REPORTABLE: (114)

(1) ALFRED KUSHAMISA MWAZHA (2) NGONI EDWARD MWAZHA (3) MASIMBA MWAZHA (4) JAMES MWAZHA (5) RICHARD JURU (6) ELSON TAFA (7) CHARLES TEKESHE (8) LOVEMORE MHARADZE (9) NORMAN SIYAMUZHOMBWE (10) AFRICAN APOSTOLIC CHURCH

v

ERNEST MHAMBARE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA & CHIWESHE JA
HARARE: 28 JUNE 2021 & 14 OCTOBER 2021

D. F. Ochieng with *F. Chinwawadzimba,* for the appellants
L. Uriri, for the respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court sitting at Harare granting a declaratur in favour of the respondent. The judgment appealed against set aside the nomination of the first appellant as successor to the Archbishop Ernest Paul Mamvura Mwazha, the head of the tenth appellant and, resultantly, proceeded to set aside as null and void any decisions or actions taken by the first appellant as Archbishop of the tenth appellant. It also directed the tenth appellant's Priesthood Council to convene and nominate a successor to the Archbishop.

FACTUAL BACKGROUND

The first to ninth appellants and the respondent are all senior members of the tenth appellant ("the Church"). The tenth appellant is a voluntary association of members of a

church whose main objective is to hold the faith of Jesus Christ and to act in accordance with its doctrines. The Church operates as a universitas under the provisions of its Constitution. It is led by Archbishop Ernest Paul Mamvura Mwazha. The Archbishop is 102 years old and is perceived by some Church members as being afflicted with dementia and for that reason no longer competent to lead the Church.

The supreme governing organs of the Church are established under Article 9 of its Constitution. The office of the Archbishop is provided for under Articles 9.2 and 9.2.1 which articles read as follows:

> "9.2 Office of the Archbishop
>
> 9.2.1 Archbishop Ernest Paul Mamvura Mwazha is the permanent head of the African Apostolic Church (VaApostora veAfrica) and has the final say on all church matters relating to succession.
>
> 9.2.2 In the absence of Archbishop Ernest Paul Mamvura Mwazha by apology, illness or death, a council of Bishops (hereinafter referred as the Priesthood Council), constituted by the biological sons of Archbishop Paul Mwazha, who are bishops, shall preside on his behalf, with the full Delegated Authority, of the Archbishop. Binding decisions made by this Priesthood Council shall only be by a unanimous vote (not Majority Vote) of a full council sitting."

From the foregoing, it is clear that a would-be successor to the office of Archbishop must satisfy either of the two conditions – the blessing or approval of the incumbent Archbishop, or alternatively, should the Archbishop be incapacitated, the unanimous vote of a full Priesthood Council meeting.

It is common cause that on account of his age and infirmity the Archbishop is unable to physically attend to the day to day business of the Church. He has consequently delegated some of his functions to his bishops who are his biological sons. A debate has now

arisen within the Church as to who his successor should be in the event of his demise. The first appellant has taken centre stage in the race to succeed the Archbishop. He relies in this regard on a note handwritten by the Archbishops' aide, one Evangelist Kasema, the contents of which were, according to Kasema, dictated to him by the Archbishop himself. The first appellant contends that this handwritten note is the vehicle through which the Archbishop has appointed him as his successor. He has publicly announced himself, on the basis of that note, as the successor to the Archbishop and has purported to have taken over the reins of the Church. He is fervently supported in that regard by the second to ninth appellants.

Being of the firm belief and conviction that the conduct and actions of the first appellant amount to a usurpation of the powers and position of the Archbishop and that such conduct was in violation of the Church's constitution, specifically Article 9 thereof, the respondent, who is a reverend of the tenth appellant, approached the court *a quo* seeking a declaratur in the following terms:

"IT IS ORDERED THAT:

1. The purported appointment of the 1st respondent as the Archbishop of the African Apostolic Faith (Vaapostora VeAfrica) was unconstitutional therefore null and void.
2. All appointments and or reassignments and actions of the 1st respondent in his purported capacity as Archbishop were unconstitutional and therefore null and void.
3. The respondents be and are hereby ordered to comply with Article 9.2.2 of the Constitution and convene a meeting of Bishops who constitute the Priesthood Council for the purpose of exercising the full delegated authority assigned to them by the Archbishop, in terms of the aforementioned article of the Constitution within seven (7) days of the date of this order.
4. The 1st – 9th respondents are ordered to pay the costs of this application on an attorney and client scale, jointly and severally, the one paying, the other to be absolved."

The first appellant vigorously opposed the granting of the application in the court *a quo*. He did so on two fronts. Firstly, he averred that he was duly appointed by the Archbishop to be his successor. The Archbishop so appointed him through the note written by the personal aide to the Archbishop. The contents of the note had been dictated by the Archbishop himself. He therefore argued that his appointment as successor was proper, valid and in accordance with the provisions of Article 9.2.1 of the Constitution of the Church. Secondly, he argued that the respondent (applicant in the court *a quo),* should have cited the Archbishop, a party that had a direct and substantial interest in the outcome of the matter. He contended that this non-joinder was fatal to the application as the participation of the Archbishop was indispensable to the resolution of the matter before the court *a quo*.

After hearing arguments the court *a quo* found in favour of the respondent and ordered as follows:

> "1. The purported nomination and/or appointment of the first respondent as the Archbishop or successor to the Archbishop of the tenth respondent presently Ernest Paul Mamvura Mwazha is unconstitutional *vis-à-vis* the 10th respondent's constitution and resultantly is null and void.
> 2. Any appointments and reassignments of personnel made by the 1st respondent and other actions which changed the administration of the Church made by the 1st respondent in the purported position of Archbishop are null and void.
> 3. The respondents are each and all of them ordered to comply with the provisions of clause 9.2.2 of the 10th respondent's constitution in regard to the succession dispute bedevilling the 10th respondent. The respondents must comply with this order within seven (7) days of the date of this order.
> 4. The 1st to 9th respondents jointly and severally, the one paying the others to be absolved shall pay costs of this application on a party and party scale."

Although the order of the court *a quo* departs from the exact wording of the relief sought by the applicant in the draft order, it does in substance, grant the relief sought save for costs which it grants on the ordinary scale instead of the higher scale sought by the applicant.

Allegations by the appellants that the court *a quo* granted relief not sought by the respondent are not supported by the facts.

GROUNDS OF APPEAL

Dissatisfied with the decision of the court *a quo* the appellants filed the present appeal on the following grounds:

"1. The court *a quo* erred and misdirected itself in not finding that the non-joinder of the Archbishop was fatal.
2. The court a quo erred and misdirected itself by holding, in disregard of the evidence, that the nomination of the first appellant as successor to the Archbishop was unconstitutional.
3. The court *a quo* erred by ordering putative compliance with clause 9.2.2 of the Constitution of the tenth appellant in the absence of a finding as to the incapacitation or resignation of the Archbishop."

It is the appellants' prayer that this Court allows the appeal with costs and that the order of the court *a quo* be set aside and be substituted with an order dismissing the application with costs.

THE ISSUES

The issues to be determined arising from the grounds of appeal are:

1. Whether the non-joinder of the Archbishop was fatal.

2. Whether the nomination of the first appellant as successor to the Archbishop was unconstitutional.

3. Whether it was competent to order compliance with clause 9.2.2 of the Constitution of the tenth appellant in the absence of a finding as to the incapacitation of the Archbishop.

THE LAW

The first and second grounds of appeal have no merit. Firstly, the appellants have argued that the non-joinder of the Archbishop was fatal to the proceedings. The effect of non-joinder is a well traversed subject in this jurisdiction. The law in this regard was succinctly spelt out by GARWE JA (as he then was) in the case of *Wakatama and Others vs Madamombe* 2011 (1) ZLR at p 18 A-D when he stated thus:

> "Whether the non-joinder of the Minister is fatal need not detain the court and can easily be disposed of by reference to r 87 of the High Court Rules which provides:
>
> '1. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party, and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> 2. At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application-
>
> (a)……
>
> (b) Order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party.'
>
> The above provision is clear and allows of no ambiguity. The non-citation of the Minister is not in the circumstances fatal. Indeed the court restated this position in the recent decision in *Gula Ndebele vs Bhunu NO* SC 29/11."

Similarly *in casu* the non-joinder of the Archbishop was not fatal to the application before the court *a quo*.

The remedy for non-joinder is provided for in r 87 itself. A party who is aggrieved by the non-joinder of another party must proceed in terms of r 87(2) and make the necessary application for the joinder of that other party. It is thus permissible for a court to order the joinder of any party either on its own motion or on the application of any of the

parties before it, or, for that matter, any other party who may have an interest in the outcome of the matter. The appellants, being of the view that the Archbishop ought to have been joined in the proceedings before the court *a quo* chose not to apply for the Archbishop's joinder. They cannot now be heard to cry foul and seek to rely on their own inadvertence as a ground of appeal to this Court. Having chosen not to apply for the Archbishop's joinder the least the appellants could have done was to file a supporting affidavit sworn to by the Archbishop confirming that he had appointed the first appellant as his successor. No such affidavit was filed. The *onus* lay upon the first appellant to prove on a balance of probabilities that he had been so appointed to succeed the Archbishop as head of the Church.

In any event the order sought does not prejudice the Archbishop or any of the parties. On the contrary, what was sought by the respondent (applicant in the court *a quo*) is a declaratur to the effect that the question of succession be dealt with in accordance with the Constitution of the Church. No prejudice against anyone could possibly arise out of such a declaration. On the contrary the first appellant's contention is that he was appointed successor in accordance with that Constitution. By inference therefore the first appellant agrees that the question of succession must proceed in terms of the Constitution. That is precisely the position declared by the court *a quo*.

At any rate what in essence the court *a quo* sought to do was to interpret the provisions of the Church's constitution. In that regard it did not need the assistance of the Archbishop – the document to be interpreted spoke for itself. Thus the first ground of appeal falls by the way side. It must be dismissed.

With regards the second ground of appeal the court *a quo* ruled, correctly in our view, which the handwritten note presented to it in order to prove that the Archbishop had chosen the first appellant as his successor was silent on the issue. The translated version of the contents of the note reads:

> "Date 28 February 2020
>
> Do not change the one who administer the Holy Communion, is the one to keep administering My child Tawanda Mwazha it is because he has experience. I know that he is the one I had assigned this task since long back.
>
> When you are going to buy the Holy Communion, you all go with your leader when you are at Church. The elder Mwazha Alfred Kushamisa is the eldest and one is above him, he is the elder. So he is the one to lead you to buy the Holy Communion at town with all the Board of Trustee.
>
> His elder Ngoni will not lead the church, it is because he was lost a lot, he is polygamous and why he did that, one wife the rule. I was told by God when I was at Howard, Recreation of Africa write to all children at Universities to assist in the work of creating this new Africa. They will assist me Paul Mwazha. I am the one to Recreate Africa. All these other ones are assisting me. They all know it.
>
> I am their leader all of them.
>
> Why they also not use Majon'oro?"

The learned judge *a quo* analysed the text of this note and came to the inevitable conclusion that there was nothing in it which spoke to the nomination of anyone (let alone the first appellant) as the successor to the Archbishop. He correctly observed that a nomination of such magnitude cannot be inferred. It has to be clear and specific both in terms of the identity of the nominee and the position to which he is nominated. In doing so he gave the words in the document their ordinary grammatical meaning. He found no ambiguity and came to the conclusion that he did. The learned Judge *a quo* cannot be faulted in that regard. For that reason, the second ground of appeal stands to be dismissed.

The third ground of appeal attacks para 3 of the order of the court *a quo* which reads as follows:

> "3. The respondents are each and all of them ordered to comply with the provisions of clause 9.2.2 of the tenth respondent's constitution in regard to the succession dispute bedevilling the tenth respondent. The respondents must comply with this order within seven (7) days of the date of this order."

I agree with the appellants that clause 9.2.2 of the constitution can only be invoked in the event that the Archbishop is absent "by apology, illness or death." It is only then that the Council of Bishops (the Priesthood Council), acting in terms of clause 9.2.2, can sit and deliberate on the question of succession. In other words it is the incapacitation of the Archbishop that constitutes the "*conditio sine qua non*" for the invocation of clause 9.2.2 of the constitution.

The learned Judge *a quo* did not make a finding that the Archbishop was incapacitated to lead the Church. In the absence of that finding the order that the Church proceeds to act in terms of clause 9.2.2 has no leg to stand on. I agree with Mr O*Chieng* (for the appellants) when he submits in his heads of argument as follows:

> "The court *a quo* could therefore only ever grant that relief as a result of having made a finding that the Archbishop was too ill to function. To extend that relief without that finding was to proceed improperly in the absence of the jurisdictional facts on which the validity of the ordered proceedings depended."

Without therefore having made a finding as to the incapacity of the Archbishop the learned Judge erred and misdirected himself in granting an order for the invocation of clause 9.2.2. In any event such an order could not have been made as no cogent evidence had been placed before the court *a quo* as to the Archbishop's condition. The parties' views in this regard were divergent. The appellants conceded that the Archbishop was frail on account

of his age but were adamant that he was in full control of his faculties and of sound mind. The respondent on the other hand insisted that the Archbishop suffered dementia to the point of being incapacitated to lead the Church. Every person is presumed normal and of sound mind until the contrary is proved. No credible evidence was placed before the court *a quo* to enable it to make the finding that would trigger action in terms of clause 9.2.2. The third ground of appeal thus has merit.

DISPOSITION

We conclude therefore that the non-citation of the Archbishop was not fatal to the proceedings in the court *a quo*. Further we are not persuaded by the appellant's contention that the court *a quo* erred and misdirected itself in holding, as it did at paragraphs 1 and 2 of its order, that the nomination or appointment of the first appellant as successor to the Archbishop was unconstitutional and therefore null and void. In our view the court *a quo*'s decision in that regard cannot be faulted in light of the provision of article 9.2 of the 10th appellant's constitution.

We however agree with the appellants that para 3 of the order of the court *a quo,* directing the Priesthood Council to convene and choose a successor to the Archbishop, cannot be sustained in the absence of a finding that the Archbishop is incapacitated to lead the church. To that extent therefore the appeal partially succeeds. For that reason this is a case in which each party should bear its own costs.

IT IS ORDERED AS FOLLOWS:

1. The appeal succeeds in part.
2. Paragraphs 1 and 2 of the order of the court *a quo* be and are hereby upheld.
3. Paragraph 3 of the order of the court *a quo* be and is hereby set aside in its entirety
4. Each party shall bear its own costs

MAVANGIRA JA: I agree

UCHENA JA: I agree

Mupindu Legal Practitioners, appellants' legal practitioners.

Mushangwe & Company, respondent's legal practitioners.