

DISTRIBUTABLE (4)

(1) MARANGE APOSTOLIC CHURCH OF ST JOHANNE (2)
ISRAEL RUWOKO
v
CLEMENCE MOMBERUME

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & PATEL JA
HARARE, FEBRUARY 7 & FEBRUARY 21, 2014**

R. Goba, for the 1st appellant

T. Mberi, for the 2nd appellant

T. Mpofu, for the respondent

GWAUNZA JA: This is an appeal against the decision of the High Court Harare, in HC 11782/2011, which was handed down on 15 May 2013.

The background to the dispute is that the respondent instituted court action in 2005 against the first appellant and two others for, *inter alia*, the return of certain church goods and regalia. On 13 December 2006 a default judgment was granted in favour of the respondent. This judgment was subsequently rescinded on 14 May 2007. Almost two years later, on 3 February 2009, the respondent's then legal practitioners filed a notice of withdrawal of the action, purportedly on the instructions of the second appellant.

It is pertinent to note that the first appellant and the respondent belong to rival factions of what used to be one church.

The crux of the appeal is whether or not the court *a quo* erred in accepting that the said notice of withdrawal in case No. 2716/2005 was filed on the instructions of the second appellant as opposed to the respondent.

The judge *a quo* accepted the respondent's version that the second appellant, acting maliciously and without the respondent's specific mandate, gave the instructions to the legal practitioners to withdraw the action in HC 2716/05. In accepting this evidence, the learned Judge relied essentially on the affidavit dated 24 November 2011 and filed by the respondent's erstwhile legal practitioner, Mr Gunje. The affidavit was to the effect that Mr Gunje had in fact never met the respondent, had always dealt with the second appellant as the respondent's representative and that the second appellant was the one who gave him the instructions to file the notice of withdrawal. The court *a quo*, however, made no reference to the letter, written by Mr Gunje almost three years earlier on 9 February 2009, and addressed to the first appellant's legal practitioners. As indicated below, we find the contents of this letter to be quite significant.

The second appellant's defence was that he never gave the instructions in question to the respondent's legal practitioners; rather, that it was the respondent himself who did so. The first appellant, in his notice of appeal and heads of argument, took the same position. Strangely, in argument before us, Mr *Goba* for the first appellant deviated from this position and attempted to argue that the second appellant did in fact give the relevant instructions, but solely acting as agent for the respondent.

In our assessment of Mr Gunje's affidavit, we find that he failed to explain in any way whatsoever the contents of his letter of 3 February 2009, which was addressed to Messrs *Danziger & Partners*, the first appellant's legal practitioners. Nor does Mr Gunje's

affidavit deal with the contradictions between his averments therein and the statements contained in the said letter. The essence of that letter, which was written on the very same day that the notice of withdrawal was filed, was that Mr Gunje had taken detailed instructions and then recommended to his client that he should withdraw his claim in HC 2716/05. Our reading of the letter makes it clear that the client referred to was the respondent. The contemporaneity of the letter with the notice of withdrawal, in our view, leaves no room for any other conclusion.

One of the points taken by the respondent was that the second appellant had, at the time he allegedly gave instructions for the notice of withdrawal to be filed, switched allegiance from the respondent's faction to that of the first appellant. However, this assertion is quite evidently belied by the second appellant's letter dated 8 March 2009 which shows that, a month after the notice of withdrawal was filed, he was still acting for and on behalf of the respondent's faction.

When all is considered, we find that the probabilities clearly favour a finding that it was the respondent himself who, acting on the advice of his lawyer, gave the instructions for the notice of withdrawal to be filed.

In the result, this court is of the view that the judge *a quo* erred in finding, on the papers, that the withdrawal was not properly made as it was not done either by the respondent or on his authority or instructions. We accordingly find that the judge misdirected himself by ordering that the notice of withdrawal in case HC 2716/05 be set aside and that the matter be reinstated.

In the event, it is ordered as follows;

- (1) The appeal is allowed with costs.
- (2) The judgment and order of the High Court be and are hereby set aside and substituted with the following:

“The application be and is hereby dismissed with costs.”

GOWORA JA: I agree

PATEL JA: I agree

Munangati & Associates, appellant’s legal practitioner

Self Actor, 1st respondent

Danziger & Partners, 2nd respondent’s legal practitioner