Schoonhoven), one of the founder's four sons. The founder's three other sons are

Trustees (the first, second and third appellants). In sum, Mr Pieter Schoonhoven contended that the Trustees did not enjoy a discretion to select individual capital beneficiaries and that the identity of the capital beneficiaries (save for children still to be born) had been determined by the founder under the terms of the Will, read with clause 27 of the Trust Deed. The respondents include the descendants of the founder, being the children of the founder's sons, together with his wife, Bregda Elizabeth Schoonhoven. These respondents played no part in the proceedings.

[3] The high court interpreted the Trust Deed and held as follows: (i) the Trust required the appointment or selection of capital beneficiaries; (ii) that was not done under the Will of the founder, pursuant to his right to do so in terms of clause 27 of the Trust; (iii) the Trust Deed failed to specify who should appoint or elect the capital beneficiaries; (iv) if the Trustees wished to secure the relief they sought, they would need first to institute an action and claim the rectification of the Trust Deed to reflect the discretion for which they contended; (v) absent such a claim for rectification, the Trustees had failed to provide evidence sufficient to support their interpretation of the Trust Deed, and their application was thus dismissed, with costs. With the leave of the high court, the Trustees now appeal to this Court.

Did the Will designate the capital beneficiaries?

[4] Although the affidavits filed of record are in English, the Trust Deed and the Will are in Afrikaans. The parties do not fully agree with the sworn English translations of the Trust Deed and the Will. I will therefore reference the Afrikaans text. The parties agree that the now well established principles of interpretation set out in *Endumeni*[1] and *Capitec*[2] are to be applied in deciding upon the meaning of

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[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[2] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

the Trust Deed and Will. Our overarching duty is to discern and show fidelity to the intention of the founder of the Trust, and his wishes expressed in the Will.[3]

[5] The Trust Deed defines Capital Beneficiaries as follows:

'**Kapitaalbegunstigdes:** Die begunstigdes aan wie die trustfonds gedurende die bestaan of by beëindiging daarvan, kragtens die bepalings van die trustakte oorgemaak sal word, en welke begunstigdes ingevolge die bepalings van die trustakte aangewys sal word uit die geledere van:

(i) JOHANNES BERNARDES ALPHONSUS SCHOONHOVEN
(ID. 381003 5073 08 8)

(ii) BREGDA ELIZABETH SCHOONHOVEN
(ID. 400501 0057 08 6)

(iii) 1. SAMUEL ALFRED SCHOONHOVEN
2. JOHANNES FRANS ALPHONSUS SCHOONHOVEN
3. PIETER CORNELIUS ANTONIUS SCHOONHOVEN
4. JEAN JOHANNES SCHOONHOVEN

(iv) Die wettige afstammelinge van die begunstigdes genoem in (iii):

(v) Enige trust geskep in enige land ten behoewe van enige begunstigde of groep van begunstigdes vermeld in (i) tot (iv) hierbo;

(vi) Enige regspersoon in enige land waarvan enige begunstigde en/of sy afstammelinge al die aandele of die totale belang hou;

(vii) Die testate of intestate erfgename van JOHANNES BERNARDUS ALHONSUS SCHOONHOVEN en BREGDA ELIZABETH SCHOONHOVEN, slegs indien geeneen van die begunstigdes vermeld in (i) tot (iv) hierbo op die vestigingsdatum van die trust in lewe is of bestaan nie.'[4]

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[3] *Robertson v Robertson's Executors* 1914 AD 503 at 507.

[4] '**Capital beneficiaries**: The beneficiaries to whom the trust fund will be transferred during the existence or on termination thereof, in terms of the provisions of the trust deed, and which beneficiaries will be designated from the ranks of:

(i) JOHANNES BERNARDES ALPHONSUS SCHOONHOVEN
(ID. 381003 5073 08 8)

(ii) BREGDA ELIZABETH SCHOONHOVEN
(ID. 400501 0057 08 6)

(iii) 1. SAMUEL ALFRED SCHOONHOVEN
2. JOHANNES FRANS ALPHONSUS SCHOONHOVEN
3. PIETER CORNELIUS ANTONIUS SCHOONHOVEN
4. JEAN JOHANNES SCHOONHOVEN

(iv) The lawful descendants of the beneficiaries named in (iii);

[6] Although there was some difference between the parties as to how the word 'aangewys' in the definition should be translated, the following is clear from the introductory language of the definition of 'Kapitaalbegunstigides' (capital beneficiaries). First, there are beneficiaries to whom the trust fund *will* be transferred (my emphasis). Second, that is done: (i) in accordance with the terms of the Trust Deed and (ii) during the existence of the Trust or on its termination. Third, the beneficiaries 'aangewys sal word uit die geledere van: . . .'. This can be rendered, without undue controversy, to mean that the beneficiaries 'will be designated from the ranks of' the listed beneficiaries. The important point is that the identification of the capital beneficiaries requires some act of designation from those listed in (i)-(vii) of the definition. What the definition does not contain is reference to the persons who have the power to make the designation.

[7] Absent a reference to such persons in the definition of capital beneficiaries, it is necessary to consider the provisions of the Trust Deed to ascertain by whom the designation of capital beneficiaries must be done. A good starting point is clause 27. It reads as follows:

'**TESTAMENTêRE VOORBEHOUD**

27.1 Daar word spesiaal bepaal dat JOHANNES BERNARDUS ALPHONSUS SCHOONHOVEN die reg sal hê om by wyse van sy testament:

27.1.1 die vestigingsdatum ten opsigte van die trustfonds of enige gedeelte daarvan te bepaal;

27.1.2 die formule voor te skryf vir die verdeling van die trustfonds tussen die kapitaalbegunstigdes by beëindiging van die trust, en sodoende aan te dui

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(v) Any trust created in in any country in favour of any beneficiary or group of beneficiaries mentioned in (i) to (iv) above;

(vi) Any juristic person in any country of which any beneficiary and/or his descendants hold all the shares or the total interest;

(vii) The testate or intestate heirs of:
JOHANNES BERNARDUS ALPHONSUS SCHOONHOVEN and BREGDA ELIZABETH SCHOONHOVEN, only if none of the beneficiaries mentioned in (i) to (iv) above are alive or in existence on the vesting date of the trust.' (My translation.)

welke kapitaalbegunstigde welke deel van die trustfonds moet ontvang en die toekennings hoef nie noodwendig gelyk in grootte, waarde of omvang te wees nie.

27.2 Indien gemelde JOHANNES BERNARDUS ALPHONSUS SCHOONHOVEN by wyse van sy testament sy prerogatief uitoefen soos in paragraaf 27.1 aan hom verleen, geniet die testamentêre voorskrifte, ondanks enige andersluidende bepalings van die trustdokument, by beëindiging van die trust voorrang en is bindend.

27.3 Indien geen voorskrifte ingevolge 27.1 gegee is nie, word die trustfonds verdeel in ooreenstemming met die bepaling in paragraaf 17 vervat.

27.4 Slegs die kapitaalbegunstigdes mag, by beëindiging van die trust, uit die trustfonds bevoordeel word en die persoon wat oor die bogemelde bevoegdheid beskik kan dit nie aanwend om homself of sy boedel uit die trust te bevoordeel nie.'[5]

[8] Clause 27 invests the founder with two rights. First, to determine the vesting date of the trust fund or any portion of it. Second, to prescribe the formula for the distribution of the trust fund among the capital beneficiaries at the termination of the trust, which distribution need not be equal in size, value, nor extent. I shall refer to these rights as the prescription rights. The founder is required, if he wishes to exercise these rights, to do so by way of his will. Hence the heading of clause 27, 'Testamentêre Voorbehoud' or testamentary reservation.

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[5] '27. TERSTAMENTARY RESERVATION

27.1. It is specially provided that JOHANNES BERNARDUS ALPHONSUS SCHOONHOVEN shall have the right, by way of his will, to:
  27.1.1. determine the vesting date in respect of the trust fund or any portion thereof;
  27.1.2. to prescribe the formula for the distribution of the trust fund among the capital beneficiaries on termination of the trust, and thus to indicate which capital beneficiary must receive which portion of the trust fund and the allocations need not necessarily be equal in size, value or extent.

27.2. If the said JOHANNES BERNARDUS ALPHONSUS SCHOONHOVEN exercises his prerogative by way of his will as granted to him in paragraph 27.1, the testamentary prescriptions, notwithstanding any contrary provisions of the trust document, on termination of the trust, will enjoy preference and such testamentary prescriptions shall be binding.

27.3. If no prescriptions in terms of 27.1 are given, the trust fund shall be divided in accordance with the provision contained in paragraph 17.

27.4. Only the Capital Beneficiaries may, upon termination of the trust, benefit from the trust fund and the person who has the above authority may not benefit himself or his estate out of the trust.' (My translation.)

[9] The content of the prescription rights references a formula for the distribution of the trust funds. That formula prescribes how the trust funds are to be distributed. It is less clear that the prescription rights also permit the founder to decide to whom, amongst the listed capital beneficiaries, such distribution is to take place. However, since clause 27 is a testamentary reservation of rights given to the founder, and it is plainly intended to provide the founder with an overriding competence to determine both the vesting date and the distribution of the trust fund, it would make little sense to confine the founder's prescription rights to the prescription of a formula by reference to which the trust funds are to be distributed, without also permitting the founder to decide amongst whom that distribution is to take place. I shall refer to these two aspects of the prescription rights as the distribution prescription and the identification prescription.

[10] As I have observed, the definition of capital beneficiaries requires designation, but does not say by whom and under what distributive formula this is to be done. This is relevant to the interpretation of clause 27. Clause 27 reserves rights to the founder. The right to determine the vesting date has important consequences. The vesting date is a defined term of the Trust Deed. It reads as follows:

'**VESTIGINGSDATUM** beteken die datum waarop die trust met betrekking tot die trustfonds, in die geheel of gedeeltelik, ten einde loop, op welke datum die trustfonds of enige gedeelte daarvan aan die begunstigdes vir wie dit afgesonder is, oorgemaak word en in hulle vestig, naamlik enige van die volgende datums:

(a) Die datum waarop die trustees tussentydse uitkerings van die trustfonds ingevolge die bevoegdhede waarmee hulle beklee is, aan begunstigdes maak ten opsigte van daardie gedeelte van die trustfonds;

(b) Die datum wat die trustees in hulle uitsluitlike diskresie te enige tyd mag vasstel as die vestigingsdatum ten opsigte van 'n gedeelte of die geheel van die trustfonds.

(c) Die datum (indien enige) bepaal ingevolge die bepalings van paragraaf 27.1.1.'[6]

[11] The determination of the vesting date by the founder pursuant to clause 27 is then the date on which the trust fund, in whole or in part, expires and is transferred to any beneficiary for whom it is set aside and settled. The exercise of this right by the founder contemplates that there is provision in the Trust Deed by which the beneficiaries of the Trust can be identified. For the founder to have the right to determine a vesting date without such a provision would make little sense. The prescription rights that are set out in clause 27.1.2 are best understood to encompass both the identification prescription and the distribution prescription because it would be difficult to comprehend why the Trust Deed would invest the founder with an overriding competence to determine the vesting date, but with an incomplete competence to decide to whom and in what shares transfers of the trust fund would take place on the vesting date. The reference to a formula for the distribution of the trust fund in clause 27.1.2 may be somewhat imprecise language, but it is certainly capable of being read to encompass the identification and distribution prescriptions. And a coherent interpretation of the Trust Deed strongly supports such a reading. I did not understand either of the parties to disagree.

[12] The question is then this: did the founder in his will exercise his rights to make the identification and distribution prescriptions? The Will, dated 21 July 2010, in relevant part, reads as follows:

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[6] '**VESTING DATE** means the date on which the trust in respect of the trust fund, in its entirety or in part, comes to an end, on which date the trust fund or any portion thereof is transferred to the beneficiaries for whom it is set aside and vests in them, namely any of the following dates:
(a) The date on which the trustees make interim payments from the trust fund to the beneficiaries in respect of that portion of the trust fund, in terms of the powers with which they are vested;
(b) The date that the trustees may in their sole discretion at any time determine as the vesting date in respect of a portion or the entire trust fund.
(c) The date (if any) determined in terms of the provisions of paragraph 27.1.1.' (My translation.)

'5.2 In terme van bogemelde Trustakte en wel klousule 27 daarvan het die Testateur die reg om by wyse van testament die vestigingsdatum van die Trust te bepaal. Die Testateur bepaal hiermee dat die vestigingsdatum sal wees 15 (Vyftien) jaar vanaf datum van sy afsterwe.
5.3 Die Testateur het voorts in terme van klousule 27 van die gemelde Trustakte, die reg om voor te skryf die formule vir die verdeling van die Trustfonds tussen die Kapitaalbegunstigdes by beëindiging van die Trust. Die Testateur bepaal hiermee dat die Kapitaalbegunstigdes in gelyke dele die netto opbrengs van die Trust sal ontvang.'[7]

[13] The founder clearly determined that the vesting date of the Trust will be fifteen years from the date of his death. That is uncontroversial. What did the founder do in virtue of the determination made by him in clause 5.3? This is much disputed by the parties. Mr Pieter Schoonhoven's counsel contended that clause 5.3 should be interpreted to mean that the founder determined that all the persons listed in (i)-(vii) of the definition of capital beneficiaries should receive the net proceeds of the Trust in equal shares. In other words, the identification prescription was made by the founder to include all the persons listed in (i)-(vii); and the distribution prescription is that all such persons will each enjoy an equal share of the net proceeds. On this interpretation, the founder has exercised his prescription rights. This must be given effect to. And in consequence, the order of the high court must stand, and the appeal must be dismissed.

[14] The Trustees' counsel submitted that the founder in his Will did not exercise his right to make the identification prescription. That is, the Will in clause 5.3 does not identify the capital beneficiaries or failed to do so in a complete way. The high court reached the same conclusion. The Trustees' contention rests upon the

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'5.2 In terms of the above-mentioned Trust Deed and specifically clause 27 thereof, the Testator has the right to determine by means of a will, the vesting date of the Trust. The Testator hereby determines that the vesting date will be 15 (fifteen) years from the date of his death.
5.3 The testator has further in terms of clause 27 of the said Trust Deed, the right to prescribe the formula for the distribution of the Trust Fund among the Capital Beneficiaries upon termination of the Trust. The Testator hereby determines that the Capital Beneficiaries will receive the net proceeds of the Trust in equal shares.'

following. First, if clause 5.3 is taken to mean all the persons listed in (i)-(vii) of the definition of capital beneficiaries, this would lead to absurdity. It would mean that the founder, years before the vesting date, must be taken to have determined the capital beneficiaries by reference to persons who may or may not exist at the vesting date. So, for example, there may be trusts established for the benefit of beneficiaries or juristic persons in which beneficiaries hold shares (items (v) and (vi) of the definition of capital beneficiaries) who would then take in equal shares with the named persons (items (i)-(iv)) and their lawful descendants (item (iv)), given the founder's distributive prescription of equal shares. Such an outcome, it was submitted, would be absurd.

[15] Second, the interpretation of clause 5.3 favoured by Mr Pieter Schoonhoven would lead to anomalous results. For example, since he has more children, who qualify as lawful descendants, than each of his brothers, this leads to a skewed distribution of the funds of the trust on the vesting date, rather than a distribution of equal shares. A similar anomaly would come about if, as a result of clause 17.2 of the Trust Deed, a named beneficiary is replaced by his lawful descendants.

[16] Third, the use in clause 5.3 of the Will of the definite article in the phrase 'tussen *die* Kapitaalbegunstigdes in gelyke dele' (My emphasis) (between *the* capital beneficiaries in equal shares) is not an identification of capital beneficiaries where the capital beneficiaries listed in the definition include open-ended classes. That is to say, classes that reference trusts or companies to be formed.

[17] I turn to consider what the founder effected by way of clause 5.3 of the Will. Discretionary trusts are a well-established part of our law. A founder may confer upon the trustees wide discretionary powers. These powers may include the power to select beneficiaries both in regard to the application of the trust income or capital

or both. This power of appointment is valid provided that the beneficiaries or the class of beneficiaries from whom the appointment is to be made are adequately specified.[8] There is no suggestion that the definition of capital beneficiaries in the Trust Deed that denotes who may benefit is not adequately specified. The question is rather whether the power of appointment enjoyed by the founder by way of the prescription rights has been exercised to identify such beneficiaries.

[18] There can be no doubt that the founder intended to exercise the rights conferred upon him in terms of clause 27.1.2 of the Trust Deed. Clause 5.3 of the Will specifically references his prescription rights and then proceeds to make a determination. The determination that is made in clause 5.3 of the Will bears a close resemblance to clause 17.1.2 of the Trust Deed. Clause 17.1 of the Trust Deed reads as follows:

'**BEëINDIGING VAN TRUST EN VERDELING VAN TRUSTFONDS**

17.1 Onderhewig aan die woordomskrywing van VESTIGINGSDATUM geld die volgende bepalings by beëindiging van die trust:

Behalwe vir tussentydse kapitaaluitkerings wat die trustees na eie goeddunke mag maak, duur die trust voort tot by die VESTIGINGSDATUM en, onderhewig aan paragraaf 17.2 van die trustakte, word die trustfonds soos volg aan die begunstigdes oorgemaak:

17.1.1 indien voorskrifte kragtens die bepalings van paragraaf 27 gegee is, geskied die verdeling en oormaking van die trustfonds aan die begunstigdes in ooreenstemming met die voorskrifte;

17.1.2 by ontstentenis van enige sodanige voorskrifte, word die trustfonds gelykop tussen die kapitaalbegunstigdes van die trust verdeel.'[9]

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[8] *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) at 867 C – *G; Smit v Du Toit en Andere* 1981 (3) SA 1249 (A) at 1260-1.

[9] 'TERMINATION OF TRUST AND DISTRIBUTION OF TRUST FUND

17.1. Subject to the definition of VESTING DATE, the following provisions shall apply upon termination of the trust:

Save for interim capital distributions which the trustees may make at their own discretion, the trust shall endure up to the VESTING DATE and, subject to paragraph 17.2 of the trust deed, the trust fund shall be transferred to the beneficiaries as follows:

17.1.1. If directions in terms of paragraph 27 have been given, the distribution and transfer of the trust fund to the beneficiaries shall take place in accordance with the directions;

17.1.2. in the absence of any such directions, the trust fund shall be distributed equally among the capital beneficiaries of the trust.'

[19] Clause 17.1 provides that, upon the termination of the Trust, save for interim capital distributions, the trust assets shall be transferred to the beneficiaries, in accordance with the directions given in terms of the testamentary reservation provided for in clause 27, absent which, the trust fund shall be distributed equally among the capital beneficiaries of the Trust. Clause 17.1 thus incorporates a residual provision as to how the trust assets are to be transferred to the beneficiaries, absent an exercise of the founder's rights in terms of clause 27.1.2. I shall refer to this as the residual provision.

[20] If then, the founder sought in clause 5.3 to exercise his prescription rights, did he thereby, in fact, designate beneficiaries, that is, make an identification prescription? The definition of capital beneficiaries requires a designation from the ranks of (uit die geledere van) those beneficiaries listed in (i)-(vii) of the definition. Clause 27.4 of the Trust Deed excludes the founder from benefitting himself or his estate should he exercise his prescription rights. This makes sense, since the point of the testamentary reservation is to empower the founder to designate who are to be the beneficiaries of the trust fund after his death. The residual provision also reinforces the function of the prescription rights, that is, to decide who is to benefit from the trust. The scope of the prescription rights conferred upon the founder by clause 27 is wide. Clause 27.1.2 makes it plain that the founder has the right to choose which capital beneficiary must receive which portion, and the allocation need not be equal in size, value or extent. This freedom means that the founder may include or exclude from the list of persons set out in (ii)-(vii) of the definition those that he wishes to designate as capital beneficiaries, and of those beneficiaries designated, the founder has the freedom to decide upon the allocative scheme that he favours.

[21] Does this freedom permit the founder to exercise his prescription rights so as to designate all of the persons listed in (ii)-(vii) of the definition? Conceptually, the right to choose from the ranks of listed beneficiaries allows for the choice of all. In a simplified case, if I am given the right to choose from x, y and z, and no minimum or maximum number is specified, I have the following choices: x or y or z; x and y; x and z; y and z; or x and y and z. To choose from a list does not mean that I cannot choose all, that is x and y and z. Once it is accepted that the prescription rights in clause 27.1.2 includes within their scope the right to make an identification prescription, as I have found, then to prescribe from among the capital beneficiaries (tussen die kapitaalbegunstigdes) allows for a prescription of all the capital beneficiaries. Put differently, the right does not specify how many beneficiaries may be designated, and consequently all beneficiaries fall within the scope of the right to make an identification prescription.

[22] The principal difficulty with this interpretation is whether the prescription rights conferred upon the founder in clause 27.1.2 could have been exercised by the founder to designate all the persons listed in (ii)-(vii) of the definition of capital beneficiaries, when he could not have known which of the persons, thus designated, would exist at the vesting date. This difficulty would appear to be most acute in respect of the classes constituted by items (v) and (vi) which reference any trust created for the benefit of any beneficiary or group of beneficiaries and any juristic person of which any beneficiary holds all the shares or the total interest. The problem is not that the beneficiaries who will fall within these two classes are unascertainable upon the vesting date, but rather that the founder cannot have made a designation of trusts and companies, where these classes of beneficiaries, did not exist at the time he made the Will in 2010, may or may not come into existence after his death, and before the vesting date, and hence could not have been within his contemplation. Put simply, to designate an indeterminate class cannot be an exercise

of the right of appointment. And, if the founder designated all beneficiaries, and thereby included indeterminate classes in his designation, the founder failed to exercise his right to make an identification prescription. I shall call this the problem of indeterminacy.

[23] There may be discretionary trusts that confer a discretion that does not permit of the appointment of beneficiaries from an indeterminate class. But I am not persuaded that the prescription rights conferred upon the founder, and in particular the identification prescription, constrained the founder's discretionary right in respect of the designation of an undetermined class. The problem of indeterminacy is not confined to the classes constituted by (v) and (vi). The lawful descendants of the children of the founder (item (iv)) is a class that could also comprise persons who are born after the death of the founder and who thus cannot be specifically identified. Had the founder simply designated these descendants, it is difficult to see why that would not be a proper exercise of his prescription right. The same is potentially true of the class of testate or intestate heirs of the founder's wife, in the event that none of the children and their descendants are alive at the date of vesting (item vii). The testate heirs of the founder's wife, for example, may not be finally determined, given that the founder decided that the vesting date would be 15 years after his death.

[24] The classes constituted by items (v)-(vii) are listed to allow for contingencies that might arise in respect of the named beneficiaries (items (ii) and (iii)) and the descendants of the founder's children (item (iv)). These contingencies allow for the possibility, no doubt for reasons of estate planning, that the beneficiary should be the trust of a beneficiary or his company. No doubt this flexibility was introduced to permit the trust or company, in whole or in part, to substitute for a child or a

descendant. But it does not follow that the prescription rights required the founder to limit the exercise of his discretion in this way.

[25] Indeed, the absence of restraint upon the right conferred upon the founder or put differently, the freedom with which he could exercise his prescription rights appears from the Trust Deed. Consider the residual provision which requires that, absent directions, the trust fund shall be distributed equally among the capital beneficiaries. That must be taken to mean all beneficiaries because it is a provision that must be capable of application without the exercise of any discretionary power. And if that is so, it is difficult to construe the Trust Deed to provide that the residual provision would be more extensive as to who may constitute the capital beneficiaries than the scope of the right of the founder to designate capital beneficiaries. Both the scope of the discretion conferred upon the founder to designate capital beneficiaries in virtue of his prescription rights, and the breadth of conferral by operation of the residual provision flow from the intention of the founder, and there is no reason to suppose that he intended to accord himself a more limited right of designation, to exercise by way of discretion, than the residual provision with which he was content, in the event he did not exercise his prescription rights.

[26] The freedom attaching to the prescription rights is also to be discerned, as I have observed, from the range of choices accorded to the founder. And the paramountcy of the exercise of the right of prescription is clearly expressed in clause 27.2 of the Trust Deed in which testamentary prescriptions have preference and shall be binding.

[27] The Trustees contended that if clause 5.3 of the Will is taken to be the exercise of the founder's right to designate all the persons in items (ii)-(vii) as capital beneficiaries, unequal treatment will result. In sum, the equal shares determined in

clause 5.3 will in fact be unequal; and this inequality could be considerably exacerbated should it prove possible to multiply the trusts or companies contemplated in items (v) and (vi). The inequality also comes about because Mr Pieter Schoonhoven has more children than his siblings. These inequalities of result may well eventuate. But inequality is a state of affairs that the Trust Deed contemplates and inequality is a permissible way in which the founder's discretion could be exercised. Thus, the express language of clause 21.1.2 of the Trust Deed makes plain that there need be no allocative equality. Accordingly, allocative inequality is an incident of the rights conferred upon the founder, and there is no reason to suppose that such inequality is only permitted from an exercise of the founder's rights to make a distributive prescription. The founder also enjoyed the right to make an identification prescription that could bring about inequality.

[28] Ultimately, the rights given to the founder both as to the determination of the vesting date and the prescription rights are widely framed. The prescription rights invested in the founder a discretion to designate beneficiaries, even in respect of broad and undetermined classes, and allowed that by so doing it might give rise to inequalities of result, given the passage of time between the death of the founder and the vesting date. That the founder chose to exercise his right in this way is not a matter for this Court.

[29] The founder in clause 5.3 of the Will refers to *the* capital beneficiaries. The language has a striking kinship with the formulation of the residual provision. I have explained above why the reference to the capital beneficiaries in the residual provision must mean 'all the capital beneficiaries'. It seems likely that the founder mimicked that language in clause 5.3. Additionally, to give practical effect to what was written in clause 5.3, to receive equal shares, the capital beneficiaries must be designated to be determinable on the vesting date. For that to occur, the only

available construction is that 'the capital beneficiaries' means 'all capital beneficiaries'.

Conclusion

[30] It follows that the founder did exercise his prescription rights and designated the capital beneficiaries to be all the persons falling within item (ii)-(vii) of the definition of capital beneficiaries who can then receive their share on the vesting date. Once that is so, such designation is binding. There is accordingly no reason to consider whether the Trustees enjoyed a discretionary power to designate the capital beneficiaries because, whether they have such a power matters not – the founder's designation is binding. The declaratory relief sought by the Trustees was correctly dismissed by the high court, though for reasons that differ from those stated above.

[31] In the result, the appeal is dismissed with costs, including the costs of two counsel where so employed.

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D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For appellants:	A M Annandale SC (with her L K Olsen)
Instructed by:	Strauss Daly Inc., Umhlanga
	McIntyre van der Post, Bloemfontein
For first respondent:	P J Tredoux (with him P S van Zyl)
Instructed by:	JB Law Attorneys, Somerset West
	Rosendorff Reitz Barry Attorneys, Bloemfontein.