THE DIOCESAN TRUSTEES FOR THE DIOCESE OF HARARE — APPLICANT
versus
THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA — RESPONDENT

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE, 23 & 24 July 2009

COURT APPLICATION

G C C Chikumbirike, for the applicant
W W Morris (SC) with. *H Zhou* (SC), for the respondent

HLATSHWAYO J: The two matters: HC 4327/08, which is a court application, and HC 2792/09, which is an urgent chamber application, were consolidated and heard together. Judgment in outline form was handed down on 24 July 2009 for both matters, but as indicated then, a detailed written judgment was to follow. This is it:

In HC 4327/078, *The Diocesan Trustees for The Diocese of Harare* v *The Church of the Province of Central Africa* ("the court application") the applicant seeks the following order:

"It is ordered that:

1. The following persons be and are hereby declared the Diocesan Trustees of the Diocese of Harare:

   (i) Bishop Dr Nolbert Kunonga

   (ii) Mr Beaven Michael Gundu

   (iii) Mr Justin M Nyazika

   (iv) Mr P Majokwere

   (v) Mr Onias Gatawa

   (vi) Mr Alfred Tome

   (vii) Mr Winter Regie Shamuyarira

2. The property of the Diocese of Harare whether movable or immovable owned by the church within the Diocese vests in the Diocesan Trustees mentioned in para 1 above.
3. The respondent be and is hereby ordered to give vacant possession/occupation and control of the assets of the applicant which respondent occupies or possesses and or controls to the Diocesan Board ***within seven days*** of the date of this order failing which the Deputy Sheriff with the assistance of the Zimbabwe Republic Police be and is hereby authorized on the direction of the Board to take occupational possession of any assets of the Diocese and to hand over any assets or possession to the Board. *(highlighted amendment added)*
4. Cost of suit".

In case number HC 2792/09, *The Diocesan Trustees for the Diocess of Harare* v *The Church of the Province of Central Africa*, the applicants seek the following provisional order:

"Terms of the Interim Order

a) That the consecration of a new Bishop by the respondent on 26 July 2009, or any date thereafter be and is hereby stopped ***pending the discharge or confirmation of this order on the return date***." (*highlighted amendment added*)

"Terms of the Final Order Sought

a) That it be declared that Dr Nolbert Kunonga is still the Bishop of the Diocess of Harare;
b) That the respondent is barred from recognizing any Bishop of the Diocese of Harare until there has been compliance with the Constitution of the respondent; and
c) That it pays costs of suit".

There were preliminary points of law that were raised pertaining to both matters: recusal of the presiding judge, jurisdiction of the court, the defence of *lis alibi pendens* and *locus standi* of the applicants.

Recusal Application

No formal written application for recusal of myself as the presiding judge was made in this case despite the requirement for such an application having been drawn to the attention of the applicant or mover of the recusal motion (who, however, I shall continue to refer to as "the respondent" as in the main matters). The necessity for such a formal application is self evident given that certain issues raised informally in the preliminary stages of a recusal request could have fallen away and more pertinent points assumed prominence. The formal application, like pleadings, 'fixes' or joins issues, so that the proceedings do not become a snowballing roller-coaster of complaints and allegations. As matters stand now, the basis for the application can only be gleaned from the letter of the respondent dated 29 June 2009 addressed to the High Court Registrar and the verbal submissions made in court on 23 July 2009, which predictably introduced new issues.

The relevant portion of the letter of 29 June 2009 reads as follows:

> "The Honourable Judge has always taken the view that this matter is capable of resolution and has been encouraging parties to settle the same… In his effort to effect a settlement in the matter the Honourable Judge has made it clear that he is inclined to take the position that since Dr Kunonga's attempt to withdraw the Diocese of Harare in September 2007 was uncanonical and unconstitutional it was to that extent a nullity and that in the circumstances it should be taken that Dr Kunonga has therefore not left the church of the Province of Central Africa and remains the incumbent Bishop for the Diocese of Harare under the Church of the Province of Central Africa.
>
> The Judge has expressed the view that it was not useful to refer to events that then occurred after 21 September 2007.
>
> The Honourable Judge among other things enquired about Dr Kunonga's age in an apparent consideration of the fact that if he were to be reinstated in the Church of the Province of Central Africa he could continue to serve as Bishop and retire in the foreseeable future, the implication being that in the circumstances our client's discomfort with reinstating Dr Kunonga may be short lived.
>
> Indeed in all these discussions the Honourable Judge referred to Dr Kunonga as 'the incumbent Bishop'.
>
> Our understanding of the Judge's position in this regard has been confirmed by the other party in this matter in their urgent application case number HC 2792/09 which has also been referred to HLATSHWAYO J. Reference is made here to para 6 of Dr Kunonga's founding affidavit in that urgent application".

Paragraph 6 of Dr Kunonga's founding affidavit in case number HC 2782/09 reads:

> "6. The issues in the Anglican Church have been the subject matter of much controversy since September 2007. Litigation is underway in various cases and in particular pertinent to the issue at hand is case number HC 4327/08, in which the applicant has instituted a suit (by way of court application) seeking a declarator as appears on a copy of the draft order, which I attach as annexure "B". That issues raised therein are still pending, before his Lordship Mr. Justice HLATSHWAYO, who postponed the matter *sine die*, because it was his Lordship's view that the parties must settle. The parties are to revert to him shortly, at least before the end of the week, to enable dialogue to be pursued in his Lordship's presence, both parties having accepted that his Lordship's perspective that (made in the light of the averments that were made in the application under reference), the only way in which the dispute in the Anglican Church can be resolved is to revert to the *status quo*, as it pertained on 21 September 2007. It is not necessary that I relate to the reasons for such in this application, suffice to ask and beg this honorable court to refer to my affidavit in that matter, which I beg leave be incorporated as part of this application".

The respondent (Church of the Province of Central Africa) itself emphatically countered the above averments in its notice of opposition in a manner which should have put the whole matter of recusal to rest, thus:

> "36 Ad paragraph 6
>
> a) The application HC 4327/08 has not been determined by HLATSHWAYO J. The respondent's position to the proposed settlement will be set out to the judge and all interested parties.
>
> b) HLATSHWAYO J has not made a determination in that matter and it is improper that the deponent herein would refer to the remarks that were made by HLATSHWAYO J off the record in an attempt to settle the matter. HLATSHWAYO J has not ruled that the parties should revert to the *status quo* pertaining on 21 September 2007. If indeed he has ruled so the applicant is requested to provide proof of this at the hearing of this application. The respondent has never agreed to that proposition. The respondent notes that there is now agreement that Dr Kunonga's actions were uncononical and unconstitutional and that the Diocese of Harare and as such its assets never left the respondent."

When next I met the lawyers in chambers I clarified the position by making the following points:

(a) That I had not made any determination in the matter but had merely invited the parties, "as a base and point of departure", to focus on the concession made that the attempted withdrawal of the Harare Diocese from the Province of Central Africa was ineffectual. Subsequent developments could then be taken on board but not as starting points, as there was great divergence of opinion pertaining to them.

(b) That the respondent's reply to the applicant's paragraph 6 sets out the correct position in fact and at law and that, generally, recusal would be expected where the judge has made statements *outside* court expressing prejudice against one of the litigants and rarely where the comments are made in court, unless the utterances are completely outrageous.

(c) That any references that could have been made in "without prejudice" consultations in chambers to an "incumbent Bishop" were not made in a manner determinative of the matter but just to avoid continuously referring to "Dr Nolbert Kunonga" in the same manner that reference was constantly made in those discussions to "incoming Bishop", "substitute" or "caretaker Bishop".

(d) That regarding the age of Dr. Kunonga, I had inquired whether the appointment as bishop was for life and was advised it was subject to a mandatory retirement age of 65 years, whereupon, and quite naturally, I asked how old the "incumbent bishop" was and was told 62 or 63 – quite relevant information which the parties in their negotiations could utilize whichever way they pleased.

(e) That, at any rate, intimations or indications made by a judge in assisting parties to find common ground are not binding on the parties. I also added that not being a member of either of the so-called factions of the Anglican Church, nor a Christian for that matter, but regarding myself as a rationalist or atheist, I viewed their dispute quite dispassionately.

It appeared that both parties were satisfied with the above explanation and that the issue of recusal had been laid to rest. Indeed, the parties proceeded to make arrangements for the continuation of the settlement efforts with the assistance of the same presiding judge. It was therefore surprising that the respondent proceeded to file heads of argument regarding the 'application' for recusal stating:

> "It is regrettable that this application must be persisted in but application HC 2792/07 makes it inevitable".

The settlement efforts had continued for over a month; between 29 June 2009, when the letter requesting recusal was authored, until 20 July 2009 when the parties declared that negotiations had failed and insisted that the formal process, including the recusal application, be resumed. Accordingly, I set down the matter of my recusal for argument in open court on 23 July 2009. Advocate *Zhou* for the applicant in the recusal matter based the 'application' on the letter of 29 June 2009 already quoted extensively above and the heads of argument filed on the subject. He, however, added a new point: that since it is a tradition of this court that a judge who presides over a pre-trial conference does not preside over the trial itself, I should recuse myself from hearing the applications having been involved in the parties' abortive settlement efforts. However, I was not drawn to any particularly sensitive information or documentation or processes which I could have been exposed to during the settlement efforts which could possibly affect my objectivity in dealing with the applications.

Before he could respond, I explained to Mr *Chikumbirke,* the applicant's lawyer in the main matters, that he need not make any submissions at all as the matter of recusal strictly speaking was one between the Bench and the side making the application, unless he intended to make an exceptional contribution akin to a point of order in parliamentary parlance (see *Associated Newspaper of Zimbabwe* (*Pvt*) *Ltd & Anor* v *Diamond Insurance Company* (*Pvt*) *Ltd* 2001(1) ZLR 226 (H) at p 233 E-F) - a position he fully appreciated but wished only to submit that in his view the continuation with the recusal application was not *bona fide* as the issue had been settled in chambers. *See Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 where SMITH J in dismissing an application for his own recusal from that case said:

> "I am satisfied that the application is not *bona fide*. Trinity (the applicant) has not satisfied me that the grounds for this application are not *frivolae causae*. I am also satisfied that I will be able to deal with the matter in an impartial and unbiased manner."

Although, of course, and with respect, the issue of the judge's own subjective belief that he would not be biased is increasingly regarded as irrelevant (*Leopard Rock Hotel Co (Pvt) Ltd & Anor v Wallen Construction (Pvt) Ltd* 19994 (1) ZLR 255 (S) at p.275 A-B), I do associate myself with the notion, however, that the application itself should be *bona fide*. After the explanations and clarifications in chambers which were apparently accepted and after the applicant in its notice of opposition had pointed out the correct position at law pertaining to the misconstrued privileged utterances, there remained very little ground upon which a reasonable apprehension of bias could be based, a mere suspicion of bias not being enough. *See Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd (supra)* and the cases quoted with approval therein especially *R (Donoghue) v County Cork JJ* [1910] 2 IR 271 at 275 where LORD O'BRIEN CJ said:

> "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds – was reasonably generated – but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

Even in its supplementary heads of argument, the applicant in the recusal matter (respondent in the main matters) betrays the lack of any subjective apprehension of bias on its part, let alone the required objective standard, but reveals, probably, the existence of a justifiable objection to the manner of pleadings which could have been cured by an application to strike out the offending paragraph:

> "It must also be stated that the whole of the Application in case HC 2792/09 has been predicated on an opportunistic seizure of words that fell from a learned Judge's lips on an occasion which should have been *sub rosa*. The regrettable result of basing an Application on the pronouncements of a Judge who was doing no more than to suggest an avenue down which a settlement could be explored is that an indelible impression of bias has been perceived on the part of the Respondent which must lead to an application for recusal of the Judge in question." (paragraph 8.)

Regarding my participation in the abortive settlement, and as already pointed out, my attention was not drawn to any particularly sensitive documentation, discussions or processes that could jeopardize my impartiality. The settlement attempt never got beyond the initial stages where parties essentially restated their positions – submissions which were no different from those they would make in presenting their heads of argument or making closing remarks. The exchanges of letters were copied to the court for information only and contained either notification to the judge that negotiations were continuing or had finally failed or that applications would be made to file certain additional documents, which was subsequently done.

The actual negotiations were not conducted by or before the judge, but by the parties themselves, outside the court. Once the principle and need for settlement was understood and accepted by all concerned, the judge remained simply available to the parties should they need the court's assistance or directions. In the same vein, the meeting with the lawyers and their principals in the judge's chambers was arranged with the consent of all concerned with a view to enable the principals to hear directly from the judge concerning what had been identified in chambers as the need and apparent basis for a possible settlement and to react thereto. Accordingly, the parties contributed on the need for good faith in the settlement effort, identities and capacities of the negotiating principals and the option to stay all pending court cases and processes while negotiations continued.

A sample of the correspondence exchanged by the parties' lawyers and copied to the judge's clerk may be of assistance in showing the role envisaged for, and actually played by, the judge:

The respondent's lawyer wrote to his counterpart referring to the lawyers' appearance in chambers on 3 June 2009, thus:

> "The Honourable Judge expressed his view that this matter should perhaps be resolved by the parties and that the respective legal practitioners should take a leading role in this regard."

On 4 June 2009, *Mr Chikumbirike* for the applicants in the main matters wrote to the judge's clerk, copying the other party, thus:

> "Please could you bring to his Lordship's attention that the parties are still discussing the above matter, with a view to settling. We intend to revert to his Lordship before close of business tomorrow. The parties will be holding a conference at 11.30 am tomorrow. Could you ask his Lordship to bear with us whilst we are engaged in this fairly delicate process."

Mr. Chikumbirike addressed another letter to the respondent on 5 June 2009:

> "Your letter of the 5th June 2009…refers. Since we are relating to ecclesiastic matters, let me borrow an analogy from the Biblical texts. I feel betrayed, as much as Jesus Christ was betrayed by the actions of Judas Iscariot. The contents of your letter seem to have scampered, in one stroke, the *bona fide* efforts, which we, as legal practitioners, had started, after the initiation by his Lordship, Mr. Justice Hlatshwayo, to take torch, and lead our respective clients from the impasse, that has bedeviled the diocese of Harare since the actions, by both parties, which we agreed had not been done in accordance with constitutional provisions, which both accept are applicable to them…The position I hold, after reading your letter, is that you still want to insist on the position held by your client, in his affidavit in opposition to the Application and in your heads of argument."

On 8 June 2009, the respondent replied:

> "It is unfortunate that your Mr Chikumbirike feels betrayed. As is apparent from our letter of 5 June 2009 we took time to consider the matter and more importantly to consult with our client and put forward what we believe is a clear and understandable position taken by our client."

On 7 July 2009, the applicant wrote to the respondent:

> "Our meeting of today's date, in his Lordship's Chambers (Hlatshwayo J), refers. From what has transpired so far, it is quite evident that his Lordship wants a permanent resolution of the matter. For that to be achieved, it would appear to be his view, that a judgment of the Court which will result in either of the divergent positions held by the parties being upheld (or dismissed) will not be the ideal solution. The ideal being a judgment by consent. Consequently, he would like this matter settled without the Court having to impose its decision on the parties. From this, it follows, in our view that all parties must relate to the negotiations towards a settlement, with a sense of responsibility and maturity. To do so, it is necessary that once a party has a thought, which it has formulated, (which it thinks might solve the problem at hand), that it communicates that thought to the other (so as to enable the thought to be interrogated). We only have seven (7) days within which to do this before the parties revert to his Lordship."

On 8 July, the respondent replied:

> "Our client is equally indebted to the Honourable Judge's attempt to resolve this matter finally without the need for litigation. It is in that spirit that following our last meeting on the 3rd of July 2009 we have met our client and sought further instruction."

And on 15 July 2009, the respondent further wrote:

> "We refer to our recent attempts to settle this matter and the various correspondence that we have exchanged in that regard.

> You will recall that on Friday the 10th July 2009 we had agreed that we would meet our respective clients on Monday 13 July 2009. That we ourselves would then meet on Tuesday 14 July 2009 and then brief Honourable Justice Hlatshwayo on the position of the discussions and the way forward on Wednesday 15 July 2009. In other words, today. Yesterday we made several attempts to speak to you in vain. We were advised at each turn that you were involved in some consultation. Our attempts to reach you this morning have also not borne any fruit. In light of the time element it is inevitable that we discuss this much urgently and as much as possible report to Honourable Justice Hlatshwayo today."

And finally, on 20 July 2009, the respondent, indicated that the negotiations had failed:

> "We refer to the above matter and to the meeting which had been scheduled at your offices for 2.30pm on Monday 20 July 2009. We waited and eventually left just before 3.00pm. As we waited the writer engaged his counterpart, Mr Chikumbirike over this matter. We seem to be agreed that despite the parties' best wishes we cannot pursue the settlement issue any further. The parties' efforts are underlined by the fact that a lot of time and resources have been dedicated to this process. In the circumstances we look forward to hear from the Honourable Judge about the resolution of the various matters before him."

From the above examples, it is quite clear that as judge I did not participate directly in the abortive settlement efforts, nor was I expected to. That alone should dispose of this particular ground for recusal, and lay the whole issue to rest. However, there still remains the submission made that my role in the settlement effort pertaining to an application may be equated with participation in a pre-trial conference, which, as already noted, constitutes a bar to presiding over the actual trial in terms of a time-honoured tradition of this Court.

My view is that this comparison ignores important differences between application and trial procedures. In application procedures, the judge makes decisions based on affidavits and legal arguments filed of record and presented in court by counsel. Rarely do application proceedings entail the calling and examining of witnesses with the consequent need for the judge to assess the credibility of such witnesses. Therein lies the nub of the distinction, in my view.

This Court's tradition of prohibiting a pre-trial judge from conducting the trial itself, seeks to prevent the mischief of a judge's assessment of evidence in the actual trial being coloured by proceedings at the pre-trial conference stage. That risk does not exist in application proceedings. Moreso where, as in this case, the judge was not directly involved in the settlement efforts and the negotiations collapsed at the very early initial stages.

Finally, this might be as good an opportunity as any to reflect on whether our rules and practices regarding recusal enhance or detract from impartiality as a fundamental value inherent in judicial function. Firstly, regarding our rules, the adoption of the objective test and increasing rejection of the subjective self-assessment goes a long way in fostering public confidence in the administration of justice and, in my view, appears to be well ahead of the *The Bangalore Principles of Judicial Conduct* (which was adopted by the Judicial Group on Strengthening Judicial Integrity and noted by the UN Commission on Human Rights, as revised at the Round Table Meeting of Chief Justices at The Hague, 2002) which appears to embrace both the subjective and the objective approaches. Principle 2.5 thereof provides guidelines as to circumstances in which judges should disqualify themselves from a case, thus:

> 2.5 A judge should disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:
>
> 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> 2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or
>
> 2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:
>
> Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act would lead to serious miscarriage of justice."

The European Court of Human Rights has established the principle that "any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw" (Case of *Indra v. Slovakia*, ECtHR judgement of 1 February 2005, Application 46845/99, para.49) – an approach which is similar to ours.

Secondly, regarding practice, the impression gained from reported cases that the judges appear reluctant to recuse themselves where so requested may be misleading as the reported cases are the contested ones whereas in practice judges routinely recuse themselves *mero motu*, sometimes without even the parties knowing, and oftentimes at the slightest prompting from any of the parties. Thus, the reported cases constitute a tiny fraction of the recusal cases. However, there still does exist a tension which should not be ignored between acceding too readily to requests for recusal, on the one hand, and the duty to sit where one is not disqualified on the other. As was noted in *Associated Newspaper of Zimbabwe* (*Pvt*) *Ltd & Anor* v *Diamond Insurance Company* (*Pvt*) *Ltd (op.cit.)*, the judge's duty to sit where he or she is not disqualified is as compelling as the duty not to sit where disqualified. In this regard, the opinion of Justice Mason in the High Court of Australia judgment (*Re JRL: Ex p CJL* (1986) 161 CLR 342 (HCA) at p.352 bears repeating here:

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

Accordingly, I dismissed with costs the application for my recusal.

Jurisdiction of the Court

Advocate *Morris* raised the issue of lack of jurisdiction on the part of this court to hear the matters before it as a late submission not even mentioned in his heads of argument. He submitted that the majority of the bishops of the Church of the Province of Central Africa who constitute the Episcopal Synod thereof, are not within this court's jurisdiction and therefore this court would not be able to give an effective judgment. This issue need not detain us at all.

It is common cause that the respondent is composed of dioceses some of which are located here in Zimbabwe although others are in countries within the region (Zambia, Botswana, Malawi) and that, through such dioceses or directly, it owns properties in Zimbabwe and other countries and that the issues the subject matter of this litigation relate to ownership of such properties and appointment to and retention of offices in Zimbabwe. I have no doubt at all that this court will be in a position to give full effect to its judgment in both matters. See *Steytler* v *Fitzgerald* 1911 AD 346, *Forbes* v *Clys* 1933 TPD 369.

Further than that the respondents has clearly submitted to the jurisdiction of this court as evidenced by numerous court cases it has participated in relating to these matters and the pleadings it has filed relating to the matters before this court. It has been said that once a defendant demands security of costs or asks for a postponement or pleads to the merits, he will be held to have submitted to the jurisdiction of the court. (See *Irving & Company* v *Dreyer* 1921 CPD 185 and *New York Shipping Co* (*Pty*) *Ltd* v *EMMI Equipment* (*Pty*) *Ltd & Ors* 1968 (1) SA 353 (SWA).

A related contention advanced by Advocate *Morris* is that formal law courts have no business dealing with ecclesiastical matters; that there is no body of law in Zimbabwe, unlike in the United Kingdom, dealing with such matters, and that therefore any aggrieved member of a religious body should look to the internal rules of such a body and not to the formal courts for redress. However, in my view, this contention is only true to a limited extent. It is correct to hold that, as a general rule, voluntary associations, such as churches, should conduct their affairs according to their constitutions and rules of association. The formal courts would not want to interfere at all in such arrangements. However, where, for example, the criminal laws of the country are violated or members are unfairly discriminated against or the very rules of the association are violated, it is inevitable that the formal courts would get involved.

As to the laws that our courts would apply in connection with church disputes, I am indebted to Mr *Chikumbirike*'s survey of the approach taken by our courts in his heads of argument in HC 4327/08. Our courts have consistently stated that there is no separate body of law dealing with church disputes.

> "In resolving church disputes our courts have consistently applied the law of voluntary associations. The majority of disputes involving private associations that culminate in

> litigation involve churches. As there is no homogenous law of voluntary association it seems to me that church property disputes demand special focus. In resolving disputes involving voluntary associations which are churches, the law applicable thereto ought to be fashioned to meet the needs of Zimbabwe churches. Religious associations have features which distinguish them from other associations" per DEVITTIE J in *Independent African Church* v *Maheya* 1998 (1) ZLR 552 (H) at p 556 D-E."

Again in *Independent Church* v *Maheya* 2000 (1) ZLR 39 (H) it was held that where the resolution of a church dispute involves matters of church doctrine and practices, the courts should not become immersed in consideration of the merits of doctrinal matters; they ought instead to apply "neutral principles of law", and further that all questions involving a voluntary association, may be resolved in terms of its constitution, using a common sense interpretation.

Lis Alibi Pendens

The respondent has raised the plea of *lis alibi pendens* in opposition to the hearing of the matters HC 4327/08 (the application) and HC 2792/09 (the urgent chamber application) maintaining that both matters were instituted in order to frustrate the prior action in HC 6544/07. Initially, of course, the plea was directed at the court application, but when the urgent chamber application was filed, the exception was accordingly extended (S*ee*, for example, respondent's notice of opposition in case HC 2792/09 para 38(c) where it is stated: "This urgent application (HC2792/09) together with the matter HC 4327/08 are ill conceived and are a clear attempt to avoid the proper determination of the matter at the trial set for 6 July 2009" and respondent's heads of argument in HC 2792/09 which double as supplementary heads in HC4327/08, para 4: "Alternatively, these matters are *lis alibi pendens* in a trial cause where all genuine disputes of fact can be aired and tested in a proper way.")

I have already set out the claims and orders sought in the two applications at the beginning of this judgment. In the trial matter, HC6544/07, the respondent in the applications and plaintiff in the trial, viz., the Church of the Province of Central Africa, seeks against the applicants, the Diocesan Trustees for the Diocese of Harare, who are listed in their individual capacities as the 1st to the 7th defendants ("the 'trustees'") and various financial institutions (8th-11th defendants) an order interdicting the 'trustees' from in any way holding themselves out as office bearers of the plaintiff and in particular the 1st defendant from holding himself out

as plaintiff's bishop of the diocese of Harare; the 'trustees' from accessing or transacting from plaintiff's bank accounts held by the financial institutions and that the financial institutions are interdicted from taking instructions from the 'trustees'; an interdict against the 'trustees' from working or doing business from any of its immovable properties including cathedrals, churches and chapels and for delivery of all plaintiff's movable assets including specified motor vehicles and for the 'trustees', jointly and severally, to pay the costs of the action.

Summons commencing action were issued on 20 November 2007 but parties only joined issue when plaintiff's replication was filed on 9 May 2008. The court application was filed on 28 August 2008 and the urgent chamber application on 25 June 2009. The court application was set down for hearing on 3 June 2009, but because it appeared that there were prospects of settling the whole matter out of court, the parties started negotiations which eventually collapsed on 20 July, 2009. In the meantime, the trial which had been penciled for the 5th of July 2009, could not commence because the trial judge was taken ill and also because the applications and negotiations had not been disposed of.

The plea in abatement that there are pending proceedings between the same parties (*lis alibi pendens*) is raised by a party that is able to establish the following prerequisites: a) that the litigation is pending; b) the other proceedings are between the same parties or their privies; c) the pending proceedings are based on the same cause of action, and d) the pending proceedings are in respect of the same subject matter. However, even if a party satisfies all the requisites, the court still has discretion to order or refuse a stay of proceedings on the grounds of *lis alibi pendens*, and in the exercise of that discretion it will have regard to the equities and to the balance of convenience in the matter. (*See*: *Mhungu v Mtindi* 1986 (2) ZLR 171 (S), *Baldwing v Baldwin* 1967 RLR 289, *Chizura v Chiweshe* 2003 (2) ZLR 64)

This case, unlike the usual *lis pendens* cases where both matters are instituted by the same party, involves the rare, but not unprecedented, situation where the prior matter, the action, was instituted by one party and the latter matter by another party; and in this case the latter matter consists of two applications. In *Michaelson v Lowenstein* 1905 TS 324, "[t]he court found it unnecessary to decide whether the exception *lis pendens* is or is not confined to actions in which the same person is plaintiff or claimant in both actions, but held that the exception is not an absolute bar and that it is a matter in the discretion of the Court to decide

whether an action brought before it should be stayed pending the decision of another previously brought between the same parties for the same cause and in respect of the same subject matter or whether it is more just and equitable or convenient that it should be allowed to proceed." *Estate Breytenbach v Breytenbach* 1945 TPD 264 at p.268-9.

In our jurisdiction it appears settled that the exception *lis pendens* is available even where the matters in issue are not brought by the same party, and indeed even where the prior or latter matters consist of more than one suit. *See Mhungu v Mtindi (supra)* where in response to an application for summary judgment the respondent said there were other prior proceedings involving virtually the same issues. The court exercised its discretion to determine the dispute before it in the summary judgment application and made reference to its own records in the other proceedings, taking note of their contents, in disposing of the matter. In *Baldwing v Baldwin (supra)* a wife sued for divorce in a foreign jurisdiction and the husband brought his divorce action before the local courts and the wife's plea in abatement of *lis alibi pendens* was rejected on the basis that the balance of convenience and equities was not in her favour.

Mr. Chikumbirike submitted that not all the requirements of *lis pendens* were met in this case and in particular that the parties are not the same, maintaining that Bishop Kunonga is not the applicant:

> "He is only its Chairman. You do not find the status of a party in the deponent that subscribes to that party's affidavit. Moreover, 1st -11th respondents, apart from being parties in Case No. HC6544/07, are not parties in this application. For one to be a party, one needs to be cited, not merely mentioned, in the body of an affidavit. These persons only appear in the body of the affidavit as trustees and not in their individual capacities, as is their citation in Case No. HC 6544/07."

However, in my view, this is only a purely technical change in the designation of the parties while the parties remain substantially the same in all the matters. (*Thorsen v Coopsamy* 1936 NPD 636). The 8th -11th defendants in Case HC6544/07 are financial institutions who are not active in the litigation and have opted to abide the court's decision. The fact that the

financial institutions are not cited in the two applications does not change the fact that the parties in the applications and the action are virtually the same.

Therefore, I am satisfied that all the basic requirements for the plea are present. The critical issue in this matter, however, is how the court should exercise its discretion relative to the plea of *lis pendens*. Where does the balance of convenience and equity lie? Does it lie in stopping the applications and allowing the trial to proceed or can the issues raised in all the matters be fairly, conveniently, equitably and expeditiously disposed of on the basis of the averments and affidavits filed of record in the applications?

In order to answer the above question, it might be useful to use a hypothetical situation which might be regarded as fairly comparable to the factual situation in this case. Suppose a husband has issued summons against his wife to whom he is married in a monogamous relationship seeking an order against her continued use of their marital name, that she should stop holding herself out as his wife, that she should surrender all assets under her control and possession by virtue of the marriage and interdicting banks from accepting her instructions in relation to their joint accounts, arguing that she has left the matrimonial home and eloped with a lover. Suppose again, that after pleading to the merits, the wife files a court application for a declarator that she is still formally married to the husband and is entitled to hold certain assets and transact in the joint accounts by virtue of her extant marriage. And suppose finally, the wife files an urgent application to stop the husband from immediately contracting another marriage and the husband raises the plea of *lis pendens.* Would it be more equitable and convenient to stay the applications and wait for the issues to be resolved at a trial to be held at a future date way after the proposed marriage or would the court be justified in disposing of the issues by hearing the applications?

In my view, if the matters are capable of resolution on the papers, it would appear that it would be beneficial for both parties to have a declaration of their rights made upfront. Then if the finding is that the marriage to the wife no longer exists, the new marriage can be celebrated without the cloud of disputation. If, on the other hand, the court finds that the marriage to the wife is still extant, then the husband would be saved from entering into a bigamous relationship and a long but inconclusive trial would have been avoided. The husband, of course, would still retain the right to proceed against the wife regarding her

indiscretions either by formally suing for divorce or in one way or another reconciling with her.

I have already commented on the unique feature of this case that the plea has been raised as against both the court application and the urgent chamber application, and that both applications and, indeed, all the three matters, are intrinsically linked so that one cannot decide one matter without that decision affecting the other matters. Thus, the urgent chamber application seeks as interim relief an order interdicting the consecration of a new bishop for the diocese of Harare while in the final relief and the application the applicant seeks a declaration that he is still the bishop of Harare and in the action the plaintiff seeks, among other things, an interdict preventing the 1st defendant from holding himself out as the bishop of Harare. The consecration has been scheduled for the 26th July 2009. If the plea is upheld then the rights of the parties relating to the urgent application would not be determined before the consecration - with irreparable harm to the applicants. If, on the other hand, the matters are heard, then the respondent, if successful, would proceed with the consecration without the cloud of disputation, but even if unsuccessful would not lose the right to institute disciplinary proceedings against the applicants for whatever wrongs they are deemed to have committed. The balance of convenience and equity on this ground of urgency and interrelatedness of the issues, in my view, is with the applicants, all other things being equal.

The five days trial which was scheduled for 6 July 2009 has been postponed indefinitely for reasons noted above. The matters in issue are important issues of faith for a large number of people who regard themselves as Anglicans in Zimbabwe, the central African region and indeed the world over. In the case of *Diocese of Harare v Church of the Province of Central Africa & Anor* SC 2/08 the Chief Justice underlined the urgent need to resolve the various disputes between the protagonists in all the matters that have been litigated upon. If the matters can be resolved on the papers, in my view, it would be more expeditious to proceed on the basis of the applications than to wait for a new trial date to be set. I am fortified in this conclusion by the fact that not only is the rescheduling of the trial beset by the unfortunate circumstances noted above, but there is the additional complication that allowance has to be made for some witnesses to come from outside the country, and that there is a point *in limine* to be argued before the commencement of the trial on the challenged *locus standi* of the plaintiff.

The manner in which the *locus standi* of the plaintiff is challenged and responded to in the replication is the mirror vision of the same challenge and response in the two applications. In fact, the issue of *locus standi* of one or the other of the parties lies at the centre of the whole dispute in all the three matters. In the action the standing of the plaintiff is challenged in the following manner:

> "The plaintiff lacks the requisite *locus standi in judicio* to sue in respect of property belonging to, or vested in, the Diocese of Harare. In terms of the Acts of the Diocese of Harare, such property is held in trust on the Diocese of Harare's behalf by the Trustees of the Diocese of Harare and it is these Trustees that are authorized or permitted to institute legal proceedings in respect of the property of the Diocese."

To the above plea, the plaintiff replied that the 1st -7th defendants "having resigned, withdrawn or seceded from plaintiff and its diocese of Harare are not eligible for appointment or election to the positions of Trustees of the Diocese of Harare and have no right to hold, possess, control or use any of the assets in issue in this matter." In other words, the whole subject matter of the application would be rehashed in the trial even if the plea is upheld.

I am also further fortified in my conclusion about the inconvenience of upholding the plea by the fact that the evidence which is sought to be led at the trial consists of information which is already filed of record by way of affidavits and documents in the applications. For example, in plaintiff's synopsis of evidence the plaintiff indicates that in the trial it will lead evidence from five witnesses, namely; Bishop Trevor Mwamba, the Bishop of the Diocese of Botswana, Mr. R Stumbles, the Chancellor of the Diocese of Harare, Bishop Hatendi, Mr. O Kuwana, Mrs. M Ndebele and from Phides Mazhawidza. It goes on to say that Bishop Mwamba will take the court through the church's constitution and will say that a diocese of the Church of the Province of Central Africa is an integral part of the church and none of the dioceses can exist independently from the Province and can only be excluded or removed from the Province through a special procedure and that the defendants did not follow such procedure and should be taken as having left the church and are no longer members of plaintiff.

Mr. Stumbles will corroborate Bishop Mwamba and chronicle events leading to 1st defendant's secession from the plaintiff and tell the court how 1st defendant and his followers subsequently formed their own church known as the Anglican Church for the Province of Zimbabwe for which the 1st defendant is the Archbishop, and that therefore the defendants cannot lay claim to the assets of the plaintiff held through the diocese of Harare. The synopsis concludes by pointing out that the rest of the witnesses "will lead evidence in corroboration of the evidence set above".

Now, the evidence to be adduced from Bishop Mwamba is already part of the record in the two applications by way of the filing of the Constitution and Canons of the Church of the Province of Central Africa which have further been interpreted in the affidavits and commented upon in heads of argument. The plaintiff's apparent star witness, Mr. Robert Stumbles, has already submitted a detailed affidavit on the issues supported by an attachment of a statement of all the Anglican bishops comprising the plaintiff at an Extraordinary Episcopal Synod especially held on the diocese of Harare issue. The other witnesses will corroborate what the two key witnesses would have said. Beyond what is already available on record, very little additional evidence, it seems, would be forthcoming at the trial itself. Now, if the issue can be determined on the basis of the affidavits and documents filed of record in the applications, there appears to be very little reason why such a decision should be postponed until a trial is held which would not put the court in any materially better position to make the decision.

In *Estate Breytenbach v Breytenbach (supra)* p.269 it was said:

> "If the present matter can be decided on affidavit it is certainly just and equitable and convenient that it should be so decided, otherwise respondent, by reason merely of the fact that he has issued summons, will remain for a considerable period in possession of the property to which he may not be entitled and petitioners will be compelled to delay the liquidation of the estate unnecessarily. As in my opinion the matter can be decided on affidavit I am of the opinion that petitioners should be allowed to proceed with their application and the exception of *lis pendens* fails..."

In *Richtersveld Community v Aleskor Ltd & Anor* 2000 (1) SA 337, it was concluded:

> "At the end of the day, considerations of convenience and equity must underpin the exercise of any discretion whether or not to allow the defence of *lis pendens*. The case which is allowed to proceed must not necessarily be the one that was instituted first. The question is whether 'justice will not be done without the double remedy'. In the present case I am satisfied that the plaintiffs had good reason for bringing the second case."

In *Geldenhuys v Kotze* 1964 (2) SA 167 the applicant applied on a notice of motion for the cancellation of a written deed of sale in terms of which he had sold a certain farm to respondent, for an order that the respondent forthwith vacate the farm and costs of the application. Earlier an action had also been instituted in the same court against the respondent for the cancellation of the same agreement with costs and also damages. The respondent, who had already entered appearance to defend the action, raised the defence of *lis pen*dens, as the dispute in both cases arose out of the same cause of action. It was held that the applicant's procedure in bringing the application was not inadmissible, either in relation to the facts or the nature of the application, that the respondent had disclosed no good defence on the papers and that, as the court had a discretion, the application should be allowed for the sake of equity and convenience.

Accordingly, the plea of *lis pendens* must fail, and the factors discussed above and case authorities support this conclusion.

Locus Standi

The applicants' *locus standi* is challenged on the basis that they left the church of the Province of Central Africa, formed a province of their own called the Province of Zimbabwe and were subsequently excommunicated, which allegations they deny. They maintain that they, in their representative, and not individual, capacities attempted to remove (withdraw) the diocese from the Province over a doctrinal dispute, that in response to their request to withdraw the province, the Dean of the Province responded by stating that their attempted withdrawal of the diocese was "uncanonical and unconstitutional," but, however, that their dissociation from the province as individuals was accepted.

The Dean's conclusion, in my view, was a *non sequitur*. The applicants might have expressed their desire to sever ties between the diocese and the province is very strong terms as noted by the respondent but nowhere in their letter do they evince a desire to withdraw as individuals. Nothing done subsequently by the province to correct or ratify this action seems to have been executed properly.

In a letter dated 21 September 2007 addressed to the Archbishop and Primate of the Church of the Province of Central Africa, the Most Reverend Dr. B A Malango, Dr. Nolbert Kunonga in his capacity as Bishop of the diocese of Harare had written concerning the formal withdrawal of the diocese of Harare from the Church of the Province of Central Africa as follows:

> "The above refers, from the Bishop of the Diocese of Harare, Diocesan Synod, Standing Committee, Diocesan Trustees and the whole body of the Church in the Diocese…
>
> Consistent, therefore, with our 61st Session Diocesan Synod on the 4th of August 2007, in accordance with the Scriptures and the will of God, we were mandated by our Synod to dissociate and sever ties with any individual, group of people, organization, institution, diocese, province which sympathizes or compromises with homosexuality. We, the Diocese of Harare, would like it to be put on record that with effect from 4th August 2007 and as confirmed by the Provincial Synod, we are withdrawing from the Church of the Province of Central Africa.."

On 16 October 2007 the Dean of the Province of Central Africa and Bishop of Northern Zambia, the Right Reverend Albert Chama responded in a letter headed "Acceptance of the Withdrawal of the Bishop of Harare from the Church of the Province of Central Africa":

> "I am in receipt of your letter dated 21 September 2007, addressed to the former Archbishop of the Province, the Most Reverend Dr. BA Malango advising him of the formal withdrawal of the Diocese of Harare from the Church of the Province of Central Africa.
>
> I would first like to advise you that it is constitutionally and canonically impossible to withdraw the Diocese of Harare from the Church of the Province of Central Africa

because a diocese in accordance with the Constitution of the Church of the Province of Central Africa forms an integral part of the Province. Any act that purports to withdraw a diocese is unconstitutional and uncanonical as this action is tantamount to altering the very structure and essence of the Province. The Constitution and Canons of the Church of the Province of Central Africa specifically stipulate that any alteration of the Province would require the approval of the Provincial Synod after the Synod of each Diocese in the Province has also approved and confirmed by the Provincial Synod by a two-thirds majority of those present and has subsequently been endorsed by the Archbishop of Canterbury as not affecting the terms of Communion between the Church of the this Province, the Church of England and the rest of the Anglican Communion.

Consequently, the heading of your letter stating the "Formal Withdrawal of the Diocese of Harare from the Province of Central Africa" is unacceptable and misleading. We, however, as the Dean of the Province of Central Africa accept and acknowledge that you and some of your supporters have by notice of your letter severed relationship with the Province of Central Africa.

Therefore I declare that the See of Harare is with immediate effect vacant and in accordance with Canon 14(1) I shall be appointing a Vicar General to hold office whilst the necessary steps are taken for the holding of an elective assembly to elect the next Bishop of the Diocese of Harare.

Given your leaving the Church of the Province of Central Africa we direct that all properties and assets belonging to the Province should be surrendered immediately to the Vicar General whose name we shall give you in a few days time."

Certain developments and measures then followed, including the excommunication of the bishop of Harare some of the clergy and laity, the purported formation of a new province and the ratification of the actions of the dean of the province.

Now, if what the applicants did constituted an offence in terms of the canons of the church, then they should have been charged, tried and punished accordingly. Excommunication is a form of punishment following a trial. It has not been shown that any such trial took place.

The formation of a new province may be an act in violation of the canons of the church and the church would be within its rights to punish such act in terms of its own procedures. The courts will not interfere, for example, as regards whether or not certain acts are punishable by excommunication or not as these are issues within the ecclesiastical competency of the respondent. However, no such trials in terms of canons of the church have taken place. All that the province has done is to make declarations in direct conflict with specific provisions of the canons.

Canon 24(1) provides that any bishop, priest or deacon of the province "may be accused of and tried in Church Court" for a variety of offences which include schism and willful disobedience of church laws and authorities. There are strict procedures relating to the prosecution of a bishop or a priest in terms of Canon 24(2):

> "No original proceedings shall be instituted in any Church Court:
>
> a) …
>
> b) against a Bishop of the Province unless it be preferred by at least three priests licenced in the Province or by two Bishops of the Province, or, if it relates to matters other than faith and doctrine, by at least three Priests and three Churchwardens or Councillors all of the dioceses of the accused Bishop;
>
> c) against a priest or deacon, unless leave shall have been given in writing by the Bishop:
>
> d) ..."

The canons also provide for the need for the issuance of notices to accused persons, the right of appeal in respect of any conviction, the suspension of decisions of the court pending appeal, etc. (Canon 26). There is nothing in the pleadings showing that any of the above things were done and actual trials held on the basis of which the sentence of excommunication was eventually pronounced. Nothing.

I have been referred to the opinion of my brother, HUNGWE J, in HC 3208/07 regarding *locus standi* of the applicants but, with respect, it seems to me that the averments considered in that judgment are different from what has been submitted before me. At any rate, since this judgment is subject to a pending appeal, it would be remiss on my part to comment any further on it.

By the same token, I need not dwell on the contention of issue estoppel, which the responds contends prohibits applicant from disputing that it has no *locus standi* as decided by HUNGWE J, since this decision is currently the subject of an appeal.

I therefore find that the applicants do have *locus standi in judicio* to bring these applications.

RE: COURT APPLICATION CASE HC 4327/08

The issue whether there are disputes of fact which cannot be resolved on the papers was not persisted in by the respondent in its heads of argument, and must be regarded as having been abandoned. At any rate, the court may take a robust approach and resolve the apparent disputes. *See Sofiantini v Mould* 1956 (4) SA 150 at 154 E, where it was stated:

> "If by a mere denial in general terms, a respondent defeats or delays an applicant who comes to court on motion, the motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common sense approach to a dispute in motion proceedings as otherwise the effective functioning of the court can be humstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so."

The analysis pertaining to the issue of *locus standi* has already led to the conclusion that the applicants do have *locus standi* to bring this application, that they have not been lawfully removed from their positions as trustees and that until they are so removed they continue to hold those positions and the property of the church in trust.

Accordingly, the order in terms of the draft as amended is granted.

RE: URGENT CHAMBER APPLICATION-HC 2792/09

Once more the issue of *locus standi* has been addressed, and decided. As far as the merits of the interim order sought are concerned, the applicants need only establish a *prima facie* case. That the applicant will suffer irretrievable harm if the proposed consecration of a new bishop for the dioceses of Harare proceeds before he is legally removed from the same position admits of no dispute. That the matter is urgent and the remedy sought is the only effective remedy available also admits of no dispute. The only real point of contention is what is pointed out in the respondent's answering affidavit to the effect that the consecration of the new bishop has nothing to do with the position of the bishop of the diocese of Harare. This new and startling contention is stated in respondent's Harare diocese registrar, Michael T Chingore's affidavit dated 23rd July 2009 as follows:

> "The third point which should be made is that the Bishop being consecrated on 27th July is a Bishop of the Anglican Communion worldwide, and not of Harare or the Church of the Province of Central Africa. His appointment transcends provincial boundaries. The fact that the consecration is taking place in Zimbabwe does not change the above position. The consecration could have taken place in any part of the world. The position of Bishop of the Diocese of Harare is an administrative position which may be given to him after his consecration."

However, this contention is contradicted by all the previous pleadings and the affidavit of a senior member of the church Mr Robert Atherstone Stumbles, the Chancellor of the Anglican Diocess of Harare and Deputy Chancellor of the Church of the Province of Central Africa wherein he states that:

> "The appointment of Dr Chad Gandiya has been canonically confirmed and the respondent recognizes him as the incoming bishop of the diocese".

It is quite clear therefore that the appointment of the new bishop is to replace the existing one. Now, if Bishop Kunonga is to be replaced, he must first be charged, tried, convicted and sentenced or forced to resign in terms of the canons and constitution of the respondent. He cannot simply be replaced, wished away or deemed to have resigned without due process in terms of the statutes declaring or ratifying such removal.

To use a homely example, a spouse in a monogamous relationship does not get rid of a partner by marrying another spouse; that is bigamy, a crime. Such an estranged spouse must first sue the errant spouse for divorce before entering into another relationship. It does not matter what the seriousness of the indiscretions of the errant spouse may be. I suppose even in the traditional polygamous relationships certain procedures like giving *gupuro* in the Shona culture or the thrice incantation of "I divorce you" in the Islamic religion must be followed.

Accordingly, the interim relief as amended is granted.

Chikumbirike & Associates, applicant's legal practitioners
Gill Godlonton & Gerrans, respondents' legal practitioners