BISHOP REVEREND DOCTOR ISAAC SODA
versus
THE EVANGELICAL CHURCH OF ZIMBABWE
and
SIMON NOTA
and
REVEREND BENSON MAKACHI
and
SILAS GWESHE
and
GIBSON MUTSAKA
and
MRS N FOYA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 30 May and 13 June 2016

Opposed Matter

R Mapondera, for the applicant
W Jiti, for the respondent

MANGOTA J: The applicant and the respondents, or some of them, have appeared before the court on not less than three occasions. The present is their fourth such appearance.

At the centre of the dispute between the parties was the selection and election of the applicant into the office of bishop of the first respondent. He said he was constitutionally and, therefore, properly elevated to the office. They said he was unconstitutionally selected and elected and they, therefore, did not recognise him as the first respondent's bishop.

The applicant moved the court to grant him the order which was couched along the following terms:

> "1. The election process for the election of Bishop of the 1st Respondent be and is hereby upheld and confirmed.
> 2. Applicant be and is hereby declared the Bishop of the 1st Respondent for the next 5 years.

3. 2nd – 6th Respondent be and are hereby interdicted from interfering with the business of the 1st respondent.
4. Respondents to pay costs of suit."

The first respondent is a *universitas*. It is a voluntary association of a religious character. Its business and conduct are governed by its constitution ["the constitution"].

The applicant attached the constitution to his application. He called it Annexure A. He moved the court to consider and examine the processes which culminated into his election as a bishop and measure those against the contents of the annexure. His submissions were that the provisions of the constitution were strictly followed at his selection and election into the office of bishop. He insisted that he was properly and, therefore, validly elevated to the office. He, in that regard, described the second, third, fourth, fifth and sixth respondents as faction leaders whom he said were or are anti-authority. He, accordingly, prayed that they be interdicted from interfering with the first respondent's operations.

The first respondent opposed the application. The remaining respondents did not. They did not pronounce their position on the application. They did not do so notwithstanding the fact that the application was served upon each one of them. They were, therefore, regarded as having taken the view that they would abide by the decision of the court however or whatever its outcome would be.

The first respondent raised five (5) matters in its opposition to the application. It stated that:

(a) the ballot papers were not sent according to the provisions of the constitution and election procedure of the first respondent;
(b) the wives and friends of the candidates and one of the candidates distributed the ballot papers at the Chinhoyi Ladies Leadership Conference of 20-21 February, 2015;
(c) the ballot papers were irregular and flawed in that they stated the names of the voting members;
(d) Article VIII (g) of the constitution was violated in that the final nomination forms were not with the local churches within thirty (30) days of the annual general conference – and
(e) the Church Council did not set the election dates of 20 – 21 march, 2015.

The first respondent submitted that, on the strength of the foregoing five matters and others which it did not specifically mention, the applicant's election into the office of bishop was

not in compliance with the constitution. It said the selection and election processes were seriously flawed and were, therefore, a nullity.

The record showed that each of the parties to the application supported his, or its, or their position on provisions of the first respondent's constitution. It was, therefore, pertinent that relevant sections of the constitution had to be examined and measured against what took place when the selection and election of the applicant into the office of bishop took place. The view which the court took of this aspect of the application found fortification in the learned words of Bamford who, in *The Law of Partnership And Voluntary Association in South Africa*, 3rd ed p 132, stated that:

> "all questions involving a voluntary association turn ultimately and essentially on the terms of its constitution:
> ...[for this is] the character of the organisation, expressing and regulating the rights and obligations of each member thereof." [emphasis added].

Contained in the constitution of the first respondent is an organogram of the organisation's structures or organs. The organogram defines the positions of office bearers of the first respondent, their hierarchy within the same and how they interact with each other for the good of the entire membership of the first respondent.

One such office is that of the bishop. The office is provided for in Article VIII of the constitution. It is the third highest office in the structures of the first respondent. Its incumbent reports to the Church Council to which he or she is a member.

The Church Council which is provided for in Article II is the second highest office in the hierarchy of the first respondent's office bearers. Its mandate is to execute and implement policies, resolutions and budgets which the annual general conference will have agreed upon.

The Annual General Conference, referred to in Article III as the AGC, is the supreme organ of the first respondent. All the functions and powers of the first respondent are vested and exercised through it. Its decisions are final and binding on all members of the first respondent. It meets once every year. The Church Council convenes meetings of the Annual General Conference through the office of the bishop.

It was in the spirit of the above stated matters that the Church Council, through the third respondent, convened the Annual General Conference of 7-8 November, 2014. The conference did not, however, proceed to conduct the business for which it had been convened. It did not do

so for one reason. The reason centered on the report which the first respondent's national treasurer tabled before the conference. He reported that:

(a) only seventeen (17) member churches – and

(b) a few member churches had paid their subscriptions and tithes to the national office. The conference remained of the view that the sad state of affairs which had been reported violated the constitution of the first respondent. It stressed that the provisions of the constitution should, at all material times, be religiously complied with. It resolved that the Church Council had to meet and come up with a new date for the Annual General Conference. It was agreed that the next conference would be held after all member churches had settled their arrears. [emphasis added].

Pursuant to the directive of the Annual General Conference of 8 November, 2014 the Church Council held its meeting on 17 January, 2015. The treasurer who should have reported to the Church Council on the issue of payment of arrear subscriptions and tithes did not attend the meeting. He excused himself from the same. That fact notwithstanding, the Church Council observed that the first respondent did not have any money. The council remained of the view that insufficient funding of the first respondent made it difficult to make planning for holding the Annual General Conference in 2015. It discussed the issue of the selection and election of the bishop. It noted that the process which related to that matter was under way. It made efforts to allow the process to comply with the constitution of the first respondent. It, in the mentioned regard, moved the date of the Annual General Conference from 27-28 February, to 20-21 March, 2015.

On 21 January, 2015 the Acting Church Council Chairperson, Reverend A Mateva, addressed a letter to the Selection Committee Chairperson, Reverend Dr M Dewah. He advised, in the letter, of the meeting which the Church Council held on 17 January, 2015. He advised, further, of the Church Council's resolution which was to the effect that the first respondent's constitutional processes and requirements for the election of the bishop had to be strictly adhered to. He directed the selection committee to proceed to finalise the election process which remained with two contenders. These were one Reverend K Kawaya and the applicant.

On 9 February, 2015 the third respondent who was the bishop of the first respondent addressed a general letter to all member churches of the first respondent. He advised these of the

aborted Annual General Conference of 7-8 November, 2014 as well as the reasons therefor. He encouraged member churches to pay their subscriptions and tithes which were in arrears to enable them to attend the next Annual General Conference which was slated for 20-21 March, 2015. He expressed the hope that member churches which will attend the conference would have paid up all their membership subscriptions and tithes for the period 1 January – 31 December, 2014.

The above analysed matters showed a common thread which ran through them. The thread was that the first respondent's membership made every effort to adhere to the constitution of the organisation. So religious was the membership's adherence to the constitution that the Annual General Conference of 8 November, 2014 had to be called off when it was discovered that its continuation would not resonate with the first respondent's constitution. The need to comply with the constitution was echoed at:

(a) the aborted annual general conference of 7 – 8 November, 2014
(b) the Acting Church Council Chairperson's letter of 21 January, 2015 – and
(c) The third respondent's general letter of 9 February, 2015.

It is stated, in passing, that compliance with the constitution referred to member churches having paid their membership subscriptions and tithes which were in arrears. It was the position of the authorities that members who were in arrears with their subscriptions and tithes were in violation of the first respondent's constitution. Such members could not, therefore, lawfully attend the first respondent's Annual General Conference let alone be allowed to vote at the conference.

The court noted that, notwithstanding the commended position of the first respondent's membership's avowed intentions to always comply with the constitution, the Annual General Conference of 20-21 March, 2016 skirted around the issue which pertained to payment by members of their arrear subscriptions and tithes. The treasurer's report which was tabled before the conference was substantially silent on that matter. One was, therefore, left to wonder if the persons who attended the Annual General Conference had, or had not, paid their arrear subscriptions and tithes in full. If they had paid those, then their attendance at the conference was in compliance with the first respondent's constitution and their voting at the conference was proper and, therefore, valid. However, if the opposite was the case, then their attendance at the

conference adversely affected the validity of decisions which they made at the conference, as well as the members' rights to vote at the same.

At the Annual General Conference of 20-21 March, 2015 the national treasurer of the first respondent, Pastor G Mawire, reported that eighty-two (82) member churches had not paid their tithes for the year 1 January – 31 December, 2014. The member churches which fell into the mentioned category were not mentioned by name. Those which had paid their tithes partially or in full were also not mentioned in the report. One would not speak with any degree of certainty on whether or not the 40% member churches which attended the conference of 20-21 March, 2015 fell into the former or the latter group of member churches. One would also not know, among the 40% member churches which attended the conference, the percentage which fell into the group of member churches which had paid their tithes in full and/or what percentage of the same had not paid their tithes partially or in full. The treasurer's report left that matter in abeyance. No reasons were advanced in the report for not having dealt with that matter to the satisfaction of all and sundry.

It is of immense interest to note that the treasurer's report did not analyse, to the conference's satisfaction, if the reasons which caused the Annual General Conference of 7 – 8 November, 2014, to be aborted had been addressed in full when the conference of 20-21 March, 2015 proceeded to deal with the election of the bishop. One would have expected to see and hear of whether or not the issues which were the effective cause of the aborted conference of 7 – 8 November, 2014 had been addressed in that those who attended the conference of 20 – 21 March, 2015 had paid their subscriptions and their tithes in full as most member churches were in arrears as late as 7 – 8 November, 2014.

Such matters as have been stated in the foregoing paragraphs tend to place the processes which culminated in the election of the applicant to the office of bishop of the first respondent on some extremely shaky ground. No one would state with any degree of certainty if the provisions of the constitution were adhered to when the conference which elevated the applicant to the office of bishop was held. No evidence was placed before the court to satisfy it that the processes were not in contravention of the constitution and were, therefore, not flawed.

The minutes of the conference of 21 March, 2015 recorded that forty-eight (48) out of one hundred and twenty (120) member churches attended the conference. They also recorded

that one hundred and ten (110) delegates attended the conference. The delegates comprised "eighty-seven (87), eight (8) council members and fifteen (15) observers," according to the minutes.

The fifteen observers are what their description suggested. They did not have any voting rights at the conference. What that meant in effect was that only nighty-five (95) delegates could vote at the conference.

The issue of whether or not the conference had a *quorum* to proceed with the meeting of the day exercised the minds of the delegates. The applicant stated as much in his affidavit. He said:

> "19. 40% of the churches were duly represented and there were 95 delegates at this meeting. Article 111 D (ii) of Annexure B herein provides that *quorum* of the Annual General Council (*sic*) is composed of 25% of member's churches (*sic*) and a minimum of 100 delegates. A copy of the minutes is hereto attached as Annexure "H".
>
> 20. The meeting noted that <u>one of the requirements had been met</u> and also that this was a second AGC after the first one had been aborted which were situations that were not provided for in the constitution and therefore they resolved to evoked (sic) the Provisions of Article III C (ii) which provides that AGC shall be vested with powers to deal with and dispose of any matter which may arise, and for which no provision exist (*sic*) and they resolved that a *quorum* was present and therefore they proceeded with the meeting" [emphasis added]

When the applicant stated that the meeting noted that one of the requirements had been met, he, in the same breadth, acknowledged that the other requirement for the *quorum* of the conference had not been met. It is evident from his statement that a *quorum* as provided for in Article 111 D (ii) of the constitution had to have two requirements. The requirements are stated in the article which he referred to in his statement. The Article reads:

> "D MEETINGS AND PROCEDURES OF THE AGC
> (i) …….
> (ii) The AGC <u>quorum</u> shall consist of <u>at least</u> 25% of member churches **and** a minimum of 100 delegates" [emphasis added]

It follows, from the foregoing, that the meeting of 21 March, 2015 was short of the required number by five (5) delegates. The conference placed reliance on Article 111 C (ii) as a way of curing the defect which related to the issue of the *quorum.*

The Article reads:

> "C POWERS AND FUNCTIONS OF THE AGC
> (i) -------

(ii) The AGC shall be vested with powers to deal with and dispose of any matter which may arise and for which no provisions exist." [emphasis added].

It is clear from the minutes that the issue of the *quorum* had arisen. However, that issue is provided for in the constitution. One would, in that regard, go no further than making reference to Article III D (ii) wherein the issue of the *quorum* is provided for. The conference's interpretation of Article III C (ii) was, therefore, misplaced. The article's provisions did not apply to the situation which faced the conference of 21 March, 2015.

The minutes of the conference of 21 March 2015 recorded that the issue of the existence or otherwise of the *quorum* was put to the vote. The result of the vote, the minutes stated, was as follows:

(a) Seventy – four (74) delegates voted for the meeting to continue.

(b) one (1) person voted against the motion – and

(c) twelve (12) delegates abstained from voting.

Simple mathematical calculation showed that eighty – seven (87) out of ninety – five (95) delegates participated in the voting process which related to the motion to adjourn or continue with the conference. The applicant could not and did not advise the court of what became of the remaining eight (8) delegates, who attended the conference of 21 March, 2015. Their voice was conspicuously absent from what occured on that aspect of the matter.

The applicant stated that the first respondent had a total of one hundred and twenty (120) member churches in the country. The first respondent submitted that it had one hundred and thirty – two (132) member churches in Zimbabwe. One was left to wonder as to the correct number of the first respondent's member churches which were in the country. An attachment to the application of a register of member churches which are in Zimbabwe could easily have resolved that matter.

The applicant did not advise the court of whether the 40% which he said constituted the better part of the *quorum* for the conference of 21 March, 2015 was computed from his stated figure of one hundred and twenty (120) member churches or from that of the first respondent's figure of one hundred and thirty – two (132) member churches. The fact that the number of member church delegates who attended the conference was not stated apart from the minutes' recorded figure of 40% compounded the difficulty which pertained to that aspect of the case.

Minutes of the conference of 21 March 2015 recorded that the *quorum* was short by five (5) delegates to reach the required mark of one hundred (100) delegates. The minutes also recorded that when the process leading to the election of the bishop was about to be undertaken, four members walked out of the conference. The members comprised one Mutsaka, one H Foya, one Bagu and one P. Chitsato. These, it was reported, walked out of the meeting before the elections were held. No reasons were recorded as to what caused the four to walk out of the meeting at such a crucial stage of the conference's proceedings. Whatever the reasons for the walking out of the conference by the four delegates were, their conduct was a clear demonstration that they did not want to associate themselves with the process which pertained to the election of the applicant into the office of bishop of the first respondent.

The walking out from the conference room by the four delegates further depleted the *quorum* of the conference delegates. That act reduced the number of delegates who attended the conference from ninety-five (95) to ninety-one (91) delegates. It was surprising to observe that, notwithstanding the absence of a *quorum* in the process which led to the election of the bishop, the remaining delegates made up their minds to proceed with the same.

It is on the basis of the foregoing that the court remained of the view that the delegates to the conference of 20 -21, March, 2015 violated the constitution of the first respondent left, right and centre in their effort to catapult the applicant into the office of bishop. They ignored clear provisions of the constitution and, at times, they read into the same clauses and/or Articles which were either not in, or applicable to, the constitution. Their conduct sowed some seed of discontent amongst and within the first respondent's entire membership. The discontent spilled into the courts where such a matter as the present one was placed before the court for determination.

In its determination of the application, the court could do no better than to examine the conduct of the delegates who attended the conference and measure such against the provisions of the constitution of the first respondent. The history of the conduct of the first respondent's membership, as examined from the perspective of the Annual General Conference of 7 – 8 November, 2014 was quite telling. The members were, at that and subsequent stage(s), complying with the provisions of their constitution in a thoroughly exemplary manner. Those in authority over others even went as far as to exhort the latter to always comply with the

constitution of their organisation to the letter and spirit. So strict was the membership's desire to uphold the constitution of the first respondent to the extent that the Annual General Conference of 7 – 8 November, 2014 which did not comply with the constitution had to be, and was in fact, aborted in the interests of the membership's common good.

It is, accordingly, difficult, if not impossible, for one to understand the reasons which persuaded the delegates to the conference of 20 - 21 March, 2015 to flout the provisions of their constitution as they did. The zeal with which they bended the rules in the face of clear provisions of the constitution to suit their intended goal was not only amazing but was also very disquieting. One would have appreciated, and probably accepted, their conduct if such was not based on a written constitution. A margin of error as to what the parties agreed between and amongst themselves would have been allowed under such circumstances. The conduct of the applicant and his colleagues could not and cannot be accepted when they chose to flout clear provisions of their written constitution as they did.

The applicant moved the court to:

(i) declare him as the bishop of the first respondent – and

(ii) interdict the second – sixth respondents from interfering with the business of the first respondent.

The court reminds the applicant that it is not be business of the court to anoint or consecrates or appoint or ordain priests and/or bishops. That aspect lies within the jurisdiction of the organisation's membership as dictated to the same by its rules, regulations, practices and/or procedures.

Where a dispute such as the present one arises, the court's duty is to interpret the contents of the document which governs the activities of the organisation and ascertain if what the members did was or is in *sync* with what they agreed between and amongst themselves. Where the conduct of the members, or some of them, is resonating with what they said they would do, the declaration prayed for is easy to make and it would most certainly be made. Where, however, the opposite is the case, as in *casu*, no such declaration would be made and no bar would be placed on those who are calling upon errant members of the organisation to return to the drawing board and conduct themselves in terms of unambiguous provisions of their organisation's constitution. The court associates itself with the remarks of Malaba JA who, as he then was,

stated in *Dynamos Football Club (Pvt) Ltd & Anor* v *Zifa & Others* 2006 (i) ZLR 346 at 355 that:

> "…. The duty of a court of law is to determine whether what is claimed to have been done is in fact what was prescribed by the members of the club in strict compliance with the procedure which they laid down for validity to attach to those acts……."

The applicant moved the court to consider the first respondent's opposition to the application as a nullity. He submitted that the first respondent's administrative committee did not authorise the deponent of the opposing affidavit to depose to the same. He, therefore, insisted that there were no opposing papers before the court. He submitted that, as the second to the sixth respondents did not oppose the application and as the first respondent's opposing papers were defective and, therefore, not properly before the court, the application should have been treated as an unopposed one.

The court remained of the view that the applicant's submissions would have held if his case, standing on its own, had merits. It is not taken as a rule of thumb that an applicant to an unopposed matter will always get the relief which he moves the court to grant him. The law says he who avers must prove. He must, therefore, show that his case holds on the merits before he moves the court to disregard the submissions and/or papers of his adversary. In *casu*, the applicant showed that his application was hopelessly beyond redemption. He could not, therefore, get the relief which he prayed for even if the first respondent's opposing papers were defective and, therefore, improperly before the court. He, out of zeal, bended the provisions of the constitution to achieve what his heart desired most. A few of his colleagues assisted him in the process. The court could not sanction such conduct.

The court has considered all the circumstances of this case. It was satisfied that the application could not and did not hold. It could not succeed. The application is, accordingly, dismissed with costs.

Mapondera & Company, applicant's legal practitioners
Musendekwa- Mtisi, respondents' legal practitioners