

REPORTABLE (1)

A. TIMOTHY KUWIZA SANGO

v

- (1) THE BOARD OF TRUSTEES OF THE ANGLICAN DIOCESE OF
MANICALAND, CHURCH OF THE PROVINCE OF CENTRAL AFRICA**
(2) THE CIVIL SERVICE COMMISSION
(3) THE MINISTER OF PRIMARY AND SECONDARY EDUCATION

B. EDWARD DUMBURA

v

- (1) THE BOARD OF TRUSTEES OF THE ANGLICAN DIOCESE OF
MANICALAND, CHURCH OF THE PROVINCE OF CENTRAL AFRICA**
(2) THE CIVIL SERVICE COMMISSION
(3) THE MINISTER OF PRIMARY AND SECONDARY EDUCATION

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, GWAUNZA JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC, MAVANGIRA AJCC &
BHUNU AJCC
HARARE, OCTOBER 22, 2014 & MARCH 28, 2018**

L Uriri, for the applicants

A P de Bourbon SC, for the first respondent

No appearance for the second and third respondents

MALABA DCJ: These are two separate applications which are substantially similar, in that they raise the same issues and seek the same kind of relief against the same respondent church.

BACKGROUND

The applicants are employed by the Ministry of Primary and Secondary Education as full-time civil servants. The applicants were deputy headmasters at St. David's Bonda High School and St. Mathias Tsonzo High School respectively. Both schools were established and are administered by the Anglican Church of the Province of Central Africa ("the Anglican Church") through the first respondent. The second respondent employs all civil servants; whilst the third respondent is responsible for the deployment of civil servants in the education sector through relevant regional administrative offices. The third respondent is tasked with the responsibility of supervising all civil servants employed in the education sector. The applicants report to the third respondent.

The "ACTS OF THE DIOCESE", which are the constitution of the first respondent, provide under clause 12.15 as follows:

"12.15 GENERAL

- d) **Heads and their deputies should be Anglicans so that the spirit of Anglicanism is maintained.** Other members of staff should be Anglicans or as recommended by the Boards and Ministry of Education." (My emphasis)

There was no evidence of an express agreement entered into between the first respondent and the third respondent in terms of which the Government bound itself to deploy to schools owned by the former, headmasters and deputy headmasters who adhered to the doctrine of Anglicanism. It was common cause, however, that the understanding between the parties was that the policy position of the first respondent, as stated in clause 12.15 of its constitution, be respected.

At the time they were posted to the first respondent's schools, the applicants were practising Anglicans. They knew and accepted that they had been posted to the respective schools as deputy headmasters ahead of other possible candidates because they met the requirement that all headmasters and their deputies at Anglican Church schools had to be Anglicans. Both applicants were classroom practitioners. The first applicant taught Divinity, Bible Knowledge, Guidance and Counselling, whilst the second applicant taught English Literature, Guidance and Counselling. Both applicants were ordained priests, an attribute that had been taken into account when they were posted to the first respondent's schools.

The Acts of the Anglican Diocese of Manicaland ("Acts of the Diocese") are explicit that the aim of the schools under the auspices of the first respondent are "to fulfil Anglican church ethos". They also state that "school heads, teachers and students are expected to attend church services and other Christian educational activities organised by the church". "Acts" are decisions of the Synod which are intended to have mandatory effect as part of the Ecclesiastical Law of the Diocese.

During the period from 23 September 2007 to 21 February 2013 disputes arose in the Anglican Diocese of Manicaland, as a result of which some members left the Anglican Church. The applicants elected to join the newly formed Evangelical Anglican Church International and left the Anglican Church of the Province of Central Africa. In other words, the applicants left the Anglican Church which owned the schools where they were stationed as deputy headmasters. After leaving the Anglican Church, the applicants took up positions as pastors in the new church.

They were now conducting non-Anglican church services at the schools, thereby raising conflict of interest with the host Anglican church.

Some time in 2013 the first respondent asked the applicants to stop performing prayers within the schools as well as conducting church services. The applicants were also ordered to remove their priestly collars. They complied with these orders. The purpose of the orders was to discourage the applicants from using their powerful position of deputy headmaster to influence students and other members of the school community to the benefit of their new church.

The first respondent requested the third respondent to transfer the applicants from its schools. The request was granted. The papers show that the applicants were replaced in the position of deputy headmaster at the two schools by Mrs Nyamapfeni and Mrs Pswarayi respectively.

The applicants took the view that the actions of the first respondent were unconstitutional and launched an application for an order to the effect that:

- “1. It is declared that the first respondent’s conduct of seeking the transfer and eviction of the first applicant from St David’s Girls High Bonda and the second applicant from St Mathias Tsonzo by virtue of them not being members of the Anglican church is unconstitutional, null and void since it infringes the applicants’ right to equality and non-discrimination, freedom of assembly and association, and freedom of conscience.
2. It is hereby declared that the Agreement entered (into) between the respondents to the effect that headmasters and deputy headmasters in the first respondent’s schools must be Anglicans is unconstitutional, null and void.
3. It is declared that the removal of the applicants from the post/office of the deputy headmaster by the first respondent and appointment of a Mrs Nyamapfeni and

Mrs Pswarayi respectively as replacements for the respective applicants is unconstitutional, null and void since it usurps the second and third respondents' powers as enshrined in the Constitution of Zimbabwe.

4. The first respondent be and is hereby ordered to pay the costs of the application.”

The second and third respondents have not opposed the applications.

Each applicant brought the application on the allegation that his right to freedom from unfair discrimination (s 56(3)), right to religion (s 60(1)), and right to freedom of assembly and association (s 58(1)) has been infringed by the respondents. The facts show that there was no infringement by the respondents of any of these rights of the applicants.

The Court holds that the applications were without merit. The reasons now follow.

The applicants had no basis for the allegation that they were discriminated against by the implementation of the requirement of clause 12.15(d) of the Acts of the Diocese to the effect that headmasters and deputy headmasters of the first respondent's schools be adherents of the Anglican religion. They benefitted from the observance of the requirement by the representatives of the second and third respondents when they were appointed deputy headmasters of the respective schools. The request by the first respondent to the third respondent that the applicants be transferred from its schools, which request was granted, was a direct consequence of the exercise by the applicants of their right to freely choose a religion of their own to practise and propagate.

As a result of the exercise of the right to change religion, the applicants disabled themselves from discharging some of the duties of the office of deputy headmaster. They were no longer able to perform the duties in respect of affairs in matters of the Anglican religion. The Acts of the Diocese required the applicants in their capacities as deputy headmasters of the schools to play leading roles in church affairs, attend church services, and project an Anglican Christian ethos in the schools. They were required to be role models to their subordinates in the community in their lifestyles. It was their duty to conduct themselves in a manner that promoted and upheld Anglican Christian principles and values. The applicants deprived themselves of the right to remain deputy headmasters at the schools. Their inability to perform important duties as deputy headmasters of the first respondent's schools prejudiced the interests of the community that established the schools. The applicants confessed in the founding affidavits that they stopped carrying out the duties of propagating the Anglican religious ethos at the schools when it was their duty to do so as deputy headmasters and priests.

The roles played by the first and third respondents in the transfer of the applicants from the schools were part of the consequences of the exercise by the applicants of their right to choose a religion of their own. An exercise of a right may bring about undesired consequences. These include reactions by others whose interests are adversely affected by the exercise of one's right. The applicants cannot seek protection from consequences of their own voluntary acts. As a reaction to the situation of the inability by the applicants to manage affairs in matters of the Anglican religion which formed an integral part of the duties of the office of deputy headmaster, the transfer of the applicants from the schools was a means of protecting the interests of the religious community that established the schools.

A person who occupies a position in the administration of a private school established and managed by a religious community on the condition that he or she is an adherent to the religion for which the denomination stands, but later changes religion in the exercise of the right to freedom of conscience thereby disabling himself or herself from continuing in occupation of the office, entitles the authority with the power to do so to remove him or her from the office. The church, as an organised religious community of people with substantially similar views on matters of faith, has a right to protect its interests in schools established for the purpose of promoting its religion. Where the individual and collective aspects of s 60 of the Constitution conflict, it will generally be appropriate to consider that the collective rather than the individual interests prevail – so long as the former do not become oppressive or tyrannical.

The allegation that the requirement in clause 12.15(b) of the Acts of the Diocese, that headmasters and deputy headmasters of the first respondent's schools be Anglicans, is an infringement of s 60(1) of the Constitution was made without having taken into account and considered all relevant factors. Section 60(1) of the Constitution gives every person the right to freedom of religion and freedom to practise and propagate one's religion whether in public or in private and whether alone or together with others. The schools to which the qualification for employment of headmasters and deputy headmasters relates are religious schools. They are not public schools. In addition to the ordinary academic programme, a religious element, which determines the nature and character of the institution, is present in these schools. To carry out the purposes of the schools, full effect must be given to this aspect of their nature.

The schools were established by the first respondent in the exercise of the right enshrined in s 60(4) of the Constitution. Section 60(4) of the Constitution provides:

“60 Freedom of conscience

(1) to (3) ...

(4) Any religious community may establish institutions where religious instruction may be given, even if the institution receives a subsidy or other financial assistance from the State.”

The words “religious community” in s 60(4) of the Constitution must take colour from the word “religion”. The expression “religious community” must satisfy three conditions –

- (1) it must be a collection of individuals who have a system of belief or doctrines which they regard as conducive to their spiritual wellbeing, that is, a common faith;
- (2) common organisation; and
- (3) designation by a distinctive name.

There is no doubt that the first respondent is a religious community. Only a religious community has the power to establish an institution for the purpose prescribed under s 60(4) of the Constitution. The first respondent exercised the right and established schools where one of the objectives is to give to the students religious instruction deemed valuable by their parents who largely share the Anglican faith. The instructions would obviously not be in conflict with any public interest.

Section 60(4) of the Constitution does not forbid a religious community that has established a school from having an influence on the mechanisms for the appointment of officials

to occupy positions that are critical in ensuring the achievement of the objectives of the establishment of its institution. It is in respect of an institution that a religious community has established in the exercise of freedom of religion that it can claim a right to have included in the conditions of appointment of managerial employees to its institutions by the central authority that the people be adherents of its religion. The freedom to establish institutions where religious instruction is given includes the right of the religious community to take part in the determination of who exercises the power to manage the affairs in matters of its religion at the institutions.

Section 60(4) of the Constitution gives a religious community the right to establish an institution where instructions on its religion are given. It does not prohibit the religious community from adopting measures such as are prescribed in clause 12.15(d) of the constitution of the first respondent. The measures were adopted as a means of ensuring the achievement of the purposes of the schools. That the schools were established for the purpose of promoting the spirit of Anglicanism is clear from the contents of the provisions of the Acts of the Diocese.

It is provided, under clause 12.15(a) of the Acts of the Diocese, that although employment in the first respondent's educational institutions will be on merit, preference will be given to practising members of the Anglican Church. Clause 12.14 of the Acts of the Diocese provides that the teacher in an Anglican school plays a role that projects Anglicanism and contributes to the ethos of the school through a good professional approach aimed at fulfilling the mission statement.

It is clear that the objectives of the Anglican schools are furthered by a number of principles which have been developed by the Anglican church. To achieve their specific aims, the Anglican schools depend not so much on the subject matter of the curriculum as on the people who work there. The occupants of the office of headmaster and deputy headmaster being Anglicans is an integral aspect of the administration of the schools guaranteeing the propagation and promotion of Anglicanism. The reason is that the religious or doctrinal aspects of the schools lie at their very hearts and colour all their activities and programmes. The role of the headmaster and deputy headmaster in this respect is fundamental to the whole effort of the schools as much in their spiritual nature as in the academic. (See *Ontario Human Rights Commission v Etobicoke (Borough of)* [1982] 1 SCR 202 at 208.)

The measures taken attest to the exercise by the religious organisation of the right to determine the policy and rules governing the administration of the affairs of the schools it would have established for the purposes of promoting its own religion. The enjoyment of the right by the religious community concerned is consistent with the foundational principle of the Constitution that Zimbabwe is a secular State.

Whilst the decision to appoint a person as a headmaster or deputy headmaster of a school is a secular decision, the qualifications for appointment to a religious school may properly include a requirement that the person be an adherent of the religion for which the community that established the institution stands. The management of religious schools established under the authority of s 60(4) of the Constitution cannot be governed wholly by secular laws, as the purpose of their establishment is invariably the provision of secular education as well as religious

instruction. The rule was enacted by an ecclesiastical body for the management of internal affairs in matters of religion at its schools. Religious organisations are obviously formed to uphold and enforce the fundamental principles and doctrines of the religion chosen by their members.

The requirement that a person appointed to be headmaster or deputy headmaster at schools established by the first respondent should be an Anglican was imposed honestly, in good faith and for a legitimate purpose of ensuring that affairs in matters of the Anglican religion were properly managed. The requirement was clearly related in an objective sense to the performance of the duties of a deputy headmaster of a religious school. The requirement of religious conformance was imposed solely to promote the objects of the schools. The requirement underlines the fact that it is of primary importance to the achievement of the objectives of the schools that the headmaster and deputy headmaster be embodiments of the doctrines and ethos of the Anglican religion for them to preside over their teaching to students and their practices as a way of life at the schools. Having regard to all these principles and the special nature and objectives of the first respondent's schools, the requirement that the headmaster and deputy headmaster be Anglican is consistent with the exercise of the right to freedom of religion. The principle of religious neutrality does not apply to a private school established by a religious community for the purpose of propagating and promoting the collective faith.

Lastly, the allegation that the applicants' right to freedom to choose a religion of their own was infringed because their transfers were penalties for having exercised their right to change religion is without foundation in fact and in law. The applicants were not transferred because they changed religion. No-one is compelled to be a member of a religious organisation.

The respondents respected their right to freely choose to change religion. They were transferred because they had placed themselves in situations in which they were no longer able to perform some of the core functions of the office of deputy headmaster at the schools.

The applicants voluntarily opted to change their allegiance from the Anglican Church of the Province of Central Africa to the Evangelical Anglican Church International. In so doing, they ceased to be priests adhering to the principles of the Anglican Church as set out and practised by those who are members of the first respondent. The freedom to associate necessarily includes the freedom to disassociate. They became pastors adhering to the tenets and beliefs of the Evangelical Anglican Church International.

In *R v Big M Drug Mart Ltd* (1985) 18 DLR (4 ed) 321 at 353 DICKSON CJC said:

“The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.”

The applicants did not deny that they were able to do and did all these things in the exercise of the right to freedom of religion.

Nothing was done by any of the respondents to prevent the applicants from practising their new faith and performing their duties as pastors in their new church. Their right of choice of religion and the right to practise that religion was not impaired at all by any of the respondents. None of the respondents in any way interfered with the applicants’ positions as pastors in their

new church, nor did they prevent any of them from taking part in any religious activities of that church.

Just as the Supreme Court held in *Church of the Province of Central Africa v Diocesan Trustees, Harare Diocese* 2012 (2) ZLR 392 (S) that those who secede from a church have no right to take church property with them, so too it cannot be accepted that those who secede from a church can take control of schools established by that church in order to propagate a different religious ethos.

DISPOSITION

The applications are dismissed with costs.

CHIDYAUSIKU CJ:

GWAUNZA JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

BHUNU AJCC: I agree

Makombe & Associates, applicants' legal practitioners

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