HH 164-03
HC 3379/01
MAGAGA MASEDZA
versus
GOSPEL OF GOD CHURCH

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 20 December, 2001 and 15 October, 2003

Opposed Application

Mr *G C Chikumbirike* for applicant
Mr *G E Mandizha* for the respondent

HUNGWE J: Applicant seeks the following order -

a) **That the Applicant, members of his family, descendants of the late Johanne Masowe Magaga and members of the Gospel of God Church aligned to the Applicant be and are hereby allowed visitation rights known as *inter ad sepulcrum* at least twice a year for a period of one month to the grave of the late Johanne Masowe Magaga at times which they will agree with the leaders of the Respondent.**

b) **That the agreement to exercise the right of *inter ad sepulcrum* be exercised after giving at least 30days notice from the date at which such visitation shall occur.**

c) **That the Applicant and members of his family be allowed to exercise the right of *inter ad sepulcrum* at least once every month for a period of seven days.**

d) Costs of suit.

In his founding affidavit applicant makes the following averments. The respondent is a church which was founded by his father the late Baba Johanne Masowe Masedza in the early 1930's. His father fled the country taking with him his family including himself. His father established the church in South Africa, Botswana, Zambia, Mozambique and Kenya. Before his

death he had indicated his wish to be buried at a hill in Gandanzara. This spot would become the Church's shrine being the burial place of the Church's founder and prophet.

Applicant came back to Zimbabwe together with others of his descendants and church members. When he attempted to visit the Shrine, his father's burial site, the leaders of the respondents would not allow it. There was a split in the Church. He described the build up to the schism in the church leading to sometimes violent disruptions of worship at the site, the legal wrangles that followed, culminating on several orders by this Court and other inferior courts. None of this has resolved the schism. As he is the eldest son of the founder of the respondent and an adherent of his father's teachings he seeks an order through which he together with other followers and family members will be able to fulfil the religious teachings of their father and founder member of the respondent without let or hindrance from the other faction that now runs the respondent.

Respondent's council through its general secretary disputes his *locus standi* to launch the present application. In its opposing papers it disputes the wishes of the late Baba Johanne Masowe as espoused by applicant. It states that during the lifetime the founder father of the respondent Baba Johanne Masowe had renounced all his earthly possessions including his own traditional cultural beliefs and practices. He had given himself to the service of the Lord and expressed his wish to be embalmed at what would then become the Church's holiest shrine in Gandazara, Rusape. The respondent had by the time of his death become charged with the administration of his estate including the burial of Baba Johanne Masowe and leadership of the respondent.

His teachings are a charge to the respondent and a responsibility it still carries out to this day.

Respondent then gave a background to the genesis to the present doctrinal schisms that has split the congregation right down the middle.

The result of the split, the respondent says, is that applicant formed his own church which espouses certain doctrinal heresy which amount to an antithesis of everything the late Baba Johanne Masowe stands for. That doctrinal dispute and subsequent division is the real reason why the two factions cannot worship together. That is why it was incumbent upon the respondent to prevent applicant from visiting the holy shrine as such a visit for whatever purpose would desecrate the shrine.

In argument Mr *Chikumbirike* for the applicant urged me to find that the right known as *iter ad sepulcrum* recognised in the old Roman and Roman-Dutch law ought to be extended to the applicant. By virtue of that right applicant is, as a direct progeny of the late Johanne Masowe Masedza entitled to visit the grave of his father. He correctly pointed out that in South Africa this right now exists through codification.

As the law in this country is as that at the Cape Colony since 1890, the same right is to be recognised as law in this country.

Simply put, the applicant has a right of way recognised at law which entitles him to visit his father's grave. It is in the exercising the right that the Court ought to grant the order sought.

As pointed out by Counsel for the applicant, there is no authority for the proposition that was advanced on applicant's behalf.

I must investigate first if the right claimed is one that is recognised as part of our law.

Applicant has elected to bring this application on the basis that he is the son of the founding father of the respondent who is buried at the shrine situated on the property owned by the respondent. He accepts that as owner respondent is entitled to refuse entry upon its property as holder of the real right in that immovable property. I will therefore assume, although this has not been proved, that respondent is the registered holder of title to land upon which the shrine is situate.

Before one can be recognised as a holder of any right in another person's property, that person ought to demonstrate that he holds some recognized real right in that immovable property, ius *in re aliena*.

By far the most important class or real right less than ownership were servitudes. These were recognised in the Roman Law by Gains (2.14.17) W W Buckland (1921) in "Á Textbook of Roman Law from August to Justirian" defines a servitude thus -

> **"A servitude was essentially a right or group of rights forming part of *dominium*, but separated from it and vested in some person other than the *dominus*. From another point of view it was a burden on ownership, a *ius in rem* in another person,**

to which the owner must submit".

R W Lee (1915) in Á Textbook of Roman-Dutch Law" defines servitudes thus -

"A servitude is a real right enjoyed by one person over or in respect of the property of another, whereby the latter is required to suffer the former to do, or himself to abstain from doing, something upon such property for the former's advantage".

***Voet,* Compendium 7.1.1. *Grotius* 2.33.4.**

Relying on *Voet*, Lee says that -
"The person for whose benefit such right is constituted may either enjoy it as incidental to and inseparable from immovable property of which he is the owner, or may enjoy it personally and without any property or which he is the owner. In the first case the right is termed a real or praedal servitude; in the second case it is termed a personal servitude".

J.T.R. Gibson (1977) in *Wille's Principles of South African Law*" also relies on the same passage from *Voet* (7.1.1.), when he defines a servitude as:-

"….a right belonging to one person, in the property of another, entitling the former either to exercise some right or benefit in the property, or to prohibit the latter from exercising one or other of his normal rights of ownership".

A personal servitude is one which may be constituted in favour of any person, and it may exist over movable or immovable property. On the other hand a praedal servitude can be constituted over immovable property alone, and be of some benefit to the owner of another piece of immovable property (*Gibson supra*).

The consequence of these distinctions is that a real or praedal servitude is a fragment of the ownership of an immovable detached from the residue of ownership and vested in the owner of the adjoining immovable as necessary to such ownership and for the advantage of such immovable. Though ownership is divided and vested in two persons, the detached fragment is, as a rule, so insignificant as compared to what remains. It is therefore common to speak of the person to whom the residue belongs as the owner of the land while the person in who the detached right is vested is said to have a *ius in re aliena*. Thus personal servitudes approach more nearly to ownership in scope of enjoyment and have little in common with real servitude's except the name.

Real or praedal servitudes are distinguished as being rural or urban depending on the use to which the dominant tenement is put. The most easily recognised traditional servitudes are -

(a) the right of way and

(b) the water rights

(c) rights of pasture and

(d) right of cutting wood.

It will be seen that in each category several other sub rights are recognised. Thus four sub rights were recognised in the old Roman or Roman-Dutch law. These are -

(a) ***iter*** **(foot path)**

(b) ***actus*** **(driving cattle)**

(c) *via*

Modern writers such as Silberberg & Schoeman in "The Law of Property" 3rd Edition recognised that although the number of praedal servitude's is now said to be practically unliminated it is important to refer to certain well established kinds of servitudes so as to ascertain if any such servitude does indeed exist. They also recognise the three i.e. right of way, way of necessity and water servitudes as the more readily recognized servitude.

Iter, or right of foot path (*voet pad)* is recognised as a variety of the right of way amongst rural servitudes. Specifically it entailed the right of walking across the land of another. In the old Roman Law *res divini uiris* was divided into *res sacrae, res religiose* and *res sanctae* (Ins 2.1.8.). *Res Sacrae* where those things which had been consecrated to God by a pontiff as a result of a *lex* or *sanctus consultum* e.g. churches and temples, and only if publicly consecrated. On the other hand things could become *religiosae* by the private burying of a corpse on one's own premises or on another's land with the owner's consent. (Digest 1.8.6.4.) An empty tomb was similarly considered *res religiousa. Res Sanctae* were things protected by sanctions e.g. city walls. And gates (Silberberg & Schoeman).
Writing about the first two categories, Lee says there could be no servitude on *res sacrae* or *religiosae* as this was inconsistent with religion. He says that a *res* cannot be *religiosae* without the consent of all those having *iura in rem*; but expresses that there are difficulties in *res sacrae* which the old authorities do not explain.
It seems to me that the reason for the prohibition of servitudes on *res religiousa* may be founded on the reverence surrounding religion which stood the risk of being confused as to whether it was God who was being worshipped or the human being in whose favour the right is granted. Even if I am wrong on this view, whatever the correct position may have been in the old Roman-Dutch Law, Silberberg and Schoeman categorically state that the classification of things as *divini iuris* is obsolete as they are now *res in commencium*. See also, *Cape Inn District Waterworks* v *Elders Executors* (1890) 8 S.C. 9.
The contention by the applicant is that by virtue of this status in respect of the corpse that is

interred at Gandangara Shrine owned by the respondent he is entitled to institute rights on the basis of *iter ad sepulcrum*.

As applicant bases his claim on a praedal servitude, he had a praedal servitude to first establish that the shrine is situate on servient and that he, as owner or occupier of a dominant tenement or at least that reposed in him personally as *ius in re aliena.*

As discussed above a real or praedal servitude (as claimed here) in the old authorities, cannot exist on its own. There must be on the applicant's own admission as reflected in his heads at paragraph 4 page 3 -

> "The servitude of an iter giving access to a burial place will remain a matter of private property, and consequently it can be released to the owner of the servient estate; moreover it can be acquired even where the religious nature of the burial place is already established".

It seems to me that the application was bound to fail on other grounds than those given above.

Finally, the Emperor in the Digest, speaks of "…iter giving access to a burial place…" seems to suggest that the right given was merely one of access to a grave. Access denotes the right to enter a place in this case a grave yard. Or it can refer to the way by which one can reach a place. Thus if say your father's grave is created on a farm which is now under the control of some totally strange family, under this decree one could gain access to visit the grave through the shortest way from the public road on specific days or occasions.

Secondly the place applicant seeks to visit is not a grave yard. It is more. It is a shrine, a place of worship which is capable of ownership. It is more than a grave. It does not, to my mind qualify as a burial place and cannot qualify as such by any analogy.

Having failed to establish the right it is not necessary for me to discuss whether or not applicant has *locus standi*. It is implicit in my reasoning that he has not established *locus standi*. My reasons for this view is that the immovable property belongs to respondent. Applicant has failed to establish *ius in re aliena* over the shrine.

In the premises his application is dismissed with costs.

***Chikumbirike and Associates*, applicant's legal practitioners**