

MOROTASHI APOSTOLIC CHURCH
and
THOMPSON MACHINGURA
and
WINSTON MASOWANI
and
DANMORE CHAPASUKA
and
JOSEPH DAVID
versus
KURAI CHIKONYORA
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 14 July 2022 & 14 July 2023

Opposed Application

Mr *B Magogo*, for the applicants
Mr *A Chimhofu*, for the 1st respondent

MANYANGADZE J: The applicants seek an order against the first respondent, which, in their draft order, is couched in the following terms:

“1) It is declared that WINSTON MASOWANI is the duly appointed Bishop of MOROTASHI APOSTOLIC CHURCH in terms of the provision of Article 8.1 (i) (a) –(f) and taking over the leaders (*sic*) of the Church following the demise of BISHOP AARON KAWANZARUWA.

2) The purported appointment of KURAI CHIKONYORA as the new Bishop of MOROTASHI APOSTOLIC CHURCH be declared to be in violation of the provisions of Article 8.1. (i) (a) – (f) of the MOROTASHI APOSTOLIC CHURCH Constitution and therefore null and void, and consequently set aside. Consequently,

3) The purported appointment of new leaders of MOROTASHI APOSTOLIC CHURCH by KURAI CHIKONYORA and dispossession of Applicants from the property where they have undisturbed possession be declared to be in contravention of the provisions of the MOROTASHI APOSTOLIC CHURCH’s Constitution and therefore null and void and set aside.

4) All transactions, programs and appointments made by KURAI CHIKONYORA subsequently to his unilateral appointment to the office of the Bishop, be and is (*sic*) hereby declared to be null and void and set aside.

5) That the 1st Respondent shall pay costs of suit on an Attorney and Client scale.”

The applicants initially filed what they titled an “URGENT CHAMBER APPLICATION FOR A SPOILIATION ORDER” on 3 September 2021, seeking the above stated relief. This application was struck off the roll, on the basis that it was not urgent. The application was subsequently filed on the ordinary court roll.

After the applicants filed their answering affidavit, the first respondent filed a chamber application for leave to file a further affidavit, under Case No. HC 207/22. In his founding affidavit to this ancillary application, the first respondent avers that the answering affidavit contains new and material allegations which are not averred in the applicants’ founding affidavit. These allegations necessitate rebuttal, hence the need for a further affidavit.

The applicant opposes this application, and contends that there are no new facts warranting that course of action.

The parties agreed that the chamber application under HC 207/22 be consolidated with the main application under HC 4458/21. The applications were duly consolidated and a consolidated index was prepared under Case No. HC 4458/21. At the hearing of the matter, the parties argued quite extensively on the application for leave to file a further affidavit. This application was vehemently opposed by the applicants, as much as it was vigorously pushed by the first respondent. Thus, the main matter was held in abeyance pending determination of the ancillary application.

In this judgment, which is dealing with the ancillary application, the first respondent in the main matter will be referred to as the applicant, and the applicants in the main matter will be the first to fifth respondents (“respondents”). This should avoid a mix up of the parties as between the two applications.

A brief summary of the factual background should help put the matter into perspective.

The applicant and the respondents are embroiled in a bitter leadership wrangle over the control of the Morotashi Apostolic Church (the 1st respondent). The power struggle arose after the death of the founding leader, Bishop Aaron Kawanzaruwa, sometime in March 2021. The applicant claims that he was anointed the successor Bishop by Bishop Kawanzaruwa himself. This was done at a ceremony held at the Bishop’s residence on 11 and 12 March 2021. This

appointment or anointing was carried out in accordance with the beliefs, traditions, and practices of the church and also in compliance with its constitution.

On the other hand, the third respondent asserts that he is the duly appointed successor to Bishop Kawanzaruwa. His appointment was done on 5 June 2021 in terms of the 1st respondent's constitution and was approved by the Bishops' Council.

Details of how the ceremonies leading to the appointment of the two rival leaders were held are contained in the parties' founding and opposing affidavits to the main dispute. Suffice it to state that the respondents resolved to institute legal proceedings to stop the applicant from holding himself out as Bishop of the first respondent. The legal action also seeks to evict the applicant from the Bishop's residence, as it is alleged that he took unlawful occupation of the residence.

In seeking to file a further affidavit, the applicant alleges that there are new and material facts in the respondents' answering affidavit filed in the main matter. These facts are to the effect that the late Bishop Kawanzaruwa was terminally ill at the time the applicant claims he was anointed successor. The Bishop was unconscious and in no condition to conduct a succession ceremony. The implication of these allegations is that the applicant's appointment ceremony was a sham and out rightly fraudulent. In this regard, the applicant avers, in para (iii) of his founding affidavit to the ancillary application:

"These allegations are material to the resolution of the matter in that:

- a. They speak to the late Bishop's capacity to participate in the appointment ceremony and thus the authenticity thereof.
- b. They seek to colour the proceedings as though they were against the late Bishop Kawanzaruwa's wishes.
- c. They seek to flavour the proceedings with an air of fraud when the business of the day was conducted with *bona fides* intentions and in accordance with the guidance of the Holy Spirit."

In resisting the filing of a further affidavit, the respondents aver that the application is *mala fide*. The applicant simply wants to delay litigation and in the process prolong his unlawful stay at the Bishop's residence. The respondents contend that there is nothing new about the averments in the answering affidavit. The answering affidavit is disputing the narration of events in the opposing affidavit. These events were known all along, and could have been alluded to by the applicant in his opposing affidavit. Crucial to these events was the presence of one Barnabas Manongwa and one Rungano Magwani. The respondents attached affidavits to their answering affidavit, wherein these individuals are stating that Bishop

Kawanzaruwa was critically ill and as such unable to perform any church functions. They had in fact come to his residence after learning that he was seriously ill. They objected to the proposed ceremony to appoint the applicant as Bishop under such circumstances.

The respondents aver that the applicant knew all along that these people had called at the Bishop's residence on the night the purported appointment was done. The applicant should have mentioned that in his opposing affidavit to the main matter. The respondents maintained their position that the application is meritless and should be dismissed.

The law on the filing of a further affidavit has been set out and clarified in a number of authorities. To begin with, r 59 (12) of the High Court Rules, 2021, provides as follows:

“After an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge.”

The rule simply spells out the fundamental position. It is that an answering affidavit closes the filing of affidavits in motion proceedings. It completes the sequence of affidavits in such proceedings, the first two being the founding and opposing affidavits, respectively. The rule recognises the possibility of exceptional situations, where a further affidavit may be called for. However, such an affidavit can only be filed with the leave of the court. This must have been intended to place a cut off point in the filing of pleadings, otherwise there would be an endless filing of affidavits and other documents. Litigation can easily be abused and turn into a circus, if not a nightmare.

The cited rule does not set out the factors to be taken into account in allowing an additional affidavit. One must therefore look to case law for guidance. It becomes a matter of judicial discretion, having regard to the circumstances of each case. The paramount consideration is to achieve fairness between the parties.

The court was referred to cases where this question was considered. The court is indebted to both parties for the cases referred to. Among these cases was that of *United Refineries Limited v Mining Industry Pension Fund & Ors* SC 63/14. In that case, GOWORA JA (as she then was) stated, at pp 2 -3 of the cyclostyled judgment:

“When considering an application by a party for leave to file a supplementary affidavit, the court is called upon to exercise a judicial discretion. In the exercise of this discretion, it is a fundamental consideration that the dispute between the parties be adjudicated upon all the relevant facts pertaining to the dispute. The court is therefore permitted a certain amount of flexibility in order to balance the interests of the parties to achieve fairness and justice. In this exercise the court has to take into account the following factors:

- a) A proper and satisfactory explanation as to why the information had not been placed before the court at an earlier stage;
- b) The absence of *mala fides* in relation to the application itself;
- c) That the filing of the supplementary affidavit will not cause prejudice which cannot be remedied by an order of costs.”

See also *Silver Trucks (Pvt) Ltd & Anor v Director of Customs and Excise* 1999 (1) ZLR 490 (H), *Cohen v Nel* 1975 (3) SA 963.

In casu, the founding affidavit indeed makes no reference to Bishop Kawanzaruwa being so critically ill that he was unable to conduct the disputed ceremony anointing the applicant as Bishop. This material averment goes to the root of applicant’s claim to succession to the church leadership. It only emerges in the answering affidavit. The answering affidavit goes on to carry with it two supporting affidavits, substantiating this crucial averment.

It is inconceivable how the respondents expected the applicant to rebut averments not made in the founding affidavit. An opposing affidavit does not originate the case. It is a response to a case originated in the founding affidavit. Thus, the founding affidavit must contain all the material facts and allegations on which the cause of action is founded. This enables the respondent to comprehensively respond in the opposing affidavit.

In the instant case, the respondents have not been heard to dispute that some of the issues they included in the answering affidavit were not in the founding affidavit. These issues concerned Bishop Kawanzaruwa’s physical and mental capacity at the material time. These were new allegations and they touched on the validity of the applicant’s appointment. The validity or otherwise of the applicant’s appointment is of course not a matter for consideration at this stage. The parties shall fully ventilate that in the main matter. However, such ventilation must be done after each party has been given a fair and reasonable opportunity to file essential pleadings. It is basically a question of procedural fairness.

In the circumstances, the court is of the considered view that the applicant has made out a case allowing a departure from the general rule prohibiting the filing of a further affidavit following the filing of an answering affidavit. He must, in the circumstances, be granted leave to file such an affidavit.

In the result, it is ordered that:

1. The application for leave to file a further affidavit be and is hereby granted.
2. Costs shall be in the cause.

Rusinahama – Rabvukwa Attorneys, applicant's legal practitioners
Mafongoya and Matapura Law Practice, respondents' legal practitioners