DISTRIBUTABLE (4)

(1) BISHOP ELSON MADODA JAKAZI (2) THE BOARD OF TRUSTEES ANGLICAN DIOCESE OF MANICALAND
V
(1) THE ANGLICAN CHURCH OF THE PROVINCE OF CENTRAL AFRICA (2) REVEREND JOSEPH CHIPUDHLA (3) RIGHT REVEREND RALPH PETER HATENDI

SUPREME COURT OF ZIMBABWE
HARARE, DECEMBER 10, 2012 & FEBRARY 21, 2013

T.M Kanengoni with *C Nyika*, for the applicants
A.P de Bourbon with *T Mpofu*, for the respondents

Before, **ZIYAMBI JA**, in chambers in terms of r 5 arw r 31 of the Supreme Court Rules.

This is an application for condonation of the late noting of an appeal and an extension of time within which to appeal against a judgment of the High Court (BHUNU J).

The judgment was delivered on 19 May 2010. The applicants filed an invalid notice of appeal on 21 May 2010. The invalidity of the notice of appeal was pointed out to the applicants' legal practitioners in heads of argument filed by the respondents on 3 August 2010. On 22 October 2012, the matter came before the Supreme Court for hearing and the issue of the invalidity of the notice of appeal not having been addressed by the applicants, the matter was struck off the roll. The present application was filed on 1 November 2012.

Bearing in mind the date of the judgment sought to be appealed against, it is clear that the delay in making this application is inordinate.

It is now trite that:

> "The broad principles an appellate court would have regard to in determining whether to condone the late noting of an appeal are: the extent of the delay; the reasonableness of the explanation proffered for the delay; and the prospects of success of the appeal. See *de Kuszaba-Dabrowski et Uxor v Steel NO* 1996 RLR 60 (A) at 62 and 64*;* 1966 (2) SA 277 (RA); *HB Farming Estate (Pty) Ltd & Anor v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134A-B; *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) 57G-58A. And as BEADLE CJ observed in *R v Humanikwa* 1968 (2) RLR 42 (A) at 44B:
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> > "The longer the delay in applying for condonation in the late noting of an appeal the more certain the court must be that there is a real chance of the appeal succeeding.""
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> See *Jensen v Acavalos* 1993 (1) ZLR 216 (S) at p 220F-G.

The explanation given by the applicants for the delay is that the matter was being handled by the late George Chikumbirike who filed the defective notice of appeal and who was ill at the time that the respondents' heads of argument for the appeal hearing were served on his firm. Mr Chikumbirike died on 4 May 2011 some 9 months after the filing of the said heads of argument. Mr *Kanengoni*, an associate in the firm *Chikumbirike & Associates*, who assumed the conduct of the applicants' case after the demise of Mr *Chikumbirike*, said that he only looked at the record in this matter three days before the appeal hearing on 22 October 2012. Although fully aware of the defects in the notice of appeal, he nevertheless made no attempt at any time before the hearing to rectify the invalidity.

Legal practitioners are expected to know and comply with the Rules of the Court. It is bad enough to overlook a provision of the Rules but to deliberately refrain from

compliance therewith when the oversight or non-compliance has been pointed out by a colleague is to exhibit a disdain for the Rules which will not, except in special circumstances, be readily condoned. The explanation proffered for the delay is in my view unacceptable.

This brings me to the consideration of the applicants' prospects of success on appeal. In this regard it has been held that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are. This applies even where the blame lies solely with the attorney.

See *Paul Gary Friendship v Cargo Carriers Limited & 2 Ors* SC 1/13*; Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249(S) at p 254 D-E; *Tshivhase Royal Council & Anor v Tshivhase & Anor* 1992 (4) SA 852(A) at p 859E-F.

The facts of the matter are these. On 23 September 2007, the first applicant who was then a Bishop of the Anglican Church of the Province of Central Africa, the first respondent in this matter, and head of the Diocese of Manicaland, addressed a letter to the Archbishop of the first respondent and the Bishop of Upper Shire notifying them of the withdrawal of the Diocese of Manicaland from the first respondent. The letter read as follows:

> "Your Grace,
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> RE: NOTIFICATION OF WITHDRAWAL OF THE ANGLICAN DIOCESE OF MANICALAND FROM THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA.
>
> The above subject refers.

To put to rest speculation from your office, the Church of the Province of Central Africa and the rest of the Anglican community, this letter comes to you as confirmation that the Anglican Diocese of Manicaland has withdrawn from the Church of the Province of Central Africa with effect from 21 September 2007.

The resolution by the Diocesan committee which is attached and my submission to the Provincial Synod when I moved a motion on the need for the dissolution of the Province also attached and the minutes of the standing committee is a statement of emphasis on this matter by the standing committee.
This your Grace is the kind of seriousness that we take of the matter.

Yours faithfully

Signed

The Rt Revd. Elson Jakazi

Cc All Bishops of the Church of the Province of Central Africa."

The Bishops of the first respondent replied by issuing a statement acknowledging that the first applicant and his supporters had personally resigned or withdrawn from the first respondent and accepting the first applicant's resignation as an individual but asserting that the Diocese of Manicaland could not be withdrawn from the first respondent except in accordance with the latter's constitution. The statement read in part:

"We unanimously concurred that:

1. The Fundamental Declarations, Articles of the Constitution, Canons and laws of the C.P.C.A. do not permit the unilateral withdrawal of a Diocese from the Province even if, as alleged by Bishop Jakazi, but challenged by many, the Diocesan Standing Committee of that Diocese unanimously expresses a desire to no longer be associated with the Province.

2. Bishop Jakazi was, *inter alia*, expressing his personal attitude and intention to sever all ties with the Province and was himself withdrawing from the Province.

3. In the circumstances, we accepted his personal resignation and withdrawal from the body of the C.P.C.A."

Thereafter, on 31 October 2007, in a letter written on his instructions by his Diocesan Registrar, the first applicant sought to retract his withdrawal from the first respondent. The retraction was not accepted by the first respondent who, through its Bishop Albert Chama, wrote back as follows:

> "We write to advise you that following the letter of 31 October 2007 written on your instructions by the diocesan Registrar of Manicaland, Mr Peter Makombe retracting your withdrawal from the Church of the Province of Central Africa as per your letter of 23 September 2007, addressed to the former Archbishop of Central Africa Dr. Bernard Amos Malango and copied to all bishops of the Province. The Episcopal Synod held at the hotel on 20 December 2007 considered your letter of retraction and decided to uphold the earlier decision taken and communicated to you that you are no longer a Bishop of the Church of the Province of Central Africa.
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> Consequently we as dean of the Province of Central Africa immediately appoint a Vicar General for the Diocese of Manicaland pending the election of the next Bishop."

Following upon this letter, the first respondent proceeded to appoint second and third respondents as Bishops. This prompted the applicants to file an urgent chamber application in the High Court seeking an order setting aside the appointment of the second and third respondents and declaring the first applicant to be the reigning bishop for the Diocese of Manicaland until such time as the applicants' appeal has been determined in terms of the provisions of the first respondent's constitution and canons.

The learned Judge, in dismissing the application, said:

> "It is an established rule that resignation is a unilateral voluntary act which takes effect as soon as the resignation has been communicated to the correct person or authority. In the case of *Muzengi v Standard Bank & Anor* (2) ZLR 137 this Court held that a letter of resignation constitutes a final act of termination by an employee."
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> What this means is that once the first applicant's resignation letter was received by the Archbishop of the Church of the Province of Central Africa the first applicant

automatically ceased to be an employee or member of that church organization without any further formalities.

Having ceased to be an employee or member of the church organization he automatically stripped himself of any rights and privileges arising from the contract of employment, membership or his status as Bishop of that church organization. The 1st applicant was not dismissed. His was a voluntary act to resign from that church organization. That being the case, he can hardly be heard to complain or cry foul. Any appeal or review which he may launch means that he is appealing or seeking a review of his own conduct. This is wholly untenable and illogical such that it must be incompetent at law.

The applicant having voluntarily divested himself of all rights and privileges accruing to a member, employee or Bishop of the Anglican Church of the Province of Central Africa he has no residual rights to meddle in the affairs of that organization by barring the appointment of replacement staff."

The facts are common cause. The law is clear. Resignation is a unilateral act which takes effect upon being communicated. See *Riva v NSSA* 2002 (1) ZLR 412 (H), at p 414A-B where the Court said:

"It is common cause between parties that the giving of notice is a unilateral act; it requires no acceptance thereof or concurrence therein by the party receiving the notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it. It seems to me to follow that notice once given is final and cannot be withdrawn except obviously with consent…"

See also *Muzengi v Standard Bank Zimbabwe & Anor* 2002 (1) ZLR 334 (S) at p 340A-F.

The above cases clearly show that the first applicant could not unilaterally withdraw his resignation from the first respondent.

The first applicant has submitted that he did not withdraw in his individual capacity but as a diocese. This issue was settled in *The Church of the Province of Central Africa v The Diocesan Trustees for the Diocese of Harare* SC48/12 where the Bishop of

Harare raised the same argument as is now being raised by the applicants herein. The Court held that the Bishop of Harare had resigned his office.

Further, as the respondents submitted, the letter of resignation demonstrates quite clearly that the stated position taken therein was that of the first applicant and others who wished to withdraw from the first respondent. "This, your grace is the kind of seriousness that *we* take of the matter" said the first applicant in the letter.

Moreover since the Diocese itself could not be withdrawn by the applicants from the first respondent it seems to me the respondents are correct in their submission that the applicants were withdrawing in their individual capacities.

In view of the above the applicants have not established that there are any prospects of success on appeal.

It follows, that in the result, the application must fail.

The application for leave to appeal is accordingly dismissed with costs.

Chikumbirike & Associates, applicants' legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners