

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
MANZUNZU J
HARARE, 14 June & 27 June 2019

Court Application: Points In Limine

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

MANZUNZU J: This is a hearing *de novo* as directed by the Supreme Court in its appeal judgment of 4 April 2019 in SC 36/19.

It is a court application in which the applicants seek an order in the following terms:-

“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 compliance 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 of 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 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 other 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 opposing the application the respondents have also counterclaimed seeking relief in the following terms:

“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 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 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 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.”

The application was initially heard by my sister CHIGUMBA J who delivered a judgment on 16 November 2016. Dissatisfied with the judgment, the respondents appealed to the Supreme Court.

On 4 April 2019 the Supreme Court handed down its judgment with the following order:

“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*.”

It is on this basis that the matter was placed before me for hearing *de novo*. I allowed Counsels to address me on the points in *limine* raised by the respondents. The two points in *limine* are:

- (a) Whether or not the applicants have *Locus standi* to bring this application.

(b) Whether or not there are material disputes of fact in this application.

This judgment relates to the preliminary points which I will now deal with in turn:

Locus Standi of the applicants:

Advocate *Magwaliba* who appeared for the respondents argued at length saying the applicants have no *locus standi*. He relied on the authority of the case of *CIR v McNeillie's Estate* 1961 (3) SA 840 which held that the actions involving trust affairs must be brought by the trustee in his official capacity.

He went further to demonstrate why he said the applicants sued in their personal capacities. He referred to the draft order (cited supra) which in its entirety shows that the relief sought is not one attaching to the applicants but beneficial to the Trust. He further said the applicants were acting for the benefit of the Trust and yet they were not the only trustees. Paragraph 2.1 of the founding affidavit by the first applicant was relied upon. It reads in part;

“I make this affidavit in my personal capacity having direct interest in my assertion of rights and to the outcome of the relief that I, second and third applicants, as Trustees of the Al Falaah Trust – seek.”

This was meant to demonstrate that applicants were seeking relief in their personal capacity but the relief relates to the affairs of the Trust. It was also further argued that the respondents were cited in their personal capacities for the actions they took as trustees. The founding affidavit cites the respondents, “in his personal capacity as an interested party to this application and by reason that he is a Trustee of the AL Falaah Trust.”

Advocate *Magwaliba* further demonstrated the alleged lack of *locus standi* by reference to clause 8 (g) on powers of the Trust on the Notarial Deed of Trust which states that:

“The Trust shall have the following powers:

To sue or be sued and to appear by proper representation under the name of the Trust in any court of law or before any Tribunal of any kind in any place and to join in and bind itself to any submissions to arbitration under the laws of Zimbabwe.”

This, he argued, shows that the affairs of the Trust cannot be vindicated by individuals in their personal capacity.

Further reference was made to clause 9 of the Deed of Trust on the exercise of objects and powers of the Trust, which provides;

“EXERCISE OF OBJECTS AND POWERS OF THE TRUST

9 (a) The Trustees undertake and agree that they will and they shall carry out the objects of the Trust in such manner and to such extent as they shall see fit, but subject always to the provisions of this deed.”

This was used as emphasis that applicants had no legal standing in their personal capacities to litigate for the benefit of the Trust.

Clause 9 (b) of the Deed of Trust was also relied on to demonstrate the need for all Trustees to jointly sue. The clause reads:

“9 (b) All the powers of the Trust shall be exercised on behalf of and in the name of the Trust by the Trustees, in such manner and to such extent as the Trustees shall decide; but subject to the provisions of this deed.”

He closed his submissions on this point with emphasis that the relief was for the benefit of the Trust and not the applicants in their personal capacity.

Advocate *Girach* had of course to respond to the submissions taking a totally different view. In his submissions in general, he urged the Court to see through the intentions of the respondents in their effort to delay finality to this matter. He said the whole purpose of the respondents raising points *in limine* is to achieve delay. This explains why, he argued, the issue of *locus standi* seats in the heads when it should adequately been raised in the opposing affidavits. He referred the Court to paragraph 2:1 of the founding affidavit by first applicant, which I quoted earlier on in this judgment, but I see no harm in reciting the same. It reads:

“I make this affidavit in my personal capacity having direct interest in my assertion of rights and to the outcome of the relief that I, second and third applicants, as Trustees of the Al Falaah Trust – seek.”

A reading of this statement by applicants, to me, means that applicants are suing in their personal capacity and derive such personal interest by virtue of them being trustees. The bottom line is that they are suing in their personal capacity.

Further, reference was made by Advocate *Girach* to para 2:1 of the opposing affidavit of first respondent which stated that paragraphs 2 to 14 of the first applicant’s founding affidavit were admitted. Paragraph 2 of the first applicant’s founding affidavit deals with description of parties. It was argued that such an admission meant the applicants had *locus standi* otherwise respondent ought to have raised this point at that juncture. To then challenge *locus standi* of the applicants in heads amounts to a withdrawal of an admission which cannot be allowed at law. This was an admission made and cannot be withdrawn procedurally, it was argued.

Advocate *Magwaliba* on this point was quick to say the admission by the respondents was an admission on the facts as stated by the applicants. In other words, he was saying the respondents are saying, yes we admit as you stated that you are suing respondents in your personal capacities. I agree with Advocate *Magwaliba*'s reasoning on this point. The admission cannot be construed to mean an admission on a point of law that the applicants had *locus standi*.

Paragraph 2 of the second and third applicants' supporting affidavits was also relied on and the relevant part reads;"...and I make this affidavit in my personal capacity and as a Trustee of the Al Falaah Trust....." The attack on this was that such a claim was not done with the blessing of all the trustees who should have been cited as applicants.

The second leg of Advocate *Girach*'s argument was that no law says one cannot sue in his personal capacity. He gave examples of a political party member who challenges a decision not taken in line with the Constitution of that organisation. I did not find the example to be on all fours with the present scenario where we are dealing with trustees. By illustration, he said applicants were suing the respondents by saying "you respondents, you have done something which only us the trustees could do." It was said the complaint was not against the respondents as trustees but the Menks. Be that as it may, the issue remains the applicants seek relief not for their personal benefit but for the benefit of the Trust.

Advocate *Girach* could not easily accept defeat on this point. He pushed his argument further to a third level. He said the complaint is against the respondents not as trustees. This is because the issue of *locus standi* affects the ability to sue not to be sued.

It was further argued that the relief sought was declaratory and for such relief applicants must be cited as trustees because of their substantial interest in the matter. Further, that there was no need to cite the Trust as a party.

The evidence on paper is clear that the applicants brought this application in their personal capacity but seeking a relief for the benefit of the Trust. Such an action can only be brought by trustees. The applicants have no *locus standi* to remedy the affairs of the Trust in their personal capacity. This point *in limine* must succeed.

Material disputes of fact:

The applicants alleged that there are material disputes of fact which cannot be resolved on paper.

Material disputes of fact were defined in *Supa Plant Investments (Pvt) Ltd v Edgar Chadavaenzi*, HH 92/09 where at p 4 of the cyclostyled judgment MAKARAU JP (as she then was) states that;

“A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

It must be noted that the 6 trustees are members of the 2 families the Materias and the Menks. Their dispute has taken family lines. There is hostility between the two families. Each family has claimed superiority over the other by laying blame on the other family. We have a situation where each family says they were right and the other family is to blame. Advocate *Magwaliba* said the material disputes of fact surrounds the formation and functions of the advisory Committee, the executive committee and other subcommittees which fall thereunder. Furthermore, he argued that the applicants in their heads conceded to the existence of the material disputes of fact. He drew the court’s attention to para 4 of the applicants’ written heads which says;

“It is immediately accepted if this Honourable Court considers it necessary to resolve any of the disputes as to the events that have occurred since October 2015, those disputes cannot be resolved on the papers and would have to be stood over for a trial. However, it is submitted that the relief sought by the Applicants has to be granted notwithstanding those disputes, and the relief sought in the counter-claim cannot be given as that relief claimed is outside the powers of this Honourable Court.”

Advocate *Girach* said he would stand by the heads. He expressed a strong view that the court could only decide whether or not material disputes of fact exist after the court has heard the merits of the matter. I do not think that is the proper route to take. The court is already aware of the contention between the parties through their evidence on paper. Written heads have already been filed in support of the parties’ positions. The court can easily make a determination on the papers filed of record. The applicants’ supplementary heads para 15 reads;

“Once again it is difficult to determine from the Heads of Argument what facts relevant to the relief being sought are put in issue by the Respondents. There are undoubtedly ‘areas of contention’, but they do not relate to the existence of the trust deed, the fact that the six parties hereto are the appointed trustees, that an executive committee has been created and that there is a divergence of view as to rights concerning such an executive committee arising out of the trust deed. What transpired between the parties is of little or any relevance to the real issues between the parties.”

Faced with concession by the applicants, advocate *Girach* said material disputes of fact exist after October 2015 after the formation of the executive committee but the relief sought could nevertheless be granted as it relates to the period prior to that. I have difficulty in accepting this line of argument. It is a splitting of hair type of argument.

The truth of the matter is that there are material disputes of fact in this application which are acknowledged by the applicants themselves. What then is the consequence of an application marred with material disputes of fact.

Advocate *Magwaliba* said the application must be dismissed with costs. He relied on the authority of *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 H 221 where ROBINSON J (as he then was) dismissed the application instead of referring the matter to trial as a way of discouraging applicants who chose the application procedure in the circumstances they knew or ought to know the existence of real and substantial disputes of facts in the matter. I did not hear Advocate *Girach* interpret the reasoning in that judgment differently.

For the above stated reasons, the points *in limine* must succeed.

Accordingly, it is ordered that:

- (a) The points *in limine* succeed.
- (b) The application is hereby dismissed with costs.

Honey and Blanckenberg, applicants' legal practitioners
Dube, Manikai & Hwacha, respondent's legal practitioners