

THE EVANGELICAL CHURCH OF ZIMBABWE
versus
REVEREND DOCTOR ISAAC SODA

HIGH COURT OF ZIMBABWE
MATHONSIJ
HARARE, 13 May 2015 and 20 May 2015

Urgent Application

J. Burombo, for the applicant
Ms R. Munatse, for the respondent

MATHONSIJ: This is a church dispute gone awry in which the respondent was elected Bishop of the applicant in an election conducted on 21 March 2015 whose process and outcome has been disputed by other members of the church who say they are the majority. They have, by resolution passed at an extra-ordinary general conference held on 28 March 2015 resolved *inter alia*:

“That the Evangelical Church of Zimbabwe declares null and void the unconstitutional elections of the Bishop of The Evangelical Church of Zimbabwe held by minority members of the Denomination at the Ministry Centre on Saturday 21 March 2015. Therefore the church does not recognize Reverend Isaac Soda as its newly elected Bishop.”

In arriving at that resolution those involved cited the violation of the applicant’s constitution in the process. The applicant is a *universitas* constituted and governed by a constitution and therefore can only function and be run in accordance with that constitution. It is alleged that while Article VIII C of the Constitution and church practices require the co-ordination of the election by a five member Selection Committee, the election was co-ordinated by only two members of the committee.

While ballot papers should be sent out following the approval of the Church Council which should pass a resolution sanctioning the holding of an election, this was not done. The wives and friends of the candidates and one of the candidates are the ones who distributed ballot

papers instead of the church overseers as is the procedure. In breach of Article VIII C(1)d) of the constitution the selection committee did not consult the Pastors' Council on the suitability of election candidates.

In breach of Article VIII C (1)(g) the Selection Committee shortlisted only two candidates for the position of Bishop instead of 3 and disqualified the third candidate. The final nomination forms were not issued in accordance with the constitution which requires that they be issued within the period of 30 days preceding the Annual General Conference. One of the two candidates was not qualified as he is not a holder of a first Theological degree as required by Article V111 A(v) of the Constitution. The two selection committee members intimidated voters by threatening unspecified legal action if they did not proceed with the election.

The applicant states that the respondent appeared to recognize the power of the majority members to nullify the election results when he approached this court by court application filed on 29 April 2015 in HC 3889/15 in which he seeks the following order;

“IT IS HEREBY ORDERED THAT

1. The election process for the election of the Bishop of the 1st respondent be and is hereby upheld and confirmed.
2. Applicant be and is hereby declared the Bishop of the 1st respondent for the next 5 years.
3. 2nd – 6th respondents be and are hereby interdicted from interfering with the business of 1st respondent.
4. Respondents to pay costs of suit.”

In that application, the respondent cited the present applicant as the first respondent and five other people, the secretary of the church council, the current Bishop, the treasurer and the chairpersons of the constitutional committee and the national women fellowship. It would appear however, that the respondent may have grown impatient while waiting for the rusty old train of this court to deliver justice to him because the applicant complains that before the determination of his application for a declaratur the respondent caused notice to be sent out through his supporters on 3 May 2015 announcing his intended inauguration on 9 May 2015 at 10am at the applicant's head office.

It should be noted however, that 9 May 2015 was set as the date of the inauguration at a

meeting of the church council held on 1 April 2015 which was chaired by the Vice Bishop Reverend A Mateva. If a notice was sent out on 3 May 2015 as alleged by the applicant and triggered the filing of this application, it was in fulfillment of a resolution which was already in place. Be that as it may, the applicant says it is the announcement made on 3 May 2015, which the respondent denies making, which prompted it to make this urgent application seeking to interdict the respondent from staging the inauguration. The full text of the relief that the applicant seeks is in the following:

“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 election held on 20-21 March 2015 for the contesting of the position of Bishop of the applicant be and is hereby declared null and void and of no force or effect.
2. Respondent be and is hereby declared as not being duly elected Bishop of the applicant in the elections held on 20-21 March 2015.
3. The respondent to pay costs of this application on an attorney and client scale only if he opposes it.

INTERIM RELIEF GRANTED

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

1. The inauguration of the respondent as the applicant’s Bishop on 9th May 2015 at applicant’s head office be and is hereby stopped from taking place.
2. The respondent be and is hereby ordered not to interfere in any unlawful manner in the operations and business of the applicant.
3. The respondent be and is hereby ordered not to use (his) supporters to interfere in any unlawful manner in the operations and business of the applicant.”

It is the interim relief that the applicant seeks which is the concern of the present inquiry. However the respondent has taken essentially two points *in limine* namely that the deponent of the founding affidavit David Chiveso does not have *locus standi in judicio* to represent the applicant in any legal action and as such is ill-suited and that the matter is not urgent, it being self-created urgency which should not be entertained at all.

Regarding *locus standi*, the point is made that the applicant, as a *universitas* governed by a constitution can only act in accordance with that governing document. Anything done in breach of its constitution is in essence a nullity and of no legal consequence what so ever. I agree.

Article VIII A (1) of the applicant's constitution provides:

- “(i) The head of the Evangelical Church shall be an Executive Bishop. The title Bishop shall be restricted to the term of office.
- (ii) The Bishop's term of office shall be five years which may be extended, for another five year term if re-elected by the AGC.”

Article VIII D deals with the duties and functions of the Bishop and provides at (x) that:

“The Pastors' Council Chairman shall be Deputy to the Bishop and shall act in place of the Bishop when the Bishop is out of office.”

In my view this matter resolves itself on the facts that are common cause. It is common cause that the outgoing Bishop Makachi's term has expired hence the need for an election to fill that position. In any event if it had not expired, he is not the one who has instituted this application. Instead Chiveso did, purporting to act in terms of a resolution passed at a meeting of the applicant held on 4 May 2015. The minutes attached to the application do not specify which structure of the applicant held that meeting.

The Deputy Bishop is, by constitutional provision, the Pastors' Council Chairman and he acts on behalf of the Bishop in the absence of the latter. It is common cause that the office in question is currently held by Reverend Amos Mateva, who has deposed to an affidavit denying convening the meeting on 28 March 2015 which overturned the election results. He also denied instituting any legal proceedings on behalf of the church or convening any meeting which resolved to take such action, while at the same time proudly claiming responsibility for the inauguration of the respondent on 9 March 2015 even after he had been served with the present application.

Article XII B (vi) of the applicant's constitution provides;

“The Administrative Committee shall have the right to represent the church in all its structures in all legal matters where such expertise is needed.”

It is common cause that the chairman of the administrative committee is Reverend Dewah. He has deposed to an affidavit denying convening the meeting of 4 May 2015 which appointed Chiveso to represent the applicant in this matter. He denies that his committee ever

resolved to institute any legal proceedings against the respondent and states that it is not the church which has made this application. Quite to the contrary, it is his committee which organised and presided over the inauguration of the respondent as Bishop of the church.

The question therefore is whether Chiveso had the requisite authority to sue using the name of the church in the circumstances.

The starting point is to state that the relationship between the parties who are members of an association like a church or a social club is contractual. They are governed and bound by the rules and regulations of the association: *Constantinides vs Jockey Club of South Africa* 1954 (3) SA 35(C) 44C. The interests and rights of persons who are members of any type of unincorporated association are governed exclusively by contracts, that is, rights between themselves; *Civil Service Employees Association & Anor vs Public Service Association & Ors* HH 111/14; *Re Bucks, Constabulary Widows and Orphans Fund Friendly Society* (NO)[1979] WLR 936 at 952.

In *Dynamos Football Club (Pvt) Ltd & Anor vs Zifa & Ors* 2006 (1) ZLR 346 (S) 355 G; 356 A Malaba JA (as he then was) made the point that:

“It is important to bear in mind what the learned judge appears not to have appreciated. It is the fact that the legal basis of an unincorporated voluntary association of persons such as a social club is the contract between and amongst the associates. The law recognises their freedom to determine the acts by which they intend to be bound, who should perform them, and when. The duty of a court of law is to determine whether what is claimed to have been done is in fact what was prescribed by the members of the club in strict compliance with the procedure they laid down for validity to attach to those acts.”

Members of the church prescribed for themselves the rules that govern them in the form of the constitution. They had the freedom to do so. Those rules provide that their head is the Bishop and where the Bishop is unable to act for any reason, it is the Deputy Bishop who acts in his place and discharges the functions of that office which include convening meetings. The rules prescribe that the Administrative Committee chaired by Reverend Dewah should represent the church in legal matters. It is not open to any aggrieved member or faction of members to litigate using the name of the church, no matter how many they are. If they do, what they do in violation of the constitution is a nullity and of no legal consequence.

Unfortunately this is exactly what Chiveso has done. It matters not that he has the backing of the majority members, real or imagined. Such action cannot possibly be valid because Chiveso

does not have the constitutional mandate to sue on behalf of the church. As it now turns out, those clothed with authority to sue on behalf of the church have disowned Chiveso leaving him high and dry.

Allied to the question of authority to sue is the issue of legal interest. LICHTENBERG J aptly put it in *SA Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (0) at 103I; 104 F where the learned judge said:

“To justify its participation in a suit or to bring proceedings for relief, a party must show that it has a direct and substantial interest in the right which is the subject-matter of the litigation and in the outcome of the litigation and not merely a financial interest which is only an indirect interest in such litigation.”

See also *Henri Viljeoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O); *Zimbabwe Teachers Association & Ors vs Minister of Education and Culture* 1990 (2) ZLR 48 (H).

In his heads of argument, Mr *Burombo* for the applicant did not bother to address the issue of *locus standi* settling for the merits of the matter only. Chiveso and his group may well have an interest in the election of a Bishop, but such interest is only in their capacities as members of the church or congregants. They should have litigated in their own names and not in the name of the church.

Mr *Burombo* submitted at the hearing however that Elder Chiveso was elevated to the position of Chairman of the Administrative Committee at the meeting of 28 March 2015 which ex-communicated the then chairman and the Deputy Bishop. For that reason he has capacity to represent the church. The difficulty with that submission is that that meeting is colourless and mysterious indeed. It is not clear which organ of the church held that meeting and whether it was constitutional.

Mr *Burombo* submitted that it was an Extra Ordinary General Conference convened in terms of Article 111 A (iv) of the Constitution which provides that the council may convene Extra-Ordinary General Conferences as and when deemed fit. Even if that were the case and there was indeed a council with such power among the members who participated, I agree with Ms *Munatse* that in terms of that Article such a meeting could not invalidate what was decided by the Annual General Conference. This is because it was of inferior jurisdiction than the latter. In terms of Article 111A (1):

“The Annual General Conference (AGC) is the supreme organ of the Evangelical Church of

Zimbabwe and all the functions and powers of this church as a corporate body are vested and exercised through this organ. Its decisions are final and binding on the entire membership of the church”

That should put the matter to bed really. The meeting of 28 March 2015 could not lawfully invalidate what was done by the supreme organ. It could not ex-communicate the Deputy Bishop and/or the Chairman of the Administrative Committee recognised by the supreme organ and for participating at the Annual General Conference. Therefore both Rev Mateva and Dewah remained in office and should be the ones representing the church and not Chiveso who clearly has no *locus standi*.

I must however express indignation at the conduct of Mateva who boasts of having presided over the inauguration of the respondent on 9 May 2015. This matter was set down for 13 May 2015 on 7 May 2015 and due notice for the hearing was served upon the respondent as well as on his legal practitioners on 8 May 2015, well before the inauguration. Obviously Rev Mateva became aware of the application which sought to stop that activity, so did the respondent.

It was therefore improper for them to proceed with the inauguration. They should have refrained from it until after the matter had been determined. I find it disturbing that the respondent and his hangerlings elected to disregard the court process calling into question the inauguration as if nothing had happened. It has been said repeatedly by the courts that it behoves a party in the position of the respondent and indeed Rev Mateva to respect the process of the court and refrain from conduct that would render nugatory the process of the court: *Rukonda & Ors vs Minister of Local Government, Public Works and National Housing N.O. & Ors* HH360/14.

If this application had been valid I would not have hesitated to nullify the inauguration of the respondent. For his conduct, he is not entitled to costs of suit.

In the result, the application is hereby dismissed with each party to bear its own costs.

Messrs Moya & Associates, applicant’s legal practitioners
Messrs Mapondera & Company, respondent’s legal practitioners

