

SIMON MAFUNDA  
versus  
THE ZIMBABWE EAST ANNUAL CONFERENCE  
OF THE UNITED METHODIST CHURCH OF ZIMBABWE  
and  
BISHOP EBEN KANUKAYI NHIWATIWA N.O.

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE 26 October & 2 November 2022

### **Opposed Application**

*F Mahere*, for the applicant  
*A Rutsanzira*, for the respondents

**TAGU J:** This is an application brought in terms of s 4 of the Administrative Justice Act [Chapter 10.23] (the Act) for the setting aside of the vote of no confidence against the applicant as conference lay leader of the first respondent (The Zimbabwe East Annual Conference of the United Methodist Church of Zimbabwe) which was conducted by the first respondent and presided over by the second respondent (Bishop Eben Kanukayi Nhiwatiwa). The application is brought on the basis that the vote of no confidence was unlawful and was conducted in a procedurally irregular manner contrary to the first respondent's duty to act lawfully, reasonably and in a procedurally fair manner as provided for in terms of s 3 of the Act.

The facts are that in 2008 the applicant was elected into the position of conference lay leader of the Zimbabwe East Annual Conference a position he held until he was removed in December 2021 through a vote of no confidence conducted by the first respondent at its annual meeting held virtually via the Zoom online meeting platform from 4 to 5 December 2021 and was presided over by the second respondent. Historically, since the 1970s the broader United Methodist Church has been embroiled in an internal dispute because of differences of opinion regarding the Biblical doctrine to be applied to human sexuality, particularly the acceptance of homosexuality within the church. This gave rise to two main factions within the United Methodist Church. On one hand is the Traditionalist (or Conservative faction) who wish to maintain the current rules and regulations of the church as contained in the Book of Discipline which expressly prohibits the

practice of homosexuality in the church. On the other hand is the Liberal faction (or the Continuing United Methodist Church) who wish to include members who practice homosexuality and identify themselves within the LGBTQ (Lesbian, Gay, Bisexual, Transgender and Queer) community into the church. The applicant associates himself with the Traditionalist faction and since 2017 has been an active member of the Wesleyan Covenant Association (WCA) which is an unofficial traditionalist lobbyist group that advocates for adherence to the Traditionalist position within the broader United Methodist Church. In November 2021 the applicant was formally employed as coordinator and representative of WCA. His mandate in this capacity was to disseminate and promote the Traditionalist position to the United Methodist Church in Africa and beyond. From then until December 2021, he continued to serve in his capacity as conference lay leader. It is in the above context that a dispute arose between himself and the second respondent which culminated in what transpired at the annual meeting of the first respondent. At the meeting second respondent stated that his view was that the first respondent should remain in the Continuing United Methodist Church. Second respondent then advised the members present at the meeting that applicant had taken up employment with the WCA and that his employment with the WCA amounted to a breach of trust which was contrary to the position he just advised the meeting about with regard to remaining in the Continuing United Methodist Church. A motion to carry out a vote of no confidence was raised by Junior Nyambayo and seconded by Brian Manyukwe and Simon Muchesa, members of the delegation. This culminated in the vote of no confidence on applicant being passed – six out of seven districts voted in favour of the motion. The applicant's contention is that the vote of no confidence was unlawful and was conducted in a procedurally irregular manner contrary to the first respondent's duty to act lawfully, reasonably and in a procedurally fair manner as provided for in terms of s 3 of the Act.

Three points *in limine* were raised by the first respondent. The first being that the applicant prematurely brought this application without exhausting domestic remedies. The second being that applicant waived his right to challenge the purported procedural irregularities resulting in his removal by expressly participating in the process, accepting its outcome and bidding farewell to the church soon after the meeting complained of. The third point being that applicant lacks *locus standi* to bring this application by virtue of his automatic resignation from the first respondent prior to the conference he complained about.

The first respondent did not pursue the first point *in limine*. It abandoned the same. As regards the second point *in limine* the first respondent denied ever waiving his rights to appeal against the decision to remove him as a lay leader. He said he wrote a letter to the second respondent on 10 December 2021 registering his grievance.

The letter on page 17 of the record starts by saying:

**“1. Preamble**

I am reaching out to you after allowing myself time to pray, calm down, reflect and make careful considerations following the adjournment of the Zimbabwe East Annual Conference session. I now write to formally register how much and why I am so aggrieved by the process through which the Presiding Bishop arrived at a no confidence vote on the duly elected Conference Lay Leader at the just ended Zimbabwe East Annual Conference Session (4-5 December 2021) which was held virtually and in a distributed format.....”

What is clear is that the applicant did not immediately file his appeal or register his disapproval for reasons stated in his letter of 10 December 2021. If he had waived his rights then he could not have written the letter in the manner he did. I found that the applicant did not waive his right but wanted to cool down before he takes action.

As regards the last point *in limine* the applicant denied that he joined another Church. His explanation is that he is still a member of the United Methodist Church. He said the Wesley Covenant Association which he joined sometime in November 2021, which led to his dismissal as a lay leader is not a church. He said he was only appointed as the African Coordinator of Wesley Covenant Association by virtue of being a member of the United Methodist Church of Zimbabwe.

As I highlighted above two main factions within the United Methodist Church arose. One for and the other against accepting homosexuality in the church. The applicant is against issue of homosexuals while the second respondent is for homosexuals. To date the factions have remained at an impasse. At a Special Session of the General Conference of the United Methodist Church held in 2019 in Missouri, United States of America, the Traditional Position of the denomination was once again affirmed by the majority vote under a legislation called The Traditional Plan against two other plans. Unfortunately, conflict and disobedience escalated within the denomination until a new proposal was negotiated and crafted called the Protocol for Reconciliation and Grace through Separation and Restructuring (the Protocol). The United Methodist Church was due to vote on whether or not to adopt the Protocol at the 2020 General Conference. However, due to the COVID-19 pandemic and the resultant travel restrictions that

have been imposed by governments across the globe the General Conference has been postponed three times now until 2021. In short the applicant was appointed by the faction that supported the traditionalist position while the second respondent is supporting the Continuing United Methodist Church. At no time did the applicant resigned from the first respondent. In my view WCA is not a church organization but is a lobbyist group that advocates for adherence to the traditional position on homosexuals and lesbians. Even for a moment if it is agreed that the applicant had resigned from the first respondent before attending the meeting, then the question is why was he allowed to attend the conference meeting up to the end? If indeed he was no longer a member of the first respondent, why did the first respondent hold the vote of no confidence against a non-member? The applicant was a member of the first respondent up to 5 December 2021 when he was allegedly removed through vote of no confidence. He therefore had the locus standi to bring this application. The respondents agreed that before the vote of no confidence was passed against the applicant, the applicant was not served with a notice that he was facing some disciplinary charges by joining WCA. Neither was he advised that a vote of no confidence would be passed against him at the conference. In fact the vote of no confidence was not on the agenda of the meeting. It came as a shock to the applicant. Section 3 of the Administrative Justice Act [*Chapter 10:28*] provides as follows:

“Duty of administrative authority

- (1) An administrative authority which has the responsibility or power to take administrative action which may affect the rights, interests or legitimate expectations of any person shall –
  - (a) Act lawfully, reasonably and in a fair, manner, and
  - (b) .....
  - (c) .....
- (2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1) –
  - (a) adequate notice of the nature and purpose of the proposed, and
  - (b) a reasonable opportunity to make adequate representations, and
  - (c) adequate notice of any right of review or appeal where applicable.”

In the present case non- of the above were complied with. If the need to hold a vote of no confidence was to be carried out, at least this should have been an item on the agenda. The Book of Discipline in para 711 provides for the removal of any member, officer, or employee of the church as follows:

“The councils, boards, committees, or commissions elected, authorized, or provided for by the General Conference shall have full power and authority to remove and dismiss at their discretion any member, officer, or employee thereof:

1. Who has become incapacitated so as to be unable to perform official duties.
2. Who is guilty of immoral conduct or breach of trust.
3. Who for any reason is unable to or who fails to perform the duties of the office or for other misconduct that any council, board, committee, or commission may deem sufficient to warrant such dismissal and removal.”

While the above relevant provisions provide for the appointment of the Conference Lay Leader and the removal of any member, employee, or official generally, there is no provision in the Book of Discipline for the passing of a vote of no confidence against a member let alone the conference lay leader. In as much as the second respondent highlighted the charge of breach of trust, no hearing was conducted and no finding of guilty was ever established. Instead, the delegates of the first respondent were instigated into passing a vote of no confidence resolution which had no basis in law of the church. Given that this decision was not rooted in any legal provision, in my view the vote was invalid. The process that led to the vote of no confidence against the applicant was fraught with gross procedural irregularities. Whilst the relevant provision in the Book of Discipline regarding the election of the conference lay leader provides discretion to the first respondent to determine the procedure to be followed, the voting procedure that the first respondent used to remove the applicant from office was a great departure from the voting procedure that is normally followed. Ordinarily, what ought to have happened was the following:

1. The motion to conduct a vote of no confidence against the applicant ought to have been seconded by another delegate, regardless of their district, in order to allow the mover to speak to the motion.
2. After the presentation of the motion to the delegates, the second respondent as the chairman, ought to have called for amendments or debate on the motion.
3. After debate and any amendments to the motion, the second respondent ought to have called the motion to a vote. In doing so he ought to have stated the manner in which the vote was to be conducted. The two recognized methods of voting that the first respondent has used since time immemorial are the secret ballot as well as a show of hands. In the absence of a requirement for a special majority vote, the motion should have been sustained by a simple majority of the votes, cast by delegates present and participating in the meeting. The voting procedure should have been done through the individual delegates that comprise it and not through the districts into which it has been divided for administrative purposes. Districts of the Zimbabwe East Annual Conference of the United Methodist

Church do not vote as units because they do not represent any membership at the meetings of the first respondent. This is confirmed by an affidavit deposed to by Arthur Chaguma, who has been member of the United Methodist Church for over 70 years.

For these reasons the applicant has managed to prove his claim and I will grant it.

**IT IS ORDERED THAT:**

1. The vote of no confidence removing Simon Mafunda as the Conference lay leader of Zimbabwe East Annual Conference of the United Methodist Church of Zimbabwe conducted on 4 and 5 December 2021 be and is hereby set aside.
2. Simon Mafunda shall be reinstated into his position as the conference lay leader of the Zimbabwe East Annual Conference of the United Methodist Church of Zimbabwe from the date of this order.
3. There shall be no order as to costs.

*Coghlan, Welsh & Guest*, applicant's legal practitioners  
*Scanlen & Holderness*, respondents' legal practitioners