

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2023-007716

DATE: 24 MARCH 2025

In the matter between:

GOOLAM YOUSUF MAHOMED N O

First Applicant

YUSUF SURTEE N O

Second Applicant

ABDOOL RAHMAN ISMAIL LAHER N O

Third Applicant

MOHAMMED ALI YUSUF SEEDAT N O

Fourth Applicant

and

H E SALEH A AZIZ MOHAMMED AL-AL SHAIK N O

First Respondent

FAISAL HAMAD AHMED MOALLA N O

Second Respondent

ABDAILAH F AL-LHEEDAN N O

Third Respondent

MOHAMMED ABDULWAHED A. ALARIFI N O

Fourth Respondent

FAHAD FALEH MEGWAL AL OTAIBI N O

Fifth Respondent

Neutral Citation: *Mahomed N O and Others v Al-Al Shaik N O and Others (2023/007716)* [2025] ZAGPJHC --- (24 March 2025)

Coram: Adams J

Heard on: 1 and 2 October 2024 – ‘virtually’ as a videoconference on *Microsoft Teams*.

Delivered: 24 March 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 24 March 2025.

Summary: Trust – trust instrument – termination – requirements – Trust Property Control Act 57 of 1988, s 13 –

One set of Trustees applied for termination of the Trust – other trustees counter-applied for declaratory orders relating to decisions taken by applicants – s 13 of the Act gave a court the power to terminate a trust if a provision of the trust instrument led to a consequence that the trust's founder did not foresee, and which hampered achieving his aims –

The court concluded that applicants established the requirements and the grounds to terminate the trust in terms of s 13 –

Application granted and counter-application dismissed.

ORDER

(1) The applicants' application dated 30 March 2023 to strike out certain paragraphs of the respondents' answering affidavit is refused with costs,

(2) The first, second, third and fourth applicants, jointly and severally, the one paying the other to be absolved, shall pay the respondents' costs pertaining to the strike out application, which costs shall include the costs consequent upon the employment of two Counsel, one being Senior Counsel, on scale 'C' of the tariff applicable in accordance with the Uniform Rules of Court.

(3) The *King Fahad Islamic Centre Trust*, registered under Trust Deed No: 5[...] ('King Fahad Trust') is hereby terminated in terms of section 13 of the Trust Property Control Act 57 of 1988.

(4) Pursuant to the termination of the King Fahad Trust, the consolidated immovable property registered in the name of the Trust, namely Erf 2[...], H[...] E[...]e, Johannesburg ('the immovable property'), is to be transferred to the Houghton Muslim Jamaat Trust, registered under Trust Deed No: 4[...].

(5) Such transfer shall be effected, solely at the cost and for the account of the Houghton Muslim Jamaat Trust, within ninety days from date of this order.

(6) Upon termination of the King Fahad Trust and the registration of transfer of the immovable property into the name of the Houghton Muslim Jamaat Trust, the Houghton Muslim Jamaat Trust shall pay to the Saudi Arabian Government the amount actually and reasonably paid by the Saudi Arabian Government to the King Fahad Trust or for the construction of the mosque on the immovable property, as determined after a statement and debatement of account before an independent party ('the umpire') agreed to by parties; alternatively, appointed by court failing such agreement being reached within thirty days of this order, with the following time-lines being applicable:

(a) The statement by the Saudi Arabian government or the respondents shall be provided to the applicants and the Houghton Muslim Jamaat Trust within thirty days of the order;

(b) The debatement and final determination by the umpire after considering submissions by both parties (to be made within thirty days of the statement being provided) shall take place within sixty days of the statement being provided; and

(c) Payment shall take place within ninety days of debatement and final determination having been made by the umpire or the transfer of the immovable property to the Houghton Muslim Jamaat Trust – whichever occurs later.

(7) The first to fifth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs pertaining to the applicants' application, which costs shall include the costs consequent upon the employment of three Counsel, one being Senior Counsel, on scale 'C' of the tariff applicable in accordance with the Uniform Rules of Court.

(8) The first to fifth respondents' counter-application is dismissed with costs.

(9) The first to fifth respondents, jointly and severally, the one paying the other to be absolved, shall pay the first to fourth applicants' costs of the counter-application, which costs shall include the costs consequent upon the employment of three Counsel, one being Senior Counsel, on scale 'C' of the tariff applicable in accordance with the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. The King Fahad Islamic Centre Trust ('The King Fahad Trust' or simply 'The Trust') was created and its Deed of Trust registered during 2006 under the Master's reference number I[...]. The Deed of Trust provides that the objects of the Trust are as follows:

'The sole object for which the trust is created is to carry on one or more public activity in the Republic of South Africa, as defined in section 30(1) of the Income Tax Act, Act 58 of 1962, as amended, which qualify for tax exemption as envisaged in Section 10(1)(cN) of the Income Tax Act.

More specifically, and without derogating from the generality of the foregoing, the objects of the trust are:

➤ To establish a special fund in the Republic of South Africa for the purpose of acquiring immovable property, holding such immovable property and to use the property for the sole purpose of constructing the King Fahad Islamic Centre (comprising of Masjid and Islamic Centre) in Houghton, Johannesburg.

- to conduct the affairs of the Masjid and the Centre in particular to serve the spiritual needs of the Muslim community;
- to promote the upkeep and interest of the Masjid and the Centre.'

[2]. The first to fourth applicants (applicants) are the South African Trustees of the Trust and the first to fifth respondents (respondents) are its Saudi Arabian Trustees.

[3]. In this opposed application, which came before me in the Commercial Court of this Division, the applicants apply for an order that the King Fahad Trust be terminated or dissolved in terms of s 13 of the Trust Property Control Act 57 of 1988 ('the Act'). Pursuant to the termination of the Trust, the applicants also pray for an order that all of its trust property be transferred to the Houghton Muslim Jamaat Trust ('Houghton Muslim Trust'). In the alternative, the applicants pray for an order that the respondents be removed as Trustees of the King Fahad Trust in terms of section 20(1) of the Act. In a nutshell, the case on behalf of the applicants is that the Trust should be terminated on account of the fact that the Saudi Arabian Trustees have, through their conduct, frustrated the objects and purpose of the Trust.

[4]. The respondents oppose the application on the basis that factually and legally the applicants are not entitled to the relief sought. The respondents have also preferred a counter-application *inter alia* for an order declaring 'void and of no force and effect' and setting aside certain decisions taken by the applicants during the existence of the Trust, for example: (a) the decision to appoint the Imam and the stipulation of his duties; (b) the decision of naming the Mosque the 'Houghton Mosque', and (c) the decision to call the Islamic Centre the 'Houghton Jumma Masjid, West Street'. The respondents also apply for an order directing the applicants to account to them 'for all decisions taken by [the applicants] in relation to the trust assets, and the trust affairs from inception to date' and to provide the audited financial statements of the King Fahad Trust for the years ending 2014 to 2022.

[5]. The main issue to be decided in this application is whether the objects of the Trust have been hampered or frustrated by certain of its provisions and by the conduct of the respondents and their alleged inaction in the administration of the

Trust. Furthermore, the question which I need to consider is whether such conduct on the part of the respondents, if proven, entitles the applicants to an order terminating the Trust and an order transferring ownership of the immovable property, owned by the Trust, to another trust under the control of the applicants.

[6]. The applicants' case in that regard is that the objects of the Trust which are hampered and/or frustrated by the uncooperative respondents include the development and the construction of the Masjid (Mosque) and the Centre, the upkeep and administration of the Masjid and the Centre, and generally the conduct of the affairs of the Masjid and the Centre in a manner that best serves the spiritual needs of the South African Muslim community generally and the community where the Mosque is located.

[7]. Closely related to the foregoing issue is the following question: Does the Trust Deed require the South African and the Saudi Arabian Trustees to act jointly and was the complete breakdown in the relationship between the two camps of Trustees foreseeable at the time the Trust Deed was concluded? And finally, I need to consider whether the termination of the Trust in terms of section 13 of the Trust Property Act is an appropriate order.

[8]. All of these issues are to be considered and decided against the factual backdrop and the facts in the matter as set out in the paragraphs which follow. However, before dealing with the facts, it may be apposite at this point to have a brief overview of the applicable legal principles and a convenient starting point is s 13 of the Trust Property Control Act 57 of 1988 ('the Act'), which provides as follows:

-

'13 Power of court to vary trust provisions

If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which –

- (a) hampers the achievement of the objects of the founder; or
- (b) prejudices the interests of beneficiaries; or
- (c) is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision *or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.*' (Emphasis added).

[9]. The jurisdictional requirements for an order of termination under s 13 of the Act were set out in *Gowar and Another v Gowar and Others*¹, in which the Supreme Court of Appeal at para 34 explained as follows:

'[34] Thus, s 13 of the Act is to the effect that the court may, on application of the trustee or any person who, amongst others, has sufficient interest in the trust property, delete or vary any such provision in a trust deed which brings about the result specified in the section, or grant "an order terminating the trust". *Cameron et al* state that the provisions have both subjective and objective criteria. The former relate to the founder's lack of foresight or contemplation and the latter relate to prejudice to the trust object, beneficiaries or the public interest. These criteria must be satisfied before the court can intervene. Accordingly, as I see it, for the purposes of s 13 of the Act the appellants had to establish on a balance of probabilities that any provision of the trust deed has brought about any one of the consequences mentioned in s 13(a), (b) and (c) of the Act and that the founder of the trust did not, at the time the trust was established, contemplate or foresee such a result.'

[10]. In order to grant relief under s 13 of the Act, the Court must be satisfied that the Trust Deed contains a 'problematic provision', which has hampered the achievement of the objects of the founder and which result the founder did not, at the time the trust was established, contemplate or foresee such a result.

[11]. In *Estate Hafiz and Others v Hafiz and Others*², the Supreme Court of Appeal held as follows at para 30:

¹ *Gowar and Another v Gowar and Others* 2016 (5) SA 225 (SCA).

² *Estate Hafiz and Others v Hafiz and Others* 2024 (2) SA 374 (SCA).

‘Section 13 does not confer upon a court a general power to vary a deed of trust. A court’s power is confined to the circumstances which are set out in the section.’

[12]. In *K H NO v H Trust and Others*³, this Court (per Strydom J) explained that s 13 of the Act does not provide the court with a wide discretion but is limited in its application to cases where the requirements set out by the Supreme Court of Appeal in *Gowar* have been met.

[13]. That then brings me back to the facts in the matter, which are, in my view, by and large common cause or at least not seriously challenged,

[14]. The applicants allege that, contrary to what is provided for and envisaged by the Deed of Trust, the Saudi Arabian Trustees have failed to construct the Islamic Centre, despite being required to do so. They also failed to properly construct the Masjid, as required, necessitating the intervention of the South African Trustees to ensure that it was constructed and made available for use, and, for the past ten years or so, deliberately ignored and refused to attend any meetings of the Trustees and refused to participate in the day-to-day running and administration of the business of the Trust, that being the management of the Masjid. It is also averred by the applicants that the Saudi Arabian Trustees deserted the project, leaving the affairs of the Masjid in the hands of the South African Trustees, who have tended to the Masjid since its opening in May 2013, and funded its ongoing running expenses.

[15]. Mr Bhana SC, who appeared on behalf of the applicants with Messrs Itzkin and Mohammed, contend that the foregoing is incontrovertibly borne out by the documentary evidence before the Court and emerges from the Saudi Arabian Trustees’ own answering affidavit. It follows, so the contention goes, from the version of the facts put up by the respondents. I will revert to this contention later on in the judgment.

³ *K H NO v H Trust and Others* (035385/2022) [2023] ZAGPJHC 1146 (6 October 2023).

[16]. As I have already indicated above, the King Fahad Trust was created during 2006. The founder of the Trust is the first respondent, His Excellency Saleh A Aziz Mohammad Al-Al Shaik, in his official capacity as the 'Minister of Islamic Affairs, Endowments, Da'wah and Guidance' of the Kingdom of Saudi Arabia. In founding the Trust, the first respondent was representing the Kingdom of Saudi Arabia, which, for all intents and purposes, is the founder of the Trust.

[17]. Prior to the creation of the Trust, the Kingdom of Saudi Arabia's Ministry of Islamic Affairs, Endowments, Da'wah and Guidance ('Ministry of Islamic Affairs') and the Houghton Muslim Trust concluded, on 19 April 2005 and at Riyadh in the Kingdom of Saudi Arabia, a Memorandum of Understanding ('MoU'). In terms of the MOU, the parties resolved to implement a project in Houghton, Johannesburg, to consist of phase 1, which was for the construction of the Masjid (or Mosque), as well as phase 2, which involved the construction of an Islamic Centre which would include a conference hall, facilities and a library ('the Centre').

[18]. The MoU envisaged the creation of the Trust, which would act as the vehicle for the aforesaid project. The MoU also set out the duties of the Ministry of Islamic Affairs in relation to the project, notably that it would provide the necessary funding required for the construction of the King Fahad Islamic Centre (comprising of the Masjid and the Islamic Centre) in Houghton, Johannesburg, in accordance with the regulations and procedures set out by the Saudi Arabian Ministry of Finance and the building plans provided by the Houghton Muslim Trust. The Ministry of Islamic Affairs also pledged to make available the necessary funding and give final approval, as required by the Ministry of Finance of the Kingdom of Saudi Arabia, for construction of the first phase to begin within four months of the signing of the agreement.

[19]. Clause 3 of the MoU sets out the duties of the South African Trustees, represented by the Houghton Muslim Trust, in relation to the project. Importantly, as owner and lawful title holder of Erven 1450, 1451, 1452 and 1453, the Houghton Muslim Trust agreed to complete the registration and the transfer of the aforementioned erven into the name of the Trust, for no value. The erven were to be consolidated into a single stand for purposes of the development.

[20]. I have already alluded *supra* to the objects of the Trust. Clause 5.1 of the Trust Deed reads as follows:

‘There shall at all times be not less than 10 (ten) trustees in office for the purpose of the valid exercise of the powers and discharge of the duties of the trustees in terms of this deed. Six trustees will constitute a quorum at all meetings of trustees convened for the purposes of the business of the trust to be transacted at such a meeting.’

[21]. Clause 5.2 provides for the appointment of the first ten trustees, namely the first to fifth respondents and the first to fourth applicants, as well as a Mr Abdool Razak Moti. Clauses 5.3.1 and 5.3.2 indicate that the board of trustees will comprise 10 trustees, 5 of which will represent the Kingdom of Saudi Arabia and 5 of which will be the South African trustees. Clause 8.3 of the Trust Deed provides that ‘[m]atters arising at any meeting of trustees will be decided by a majority of votes’. Clause 10.5 of the Trust Deed reads as follows:

‘The trust will be administered at all times by the trustees in terms of the powers vested in them in clause 11 hereafter and in this regard, it is hereby minuted that: ...’.

[22]. Clause 11.2 of the Trust Deed identifies the powers of the trustees, which includes the powers to formulate and implement general policy to serve the interests of Islamic Da’wah, to attend to the appointment of the Director of the Centre and the stipulation of his duties, and to attend to the appointment of the Imam and the stipulation of his duties.

[23]. From the foregoing it is clear that in order to attend to the day-to-day running of the Masjid, as well as to attain the other objects of the Trust, such as the construction and upkeep of the Masjid, the Saudi Arabian and South African trustees must act jointly. This, in turn, entails that decisions relating to the running of the Masjid are to be taken by a majority of votes at a quorate meeting, which must of necessity include attendance of at least some members of both sets of Trustees. This is so because the quorum of six can only be achieved if portions of both sets of Trustees attend at those meetings. The net effect of clause 5.1, which imposes the requirement that six Trustees be present at a meeting in order for it to be quorate, in

effect creates an obligation on the Saudi Arabian and South African sets of Trustees to act jointly in order to give effect to the purpose of the Trust.

[24]. It therefore cannot be gainsaid that, as contended by the applicants, the Deed of Trust contemplated the Saudi Arabian and the South African Trustees working together and acting jointly to attain the objects of the Trust

[25]. The next issue relates to the subjective intention of the founder, which, as submitted by the applicants, can be gleaned from the MoU. Clause 1.1 of the MOU reads as follows:

‘The two parties hereby agree to form a board of trustees for the King Fahad Islamic Centre, Johannesburg, Republic of South Africa. The Board of Trustees will comprise ten (10) members, half of whom shall represent the first party [Ministry of Islamic Affairs] and the other half to represent the second party [Houghton Muslim Trust] in order to give effect to a joint relationship and will be made up of the following: ...’.

[26]. The MOU records that the duties of the board of trustees included the formulation and implementation of general policies to serve the interests and needs of the South African Muslim community, the appointment of the Director, and the appointment of the Imam.

[27]. Clause 5.1 of the MOU reads as follows:

‘It is agreed that the Masjid and the Centre is one project. Its control vests with the board of trustees.’

[28]. Clause 5.2 provides thus:

‘Upon completion of this project, the parties will ensure that an appropriate plaque is positioned on the property reflecting the name of the centre as the King Fahad Islamic Centre and acknowledges that the Centre, inclusive of the property, was brought about by the graciousness of the Kingdom of Saudi Arabia.’

[29]. What is clear from the MOU, read together with the Deed of Trust, is that the Trust was founded on the basis of joint cooperation, in terms of which the Saudi Arabian Trustees and South African Trustees would exercise joint control to ensure that the project is completed and that the affairs of the Masjid and the Centre are then collectively addressed in order to serve the interests and needs of the South African Muslim community. A joint relationship that discharges these duties is clearly the bedrock of the Trust. This quite obviously was the foreseeable goal that was sought to be achieved by the formation of the Trust.

[30]. That then brings me to the next question, that being whether the objects of the Trust are being hampered.

[31]. The evidence in the matter suggests that the requirement imposed by clause 5.1 of the Trust Deed – that the Saudi Arabian and South African Trustees act jointly in order to give effect to the purpose of the Trust – has hampered the objects of the Trust. It is, as submitted by the applicants, that a situation in which one set of trustees – either the Saudi Arabian Trustees or the South African Trustees – would of necessity, and as a result of the non-cooperation of the other camp of Trustees, conduct the affairs of the Trust, was not contemplated by the founder at the time at which the Trust was formed. Moreover, it has to be accepted that objectively the objects of the Trust are frustrated by the foregoing requirements. Those objects importantly relate to the construction and development of the Masjid and the Centre and conducting of the affairs of the Masjid and the Centre in particular to serve the spiritual needs of the Muslim Community, as well as the promotion and the upkeep of the Masjid and the Centre.

[32]. The evidence before me confirms that the Saudi Arabian Trustees have not been involved in the day-to-day running of the Masjid since 30 May 2013. It is the South African Trustees who have maintained and administered the Masjid from that date onward. This is not denied by the Saudi Arabian Trustees, who, in response to an allegation that the South African Trustees have, for over a decade, attended to the administration of the mosque and of the property without the involvement or assistance of the Saudi Arabian Trustees, note in their answering affidavit that ‘it is correct that the applicants have attended to the management and administration of

the mosque and the property for over a decade'. They do however qualify this concession by remarking that such management and administration was 'without the respondents' consent', and they allege that same was 'part of a deliberate strategy to exclude the respondents from fully participating in the Project'.

[33]. The fact remains, however, that, as averred by the applicants, for a period of about ten years there has been non-participation by the Saudi Arabian Trustees in the day-to-day running and the management and administration of the Masjid. The foregoing is aptly borne out and demonstrated by correspondence from the applicants to the respondents during 2007 and thereafter in which the respondents were requested to 'advise as to when the first Trustees' meeting is to be convened ...'. This request is repeated in a letter from the South African Trustees dated 12 October 2012, which letter also noted that 'meetings have been promised on numerous occasions but no such confirmation of the proposed meetings to be held have been forthcoming'. The letter further records that the South African Trustees 'as partners ... are extremely disappointed and saddened in the manner in which we have been treated and cannot see ourselves [the South African Trustees] continuing if the present unsatisfactory state of affairs continues'. In a subsequent letter from the South African Trustees dated 14 January 2014, they 'reiterate their request for a meeting with the Minister of Islamic Affairs'.

[34]. This trend continued, as did the repeated pleas by the South African Trustees for a meeting of the Board of Trustees to be held, all of which fell on deaf ears. This culminated in a comprehensive letter from the South African Trustees dated 24 March 2015 in which they propose that "in order to move forward within the parameters and objectives of the Trust, that a duly constituted meeting of the board of trustees be held at the earliest possible convenience ...'. The South African Trustees 'reiterate[d] that they are willing to attend a duly constituted meeting of the Trustees at the convenience of the Minister ... to be held either in the Kingdom of Saudi Arabia or the Republic of South Africa'. This communiqué was also met with a deafening silence from the side of the Saudis.

[35]. As I have already indicated, the foregoing demonstrates indubitably the non-cooperation on the part of the Saudi Arabian Trustees and their non-compliance with

their duties as Trustees in terms of the Deed of Trust. What this also demonstrates is that it cannot be said with any conviction that the South African Trustees had sought to deliberately exclude the respondents from fully participating in the Project. The opposite is true, in that the South African Trustees have sought to convene a meeting of the Trustees, including the Saudi Arabian Trustees, on numerous occasions, to no avail.

[36]. The Saudi Arabian Trustees themselves admit, and it is therefore common cause, that there has not, as yet, been a duly constituted meeting of the Trustees of the King Fahad Trust (save for the inaugural meeting). This cannot possibly be attributed to the South African Trustees. Nor can it be said that they did not do everything in their power to make the meeting of the Trustees happen. What is more is that, by all accounts, there has been an irretrievable breakdown of the relationship between the South African Trustees and the Saudi Arabian Trustees. The breakdown in relationship extends beyond a mere squabble. The inability of the parties to act jointly is now actively preventing the achievement of one of the fundamental objects of the Trust.

[37]. On the basis of the foregoing facts, I reject out of hand the suggestion by the respondents that the South African Trustees have prevented the Saudi Arabian Trustees from being involved in the day-to-day running of the Masjid, including the making of decisions regarding the appointment of the Director and the Imam. Clearly, the South African Trustees have, over many years, sought the involvement of the Saudi Arabian Trustees by way of repeatedly requesting the convening of meetings of the Trustees, at which these decisions could have been jointly made, which requests were simply not acceded to.

[38]. In addition to this, the Saudi Arabian Trustees refuse to allow the South African Trustees to exercise their right to appoint a new trustee, following the passing on of Dr Razak Moti. To this end, the Saudi Arabian Trustees have refused to provide the South African Trustees with copies of their passports to allow the Master of the High Court to process the amendment to the Trust Deed to reflect the newly appointed South African Trustee. There appears to be deliberate conduct by

the Saudi Trustees which is calculated to completely frustrate the achievement of the Trust's objects.

[39]. I therefore conclude on this point that the requirement to act jointly, assessed in the light of the Saudi Arabian Trustees unwillingness to participate in the running of the Masjid and in the affairs of the Trust, has resulted in the non-completion of the Project, as a result of the Centre not being constructed, this being the singular purpose of the Trust. This, in turn, has resulted in the administration of the Trust, being the running of the Masjid, being attended to only by the South African Trustees, purely as a matter of necessity. The entire substratum of the Trust has disappeared in that the purpose for which it was created fell away after having been formed for a particular purpose. This is clear from the fact that the South African and Saudi Arabian Trustees have been unable to jointly act in procuring the objectives of the Trust, as indicated in the Trust Deed, as contemplated by the founding in terms of the MOU.

[40]. The net effect of all of the foregoing is this. The requirement that the South African and Saudi Arabian Trustees act jointly, has given rise to a permanent and irresoluble frustration of the purposes and objects of the Trust Deed, in a manner that directly contradicts the intentions of the founder (which is that such joint decision-making power would be for the benefit of the Trust, and not to its detriment).

[41]. I therefore find myself in agreement with the above contentions on behalf of the applicants. Because of the inaction and the non-cooperation on the part of the Saudi Arabian Trustees, the Islamic Centre has not been constructed, despite the fact that it was required to be built as one of the main objects of the Trust. They also failed to properly construct the Masjid, which was also required to be built and completed as a main object of the King Fahad Trust, thus necessitating the intervention of the South African Trustees to ensure that it was constructed and made available for use. Moreover, for the past ten years or so, the Saudi Arabian Trustees have deliberately ignored requests by the South African Trustees to attend any meetings of the Trustees and they flatly refused to attend such meetings. They also refused to participate in the day-to-day running and administration of the business of the Trust, that being the management of the Masjid. I also accept, as a

fact, the applicants' averment that the Saudi Arabian Trustees deserted the project, leaving the affairs of the Masjid in the hands of the South African Trustees, who have tended to the Masjid since its opening in May 2013, and funded its ongoing running expenses.

[42]. Using the wording of s 13, I conclude, in sum, that: (a) The Deed of Trust of the *King Fahad Islamic Centre Trust* provides that the Saudi Arabian Trustees were to cooperate and work jointly with the South African Trustees with a view to attaining the objects of the Trust; (b) This provision has as a consequence that the construction of the Masjid and the Islamic Centre could not be completed, as contemplated by the Deed of Trust and its main objects; (c) This consequence could not possibly have been contemplated or foreseen by the founder of the Trust; and (d) This provision clearly, in the circumstances described above, hampers, *nay* completely defeats the achievement of the objects of the founder, notably the construction and the completion of the Masjid and the Islamic Centre and the day-to-day running of the Masjid and the Centre, in addition to it prejudicing the interests of the beneficiaries, namely members of the Islamic community in South Africa.

[43]. I interpose here to reiterate that the Trust's object in relation to the construction of the Masjid and the Centre has been frustrated by the requirement that the South African and Saudi Arabian Trustees act jointly, specifically because the Saudi Arabian Trustees simply refuse to be involved in the Trust's affairs. Importantly, the construction of the King Fahad Islamic Centre is expressly noted as an object of the Trust. As per the Trust Deed, the King Fahad Islamic Centre is to comprise both the Mosque and the Islamic Centre. It is common cause that the Islamic Centre has not been constructed.

[44]. This factual matrix and the legal consequences which flow from this (as alluded to above) are not, in my view, displaced by the explanation by the Saudis for this state of affairs. In that regard, they explain the reasons for the delay in the construction and the completion of the Mosque and the Islamic Centre as follows:

'As one would expect, given the deadlock between the parties on fundamental issues and the subversion of agreements in relation thereto, it was decided to put phase 2 on hold until the HMJ Trust [Houghton Muslim Trust] restores

possession of the site to the Saudi Arabian government and permit it to take steps to procure the appointment of the Director and Imaam in accordance with the founding documents and related agreements.’

[45]. If anything, this stance by the Saudi Arabian Trustees bolsters my above conclusion. The point is that the construction of the Centre, being ‘phase 2 of the Project’, has been put on hold as a result of the inability of the parties to act jointly, which has manifested in the ‘deadlock’ referred to by the Saudi Arabian Trustees. This is further evidence that the object of the Trust is being hampered.

[46]. Section 13 therefore finds application *in casu* in that the jurisdictional requirements of the said section are met. The next question is whether an appropriate remedy would be a termination of the Trust or whether one of the other possible remedies – deleting or varying the aforesaid provision or making in respect thereof any order which this court deems just, including an order whereby particular trust property is substituted for particular other property – would be more appropriate.

[47]. The applicants contend that termination is the only realistically feasible option available to this Court. That is because, as set out above, the requirement to act jointly, while manifested through clause 5.1 of the Trust Deed, implicates several material provisions of the Trust Deed, namely Clauses 5.3.1 and 5.3.2, which stipulate that there must at all times be a minimum of 5 trustees representing the Kingdom of Saudi Arabia and 5 South African trustees; Clause 8.3, which requires that meetings of trustees must be decided by way of majority vote, read together with clause 5.1, which indicates that there must be a minimum of 10 trustees in office for the purposes of the valid exercise of powers by the Trust, and which further indicates that 5 trustees will constitute a quorum at all meetings of trustees under the Trust Deed.

[48]. I find myself in agreement with these contentions on behalf of the applicants. The simple fact of the matter is that these clauses, read together with the MoU, clearly set out the substratum of the Trust Deed and involve the joint administration of the Trust by the South African Trustees and the Saudi Arabian Trustees. That was

the intention and purpose behind the Trust, which has subsequently fallen away as a result of the conduct of the Saudi Arabian Trustees. In these circumstances, I believe that it is impossible for this Court to disentangle or disregard these clauses, and to vary or amend the Trust Deed in order to somehow keep the Trust intact and functional.

[49]. I am therefore of the view that, in the exercise of my discretion, I should grant an order terminating the Trust together with ancillary relief with a view to ensuring fairness to the founder and in order to ensure that he is not unfairly prejudiced.

The Respondents' Counterapplication

[50]. In the notice of motion in the counter-application the respondents apply for orders in the following terms:

- '1. The following decisions taken by the applicants are to be declared void and of no force and effect and set aside:
 - 1.1. the decision to appoint the Imam and the stipulation of his duties;
 - 1.2. the decision of naming the Mosque the "Houghton Mosque";
 - 1.3. the decision to call the Islamic Centre the "Houghton Jumma Masjid, West Street";
 - 1.4. any and all decisions which in terms of clause 11.2 of the Trust Deed are required to be discussed and decided at a duly convened meeting of the trustees.
2. Directing the Applicants to provide and account to the Respondents within 5 (five) days from the date of this order:
 - 2.1. for all decisions taken by them in relation to the trust assets, and the trust affairs from inception to date;
 - 2.2. the audited financial statements of the King Fahad Trust for the years ending 2014 to 2022;
 - 2.3. if the audited financial statements are not available, then the unaudited financial statements for the years ending 2014 to 2022; and
 - 2.4. detailed account of the state of investments of, and dealings with trust property setting out both the income and expenditure for the period between 2014 to date.'

[51]. In light of my findings in the main application, I am of the view that the relief sought by the respondents in the counter-application has become moot. Put differently, the counter-application relief cannot be granted because the relief in the main application has been granted.

[52]. Moreover, as submitted by the applicants, the granting of the relief sought in the counter-application will do nothing to solve the fundamental impasse in the administration of the Trust. If anything, it will compound the breakdown in the relationship and will inevitably lead to a series of further disputes arising. The setting aside of decisions which are operative and which relate to the day-to-day running of the Mosque, will make it impossible for it to operate, and will render the benefits to the beneficiaries (the Muslim community of South Africa) nugatory – which would undermine the fundamental purpose of the Trust. The consequence of this is that the parties will simply end up coming to court again.

[53]. For these reasons alone, the counter-application falls to be dismissed.

Applicants' Application to Strike Out

[54]. There is one last issue that requires my attention and that relates to the interlocutory application by the applicants to have struck out certain paragraphs in the answering affidavit of the respondents on the basis that those paragraphs allegedly contain inadmissible hearsay evidence.

[55]. I heard the said application on 27 March 2024 and, after the arguments in relation to the said application were completed, I handed down an *ex tempore* judgment and ordered that the said application be postponed, to be decided upon by the court in its judgment in the main application. The costs of the application were reserved.

[56]. In my *ex tempore* judgment I expressed the *prima facie* view that the said application should fail. For the reasons mentioned in my said judgment, I am of the view that the application is ill-advised and should be dismissed. The simple point is

that factually the applicants failed to demonstrate that the deponent to the answering affidavit did not have the requisite knowledge to depose to the said affidavit. In the respondents' answering affidavit in the interlocutory application, they explain that the person who confirmed the facts averred in the answering affidavit in the main application, one Mr Mohammed Wadee ('Mr Wadee'), a South African national, was employed by the Royal Embassy of the Kingdom of Saudi Arabia in South Africa from 2001 to 2016 and he had intimate knowledge of what transpired in relation to the Trust and between the Trustees during that period.

[57]. Mr Wadee was employed by the Royal Embassy's Religious Attaché as an Administrative Secretary and he acted as an interpreter between representatives for Saudi Arabia and the Houghton Muslim Trust. He has firsthand knowledge of the circumstances and events that led to the conclusion of the MoU in 2005 and the constitution and registration of the King Fahad Trust in 2006.

[58]. In *Helen Suzman Foundation v President of the Republic of South Africa and Others*⁴, the Constitutional Court held as follows at paras 27 and 28: -

'[27] Is the additional evidence scandalous, vexatious or irrelevant? Two requirements must be met before a striking-out application can succeed: (i) the matter sought to be struck out must be scandalous, vexatious or irrelevant; and (ii) *the court must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced.*

'[28] "Scandalous" allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a 'vexatious' matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and "irrelevant" allegations do not apply to the matter at hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.' (Emphasis added).

⁴ *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

[59]. There is, on the basis of this Constitutional Court authority, another reason why the applicants' strike out application should fail, that being that the applicants have failed to demonstrate prejudice in the event of the offending paragraphs not being struck out.

[60]. Accordingly, the application to strike out certain paragraphs falls to be dismissed with costs,

Costs

[61]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*⁵.

[62]. I can think of no reason why I should deviate from this general rule.

[63]. I am therefore of the view that the respondents should pay the first to the fourth applicants' costs of the main application as well as their costs of the counter-application. In that regard, I have been urged by Mr Bhana SC to grant punitive costs on an attorney and client scale. I am not persuaded that a case is made out on behalf of the applicants for a punitive costs order.

Order

[64]. Accordingly, I make the following order: -

- (1) The applicants' application dated 30 March 2023 to strike out certain paragraphs of the respondents' answering affidavit is refused with costs.
- (2) The first, second, third and fourth applicants, jointly and severally, the one paying the other to be absolved, shall pay the respondents' costs pertaining to the strike out application, which costs shall include the costs consequent upon the employment of two Counsel, one being Senior Counsel,

⁵ *Myers v Abramson* 1951(3) SA 438 (C) at 455.

on scale 'C' of the tariff applicable in accordance with the Uniform Rules of Court.

(3) The *King Fahad Islamic Centre Trust*, registered under Trust Deed No: 5[...] ('King Fahad Trust') is hereby terminated in terms of section 13 of the Trust Property Control Act 57 of 1988.

(4) Pursuant to the termination of the King Fahad Trust, the consolidated immovable property registered in the name of the Trust, namely Erf 2[...], H[...] E[...], Johannesburg ('the immovable property') is to be transferred to the Houghton Muslim Jamaat Trust, registered under Trust Deed No: 4[...].

(5) Such transfer shall be effected, solely at the cost and for the account of the Houghton Muslim Jamaat Trust, within ninety days from date of this order.

(6) Upon termination of the King Fahad Trust and the registration of transfer of the immovable property into the name of the Houghton Muslim Jamaat Trust, the Houghton Muslim Jamaat Trust shall pay to the Saudi Arabian Government the amount actually and reasonably paid by the Saudi Arabian Government to the King Fahad Trust or for the construction of the mosque on the immovable property, as determined after a statement and debatement of account before an independent party ('the umpire') agreed to by parties; alternatively, appointed by court failing such agreement being reached within thirty days of this order, with the following time-lines being applicable:

(a) The statement by the Saudi Arabian government or the respondents shall be provided to the applicants and the Houghton Muslim Jamaat Trust within thirty days of the order;

(b) The debatement and final determination by the umpire after considering submissions by both parties (to be made within thirty days of the statement being provided) shall take place within sixty days of the statement being provided; and

(c) Payment shall take place within ninety days of debatement and final determination having been made by the umpire or the transfer of the immovable property to the Houghton Muslim Jamaat Trust – whichever occurs later.

(7) The first to fifth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs pertaining to the

applicants' application, which costs shall include the costs consequent upon the employment of three Counsel, one being Senior Counsel, on scale 'C' of the tariff applicable in accordance with the Uniform Rules of Court.

(8) The first to fifth respondents' counter-application is dismissed with costs.

(9) The first to fifth respondents, jointly and severally, the one paying the other to be absolved, shall pay the first to fourth applicants' costs of the counter-application, which costs shall include the costs consequent upon the employment of three Counsel, one being Senior Counsel, on scale 'C' of the tariff applicable in accordance with the Uniform Rules of Court.

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON:	1 and 2 October 2024
JUDGMENT DATE:	24 March 2025
FOR THE FIRST, SECOND, THIRD AND FOURTH APPLICANTS:	R Bhana SC, R Itzkin and S Mohammed
INSTRUCTED BY:	Koor Attorneys, Houghton Estate, Johannesburg
FOR THE FIRST TO THE FIFTH RESPONDENTS:	N Maritz SC and A Vorster
INSTRUCTED BY:	Shaheem Samsodien Attorneys, Sandown, Sandton