IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

CIVIL CAUSE NO 147 OF 2017

BETWEEN

REVEREND DANIEL MHONE.....FIRST APPLICANT

AND

REVEREND CHIMWEMWE NKHATA.....SECOND APPLICANT

AND

PASTOR MAIDONI.....THIRD APPLICANT

AND

PASTOR S. CHISALE.....FOURTH APPLICANT

AND

REGISTERED TRUSTEES OF MALAWI UNITED METHODIST CHURCH..... RESPONDENT

Coram

Hon Justice Jack N'riva, Judge
Mr C Gondwe for the applicants
Mr Kaonga for the respondents
Mrs D Mtegha, court Clerk

JUDGMENT

Introduction

The applicants are pastors in Malawi United Methodist Church. The Church excommunicated them and dismissed them as pastors. They came to Court to obtain an order restraining the respondent from excommunicating and dismissing them until the determination of the matter. After the order, the respondent convened a conference, and amended the church's rules and went on to dismiss them based on the new rules. This was after the order that the Court granted was still subsiding. Thus, this hearing was in relation to the claims that the applicants raised.

However, as I will demonstrate in due course, the respondents argued that the claims were of no practical effect as the acts complained of were overtaken by the subsequent excommunications and dismissals.

The remedies the applicants sought

The applicants sought the following remedies which I quote as the applicants represented them:

a) a declaration or an order that there was no properly convened and valid Easter annual conference from the 14th to 16th April, 2017, because the conference contravened the requirements of the Book of Discipline.
b) a declaration that there is no validly elected and consecrated bishop in the Malawi provisional annual conference other than Bishop Eben Nhiwatiwa
c) a declaration that as per the United Methodist Church Book of Discipline, the annual conference has no powers to dismiss/ excommunicate a pastor/clergy before a recommendation has been made by the board of ordained ministers after properly hearing the applicants in accordance with the rules of natural justice and dictates of the Book of Discipline.
d) a declaration that as the excommunicated reverend/pastors were not given an opportunity to be heard in accordance with the rules of natural justice the said dismissals are null and void.
e) a permanent order of an injunction restraining the respondent from excommunicating the applicants herein as both

reverends/pastors and members as the respondent did not comply with chapter 7 of the Book of Discipline any other relief/orders that the honourable court would deer to be proper and just in the circumstances.

f) Costs of the case

Evidence and arguments

Reverend Daniel Mhone provided a sworn statement to allege that the Easter annual conference of April 2016 came up with resolutions to excommunicate him and others from the church. He argues that the conference had no mandate as there was no-one with authority to call the conference.

Further, he argued that the excommunicated pastors were not called to a hearing.

The respondents, on the other hand, objected to the matter proceeding arguing that the claimants ought to have commenced the matter through judicial review. Secondly, the respondents argued that determining the issue would be a moot exercise.

Therefore, foremost, I have to deal with the question whether the matter should have proceeded by the way of judicial review.

The respondent argued that the case should have proceeded by a judicial review because the respondent was a public trust. The respondent argued that their body is a public body. They based the argument on the fact that the respondent was incorporated under the Trustees Incorporation Act. They argue that that is the reason why the Attorney General commenced an action as a *parens patriae* against the current trustees and the decision was upheld by the High Court in Civil Cause No. 490 of 2014, Lilongwe Registry. Counsel argued that if it were not a public body, the Attorney General would not have had such powers as a *parens patriae.* Counsel argued that the respondent falls within the ambit of public law duty susceptible to judicial review proceedings. Counsel, therefore, argued that the applicants were wrong to commence this action by originating summons and I should dismiss the case.

The applicants argued that although the respondent is a trust incorporated under the Trustees Incorporation Act, the incorporation under the act did not make it a public body. The applicants argued that the Trustees Incorporation Act does not establish the respondent.

As to whether the action is moot and academic at the material time, the respondent's argument is that the first excommunication was done by the annual conference, and not the respondent. The applicants' challenge was to the annual conference and the decisions it made. The respondent argued that in compliance with the new constitution, they called the applicants to a disciplinary hearing but they did not attend. The respondent consequently dismissed them from the association. They, therefore, argue that the present action has been superseded by events and its continuation would be merely moot and academic.

On the other hand, the applicants argued that there is an injunction restraining the respondent from excommunicating the applicants from the church until the determination of the matter or any further court order. The applicants argued that the matter was yet to be determined and there has not been any other order by the court. The applicants' argument, therefore, was that the injunction is subsisting and any act or attempt by the respondent to excommunicate the applicants has been made in defiance of the order.

The applicants, therefore, argued that the matter had not been superseded by events and that the action herein is not moot and academic.

I should first deal with these two questions.

Judicial reviewability of the respondent's decision

I will start with whether the matter should have been commenced by judicial review

I dismiss this argument. I do not find anything making the respondent a public functionary. It is merely a body incorporated under a Trustees Incorporation Act. That does not make a body a public body. Under our law, judicial review covers review of

(a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
(b) a decision, action or failure to act in relation to the exercise of a public function in order to determine,
    (i) its lawfulness;
    (ii) its procedural fairness;
    (iii) its justification of the reasons provided, if any; or
    (iv) bad faith, if any,
    where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

See Order 19 rule 20 of Courts (High Court) (Civil Procedure) Rules.
I do not find the other argument, of *parens patriae,* convincing. The respondent argues that the Attorney General commenced an action as *parens patriae* against the respondents. Under common law, principle of *parens patriae* is where the State (or the Crown) commences an action on behalf of persons who are unable to commence proceedings on their own. See e.g. *Wallis v Solicitor General for New Zealand* [1903] AC 173. The Attorney General represents the State or the Crown, as the case may be, to further litigation on behalf of persons who cannot do so on their own behalf. A person so represented cannot assume that they are a public officer. Moreover, in this case, the respondent was the party that was sued. I fail to appreciate why the Attorney General's acting as a *parens patriae* should make the respondent a public body.

Furthermore, the issue before the Court in the case the respondent cited, was whether a decision of Attorney General as a *parens patriae* was amenable to judicial review. The Court said it was not amenable to judicial review because the Attorney General's acts are not administrative. In total sum, I fail to appreciate why this matter should have been commenced by judicial review. It is not a public law case of administrative action.

Whether the hearing is a futile exercise

As to whether the matter is academic or moot, as I see it, the issue the respondent is raising is that there an ex-communication done by a conference. Then the respondent conducted another excommunication. Thus, the first excommunication was overtaken by the second one. The applicant raised the issue with the first excommunication. Now that there is another excommunication, they argued, proceeding with issues of the first excommunication is unnecessary. Further, the excommunication was by a conference and not the respondents.

I do not find the argument convincing. Reading through the arguments from the parties, all the issues concerning the parties are related. The issue is about the excommunication of the applicants. To proceed the way the respondent is arguing is tantamount to splitting hairs as it were. There is a thin line between the two events. As I will illustrate, the second excommunication was reactionary to the first one. In sum, I do not find the claimants claims to be moot. The applicants were within their rights to raise the questions they raised in the Court. The second excommunication should not remove the applicants' challenge to the first excommunication that was already in Court. The injunction was still in existence. To

allow the argument by the respondent is tantamount to aiding disobedience of the Court order.

I therefore dismiss the respondent's objections and proceed to consider whether to grant the declarations and the claims that the applicants sought.

Arguments in the substantive claims

On whether the amended provisions of the respondent's constitution can apply retrospectively, the applicants argued that the respondent excommunicated the claimants under the rules applicable before the amendment of the constitution.

The applicants argued that the respondent amended the constitution when this matter was still in court and before the court's determination. Upon the said amendment, the respondent called the applicants for disciplinary hearing under the new rules but on the very same issues that they firstly excommunicated the claimants for. The applicants, therefore, contended that the new rules that came about after the amendment cannot be applied on the issues that were already subjected to the old rules. The applicants argued that that will be retrospective and prejudicial to the claimants.

The other point that the applicants argued was that the disciplinary hearing herein was chaired by Reverend Stephen Mbewe who, they argue, is not a pastor of the church as he was dismissed from the church in 2014. The applicants, therefore, argue that the said Reverend Stephen Mbewe could not have been in the disciplinary committee for lack of interest in the matters of the church that he is not a member of. The applicants contended that the resolutions of the purported disciplinary hearing herein are void for they were made by people who did not have the powers to make them.

On the issue of whether there was a properly convened and valid conference from the 14th to 16th April, 2017, the applicants argued that "The Book of Discipline of The United Methodist Church" governs all affairs and activities of the United Methodist Church worldwide. They said according to the book, the bishop is the only person who appoints the times for holding the annual conference. They argued that the annual conference was not convened by the legitimate bishop. They argue that legitimate bishop for Malawi United Methodist Church Is Bishop Eben Nhiwatiwa Who Resides in Zimbabwe And Oversees the Malawi Provisional Annual Conference. They argued that it was illegal and against the Book of Discipline of the United Methodist Church for any person apart from the bishop

responsible to call for the provisional annual conference. They, therefore argued that the Easter annual conference that took place between 14th and 16th of April, 2017 was improperly convened and illegal hence all the decisions made at the said conference be declared invalid.

On whether the excommunicated reverends and pastors were given an opportunity to be heard in accordance with the rules of natural justice, the applicants argued that they were not heard. They argued that they were not invited to the annual conference that excommunicated them. The say the excommunication was firstly contrary to the rules of natural justice and secondly, contrary to rules of the Book of Discipline of the united Methodist church, a book that governs all activities of the said church.

Furthermore, they argued, the Book of Discipline of the United Methodist Church provides for a fair process in judicial proceedings and that that envisages principles of natural justice. Among those rules to be followed in a disciplinary hearing include the right of the accused to be heard, the right of notice of hearings, and the right to be informed of resolutions. In this matter, in ex-communicating the applicants, the respondents never followed the guidelines and rules as laid down in the Book of Discipline of the United Methodist Church. Therefore, the applicants argue that the said decision taken by the respondents at the said annual conference be declared invalid for want of procedural requirement.

The further argument was that according to the United Methodist Church Book of Discipline, the annual conference does not have powers to dismiss or excommunicate a member of the church through a resolution.

On whether, in the circumstances, it was lawful to dispense with the right to be heard, the applicants argued that the conduct by the respondent in excommunicating the claimants without giving them a right to be heard was unjustified. The applicants argued that the respondents argued that they did not invite the applicants to the conference that dismissed them because they have a tendency of blocking such conventions by obtaining injunctions in matters they never prosecute. The applicants argued that this reason is not justified and unreasonable. The applicants argued that that that was not a lawful reason for limiting one's constitutional right. This is so as it does not satisfy any of the requirements contained in section 44 (2) of the constitution.

The applicants argued that they found strange the reasoning by the respondent. They argued that the injunctions are granted by competent courts of law after being satisfied that there are issues warranting the grant of an injunction.

I will now outline the arguments by the respondent.

On the applicants' contention that the amended constitution cannot apply retrospectively, the respondent argued that the constitution was in force by the time the respondent invited the applicants to a disciplinary hearing. The respondent said that at the time the annual conference made the decision, the constitution was indeed not yet in force. However, after the conference and the commencement of this action, the constitution was in force. Therefore, they argued that they did not retrospectively apply of the constitution. They argued that grounds of dismissal were existent and valid at the time of this second disciplinary hearing.

On the composition of the disciplinary committee, the respondent argued that Reverend Mbewe was a pastor of the respondent at the time of the disciplinary hearing. As to whether the Book of Discipline is applicable and in force and whether the annual conference was properly convened or not, the respondent said that the book was not among the documents that the respondent submitted to the Minister for registration. Therefore, it was not part of the respondent's constitution.

On the issue whether the applicants were fairly dismissed or not the respondent argues that it had demonstrated reasons why the applicants were excommunicated. They argued that reasons are valid. They argued that the applicants were only against the process of excommunication. They contended that the right to be heard is not absolute. some circumstances might justify the exemption of the right. The respondent has argued that the reason why the applicants were never specially invited to the annual conference that dismissed them was that they have a tendency of blocking such conferences by obtaining injunctions in matters they never prosecute afterwards. They argue that it would have been impracticable to call the applicants to a hearing well knowing that they would get an injunction to frustrate the process of having the hearing.

The further argument was that some of the allegations, in particular impersonating themselves as trustees, were already determined by the High Court in various decisions.

Furthermore, the applicants have not appealed the findings of the High Court. The respondent, therefore, argued that they were already heard by courts of competent jurisdiction acting fairly and impartially.

The respondent argued that it would be unfair to impeach the ex-communication based on a flaw in the decision-making process when the allegations were justifiable.

Lastly, on whether I should grant a permanent injunction, the respondent argued as follows. The relief of permanent injunction goes beyond the powers of the court in determining this action because the right to be a member of the respondent is not absolute. A member of the respondent can be excommunicated by following the applicable rules at a material time. The respondent further argued that even if I agree with the applicants that the excommunication of the applicants ought to have complied with the Book of Discipline, it will be impractical to grant a permanent order of injunction restraining the excommunication of the applicants unless the excommunication complies with the Book of Discipline. The respondent argued that they may proceed to amend the rules on excommunication of members by not making reference to the Book of Discipline. The respondent claimed that the constitution has already been amended and approved by the Minister which gives a disciplinary committee the powers to excommunicate its members. The respondent averred that a permanent injunction would 'unlawfully and unjustifiably restrain a body entrusted with excommunication under the amended applicable rules from following the applicable rules of excommunication'. The respondent argued that the applicable rules never makes reference to the Book of Discipline'.

Determination and finding

Having outlined the arguments by both parties, I now turn to the question whether to grant the reliefs that the applicants have sought;

Many issues arose, I do not intend to deal with all the issues. I believe I only have to tackle matters that would effectively deal with the applicants' claims. The first two issues were about the propriety of convening the conference. This had to do with who has the authority to convene a conference. This went to the propriety of the conference. This was based on the statutes of the Church in respect to conferences and disciplinary activities. This has to be understood in the context that the applicants commenced this action against the respondent. The Court granted an injunction. I find that the allegations against the respondent make sense. The respondent convened the conference without authority. I am

convinced it has not challenged that the Bishop responsible for Malawi did not convene the conference.

As the applicants suggested, the respondents might have made the amendments to frustrate the claimants in their quest to get an effective remedy on the matter. These are amendments which were made after the applicants commenced the matter. It is quite apparent that the respondents effected the amendments to specifically address the issues that the claimants brought in this court. The respondent, therefore made the amendment in bad faith.

Much as the respondent argued that they invited the applicants to a hearing, they conceded that they did not call the applicants to a hearing. The respondent argued that whenever they are called to a hearing, the applicants rush to Courts for injunctions. Thus, they argued, it worthless to call them to the hearing as they would have rushed to the Courts. In my finding, I find that the respondent carried themselves wrongly in getting rid of the applicants. They flouted their own procedures and did not hear the applicants.

Looking at the case in its totality, the issue in this matter is not only about excommunication from the church. It is also about losing positions in the church. The positions, it is on record, came with high stakes in addition to salaries. Therefore, whether looked at as an employment issue, or otherwise, this was a case where expectations, financial or otherwise, were high. By any means, the respondent had to accord the applicants a hearing. By failing to accord the applicants a hearing, that the excommunication of the applicants was wrong and void. The respondent tried to justify why they could not call the applicants to a hearing. The reasons are not convincing. The failure is unjustifiable.

In *Mbewe v Registered Trustees of Blantyre Adventist Hospital* [1997] 1 MLR 403 (HC) the Court held that the right to be heard carries with it a right in the accused person to know the case which is made against him. The accused person must, thus, know what evidence has been given and what statements have been made affecting him. He must then be given a hearing with a fair opportunity to correct or contradict them. The one conducting the hearing must not hear evidence or receive representations from one side behind the back of the other: *Kanda v Government of Malaya* [1962] AC 322 at 327.

It is immaterial, in my judgment, that the respondent might have valid grounds for dismissing the applicants. I believe that this is the most operative declaration the applicants sought from the Court. All the other declarations the applicants sought were meant to reinforce the illegality or the unfairness, as it were, of the excommunication or the dismissal. It is unnecessary to deal with all the arguments one by one. The bottom-line is that the respondent were in the wrong in excommunicating the applicants.

I allow the applicants' claims with costs.

The applicants prayed for a permanent order of the Court restraining the respondent from excommunicating them. As I have pointed out the issue is about excommunication and/or dismissal. Secondly, an injunction, at the end of a trial is applicable in cases where it is practicable to do so. Examples are in the tort of trespass and in infringement of intellectual property. Thus, for example, where a Court finds a defendant to be liable for trespassing on one's land or infringing one's copyright or trademark *etc*., the Court can make an order of permanent injunction against such acts- *cf: - Agricultural Development And Marketing Corporation v Bina Kakusa* Civil Cause number 3816 of 2000 and *Bata Shoe Company (Malawi) Limited v Shore Rubber (Lilongwe) Limited* Civil Cause No. 3816 of 1999.

I do not find that it is practical to make such an order in cases of a club membership or employment issues. In both cases membership and employment is based on mutual trust and compatibility. Even under the Employment Act, after a dismissal, the Court can order reinstatement, reengagement or compensation. Much as the Court may order reengagement and reinstatement, it would not be proper to order the employer not to dismiss the employee. To do so would lead to an absurd scenario whereby the employer is left with no discretion to dismiss the employee in appropriate situations. I, therefore, disallow the claim for permanent injunction.

Conclusion

In summary, the respondent did not conduct itself properly in the manner it held the excommunication of the applicants. I, thus, find and make all the declarations that the applicants sought on the impropriety of their excommunication. However, I decline to make the order of permanent injunction. I award costs to the applicants.

MADE this 11th day of January, 2019

J N'RIVA

JUDGE