CASTEN MANGA
and
DAVID MUSUNGO
and
SHADRECK MHEMBERE
and
SHEPHERD MAHACHI
and
WILLIE SHUMBA
and
SENZILE MPOFU
and
NYARADZO MERCY MATUNHIRA
and
BENJAMIN MUKOROMBINDO
and
OBEDIAH MPOFU
and
SIMAWU MANUEL SITHOLE
versus
REVEREND CHAMUNORWA HENRY CHIROM
and
EMMANUEL BAPTIST CHURCH
and
CLEOPAS NEUSO
and
PATIENCE MARENGO
and
MRS NHLIZIYO

HIGH COURT OF ZIMABABWE
GOWORA J
HARARE, 22 May and 26 November 2008

K Gama, for the applicant
L Uriri, for the respondents

GOWORA J: The applicants, in a founding affidavit deposed to by the first applicant and to which the other nine have confirmed themselves to be party to the averments contained therein, allege that they are members of the Emmanuel Baptist Church in Zimbabwe. In an opposing affidavit deposed to by the first respondents, all respondents have challenged the

membership of a number of the applicants. For the resolution of the dispute before me it is not necessary that I make any finding regarding the membership of the said applicants. The respondents on the other, apart from the second respondent are members of the church which is cited herein as the second respondent. The applicants aver that the application is made on behalf of the second respondent (the church) but have failed to explain why then the church itself is a respondent.

The matter had initially been brought to court on a certificate of urgency but was judged not to be urgent. The matter was thereafter dealt with as an opposed matter by the parties and I presume that when the applicants noted that the nature of the relief they sought was being strongly challenged they decided that the best course was to amend their draft order. Consequently an application to amend the same was made and the respondents did not oppose it. The relief now being sought is in the following terms:

IT IS ORDERED THAT:

1. The third , fourth and fifth respondents be and are hereby ordered to convene a special general meeting within 14 days hereof for the purpose of resolving the issues stated in the letter of request for a special general meeting written to the chairman of second respondent by church members on 14 August 2007.

2. The decree imposed on church members by the first respondent prohibiting members of second respondent from conducting church meeting and playing musical instruments be and in hereby declared null and void.

3. First, third, fourth and fifth respondents be and are hereby ordered to pay the costs of suit

The background to the application is this. The first respondent is the pastor for second respondent. The third fourth and fifth respondents are office bearers within the church. In January 2005 allegations of adultery were leveled against the first respondent by members of the church. It is not in dispute that thereafter the first respondent experienced a number of problems and challenges in his relations with his church folk in general. It is also not in dispute that the first respondent issued certain ‘decrees’ with regard to the conduct of church services meetings and incidental matters. The upshot of all these developments is that a number of members of the church then addressed a petition to the first respondent demanding that he subject himself to a process of discipline under the supervision of the deaconate.

Needless to say that did not happen and as a result on 17 September 2007 a letter was written to him by the deacons indicating that they had taken over the running of the church. The matter of his suspension is not before me as that is a labour issue which is out of the ambit of this court. In submission in court Mr *Gama* for the applicants conceded this and I will as a consequence not dwell on it at all as an issue. It appears however that the applicants are not concerned with the letter of the deacons to the first respondent. On 14 August 2007 thirteen members wrote a letter to the Executive Committee of the church requesting that the committee call for a special general meeting to discuss the issues raised in the petition. The committee was put under terms to call for the meeting within twenty one days of the date of the letter. No meeting was called for hence the launching of the application for an order to that effect amongst other relief being sought.

Mr *Uriri* has argued, on behalf of the respondents, that the application which is before the court is to do with matters of faith, church practice and doctrine and that it is in fact an ecclesiastical dispute to which matters of neutral law do not apply. One only has to have regard to the first paragraph of the draft order to see that indeed this court is being asked to determine on issues relating to faith, church practice and doctrine. The letter of 14 August 2007 which requested for a special general meeting made reference to the petition delivered to the first respondent in June and July 2007. The petition required the following actions from the first respondent:

Stop pastoral duties and clear outstanding issues with the church

Undergo a formal and transparent disciplinary process presided over by the church's board of deacons and or pastors

Come clean on the Kwaedza Article of 1 June 2007 and the rumours of numerous children out of wedlock.

Apologize to the church for all the false accusations and for the disrespectful behaviour.

The natural question following upon the submission from Mr *Uriri* is what is in the order being sought that speaks of church practice or doctrine. On behalf of the respondents Mr *Uriri* contended that the court had to look at the substance of the application rather than the form to determine what it is that an applicant seeks by way of relief. Although the draft order has been amended to make reference to a letter what in substance is being sought is for the

court to order the convening of a meeting for purposes of a disciplinary enquiry into the conduct of the first respondent as pastor. I say this for the following reasons. When the matter was initially presented to this court it was on a certificate of urgency. The legal practitioner who filed the certificate stated therein that the first respondent had banned members of the church from worshipping through decrees, banned general meetings, was facing allegations of adultery which allegations were paralyzing the church and therefore an order was required that would protect the rights of the applicants pending the holding of a general meeting. The final order that was being sought was for the convening of a special general meeting to enquire into the allegations of adultery. The draft also sought the confirmation of the suspension of the first respondent and the assumption of the administration of church affairs by the deacons together with an interdict against the said respondent from conducting any pastoral duties pending the determination of the allegations of adultery.

The founding affidavit itself is replete with the alleged transgressions of the first respondent. There is therein reference to the failure to hold any general meetings except one from 2005 to 2006. The applicants have not sought an order relating to that failure. Rather they seek a special general meeting to enquire into the allegations leveled against the first respondent which are concerned with the conduct of the first respondent as pastor of the second respondent. For this court to decide on whether or not the applicants have made out a case for the issuance of the order sought it means that an analysis of the averments be conducted by this court. A simple illustration is obvious from paragraph 1. of the amended draft order. In order to find that there is need for the convening of a special general meeting to resolve the issues mentioned in the letter of 14 August 2007 sent to the first respondent the court must decide whether or not those issues, according to the constitution of the church, warrant the convening of a special general meeting for resolution. It does not seem to me as if the court can merely make an order for the convening of the special general meeting for the resolution of the vexed issues. I am convinced that in order to find that the calling for such a meeting is warranted the court must enquire into the basis of the dispute and decide whether the applicants have justification for the calling of such meeting. Such enquiry would involve the court delving into the manner in which the church herein conducts its worship, the rights of the members and the duties and obligations of the pastor of the church. Only by such an exercise can a court then decide whether or not there is merit in the complaint and further

whether then a special meeting would be necessary to resolve the problems confronting the church. That in effect would be the substance of the application before me as it is not concerned with the mere rubber stamping of an order being sought but instead an analysis of the facts before it coupled with decision as to whether the facts do establish a need for the calling of the special general meeting. The same is true of paragraph 2 of the amended draft order which requires that the 'decree which was imposed by first respondent prohibiting members of second respondent from conducting church meetings and playing instruments be and is hereby declared null and void'. A declaration of nullity would only follow if this court were to first find that the church members are entitled to have church meetings and to play musical instruments during worship. The court has to first decide what form the worship in the Baptist doctrine takes, whether there is an entitlement to church meetings and the playing of musical instruments and only then can it pronounce on the nullity of the decree banning the same. I have no hesitation in concluding therefore that the application before me concerns matters of faith, church doctrine and practice.

It is contended by the respondents that the body of laws that has evolved over the years is that secular courts are equipped with the task of determining issues relating to faith, church doctrine and practice. Secular courts apply neutral principles of law which in the case of matters relating to religion are inapplicable due to the nature of religion and religious practices. Where disputes which are entwined in church doctrine and faith have concerned proprietary rights, the courts have found justification for valid reason of having jurisdiction over such disputes by invoking principles applicable to voluntary associations. One would consider that legal rights in property disputes are matters of concern to the general public and as such courts must be seen to have jurisdiction to deal with those even where faith and doctrine have a large part to play in how those rights arise and are held. In *Independent African Church v Maheya*[1] DEVITTIE J undertook a painstaking and meticulous examination of American court decisions which dealt with disputes in which church doctrine and practice played a central if not pivotal role in the determination thereof. I have not been able to peruse the authorities cited by the learned judge and I will therefore be quoting from his judgment. It is not necessary I think that I traverse the same journey that DEVITTIE J undertook. It suffices

[1] 2000 (1) ZLR 39

if I mention or refer to the latest judgments that he quoted from. At p 559E-H the learned judge stated:

> "In Serbian Eastern Orthodox Diocese for the *United States and Canada v Milivojevich* 426 US 696 (1976) a dispute arose over the control of the American Diocese of the Serbian Eastern Orthodox Church property. The State court invalidated the bishop's removal as arbitrary, because removal proceedings were not conducted according to the church's interpretation of the church's Constitution and the Penal Code. The Supreme Court overturned the decision stating at 708 that:
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> *'The fallacy fatal to the judgment is that it rests upon an impermissible rejection of the decision of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and it impermissibly substitutes its own inquiry into church policy and its resolution based thereon of these disputes'*.

The court noted that the constitutional requisite that courts refrain from resolving church controversies over religious doctrine "applied with equal force to church disputes over church practice and administration". The court further held that notwithstanding the arbitrariness exception in Gonzalvez, the evaluation of testimony concerning church procedures and rejection of the interpretations of the highest church body was inappropriate."

What emerges from the authorities cited by DEVITTIE J and from his judgment under discussion here is that secular courts have no business enquiring into matters of faith church doctrine and practice. *In casu,* the court would have to conduct an enquiry as to the appointment of the pastor, his position vis-à-vis the deacons and whether they have the authority to suspend or dismiss him. Then there is the issue of the alleged adultery which from the affidavits filed on behalf of the applicants is the main complaint against him. This court cannot embroil itself in such matters as these are not concerned with neutral law.

In view of the amendment to the draft order it is no longer necessary that I deal with the other issues raised in the heads of argument filed on behalf of the parties. In the premises the application is dismissed with costs.

Madzivanzira , Gama & Associates, legal practitioners for the applicants
Gutu & Chikowero, legal practitioners for the respondents.