HH 40-2010
HC 3391/09
Ref. HC 2792/09
Ref. HC 4327/08
Ref. HC 5637/07
Ref. HC 6544/07
Ref. 3208/07
Ref. 345/08
Ref. HC 402/08
Ref. HC 1311/08
Ref. HC 2259/08
Ref. HC 2927/08
Ref. SC 2/08
Ref. SC 32/08
Ref. SC 17/08
Ref. SC 83/08

THE DIOCESAN TRUSTEES FOR THE DIOCESE OF HARARE
versus
THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA
and
BISHOP CHAD GANDIA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 3rd August 2009 and 13th August 2009 and 8th September 2009 and 9th September 2009 and 18th September 2009 and 3rd March 2010

G Chikumbirike, for the applicant
Mr Moyo, for the respondents

BHUNU J: All the parties in this case claim to be members of the Anglican Church but belonging to rival factions. They are however engaged in vicious Court battles concerning their legitimacy and entitlement to Church property.

On 24 July 2009 the applicant obtained a provisional order against the first respondent from HLATSHWAYO J under case number HC 2792/09 in the following terms:

"TERMS OF THE INTERIM ORDER

(a) That the consecration of a new bishop by the respondent on 26 July 2009, or any date thereafter be and is hereby stopped pending the discharge or confirmation of this order on the return date.

TERMS OF THE FINAL ORDER SOUGHT

(a) That it be declared that Dr. Nolbert Kunonga is still the Bishop of the diocese of Harare.

(b) That the respondent is barred from recognizing any Bishop of the Diocese of Harare until there has been compliance with the Constitution of the respondent.

(c) That it pays costs of suit."

On the same date HLATSHWAYO J under case number HC 4327/09 granted a declarator declaring Nolbert Kunonga's Board of Trustees as the legitimate Board of Trustees for the Diocese of Harare. The same order further affirmed that the said Diocese's property is vested in the applicant, that is to say, The Diocesan Trustees For The diocese of Harare.

Aggrieved by both judgments the first respondent lodged an appeal to the Supreme Court on the same date, the 24th of July 2009. Notwithstanding HLATSHWAYO J's order to the contrary, the first respondent proceeded to consecrate the second respondent as the new Bishop for the Diocese of Harare. In doing so the respondents were relying on the well known rule of practice in the superior courts that an appeal suspends the decision appealed against.

The applicant responded by filing this urgent chamber application seeking to enforce HLATSHWAYO J's orders notwithstanding the noting of an appeal against his orders. The application is premised on numerous grounds these include:

(1) That the appeal was *mala fide* in that it was lodged for the mere purpose of by-passing HLATSHWAYO J'S orders.
(2) That the noting of the appeal was irregular and to that extent a legal nullity.

During the course of the hearing counsel for the applicant took the point that the appeal relied upon by the respondent in proceeding to consecrate the second respondent against

HLATSHWAYO J's order was fatally defective and a nullity at law in that the appeal was noted before HLATSHWAYO J had delivered his judgment. Whether or not the appeal was filed before His lordship had delivered his judgment is a point of fact which in the normal run of things should be referred to trial. It was however argued that the nature of the dispute was such that it was capable of resolution on the papers after considering documentary evidence from relevant witnesses.

It is common cause that the registrar's office responsible for processing appeals to the Supreme Court closes at 4 pm. No notices of appeal are accepted after 4 pm. The applicant's complaint is that HLATSHWAYO J completed delivering his judgment after 4 pm. In that case it was practically impossible to file a notice of appeal in the registrar's office that day because by the time the Judge finished delivering his judgment that office had closed

Considering that the issue of when and how a notice of appeal was lodged and issued in the registrar's office is an issue essentially within the registrar's responsibility I sought clarification from him. The Registrar has since submitted a detailed written report which reads:

"In the course of the proceedings held before Hon. BHUNU J in the above cited matter this honourable Court directed me to investigate and report on an allegation that a notice of appeal issued under case number SC 180/09 was issued and processed on 24 July 2009 before the Honourable HLATSHWAYO J, had passed his judgment at 17:35 pm on the same date.

I have had the occasion to peruse the notice of appeal in question and to interview the officer who issued the appeal in the Supreme Court and my findings thereon are discussed *seriatum.*

Firstly, the issuance of all Court processes and pleadings except urgent applications filed outside working hours is conducted between 8:00 am and 4:00 pm which times are in

terms of the Rules of Court called business hours. In *casu*, the appellant through its legal practitioners Gill Godlonton and Gerrans approached the Supreme Court on the 24th July before close of business at 4:00 pm with a notice of appeal. Having satisfied himself that the notice of appeal was *prima facie* complying with the requirements prescribed by the rules of Court in that:-

(a) the notice contains the date of judgment of the Court-*aquo*
(b) It mentions the court from which the appeal lies.
(c) It contains the grounds of appeal and prayer.
(d) It is signed by the legal practitioner of the appellant and contains the requisite address of service.

The Registrar categorically proceeded to issue the appeal by stamping and affixing a case number to the appeal and recording it in the Civil Book.

A copy of the notice of appeal was thereafter filed with the High Court in the registrar's reception shortly before close of business at 4:00 p. I however notice that the appeal was not filed with the appeals' office as required. A blue ink has been used for the whole of July 2009 by the Appeals Office.

In my final analysis, I am fortified to maintain that the Notice of Appeal was issued during working hours when regard is given to the time that the respondents were served with the Appeal. The service was effected at 16:23 hours on the same day (see) page 2 of the attached notice."

Both officers who handled the notice of appeal in the Supreme Court Supreme Court and the High Court have filed affidavits. Their respective affidavits confirm the registrar's report in every material respect.

The officers' affidavits and the registrar's report establish beyond question and I did not hear anyone disputing that the notice of appeal was filed during working hours. I accordingly find as am matter of fact that the notice of appeal in question was filed during normal working hours between 8:00 am and 4:00pam.

The real crux of the matter is however, whether or not the notice of appeal was filed before HLATSHWAYO J had delivered his judgment. Mr Tranos Goronga the Judge's Clerk who handled the matter submitted a detailed affidavit concerning when the sitting started and ended on that day. It is necessary to reproduce his affidavit verbatim. It reads:

> I am a clerk to the Honourable Justice HLATSHWAYO and as such relate directly to the files that he handled.
>
> 2 The matter between the Diocesan Trustees for the Diocese of Harare and the Church of The Province of Central Africa Case No. HC 2702/09 and HC 4327/08 were heard in Court on 23 July 2009, with judgment being reserved for 15 00hrs on 24 July 2009
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> 3. At around 15:00 hrs on 24 July 2009, I attended Court 'E' and advised the parties' legal practitioners namely Mr *T Moyo* of Messrs Chikumbirike and Associates for the applicant and Mr *R Moyo* with Advocate *Zhou* for the respondents that the Judge was delayed and was finalizing his judgment. I further advised the parties' legal representatives that I was going to inform them what time the judge was going to be available.
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> 4. It was around 16:00 hrs, when I attended Court to advise the parties that the learned Judge was now ready to pass his judgment. And was therefore attending Court thereafter. The Honourable Judge HLATSHWAYO led by myself then entered the Courtroom a short while later, and read a prepared judgment in respect of Case No. HC2792/09 which was in favour of the applicant. An order was given in favour of the applicant. Immediately thereafter he proceeded to read his judgment in Case No. HC 4327/08 which was in favour of the applicant. I confirm that the proceedings ended at or around 16:35 hrs.

5. As I was leaving the Court room, I met a clerk in the employee of Messrs Gill Godlonton and Gerrans who handed me a notice of Appeal in respect of case number HC 2792/09 (the provisional order), which he asked me to file in the record, I acted accordingly.

6. That is all I believe is relevant to the handing down of judgment in HC 4327/08 and HC 2792/09 and the notice of appeal SC 180 /09"

The respondent has strongly objected to this Court's Jurisdiction on the grounds that the matter is now within the domain of the Supreme Court.

The respondents have strenuously opposed the application on the basis that the appeal was filed during normal working hours after HLATSHWYO J had delivered his judgment They denied that the judge delivered his judgment after 4 pm. To this end they have filed affidavits from their legal practitioner Mr *Chingore* who represented them at the hearing before HLATSHWAYO J. His affidavit was dully supported by that of Mr *Moyo* one of the legal practitioners for the respondents. The affidavit of Mrs *Vimbai Nyemba* a fellow legal practitioner in support thereof is however to a large extent based on hearsay evidence. Mr. Tichaona Murazi who filed the notice of appeal at the Supreme Court deposed to an affidavit affirming that he filed the notice before 4 pm at around 3:45 pm.

The applicant's deponent in his founding affidavit under case 3391/09 corroborates the respondents' contention in every material respect when he says that:

"7. On 24 July in the afternoon after the judgment had been handed down, the first respondents issued a Notice of Appeal against the judgment(s) of HLATSHWAYO J. The Notice of Appeal is **annexure 'C'** here of."

The above sworn statement is in direct contradiction to the applicant's present stance that the notice of appeal was issued before the learned judge had issued his judgment. The applicant has sought to explain the contradiction by saying he was merely making the usual general statement on appeal when he said that the appeal was filed after the learned judge had issued his judgment. I find that explanation incredible and unconvincing considering that the applicant was making a sworn statement. The applicant's deponent is no ordinary citizen, he is a man of the cloth. He knows the value of an oath. He was therefore duty bound to verify and ascertain his facts before taking the oath. The applicant cannot blow both hot and cold. It is stuck with the consequences of his lack of diligence.

Mr Goronga the Judge's clerk is an officer of this court who apparently has no interest in the outcome of this matter. That being the case, he is unlikely to deliberately mislead the Court unless he is mistaken. He did not keep a record of the times alluded to in his affidavit otherwise he would have referred to it had it been in existence. He did not tell us how he ascertained the time the Court adjourned. We do not know whether he had a reliable means of telling the time or he was merely relying on guess work. I am therefore unable to exclude the possibility that he might be genuinely mistaken. This is particularly so taking into account that his evidence goes against that of the applicant's initial affidavit and that of respectable senior lawyers who are also members of this Court.

Generally Courts trust the word of its officers until the contrary is shown. This is because they are sworn to tell the truth in Court at all material times. Doing otherwise has grave consequences for any legal practitioner. In this case I would hesitate to find that several lawyers would put their careers on the line for the sake of advancing their client's case.

The applicant's deponent contradicted himself on a material point of fact upon which its application hinged thereby rendering the veracity of his affidavit unreliable and highly questionable. The onus of proof lay on the applicant. It chose to discharge that onus on the papers without *viva voce* evidence. In doing so it was taking a deliberate calculated risk. The quality of documentary evidence it relied upon is far from satisfactory and falls far too short of proving what it alleges on a balance of probabilities.

Looked at from a different angle the respondents took the point that this application ought to have been lodged with the Supreme Court as it is now seized with the matter. On 24 September the applicant filed a chamber application seeking the dismissal of the appeal in Case Number SC180/09 on the grounds of irregularity. What this means is that the question of whether or not the appeal filed in the Supreme Court is regular is within the domain of that Court The same issue cannot be pending in both the Supreme Court and this Court. For to do so, is to set the two courts on a collision course. It is trite in our jurisdiction that whenever a higher Court is set against a lower court the higher court takes precedence. Thus the mere fact that the same issue before this Court is pending in the Supreme Court negates this Court's Jurisdiction.

In the final analysis I find:

1. That the applicant has failed to prove on a balance of probabilities that the appeal was noted before HLATSWAYO J had delivered his judgment.

2. That as the same issue is pending in the Supreme Court this Court has no jurisdiction to hear and determine the matter.

It is accordingly ordered that the application be and is hereby dismissed with costs.

Chikumbirike and Associates applicant's legal practitioners
Gill Godlonton and Gerrans, respondent's legal practitioners.