1. CHURCH OF THE PROVINCE OF CENTAL AFRICA
and
DIOCESAN TRUSTEES FOR THE DIOCESE OF CENTRAL AFRICA
and
DIOCESAN TRUSTEES FOR THE DIOCESE OF MASVINGO
versus
DR. NOLBERT KUNONGA
and
BISHOP MUNYANYI
and
THE DEPUTY SHERIFF OF ZIMBABWE
and
COMMISSIONER GENERAL OF THE ZIMBABWE REPUBLIC POLICE.

2. SCHOOL DEVELOPMENT COMMITTEE DARAMOMBE HIGH SCHOOL
and
DEPUTY SHERIFF CHIVHU
and
DIOCESE TRUSTEES FOR THE PROVINCE OF HARARE
and
THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA.

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 30 August 2011, 15 September 2011 & 12 October 2011

BHUNU J: The above two cases were consolidated by consent of the parties because they are interwoven and related such that the relief sought is substantially the same. The parties are engaged in protracted litigation over ownership, detention, custody and control of church properties located in three dioceses. They have taken each other to Court on numerous occasions without finality to their dispute.

They have been to the Supreme Court and now the matter is pending in the Constitutional Court and yet the feud over the disputed properties still relentlessly persists in this Court with monotonous regularity.

On 24 July 2009 HLATSHWAYO J under case Number HC 4327 / 08 between *The Diocesan Trustees for The Diocese of Harare And the Church Province of Central Africa* made the following order:

"IT IS ORDERED THAT:

1. That the following persons be and are hereby declared the Diocesan Trustees of the Diocese of Harare who constitute the Diocesan board:

    1. Bishop Dr. Nolbert Kunonga
    2. Mr. Beaven Michael Gundu
    3. Mr. Justin M. Nyazika.
    4. Mr. P. Manjokwere
    5. Mr. Onias Gatawa
    6. Mr. Alfred Tome
    7. Mr. Winter Reggie Shamuyarira.

2. That 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 paragraph 1 above

3. That the Respondent be and is hereby ordered to give vacant possession / occupation and / control of any assets of the Applicant which Respondent occupies or possesses and or control(s) to the Diocesan Board within 7 (seven) days of 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 occupation, possession of any assets of the Diocese and to hand over any assets or possession to the Board.

4. Costs of suit."

Dissatisfied with the above order the applicants took the matter to the Supreme Court and on 7 July 2011 the Learned Chief Justice issued the following order under case number SC180 /11:

"IT IS ORDERED THAT:

1. The Church's failure to provide security for costs in terms of Rule 46 of the Supreme Court Rules in respect of the first order of ***HLATSHWAYO J*** of 24 July 2009 be and is hereby reinstated.

2. It is ordered that the appeal against the first order of ***HLATSHWAYO J*** of 24 July 2009 be and is hereby suspended

3. The noting of the appeal should not suspend the operation of the order referred to in para 2 above.

4. It is ordered that costs be costs in the cause."

Armed with the above two orders the first and second respondents backed up by the third respondent in his capacity as Deputy Sheriff of Zimbabwe instituted procedures to evict the school's employees, officers and parishioners from certain church properties situate in the Dioceses of Central Zimbabwe and Masvingo.

The cardinal issue for determination is whether HLATSHWAYO J's order extends to church properties in other dioceses.

The Applicant in the first application has now made an urgent chamber application for a provisional order seeking to interdict the respondents from in any way interfering with the applicant, its parishioners' use and enjoyment of the church properties in the dioceses of Masvingo and Central Zimbabwe without due process.

Likewise the applicants in the second application made a similar application seeking similar relief in respect of its staff members at Daramombe School.

The first and second respondents opposed both applications on the basis that they were merely lawfully enforcing HLATSHWAYO J*'s* order through the third respondent as they were legally entitled to do.

During the course of the hearing the applicant in the first case objected to the respondents being heard on the basis that they were approaching the court with dirty hands in so far as they went on to *execute* HLATSHWAYO J's order after the applicants had already lodged and served them with this application.

The respondents countered that the applicants had approached the Court with even dirtier hands in so far as they have defied both the Supreme Court and this Court by refusing to obey HLATSHWAYO J's order.

The papers establish quite clearly beyond question that the respondents are guilty of undermining the authority of this Court by continuing with evictions in circumstances where they were aware of the fact that an application had been made to Court to stay the evictions.

It is also self evident and a matter of common cause that the first applicant in the main case has consistently defied and continues to defy HLATSHWAYO J's order as well as the Supreme Court's order directing that the order be executed pending appeal.
Both the first applicant in the main case and respondents are therefore guilty of undermining the authority of the Courts. Consequently they have both approached the Court with dirty hands. It is trite that the Court May decline audience to a party who approaches it with dirty hands until such party has cleansed itself. One need not sight any authority for such a well established rule of practice, but if any authority be required one need look no further than *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity and Ors* S-20-2003 where the Supreme Court made the following pertinent remarks:.

> "This Court is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this Court with clean hands on the same papers"

Thus the Court is at liberty and within its rights to decline to hear either party until they have purged their defiance of the Courts' authority. Both litigants cannot seek

relief in the same Courts whose authority they continue to hold in disdain. The rule of law requires that binding Court orders be obeyed regardless of whether or not one agrees with such orders.

The rule is that obedience first and complaints later. Where a litigant is in deliberate contempt of court such litigant closes the door for his complaints to be heard thereby depriving himself of a remedy through the courts of law. The Court can only open its doors upon full recognition of its authority and total unconditional compliance with its orders.

In this case while it is questionable whether the order of HLATSHWAYO J extends to properties situate in other dioceses there is no doubt that it covers the Diocese of Harare. That being the case there is absolutely no reason why the applicant has failed to comply with the learned judge's order within the diocese of Harare.

Case Number Two

I now turn to consider the second application made by the School Development Committee Daramombe High School In the diocese of Masvingo against the Dioceses Trustees for the Diocese of Harare and The Church of The Province of Central Africa.

The applicant's complaint is that the Deputy Sheriff has already begun to evict some of its staff members at Daramombe School at the instance of the 2nd respondent the Dioceses Trustees for the Diocese of Harare. The 2nd respondent's conduct in this respect amounts to unlawful summary dismissal of the concerned members who claim to be mere neutral employees unaligned to any of the feuding parties. They are willing to submit to the authority, of anyone who is declared to have lawful authority and control over them by the courts.

The applicant therefore seeks an order restoring the status *quo ante* until the warring parties' dispute is resolved by the courts.

Analysis of the Problem in Both Cases.

HLATSHWAYO J's order restoring the *status quo ante* was premised on the fact that the first respondent Dr. Nolbert Kunonga and his compatriots had wrongfully and unlawfully been excommunicated or penalized without being heard and in breach of the church's own cannons and constitution. If he had committed any act of misconduct the Church had the right to discipline him in terms of its domestic remedies. In the words of the learned judge at page 21 of his cyclostyled judgment:

> "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 following a trial. It has not been shown that any such trial took place.
>
> The formation of a new province may be 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 competence of the respondent. However, no such trial in terms of the canons of the church have taken place. All that the church has done is to make declarations in direct conflict with specific provisions of the canons." (*My emphasis).*

A perusal of the church's Constitution and Canons shows that it has an elaborate ecclesiastical court system presided over by qualified judges more or less equivalent to circular judges. Canons 27 (8) and (9) provide for their qualification as follows:

"8. (1). The lay judge of a court shall be fully thirty years of age, a communicant of the Church and of good life.

(2). The lay judge of a provincial court shall be an advocate or a barrister or a legal practitioner, according to the terminology used in the country of his residence, of not less than ten years' standing , entitled to practise in the Superior Courts of that country.

(3) The Lay judge of a diocesan Court shall be an advocate or a barrister, according to the terminology used in the diocese, of not less than seven years standing, entitled to practise in the Superior Courts of the diocese for which he is appointed.

9. Every judge, before acting in his office, shall in the presence of the archbishop {in the case of a Provincial Court) or of the Bishop (in the case of the Diocesan Court) promise that he will do justice."

Canons 24 and 25 as correctly pointed out by HLATSHWAYO J confer jurisdiction on the Church Court to try and punish bishops and other members of the clergy for prescribed offences. They provide as follows:

"24 (1) Any Bishop, Priest or Deacon of the Province may be accused of and tried in Church Court for the following offences:-

25 (1) Any Bishop, Priest or Deacon of the Province who is found guilty of an offence may be sentenced as herein provided:-"

What emerges quite clearly is that the applicant in the main case, that is to say, the Church of the Province of Central Africa has the power and jurisdiction to rein in and discipline the first respondent Dr. Nolbert Kunonga and his compatriots in terms of HLATSHWAYO J's judgment if whatever they are alleged to have done or are doing constitute a transgression of the Church's constitution and canons.

In my view the judgment of HLATSHWAYO J had the effect of empowering and fortifying the parties in this protracted wrangle to resolve their internal disputes privately and confidentially by resorting to domestic remedies and administrative measures. Thus the learned judge's judgment firmly placed the Church in the driving seat and in control of its own affairs.

Indeed our courts encourage the exhaustion of domestic remedies before approaching the ordinary courts. There is a glut of case law on this point but I have decided to zero in on the sentiments of the Supreme Court in the case of *Chikonye and Anor. V Peter House 19199 (2) ZLR 329 (S)* where the Court observed that:

> "In the *Girjac* Case., it was said that a litigant should exhaust domestic remedies unless there are good reasons for approaching the Court. Also in this Court it has been said that, "domestic tribunals" should not be by – passed without good reason."

While I am unable to speak for the Supreme Court, I nevertheless think that this is the major reason why the Supreme Court took the unusual stance of authorizing the execution of HLATSHWAYO J's judgment despite the pending appeal against the judgment. This is for the logical reason that the execution of his Lordship's judgment will not leave the parties without a remedy as they can always resort to domestic remedies.

What boggles the mind is why the Church prefers circular Courts to its own courts only to defy the circular Court judgments when they turn out to be adverse to its interests. Submission to the circular Courts' jurisdiction however, entails the corollary obligation of obeying and abiding with the courts' judgment and orders.

As is often said, "When two elephants fight it is the grass that suffers." The School Development Committee is caught in the crossfire because of the main contesting parties' intransigence in refusing to recognize the authority of the Courts. Had all the contesting parties in the main case recognized the authority of the Courts no evictions and constructive dismissals of employees at Daramombe School would have taken place without due process.

The irony of this case is that Dr. Kunonga and his compatriots won their case before HLATSHWAYO J on the technical basis that they had been convicted and condemned without trial and without being heard. Having won their case on that basis, they then proceeded to use that same judgment to evict and dismiss employees without giving them an opportunity to be heard in complete violation of labour and procedural laws. The school Development Committee members as lawful occupiers of school premises in terms of their respective contracts of employment were entitled to be heard before eviction.

Section 16 0f the Labour Act [*Cap. 28:01*] provides for the rights of employees upon transfer of an undertaking. It provides that:

> "**16 Rights of employees on transfer of undertaking**
>
> (1) Subject to this section, whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated,

> be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted.
>
> (2) …
>
> (3) It shall be an unfair labour practice to violate or evade or to attempt to violate or evade in any way the provisions of this section."

I merely quote the above section in passing to demonstrate that the employees in this case have legal rights which cannot be trampled upon without due process of the law. The specific determination of their rights in this respect however lies in the province of the Labour Court. See *Tuso v City of Harare 2004 (1) ZLR 1.*

It is however a fundamental rule of our law that no one shall be victimized or dispossessed without due process of law and without being head hence the ruling of HLATSHWAYO J in his judgment under case number HH 166 / 09. The *audi alteram patem* rule, that is to say, the need to hear the other side before making any determination affecting the rights of another is the bedrock upon which our legal system is founded.

In my view by restoring the *status quo ante* the learned judge was not clothing Dr, Kunonga and his compatriots with more powers than those they had enjoyed prior to their unlawful excommunication. Entitlement to vacant possession of properties does not however, without more entail wholesale eviction of lawful occupants without recourse to law. It follows therefore that by granting vacant possession to Dr. Kunonga and others the learned judge did not mean that they could evict and dismiss employees without recourse to due process of the law. Though not expressly stated it was implicit in the learned judge's order that the beneficiaries of his order could only get vacant possession after due process of the law for to do otherwise would amount to authorizing an illegality.

The evictions of members of the School Development Committee from premises they previously occupied in terms of their respective contracts of employment were therefore, illegal and not permissible at law though carried out through the auspices of the Deputy Sheriff. The evictions were therefore *ultra vires* the Court's order. Those

evictions accordingly amounted to spoliation as the complainants were in peaceful and undisturbed possession of their dwellings prior to the illegal evictions.

Where one has been unlawfully dispossessed the courts will restore possession pending the determination of the parties' competing rights and obligations. The position at law was succinctly articulated in the well known case of *Nino Bonino 1906 TS 120 wherein* INNES CJ *remarked that:*

> "It is a fundamental principle that no man is allowed to take the law into his own hands, nobody is allowed to dispossess another forcibly or wrongfully and against his own consent of the possession of property whether movable or immovable. If he does so the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority on a principle so clear."

It is therefore necessary to restore the status quo ante in respect of the Daramombe School Development Committee's case until such time the employees are removed by due process of the law.

In the result it is accordingly ordered:

1. That the first applicant in the main case HC 8174 / 11 be and is hereby denied audience in this Court until such time it has complied with HLATSHWAYO J's judgment in case number *HC 4327 / 08.*

2. That the first and second respondents in case HC 8174 / 11 be and are hereby denied audience in this Court until such time they have reversed all the executions done after 25 August 2011 after service of notice of set down of this application on their legal practitioners *Chikumbirike & Associates*.

3. That the applicant's application for a provisional order under case HC 8777 / 11 be and is hereby granted in the following terms:

TERMS OF FINAL ORDER SOUGHT

(a). The order by the Supreme Court Order in case no. SC 180 / 09 read with reference to the High Court case no. HC 4327 / 08 does not give the respondent a right to dismiss the applicant's members from their employ.

(b). The order by the Supreme Court in case no. SC 180 / 08 as read with High Court case no. 4327 / 08 does not cover and include Daramombe School Development High School, Primary School and clinic as same falls under the Masvingo Diocese.

(c). The second respondent to pay costs at an attorney client scale.

INTERIM RELIEF GRANTED

(a). The first and second respondents be and are hereby ordered to stay eviction of all staff at Daramombe High School and Primary School pending determination of the final order.

(b). The first and second respondents shall not interfere with the respective staff operations at Daramombe High School, Primary School and Clinic.

(c). Any of the staff members listed in paragraph 14 of the applicant's founding affidavit who may have been removed to be reinstated in their previous occupation and workstations pending determination of the final order.

SERVICE OF THE ORDER

The order shall be served on the respondents by the applicant's legal practitioners.

Case HC 8174 / 11:

Gill Godlonton & Gerrans, the 1st and 2nd Applicants' Legal Practitioners.
Chikumbirike and Associates, the 1st and 2nd respondents' Legal Practitioners.

Case HC 8777 / 11

Munangati & Associates, the Applicant's Legal Practitioners.
Chikumbirike and Associates, the 1st and 2nd respondents' `Legal Practitioners