

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2016/HP/201

(Civil Jurisdiction)

BETWEEN:

ISAAC APTON MUMBA *(Suing as himself and on behalf of* **1ST PLAINTIFF**

Others as per attached list as members of Emmanuel Global Church

AND

PASTOR SIMON ZULU *(and 13 Others as per the attached list)* **1ST DEFENDANT**

Before Justice F. M. Chisanga this day of 2016

For the Plaintiff: G. Pindani, Messrs Chonta Musaila & Pindani Advocates

For the Defendant: M.Z.Mwandenga, Messrs M Z Mwandenga and Company

RULING

Cases cited

- 1. Fender vs St John - Midway (1938) ACP1, at P38.**
- 2. Mother care Ltd is Robson Books Ltd (1979) F.S.R 466 at 474**
- 3. America Cyanamid Co vs Ethicon Ltd (1975) A.C. 396**
- 4. Cayne vs Global Natural Resources Ltd (1984) 1 ALL SC 225 at
237 H**
- 5. Francome vs Milner Grays Newspapers(1984) 1 WLR 892 at 898
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The plaintiffs filed a writ of summons on the 1st February, 2016, wherein they seek a declaration that the appointment of the 1st defendant as Resident Pastor for Emmanuel Global Church at Ramah worship centre is null and void ab initio. They also seek an order nullifying the appointment of the 1st defendant as resident pastor as well as all appointments made by the 1st defendant within EGC at Ramah Worship Centre. Other orders are sought for, including an injunction restraining the 1st defendant from performing duties of a resident pastor.

An ex-parte application for injunction was equally lodged. I however directed that the application be heard inter-parties. The application is supported by an affidavit sworn by Isaac Apton Mumba, the 1st plaintiff.

He had deposed therein that he is a senior elder at Emmanuel Global Church, at Ramah Worship centre at plot 32268 in Thornpark Lusaka. He is also chairperson of the Deaconate Board at the said church. He has been duly authorized to depose to the contents of the affidavit on behalf of the rest of the plaintiffs from information in his personal knowledge. He has stated that the plaintiffs are members of Emmanuel Global Church, and were duly appointed members of the Deaconate Board of EGC pursuant to the constitution of the church.

The 1st defendant has been congregating with the church since 2010, and helping in performing some church functions in collaboration with, and supervision of the retired Reverend Chama W. Kapaya. The 2nd to 14th Defendants are also members of the said church and members of the deaconate board.

It is further deposed that the church is duly registered with the Registrar of societies since 31st July, 2006, and has a constitution which regulates the affairs of the church. The constitution is binding on all the members.

In December, on the 31st day of that month in the year 2013, the Resident pastor, reverend Chama W. Kapaya retired. In terms of Article 6.4.1, and 6.4.2 of the constitution, the process of recruiting a resident pastor is the responsibility of the members of the church, through a search committee which is put in place by the deaconate board, to undertake that responsibility under the supervision and guidance of the deaconate board. The plaintiffs and the 2nd to 14th defendants as members of the board, appointed a search committee comprising members of the administrative and elder's committee to recruit a new resident pastor. On 7th June, 2014, the deaconate board resolved to advertise for the position of the resident pastor and tasked the search committee to scrutinize the applications. On 11th June, 2004, the church secretary, who is the 2nd defendant, notified all pastors of the decision to fill the vacancy in the office of Resident Pastor.

After the search committee had discussed and evaluated the applications that had been submitted, it advised the church secretary to invite applications from the in-house Pastors at Ramah Worship Centre and all pastors in the branches. Six applications were received. Scrutiny of the application revealed that none of the applicants qualified to fill the vacancy. The search committee thus requested the church secretary to survey entry qualifications for theological institutions and colleges. After consideration of feedback from training institutions, the search committee shortlisted three applicants from the six. It was recommended by the search committee that the shortlisted candidates be interviewed.

This recommendation was approved. The interviews were accordingly conducted on 26th February, 2015. The results of the interviews were however inconclusive. Initially, the interviewing panel resolved to break the tie by exposing the two top contenders to preaching sessions. However, the chairman on the panel subsequently and verbally recommended to the search committee that they try the 1st defendant and work on his weaknesses subsequently. No justification was advanced for change of position on the part of the chairman. The interview results, as well as the verbal recommendation leaked to the congregation. That leakage incited those who support the candidature of the 1st defendant to start agitating and canvassing for his appointment. Further, the deaconate board was inundated with petitions from its own pastors against the appointment of the 1st defendant, and some ordinary members who supported his appointment. This placed conflicting competing demands on the board.

The board considered all the petitions and held meetings with petitioners with intent to build consensus around the pastoral appointment. After addressing the petitions the deaconate board decided to conclude the recruitment process.

They resolved to appoint Reverend Charles Kangwa. In arriving at that decision, the board noted that Pastor Simon Zulu was neither sufficiently experienced nor fully qualified to constitutionally execute church practices some of which required an ordained clergy when he is not ordained. On the other hand, reverend Charles Kangwa was experienced, more qualified and most importantly ordained. It was the board's view that Kangwa is not constrained to constitutionally discharge his functions as a resident Pastor for Ramah Worship Centre.

The deaconate board announced its decision to the church. This announcement galvanized the 1st defendant's devotees to clamor for an extra ordinary Assembly meeting. That meeting was held on 12th July, 2015. Despite an explanation as to why the decision made was arrived at, the decision of the deaconate board was reversed on a show of hand.

In total disregard of the church constitution, particularly articles 6.4.1 and 6.4.2, the Extra ordinary Assembly council meeting went ahead to erroneously appoint pastor Simon Zulu when he is not ordained, and in total disregard of the constitution which confers powers of appointment on the Deaconate Board through a search committee and not the said meeting.

According to Articles 3.3.2 and 6.1.3 of the Constitution, only an ordained pastor can administer holy communion, which is done once every month. As Pastor Simon is not ordained to perform such functions, he has been inviting different pastors from other churches other than EGC to come and administer holy communion much to the surprise and dislike of the members. The plaintiffs and several members of the church, who are firm believers in the doctrine and sanctity of ordination, and who are determined to see that their own constitution is not violated or breached with impunity or simply modified to accommodate the appointment of the 1st defendant, who is not fully qualified to occupy the office of resident pastor are aggrieved.

It is deposed further that the appointment of unordained clergy such as the 1st defendant has brought confusion, mayhem and anarchy in the church. To forestall further disagreements with the defendant's faction, the plaintiff's and several church members have alternatively and collectively opted to part ways with supporters of the 1st defendant. That

the plaintiffs have always desired the parties to sit down and harmoniously agree every facet of the split or terminate the appointment of pastor Simon Zulu and altogether recruit a fully qualified pastor but the defendants have refused.

It is further stated that since the purported appointment of the 1st defendant as a resident pastor, a number of aggrieved and deeply concerned church members have stopped attending church services for fear of provocation and harassment or being ridiculed by the 1st defendant's devotees. The 1st defendant, in a desperate attempt to solidify his position wants to appoint a new deaconate board in the face of a resolution to retain the current deaconate board for a period after the recruitment of a new resident pastor. It is deposed that the plaintiffs have suffered and continue to suffer damage.

The application is opposed by the 1st defendant. He has deposed that the Emmanuel Global Church has a constitution which is binding on all its members. The 1st defendant states that he has a grade twelve certificate, and two diplomas. He states that there was controversy over the appointment of a resident pastor at the church. The controversy was referred by the deaconate board to an Extra Ordinary General meeting or Extra ordinary Assembly Council for resolution. It was resolved, after deliberations that the recruitment process be upheld up to the interviews and the results be respected as recommended by EFZ, to have pastor Simon Zulu as Resident Pastor. The resolution was supported by 56 members, who represented 70% of those present by show of hands. Thereafter, the 1st defendant was informed of his appointment, which he accepted. He believes there is no basis for the church to separate and for

its assets to be shared. He has not yet been ordained, and has not been banned from being ordained, and believes that he will soon be ordained.

He has gone on to state that ordination is not a pre requisite for recruitment of the resident pastor as per articles 6.4.0 to 6.4.8 of the constitution. He states that he has been inviting ordained pastors to administer Holy Communion at appropriate times at the church.

The second defendant has equally filed in an affidavit in opposition. He has deposed therein that in accordance with Article 3.8.4 of the constitution, a person ceases to be a member when he takes the church or a member to court. The plaintiffs commenced these proceedings on 1st February, 2016. By commencing these proceedings, they ceased to be members of the church by operation of the constitution, on the 1st February, 2016. They have no right to continue prosecuting these proceedings as a result. He has gone on to state that in terms of Articles 6.4.1 and 6.4.2 of the constitution, the responsibility of recruiting a local or resident pastor is that of the members of the local church through a search committee, and the supervision is as provided for in Articles 4.1.0 church structure with the assembly council being the Supreme body.

The 2nd defendant has explained how the 1st to 8th plaintiff's and 2nd to 14th defendants agreed as a deaconate board chaired by the 1st plaintiff to have the administrative and elders committee as a search committee to recruit the new resident pastor. The position was advertised to internal pastors in EGC only. Six internal pastors' profiles were scrutinized and the preliminary review showed that a number of them did not meet the criteria in the constitution as provided under Article 6.4.0. The 2nd defendant was therefore tasked to check the entry requirements for diploma and degree with some local institutions. After

consideration of the feedback from the training institution, the search committee, on 11th October, 2014, agreed to shortlist three applicants from the six.

The three who were shortlisted included the 1st defendant Pastor Simon Zulu. On 16th October, 2014, the search committee met and recommended that the three shortlisted candidates be subjected to interviews on 1st October, 2014. On 1st March, 2015, the Executive Director of RFZ, Reverend P. Mwanga requested a meeting on the 2nd March, 2015 for the search committee and all the panelists where he informed all those present that he had received a grievance from one of the candidates who was not shortlisted as to why he was not shortlisted and the grievance was dealt with. After consideration of the matter it was agreed the Executive director being an independent person should make a recommendation. He recommended that the 1st defendant be considered for the position of the resident pastor.

Some candidates complained about the recruitment process. On 25th April, 2015, the deaconate board considered the petition, and after deliberations, it was resolved that pastor Kangwa be appointed as resident pastor. Subsequently, another petition was received from the general membership who mainly contested the appointment of pastor Kangwa, and requested for an Extra Ordinary Assembly meeting to be convened to resolve the controversy surrounding the appointment of the pastor at the church. The meeting was called and took place. After deliberations, it was resolved that the recruitment process be upheld, up to the interviews and the results be respected as recommended by EFZ. Pastor Simon Zulu was thus engaged as Resident pastor. Pastor Simon Zulu is not banned from being ordained in due course.

An affidavit in reply was made, to the affidavits in opposition. The affidavit sought to challenge certain portions of the affidavits in opposition. Inconsistencies were pointed out in the names of the 1st defendant on the exhibits annexed to his affidavit. The assertion that the board referred controversy to the extra ordinary assembly council was denied. The deponent asserted instead that the board appointed Reverend Charles Kangwa, and announced its decision to the church. It was stated that the 1st defendant has not been appointed in accordance with the constitution.

Put succinctly, the reply has set out to dispute the assertions in the affidavit in opposition. I will not here repeat all that has been said in the said affidavit, as I cannot make findings of fact on the present application, save to premise my determination on undisputed assertions.

At the hearing, learned counsel for the plaintiff, Mr. Pindani placed reliance on the affidavit, as well as the skeleton arguments filed into court. Learned counsel contended that a serious question to be tried was manifest, as the constitution provides for an ordained pastor to preside over and administer Eucharist functions. It is contended further that damages would not be an adequate remedy in view of the spiritual deprivation the plaintiffs are suffering by virtue of the defendant's actions. The plaintiffs have a sense of belonging to Emmanuel Global Church where they exercise their right of worship. Damages cannot therefore be quantified. It is further argued that the plaintiffs cannot be deemed to have ceased to be members of the church, by commencing this action so as to prevent violation of the church constitution. That term of an agreement that usurps the powers of the court to adjudicate is unenforceable.

In opposition, learned counsel for the defendant Mr. Mwandenga placed reliance on the affidavit in opposition. He equally placed reliance on the submissions filed into court. Learned counsel submitted that the plaintiffs ceased to be members on the date they filed these proceedings. They thus had no locus standi to continue these proceedings.

Learned counsel contended that enjoining the defendants would mean termination of the 1st defendant's contract of employment, as well as stopping the 2nd and 14th defendants from congregating at the church, in violation of their freedom of association and assembly, guaranteed by Article 21 of the bill of rights. If the defendants stop congregating, there will be nobody to fill up the vacancy created. Worse confusion would be created than would be caused in having the 1st defendant as a resident pastor. The balance of convenience therefore tilts in favour of granting the injunction.

In response, learned counsel for the plaintiff reiterated these earlier arguments, and contended that the balance of convenience did not arise.

I have considered the application for injunction, as well as the arguments for and against the grant of injunction. I have equally considered the constitution produced herein, which regulates the association of the members of Emmanuel Global Church. Article 3.8.0 of the said constitution deals with cessation of membership. One of the instances in which membership will cease is where a member takes the church or church member to court.

The defendants contend that by bringing the matter to court, the plaintiffs have ceased to be members by virtue of the said provision. In the present case, it is not the church that has been brought before

the court, but rather some of its members. The dispute relates to the appointment of a resident pastor, to shepherd the flock. The constitution prescribes how the affairs of the church in question are to be run. It is trite that persons who affiliate to an organization such as the one in question are all obliged to abide by the constitution of the organization. Turning to the article in question, a court considering the matter would have to satisfy itself that the provision in question is not contrary to natural justice and contrary to public policy which requires that people fulfill their contracts - see **Fender vs St John - Midway (1938) ACP1, at P38.**

The members of the church are bound to abide by the rules made by themselves and cannot shield behind a clause that would prevent the aggrieved members from ventilating their grievances before a court of law.

The intendment of the rule in question being one that is contrary to the rules of natural justice, and one that would prevent anyone seeking enforcement of the provisions of the constitution by a court of law, I doubt that the said provision would withstand scrutiny before the court. On that view at this stage, I agree with learned counsel's argument that the plaintiffs have locus standi to bring this action. Ordinarily at this stage, the court will not delve into a discussion of the merits of a matter. The question of locus standi being pertinent, however it was necessary to advert to that issue, even though I but scratched the surface only.

I next approach the application for an injunction. The affidavits and the constitution reveal that recruitment of the local pastor is the responsibility of the local church. See article 6.4.1. It is disclosed on the evidence that issues were raised during the process of recruitment of a

resident pastor. Ultimately, the Extra Ordinary Assembly Council meeting voted for the appointment of the 1st defendant.

On these facts, the presence of a serious question to be tried cannot be denied. If the opinion expressed on locus standi be correct, then it can be said, as articulated in **Mother care Ltd is Robson Books Ltd (1979) F.S.R 466 at 474** that the plaintiffs have prospects of success which in substance and reality exist.

The more vexing question is whether if the injunction is refused, the plaintiffs would not be adequately recompensed in damages. Out rightly, it can be said that it would be impossible to assess damages for the plaintiff should they succeed in challenging the appointment of the 1st defendant as resident pastor. On the other hand, if the defendants succeed at the trial, but are enjoined now, it would equally be difficult to assess the damages for the defendants. This dilemma brings one of the principles articulated in **America Cyanamid Co vs Ethicon Ltd (1975) A.C. 396** into focus. It was said there that; *“Where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, then the general balance of convenience arises.”*

Sir Robert Meggery V.C. in **Cayne vs Global Natural Resources Ltd (1984) 1 ALL SC 225 at 237 H**, said the *“balance of convenience”* was more fundamental, more weighty than mere ‘convenience.’ He said the phrase, *“the balance of the risk of doing an injustice better describes the process involved.”*

Sir Donaldson M.R. expanded on the approach in **Francome vs Milner Grays Newspapers(1984) 1 WLR 892 at 898 E** when he said, *“I stress, once again, that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders if any, as are appropriate pending the trial of the action. It is sometimes said that this involves the weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not inconvenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing, we are seeking a balance of justice, not convenience.*

What order then is appropriate pending trial in the present case? This question must be addressed with the caveat that one is not to determine the final rights of the parties at this stage. I have stated earlier that it is difficult to assess damages for either party, in the event either succeeds at trial.

The plaintiffs are 8 in number, while apart from the 14 defendants, there are other members of the church who seem happy with the appointment of the 1st defendant. They it seems, have no difficulty with the idea of holy communion being administered by invited ordained pastors. On the other hand, the plaintiffs find the inviting of other clergy to administer holy communion distasteful.

In my considered view, the balance of convenience lies in maintaining the status quo, pending determination of the main action. On the foregoing, I hold that the balance of convenience militates against the grant of an injunction. This therefore is a proper case in which to maintain the status quo, and it is so ordered. The cost hereof will be in the cause. Leave to appeal granted.

Dated the^{8th} day of^{June} 2016



F. M. CHISANGA
HIGH COURT JUDGE