

SOUTH AFRICA / JUDGMENT

Hoosen NO and Others v Deedat and Others (336/97) [1999] ZASCA 49; [1999] 4 All SA 139 (A) (16 July 1999)

[1999] ZASCA 49

COURT

Supreme Court of Appeal

BEFORE

Mahomed, Smalberger, Olivier, Streicher, Melunsky

CASE / FILE NUMBER

336/97

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REPORTABLE

Case No: 336/97

IN THE SUPREME COURT OF APPEAL OF

SOUTH AFRICA In the matter between: NAUSHAD HOUSEEN N.O. 1ST APPELLANT YUSUF ALLY N.O. 2ND APPELLANT MAHOMED KHAN N.O. 3RD APPELLANT and YASMIN DEEDAT 1ST RESPONDENT YOUSUF AHMED DEEDAT 2ND RESPONDENT AHMED HOUSEEN DEEDAT 3RD RESPONDENT BRAHIM JADWAT N.O. 4TH RESPONDENT

CORAM: MAHOMED CJ, SMALBERGER, OLIVIER, STREICHER JJA and MELUNSKY AJA

DATE OF HEARING: 17 MAY 1999

DELIVERY DATE: 16 JULY 1999

Religious Trust - Purported delegation of Trustee's powers and duties - Legally impermissible on proper interpretation of Trust Deed

JUDGMENT

... SMALBERGER JA

SMALBERGER JA: [1] The Islamic Propagation Centre International ("the Trust") was formed by a Notarial Deed of Trust ("the Trust Deed") in April 1985 and duly registered with the Master of the Supreme Court ("the Master") on 19 June 1985. The third respondent was a co-founder and one of the original trustees of the Trust, a position he has continued to occupy since. The Trust Deed initially provided for five trustees; in August 1986 the number was increased to seven. The Trust

owns very substantial assets including four valuable income - producing properties.[2] Regrettably the affairs of the Trust have not always run smoothly. Factionalism within the ranks of the trustees has led to deteriorating relationships between them. This has inevitably been prejudicial to the proper management of the Trust. It has resulted in deadlock and frequent litigation between individual trustees or groups of trustees. [3] On 4 May 1996 the third respondent unfortunately suffered a stroke leaving him paralysed from the neck down and unable to speak. For present purposes it may be accepted that notwithstanding his physical disability he remains of sound mind and is able to communicate in a fashion through a computer aided communication system. However, his disability precludes him from attending meetings of the trustees and performing his related duties as a trustee. This effectively led to a shift in the balance of power within the ranks of the feuding trustees. To remedy this the third respondent, on 10 March 1997, granted a Special Power of Attorney (“the Power of Attorney”) to his daughter-in-law, the first respondent, to represent him at meetings of the Trust.[4] This gave rise to an application in the Durban and Coast Local Division by the appellants (as applicants) to have, inter alia, the Power of Attorney “declared to be null and void and of no legal force and effect” and to interdict the first respondent from acting “as a trustee of the [Trust] as the agent of . . . the third respondent.”[5] When the application was launched the trustees of the Trust were the three appellants and the second, third and fourth respondents. The position of the seventh trustee was vacant. The appointment of the third appellant as trustee has since been set aside (see *Deedat and Another v The Master and Others* 1998(1) SA 544 (N)). An application by the Master for the removal of the remaining trustees is currently being heard in the Durban and Coast Local Division.[6] The history of the course taken by the application appears from the judgment of the court a quo (Magid J) which is reported as *Hoosen NO and Others v Deedat and Others* [1997] 3 ALL SA 32 (D) and need not be repeated.[7] The issue which ultimately fell to be decided was whether the third respondent was entitled in law to delegate his duties qua trustee in terms of the Power of Attorney. The learned judge found for the respondents, holding that the Power of Attorney did not constitute an invalid delegation of the third respondent’s functions. He further awarded costs against the appellants *de bonis propriis*. He subsequently granted leave to appeal to this Court. The issue referred to is the sole issue on appeal.[8] In terms of the Power of Attorney the third respondent purported to appoint the first respondent

“to act on my behalf and in my name and place for the express purposes of voting on my behalf in all meetings of the ISLAMIC PROPAGATION CENTRE INTERNATIONAL TRUST as the said YASMIN DEEDAT may deem fit so long as it does not militate against the aims, objects and conditions as contained in the Constitution of the ISLAMIC PROPAGATION CENTRE INTERNATIONAL TRUST, that I am a founder member of.”

- [9] The Power of Attorney proceeds: “MRS YASMIN DEEDAT is also empowered to sign all documents on my behalf and to do all the necessary and to give effect to any decision that may be taken by the Trustees of the ISLAMIC PROPAGATION CENTRE INTERNATIONAL and generally to do all such things to give effect to the aforesaid wherever and whenever necessary.

And generally for effecting the purposes aforesaid, to do or cause to be done, whatsoever shall be requisite, as fully and effectually, to all intents and purposes, as I might or could do if personally present and acting therein; hereby ratifying, allowing and confirming, and promising and agreeing to ratify, allow and confirm all and whatsoever my said Agent shall lawfully do or cause to be done by virtue of these presents.”

[10] The provisions of the power of Attorney must be interpreted objectively in order to determine their precise ambit and legal effect. It is legally irrelevant that the third respondent may not have contemplated the first respondent exercising an independent discretion, and may have intended no more than that she be a mere conduit for his wishes. [11] The Power of Attorney empowers the first respondent to vote at meetings of the Trust as she “may deem fit”. On a proper construction, this entitles her to exercise an independent judgment and form her own view in relation to matters arising at the meetings. She is not legally obliged to ascertain the wishes of the third respondent or to give effect to his directions, whatever she may consider her moral obligation to be in that regard. Where voting at a meeting calls for the exercise of a discretion it falls to her to exercise such discretion, thereby supplanting the function of the third respondent in that respect. This renders her position akin to that of a duly elected trustee, which she is not.[12] Moreover, any decision to which the first respondent may come, as reflected in the way she votes, would not be subject to control or correction by the third respondent, even though he may have to assume responsibility for it. This is because he has, in terms of the Power of Attorney, ratified her actions in advance, or at least bound himself to ratify them. While he could revoke the Power of Attorney, he could not undo what had already been done.[13] The qualification in the Power of Attorney that the first respondent may vote as she deems fit “so long as it does not militate against the aims, objects and conditions as contained in the Constitution of the [Trust]” is mere surplusage and takes the matter no further. It places no limitation on her voting powers as compared to those of the third respondent. It merely makes her subject to the same constraints that applied to him. It does not detract from the fact that she may, when voting, operate as effectively and independently as any duly and properly appointed trustee.[14] To sum up, the Power of Attorney, properly construed, seeks to transfer to the first respondent the third respondent’s rights and duties, and concomitant powers, arising from attendance and voting at meetings of the Trust. This amounts to a delegation to the first respondent of the third respondent’s judgment and discretion in relation to the decision making process of the Trust. It constitutes at least a temporary abdication of the third respondent’s functions in favour of a non-trustee. The question arises whether that is a legally permissible delegation. [15] The Trust, as the name implies, is a religious trust established to further the aims of Islam. Clause 2 of the Trust provides that the objects of the Trust shall be

“2.1. to create a fund primarily to promote charitable and religious activities of the Islamic Faith;

2.2. To propagate the Islamic faith to Muslims and non-Muslims primarily through the offices of the [Trust] . . .”

The latter object is to be achieved (in terms of clause 2.2.1 - 8) by means, inter alia, of public lectures, the distribution of the Holy Quran and various other ways of promoting Islam. The use of the word “primarily” in clause 2.2 indicates that the propagation of the faith of Islam may go beyond the matters listed in clause 2.2.1 - 8. Any such extension would call for consideration by the trustees and the exercise of the necessary judgment and discretion on their part.[16] Clause 3 deals with the powers of the trustees in relation to the general administration of the Trust. These include

“3.4 To manage and control the Trust or other institutions established or acquired by the Trust and to appoint, and at their discretion remove, or suspend managers, secretaries, clerks, agents and servants for permanent, temporary or special services, as they from time to time think fit, and to invest them with such powers (including power to sub-delegate) as they may think expedient . . .

and

3.6 Generally to do all such other things and carry out all such undertakings as may be expedient to further the interest of the Trust or which may be incidental or conducive to the attainment of the aforesaid objects.”

[17] Clause 4 provides that

“All the business and affairs of the Trust shall be managed and controlled by the Trustees, who shall have full power to carry out the objects of the Trust as hereinbefore provided”

[18] In terms of clause 5 (as amended) the Board of Trustees shall consist of not more than seven (previously five) Muslim members, all of whom shall hold office for life. The first five trustees were the co-founders of the Trust. The relevant portion (for present purposes) of clause 7 reads:

“On the death, resignation or removal from office of any of the Trustees and as often as a vacancy shall occur, the remaining Trustees shall as soon as conveniently possible elect another Trustee, a two-thirds majority decision shall be considered sufficient for such election”

[19] Clause 9 provides that any major decision of the Trust has to be ratified by at least two-thirds of the Trustees then holding office; clause 10 exempts the Trustees from the filing of any security with the Master; clause 15 makes provision for the annual balance sheet to be signed by the auditor “and by such of the Trustees as shall be delegated to that end from time to time.”[20] Further relevant provisions are to be found in clauses 21 and 22. They provide:

“21. The Trust shall be a body of perpetual succession and the Trustees or their successors shall neither have the right nor the power to terminate the Trust

. . . .

22. Any matter [for] which no provision has been included in this Deed of Trust shall be decided upon by the Trustees and such decision shall be binding and effective as if it were a clause in this Deed of Trust.”
- [21] A trustee in the narrow or strict sense (the kind with which we are dealing) is not an agent. (As to the main points of distinction between them see Honore’s South African Law of Trusts: 4th Ed, pp 57/8.) He, unlike an agent, does not derive his powers from a principal to whom he is responsible. As he does not exercise derivative powers the maxim *delegatus delegare non potest*, initially relied upon by the appellants’ counsel, cannot assist the appellants.[22] As the authority of the trustees derives from the terms of the Trust Deed its provisions have to be considered in order to determine whether it expressly or impliedly authorises delegation by an individual trustee of his powers and functions. [23] It is apparent from a consideration of the Trust Deed that no express provision is made for the delegation by any individual trustee of any of his rights, duties or powers. The Trust Deed only provides for collective action by the trustees. Control and management of the Trust vests in the trustees jointly (clauses 3 and 4). Where specific provision is made for the delegation of functions (see clauses 3.4 and 15), such delegation is made by the trustees acting in concert (or at least a majority of them). The Trust Deed makes no provision for the exercise of any powers or functions by individual trustees unless authorised thereto by the body of trustees. This is in keeping with the general principle that where the administration of a trust is vested in co-trustees they must execute their duties in their joint capacity.[24] It is also noteworthy that where provision is made for delegation in the Trust Deed, such delegation relates to matters that are by and large purely administrative. The delegation does not relate to areas where the exercise of a discretion is called for by the trustees in carrying out their duties of management and control. This accords with the principle that the fundamental decisions relating to a trust need to be taken by the trustees; the implementation of such decisions may be delegated to others, although ultimate responsibility remains with the trustees (cf *Erlank’s Trustee v Allan* [1909] TS 303 at 306). [25] In the absence of express authorisation in the Trust Deed permitting an individual trustee to delegate his functions in the manner sought to be done by the third respondent in terms of the Power of Attorney, is there scope for an implied authorisation to that effect? In my view not.[26] The essentially collective nature of the trustees’ duties and the general prohibition against the delegation of a fundamental discretionary power would militate against any such implied authorisation. Nor is a power to delegate necessary for the proper exercise of an individual trustee’s rights and duties under the Trust. In considering the issue one may also, by analogy, draw usefully from an established principle in the law of agency, while not losing sight of the essential differences between a trustee and an agent. That principle states that where the identity and personal attributes or skills of the performer of an act are of material importance, delegation is not permitted (*Strydom v Roodewal Management Committee and Another* 1958 (1) SA 272 (O) at 273G; *Pothier’s Treatise on the Contract of Mandate*: par 99; *Kerr: The Law of Agency*: 3rd Ed, p 237).[27] The Trust was established in the interests of the Muslim community in order to propagate and promote the Islamic faith. The trustees would have to

be people imbued with the spirit of Islam who could be relied upon to give effect to the objects of the Trust. Those objects are of such a nature as to require the exercise of personal judgment and discretion in relation to policy decisions of one kind or another. The wide powers accorded the trustees point to the founders of the Trust reposing faith in their values, judgment and discretion. The personal attributes of the trustees would inevitably have played a significant if not conclusive role in their selection. Those same attributes would also be of concern to, and have an influence on, potential donors of the Trust.[28] The importance of the personal attributes and skills of the trustees is underscored by the fact that the co-founders of the Trust appointed themselves joint trustees of the Trust for life. The self-perpetuating nature of the Trust enables the trustees, on the death or resignation of one of their members, to appoint to the vacancy (also for life) someone with similar values (cultural and spiritual) as their own and someone whose judgment and abilities are respected by them. Thus the person of the trustee assumes importance in the overall design and functioning of the Trust; and a person elected as trustee must have the support of at least two thirds of the remaining trustees. I accordingly conclude, contrary to what was held by the judge a quo, that the trustees are people selected for their personal attributes. Applying the principle referred to in paragraph [26] above precludes, in my view, any suggestion of implied authorisation.[29] I am thus of the view that the delegation by the third respondent of his powers and duties to the first respondent in terms of the Power of Attorney was legally impermissible as it was neither expressly nor impliedly authorised by the Trust Deed. I do not consider it necessary to deal with the reasoning of the judge a quo in arriving at a different conclusion.[30] It follows that the appellants were entitled to an order in the terms sought. Originally what was sought was a rule nisi. It is common cause that at this stage the appellants, if successful, would be entitled to a final order. [31] There remains the question of costs. In their application the appellants sought costs against the first and second respondents (in the case of the latter, *de bonis propriis*). In dismissing their application the court a quo granted costs against the appellants *de bonis propriis*. That order will now fall away, and what is to be decided is the appropriate order as to costs both in the court below and on appeal.[32] Significantly, no order for costs has ever been sought against the third respondent, yet it is his conduct in giving the first respondent a power of attorney that has led to the present litigation. It is perfectly understandable that the third respondent, as a founder of the Trust

- and by all accounts the guiding spirit behind the Trust - should, despite his manifest incapacity, wish to remain a trustee and maintain an interest in the Trust's affairs. The reason why no costs' order was sought from the third respondent may well have been that the validity of the course he took was linked to a proper interpretation of the Trust Deed.[33] A number of disputed factual issues arose on the papers. These have remained unresolved. The real issue, both in the court below and on appeal, concerned the legal validity of the Power of Attorney. This in turn involved the interpretation of the Trust Deed.[34] The appellants were entitled to challenge the Power of Attorney and have done so successfully. There exists no sound basis for depriving them of their costs. The question is, who is to pay

them?[35] I see no reason why first and second respondents should have distanced themselves from the proceedings. Second respondent was entitled initially to answer the factual allegations made against him. When the only remaining issue related to the validity of the Power of Attorney, he was entitled to be heard as trustee insofar as an interpretation of the Trust Deed was called for. In addition he was entitled to oppose the costs' order sought against him personally.[36] The first respondent, as matters turned out, could have abided the decision of the court (although she too had a costs' order sought against her). But she obviously (and understandably) feels a certain loyalty towards the third respondent, and her appearances in person on appeal and in the court below could not materially have contributed towards the costs.[37] In all the circumstances I am of the view that as an interpretation of the Trust Deed was reasonably called for it would be appropriate, in the proper exercise of our discretion, to order that the costs of the proceedings both in this court and below be borne by the Trust. This must not be seen as a licence to the trustees to continue feuding. They should be warned that the costs of any future litigation between them, in the light of what has occurred in the past, are likely to have to be borne by them personally, and conceivably on a punitive scale. The following order is made:

- 1) The appeal succeeds.
- 2) The order of the court a quo is set aside and there is substituted in its stead the following:
"1. The Special Power of Attorney purportedly executed by the Third Respondent in favour of the First Respondent on 10 March 1997 is declared to be of no legal force and effect.
2. The First Respondent is interdicted from acting in terms of the aforesaid Special Power of Attorney."
- 3) The costs of all parties in respect of both the application in the court a quo and on appeal to this court are to be borne by the Islamic Propagation Centre International.

_____J W SMALBERGER

JUDGE OF APPEAL

Mahomed CJ)Concur

Olivier JA)Streicher JA)Melunsky AJA)

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