

CHURCH OF THE PROVINCE OF CENTRAL AFRICA
versus
MR ELSON M JAKAZI
and
MR F MATAMBANADZO
and
MR J D NYAMUNDA
and
MR J MAPANI
and
MR D MAKONI
and
MR J KUWANA
and
MR TP PENGA
and
MR G KADZUNGE
and
MR E MUZOKURA
and
MR W SIMBABURE
and
SARUDZAI SPIWE MAWOKO

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 11 and 24 February and 28 April 2010.

EXCEPTION

Mr R Moyo for the plaintiff/ respondent;

Mr G C Chikumbirike for the defendants/ exceptients.

MAKARAU JP: This is an exception with an exception. It is but a skirmish in the battle of suits, applications and counter applications that the two factions of the “Anglicans” have brought against each other before this court, a spate of litigation that is now assuming nuisance value. The application was partly argued before me and prior to the resumed hearing, it was withdrawn without a tender of costs. The issue of costs was then raised for my determination.

For a full appreciation of the nature of the dispute before me, it is in my view necessary that I set out the history of this matter in some detail.

The plaintiff issued summons against the twelve defendants on 1 October 2008. In the summons, it sought an order declaring that the twelve had seceded from the plaintiff and that they should be restrained from holding themselves as office bearers in the Manicaland Diocese of the plaintiff. The order also sought the eviction of the twelve defendants from the plaintiff's property.

The claim was defended.

In their plea the defendants denied the allegation that they seceded from the plaintiff church and put the plaintiff to the proof thereof. They further averred that if the plaintiff had proceeded to relieve the defendants of their posts within the church, such divesture was not in accordance with the canons of the plaintiff and was therefore illegal.

Two of the defendants denied that they were office bearers and averred that they were employees of the church whose contracts of employment were still extant.

In particular, the first defendant averred that the decision to withdraw the Diocese of Manicaland from the plaintiff was a decision of the Standing Committee of the Diocese and that this decision could not be brought before the courts without citing the body that made the decision. It was further averred that in any event, the decision to withdraw from the plaintiff had been rescinded and the fact communicated to the plaintiff.

Regarding the eviction of the defendants sought by the plaintiff from the plaintiff's properties, it was averred that the properties occupied by the defendants were registered in the name of the Diocese of Manicaland, which is run by a Board of Trustees and that failure to cite the Board of Trustees was fatal to the plaintiff's claim.

After the pleadings had closed, the matter proceeded to a pre-trial conference. In their draft minutes of the pre-trial conference, the defendants raised the issues of the *locus standi* of the plaintiff to bring the proceedings against them, the non citation of the Board of Trustees to the action, the fate of the contracts of employment of the second and third defendants and whether the plaintiff could seek the eviction of the defendants from properties built and owned by the Diocese of Manicaland.

The issue of the *locus standi* of the plaintiff and the role of the Board of Trustees of the Diocese of Manicaland appear to have weighed heavily with the judge presiding over the pre-trial conference who then directed that the defendants file an exception outside the time limits provided for in the rules, to deal specifically with these issues. The judge also directed that the

exception be filed on or before the 29th of April 2009 and that thereafter, the matter proceeds in terms of the rules.

While the issue is not at all before me, it however appears to me that this matter will be before the courts for a while longer than is necessary as it is not clear procedurally, what should happen now after the withdrawal of the exception. The pre-trial conference was not concluded. It is not clear whether the matter should now proceed to trial as there is no such referral and issues for trial have not been agreed upon. I simply note this in passing. The parties may have to make a further approach to this court for directions.

On 27 April 2009, the defendants filed a special plea and exception in which it was alleged that the claim brought by the plaintiff against the defendant was bad in law and does not set out a valid cause of action. It was further alleged that in terms of the Acts of the Diocese of Manicaland, all legal proceedings relating to the property of the Diocese is to be brought by and in the names of the Trustees.

The exception was opposed and in due course was set down before me for hearing. It is not necessary that I detail the proceedings relating to the hearing of the exception. Suffice it to say that the hearing was postponed and prior to the resumption of same, the defendants withdrew the exception by written notice dated 24 February 2010. At the same time, the defendants filed a notice to amend its plea at the trial of the matter, to add a special plea.

It is pertinent at this stage to observe that unless it is further amended, the special plea to be raised at the trial of the matter is worded in the exact language used in the exception that has been withdrawn before me. To the special plea is however attached a copy of the Acts of the Diocese of Manicaland.

The issue that arose before me is whether in the circumstances, the defendants should be made to pay the costs of the withdrawal of the exception.

The defendants argued that they should not be made to meet the costs of the withdrawn exception as they have in essence substituted it with a special plea which they filed on the date of the withdrawal of the exception.

Order 21 of the High Court Rules 1971 which provides for the filing of exceptions and special pleas does not provide for how these are to be disposed of and what order as to costs, if any, a court may make where an exception has been withdrawn.

It is trite that in a legal system in which the procedures are driven by the parties to the suit, as opposed to a system where the process is managed by the court, the general rule

appears to me to be that any party to the suit is entitled to withdraw any of its pleadings provided this does not cause any injustice to the other party. Following this general rule, it is trite that the defendants before me were at liberty to withdraw their exception and special plea provided the withdrawal did not cause any injustice to the plaintiff and which in justice could not be cured by an order of costs.

In *casu*, the withdrawal of the exception by the defendants is not in issue. By the time the exception was withdrawn however, both parties had incurred some costs as the parties appeared before me for oral argument. This was after both had filed heads of argument in the matter. Counsel argued the matter for the best part of the morning before seeking a postponement. For all these procedures and necessary attendances, both parties had to pay legal fees to their respective legal practitioners.

In view of the above, the defendants should have tendered the plaintiff's wasted costs caused by the withdrawal. This is standard practice in this jurisdiction.

Mr Chikumbirike has argued that the defendants should not be ordered to pay the costs occasioned by the withdrawal of the exception as they have substituted the withdrawn exception by a special plea filed on the same date as the withdrawal.

I cannot agree.

Firstly, the defendants have withdrawn an exception and have substituted it with what purports to be a special plea. It presents itself clearly to me that the issues raised in the special plea filed by the defendants are the same issues that arise from its plea on the merits. As indicated above, the issues arose from the defendants' draft minutes of the pre-trial conference. They form part of the very issues that have to be determined at the trial of the matter. It may be that they are decisive and their determination will render unnecessary the determination of the rest of the proposed issues. That, in my view, is besides the point. In any event, the issue can only be heard at the trial of the matter as that is when the amendment to incorporate the special plea into the record will be made.

That the parties will now argue the merits of the trial is hardly a defence against an award for costs that were occasioned by the withdrawal of the exception.

Secondly, it appears to me to be the correct position that even if the defendants had withdrawn one exception and substituted it with another exception, they still would have been liable for the plaintiff's costs in considering the withdrawn exception. The issue is not whether or not the same dispute is still before the court. It is whether by the actions of the defendants in

filing the first exception, the plaintiff has been put to some expense. The award of costs in its favour is restricted to the consideration of the withdrawn pleading and has little if anything to do with the outcome of the hearing on the pleading. SMITH J in *Hackleton Investments (Pvt) Ltd v Time Bank of Zimbabwe Limited* 2000 (1) ZLR 60 (HC) at 61H-62B aptly summarises the position as follows:

“I can see no reason why a party should not be permitted to withdraw an exception or special plea which he or she realizes is not in order, or can be improved upon, and replace it with an improved draft, if that is done timeously. If the other side has been put to some expense in considering or dealing with the exception or special plea that is withdrawn, then the party filing the exception or special plea would have to tender wasted costs.”

I am aware that costs are in the discretion of the court. It is trite that such discretion must be exercised judiciously and must be guided by general approaches established by precedent. In *casu*, I see no reason to depart from the general rule of compensating a party who has been put to some expense in considering or dealing with a pleading that is subsequently withdrawn.

In the result, I make the following order:

The defendants are to pay the plaintiff's wasted costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners.

Chikumbirike & Associates, defendants' legal practitioners.