

APOSTOLIC FAITH MISSION IN ZIMBABWE
versus
COSSAM CHIANGWA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 29 November, 2021 & 13 January, 2022

**Urgent Chamber Application:
(Execution Pending Appeal)**

F Mahere, for applicant
L Madhuku, for respondent

[1] TSANGA J: Having obtained a spoliation order on the 10th of November 2021 under HC 5549/21 against dispossession of church premises by the respondent, the applicant sought leave to execute pending an appeal that has been lodged by the respondent against the granting of that order. The matter was set for hearing on the 25th of November 2021 when the respondent requested to formally file a point *in limine* for consideration regarding referral of the matter to the Constitutional Court in terms of s 175(4) of the Constitution of Zimbabwe 2013. The request to file a formal application for consideration of referral of the matter to the Constitutional Court was granted and the case resumed for hearing on the 29th of November 2021. For ease of dealing with the parties in the context of the case as a whole, I retain the title of applicant with reference to Apostolic Faith Mission in Zimbabwe and that of respondent with reference to Cossam Chiangwa in addressing the preliminary point raised.

[2] The issues which the respondent seeks to be referred to the Constitutional Court are the following:

Whether or not the High Court's common law jurisdiction to order an execution of its judgment pending an appeal already pending in the Supreme Court:

- a) is consistent with the hierarchy of courts provided for in s 162¹ of the Constitution of Zimbabwe 2013.

¹ To give context, s162 lists the hierarchy of all the courts, with the Constitutional Court at the top of the hierarchy followed by the Supreme Court for instance.

- b) involving as does, a lower court determining the prospects of success of an appeal already before a superior court, is consistent with the mandatory duty of the courts to be impartial as provided for in subss 1 and 2 of s 164² of the Constitution of Zimbabwe, 2013.
- c) involving as it does a lower court determining the prospects of success of an appeal already before a superior court is consistent with the fundamental right of every person to a fair hearing enshrined in s 69(2)³ as read with s 3 (1) (b)⁴ of the Constitution of Zimbabwe, 2013
- d) involving as it does a lower court determining the prospects of success of an appeal already before a superior court is consistent with the fundamental right of every person to access to the courts enshrined in s 69(3)⁵ as read with s 3(1) (b) of the Constitution of Zimbabwe, 2013.

[3] The gist of respondent's submissions are that for reasons of court hierarchy, impartially, and fair hearing as articulated above, once a Supreme Court is seized with an appeal, no lower court should have anything to do with that appeal whether directly or indirectly. It is argued that what suspends the judgment is the power of the Supreme Court and that it this court, by power of the law, that suspends the judgment of the lower court. Thus the common law rule is said to run contrary to this power by permitting a lower court to undo what a higher court would have ordered. It is in this respect that the common law rule is alleged to be in breach of s 162 (judicial authority) as read with ss 168 and 169 which deal with the Supreme Court and its jurisdiction. It is also argued that under the common law jurisdiction, it is mandatory for a judge to deal with prospects of success and the judge is thereby be forced to pitch his or her tent in favour of one side in the appeal matter. This is alleged to violate the imperative of impartiality espoused in s 164 of the constitution.

[4] In response to this quest for referral on the above grounds, the applicant argues that the context in which the application to execute pending appeal is sought has to be fully appreciated.

² These subsections deal with the independence of the Judiciary and their need apply the law impartially without fear or favour. Subsection 3 deals with non-interference by the state or any agency of government.

³ Section 69(2) provides as follows: "In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law".

⁴ This section states that Zimbabwe is founded on respect for values and principles which include the rule of law

⁵ Section 69 (3) deals with the right of access to the courts or such tribunal for the resolution of disputes

In this instance, the application is being made against the overall back drop of a Supreme Court judgment which authorised it to take control of the church and where that control had been interfered with through spoliation as found by the High Court. Thus applicant argues that the appeal has not been noted on *bona fide* grounds but merely to gain time and harass the applicant. The effect of allowing the referral would, according to the applicant, be to delay the day of reckoning. Thus the applicant argues that if the court does not grant the execution it would be condoning an illegality. The applicant is also not prepared to share the premises of worship with the respondent pending the appeal on the basis that this would in fact be condoning the respondent's illegal conduct.

[5] The applicant also argues that though on the face of it the issues raised for referral may not appear frivolous, they are manifestly vexatious in nature in that applicant would be vexed by not being able to conduct its Sunday services. It would equally be vexed in that it would not be able to carry into effect the judgment of the Supreme Court that gave it control of the church. Applicant would be further vexed as a litigant that has followed due process and sought the protection of the law only to be hampered by a vexatious application. In her arguments in response to the application for referral Ms *Mahere*, on behalf of the applicant therefore emphasised that referral would offend the notion of equality before the law and the right to equal protection as provided for by s 56 of our Constitution.

[6] Critically the respondent was said to have failed to place a single authority before the court that states that an application for execution pending appeal violates the right to a fair hearing, whose components are, firstly, a right to be heard, and, secondly, a right to a fair hearing. Even if execution pending appeal is granted Ms *Mahere* argued that the respondent would still have an ample opportunity to put forward his case and make his legal representations. She emphasised that no facts had been placed to demonstrate in what way the application violates a fair hearing and that contrary to the respondent's assertion in the application for referral, the court would not be pitching its tent with either side. The notion of fairness, she argued, requires that a litigant be able to protect and prevent a judgment from being a *brutum fulmen*. As for violation of s 162 on judicial authority of the courts, she argued that there is nothing in that section that takes away the powers of the High Court to invoke several procedures on appeals pending before the Supreme Court. She also emphasised that in any event the procedure of execution pending appeal is one granted in exceptional

circumstances but however, moved that the application for referral be dismissed on grounds that it is vexatious and also frivolous in the context of the case.

Analysis of arguments for referral

[7] Indeed at first glance, it may appear as if the quest for referral is not frivolous in the sense that the respondent appears to motivate some seemingly rational but in reality highly generalised non-contextualised arguments in support of the application for referral. This is not surprising. Arguments for or against a position are created by lawyers all the time and it is in fact the norm to put up whatever decent argument on behalf of a client. Coming up with different possibilities to a client's problem is after all the duty of an astute lawyer. However, it does not mean that the purposes for which such arguments are not necessarily frivolous or vexatious. Applications for execution always engage the facts and are contextual.

[8] Stay of execution admittedly provides some protection against what might indeed be an erroneous judgment by a lower court whilst the power of the lower court to allow execution equally deals with situations of manipulative abuse of procedural court processes. It is a fact that generally the right to appeal is preserved and thus suspension of execution of a judgment is not easily interfered with. But whilst an appeal automatically suspends the execution of a judgment with no action being required on the part of the appellant for the suspension of the order, there may be factual situations which may make a suspension impractical or undesirable. In such circumstances there is nothing wrong in ordering enforcement during the pendency of an appeal. What is important is that each case must be dealt with on its merits. The totality of the factual circumstances and an analysis of the full facts is therefore always important in cases such as these in arriving at a proper conclusion as to whether stay of execution is justified or not.

[9] The back drop against which the applicant seeks execution has been articulated by the applicant. The applicant's incentive in seeking enforcements rests in not only having won their litigation on spoliation but it is also against the backdrop of having won the Supreme Court matter in the church's leadership wrangle. The applicant also seeks enforcement expeditiously against the backdrop of the respondent having left the church only to return by force to take over the premises. The respondent, on the other hand, believing as he does that his congregants are in the majority, seeks to delay the enforcement of that judgment on the basis that the court erred. Generalised arguments that deliberately skirt the context of each case in which execution

is sought cannot therefore be a basis for creating an imagined constitutional crisis. Materially, there is therefore nothing inherently unconstitutional in a court ordering execution of its judgment where it firmly believes that the appeal has been lodged to simply buy time. Allowing a lower court to determine whether a judgment should be enforced pending an appeal is a way of dealing with frivolous appeals. As stated in *Old Mutual Life Assurance Company (Private) Limited V L.Makgatho* HH 39-07:

“Where however the appellant brings the appeal with no bona fide intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or to harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal vesting in the appellant.”

[10] As regards the unconstitutionality of a court ordering execution in a matter which is on appeal in a higher court, what is important to grasp is that the Supreme Court looks at the appeal as whole to determine whether the appeal is merited and not. It is not tied to whether execution has been permitted or not. Moreover, an appeal in the Supreme Court is heard by three judges. It therefore cannot be suggested that a single judge of the High Court would even have the power to influence the reasoning of three judges on whether the appeal is merited or not. Therefore in so far as the quest for referral alleges inconsistency with the hierarchy of courts provided for in s 162 of the Constitution of Zimbabwe 2013, the argument is indeed frivolous. In other words, even if execution is permitted, the fact is that three judges the Supreme have the ultimate unfettered say on the appeal. Their decision has nothing to do with whether execution has been allowed or not pending appeal but rather their focus is squarely on the merits of that appeal. The argument that a lower court determining the prospects of success of an appeal already before a superior court is inconsistent with the mandatory duty of the courts to be impartial as provided for in subs(s) 1 and 2 of s 164 of the Constitution of Zimbabwe, 2013 is therefore flawed. There is also no interference with a right to a fair hearing enshrined in s 69(2) as read with s 3 (1) (b) of the Constitution of Zimbabwe, 2013. On hearing of the appeal the Supreme Court may affirm or reverse the judgment appealed against based on the merits of the appeal.

[11] The quest for referral in my view is lacking in merit and is accordingly dismissed. What this court needs to focus is whether the application for execution pending appeal is merited based on those factors which a court faced with such an application is enjoined to consider.

The Merits

[12] Drawing on the Supreme Court case of *Netone Cellular (Pvt) Ltd v Netone Employees & Anor* 2005 (1) ZLR 275 SC at p 281, Ms *Mahere* laid out the factors which a court would normally consider in determining what is just and equitable where an applications for execution pending appeal has been made. These are as follows:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time to harass the other party; and
- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent the balance of hardship or convenience, as the case may be.

[13] She argued that the respondent would not suffer any harm given that he had in fact left and formed his own church and was in fact now worshipping at different premises before making a return. If the order for execution pending appeal is granted, he would therefore simply go back to the premises that he and his congregants were now using. Moreover, she emphasised that there are no other proceedings pending to question applicant's authority to control the church.

[14] As regards whether the applicant, on the other hand, would suffer harm, she emphasised that the applicant has been unable to conduct its church services even though they had been doing so from the time of the Supreme Court judgment that dealt with the issue of the church's leadership. Unlike the respondents who had left, they do not have an alternative venue. Lost services can also not be recovered if the appeal fails. In addition she also emphasised that allowing spoliation to continue could result in a volatile situation getting worse as respondent continues to take the law into its own hands. She drew attention to a widely reported shooting incident that had occurred at the church following the spoliation order being granted. On balance of hardship, she argued that convenience favours the *status quo ante* being restored, and, lawfulness to prevail, pending the Supreme Court appeal on spoliation.

[15] As for prospects of success on the grounds of appeal, the respondent has appealed on the following summarised grounds:

1. That the court erred in granting a spoliation order pursuant to an urgent chamber application in circumstances where a spoliation order, being a final order, can only be granted pursuant to a court application.

2. That the court erred in granting a spoliation order without making a definitive finding the respondent was in possession of the property in question.
3. That the court erred in granting a spoliation order without making a definitive finding that the alleged act of spoliation by the appellant was unlawful or wrongful
4. As an alternative to two above, the court's finding that it was the respondent who was in possession of the property in question was grossly irrational in that no reasonable court applying its mind to the disputed facts, would ever have reached such a conclusion.
5. That given that the respondent is a *persona ficta* which can only possess property through agents, the court erred in granting a spoliation order in favour of the respondent without establishing the natural persons that possessed for and on behalf of the respondent.

[16] As for prospects of success Ms *Mahere* argued that the respondent has no prospects of success and has simply noted an appeal to prolong an unlawful occupation. The appeal was therefore said to be an abuse of court process, vexatious and mala-fide, its effect being to allow the respondent to benefit from wrong doing pending the hearing. As regards the first ground of appeal that there should have been a full court application for a final order to be granted, she argued that there is no law which prevents a court from granting a spoliation on the basis of an urgent chamber application. As such this ground could not be the basis upon which the Supreme Court would sanction an act of spoliation.

[17] As regards ground two in which the court is said not to have made any finding that the respondent was in possession of the premises, she maintained that the court did in fact make such a finding. Ground three to the effect that that the court did not make a finding that the spoliation was wrongful and unlawful was also said to be frivolous since an act of spoliation is inherently unlawful and due process was not followed by the respondent in this instance. As for ground 4 that no reasonable court applying its mind to the disputed facts would have reached such a conclusion, she argued that this ground is equally without merit as the respondent's entitlement to possession was unsubstantiated. With regards to ground five that the natural persons that possessed for and on behalf of the applicant (respondent in appeal) needed to be established, Ms *Mahere* argued that there is no law which requires every person to be named.

[18] The sum total of the argument on the merits was therefore that it is urgent for this court to find that the noting of the appeal should not suspend the order especially as s 176 of the Constitution entitles the High Court to protect and regulate its process. Furthermore, it is the

applicant who has chosen not to resort to violence, making this a proper case to grant the order for execution pending appeal.

[19] Mr *Madhuku* argued in response to the above submissions that this is not a proper case to apply the principles stated in the *Netone Cellular* case. His thrust was that irreparable harm means that it would be “pointless” whereas herein there is no irreparable harm in that context. He also argued that the court should take cognisance of the fact that courts now conduct virtual services and that this is not the kind of case that the common law had in mind. For the respondent, he stated that it might be injustice of a high level but not irreparable harm. He also argued that it had been two months since the alleged incident of spoliation on 10th October 2021 and that as such, the respondents who have been there would suffer injustice.

[20] On balance of convenience, he again emphasised that the respondent has been on the premises for at last two months going by the judgment whilst he maintained though that the respondent has always been in occupation. As such, he argued that it would be inconvenient to change the *status quo* when an appeal is still to be heard. According to him, it would be inconvenient to disturb the *status quo* now when the respondents are in control and occupation of the premises.

[21] On prospects of success, he maintained that the court was wrong to give a final order for spoliation through an urgent chamber application on the basis that justice in closed chambers is not open justice. He emphasised the need for open court in that every interested party must be a party to an application.

[22] As for grounds two and three, he argued that the court did not make definitive finding on possession and that the court had not openly stated that the applicant was in possession. He also argued that it could not be said that the appeal is mala-fide as there was no evidence of the mind-set of the respondent. He also challenged the applicant’s quest for the order to stand despite the noting of the appeal on the basis that the right to appeal is given by statute. He therefore argued that this application for execution pending appeal is in fact an application for preferential treatment.

[23] In response, Ms *Mahere* highlighted that the respondent, through his counsel, had in fact confirmed in argument that he and his congregants had merely been on the premises for two months and that the court was therefore clearly not dealing with a litigant who has been in possession but one who took possession two months ago. She agreed with the respondent’s

own assessment that he would not suffer irreparable but stressed that the respondent could not speak for the applicant in that regard. She re-emphasised the need to go back to the *status quo* on the basis that the applicant is failing to conduct church service and for a church whose main business is to worship, to stop them from doing so goes to the root of irreparable harm. Moreover, the applicant was said not to be conducting any virtual services. As regards the argument on other interested parties if indeed any, she pointed out that they had not sought to be joined.

Analysis of the merits of application for execution pending appeal

[24] The issue of whether the application is frivolous or vexatious has already been looked at with respect to the issue of referral. I turn to the related issue of prospects of success of the grounds of appeal as these are a fundamental determinant on whether or not execution pending appeal should be granted. As regards the first ground of appeal, the High Court judgment on spoliation in para 9 clearly stated that central to spoliation is the need to urgently stop unlawful conduct and self-help and restore the *status quo ante* until the law has taken its course. This court maintains that there was nothing wrong therefore in hearing the application on an urgent basis in order to stop the unlawfulness that had been clearly spelt out in the application and accepted as truth by the court. This was in contrast to the respondent's assertions that he had never left the premises to start his own church when the evidence in the application showed he most certainly had. The ground of appeal is unlikely to succeed.

[25] As regards the second and third grounds of appeal, paragraph 10 of the judgment clearly outlined the applicant's basis for seeking spoliation and examined the counter arguments by the respondent. The judgment made it clear that the respondent's reasons for its action of despoliation emanate from his view that his faction of congregants being the majority, are the owners of the premises. See para(s) 13-15. The court's judgment is clear that ownership is not a reason for despoliation and that the respondent did despoil the applicant and that the ownership dispute must follow due process.

[26] The fourth ground that the court erred in reaching a conclusion of despoliation on the facts that were before it is also unlikely to succeed. The judgment clearly captured the factual realities as put forward by the applicant that supported the conclusion that the respondent had left the church and formed his own. The fact that the respondent put forward bare denials does not make the court's finding unreasonable.

[27] The last ground of appeal is also meritless under the factual findings that he had indeed previously left only to return on the 10th and 11th of October under the circumstances averred. There was no error in the court granting a spoliation order in favour of the applicant herein under circumstances where it was clear that applicant's congregants indeed had control of the premises following the resolution of the church leadership wrangle by the Supreme Court and the departure of the respondent. There was no need to establish them as natural persons.

[28] Consequently, looking at the application as a whole this court comes to the conclusion that the application for execution pending appeal is meritorious and that the appeal has simply been made to buy time to allow the respondent to re-establish himself on the premises whilst he charts his course of action regarding his real gripe which centres on ownership of the premises.

[29] Accordingly, it is ordered that:

1. The application by the applicant for leave to execute the judgment of this honourable Court granted on 10th November 2021 as judgment number HH 626-2021, pending the appeal against the judgment noted by the respondent under SC 433/2021, be and is hereby granted.
2. Consequently, it directed that the applicant be and is hereby granted leave to carry the judgment of this court in HH 626-2021 into execution notwithstanding the appeal against it by the respondent.
3. The costs of this application shall follow the outcome of the appeal in SC 433/21.

Mtewa & Nyambirai, applicant's legal practitioners

GS Motsi Law Chambers, respondent's legal practitioners