IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between

SHEIK ABDULLAH ABDEROEF ..... First Appellant
(First Defendant a quo)

and

SHEIK KARZEAM ABDEROEF ..... Second Appellant
(Second Defendant a quo)

and

THE BOARD OF TRUSTEES OF THE CLAREMONT MAIN ROAD MOSQUE CONGREGATION
..... Respondent
(Plaintiff a quo)

Coram: Muller, Kotzé, Diemont JJA. et
Viljoen, Trengove AJJA.

Heard: 11 September 1978.

Delivered: 14 November 1978.

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J U D G M E N T

VILJOEN AJA. :-

This is an appeal against the following order made

by / ....

by WATERMEYER, J. in the Court a quo :-

" IT IS ORDERED

1. That judgment is granted for the Plaintiff on the Claim in Convention; and

   (a) That Defendants are ordered to hand over the keys and control of the mosque and dwelling to the Plaintiff.

   (b) That First and Second Defendants are ordered to pay Plaintiff's costs of suit, including the costs of two Counsel.

2. That the Claim in Reconvention is dismissed with costs. First and Second Defendants (Plaintiff's in Reconvention) are to pay the costs of Plaintiff (Defendant in Reconvention), such costs to include the costs of two Counsel."

For the sake of convenience I shall hereinafter refer to the appellants as the defendants and where occasion demands, as the plaintiffs in reconvention, and to the respondent as the plaintiff or the defendant in

reconvention.

The mosque referred to in the order appealed against is the Claremont Main Road Mosque. The history of this mosque, including the history relating to previous litigation concerning this mosque, as well as the issues in the present matter, were set out by the learned Judge as follows :-

> "On 3rd November 1854 one Slamdien appeared before the Registrar of Deeds, Cape Town, and executed a Deed of Transfer in which he declared that for divers good causes and considerations he had donated to the Malay Community at Claremont in the Cape a certain piece of land with a Mosque thereon and:
>
> > 'consequently did by these presents cede and transfer in full and free property to Imaum Abdol Roef Malay Priest, or his successors in office, of the Mosque in Buitengracht Cape Town, in trust for the Malay Community of Claremont in the Cape Division, certain piece of land with a Mosque thereon situate at Claremont .....'
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> The Deed goes on to provide that:
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> > 'by virtue of these presents, the said Imaum Abdol Roef, Malay Priest, or his successors in office, of the Mosque situate in Buitengracht, Cape Town, in trust for the Malay Community at Claremont now is, and henceforth shall be, entitled thereto .....

> Appeared likewise the said Imaum Abdol Roef, Malay Priest of the Mosque situate in Buitengracht, Cape Town, who on behalf of the Malay Community at Claremont and in trust as aforesaid declared gratefully to accept of the aforesaid Donation or Gift of the property assigned and transferred over by these presents .....'

I have quoted the wording of the relevant portions of the Title Deed in full because, as will appear later, there is a dispute as to who is the successor in office to the aforesaid Imaum Abdol Roef under the Deed.

It is not clear from the evidence exactly when Abdol Roef died but it appears from one of the documents handed in, (R.S.C.4), that he must have died prior to 6th November 1895. Before his death he appointed one of his sons, Abdullah, a priest at the Mosque in Claremont, and in 1907 Abdullah in turn appointed his three sons, Aboo Bakkir, Mohammed Amie and Abdol Roef (who was apparently also known as Roef Abdullah) to be priests of the Claremont Mosque to take office upon his death (see R.S.C. 10). Abdol Roef (Roef Abdullah) was the last survivor of the three sons and he officiated as Priest until his death in or about 1964. First Defendant testified that Abdol Roef (Roef Abdullah) had appointed him to succeed him as priest at Claremont and that he continued to act as such until, in circumstances which I shall detail later, he resigned as priest in March 1972.

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An 'Imaum' is the official in a Mohammedan mosque who recites the prayers and leads the devotions. He also officiates at baptisms, marriage ceremonies, funerals and the like. There has for some time been attached to the Mosque at Claremont a dwelling which is occupied by the Imaum in charge of the mosque. Second Defendant says it was built by his grandfather, Abdullah. At the time the present proceedings commenced First Defendant was living in the dwelling, but he has since taken up residence in Lansdowne.

It appears that at about the time of the death of Abdol Roef (Roef Abdullah) trouble started brewing within the Community. Although the cause of the trouble was not clearly established on the evidence it would appear that it was to some extent due to the effect of the Group Areas Act as a result of which many members of the Community started moving out of Claremont. Possibly it was feared in some quarters that the Mosque might become redundant and be sold and the proceeds claimed by persons not entitled thereto. Second Defendant testified that certain of the descendants of the original donor, Slamdien, has laid claim thereto, and he and his brother, First Defendant, claimed that in that event the proceeds should come to their family. But however that might be, that is not the position yet. The

mosque is still being used as a mosque.

The dispute as to the ownership of the Mosque was taken to the Moslem Judicial Council, a body which was established in about 1945 consisting of Sheiks, persons versed in Islamic Law and Imaums of mosques, with jurisdiction over the Cape Province, and it gave a certain ruling with which the Second Defendant disagreed and which, according to the witness Najaar, led to Second Defendant's dismissal as a member of the Moslem Judicial Council.

At that time one Amien Bassadien was the Imaum officiating at the Mosque in Buitengracht Street and in 1965 he commenced action against First Defendant in this Court in which he, as the then Imaum of the Buitengracht Street Mosque, alleged that he was the trustee of the Claremont Mosque under the 1854 Deed of Transfer and, as owner of the property, claimed the ejectment of First Defendant from the Mosque and dwelling. First Defendant filed a plea in which he claimed to be the trustee as the successor to Abdol Roef. He alleged that he was therefore the owner of, and entitled to occupy, the property.

In an attempt to get the matter decided expeditiously the parties agreed, in terms of Rule of Court 33 (1), to state a case for the adjudication of the Court. The matter came before me and after hearing argument I ruled that Bassadien was the trustee, and not First Defendant. There is no need for me to

repeat my reasons for that ruling as they are set out in a written judgment given by me on 14th February 1967. The further hearing of the action was by consent referred to trial.

The next stage in the history is that Senior Counsel were called in on both sides and an effort was made to settle the dispute. The Malay Community of Claremont was up till then an indeterminate body of individuals who worshipped at the Mosque, with no Constitution, Office Bearers or Treasurer, and it was no doubt considered desirable that an attempt should be made to put the Community on a proper footing and to provide a means of collecting funds for the maintenance of the building and the like. To resolve the dispute concerning the ownership and right of occupation of the property Bassadien was prepared to resign as Trustee and the First Defendant was to be allowed to continue as Imaum and as such to occupy the dwelling. A Constitution for the Community was drawn up providing for the election of a Board of Governors, consisting of a President, Vice-President, Treasurer, Assistant Treasurer, Secretary, Assistant Secretary and 9 additional members, to administer the affairs of the Congregation. It also provided for a Board of Trustees, consisting of the President, Vice-President and the Imaum, for the time being, to stand possessed of all the assets

of the Congregation. It contained certain clauses relating to the office of Imaum in charge of the Mosque to which I shall have occasion to refer later. The Agreement between Bassadien and First Defendant was contained in a separate document the principal clauses of which provided that a meeting should be called by way of advertisement in the Press, to be presided over by the Chairman of the Cape Bar Council, for the purpose of electing the Board of Governors. There was also provision made for how the persons entitled to attend and vote at the meeting should be determined. In terms of Clause C 1 of the Agreement Bassadien resigned and vacated the office of Trustee, and it was provided that in his stead as Trustee of the property there was appointed the Board of Trustees provided for in the Constitution which was annexed to the Agreement. The aforesaid resignation and vacation of office was to become effective upon the election of the Board of Trustees, and the signatories to the Agreement prayed that the Court would be pleased to make it an Order of Court, including an authorisation and direction to the Registrar of Deeds to endorse the Deed of Transfer, No. 32 of 1854, with the Order of Court.

On 22nd April 1968 the parties again appeared before me and asked that the Agreement of Settlement be made an Order of Court, and this was duly done. In June

1968 a meeting was held and a Board of Governors elected. The President, Vice-President and Imaum then, in terms of the Constitution, became the Board of Trustees and that Board is the Plaintiff in the present proceedings.

To continue with the history, Second Defendant, who is First Defendant's younger brother, did not approve of the settlement. He says that he was present in Counsel's chambers when the Agreement was about to be signed but walked out before it was signed. First Defendant, however, said that he followed his Counsel's advice and for the sake of harmony in the Community agreed to sign, it having been made clear to him that he would be entitled to stay on in the house as Imaum. This position continued until March 1972. First Defendant stated in evidence that there were, however, a number of persons who, like his brother, did not agree with what he had done. Furthermore, he said that he was treated badly by the congregation, other Imaums were called in from time to time to perform weddings and the like, and in March 1972 because of this and because his health was not good and he wanted to go to Mecca he resigned as Imaum and appointed Second Defendant in his place. He went to Mecca for about four months and his health improved. Despite his resignation he stayed on in the house.

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On 27th June 1972 First Defendant received a letter from the Board of Governors saying that he had been dismissed as Imaum and that he must vacate the house by 31st July 1972. He, however, ignored the letter and remained in occupation.

On 1st September 1972 the Plaintiff Board of Trustees launched the present proceedings against First Defendant alleging in its Particulars of Claim that it was the owner of the immovable property, consisting of the Mosque and the dwelling, that First Defendant was in possession and failed to vacate it, and it claimed an order for his ejectment from the dwelling.

The pleadings in the present case run into many pages and have been amended on several occasions, but for convenience I shall refer to them in their final form. In his plea First Defendant alleged that by a series of appointments made by successive Imaums he was the Imaum of the Claremont Mosque until he resigned in March 1972. On his resignation as Imaum he had appointed his brother, Second Defendant, as his successor in office. Second Defendant was therefore presently the Imaum of the Claremont Mosque and as such the owner in trust of the property. He, first Defendant, was presently occupying the dwelling at the pleasure of Second Defendant, and Plaintiff consequently had no right to eject him.

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I should make it clear at this stage that throughout the trial there was at times confusion on the part of the Defendants between the offices of Imaum and Trustee. They took up the attitude that both offices are held by the same person, but this is not necessarily so.

Plaintiff duly filed a Replication in which reference was made to the Agreement of Settlement, Constitution and Order of Court. It was alleged that First Defendant had held office as Imaum in terms of the Agreement and Constitution and, apart from his resignation in March 1972, he was also dismissed as Imaum in terms of the Constitution. I should mention here that Plaintiff no longer relies upon First Defendant's dismissal. It relies solely upon his resignation as Imaum, which it is common cause took place before the alleged dismissal. Plaintiff then went on to allege that First Defendant's purported appointment of Second Defendant as Imaum was of no force and effect, and to deny that Second Defendant was the owner in trust. Plaintiff alleged that after Bassadien resigned as trustee there was no trustee and that the Court appointed a trustee in his place, namely, the Plaintiff Board which was elected at the meeting held in terms of the Order of Court.

A Rejoinder and Amended Rejoinder were filed by the Defendants in which it was alleged that the Agreement and Order of Court based upon it were void ab initio, firstly, because the agreement constituted a variation of the Trust of 1854 and, secondly, because it was beyond First Defendant's power to agree to such a variation. The Amended Rejoinder also incorporated a claim based on prescription. At the same time as the Rejoinder was filed Defendants also filed a Counter claim which merely referred to, and repeated, the allegations in the Plea and Rejoinder and prayed for an order declaring the Order of Court made on 22nd April 1968 to be of no force and effect.

For the sake of clarity I should mention that although I have referred to both Defendants as if they had both been parties to the suit from the date of summons that was not in fact so. The action was brought only against First Defendant. It was, however, necessary to apply to Court for leave to file a Rejoinder and Counter-claim out of time, and at the same time application was made to join Second Defendant as a party and to treat all pleadings as if he had been cited as a defendant throughout. This application was duly granted.

Yet one further matter requires mention. At this stage Bassadien was no longer the Imaum of the Buitengracht Street Mosque. It was realised that

his successor, one Gabier, might be affected by the Counter-claim and he was duly served with notice. He has, however, indicated that he abides the judgment of the Court."

Having dealt with the history and litigation the learned Judge proceeded as follows :-

"It seems to me that there are two main questions to be decided, namely, who is today the trustee and who is the Imaum. There are two claimants to be trustee, the Plaintiff and Second Defendant. Second Defendant also claims to be Imaum. If he is the Imaum then no matter who is trustee he would be entitled to remain in occupation of the premises because it is common cause that the Imaum of a mosque is entitled to take charge of the mosque and any dwelling attached thereto.

Plaintiff's case on the pleadings is straightforward. It alleges simply that it is the owner, Defendants are in possession and neglect to vacate. Defendants in their plea deny that Plaintiff is the owner and the onus is consequently upon the Plaintiff to show that it is the trustee and as such owner. That would entitle it to succeed on the claim for ejectment unless Defendants could show that they have a right of occupation, the onus of proving which is upon

them (see Chetty v. Naidoo 1974 (3) SA 13 (A.D.) ).

To prove that Plaintiff is the trustee Mr. Berman relies upon the terms of the original Deed of Transfer, Bassadien's resignation as Trustee, the 1968 Order of Court with the Agreement and Constitution annexed, certain admissions made by the Defendants in their pleadings and such evidence as there is touching on these points. Mr. Young contests Mr. Berman's interpretation of the Deed, submits that Bassadien was not Abdol Roef's successor in office as Imaum of the Buitengracht Street Mosque and was thus not trustee of the Claremont Mosque. He also says that the admissions in the pleadings do not take Mr. Berman far enough to show that Plaintiff is the trustee.

So far as the Deed of Transfer is concerned I have already expressed my view as to its meaning in the judgment I gave on 14th February 1967. I there said with regard to the words 'successors in office' to Imaum Abdol Roef the only office referred to was that of Malay Priest of the Mosque in Buitengracht Cape Town, so that it was the holder of that office, namely Bassadien, who was the successor and as such the trustee in 1968. Mr. Young says that I am not bound by that judgment, submitted that the Deed is ambiguous and invited me to reach a different

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conclusion in the light of the evidence of surrounding circumstances which was adduced in this action."

It does not appear from the judgment on what authority counsel relied for submitting that the Court a quo was not bound by that judgment.

There are two aspects of this matter which have caused me some concern. The first is whether the interpretation of the terms of the trust and the ruling by the learned Judge a quo on the issue of the succession of imaums in the previous matter between Bassadien and the first defendant and the settlement which followed and was made an order of court were not res judicatae against the defendants in the present case. The second aspect relates to the counterclaim. Mr. Young obviously realised that unless he succeeded in having the previous judgment and order set aside they might, even if they could not be said to be res judicatae in the sense of disposing of the defendants' entire defence in the present case, at least

preclude him from raising, on their behalf, certain issues, particularly the issue of succession of trustees. My difficulty in this regard is that in our law a judgment of a court can only be set aside on certain narrow grounds under both the common law and the rules of court and that good cause must be shown before any court will grant an applicant relief of this type.

The matter was raised with counsel as to whether this Court should not deal with the res judicata aspect mero motu. After due consideration I have decided not to do so. It would be dangerous for this Court to find, mero motu, that the previous judgment and court order were res judicatae against the defendants. Res judicata was not specially pleaded and it is difficult at this stage to visualise all the ramifications and implications such special plea, if properly raised, might have had. The matter was not fully argued before us - due, no doubt, to the fact that counsel were somewhat taken by surprise. It seems to me, moreover, that it would not be

competent for the Court to deal with this matter in the absence of a special plea. Voet (Com. ad Pand. 42.1.47) says that a litigant who does not set up the exceptio rei judicatae is understood by so doing to have impliedly renounced the right which accrued through the decision.

I have also decided not to express any views as to whether there was any prospect of the defendants succeeding, on procedural grounds, on the counterclaim to have the previous judgment and order set aside. This matter was similarly not argued before this Court and I shall, in what follows, refrain from discussing the grounds upon which, generally, such setting aside may be attained and shall confine myself to, and deal with this appeal on, the facts.

Mr. Young argued that upon a true construction of the deed of transfer, read in the light of the factual matrix at the time, the appointment as trustee for the Malay Community of Claremont meant and was understood to mean: "Abdol Roef Malay Priest, his successors in office

(as trustee), of (dwelling at) the Mosque in Buitengracht".

In his submission the word "imaum" which, in the deed of transfer, precedes the words "Abdol Roef" is of no significance at all. The argument proceeded as follows :- The title "imaum" does not necessarily imply the holder of an office; it is a qualification and before a person becomes the imaum of a particular mosque, he must be appointed to the post. He is an employee and as such his services can be terminated by his employer. Mosques can have more than one imaum. In the case of the Claremont mosque some confusion of expression crept in because the trustee and the imaum have always been the same individual. The appointment of a trustee implies trust in the appointee. The appointment of an imaum as such as trustee would negative the concept of trust - because of changing appointees.

This argument cannot be upheld. The only possible construction to be placed upon the words "successors in office" is that the trustee only accedes to that capacity

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by virtue of his holding an office and the only office referred to is that of imaum. The fact that an imaum must be appointed to that "post" or that "office", which is in my view the same thing, does not militate against this construction; on the contrary, it supports it. The appointee to so important a religious post as imaum of a mosque must undoubtedly be a person highly revered by the Muslim community. Why should the settler not repose implicit faith, confidence and trust in the holder, for the time being, of the office of imaum of a particular mosque?

The argument that the words "of the mosque in Buitengracht" should be read as meaning "dwelling at Buitengracht" is equally untenable. It is true that the word "of" followed by a description of, or a reference to, a certain place may designate a person's address but in my view there are two features relating to the wording of the deed which are inconsistent with such a construction. The first is the insertion of the word "imaum" followed by the words "Abdol Roef or his successors in office"

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which indicates that the office of imaum was the vital qualifying factor and was not intended to be merely descriptive. The second feature is that the words "or his successors in office" precede the phrase "of the mosque in Buitengracht". This latter phrase does not, therefore, refer to Abdol Roef alone but includes his successors in office. It could, therefore, not have been Slamdien's intention to refer to hereditary imaums because he could never have had the assurance that such imaums would always be attached to the mosque in Buitengracht. The arrangement of the words above referred to completely defeats Mr. Young's contention that the trustee or trustees of the mosque included future incumbents of the office of imaum at Claremont. I therefore agree, with respect, with the learned Judge a quo that the terms of the 1854 deed are clear and unambiguous. There is, therefore, no room for admitting evidence of surrounding circumstances.

In any event, what Abdol Roef did after the trust had been created by Slamdien, cannot, even if the terms of

the trust were ambiguous, be regarded as surrounding circumstances which may be considered for the purposes of construing the deed. Moreover, the fact that Abdol Roef appointed his sons as imaums to officiate at the Claremont mosque does not justify an inference that he appointed them trustees. The trustee remained the imaum of the Buitengracht mosque. Because the imaums at Claremont regularly paid rates and other charges and carried out repairs and alterations to buildings at the Claremont mosque they might have been looked upon by the Municipal authorities and other persons as the officials responsible for the administration of the affairs of that mosque but the vague evidence which was adduced in this regard is not strong enough to warrant a finding that they did so adversely to the trustee or trustees attached to the Buitengracht mosque and otherwise than on sufferance or by delegation. This consideration disposes of Mr. Young's contention that all claim to the trusteeship of the Claremont mosque by the imaum of the mosque in

Buitengracht was lost by prescription.

Mr Young attacked the validity of the order of court which sanctioned the agreement entered into between Bassadien and the first defendant by submitting, firstly, that the agreement of settlement went far beyond the mere substitution of a trustee and amounted to a substantial variation of the trust and, secondly, that the procedure which was followed was wrong.

On the second aspect, the learned Judge a quo reasoned as follows :-

> "In 1968 Bassadien resigned as Trustee of the Claremont Mosque and if he was the trustee, as in my opinion he was, the effect of his resignation was that there was no trustee. But even if I should be wrong in my interpretation of the Deed, then the only other possible trustee as at that date was First Defendant. By signing the Agreement he clearly abandoned any claim to be trustee and in effect resigned as trustee. There was thus then no trustee and it became the duty of the Court to fill the vacancy. Indeed, that was the whole purpose

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of the settlement, namely, to resolve the dispute by creating a vacancy and inviting the Court to fill it either under its common law powers or under the provisions of Sections 6 and 7 of The Companies' and Associations' Trustees Act, No. 3 of 1873 (Cape). That in my opinion is what the Court did by making the Agreement an Order of Court. It is true that the Court did not appoint any individuals by name, but it laid down who the trustees were to be, and it would seem to have been an eminently fair way of appointing those persons whom the majority of the people who were willing to join the organised Congregation and to contribute funds wished to elect as trustees.

Mr. Young referred to the terms of Section 6 of Act No. 3 of 1873, in which the procedure contemplated is by way of petition and the Court is empowered to order service of notice of the petition upon any person whom the Court thinks fit. He said that that procedure had not been followed. My attention was not specifically drawn by Counsel to the provisions of the Act at the time I was asked to appoint trustees, and I think, in retrospect, that it might have been better had a rule nisi been issued and published, but in my view these are merely procedural matters and a failure by the Court to observe them would not render the appointment null and void.

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I say this because, although the members of the Community would probably be interested in who was to be appointed trustee, the members as such had no say in the actual appointment. The appointment was made by Slamdien and when the office of trustee fell vacant it was for the Court to fill the vacancy."

On the first aspect the judgment reads as follows :-

"In my view all that is contained in the Deed of Transfer is :

(a) who are to be the trustees, present and future;

(b) what is the trust property, and

(c) who are the beneficiaries.

The Court dealt with (a). There was in 1968 no trustee and the Court had the power to appoint a new trustee, and future trustees. As to (b) and (c) the Court did not change the property in any way, nor did it alter the beneficiaries. The Constitution declares the mosque to be 'Wakaf', which means that it is open for the use of all Moslems, and any member of the Malay community can still attend and worship there if he or she wishes to do so. No member of the Community is obliged to

accept the Constitution and become a member of the organised congregation. He can still attend and by so doing does not oblige himself to make any contribution, any more than he was obliged to do so before. The trustees are responsible for the maintenance of the buildings, and I can see no valid objection to the principle that only those who are prepared to contribute are entitled to vote for the election of the trustees. No member of the Malay community of Claremont had any right to vote for the election of trustees before 1968, so no right was taken away from anyone."

Mr. Young submitted that there was no vacancy, that the procedure laid down by section 6 of Act 3 of 1873 (Cape) was not applied, that the Court never exercised its discretion under the Act and cannot do so ex post facto. Mr. Berman, for the plaintiff, argued that Bassadien resigned as trustee of the Claremont mosque on the 22nd April, 1968, thus leaving the trust without a trustee and that a board of trustees was properly created by an order of court. As to Bassadien's right to resign, with the leave of the court, Mr. Berman referred this Court to

Honoré, Law of Trusts (2nd edition), p. 162. He submitted further that the Court has power to appoint a trustee where no trustee exists. Indeed, he said, it is incumbent upon a court, if approached to do so, to appoint a trustee in such circumstances. This power, he contended, is derived from the common law.

A court is frequently requested to fill a vacancy which has occurred because the original trustee, who had been specifically named by the settlor, has for some reason or other vacated the office of trustee or has declined to accept the nomination. This is the usual type of case. In the present case no specific individual but the incumbent of the office of imaum of the Buitengracht mosque, had been appointed by Slamdien. Moreover, the Court was not required to fill a vacancy which had occurred; Bassadien resigned as a consequence of the agreement which was made an order of court; the agreement did not come into existence as a result of the vacancy.

In my view, however, the fact that Bassadien resigned only subsequent to and as a consequence of the court order

does not assist the defendants. Although there was no evidence as to what the motivation was for Bassadien to resign, it is probable that he did so because he desired to be relieved of the responsibility to administer the mosque at Claremont with which, as the imaum of the Buitengracht mosque, he had been burdened. His successor, Gabier, was given notice but he indicated that he abides the judgment of the Court. It must be presumed, therefore, that either Gabier is not interested or that he regards the variation introduced by the agreement and court order to be in the interests of those affected thereby.

Although it will always consider the will of the settlor as expressed in the trust deed, the court has inherent jurisdiction to depart from the terms of the trust in the interests of the beneficiaries under the trust. See Port Elizabeth Assurance Agency and Trust Co. Ltd. v. Estate Richardsoh, 1965 (2) SA 936 (C) at pp. 938 B - 939 D and 940 A-E; Ex parte Leandy and Another, NN.O., 1973 (4) SA (N) 363 at p. 366 A-C and 366 H - 367 C. By substituting a board of trustees, constituted in terms

of a constitution which in detail regulates the affairs of the congregation, for successive imaums of the Buitengracht mosque, the Court has, in my view, exercised its jurisdiction properly. Although he might have had faith, generally, in the holder of the office of imaum, the settlor Slamdien did not repose his trust in specific people whom he knew and in whom he had confidence. He had no means of knowing who the future imaums of the mosque at Buitengracht would be and how well they would administer the trust. Appointing successive imaums of the Buitengracht mosque as trustees was probably the best he could do in the circumstances prevailing in 1854. His main concern could only have been the proper administration of the mosque for the benefit of the congregation and the Muslim community in general. This requirement is now amply and adequately provided for by the constitution which was incorporated in the court order. Admittedly the variation goes far beyond the mere substitution of a trustee, but only in detail, which is entirely lacking in the trust deed as reflected by the deed of transfer. I do not agree that

the constitution amounts to a substantial variation of the trust. By providing detailed administrative directions where none existed before the Court did not substantially vary the trust. It supplemented it. Having come to this conclusion, it is not necessary for me to consider the submission that Act 3 of 1973 (C) did not apply because there was no vacancy and that, even if it did, the procedure prescribed by section 6 of that Act had not been followed.

There is yet a further attack upon the validity of the Court order in the previous matter between Bassadien and the first defendant and upon the judgment of the Court a quo with which I have to deal. In the first judgment WATERMEYER J held that the present first defendant had not shown that he was the successor in office to Imaum Roef in the sense in which those words were used in the deed of transfer. In the matter now under appeal evidence was led that the Buitengracht mosque premises were sold in execution in 1905. Mr. Young submitted that the consequence of such sale was that the trust in favour of the

Malay community in Buitengracht failed, that the imaum lost his employment and that there was no continuity with the mosque subsequently established in the same old building. The learned Judge a quo dealt as follows with the history of this sale in execution and came to the firm conclusion that Bassadien was Abdol Roef's successor :-

> "The next poiht taken by Mr. Young was that even on this interpretation of the Deed Bassadien was not in 1968 Imaum of the same mosque as that referred to in the 1854 Deed. He based this submission on two grounds, firstly, that the title deeds and other documents put in by the conveyancer called by him showed that in 1905 the mosque was sold in execution, and that in 1939 it was sold to twelve Indians in their capacity as Trustees of the British Mizam of Afghanistan Society. He submitted that the 1939 sale altered the nature of the mosque and that consequently the mosque that was there in 1968 was not the same mosque as that referred to in the 1854 Deed. Although Second Defendant in evidence did say that under Islamic Law when a mosque is sold in execution it ceases to be a mosque, for the reasons I shall give later I prefer the evidence of Sheik Najaar who disagreed with this view. Najaar said that under Islamic Law any sale of a mosque is illegal, but if it is

in fact sold, whether in execution or otherwise, it does not thereby cease to be a mosque. According to Islamic Law a mosque is never owned by an individual. It belongs to the Almighty, and a change of ownership under the law of the Country in which it is situated does not mean that it ceases to be a mosque. With regard to the sale in 1939 Sheik Najaar said that the purchasers, although Indians, were also Moslems, and they bought the property to prevent it from falling into non-Moslem hands. They immediately appointed a Malay one Sheik Ismail Hanief, as Imaum of the mosque. There is thus no acceptable evidence that the mosque that existed in 1968 in Buitengracht Street was not the same mosque as that referred to in the 1854 Deed, nor is there evidence that it has ever ceased to be used as a mosque. It is common cause that Bassadien was the Imaum of that mosque in 1968 and I accordingly hold that as at that date he was the trustee of the Claremont Mosque appointed by Slamdien."

Mr. Young argued that the learned Judge erred in accepting the immortality theory of a mosque propounded by Sheik Najaar. In South African law a mosque is not extra commercium and the evidence of second defendant is to be preferred, he submitted. The learned Judge has

given good reasons why he accepted Najaar's evidence and I remain unpersuaded that he erred.

Yet another argument advanced by Mr. Young was that the agreement which was made an order of court in the matter between Bassadien and the first defendant was executory and that due execution thereof had not been proved by the plaintiff. This argument is a repetition of an argument advanced by Mr. Young in the Court a quo and which was alluded to by the learned Judge as follows :-

> "I come now to an aspect of the case which is not without some difficulty. As I have already mentioned, the onus of proving that Plaintiff was the trustee appointed by the Court rested upon Plaintiff. So far, Plaintiff has shown that there was a vacancy and that the Court laid down a procedure for the filling of that vacancy. It was still for the Plaintiff Board to show that it had been elected trustee in terms of that procedure. No evidence was led by either side on this aspect of the case and Mr. Berman relied upon admissions made in the pleadings."

As he did in the Court a quo Mr. Young relied on the

absence / ...

absence of any evidence to establish the allegation that plaintiff had been "duly" elected as the Board of Trustees, which allegation, according to Mr. Young, was put in issue on the pleadings. After having analysed the pleadings the learned Judge came to the following conclusion :-

> "It is not quite clear to me what meaning should be given to the word 'duly'. It can mean 'in due course', or it can mean 'properly'. But whatever meaning should be given to that word it seems to me that on the pleadings in convention there was an admission that the meeting and election were duly held and that on the claim in convention it was not necessary for Mr. Berman to adduce any evidence that the meeting was properly advertised, that it was presided over by the proper office, that only persons entitled to vote did vote, and the like."

The learned Judge had no difficulty in rejecting this argument in respect of the counterclaim because for the purposes thereof the onus was on the defendants. However, in endeavouring to ascertain what the pleader on

behalf of the defendants had denied in the pleadings in convention the learned Judge took into account certain particulars supplied for purposes of the counter-claim. He finally took the view that the plaintiff had succeeded in proving that it was the trustee of the Claremont mosque. In view of Mr. Young's argument it becomes necessary for me to examine the relevant allegations in the pleadings.

In the plaintiff's replication to the defendant's amended plea the following allegations were made :-

"(iii) On 22nd April 1968 the said BASSADIEN resigned and vacated the office of Trustee of the Main Road Mosque and of the immovable property on which it is erected, viz. the said Erf and the buildings thereon, with effect from the election of the persons constituting a Board of Trustees, viz. Plaintiff, at a meeting to be held in terms of the said order of this Honourable Court ;

(iv) The said meeting and election were duly held, and Plaintiff was - pursuant to the said order - vested with the administration of the said Erf (and the buildings thereon)

and / ...

and is still so vested, and Plaintiff is accordingly entitled to the possession and control of the said Erf, and of the Mosque and dwelling house thereon."

The first defendant (at that stage the only defendant) rejoined as follows :-

"(ii) Defendant admits the purported action alleged in sub-paragraphs (iii) and (iv) but denies that such action had in law the effect alleged."

It is not clear to what "action" the defendants referred but what is clear is that it was not denied that the meeting and election were "duly" held, by which, in my view, the plaintiff meant that the meeting and election were held in terms of the constitution which was incorporated in the order of court. The denial that such action had in law the effect alleged obviously referred back to the allegation by the defendants that the agreement of settlement was void ab initio.

For purposes of the counterclaim the defendants merely repeated the allegations in the amended plea and rejoinder. The plaintiff requested, inter alia, the following further particulars to defendants' counterclaim :-

" 1. Defendants having denied, in sub-paragraph (ii) that the 'purported (sic.) action' had in law the effect alleged, they are required to state what legal effect such action, and the order of court in such action, had.

2. Do Defendants deny that the election and meeting ..... were duly held, or do they deny that the said election and meeting were held at all? "

The reply to that request included the following allegations :-

" 4. The purported agreement by First Defendant being ultra vires him was not binding on him or on other interested parties. In the circumstances any interested party, including

the First Defendant, is entitled to seek an Order of Court setting aside the said Consent Order.

5. Defendants will admit that a meeting purporting to be held in terms of the Agreement of Settlement was held but make no further admissions in regard thereto and put Plaintiff to the proof of the allegation that it was duly held."

In my view this attitude went further than the denial made for purposes of resisting the claim in convention. As pointed out by me the only denial in that regard was that "such action had in law the effect alleged". The rejoinder was not amended and as it stands it is capable of one construction only and that is that the fact that a meeting and an election in terms of the constitution were held was not denied. What was denied was that the resignation by Bassadien and the holding of such meeting and election had in law the effect of constituting the plaintiff the trustee in Bassadien's stead. It was, therefore, not necessary for the plaintiff to prove that

the meeting had been held and the election conducted in terms of the procedure laid down in the constitution. The refusal to make any admissions other than that a meeting purporting to be held in terms of the agreement of settlement was held and putting the plaintiff to the proof of the allegation that it was duly held is clearly an afterthought. This refusal was expressed for purposes of the counterclaim only in respect of which the onus was on the defendants. It cannot affect the plaintiff's claim in convention and the finding by the learned Judge that the plaintiff succeeded in proving that it was the trustee of the Claremont mosque cannot be disturbed.

What the learned Judge a quo referred to as the second main question to be decided viz. who is today the imaum, must finally be dealt with. In this regard the learned Judge said :-

> "I proceed now to consider the validity or otherwise of Second Defendant's claim to be Imaum by reason of the First Defendant's appointment of him as Imaum in his stead. Second Defendant does not claim, nor could he claim, that he was appointed Imaum

by Slamdien, because Slamdien appointed only trustees, not Imaums.

It seems to me that the validity or otherwise of Second Defendant's claim must be judged by Islamic Law and custom, ....."

To my mind it was not necessary to have recourse to Islamic law and custom. If the agreement, as sanctioned by the order of court referred to, prevails, as the learned Judge a quo has correctly found that it does, the second defendant cannot be the imaum because he has not been appointed in terms of the constitution. The agreement of settlement, to which the first defendant was a signatory, provides in clause A.2 :-

"Defendant shall remain in office as Imaum, in charge of the Mosque, subject to the provisions of the Constitution."

Clause 30 of the Constitution provides :-

"(a) Upon the death, resignation, removal or vacation of office of Imaum in Charge or the incumbent thereof, a new Imaum in charge shall be elected by the Congregation at a General

Meeting thereof, specially called for such purpose.

(b) The Imaum in Charge shall be entitled to nominate a person to succeed him as Imaum but the person so nominated shall only become Imaum if he is elected to that office by the Congregation at the General Meeting referred to in Clause 30 (a) above. The aforegoing shall not prevent any other person being nominated for election as Imaum."

The second defendant did not rely upon his having been nominated and elected in terms of the constitution. Both defendants relied upon a hereditary right of each imaum appointed from the Abderoef family to appoint as his successor another member of the family. In accordance with this right, they said, the first defendant, when he resigned, appointed the second defendant. This appointment is of no force or effect.

The appeal / ...

The appeal fails and is dismissed, with costs, including the costs consequent upon the employment by the respondent of two counsel.

G. VILJOEN,
Acting Judge of Appeal.

MULLER, JA. )
KOTZÉ, JA. )
DIEMONT, JA. ) Concur.
TRENGOVE, AJA.)