

190/94

CASE NO 253/94

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

YOUSUF AHMED DEEDAT

First Appellant

AHMED HOSEN DEEDAT

Second Appellant

GOOLAM HOSEN AGJEE

Third Appellant

and

THE MASTER OF THE

SUPREME COURT (NATAL)

First Respondent

YUSUF ALLY

Second Respondent

NAUSHAD HOSEN

Third Respondent

ISLAMIC PROPAGATION CENTRE

INTERNATIONAL

Fourth Respondent

CORAM: JOUBERT, VAN HEERDEN, VIVIER, NIENABER

et HOWIE JJA

Heard: 1 November 1994

Delivered: 30 November 1994

J U D G M E N T

JOUBERT JA:-

This is an appeal against a judgment of HURT J in the Natal Provincial Division, dismissing an application brought by the appellants against the respondents. In their notice of motion, dated 11 July 1992, the appellants sought a declaratory order in the following terms:

- "1 It is declared that:
- (a) First, Second and Third Applicants are not trustees as defined in either the Trust Moneys Protection Act No. 34 of 1934 or the Trust Property Control Act No. 57 of 1988;
 - (b) Fourth Respondent is not a trust as defined in the Trust Property Control Act No. 57 of 1988;
 - (c) First Respondent is not entitled, in respect of First, Second and Third Applicants and Fourth Respondent, to exercise any of the powers vested in him by the Trust Property Control Act No. 57 of 1988.
2. First Respondent is ordered to pay First, Second and Third Applicants' costs.
3. Any Respondents unsuccessfully opposing this application are ordered to pay the costs occasioned to First, Second and Third Applicants by such opposition jointly and severally, any one paying the others to be absolved."

Leave to appeal to this Court was granted in terms of sec. 20 (4) (b) of Act No 59 of 1959. For the sake of convenience I shall refer to the First and Fourth

Respondents as "the Master" and "the IPCI" respectively.

The material background facts to the appeal are common cause and may be broadly outlined as follows.

During 1957 the Islamic Propagation Centre ("the IPC") was constituted as a voluntary association with a written constitution. Its object was to raise funds by soliciting donations from donors in order to use them for the propagation of the Islamic Faith worldwide by means of lectures and the dissemination of literature. By 30 June 1984 the IPC owned assets which according to its financial statements amounted to R176 069-14, comprising a General Fund of R151 761-76 plus an Interest Fund of R24 307-38. In 1985 the IPC was managed by Second and Third Appellants and G.H.E. Vanker.

On 1 April 1985 a notarial deed of trust was executed by the five settlors, viz Second and Third Appellants as well as the Second Respondent, G H E Vanker and Mohamed Yusuf Buckas, to constitute the IPCI as a trust. Its relevant provisions are the following:

Clause 1 "The name of the Trust is the 'Islamic Propagation Centre International' (hereinafter referred to as 'the Trust')."

- Clause 2 sets out the objects of the Trust which are
- (1) "to create a fund primarily to promote charitable and religious activities of the Islamic Faith" (Clause 2.1) [My underlining]
 - (2) "to propagate the Islamic faith to Muslims and non-Muslims" according to the methods set out in Clause 2.2.1. to 2.2.8.
- Clause 3 confers powers on the trustees to further and realise the objects of the Trust which include the preservation, maintenance and upkeep of properties held by the Trust (Clause 3.2); to administer the Trust Fund (Clause 3.3 and 3.4); "to raise or borrow money for the purposes of the Trust in such manner and on such security as may be determined" (Clause 3.5). [My underlining].
- Clause 4 stipulates that the trustees are to "hold the Trust Fund upon trust for the application of the income and/or capital thereof for the promotion "of the objects of the Trust. [My underlining].
- Clause 5 provides for 5 Muslim trustees for life. The first trustees mentioned in Clause 6 are the Second and Third Appellants together with Second Respondent, G H E Vanker and Mohamed Yusuf Buckas.
- Clause 14 requires the trustees to keep proper set of books of their administration of the funds of the Trust and to have them audited annually by an independent auditor.

It is recorded in the deed of trust that a certain Suleman Ebrahim Lockat accepted on behalf of the five designated trustees their appointments as such.

I may add that the deed of trust was subsequently amended on various

occasions but these amendments are not relevant for purposes of the present proceedings. At present the trustees of the IPCI are the three Appellants and the Second and Third Respondents.

On 19 June 1985 the deed of trust was registered in the office of the Master as a trust instrument in terms of the provisions of the Trust Moneys Protection Act No 34 of 1934 ("the 1934 Act"). This Act which came into operation on 1 September 1934 remained in force until it was repealed in toto and replaced as from 31 March 1989 by the Trust Property Control Act No 57 of 1988 ("the 1988 Act"). The IPCI has throughout been dealt with by the Master as a trust in terms of the 1934 Act and subsequently the 1988 Act.

Towards the end of 1990 a serious dispute arose between the Appellants on the one hand and the Second and Third Respondents on the other hand in regard to the administration of the IPCI's assets. Accordingly the Master, acting pursuant to the provisions of sec 16 (2) of the 1988 Act, on 18 October 1991 instructed Messrs. Coopers, Theron Du Toit, a firm of chartered accountants, to investigate the administration of the IPCI by its trustees and the disposal of its

trust property. Matters came to a head when the Master decided to further the investigation by having the trustees questioned. The reaction of the Appellants was to inform him that the steps taken by him were unlawful since the IPCI did not fall within the definition of a "trust" in the 1988 Act and that they intended to apply to Court for a declaratory order. That application was brought by their notice of motion, dated 11 July 1992.

In paragraph 15 of the founding affidavit the First Appellant stated the following:

"I respectfully draw the attention of this Honourable Court to the fact that the five contracting parties, who called themselves 'Settlors', did not undertake in the first agreement to transfer any assets to themselves as 'Trustees' and no one was bound to transfer anything to Fourth Respondent or its Trustees. It was not an agreement by which moneys were settled on the Trustees, but a contractual constitution binding them to operate according to its provisions." (The 'first agreement' refers to the notarial deed of trust, dated 1 April 1985. In the above paragraph the First Appellant sought to disavow the validity of the IPCI as a trust

according to our common law.)

The Court a quo was apparently not called upon to decide the common law validity of the IPCI. What it did decide was the issue whether or not the IPCI was a statutory trust for the purposes of the 1934 Act and the 1988 Act. That issue was decided affirmatively and accordingly the application was dismissed with costs.

Charitable trusts are classified under trusts for impersonal purposes e.g. scientific, educational, health, religious purposes. Unlike private trusts they do not have beneficiaries in a legal technical sense. One of the essential elements of a valid trust, according to the common law, is a definite or identifiable subject-matter. Consult American Jurisprudence, 2nd ed., 1992, vol. 76 s.v. Trusts § 48: "A valid trust requires an ascertainable, definite, or clearly defined trust res, a definite or certain subject of the trust, or definite trust property. That is, a trust cannot be created unless the subject matter is definite or definitely ascertainable, and it is essential to the creation and validity of a trust that the trust res be pointed out with reasonable certainty. The trust res must be so sufficiently described or

capable of identification that its title can pass to the trustee upon actual delivery of the trust corpus, or if the character of the property composing the corpus is such, there must be a legal assignment of the corpus to the trustee sufficient to convey present title." See also Scott on Trusts, 2nd ed., 1956 vol 1 § 96; Halsbury's Laws of England, 4th ed., 1984, vol 48 s.v. Trusts § 551 and Halsbury's Laws of England, 4th ed. reissue, 1993, vol 5 (2) s.v. Charities § 77; Corbett Hahlo Hofmeyr and Kahn, The Law of Succession in South Africa 409,410 Q.

A close examination of the deed of trust reveals a clear intention on the part of the settlors and the trustees to create a charitable trust for the promotion of the charitable and religious activities of the Islamic Faith. However, the deed of trust, although referring to a "Trust Fund", does not expressly identify its source and nature. In American Jurisprudence, *supra* § 19, it is said:

"It would seem to be clear that even a charitable trust, regarded fundamentally as a gift, will necessarily fail if it purports to be of some specific property or amount of money but the property or amount is not sufficiently described or specified as to be identifiable. The exact amount need not be stated in the instrument of gift if it is, or will be, capable of definite ascertainment in the light of the terms employed."

I shall assume, without deciding, that this passage correctly reflects our own law.

But on this assumption the charitable trust will not fail if the subject matter of the trust is capable of ascertainment by admissible means of interpretation. Such means may be proof of extraneous facts which are admissible because they bear no relationship to the oral agreement or negotiations giving rise to the creation of the trust. (See Honore's The South African Law of Trusts, 4th ed., 118 and the cases cited.)

In the instant matter it is agreed on the papers that the ownership of the assets of the IPC was taken over by the IPCI. In 1985 the IPC was managed by the Second and Third Appellants and G.H.E. Vanker while the initial trustees of the IPCI were the same three gentlemen together with the Third Appellant, the Second Respondent and Mohamed Yusuf Buckas. Moreover, it is significant that the first financial statement and balance sheet of the IPCI as at 30 June 1985 included in its opening balance of accumulated funds the amounts of R151 761,76 and R23 307,38 which formed part of the assets of the IPC according to its financial statement and balance sheet as at 30 June 1984 (supra). These financial statements and balance sheets, duly audited, furnish acceptable evidence of an

identificatory nature of the existence and extent of the "Trust Fund" referred to in the trust deed. It follows that the assumed requirement of the common law that the subject matter of a trust must be in esse and be identifiable, has been satisfied; and that after the "take-over" the IPCI was in esse as a valid charitable trust. The trust fund thereupon consisted of current as well future assets. It is common cause that the trustees of the IPCI in exercising their powers under clause 3.5 of the Deed of Trust succeeded in supplementing substantially the capital assets of the IPCI by their acceptance of donations, legacies, inheritances etc. and the investment thereof. In this manner the IPCI has become a multi-million rand concern.

The next question is to determine whether the IPCI qualifies as a trust for purposes of the 1988 Act. The answer thereto depends on whether or not the IPCI falls within the description of a trust as defined in the 1988 Act. According to section 1 trust "means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed -

(a) to another person, the trustee, in whole or in part, to be administered or

disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or"

Section 1 defines trust instrument as meaning "a written agreement or a testamentary writing or a court order according to which a trust was created." It follows from the definition of "trust instrument" that an oral trust agreement is excluded from the scope of the 1988 Act.

Mr Southwood, on behalf of the Appellants, submitted that the definition of "trust" in the 1988 Act connects the "trust instrument" (which must be in writing) with the "making over" of ownership in property by providing that such ownership must be made over "by virtue of" the "trust instrument". Here, so it was submitted, there was no trust instrument making over the trust property: the trust deed itself was silent about it; and the trust property that was transferred was "made over" by IPC to IPCI either orally or by conduct and hence not in writing.

This submission has already been refuted by my earlier conclusion that

facts extraneous to any negotiations or oral agreements between the settlors identified the assets which vested in the "Trust Fund" referred to in the trust instrument. There is in any event much to be said for the view - adopted by the Court a quo - that the words "by virtue of" must be widely construed as "on account or by reason of". It may well be that the definition of a trust in the 1988 Act is wide enough to encompass property, duly identifiable, which is only to be acquired by the trustees in future from outside sources. In my judgment the IPCI therefore constituted a trust under the 1988 Act.

All counsel were ad idem that the appeal should be dismissed should the Court come to such a conclusion. It is accordingly unnecessary to consider the position of the IPCI under the 1934 Act. The First Respondent acted pursuant to the powers conferred on him by the 1988 Act. The appeal must accordingly fail.

The appeal is dismissed with costs (including the costs of two counsel for the First Respondent). It is recorded that Mr Marnewick who appeared with Mr Choudree for the Fourth Respondent presented no argument in this Court. Nor did he ask for any relief or associate himself with any of the other parties. No relief

was in turn asked against the Fourth Respondent.

C.P. JOUBERT JA

CONCUR

VAN HEERDEN JA

VIVIER JA

NIENABER JA

HOWIE JA