THE PAGET-PAX ENDOWMENT TRUST
versus
HIGHLIFE INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20 & 21 May 2015, & 10 June 2015

Civil trial

R. Chibaya, for the plaintiff
J. Samukange, for the defendant

MAFUSIRE J: The plaintiff sued the defendant for eviction from certain premises situate in Harare. The sole point for determination was whether the plaintiff required the premises for its own use. Such an issue arose because the defendant disputed the identity of the plaintiff. Therefore, the question was largely who was the real plaintiff?

Most facts were common cause. In fact, at the commencement of the trial, Mr *Samukange,* for the defendant, suggested that the matter could proceed by way of a special case as he felt that none of the relevant facts were in dispute. But I did not have to decide the issue. Ms *Chibaya*, for the plaintiff, was flatly opposed to the suggestion. In terms of Order 29, for a matter to proceed as a special case, either the parties have to concur, or the court may give a directive if it is convenient that any cause or question of law be decided first. None of these conditions was present.

Because of the nature of the defence, much of the effort at the trial was to unpack the plaintiff. For it, this was done through two witnesses; Reverend Clifford Dzavo ("***Rev Dzavo***") and Mrs Faith Gandiya ("***Mrs Gandiya***"). The totality of their evidence was this. The premises in question belonged to their Church. The Church's full name was said to be Diocese of Harare in the Anglican Church of the Province of Central Africa (hereafter referred to as "***the Church***"). The plaintiff was a trust. It was set up in terms of a notarial deed that was executed in 1979. The object of the trust was to manage and control the proprietary affairs of the Church, including the premises in question, for the benefit of the Church. The Church was made up of different ministries or organs, namely the men, the women and the youth.

The plaintiff was administered by trustees appointed by the Church. In terms of the trust deed, the trustees had the power, *inter alia*, to institute or defend legal proceedings. In terms of clause 11 of that deed, the trustees had power to employ, among others, a secretary to administer or assist in any business of the trust. Rev Dzavo was the secretary. He had been the secretary at all relevant times. He said he had been authorised and empowered by the trustees to represent the trust in court and to speak on its behalf.

Both witnesses for the plaintiff stressed that the premises were required by the plaintiff for its own use. The "***own use***" referred to the Mothers' Union. It was an integral part of their Church, they said. It was a ministry within the Church. Its object was to render all kinds of support to families on behalf of the Church. The witnesses said that the Mothers' Union wanted the premises so that it could run some income generating projects with the aim of raising income for the Church. The projects would include the selling of Christian material such as Bibles, hymn books, sacraments for Holy Communion, office requirements, uniforms, and the like. The Mothers' Union would not be paying rent.

Mrs Gandiya was the president of the Mothers' Union. She said although initially she had had to contest for that position and had prevailed against other eligible ladies, the constitution of the Mothers' Union had subsequently been amended to make the wife of the sitting Bishop the *ex officio* president. Her husband was the sitting Bishop.

The plaintiff's witnesses said that the idea to recover the premises for use by the Mothers' Union had been conceived in 2011. The Union had submitted a project proposal and an application to the Board of Trustees. The application had been granted. Preparatory work for the project had included getting approvals and relevant licences from the local authority. The defendant had been given the requisite period of notice to vacate the premises. The notice had been given by the plaintiff because it was the one mandated by the Church to manage its property affairs. However, the defendant had refused to vacate, claiming that it was a statutory tenant and that it was not true that the premises had been required for the plaintiff's own use.

That was the plaintiff's case.

The defence case was told by Doctor Michael Ngoni Mambo ("***Dr Mambo***"). The defendant was a duly registered company. He himself was a co-shareholder and co-director. The other co-shareholder and Managing Director was his wife, Mrs Lena Mambo ("***Mrs Mambo***"). In reality she was the soul and face of the defendant. Unfortunately, she was currently undergoing medical treatment in the United States of America. As a matter of fact,

the trial of this matter had been delayed on one or two occasions in the hope that she would be well enough to travel and attend court. However, she had still not recovered sufficiently by the time of the trial.

Dr Mambo's evidence was this. The defendant's business comprised a hair salon and a boutique. They had acquired it from someone else for whom Mrs Mambo had been working for many years. The defendant had been in occupation of the premises since 1995. In 2010 the defendant had a three year lease with the plaintiff. That lease expired in December 2012. It was not renewed. The defendant had become a statutory tenant. The plaintiff was saying it wanted the premises for its own use. Notices to vacate had been received. However, the defendant did not believe that the plaintiff required the premises for its own use. The Mothers' Union was not the plaintiff. It was not cited in the deed of trust as a beneficiary. There had only been one beneficiary, i.e. the Church.

Dr Mambo said that the defendant had invested a lot of money in its business. It was literally Mrs Mambo's whole life. They could not think of relocating and starting afresh elsewhere. Otherwise they might just as well close shop.

Dr Mambo further claimed that the plaintiff was being jealousy of the success of the defendant's business. It wanted to take advantage of the goodwill that the defendant had generated at the premises. It was also claimed that Mrs Gandiya wanted the premises for her own personal use. The Mothers' Union was just a façade. Mrs Gandiya had on occasions sent several women to harass Mrs Mambo. All over the world it is not the business of mothers' unions to run businesses.

To back up this latter claim, Dr Mambo produced a copy of the Constitution of the Mothers' Union for the Diocese of Manchester in the United Kingdom. He said he had surfed on the internet for constitutions for mothers' unions in other parts of the world, particularly countries or regions such as Canada, Trinidad and Tobago and Southern Africa. Their objects were identical. Mothers' unions had nothing to do with the running of commercial enterprises within the Church.

Dr Mambo questioned the legitimacy of the claim by the plaintiff's witnesses that the premises were required for the purposes of running a business to benefit the Church. The plaintiff was already making a lot of money from the rentals that the defendant was paying. He said those rentals were much higher than the market averages. Furthermore, the defendant was up to date with its rent payment. It always paid promptly on due dates.

The defendant said as a statutory tenant, it was protected from capricious evictions by virtue of s 22(2) of the Commercial Premises (Rent) Regulations[1] ("***the rent regulations***" or "***the regulations***").

Dr Mambo said at one time there was a leadership wrangle within the Diocese of Harare for the Anglican Church that pitted one Bishop Kunonga and Bishop Gandiya. Bishop Kunonga and his faction had been in charge of the Church. During his reign, his wife had wanted to wrestle the premises from the defendant for her own personal use. The defendant had successfully warded her off. Eventually Bishop Gandiya and his faction had taken over. That development had given the defendant hope that its tenure at the premises would now be more secure since it considered the incoming faction as "**good people**". However, the defendant was soon disappointed that the same problems that it had faced during Bishop Kunonga's reign were now repeating themselves in the new dispensation. But the defendant had resisted being pushed out. The plaintiff had reacted by increasing the rentals.

That, basically, was the defendant's case.

Rev Dzavo denied that the plaintiff had increased the rentals when they had come in from "**exile**". The rent, at $1 200 per month, had been pegged at that level during Bishop Kunonga's tenure. It was still at the same level. He said when the new administration of Bishop Gandiya had taken over, it had made an inventory of all the leases and the lessees to all the Church's premises. In 2011 the Mothers' Union's business proposals had been accepted. In February 2013 all the tenants had been invited to submit copies of their current leases. The letter to the defendant was dated 20 February 2013. All the other tenants had complied. The defendant had not. It was soon discovered that the defendant's lease had expired in December 2012. It had not been renewed but the defendant had remained in occupation.

Rev Dzavo said that it had been decided that the defendant would be accommodated up to December 2013. On 27 June 2013 he wrote to the defendant reminding it of the expiry of the lease and giving notice that it had to vacate the premises by not later than 31 December 3013. He said the Church now wanted the premises for its own use.

There were negotiations between the parties. On 10 July 2013, Rev Dzavo, as Diocesan Secretary, and using the Church's letter-head, wrote to the defendant offering a one year lease, from 1 January 2013 to 31 December 2013. Rev Dzavo said in one of the

[1] SI 676 of 1983

discussions the possibility of the parties sharing the premises for some time from 2014 had been considered. However, according to Rev Dzavo, Mrs Mambo had not come back to him on the feasibility of sharing. On the other hand, Dr Mambo said that the responsibility to check on the feasibility of the parties sharing had been left to the Church, not Mrs Mambo. But the Church had done nothing about it.

On the one year lease up to 31 December 2013, the defendant had responded on 16 September 2013, through its legal practitioners, Venturas & Samukange. The material portion of that letter read as follows:

> "We must bring to your attention that our client has been occupying the premises for more than 15 years. They are currently statutory tenants due to the fact [that] the previous lease agreements have expired.
>
> Your demand that our client vacates[s] the premises by December 2013 shall be vigorously challenged. Please note [that] our client has kept the premises in good order and have spent their money to improve it which has resulted in yourselves benefiting especially during the period when there was serious disputes between yourselves and the Kunonga faction. As statutory tenants, our client ha[s] complied with the terms of the old lease."

Rev Dzavo, again as Diocesan Secretary, and on the same letter-head, again wrote directly to the defendant on 7 October 2013 giving three months' notice to vacate the premises. The notice would run from 1 November 2013 to 31 January 2014. The reason for terminating the lease was that "… ***the premises are now required solely for the owner's occupation effective 1 February 2014***."

Venturas & Samukange responded on 10 September 2013. They denied that there was any legal basis for wanting the defendant out. They claimed that the premises were not required for own use but for letting to somebody else. Noting that a notice had previously been given, they alleged that such conduct showed confusion within "… ***your organisation***."

Thereafter, the plaintiff sued.

That was the case before me.

A statutory tenant is one whose continued occupation of the landlord's premises after the expiry of the lease agreement, either by the effluxion of time, or on due notice of termination having been given, is by operation of the law. That law is the rent regulations. The statutory tenant must continue to pay the rent due within seven days of the due date, and to perform all the other conditions of the expired lease. However, such a tenant can still be evicted if the landlord proves to the court that he has "***good and sufficient grounds***" for wanting back the premises. But it is not "***good and sufficient grounds***" that the lessee has

refused an increase in rent, or that the landlord wants to let the premises to somebody else. Sub-section (2) of s 22 of the regulations is worded like this:

> "(2)No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee—
>
> *(a)* continues to pay the rent due, within seven days of due date; and
>
> *(b)* performs the other conditions of the lease;
>
> unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that—
>
> (i) the lessee has declined to agree to an increase in rent; or
>
> (ii) the lessor wishes to lease the premises to some other person."

What constitutes "***good and sufficient grounds***" in the regulations is not capable of precise or exhaustive definition. Every case depends on its own set of facts. However, if the landlord proves that he needs the premises **for his own use**, that should qualify as "***good and sufficient grounds***". In *Moffat Outfitters (Pvt) Ltd v Hoosein Ors*[2]: GUBBAY JA (as he then was) said[3]:

> "It is hardly possible and, in my opinion, certainly undesirable, to attempt any definition of the words 'good and sufficient grounds' which appear in the latter part of …. s 22(2) of the Regulations. Whether a lessor succeeds in overcoming the burden they create depends on the particular circumstances of each case, viewed against the real purpose behind the Regulations. That purpose ……. is to 'to prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing the tenants' rents unjustifiably'. The court is enjoined to exercise a value judgment, which if arrived at without caprice or bias or the application of a wrong principle, will not lightly be interfered with."

See also *Kingstons Ltd* v *L D Ineson (Pvt)*[4].

However, it is not enough that the landlord should simply assert that he wants the premises for his own use. The court would want to know what use. In ***Boka Enterprises (Pvt) Ltd* v *Joowalay & Anor***[5] GUBBAY JA said[6]:

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[2] 1986 (2) ZLR 148
[3] At p 154C - D
[4] 2006 (1) ZLR 451 (S), at p 457C
[5] 1988 (1) ZLR 107 (S)
[6] At pp 115A – B, a passage quoted approvingly in, among others, *Film & Video Trust v Mahovo Enterprises (Pvt)* Ltd 1993 (2) ZLR 191, at 203E – F; and *Kingstons Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S), at 456A - B

> "Each case of an owner genuinely seeking the use of lease premises for himself must be assessed on its own merits. It will not be enough for him somewhat naively to proclaim: 'The premises belong to me and I now desire to use them for my own purposes'. That would not constitute good and sufficient grounds. The court would want to know the précises use to which it was intended to put the premises. If that were found to be illegal or frivolous or, having regard to the owner's circumstances, unreasonable, the eviction of the lessee would be refused."

Earlier on in the same judgment, the learned judge of appeal had said[7]:

> "The phrase 'good and sufficient grounds' is not defined in the Regulations. Save for providing that such grounds exclude the refusal of the lessee to agree to an increase in rent and the wish of the lessor to lease the premises to someone other than the lessee, no guidance is given to the court as to the factors to be taken into account in making its determination.
>
> In the nature of things, it is hardly possible, and certainly undesirable, for this court to attempt to itemise the grounds which would be regarded as good and sufficient. And no general rule would be likely to cover all the varying circumstances which may arise in determinations of this type. What is clear, however, is that the court is enjoined to exercise a value judgment."

In casu, Ms *Chibaya* argued that the Church and its various organs such as the Mothers' Union and the plaintiff was one entity. There was no justification for the artificial fragmentation urged by the defendant. Even though the ultimate beneficiary would be the Mother's Union, it being part of the Church, this did not detract from the fact that the premises were required by the plaintiff for "***own use***". She stressed that the Mothers' Union would not be paying any rent.

On the other hand, Mr *Samukange* stressed that no notice to vacate had been given by the proper plaintiff, i.e. the trust. He stressed that all the relevant notices had been on the letter-head of the Church. He argued that the trust was capable of suing and being sued. He also alleged that the Mothers' Union had its own administration that was separate from that of the Church or the trust, and that it had its own separate constitution. As such, he continued, the Mother's Union was capable of suing and being sued in its own right.

Mr *Samukange* concluded by accusing the Church of corruption. He said it was unacceptable that it was the wife of the head of the Church that was gunning for the premises for her own use.

In my view, the first issue to be resolved is who was the real plaintiff in this matter? I have no doubt that the real or true plaintiff was the generic church, the Anglican Church, or,

[7] At p 114 E - F

more precisely, the Diocese of Harare in the Anglican Church of the Province of Central Africa.

In this country a church is an unincorporated entity. In the case of *Church of the Province of Central Africa* v *Diocesan Trustees, Harare Diocese*[8] the Supreme Court[9] described the church as[10]:

> "… a voluntary and unincorporated association of individuals united on the basis of an agreement to be bound in their relation to each other by certain religious tenets and principles of worship, government and discipline."

From the above definition I unpack the true plaintiff this way. I believe that the Anglican Church calls itself by that name because of certain religious beliefs, practices and traditions of its members that identify it as such. Being bound in their relation to one another, the members are divided into various ministries that comprise the men, the women and the youth, all of them with general or specific functions. They may be different ministries or groupings but they remain parts of one body, the Church. For good governance and discipline, particularly in relation to the ownership, management and control of the property of the Church, a trust was formed. It had specific powers set out in its deed of trust. Amongst its objects was the utilisation of the income from, *inter alia*, the premises in question. This was for the benefit of the Church. The trustees have the specific mandate to manage the property of the Church for the Church.

But that the trust, i.e. the plaintiff herein, was a special creation by the Church, does not mean that it was divorced from the Church. It was a special creation ***for*** the Church ***by*** the Church. At any rate, it is trite that in law a trust is not a juristic person. It has no corporate personality. It has no existence separate from that of the trustees. A trust is no more than a legal arrangement through which one administers property for another or for some impersonal object: see HONORE *The South African Law of Trusts*[11]; *Crundal Brothers* v *Lazarus*[12]; *Gold Mining & Minerals Development Trust* v *Zimbabwe Miners' Federation*[13].

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[8] 2012 (2) ZLR 392 (S)
[9] MALABA DCJ
[10] At p 410A
[11] 5th ed. p 419
[12] 1990 (1) ZLR 290 (SC)
[13] 2006 (1) ZLR 174 (H)

In terms of Order 2A r 8 of the Rules of this Court, associates may sue or be sued in the name of their association. In terms of r 7, "***association***" includes a trust. "***Associate***" in relation to a trust, means a trustee.

Therefore, whilst the citation and description of the plaintiff in the declaration, namely "… ***a trust duly formed and registered in terms of the laws of Zimbabwe*** …" seemed to imply corporate personality, this does not detract from the fact that a trust is not a juristic person and that the true party to the action were the trustee behind the trust. Furthermore, in the same citation, the plaintiff, i.e. the trust, was said to be "… ***under the control of the Anglican Church of the Province of Central Africa (Diocese) of Harare***."

Thus, I find that the notices to vacate given in writing by Rev Dzavo, at all times the secretary of the trust, but using the Church's letter-head, and signing the letters as "**Diocesan Secretary**", were notices by the Church, the real owner of the premises, but which were managed and administered by the plaintiff. I find that the rent regulations were complied with as far as the giving of notice was concerned. I agree with Ms *Chibaya* that it is common practice in most parts of the Christian world that churches vest the control and administration of their properties under special boards of trustees. She referred me to the English case of *JGE* v *The Portsmouth Roman Catholic Diocesan Trust*[14]. Therein LORD JUSTICE WARD noted as follows:

> "The diocese comprises the people within a defined territory who have been entrusted to the care of a bishop as pastor. Since the law of England and Wales does not recognise the Catholic Church as a legal entity in its own right, but sees it as an unincorporated association with no legal personality, the diocese usually establishes a charitable trust to enable it to own and manage property and otherwise conduct its financial affairs in accordance with domestic law. The defendant Trust is such a charity."

Thus, there was no basis in the argument by the defendant that the Mothers' Union in this case was a different and separate entity capable of suing and being sued. It was part of the Church.

Mr *Samukange* relied on the case of *Old Mutual Life Assurance Co Zimbabwe (Pvt) Ltd v Raftopoulos*[15] to argue that the Mothers' Union was different and separate from the generic church, or the plaintiff, and that therefore, it could not be said that the plaintiff had proved that it required the premises for its own use. In that case the plaintiff, Old Mutual Life

[14] [2012] 4 All ER 1152
[15] 2010 (1) ZLR 439 (H)

Assurance Company Zimbabwe (Private) Limited ("***The Old Mutual***"), was said to be the holding company of the Central Africa Building Society ("***CABS***"). But the two were separate entities. It was said that The Old Mutual wanted the premises for "own use", this being to lease them to CABS. CABS would be paying rent like any other tenant. At p 449A – C of his judgment in that case MTSHIYA J held:

> "*In casu*, the lessor is the plaintiff. Irrespective of any relationship, CABS cannot, in these proceedings, be defined as the lessor. The Regulations, in my view, are meant to define the relationship between the lessor and the lessee. Accordingly, when the lessor declares the need for own use of the leased premises, it is logical that the lessee should understand that to mean 'own use' by the lessor to whom the rent is payable. As per the Regulations, the lessor cannot repossess the premises for the reason of "leasing the premises to some other person". That would certainly be against the spirit of the law. It was conceded that CABS is a separate legal entity that would also be required to pay rent for the premises as a lessee. That concession to me disposes of this matter because it clearly establishes that the plaintiff wanted to lease the premises to another person – a third party."

There was a world of difference between the *Old Mutual* case and the present. In *Old Mutual*, The Old Mutual required the premises to let to somebody else. Not only was that contrary to the **spirit** of the law, but actually it was in direct conflict with the **letter** of the law.

In the present case, the Mother's Union was not a legal entity, let alone an entity separate from the Church. Furthermore, it was not in issue that the Mothers' Union would not be paying rent. Therefore, the defendant could not rely on *Old Mutual*.

It is now trite, in my view, that the judicial officer looks at the position of the lessor, not that of the lessee, to determine whether there are good and sufficient grounds for the lessor wanting his premises back. If the lessor has good and sufficient grounds, that is the end of the matter. In making his value judgment, the judicial office takes no account of the position of the lessee: see *Boka Enterprises (Pvt) Ltd v Joowalay & Anor, supra, Film & Video Trust v Mahovo Enterprise (Pvt) Ltd, supra,* and *Kingstons v L D Ineson (Pvt) Ltd, supra*.

Thus, the defendant's argument herein that it had been on the premises in question for close to twenty years; or that it had invested a lot of money in its business; or that the business was Mrs Mambo's whole life and that it would rather close shop if required to move out than start somewhere else again, were all irrelevant.

It also trite, on the authority of the above cases, and, additionally, *Newman v Biggs*[16], that in proving "***good and sufficient grounds***" the landlord needs no more than assert his reasons **in good faith** and then bring **some small measure of evidence to demonstrate the genuineness of his assertion** (my emphasis). It rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuineness of the lessor's claim.

In casu, Mr *Samukange* charged that the plaintiff corruptly wanted the premises to let them to Mrs Gandiya personally. It was manifestly a wild charge. There was not iota of evidence. On the contrary, the plaintiff's claim that it wanted the premises for use by the Mothers' Union was, among other things, backed up by a fairly detailed business proposal. Furthermore, Mrs Gandiya's evidence that the Union had obtained the necessary licences from the local authority was not refuted successfully. The objects of the constitutions for mothers' unions in other parts of the world such as that of the Mother's Union for the Diocese of Manchester in the United Kingdom, did not preclude the kind of activity for which the plaintiff had earmarked the premises in this case. Thus, the defendant failed to bring any circumstances casting doubt on the genuineness of the plaintiff's claim.

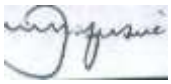
The plaintiff was quite entitled to its relief as claimed in the summons.

DISPOSITION

1. The defendant, and all those claiming occupation through it, shall vacate the plaintiff's premises situate ground floor, Pax House, Kwame Nkrumah Avenue, Harare within seven (7) days of the date of this order.

2. The costs of suit shall be borne by the defendant.

10 June 2015



Sawyer & Mkushi, plaintiff's legal practitioners
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[16] 1945 EDL 51