APOSTOLIC FAITH MISSION IN ZIMBABWE
versus
APOSTOLIC FAITH MISSION OF ZIMBABWE
and
AMON NYIKA CHINYEMBA
And
ALEX MWANZA
and
CAESAR MAGWENTSHU
and
DENNIS MUTUNGI
and
HENRY NOTISI
and
GIDEON CHOTO
and
TAPIWA MASAMBA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 April and 28 April, 2022

URGENT CHAMBER APPLICATION

F Mahere for the applicant
CW Gumiro for the respondents

MANGOTA J:

Until 28 May 2021 when the Supreme Court made its determination under SC67/21 causing the applicant and the first respondent to go their own separate ways, the two organs of faithful worshipped together, fellowshipped together and prayed together as one complete whole in an admirable mark of unity of purpose, profession of one faith and a sustained intent to spread the word of God Almighty, and reap many souls into, or for, His Kingdom. Somewhere, somewhat between the two centers of power arising from circumstances which are out of the ordinary, the applicant stopped seeing eye-to-eye with the first respondent. A seed of hatred was sewn between them. They are now not at church praying together as they used to do. They are now more in, than out of, court. They are now at each other's throat in a very shameful manner which defies

description. And, if an example may be favoured, one would go no further than HC 2405/22, HC 2409/22 as read with this current application all of which were filed within a space of two or three days of each other-all in an effort on the part of the applicant to vindicate or protect what it believes belongs to it.

ZHOU J who considered the first two cases –HC2405/22 and HC2409/22- was quick to strike each of them off the roll of urgent matters for reasons which the learned judge was pleased to give in each case. The current is yet another application which the applicant filed through the urgent chamber book. It is one for a final interdict. It moves me to prohibit the respondents and all those who are acting through them from entering, using or occupying Subdivision E of Stand 164 of Prospect measuring 19771 hectares which is commonly referred to as 164D, Northway, Prospect, Waterfalls, Harare ('the property"), held under Title Deed 8984/87.

The respondents' state, in opposition to the application, that:

i) the applicant cannot competently move for a final interdict in an urgent chamber application- and

ii) by striking HC 2405/22 and HC 2409/22 off the roll of urgent applications, the court remained satisfied that the applicant was abusing court process.

On the first matter, the applicant argued satisfactorily in my view, that a final relief can be successfully moved through the urgent chamber book subject to the applicant proving, on a balance of probabilities, his entitlements to the final relief. The High Court Rules, 1971 which, by and large, did not allow the applicant in an urgent application to move for a final relief were, it has been submitted, different from the new High Court Rules, 2021. These, it has been observed, permit the applicant who applies through the urgent chamber book to move the court for the granting of a final relief where he can prove such.

ZHOU J was not incorrect when he ruled that the applicant in HC2405/22 whom the respondent served with the letter on 25 February, 2022 had not treated the matter with the urgency which it deserved when it filed its suit on 9 April, 2022. The applicant was, in the circumstances of the case, found to have suffered from what is normally referred to as self –inflicted urgency which the court in *Kuvarega* v *Reistrar- General & Anor*,1999 (1)ZLR 188 AT 193 was pleased to make pronouncements upon when it stated that:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arose, the matter cannot wait. Urgency which stems from a

> deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules".

The principles which relate to urgency proper were discussed in an exhaustive manner in *Pickering* v *Zimbabwe Newspapers* (1980) Ltd, 1991 (ZLR 71(H) as well as in *Dilwin Investments (Pvt) Ltd* v *Jopa Engineering Company (Pvt)* Ltd HH116/98 wherein the court stressed that :

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. The preferential treatment is only extended where good cause can be shown for treating the litigant differently from most litigants."

HC 2409/22, it is evident, was struck off the roll on the ground that the application which was for the relief of *mandament van spolie* had been overtaken by events. The respondents, according to the finding of the court, used the property which was the subject of the application for the period 8-10 April, 2022. When the matter was heard on 12 April, 2022 the urgency of the matter had been lost when the respondents ceased to be in possession of the property which was is the subject-matter of the *mandament.*

It is evident from a reading of the abovementioned matters/cases that the applicant was not abusing court process as the respondents would have me believe. Its applications, it is clear, were marred with some degree of tardiness. They were, however, a genuine effort on its part to vindicate what it believed belonged to it.

The statement of the applicant as contained in paragraph 13 of its founding affidavit constitutes its third cause of action. The statement is to the effect that the sixth, seventh and eighth respondents all of whom fall under the administration of the first respondent which is a breakaway faction from the applicant notified the latter that they would use the property on 14 April, 2022 going forward. Its uncontroverted evidence is that the property is registered in its name. It attached to its application a copy of the title deed which shows, in clear and unambiguous terms, that the property is registered in its name. It is for the mentioned reason, if for no other, that the applicant applies for a final interdict. It moves me to prohibit the respondents from using, occupying and /or entering the property without its knowledge and/or consent.

The requirements of a final interdict were settled in a number of cases amongst them that of *Setlogelo* v *Setlogelo*, 1914 AD 221 wherein they were stated as:

i) a clear right which must be established on a balance of probabilities;

ii) irreparable injury actually committed or reasonably apprehended- and

iii) absence of a similar protection by any other remedy.

As the registered owner of the property, the applicant has a clear right to the same. Our law jealously protects the rights of the owner in regard to his property, unless of course the possessor has some enforceable right against the owner: *Oakland Nominees Ltd* v *Gelria Mining & Investment Company Ltd*, 1976 (1) SA 441 at 452 (A). It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner, for example a right of retention or use: *Chetty* v *Naidoo*, 1974 (3) SA 13 (A). The action *rei vindicatio* is an action brought by an owner of the property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent: *Savanhu* v *Hwange Colliery Company*, SC8/15.

The abovementioned excepts spell out the rights of the applicant *vis-a –vis* the property which is registered in its name. It owns the same to the total exclusion of all the respondents or anyone who may want to make use of it without its consent or against its will. It has no agreement with the respondents in terms of which the latter are allowed to use the whole or any portion of the property which is wholly owned by the applicant. The respondents may not, therefore, withhold the property or any portion of it from the applicant. The applicant cannot be deprived of possession of the property or any part of it without its consent.

The statement of the respondents which is to the effect that the applicant and them have used the civic center together cannot possibly be correct. If that was the case, the applicant would not have filed one application after another as it did when it applied for a provisional interdict, a *spoliatory* relief and this final interdict. It is a case of a clear misconstruction of events for the respondents to allege, as they are doing, that they built the civic center on the basis of which they should be allowed use of the same. The reality of the matter is that they build the same when they were one whole body-a complete *universitas* which manifested itself in the applicant.

The moment the respondent broke away from the applicant to form their own church as they did after the Supreme Court judgment SC 67/21, whatever they did with the applicant as one church remains with the latter. Nothing of it goes with the respondents. This principle of the law is evident from the statement which is to the effect that a member of the club who breaks away

from the club does not take away with him items of the club. He acquires his own items. He formulates new rules for his new club and conscripts persons into the new club.

The respondents did not produce any evidence which showed that the applicant allowed them to use the civic center as and when they remained inclined to use it. By breaking away from the mother body which is the applicant *in casu* and constituting themselves into an *univeristas* which is separate and different from the applicant, the respondents deprived themselves of use of whatever goods which remained with the applicant. They do not carry along with them the property of the applicant wherever it is situated to wherever they go to fellowship and/or worship. They started their own church and, in the process, they will in the fullness of time acquire their own assets which are separate and different from those which they left behind with the applicant. The stated principle is an unpalatable pill to swallow. Yet it spells out the correct law which neither the respondents nor anyone can wish away.

The respondents cannot have their cake and eat it. They cannot break away from the applicant and pretend to want to continue to enjoy the property of the applicant. They are either with the applicant in which case they are allowed to partake of the joys and sorrows of the latter or they have moved on in which case they cannot enjoy the advantages which the law extended to the applicant. Their intended continuous use of the property of the applicant, no doubt, constitutes irreparable harm to the applicant. They have no legal or other right to continue to use the applicant's premises. Their threat to interfere with the applicant's possession as well as ownership without due regard to due process should always be frowned upon. No one should be allowed to take the law into his own hands. Self-help remains an unwelcome law of the forests in terms of which civilized man cannot partake of.

That the applicant will suffer irreparable harm by the respondents' continued use of the applicant's property requires little, if any, debate. There will be abuse by trespassers of its own property. There will also be disturbances of its own activities if the respondents are not interdicted on an urgent basis from unlawfully using the property of the applicant. The applicant relies on the success of this application to arrest the unwholesome conduct which is visiting it at the instance of the respondents. The police regard the dispute between the respondents and it as of a civil nature. They will not therefore assist the applicant whose remedy lies with this court.

The applicant states, correctly so, that the law allows for the grant of a final relief pursuant to an urgent chamber application where a clear right is established. I agree. I do so on the strength of the *dicta* which the court was pleased to enunciate in *Blue Rangers Estates (Private) Limited* v. *Muduvuri*, SC 29/09 and *Chiwenga* v *Mubaiwa*, SC 86/ 20.

The applicant proved its case on a balance of probabilities. The respondents failed to controvert the evidence of the applicant in its material respects. The application is, in the result, granted as prayed.

Dube- Tachiona and Tsvangirai, applicant's legal practitioners.
Moyo Chikono and Gumiro, respondent's legal practitioners.