

BETHLEHEM APOSTOLIC CHURCH
and
REPHIO CHIRUMBWA N.O.
versus
ZACHARIA CALEB GEMU

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 14, 15, 21, 22 & 23 March 2022 & 3 May 2023

Civil Trial – Absolution from the Instance

Ms AK Verenga, for the plaintiff
Mr N Mugiya, for the defendant

MUSITHU J: The first plaintiff is a common law *universitas* by status. As the appellation implies, it is an apostolic church with its own constitution which provides for the regulation of its affairs as well as the election of its leadership that oversees its affairs. The church is the spiritual home and sanctuary for those in need of salvation through fellowship. In terms of its constitution, one of the purposes of the first plaintiff is described as “*the channel through which the holy spirit operates to extend the Kingdom of God and to Edify the Saints in the world of God...*” Regrettably the church has also assumed a new status which none of its members would have dreamt of in their lifetime. It has become a legal battlefield of the very people that are supposed to steer the flock towards salvation. The main actors are the second plaintiff and the first defendant. They both claim to be the legitimate Bishop of the church. The church has not been left behind in those fights. Unfortunately it cannot tell its own story for it has no mouth of its own. It cannot only speak through the medium of the two gentlemen who unfortunately failed to find a spiritual solution to the leadership dispute that continues to haunt the church. The plaintiffs approached the court seeking the following relief:

- a) An order declaring the 2nd plaintiff the duly elected and substantive Bishop.
- b) An order interdicting defendant or anyone acting through him or on his behalf from claiming to be Bishop of Plaintiff or member of Plaintiffs’ General Board.
- c) An order interdicting Defendant or any one acting through him or on his behalf from purporting to represent Plaintiff.

The Background to the Plaintiffs' Claim

The leadership dispute between the parties has been raging on for some time. The parties are bruised. They bear the scars of endless litigation that has played out before this court on diverse occasions. Regrettably, none of it has resolved the central issue behind those fights. That issue is the leadership wrangle of the church. On 17 October 2017, this court per TSANGA J granted an order by consent under HC 3350/17. In that matter, the first plaintiff herein was the first plaintiff therein. The defendant herein was the second plaintiff in that matter. The first defendant was one Alfred Zamnkosini. The second plaintiff herein was the second defendant. The consent order reads as follows:

“IT IS ORDERED BY CONSENT THAT:

1. Parties be and are hereby ordered to return to the status quo as at the time that 1st defendant tendered his resignation letter on the 12th of June 2015.
2. The 2nd plaintiff who was the archdeacon at that time, be and is hereby ordered to return the position of archdeacon and act as the bishop of the church until 24 February 2018, when the plaintiff holds its annual general meeting in terms of the constitution.
3. Parties are hereby directed to appoint a bishop at the annual general meeting to be held on the 24th of February 2018, in terms of the 1st plaintiff's constitution.
4. Parties be and are hereby directed to worship together as they used to as at the 12th of June 2015, when 1st defendant resigned.
5. Each party shall bear its own costs.”

An Annual General Meeting (AGM) was convened on 24 February 2018 in compliance with the above order. The elections for the position of Bishop and members of the General Board were held on this day. The second plaintiff was elected bishop by members of the plaintiff who were present and eligible to vote. The second plaintiff is alleged to have received 130 votes against zero for the defendant.

The defendant disputes the election of the second plaintiff as the Bishop of the first plaintiff. He also disputes the election of Isaac Gaveta, David Njanji, Never Banda and Moses Sithole as members of the General Board. According to the plaintiffs, the defendant's conduct has caused unnecessary rift and conflict within the membership of the first plaintiff. He installed himself as the Bishop of the first plaintiff. He also set up his own General Board comprising of J Ncibe, LS Kachere, W Magiga, J Shava, Tiba, M Msipa and P Matonga. The plaintiffs further contend that the defendant's conduct violate Article ix Clause (b) of the first plaintiff's Constitution as it inculcates a culture of impunity and conflict.

The defendant is also accused of running structures that are parallel to those of the duly elected Bishop of the first plaintiff and the General Board. Those parallel structures have interfered with the smooth running of the first plaintiff by the second plaintiff.

The Defendant's Plea

The defendant averred that he was the lawful Bishop of the church. The first plaintiff could thus not sue its own Bishop. He further averred that the issue was *res judicata* as this court determined that he was lawfully appointed in compliance with the order in HC 3350/17. The defendant also insisted that he won the elections as confirmed by minutes that were placed before this court. The second plaintiff allegedly created his own minutes that contradicted the legitimate minutes of the AGM.

Finally, the defendant averred that the plaintiffs had failed set out the basis for seeking a *declaratur*, as well as the cause of action to justify such a relief. The proceedings were an abuse of court process which had to be dismissed with costs on the punitive scale.

The Trial

The agreed trial issues were recorded following the pre-trial conference meeting held before CHAREWA J on 8 June 2021. They are captured as follows:

- Whether or not the second plaintiff is properly before the court;
- Whether or not the second plaintiff or the defendant was duly elected Bishop of the first plaintiff;
- The appropriate level of costs.

At the commencement of the trial, Mr *Mugiya* for the defendant raised a preliminary point. He submitted that the matter in HC3350/17 which gave birth to the consent order by TSANGA J remained pending before the same judge. The matter was at the pre-trial conference stage. The relief sought in that matter was similar to the relief sought herein. The defendant was seeking to be declared the lawful bishop of the first plaintiff. Two similar matters were therefore running concurrently. He also made reference to another matter involving the same parties in which MANZUNZU J rendered judgment affecting the same parties. MANZUNZU J granted a spoliation order in favour of the defendant and the first plaintiff herein. Mr *Mugiya* wanted the plaintiffs barred from proceeding with this matter as it was already *lis pendens*. Alternatively he proposed that the two matters be consolidated and heard as one.

In response Ms *Verenga* for the plaintiffs denied that the matter in HC 3350/17 remained pending before TSANGA J. That matter was completed and the court became *functus officio*, once it granted the consent order. The order granted by TSANGA J was the very reason why the parties were in court. It had directed the holding of elections by a certain date. The elections were held but the outcome was disputed. The issue before the court was the disputed outcome of that election.

Having considered the parties' submissions, I dismissed the preliminary point raised by Mr *Mugiya* with costs being in the cause. TSANGA J granted an order by consent when the parties appeared before her for a pre-trial conference. The matter in HC 3350/17 was therefore resolved on that basis. There was nothing pending before the learned judge. The judgment by MANZUNZU J in HC 3131/18 had no bearing on the present matter. In that matter, the defendant herein claimed to have been unlawfully evicted from the church premises by the second plaintiff herein and some church leaders. In granting the spoliation order, the learned judge made it clear that the restoration of possession did not determine the parties' rights regarding the lawfully elected bishop of the church. The dispute concerning the outcome of the election of the bishop was not before him.

The preliminary objection was accordingly devoid of merit. Nothing stood in the way of the hearing of this matter before me.

The Plaintiffs' Case

The first witness was the second plaintiff. He is one of the founding members of the first plaintiff which was established on 14 March 1987. He claimed to be the bishop after being elected in terms of the church's constitution. The defendant became the acting bishop following his appointment to that position by Alfred Zamnkosini who had become incapacitated because of ill-health. That appointment was not done in terms of the church's constitution. After his appointment in June 2015, the defendant called for a meeting of the General Board members and their wives in December 2015. He told them he wanted to teach them how to do their work properly as they had been failing in that regard. He also castigated the former bishop for having failed to lead the church effectively.

According to the witness, the defendant's utterances and his somewhat abrasive approach led to disturbances in the church. The parties approached the Apostolic Christian Council of Zimbabwe (ACCZ) for mediation and counselling. The ACCZ advised that Zamnkosini ought to have been elevated to the position of Arch-Bishop, with the defendant remaining the Bishop. The proposal was not implemented leading to further chaos with the dispute further spilling over into the Magistrates Court and the High Court. The parties have been in and out of court, with one of the latest court contests being the action that gave birth to the consent order granted by TSANGA J. The consent order directed that the defendant holds the acting position until 24 February 2018 when elections were to be held.

According to the witness a Bishop was spiritually/prophetically appointed into office by the General Board and the general membership of an AGM. The Bishop's tenure of office was only terminated either by death or resignation or by being voted out of office for one reason or another at an AGM following recommendations by the General Board. The witness further stated that the nomination of a member to stand as a candidate in the election of a Bishop by the General Board had to be endorsed by the Board of Trustees.

The witness stated that the church reverted to the *status quo* following the order by TSANGA J. He was nominated by the General Board to be the candidate for the post of Bishop at a meeting held on 20 October 2017. The General Board was the body responsible for the day to day running of the church through Board meetings. At the time of his nomination, the General Board comprised of 9 members following the resignation of Zamnkosini. The minutes of the meeting of 20 October 2017 were only signed by five members of the Board out of the nine. The witness was also a member of the General Board. The witness stated that only five members signed those minutes because of misunderstandings and divisions within the church that arose after the defendant took away the church's Holy Ark. The other four members sided with the defendant and hence their abstention. In terms of the constitution, the quorum for the meeting was one more than half of the total number of members present. That meant that out of the nine General Board members available, if five attended then they would constitute a quorum.

Following his nomination to stand in the election for the position of bishop, the witness claims that both factions invited their legal practitioners to be in attendance on the election day. The plaintiff's faction was represented by a Mr *Chigudu*, while the defendant's faction had a Mr *Muvhami*. The legal representatives were required in order for them help in interpreting the constitution and the consent order by TSANGA J. Proceedings started with a prayer from the General Secretary, one Ncube. The witness claimed that the General Secretary then hijacked the meeting and imposed himself as the chairperson of the day's proceedings. He invited the two legal practitioners to explain the implications of the consent order. The two legal practitioners consulted each other and agreed that Muvhami would address the meeting.

Muvhami advised the meeting to compile the names of the attendees from the church's districts in order to confirm those in attendance. He also explained the purport of the consent order as well as the election process. Thereafter he handed over to the General Secretary. As the voting was about to commence, the defendant invited the General Board members together

with the legal practitioners for a chat outside the church. He pointed out that the witness could not participate in the election since his nomination had not been endorsed by the Board of Trustees. The plaintiff's legal practitioner requested the defendant to produce the paperwork confirming that his nomination had also been endorsed by the Board of Trustees. He had also not been endorsed. None of the candidates had therefore been endorsed to participate in the election by the Board of Trustees.

According to the witness, the legal practitioners agreed that since members of the Board of Trustees were all available, the two contestants could be endorsed. This was duly done and after their endorsement, they went back into church to vote. The General Secretary requested the candidates and their spouses as well as their legal practitioners to go out of the building during the voting process. While they were waiting outside, they heard a commotion from inside the church. The witness saw the defendant leaving the premises with his followers and their legal practitioner. The witness and his team and their legal representative remained behind. Their legal practitioner suggested that they go back into church to establish the cause of the commotion. While inside they were informed what transpired. The General Secretary had endorsed the defendant as the duly elected Bishop since the second plaintiff was disqualified from participating in the election. After this announcement chaos erupted in the church leading to members of the defendant's faction to leave the church. The plaintiffs' legal practitioner advised them to proceed with the election in compliance with the court order and the church's constitution. The elections went ahead and the second plaintiff was duly elected Bishop.

The plaintiff referred to minutes of the meeting which were tendered as exhibit 2 together with a list of the districts that had voted in the election. The documents confirmed that the second plaintiff had received 130 votes while the defendant received nil votes. The witness averred that he was therefore properly elected. He was a serving member of the General Board which nominated him to stand in the elections. His nomination was endorsed by the Board of Trustees. His election was done by the general membership at the church's AGM.

The witness further told the court that in terms of Article II (e) of the first plaintiff's constitution, any person could institute proceedings. He further stated that in the spoliation proceedings before MANZUNZU J, the defendant had lied that the witness and his faction members had assaulted and took away the church's keys from him. According to the witness that was false because since the Election Day, the defendant never set foot at the church again.

Under cross examination, the witness stated that he was giving evidence in his capacity as the Bishop of the first plaintiff. When asked about whether he had a resolution to represent the first plaintiff, the witness stated that he had such authority by virtue of minutes prepared following the meetings of the General Board and the Board of Trustees. Such minutes had not been tendered in evidence. There was no provision for a resolution in the Constitution.

Still under cross examination, the witness denied that a Bishop had the authority to appoint another Bishop even on recommendations of the General Board. The witness further averred that even though he did not challenge the appointment of the defendant as acting Bishop by Zamnkosini that did not make his appointment to that position constitutional.

The witness was asked to comment on a letter for his expulsion from the first plaintiff by the defendant addressed to his former legal practitioners Zinyengere Rupapa, dated 25 October 2019¹. The witness confirmed receiving the letter, but argued that he had challenged his dismissal. Although he admitted that there was no order of court setting aside his expulsion, he averred that he had also written a letter expelling the defendant from the church. He denied that by the time that he instituted the current proceedings he was no longer a member of the church by virtue of the said expulsion since he was the Bishop of the church. The witness admitted that in terms of Article I (a), a Bishop had the power to expel any officer who violated the Constitution of the church. He still denied though that he was lawfully expelled from the church since the defendant was never elected as Bishop.

Under cross examination, the witness admitted that he did not notify the defendant's faction of the meeting of 20 October 2017 where he was nominated to stand in the elections for the position of Bishop. At the material time, the defendant was the Acting Bishop in terms of the consent order by TSANGA J. The witness defended his actions on the basis that because of the friction within the church, it was no longer possible to hold meetings together with the faction led by the defendant.

On the Election Day, and going by the version of the minutes of the meeting produced in court as exhibit 2, the General Secretary declared the defendant the winner before the attendees had voted. He then walked out of the church together with the defendant's followers. The same minutes however state that following the departure of the General Secretary and the defendant together with their followers, the remaining attendees comprising of all the eight districts decided to proceed with the elections in terms of the constitution. The elections

¹ Page 209 of the plaintiff's supplementary bundle of documents

proceeded peacefully and the witness was elected as Bishop. According to the witness, following the departure of the General Secretary, the General Pastor, a Mr Banda presided over the elections.

In his re-examination, the witness stated that the name of the church in terms of the Constitution was Bethelhem Apostolic Church. The purported letter of his expulsion was on a letterhead of an entity called Bethlehem Apostolic Faith Church. The two entities were different. He could therefore not act on a letter from an organisation that he had no knowledge of. He was a member of Bethelhem Apostolic Church and not Bethlehem Apostolic Faith Church.

The evidence of John Muhomba

The next plaintiffs' witness was John Muhomba. He joined the church in 1994, and held the position of District Pastor. He corroborated the second plaintiff's evidence on how a Bishop was elected in terms of the church's constitution. He narrated the events of the Election Day as follows. They first sought Police clearance to hold the election. Proceedings were set to commence at 10:00 a.m. and end at 4:00 p.m. Everyone present got into church at the time proceedings were set to commence. The defendant and the General Secretary were nowhere in sight.

Around lunchtime it was suggested that elections must proceed even in their absence. Others were against the idea, and members of the Board of Trustees were requested to look for them. They found them at the defendant's home and they came back together to the church premises. They got into church and started with an opening prayer. The General Secretary and the parties' respective legal practitioners took to the floor to speak. The legal representatives explained the implications of the consent order by TSANGA J and the process for the election of a Bishop in terms of the constitution. They further explained that their role was to assist the parties with the election process.

The next stage of the process was to determine those that were eligible to vote in the elections. This was done through a call register which identified all the districts. Thereafter, the General Secretary took the voters roll and handed it over to the defendant. He then requested the second plaintiff and the defendant as well as their respective spouses to go outside to allow the elections to commence. The General Secretary further announced that Zamnkosini was not in attendance to sign his papers as a contestant. Accordingly, the defendant stood unopposed in the contest for the election of Bishop. This announcement came as a surprise to

the attendees because it had not yet been agreed how elections would be conducted and who was going to be the presiding officer. During the commotion, the General Secretary walked out of the church with a few followers in the direction of the defendant's house. The people who remained behind asked themselves what had to be done in the circumstances.

The second plaintiff's legal practitioner called for calm and explained to the people what the consent order demanded. He further explained that there was not much time left in terms of the clearance that had been given by the Police. He urged the meeting to proceed with the elections as directed by the court order. A chairperson was chosen to preside over the elections with the assistance of the Board of Trustees members. The elections went ahead and the second plaintiff was duly elected Bishop. The witness averred that the second plaintiff was properly elected by the majority of the eligible voters as required by the Constitution. All the structures that were required to partake in the election were present. The required quorum was also there. The electoral process were also followed.

The witness further stated that a Bishop was recommended to the General Board for election by the Board of Trustees. The General Board could also appoint one of their members as Bishop. Still a Bishop could also be appointed by the Board of Prophets and Ministerial District members. The witness denied that a Bishop could be appointed by another Bishop. He also denied that the defendant was appointed by the General Board. The witness stated that the second plaintiff's elevation did not just involve the General Board members alone. It also involved district structures, board of prophets and the Board of Trustees.

The witness also corroborated the second plaintiff's evidence that at the time he was recommended for election as Bishop, the General Board members were nine. Five members of that Board could therefore constitute a quorum.

Under cross examination, the witness was asked to comment on the accuracy of minutes of the AGM of 24 February 2018 at which the second plaintiff was allegedly elected Bishop. The minutes stated that the meeting ended at 09:30hours, when according to the witness's version the elections only commenced after lunchtime. The witness stated that he was not aware how minutes were prepared but he stood by his version of events. The witness was also asked to comment on another set of minutes of the same meeting which were allegedly prepared by Banda. These stated that the meeting ended at 1200hours. His response was that there could have been an error on the noting of the exact time that the meeting started and

ended. The witness also acknowledged that the two sets of minutes produced by the plaintiffs did not show that the legal practitioners were excused from the meeting.

The evidence of George Saizi

The plaintiffs' third witness was George Saizi. He held the position of Minister at the district level in the first plaintiff. He told the court that any member of the church could represent the first plaintiff in terms of the constitution. He referred to Article 2(e) of the constitution. His evidence on the events of 24 February 2018 was not materially different from that of the first two witnesses. He confirmed that although the second plaintiff and the defendant had been nominated by the General Board, they had not been endorsed by the Board of Trustees. That anomaly had to be regularised. The two contestants went out of the building with their respective members of the General Board who supported them to get the endorsement of the Board of Trustees.

Whilst the attendees waited for the regularisation of the anomaly, the General Secretary came back in the building and informed the meeting that after following due process, it was realised that the second plaintiff could not contest so the defendant was elected Bishop unopposed. That announcement led to a commotion in the church and at that point the General Secretary left the building with the defendant's supporters. The plaintiff's case was closed after the evidence of the three witnesses.

The Application for Absolution from the Instance

Following the closure of the plaintiffs' case, Mr *Mugiya* advised the court that he had instructions to apply for absolution from the instance. His submissions were as follows. Firstly he submitted that the plaintiff was not properly before the court. The first plaintiff could not sue other than through its members. Nowhere in the pleadings was it indicated that the first plaintiff was being represented by a natural person. It ought to have been clearly stated from the declaration who exactly was representing the first plaintiff and the source of such authority. Mr *Mugiya* further submitted that proceedings were instituted without the authority of members of the General Board or the Board of Trustees. No evidence was also led in relation to the interest of the first applicant in the proceedings. Counsel also submitted that in previous proceedings involving the parties (HC 9936/19), the second plaintiff had raised a similar objection against the defendant herein.

Mr *Mugiya* also submitted that the second plaintiff was not properly before the court. The heading to the pleadings cited him in his official capacity, but that capacity was not stated. Such an anomaly was fatal in the absence of a condonation being granted by the court.

The second ground of attack was that the evidence of the three witnesses was contradictory. It was submitted that the three witnesses gave different versions concerning the election of a Bishop. They clearly had no understanding of their own constitution. They failed to deal with the question of the quorum concerning the election of a bishop. The third witness claimed that the election of a bishop was done through voting by the general membership of the AGM. The second witness did not make reference to that at all. The second witness also appeared not to have a clue on that matter. The last witness allegedly failed to define the quorum of an AGM. His version was even worse because he could not state whether a bishop was appointed by the General Board or the Board of Trustees or District Ministerial Committees.

Counsel also submitted that the witnesses contradicted themselves in connection with the events of 24 February 2018. The witnesses had also made concessions on key issues pertaining to that election such as: that elections were conducted by Ncube as the presiding officer; Ncube's capacity as the presiding officer was not challenged; Ncube proceeded to announce the winner of the election. Problems only arose after the declaration of the defendant as the duly elected bishop of the church. The election of the defendant as bishop had not been challenged to this date.

Mr *Mugiya* also submitted that the second plaintiff failed to demonstrate that the defendant's election did not comply with the order by TSANGA J. The plaintiff's witnesses did not comment on the minutes that contained a different version of events to theirs. Those minutes confirmed the appointment of the defendant as the bishop of the first plaintiff. The plaintiff attached those minutes to its own bundle of documents.

Counsel also made reference to the findings by MANZUNZU J in the spoliation proceedings before him. In his judgment, the learned judge found that the defendant was in control of the church before 24 February 2018.

It was also submitted that the second plaintiff did not challenge a letter written to the ACCZ by the General Secretary on 12 June 2015, informing that organisation of the appointment of the defendant as Bishop to succeed Mr Zamnkosini². It was alleged that the

² Letter on p 179 of the plaintiff's supplementary bundle

second plaintiff and his faction were expelled from the church, but they did not challenge that expulsion. It was further submitted that the second plaintiff ought to have challenged the election of the defendant and not to seek the confirmation of his own mock election. Counsel moved for the granting of the application with costs on the attorney and client scale.

In reply, Ms *Verenga* submitted that the plaintiffs had established a *prima facie* case through the evidence led. She argued that the first plaintiff was properly before the court. She referred the court to the case of *The Evangelical Church of Zimbabwe v Reverend Doctor Isaac Soda*³, to argue the point that as a *universitas* with its own constitution, the second plaintiff did not require special authority to institute proceedings on behalf of the first plaintiff. The plaintiffs acted in accordance with Article 3 of the church's constitution. No resolution was required to enable the first plaintiff to institute proceedings. As a member of the first plaintiff, the second plaintiff was at large to institute proceedings against the defendant.

As regards the merits, Ms *Verenga* argued that a *prima facie* case had been established. The second plaintiff was properly elected in terms of the constitution. The defendant was not. There may have been contradictions in the witnesses' account of events, but such contradictions did not justify the summary termination of the plaintiff's case.

The Analysis

The defendant contends that the both plaintiffs are not properly before the court. The first plaintiff is alleged not to be properly before the court because no resolution was produced authorising the second plaintiff to drag it into these proceedings. This point was not one of the agreed trial issues. I however considered it to be an issue on a point of law that can be raised at any stage of the proceedings. Besides, all the witnesses had been grilled on that same issue in cross examination without any objection by the plaintiffs' counsel.

The first plaintiff is a legal *persona* by virtue of its status. The position of the law regarding the institution of proceedings by such entities has been settled in this jurisdiction in the case of *Dube v Premier Service Medical Aid Society & Another*⁴. The court followed the *ratio decidendi* in the earlier decision of *Madzivire & Ors v Zvarivadza & Ors*⁵, and explained the position of the law as follows:

“A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorised to represent the entity is not sufficient. He must produce a resolution of

³ HH 458/15

⁴ SC 73/19

⁵ 2006(1) ZLR 514 (S);

the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue. This represents the current state of the law in this country.”⁶

The current position of the law therefore as reaffirmed in the *Dube* case is that when the authority of a person purporting to represent a legal entity is challenged, then that authority must be proved in the form of a resolution of the Board authorising him or her to institute or defend proceedings in the name of that entity.

I also note that in earlier proceedings (HC 9936/19) in which the defendant herein and the first plaintiff sued the second plaintiff and the other membership of the first plaintiff’s leadership, the second plaintiff challenged the resolution that had been tendered by the defendant herein to institute proceedings on behalf of the church as follows:

- “5.1 The 2nd Applicant has no *locus standi* to institute the present proceedings on behalf of the 1st Applicant.
- 5.1 He lacks the requisite authority to deposit to the affidavit on the 1st Applicant’s behalf. The resolution attached is fatally defective as it falls short of the requirements of the 1st Applicant’s Constitutional requirements conferring one with authority to representing it.
- 5.2 In terms of Chapter 3 of the constitution of Bethlehem Apostolic Church authority is confirmed by the General Board which is consisted of all members of the General Board. The members who signed the resolution are not part of the General Board and therefore lack such authority.”

These were the words of the second plaintiff herein challenging the defendant’s authority to institute proceedings on behalf of the first plaintiff, who was the first applicant in that matter. The defendant was the second applicant while the second plaintiff was the first respondent. It is therefore clear to me that when authority to bring proceedings in the name of the legal entity is challenged, the person bringing such proceedings in the name of that entity must satisfy the court through a resolution or some other form of authority that he or she has the requisite authority to make that legal entity a party. That is the current position of the law as confirmed by the above Supreme Court authorities.

Litigation comes with certain consequences including costs of suit that may be ordered against such a legal entity. It is therefore imperative that the legal entity must be properly before the court. For the foregoing reasons, the court determines that the first plaintiff is not properly before the court. The first plaintiff therefore ceases to be a party in these proceedings in terms

⁶ At p 14 of the judgment

of r 32(12)(a) of the Rules. The second plaintiff shall henceforth be known as the plaintiff in these proceedings.

The position of the second plaintiff (now the plaintiff) is different. He and the defendant are the key players in the battle to lead the church. In the declaration he states that he is cited in his official capacity. He does not state that capacity, but one presumes that it is that of Bishop of the church because in the same declaration he goes on to state that he was lawfully elected Bishop of the church at the AGM. This position was also confirmed in his evidence in chief and under cross examination. The status of the plaintiff is tied to the merits of the dispute before the courts. Whether or not he is the lawfully appointed Bishop of the church is what the court must ultimately determine on the merits. Put differently, the leadership wrangle cannot be resolved without the participation of both the plaintiff and the defendant herein. This issue must therefore be deferred to the merits of the case.

The test in an application of this nature was set out in *Mazibuko v Santam Insurance Co Ltd and Anor*⁷, where the court said:

“In an application for absolution made by the defendant at the close of the plaintiff’s case the question to which the Court must address itself is whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff; in other words whether plaintiff has made out a *prima facie* case”.

The remedy of absolution from the instance is available to a defendant at the close of the plaintiff’s case, if the plaintiff has failed to adduce sufficient evidence upon which a reasonable court might grant judgment in favour of such plaintiff. Courts are generally averse to grant absolution as the remedy makes a serious encroachment into the *audi alteram partem* rule, which requires all parties to be heard before a decision affecting their rights is rendered. In *Maranatha Ferrochrome (Private) Limited v Riozim Limited*⁸ MAFUSIRE J echoed words of caution when he said:

“[18] Courts are chary of granting absolution at the close of the plaintiff’s case. They are loath to decide upon questions of fact without hearing all the evidence. As was pointed out in the *Supreme Service Station [1969]* case above, the practice in South Africa and in this jurisdiction has always been that, in case of doubt as to what a reasonable court *might* do, a judicial officer should always lean on the side of allowing the case to proceed. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance.”

⁷ 1982 (3) SA 125 (AD) at 132H

⁸ HH 482/20 at p 6

It must be remembered that at this stage, the court has only heard half of the case before it. The court must carefully evaluate the plaintiff's evidence in the context of the pleadings that are before it in order to determine whether the plaintiff has set out a *prima facie* case. The starting point is the order by TSANGA J which directed that the defendant was to remain the Acting Bishop of the church until the holding of elections on 24 February 2018. The court also directed that an AGM be held on that date for purposes of electing a bishop of the church in terms of the church's constitution.

From my reading of the consent order by TSANGA J, the defendant's tenure as Bishop of the church would end on 24 February 2018 when the said elections were held. He could not proceed as Bishop of the church in terms of that consent order because his tenure was defined by that order. His claim to be Bishop of the church can only be on account of him having been elected as such at the AGM on 24 February 2018. In his plea and summary of evidence, the defendant maintains that he was lawfully elected Bishop at the elections that were held on 24 February 2018, in compliance with the order by TSANGA J. He further contends that the plaintiff was disqualified from standing as a candidate in the elections because he did not satisfy certain requirements of the church's constitution. He was then disqualified by the General Secretary.

The plaintiff and his witnesses narrated the events of the Election Day that led to his election as Bishop. The General Secretary allegedly declared the defendant as the Bishop before those eligible to vote had cast their votes. The General Secretary and the defendant thereafter left the meeting but not before the chaos erupted following the declaration of the defendant as the duly elected Bishop. The plaintiff and his witnesses aver that following the departure of the defendant and his entourage, calm was restored and with the assistance of their legal representative, it was decided that elections be properly conducted in terms of the constitution.

There were some variations in the witnesses' testimony regarding the exact time when elections were held, who voted and the questions of quorum. There are also different sets of minutes from the two factions, with different versions of the events of 24 February 2018. The minutes produced by the plaintiff's faction allege that the defendant was declared Bishop before the election had even started. The elections were then properly conducted after the defendant and his faction abandoned the meeting and left. The plaintiff was then duly elected Bishop. The minutes from the defendant's faction portray a different picture altogether.

The position on the ground therefore is that both plaintiff and the defendant claim to be Bishop of the church by virtue of having been elected at the AGM on 24 February 2018. The inconsistencies pointed out in the plaintiff's evidence in my view need to be considered in the broader context of the entirety of the evidence to be placed before the court by both parties herein. If the events of the day, as submitted in the evidence of the plaintiff are not true, then whose version of events is true since both parties claim to have been elected Bishop at the same meeting? Who was lawfully elected Bishop on 24 February 2018 between the plaintiff and the defendant? The court needs to hear the whole story between the two feuding parties in order to determine whose version is credible. The decision to expel the plaintiff and his faction, which is attributed to the defendant post the events of 24 February 2018, must also be considered in the wider context of the entirety of events which allegedly occurred at the AGM at which both parties claim to have been elected Bishop.

Can this court accept that the plaintiff and his faction members were expelled from the church by the same defendant who they claim to have been unconstitutionally installed at the AGM? This is the very gravamen of the dispute before the court. The court cannot just accept that the plaintiff was expelled from the church by the defendant when the evidence of the defendant's election as Bishop has not been placed before the court. His supposed election is what the plaintiff is contesting. The court must be satisfied that the defendant was indeed the Bishop of the church at the time that he purportedly expelled the plaintiff and the other leaders from the church. This court can only be thus satisfied if the defendant places evidence before the court to confirm that he is the lawfully elected Bishop of the church. The status of the plaintiff in the church cannot be resolved without a determination of the status of the defendant in the same church. The two issues must be resolved at the same time.

This is clearly not the kind of matter that the court can take a risk and proceed to make a determination based on half the story heard this far. The plaintiff's story, despite some inconsistencies in the witnesses' testimonies, is not so unbelievable as to leave the court in no doubt that there is no need to put the defendant to his defence. As already noted, the elections were to be held in terms of an order of this Court. This court therefore needs to hear both parties in order for it to conclusively determine if whoever was elected Bishop, was so elected in compliance with the order of this court.

For the foregoing reasons, the court determines that there is no merit in the application.

Resultantly, it is ordered as follows:

1. The defendant's application for absolution from the instance at the close of the plaintiff's case is hereby dismissed.
2. The trial shall resume on a date, or dates, to be agreed upon by the parties in consultation with the Registrar.
3. Costs shall be in the cause.

Nyawo Ruzive Attorneys At Law, plaintiff's legal practitioners
Mugiya & Muvhami Law Chambers, defendant's legal practitioners