IN THE HIGH COURT FOR ZAMBIA **2013/HP/1591**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JOHN PETER MWANZA & 31 OTHERS **PLAINTIFFS**

AND

REVERAND DR PETER R. NDHLOVU & 23 OTHERS **DEFENDANTS**

BEFORE : HON. G.C. CHAWATAMA

For the Plaintiffs : *Messrs Zulu & Company*

For the Defendants : *Messrs Major Lisita – Central Chambers*

RULING

CASES REFERRED TO:

1. ***America Cynamid Company V Ethicon Ltd (1975) AC 396***
2. ***Shell and BP Zambia Limited V Conidaris and Others***
3. ***Fellowes V Son Fisher, Browne L.J.***

The Plaintiffs' claim included an order of interim injunction to restrain the Defendants from letting, selling leasing or disposing or occupying or in any way dealing with Bigoca's immovable property including Plot No. 292/B George Township Lusaka Plot 493 Garden Township, Lusaka Stand No. 9756 Barlastone Lusaka, Plot no. 108 Katima Mulilo Road Garden Lusaka and Wilanga Tavern Plot, Matero Lusaka (Holy Ghost Centre premises) pending trial or until a further order of the court.

Further an order of interim injunction to restrain the Defendants from dissolving or attempting to dissolve BIGOCA and convert it into a private business was also sought. Summons for an order of interim injunction and affidavit in support of the same was filed on the 8th November, 2013. An affidavit in opposition to summons for an order of interim injunction was filed on the 25th November, 2013. The parties were heard on the 18th July, 2014.

After making all considerations I granted the injunction stating as following:

> ***"In the premise I order that all the Pastors and Administrative Officers should continue carrying on their duties normally, but that there should be no disposal of any properties, neither should there be any amendments to any laws/rules governing the church until further order or until this matter is completely disposed of and the rights and obligations of the parties are clearly determined by this court."***

Thereafter, I referred the matter for mediation. The matter was fully settled by mediation; a consent order was executed by all parties and sealed.

The Defendants have now filed an application before this court to vary the consent order. They filed an affidavit in support of their application deposed to by Dr. Peter R. Ndhlovu and an affidavit in reply and skeleton arguments on which they fully relied on their application.

It was contended by Major Lisita on behalf of the Defendants that paragraphs 4 and 6 of the consent judgment were consented to by them based on a mistake of fact, the understanding of the Defendants was that, as agreed at the mediation session, the Rev Dr. Ndhlovu was to be ratified and retired at the General Council and that all the Regional Bishops were to revert to their positions as Pastors for the purposes of circumnavigating their influence at the elections to be held thereat. This, it was contended, was the spirit with which the Defendants entered into the consent judgment (order).

The said paragraphs 4 and 6 state as follows:

4. ***That Rev. Dr. Peter R. Ndhlovu and Rev. M.O. Kanyenda shall be ratified by the General Council as Bishop and Administrative Secretary respectively and shall forthwith be retired with full benefits to be worked out by the General Council.***
6. ***That Regional Bishops shall revert to their original positions as Pastors but shall be eligible to be appointed to high office by the General Council or by the General Council or by the new Church leadership as the case maybe.***

Major Lisita went on to submit that the position now is that the Plaintiffs have since attempted to construe and implement the two paragraphs as having immediate effect which was not in the spirit of the agreement; that this was a mistake of fact. Counsel relied on Halsbury's Laws of England, 4th Edition, Volume 32, paragraph 10 which states that:

> ***"A mistake as to the nature, character or effect of a document may entitle a party to it raise the plea of non est factum. The test is whether the document is fundamentally different in nature, character of effect from that which the party intended to sign."***

It was submitted that implementing the said consent by invoking paragraphs 4 and 6 as having come into force immediately and not as was envisaged at mediation amounts to altering the document such that it is fundamentally different in effect from that which the defendants intended to sign. The Plaintiffs misrepresented that the said paragraphs were to be effected at the General Council whey they knew only too well that they in fact a hidden meaning of making the said paragraphs effective immediately.

Counsel further pointed out that paragraph 390 of Halsbury's Laws of England, 4th Edition, Volume 37 states that:

> ***"A party cannot arbitrarily avoid a consent judgment or order, but before such a judgment or order is entered or passed, a consent given by mistake or surprise may be withdrawn, and a consent order, even if approved by the court, may be set aside if it appears that the consent was given under a misapprehension or misrepresentation...moreover, where the consent order or judgment is still executor, the courted may refuse to enforce it if it would be inequitable to do so."***

In reply to the Plaintiffs observation that the application was made pursuant to an inapplicable law, Counsel submitted that paragraph 14 of the consent order gave the parties liberty to apply to the trial court and therefore there was no need to seek

any other law under which to bring the application and hence the caption of the summons ***"Pursuant to paragraph 14 of the Consent Judgment dated the 20th day of March 2015."***

Counsel referred me to my ruling of 27th February, 2015, which he said was very clear. He further submitted to construe paragraphs 4 and 6 as the Plaintiffs are attempting to do by reverting the Reverend and Regional Bishops before the General Council and more importantly before the Honourable court has "completely clearly determined" the matter would be to allow the Plaintiffs to overrule or vary the Honourable court's order and substitute the court's order with the Plaintiffs' own "order". Further that the parties were constrained, by this order, from negotiating or agreeing on issues already determined by the Honourable court and vary or alter such determination. Counsel further submitted that the parties cannot agree on terms outside the restrictive parameters set by the Honourable court.

In response, Mr. Zulu, State Counsel, submitted that the application is misconceived as the Defendants seek to set aside paragraphs 4 and 6 of the consent settlement on the ground of alleged mistake, misunderstanding or fraud or fraudulent language. Counsel's contention is that these are contentious issues which may not be disposed of by affidavit evidence. Counsel submitted that in order for these allegations to be proved one has to commence a fresh action setting aside the consent settlement order. A consent order may not be varied

without the consent of the other party. Counsel also objected to the fact that the Defendant's had brought this application ***"pursuant to paragraph 14 of the consent order"***, as I have already alluded to above. It was Counsel's submission that if one looked at article 38 of the Constitution, it shows that Bishops and the Secretary maybe appointed by the General Council, thus no Bishop was appointed because there was no General Council. Hence they all continued as Pastors; the settlement order reflects that. Counsel concluded that there was no misunderstanding as to whether there was a Bishop or Regional Bishops. Bishop Ndhlovu is not a Bishop and cannot elect.

From the onset, I would like to state the law concerning a settlement order is very clear. ***Order XXXI Rule 12, Cap 27 of the Laws of Zambia*** provides that a mediation settlement once signed by the parties and the mediator and registered it has the same force of law and effect as a judgment, order or decision and is to be enforced in the like manner. ***Rule 14*** of the same Order states that there shall be no appeal against a registered mediated settlement.

The application before me is to vary the settlement order. As State Counsel has pointed out, a consent order may be varied by the consent of the other party. This law, I think, maybe extended to a settlement consent order. However, in this case there is no consent from the other Party to set aside this settlement order.

Major Lisita went to great lengths to provide the court with authorities on how a document signed by mistake can be set aside. I have looked at the paragraphs in contention, that is 4 and 6 of the settlement consent and my view is that they are very clear. It is not easy to tell on the face of it that this was a mistake. In my opinion the language is simple and clear. I would have probably held a different opinion if the language was ambiguous and maybe there was no opportunity for the Defendants to examine the document (settlement consent order) before signing it. A further perusal of the said order reveals that it was signed by Rev. Dr. Peter R. Ndhlovu and a legal represented from Messrs. Central Chambers, on behalf of the Applicants herein.

As stated by Mr. Zulu, consent orders are only set aside by commencing a fresh action. For instance, ***Order 13/9/16 RSC, 1999 Edition*** provides as follows:

> ***"It would appear that a judgment by consent cannot, after it has been passed and entered, be set aside under this rule on the ground that the consent was given under a mistake but it can be set aside in a fresh action for the purpose on grounds that would suffice to set aside a contract".***

This was echoed by Judge Chibesakunda (obita dictum) in the case of ***Zambia Seed Company v Chartered International (PVT) Limited (1999)*** where she stated that:

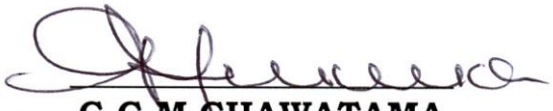
"By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment."

Therefore, even if I were to entertain the application to set aside the settlement consent order, it would have to be commenced as provided by the law in the cited authorities.

Moreover, my ruling of 27th February, 2015 clearly stated that the status quo would be maintained until further order of the order or until final determination by the court. There being no further order, the court referred this matter for mediation. The intention of the court was that this matter would be fully determined by mediation. The mediation settlement consent as stated in ***Order XXXI Rule 12, Cap 27 of the Laws of Zambia,*** has the same force and effect as a judgment I would have passed had this matter not gone for mediation. I am, therefore, satisfied that this matter was fully determined by the settlement consent entered into by all parties on 20th March, 2015.

This application is dismissed. Leave to appeal is granted.

DELIVERED ON THIS 18TH DAY OF FEBRUARY, 2016.



G.C.M CHAWATAMA
JUDGE