

RIMUKA ISLAMIC SOCIETY
versus
ENOCK MWASHUHWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 28, 30 & 31 July 2014 & 11 February 2015

Civil Trial

I.A. Ahmed for the plaintiff
T. Matiyashe for the defendant

ZHOU J: On 23 August 2012 the plaintiff, a religious organisation with the capacity to sue and be sued in its own name, instituted an action for the ejection of the defendant and all persons claiming occupation through him from a house located at Stand 7314 Rimuka Township, Kadoma. The property is owned by the plaintiff in terms of a deed of transfer No. 194/2012. The defendant contests his eviction from the premises on the ground that he is entitled to occupy the house thereat by reason of the fact that he is the pastor, known in his religion as the Sheikh, of the plaintiff. According to his plea he was authorised to occupy the main dwelling house on the property following the death of one Abdullah who was the pastor of the plaintiff. The authority to occupy the house was given to him by the elders of the plaintiff. The defendant admitted to being given three months' notice to vacate the premises but averred that there was no resolution made on behalf of the plaintiff for him to vacate.

The parties led evidence from one witness each. The plaintiff's witness, Jabilu Phiri, joined the plaintiff in 1996. He testified that he is the chairman of the plaintiff elected in terms of the latter's constitution. He produced a copy of the constitution, Exh. 2. Although the constitution refers to "Rimuka Muslim Society" no issue was made of that fact by both parties. The constitution is signed on the last page on 12 June 2011 by Jabilu Phiri as chairman, Magidu Janatu as secretary, and the defendant as a member, presumably of the executive committee referred to in section 6 of the constitution. On the last page bearing the signatures the document states the following: "This constitution was formally accepted by a special meeting." The witness produced minutes of the meeting at which the constitution was

adopted on 12 June 2011. At the same meeting the witness was elected to be the Chairman of the plaintiff. The defendant gave the opening prayer and closing speech at that meeting. According to the witness defendant's other name, which is recorded in the minutes, is Sheik Ahmad. The witness testified that the dwelling house in dispute was previously occupied by one Abdullah who was the pastor of the plaintiff. Following the death of Abdullah the plaintiff gave notice to his widow to vacate the house. When she failed to vacate the property the plaintiff instituted proceedings for her eviction. The proceedings were instituted in terms of the constitution of the plaintiff, Exh. 2. The decision to evict the widow of Abdullah was taken at a meeting which was attended by members, including the defendant. He stated that the defendant took occupation of the house in August 2011 without the authority of the plaintiff's committee. The witness stated that when the defendant failed to vacate the premises after being requested the members convened a meeting on 2 October 2011. A petition was prepared and signed by the members of the plaintiff. A copy of the petition was produced in evidence as Exh. 4. The meeting resolved that the defendant should vacate the premises. Among the demands listed in the petition was that the defendant and his family must vacate the house in dispute. On 30 April 2012 the plaintiff through its legal practitioners gave the defendant three months' notice to vacate the house. The witness stated that there is no organ bearing the name "Elders" in the constitution of the plaintiff. He stated that when the defendant failed to vacate the premises after being given three months' notice the executive committee of the plaintiff passed a resolution for eviction proceedings to be instituted. A copy of the resolution was exhibited in evidence (Exh. 6).

The defendant gave evidence himself. He became a member of the plaintiff in 1983. He became the Vice Pastor of the plaintiff, deputising the late Ali Abdullah who died in 2011. He was appointed to be the Pastor by the elders of the plaintiff after a period of forty days had passed following the death of Abdullah. The same elders gave him the authority to occupy the house in dispute. He stated that prior to the adoption of the Constitution of the plaintiff, Exh. 2, there was in existence another constitution. He produced a copy of that constitution which is headed: "Constitution of Rimuka Islamic Centre". He stated that the constitution produced by the plaintiff's witness came about through the efforts of Jabilu Phiri who had advised the congregants that he had found a person who was prepared to donate to the plaintiff in order to uplift the welfare of the children. He signed the constitution because he and the other members of the plaintiff were happy with it. He confirmed that Jabilu Phiri was elected to be the chairman of the plaintiff by the members. According to the defendant

the understanding was that that constitution had to do with the management of the plaintiff's school. He stated that problems started when Jabilu Phiri started to claim to be the leader of the plaintiff. Because of those problems the plaintiff's members held a meeting on 25 September 2011 at which they repealed the constitution, Exh. 2. The members resolved to revert to the old constitution. The defendant questioned the validity of a resolution (Exh. 6) produced by the plaintiff's witness authorising proceedings for his ejection from the plaintiff's house.

The dispute between the parties turns on whether the Constitution of the plaintiff, Exh. 2, was repealed and replaced with Exh. 7. There are mutually destructive versions in that one party asserts that Exh. 2 is still operational while the other party states that it was repealed. The onus is on the plaintiff to prove its case against the defendant on a balance of probabilities. The position of the law is that where there are two versions which are mutually destructive, before the onus is discharged, the court must be satisfied upon sufficient grounds that the version advanced by the party upon which the onus rests is true and the other is false. *National Employers Mutual General Insurance Association v Ganyu* 1931 AD 187 at 199; cited with approval in *Matiza v Pswarayi* 1999 (1) ZLR 140(S) at 143B. This court must weigh the probabilities arising from the evidence tendered and all the circumstances of the case in order to determine which of the two versions regarding the applicable constitution is more probable. See *Selamolele v Makhado* 1988 (2) SA 372(V) at 375D-E.

The defendant admitted that he accepted Exh. 2. He appended his signature on it. He accepted, too, that Jabilu Phiri was elected chairman of the plaintiff in terms of that constitution. While *Mr Matiyashe* for the defendant suggested to Jabilu Phiri that there was another constitution in existence a copy of it was not exhibited to that witness when he was cross-examined. Indeed, all the documents which the defendant produced in evidence were not shown to the plaintiff's witness. He therefore did not have an opportunity to comment on them. That omission severely weakens the defendant's case in view of the fact that the plaintiff's witness disputed the existence of any constitution other than Exh. 2 when he gave his evidence. It is improper for a legal practitioner who is in possession of a document which he intends to produce in evidence not to show that document to a witness for the other side to comment thereon when that witness disputes the existence or authenticity of the document. In such a situation the Court is entitled to infer that the failure to show the documents to the witness was deliberate and calculated to avoid the discrediting of the document by that witness. Exh. 7 does not contain an effective date. It is not signed by any of the members or

officials of the plaintiff. There is nothing to authenticate it. There is a list of names attached to Exh. 7. Nothing is said either in the constitution or in the document containing the names as to the relevance of those names to the constitution. There are no signatures of the persons whose names are listed. In fact, the names listed appear to have been written by one person. In the absence of signatures it is difficult for the court to accept that the persons whose names are listed attended the meeting and made the resolutions attributed to them.

Also, the meeting of 25 September 2011 was scheduled to commence at 1000 hours, according to the defendant. Exh. 8 shows that the meeting started an hour earlier at 0900 hours. No sound explanation is given as to why such a meeting to discuss the issue of the constitution of the plaintiff would start earlier than the time notified to the members. The attendance register relating to that meeting does not contain the signatures of the persons listed as having attended the meeting. The names also appear to have been written by one person. The minutes make reference to a vote in which the defendant whose other name is Sheikh Ahmad won 130 votes against one Sheik Yard's 0. The minutes then record that: "The result of the vote was that Sheikh Ahmad was the winner." Nothing is said about what was being voted for or what it is that the defendant became the winner of. Immediately after that it is recorded that: "People resolved that: (1) Old constitution was to be in place." Nothing is said about the repeal of the constitution, Exh. 2. The minutes do not state who chaired the meeting. There is no signature on the portion for the chairman on the last page of the minutes. As pointed out earlier, both the minutes (Exh. 8) and the so-called old constitution were not shown to the plaintiff's witness in cross-examination. The version of Jabilu Phiri that there was no such "old constitution" is more probable than that of the defendant. Indeed, if that constitution had been in existence it would have been referred to in Exh. 2 when the latter constitution was adopted. The probabilities point to the conclusion that Exh. 7 and Exh. 8 were prepared for the purposes of the instant proceedings.

A letter addressed to the Officer in Charge, Zimbabwe Republic Police, Rimuka, by the defendant's legal practitioners (Exh. 10) states that: "The old committee of the Society led by Mr Mwashuhwa was the one which was valid..." In other words, the defendant was claiming chairmanship of the plaintiff. That contradicts his evidence that some other person chaired the meeting. The statement would also contradict art. 12.2 of Exh.7 which the defendant referred to as the old constitution. In terms of that article the Sheikh Imaam, the defendant, is not part of the committee and has no voting powers in meetings of the executive committee provided for in Exh. 7. Clearly, the evidence of the defendant is contradictory and

does not accord with the probabilities in this case. The defendant struck me as an intelligent man who was very calculating in the manner in which he answered the questions put to him. He is certainly not the unsophisticated witness that he sought to present himself as. I do not believe his evidence that he was allowed to occupy the plaintiff's property by the elders when he knew that there was a committee in existence.

I am, therefore, convinced that the proper constitution of the plaintiff is Exh. 2 and that the committee authorised to represent the plaintiff is that which is chaired by Jabilu Phiri. The plaintiff passed a resolution that the defendant must be evicted from its premises. He has not tendered any valid defence to the claim for eviction. The allegation that he was authorised by the elders to occupy the house is not founded upon the provisions of the constitution as there is no provision for such elders to authorise persons to occupy the plaintiff's properties. The defendant is therefore in occupation of the plaintiff's property without the consent of the plaintiff.

Accordingly, judgment must be granted in favour of the plaintiff against the defendant. In view of the time that the defendant has been in occupation of the property, it would seem to me to be unfair to ask him to forthwith vacate the property. Although neither he nor the plaintiff addressed that point, it seems to me that in all fairness he should be given a period of fourteen days to look for alternative accommodation. In coming up with that period I have considered the fact that the defendant was given three months' notice to vacate the premises before summons was issued for his ejection. It would therefore be unfair to the plaintiff to give the defendant a further period of more than two weeks to vacate the premises when he has known all along that the plaintiff requires the premises for some other purpose.

In the result, IT IS ORDERED THAT:

1. The defendant together with all persons claiming occupation through him shall vacate the plaintiff's house which is situate at stand 7314 Rimuka Township, Kadoma, within fourteen days from the date of this order.
2. The costs of suit shall be paid by the defendant.

Ahmed & Ziyambi, plaintiff's legal practitioners
Mangwana & Partners, defendant's legal practitioners