

DISTRIBUTABLE: (88)

(1) BENSON MAKACHI (2) MR MUGAVA (3) SIMON NOTA
(4) SILAS GWESHE (5) GIBSON MUTSAKA (6) EVERSON
BREAKFAST (7) DAVISON CHIVESO (8) FREDSON GAMA
V
EVANGELICAL CHURCH OF ZIMBABWE

**SUPREME COURT OF ZIMBABWE
UCHENA JA, CHITAKUNYE JA & CHATUKUTA JA
HARARE: 17 FEBRUARY 2022 & 29 SEPTEMBER 2022**

M. Ndlovu with *W. Jiti*, for the appellants

L. Madhuku, for the respondent

CHITAKUNYE JA: This is an appeal against the whole judgment of the High Court, sitting at Harare, handed down on 29 July 2020 as judgment number HH495/20, wherein the court *a quo* granted a declaratory order to the effect that the appellants were no longer members of the respondent and were thus not entitled to the use of the respondent's name and properties.

FACTUAL BACKGROUND

The appellants are former members of the respondent. Most of them held different leadership positions within its ranks. The respondent is a common law *universitas* with various

ecclesiastical branches nationwide. It is a voluntary association of a religious character whose business and conduct are governed by its constitution.

The genesis of the dispute between the parties followed the expiration of the first appellant's five-year term as Bishop on 31 August 2014. The first appellant had been appointed Bishop in 2009 irregularly as he did not possess the educational qualification prescribed by the respondent's constitution. He was nevertheless allowed to complete his term. It is common cause that towards the end of the first appellant's term as Bishop, a nomination process was initiated to shortlist candidates for the vacant office in terms of the respondent's constitution. Five nominees declined to participate in the election process. The first appellant along with another nominee were then removed from the shortlist as they did not possess the requisite educational qualification of a theological degree, or its equivalent approved by the Annual General Conference (AGC) as the Supreme Board. Another hurdle in the first appellant's way was that he was also ineligible as he was past the retirement age of 65 years.

The first appellant was aggrieved by this decision. He disputed his disqualification and refused to be removed from the list of nominees. The respondent's Church Council (Council) resolved to hold an AGC for the purpose, *inter alia*, of electing a Bishop. The AGC was initially set for November 2014 and when there was no quorum of paid up members the conference was aborted. The conference was eventually set for 20-21 March 2015. The first appellant, as the outgoing Bishop and chairperson of the Council duly convened the AGC for 20 – 21 March 2015. However, the first to eighth appellants, with the exception of the fifth appellant, boycotted the AGC. In the result the congregants who attended the aforementioned

conference did not form *a quorum* in terms of the respondent's constitution. The attendees resolved to continue with the AGC and invoked Article III C (ii) of their constitution which states that:

“The AGC shall be vested with powers to deal with and dispose of any matters which may arise and for which no provisions exist.”

It was at this AGC that a new Bishop, Isaac Soda, was elected. The appellants then clandestinely organised an alternate conference on 28 March 2015, which they termed the ‘Emergency Extra-Ordinary General Conference’. The outcome of that conference was the renunciation of Isaac Soda's election as the Bishop, the excommunication of various members of the Council who had proceeded with the AGC on 20-21 March 2015 and the declaration of the first appellant as the substantive Bishop of the respondent till the election of a new Bishop. The appellants established their own structures replacing the excommunicated leaders. The excommunicated members were notified of their expulsion from the church.

Thereafter, the two sides became embroiled in a dispute to identify the *bona fide* representatives of the church. The acting Bishop, Reverend Amos Mateva, then convened an Extra-Ordinary General Conference on 10 September 2016 to hold regularised elections. Isaac Soda won the majority vote and was elected Bishop. However, his victory was disputed by the appellants who argued that it was unconstitutional and they continued to champion the first appellant as the legitimate leader of the church. In effect, there now existed two parallel structures utilising the name of the respondent. This resulted in the respondent issuing summons

in the court *a quo* for a declaratory order under HC 10163/15 to confirm the secession of the appellants.

BEFORE THE COURT A QUO

In the court *a quo*, besides seeking a declarator, the respondent also sought an order interdicting the appellants from using its name, uniforms and various church buildings and an order evicting them from its aforesaid buildings. The appellants on their part contested the relief sought contending that they were still members of the respondent. It is, however, apposite to note that before the court *a quo*, and as confirmed by a Joint pre-trial conference (PTC) minute dated 16 March 2018, the parties agreed that they were now two separate entities. They also agreed that the first appellant's term of office as Bishop expired and he had not been re-elected, that the qualifications for a Bishop are as set out in the constitution and that all other ancillary matters between them would be resolved by a determination of the legitimate faction between the two. The joint PTC minute of March 2018 inexplicably identifies the sole issue referred to trial as whether or not Bishop Isaac Soda was the legitimate leader of the original church which issue is not supported by the pleadings.

At the trial, it was argued that the election of Bishop Soda on 10 September 2016 was invalid as the church's constitution did not provide for a re-run. The first appellant begrudgingly admitted that he was over the constitutional retirement age of 65 years. He also alleged that he boycotted the AGC held on 20 – 21 March 2015 due to threats on his person despite being the convenor of that conference. He also conceded that the clandestine meeting held on 28 March 2015 was irregular. It was also common cause that the appellants had formed

parallel structures from the respondent which included opening separate bank accounts and leadership posts.

After hearing evidence from the parties, the court *a quo* ruled in favour of the respondent. It found that the appellants had created a schism in that in their opposition to the election of Isaac Soda and insistence on the validity of the first appellant's candidacy, they had proceeded to allocate themselves positions in the church and purportedly dismissed members of the Church Council. They in effect proceeded to create their own structure contrary to the dictates of the constitution and defied attempts to be disciplined by the respondent. The court held that as the appellants had abandoned the canons of the church and its constitution, they were no longer members of the respondent. The appellants were interdicted from using the respondent's name and regalia. They were also barred from using respondent's properties previously in their possession and ordered to vacate its premises.

Aggrieved by the court *a quo*'s decision, the appellants noted this appeal on the following grounds of appeal:

GROUND OF APPEAL

1. Having correctly found that Isaac Soda had not been properly elected as the Bishop of the respondent, the court *a quo* erred in holding that the appellants, by opposing Isaac Soda's supposed leadership had seceded from the respondent.
2. The court *a quo* erred in holding that the faction of the respondent led by Isaac Soda was the correct church for purposes of the dispute that was before it.
3. The court *a quo* further fell into error at law in holding that the appellants were no longer members of the respondent when in terms of the respondent's constitution, only local

congregations and not natural persons are capable of acquiring and/or relinquishing membership in the respondent.

4. The court *a quo* erred in granting eviction of the appellants at the instance of a faction of the respondent which faction had no properly elected leadership.
5. The court *a quo* fell into error in holding that the assets of local churches belonged to the respondent when the listed assets belonged to individual autonomous local churches and some instances to individuals.
6. The court *a quo* erred in granting an interdict against the appellants restraining them from calling themselves the Evangelical Church of Zimbabwe and using the respondent's uniforms when such issue was never referred to it for determination.

SUBMISSIONS BEFORE THIS COURT

Mr. *Madhuku*, for the respondent, raised a preliminary point that the appeal had been deemed abandoned as the appellants' heads of argument did not address the grounds of appeal. *Per contra*, Mr *Ndlovu*, for the appellants, submitted that they had motivated each ground of appeal. He submitted that the issue is really one of style rather than failure to motivate the grounds of appeal. Resultantly, Mr *Madhuku* abandoned the preliminary point. It is, however, this court's view that whilst legal practitioners have different styles of presenting their heads of argument, whatever style adopted must surely be clear and consistent with the grounds of appeal. *In casu*, the heads of argument were convoluted and not easy to relate to particular grounds of appeal. The appellants' heads of argument could have been drafted in a better way. We nevertheless opted to painstakingly peruse the convoluted heads of argument as, in our view, the real issues were clear from the record of proceedings.

On the merits, counsel for the appellants submitted that the faction led by Isaac Soda is the one which seceded from the church. This was because Isaac Soda had not been properly elected as the Bishop and his re-election itself was a nullity. Mr. *Ndlovu* submitted that the first appellant remained the Bishop until an election was held in accordance with the constitution of the church. As to the appointment of people to the Council under the faction led by the first appellant, Mr. *Ndlovu* submitted that they were rightfully appointed in accordance with the position that the first appellant was the legitimate Bishop until a valid election was held.

Counsel for the appellants also submitted that once the court found that Isaac Soda had not been rightfully elected, the members who were not in support of his election could not be said to have seceded. Counsel further submitted that the finding by the court *a quo* that the appellants were no longer members of the church was against the church's constitution which provides that affiliate branches of the church are the ones considered as members of the church and not natural persons such as the appellants.

In motivating the fourth ground of appeal, counsel submitted that as Isaac Soda was found not to be duly elected as Bishop, he could not seek the eviction of other members of the church. On the fifth ground of appeal, counsel submitted that the court *a quo*'s order that the appellants surrender properties to the respondent violated the church's constitution. In summation, counsel submitted that once a finding had been made that Bishop Isaac Soda had not been duly elected, it followed that the appellants could not be said to have broken away from the church despite the accepted position that they had created a parallel structure and allocated

themselves leadership positions in that structure. He maintained that there was therefore no basis for the grant of the interdict against the appellants by the court *a quo*.

On the contrary, Mr. *Madhuku*, for the respondent, submitted that the appeal was devoid of merit as the appellants' case was grounded on the mistaken fact that Isaac Soda was not the duly elected Bishop of the church. He added that the real issue for determination by the Court *a quo* was which of the two factions was the legitimate Evangelical Church of Zimbabwe. He submitted that the court *a quo*'s finding that the appellants had seceded from the church resolved the dispute between the parties. In addition, counsel reiterated that the issue of Isaac Soda's occupation of the office of the Bishop was not the main issue for determination but was merely one of the side issues to be resolved by the Court. He added that as the first appellant's term in office had expired, all those in support of him had seceded from the church by forming their own parallel structure.

This Court finds that only one issue commends itself for determination in this matter. It is whether the court *a quo* erred by finding that the appellants were no longer members of the respondent and were thus not entitled to the properties owned by the respondent.

APPLICATION OF THE LAW TO THE FACTS

It is common cause that in preparation for a pre-trial conference, the parties held a meeting on 24 November 2017. In that meeting parties agreed that the issue for referral to trial was- "whether or not the plaintiff (*sic*) is the legitimate leadership of the Evangelical Church of Zimbabwe". It was their view that a resolution of this issue would resolve the rest of the issues

they deemed ancillary. At that meeting the respondent being the church was represented by Rev Dewah. Thus, the determination of the legitimate faction was to resolve the dispute. At the PTC held on 16 March 2018 both sides acknowledged that the Council had split into two factions. This acknowledgment was made subsequent to the agreement made on 24 November 2017 referred to above.

Despite the identification of the issue as one of legitimacy of the factions, in the joint PTC minute the parties inexplicably recast the issue to be whether or not Bishop Isaac Soda is the legitimate leader of the original church. The court *a quo* aptly observed that the respondent had not pleaded for an order declaring Isaac Soda to be the duly elected Bishop.

The court *a quo* further found that there was no legitimate Bishop for the respondent as on 13 June 2016 in case number HH 359-16, MANGOTA J had found that the election of Isaac Soda on 21 March 2015 was afflicted with irregularities and so declined to declare him the duly elected Bishop. Equally the court *a quo* held that the election of 28 March 2015 wherein the first appellant was re-elected Bishop suffered the same fate as it was afflicted with fatal irregularities which appellants conceded. The court *a quo* further held that the re-election of Isaac Soda done on 10 September 2016 was afflicted with some irregularities. The court noted that the constitution did not provide for a re-run of an election yet this is what the respondent had purported to do without following the laid down procedures. In noting the above, the court *a quo* was alive to the fact that the respondent had not specifically pleaded for a declaration of Isaac Soda as a duly elected Bishop hence it did not make such a declaration.

A perusal of the respondent's declaration before the court *a quo* clearly shows that the respondent did not plead for a declaration of Isaac Soda as the legitimate Bishop of the Evangelical Church of Zimbabwe. The respondent ought to have amended its declaration so as to include the issue of the legitimacy of Isaac Soda as Bishop. As the respondent did not do so, the court *a quo* cannot be faulted for not making a declaration on whether or not Isaac Soda is the legitimate Bishop of the respondent.

In *Mashonaland Tobacco Company (Private) Ltd v Mahem Farms (Pvt) Ltd & Another* SC 152/20 at p 9, this Court summed up the general principle regarding the necessity of pleading a cause of action in these words: -

“As a general rule, judgment cannot be granted on a cause of action that is not pleaded. The pleadings must clearly set out the precise parameters of the issues contested between the parties. Thus, in the Namibian case of *Courtney-Clarke v Bassingthwaite* 1991(1) SA 684 (Nm), at 698, it was explained that:

‘..... there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively, there is no authority for ignoring the pleadings and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment.’”

In *Medlog Zimbabwe (Pvt)Ltd v Cost Benefit Holding (Pvt)Ltd* 2018 (1) ZLR 449(S) at 455G, this Court aptly stated the position as follows: -

“In general, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law.’

And at page 456E-G that: -

“25.6 In *Jowell v Bramwell-Jones & Ors* 1998 (1) SA 836(W) at 898 the court cited with approval the following remarks by Jacob and Goldrein *Pleadings: Principles and Practice* at pp 8-9:

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings.... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the function of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation..... The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.” (*underlining for emphasis*)

See also *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92(S) at 101F-G and D-E, *City of Harare v Everisto Mungate* SC 86/22.

In casu, the respondent’s pleadings were for a declaration that the appellants had seceded and attendant ancillary relief. The appellants’ contention in their pleadings was that they had not seceded. The pleadings clearly related to the issue of the legitimacy of the two factions and the attendant consequences. The issue of Isaac Soda’s election was unfortunately let in at the pre-trial conference even though it did not arise from the pleadings. This was clearly improper. The court *a quo* did not err or misdirect itself when it noted that despite the parties’ agreement on the issue as being on the election of Isaac Soda, the respondent had not pleaded the election of Isaac Soda on 10 September 2016 and so it could not determine an issue not pleaded by the parties. There was nothing in the pleadings to bring in the issue of Isaac Soda’s election. It is trite

that issues of secession or schism are decided on adherence to the church's principles and ethos as enshrined in its constitution rather than allegiance to a particular leader.

The appellants' counsel submitted that after the court *a quo* found that there was no legitimate Bishop of the respondent from the elections of 21 March 2015, the court misdirected itself by holding that the appellants had seceded from the respondent. He argued that as Isaac Soda was not a validly elected Bishop, the appellants' opposition to his appointment could not amount to secession. He further submitted that the appellants did not create a schism within the church by opposing Isaac Soda's appointment and assuming positions within the church.

The law on church disputes and in particular, secession, was discussed at length by this Court in *Church of the Province of Central Africa v Diocesan Trustees, Harare Diocese* 2012 (2) ZLR 392 (S), where MALABA DCJ (as he then was) at p 410A-B stated the importance of constitutions in religious institutions as follows:

“By definition, a church is a voluntary and unincorporated association of individuals united on the basis of an agreement to be bound in their relation to each other by certain religious tenets and principles of worship, government and discipline. The existence of a Constitution is testimony to the fact that those who are members of the Church agree to be bound and guided in their behaviour as individuals or office-bearers on ecclesiastical matters by the provisions of the Constitution and the Canons made under its authority.”

Premised on the above, when faced with an issue of factionalism, the court must determine which of the two groups before it has abandoned the core values and ethos as espoused in the constitution and canons of the church and thus seceded. The seceders would not be entitled to ownership of the church's property. The Court in the *Church of the Province of*

Central Africa (supra) laid out the important factors to be considered. Factors such as allegiance to a particular leader or which faction or group has the majority of members were held not to be applicable in these words at p 413F-G:

“The rationale for the rejection of the application of the factor of majority lies in the concept of a church as a voluntary association of individuals united by an agreement on the religious principles by which their affairs as individuals and association should be conducted. On the principle of majority, it would mean that where one person remains holding the original principles of the church there is no organized association of people. The issue is not that the person is alone at the time of secession from or division in the church. It is that the one person adheres to the fundamental principles which define the church. As long as there is no provision in the constitution (on the basis of which he or she subscribed the principles and undertook to be bound by them) as to what should happen when he or she is not in the majority, his or her adherence to the fundamental principles is the decisive factor.” (*underlining for emphasis*)

The above puts to rest the contention by the appellants that they ought not to have been ordered to vacate the premises owned by the respondent on the basis that ninety-four members of the Evangelical Church of Zimbabwe recognize the first appellant as the Bishop while only thirty-eight members recognize Isaac Soda as the Bishop. Allegiance to a particular leader or to a faction having the majority of members are clearly not determinative factors in establishing which faction gets ownership of property in the face of a split in the church.

The paramount consideration in a matter such as this is which of the two groups acted in accordance with the constitutional principles upon which the church is founded. This was unequivocally stated in the *Church of the Province of Central Africa* case (*supra*) at p 412C in these words:

“Adherence to the fundamental principles on which the church is founded must be the factor on which disputes of ownership or possession and control of church property are determined....”

And at 413D that:

“The application of the principle of adherence to the fundamental principles of a church supports the proposition that those who have departed from the standards and principles on which the church is founded are more likely to leave it.”

In casu, the appellants are without doubt the ones who acted in contravention of the respondent’s constitution. This is because they sabotaged the duly convened AGC on 20-21 March 2015 by not attending it. They then insisted on the nomination of the first appellant as a candidate regardless of his lack of the requisite qualifications, such as education and age.

Despite the common factor that the first appellant was not eligible in terms of the constitution, the appellants did not renege on their position; instead, they went on to create a parallel structure with the first appellant as the Bishop, coupled with the dismissal of other members from the Council and allocating themselves positions outside of the provisions of the respondent’s constitution. They even went as far as opening and operating new bank accounts for their faction. This undoubtedly resulted in the creation of a schism. It is a long-standing principle that a person who is responsible for the creation of a schism cannot assert that he or she is still a member of the original church.

Further, it is on record that the appellants conceded that the Council had split into two factions. This, in our view, is a clear indication that the appellants broke away from the

respondent. It is in view of the above that this Court finds that the finding by the court *a quo* that the appellants constitute the seceding party cannot be faulted.

The consequences of secession were well articulated in the *Church of the Province of Central Africa* case (*supra*) at p 421B as follows:

“It has long been established as a salutary principle of law in this area of property ownership that when one or more people secede from an existing church, they have no right to claim church property, even if those who remain members of the congregation are in the minority.”

The author, B. Bamford on *The Law of Partnership and Voluntary Association in South Africa*, Juta & Co Ltd, 1982 at p 218 supports the above assertion in these words: -

“The seceders would not in any event be entitled to property belonging to the parent association, even if the whole association has seceded...”

This Court finds that as the actions of the appellants were brazenly in violation of the principle values contained in the respondent’s constitution, they are not entitled to any of the property belonging to the respondent. This is in tandem with the tenet that the control and use of church property is the preserve of those who uphold the fundamental principles upon which the church is established and governed.

DISPOSITION

It is clear that this appeal has no merit. The judgment of the court *a quo* cannot be faulted. The appeal ought to fail.

COSTS

There was nothing submitted justifying a departure from the general principle that costs follow the cause.

Accordingly, the appeal be and is hereby dismissed with costs.

UCHENA JA

I agree

CHATUKUTA JA:

I agree

Jiti Law Chambers, appellants' legal practitioners

Mapondera & Company, respondent's legal practitioners