

**JULIE JOSEPH NKOMO
TAUKOSI SIBANDA
FELIX MABASO
GILBERT MURAMBASVINA
PHELEMON MANONGORE
LAWRENCE JORAM JONHERA
PASTOR MICHAEL MATARIRANO
DANIEL SIBALO**

Versus

**DANIEL LEE
DWIGHT BALZTELL
CERYL PAULSEN
REVEREND ONIYAS GUMBO
ASHWORTH MAHACHI
JAMSON NKIWANE
KWAZISO BOSHA
APOSTOLIC FAITH MISSION OF PORTLAND, OREGON
(SOUTHERN AFRICA HEADQUARTERS) INC
APOSTOLIC FAITH MISSION OF PORTLAND, OREGON
(INTERNATIONAL HEADQUARTERS) INC.**

**IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 31 JANUARY 2023 & 7 MARCH 2024**

Opposed Application

V. Majoko for the applicants
S.Tsunde for the respondents

MOYO J: This is an application wherein the applicants seek a declaratory order couched in the following terms:-

“Whereupon, after reading documents filed of record, and hearing counsel, it is declared that:

- a) The 2012 constitution purporting to be the constitution of the 1st respondent and purporting to repeal the 1st respondent’s 1996 constitution was unprocedurally crafted and is a nullity, and that in, consequence all appointments and decisions made, in terms thereof, are of no lawful force and effect.
- b) The judgment and order in case number HC 1451/13 is binding only on Reverend R. J. Sibanda and those occupying through him and against no one else.
- c) The order in case number HC 2106/19 is binding only on Reverend Sibanda and those who claimed occupation through him

- d) The evictions carried out under case number HC 2106/19 were irregular to the extent that they were effects against church members in respect of whom there was no order for eviction.
- e) That the applicants and other church members evicted be restored into occupation and control of all of the church premises just as they were prior to the evictions.
- f) That all church properties movable and immovable, be restored to the control and enjoyment of the applicants and members illegally evicted.
- g) Save in amendments relating to doctrine which requires the consent of the parent church, the power to amend the constitution of the local church with the local church.”

The background of this matter is that applicants and respondents have a dispute regarding issues at the 8th and 9th respondents being a church in Zimbabwe but also headquartered internationally overseas.

Applicants are disgruntled with the manner in which the constitution of the church in Zimbabwe from the founding affidavit and the rest of the papers although the draft order (clause (9)) thereof is relating to the constitution of 1st respondent yet 1st respondent per the founding affidavit is a natural person. There is seemingly a problem there. The applicants also have an issue with the way they were evicted from the church premises and the dispossession of church assets that had been allegedly in their control.

At the hearing of this matter the respondents raised points *in limine*. The first point *in limine* being that 1st applicant has no *locus standi* as he is no longer a member of the church. With regard to the other applicants, it is argued that 1st applicant has no mandate to represent them and that 1st applicant cannot seek the relief he seeks on behalf of others. That 2nd to 8th applicants are not members of the church and that they therefore equally lack the *locus standi*.

The 2nd point *in limine* is that the claim has prescribed as applicants cannot seek a declaratory order against the amendment of a constitution that was done more than 11 years ago and that the founding affidavit shows that the cause of action arose in July 2012.

The 3rd point *in limine* is that there are material disputes of fact. Firstly, that the purported amendments are not placed before the court. That there is a question as to who amongst the church in relation to clause (a) of the draft order will benefit from the order being sought. Also that clause (f) relates to unnamed church properties and different people evicted from different places. That Felix Mahaso says he was evicted from Gutu, Lawrence Joram Jonhera from Murambinda. Respondent’s counsel abandoned the point *in limine* on the

exhaustion of remedies so in essence there are 3 points *in limine* raised and argued by the respondents.

Applicant's counsel submitted against the points *in limine* that none of the raised preliminary points have merit. That what is being sought is a declaratur. Also that a member of the church is anyone with a relationship with God. That paragraph 20, 35 and 39 of the founding affidavit, talk to applicant's standing. Paragraph 20 reads as follows:

“My co-applicants and I are members of the Apostolic Faith Mission of Portland Oregon, Southern African Headquarters (Inc) a church established and regard as a universities in accordance with the laws of Zimbabwe, with power to sue and be sued in its own name.”

On the issue of prescription, applicant's counsel submitted that not all the aspects of the relief sought would be affected by the issue of prescription. The respondent's counsel conceded that the issue of prescription would not affect clauses (b), (c), (d) and (e) of the draft order. That then leaves the issue of prescription not relevant as a preliminary point as it does not dispose of the matter. It is a point that respondents can then tackle on the merits as they deal with the issue of whether applicants have made a case for the relief that they seek. That leaves this court with basically 2 preliminary points to resolve, that of *locus standi* and that of material disputes of fact. I will start with the 2nd one of material disputes of fact as I hold the view that the issue of *locus standi* is a sub issue under the material disputes of fact.

Looking at the founding affidavit, it tells a long story of how the church came into being in Zimbabwe, how the constitution was amended in 2012, how the other members, including Reverend Sibanda fell out of each other with the rest of the church. How the applicants fell out with the church, and how the applicants are and should remain the members of the church.

In paragraph 18 (a) applicant avers that:

- a) The constitution purports to be the constitution of the 8th respondent and proposing to repeal the 8th respondents' 1996 constitution was unprocedurally crafted and is a nullity and that in consequence, all appointments made in terms thereof, are of no lawful force or effect.

In paragraph 19, applicant avers that:

“It is an application which seeks clarity on delineation of functions between the parent and the local church.”

In paragraph 40 of the founding affidavit 1st applicant states thus:

“In or about July 2012, what purports to be a constitution of the local church was signed by 4th to 8th respondents in about November 2012 was lodged with the Registrar of Deeds, Bulawayo for registration and registered. The constitution purports to supersede any previous constitution and to repeal all previous constitutions.”

In paragraph 50 (a) of the founding affidavit applicant avers that;

“The 2012 constitution claims that it is the product of the church duly adopted at an assembly of the church at Portland, Oregon, on the 11th of July 2012. This claim is simply untrue” and that therefore the constitution lies about itself. In paragraph 7 of the opposing affidavit by Onias Gumbo, the respondent is dealing with the history of the church as a background to this case. They also narrate their own background, different from that of the applicants as to how the church came about and how the constitution came about.

Before this court, is a dispute centered on a constitution that is born of a background that either party narrates differently. There is need for clear evidence as to what the history of the church is, how the constitution came about and amendments if any, and what is the current state of affairs *vis-a-vis* the church’s constitution, or put differently what is the applicable constitution in the church being the subject matter of this dispute? With the different backgrounds being given factually by both sides what it means is that it remains an issue that must be resolved factually and through the leading of oral evidence as to how all these issues came about and what then is the correct constitutional regime of the church? Applicants contend that even the constitution lies about itself meaning this court cannot even rely on its contents to resolve the issue of what constitutional regime is valid.

The other issue that needs to be resolved is the issue of *locus standi*. It is the contention of the respondents that the applicants are not members of the church, whilst applicants contend that they are still members. Applicants refute that they were lawfully dismissed yet respondents contend that that is the correct position. There is no register or any document to show that applicants are current members of the church. The respondents state that applicants stand dismissed whilst applicants contend that the dismissal is not valid. This issue of whether applicants are still members of the church or not, is in itself not an issue I cannot resolve on paper. It therefore follows that whether applicants have *locus standi* or not is also an issue

where witnesses must be called to testify and be cross-examined on that point so that the court is able to discern the correct version on the issue.

Again, the relief of the restoration of applicants and other church members into the occupation and control of the church premises as well as the restoration of church assets to them is also a problem in that not only is it being challenged by the respondents but a material dispute of fact arises *vis-à-vis* that issue, that is to say:- who was evicted, who is entitled to be restored possession, which assets should be restored to who since respondent refutes that they are members in the first place. What it then means is that there are material disputes of fact on all the issues that the applicants want this court to resolve as well as their very standing in the respondent church and this suit.

As aforesaid, I find that this matter cannot be resolved on these papers. Neither can I refer the matter to trial with the papers as they stand for the simple reason that the papers filed of record need to be properly couched in the form of pleadings for an action so that the trial court is not burdened by the various affidavits filed herein with voluminous information which will make the crafting of issues even more complicated. A proper suit, with the cause of action properly enunciated in pleading form is required as the papers as they stand are a mixture of too many issues and too much information that will make it very difficult and impractical for the Judge seized with the matter to properly and ably craft the issues for trial. It is for these reasons that I uphold the point *in limine* on material disputes of fact as it does have merit and I consequently strike the matter off the roll with costs.

I accordingly strike the matter off the roll with costs.

V. Majoko, applicants' legal practitioners
Dube-Banda, Nzarayapenga & Partners, respondents' legal practitioners