HH 202-03
HC 2397/03
WOMEN & LAW IN SOUTHERN AFRICA RESEARCH
AND EDUCATION TRUST
and
ELIZABETH SHONGWE
and
DR THERESA MOYO
versus
DINAH MANDAZA
and
LAURA HARRISON
and
TRUST BANKING CORPORATION
and
STANDARD CHARTERED BANK OF ZIMBABWE
and
CENTURY BANK LIMITED
and
ZIMBABWE BANKING CORPORATION
and
OLD MUTUAL

Opposed Application

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 28 August and 26 November, 2003

E T Matinenga **for applicants**
R M Fitches **for first and second respondents**

CHINHENGO J: On 30 April 2003, the applicants obtained a provisional order in terms of which bank accounts held by the first applicant ("WLSA") were frozen until new signatories to those accounts were appointed - see *Women & Law in Southern Africa Research and Education Trust & 2 Ors* v *Dinah Mandaza & 7 Ors* HH 71/03. The real parties in this matter are the second and third applicants on the one hand and the first and second respondents on the other. WILSA is but a victim

of the antagonistic positions adopted by the two parties. The third to eighth respondents have either not filed any papers in opposition or they have stated that they will abide by whatever decision is made by this court.

The specific interim relief granted in HH 71-03 is that -

"1. 1st and 2nd respondents, be and are hereby ordered to cease forthwith the withdrawal of any money from all Women & Law in Southern Africa Research and Education Trust's accounts in Zimbabwe and abroad;

2. 3rd, 4th, 5th, 6th, 7th and 8th respondents be and are hereby ordered to immediately suspend any banking transactions and block any withdrawals of money by lst and 2nd respondents for and on behalf of lst applicant on the following accounts - (lst applicant's 19 banking accounts with the respondent banks are then listed).

3. lst and 2nd respondents be and are hereby interdicted from withdrawing any money transferred out of the Century Bank FCA banking account to the Zimbabwe Banking Corporation Account No 4191317679100 and are hereby interdicted from further transferring any money from the said Zimbank Account to any other account.

4. That costs of this provisional order are reserved".

The bank accounts having thus been frozen certain difficulties which were or should have been foreseen arose. Staff salaries and telephone bills could not be paid. The telephone and facsimile lines were disconnected. WILSA's accounts for water, rates and electricity could not be paid. The applicants were constrained to approach this court again for an order which would enable WILSA to meet its obligations.

The provisional order in HH 71/03 was obtained pursuant to an urgent application. The urgency which prompted this court to grant the provisional order was that the first and second respondents ("Mandaza" and "Harrison" respectively) had withdrawn over US$31

000 out of WILSA's bank accounts between 14 February and 30 March 2003 and that Mandaza had obtained signing powers on a WILSA foreign currency account holding US$60 000 at Century Bank. The applicants expressed the apprehension that Mandaza would spend the money on work unrelated to WILSA or transfer the money to another bank. Essentially the applicants were alleging that Mandaza was misusing WILSA funds and should therefore be barred from withdrawing any money from the organization's bank accounts or otherwise deal with those accounts.
When the difficulties I have mentioned above arose and the applicants made another application to this court they succeeded in obtaining an order that -

> **"1. The 2nd, 3rd, 4th, 5th and 6th respondents shall accept as signatories to the WILSA account at their respective institutions the 3rd applicant and either the lst respondent or a person appointed by the lst respondent in writing with any cheque or transaction to be signed or authorised by both signatories.**
>
> 2. The costs of this application shall be costs in the cause".

See *Women & Law in Southern Africa, Research and Education Trust & 2 Ors* v *Dinah Mandaza & 7 Ors* HH 98/03.

It is, I think, quite apparent that the order in HH 98/03 somewhat detracted from the order in HH 71/03 in that whereas Mandaza and Harrison had been barred from withdrawing money from the bank or transacting any monetary business of WILSA by the order in HH 71/03, they were now, *per* necessity, being required to do exactly that which they had been barred from doing. The provisional order was, no doubt, significantly neutralized in its effect by the order in HH 98/03. The only advantage, if such it was, derived by the applicants from the order in HH 98/03 was that the third applicant ("Moyo") was now to be a signatory to the bank accounts together with Mandaza or Mandaza's nominee. In my view Mandaza's position was not drastically altered, if at all, in respect of the authority or power to transact the monetary affairs of WILSA except to the extent that Moyo was now to be involved.

The applicants had not, in lodging the urgent application in HH 71/02 thought through the problems which that application would create for WILSA. If they had thought through those problems and had decided nonetheless to seek the order which they then obtained, it would beg the question whether the real dispute between the parties was

over the withdrawal and use of WILSA funds by Mandaza or whether in fact Mandaza was misusing the funds of the organization. I will show that the applicants avoided to tackle the real issue in dispute between them and Mandaza and that, because they did not tackle the real point of the dispute, that issue remains alive and will dog WILSA for sometime until it is tackled head-on and hopefully resolved.

I am concerned only with the confirmation or discharge of the provisional order granted in HH 71/03. The papers placed before me do not disclose how, if at all, the order in HH 98/03 has been implemented. If it has been implemented in its terms then one of either Mandaza or Harrison or Mandaza's other nominee is still a signatory to WILSA's bank accounts.

The final relief sought by the applicants which I am required to confirm is similar in its material respects to the interim relief already granted. It is that -

> **"1. The lst and 2nd respondents be and are hereby ordered to cease forthwith the withdrawal of any money from all Women & law in Southern Africa Research and Education Trust's accounts in Zimbabwe;**
>
> **2. The 3rd, 4th, 5th, 6th, 7th and 8th respondents be and are hereby ordered to suspend all banking transactions and revoke the lst and 2nd respondents' signing powers against any withdrawals of money by lst and 2nd respondents in respect of the following accounts (which are listed - all l9 of them);**
>
> **3. The lst applicant represented by the 2nd and 3rd applicants be and are hereby directed to furnish all the respondents within fourteen days of this Order with new signatories for all the lst applicant's banking accounts and all respondents are hereby ordered to accept the new signatories as directed by the 2nd and 3rd applicants;**
>
> **4. The lst and 2nd respondents be and are hereby interdicted**

from visiting the offices of lst applicant or transacting any business purportedly on behalf of the lst applicant.

5. The costs of this application be borne and paid by lst and 2nd respondents jointly and severally, the one paying the other to be absolved".

It will be necessary for me to analyze and determine the nature of the final relief sought by the applicants. Before doing so however, I have, I think, to show what the real dispute between the parties is.

In the founding affidavit the second applicant ("Shongwe") averred that she is a trustee and the new chairperson of WILSA. She said that she was appointed as chairperson at a WILSA Extraordinary General Assembly Meeting held at Johannesburg South Africa on 28 February 2003. She said that Moyo was also accepted as a trustee of WILSA at the same meeting. Shongwe stated that Mandaza was a trustee and chairperson of WILSA until her (Shongwe's) appointment on 28 February 2003. Her contention is that since Mandaza was a signatory of WILSA's bank accounts by virtue of her position as trustee and chairperson and that since she ceased to be a trustee and chairperson with effect from 28 February, she cannot remain a signatory to any of WILSA's bank accounts or continue to transact any business on behalf of WILSA. Moyo identifies with Shongwe's position. She averred that she too was appointed as a trustee of WILSA at the Johannesburg meeting. Both Shongwe and Moyo state that the real reason that WILSA is in a crisis is because of Mandaza's refusal to vacate office as trustee and chairperson of WILSA.

Mandaza and Harrison dispute the assertions by Shongwe and Moyo. They contend that the Johannesburg meeting was irregular and unauthorised and that the appointments of Shongwe as chairperson and Moyo as trustee and the alleged new board chaired by Shongwe were irregular and therefore invalid. Mandaza averred that Shongwe and Moyo have no standing to institute these proceedings in the name of WILSA for the reason that their appointment was invalid. Mandaza maintained that she is still a trustee and the chairperson of WILSA and as such her powers as a signatory to the bank accounts cannot be taken away. She also said that

the legitimate Board of Trustees of WILSA is the one chaired by her and not the one chaired by Shongwe. Mandaza averred that the present crisis in WILSA was not created by the so-called refusal by her and her board to step down but by the refusal of WILSA's management staff (National co-ordinators) to accept the appointment of Harrison as WILSA's regional co-ordinator. The refusal resulted in her Board dismissing them. This prompted them, in turn, to agitate for the removal of herself and her Board of trustees. She also contended that the crisis in WILSA was not caused by the withdrawal of any monies by her from the WILSA accounts. In these averments she is supported not only by Harrison but by other trustees on her Board in particular by Unity Chari and Victor Nkiwane and by Stembiso Sithole the Administrative Officer of the WILSA Regional Office. They all filed affidavits in support of Mandaza.

The events which have led to the present dispute are fully set out in HH 71/03 at pp 2-4. For the sake of completeness I will quote from that judgment:

> "The dispute which has resulted in this application started when Mandaza and her Board appointed Harrison as acting Regional Co-ordinator, following the death of the incumbent to that post. The National Co-ordinators were not prepared to accept that appointment because they felt that one of their members should be promoted to the post. On 29 January they advised Mandaza that they did not accept the appointment of Harrison and would not recognise her as the Regional Co-ordinator. Mandaza informed them that as far as she was concerned, the Board had legally appointed Harrison and, if the National Co-ordinators refused to accept what the Board had done, then they would be regarded as having committed an act of misconduct. When the National Co-ordinator refused to retract, Mandaza wrote to each National Co-ordinator saying that she had been summarily dismissed by the Board because of willful disobedience to a lawful order given by the Board.

On 30 January 2003 the National Co-ordinator and some programme officers and

research associates wrote to Mandaza and five other trustees to remind them that their tenure of office had come to an end in or about April 2001 after Phase 4. They said that the request for the trustees to remain in office was specifically for the purpose of awaiting approval of DANIDA funding, approving the relocation of the WILSA Regional Office and participating in a donor round-table meeting in Lusaka on 31 October 2002. Those tasks had been successfully completed. Therefore the trustees should vacate their office forthwith so that new trustees could be nominated and appointed. Mandaza replied on 31 January, saying that at the Board Meeting on 2 March 2002 National Co-ordinators, as Management, requested that certain trustees who were due to retire should remain in office until certain matters had been attended to, including the process of a proper hand over to the new trustees. Then at the Board meeting on 14 September 2002, the process of retirement was again discussed as it seemed that the National Offices had not addressed the issue of the process of appointment and hand-over as requested by the Board. Therefore the trustees concerned would not vacate their offices except in terms of the agreed position as stated in the minutes and as generally agreed. Consequently they would disregard the WILSA Staff's request for the trustees to vacate their offices by 5 February 2003.

The members of staff responded to this letter by noting Mandaza's admission and acceptance that the term of office of herself and other trustees had expired and pointing out that the other issues that needed to be done had been carried out. They also pointed out that Mandaza had been presented with farewell gifts from WILSA countries on 14 September 2002. Mandaza replied saying that there was no admission or acceptance that her term of office and that of the other trustees had expired. She went on to say that WILSA Management had requested that the trustees whose terms of office were due to expire should not vacate their office until certain matters were attended to. That request was accepted and adopted and recorded in the minutes. Therefore the particular trustees remain in office until the process of hand-over is duly effected as agreed at the Board meetings on 2 March and 14 September. Neither herself, as Chairperson, nor any other trustees had been informed of the process of appointment of the future trustees. Until there was a proper hand-over as agreed at the Board meetings, the trustees concerned remain in office.

The applicants' claim that the crux of the dispute between the parties is the refusal by Mandaza and certain other trustees to accept that their term of office has expired. Mandaza denies that. She claims that it is the refusal on the part of management to accept the decision of the Board to appoint Harrison as acting Regional Co-ordinator that has led to the present dispute".

The real dispute between the parties, therefore, is whether the Mandaza or the Shongwe Board of Trustees is the legitimate board of trustees of WILSA.

To come back to the final relief sought I must observe that the holding of the

purse-strings of WILSA is considered by both parties, in particular by the applicants, to be the linchpin of the legitimacy of their respective boards of trustees. The applicants must have calculated that if they obtained an order barring Mandaza and Harrison from transacting the monetary affairs of WILSA they would have obtained the means by which they would force Mandaza and her Board of Trustees to capitulate. With access to WILSA's funds, following the confirmation of the provisional order Shongwe and her Board would have emasculated Mandaza and her Board. Thus the provisional order was not intended to deal directly with the real dispute between the parties but rather to remove the carpet, so to speak, from under the feet of Mandaza and her board of trustees and render them ineffective. Paras 3 and 4 of the final order sought would have the effect of constituting Shongwe and her board of trustees into the *de facto*, if not the *de jure*, board of trustees of WILSA because those paragraphs seek to authorise Shongwe and Moyo to furnish the respondent banks with the names of the new signatories for all the bank accounts. Para 2 of the final draft order requires the banks to revoke Mandaza and Harrison's signing powers. In my view, this cannot be a legitimate function of the banks. Rather the revocation of signing powers is properly the function of the legitimate Board of Trustees of WILSA. The applicants had written to the banks purporting to revoke the signing powers of Mandaza and Harrison. They had not succeeded because the banks refused to acknowledge their request or

instruction as legitimate for the reason, it would seem, that they had not been given to understand that Shongwe's Board had replaced that of Mandaza. It must be clear also that by seeking to remove the carpet from under the feet of Mandaza and her Board in the manner I have mentioned above the applicants would also have dealt a fatal blow to the claims by the other trustees on Mandaza's Board that they are still trustees of WILSA. Such an outcome is quite obviously inappropriate. The other five trustees on Mandaza's Board were not parties to the present application. Confirming the order and thereby effectively declaring that the Board on which they claim to validly sit as trustees has ceased to exist would detract most inappropriately from the rules of natural justice. These trustees cannot be adversely affected in their rights or legitimate expectations without having been afforded the right to be heard. It seems to me therefore that if the applicants had intended to seek a solution to the real dispute between the parties, they should have cited all the members of Mandaza's Board and challenged its right to remain in office. They did not do that. Rather they sought final relief which was materially the same as the interim relief. In so doing the applicants brought themselves within the criticism levelled against such an approach by CHATIKOBO J in *Kuvarega* v *Registrar-General & Others* 1998(1) ZLR 188(H) at 193 A-B where he said:

> **"The practice of seeking interim relief which is exactly the same as the substantive relief sued for, and which has the same effect, defeats the whole object of interim protection. In effect a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because**

> **interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable where as here, the applicant will have no interest in the outcome of the case on the return day".**

The same criticism was made by CHIDYAUSIKU CJ in *Registrar-General of Elections* v *(1) Combined Harare Residents Association (2) David Samudzimu* SC 7/02 at p.10 of the cyclostyled judgment. He said:

> "In my view, the relief sought and granted in the draft interim order is the same as that sought on the return day.
> **Where the relief sought as interim relief is essentially the same as the relief sought on the return day, the court's correct approach should be to proceed by way of an urgent application seeking final relief - see *Econet* v *Mujuru* HH 58-92".**

In the present case, however, the applicants maintained their interest in the matter right upto the return day not because they had not achieved their purpose but more because a final order, similar in all material respects to the interim relief already granted, would drive the last nail into Mandaza's Board's coffin. This approach has several drawbacks, some of which I have already mentioned. The applicants' real objective was the removal of Mandaza's Board so that their new Board could operate smoothly. That being so the applicants should have sought as interim relief the freezing of the bank accounts and, as final relief, a declaration of legitimacy of their new board of trustees.

The final relief sought by the applicants is, to my mind, a final interdict against Mandaza and Harrison from carrying on the financial affairs of WILSA, and, in particular from operating WILSA's banking accounts and from visiting

WILSA offices. Viewed from this perspective the interdict has nothing directly to do with whether Mandaza is still a trustee and chairperson of WILSA. That this is so is supported by the applicants' averments regarding the alleged misuse of funds by Mandaza which allegations were not pursued by them in their heads of argument or in their oral submissions at the hearing. In my view the interim relief granted in HH 71/03 could not have been granted if the court had not been persuaded that Mandaza was abusing WILSA funds. On the other hand the order in HH 98/03 could not have been issued if it had been seriously contended that Mandaza was abusing WILSA funds. This means that the allegations of misuse of funds were made merely to cloud the issues and avoid dealing with the real dispute between the parties and to obtain the provisional order much more easily.

The final relief sought in this matter is, as I have said, in the nature of an interdict. I must therefore examine the requirements for the granting of a final interdict and satisfy myself that those requirements have been met by the applicants. Mr *Fitches* submitted that both the provisional order and the final order seek a final interdict. I agree that this is the case.

The requirements for a prohibitory interdict are set out in many cases - *Lipschitz* v *Wattrus* 1980(1) SA 662(T) at 673 C-D; K*aputuaza & Anor* v *Executive Committee of the Administration for the Hereroes & Ors* 1984(4) SA 295 (SWA) at 317 F and *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996(2) ZLR 52(S). These are a clear right, an injury actually committed or reasonably apprehended and the absence of a similar protection by any other ordinary remedy. See also *Setlogelo* v *Setlogelo* 1914 AD 221 at 227; *PTC Pension Fund* v *Standard Chartered Merchant Bank Zimbabwe Ltd & Anor* 1993(1) ZLR 55(H) at 63 A-C and *Moyo* v *Muleya & Ors* 2001(1) ZLR 251 (H) at 265E - 268D.

The applicants have not established a clear right in their favour. As at 30 January 2003 the applicants and those sympathetic to their cause acknowledged that Mandaza's Board was still in office. In a letter of this date (Annexure D) National Co-ordinators,

programmes officers and full-time research associates who were aggrieved by the appointment of Harrison as the Acting Regional Co-ordinator addressed Mandaza and other trustees on her Board - Victor Nkiwane, Unity Chari, Professor Mafa Sijanamane, Monica Musachoonga and Lebogang Letsie and said:

> "**Re: Reminder of Expiry of Tenure**
>
> **Further to the correspondence to the Board of Trustees from the management Committee dated 29th January, 2003, we the undersigned, write to remind you that you have served for a maximum period of two research phases in accordance with article 5 of the Trust Deed of Women and Law in Southern Africa Research and Educational Trust.**

You will recall that your tenure of office came to an end in or about April 2001, after WILSA's fourth research Phase on 'Women and the Administration of Justice : Problems and Constraints'. As you are aware your request to remain in office was specifically for the purpose of:

a) awaiting approval of DANIDA funding;
b) approving the relocation of the WILSA regional office;
c) **participating in the Donor Roundtable meeting in Lusaka on 31st October, 2002.**

We would like to acknowledge that you have successfully completed these tasks.

In the light of the above and the commencement of activities for Phase V, it is imperative that a new Board of Trustees be immediately constituted to undertake functions as stipulated in WILSA's Trust Deed for the pursuance of the organization's mission and objectives.

> **You are therefore kindly requested to vacate office forthwith, and in any event, no later than the 5th February, 2003, to enable the remaining three trustees to invite the nominated incumbents.**

We would like to express our appreciation and gratitude for the time that you have invested in the organisation and wish you success in your other endeavours".

This letter clearly acknowledged Mandaza's Board as legitimate until it stepped down as demanded, on 5 February 2003. When Mandaza's board refused to step down the crisis in WILSA deepened. The National co-ordinators who had rejected Harrison's acting appointment were dismissed by Mandaza's Board, a General Assembly meeting, or an extraordinary such meeting, was convened and a new board chaired by Shongwe was put in place. I have already observed that the General Assembly meeting held on 28 February was not authorised by the existing Board chaired by Mandaza. In terms of WILSA'S Trust Deed, clause 8.3 -

> "The meeting of the General Assembly shall be called by the Chairperson on not less than twenty-one (21) days notice".

and in terms of clause 8.6 -

> "An Extraordinary General Assembly may be convened to consider extraordinary issues if called upon to do so by the chairperson on fourteen (14) days notice or upon the written request of fifty per cent (50%) or more of those entitled to attend the General Assembly".

The applicants are not very clear what meeting they called - whether a General Assembly or an Extraordinary General Assembly. Although the applicants attempt to show that an Extraordinary General Assembly was held on 28 February 2003, the documents which they attach to their founding affidavit give a different picture - to wit, that what was actually held was a General Assembly. The notice convening the meeting (Annexure "M"), the proposed amendments to the Trust Deed and the list of those who attended the meeting (Annexure "N") all indicate that a General Assembly and not an Extraordinary General Assembly was held on 28 February 2003. Annexure "N" is

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headed:

> **"General Assembly of Women and Law in Southern Africa Research and Educational Trust : Held at Holiday Inn Johannesburg International Airport Hotel Conference Centre, 28th February, 2003".**

Shongwe, attached to her answering affidavit a full list of participants (being Annexure "N"). Its heading shows that a General Assembly meeting was held. In terms of clause 8.3 of the Trust Deed such a meeting could only have been validly called by the chairperson. It was not her who called that meeting. The resolutions passed at the meeting are recorded as having been passed by a General Assembly - see p 192 of the papers. There is simply no documentary proof that the meeting held on 28 February 2003 was an Extraordinary and not a General Assembly meeting. It seems to me that in view of their letter, the disgruntled members of staff of WILSA should have requested the chairperson to call a General Assembly meeting rather than call upon her to step down before a General Assembly meeting was convened. It would seem to me that the meeting held in Johannesburg was irregular in that it was not convened in terms of the provisions of the Trust Deed. This however is not a crucial issue for the purpose of confirming or discharging the provisional order. The crucial issue is that Shongwe and Moyo when seeking the provisional order and its confirmation were aware that the dispute over the legitimate Board of WILSA had been raging since January 2003 and that that dispute had not been resolved. That dispute has wide implications for WILSA and its members. Until a decision is procedurally made as to which of the competing Boards is the legitimate Board of WILSA I cannot see how the applicants can show that they have a clear right entitling them to an interdict. I cannot see how they can establish the other requirements

for the granting of a final interdict. The provisional order must, on this basis alone, be discharged.

The provisional order was granted on an urgent basis largely, in my view, because the applicants appeared to have established a case that Mandaza was abusing WILSA funds. That allegation was denied by Mandaza and refuted soundly and convincingly in her opposing affidavits. The applicants did not pursue it in their heads of argument or their legal practitioners in oral argument. The order issued in HH 98/03 would not have been issued had the court been satisfied that Mandaza was abusing WILSA funds. The bedrock of the application for the provisional order having thus been destroyed, there cannot, in my opinion, be any other sufficient ground upon which the provisional order can be confirmed.

In HH 98/03 at p 1-2 of the cyclostyled judgment SMITH J said that -

> **"I handed down a judgment HH 71/03 - granting the order sought and giving my reasons therefore. I found that Mandaza, who had been a trustee and chairperson since 1993, was no longer a trustee and therefore could not be the chairperson". (emphasis added)**

I do not think that it was the learned Judge's intention that this finding should not be revisited on the return day. He was considering an application for interim relief at which stage all the facts pertaining to the matter were not before him. That means he was fully aware that his finding, which could only be based on a *prima facie* case, was open to be reversed on the return day. The issue as to which Board is the legitimate Board of WILSA was not squarely before SMITH J and he made no declaration to that effect. I must hold that that finding, which is relevant

to Mandaza only does not make the Shongwe Board or Shongwe herself the legitimate Board and chairperson, as the case may be, of WILSA. I am fortified in this view because if

SMITH J had determined that the Shongwe Board was the legitimate Board he would, as a further interim order in HH 98/03 have sanctioned that Board to appoint new signatories to the bank accounts until the provisional order was confirmed and not empowered Mandaza to do that which she had been barred from doing in HH 71/03. If his finding was definitive as to the legitimacy of the Shongwe Board, there would have been no reason for him to issue a provisional order. He should have issued a final order. That he did not do so supports the view I have taken that his finding was only for the purpose of enabling him to grant the interim relief. What was before the learned judge was a dispute over access to the funds of WILSA - the request that Mandaza and Harrison be interdicted from transacting the financial affairs of WILSA. A provisional order was issued to that effect. When it comes to its confirmation I am required to decide whether the confirmation of the order is warranted having regard to the papers filed of record and the submissions made before me. For the reasons I have given, I am satisfied that the applicants sought to remove by the backdoor a Board whose legitimacy they had acknowledged at least until 5 February 2003. I am satisfied that any finding along the lines of SMITH J that Mandaza is no longer a trustee and chairperson would have the effect of removing from the Board five other trustees who were not cited as parties and who were not given an opportunity to defend themselves. I am satisfied that the main thrust of the applicants in seeking the provisional order was the alleged misuse of WILSA

funds by Mandaza. The applicants have failed to establish this as fact. I cannot therefore confirm a provisional order which has not been sufficiently justified and whose implications are much wider and potentially prejudicial to other persons who have not been given the opportunity to defend themselves.

It seems to me that the parties and in particular the applicants take cognizance of the Trust's Policy and Procedure Manual ("the Manual") when it suits them only. Mr *Matinenga* correctly submitted that the Manual should be *intra vires* the Trust Deed. I agree entirely. It contains, as per its preamble, information which is useful to the members of the trust, donors and other interested organisations and individuals. It provides for membership of WILSA on a basis completely different from that provided in the Trust Deed. Whereas the Trust Deed provides that membership is on a country basis the manual provides that the regional co-ordinator, deputy regional co-ordinator, national co-ordinators, full-time research associates, full-time action associates and part-time research and action associates shall be members of WILSA. The national co-ordinators owe their membership not to the provisions of the Deed but to the provisions of the Manual. The Manual, as submitted by Mr *Matinenga*, is to the Trust Deed as regulations are to a statute. And for as long as its provisions are not contrary to those of the Trust Deed, they are binding on the members. The Manual provides that there shall be three trustees from Zimbabwe and that the Board of Trustees shall appoint as chairperson, a person resident in Zimbabwe. The applicants have

not shown that these provisions of the Manual are contrary to the provisions of the Trust Deed. In my view they are not because they make provision for what the Trust Deed does not provide. They are complementary of the Trust Deed. They must therefore bind the WILSA members until such time as they are amended. In her answering affidavit Shongwe baldly states that these provisions of the Manual have been amended. There is nothing to show for it. I am therefore satisfied that as things stand the WILSA Board of Trustees must have three Zimbabwean trustees and a chairperson who is resident in Zimbabwe. The Shongwe Board is not so composed. She herself is not a Zimbabwean resident but a resident of Swaziland. The Shongwe Board is on this basis irregularly composed. Having regard to the Manual it becomes clear that the Shongwe Board cannot be the legitimate Board of Trustees of WILSA. It would therefore be wrong to confirm the provisional order and empower an otherwise irregularly appointed Board to take charge. This is a matter which can only be resolved, not when Mandaza is barred from transacting WILSA business but when a legitimate Board of Trustees has been appointed. For this reason also I cannot confirm the provisional order.

There are other issues which were canvassed by the parties. I do not think that they would add anything more to justify my conclusion. To do justice to the parties and their legal practitioners who filed copious affidavits and heads of argument I will address them.

Mr *Matinenga* was correct in his submission that Mandaza's objection to the

institution of the proceedings in the name of WILSA was not well founded. It is true, as the learned judge stated in HH 7/03 at p 8-9 that a trust is not a corporate body and therefore it cannot appear as a party. He correctly referred, as supportive of this proposition, to the decisions in *Commissioner for Inland Revenue* v *MacNeillie's Estate* 1961(3) SA 833(A) and *Crundall Bros (Pvt) Ltd* v *Lazarus N.O. &v Anor* 1990(1) ZLR 290 (H) also reported as an appeal decision in 1991(2) ZLR 125(S). But the High Court Rules 1971 as amended by the High Court of Zimbabwe (Amendment) Rules 1997 (No. 33), (S.I. 192 of 1997), introduced a procedure where associates may, in terms of r.8, sue or be sued in the name of their association. In terms of r.7 an association includes a trust and an associate, a trustee. The rules therefore permit a trust to be cited by name as a party to any proceedings. In this regard, and as submitted by Mr *Matinenga*, the learned judge should not, in my respectable view, have given credit to Mandaza's objection.

The question of Shongwe and Moyo's *locus standi* was also raised. Shongwe at least is a trustee of WILSA by Mandaza's own admission. She could in an appropriate case have standing even if she were not the chairperson but just a trustee - see *Trustee Mohammedan Mosque* v *Mohammed Sayed* 1937 NPD 241; *Mtshali* v *Mtambo & Anor* 1962(3) SA 469 (GWLD); *de Waal & Ors* v v*an de Horst & Ors* 1918 TPD 227; *Van Rensburg* v *Afrikaanse Tall-en Kultuurvereniging* (SAS & H) 1941 CPD 184 and *Tendai Westerhof* v *Zimbabwe Banking Corporation* HH 105/03.

Mr *Matinenga* submitted that the dispute in this case, by which I think he meant the dispute as to which is the legitimate Board of Trustees, can be resolved on the basis of interpreting clause 5 of the Trust Deed. That clause provides that -

"5.1 A Trustee shall hold office for a period not exceeding one research phase of the Trust or the remaining period of any research phase for Trustees appointed during the course of a research phase;

5.2 Retiring trustees shall be eligible for nomination to no more than one additional term of office".

Mr *Matinenga* argued that because Mandaza and her Board had been in office for more than four research phases taking into account the period before and after the amendment of the Trust Deed in 1999, the intention of the amendment in 1999 was that they should forthwith cease to be trustees. Whilst I accept that it is desirable to give a generous and purposive interpretation with an eye to the spirit and letter of a provision (*Smyth* v *Ushewokunze & Anor* 1997(2) ZLR 544 (S) at 553 A-C) the particular facts of this case are such as require this court to reach the conclusion I have reached. I have shown that the national co-ordinators and others who were not happy with the continued tenure of Mandaza and the other trustees acknowledged by letter dated 31 January, 2003, that Mandaza's Board was in office as at that date with the general membership's consent until at least 5 February 2003 when the authors of the letter demanded that they step down. Having extended the tenure of Mandaza's Board from April 2001 it seems to me that all that remained was for the new trustees appointed in terms of clause 4.1 of the Trust Deed to be notified to the old Board so that a smooth hand-over procedure could be carried out. Instead of doing this, the applicants sought to hold an irregular General

Assembly meeting and instal a new Board of Trustees without following the procedure previously agreed in regard to a smooth hand-over. In any case a finding that Mandaza and her board should step down or should have stepped down does not mean that Shongwe's Board was regularly appointed or that it is the legitimate Board of WILSA. Therefore the applicants would still not be entitled to the confirmation of the provisional order even if it were to be found that Mandaza is no longer a trustee and chairperson of WILSA.

WILSA is an important regional organisation. It has been the beneficiary of generous international donor support. It is extremely important that its affairs be handled in a transparent and professional manner. Trustees are personally liable for the conduct of trust affairs and as such any change of trustees must occur against the background of a full account of their performance by the outgoing trustees. It is my hope that WILSA will gather its thoughts, pick-up the pieces and its members co-operate with each other with a view to progressing the objectives of this worthy organisation. They need a new start and this judgment may provide an opportunity for such a new beginning. In order to restore harmony in WILSA and in recognition of the fact that each of the parties has the interests of WILSA at heart, I will not order any of them to pay the other's costs. If funds are available the costs in this matter and those reserved in HH 71/03 and HH 98/03 may be paid by WILSA.

The provisional order is accordingly discharged. There will be no order as to cost in respect of this application or HH 71/03 and HH 98/03. If WILSA has the funds the costs may be paid by it.

***Coghlan Welsh & Guest*, legal practitioners for applicants**
***Honey & Blanckenberg*, legal practitioners for lst and 2nd defendants**