

**REPORTABLE (43)**

(1) MUJAHID KHALPEY N.O. (2) AFZAL KASSIM N.O.  
v  
(1) MUHAMMAD YAQUB MIRZA N.O (2) MOLVI MUSA  
MENK (3) IQBAL OMAR MOHAMED N.O.

**SUPREME COURT OF ZIMBABWE  
MAKONI JA, CHIWESHE JA & MUSAKWA JA  
HARARE: 28 MARCH 2023 & 14 MAY 2024**

*T. Magwaliba*, for the appellants.

*T. Chagonda*, for the first respondent

**CHIWESHE JA:** This is an appeal against the judgment of the High Court (the court *a quo*) sitting at Harare, handed down on 28 July 2022, declaring that the appointment of the appellants as Trustees of the Centennial Trust was null and void. The court *a quo* also ordered that the appellants pay costs of suit on the legal practitioner and client scale.

**BACKGROUND FACTS**

The appellants were appointed as Trustees of the Centennial Trust (the Trust) on 13 March 2017. The first and the second respondents are also Trustees of that Trust. The first respondent approached the court *a quo* armed with an application for an order declaring that the appointment of the appellants as Trustees was unlawful and contrary to the provisions of the Trust Deed and thus null and void.

In his founding affidavit *a quo* the first respondent averred as follows:

The Trust was formed on 13 May 1998 as a charitable and educational organisation. Its goals were the relief of poverty and sickness, the advancement of education and the improvement of health amongst the people of Zimbabwe. The founding Trustees were Abdullah Ismail Kassim, Suleman Kassim Girarch, Molvi Musa Menk (the second respondent) and Mohammed Yakub Mirza (the first respondent). Suleman Kassim Girarch had since left the country and for that reason had ceased to be involved in the activities of the Trust. The remaining Trustees were chaired by Abdullah Ismail Kassim.

The first respondent states that despite being a Trustee, he had not, in the last two years, received any notice of a meeting of the Trustees nor had he, during that period, been privy to the financial records of the Trust. On 3 November 2021, he wrote to the Chair of the Trust requesting an update of the activities of the Trust, minutes of the meetings and financial statements for the previous two years. He also requested a list of the Trustees and their contact details. Despite a follow up letter by his legal practitioners, he did not receive any response from the Chair. In view of the urgency of the matter, he wrote to the Chair advising that if the requested information was not availed, he would exercise his right in terms of the Trust Deed to call for a meeting of the Trustees. It was then that he received a letter from the Chair, dated 4 February 2022, advising that the schedule of meetings for the year had been finalised and that financial statements would be tabled at the scheduled meetings. On his part, he requested that past financial statements be provided outside of a meeting. These were, however, never provided.

According to the schedule, the first meeting was to be held on 22 February 2022. That meeting was not convened. As a result, the first respondent requested the Chair, who was a friend of his, to step down as Chair and Trustee because he was failing to discharge his duties.

He had subsequently learnt that the failure by the Chair to discharge his duties was due to his ailing health. The first respondent then instructed his legal practitioners to engage the Chair's legal practitioners with a proposal that the Chair resigns but that he retains his position as a Trustee. To his surprise, he was advised by letter dated 10 March 2022, that meetings had been held regularly and that the appellants had been appointed Trustees. He avers that he had not been aware of these developments as he had never been notified of such meetings as required in terms of the provisions of the Trust Deed. In addition, he had not been called upon to vote for the appointment of these additional Trustees. He was also surprised that Dube, Manikai & Hwacha Legal Practitioners were representing the Trust as no resolution to appoint them as such had been passed by the Trustees. He had thus requested, by letter dated 6 April 2022, to be furnished with documentation, including financial statements and records of meetings allegedly convened and the resolution to appoint the additional Trustees. He was not furnished with that information. It later came to his attention that the Chair had passed away on 11 May 2022.

The first respondent asserted that in terms of the Trust Deed, the appointment of an additional Trustee must be done by way of a special resolution passed by two thirds majority of the Trustees. Since Mr Girarch had ceased to be a Trustee, the existing Trustees prior to the appointment of the appellants would have been the late Chair, Abdullah Kassim, Molvi Musa Menk (the second respondent) and the first respondent himself, Muhammed Yaqub Mirza. For the appointment of the appellants to take place, two requirements should have been met in terms of the Trust Deed. These are that a notice to convene a meeting ought to have been circulated to all the Trustees and that a special resolution ought to have been passed at such meeting appointing the appellants as additional Trustees.

The first respondent was adamant that he was never notified of any such meeting nor was he ever called upon to vote for or against the appointment of the appellants. He had enquired from the second respondent who had advised him that he too was never invited to vote for the appointment of the appellants. The first respondent's averments were in the main corroborated by the second respondent, Molvi Musa Menk, who filed a supporting affidavit. It was for these reasons that the first respondent contended that the appointment of the appellants, in the absence of a special resolution supported by a two thirds majority of the Trustees, was contrary to the provisions of the Trust Deed and, accordingly, null and void.

In his opposing affidavit, the first appellant stated that he was a Trustee of the Trust, having been so appointed on 13 March 2017. He averred that the third respondent was not a trustee and should not have been sued as such. He is only an administrator of the Trust. He contended that for that misjoinder, the application ought to be struck off the roll. He also raised another point *in limine*, namely that the first respondent was resident in a foreign country and that his founding affidavit had not been properly notarised in terms of r 85 (2) of the Rules of the court *a quo*. The founding affidavit was therefore defective and the application should be struck off the roll.

On the merits, the first appellant's averments were to the following effect. Contrary to assertions by the first and the second respondents, meetings of the Trustees were held regularly in terms of the Trust Deed. For example, meetings were held on 27 September 2017, 28 November 2018 and 6 November 2019. He attached minutes of the respective meetings as annexures to his opposing affidavit. He also stated that there were numerous other meetings held over the period 2017 to 2019. He also attached minutes of those meetings. He further stated that the trustees were unable to hold meetings in 2020 owing to the provisions of the

Public Health (Covid-19 Prevention, Containment and Treatment) Regulations, 2020 (S.I. 77 of 2020) that prohibited any gathering of people whatsoever. He averred that it was not true that the first respondent was not put on notice of these meetings. For example, by letter dated 10 March 2022, (which the first appellant attached to his founding affidavit) the first respondent was notified of the current state of the Trust. He further makes reference to clause 10 (d) of the Trust Deed which provides that the majority of the trustees shall be resident in Zimbabwe. He averred that since the first respondent had left the country, his position as a Trustee should be nullified on that basis. He also stated that the requirements for a “*declaratur*” had not been met as the first respondent was unable to show that he had a direct and substantial interest in the matter as he was no longer a Trustee. On that score, he contended that the application *a quo* ought to be dismissed.

In any event, contended the first appellant, the first respondent, having relinquished his position as a Trustee, could not challenge the appointments in question as he was no longer privy to the proceedings of the Trust. He thus no longer had capacity to institute the present proceedings. The first appellant asserted that the appointments in question were properly made as evidenced by the letters of appointment attached as annexures to his opposing affidavit.

The first appellant prayed for costs on the higher scale, alleging that the application before the court *a quo* was frivolous. The second appellant filed a supporting affidavit associating himself with the first appellant’s affidavit and adopting it in all its terms as if he had specifically deposed to it himself. The third respondent similarly bound himself in his supporting affidavit.

**SUBMISSIONS BEFORE THE COURT A QUO**

In his heads of argument before the court *a quo* the first respondent submitted that the point *in limine* regarding the alleged misjoinder of the third respondent be dismissed on the grounds that it was the first appellant's legal practitioners who had communicated to him that the third respondent was a Trustee and not a mere administrator of the Trust. For that reason, the third respondent was cited as such. Accordingly, the first appellant, having indicated the position of the third respondent as such, could not now turn around and lodge an objection to the joinder of the third respondent. In any case, such alleged misjoinder could not disentitle him to the relief sought, in view of r 32 (11) of the High Court Rules, 2021 which provides that no cause or matter shall be defeated by reason of the misjoinder or joinder of any party. The court may determine the questions in dispute in so far as they affect the rights of the persons who are parties to the matter before it.

As regards the validity of his founding affidavit, he contended that same had been properly notarized and lodged in terms of r 85 (2) (a) of the Rules of the court *a quo*, which reads:

“Any documents executed in any place outside Zimbabwe shall be deemed sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is duly authenticated at such foreign place by the signature and seal of office-

(a) of a notary public, Mayor or person holding judicial office.”

Having complied with that rule, the first respondent submitted that the point *in limine* raised by the appellants be dismissed.

On his part the first respondent raised a point *in limine* to the effect that the second appellant and the third respondent had not filed valid opposition to the application. He contended that the mere filing of supporting affidavits by these parties was not sufficient to

constitute a valid defence. He argued that the second appellant and the third respondent ought to have filed opposing papers in their own right. For that reason, he submitted that as no valid opposition existed, the relief sought against these parties be granted unopposed.

On the merits, the first respondent submitted that the appellants had failed to establish that the provisions of the Trust Deed were complied with in the calling of the meetings and in the appointment of the additional trustees. He argued that in terms of clause 12 of the Trust Deed, he was as a Trustee, entitled to receive notice of every meeting of the Trustees. He specifically averred that he had not received any such notices. He concluded by submitting that any meetings held without such notices were held outside the provisions of the Trust Deed.

On their part the appellants' heads of arguments were to the following effect. They persisted with the point *in limine* regarding the citation of the third respondent who they said was not a Trustee but an administrator of the Trust. They submitted that his citation was improper and a material misjoinder and that he should be removed as a party in this matter. They also persisted that the first respondent's founding affidavit had not been properly authenticated and was therefore invalid. In the absence of a valid founding affidavit, the first respondent's case falls away as it is trite that an application stands or falls on its founding affidavit.

On the merits the appellants submitted that the first respondent had not met the requirements of the grant of declaratory relief as his status as a Trustee was questionable in view of his continuing absence from Zimbabwe and his unavailability at meetings of the Trust over an extended period.

The appellants also raised the issue of prescription arguing that the first appellant was appointed a Trustee in 2017 and that in terms of the Prescription Act, the cause of action had prescribed.

The appellants submitted that the allegations that they are not Trustees is a matter of disputed fact which cannot be resolved on the papers without hearing evidence. Further, it was also submitted that the first respondent had not filed an answering affidavit to rebut the appellants' assertions as per their opposing papers. Reliance was placed on the case of *Fawcett Security Operations v Director of Customs and Excise* 1993 (2) ZLR 121 (S) where this Court held that it was trite that what is not denied in an answering affidavit is taken to having been admitted. It should be concluded therefore, argued the appellants, that the first respondent does not dispute the appellants' averments in respect of the point *in limine* raised to the effect that the requirements for a declaratory order had not been met and the prayer by the appellants that the application be dismissed for lack of merit.

The appellants prayed for costs on the punitive scale arguing that they had unnecessarily been put out of pocket defending a frivolous application.

### **DECISION OF THE COURT A QUO**

The court *a quo* initially rendered an *ex-tempore* judgment granting the application for the declaratur as requested by the respondents. In the face of the present appeal the court *a quo* has provided written reasons for that decision.

In its judgment the court *a quo* noted that in terms of clause 10 of the Trust Deed there has to be a notice to trustees of a meeting at which a special resolution must be passed



before the appointment of new trustees. It found as a matter of fact that no such special resolution appointing the appellants as trustees had been produced. It ruled that the letters produced by the appellants as proof of appointment were not special resolutions as required by the provisions of the Trust Deed. The letters merely advised the addressees that the appellants had been appointed. No special resolution(s) had been attached to the letters confirming such appointments. For these reasons the court *a quo* concluded that there was no evidence of the appellants being appointed as Trustees in tandem with the Trust Deed. It was further fortified in that view by the non-production by the appellants of the Trustees' Minute Book where all new appointments are to be recorded in terms of clause 10 (h) of the Trust Deed and the signatures of such new appointees being appended to indicate their acceptance of the appointments.

It was for these reasons that the court *a quo* granted the application before it and, by consent of the parties, removed the third respondent from the papers, it being common cause that the third respondent had not been appointed to the office of a Trustee.

The first respondent had sought costs on the higher scale. The court *a quo* so ordered indicating that such costs were warranted because the appellants had persisted with a hopeless opposition thereby putting the respondents unnecessarily out of pocket.

In the result, the court *a quo* made the following order:

- “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 applicants costs on a legal practitioner and client scale.”

It is that order of the court *a quo* which is the subject of this appeal on the following grounds:

### **GROUND OF APPEAL**

1. The court *a quo* erred in fact and in law and misdirected itself in finding that first and second appellants were never appointed as Trustees as per the Deed of Trust in circumstances where the evidence presented showed that there was substantial compliance with conditions in the Deed of Trust.
2. Alternatively, and in any event, the court *a quo* erred in not finding that there were material disputes of fact on the question of the appointment process of Trustees which could not be resolved on the papers without the leading of evidence.
3. The court *a quo* erred in fact and in law and misdirected itself in ordering punitive costs when there was no basis for the court *a quo* to adopt punitive costs in circumstances where the appellants did not appoint themselves as Trustees and there were good grounds to defend their appointment.

The appellants seek the following relief.

#### “RELIEF SOUGHT

1. That the instant appeal succeeds with costs.
2. That the order of the court *a quo* be set aside and substituted with the following:
  1. The application is dismissed with costs.”

### **THE ISSUES**

The grounds of appeal raise three issues, namely:

- (1) Whether or not the appellants were properly appointed as Trustees in terms of the Deed of Trust of the Centennial Trust.

- (2) Whether or not there were material disputes of fact which could not be resolved on the papers without leading evidence *viva voce*.
- (3) Whether or not the appellants should have been mulcted with an order of costs on the legal practitioner and client scale.

### **SUBMISSIONS BEFORE THIS COURT**

Mr *Magwaliba*, for the appellants, submitted that the court *a quo* erred when it failed to take a purposive approach in interpreting the Trust Deed. In this regard he referred the court to the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (2) ALL SA 262.

He submitted that the court *a quo* had a duty to ensure that a Trust does not fail for want of trustees. For this proposition reliance was placed on the case of *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA)

He further submitted that there was evidence to show that the appellants were *de facto* trustees. For that reason, there was substantial compliance with the provisions of the Trust Deed.

He also submitted that the evidence shows that the appellants had been appointed as trustees and had acted in a *bona fide* manner in the execution of their duties.

Mr *Magwaliba* further submitted that there was no suggestion before the court *a quo* that there was fraud in their appointment. He submitted that an accidental omission to comply with the provisions of the Trust Deed was not fatal.

On the issue of costs, he submitted that these ought to have been borne by the Trust as the appellants had been sued in their official capacities.

Mr *Chagonda*, for the first respondent, submitted that the fact that the appellants acted in a *bona fide* manner was irrelevant. The real issue before the court *a quo* was whether the appellants had been properly appointed in terms of the Trust Deed. He further submitted that as no special resolution was attached proving their appointment, the court *a quo* could not be faulted for holding that there was no evidence to support the appellants' case.

Mr *Chagonda* further submitted that the question of the purposive interpretation of the Trust Deed was never argued before the court *a quo*. As for costs he submitted that punitive costs were justified as the appellants had falsely claimed that they were in possession of the special resolution appointing them as trustees.

## **ANALYSIS**

### **VALIDITY OF APPOINTMENT**

The fate of this matter hinges on the interpretation of the provision of the Trust Deed pertaining to the appointment of trustees. In order to succeed, the appellants must show that the appointment procedures were complied with. These procedures are provided for under clause 10 of the Trust Deed. Paragraph (a) of that clause names and appoints the founding trustees as Muhammad Yaqub Mirza (the first respondent), Abdullah Ismail Kassim, Suleman Kassim Girarch and Molvi Musa Menk (the second respondent). Paragraph (c) provides that there shall at all times be no fewer than three and no more than nine trustees of the Trust. Paragraph (d) provides that a majority of trustees at any time holding office as such shall be residents of Zimbabwe.

Paragraph (e) of clause 10 of the Trust Deed reads:

“(e) for as long as there are not less than two trustees holding office as such following a resignation or death or vacation of office or disability of a Trustee or his inability 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.”

The appellants, not being among the founding trustees, could only have been appointed as a result of a vacancy arising in terms of para (e) above and in the manner prescribed under para (f) below:

“(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 paras 10 (c) to 10 (e) inclusive of this clause.

Paragraph (g) of clause 10 provides that the Trustees may by special resolution remove any Trustee from office.

More importantly, paragraph (h) requires that:

“The appointment of any replacement or new or additional trustee as provided in para 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 their appointment as such upon all the terms of this Deed.”

It is common cause that the appellants did not produce any resolution of the Trustees appointing them as replacement or additional trustees of the Centennial Trust. They only produced letters advising of their appointments. We agree with the court *a quo* that such letters do not constitute the resolution required to be passed by Trustees in terms of para 10 (f) of the Trust Deed. In simple terms, there is no evidence to substantiate the claim by the appellants that they were properly appointed as trustees in accordance with the provisions of the Trust Deed.

The appellants have argued that on the basis of the letters they produced, there was substantial compliance with the relevant provisions of the Trust. We disagree because the language of the appointment procedures is clear, unambiguous, specific and peremptory. There has to be a duly convened meeting of the Trustees at which a proposed appointment is tabled. The matter must then be put to the vote. A vote in favour of the candidate must result in the Trustees passing a special resolution appointing him or her as a trustee. There cannot be substantial compliance outside that process.

We are fortified in that view by the fact that the appellants have not provided minutes of any meeting at which the trustees agreed to appoint them as such but omitted to pass the required special resolution. Paragraph 10 (h) provides that the appointment of any replacement, additional or new trustee shall be recorded in the Trustees Minute Book and signed by the new trustee. At the same time the new trustee is required to sign a copy of the Trust Deed thereby accepting his or her appointment. No such minutes or signatures of acceptance have been produced. Further, there is no merit in the submissions by the appellants that there was no format in which the special resolution should have been presented. Paragraph 14 (c) of the Trust Deed provides:

“(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 two thirds majority of Trustees for the time being holding office as such.”

The submission by the appellants, in their heads of argument, that the matter was riddled with material disputes of fact incapable of resolution on the papers has no merit. The dispute was whether the appointment of the appellants was in accordance with the provisions of the Trust Deed. All that was required was for the appellants to show their credentials proving such appointment. They did not do so. The matter ends there. No material

dispute of fact of the magnitude referred to by the appellants arises, let alone one that could not be resolved on the papers. See *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH 92/09. In his oral submissions Mr *Magwaliba* did not motivate this ground of appeal, namely, whether the application before the court *a quo* was riddled with material disputes of fact which could not be resolved on the papers without hearing *viva voce* evidence. For that reason, the court assumes that this ground of appeal was abandoned, and, in our view, properly so.

We conclude, therefore, that the court *a quo* made a finding of fact that there was no special resolution or any other evidence confirming the appellants' appointment as Trustees. It granted the application on that basis. That decision, in the circumstances, cannot be irrational let alone grossly so.

The general rule on whether or not an appeal court should interfere with the decision of the lower court was expressed in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 C-D where the court pronounced as follows:

“The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion.”

### **ISSUE OF COSTS**

Mr *Magwaliba* submitted that as the appellants were sued in their official capacities as trustees, the court *a quo* erred in making an order for costs against the appellants personally. He submits that costs should be paid by the Trust itself. We disagree with that submission for the reason that the Trust *per se* was not before the court *a quo* nor is it before us.

As to whether such costs should be at the legal practitioner and client scale, it is important to reiterate that the question of costs is always at the discretion of the trial court, in this case the court *a quo*.

The correct approach in determining whether costs should be granted on the punitive higher scale is discussed by the learned authors Herbstein and Van Winsen in their work. “*The Civil Practice of the High Courts of South Africa*”, Fifth Edition, volume 2 where it is stated at pp 971 to 972 as follows:

“An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavor and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint such party may have.

The grounds upon which the court may order a party to pay an opponent’s attorney-and-client costs include the following: that the party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious, or frivolous motives; or committed grave misconduct either in the transaction under inquiry or in the conduct of the case. The court’s discretion ..... is not however restricted to cases of dishonesty, improper or fraudulent conduct: it includes all cases in which special circumstances or considerations justify the granting of such an order. No exhaustive list exists.”

In *casu* the court *a quo*’s reason for awarding punitive costs was that the appellants had persisted with a hopeless defence when they well knew that no special resolutions were at hand to prove their appointment in terms of the Trust Deed and had, for that reason, put the respondents unnecessarily out of pocket.

In exercising its discretion in that way, the court *a quo* failed to address its mind to the following important principle, namely, that punitive costs should only be awarded under exceptional circumstances and within the framework discussed above. In *casu* we agree with Mr *Magwaliba* that there was no evidence of fraud on the part of the appellants or any other misconduct to warrant such order for punitive costs. On the contrary, the appellants were of the *bona fide* belief that they had been properly appointed as trustees. They had acted as such



for a considerable period of time without question. To all intents and purposes, the appellants were, at the very least, *de facto* trustees. The blame, if any, should fall on those persons who appointed them without following the procedures laid down in the Trust Deed.

In our view therefore, the court *a quo* did not properly apply its mind to the question before it, namely, whether punitive costs were warranted, in the circumstances of this case. It misdirected itself in a material way by concluding that the appellants' defence to the application was frivolous and deliberately so and by not recognizing that such costs are only appropriate in exceptional circumstances. For these reasons we are of the view that the order for costs on the higher scale be set aside and substituted with an order for costs on the ordinary scale.

### **DISPOSITION**

We are satisfied on the evidence put before the court *a quo* that the appellants failed to show, on a balance of probabilities, that they were properly appointed as trustees of Centennial Trust. No special resolution to that effect was produced nor were the appellants able to provide evidence that such resolution had been passed at any meeting of the trustees nor did they provide any evidence of their acceptance of such appointment through their signatures as required under clause 10 (h) of the Trust Deed. It is thus our view that on the merits, the appeal cannot succeed.

However, we are of the view that the court *a quo* grossly misdirected itself in awarding costs against the appellants on the legal practitioner and client scale.

The general rule is that costs shall follow the cause. Where an appeal succeeds only in part a court may depart from this rule. In the instant case it is our view that each party should meet its own costs.

Accordingly, we order as follows:

1. The appeal succeeds in part with each party meeting its own costs.
2. Paragraph (1) of the order of the court *a quo* be and is hereby upheld.
3. Paragraph (2) of the order of the court *a quo* be and is hereby set aside and, in its place, substituted the following:

“(2) The second and third respondents shall pay the applicants’ costs of suit on the ordinary scale.”

**MAKONI JA** : I agree

**MUSAKWA JA** : I agree

*Dube Manikai & Hwacha*, appellant’s legal practitioners

*Atherstone & Cook*, 1<sup>st</sup> respondent’s legal practitioners