



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 27 July 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Estate late Hafiz and Others v Hafiz and Others (804/2022) [2023] ZASCA 114 (27 July 2023)

The Supreme Court of Appeal (SCA) today dismissed an appeal against an order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg sitting as a court of appeal (the full court), which set aside an order declaring that the Goolam Murtuza Hafiz Trust (the Hafiz Trust) had not been validly established.

In 1991, Goolam Murtaza Hafiz (Goolam Hafiz), who was then the trustee and Imam of the Sherwood Mosque, acquired a property adjacent to the mosque. It was purchased by way of loan finance and the loan was repaid from donations received from the community served by the mosque. In 1994, Goolam Hafeez entered into an agreement with his eldest son, Ahmed Hafiz, to establish the Hafiz Trust. Goolam Hafiz named Ahmed Hafiz as first trustee of the Hafiz Trust. He donated the property to the Hafiz Trust to be used for charitable purposes in accordance with the tenets of the Sunni Islamic faith. Ahmed Hafiz accepted the obligations as trustee. The Hafeez Trust was registered by the Master of the High Court (the Master) and letters of authority were issued to Ahmed Hafiz.

In 1996, a second property, also adjacent to the mosque, was acquired by Goolam Hafiz and donated to the Trust. In 2004, the Trust Deed was amended to enable the Hafiz Trust to be registered as a non-profit organisation. Two additional trustees were appointed in 2005.

In 2011, Goolam Hafiz sought to have his two younger sons appointed as trustees to the Hafiz Trust. Letters of authority were initially issued by the Master. When still further trustees were sought to be appointed, the Master took the view that the appointments of all of the trustees ought to be withdrawn. The Master had formed the view that a clause in the original trust deed, which provided for the succession of trustees only allowed for the appointment of trustees upon the death of the settlor.

In 2013, Goolam Hafeez brought an application before the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) to declare that the Hafiz Trust had not been validly established. He sought the transfer of the properties back into his name. A counter application was brought by two of the trustees appointed in 2005. They sought an order declaring the Trust to have been validly established and that it was to be administered in terms of the 2004 Deed of Amendment.

The matter came before the high court in February 2018 and on 23 August 2018, Balton J dismissed the counter application. The high court found that the Hafiz Trust was not validly established. The high court, however, found that a Trust was validly established by an amendment, recorded in a deed of trust executed in December 2011 (the 2011 Deed of Trust).

The matter went on appeal to the full court on 27 January 2020. On 12 May 2020, the full court upheld the appeal. The full court found that the Hafiz Trust had been validly established in 1994 and that the

trust deed had been amended by the deed of amendment in 2004. It declared that Ahmed Hafiz, Akhmed Wahab and Sayed Mohammed were the trustees of the Hafiz Trust.

Special leave to appeal was granted by the SCA. The appeal was disposed of without oral argument in terms of s 19(a) of the Superior Courts Act 10 of 2013.

The SCA held that the validity of a Trust is established by evidence and that the Trust Deed executed in 1994, formed part of the evidentiary material upon which a determination of validity was to be made. It held that the terms of the 1994 Trust Deed, properly interpreted, established a clear and unequivocal intention on the part of the settlor to establish a Trust. It found that the named trustee, Ahmed Hafiz, accepted the obligations imposed upon him by the Trust Deed. The donation of the property by the settlor divested the settlor of control of the property, which passed to the trustee on behalf of the Hafiz Trust.

The SCA found that the clause dealing with the succession of trustees, expressed an intention on the part of the settlor that his descendants remain in control of the Hafiz Trust. It did not have the effect that ownership of the trust property would only pass to the trustee upon the death of the settlor. The SCA found, upon the evidence as a whole, that the Hafiz Trust had been validly constituted in 1994. The SCA found that the full court did not have before it an application to vary clause 4.1 of the Trust Deed in terms of s 13 of the Trust Property Control Act 57 of 1988. It was therefore not entitled to vary the clause.

In relation to the amendment of the 1994 Trust Deed, it found that clause 7, which provided for amendment or variation of the Deed, required agreement between the first, second and third trustees. These were stated to be the sons of Goolam Hafiz, as settlor. At the time that the amendment was agreed, the second and third trustees had not been issued with letters of authority by the Master. They were therefore not entitled to act in the capacity as trustees. The 1994 Trust Deed had therefore not validly been amended by the 2004 Deed of Amendment.

Insofar as the appointment of additional trustees was concerned, the SCA found that there had been no challenge to the Master's decision to withdraw the issuing of those letters of authority. It found that the papers provided no factual basis upon which a court could, in the exercise of its discretion, appoint the additional trustees. It could therefore only confirm the order appointing the named first trustee.

The required variation of the full court's order did not alter the substantive determination on appeal. Save for varying the full court's order the SCA dismissed the appeal with costs.

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