

HH 71-03
HC 2397/02
WOMEN & LAW IN SOUTHERN AFRICA
RESEARCH AND EDUCATION TRUST
and
ELIZABETH SHONGWE
and
DR THERESA MOYO
versus
DINAH MANDAZA
and
LAURA HARRISON
and
TRUST BANKING CORPORATION
and
STANDARD CHARTERED BANK OF ZIMBABWE
and
BARCLAYS BANK OF ZIMBABWE LIMITED
and
CENTURY BANK LIMITED
and
ZIMBABWE BANKING CORPORATION
and
OLD MUTUAL

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 15 and 30 April, 2003

Mr A Masterson for applicants

Mr P Nherere for 1st & 2nd respondents

SMITH J: The constitution of the 1st applicant (hereinafter referred to as "WLSA") was duly registered at the Deeds Office in 1993. It was amended in 1999. The 2nd applicant (hereinafter referred to as "Shongwe") is a trustee of WLSA and claims that she was appointed chairperson of the Board on 28 February 2003. She is a resident of Swaziland. The 3rd applicant (hereinafter referred to as "Moyo") was nominated as a trustee of WLSA in September 2002 and approved at the WLSA General Assembly on 28 February 2003. WLSA is a regional non-governmental organisation whose main object is to carry out research in Zambia, Malawi, Lesotho, Mozambique, Swaziland, Botswana and Zimbabwe with a view to uplifting the legal status of women in those countries. Since its inception it has conducted research in 3-year phases. Phase 1 was from 1989 to 1991, Phase 2 from 1992 to 1994, Phase 3 from 1995 to 1997 and Phase 4 from 1998 to 2000. From January 2001 to June 2002 the organisation was involved in executing the action required for getting Phase 5 off the ground. Phase 5 will be from 2002 to 2005. WLSA has its head office in Harare and has national offices in

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each member country. There is a National Co-ordinator based in each member country and a Regional Co-ordinator. WLSA sources financial assistance from donors. It has had immense support from the Danish Ministry of Foreign Affairs, also known as DANIDA.

The first respondent (hereinafter referred to as "Mandaza") was appointed as a trustee in 1993 and became chairperson of the Board. She has held the position of chairperson since then. The second respondent (hereinafter referred to as "Harrison") is the acting Regional Co-ordinator. The third to seventh respondents are commercial banks at which WLSA has accounts. Mandaza and Harrison are signatories for those accounts.

The applicants are seeking an order that Mandaza and Harrison cease forthwith to withdraw any money from the WLSA bank accounts in Zimbabwe and that the banks concerned suspend all banking transactions and revoke the signing powers of Mandaza and Harrison in respect of those accounts.

The dispute which has resulted in this application started when Mandaza and her Board appointed Harrison as acting Regional Co-ordinator, following the death of the incumbent of that post. The National Co-ordinators were not prepared to accept that appointment because they felt that one of their number should be promoted to the post. On 29 January, 2003 they advised Mandaza that they did not accept the appointment of Harrison and would not recognize her as the Regional Co-ordinator. Mandaza informed them that, as far as she was concerned, the Board had legally appointed Harrison and, if the National Co-ordinators refused to accept what the Board had done, then they would be regarded as having committed an act of misconduct. When the National Co-ordinators refused to retract, Mandaza wrote to each National Co-ordinator saying that she had been summarily dismissed by the Board because of wilful disobedience to a lawful order given by the Board.

On 30 January 2003 the National Co-ordinators and some programme officers and research associates wrote to Mandaza and five other trustees to remind them that their tenure of office had come to an end in or about April 2001 after Phase 4. They said that the request for the trustees to remain in office was specifically for the purpose of awaiting approval of DANIDA funding, approving the relocation of the WLSA Regional Office and participating in a donor round-table meeting in Lusaka on 31 October 2002. Those tasks had been successfully completed. Therefore the trustees should vacate their office forthwith so that new trustees could be nominated and appointed. Mandaza replied on 31 January, saying that at the Board Meeting on 2 March 2002 the National Co-ordinators, as Management, requested that certain trustees who were due to retire should remain in office until certain matters had been attended to, including the process of a proper hand over to the new trustees. Then at the Board meeting on 14 September 2002 the process of retirement was again discussed as it seemed that the National Offices had not addressed the issue of the process of appointment and handover as requested by the Board. Therefore the trustees concerned would not vacate their offices except in terms of the agreed position as stated in the minutes and as generally agreed. Consequently, they would

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disregard the WLSA staff's request for the trustees to vacate their office by 5 February 2003.

The members of staff responded to this letter by noting Mandaza's admission and acceptance that the term of office of herself and the other trustees had expired and pointing out that the other issues that needed to be done had been carried out. They also pointed out that Mandaza had been presented with farewell gifts from all WLSA countries on 14 September 2002. Mandaza replied saying that there was no admission or acceptance that her term of office and that of the other trustees had expired. She went on to say that WLSA management had requested that the trustees whose terms of office were due to expire should not vacate their office until certain matters were attended to. That request was accepted and adopted and recorded in the minutes. Therefore the particular trustees remain in office until the process of handover is duly effected as agreed at the Board meetings on 2 March and 14 September. Neither herself, as chairperson, nor any of the other trustees had been informed of the process of the appointment of the future trustees. Until there was a proper handover as agreed at the Board meetings, the trustees concerned remain in office.

The applicants claim that the crux of the dispute between the parties is the refusal by Mandaza and certain other trustees to accept that their term of office has expired. Mandaza denies that. She claims that it is the refusal on the part of management to accept the decision of the Board to appoint Harrison as acting Regional Co-ordinator that has led to the present dispute.

In my opinion the resolution of the dispute turns on one issue. Has Mandaza's term of office as trustee, and therefore as chairperson of the Board, terminated. She is a signatory to the various bank accounts of WLSA in her capacity as chairperson. If she is no longer chairperson, then she cannot remain a signatory.

The Trust Deed of WLSA that was adopted and registered in 1993 provided for the appointment of 8 trustees, 3 being representatives of Zimbabwe and one being from each of the other member countries. The country concerned nominates a person for appointment as trustee but the final appointment lies with the Board. There was

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no provision fixing the term of office of a trustee. There are other shortcomings in the Trust Deed. For instance there is no provision setting out how persons are nominated for appointment as trustee. In 1999 the Trust Deed was duly amended, clauses 1 to 11 thereof being deleted and 16 clauses being substituted. The new clause 5 provides as follows -

"5.1. A Trustee shall hold office for a period not exceeding one research phase of the Trust or the remaining period of any research phase for Trustees appointed during the course of a research phase.

5.2. Retiring Trustees shall be eligible for nomination to no more than one additional term of office."

The applicants contend that, as Mandaza had already served more than two research phases, her term of office expired at the end of 2000 and she was not nominated for a further term. Therefore she is no longer a trustee and, *ipso facto*, no longer chairperson of WLSA. Mandaza's contention is that laws apply prospectively and not retrospectively and therefore her term of office has not expired. She is still fully in office, together with the trustees who joined the Board on the same date that she did, which was in 1993. When the amendment to the Trust Deed was made in 1999 she was holding office in Phase 4, which ran from September 1999 to May 2001 and she was eligible to remain in office for an additional term, which is Phase 5, which runs from November 2002 to April 2005.

The original Trust Deed and the amendments that were made in 1999 clearly were not drafted by a skilled draftsman. Many eventualities are not catered for. For example, it is not stated how or by whom a person is nominated for appointment as a trustee. Clause 6.2 provides that when a vacancy occurs the country "unrepresented" on the Board shall forthwith nominate a candidate and the Board shall appoint such candidate to fill the vacancy. As Zimbabwe has 3 trustees, if one of them resigns or dies there are still 2 members representing Zimbabwe, so it will not be "unrepresented". There is no indication as to how the chairperson is appointed or elected. There is no provision for the removal of a trustee who commits a serious offence. Although the term "research phase" is not defined in the Trust Deed, there is no dispute between the parties as to what it means, although they differ as to when Phase 4 ended and Phase 5 began.

In her opposing affidavit Mandaza says that, at the request of management, the Board agreed

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to amend the Trust Deed to insert a provision fixing the tenure of office of trustees. Clearly management felt that no trustee should serve more than two consecutive terms of office, i.e. for more than two research phases. It was obviously felt by management, and the Board agreed, that when a trustee had served two terms, he or she should move on and allow new blood, with fresh ideas, to come onto the Board. If that was the feeling amongst management and the trustees, it would be completely unreasonable to find that the intention was that serving trustees would be exempt from that provision. Mandaza and her fellow trustees who were appointed in 1993 had been in office for 4 research phases when the amendment to the Trust Deed was made in 1999. If it was felt by all that a trustee should serve a maximum of 2 research phases, why would it be alright that existing trustees, who had already served 4 research phases, should be eligible to stand and serve for a fifth research phase? It would appear that earlier this year Mandaza shared the view of management that she would not be eligible to serve a fifth term. In her letter to the Regional Co-ordinator she said that she was entitled to stay on because management had asked her and the other trustees to stay on until certain formalities had been completed and new trustees appointed and the Board had accepted that proposal by management.

In Kellaways Principles of Legal Interpretation at para 40 on p 177 the learned author states -

"In the courts of Britain and South Africa it has often been said that if the 'intention' of the legislature is clearly expressed there is no need for any rules of construction, and that principles of interpretation are intended...as aids to resolving any doubts as to the Legislature's true intention.

However Lord Watson said ,

"The intention of the Legislature is a common, but slippery phrase, which popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it ... What the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication".

Then at p 178 the learned author concluded -

"To conclude, when construing a statute it is a court's duty to so interpret it as to give effect to what the legislature had in mind in order to realise the purpose of the amendment".

The intention of those who were responsible for the amendment of the Trust Deed, and that includes the trustees, was to introduce the principles that no trustee should serve more than two consecutive terms of office. That was the main reason why the Trust Deed was amended. Obviously it was felt that a regular introduction of new trustees with fresh ideas was necessary for the well-being

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of WLSA. To give clause 5 of the Trust Deed the interpretation suggested by Mandaza would lead to an absurdity. It would result in the interpretation that trustees could not serve more than 2 consecutive terms but the trustees in office in 1999 could serve 5 consecutive terms.

Even if Mandaza were correct in her contention that she was eligible to serve a fifth term, that does not mean that she is still a trustee. Clause 5.1 of the Trust Deed fixes the term of office of a trustee as one research phase. At the end of the research phase the trustee's term of office comes to an end. That means that the trustee must vacate his or her office unless he or she is nominated for a second term and the Board then appoints him or her as trustee. Shongwe, in her founding affidavit, alleges that Mandaza's term of office expired at the end of 2000 and that she was not nominated for a further term. In her opposing affidavit Mandaza does not assert that at the end of Phase 4 she was nominated for another term and that the Board thereafter appointed her as a trustee for the Phase 5 term. She seems to have assumed that, by virtue of clause 5 of the Trust Deed she was entitled to continue in office for a subsequent term.

Mr Nhereretook the point, *in limine*, that WLSA, being a trust, is not a corporate body and therefore cannot appear as a party. That contention is legally sound. In *Commissioner for Inland Revenue v MacNeillie's Estate* 1961(3) SA 833 (A) at 840 F-H STEYN CJ said -

"Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a *persona* or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our Courts have recognised it as such a *persona* or entity. The Estate Duty Act, like the Income Tax Act, 31 of 1941, does not define 'person'. The statutory definition in sec. 2 (x) of the Interpretation Act, 33 of 1957, does not mention a trust or any category of persons which would include a trust. It is trite law that the assets and liabilities in a trust vest in the trustee. The introduction of another *persona* consisting of those assets and liabilities for the purposes of the imposition and collection of a tax, when there is a trustee ready to hand, would be an extraordinary measure which would call for some adjustment, the nature of which is by no means obvious, and of which there is no trace in the Act, between the legal position of such a *persona* and that of the trustee".

The views expressed above were cited with approval in *Crundall Bros (Pvt) Ltd v Lazarus*

N.O. & Anor 1990(1) ZLR 290 (H) at 298 E where it was said -

"I can see no reason why a trust should be regarded as a 'person' for the purposes of the Regulations, when it is not regarded as a 'person' for other purposes".

That statement of the law was confirmed by the Supreme Court in *Crundall Bros (Pvt) Ltd v Lazarus*

N.O. & Anor 1991(2) ZLR 125(S) where at 128 F it was said -

"A trust is not a person. The trustee is the person to be considered for the purposes of the Regulations"

It is interesting, however, to note that when Mandaza instituted an action seeking to interdict Shongwe from holding herself out as chairperson of WLSA (case No HC 2053/03) the action was brought in the name of WLSA. Mandaza deposed to the founding affidavit, but the applicant was cited as WLSA. It seems strange that she was prepared to institute an action in the name of WLSA and yet, when Shongwe instituted this action in the name of WLSA, she claims that it is legally improper to do so.

It is tragic that WLSA is being brought to its knees, if not being killed off, because the trustees

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and management, who should hold the welfare of WLSA at heart, cannot resolve their problems amicably and must resort to the Courts to settle their differences. Because of the dispute and the course it has taken, DANIDA has frozen all funding to WLSA. It has requested WLSA to solve the management crisis and to take immediate steps to sort out the allegations of financial misconduct. As it has serious doubts as to the management of the organisation and who carries the financial responsibility, it has requested that funds from the regional account are not to be released unless authorised in writing by DANIDA. As I say, it is most unfortunate that the trustees have allowed the dispute to degenerate as it has. One wonders why the trustees are so determined to cling to office when they themselves approved the amendment to the Trust Deed which introduced the principle that a trustee should not serve more than 2 consecutive terms of office. They have served 4 terms and insist on serving a fifth, even if it means that WLSA is destroyed and the good work that it has done comes to an ignominious end.

For the reasons set out above, Shongwe and Moyo are entitled to the provisional order sought. The effect of that order will be that the bank accounts concerned will be frozen until new signatories are appointed. Mr *Masters* said that it may well be necessary to pay salaries or make other payments in the interim. It was agreed that the parties would discuss the matter and try to find a solution to the problem. I said that if a consent paper was produced, I would be prepared to issue the order required. That position will still pertain, notwithstanding the issue of the provisional order.

A provisional order in terms of the draft is issued.

Coghlan, Welsh & Guest, legal practitioners for applicants

Honey & Blanckenberg, legal practitioners for 1st & 2nd respondents