PETER NDLOVU
and
OBVIOUS SANDANA MALE
and
CASTER MUZILA
versus
MANNERS NGWENYA
and
ALECK DUBE
and
THE TWELVE APOSTOLIC CHURCH OF CHRIST
and
ELIJAH MASUKU
and
JAMSON PHAMBA NDEBELE
and
WATSHE PHILEMANI NDLOVU

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 4 APRIL 2017 AND 13 APRIL 2017

Urgent Chamber Application

J Sibanda for the applicants
R Ndlovu with *B Masamvu* for the respondents

MOYO J: This is an urgent application wherein the applicant claims the following interim relief:

"a) Setting down an executive meeting of 3rd respo7ndent, to be held at 3rd respondent's headquarters at No 73446 Lobengula, Bulawayo, or at any other place decided by the majority of those present on 1 April 2017, at 10:00 or soon thereafter as the meeting may commence.

b) Directing the 1st and 2nd respondents to draw up an agenda for such meeting within 48 hours of this order and distribute the same in accordance with good corporate governance within 24 hours of drawing it up.

c) In the event that they fail so to do, the agenda shall be drawn up by the applicants herein and distributed in accordance with good corporate governance within 24 hours of the failure of the 1st and 2nd respondents to comply with the terms of (b) above.

d) Directing that the members present at such meeting shall constitute a quorum for purposes of such meeting."

The applicants are members of the Executive Board of the third respondent a church organization. They allege that due to squabbles within the church no Annual General Meeting was held in the year 2016 and that an annual general meeting has to be held in April of every year in terms of the church constitution and as such one needs to be held this April. The meeting sought to be held in terms of the provisional order is the preliminary meeting in preparation for the annual general meeting.

Respondent has challenged the application by raising two points *in limine*, firstly that the matter is not urgent and therefore there is absolutely no lawful justification for it to jump the queue and that the relief sought is final in nature. The certificate of urgency provides thus:

"8. Article X of 3rd respondent's Constitution provides that upon the request of three members of the Board of Directors, the 1st and 2nd respondents should, within 14 days of such request convene an executive meeting of the Board.
9. The applicants wrote to 1st and 2nd respondents requesting the convening of such meeting on 27 February 2017.
10. The 1st and 2nd respondents have not convened such meeting despite more than 14 days having elapsed after the request.
11. In fact the 1st and 2nd respondents have not convened any meeting of the Board in several months.
12. The failure to convene such meetings amounts to administrative conduct by 3rd respondent, which is a legal persona and is bound by the national constitution, that is not lawful, prompt, efficient, reasonable, proportionate, impartial substantively and procedurally fair in contravention of section 68 of the Constitution of Zimbabwe.
13. Applicant, a religious institution based on the Christian Faith, holds its Annual General Meeting in April of every year.
14. Such meeting of necessity must follow a preparatory are held by the executive.
15. Despite the fact that April is only days away, 1st and 2nd respondent have not called for the preparatory meeting of 3rd respondent.
16. ---
17 ---
18. If the Annual general meeting is not held applicants stand to be irreparably harmed in a matter affecting their faith and how that faith is practiced."

It is also stated in the certificate of urgency that April only comes once and the harm caused by the failure to hold such a meeting cannot be corrected. There is also an inference in the certificate of urgency that first and second respondents are attempting to frustrate the holding of

an annual general meeting so that they do not account for massive church funds and other church property.

A closer look at the certificate of urgency would show that it has not been shown what irreparable harm is impending to render the matter urgent. If the Annual General Meeting is not held, what harm would occur to the respondents which harm cannot be remedied in a court of law through a normal court application? We are not told in the certificate of urgency what precise harm would be suffered by the three applicants in the event that the annual general meeting is not held in terms of the Constitution. We are not told how a normal court application would render the result sought inconsequential. That April only comes once in a lifetime on its own does not in my view then mean that if it comes and goes applicants will suffer irreparable harm as clearly the failure to hold the Annual general meeting in April can be remedied through the normal court process.

I believe the certificate of urgency does not lay a proper case for urgency, as it simply makes averments of the necessity to hold meetings and therefore attain proper administrative goals and ensure administrative rights. It does not go further to show what irreparrable harm the applicants will suffer in the event that these administrative rights are not protected as a matter of urgency.

Not only does the certificate fail to explain the impending doom but it also fails to establish the link between the meeting called for by applicants and the Annual General Meeting. I say so for the applicant does not seek an interim order compelling the holding of an Annual General Meeting, but an order seeking the holding of a meeting not supported by its own constitution as a preliminary meeting prior to the holding of the Annual General Meeting.

Applicant's founding affidavit does not take the case any further as applicants state that in 2016 no Annual General Meeting was held, but they do not show the court that indeed irreparable harm was caused to them by the failure although they say it was impossible due to squabbles to hold it. One would have expected applicants to chronicle the irreversible harm that they also suffered as a result of the failure to hold last years' annual general meeting so that it is clear to the court that indeed harm is imminent to them. Urgency must be stated explicitly in the certificate and the founding affidavit. In other words both the legal practitioner issuing a certificate of urgency and the applicant in his/her founding affidavit must clearly state in fully

explicit terms, the cogent reasons why the matter is urgent. An applicant would show this in a founding affidavit by establishing the *prima facie* right that has been or is about to infringed. The applicant should go further and explain why normal court process would not otherwise save the situation. The applicant should go further and show the irreversibility of the harm, and that if he does not obtain the relief sought, he will suffer specific irreparable harm. The harm must be stated in clear and no uncertain terms and also why the harm can never be made good.

Refer to the case of *East Rock Trading 7 Pty Ltd and Another* v *Eagle Valley Granite Pty Ltd and Others* 2011 ZAGPJHC 196 in paragraph 6 wherein it has stated thus:

> "An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal laid down procedures it will not obtain substantial redress. ---- whether an applicant will not obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

In this case I hold the view that the applicant together with the legal practitioner who certified this matter as urgent, have failed to establish irreversible harm to the applicants in the event that the annual general meeting is not held in April. There is an averment in the founding affidavit that April is an important month to the church and that it is the month of Passover. We are however not told in clear and precise terms how the Passover is relevant to the annual general meeting and the harm that will be occasioned if April the month of Passover passes by and the annual general meeting is not held. The constitution of the church at Article 10 provides that an annual general meeting will be held during the month of April.

The constitution uses the word will as opposed to shall which is peremptory. Applicant has not shown this court that they cannot obtain substantial relief by normal notice of motion wherein those responsible are called upon to convene the annual general meeting at the time the order of this court would be granted, seeing that April may well have passed. Applicant has not shown why it is not a remedy to approach the court by way of a normal application seeking an order that the respondents adhere to the Constitution by calling an annual general meeting. Mr

Sibanda, counsel for the applicant submitted that respondent would oppose and state that that is no longer possible since April would have passed, but applicant launched this application on 28 March 2017, meaning that kind of opposition would not be available to the respondents.

I do not hold view that this matter is urgent at all for the reasons aforestated. Again l agree with counsel for the respondents that the relief sought is final in nature. Once the meeting is held applicants would have no reason to come back to court. This kind of relief was specifically dealt with in the case of *Kuvarega* vs *Registrar General* 1998 (1) ZLR 188 H. An applicant cannot come to court seeking interim relief which is nonetheless final in nature.

I accordingly uphold the points raised *in limine* and l would as a result dismiss the application.

I will thus order as follows:

The order sought by applicants is refused and applicants shall pay the costs of suit.

Job Sibanda and Associates, applicants' legal practitioners
R Ndlovu and Company, respondents' legal practitioners