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HH 451-12
HC 13680/12
Ref Case No. HC 6544/07
Ref Case No. HC 4327/08
Ref Case No. HC 2792/09
Ref Case No. SC 180/09
Ref Case No. SC 130/10

ANGLICAN CHURCH OF THE PROVINCE OF ZIMBABWE
versus
ANGLICAN CHURCH OF THE PROVINCE OF CENTRAL AFRICA
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 4 and 5 December 2012 & 10 December 2012

Mr *J Samukange* with Mr *T Hungwe*, for the applicant
Adv *T. Mpofu* & Mr *R. Moyo* with Pastor *Dzavo*, for the respondents

CHIWESHE JP: In July 2009, my brother HLATSHWAYO J, heard an application under case number HC 4327/08 as consolidated with another application under case number HC 2792/09. The parties to those applications were the Diocesan Trustees of the Diocese of Harare (as applicants) and the Church of the Province of Central Africa (as respondents). In this judgment I shall refer to the latter as "the mother church". In that consolidated application, HLATSHWAYO J made an order declaring Bishop Dr Nolbert Kunonga and six others to be the Diocesan Trustees of the Diocese of Harare, a diocese under the mother church. It was further declared that the property of the Diocese of Harare, movable or immovable, owned by the mother church vests in the said Diocesan trustees and, on that account, the mother church was ordered to give vacant possession /occupation and control of the assets to the Diocesan Board failing which the Deputy Sheriff was authorised to seize such property and hand it over to the Diocesan Board. In addition, with regards the application under HC 2792/09 Dr Kunonga's position as Bishop of the Diocese of Harare was confirmed on the grounds that his purported removal from that position had not been pursued in terms of the canons and constitution of the mother church.

The mother church appealed against these decisions as well as the decision made under case number HC 6544/07. The Supreme Court, under judgment number SC 48/2012 (Civil Appeal No. SC 180/09 and SC 130/10), upheld the appeals against the decision of

HLATSHWAYO J under case No. HC 4327/08 and case No. 6544/07 and ordered as follows:-

"1. The appeal in the case of *The Church of the Province of Central Africa v The Diocesan Trustees for the Diocese of Harare* SC 180/09 succeeds with costs.

2. The judgment of the court *a quo* in case No. HC 4327/08 is set aside and substituted with the following:

'The application is dismissed with costs.'

3. The appeal in the case of *The Church of the Province of Central Africa v Bishop N. Kunonga and Ors* SC 130110 be and is hereby allowed with costs.

4. The judgment of the court *a quo* in case No. HC 6544/07 is set aside and substituted with the following order:

'The claim is granted with costs.' "

I must indicate that the claim under case number HC 6544/07 relates to the question of costs incurred by the same parties in an aborted trial. The recovery of such costs is governed by the rules pertaining to debt collection.

Armed with the Supreme Court rulings the mother church proceeded to issue out of this honourable court warrants of ejectment and notices of removal. Three such notices of removal have been filed of record. They were issued on 23 November 2012. They were served on the defendants Dr Kunonga and others. The notices relate to the following properties; 101 Central Avenue, Paget House, and Cathedral Offices. The execution of these warrants was to take place at the respective premises on 28 November 2012.

Served with these notices of removal the applicant in the present matter, who I shall refer to as 'the applicant church', filed, on 27 November 2012, an urgent chamber application with this honourable court. The application is in the form of a provisional order couched in the following terms:

"TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the 1st and 2nd respondents be and are hereby interdicted from evicting the applicant from;

- i) Cathedral Offices, Nelson Mandela Avenue, Harare
- ii) Paget House, Kwame Nkrumah Avenue, Harare
- iii) 101 Central Avenue, Harare

or any other premises in dispute occupied by the applicant pending the finalisation and determination of the declaratory order.

2. Costs of suit.

INTERIM RELIEF SOUGHT

Pending determination of this matter the applicant is granted the following relief

1. That the respondents are interdicted from evicting applicant from
 - i) Cathedral Offices, Nelson Mandela Avenue, Harare
 - ii) Paget House, Kwame Nkrumah Avenue, Harare
 - iii) 101 Central Avenue, Harare

or any other premises in dispute occupied by the applicant."

At the same time the applicant church issued summons under case No. HC 13703/12 in which it seeks a declaratur as follows:

- (a) All the churches under its control and possession including the Anglican Cathedral be declared to be owned by it.
- (b) Defendant has no right whatsoever to take possession and control of the property and churches under the plaintiff's control.
- (c) Defendant and its followers are interdicted from interfering with the smooth worshipping by the plaintiff and its members at the various churches across Zimbabwe.
- (d) Plaintiff has been in de facto and de jure control of the churches, schools and colleges in Zimbabwe since 2007 and is therefore entitled to undisturbed possession.
- (e) Defendant pays costs on attorney and client's scale.

The founding affidavit to the urgent chamber application is sworn to by Dr Kunonga, the applicant church's Archbishop. It is to the following effect. Dr Kunonga is the head of the applicant church. The church was formed in 2007 when it became clear that differences

with the mother church's leadership with regards issues to do with homosexuality, sanctions and the country's sovereignty could not be resolved. Further, the applicant church's bishops and congregation supported the Government's policies of land acquisition, indigenisation and empowerment. The mother church on the other hand was not supportive of these policies.

The mother church, according to Dr Kunonga, was tolerating homosexuality a posture which is against African culture. As a result of these differences the applicant church was formed. Dr Kunonga states that on 23 November 2012 he was handed notices of removal by the Deputy Sheriff. These notices related to premises 101 Central Avenue, Paget House and Cathedral Offices. The notices are filed of record. He and other priests decided to instruct a legal practitioner, Mr J Samukange, to apply for stay of execution pending the determination of the parties' rights in terms of the summons issued under case No. HC 13703112. Dr Kunonga further states that the applicant has been in possession of the various properties from which the mother church intends to remove it since 2007. The applicant church has not been party to the proceedings under SC 180/09 or any other proceedings in the High Court and the Supreme Court. The mother church, according to Dr Kunonga, was at all material times aware that the applicant church was in possession of these properties and that the applicant church had an interest in the dispute between the parties. The applicant church has not been cited as a party to the various litigations before this court or the Supreme Court. The applicant church, argues Dr Kunonga has a right to be heard in an open court. At para 8 of the founding affidavit he states:

"8. Should this Honourable Court not intervene now applicant will have its rights violated without being heard. This is a negation of the *audi alteram partem* rule. In fact applicant was formed in 2007, some five years ago and has been existing separately as a common law *universitas*. It is legally entitled to be heard accordingly.. It has not been heard."

Dr Kunonga also states that at the time notices of removal were served, the parties had agreed to engage innegotiations aimed at achieving an out of court settlement. The applicant church was accordingly taken by surprise by the sudden turn of events. However, contrary to averments made in para 10 of his founding affidavit, no statement from the applicant church's legal practitioners has been filed with regards these negotiations.

Filed of record as Annexure "A" is a resolution of the applicant church, duly signed by Reverend A. Chisango, its Provincial Secretary, authorising Dr Kunonga "to represent the Anglican Church of the Province of Zimbabwe, in both the High Court and the Supreme Court of Zimbabwe."

Seized with the matter I immediately directed that the application be served on the mother church and further directed that the matter be set down for hearing in chambers on Tuesday 4 December 2012. Despite timeous service of this directive on the mother church, evictions were carried out as from 28 November 2012. This conduct on the part of the mother church prompted Mr *Samukange*, for the applicant church, to address me, on an urgent basis, complaining against the conduct of the Deputy Sheriff, who, having been served with the notice of set down, nonetheless proceeded with evictions, thereby defeating the purpose of the hearing set down for 4 December 2012. I must at this stage state that it is the practice, custom and tradition of this court that when an urgent matter has been set down, it suspends execution until the matter is heard. Mr *Samukange's* letter of complaint was copied, among others, to the mother church's legal practitioners. Notwithstanding that intimation the mother church proceeded with these evictions.

In the face of all this confusion Mr *Samukange* (for the applicant church) filed an *ex parte* urgent application seeking the same relief as already prayed for. The *ex parte* application was filed on 29 November 2012 under case No. HC 13751112. By then the evictions were already underway. I decided to hear the parties once and for all on 4 December 2012. In response to the *ex parte* chamber application, the legal practitioners for the mother church promptly wrote to the registrar on 29 November 2012 requesting to be given "an opportunity to be heard in the event that his Lordship is of the view that this application is worth considering. The irony of that statement is that while the mother church wished to be heard in the *ex parte* urgent chamber application, they were at the same time denying the applicant church the same right by executing evictions ahead of the present urgent chamber application, thereby defeating the purpose of this hearing.

In its opposing affidavit sworn to by M.T.N. Chingore, its Provincial Chancellor, the mother church raised a number of preliminary issues, viz

1. That the applicant church remains in occupation in defiance of notices of eviction issued in pursuance of a Supreme Court order. For that reason it is in contempt of court. Until it has purged its contempt, it has dirty hands and for that reason it should not be allowed to approach the court.
2. That the application is defective for want of compliance with r 241 of the Rules of Court. For that reason there is no application before the court.
3. That the application lacks urgency. The matter has been pending in the courts in the last five years and therefore applicant church knew that the ultimate victor would evict the unsuccessful party. The urgency is therefore self-created as the applicant church should have acted over the years.
4. That in all the litigation brought by Dr Kunonga the applicant church was never mentioned. It was Dr Kunonga's duty to join the applicant.
5. That this court lacks jurisdiction because the Supreme Court has already ruled that:
 - (a) Dr Kunonga and others seceded from the mother church and formed the applicant church.
 - (b) Dr Kunonga and others, on seceding, lost all their rights of occupation and use of the property of the mother church. The properties belong to the mother church.
6. That if the applicant church existed or still exists and was in occupation of the mother church's properties it occupied the same through Dr Kunonga. In any event it was always the Trustees of the Diocese of Harare, and not the applicant church, that claimed right of occupation. The formation of the applicant church cannot be used to reverse that position.
7. That Dr Kunonga's eviction included those persons claiming occupation through him. The applicant church must fall in the category of those persons claiming through Dr Kunonga.
8. That Dr Kunonga and others are estopped, having prosecuted applications in this

court and the Supreme Court in their capacity as trustees of the diocese of Harare, from now turning around to pursue their interests under the guise of the applicant church. After all, their legal practitioner told the Supreme Court that the applicant church was now defunct and no longer in existence.

9. That the applicant church's papers fail on the very first hurdle — that is that it has not established a clear right upon, which a provisional order could be granted. It has not alleged that it owns the contested properties or that it occupies the same through a lease or other recognised right. It merely relies on occupation since 2007. Its acceptance that there has been a contest over the properties is acceptance that there has never been peaceful and undisturbed possession of those properties.
10. That applicant has not produced proof that it is a legal "persona", capable of suing or owing property in its own name.
11. That the balance of convenience does not favour the applicant church but the mother church as there must be finality in litigation. The matter has been finalised by the Supreme Court.
12. That the mother church denies ever being involved in negotiations for an out of Court settlement. The discussions which eventually did not take place, were for Dr Kunonga and colleagues to vacate the premises in a peaceful and orderly way rather than wait to be evicted.

The applicant church's answering affidavit addresses the issues raised by the mother church as follows:

There is a distinction between Dr Kunonga and the applicant church. The applicant church is an association of worshippers and is distinct with its own legal identity. The application is urgent because it is for stay of execution pending the outcome of the action instituted by the applicant church. The application complies with the rules of Court. The

applicant was not party to any court proceedings. It was the Trustees who were made party to the dispute, not the applicant church. The applicant church, it is averred, is not complaining that it was not joined as a party to the proceedings. All the applicant church is saying is that it cannot be bound by the decision in a case in which it was not party. The rules of natural justice must be obeyed. The applicant church denies that there exists a court order in which it has been evicted from the premises. The issue of ownership relating to the applicant church was never brought before the courts because it was not made party to the proceedings. Further it *is* stated that the applicant church is not claiming occupation through Dr Kunonga. It is claiming occupation in its own right and it is that right which must be determined first before it can be evicted. It is also denied that the applicant church is defunct. It was in occupation and operating as a church at all relevant times. Possession of the properties creates a real right and therefore the applicant church must be heard by the courts. The applicant has not instituted proceedings for spoliation where the issues of peaceful and undisturbed possession are essential elements. Rather this is an application for stay of execution.

The mother church then filed what it termed a "Supplementary Opposing Affidavit." These papers do not take the case any further than the papers already filed. The applicant also filed a "Supplementary answering affidavit". That affidavit was filed in answer to a query I had raised regarding the legal status of the applicant church.

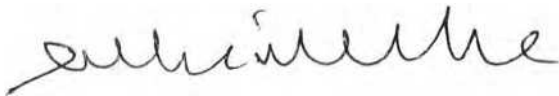
I heard oral submissions in chambers on 4 and 5 December 2012. There are three cardinal points to be determined in this urgent chamber application, namely, whether the applicant church is bound by the prior decisions of this court and specifically by the decision of the Supreme Court in SC 48/2012 and, if not, whether the applicant church has a right to be heard and if so, whether in fact it should be heard. The answer to these questions requires an interpretation of the scope and extent of the Supreme Court judgment in SC 48/2012. The High Court is not the appropriate forum for that kind of exercise. The applicant church should have approached the Supreme Court for directions.

The parties have referred me to numerous authorities in support of their respective positions. I thank them for their diligent research and their lively arguments. In the final

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analysis I agree with the mother church that this matter is *res judicata*- the Supreme Court has spoken.

Accordingly I hold that I have no jurisdiction to entertain this application. For that reason I would, as I hereby do, dismiss this application with costs.

A handwritten signature in dark ink, appearing to read 'Samukange', written in a cursive style.

Venturas & Samukange, applicant's legal practitioners
Gill, Godlonron & Gerrans, respondents' legal practitioners