

REPORTABLE (33)

(1) MUSA MENK (2) SHABIR AHMED MENK (3) ISMAIL
MUSA MENK
v
(1) IBRAHIM MUSA ASMAL MATERIA (2) RASHID AHMED
MATERIA (3) ZAKARIYYA MATERIA

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & ZIYAMBI AJA
HARARE: OCTOBER 2, 2017, & APRIL 4, 2019

T. Magwaliba, for the appellants

F. Girach, for the respondents

GUVAVA JA: This is an appeal against the entire judgment of the High Court of Zimbabwe sitting at Harare handed down on 16 November 2016 in which the following order was granted:

1. “That it be and is hereby declared that 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 (*sic*) Deed of Trust and is therefore an unlawful delegation of the powers of the trustees.
2. That it be and is hereby declared that any decisions and actions taken in the name of the executive committee of the Al Falaah Trust, which are inconsistent with the objectives of the Trust, from 14 November 2015 to date, are of no force or effect.
3. That all decisions relating to the operations and activities of the Mosque and Madrash must be taken by the Trustees at a properly convened meeting of the Trustees, or by a resolution signed by the Trustees, in terms of the Trust Deed.
4. That the first to third respondents be and are hereby interdicted from acting unilaterally in the name of the Trust, save where specific authority has been given in terms of the Trust Deed and by a resolution duly passed at a properly constituted meeting of the Trustees.
5. That all persons purporting to be members of the Executive Committee of Al Falaah Trust or such other persons who hold themselves out as agents or representatives of the respondents be interdicted from involving themselves out as managers of the Trust and from interfering with the activities of the Trust.

6. That respondents' pay the costs of suit the one paying the others to be absolved."

BACKGROUND FACTS

1. The appellants and respondents are trustees of a Trust known as Al Falaah Trust (hereinafter referred to as "the Trust"). The Notarial Deed of Trust establishing the Trust was registered on 29 January 2013. The Trust was established by an initial settler donation of US \$100 by Musa Menk (hereinafter referred to as "the first appellant") and Ibrahim Musa Asmail Materia (hereinafter referred to as "the first respondent"). The first appellant's sons Shabir Ahmed Menk and Ismail Musa Menk are the second and third appellant respectively. The first respondent's sons Rashid Ahmed Materia and Zakariyya Materia are the second and third respondents. They are all Trustees of the Trust.
2. The Trust was established for educational and charitable purposes as well as assisting in the operation and maintenance of places of worship and religious instruction of followers of the Islamic faith.
3. In terms of the Deed of Trust, the Trustees were given a wide range of powers which included, *inter alia*, the right to acquire movable and immovable property on behalf of the Trust. They acquired a Madrasah (Islamic Religious School) and a Mosque located in Belvedere, Harare. The Trustees also appointed an administrator and other staff for both places who included teachers and assistants, some of whom were paid a salary and others who were employed on a voluntary basis. Following the establishment of the Trust, personal differences began to set in among the Trustees.
4. According to the respondents the core of the dispute was centred on the establishment of an Executive Committee which was an initiative of the appellants. The Executive Committee and the appellants were alleged to have taken over various aspects of control, including the running of the Mosque and the Madrasah, without the approval and consent of the respondents as co-Trustees. According to the respondents this was an outright

violation of the Deed of Trust. As a result of this dispute, there was a split between the appellants' family and the respondents' family. It was alleged that a 'schism' had arisen between the trustees along family lines.

5. On 3 October 2015 a meeting was held. Only the first respondent represented his family (being the second and third respondents). In that meeting it was agreed that an Advisory Committee comprising of mosque congregants was to be established and operate temporarily for three months from 3 October 2015 – 3 January 2016. The primary purpose for which the Advisory Committee was established was to provide a mechanism to smoothen ongoing disagreements, differences or difficulties between the Trustees. This would in turn assist in the management of the Mosque, Madrasah and collection and disposal of tithes ('*Zakaat*'). The first respondent averred that neither him nor his sons, the second and third respondents, agreed to assign or relinquish any of their powers as trustees to the Advisory Committee.
6. On 28 October 2015, the second respondent received a message inviting all the respondents to attend a meeting of Trustees which was to be held on 1 November 2015. It is averred that the respondents sought a postponement as they could not attend, but the appellants proceeded with the meeting in their absence. The first respondent was then subsequently invited to a meeting in order to be updated on what had been agreed upon by the Advisory Committee and the appellants in that meeting. He was advised that the Advisory Committee which was initially intended to run for three months was now to run indefinitely. The first respondent protested against this development but to no avail.
7. Another meeting was held by the appellants and the Advisory Committee, again in the absence of the respondents who were later on advised on the decisions that had been made. The respondents were informed of yet another change. It was to the effect that the Advisory Committee would be dissolved and reconstituted as the Al Falaah Executive

Committee with power to exercise 'executive' functions for and on behalf of the Trust. The respondents were advised that several sub-committees would be established in finance and maintenance. A Mosque and Madrasah Sub-Committee to oversee staffing and manage duty prayer rosters was also put in place. These functions were previously held, managed and controlled exclusively by the Trustees. It is alleged by the respondents that all these meetings, which were conducted by the appellants in their absence, were *ad hoc*. No agenda was drawn up and no minutes taken. There were only registers to record attendance and very little prior warning with inflexibility on dates to accommodate him and his sons. The respondents argued that this was contrary to the terms of the Deed of Trust.

8. After the decision to establish the Al Falaah Executive Committee was conveyed to the respondents, the situation quickly deteriorated. Neither side recognized the other and simply did not appear for the meetings called by the other. After an exchange of letters, the appellants purported to dismiss the third respondent as a teacher from the school and the first respondent from his voluntary services at the Madrasah. A meeting of the Trustees was eventually held on 16 January 2016 wherein the respondents requested the dissolution of the Executive Committee. The request was denied.
9. In response to the application filed by the respondents in the court *a quo* the appellants conceded that a Deed of Trust was in existence which ought to be followed with regards to the governance and operation of the Trust. However, they contended that, since its inception, the Trust was much more informal in its undertakings and procedure. They further averred that since the establishment of the Executive Committee it had effected many changes to the Mosque, therefore it could not simply be disbanded without consideration to its financial contribution.

10. Having filed their response, the appellants went on to file a counter application, in which they averred that the Trustees had not been able to operate effectively. The Trust is said to have been hampered by differences along family lines and ceased to operate effectively without the assistance of other people. As such an Executive Committee and sub-Committees were put in place to assist the effective operation of the Trust. It was the appellants' contention that the Board of Trustees should be restructured to include members of the congregation who are not a part of the two families as that would help to overcome the problems currently be-devilling the trust.
11. The counter application was opposed by the respondents who averred that the operations of the Trust were hampered by the appellants' usurpation of all trustee powers. They further pointed out that all authority was now vested in the hands of the Executive Committee. In their answering affidavit the appellants agreed that the current state of affairs was untenable.
12. In the court *a quo* it was held that the provisions of the Trust Deed had not been complied with. It was common cause that the Executive Committee was created outside the provisions of the Deed of Trust. Therefore its actions could not have been lawful as the power was not legitimately acquired. With regards to increasing the number of trustees the court held that it had no power to vary the terms of the Deed of Trust by appointing additional trustees. It held that only the trustees could do that by a special resolution.
13. As a result, the court *a quo* decided in favour of the respondents in finding that the establishment and functioning of the Executive Committee was not in line with the deed of trust and therefore a nullity. The court *a quo* did not deal with the issue of *locus standi* raised by the appellants *a quo*.
14. Aggrieved by that determination, the appellants noted an appeal against the determination of the court *a quo* on the following grounds of appeal:

1. “The High Court erred in granting relief to the respondents who had no *locus standi* in their personal capacity to institute proceedings and were doing so on behalf of the Trust.
2. The High Court erred and misdirected itself in granting relief against members of the Executive Committee and unnamed agents of the appellants who were not parties to the proceedings and were therefore not before the court to defend themselves.
3. Having correctly found that the provisions of the Trust were not being followed by the parties, the court *a quo* erred in finding that the appointment of the Executive Committee of the Al Falaah Trust was invalid.
4. The High Court erred in upholding some decisions and actions of the Executive Committee of the Al Falaah Trust and invalidating others without identifying such decisions and in proceedings where the Al Falaah was not cited as a party.
5. The High Court erred and misdirected itself in granting declaratory relief on questions of fact and not issues of law.
6. The High court further erred in granting a final interdict where the respondents had not established a final right whilst having upheld some decisions
7. The High Court further erred in finding that it had no power at law to vary terms of the Trust Deed in favour of the interests of the Trust and its beneficiaries as prayed in the counter-claim.”

ISSUES FOR DETERMINATION

15. Although seven grounds of appeal were raised, the eighth having been abandoned, I am of the view that the appeal may be resolved on the first ground which is whether or not the court’s failure to deal with the point *in limine* raised by the appellants in the court *a quo* in relation to *locus standi* constitutes an irregularity.

It is my considered view that the issue of *locus standi* raised by the appellants in their first ground of appeal may dispose of the matter before the court. This is so because, in the event that the respondents do not have *locus standi*, that would be the end of the matter. In the event that the court finds otherwise then it will deal with the merits of the matter.

16. The appellants questioned the *locus standi* of the respondents in the court *a quo*. Their argument was based on the legal principle that, in actions involving trust affairs, only trustees acting in their official capacity and not personal capacity had *locus standi* to bring claims on behalf of the trust. The first respondent in his founding affidavit had stated that he, and his co-respondents, had approached the court in their personal

capacities. The judge *a quo* however, did not address the issue of *locus standi* raised by the appellants and went on to determine other issues.

17. This court in *P.G Industries Zimbabwe (Pvt) Ltd v Bvekerwa* SC 53/16 expressed the view that it was undesirable for a court to completely turn a blind eye on issues that are raised before it by litigants. GOWORA JA had the following to say at page 7 of the cyclostyled judgment:

“The preliminary point raised was such that the court could not dispose of any issue in relation to the matter without making a finding on the point. The court could not simply wish it away as a non-issue. It had to make a determination. In my view, the failure to deal with an issue raised is an irregularity that can serve to vitiate the proceedings.

The position is settled that where there is a dispute on a question, be it on a question of fact or point of law, there must be a judicial decision on the issue in dispute. The failure to resolve the dispute vitiates the order given at the end of the proceedings.”

The court *a quo* was presented with an issue which it ought to have determined but, for reasons which have not been disclosed in its judgment it omitted to deal with the issue.

This Court in *Gwaradzimba v C.J Petron & Company (Pvt) Ltd* SC 12/16 expressed the view at para 21 of the judgment that;

“In general,...in a case where a number of issues are raised, it is not always incumbent upon the court to deal with each and every issue raised in argument by the parties. It is also correct that a court may take the view that, in view of its finding on a particular issue, it may not be necessary to deal with the remaining issues raised. However this is subject to the rider that the issue that is determined in these circumstances must be one capable of finally disposing of the matter.”

18. In *casu*, the issues dealt with by the court *a quo* did not dispose of the matter. The question still remained whether the respondents had *locus standi* to institute proceedings on behalf of the trust in their personal capacities. This was not an issue the court *a quo* could ignore or wish away. The court was obliged to consider it and decide whether the application was properly brought before it. As per the *Gwarazimba case (supra)*, it was

improper for the court *a quo* to proceed to determine the substantive and other legal issues without first determining if the respondents had standing before the court. If the court, as it appears to have done, tacitly accepted that the respondents had *locus standi*, then the reasons for such tacit acceptance of their standing should have been given.

GARWE JA in the *Gwarazimba case (supra)* also reiterated

that;

“The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, “unless the issue so determined can put the whole matter to rest”- *Longman Zimbabwe (Pvt) Limited v Midzi & Ors 2008 (1) ZLR 198, 203 D (S)*.

The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial- *Kazingizi v Revesai Dzinoruma HH 106/2006, Muchapondwa v Madake & Ors 2006 (1) ZLR 196 D-G, 201 A (H); GMB v Muchero 2008 (1) ZLR 216, 221 C-D (S)*”

19. Consequently, the failure by the court *a quo* to determine the issue of *locus standi* vitiates the proceedings. The order granted pursuant to that failure constitutes a gross irregularity warranting interference by this Court. Resultantly, the order of the court *a quo* cannot stand as it is based on a nullity. It follows therefore that it must be set aside. The court *a quo* should have first determined the issue of *locus standi*.

DISPOSITION

During the hearing, this Court was urged to determine the issue of *locus standi* which was not dealt with by the court *a quo*. In my view, this was not proper as the failure by the court *a quo* to deal with this issue was a gross irregularity that would vitiate the proceedings. At page 161 of the record, the issue was clearly raised *a quo* but was not determined. It follows from the foregoing that the appeal must succeed.

Accordingly it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* under case number HH 706/15 dated 16 November 2016 be and is hereby set aside.
3. The matter is hereby remitted to the court *a quo* for a hearing *de novo*, including a determination on the issue of *locus standi*.

UCHENA JA : I agree

ZIYAMBI AJA : I agree

Honey and Blankenburg, Appellant's legal practitioners.

Dube Manikai and Hwacha, Respondent's legal Practitioners.