

BAPTIST CONVENTION OF ZIMBABWE
and
NGEZI BAPTIST CHURCH
versus
MICHAEL MALUNGA & 34 OTHERS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 14, 20 May, 8 July, 15 December 2020 & 30 September 2021

CIVIL TRIAL

C. Kwaramba, for the plaintiffs
S. Mpofo, for the respondents

TAGU J: The two plaintiffs issued summons claims against the 34 defendants for-

- (i) an order declaring that the defendants are no longer members of the plaintiffs as a result of their withdrawal from membership of the plaintiffs.
- (ii) an order declaring that possession and control of the church property known as Baptist Church, Site No. 6 Ngezi Township Kadoma vests in the plaintiffs and not the defendants who are in unlawful possession and control.
- (iii) an order evicting the defendants and/or all those claiming occupation through them from the church property known as Baptist Church, Site No. 6 Ngezi Township, Kadoma within ten (10) days of the making of this order failing which the Sheriff or his lawful Deputy shall be authorized to eject the said defendants in order to divest them of their unlawful occupation.
- (iv) an order interdicting the defendants or anyone acting on their behalf from entering, using or occupying the church property known as Baptist Church, Site No. 6 Ngezi Township Kadoma, or interfering with any activity of the Plaintiffs at the said church premises, in order to bar their unlawful conduct and interference, and

(v) costs of suit.

INTRODUCTION

The first plaintiff is the Baptist Convention of Zimbabwe, a duly constituted common law *universitas* of religious discourse capable of suing and being sued in its name. The second plaintiff is Ngezi Baptist Church, an affiliate member of the first plaintiff, and also a voluntary religious association capable of suing and being sued in its own name. All the defendants are the members of the Ngezi Baptist Church (second plaintiff) who sought to be dissociated with the governing body which is the Baptist Convention of Zimbabwe (first plaintiff) after the first plaintiff made certain amendments to its Constitution.

BACKGROUND FACTS

The first plaintiff is and has always been the overall body and authority that exercised jurisdiction over all Baptist Churches in Zimbabwe. Hence all Baptist Churches in Zimbabwe including the second Plaintiff were affiliates and members of the first Plaintiff, who subscribe to the canon laws, religious doctrines and tenets. While they exercised local autonomy, they are still bound by the authority and directions of the first Plaintiff which is the mother body. All property, movable or immovable that is held by the Baptist Churches is held in trust for and on behalf of the first plaintiff. In this case the second plaintiff holds title in respect of the property known as Baptist Church, Site No. 6, Ngezi Township for and on behalf of the first plaintiff who initially held rights in the property but subsequently ceded them to first plaintiff for administration and management purposes only. In 2013 there were proposals for the amendment of the constitution of the first plaintiff. Following wide consultations on/or about January 2014 a special congress was convened in terms of the constitution wherein the proposed amendments were tabled, debated, voted for, approved, and passed into law by the majority of the members. Dissatisfied with the endorsement and adoption of the Constitutional amendments the defendants expressly withdrew their membership from the first plaintiff through a letter dated 1 October 2014. They further purported to withdraw second plaintiff's membership from the first plaintiff. Despite the withdrawal from plaintiffs' membership the defendants continued to act purportedly for and on behalf of the second plaintiff. They then prevented other church members from using the church property for worship purposes and dismissed the sitting pastor. Despite several demands,

defendants refused, failed and or neglected to vacate the premises, cease the unlawful conduct, stop the interference with plaintiffs' activities and generally to cease conducting themselves in a manner inconsistent with their decision to withdraw from the Baptist Church, hence the present case was filed against them.

Only two issues were referred for trial as captured in the joint pre-trial conference minute. These are-

1. Whether or not first Plaintiff can exercise jurisdiction over Ngezi Baptist Church.
2. Whether or not Defendants must be evicted from the Baptist Church, Site No. 6 Ngezi Township, Kadoma.

An admission was made by the defendants at the Pre-trial conference. They admitted that they are not members of the first plaintiff (Baptist Convention of Zimbabwe).

On 14 of May 2019 the plaintiffs filed a notice of withdrawal of their claim against the 18th defendant Samson Sakala now late, the 24th defendant Esnah Chulu now late, the 25th defendant Mercy Chulu, the 27th defendant Spiwe Jere now late and the 31st defendant Marshy Chagomoka and tendered wasted costs.

In support of its cause the plaintiffs led evidence from Pastor Greenwell Mugoni, the Executive Secretary in the first plaintiff and a Pastor in the second plaintiff, Mr. Diro Jonas and Velenika Mbeve congregants in second plaintiff. After extensive cross examination by the defendants' legal practitioner the plaintiffs closed their case. At the close of the plaintiffs' case the defendants applied for absolution from the instance which this court dismissed as there were several aspects of the case that the defendants had to explain. In their defence the defendants led evidence from one witness Mr. Michael Malunga the first defendant and one of the rebellious congregants. Thereafter the counsels filed closing submissions.

In brief witnesses for the plaintiffs told the court that the defendants withdrew their membership from The Baptist Convention of Zimbabwe as well as the Ngezi Baptist Church but continued to use the premises at No. 6 Ngezi Township for their prayers. They chronicled how the Church was formed and that they have always been under the Baptist Convention of Zimbabwe. They denied that the second plaintiff moved out of the Convention, but said rather

the individual cited as defendants are the ones who withdrew their membership. They claimed to be the rightful owners of the premises and prayed that the defendants be evicted from the same since they have ceased to be their members.

On the other hand Mr. Michael Malunga gave evidence to the effect that the Baptist Convention of Zimbabwe has no authority over him and other 34 defendants since they withdrew from its membership. He claimed that they are the rightful people to be congregating at this premises. He challenged the eviction from the premises. He confirmed the letters of withdrawal from the Convention.

For easy of reference the court will quote the purported letters of withdrawal. They read as follows:

“Ngezi Baptist Church
Box 356
Kadoma

The Secretary
Baptist Convention of Zimbabwe
Box 1645
Gweru

Dear Sir

REF: PROTEST AGAINST THE NEW CONSTITUTION OF BAPTIST CONVENTION

This letter serves to inform you that the Ngezi Baptist Church rejects the new Constitution.

This is because 95% of the new constitution is against our beliefs and inconsistent with what we as Baptists believe in and such we are using the old constitution which is consistent with what we are and what we believe in.

Could we have your audience/response on or before the 14th of October 2014. Should we get no response from you within this stipulated time, the Ngezi Baptist Church will be automatically out.”

And the second letter reads as follows-

“Ngezi Baptist Church
P.O. Box 356
Kadoma

01-01-2014

To the Kadoma and Chegutu Association Member churches

REF: PROTEST AGAINST THE NEW CONSTITUTION OF BAPTIST CONVENTION OF ZIMBABWE

This letter serves to inform you that Ngezi Baptist church has rejected the new constitution of B.C.Z.

Which means that by rejecting the B.C.Z. constitution, automatically we have rejected the associational supreme law which was drafted in consistency with the B.C.Z. new constitution? Therefore we Ngezi Baptist have found it fit to withdraw our membership from this association as from the first of October 2014.

NOTE: Any person from this church who may attend or hold a position in the Kadoma and Chegutu association as from this date is **no longer representing Ngezi Baptist church** but is merely representing himself/herself on volition.

NOTE: This withdrawal covers all groups; B.M.F, W.M.U, YOUTH and all smaller groups.

Your cooperation is highly appreciated.

Yours in Christ

Michael Malunga
Secretary

not legible
Deacon

Caroline Malunga
Chairperson “

This case therefore can only be decided by resolving the question whether the withdrawal of membership by the Executive Committee of Ngezi Baptist Church from the Baptist Convention of Zimbabwe amounted to separation from the Baptist Church at Ngezi or the World Baptist Church, that is the Convention. If the withdrawal of membership was a withdrawal of the Ngezi Church as a whole, then no eviction can be sustained against defendants by the first Plaintiff. If the withdrawal was only by those who wrote the letter, then all the other defendants cannot be made part of it unless they were part and parcel of those who wrote the letter of withdrawal. The court must therefore decide who withdrew membership.

Before resolving the above questions it is necessary that this court state the facts that were established beyond doubt by the evidence from the plaintiffs as well as the defendants so that a clearer picture of the situation is portrayed. What emerged clearly from the evidence and submissions made in this case is as follows. That the Baptist Church in Zimbabwe was established by foreign missionaries who came to Zimbabwe in 1949. That one of the churches the foreign missionaries established in Zimbabwe was Ngezi Baptist Church, the second plaintiff. That those churches which were established by the foreign missionaries came together to form an umbrella body called the Baptist Convention in Zimbabwe. That Ngezi Baptist Church, that is, second plaintiff was thus a founding member of the Baptist Convention of

Zimbabwe, the first plaintiff. That the Baptist Mission began to acquire properties country-wide through leases to house its member churches. That Site 6. Ngezi (the property in the centre of the dispute) was one of the properties acquired by the foreign Baptist Missionaries through a lease for use by the member church (second plaintiff). That none of the current congregants/contestants were there when all this was happening. It is clear that the foreign Baptist Missionaries proceeded to build a church at Site No.6 Ngezi for use by congregants of the member church. That none of the current contestants were there when the property was acquired and built. It is common cause that the property was acquired for the common use by all those who were willing to be members and to abide by the Baptist principles. When the foreign Missionaries were about to leave Zimbabwe, they handed over everything to the Baptist Convention of Zimbabwe including the property at Site No.6 Ngezi. This position is confirmed by the letter dated 17 November 1983 which was admitted as an exhibit. The understanding was that the Baptist Convention of Zimbabwe was to hold the property in trust for the member churches. It is further not in dispute that the foreign Baptist Missions then ceded its rights in Site No. 6 Ngezi to the Baptist Convention of Zimbabwe. This again is confirmed by the cession agreement dated 21 June 1979 which was tendered as an exhibit. To that end the Baptist Convention of Zimbabwe exercised supervisory powers and had some control over Ngezi Baptist Church. The Baptist Convention of Zimbabwe also had rights over Site No.6 Ngezi Township, Kadoma. It is not disputed that sometime around 2002 the members of Ngezi Baptist Church managed to pull their resources together and paid for the outright acquisition of the property from Kadoma Municipality moving away from being a lessee. The evidence also pointed to the fact that prior to 2014 Ngezi Baptist Church was an affiliate member of the Baptist Convention of Zimbabwe. It is not disputed that in January 2014 the Baptist Convention of Zimbabwe adopted a new Constitution. It is clear that the Ngezi Baptist Church as a member of the Baptist Convention of Zimbabwe participated in the Constitution making process, voted and lost. Therefore from January 2014 to October 2014 the Ngezi Baptist Church existed as a member of the Baptist Convention of Zimbabwe governed by the new constitution. It was only in October 2014 that a group of members of Ngezi Baptist Church mainly comprising of the defendants wrote to the Baptist Convention of Zimbabwe indicating their withdrawal from the Convention

due to their disgruntlement with some provisions of the adopted Constitution as reflected in the letter cited *supra*.

Hence as stated elsewhere in this judgment this entire matter turns on the effect of the withdrawal of October 2014.

Having analyzed the evidence, and the papers filed of record, the inescapable conclusion that this court came to is that it is not in dispute that the defendants decided to withdraw from the plaintiffs. While the letter of withdrawal was written in an official capacity purportedly saying the Ngezi Baptist Church will be automatically out, the defendants were withdrawing on their own capacities. I say saw because the defendants admitted their withdrawal in their plea. In paragraph 11 of their plea the defendants stated as follows-

“This is denied. A so called Special Congress was convened in which the second Plaintiff elected to be members of the Baptist Convention of Zimbabwe. However, the defendants were strongly opposed to the proposed amendments which were aimed at adoption of the constitutional amendments to integrate the Ngezi Baptist church to the Baptist Convention of Zimbabwe”

They further said in paragraph 12 of their plea-

“This is denied. The Defendants withdrew their membership from the Baptist Convention of Zimbabwe as they refused to be bound by new constitutional amendments which were being proposed by the second plaintiff.”

What is clear from the above pleas is that the defendants in their individual capacities disagreed with both the Baptist Convention of Zimbabwe and Ngezi Baptist Church. Because of that disagreement they decided to withdraw their membership. In this court’s judgment on absolution I posed the following questions for the defendants to answer-

“The other interesting issue which boggles the mind is on which authority were the defendants representing other congregants and then withdrawing from the Convention on their behalf? “

I even went further to say:

“in the present situation the defendants are to prove the authority upon which they were withdrawing from the Convention. As it stands, the Defendants were individuals who had made a decision to venture on their own without necessarily representing Ngezi Baptist Church.”

Despite knowing what the court expected them to prove, the defendants did not in their evidence-in-chief present any evidence that they were authorized either by the Ngezi Baptist church leadership or by the general membership of the Ngezi Baptist Church to withdraw Ngezi Baptist Church from the Convention. If their plea in para 11 is accepted, as I hereby do, that a so

called Special Congress was convened in which the second plaintiff elected to be members of the Baptist Convention of Zimbabwe, then when and how did the second plaintiff decided otherwise? As I said they admitted as defendants in para 12 of their plea that they withdrew their membership from the Baptist Convention of Zimbabwe. It is trite that an admission made in a pleading is binding on a party. See *Remo Investment Brokers (Pvt) Ltd & Ors* Civil Appeal No. SC 13/13; and *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (SC) where it was held that:

“The effect of a formal admission made in pleadings was underscored in *Gordon v Tarnow* 1947 (3) SA 525 (AD) where DAVIS AJA at 531- 532 said:

But this admission in the plea is of the greatest importance, for it what Wigmore (paras 2588-2590) calls a ‘judicial admission’ (of the confession *judicialis* of *Voet* (42.2.6)) which is conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it. (See also Phipson 7 ed p18)...”

These *dicta* were approved by MACDONALD ACJ (as he then was) in *Moresby –White v Moresby-White* 1972 (1) RLR 199 (AD) at 203E-H, 1972 (3) SA 222 (RAD) at 224.

In my view the admissions made by the defendants proved the plaintiffs’ case that the defendants created a schism. The Supreme Court in the case of *The Church of the Province of Central Africa v The Diocesan Trustees for the Diocese of Harare* SC 48/12, a case in almost all fours with the present one had occasion to deal with all the issues that have arisen in this matter. At p 26 of the judgment the court dealt with the issue of the creation of a schism thus;

“According to ‘The Concise Oxford Dictionary (1990)’ a schism is “the separation of a church into two churches or the secession of a group owing to doctrinal, disciplinary differences”. The court agrees with Mr. de Bourbon that the evidence proved that Dr. Kunonga and his followers created a schism. The schism in the circumstances of this case is clear evidence of withdrawal of membership by Dr. Kunonga and his followers from the Appellant Church.”

The defendants did not have any authority to withdraw Ngezi Church from the Baptist Convention. During cross-examination the first defendant Michael Malunga was challenged by the counsel for the plaintiffs to produce minutes of any meeting of the church leadership where a decision had been made to withdraw from the Convention and that he had been authorized to withdraw Ngezi from the Convention. He was challenged to produce minutes of a meeting of the general membership where the decision to withdraw had been made. He was challenged to

produce evidence that the members had met and voted to withdraw from the Baptist Convention of Zimbabwe, or even a petition signed by the general membership indicating their approval of the decision to withdraw from the Baptist Convention. He was unable to do so. MALABA DCJ (as he then was) in *The Church of the Province of Central Africa v The Diocesan Trustees for the Diocese of Harare supra* had this to say-

“Common sense indicates that Dr. Kunonga could not have been doing what members agreed that office bearers in his position would do for and on behalf of the Church. There was never agreement by the members that a Diocesan Bishop could write a letter to the Archbishop notifying him of a unilateral withdrawal of his diocese from the Province. Dr. Kunonga was obviously advancing the secessionists’ agenda.”

The Judge went further to say:

“The argument that Dr. Kunonga was acting in a representative capacity or official capacity when he wrote the letter of 21 September 2007 proves nothing. No law authorized him and others to represent others in trying to do the impossible concerning the withdrawal of the diocese of Harare from the province. Withdrawal of membership from the Church was something exclusively within their power as individuals. The minutes of the meeting of 4 August 2007 show that they discussed the question of withdrawal and agreed as individuals to withdraw from the church. If they were acting in their official capacities they could only have been representing the Archbishop and the Province. That would be impossible because they were fighting these institutions. Individual withdrawal of membership from the church was the natural consequence of the letter of 21 September. Whilst they represented no-one, Dr. Kunonga and his followers did act in common purpose...”

Therefore the group led by Mr. Michael Malunga sat and decided on their own that they wanted to withdraw from the Baptist Convention of Zimbabwe. They were free to withdraw their membership as it was within their power as individuals. But no law authorized them to represent other members to withdraw from the Convention. Indeed Daero and Mbewe testified that as members they were, like many others, not in agreement with the decision by the Malunga group to withdraw from the Baptist Convention. And as leader at Ngezi Church they had not sat in any meeting where a decision was made to withdraw from the Convention. That decision had been made privately by Malunga and his group which consisted mainly of his family.

From the evidence led it is not in dispute that the defendants were not the Ngezi Baptist Church. They were individuals who had decided to leave the church. They were free to do so. The real question presented for determination in this matter is whether or not by withdrawing their membership the defendants have lost the right to control the plaintiffs’ property which is Site No.6 Ngezi Township, Kadoma. The defendants’ contention is that for the plaintiffs to evict

them from the church property they must show that they dismissed them from their membership in terms of its constitution. This contention lacks merit because the defendants were not dismissed from the membership of the plaintiff, but they withdrew their membership. The plaintiffs could not discipline members who had withdrawn membership. Borrowing from what was said in Dr. Kunonga situation mentioned supra, the court said, and I fully associate myself with such sentiments-

“...A Church cannot institute disciplinary proceedings against a person who is no longer its members or office bearer. The court holds that Dr. Kunonga resigned as a Bishop of the Province of Central Africa and could not have been dealt with in terms of the disciplinary procedure prescribed by canon 24.”

As was stated in the case cited *supra*:

“The principle is that in the absence of express provision in the Constitution of a voluntary association such as a church, property held in trust must be applied for the benefit of those who adhere to the fundamental principles of the association. Related to this is the principle that a member of a voluntary association who leaves the organization whilst others remain must leave the property with those who have not resigned membership. When one leaves a club one does not take the property with him or her. It has been long established as a salutary principle of law in this area of property ownership that when one or more people secede from an existing Church they have no right to claim Church property even if those who remain members of the congregation are in the minority.”

In Zambezi Conference of Seventh Day Adventists v General Conference of Seventh Day Adventists & Anor 2001 (1) ZLR 160 after a dispute with the SDA, delegates to a local conference decided on 20 December 1992 to secede from the Mother Church to form the Seventh Day Adventists. The new body claimed ownership of the properties of its predecessor. The claim was dismissed on the same principle that those who have left a Church have no claim to its property. MCNALY JA at p 162 D-F said:

“These individual members, who seceded from the Church, even if they be a majority of the members of a particular congregation, have seceded as individuals. They cannot have a claim to property of the SDA. They have formed a *universitas*, a new association of individuals. They cannot have a claim to property of the SDA. It may be that as individuals, they subscribed towards the funds of the Church. But they did so as members. Having now founded a new *universitas*, they cannot in law claim ownership of the Church property.”

In casu the principles enunciated above resound with the story that the plaintiffs have told. The defendants have left the Baptist Convention as well as the Ngezi Baptist Church. They have no right to claim church property which they found there when they joined. Just as they came with nothing, they also must leave with nothing. The defendant advanced the argument that they cannot be evicted from the property because they do not stay there. The defendants do not dispute that they have possession and are in control of the church building. The defendants have keys to the building and they control the occupation and use of the same. Possession is defined by the learned authors in Silberberg and schoeman's '*The Law of Property*' 2nd ed at p 114 in this manner:

"Possession' has been described as a compound of a physical situation and of a mental state involving the physical control or detention of a thing by a person and a person's mental attitude towards the thing...Whether or not a person has physical control of a thing, and what his mental attitude is towards a thing, are both questions of fact."

Just as in the *Cossan Chiyangwa & 7 Ors v Apostolic Faith Mission in Zimbabwe & 7 Ors* SC 67/21 the defendants must lose their claim to be the true Ngezi Baptist Church and their possession and control of Site No. 6 Ngezi Township of Kadoma. There can be no doubt therefore that a case for the defendants' eviction has been made. I will accordingly grant the plaintiffs' claim.

IT IS ORDERED THAT

1. The defendants are no longer members of the plaintiffs as a result of their withdrawal from membership of the plaintiffs.
2. That possession and control of the church property known as Baptist Church, Site No. 6 Ngezi Township Kadoma vests in the plaintiffs and not defendants who are in unlawful possession and control.
3. It be and is hereby ordered that the defendants and/or those claiming occupation through them to the church property known as Baptist Church, Site No. 6 Ngezi Township Kadoma, be evicted within ten (10) days of the making of this order failing which the Sheriff or his lawful Deputy shall be authorized to eject the said defendants in order to divest them of their unlawful occupation.
4. It be and is hereby ordered that the defendants or anyone acting on their behalf be interdicted from entering, using or occupying the church property known as Baptist

Church, Site No.6 Ngezi Township Kadoma, or interfering with any activity of the plaintiffs at the said church premises, in order to bar their lawful conduct.

5. The defendants shall jointly and severally pay the plaintiffs' costs, the one paying the others to be absolved.

Mbidzo Muchadehama and Makoni, plaintiffs' legal practitioners
Munangati and Associates, defendants' legal practitioners.