REPORTABLE (2)

Judgment No. SC 2/08
Civil Application No. 17/08

DIOCESE OF HARARE v

(1) CHURCH OF THE PROVINCE OF CENTRAL AFRICA
(2) RETIRED BISHOP SEBASTIAN BAKARE

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 6 & 13, 2008

V Chizodza, for the applicant

E Matinenga, for the respondents

Before: CHIDYAUSIKU CJ, In Chambers

This is an urgent Chamber application in which the applicant seeks the relief set out in the following amended draft order:

"IT IS ORDERED

(a) THAT the urgent appeal hearing for this matter be and is hereby allowed.

(b) That the first and second respondents and their followers be and are hereby interdicted from conducting Church services in properties controlled by the applicant or the business and Ministry of the applicant.

(c) That the second respondent be and is hereby interdicted from holding himself out as a Bishop of the applicant, and conducting his Ministry as such.

(d) That the respondent(s) pay the costs of this application."

At the commencement of the hearing, I advised the parties that it was not competent to seek the relief set out in paras (b) and (c) of the draft order. Accordingly, the matter proceeded on the basis that this was an application to determine whether the appeal against the judgment of HUNGWE J should be heard or set down on an urgent basis. The wording of para (a) of the draft order leaves a lot to be desired. The relief sought in that paragraph is not that clear. I have assumed that the applicant in that paragraph is applying for the set down of the appeal on an urgent basis.

The facts of this matter are very ably set out in the judgment by MAKARAU JP in judgment no. HC 345/08. However, for the purposes of this application, I set out hereunder the following facts which are common cause –

The parties to this dispute are members of the Anglican Church that has now split into two formations. Following the split, there is a raging dispute as to which of the formations is legitimate. Access to and use of the church premises and property is hotly contested. The dispute between the parties has given rise to multiple litigation and court applications. I will only refer to those applications that have a bearing on this matter.

On 3 December 2007 the Diocese of Harare made an urgent Chamber application wherein it sought a provisional order against the respondents. The provisional order sought interim relief pending the granting of final relief, which was set out in the provisional order. It reads as follows:

"TERMS OF FINAL ORDER SOUGHT

That the first and second respondents and their supporters or followers be and are hereby interdicted from conducting Church services on any property controlled by the applicant or from holding themselves out as being part of the applicant pending finalisation of case no. HC 6464/07.

That the first and second respondents shall pay the costs of suit.

TERMS OF THE INTERIM ORDER GRANTED

Pending the finalisation of this matter, the applicant is granted the following interim relief –

That the first and second respondents and their followers be and are hereby interdicted from conducting Church services in properties controlled by the applicant, or interfering with the business and ministry of the applicant.

That the second respondent be and is hereby interdicted from holding himself out as a Bishop of the applicant, and conducting his ministry as such."

HUNGWE J reserved judgment. Although this matter was herd on an urgent basis, judgment was handed down almost two months later. This is unacceptable. In similar urgent applications MAKARAU JP and KARWI J handed down judgments within two days of hearing the matter. This is how it should be.

In between the hearing of the matter and the handing down of the judgment, two further applications between the same parties were heard and judgment given. Thus, on 18 January 2008 an urgent Chamber application regarding the use of and access to the Church premises was made. The following day, on 19 January 2008, MAKARAU JP delivered her judgment, the operative paragraph of which reads as follows:

"1. Pending determination of (case no.) HC 6544/07 (6464/07),

(a) The fourth respondent (Dr Kunonga) and all those acting under his authority shall have use of the Church premises at times previously slotted for such activities prior to 21 September 2007.

(b) The fourth respondent and all those acting under his authority shall make Church premises available to the applicant (now the first respondent) ninety minutes after its activities as detailed in (a) above.

(c) the above time slots may be varied by the parties at parish level provided that such variation is reduced to writing and communicated to the first, second and third respondents.

(d) Both the applicant and all those acting under its authority and the fourth respondent and those acting under his authority are not interfering with the activities of the other exercised in terms of this order.

(e) Each party shall pay its own costs."

Soon after the handing down of the judgment of MAKARAU JP a dispute as to the meaning of that judgment arose and that led to another Chamber application by the respondents. This application was launched on 29 January 2008. KARWI J handed down judgment on 31 January 2008, two days after the hearing of the application. In that judgment KARWI J provided clarification of MAKARAU JP'S judgment, in particular in regard to the times at which the different formations of the Church should have access to the church premises. Thus, as of 19 January 2008 the judgment of MAKARAU JP, as clarified by KARWI J, regulates the access to the church premises by the two formations pending the determination of the dispute between the two formations in case no. HC 6464/07.

On 31 January 2008, as I have already stated, HUNGWE J handed down his judgment. HUNGWE J's judgment is to the effect that the applicant is non-existent

and has no *locus standi* to bring the matter to court. This judgment in effect determined the issues raised in the main case between the parties, case no. HC 6464/07. I am advised the main case, case no. HC 6464/07, is at pleadings stage. The plea has yet to be filed. The applicant takes issue with the judgment of HUNGWE J. The applicant has filed a notice of appeal on the following grounds:

"**GROUNDS OF APPEAL**

1. The Honourable Judge misdirected himself in finding that the applicant had no *locus standi in judicio* to sue for an interdict.

2. The Honourable Judge erred in finding that there are procedures set out in the Constitution of the Church of the Province of Central Africa for a withdrawal of a Diocese from a Province without evidence on the same.

3. The Honourable Judge further erred in finding that the Constitution of the Church of the Province of Central Africa applied to the withdrawal of a Diocese in a situation where such Diocese is paramount and self-governing in that it is governed by a Diocesan Act, and merely fellowships with a Province and the Universal Anglican communion so much as much to oust the jurisdiction of the Archbishop of Canterbury and the Church of England over the Diocese of Harare.

4. The Honourable Judge misdirected himself where (when?) he found that the applicant did not exist at law.

5. The Honourable Judge erred in finding that the applicant needed the adoption of an Act made by Synod, in clear circumstances where Acts of Synod do not need adoption after the close of Synod.

6. The Honourable court erred in finding that the lawsuit before it was at the instance of … Bishop Nolbert Kunonga and a few of his sympathisers, without evidence that there was no majority vote at Synod and that Synod did not constitute a quorum when it made the Diocesan Act so much as to render the Act null and void.

7. The Honourable Court misdirected itself when it found that there was (*sic*) the essential elements for spoliatory relief or an interdict were not available so much as to render the order sought incompetent.

> Wherefore the appellant prays that the appeal may succeed against the respondent and for the judgment of (the) court *a quo* to be set aside and substituted by the following –
>
> i) The appeal be and is hereby granted.
>
> ii) The provisional order granted in case no. HC 3208/07 be and is hereby set aside."

It is common cause that the main dispute between the parties is awaiting determination in case no. HC 6464/07. That matter is proceeding by way of court action and the pleadings are yet to be completed. The applicant's complaint in the notice of appeal and indeed in the submissions before me is that HUNGWE J misdirected himself by determining issues that are to be determined in case no. HC 6464/07 when the main matter goes to trial. Those issues, it was argued, should be determined after a full trial. The issues should not have been determined in a chamber application for the issuance of a provisional order seeking to govern the relationship between the parties in the interim period while awaiting completion of the main case, no. HC 6464/07. It was the applicant's contention that the judgment of HUNGWE J will have the effect of tying the hands of the Judge who will adjudicate in case no. HC 6464/07.

While I accept that the applicant's contention has substance, it is not relevant to the issue that I have to determine in this Chamber application, namely whether the appeal should be set down on an urgent basis or not. The applicant's contention will have to be determined in the appeal.

The applicant contends that the matter should be set down as a matter of urgency, while the respondents contend the matter should not be set down on an urgent basis. Rationality seems to have abandoned all the parties and nobody is prepared to make even the most obvious of concessions. The parties could not even agree on whether the appeal should be set down as soon as possible.

The interim use of the church premises is presently governed by the judgment of MAKARAU JP which sets out how the parties are to access the church premises. As there is an order regulating the interim use of the church premises, I see no need to set down the appeal against the judgment of HUNGWE J on an urgent basis. The judgment of HUNGWE J has no bearing on the interim arrangement over the use of the church premises.

I, however, accept that the dispute between the parties should be resolved as a matter of urgency. This is common cause. The parties are agreed that case no. HC 6464/07 should be completed as soon as possible, but blame each other for lack of progress towards finalisation of the main case. In my view, the appeal against the judgment of HUNGWE J should be determined before the main trial in case no. HC 6464/07. This gives some urgency to the set down of the appeal. The determination of the appeal should not delay the finalising of case no. HC 6464/07.

I have therefore come to the conclusion that this matter should be set down on the next set down date of this Court, which I am advised is some time in mid-

March. The Deputy Registrar is so directed. This order is made on the understanding that a record of the proceedings will be prepared within two weeks of the date that this matter was heard. The undertaking regarding the availability of the record was given by the applicant. In the event of an appeal against the judgment of MAKARAU JP (the applicant indicated that such an appeal was likely to be noted), it would be advisable to consolidate the two appeals to avoid multiple appeals. The necessary application for consolidation should be made timeously.

In the result, it is ordered that the Deputy Registrar set down this matter on the next set down date available in this Court. Costs will be costs in the cause.

MV Chizodza-Chineunye, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners