

REPORTABLE (8)

ANOS CHIMENYA

v

**(1) THE CHAIRPERSON OF THE SYNODICAL COMMITTEE OF
THE REFORMED CHURCH IN ZIMBABWE (2) SYNODICAL
COMMITTEE OF THE REFORMED CHURCH IN ZIMBABWE
(3) THE REFORMED CHURCH OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, CHIWESHE JA & MUSAKWA JA
HARARE 2 OCTOBER 2023 & 23 JANUARY 2024**

E. Mubaiwa, for the applicant

T. Magwaliba, for the respondents

GWAUNZA DCJ

[1] This is an appeal against the whole judgment of the High Court, (*court a quo*), Harare, which was handed down on 19 May 2023. The court dismissed the appellant’s application for review on the basis, among others, that the appellant’s complaints to the respondents related to ecclesiastical governance and doctrine, a circumstance that removed from it the jurisdiction to hear the matter.

[2] FACTUAL BACKGROUND

The appellant is a member of the Reformed Church International South Africa (RCISA) Johannesburg Congregation and of the third respondent. The first respondent is the

Chairperson of the Synodical Committee of the Reformed Church in Zimbabwe and is cited in his capacity as the chairperson of the decision-making body which made the decision that was the subject matter of the application for review in the court *a quo*. The second respondent is the Synodical Committee of the Reformed Church in Zimbabwe (RCZ), duly set up in terms of the Constitution, Rules and Regulations of the Church. The Committee's responsibility, among others, is to carry out the duties of the Synod of the Reformed Church in Zimbabwe when the Synod is not in session. The duties include the handling of disciplinary matters. It is the body which made the decision that was taken on review *a quo*. The third respondent is the Reformed Church in Zimbabwe (RCZ), a church set up in terms of its Constitution, Rules and Regulations and cited as an interested party.

- [3] On 20 November 2019, the appellant wrote to the Church Council of the Reformed Church International South Africa (RCISA), Johannesburg Congregation, objecting to the appointment of *Mr F Kagura* as Deacon for the Sandton Home Group on the basis that he had aided and abetted the co-habitation of the appellant's daughter, one *Tatenda Violet Chimenya* with her boyfriend. The appellant contended that such conduct was contrary to Church Regulations as prescribed by rule 110 sections 157.1 to 157.6 of the Constitution, Rules and Regulations of the Reformed Church in Zimbabwe (hereinafter referred to as RCZ Constitution). The objection by the appellant to the appointment of *Mr F Kagura* as Deacon was dismissed by the Church Council on 16 December 2019. On 9 January 2020, the appellant wrote another complaint to the Church Council in accordance with rule 116 section 163.0 of the RCZ Constitution wherein he requested an investigation into a rumour to the effect that the church had blessed the marriage of his daughter notwithstanding that such conduct was contrary to rule 110 section 157.1 to 157.6 of the RCZ Constitution.

- [4] Furthermore, the appellant entreated the church disciplinary organ to investigate why the blessing of his daughter's marriage was not announced three times as mandated by, and thus contrary to, church rules. The appellant further queried why the council dismissed his objection to the appointment of *Mr F Kagura* as a deacon on technical grounds, given that his objection was in line with rules 6 to 8 sections 53 to 55.1 of the RCZ Constitution. He complained that the principles of natural justice had further been violated, specifically his right to be heard because he was forced to step down as an elder of the church on the basis that he had violated the church's mission contrary to rule 117 section 164.1 to 164.4 of the RCZ Constitution. The appellant also lodged a complaint against *Reverend Munikwa's* wife on the basis that she had aided and abetted the marriage of his daughter, contrary to the RCZ Constitution. Further, that *Reverend Munikwa* had in his turn violated the RCZ Constitution by allowing his wife to behave in such a manner.
- [5] On 2 March 2020, the Reformed Church International South Africa (RCISA) Johannesburg Congregation handed down its decision. It held that the church council supported the marriage and additionally, that the appellant had failed to tender valid reasons for his objection to it. It further held that the objection to the appointment of *Mr F Kagura* as deacon was malicious, there having been nothing procedurally wrong in his appointment. It further held that the complaints against *Reverend Munikwa* and his wife were baseless.
- [6] On 3 March 2020, the appellant lodged a further complaint with the Church Council to the effect that *Reverend Mandima Jiri* who had presided over the blessing of his daughter's wedding acted contrary to rule 110 sections 157.1 to 157.14. On 4 March 2020, he addressed another complaint to the Church Council against the decision of the RCISA that was handed down on

2 March 2020. On 6 March 2020, the Church Council responded to the appellant reiterating that it had disposed of the matter and advising him, if he so wished, to appeal to the Church Presbytery in terms of the RCZ Constitution. The appellant proceeded to file such appeal.

[7] On 22 August 2020, the Reformed Church International Presbytery made a ruling on the issues that the appellant had taken on appeal against the decision of the RCISA. It overturned the decision made by the Church Council against the appellant, having opined that the Johannesburg Church Council should have referred the appellant's case to the Presbytery as provided for in rule 131 subsection 178:3 of the RCZ Constitution.

[8] The appellant was unhappy with the decision of the International Presbytery and appealed to the Synod of the second respondent. He contended that overall, the Presbytery erred by failing to prescribe remedies and/or penalties in accordance with the RCZ Constitution against those whom it found to have violated the church constitution. Since the Synod of the second respondent only sat every two years, the appeal was heard by the Synod's Synodical Committee in accordance with section 11.2 of the RCZ Constitution. On 21 April 2021 the Synodical Committee handed down its decision in which it recommended dialogue between the church and the appellant's family as a way of resolving the disputes in question. On 10 May 2021 the appellant requested reasons for the Synodical Committee's decision and these were availed to him on 21 May 2021.

[9] Thereafter, the appellant on 16 June 2021 filed an application in the court *a quo* for review of the Synodical Committee's decision. He cited the following grounds for such review;

a) Procedural improprieties/gross irregularities- that the second respondent failed to

- determine all the issues referred to it by the appellant.
- b) Breach of duty to act fairly- that the second respondent breached its duty to act in a fair and transparent manner by deliberately refraining from dealing with the issues referred to it on appeal, recommended mediation instead of mandatory disciplinary proceedings in terms of the RCZ Constitution and refrained from ordering disciplinary proceedings against the Church Council, Reverend Jiri and other people found guilty of wrong doing by the Presbytery.
 - c) Irrationality- that the second respondent showed lack of seriousness in the manner it handled the case by referring the matter for mediation without considering each and every issue which formed the basis of the appeal.
 - d) Violation of the right to be heard - that this right was violated by the referral of the matter for mediation without the determination of all the issues referred to it on appeal, and
 - e) Improper composition of the first respondent – that the second respondent was improperly constituted when it purported to hear the appeal.

[10] The court *a quo* dismissed the application on the basis that the appellant's complaints to the Church Council, International Presbytery and Synod related to ecclesiastical governance and doctrine. The court took the deference approach and further held that the appellant had failed to establish the relevant jurisdictional facts upon which it could assume jurisdiction. It further held that the preliminary point raised by the respondents that the appellant ought to have taken his appeal to the Synod which is the highest body of the church, lacked merit because the appellant had already done that in line with section 11.2 of the Constitution of the RCZ. On the issue of the validity or otherwise of the opposing affidavits, the court *a quo* held that the argument had no merit since the appellant had failed to mention who then should have deposed to the opposing affidavits.

[11] Not satisfied with the decision of the court *a quo*, the appellant filed this appeal on a number

of grounds that raised the four issues for determination, as indicated below:-

ISSUES FOR DETERMINATION

- 1 Whether or not the court *a quo* had jurisdiction to deal with the matter and if so,
- 2 Whether or not the deponents to the respondents' affidavits had authority to depose to the affidavits in question, and
- 3 Whether or not the court *a quo* erred in not coming to the conclusion that the first and second respondents were biased against the appellant.
- 4 Having determined that it lacked jurisdiction to hear the matter, whether the court erred in considering the rest of the preliminary points raised by the respondents and then dismissing the application with costs

The first and fourth issues were raised in the appellant's grounds of appeal numbers (1) and (2) respectively.

[12] Whether or not the court *a quo* had jurisdiction to deal with the matter.

A determination of this issue will be dispositive of the appeal, if it is to the effect that the court *a quo* had no jurisdiction to hear the matter.

The parties' submissions

- [13] The appellant contends in his heads of argument that his complaints were not subject to the Holy Bible or church doctrine. Rather, he further contends, his grievance was that in dealing with the complaints in question, the first and second respondents violated the RCZ Constitution and consequently a number of his rights. Further the appellant argues that the grounds of review that were before the court *a quo* properly invoked its jurisdiction to determine the review application, since no doctrinal issue was raised as a ground for review. *Per contra*, the first and second respondents argue that the third respondent's Constitution is

intrinsically an ecclesiastical document as matters of discipline, administration and even marriage are canvassed therein with reference to what the members of the third respondent believe to be the scriptures and their doctrine. The respondents further argue that the provisions relied upon by the appellant demonstrate that the matter before the court *a quo* was one concerned solely with church doctrine. This was because, they contend further, the inquiries were ecclesiastical in nature while the answers were based on church doctrine and matters of faith as expressed in the constitution of the third respondent.

APPLICATION OF THE LAW CONCERNING JURISDICTION TO THE FACTS

[14] In order to determine whether the court *a quo* had the requisite jurisdiction to hear the matter before it, it is necessary in the court’s view to first establish whether or not the matter before the court *a quo* related to ecclesiastical matters and/or church doctrine. A definition of ecclesiastical law from *Black’s Law Dictionary* reads as follows;-

‘an ecclesiastical matter is one that concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of the membership, and the power of excluding from such associations those deemed unworthy of membership’.

[15] That a church’s constitution may, so to say, ‘codify’ various aspects of ecclesiastical law and doctrine is aptly articulated thus in *The Church of the Province of Central Africa v The Diocesan Trustees for the Diocese of Harare*, 2012 (2) ZLR 392 at 410 (A);

“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 behavior as individuals or office bearers on ecclesiastical matters by the provisions of the Constitution and the Canons made under its authority. It is the words and actions of the individuals as members and office bearers that indicate whether there is conformity with the articles of faith.....

.....

(And at 412 (D))

Almost all constitutions of churches have as their subject-matters the faith, worship, government and discipline. The Constitution would invariably make provision for matters of faith as expressed in ecclesiastical doctrines and embodied in all the rules governing matters of worship, government and discipline by incorporation” (*my emphasis*)

[16] The appellant scrupulously cited provisions of the RCZ’s Constitution in relation to each complaint filed both against other church members, and the various church organs that considered and determined such complaints. On the basis of the authority cited above, the appellant’s resort to the church’s Constitution as a premise for his various complaints, is a clear indication that he agreed to be and was, ‘bound and guided’ in his behavior as an individual on ecclesiastical matters, by the provisions of the constitution of his church and ‘the canons made under its authority’. By the same token the various church officials who adjudicated over his numerous complaints, were similarly bound.

[17] It is within this context that the nature of the appellant’s complaints to the church authorities and the manner the latter adjudicated upon and determined the complaints, must be considered. As already indicated, at the core of the appellant’s grievances with or against the respondents and other members of the church, was what he considered to be the unsanctioned (by him), marriage of his daughter to her then boyfriend. One may safely assume, since the appellant did not assert otherwise, that the daughter in question was an adult fully equipped with the capacity and authority to make decisions affecting her own life, including who to marry and who to celebrate such marriage with. The said daughter and her boyfriend are in fact, said to have travelled to Zimbabwe to contract a civil marriage before a magistrate. The appellant impugned the actions of the church and some of its members in advancing his daughter’s interests in relation to the marriage, on the basis of

various provisions of the RCZ Constitution that he specifically cited. He urged the church to discipline the offending church members according to the dictates of its Constitution. On the evidence before the court, the appellant was relentless in pursuing all of the church's constitutional channels, from the lowest to the highest, in a quest for the redress that he craved. By all accounts, several of the church's relevant organs dutifully considered the appellant's complaints *vis a vis* the provisions of the Constitution that he claimed had been violated, and found no merit in all of them. True to form, the appellant took issue with the decisions reached at every level of the church's grievance handling system, including the decision of the second respondent that he sought to have quashed on review by the court *a quo*.

[18] The fact that the appellant raised various complaints and that the church organs adjudicated over and determined them in the context of the provisions of the church's constitution is, in the court's view, clear testimony of the ecclesiastical nature of the entire dispute. The court *a quo*'s finding in this respect cannot be faulted. The question that arises, against this background, is whether or not the appellant made a case for the court *a quo* to assume jurisdiction to hear his application for the review of the church's final decision on these matters? In this respect the court finds no merit in the appellant's contention that the court *a quo*'s jurisdiction was properly invoked on the basis that no doctrinal issues were raised as grounds for the review sought.

[19] A judicial review cannot be determined in a vacuum. By nature, it addresses the procedural aspects that pertain to a decision reached by a lower tribunal on a particular matter that is properly before it. It follows from this that while such grounds will or should, not address the

merits of the decision made by the lower tribunal, such decision undoubtedly remains the subject of the review sought. *In casu*, the subject of the review sought by the appellant in the court *a quo* was the church's ultimate decision that the issues in dispute should be settled through mediation between the contesting parties.

[20] The court *a quo* having determined that the dispute before the church, and its decisions thereon, related to doctrine or ecclesiastical issues decided, on the basis of judicial deference, that it lacked the jurisdiction to determine the matter. Accordingly, the appellant's grounds for review could not be said to have raised no doctrinal issues. This is particularly so, when regard is had to fact that the appellant's major grievance had to do with the church and some of its members having aided his adult daughter in going through with a marriage that he did not approve of, and further, joining her in celebrating such marriage. As correctly contended for the respondents matters related to marriage were among the issues canvassed in the RCZ Constitution with reference to what the members of the third respondent believed to be the scriptures and their doctrine on the subjects in question. While, depending on the church's doctrine, the matter could be properly and fully determined through the adjudicating organs of the church. It clearly was not the type of dispute that one would properly prosecute in a secular court.

[21] In any case, a close look at the appellant's grounds for review, suggest that the appellant in reality, and improperly so, sought to have the court *a quo* consider and then reverse, the impugned decision on the merits, in the manner and on the same basis that an appeal court would do. That the court could not properly do so was highlighted in *The Church of the Province of Central Africa* case (*supra*), as follows at p394 E;

The court does not discuss the truth or reasonableness of any of the doctrines of the religious group. Disputes over ownership or possession and control of Church property must be resolved on the basis of the interpretation and application of the law of voluntary associations. That law requires consideration and application of the terms and provisions of the Constitution of the body concerned, as well as the rules made under its authority. (*my emphasis*).

Even though reference is made to issues related to ownership and control of church property, the words quoted above are apposite to the circumstances of this case. This is because the appellant cites provisions of the RCZ Constitution as a basis for impugning the actions of named church members and organs in supporting, facilitating and celebrating the marriage of his daughter who as an adult, had full legal capacity to marry whoever she wished.

[22] Against this background, the court finds that in determining the matter before it, the court *a quo* properly adverted to the relevant law and authorities relating to judicial deference. In the old American case of *Watson v Jones* 80 U.S 679, 722 (1871) the court developed a framework for the judicial review of ecclesiastical disputes by stating thus:-

“Whenever the questions of discipline or of faith, of ecclesiastical rule, custom, or law have been decided by the highest church judicatory to which the matter has been carried the legal tribunals must accept such decisions as final and as binding on them.”(my emphasis)

The court finds the import of this excerpt to be clear and instructive. When an ecclesiastical matter has been decided by the highest church judicatory, legal tribunals have to accept that decision as being final and binding. Their jurisdiction in respect to the same issues would, in other words, appear to be effectively ousted. However, while this authority might seem to have allowed for no exceptions, the court *a quo* cited and was guided in reaching its determination by later authorities within our jurisdiction.

[23] One of the authorities cited by the court *a quo*, *Independent African Church v Maheya* 1998

(1) ZLR 552 (H), made direct reference to the *Watson* case (*supra*) and observed that the principles in *Watson's* case were modified to an extent in the latter case of *Gonzalez v Roman Catholic Archbishop* 280 US 1 (1929). The court in the latter case held as follows:-

In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunal upon matters purely ecclesiastical, although affecting civil rights are accepted in litigation before secular courts as conclusive because the parties' interest made them so by consent or otherwise. (*my emphasis*)

Based on this *dictum*, the court in the *Independent African Church* case (*supra*) stated;

Whereas, therefore, the court in *Watson's* case urged wholesale judicial deference to determinations of a church's highest body in ecclesiastical matters, the *dictum* in *Gonzalez* case suggested that there could be some judicial review on church decisions in exceptional cases in which fraud, collusion or arbitrariness was alleged. In terms of the *Gonzalez* decision, a civil court would examine the fairness of the proceedings to determine the absence of fraud or collusion and whether the church has disregarded its own rules and acted arbitrarily.

[24] The court *a quo* in applying the authorities cited to the circumstances of the case before it, opined as follows in its judgment:-

“The position of the law therefore is that, as a general rule, the decisions of the church's highest body on matters purely ecclesiastical are conclusive and not subject to review by the courts. The general rule is subject to exceptions in situations where fraud, collusion or arbitrariness are alleged.

The grounds of review raised by the applicant do not allege fraud, collusion or arbitrariness. They are the grounds ordinarily set out in s 26 of the High Court Act.....

On the other hand the applicant has argued that that s26 of the High Court Act confers jurisdiction upon the court to deal with this application but has not gone further to discuss the deference principle set out in case law. It is clear from the prayer sought that the applicant wants this court to direct the church bodies to exercise their discretion in a particular way and impose certain punishment to (*sic*) all those found to have breached the constitution.” (*my emphasis*)

[25] It is pertinent to note that the Supreme Court, in the recent case of *Movement for Democratic Change & Others v Mashavira & Others* SC 56/20, held that exceptional circumstances are not necessarily limited to ‘fraud, collusion, or arbitrariness’, it being in the discretion of the

court to determine what constitutes exceptional circumstances in a particular case. PATEL JA (as he then was) articulated the principle concerning exceptional cases generally as a basis for courts' assumption of jurisdiction over disputes concerning voluntary organizations, thus;

“I cannot but agree with the proposition that courts should ordinarily be astute not to trample upon the consensually crafted articles of governance adopted by voluntary organisations. In other words, they should be loath to intervene in the workings and affairs of a voluntary association. Nevertheless, as is quite correctly accepted by Mr Mpofo, such interference may be warranted and justified in exceptional cases.”(*my emphasis*)

[26] The court *a quo* was also persuaded by the respondents' contention that the church's various organs had dealt with the appellant's complaints in a 'Christian like fashion' in accordance with its rules and regulations' and that this could not be a basis for relating the decisions in question to either the Administrative Justice Act or s 26 of the High Court Act. It thus upheld the preliminary point on jurisdiction.

[27] The court does not find any fault in the reasoning of the court *a quo* in this respect, nor in the conclusion that it reached, to the effect that it lacked the jurisdiction to hear the matter before it. This finding dispenses with the need to consider the second and third issues listed for determination. The court will now consider the last issue raised for determination.

Having determined that it lacked jurisdiction to hear the matter, whether the court erred in considering the rest of the preliminary points raised by the respondents and then dismissing the application with costs

[28] It is the appellant's contention that the court *a quo* should not have proceeded to determine the rest of the preliminary points raised by the respondents, after declining its jurisdiction to

hear the matter. There is merit in this submission. The court justified its consideration of the rest of the preliminary points raised by the respondents thus;

“While this finding disposes of this matter, I find it necessary to deal with the rest of the preliminary points in case I am mistaken in my finding, which I do not believe I am.” (*my emphasis*)

[29] The learned judge in the court *a quo* therefore, was cognisant of the fact that the finding of lack of the court’s jurisdiction disposed of the matter before him. He also held the belief that the decision was correct. That should have been the end of the matter. The judge’s reliance on the possibility of being wrong to then go beyond this point, was misguided. In this respect, the appellant in its heads of argument, appositely cited what this court (*per* GARWE JA as he then was), stated in *Nhari v Mugabe & Others* SC 161/20 at paragraph 45;

I am inclined to agree with the appellant that the order dismissing the entire claim was, in the circumstances, improper. The court had found that it had no jurisdiction to entertain the claims because such claims lay in the province of labour. Having so determined, there was therefore nothing that remained before the court. There was nothing further to dismiss. (*my emphasis*)

[30] These sentiments are entirely apposite *in casu*. The court *a quo* found it had no jurisdiction to entertain the matter before it because it ‘lay in the province’ of church doctrine and ecclesiastical governance. There was thus nothing left for it to determine. The court *a quo* could not therefore, have properly dismissed ‘nothing’.

[31] **DISPOSITION**

Ground number 2 of the appellant’s grounds of appeal has merit and will be upheld. In so far as ground number 1 is concerned, the court finds that indeed the matter before it was ecclesiastical in nature, being based on church doctrine. The court *a quo*, on the basis of the

doctrine of deference, properly determined that it lacked the jurisdiction to determine the matter before it. However, the court should not have dismissed the matter.

The appeal having partly succeeded, it is appropriate that each party bears its own costs.

In the result, it is ordered as follows:-

1. The appeal succeeds in part with no order as to costs.
2. The order of the court *a quo* is set aside and substituted with the following;
 - “i) The court declines jurisdiction to determine the matter.
 - ii) The applicant shall pay the costs of suit”

CHIWESHE JA : I agree

MUSAKWA JA : I agree

Matizanadzo Attorneys, appellant’s legal practitioners

Saratoga Makausi Law Chambers, respondents’ legal practitioners