ANOS MAGAYA CHIMENYA
versus
THE CHAIRPERSON OF THE SYNODICAL COMMITTEE
OF THE REFORMED CHURCH IN ZIMBABBWE
and
THE SYNODICAL COMMITTEE
OF THE REFORMED CHURCH IN ZIMBABBWE
and
THE REFORMED CHURCH IN ZIMBABBWE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 6 October 2022 & 19 May 2023

COURT APPLICATION

E Mubaiwa, for the applicant
T Magwaliba, for the respondents

MANZUNZU J

INTRODUCTION:

This is a court application for review in terms of section 26 and 27 of the High Court Act Chapter 7:06 as read with Order 33 of the then High Court Rules 1971 in which, at this point of the judgment, the court is called upon to decide on a number of preliminary points.

The applicant seeks an order in the following terms;

"IT IS ORDERED THAT:

1. *The proceedings by the 1st respondent held on the 9th of April 2021 whose decision was handed down on the 20th of April 2021 and communicated to the applicant on the 21st of April 2021 be and is hereby quashed.*
2. *In place the following order is made:*
   i) The third respondent 's International Presbytery and second respondent be and are hereby ordered to take appropriate action against all persons and bodies who were found by the International Presbytery and the second respondent to have violated the third respondent's constitution.
   ii) The second respondent and third respondent's International Presbytery be and are hereby directed to consider and grant appropriate remedies in favour of the applicant in respect of all incidences or cases wherein decisions were made by either the International Presbytery or the second respondent in

favour of the applicant in accordance with the requirements and provisions of the third respondent's constitution.

ALTERNATIVELY

The proceedings of the second respondent held on the 9th of April 2021 whose decision was handed on the 20th of April 2021 and communicated to the applicant on the 21st of April 2021 be and are hereby quashed and/or set aside.

The matter is remitted back to the second respondent for the determination of the applicant's appeal in a lawful and procedural manner in accordance with the provisions of the Constitution, Rules and regulations of the third respondent.

3. *The respondents shall pay the applicant's costs, jointly and severally, one paying the other to be absolved."*

BRIEF BACKGROUND

This matter has a long history of discontentment by the applicant in the manner in which his complaints were handled by the structures of his church, the Reformed Church of Zimbabwe (RCZ). The manner in which the applicant has persisted with every minute detail of his complaints shows how litigious he is. The applicant was an elder in the RCZ and was relieved of the position by the Church Council. He displays a litany of complaints in his founding affidavit.

The applicant was not amused by the appointment of one Felix Kagura as a deacon in the church on 13 October 2019. The reason being, he considered Kagura unfit for appointment because Kagura had voiced support for a relationship between applicant's daughter and her boyfriend. The applicant considered the relationship to be contrary to Christian values as it amounts to pre-marital cohabitation. He lodged a complaint with the Reformed Church International South Africa in November 2019 whose Council dismissed his complaint in December 2019.
The applicant then lodged another complaint with the Council asking the Council to investigate what he termed was a rumour that the church had blessed the marriage of his daughter without his knowledge. On the other hand, he complained that he was relieved of his position as an elder without the right of audience.

On 2 March 2020 the Council disposed of the applicant's complaints by dismissing them. The applicant then lodged a complaint against the reverend Jiri whom he alleged presided over the wedding of his daughter. Another complaint was also lodged against Reverend Munikwa's wife for what applicant says she "aided and abetted" the marriage of his daughter. Reverend Munikwa was not spared with the complaint for his alleged failure to rein over his wife.

The applicant further says he filed an appeal to the International Presbytery which on 22 August 2020 ruled that the blessing of the marriage was contrary to church rules and that his removal as elder of the church was contrary to the Constitution of the church; instead recommended that the disputes should have been referred to the International Presbytery.

The applicant further says was not happy with some of the findings by the International Presbytery so he decided to appeal to the Synod of the third respondent. The appeal was heard by the Synod's Synodical Committee because the Synod which seats twice a year was not in session. The outcome of the appeal was that the Synodical Committee recommended dialogue and engagement between the church and applicant's family in order to resolve the matter. This was communicated in a letter of 20 April 2021. Dissatisfaction in the outcome of his appeal has prompted the filing of this application in which he alleges procedural irregularities, breach of duty to act fairly, irrationality, violation of the the *audi alterum partem* rule and improper composition of the Synodical Committee.

The applicant cites and heavily relies on the provisions of the Constitution of the Church.

The respondents opposed the application and the relief being sought and raised a number of preliminary points, which, if successful, are dispositive of the matter. In response the applicant contests the preliminary points by the respondents and raises a point in limine.

The respondents' preliminary points are that:

1. The Constitution relied upon by the applicant is in the vernacular and has not been translated into English
2. The High Court has no jurisdiction over this matter
3. Failure to exhaust domestic remedies

In turn, the applicant alleged that the deponents to the opposing affidavits had no authority. He urged the court to treat the matter as unopposed.

I will now deal with these preliminary points not necessarily in their respective order.

JURISDICTION.
This preliminary point overrides all others in that in the event the court has no jurisdiction then the application must fall away.

When one looks at the applicant's complaints to the Church Council, International Presbytery and Synod one can easily discern that these are matters of ecclesiastical governance and doctrine. It is more so when one considers how the applicant has aligned his complaints to the provisions of the Constitution of the church.
The word "ecclesiastical" has been defined by the Oxford dictionary to mean "*relating to the Christian Church or its clergy*." The applicant has all along been pushing one complaint or the other through the ecclesiastical hierarchy created by the church constitution.

The respondents urged the court to adopt the deference approach laid down in *Tachiona v Bulawayo Seventh Day Adventist City Centre Church and Anor HB 63/17* where the court had this to say; "***In our law, while the courts have generally adopted what has come to be known as the "deference approach" to church disputes which is to say that there is judicial recognition of the decisions of the church's highest hierarchical bodies on matters of discipline, faith or ecclesiastical rule, and in the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals upon matters purely ecclesiastical, are accepted in litigation before secular courts as conclusive because the parties made them so by consent, there will always be judicial review of church decisions in situations where fraud, collusion or arbitrariness are alleged."***

The case of *Independent African Church* v *Maheya* 1998 (1) ZLR 552 (H) was cited with approval in the Tachiona case (supra) where the court stated that:
"Whereas therefore, the court in Watson's case urged wholesale judicial deference to determinations of a church's highest body in ecclesiastical matters, the dictum in Gonzalez case suggested that there could be some judicial review on church decisions in exceptional cases in which fraud, collusion or arbitrariness was alleged. In terms of the Gonzalez decision, a civil court would examine the fairness of the church proceedings to determine the absence of fraud or collusion and whether the church has disregarded its own rules and acted arbitrarily."

The position of the law therefore is that, as a general rule, the decisions of the church's highest body on matters purely ecclesiastical are conclusive and not subject to review by the courts. This general rule is subject to exceptions in situations where fraud, collusion or arbitrariness are alleged.

The grounds for review raised by the applicant do not allege fraud, collusion or arbitrariness. They are the grounds ordinarily set out in section 27 of the High Court Act. It has been argued for the respondents that, the church organs dealt with the applicant's complaints in a Christian like fashion in accordance with the church rules and regulations and that should not be a basis upon which those decisions must be measured to the provisions of the Administrative Justice Act or section 27 of the High Court Act. It was further argued that the ordinary rules either of common law review or statutory review were inapplicable in the present matter and further that the exceptions provided for in accordance with the deference principle have not been established.

On the other hand the applicant has argued that section 26 of the High Court Act confers jurisdiction upon the court to deal with this application but has not gone further to discuss the deference principle set out in case law. It is clear from the prayer sought that the applicant wants this court to direct the church bodies to exercise their discretion in a particular way and impose certain punishment to all those found to have breached the constitution. In casu the applicant while has addressed the issue of jurisdiction has failed to establish the relevant jurisdictional facts upon which this court may assume jurisdiction. The preliminary point must succeed.

While this finding disposes of this matter, I find it necessary to deal with the rest of the preliminary points, in case I am mistake in my finding, which I do not believe I am.

EXHAUSTION OF DOMESTIC REMEDIES

The respondents' position is that the applicant ought to have taken his appeal to the Synod which is the highest body of the church. It is not in dispute that the Synod is the highest body of the church but hold only two sessions per year. The applicant's argument is that when the Synod is not in session the Synodical Committee seats in its stead. Therefore, to file an appeal with the Synod at this stage will amount to a duplication as the same members of the committee are the same members of the Synod. In any event, the applicant argued, the principle of exhaustion of domestic remedies is not casting stone. This is so because an

aggrieved party is not compelled to pursue an illusory or artificial remedy which is ineffectual.
The first question to resolve is whether an appeal to the Synodical committee effectively an appeal to the Synod. Section 11.2 of the constitution resolves this issue. It reads, "When the Synod is not in session its business will be conducted by the Synodical committee." In my view an appeal lodged with the Synodical Committee while the Synod is in recess is effectively an appeal before the Synod. To file another appeal when the Synod is in session amounts to a duplication. It is neither here nor there that the membership of the Synod is more than the committee. For this reason, the preliminary point must fail.

CONSTITUTION IN THE VERNACULAR

No time should be wasted on this point because it was not pursued mainly because the relevant sections relied upon were translated. The point must naturally be put to rest.

VALIDITY OR OTHERWISE OF THE OPPOSING AFFIDAVITS

The 1st and 2nd respondents' opposing affidavit was deposed to by one Reverend Isaac Pandasvika who said was the moderator in the church and chairperson of the Synodical Committee and member of the Board of Trustees of 3rd respondent. In that capacity he said was authorized to depose to the affidavit. Reverend Tafadzwa Masimba said was the General Secretary and member of Board of Trustees of 3rd respondent and was authorized to depose to the affidavit for 3rd respondent.

The applicant's contention is a mere attack of the deponents alleging they have no authority as they allege. He said Reverend Pandasvika was not the chairperson of 1st and 2nd respondents and yet he does not tell us who then is the chairperson. He queried Reverend Masimba's authority to represent 3rd respondent. The applicant is a member of this church who at one point was an elder in the church, yet he fails to take the court into his confidence by saying who then should have deposed to the opposing affidavits. Certainly he ought to know who then has authority. The point simply has no merit and was raised as a fishing expedition.

As an appendage to this preliminary point Mr Mubaiwa argued that it was irregular for 1st and 2nd respondents to oppose the application because they were the adjudicators. This point was raised for the first time over the bar. While expressing dissatisfaction in what he referred to as litigation by ambush, Mr Magwaliba distinguished those tribunals created by law to make decisions after hearing evidence, and conciliatory bodies such as those in the present case. In any event the 1st and 2nd respondents adopted the evidence by the 3rd respondent. This preliminary point despite a concerted effort to sustain it has no merit and must fail.

While this application must be dismissed, punitive costs prayed for by the respondents are not justified. It has not been shown that the application is frivolous or that the applicant is bent on abusing court process.

DISPOSITION
The application be and is hereby dismissed with costs.

Matizanadzo and Warhurst, applicant's legal practitioners
Saratoga Makausi Law Chambers, respondents' legal practitioners.