



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NUMBER: 7530/2022

In the matter between:

**MOEGAMAT- SHARIEF ARIEFDIEN
AASHIQ NEWMAN
MOEGAMAT IGSAAN HASSEN
MOGAMAT IKRAAM COZYN
MOEGAMAT ROESDIEN EMANDIEN**

**First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant**

and

**MOGAMAD FREDERICKS
MOEGSIEN COZYN
ABDULLAH COZYN
DAWOOD SALIEM
MOEGAMAT GOESAIN COZYN
NATHIER GAMIELDIEN
JALIEL KEYSER
MUJAAHID ADAMS**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent**

Date Heard: 22 November 2023

Date Judgment delivered electronically: 26 April 2024

JUDGMENT DELIVERED ELECTRONICALLY: 26 APRIL 2024

NZIWENI, J:

Introduction

- [1] This litigation stems from a protracted leadership dispute amongst congregants of a Mosque. The dispute was triggered by the substitution of its [the Mosque's] executive committee. The Masjidul Jaamia – Kalk Bay Mosque ("the Mosque"),

located in Quarterdeck Road, Kalk Bay, was established in 1847, and had been administered and controlled by the community of Kalk Bay since its establishment.

- [2] Until 13 February 2022, the applicants held positions on the executive committee of the Mosque, for a considerable period that extended over 10 years. On 13 February 2022, the control of the Mosque's governing structure was seized from the applicants by the respondents. It is the takeover of the governance of the Mosque that gave rise to the present proceedings. In these proceedings, the respondents' authority as office bearers of the Mosque is vigorously contested.
- [3] Before the takeover, the applicants were elected to be members of the executive committee in 2019. The respondents have held positions as executive committee members of the Mosque since 13 February 2022.
- [4] In this application, the applicants contend that they held positions on the Mosques, executive committee for at least twenty years prior to the takeover; and they were in peaceful and undisturbed physical possession of the Mosque.
- [5] The applicants challenge the lawfulness of the respondents' takeover of the Mosque, which they characterise as a dispossession. Therefore, the applicants are seeking a declaratory order invalidating the respondents' current control of the Mosque by declaring the said control unlawful.

Background

- [6] On 25 May 2021, the first respondent addressed a letter to the chairman and the secretary of the Mosque. The purpose of the letter is stated thus:

“RE: INACTIVENESS AND LACK OF LEADERSHIP OF THE EMAAM
AND COMMITTEE MEMBERS VOTE OF NO CONFIDENCE”

[7] Also included to the letter are 33 names with addresses and telephone numbers. The letter purports that the signatures belonged to the residents of Kalk Bay who wanted and required changes in the current administration of the Mosque.

[8] For purposes of this application, I believe it is important to relate the contents of the letter dated 25 May 2021. The letter contained a rather scathing indictment of the applicants' management of the Mosque. It reads as follows:

“I trust this correspondence finds you in good health, with the Kudrat of
ALLAH SWT

It is with deep concern that I have to raise the following points for your
attention that whole heartedly and adversely affect the Community of
Kalk Bay

As I grew up here in Kalk Bay and are (sic) back here now for the past 2
Months on a permanent basis, I noticed a couple of heartbreaking issues
that I believe can be straightened out with the right at the helm who will
have the larger Community interest at heart

THE ISSUES AT HAND

1. Only 4 or 5 of the Community are coming for one or two Waqts
for the 5 FARD solaah. Are the Imam and Committee aware
of this...? What have they done about this situation over the
past years? NOTHING!!! Is it because they are not here to see
this?
2. There is no DEENI activity taking place in the Masjied.

3. Now during the Ramadhan, if there are 5 Community Members at a time for Taraweeh Solaah, then it's a lot.
4. There is no leader to look after the Community's needs or issues
5. The Mosque is not even frequented by any of the Committee Members or the IMAM at any given time for any Fard Solaah, besides, Jumua.
6. Neither does any of the Committee Members reside in Kalk Bay (I'm of the opinion that the committee Members should be a MUSALLIE of the Mosque in Question (sic) and should at least attend 3 Solaah per day). which is not happening (sic)
7. There is no transparency existing. When was that last a (sic) Financial Report made available or when was the last AGM held?
8. The EMAAM clearly displays a different Aqeedah (BELIEF) where QURAN & SUNNAH are concerned as the Community are AHLE SUNNAH WAL JAMAAT orientated which obviously clashes with the Emaams beliefs

The big question is now, who are you serving really?

We, the Community of Kalk Bay have now decided A VOTE OF NO CONFIDENCE in the current EMAAM & Committee Members and to elect from within our own Residents, Committee Members who will have the needs of our Future at heart and take us forward to become a stronger and more ALLAH conscience people. We request the current Emaam and Committee to immediately relinquish and vacate their current Portfolio's with immediate effect and inform the writer hereof so that a Public Meeting of the Kalk Bay Residents

can be arranged to elect new Committee Members who will have the community interest at heart. Own underlining.

We the Committee Members and the Imam for the service rendered over the past years and trust they will understand that this Community needs to progress in a positive direction for the sake of our young ones

Please respond to Mogamad Fredericks on . . .”

- [9] On 13 February 2022, a meeting was held and a vote of no confidence in the executive committee [composed by the applicants] was conducted, and it was declared that it [the executive committee constituted by the applicants] was no longer the executive committee of the Mosque. According to the founding affidavit the first and fifth applicants as well as the Imam attended the meeting of 13 February 2022, as members of the previous executive committee.

- [10] It is asserted in the founding affidavit that on 13 February 2022, the first respondent facilitated the attendance of a substantial group of individuals, predominantly from outside Kalk bay, who had no direct affiliation with the mosque. Additionally, the founding affidavit averred in that the first respondent also invited senior members of PAGAD [People Against Gangsterism and Drugs] who were not from Kalk Bay to the meeting.

- [11] According to the first applicant, they left the meeting of 13 February 2022, in order to avoid physical confrontation that was going to bring the Mosque and its community into disrepute.

- [12] The applicants assert that the PAGAD was complicit in their forcible dispossession of the Mosque.

- [13] The applicants claim that they visited the Mosque on 18 February 2022, to perform their constitutionally mandated duties. The applicants further allege that they were prevented by the first respondent, PAGAD as well as many others from attending the Mosque. It is further averred in the founding affidavit that that the Imam was also prevented from performing his duties.
- [14] The respondents assert that there were efforts made by the interim committee to have an election for a new committee. It is further alleged by the respondents that at the meeting of 13 February 2022, it was agreed that there would be an annual general meeting.
- [15] On 23 February 2022, the applicant's attorney addressed a letter to the respondents, in which he amongst others, highlighted the 'unlawfulness of the dispossession' and demanded the respondents to cease and desist in preventing the Imam and the applicants from performing their duties.
- [16] . There were disruptions when the applicants attempted to attend the mosque on February 25, 2022.
- [17] On 06 March 2022, a letter that appears to have been dictated by the secretary of the Mosque's new executive committee was dispatched by the secretary, addressed to whom it may concern. The letter read in part as follows:
- "We would like to place it on record our sincere thanks to the previous Committee for the work done over the past years . . ."

[18] In the present case, it is averred in the founding affidavit deposed to by the first applicant that the respondents, amongst others, are cited as respondents because they are listed in the letter as the office bearers and the trustees of the Mosque on the letterhead.

[19] Given the issues to be considered, I consider it prudent to attach the copy of the letter dated 06 March 2022 ("the letter"), for convenience and full perspective. See letter below.



MASJIDUL JAAMIAH QUARTERDECK ROAD KALK BAY

6 MARCH 2022

Executive Committee
Chairperson (Ameer)
Vice-Chairperson (Vice-Ameer)
Secretary
Vice-Secretary
Treasurer
Vice-Treasurer

Gamat Fredericks
Dawood Salim
Mogamat Goesain Cozyn
Nathier Gamieldien
Jaliel Keyser
Mujaahid Adams



To Whom It May Concern,

We would like to place on record our sincere thanks to the previous Committee for the work done over the past years.

Importantly, we humbly request a handover of all books, keys and account related matters pertaining to the Mosque. As Ramadaan is approaching, we would appreciate if this process could be streamlined and given the necessary importance it deserves.

May Allah Guide and Protect us at all times.

Sincerely,

Goesain Cozyn (Secretary)

South Africa's Smallest Mosque...

In 1898, Mr. R. Salie submitted plans to the council to construct a mosque in Quarterdeck Road, Kalk Bay. At the time, a place of worship was needed to accommodate emancipated slaves from Batavia, Malaysia and other Eastern countries. At first a tiny house was used for the purpose, but was later changed into an acknowledged mosque.

To date, no mosque, smaller than this one has been built in South Africa. It has been declared a Heritage Site.

Bank Details:

Account Name: MASJIDUL JAAMIA-KALK BAY
Bank: FNB
Branch: FISH HOEK: CODE: 2029
Account Type: Trust Account
Account Number: 50290030143

Trustees

Mr. Anwar Cosyn (065-193-3119) • Mr. MM Cosyn (067-407-1166) • Mr. Abdullah Cozyn (076-905-1333)

[20] Against this background, I turn to the parties' submissions insofar as necessary to recite here.

Applicants' detailed submissions

- [21] As appears from the papers, the applicants allege that their removal from the executive committee of the Mosque was arbitrary, did not observe due process, hence according to the applicants the removal was wrongful, arbitrary and deserves to be invalidated.
- [22] It is contended in the applicant's replying affidavit that in this application they seek to restore their rights of possession that they were deprived of unlawfully and unjustifiably. Additionally, the conduct of the respondents prevented them from performing their constitutional mandate. In the replying affidavit, the applicants contend that the respondents, by their actions have prevented the president, vice president and the trustees from performing their duties. In essence the applicants contend that they cannot use the Mosque property for legitimate purposes because of the unlawful interference of the respondents.
- [23] Further and in any event, the applicants assert that a copy of this application was served on the trustees, who declined to participate in the proceeding.
- [24] It is further submitted by the applicants that the respondents cannot usurp the powers of an elected management board or committee, and thereby subvert the comprehensive right of freedom of association.
- [25] According to the applicants, the Mosque operates in accordance with a constitution from 1995 by which its relevant administrative bodies are elected. The applicants aver that the unsigned constitution [1995 constitution] that was accepted in a meeting of the Society on 12 July 1995, requires that membership of the Mosque shall be afforded to all adult Muslims resident in Kalk Bay upon

their application being ratified by the executive committee duly constituted, whose decision shall be final, binding and without recourse.

- [26] Additionally, it is contended on applicants' behalf that membership for Muslims outside Kalk Bay, would be considered by the executive committee with special consideration regarding their relationship with the community.
- [27] It is submitted on behalf of the applicants that the sole purpose of 13 February 2022 meeting was to discuss grievances that the first respondent may have had. According to the applicants, the agenda items to be considered did not include a vote of no confidence. Consequently, the primary objective of convening the meeting was not to exercise a vote of no confidence. It is also the assertion of the applicants that certain attendees of 13 February 2022 meeting were deemed ineligible to participate on the grounds that they were not residing in Kalk Bay.
- [28] Applicants further submit that the first respondent is not a member of the society, therefore, he was ineligible to move a vote of no confidence. According to the applicant, most people present at the meeting, were not members of the society, and therefore were ineligible to vote. It is asserted by the applicants that the vote of no confidence is invalid, and the invalidity of the vote of no confidence is a circumstance, per se, which renders the dispossession to be unlawful.
- [29] It was strenuously contended on the applicants' behalf that since the election of the applicants as the executive committee of the Mosque, there has been no subsequent annual general meeting in terms of which the applicants have been

ousted as the executive committee. Thus, the argument continues that, the usurping of the functions of the executive committee by the respondents has been without due legal process and not in terms of a properly constituted annual general meeting.

Respondents' detailed submissions

- [30] It is contended in the respondents' heads of argument that the applicant is seeking a declaratory order and the relief is formulated as a spoliation and an interdictory relief that has a final effect. Mr Sharu pointed out that there are disputes of facts almost in all the allegations made by the applicants. The respondents are also raising several other points in *limine*.
- [31] During his oral arguments, Mr Sharu submitted that the meeting of 13 February 2022, was an annual general meeting. As Mr Sharu puts it in his submissions: Even if it [the meeting] was not an annual general meeting, the fact that it was called and constitutional issues were discussed, it means that it was an annual general meeting, even though it did not qualify as such.
- [32] The respondents' answering affidavit unequivocally declares their readiness to convene an additional annual general meeting, following which the residents of Kalk Bay shall have the opportunity to make a decision. The respondents' answering affidavit avers that if there is anything untoward in the manner that they were elected, they are happy to have this Court direct that an annual general meeting be held so that the community can decide who they wish to appoint as the custodians of the Mosque.

- [33] The respondents assert that they were appointed by the community, and they account for all the monies collected. The first respondent denies that he is not the member of the community and that most of the people who attended the meeting of 13 February 2022, were not members of the society.
- [34] It is submitted on behalf of the respondents that the applicants are not entitled to the relief they are seeking.
- [35] The respondents assert that the 1995 Constitution is irrelevant in this matter. According to the respondents, the 1995 Constitution was drafted exclusively to open a bank account. And no one has ever acted in terms of the 1995 Constitution. It is further averred in the answering affidavit that no affairs of the Mosque were ever conducted in terms of the 1995 Constitution. It is the respondents' contention that the 1995 Constitution was abandoned by the applicants and they [the respondents] are not bound by it. Indeed, Mr Sharu submits that the 1995 constitution is not known by the applicants as they have not been operating in terms of the said constitution. Accordingly, Mr Sharu submits that, given the fact that the applicants were oblivious about the existence of the 1995 constitution, the applicants were not appointed in terms of the 1995 constitution. In any event, Mr Sharu submits that the applicants were not in peaceful possession as they [the applicants] were aware that they were not happy in their possession and they were not actively engaged in the activities of the community.
- [36] The respondents deny that the meeting of 13 February was convened exclusively to address grievances. The respondents further admit that the issue of the vote of no confidence was raised by the first respondent but was executed

by members of the community that were present. Additionally, it is averred on behalf of the respondents that the respondents have the support of the community.

[37] The respondents develop the argument by saying, the manner in which the deponent of the founding affidavit describes himself as a chairman is contrary to the terms of the 1995 Constitution. According to the respondents, if the applicants were operating within the confines of the 1995 Constitution, the first respondent should have described himself as the 'President' rather than a chairman.

[38] It is further submitted on behalf of the respondents that as the applicants rely on the 1995 Constitution, then on their own reliance, they should have joined the president, vice president and more so, the trustees. In support of this assertion the respondents are relying on clause 6.9.2 of the 1995 Constitution. According to the respondents, in terms of the 1995 Constitution, the applicants should have joined the trustees.

Evaluation

[39] So far as the papers disclose, it cannot be disputed that:

1. before the dispute arose, the applicants were the ones who were previously chosen by the community members, to serve on the executive committee of the Mosque.
2. the applicants were a legitimate executive committee before 13 February 2022;

3. on 13 February 2022, the applicants were removed as the executive committee of the Mosque through a vote of no confidence that was initiated by the first respondent;
4. The applicants are denied the right to exercise authority over the affairs of Mosque.
5. the respondents are the current office bearers of the Mosque;
6. the applicants object to the appointment of the respondents as the Mosque's office bearers;
7. the 1995 constitution exists;
8. the appointment of the of the respondents as office bearers did not happen in accordance with the 1995 constitution. Generally, the election of the respondents was not based upon any specific rules or regulations of the Mosque;
9. the 1995 constitution vests exclusive jurisdiction in the annual general meeting over the appointment the executive committee.

[40] The central issue in this matter is whether the applicants were unlawfully dispossessed from exercising their powers in relation to the Mosque.

The Mosque

[41] Mosques occupies an important place in the life of Muslims. A Mosque also plays an important social role in a Muslim community. See the study by *Goolam Vahed*, *'Torn by Dissensions and litigations Durban's Memon Mosque, 1880-1930'*.

[42] It has been said on numerous occasions that courts traverse a minefield whenever they involve themselves in a dispute concerning a religious body or matters of faith. In the very nature of things, religious bodies are self-regulating. In *Hendricks v The Church of the Province of Southern Africa, Diocese of Free State* (108/2021) [2022] ZASCA 95 (20 June 2022) at paragraph 47, the following is stated:

“[47] It is also necessary to take cognisance of the fact that courts are reluctant to involve themselves in the internal affairs of a religious body.[8] This Court in *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* (De Lange) held that:

‘As the main dispute in the instant matter concerns the internal rules adopted by the Church, such a dispute, as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.

High Court judgments . . . appear to accept that individuals who voluntarily commit themselves to a religious association’s rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies.’

This was a comment made by Ponnann JA in the majority judgment in this Court. The Constitutional Court in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, referred to this view as follows:

‘The Supreme Court of Appeal held that the doctrine of entanglement strongly informs courts not to get involved in religious doctrinal issues. The effect of the doctrine is that courts are reluctant to interfere with religious doctrinal disputes. See also Supreme Court of Appeal judgment *id* at para 33, where the Supreme Court of Appeal discusses *Ryland v Edros* 1997 (2) SA 690 (C) wherein the High Court recognised this doctrine as part of our new constitutional dispensation.” Footnotes omitted.

- [43] It is important to acknowledge, nonetheless, that the thrust of the applicants' contention is that their removal was not in accordance with the prescribed procedure contemplated in the 1995 constitution of the Mosque. Put differently, applicants contend that, the respondents failed to adhere to the prescribed procedure given that the meeting that approved the vote of no confidence did not qualify as an annual general meeting. It is the applicants' contention that the respondents followed their own rules in removing them as office bearers. Obviously, the corollary of an illegal usurping power, prevents the group that is removed from power from the control and use of the religious body [the Mosque], and its property.
- [44] While I accept that religious bodies are self-regulating, I must state that in cases where there is illegal usurping of power, or control and use of a religious body, the courts will not hesitate to intervene. See *Cassim and Others Appellants v Meman Mosque Trustees Respondents* 1917 AD 154.
- [45] High-handed action to arbitrarily change power dynamics through coercive means in religious body, is contrary to the rule of law, even if the party doing so erroneously believes that it has the authority to do so. It is significant to note that in this matter, the jurisdiction of this Court to hear this matter was never challenged, and I think correctly, so.
- [46] The removal of the applicants as office bearers of the Mosque, on 13 February 2022, effectively resulted in the respondents acquiring exclusive use, control and possession of the Mosque and its property. Hence, the applicants assert that the respondents' conduct interfered with their use, control and occupation

of the Mosque as its [Mosque's] executive committee. The submission of Mr Sharu that the applicants were not in peaceful possession of the Mosque before 13 February 2022, cannot be reconciled with what transpired on the said date.

[47] As previously pointed out, the question that aptly arise for determination by this Court pertains to the right to the possession, use and control of the Mosque and its property.

[48] Therefore, in this application, this Court is enjoined to conduct an inquiry as to whether the act of the respondents that concerns property rights of the Mosque was an act in terms of the prescripts of the Mosque, or of persons having no authority.

Were the applicants unlawfully removed from their executive position?

[49] According to my understanding, in this matter there is no doubt as to whether the Mosque at the critical time had a constitution. It is important to note that, although the respondents assert that the Mosque was not regulated in terms of the 1995 constitution, they do not dispute the existence thereof. In actual fact, Mr Sharu, on respondents' behalf, contended that there was a constitution at the relevant time but the applicants were simply unaware of it. The respondents strenuously aver that the applicants' reliance on the 1995 constitution is misplaced and unwarranted.

[50] Further and significantly, the respondents contend that the applicants use the 1995 constitution when it suits them. To make a point, the respondents assert that the applicants even for purposes of this application failed to comply with the requirements of the 1995 constitution.

[51] The 1995 Constitution provides in part as follows:

“ . . .

5. ADMINISTRATION:

The affairs of the Society shall be administered by:

5.1 Annual General Meeting

5.2 General Council

5.3 Executive Committee

5.4 Various Departments

6. OFFICE BEARERS OF THE SOCIETY:

The office bearers of The Society shall constitute the Executive Committee whose title and duties are defined as follows:

6.1 PRESIDENT

6.1.1 . . .

6.1.2 . . .

6.1.3 . . .

6.1.4 To arbitrate in any dispute individually or organizationally.

6.2 VICE PRESIDENT

The Vice President shall perform the duties in the absence of the President or when specifically requested to do so by the President.

6.3 CHAIRMAN

6.4 VICE CHAIRMAN

6.5 THE GENERAL SECRETARY

6.6 ASSISTANT SECRETARY

6.7 TREASURER

6.8 ADDITIONAL MEMBERS

6.9 TRUSTEES

6.9.1 . . .

6.9.2 The Trustees shall initiate or receive all litigation directed by or to the Society in their official capacity . . .

7. FUNCTIONS AND DUTIES OF ADMINISTRATIVE BODIES:

7.1 ANNUAL GENERAL MEETING

7.1.1 The Annual General Meeting shall be held in Sha' Baan in every year.

7.1.2 Officials shall be elected at the A.G.M.

7.1.3 . . .

7.2 GENERAL COUNCIL: Shall consists of all members of The Society and shall have the following functions.

7.2.1 The right to ratify or reject any proposal made into The Society.

7.2.2 The final say regarding all decisions of The Society.

7.2.3 Be responsible for the implementation of all decisions by The Society.

7.2.4 Elect office bearers annually.

7.3 EXECUTIVE COMMITTEE:

Shall have the following functions:

7.3.1 The Executive Powers of the Society shall be vested in this committee.

7.3.2 Report on activities in writing at all General Meetings.

7.4 . . .

7.5 . . .

8. MEETINGS:

8.1 GENERAL MEETINGS: Shall be held at least once every THREE MONTHS. Special general meetings may be convened at the discretion of the Executive Committee (7 days' notice).

8.2 EXECUTIVE COMMITTEE MEETINGS: Shall be held at least once every TWO MONTHS although special Meetings may be convened at the discretion of the General Meeting.

8.3 DEPARTMENT MEETINGS . . .

9. . . .

10. . . .

11. . . .

12. . . .

13. . . .

14. . . .

15. AMENDMENTS TO CONSTITUTION:

Any amendments alterations and additions to this Constitution shall be made at the A.G.M with 14 days prior notice in writing and by a two thirds majority."

The 1995 Constitution

[52] A constitution of a religious body signifies that it possesses its own set of laws and regulations. At a risk of repetition, it is a very significant aspect in this

matter that the existence of the 1995 is not in dispute. Therefore, it seems that the provisions of the constitution that the applicants are relying on amongst others, are existing. It justly follows that a clause [of the constitution] which is in existence cannot be ignored.

[53] It is noteworthy that the respondents acknowledge that the constitution in question was drafted in 1995. While it is quite clear that before 13 February 2022, there was a pre-existing constitution, however, as previously mentioned, it is strenuously contended that the constitution was never used.

[54] To me what was stated in *Green v Fitzgerald and others* 1914 AD 88 at 110-111, equally applies to constitutions of religious bodies and societies. In the *Green* matter the following was stated:

“An enactment of once upon a statute book remains in force until removed by the Legislature, no matter how long it may have fallen into disuse . . . The civil law on the other hand recognizes the principle that a statute might not only be expressly repealed by the legislative authority, but tacitly repealed by disuse by silent consent of the whole community . . . [b]oth in principle and on authority mere desuetude must in certain circumstances be sufficient . . . Paul Voet suggests the third of a century as the minimum period of disuse which should operate as tacit repeal. Undoubtedly, a very long term would be required . . .”

[55] In the circumstances, can it be said that the 1995 constitution fell into disuse because of allegations that no one ever acted in terms of the constitution or conducted the affairs of the Mosque in terms of it? Clause 15 of the 1995 constitution explicitly states how the 1995 constitution can be amended. For all intents and purposes, until the terms of the 1995 constitution are repealed, amended or altered in terms of its provisions, it stands.

- [56] There is no evidence before this Court to demonstrate that the 1995 constitution was ever abrogated. Equally, there is nothing to show that the membership of the Mosque divested themselves from the 1995 constitution. Thus, it cannot simply disappear. For that matter, the constitution in question is not that old. Therefore, prolonged disregard does not feature or manifest.
- [57] Clause 15 of the 1995 constitution talks about amendments, alterations and additions to it. Primarily, non-implementation of the 1995 constitution does not translate itself to mean implied repeal, or that it is obsolete or invalid.
- [58] The 1995 constitution was never invalidated. In light of clause 15 of the 1995 constitution, it could not have been intended that the constitution can become obsolete. Therefore, the Mosque still stands to be regulated in terms of its constitution. In my view, the fact that the 1995 constitution was used to manage the banking operations, clearly evinces that it was used to conduct the Mosque's banking and financial affairs and businesses. Thus, the 1995 constitution was very much in use and it still remains the constitution of the Mosque.
- [59] In this connection, it should be mentioned that, even if the 1995 constitution was not applied, that does not justify an inference that it is obsolete. For that matter, the alleged applicants' disregard of the 1995 constitution is not per se, the measure of its efficacy. There can be no doubt that a failure to conduct affairs of the Mosque in terms of the constitution does not abrogate the constitution.
- [60] If one were to follow the respondents' reason that this Court is supposed to disregard the provisions 1995 constitution because amongst others, it is alleged

that the applicants were not implementing it; that would undoubtedly lead to logical inconsistencies and absurd results. It will foist on members of societies or religious groups to simply ignore constitutions with the hope of making them obsolete.

[61] It then stands to reason therefore, that, the appointment of the Mosque's new office bearers should and\ should have been done in accordance with its stipulations.

[62] Gleaning from the 1995 constitution, it becomes clear that the relationship between the Mosque and its members is based upon the Shariah of Islam and the 1995 constitution. Thus, the Mosque's affairs and its self-governance and the management of its affairs, are measured by the terms of the 1995 constitution and Shariah of Islam. Thus, it is evident the Mosque's meetings and elections held should be done in accordance with the constitution regulating it.

[63] In the circumstances of this application, it is ironic that the preamble of the 1995 constitution states the following:

"And hold fast the Rope of Allah Together and do not be divided amongst yourselves."

It is unfortunate and regrettable that in this matter it is indisputable that there is an incredible conflict amongst the members of the Mosque.

The papers of this matter are devoid of any indication that the 1995 constitution was merely a ruse designed for business purposes. In my mind, the respondents did not sufficiently demonstrate that the 1995 constitution was drafted only for purposes of opening a bank account. It is evident from the terms

of the 1995 constitution that it accorded various defined key positions that have wide ranging powers and duties. The clauses of the 1995 constitution evinces that the succession plan of the Mosque is controlled by the constitution.

If regard is had to clauses 7.1 and 7.2 of the 1995 constitution they provide as to who, when and where the officials of the Mosque are supposed to be elected. Therefore, there is a prescribed procedure in place aimed at smooth transition into power. Surely, this is meant to bolster democratic, effective, and sustainable governance of the Mosque.

Thus, the contents of the 1995 constitution do not sustain the view that the 1995 constitution was not meant for the managing or governance of the Mosque.

[64] Even assuming that the Mosque was not managed in terms of a constitution, the essential fact is that the respondent was free to use legal mechanisms that would be in compliance with the 1995 constitution to force the applicants to hold an annual general meeting for elections.

[65] For that matter, the 1995 Constitution does not even talk about a vote of no confidence.

The meeting of 13 February 2022

[66] The gravamen of the entire application revolves around the meeting that occurred on 13 February 2022, and the events that transpired there. At the said meeting it is common cause between the parties that the majority of the people who were there, voted for the ousting of the applicants as office bearers of the Mosque. It is axiomatic that the meeting of 13 February 2022, though it was

initiated by the first respondent, it was called by the applicants [executive committee].

[67] By the very nature of this application and the contents of the founding affidavit, it is clear that what transpired at the meeting of 13 February 2022 was contrary to the wishes of the applicants. As already observed, according to the applicants, the designated purpose of the meeting of 13 February 2022 was to cast a vote of no confidence.

[68] From the assertions of the applicants as well as those of the respondents, it is evident that the meeting of 13 February 2022 was a special meeting, given that its purpose was to address and discuss the grievances that were raised by the respondents, particularly the first respondent. Therefore, the meeting of 13 February 2022, was called for a specific purpose. Consequently, it is my firm view that, a consideration of the papers placed before me leads to the conclusion that the meeting of 13 February 2022, fell under the special meetings mentioned in clause 8.1 of the 1995 constitution. In the context of this case, the removal of the applicants must be regarded as having been made by a special meeting.

[69] In terms of the 1995 Constitution, an election of an executive committee does not take place during a special meeting. Additionally, in terms of the 1995 constitution, the executive committee is also elected by a general council. In my view, these clauses or constitutional requirements make absolute sense because, the executive committee is a key institutional mechanism intended to run the affairs of the Mosque and to govern it.

[70] It is quite obvious that, if the 1995 constitution states that the executive

committee shall be elected during an annual general meeting by a general council, the upshot of this is that an incumbent executive committee would then vacate as the Mosque's officers during an annual general meeting in the presence of a general council.

[71] I therefore hold the strong view that the meeting wherein the purported vote of no confidence was cast against the applicants which had the effect of removing the applicants from the offices they held, had not been properly called for purposes of removing office bearers and thus, it had no powers to a despoil the applicants of their possession of the Mosque and its property. Even supposing that the respondents after the meeting of 13 April 2022, were legally elected [and it is plain they were not] they had no power to oust the applicants and simply lacked authority to do so.

[72] In as much as the respondents asserts that the majority of the Kalk Bay Community on 13 February 2022, voted for the ousting of the applicants as officers of the Mosque, that does not by any stretch of imagination ratify the unlawful conduct that took place during the meeting. It does not necessarily follow that because there was a meeting and in that meeting the majority voted for the ousting of the applicants, the meeting had the right to remove the applicants. Clearly, the meeting of 13 February 2022, assumed a jurisdiction that did not belong to it. Consequently, it could not clothe and endow any individual with the necessary powers to become office bearers of the Mosque. This is plain from the consideration of the 1995 constitution.

[73] To that end, it stands to reason that the removal of the applicants was not in compliance with the 1995 constitution of the Mosque. Quite evidently, the

meeting of 13 February 2022 lacked competence to take such a step [removal of the applicants]. As far as this issue is concerned, on the whole the applicants appear to be correct.

- [74] It would be a great misfortune if not all the issues involved in this case are not dealt with. Of course, what remains is to determine whether the points in limine raised by the respondents are meritorious.

Points in limine

- [75] Some of the points in *limine* raised are to a great extent fully disposed of by what is stated hereinabove. As far as the dispute of facts are concerned, I have already dealt with some of the issues.

- [76] At first blush, it appears as if the instant case is peppered with dispute of facts. The factual disputes revealed by the papers were not material as this Court could determine or resolve the issues based on the papers of the parties, notwithstanding the disputed issues.

Alternative remedy

- [77] A proper understanding of the applicants' argument reveals that it is predicated upon a claim that the Mosque's current office bearers are illegitimate in their power, position and authority. The fact that the applicants aver that they were illegitimately removed as office bearers; leads to an inevitable and plausible conclusion that the applicants could not pursue an alternative remedy offered by the current executive committee. This is so because at this point, the applicants do not recognise the current office bearers as legitimate. The current situation of the Mosque is such that the applicants cannot obtain a meaningful

alternative remedy from the Mosque's office bearers.

Thus, it stands to reason that the applicants who consider themselves to have been adversely affected as a result of the conduct of the respondents, cannot be expected to seek remedy to redress their grievance from the impugned office bearers. Equally true is that they also could not use the trustees, whom they consider to be illegitimately in power. Therefore, the issue of alternative remedy as raised by the respondents is of little moment in this matter. The argument by the respondents in this regard utterly fails.

Non-Joinder of parties

- [78] An objection of non-joinder of the trustees is also raised by the respondents. Similarly, this objection is also ill conceived in light of the fact that the applicants virtually do not recognise the current executive committee of the Mosque.

Conclusion

- [79] It must be found, therefore, that the applicants [the executive committee] who were already in possession of the Mosque before the meeting of 13 February 2022; were unlawfully disturbed from their peaceful control and possession of the Mosque and its property by the respondents. It must be held that the applicants are still the lawful office bearers of the Mosque. The applicants therefore are entitled to the declaration asked for in the notice of motion.
- [80] I am thus satisfied that the applicants have succeeded in making out a case for the reliefs they are seeking with costs.

[81] In the result I make the following order;

1. It is declared that the respondents dispossession of the applicants' physical control of the Mosque known as Masjidul Jaamia -Kalk Bay in Quarterdeck Road, Kalk Bay ("the Mosque") is unlawful.
2. The respondents are directed to:
 - 2.1 restore the applicants' possession of the Mosque;
 - 2.2 hand the applicants all locks and keys to the Mosque;
 - 2.3 hand to the applicants all funds collected by the respondents for the Mosque;
 - 2.4 account to the applicants for all funds collected by the respondents for the mosque since 13 March 2022.
3. The respondents are interdicted and restrained from unlawfully dispossessing the applicants, either directly or indirectly, from their physical control of the Mosque.
4. The respondents are interdicted and restrained from collecting funds or goods for the Mosque, either directly or indirectly.
5. The respondents are ordered to pay the applicants' costs jointly and severally.



NZIWENI, J

JUDGE OF THE HIGH COURT

Appearances

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Instructed by: Sharuh Attorneys

Ref Mr Sharuh