

# Rights of beneficiaries of a discretionary trust

A trust is created when the founder of the trust places the trust assets or trust property under the control of the trustees, who must administer the trust assets in the best interest of the beneficiaries. Ownership in the trust property can either be transferred to the trustees, in their capacities as such, (a discretionary trust) or to the designated beneficiaries of the trust (a vesting trust). However, control and administration of the trust property will always be in the hands of the trustees.

Where a trust deed in the case of a vesting trust, for example, identifies three individuals as beneficiaries, they should benefit from the trust assets. This can be in the form of a right to use the trust assets, a right to the income generated from the assets, or both. If the trustees were to withhold the benefit from the beneficiaries, they would be able to protect and enforce their rights.

In the event of a discretionary trust, however, the trustees have the discretion to elect beneficiaries from a predetermined group. The trust deed will, for example, describe the beneficiaries as an identifiable group of people or provide a list of names from which the trustees must select beneficiaries. Therefore, the beneficiaries do not have a fixed or absolute right to the trust assets, but only a contingent right up until such time the trustees exercise their discretion.

A question arose as to whether beneficiaries of a discretionary trust have rights against the trust capable of protection. This was the main legal question dealt with by the High Court in the case of *Griessel NO and Others v De Kock and Another 2019 (5) SA 396 (SCA)*. In this case, a beneficiary of a discretionary trust had a difference of opinion with the trustees and his fellow beneficiaries regarding the development of the trust property, being a farm. As a result, the trustees no longer allowed the beneficiary to use the farm. The aggrieved beneficiary went to court, asking for his right to access the trust property to be restored. The court, therefore, had to decide whether a beneficiary of a discretionary trust acquired rights against the trust which were capable of protection.

The trustees argued that they had not yet elected beneficiaries and that the beneficiary “remained a potential beneficiary who merely had contingent rights and had no vested rights worthy of protection”.

The Supreme Court of Appeal (SCA), however, relied on one of its previous judgements, *Potgieter & another v Potgieter NO & others 2012 (1) SA 637 (SCA)*, as authority that beneficiaries of a discretionary trust do indeed have rights worthy of protection. In that case, the court held that “the question whether the right thus created is enforceable, conditional or contingent should make no difference. The only relevant consideration is whether the right is worthy of protection, and I have no doubt that it is. Hence, for example, our law affords the contingent beneficiary the right to protect his or her interest against maladministration by the trustee.”

Based on the *Potgieter-judgement*, the SCA held that the trustees had no grounds to discriminate against the beneficiary by treating him less favourably. The court further held that the trustees have an obligation to treat all beneficiaries “even-handedly” and owe fiduciary duties to beneficiaries with vested rights and contingent rights alike. Consequently, the court ordered that the beneficiary must have equal access to and enjoyment of the trust property. In other words, all beneficiaries must be treated alike, unless justifiable grounds for the discrimination exists.

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