TRUSTEES OF ANGLICAN DIOCESE OF MANICALAND CHURCH OF THE PROVINCE OF CENTRAL AFRICA — APPLICANT
versus
MAKONI RURAL DISTRICT COUNCIL — 1ST RESPONDENT
and
MINISTRY OF PRIMARY AND SECONDARY EDUCATION — 2ND RESPONDENT

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 8 March 2022

Opposed Application

A. Mutungura, for the Applicants.
W. Mangwende, for the 1st Respondent.
N. K. Muchinguri, for the 2nd Respondent.

MUZENDA J: This is an opposed application for a ***declaratur*** where applicant is praying for the following relief:

"IT IS HEREBY ORDERED THAT:

1. *The withdrawal of the resolution to transfer St Micheal Nerwande Primary School from Makoni Rural District Council to the Church of the Province Central Africa Anglican Diocese of Manicaland be declared unlawful, null and void.*
2. *The second Respondent is ordered to accept the recognition and transfer of the said St. Micheal's Nerwande Primary School to the church of the Province Central Africa Anglican Diocese of Manicaland.*
3. *The first respondent pays costs of suit on attorney client scale.*
4. *The second respondent pays costs of suit on ordinary scale."*

Background

St Micheal's Nerwande Church was established by applicant in 1909. In 1910 primary students used the church building for lessons. During the liberation struggle the Rhodesia government took control of the education department of the church. In 1980 the new dispensation continued with the pre-independence status quo. Its not clear on papers as when applicant engaged the first respondent, (Makoni Rural District Council) to restore control of the school to the applicant. However the Rural District Council agreed to do so but on condition applicant had to meet certain pre-requisites provided in the Education Act. Its clear on paper

that the applicant took sometime to meet the set conditions and in 2019 the Rural District Council withdrew their offer to release the school to the applicant. Applicant was not happy with the withdrawal and decided to approach the court for a *declaratur*.

In its opposing affidavit, first respondent states that on 20 November 2015 it was approached by Chiefs, headman, school committee members and members of Nerwande Community and proposed to it that applicant wanted control of the school to effect infrastructural development, enhance academic performance and general improvement of the institution. During the same year applicant penned a letter on 29 December, expressing its intention to take over the school. The Rural District Council by its letter dated 4 July 2016 counter-proposed a meeting to reach a consensus on the matter and directed applicant to keep a reserve of $3000 which was the fee payable if an agreement was concluded. From 2016 applicant went inept. It only paid $5 000 on a date in 2019 and did not indicate what the payment was for first respondent denies any agreement. In any case first respondent further avers, a lot of development and changes had taken place from 2016 to date, the school had since been remarkably developed, academic performance has greatly significantly, improved and the first respondent is fully equipped to run the school on its own. First respondent adds that it officially informed applicant that there was no formal agreement and that the payment of $5000 had no purpose. It prays for the dismissal of applicant's application with costs on a higher scale.

Applicant's Submission.

Applicant submitted that it followed all procedures prescribed by statute to change the responsible authority. On the payment of money, it paid the amount and got a reminder to pay the balance in July 2016. On the merits of the application applicant contends that first respondent had no authority nor mandate to withdraw the resolution to transfer the school from itself to the applicant. It adds that the resolution was revoked without hearing applicant as such the withdrawal has no legal basis. Applicant wants the court to order first respondent to sign the papers for the transfer of the responsible authority. In principle applicant submits that it has met the requirements of a *declaratur* and referred the court to the matters of *Family Benefit Friendly Society* v *Commissioner for Inland Revenue and Another*[1] and also that of *Eagles*

[1] 1995 (4) SA 120 (T) per VAN DIJKHORST J

Landing Body Corperate v *Molewa N. O and others*[2] and prays that the application be granted with punitive costs.

First Respondent's Submissions

First respondents in its submission emphasised that for a school to be transferred from a local authority, the community in which the school is located must indicate its willingness to have the school transferred to the church, in turn the church must express its intention to acquire the school, lastly the local authority must indicate its intention to surrender the school to the church and that is done through a resolution by the councillors. First respondent adds that the community that gathered in 2015 was not the same as at 2019 or currently, there is need for applicant to gather fresh views from the community given the changes that had evolved since 2015. In any case, first respondent, adds further the reasons originally placed before the council for taking over the school had since changed. First respondent had achieved them and there was no need for transferring authority of the school to the applicant. First respondent further submitted that there was no agreement as was the requirement of its letter written to applicant in 2016. In essence the new position of first respondent is to the effect that it was no longer desirous of handing over the school to the applicant.

It is the contention of first respondent that the court has to look and decide whether there was an offer and an acceptance. To first respondent applicant does not make an offer to take the school, the community requests first respondent and first respondent offers to applicant first respondent did not demand payment but alerted applicant to have the funds ready whilst discussions were in progress, however there was no firm offer by first respondent to transfer the school to the applicant church. First respondent went on to submit that the conduct of applicant from 2016 to 2019 amounts to a repudiation and applicant referred the court to the matters of *Highveld 7 Properties* v *Bailers*[3] *Chinyerere* v *Fraser N.O.*[4] and *Blumo Trading (PVT) LTD* v *Nelmah Milking Company (PVT) Ltd & Anor*[5], applicant did not do anything when it saw first respondent investing in the school's infrastructure and improvements and ceased communication with first respondent for a period of 3 years, it was further argued.

[2] 2003 (1)SA 412 (T)
[3] 1999 (4) SA 1307 (SCA)
[4] 1994 (2) ZLR 234 (H). 250
[5] HH 39/11

Finally first respondent contended that a declaratory order should not be granted because the applicant has no right to the school and such a declaration will not be in public interest. It was also added that applicant neglected on its obligations and breached the undertaking and first respondent had no option than to cancel the offer. First respondent prayed for the dismissal of the application with costs on a higher scale.

Issues for determination.

1. *Was there an enforceable contract between applicant and first respondent?*
2. *Has the applicant met the threshold for a relief of a declaratur?*

The Law.

Section 14 of the High Court Act confers on this court a discretion to make a declaratory order in an appropriate case. The discretion, like any other discretion, conferred on this court has to be exercised judicially and must be examined in two stages. The first is that applicant must satisfy the court that he (or it) is a person interested in an existing, future or contingent right or obligation. If satisfied on the first the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on it.[6]

In the matter of *Mushaishi* v *Lifeline Syndicate and Anor*[7] which was cited with approval in *Econet* v *Telecel Zimbabwe (Pvt) Ltd*[8] GREENLAND J said:

> "*My ruling is, in effect, declaratory, that is to declare what the law provides. The applicant enjoys nothing that he did not enjoy before launching the proceedings except the comfort of having had the court confirm his legal opinions. Still as the facts reveal a competition for rights in respect of the claims, justice confirmation on this issue and seeking of a declaratory order was indicated"*

The Education Act[9] s. 15(2) provides:

> "*Any responsible authority wishing to establish and maintain a school referred to in subsection (1) shall make an application to the Secretary in the prescribed form for the registration of such school, accompanied by such documents as may be prescribed"*

[6] Johnson v AFC 1984 (1) ZLR 95 (H)
[7] 1990 (1) ZLR 284 (H) at 288E
[8] 1998 (1) ZLR 149 (H)
[9] Chapter 29:13

Section 15(3) of the same Act provides that the Secretary shall make enquiries in order to make a determination and in terms of s. 15(4) if he or she is not satisfied, may reject the application.

On the other hand, the Rural District Councils Act[10] in s.52 deals with rescissions or alteration of resolutions and states

> "*Subject to subsection (3) a resolution passed at a meeting of a council shall not be rescinded or altered at a subsequent meeting of the Council-*
> *(a) Unless*
> (i) *a committee has recommended that the resolution should be rescinded*."

In terms of s52 (3) of the same act, the Minister may direct a council to rescind a resolution upon notice.

Applying the law to the facts.

It is common cause and a mundane truth that church organisations worldwide played a central role in establishing primary' secondary and tertiary institutions in various countries where they had accompanied pioneer settlers. At the core vision of these noble initiatives was infrastructural and intellectual development and advancement well constructed upon religious ethos and fundamentals. This was the deep perception incalculated in Nerwande Community when they resolved to approach the first respondent. They wanted the applicant to revive the old nostalgic idea and applicant to provide resources and revamp the infrastructure at the school, construct facilities and utilities and propel the school to academic and esthetic heights. Both the community and applicant had a vision of a highly competitive Nerwande School. Given the static condition of the school, first respondent adopted the idea and stipulated conditions antecedent to the handing over. A necessary resolution was unanimously passed by the council. From 2016 to 2019 applicant was docile, it faced financial whirlwind but did not inform first respondent, first respondent took the initiative to implement the infrastructural developments at the school to the full knowledge of the applicant. What was intended to be embarked by applicant in 2015 at the school was attained by first respondent. The school's academic performance greatly improved and applicant does not dispute that. Facilities were established at the school at the initiative of first respondent and applicant does not dispute that. After such meaningful infrastructural changes, applicant resuscitated the idea of a takeover of the school. First respondent sees no purpose for such, since the community of 2015 has since

[10] Chapter 29:13

changed and the council has since completed the very purpose behind the coming in of the applicant church.

Applicant's contention is that since the first respondent had resolved to handover the school it had no powers to revoke the resolution at applicant's prejudice. In principle applicant is moving the court for specific performance. Contracts are time based. Parties are expected to timeously asset their respective rights and where a party sits on its laurels, it will be easy for the court to infer repudiation on the inept party. The applicant attributes its ineptitude on financial challenges but did not see it prudent to keep the candle burning by appraising the first respondent. Applicant obviously noted first respondent renovating the school and putting other infrastructures but did not take action until those projects were completed. When all was done in view of the public the applicant decided to take a move. That is not, how it works. I am persuaded by first respondent's submission that from the circumstances either applicant acted in bad faith or repudiated the agreement itself. It is also my view that the whole agreement was still putative, in its formative stage. The second respondent was yet to approve the intended take over after making an enquiry. He may have approved the taking over or reject it. The applicant delayed and fell into a deep slumper. The resolution of the council showing first respondent's consent to pass transfer of its responsible authority to applicant was in my view legally rescinded and I see no basis of its unlawfulness or illegality. A committee sat and recommended the rescission of the resolution given the conduct of applicant and developments at the school. Applicant's representatives were invited by first respondent for that specific meeting and they attended. If applicant was not happy its option was that of a review of the rescission than an application for a *declaratur*.

I now turn to consider the question of whether this is an appropriate case for the court to exercise its discretion and assume jurisdiction to make or decline to make the declaratory order sought.

Applicant ceased to have control of the school long back to pre-independence and post independence. So what rights did applicant enjoy before launching its proceedings except a resolution by first respondent agreeing to cede its authority to applicant on conditions set. The interpretation of the law by applicant in my view is wrong when it impugned the rescission of the resolution by first respondent. The anticipated infrastructural improvements at the school by the community were effected by the first respondent. I am unable to discern the nature of pre-existing rights of the applicant except the nostalgia to add Nerwande school to the existing list of schools under the auspices of applicant. There are neither existing nor contingent nor

future rights of applicant. One could not see even the justice or otherwise of the application given the fact that there is virtually no investment done by the applicant. Yes it pioneered the establishment of the church building but not the current school infrastructure, I did not see any averment to that effect in applicant's papers. The facts reveal a competition for rights to be the responsible authority and applicant has dismally failed to show on paper why first respondent should religuish that right. I did not see the nature of the rights that had been infringed in this case. I equally see no basis for this court to assume jurisdiction to make a *declaratur*.

In the result the following order is returned:

1. *The application for a declaratur be and is hereby dismissed*
2. *Applicant to pay the respondent's costs.*

Mutungura & Partners, Applicant's Legal Practitioners.
Chigadza & Associates, 1st Respondent's Legal Practitioners.
Civil Division of the Attorney- General's office, for 2nd Respondent.