



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
JUDGMENT**

Case no: 17622/2024

In the matter between:

K[...] J[...] P[...]

APPLICANT

and

G[...] G[...] M[...] P[...] N.O

FIRST RESPONDENT

RAYMOND LEONARD MOODY N.O

SECOND RESPONDENT

M[...] M[...] M[...] P[...] N.O

THIRD RESPONDENT

CHRISTOFFEL JOHANNES ERASMUS N.O

FOURTH RESPONDENT

IAN DE LANGE N.O

FIFTH RESPONDENT

CLAYTON MICHAEL LAUE N.O

SIXTH RESPONDENT

PENELOPE ANN LAUE N.O

SEVENTH RESPONDENT

(In their capacities as joint trustees of ERF 1[...])

Fernkloof Investment Trust (I[...])

**THE MASTER OF THE WESTERN CAPE HIGH
COURT**

EIGHTH RESPONDENT

Coram:

Slingers, J

Heard: 05 October 2026
Delivered: 19 October 2026
Summary: Interpretation of Trust Deed – Meaning to be applied to “spouse”.

ORDER

The application is dismissed with costs, which costs shall be on scale B.

JUDGMENT

Introduction

[1] This is an opposed application brought in terms of section 21(1)(c) of the Superior Courts Act wherein the applicant seeks an order declaring her to be a beneficiary of the A Beneficiary in the ERF 1[...] Fernkloof Investment Trust (I[...] **(‘the Trust’)**).¹

[2] The applicant, who is an attorney and conveyancer, is the founder of the Trust which was executed during her marriage to the first respondent. The applicant and the first respondent have since divorced, and it is clear from the papers that their relationship is acrimonious.

Background

[3] The applicant avers that during the course of their marriage she and the first respondent undertook various commercial adventures with a view of expanding their joint assets and that the Trust was one of the vehicles used to achieve this.

¹ At the hearing of the application the court was informed that the respondents would not be proceeding with the points *in limine* it raised nor would the applicant be proceeding with the application to strike. Furthermore, the applicant withdrew her objection to the filing of the supplementary answering affidavit.

[4] During 2006, the applicant became aware of a new development in Hermanus and saw economic potential for a possible investment in respect of ERF 1[...], more commonly known as [...] H[...] Village, Hermanus (**‘the property’**).

[5] However, at that stage the applicant and first respondent did not have the capital amount required and approached friends to collectively raise the capital required to purchase the property.

[6] Thereafter, the Trust was formed, and the trust deed was signed on 24 November 2006. On 20 December 2026, the Master of the High Court issued letters of authority to the first to seventh respondents as trustees of the Trust.

[7] The trustees and the applicant entered into a deed of suretyship in respect of an amount of R1 5 800 000.00 to secure a mortgage bond over the property, which was duly purchased and registered in the name of the Trust on 30 May 2007.

[8] Clause 1.1.1 of the trust deed provides that:

‘1.1 In this trust deed, unless the context shall clearly otherwise indicate:

1.1.1 “the A beneficiary” means G[...] G[...] M[...] P[...] (ID No.6[...]);’

[9] Clause 1.1.8 of the trust deed provides that:

‘1.1.8 “the beneficiaries” mean the A beneficiary, the B beneficiary, the C beneficiary, the D beneficiary, the E beneficiary, the F beneficiary and the G beneficiary and in all cases, includes the spouse of each such beneficiary together with the children of each such beneficiary and their respective descendants;’

[10] The applicant was not named as a beneficiary of the Trust but by virtue of her status as the first respondent’s spouse, she became a beneficiary of the Trust in terms of clause 1.1.8 of the trust deed.

[11] The trust deed provides that the word '*descendants*' shall be given its widest meanings and shall include descendants, born or to be born. It also defines '*trustees*' to mean the trustees for the time being of the Trust. It does not define nor explain the term '*spouse*'.

[12] It is common cause that the applicant and the first respondent have since divorced. Thus, the applicant no longer holds the status of being the first respondent's spouse.

[13] It is the applicant's case that she qualifies as a beneficiary by virtue of being the first respondent's spouse as she was married to the first respondent at the time the Trust was formed. She argues that she falls under the ambit of paragraph 1.1.8 of the trust deed.

[14] The applicant alleges that in terms of clause 15 of the trust deed, she has a right to half of 33.33 percent of any income or capital of the Trust prior to the vesting date and upon the vesting date half of 33.33 percent of the capital and/or income of the Trust on such a date.

[15] The relevant portions of clause 15 provides that:

'15.1 Subject as provided in clause 15.2 below, until the vesting date, the trustees may at any time and from time to time pay, apply or appoint:-

15.1.1 the whole or any part or parts of the income of the Trust to or for the benefit of all or any one or more of the beneficiaries;

15.1.2 the whole or any part or parts of the capital of the Trust to or for the benefit of all or any one or more of the beneficiaries;

in such shares, if more than one, and in such manner and upon such terms and subject to such conditions, limitation and restrictions in all respects as the trustees may from time to time in their sole and absolute discretion determine provided that notwithstanding anything to the contrary contained or implied in this clause 15.1, any income of the Trust and any capital of the Trust distributed by the trustees in terms of and subject to the provisions of this clause 15.1 shall be distributed as to:

15.1.3 33.33 % (thirty three comma eleven percent) thereof to the A beneficiary;

...

....

- 15.2 *Until the vesting date, the trustees shall have the power from time to time and at any time, to accumulate any part of the income of the Trust for periods continuous or discontinuous as the trustees shall think fit and shall hold any accumulations so made as part of the Capital of the Trust for all the purposes hereof, but so that the trustees may at any time and from time to time pay, apply or appoint in their sole discretion, the whole or any part/parts of the said accumulations as if the same were income arising in the then current year.*
- 15.3 *On the vesting date, any capital and/or income held in trust by the trustees shall vest in and be paid to the beneficiaries in the following proportions:*
- 15.3.1 *33.33% (thirty three comma thirty three percent) thereof to the A beneficiary'.*

[16] The applicant states that subsequent to her divorce from the first respondent, the trustees have acted in a manner prejudicial to her rights and have excluded her from the benefits of the property in violation of her rights. In light hereof she was compelled to bring this application to protect her rights and interests as a beneficiary.

[17] The applicant states that prior to her divorce she had full use and enjoyment of the property and was heavily involved in the administration thereof.

[18] The applicant states that the trustees have embarked on litigation under WCHC 21114 of 2023 against her for misappropriation of trust funds but that this is not relevant to the determination of the application.²

[19] The answering affidavit was deposed to by the first respondent in his capacity as trustee and representative of the Trust by resolution.

² In light of the respondents' election not to proceed with the points in limine raised, this issue need not be addressed herein.

[20] The first to seventh respondents (**‘the respondents’**) deny that the applicant is entitled to the declaratory relief she seeks as she is not a spouse as set out in paragraph 1.1.8 of the trust deed.

[21] The respondents deny that the Trust was a vehicle to expand the first respondent’s and the applicants’ joint assets. The first respondent avers that he had the idea to build something but that he was not at the means to build and maintain a large villa in upmarket Hermanus. Therefore, he approached friends and family to raise the necessary funds. Consequently, the trust consists of an association of the first respondent’s friends and family.

[22] The respondents deny that the property was intended to be used as a second home by the applicant and the first respondent, as alleged by the applicant. They allege instead that the property was to be let out on short-term rentals as a means to generate and recoup the costs of the property.

[23] The trust is a discretionary trust rather than a vested trust. To date, the trustees have not made any discretionary decisions for a payout as the Trust has not been able to realise a profit from the short-term rentals above the costs incurred. Furthermore, there is currently an application to declare the Trust insolvent.

[24] The respondents state that none of the trustees wanted the explicit naming of their spouses as beneficiaries because they knew that the Trust would be set up for a very long time and they did not want *‘any distant ex-wives to disturb the trustees or the trust as such.’* The trustees go on to state that children stand in a different capacity to that of spouses. Consequently, the general term *‘spouse’* was used in the trust deed and any entitlement to benefit as a spouse of a beneficiary would terminate upon divorce. As the applicant and the first respondent divorced in February 2023, she is no longer a spouse as envisaged in the trust deed.

[25] In reply, the applicant acknowledges that:

*‘... The word spouse was used as well as children and grandchildren so to provide some flexibility for **future** possibilities so that when a child is born a lawyer’s coffers need not be filled.’*

Definition of spouse

[26] It is trite that a declaratory order is a discretionary remedy.³ Before granting a declaratory order, the court undertakes a two-stage inquiry. Firstly, it must be satisfied that the applicant is a person interested in an existing future or contingent right or obligation, and secondly, it must decide whether the case is a proper one for the exercise of its discretion.⁴

[27] Furthermore, as the applicant seeks final relief, any material dispute of fact must be resolved by the application of *Plascon Evans*⁵. Insofar as any dispute exists in respect of why the general term *spouse* was used instead of explicitly naming the spouses or being more specific in respect thereof, the respondents’ explanation in this regard must be accepted, namely that they knew that the Trust would be set up for a very long time and they did not want any ex-wives to disturb the Trust or the trustees.

[28] The grounds on which the applicant seeks the relief she claims is that she was the first respondent’s spouse at the time the trust deed was registered. Therefore, she reasons, she falls under the provisions of clause 1.1.1 read with clause 1.1.8 of the trust deed.

[29] The discrete issue to be determined is whether the word ‘*spouse*’ as used in the trust deed should be interpreted to include and/or refer to a person who

³ *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at para [15]

⁴ *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 14 G-I

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A),

was a spouse at the time of the creation of the Trust, but who thereafter no longer holds the status as a spouse.

[30] The trust deed is a contract between the founder and the trustees,⁶ and it stands to be interpreted as at the time of its execution according to the principles of interpretation.⁷ Thus, it is the settlor's intention at the time of executing the trust deed which must be ascertained from the language used and, in the circumstances, as they existed at that time.⁸

[31] *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁹ sets out the approach to be adopted when engaged in an interpretative exercise. It requires an objective approach, unrelated to the intention with which the words may have been selected and the starting point is to consider the language of the provision, read in context and having regard to the purpose thereof and the background to the preparation and production of the document or regulation. The approach that words must be given their ordinary grammatical meaning in statutory interpretation, unless to do so would result in an absurdity was also endorsed by the Constitutional Court¹⁰.

[32] A plain reading of clause 1.1.8 does not support the applicant's argument that *spouse* should be read to include former spouse or spouse at the time the trust deed was executed. There is no indication in the trust deed that *spouse* was meant to include or be defined as the spouse of the named beneficiaries as at the time the trust deed was executed.

[33] Both the respondents and the applicant accepted that the purpose of the Trust was forward looking. The applicant states in her replying affidavit that:

⁶ *Estate Hafiz and Others v Hafiz and Others* 2024 (2) SA 374 at para [20]

⁷ *Wormald N.O. v Woollgar and Others* (773/2020) [2021] ZAECHC 51 (30 March 2021) at para [34]

⁸ *Moosa and Another v Jhavery* 1958 (4) SA 165 (N); see also *Wilkinson and Another v Crawford NO and Others* 2021 (4) SA 323 (CC)

⁹ 2012 (4) SA 593 (SCA) (see paras 18 and 23)

¹⁰ *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC)

*'The word spouse was used as well as children and grandchildren so as to provide some flexibility for **future** possibilities so that when a child is born a lawyer's coffers need not be filled.'*¹¹

[34] The applicant states in unequivocal terms that the use of the terms *children* and *grandchildren* were intentional to provide for flexibility for future possibilities so as to prevent avoidable legal costs in not requiring the amendment of the trust deed upon the birth of future children and grandchildren. Similarly, the same logic and reasoning would apply to the use of the term *spouse*.

[35] The applicant as an attorney and a conveyancer would be alive to the importance of words in a document and the need to avoid ambiguities. The applicant explains that the trustees were nominated as a representative of a particular family and was to represent that family in accordance with its wishes. She goes on to state that the reason for this was to avoid an over cluttering of the trustees which could compromise the functioning of the Trust¹². This explanation is devoid of logic. Instead of naming a category of beneficiaries by the use of the term *spouse*, the trust deed could have specified the names of the spouses. This approach would not have over cluttered the trustees and would have left no room for any misunderstandings. Alternatively, the trust deed could simply have added the descriptive term '*current*' in front of the word *spouse*. It is difficult to see how this would have cluttered the trustees. Furthermore, it is not clear what is meant by 'over-cluttering' the trustees.

[36] The applicant herself acknowledges that her entitlement to the benefits of the property, including rentals and occupation thereof as a holiday home would arise as a result of her marriage.¹³ She states that '*... it was always envisioned that I, by virtue of my marriage, would be entitled to benefits from the property including income from rentals and occupation of the property as a "holiday home". To this end it*

¹¹ Paragraph 55 of the replying affidavit.

¹² Paragraphs 31 and 32 of the founding affidavit.

¹³ Paragraph 28 of the founding affidavit.

was recorded, as with all the Beneficiaries, that the spouses, children and grandchildren would be entitled to the benefits of the property.'

[37] The above excerpt from the applicant's founding affidavit is unequivocal – her entitlement to the benefits from the property arose from her marriage to the first respondent. When that marriage ended, so did her entitlement to the benefits of the property because she was no longer a *spouse*. The applicant admits that it is the spouses, children and grandchildren who are entitled to the benefits of the property. When the applicant's marriage to the first respondent ended, she ceased being a spouse and no longer fell within the ambit of clause 1.1.8 of the trust deed.

[38] The use of the term *spouse* is consistent with the forward-looking approach to the Trust and with the respondents' explanation for the use thereof.

Tender by the first respondent

[39] It is undisputed that the first respondent offered the applicant his 16,67 % share in the Trust in his accrual calculation during settlement discussions pertaining to his and the applicant's finalisation of the proprietary arrangements of their marriage.

[40] As correctly highlighted in the respondents' heads of argument the applicant, in her notice of motion, seeks a declaratory order without referencing any percentage. However, in her founding affidavit, she specifically asks for a declaratory order that she is entitled to all rights and benefits of 16.67% of the Trust.¹⁴ The applicant simply assumes that she is entitled to half the first respondent's allocation as a beneficiary of the Trust. The applicant does not set out how or why she arrived at the amount of 16.67%. The setting out of this calculation was necessary as she and the first respondent were not married in community of property, but out of community of property with the application of

¹⁴ Paragraph 16 of the founding affidavit.

the accrual system. Furthermore, the Trust itself does not set out how the 33.33 % allocated to the A beneficiary is to be divided or allocated between the first respondent, his spouse and their children and respective descendants.

[41] The applicant submits that this tender amounts to an admission that she is entitled to the relief she seeks. Consequently, the respondents have unnecessarily opposed her application.

[42] However, the tender was made in the first respondent's personal capacity in respect of his personal estate. It was not a tender as a trustee in respect of the benefits of the Trust. Furthermore, the tender would limit the calculation of the applicant's entitlement to benefits of the Trust to the date of determining the accrual whereas the declaratory relief she seeks would entitle her to the rights and interests of a beneficiary for as long as the Trust exists.

[43] The tender by the first applicant in his personal capacity cannot be accepted as a concession on behalf of the Trust.

[44] The applicant initially disputed the first respondent's authority to depose to the answering affidavit on behalf of the other trustees. She does not exercise the same vigilance in respect of the first respondent's alleged offer of 16.67% of his interests in the Trust.

Conclusion

[45] In the circumstances, the applicant has not made out a case that she falls within the ambit of clause 1.1.8 read with clause 1.1.1 of the trust deed and that she is a beneficiary of the Trust by virtue of being a spouse. Consequently, the applicant has not made out a case for the relief she seeks, and the application stands to be dismissed. Therefore, I make the following order:

- (i) the application is dismissed with costs, which costs shall be on scale B.

Appearances

For the Applicant:	Zaid Pillay
Instructed by:	K[...] P[...] Attorneys
For the Respondent/s:	Jolene Bernstein
Instructed by:	Cliffe Decker Hofmeyer