IBRAHIM MUSA ASMAL MATERIA
and
RASHID AHMED MATERIA
and
ZAKARIYYA MATERIA
versus
MUSA MENK
and
SHABIR AHMED MENK
and
ISMAIL MUSA MENK

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 21 June 2023 & 15 January 2024

Opposed Court Application

F *Girach,* for the applicants
T *Magwaliba,* for the respondents

CHITAPI J: This application comes to the courts for the fifth time. It was first in court before CHIGUMBA J who rendered judgement number HH 706/16 on 16 November 2016 in favour of the applicants. The respondents noted an appeal to the Supreme Court under case number SC 743/16 against the judgement of the High Court aforesaid. On 4 April 2019, the Supreme Court by judgement number SC 36/19 allowed the appeal, set aside the High Court judgement HH 706/16 and remitted the case to the High Court for a hearing *de novo*. This was the second time that the same application was in the courts. Significantly the Supreme Court order read in para 3 as follows:-

> "3. The matter is remitted to the court *a quo* for a hearing *de novo* including a determination on the issue of *locus standi*."

The third time that the application was in court was when MANZUNZU J was assigned the application to deal with in compliance with the Supreme Court order given in judgement number

SC 36/19. MANZUNZU J upheld points *in limine* including making a finding that the applicant did not have *locus standi* to bring this application. The judgement of MANZUNZU J in this respect is referenced HH 445/19 dated 27 June 2019. I have noted that the order generated by the Registrar purported that it was CHIRAWU-MUGOMBA J who dismissed the application. That is incorrect. It is common cause that it was MANZUNZU J. The mis-citation of the judges is of no great moment and inconsequential. The applicants were dissatisfied with the judgment of MANZUNZU J. They noted an appeal to the Supreme Court. The Supreme Court upheld the applicants' appeal and by order dated 24 March 2022, the Supreme Court ordered as follows in material particular:-

> "IT IS ORDERED THAT:
> 1. The appeal be and is hereby allowed with costs.
> 2. The judgment of the court *a quo* be and is hereby set aside and is substituted with the following:
>
> 'It is declared that the applicants have *locus standi* to sue the respondents in this matter.
>
> 3. The case is remitted to the High Court for a hearing and determination on the merits.'"

The Supreme Court appeal order given in case SC 402/19 was the fourth time that the matter was in the courts. The fifth time is therefore the hearing before me. At least the preliminary objection on *locus standi* is no longer an issue for determination since the Supreme Court settled it by declaring that the applicants enjoyed *locus standi* to sue in this application. The facts of this application must by now be at the fingertips of the parties counsel who have appeared before the courts on the four occasions which I have detailed. It is not the same with the courts in which the matter appeared as at each sitting a different judge dealt with the matter. It is important that I should keep my mind clear of what the prior courts may have said in relation to issues which I must determine. Should there be a convergence or divergence of factual findings and the law, that will not have arisen because I have been influenced by the prior judgements but because I have independently made my determination on the papers and arguments presented before me. However because facts are facts, it may happen that my findings coincide with findings in previous judgments. The same goes for the law should there be convergence and a repeat of case law and its application to proven facts.

On the merits the parties in this matter comprise three applicants and three respondents who are members of their respective families. They are the Materia family comprising Ibrahim Musa Asmal Materia as first applicant, Rashid Ahmed Materia as second applicant and Zakariyya Materia as third applicant. The first applicant is father to the second and third applicants. The respondents comprise the Menk Family and are Musa Menk as first respondent, Shaber Ahmed Menk as second respondent and Ismail Musa Menk as third respondent. The first respondent is father to the second and third respondents.

The first applicant and first respondents are joint settlors in the incorporation of a Deed of Trust which they named Al Falaah Trust. The Deed of Trust was registered with the Deeds Office on 29 January 2013 under registered number MA 110/2013. The three applicants and three respondents herein were appointed the first Trustees of the Trust and remain so. There has been a fall out between the applicants and the respondents relating to the management of the Trust. The applicants have filed this application which the respondents have opposed and in turn the respondents filed a counter claim which the applicants have opposed.

In relation to the main application, the applicants set out the relief which they ask from the court in their draft order whose contents in material part read as follows:-

> "IT IS ORDERED
> a) That it be and is hereby declared the appointment of the Executive Committee of the Al Falaah Trust is invalid as it is not in accordance with the terms of the Notarial Deed of Trust and is therefore an unlawful delegation of the powers of the Trustees;
> b) That it be and is hereby declared that all decisions and actions taken in the name of the Executive Committee of the Al Falaah Trust are invalid and of no force or effect;
> c) That all decisions relating to the operations and activities of the Mosque and the Madrasah must be taken by the Trustees at a properly convened meeting of the Trustees, or by resolution signed by all the Trustees;
> d) That the first to third respondents be and are hereby interdicted from acting in the name of the Trust, save where specific authority to that effect has been given in terms of a resolution duly passed at a properly constituted meeting of the Trustees; and
> e) That all persons purporting to be members of the Executive Committee of the Al Falaah Trust or such persons who hold themselves out as agents or representatives of the respondents' be interdicted from involving themselves in or with the management and control of the Al Falaah Mosque and Madrasah or of in any way interfering with the activities of the same or the Al Falaah Trust; and
> f) That the respondents pay the costs of this application jointly and severally the one paying the other to be absolved."

In relation to the counter claim, the respondents set out the relief which they seek from the court against the applicants in their draft order which reads as follows:-

> "IT IS ORDERED
> 1. Paragraph 10 (c) of the Deed of Trust of Al Falaah Trust be amended by increasing the maximum number of trustees to twelve.
> 2. The Applicants and the respondents shall within fourteen days of the date of this order appoint three additional trustees, agreeable to both parties, which trustees must have no relationship to the families of the Applicants or the Respondents, such new trustees to be from amongst those involved in the formation of Al Falaah Trust.
>
> ALTERNATIVELY
> 3. The Applicants and the Respondents shall within fourteen days of the date of this order appoint three additional trustees which trustees must have no relationship to the families of the Applicants or the Respondents from amongst those involved in the formation of Al Falaah Trust. One new trustee shall be appointed by the Applicants, one new trustee shall be appointed by the Respondents and the third new trustee shall to be appointed jointly by both parties.
>
> ALTERNATIVELY
> 4. The Applicants and the Respondents shall within fourteen days of the date of this order each appoint from amongst those involved in the formation of Al Falaah Trust three new trustees, which trustees shall have no relationship to the families of the Applicants or the Respondents. Upon the appointment of the six new trustees, the Applicants and the Respondents shall all cease to be trustees of Al Falaah Trust.
> 5. The Applicants shall pay the costs of the counter application if the counter application is opposed. If the counter application is unopposed, there shall be no order as to costs."

An analysis of the draft orders shows that as regards the main application and in simple terms, the applicants seek the invalidation of the Executive Committee which they allege, was appointed in violation of the provisions of the Deed of Trust and consequential relief. As regards the counter claim the respondents accept that there is a fall out of the Trustees. They in turn seek an order that amends the Deed of Trust to permit that the maximum number of Trustees be increased to twelve and that the applicants and respondents should mutually agree on the appointment of three Trustees unrelated to either of them but from amongst persons involved in the formation of the Trust so that the number of Trustees become nine in number. The respondents have also pleaded two alternative orders both meant to achieve the goal of having an increase in the number of the Trustees to nine from six. Therefore in essence, the draft orders considered together show that there is a fall out between the applicants and the respondents. The fact that the

administration of the Trust is in turmoil and that the applicants and respondents are in a disagreeable association regarding the administration of the Trust is therefore a given. The respondents in the counter claim effectively seek that the court should order a restructuring of the Board of Trustees because the current impasse involving the applicants and respondents appears not capable of amicable resolution amongst them.

The applicant's case as alleged in the founding affidavit is that, the main object of the Trust as indeed it is stated so upon perusal of clauses 6(a) to 6(i) of the Deed of Trust is to carry out religious, charitable and educational ends for the benefit of beneficiaries therein listed. Without limiting the scope of the objectives of the trust as listed in clause 6 generally, I will mention another objective specifically not because it overrides other objectives in importance, because the dispute between the parties touch on it. The objective I specially mention is, to establish, operate and maintain places of worship and religious instruction for Islamic Faith followers.

The applicants averred that the respondents acted contrary to the provisions of the Trust Deed, in particular clause 17 thereof by appointing an Advisory Committee and morphing it into the Executive Committee without the involvement or consent of the applicants and without following the provisions of the Deed of Trust in relation to such appointments. In this regard, the applicants averred that meetings of the Trustees can in terms of clause 11(c) of the Deed of Trust be convened by any Trustee or the Secretary to the Trust. Resolutions are passed by a simple majority. Where there is a tie of votes in favour of or against a proposed resolution, the proposed resolution will be deemed as not passed.

Connected closely to the dispute are clauses 13(c) and 17(c) of the Trust Deed. The applicants *inter alia* rely on these clauses to challenge the appointment of the Advisory Committee. The clauses read as follows:-

> "13(c) A special resolution of Trustees shall be one which is stated to be a special resolution and has been passed as an ordinary resolution but which also has received the vote in favour of it, and/or written consent to it of at least a two thirds majority of Trustees for the time being holding office as such."

> "17 (c) The Trustees may from time to time by special resolution make, amend and revoke regulations providing for the appointment of a sub-committee or committees consisting of

> such person or persons as shall therein be named or specified and who need not be Trustees of the Trust and such resolutions may delegate to such sub-committee or committees such of the powers and duties of the Trustees and upon such terms and conditions and in all respects as the Trustees shall in their absolute discretion specify."

The applicants averred in para 20 of the founding affidavit as follows:-

"20. The core dispute or issue which has now arisen and calls for relief arises from the *de facto* establishment of an Executive Committee which purports – together with the Menk family and the named Menk Trustees – to have taken over various aspects of control and the running of the Mosque and the Madarasah without my approval or the approval and consent of my co-applicant Trustees. This wrested control which is set to continue – is considered invalid and violates the Trust Deed."

In relation to the establishment of the controversial Executive Committee aptly called the Advisory Committee, the respondents admitted the existence of the Committee. The respondents in response to para 20 above stated as follows in para 9 of the opposing affidavit:-

"7. Ad paragraph 20
This paragraph is denied. There is need for trustees to delegate functions and where necessary to obtain the assistance of others. For example, the Applicants' family controls the finances and the property of the Trust – more particularly in the hands of Yahya Materia and Faizur Rahman Materia who are not trustees. Whilst this position has been accepted by the Respondents, there is no authority strictly in accordance with the terms of the Trust Deed for them to perform those functions."

In the answering affidavit, to the quoted response in the opposing affidavit, the applicants conceded that there were personality differences amongst the Trustees but pleaded that such differences should not impede the proper running of the Trust. The applicants averred significantly as follows:

> "……A return to governance in terms of the Deed by the Trustees I suggest is a necessary and vital ingredient in this regard. I reiterate that from the inception of the Trust until October 2015, the Trust successfully functioned without the need of an Executive Committee."

The applicants in paragraphs 15 and 16 of the answering affidavit appeared to accept that the set up and inclusion of the Advisory Committee was an agreed arrangement meant to last for three months only. The applicants then averred in para 16 of the same affidavit as follows:-

"16. There was however, no agreement – let alone a discussion with us – that this temporary entity should morph into an Executive Committee with executive powers and functions for an indefinite period. As indicated in my founding affidavit applicants were not present at the meeting on 1 November 2015 when this Committee was put in place."

The parties attached to their affidavits, documents which included a letter terminating the voluntary teaching service offered by the third respondent to the Madrasah or Trust's educational institution, a letter by the respondents dated 18 December 2015 responding to a letter by the applicants dated 14 December 2015 which was not attached to the papers but related to applicant's demand for *inter-alia*, minutes of meetings held and several other Trust documents which included Title Deeds, bank statements and vouchers, response of the third applicant to the termination of his voluntary teacher services and minutes of meetings which are disputed by the applicant.

There can be no doubt if one considers the papers in this application holistically that the parties are miles apart in relation to how to resolve their impasse. The applicants take the simplistic approach that the controversial Advisory Committee should be removed by the court on the basis that it was not appointed in terms of the Trust Deed. The respondents on the other hand have averred that formalities as set out in the Trust Deed were not followed in most transactions and dealings by the Trust and that that was how the Trust operated.

In para 17 of the founding affidavit, the applicants stated:-

> "17. Meetings of the Trustees – though required at least four times a year – have since inception except recently taken place on a monthly basis and more particularly on the first Sunday of each calendar month."

In response, the respondents in para 5 of the opposing affidavit stated:

> "5. Ad paragraph 17
> Initially meetings were held on an *adhoc* basis but after November 2013 it was agreed that there be a fixed monthly meeting on the first Sunday of each month. However, the specific provisions of the Trust Deed were not followed in that there were no notices and no agendas. The meetings were also attended by persons who were not trustees such as Yahya Materia and Faizur Rahman Materia members of the applicant's family."

Significantly, the applicants responded in the answering affidavit as follows in para 9 thereof:-

> "9. That said, my sons never exercised nor were granted executive powers. They were asked to make representations for the Trust to ZIMRA or of seeking Council's permission to change the use of the stands and so on. Consensus from all the Trustees to those activities was achieved and just because there is no resolution to those acts they are not sought to be undone which is in contrast to the unilaterally created and imposed Executive Committee which falls outside the contemplation and/or parameters of the Deed of Trust."

In para 17 of the answering affidavit to the counter claim the respondents averred that there was no agreement that the Advisory Committee be clothed with Executive powers or authority or that it takes over specified administrative functions from the Trustees. The respondents in para 13 of the same affidavit and in relation to the functions of the controversial Executive Committee stated:-

> "13. The executive committee does not exercise any powers which have devolved to Trustees in terms of the Deed of Trust. The members of the executive committee assist in the implementation of day to day management activities of the Trust. Indeed applicants have not made difference to a single resolution purportedly passed by the executive committee or a decision taken by the same committee which is contrary to the provisions of the Deed of Trust."

The applicants dispute minutes of meetings of the parties which were attached to the opposing affidavit. As already observed, the respondents averred that the affairs of the Trust had always been conducted with minimum and at times without formalities. In this respect para 2.2. of the respondents opposing affidavit is revealing. It is a very long paragraph which could have been broken into more than one paragraph. The failure to break long paragraphs unfortunately reflect on the competency of the drafter of the affidavit. Counsel should have regard to the provisions of r (58)(1)(b) of the rules, 2021 which state:-

> "Every written application, notice of opposition and supporting and answering affidavit shall:-
> (b) be divided into paragraphs numbered consecutively, each paragraph containing, wherever possible, a separate allegation; and …."

It is however therein stated as follows:-

> "2.2. Whilst it is correct that the Trust Deed sets out various procedures for the convening of meetings and the passing of resolutions, the factual position is that since the time that the Trust was formed until the time that difficulties arose between the applicant's family and my family; the affairs of the Trust were dealt in an informal manner without regard to the formal requirements of the Trust Deed. The applicants and respondents acted in good faith in the interests of the Trust and there was no problem. The background is important because in alleging a failure to observe the terms of the Trust Deed, the applicants overlook the various other instances where the terms of the Trust seek relating to notices and meetings were not fully complied with and the various actions of the applicants themselves which are not supported by resolutions properly passed. An example is the acquisition of the Trust's immovable property. Whilst there was obviously consensus among the applicants and the respondents that the properties should be acquired by the Trust and whilst the actions were

> undoubtedly on the interests of the Trust, no one will be able to produce a notice convening a meeting complying with the terms of the Trust Deed at which a resolution was passed until recent times when greater attention has been paid to the formalities required. The strict compliance with the terms of the Trust Deed is the responsibility of all the applicants and the respondents and if there has been a failure to properly comply with the formalities, that is the responsibility of all the parties."

In response, the applicants in the answering affidavit in para 4.1 were coy on the above quoted issue preferring to say that there was consensus in what went on but stated that it was now no longer possible and that it was necessary that the business of the Trust be conducted in terms of the registered Trust Deed. The applicants significantly stated in that paragraph as follows in part:-

> "……I firmly believe that in the interests of the community the current Trustees will be able to act in terms of the Trust Deed and to achieve the aims of objects of the Trust. It is the introduction of an Executive Committee with purported executive powers and functions – completely outside the parameters of the Deed of Trust without applicants consent – that this necessitated this application."

The counter application is brief because the background facts are adopted from the main application by reference. Very briefly, the respondents acknowledge that there are serious disagreements amongst the parties as Trustees of the Trust in issue *in casu*. They averred that owing to the disagreements amongst the applicants and respondents the Trust cannot operate without assistance of third parties. The respondents took note of the issues raised by the applicants on the existence of the Executive Committee and other sub-committees and suggested that a long term solution should be put in place to ensure that the Trust operates effectively for the sake of all persons which the Trust was meant to serve.

The respondents suggested a restructuring of the Board of Trustees by infusing independent Trustees not related to the applicants and respondents. The effect of such infusion would be to dilute the influence of the applicants and respondents and avoid a deadlock. The respondents also averred that there had been attempts at mediation on a new structure of the Board of Trustees but that the applicants were no longer pursuing the option.

The applicants in the opposing affidavit to the counter application which opposition was very long and transcended issues not arising from the counter application which was only one and half pages, basically resisted the suggestion to increase the number of Trustees and submitted that

the solution lay in the removal of the Advisory Committee. The removal of the Advisory Committee per se would not in my view then bring normalcy to the broken relationship of the Trustees because if disagreements arose before its appointment, if it is removed, the disagreements will continue.

After considering the papers filed and counsels heads of argument and submissions, what is clear apart from the disagreements of the parties as Trustees is that, the Trust has largely been run informally without regard to the dictates of the provisions of the Trust Deed. The parties appear to accept this position as common place or cause. The Trust affairs have no record to evidence how the Trust has been run or at least none was produced or referred to despite the Trust Deed requiring that the Trust should be audited annually. The parties are not agreed on how the controversial Advisory Committee in question herein was appointed. The counter application suggests that the Trustees numbers be increased which amounts to asking the court to amend the Trust Deed.

It does not appear to me that the issues arising herein can be resolved on the papers. The parties appear to have been complicit as it suited them to operate outside the parameters of the Deed of Trust. The applicant then runs to court and picks upon an aspect of the management of the Trust and seeks the setting aside of the Executive Committee for unprocedural appointment. The respondents argue that the applicants should not blow hot and cold as the informality of carrying on the business of the Trust was entrenched.

The matter calls for a trial in my view so that the court may make an informed decision on both the main and counter application after hearing evidence to establish the status of the Trust administratively. It may well be that the court may consider a forensic audit of the Trust to be carried out before the court can holistically determine whether the reliefs sought both in the main and counter applications have been supported or established at trial.

I am mindful that none of the parties raised the issue of disputed facts which would require oral evidence for resolution. However the court has in terms of r 59(26)(b) of the High Court Rules 2021 a discretion to allow the calling of oral evidence in any application before it and where it does so, it will then give directions on how the matter shall proceed.

In the case of *National Director of Public Prosecutions* v *Zuma* (*Mbeki* & *Anor* intervening) 2009 (Z) SA 279 (SCA) the court stated at para 26:-

> "In general motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed and determined probabilities. It is well established under the Plascon – Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order."

In this application, the applicants must have foreseen that their application would be met with fierce opposition and that disputes of fact would arise. In the case of *Room Hire Co. (Pty)* v *Jeppe Mansions (Pty) Ltd* 1949 (3) 1155 (T) at 1162, the court stated:-

> "It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated infra) the court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly determined by calling *viva voce* evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly where the applicant should have realized when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the court to apply rule 9 to what is essentially the subject of an ordinary trial action."

In the case of *Tanganda Tea Company Limited* v *Darlington Matsitukwa* HH 365/23 MANGOTA J had to deal with an application which he had dismissed on the basis that the applicant ought to have foreseen material disputes of fact but nonetheless proceeded to file the application. The Supreme in setting aside the decision ordered that the matter be remitted to the court *a quo* to

"<u>determine at its own discretion</u>, whether to;

(a) dismiss the application with costs

(b) direct that oral evidence on the disputed facts be adduced before the court, or

(c) refer the matter to trial."

MANGOTA J reheard the application and referred the matter to trial. In this jurisdiction therefore, a referral to trial may be exercised in the discretion of the court without the parties

having applied for the referral. However as with any judicial discretion, it must be exercised judiciously taking into account all the circumstances of the case and the interests of justice and finality to a dispute.

I have deeply and carefully considered the disputes in this matter. The easiest option was to dismiss the application on the basis that the applicant must have known because of the deep rooted disagreements between the parties that disputes of fact would arise. This was the more obvious option because the Trust was run informally in many respects without proper minutes and resolutions being made and/or kept. In such a scenario, it was evident to any right thinking litigant that disputed facts would arise.

Against the easy option however, I further considered that this application when strictly analysed is not a personal one between the applicant and respondents. The parties herein are merely Trustees who owe a fiduciary duty to the Trust to properly manage it for the benefit of the beneficiaries. Thus *stricto sensu*, the harmed party is the Trust and its beneficiaries because of the disagreements and squabbles of the Trustees. To dismiss the application on account of the applicants ill-advised choice of bringing an application as opposed to an action would simply mean that the Trust and its beneficiaries is denied justice whilst the Trustees continue to conduct themselves outside of the provisions of the Trust Deed if such allegations are proved.

Under the circumstances, I considered that the discretion which best serves the interests of justice would be a referral of the application to trial. I therefore proceed to make this order:-

IT IS ORDERED THAT:-

1. Both the main and counter applications be determined at trial and they are referred to trial.
2. The applicants founding affidavit shall stand as summons and the notice of opposition as the appearance to defend.
3. The applicants shall file and serve their declaration within 10 days of release of this judgment by the Registrar.

4. The respondents counter application shall if persisted in be subject to amendment at the respondents election to take into account any allegations of fact in the declaration as the respondent may deem fit.
5. The counter application as may be amended shall be filed together with the respondents plea to the main application. Such plea being within the time allowed for doing so calculated from the date of service of the declaration.
6. Thereafter the further process in this matter shall be in terms of the High Court, Rules 2021.
7. Costs are in the cause.

Honey & Blankenberg, applicants' legal practitioners
Dube, Manikai & Hwacha, respondents' legal practitioners