REPUBLIC OF SOUTH AFRICA

CASE NO. 627/97 IN

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

ABUBAKER MOHAMED NO.	FIRST APPELLANT
ABOOBAKER ISMAIL NO.	SECOND APPELLANT
AHMED ASRUFF ESSAY NO.	THIRD APPELLANT
MEHMOOD KHAN NO.	FOURTH APPELLANT
HABIB GANI NO.	FIFTH APPELLANT
HAROUN GANI N.O.	SIXTH APPELLANT
FAROUK ROOKNOODEEN N.O.	SEVENTH APPELLANT
ISMAIL ALLY N.O.	EIGHTH APPELLANT

AND

FAIZAL ALLY

RESPONDENT

BEFORE: VAN HEERDEN DCJ, SMALBERGER, SCHUTZ,
ZULMAN JJA and MELUNSKY AJA

HEARD: 23 NOVEMBER 1998

DELIVERED: 27 NOVEMBER 1998

SCHUTZJA

JUDGMENT

SCHUTZ JA

The dispute in this appeal concerns the method by which vacancies in the ranks of the board of trustees of the Grey Street Mosque in Durban are to be filled. There are eight appellants. All of them claim to be duly appointed trustees. Only the first four's appointments have been ratified by an annual general meeting of the congregation. The remaining four have been appointed temporarily by existing trustees to fill vacancies in their ranks. As no annual general meeting has been held since 1987, their tenure has not been put to the test of the congregation's approval or disapproval. The respondent is a member of the congregation and a regular worshipper at the mosque.

Two antagonistic factions are revealed by the papers. On the one side is the

board of trustees and their supporters. On the other is a group with views similar to those held by the respondent. Both factions claim the broad support of the congregants at large. The respondent complains that the appellants behave as a self-perpetuating oligarchy, unready to submit their administration or their filling of vacancies on the board to a general meeting. He commenced the current litigation by seeking an order compelling the appellants to call an annual general meeting (hereinafter "a g m"). The appellants, for their part, challenge the genuineness of the democratic stance of the respondent. To them he is a populist given to violence and intimidation in order to obtain his selfish ends. It is he and his companions, they say, who have rendered it impossible, or at least dangerous and undesirable, to call an a g m during the long years since 1987.

It is unnecessary to go into more detail. Suffice it to say that after initial opposition to the respondent's claim for the holding of an a g m, the appellants accepted that they had to call one. But this was almost at once tempered by a new

argument which gives rise to this appeal: an argument based on an interpretation of the governing instrument, the Juma Musjid Trust Deed. This deed was executed in 1916 and, after some intervening amendments, was again amended, and redrawn and consolidated, in 1957. That is the deed that has to be interpreted.

It provides, in clause 4(a), for a board of trustees of nine members, "five of whom shall represent the Memon section, two the Surtee section and one the Kooknee Section and one the Colonial Born Section, so long as persons from each such Section are available." This follows the pattern of the 1916 deed, some of the history of which may gleaned from Cassim And Others v Meman Mosque Trustees 1917 AD 154 at 159. The decision flowed out of previous litigation which had commenced early this century and which led to it being ordered that a trust deed be drawn up by four solicitors who had represented the various parties, and be submitted to the court for confirmation, after it had been submitted to the members of the congregation for their consideration and approval, this last "a necessary step

in the constitution of a valid trust deed" (per Solomon JA at 159). The names Memon, Surtee and Kooknee derive from the languages and regions of origin in what was then known as British India of various groups who emigrated to South Africa. The name Colonial Born applies to persons born in this country who are not members of the first three sections. By now the Colonial Borns make up some 60% of the congregation.

The interpretation that the appellants contend for is that as vacancies arise, separate meetings of one or more of the "sections" concerned must be held ("separate electoral colleges" they have been called) at which nomination and election take place only at the instance of fellow-members of the "sections". Thereafter the persons so chosen will be presented to the general meeting of the whole congregation for ratification or veto. During argument Mr Singh, for the appellants, watered down the concept of veto considerably, submitting that there could be a veto only for good reason. The respondent, on the other hand, contends

that there is only one "elective college" and that is the general meeting. Although a nominee must be of the same "section" as the trustee whom he is to replace, he may be nominated by a member of any "section" and he is to be elected by the vote of the entire general meeting without regard to "section". The court a quo (Levinsohn J) found that the respondent's interpretation is the correct one.

Before the dispute as to interpretation can be decided it is necessary to examine some further terms of the trust deed. First among its objects is "To own and continue the control and administration of the Grey Street Juma Musjid for the benefit of the followers of the Sunni Muslim religious faith." There is no reference among the objects to the advancement of the interests of any of the "sections". Clause 4 is headed "Trustees". I have already quoted part of clause 4(a), which deals with the sectional composition of the board. It also lists the nine existing trustees, mentioning the "section" which each "represents". The corresponding clause of the 1916 deed had done the same. Clause 4 (b) reads:

"There shall always be nine Trustees acting in the Trust and in the event of the office of a Trustee becoming vacant the remaining Trustees shall within one month or as soon as possible thereafter from the date of such vacancy appoint another Trustee or Trustees to act along with them and such new Trustee or Trustees so appointed shall have the like powers and authorities as are conferred hereunder upon the Trustees elected in terms hereof except that such Trustee or trustees shall only continue to act until the next Annual General Meeting. In making any such appointment the Trustees shall comply with the provisions of clause 4 (a) hereof insofar as it relates to the class of Trustee to be appointed."

Clause 4 (c) provides that a trustee holds office for life, except in six cases, such as insanity, resignation, or conviction of a crime involving dishonesty. There is no provision for his removal by a general meeting (even less by a meeting of his "section") or by his co-trustees, although he may removed by court order. Clause 4 (d) provides that certain classes of persons are ineligible for election because of specified past conduct.

Clause 4 (e) is important and reads:

"All vacancies in the Board of Trustees shall be filled at the Annual General Meeting of the Trust, provided always that any nominated Trustee

shall belong to the Class of the Trustee whose place it is sought to fill, so long as a member of that Class is available, the intention being that the Trustees shall, so far as possible, always be chosen from and represent the Class to which the first Trustee belonged and in like proportion. Any trustee so elected shall advise the Secretary of his acceptance of office within 30 days of the Annual General Meeting. Should the Secretary not have received such an acceptance within that period it shall be presumed that such person is not prepared to accept office and the remaining Trustees shall appoint another Trustee ... to act for the remainder of that year and the provisions of Section 4 (b) hereof shall apply."

Clause 4 (f) deals with the case where five or more trustees resign en bloc.

Clause 5 (a) requires a quorum of five for meetings of the board. Clause 6 (a) places the control and management of the trust in the hands of the trustees and entitles them to exercise all the powers exercisable by the trust, subject to limitations contained in the trust deed. Clause 6 (i) further requires the trustees to manage and conduct all affairs of the trust and the mosque.

Clause 7 (a) requires an a g m to be held by not later than 31 January in each year. In terms of clause 7 (c) all meetings must be held at the mosque. Clause 7

(d) lays down that votes at general meetings will be taken on a show of hands. A positive vote of 75% of those present and entitled to vote is required to pass all resolutions, save for three cases where a 50% vote suffices. The three cases are the acceptance of the annual balance sheet and accounts, the election of a trustee and the authorisation of the trustees to borrow more than £5000. Only regular worshippers aged 21 or more are entitled to vote. Regular worshippers are defined as those who make a practice of worshipping at the Grey Street Mosque on Fridays and who do not habitually attend any other mosque on other Fridays. These regular worshippers alone constitute the "congregation". The senior Iman has the final say if a question arises whether someone is a regular worshipper. Minutes are to be kept in English (clause 7 (f)). Amendments, alterations or additions to the trust deed require a 95% majority at a special general meeting (clause 8 (c)). However, two provisions are entrenched and may not be altered or varied. They are clauses 4 (a) (sectional representation on the board) and 4 (e) (filling of

vacancies at a g m with maintenance of sectional proportions).

The main thrust of the argument for the appellants relates to the emphasis which the trust deed is said to place on the proportional representation of the "sections" in order that their sectional interests may be advanced. Expanding upon this argument it is said that it is the members of a section who will best know who to choose to "represent" them. The accompanying argument is that it would be dangerous to leave something so important as class interest to a general meeting. Majoritarianism, it is said, might subvert class interests. One difficulty with this argument is that the appellants do not demonstrate what these sectarian interests are, or were, either now or in 1916 or 1957. The appellants concede that there are no religious differences at stake. All those concerned are adherents of the Sunni Muslim faith. Demonstration lacking, the appellants fall back on history, saying that there "can be" differences of opinion arising out of ethnic or linguistic disparities. Reference is made, for instance, to a case like Hessen & Others v

Daout (1889) 6 SC 372, where only the Indian members of an early Kimberley congregation were summoned to a meeting to dismiss the Imam, the Cape Malay members being left out (with predictable consequences). This is all very well as history, or as a demonstration of the human inclination towards chauvinism, but does not establish the existence of separate sectarian interests in this case. Nor, more importantly, is there any role conferred on the trustees, whether singly or jointly, to protect sectional interests or be accountable to a class. There is also no provision for removal of a life "representative" of a class by members of that class. The sole possible contrary indication is the use of the word "represent" in clause 4 (a) and (e). Practically the whole argument on behalf of the appellants is hinged on this word, to which I shall return.

It is true that for historical reasons there is a quota system for the appointment of trustees. But there is no trace of provision for separate sectional electoral colleges, where alone nominations are made, and where alone candidates

are elected. On the contrary there is express provision for election by a simple

majority of the whole congregation at an a g m. "All vacancies in the Board of Trustees shall be filled at the Annual General Meeting …", says clause 4 (e), which has to be read with clause 7 (d). Nor is there any mechanism for resolving disputes which may arise (more and more one may suppose as the decades and then the centuries pass) as to whether a person is a member of a particular "section". By contrast there is express provision for resolving disputes as to whether persons are "regular worshippers", and as such entitled to vote at an a g m (clause 7 (d)). The corollary of this is that the definition of the entitlement to vote is silent on any right to vote at a class meeting. Correspondingly, when clause 7 (d) makes provision for only a 50% vote to appoint a trustee it does so in the context of voting at a general meeting, not a class meeting.

The pointers contrary to the interpretation put forward on behalf of the appellants mount up further. Whereas clause 7 (c) provides for giving of seven

days notice of general meetings, the deed is silent on notice of a class meeting.

Then, clause 4 (f), in dealing with the situation where five or more trustees resign en bloc, provides that the remaining trustees cease to hold office "except for the purpose only of convening a Special General Meeting of the members of the congregation for the purpose only of electing new Trustees . . ." There is no mention of a machinery for class meetings. Indeed the peremptory "only" would seem expressly to forbid them. The structure provided by clause 4 (b) for the appointment of interim trustees by the board is a yet further indication. It is the "remaining trustees" (implicitly regardless of section) who make the appointment which will make the appointee a co-equal until the next a g m is held. The appellants seek to brush this argument aside, saying that clause 4 (b) is no reliable guide, as the appointment is merely an interim one and not for life. I am not impressed by this response, which raises more questions than it answers. For instance, what has happened to that important principle, the representation and

protection of groups? And why this unevenness in the deed, which in both cases (4 (b) and (e)) maintains class representation, but in only one supports it by class nomination and election? A further argument of the appellants relating to this sub-clause is that it is not surprising that clause 4 (b) (filling of interim vacancies) should produce a result not in conformity with that in clause 4 (e) (election at a g m), because 4 (e) contains the key word "represent" whereas clause 4 (b) does not. An answer to this argument is provided by clause 4 (b) itself) which requires that in making an interim appointment the trustees shall comply with the provisions of clause 4 (a) "insofar as it relates to the Class of Trustee to be appointed." Clause 4 (a) expressly states that each of nine trustees "shall represent" his section. So that this argument has no substance.

I return to the essential component of the appellants' argument, the meaning attached to the word "represent" in clause 4 (a) and (e). In the context "represent" can mean either that a trustee is the elected deputy of a group, whose function is

to advance their interests and answer to them; or it can mean simply that he is a representative of a group in that he is a descendant of one of the original members of that group. Given the context, and the absence of any indications that a trustee is to adopt a sectarian role, rather than act for the congregation as a whole, I would have thought that he "represents" only in the latter sense. But there are even more compelling reasons why this should be so. Clause 4 (e) is peremptory in saying that all vacancies shall be filled, and that at the a g m. The phrase relied on by the appellants "always be chosen from and represent the Class" is merely a reason or statement of purpose which does not detract from the peremptory words. Mr Singh was driven to concede, that if for some reason no member of a section is put forward (a situation envisaged in both clause 4 (a) and (e)) the congregation would elect a member of another section. So that the peremptory words would govern and the administration of the trust would proceed, even if one of the aspirations of the trust could not be fulfilled. Further, even the phrase upon which

reliance is placed crumbles upon internal dissection. Surely if the appellants be

correct the trustee would be chosen by and not merely "from" the class.

Wrapped in the toils of the argument, Mr Singh's submission was, in the end, that a class meeting would elect a candidate who would then be put forward to the a g m for "veto" or for approval. If a veto resulted, then the trustees would appoint an interim trustee for the year ahead. So might the impasse continue from year to year. Apart from the impracticability of such an interpretation, it is contrary to clause 4 (e)'s requirement that the vacancy "shall be filled" at the a g m.

There is, to my mind, also substance in the submission for the respondent that giving effect to the appellants' interpretation will inevitably lead to the fragmentation of the congregation into artificial blocks leading to potential friction and disharmony. A consequence of applying the appellants' interpretation might well be that a representative of one section could refuse to account to or have

regard to the interests of other sections. This would not accord with the broad object of the trust, which is to advance the interests of members of the Sunni Muslim faith, whatever their racial or ethnic origin.

I therefore conclude that the interpretation of the respondent is correct and that of the appellants wrong. This conclusion makes it unnecessary to consider the correctness of one of Levinsohn J's findings, namely that it was not permissible to have regard to events subsequent to the execution of the trust deed, this because of the rule that a trust speaks from the time of its execution: see Moosa and Another v Jhavery 1958 (4) SA 165 (D) at 169. The "subsequent events" on which the respondent seeks to rely, in the alternative, if there should be ambiguity found, are that since about 1932 at least, until the appellants purported to promulgate their rules in 1997, it has been the consistent practice that trustees are elected at an a g m by the whole congregation and that nominations are made regardless of sectional membership. I confine myself to saying that the case

of 1916 and that of 1957 may not be the same. The practices between 1932 and 1957 may possibly be admissible information when interpreting the trust deed that was redrawn in the latter year; admissible on a principle analogous to that in the case of an ambiguous statute, where regard may sometimes be had to the manner in which its predecessor was administered: Rex v Detody 1926 AD 198 at 202-3, 216-7; Whelehan v Union Government 1934 AD 123 at 128 and Consolidated Diamond Mines of South West Africa v Administrator, ,SWA and Another 1958 (4) SA 572 (A) at 633 D-E. It is unnecessary to pursue this question further.

A. The appeal is dismissed. The respondent's costs are to be paid out of the trust.

B. The order of the court below is varied in the following respects:

1. Para 3 is replaced with the following:

"It is directed that the annual general meeting be held on 20 February 1999. Save for normal daily prayers no other activity shall take place at the Mosque on

20 February 1999."

2. The word "not" in the fourth line of para 4 is deleted so that the phrase reads "save where the said rules are inconsistent with paragraph 1."

3. In para 4 (b) and (c) the date 24 November 1997 is replaced with the date 10 February 1999.

C. This order is to be displayed in a prominent place on the notice board at the Juma Musjid Mosque.

W P SCHUTZ JUDGE
OF APPEAL

CONCUR
VAN HEERDEN DCJ
SMALBERGER JA
ZULMAN JA
MELUNSKY AJA