DIOCESE OF HARARE
versus
CHURCH OF THE PROVINCE OF CENTRAL AFRICA
and
RETIRED BISHOP SEBASTIAN BAKARE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 13 December 2007 & 30 January 2008

Urgent Chamber Application

Mr *J P Mutizwa*, for the applicant
Mr *E T Matinenga*, for the respondents

HUNGWE J: Applicant seeks the following interim relief:

> "Pending the final determination of this matter the applicant is granted the following interim relief:-
>
> That the first and second respondents and their followers be and are hereby interdicted from conducting church services in properties controlled by the applicant, or interfering with the business and ministry of the applicant.
> That the second respondent be and is hereby interdicted from holding himself out as a Bishop of the applicant, and conducting his ministry as such."

Applicant is the Diocese of Harare within the Anglican Church. The first respondent is the Church of the Province of Central Africa. It is the highest organ in the Anglican Church structures in the region. It consists of 15 dioceses including the applicant.

Applicant through its Diocesan Secretary, one Barnabas Machingauta, sets out the background to the application by pointing out that the applicant broke away from the first respondent in September 2007. Applicant avers that first respondent tacitly accepted the breakaway as is implied by its action against Bishop Kunonga in HC 6644/07. At the time of applicant's withdrawal from first respondent, applicant contends that it was in peaceful and undisturbed possession and control of various movable and immovable properties which include church buildings, chapleries, houses, offices and motor vehicles.

Applicant avers that first respondent sought by way of an urgent application in HC 5637/07 an order interdicting Bishop Kunonga from working or doing business from named properties belonging to the Church as well as from transaction on the respondents bank

accounts held at specified branch. This application was dismissed. By implication, applicant contends that applicant's undisturbed possession and control of this property was confirmed by this court. Therefore, so the contention goes, by bringing proceedings against Bishop Kunonga in HC 6464/07 seeking an order that he delivers to first respondent certain motor vehicle in his possession to the Trustees of the first respondent, the latter is seeking to get by the back door what it had failed to achieve in HC 56377/07.

Applicant goes on to chronicle how second respondent has attended church service at one of the premises under the control of the applicant calling himself Bishop of the Diocese of Harare. This act, so applicant argues, demonstrates how both respondents have taken the law into their hand by invading the space of the applicant. There is a complaint about how the second respondent received donations during the service he conducted at one such church and put it to his own use when this belonged to the applicant. But the general complaint against the respondents is that they have taken the law into their hands by ministering in churches which applicant controls and that this behaviour is likely to cause a breach of the peace.

The respondents vehemently oppose the application and advance various grounds in opposition of the application.

In his opposing affidavit second respondent generally takes issue with averment of facts by the applicants. He challenged the claim that the matter was urgent. He puts into issue the identity of the applicant averring that as far as he was concerned it was Bishop Kunonga and a few other sympathizers who were opposed to the first respondent asserting its authority over church property. The majority of worshippers, he says, were content to remain within the jurisdiction of the first respondent after Bishop Kunonga left the Province. The respondents contend that the requirements for spoliation have not been met. Kunonga and his group are not in possession of any of the properties in question. The applicant has not in any way been unlawfully deprived of any control of the property in issue.

As I understood it the respondent's contention was as follows. There are 15 Dioceses which make up first respondent. Applicant is one of them. The first respondent is spread over the geographical location of Botswana, Malawi, Zambia and Zimbabwe. It is governed by a Constitution and other canons. The make up or composition of a Province is governed by this Constitution. Thus where a diocese wishes to withdraw from its Province to join another Province, that diocese must act in terms of the Constitution and obtain the relevant approval for its intended course of action. Bishop Kunonga and his group did not follow the laid down

procedures in order for their move to obtain the requisite approval for the proposed "withdrawal." Their "withdrawal" remains unprocedural and therefore illegal as it was never endorsed by the relevant church organs as is required by the Constitution. The Diocese of Harare remains an intergral part of first respondent as it has always been in the past. Kunonga cannot claim to have taken the Diocese of Harare out of the Province. As such, second respondent contends, the Diocese has not instituted this action.

Further, the respondents dispute that the applicant is in possession of the various church premises as contended by the applicants. The various churches are owned by first respondent which exercises its ownership through the Provincial Synod and at diocese level, the individual Diocesan Trusts. Thus the Diocesan Trusts hold ownership for and on behalf of first respondent. The possession and physical control of the Church buildings however is vested in church wardens of the individual churches who are elected by the parishioners of the area. It is these wardens who are in physical possession and control of the churches. As such only church wardens can, in appropriate circumstances, bring an application for spoliation. Bishop Kunonga is in control and occupation of Paget House which is the first respondent's Head Office. The respondents do not intend to unlawfully take control of Paget House from Bishop Kunonga. They however deny that the applicants are in physical possession and control of each and every church and chapel that comprise the Diocese of Harare.

When second respondent conducted church service anywhere in the diocese, it has been at the invitation of the church wardens of the churches concerned. Respondents deny that they acted unlawfully in this regard.

The respondents raise a further point in respect of the effect of the order sought. The order sought, if granted in its form, will effectively deprive the parishioners of their constitutional right of freedom of assembly and of association without them being heard.

Two grounds, in my view, will dispose of this matter.

The first is that the applicant has no *locus standi in judicio* to bring this application. The respondents argue that it is not the Diocese of Harare which has brought these proceedings but Bishop Kunonga and a few of his sympathizers who include the deponent to the founding affidavit. They point to the fact that the Diocese of HARARE, like any other, is governed by a Constitution which identifies it as part of the first respondent. There are within that Constitution, laid down procedures in terms of which such matters as withdrawal from or accession to the Province are dealt with. Applicant through its agents in the person of the

reverend Bishop, has elected not to follow that procedure thereby putting itself out of court. Until such time as the applicant complies with those requirements, it has no locus to bring this application. At law applicant does not exist and therefore lacks capacity to sue.

The Constitution of the Province of the Church of Central Africa annexed to the opposing papers as Annexure "C" contains as one of its Fundamental Declaration the following fundamental declaration which states;

> "No alteration in these Fundamental Declarations may be made unless the proposed amendment, after having provisionally approved by the Provincial Synod, has been approved by the Synod of each Diocese in the Province, and confirmed by a two thirds majority of those present, and confirmed by the Provincial Synod by a two thirds majority of those present, and has subsequently been endorsed by the Archbishop of Canterbury as not affecting the terms of Communion between the Church of this Province, the Church of England and the rest of the Anglican Communion."

It follows that in order to be binding, the withdrawal of the applicant from the first respondent would have to be supported and endorsed by the other dioceses making up first respondent. This never occurred. Even assuming certain of the Diocese did endorse this move by applicant, the next stage of approval i.e. by the Provincial Synod of the applicant was never sought or obtained.

There was certainly no approval from the Archbishop of Canterbury. The Constitution clearly requires this.

Applicant's answer to this is that at this stage of the litigation, the question of the applicant's decision to leave the Province is not before the court. What the court should deal with is the claim for spoliation. In an application for spoliation the issue is whether there has been or has not been unlawful dispossession. The court therefore ought not to consider the issue of *locus standi*.

I disagree. The question of *locus standi* is central to the determination of the availability of the remedy to the parties before a court. If the applicant's argument is taken to its logical conclusion it will mean that anyone could claim spoliation on behalf of a juristic person without the issue of that party's locus being inquired into. This would result in untenable situations and produce unintended consequences. A church is a voluntary association as such the general principles applicable to such associations should, in my view, apply. A voluntary association was founded on the basis of mutual agreement which entailed an intention to associate and consensus on the essential characteristics of the objectives of the association. The constitution of a voluntary association, which, together with its rules or

regulations constituted the agreement entered into by its members not only determined the nature and scope of the association's existence but also prescribed and demarcated the powers of the association and its office-bearers.

By accepting appointment to the office within the church, a minister or bishop like any other officer-bearer, impliedly undertakes and affirms his wish to be bound by the constitution of that church. Conversely the church by accepting the membership of its office-bearers also impliedly confirms its obligation to act in terms of its own constitution in the event that there is dispute regarding any aspect of the administration of the church.

The constitution of the church and its rules determined what procedure is to be followed where one diocese decided to secede from the Province and what act would qualify as misconduct requiring disciplinary action.

The Constitution of the Church of the Province of Central Africa, Annexure "C" to the opposing papers, sets out at page 4 the procedure to be followed where it is decided to alter any of its fundamental constitutional structures. For example it has power to admit to membership any diocese which was formed after its inauguration. It may reconstitute itself where it has been decided to join another Province subject to the provisions of the constitution.

Applicant avers that it seceded from the first respondent on or about 21 September 2007. Respondent refuses to recognize such secession. First respondent contends that that juristic act cannot be of any legal force as it did not comply with the requirements set out in declaration VII this being one such alteration as would change the structure of first respondent. In short, applicant does not at law exist. There is merit in this contention. Applicant cannot exist outside the constitution of first respondent. It has no separate constitution of its own. It therefore has no structures of its own other than those set out in the constitution. The assets under contention are assets which first respondent lays claim to. The question of ownership of these assets is not presently before me. What I should decide is whether the applicant, as presently constituted, has *locus standi* to bring this action. As I have demonstrated, the Diocese of Harare for the time being is that as presently constituted. It is made up of those parishes or ecclesiastical divisions, listed as annexure to the applicant's founding affidavit. In order for it to lawfully secede and sever its ties with the first respondent, the diocese would have passed a resolution to that effect. That resolution would have been approved by the Synod of each diocese in the Province after it had been provisionally approved by the Provincial Synod and confirmed by a two thirds majority of those present. Thereafter, the

resolution for secession from the Province would have to be endorsed by the Archbishop of Canterbury as not affecting the terms of Communion of the Anglican Church.

It is clear to me that the applicant has come nowhere near demonstrating that it has placed itself within the purview of those who confess to be Anglicans and who abide by the Constitution of their church. There is no claim that there was a resolution of the Synod of the diocese adopting this alleged breakaway. What the papers do show is that Bishop Kunonga and the Diocesan Secretary and a handful of other worshippers have decided to leave the first respondent. They have however not followed the Church's constitution. As such they cannot seek to rely on a constitution that they have so much violated. They claimed they have been despoiled by the acts of the second respondent whose only offence was to minister members of first respondent.

Even if I were wrong to hold that applicant has not established *locus standi* to bring this application, I am of the firm view that its application would have failed on different grounds. It is that applicant has not met the requirements of a spoliation order.

The requirements for obtaining an order *mandament van spolie* are met when

(a) a person has been deprived unlawfully of the whole or part of his possession of movable or immovable; and also

(b) a person has been deprived unlawfully of his quasi-possession of a movable or immovable incorporeal. See *Nino Bonino v De Lange* 1906 TS 129**;** *Shahmahomed v Hendricks and Others*1920 AD 151; *Mans v Loxton Municipality and Another* 1948 (1) SA 996 (C).

In *Ross v Ross* 1994 (1) SA 865 Erasmus J @ p869 expressed himself on the quality of possession required thus:

" Price **The Possessory Remedies in Roman-Dutch Law** at 107 declares as follows:

> 'Spoliation Order . . . *"Possession" is somewhat widely interpreted; it has been allowed to an agent, a trustee, a lessee, a depositary, a bona fide possessor who is legally incapable of owning the property in dispute, and, in fact, to any person holding property with the intention of securing some benefit to himself, either as agent of the owner, such as a borrower, or even as against the owner, such as one claiming a lien or a pledge, or possession under a hire-purchase agreement . . .'.*
>
> There is however, in my view, clearly no *numerus clausus* of persons to whom the remedy is available. Neither is it necessary for the applicant to place himself in a special legal category of persons who have a possessory relationship with an object: proof of the existence of any such sufficient relationship at the relevant time will do. The question of the nature of the requisite possession has

> been approached from the point of the objects of the remedy, with regard to the harm it is designed to prevent. In such regard the abovementioned quotation from Price (*loc cit*), continues as follows:
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> '. . . Indeed, there are many cases which seem to imply that the Court is even more interested in discouraging conduct conducive to a breach of the peace or calculated to bring the law into contempt or to undermine respect for orderly conduct than in assisting the dispossessed person, and that it will therefore not look too closely into the juridical nature of the possession alleged, provided that some reasonable or plausible claim can be maintained, together with an attempt by the respondent to "take the law into his own hands", in which case he will be required to restore the status quo ante."…….'

In *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* 2007 (3) SA 524 (N) NICHOLSON J, after a discussion of the topic concluded that:

> "A summary of the above cases would seem to me to indicate that the mandament is there to protect possession, not access. Such possession must be exclusive in the sense of being to the exclusion of others. The possession of keys by a multiplicity of parties waters down their possession, and in the present case it becomes so dilute that it ceases to be the sort of possession that is required to achieve the protection of mandament. It must be recalled that the real purpose of the mandament was to prevent breaches of the peace. If someone is in exclusive possession and exercises such possession, then deprivation thereof can, and often does, lead to a breach of the peace. No such breach would in the ordinary course of events take place where a large number of persons have access, rather than possession, of the property in question."

The applicant claims it has been unlawfully dispossessed of its control of the various properties under its control. It says in paragraph 16:

> "However, on the 25th day of November 2007, second respondent attended at St Michael's and All Angels, a church which is in the possession of the Diocese of Harare and actually conducted a church service in the building there, calling himself the Bishop of Harare of the Diocese of Harare. I submit that the first and second respondents have taken the law into their own hands by invading the space of the applicant who did not give them and withholds its consent to these actions."

By that I understand it to imply that it was in physical control of the property but that control has been taken over by the respondents. What is being complained of is access by the respondents to the church premises, not possession in the sense that meets the criteria required to qualify for the grant of the mandament. Civil possession, which is physical possession, *detentio*, accompanied by intention to hold such possession to the exclusion of everyone else, *animus possidendi*, would certainly qualify an applicant for the mandament. An applicant for the mandament must demonstrate that he was in exclusive possession of the property before he

is entitled to the mandament. It should be recalled that the real purpose of the mandament was to prevent breaches of the peace. It was intended to protect possession not access. I am unable to find that, assuming for once that applicant was in possession of the church premises in issue, a church organ, such as applicant, could possess church premises to the total exclusion of other church organs and its membership, such as respondents. By their very nature, it seems to me, it is inconceivable that applicant and first respondent could competently claim the mandament over church premises as neither can possess a church building to the total exclusion of the other.

The only other aspect relates to the incorporeal right that applicant could claim relate to ministering its membership. I will assume in applicant's favour that this right is one that is recognized in terms of the law. Indeed I did not hear the respondents to argue that applicant has no such right.

The question of the application of the mandament for incorporeal rights has been subject of discussion in case law and in academic circles. In *Telcom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) Jones AJA deals with the origins and development of the mandament as follows in paragraph (9) at 312G- 313B:

> "Originally the mandament only protected the physical possession of movable and immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed it was said the holder of a right has quasi-possession of it when he has exercised such right. Many theoretical and methodological objections can be raised against this construct, inter alia, that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of '*quasi-possession'* has passed into our law. This is all firmly established."

The applicant says that second respondent by preaching in church premises under the Diocese of Harare committed acts which amount to spoliation, if I understood his argument correctly. The acts could occasion a breach of the peace. He must be restrained by an order of spoliation. The further argument pressed on behalf of the applicant was that its Bishop Kunonga has an inherent right to minister at these premises. No other officer of the first respondent could do this without his consent. As Bishop Kunonga never consented to second respondent ministering at the various churches under the jurisdiction of the applicant, therefore such acts amount to taking the law into his hands by the second respondent. He must be visited with a mandament.

The right to exercise one's freedom of is recognized by the law. It is the ultimate exercise of one of the fundamental freedoms enshrined in our constitution. Our Constitution recognizes the freedom of worship, association, assembly and a host of other individual liberties. **(See Sections 19, 20 and 21 of the Constitution of Zimbabwe).** The question that arises then is whether the applicant, through the reverend bishop, has been unlawfully dispossessed of this right. In assessing whether any such act of spoliation has been committed, the court has to balance the rights of those parishioners to worship, their right to be ministered by one of theirs, their right to enjoy communion against the alleged unlawful invasion of the bishop's right to minister his flock. The inquiry in my view must confine itself to whether, by preaching at various churches the second respondent committed an unlawful dispossession of a legally recognized right held by the bishop. Applying the principles discussed above, I am unable to hold that where a bishop of one Diocese is invited to minister in a different Diocese and that accepts such invitation by the faithful, such services as he may conduct amount to unlawful dispossession of whatever rights are held by the ordained bishop for the locality. The applicant urged this court to hold thus. I am in respectful disagreement with that view for the further reason that the right of the two Bishops in this unfortunate saga must surely rank in *pari pasu* to each other in respect of the ministering to the members of the Anglican Church. There is no reason in logic why such rights cannot be rationally exercised over the same congregation at given times. Neither of the two sides in this matter claims exclusive right to preach or minister certain sections of the congregation to the total exclusion of the other. This is the essence of this matter. If then this is so there could be no unlawful dispossession of this perceived right. In my respectful opinion no unlawful dispossession occurred in this matter.

For to argue that entry into a church premise by a bishop of a separate diocese constitute dispossession would be to stretch the mandament too far. It was never meant for application in situations as arose in the dispute within this particular church. In my respectful opinion the parties to this dispute being men of the cloth, ought to resolve their disagreements in a God- fearing manner and respect the holy tenets of their church bearing in mind their sacred vows to God Almighty. These are not matters which should burden such courts as the present one but the proper province of the ecclesiastical organs of the Church of England.

In the result therefore, the application is dismissed with costs.

Chihambakwe Mutizwa & Partners, applicant's legal practitioners
Gill Godlontons & Gerrrans, respondent's legal practitioners