

MUHAMMAD YAQUB MIRZA N.O.  
versus  
MOLVI MUSA MENK N.O.  
and  
MUJAHID KHALPEY N.O.  
and  
AFZAL KASSIM N.O.  
and  
IQBAL OMAR MOHAMED N.O.

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
HARARE, 28 July 2022 & 18 January 2023

### **Opposed Matter**

*T Chagonda*, for the applicant  
*T Kativhu*, for the 2<sup>nd</sup> to 4<sup>th</sup> respondents

**WAMAMBO J:** This is an opposed matter wherein applicant sought an order for the appointment of second and third respondents as trustees to Centennial Trust declared null and void and the payments of costs on a higher scale.

After hearing the parties I granted the order and rendered an *ex-tempore* judgment granting the order sought as subsequently amended.

The respondents have now requested for full reasons which follow hereunder.

The facts that are common cause or at least not seriously disputed are as follows:

A charitable trust was established under a Trust Deed. The trustee is named the Centennial Trust (hereafter called the Trust).

The trustees as per the Trust Deed are applicant, Abdullah Ismail Kassim, Suleman Kassim Girach and the fourth respondent.

The trust is described in the Trust Deed as an “unincorporated association” no profit making charitable body.

The objects of the trust are “charitable and/or educational purposes in Zimbabwe”.

Matters came to a head with the appointment of second, third and fourth respondents’ as trustees of the Trust.

Mr *Chagonda* for the applicant put forward the following argument:

The appointment of second, third and fourth respondent were not in accordance with the provisions contained in the Trust Deed.

The Trust Deed provides that there has to be a notice to trustees, of a meeting and a special resolution to be passed before new trustees are appointed.

Reference was made to clauses 14(c) as read together with clauses 10(f) of the Trust Deed.

Clause 10(f) of the Trust Deed reads as follows:

“(f) The continuing or surviving Trustees if less than three in number shall within three months appoint and if more than two may at any time and from time to time appoint by special resolution a replacement or additional trustee or trustees but subject to paragraphs 10(c) to 10(e) inclusive of this clause.”

Paragraphs 10(c) to (e) read as follows:

“(c) There shall at all times be no fewer than three and no more than nine Trustees of the Trust.

(d) A majority of Trustees at any time holding office as such shall be resident in Zimbabwe.

(e) For as long as there are not less than two trustees holding office as such following a resignation or death or variation of office or disability of a Trustee or his liability to act as such for any reason, then the Trustees may continue to act as such and exercise their powers hereunder notwithstanding that there may be deficiency in the number of trustees holding office as such and may do so for any period not exceeding three months pending a replacement being appointed in terms of this deed.”

Mr *Chagonda* argued that there was never a resolution passed for the appointment of second to fourth respondents.

The letters purporting to appoint the respondents as Trustees at pages 91 and 92 are not resolutions.

The fourth respondent however was never appointed a trustee.

To counter respondent’s averment that applicant has no direct and substantial interest in the matter applicant argues that he is a founding trustee. At the end of his oral submissions Mr *Changonda* applied for an amendment removing fourth respondent from the draft order. It was understandable as the record reflects that the respondent was never appointed a trustee.

Mr *Chagonda* also sought no order of costs against first and fourth respondents. He applied for costs on a higher scale, on the grounds that respondents have no information to defeat the claim by applicant and that their opposition is frivolous and vexatious and only caused the delay in the resolution of the matter.

Mr *Kativu* for the respondents argued firmly in favour of a dismissal of the application.

He argued that second and third respondents were properly and lawfully appointed trustees as per letters of appointment at p 91 and 92. The argument raised was that second and third respondent's appointment as trustees was above board.

He further argued that applicant has abdicated his responsibility and has not brought any evidence to challenge the proceedings that resulted in the appointments as per letters at pages 91 and 92. Mr *Kativu's* oral submissions were very brief. He chose instead to abide by his heads of argument.

The letters of appointment contained at pages 91 and 92 of the record, deserve special focus in the circumstances of this case. That is because these pages contain the appointment of the second and third respondents as trustees of the Trust.

At page 91 is the letter of appointment of second respondent. It is under cover of the Trust and reflects the physical address of the Trust as ICL House, 42 Sam Nujoma Street, Harare. It is addressed to Stanbic Bank, Parklane Branch, Harare and is dated 15 March 2017.

It reads on the pertinent portion as follows:

**“RE: LETTER OF APPOINTMENT OF A NEW TRUSTEE**

This letter serves to confirm that Mr Ahmed Lunat has stepped down and has been replaced by Mr Mujahid Khalpey. This change is with effect from 13 March 2017. He has also resumes the signatory duties (sic).

Yours faithfully

M. Menk

A.I. Kassim”

On the clear face of it the letter as regurgitated above is not a letter of appointment. It is a letter confirmatory of the appointment. It is a letter directed to a Bank apparently to confirm the appointee as having signatory powers. It does not follow the provisions in the Trust Deed for the appointment of a Trustee. It does not have a special resolution attached to it or evidence pointing to the same.

I find in the circumstances that there is no evidence of second respondent being appointed as a trustee in tandem with the Trust Deed. See clause 10(f) of the Trust Deed.

I am further strengthened in this regard by clauses 10(h) and (i) of the Deed.

Clause 10(h) of the Trust Deed provides as follows:

“The appointment of any replacement or new or additional trustees as provided in paragraph 10(f) shall be recorded in the Trustees Minute Book and signed by the new trustee or trustees who shall at the same time sign a copy of this Deed and who shall thereby accept his or her or their appointment as such upon all the terms of their Deed.”

Clause 10(h) above provides for the appointment of a trustee to be recorded in the Trustee Minute book and signed by the Trustee. Proof of such appointment as recorded in the Trustee Minute book and signed by the trustees would have added weight to the first respondent’s case. That this proof was not availed in the light of the claim that his appointment was not done according to the Trust Deed is telling to the prejudice to first respondent.

I move to the appointment of second respondent. The letter at p 92 of the record will be my next focus. It is a letter under the banner of the Trust with the address given as ICL House, Corner Samora Machel Avenue and Sam Nujoma Street. It is dated 10 November 2021. It is addressed to the Board of Trustees of the Trust and reads on the pertinent portion as follows:

**“REF: APPOINTMENT AS A TRUSTEE**

This letter serves to notify that Afzal Kassim I.D. No.....has been appointed to the office of Trustee with effect 01 November 2021.

The appointment comes under agreement of Trust and to the title of all the properties of the Trust, with all the powers and subject to all the restrictions upon the original Trustee with the same powers, rights and interests regarding the Trust property and subject to the same restrictions and duties as the original Trustee.

Yours faithfully

A.I Kassim  
Mr M. Khalpey (witness)  
S. Girach (witness)  
Mr M Menk (witness)

This letter of appointment at p 92 is a notification of the appointment of second respondent. There is no evidence or proof of a special resolution passed for the appointment as provided for in clause 10(f) of the Trust Deed.

There is no evidence of the appointment as per clause 10(b) of the Trust Deed. There is no extract from the Trustee Minute book reflecting second respondent’s appointment as a trustee reflecting his signature accepting the position.

I find no proof of the appointment of second respondent as a trustee of the Trust as envisaged by clause 10(f) of the Trust Deed.

A close reading of the record reflects that a number of supportive documents were filed by the respective parties in support of their cases. Without commenting on each of them suffice it to say applicant lays a basis of his concern as a trustee on the operations of the Trust.

It is noteworthy however, that amongst the documents referred to is a letter at p 45 from Atherstone & Cook addressed to DMH Commercial Law Chambers dated 6 April 2022. The letter seeks clarity on the appointment of second to fourth respondents' appointment as Trustees.

The said letter was in response to a letter penned by DMH Commercial Law Chambers dated 10 March 2022 appearing at p 43 of the record.

According to this letter at para 5 p 44 it is recorded as follows:

“5. We have on record the resolutions for the appointment of Messrs M. Khalpey and Afzal Kassim.”

Such resolutions were never tendered and do not form part of the record. It would be stretching it too far to say the documents appearing at pages 91 and 92 as previously discussed amount to special resolutions.

This particularly in light of the fact that clause 10(f) of the Trust Deed speaks to the appointment of a trustee through a special resolution.

I find in the circumstances that the appointment of second and third respondents fall foul of clause 10(f) of the Trust Deed.

I find therefore that the appointments fall to be declared null and void and that applicant's application has merit. On costs I find that respondents persisted with a hopeless opposition in the circumstances resulting in applicant being put out of pocket unnecessarily.

To that end the order granted is as follows:

**IT IS ORDERED THAT:**

1. The appointment of the second and third respondents as the trustees of the Centennial Trust be and is hereby declared null and void.

2. The second and third respondents shall pay applicant's costs on a legal practitioner and client scale.

*Atherstone & Cook*, applicant's legal practitioner

*Dube, Manikai & Hwacha*, second respondent's legal practitioners