

LUXON TACHIONA
versus
BULAWAYO SEVENTH DAY ADVENTIST
CITY CENTRE CHURCH
and
SOUTH ZIMBABWE CONFERENCE OF THE
SEVENTH DAY ADVENTIST CHURCH

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 MARCH 2017 AND 16 MARCH 2017

Urgent Chamber Application

Ms P Dube for the applicant
Ms N Ncube for the respondents

MATHONSI J: In our law, while the courts have generally adopted what has come to be known as the “deference approach” to church disputes which is to say that there is judicial recognition of the decisions of the church’s highest hierarchical bodies on matters of discipline, faith or ecclesiastical rule, and in the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals upon matters purely ecclesiastical, are accepted in litigation before secular courts as conclusive because the parties made them so by consent, there will always be judicial review of church decisions in situations where fraud, collusion or arbitrariness are alleged. See *Independent African Church v Maheya* 1998 (1) ZLR 552 (H); *Watson v Jones* 80 US (13 Wall) 679 (1871); *Gonzalez v Roman Catholic Archbishop* 280 US 1 (1929).

The applicant is a member of the first respondent, a christian church in Bulawayo which is generally governed by a church manual binding on its members. Following the sexual harassment of his wife, also a member of the church, by an ordained pastor of the church, the applicant has been on a crusade against the said pastor and the church in his quest for justice. The matter spiraled out of control after the applicant’s wife preferred criminal charges of indecent assault against the pastor in question. The pastor was subsequently convicted by the criminal court and sentenced accordingly. It is common cause that the pastor has since been disciplined by the church for his indiscretions and his name was deleted from the church records.

Whatever may have happened when the applicant sought justice against the pastor, he was himself charged with misconduct. In fact three charges were preferred by the church against him namely disorderly conduct in attempting to man handle the pastor at the church premises; disrupting a duly constituted church programme and distributing material to church members without approval of the church, except that those charges were never put in writing and were never put to the applicant.

I must express disappointment with the manner in which the parties have handled the controversy as both sides have allowed emotions to get the better of them. No meaningful attempt has been made to find common ground or to resolve the matter quietly with the dignity that Christian faith expouses. The applicant may have resorted to megaphone tactics suspiciously informed by a desire to exert revenge on his wife's abuser, but the scutter-gun approach employed by the church as it treaded rough shod on the rights of a member have made a bad situation worse.

The applicant has approached this court on a certificate of urgency seeking what is in essence a stay of the execution of a judgment passed against him by the first respondent on 25 February 2017. The order sought by the applicant as appears in the draft order reads:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms-

1. The 1st respondent's decision of the 25th of February 2017 that barred applicant from taking part in 1st respondent's activities by vote and voice for the next 7 months is stayed until the finalization of HC 601/17.
2. The 1st respondent shall within 7 days of the confirmation of the provisional order convene a business meeting, invite applicant and announce to the entire church that their decision of 25 February 2017 which sought to censure applicant is stayed by order of this court until HC 601/17 is finalized.
3. The 1st and 2nd respondent shall pay costs of suit jointly and severally one paying the other to be absolved.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief:

1. The 1st respondents are (sic) interdicted from executing their decision and/or judgment of the 25th of February 2017, against the applicant barring him from taking part in 1st respondent's activities by vote or voice for the next 7 months.
2. In order to give effect to paragraph 1 above, the respondents are hereby ordered to give notice of the suspension to the generality of the church within 7 days of service of the provisional order on them."

In support of the application the applicant stated that he continues to suffer in his good name for as long as the censure that has been imposed on him remains in place when it was effected in violation of his constitutionally guaranteed right to a fair hearing. He was punished without a hearing on the basis of allegations leveled against him but which he could not respond to. The whole exercise promotes the idea that a person whose wife is sexually abused by the church's pastor must be silenced as if the sexual harassment of female members of the church by pastors is the policy of the church.

The applicant asserts that the unlawful conduct of the first respondent is in violation of administrative justice as every person is entitled to administrative conduct which is lawful, impartial and both procedurally and substantively fair.

On 11 February 2017 the first respondent sent a letter to the applicant signed by the Church Clerks S Hanyane and N Nyathi as well as by the District Pastor G Ngulube and the Head Elder D Musundire which states in relevant part:

"RE: CHURCH BOARD RECOMMENDATION

We greet you in the name of our Lord and Saviour Jesus Christ. Following your discussion with the Deacons, and subsequent recommendation of the Deacons Council, the Church Board met on 9 January 2017 and after deliberating on the matter, recommended that you be given a censure for a period of 3 months for disorderly conduct in June 2016, when you attempted to manhandle the pastor in the vestry and later failed to cooperate with the deacons during their investigations. It was further recommended that you be censured for another 3 months and 1 month respectively for disrupting a church program on the nomination process on 19 November 2016, resulting in the program stopping midstream and for distributing material to church members without approval on 26 November 2016. The decision comes after careful consideration. This recommendation will be tabled before the church business meeting to be held on 25 February 2017 at 4:00pm. You have the right to attend the proceedings if you wish. We however trust that you will prayerfully accept and abide by the decision made by the church."

So the Deacons Council made certain recommendations about the applicant to the Church Board which sat on 9 January 2017 and made a “decision --- after careful consideration” to impose a 7 months censure on the applicant for attempting to manhandle a pastor in the vestry and also failing to cooperate with the deacons. It cannot be said that no decision was taken. The applicant complains that both the recommendations of the Deacons’ Council and the decision of the Church Board were taken without according him an opportunity to make representations.

The applicant reacted angrily to that letter. In an email dated 14 February 2017 he accused the church of “mischief” because he had never appeared before any disciplinary committee. He complained bitterly that no charges were ever put to him to enable him to respond before a decision could be taken. He was not notified of any disciplinary hearing and insisted on his right to be heard. He copied his letter to a number of people.

The first respondent was unmoved. In a letter dated 18 February 2017 which betrays either a lack of appreciation of the fundamental rights of an accused person or a disregard of the provisions of the church manual which I shall refer to later in this judgment, the quartet of church clerks, district pastor and Head Elder stated:

“Dear Mr L. Tachiona

We thank you for your letter dated 14 February 2017. First and foremost, any correspondence to Bulawayo City Centre should be addressed to the church clerk only and not to all the people that you copied to. All communication is done through her. We therefore request for your cooperation in this. Secondly, the process of discipline as outlined in the church manual 19th edition, pages 64-65, is as follows:

1. A member may be disciplined at a properly called business meeting.
2. Two weeks written notice should be given for such a meeting.

The deacons team led by their elder Elder Matsika investigated the matter in question and made recommendations through the Deacons’ Council. The recommendations were deliberated upon by the Elders’ Council and then the church Board culminating in your being given 2 weeks’ notice for the Business Meeting of the 25th February 2017. You have therefore not been disciplined as yet. As stated in our letter to you, you are free to attend and bring witnesses with you at the above Business Meeting. There is therefore no mischief whatsoever by the church board. The process followed is in accordance with the church manual. The Business Meeting of the 25th February will therefore proceed as scheduled.”

The applicant says he duly attended that meeting but his problems got worse. For a start his witness Prosper Ndlovu, who has deposed to a supporting affidavit, was denied entry into the church premises and therefore could not attend. The applicant says at the meeting he was denied an opportunity to make representations to the meeting before it took a decision. Unperturbed, the Business Meeting of the first respondent went to uphold the recommendations of the Deacons' Council and the Church Board and imposed the 7 months censure on the applicant. The applicant has since filed a review application in HC 601/17 against the decision of the first respondent taken on 25 February 2017 on the grounds *inter alia* that the proceedings were grossly irregular and tainted by bias and malice in that he was denied the right to be heard in breach of the *audi alteram partem* rule. One of the chairpersons of that meeting Gasiano Ngulube had an interest in the cause as he had been appointed to investigate the case of sexual abuse of the applicant's wife but refused. The other one had accused the applicant's wife of having an adulterous relationship with her abuser. The applicant's witnesses were denied entry into the meeting.

Pending the hearing of the review application in HC 601/17, the applicant has made this application for a stay of execution as already stated. The application is opposed by the respondents. In his opposing affidavit, Daniel Musundire, the Deputy Head Elder of the first respondent expressed disapproval over the applicant's resort to this court by both review application and urgent application instead of exhausting available domestic remedies. As far as he is concerned the applicant should have noted an appeal against the decision of the first respondent to the church.

Musundire stated that the applicant voluntarily joined an ecclesiastical organization and is therefore bound by its church manual which discourages members from seeking recourse to courts of law when aggrieved. The church has its own procedures on how those who are aggrieved should seek redress. Quoting extensively from the church manual he stated that the procedure allows the applicant to appeal all the way up to the Executive Committee of the Conference.

By bringing this application the applicant is asking this court to usurp the prerogative of the first respondent and that of the second respondent. The respondents also have provision for

urgent hearing of appeals. The applicant is therefore flouting church procedures and is acting in clear violation of the church manual. For that reason, in particular that the applicant has not exhausted internal remedies, this matter is not properly before the court and should be dismissed.

On the merits of the matter Musundire strongly argued that the applicant was given an opportunity to be heard several times by himself but he did not take up that opportunity. He outlined the charges brought against the applicant at paragraph 2 of his opposing affidavit as:

- “(a) Disorderly conduct in attempting to manhandle Pastor Ndebele at the church premises.
- (b) Disrupting a duly constituted church programme.
- (c) Distributing material to church members without approval of the church.”

To those charges should be added the extra one of failing to co-operate with the Deacons during their investigations. What Musundire does not do in his opposing affidavit is enlighten us on how, in what form and when those charges were put to the applicant. Clearly they were not put in writing and served on him because if they were the charge sheet would have been produced. It is unlikely that they were put verbally as *Ms Ncube* who appeared on behalf of the respondents suggested at the hearing, because there was never any hearing. These charges could not have been communicated by sign language or through the process of diffusion either.

Musundire also set out the procedure that is followed by the church in disciplinary matters at paragraph 10 of his opposing affidavit where he stated:

“Secondly, applicant refused to be heard when the Deacons were investigating his matter. The procedure for discipline is as follows:

- (a) A matter is reported to the Deacons.
- (b) The Deacons investigate the matter. This includes hearing the complainant and hearing the person who is subject to be disciplined and his witnesses. (This is where applicant refused to cooperate as stated above).
- (c) Once the Deacons have completed their investigations they must make their recommendations to the Elders Council. The matter is deliberated by the Elders Council who will make a recommendation to the church board.
- (d) The church board will review the matter and make a recommendation to the church at a business meeting.
- (e) The business meeting will deliberate on the recommendation. Applicant is allowed at that meeting to be heard together with his witnesses. I have already explained how they are heard in the Seventh Day Adventist Church and applicant knows that. He again refused to be heard and wanted to be heard in a particular way and I am verily

advised that the right of hearing does not necessarily mean that one must be afforded all the facilities which are allowed to a litigant in a judicial trial. ----. Certainly the business meeting is not conducted like a trial where people give evidence, they are cross examined and then the other side gives evidence and is cross examined and the church makes a decision. In all the circumstances, the church is given adequate facts to enable it to make an appropriate decision.” (The underlining is mine)

Ms Dube for the applicant submitted that the applicant was never called for a hearing before the Deacons and never received any charges. He was only served with the letter of 11 February 2017 which already contains a decision taken by the Deacons recommending a penalty. At the business meeting not only were the applicant’s witnesses prevented from attending the meeting, he was also not allowed to make representations. The church wanted him to be taken to the vestry by the same Deacons who had already made a decision against him without hearing him. Once in the vestry he would make his submissions to the Deacons including the testimony of his witnesses. The Deacons would thereafter approach the meeting and present his submissions and evidence as they understood it. In short the applicant was not allowed to present his case before the church charged with the responsibility of sealing his fate.

When the applicant queried that procedure especially as one of the Deacons, Mr Matsika, was in fact a witness in respect of one of the charges, the church went on to decide the matter without affording him an opportunity to be heard. It is that decision that has now been taken on review.

To the extent that this is an application for a temporary interdict, the applicant must establish the traditional requirements for the grant of such an interdict namely:

- a) a right which, “though *prima facie* established, is open to some doubt;”
- b) a well-grounded apprehension of irreparable injury;
- c) the absence of ordinary remedy; and
- d) the balance of convenience favoring the grant of the interdict.

See *Erickson Motors (Welkom) Ltd v Protea Motors, Warrneton and another* 1973 (3) SA 685 (A) 691 C –G; *Charuma Blasting and Earthmoving Services (Pvt) Ltd v Njainjai and Others* 2000 (1) ZLR 85 (S) 89 E-H; *Bozimo Trade and Development Co (Pvt) Ltd v First Merchant*

Bank of Zimbabwe Ltd and others 2000 (1) ZLR 1 (H) 9 F-G; *Telecel Zim (Pvt) Ltd v Potraz and Others* 2015 (1) ZLR 651 (H) 660 F-H.

In respect of the existence of a *prima facie* right I am of the view that in this particular case that aspect must be juxtaposed with the question of the absence of any other ordinary remedy. This is because the respondents' case is that the church manual precludes the applicant from resorting to civil litigation in respect of what is in essence an intra-church dispute which should be dealt with by way of appeal within the internal structures of the church.

The starting point is to mention that the church, whether acting through the Deacons Council, the Church Board or the Business Meeting, is an administrative authority to the extent that disciplinary proceedings are concerned. As a member the applicant is entitled by operation of law to administrative justice. Ever since the introduction of the Administrative Justice Act [Chapter 10:28] administrative authorities who have the responsibility and power to take administrative action which may adversely affect a right, interest or legitimate expectation of any person are required to act reasonably and in a fair manner.

In that regard the remarks of MAKARAU JP (as she now is not) in *U-Tow Trailers (Pvt) Ltd v City of Harare and Another* 2009 (2) ZLR 259 (H) 267 F-G are apposite. She said:

“It can no longer be business as usual for all administrative authorities, as there has been a seismic shift in this branch of the law. The shift that has occurred is, in my view, profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of s3(3) of the Act, apply.”

See also *Mabuto v Women's University in Africa and Others* 2015 (2) ZLR 355 (H) 356 A-D.

Of course since those remarks were made there has been a further shift in the law in this jurisdiction in that the concept of administrative justice has since been elevated to a constitutional imperative. In terms of s68 of the Constitution the applicant has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

As provided for in s69 of the constitution he has a right to a fair hearing in the determination of his civil rights.

I had occasion in *Telecel Zim (Pvt) Ltd v Potraz and Others, supra* to discuss those constitutional provisions. At 663 A – D I stated:

“The concept of administrative justice is now embedded in our Constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised. The elements are:

1. Lawfulness , in that official decisions must be authorized by statute, prerogative or the constitution.
2. Rationality, in that official decisions must comply with the logical framework created by the grant of power under which they are made.
3. Consistency, in that official decisions must apply legal rules consistently to all those to whom the rules apply.
4. Fairness, in that official decisions should be arrived at fairly, that is, impartially in fact and appearance giving the affected person an opportunity to be heard.
5. Good faith in the making of decisions, in that the official must make the decision honestly and with conscientious attention to the task at hand, having regard to how the decision affects those involved.”

I still stand by that pronouncement and have no reason whatsoever to depart from it.

In the present case we have a situation where the disciplinary process involving members is governed by the church manual. Although Musundire has given an impressive sermon about values and the teachings of the church from which he appears to then extract a disciplinary procedure followed by the church, he has studiously failed to show where that procedure is provided for in the church manual. *Ms Ncube* for the respondents submitted that the church manual does not provide that charges preferred against a member should be in writing or that there must be a formal hearing. When her attention was drawn to page 65 of that good book she shifted ground to say that the written notice was given to the applicant in the form of the letter of 11 February 2017.

Honestly that cannot possibly be taken seriously. The letter in question was advising the applicant of the outcome of the probe conducted by the Deacons and the decision of the Church Board following recommendations made by the former. Significantly both authorities sat, deliberated and made decisions without putting charges to the applicant and without allowing him to defend himself. It is not good enough to say that the Deacons “investigated the matter” but the applicant did not co-operate.

The church manual provides at page 65 dealing specifically with discipline:

“Fundamental Rights of the Members- Members have a fundamental right to prior notification of the disciplinary meeting and the right to be heard in their own defense, introduce evidence, and produce witnesses. No church should vote to discipline a member under circumstances that deprive the member of these rights. Written notice must be given at least two weeks before the meeting and include the reasons for the disciplinary hearing.”

In my view it was incompetent for the Deacons to “investigate” the matter if that process involved taking a decision in the form of recommendations to the church board adverse to the rights of a member without giving him written notice of the hearing. It was equally incompetent for the church board to take a decision on those recommendations without according the member an opportunity to be heard. In fact the notice of the business meeting of 25 February 2017 contained decisions that had already been taken, complete with the penalty to be meted out, without even putting charges to the member facing discipline.

Whichever way one looks at it the sham of hearing on 25 February 2017 in which the applicant was purportedly given an opportunity to be heard by one hand and had it taken away from him by the other could not be taken to accord with administrative justice. You do not take a member to the vestry to present his case and evidence before a group of people who have already recommended that he be punished and then say that group should be the one that makes submissions on his behalf to a tribunal which decides his fate. It is a sham. While the church is entitled to cling onto those rules of procedure, they are certainly clinging onto relics, something that has long gone past its sale-by-date, something which does not meet the dictates of administrative justice.

Faced with that kind of arbitrariness, the applicant felt hard done by and short changed. He was distraught and with no sense of solution and hence the decision to approach this court on review. I am satisfied that the first respondent’s officials were grossly remiss in their handling of this disciplinary matter and that the applicant, who all this time was wallowing in the wilderness after all the avenues to the attainment of recourse appeared closed, was more than justified in approaching this court for relief rather than wait for the rusty old train of the church that takes its own time to deliver justice.

It occurs to me that there was a callous disregard of the prejudice that the church member was suffering when his matter was being discussed by one group after the other while he was not even charged and he was not granted audience. Indeed a person who feels aggrieved by the powerful in the church would be justified to think there is resort to obfuscation by those who flaunt power in what appears to be a cat and mouse game where only him can be the loser.

Otherwise how else can one explain the failure to give him a charge sheet when the charges were known and formulated? Why would the Deacons Council not serve him with the charges and invite him for a hearing instead of hiding behind a finger, itself a very small instrument for that purpose, by saying that they are merely “investigating” the matter. They knew they would recommend, not that he be charged, but that he be censured. He was only invited to attend when a decision had been taken and only awaited endorsement by the business meeting, a business meeting in which he was not allowed to make representations. In my view, it was a legal charade so kafkaesque as to be laughable.

Administrative justice is an embodiment of the basic rules of natural justice, including the *audi alteram partem* rule. Those rules are time tested and speak to fairness. They require that if you are going to take a decision adverse to a person you must charge them, accord them time to prepare and make representations before a decision is taken. That was not observed in this case in which arbitrariness was the order of the day. I am of the view that where there has been arbitrariness the affected person has an absolute right to approach the court for redress. When that happens the courts will not defer to ecclesiastical rules but will intervene.

I associate myself fully with the pronouncement made by DEVITTIE J in *Independent African Church v Maheya, supra*, at 557H, 558 A-D that:

“The *Watson* approach is popularly termed the ‘deference approach’ and requires judicial recognition of the decisions of the ‘church’s highest body’ on matters of discipline, faith or ecclesiastical rule, custom or law. The principles in *Watson*’s case were modified to an extent in *Gonzalez v Roman Catholic Archbishop* 280 US 1 (1929). The plaintiff claimed a right to be appointed to a chaplaincy. The Archbishop refused to do so on the grounds that the plaintiff did not qualify. The court deferred to the Archbishop’s decision in these terms:

‘Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualities of a chaplain are and whether the candidate possessed them. In the absence of fraud, collusion, or arbitrariness, the decisions of the

proper church tribunals upon matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive because the parties' interest made them so by consent or otherwise.'

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 church proceedings to determine the absence of fraud or collusion and whether the church has disregarded its own rules and acted arbitrarily." (The underlining is mine)

In the present case the church appears to have acted arbitrarily in imposing the censure without affording the applicant his rights to administrative justice. This court will therefore examine the fairness of the proceedings and determine whether there was compliance firstly with the church manual and secondly with administrative justice as provided for in both the Administrative Justice Act and the constitution. I conclude therefore that the applicant has established a *prima facie* right and that there is no alternative remedy that will deliver justice and fairness. The appeal procedure relied upon not enough in the circumstances.

The applicant has already been censured and the decision has taken effect to run for 7 months. It has the effect of curtailing his rights as a member whether he is in Harare or not. Therefore the risk of irreparable injury looms large. Considering that the respondents will lose absolutely nothing if that decision is stayed, they have been "investigating" this matter since June and November 2016 without a calamity be falling the church, it appears to me that the balance of convenience favours the grant of the interdict. The matter is therefore resolved.

In the result, the provisional order is hereby granted in terms of the draft order as amended

Dube-Tachiona and Tsvangirai, applicant's legal practitioners
Lazarus & Sarif, respondents' legal practitioners