JOHANE MASOWE CHISHANU APOSTLES
versus
JOHANE MASOWE APOSTOLIC CHURCH
(also known as) JOHANE MASOWE CHISHANU APOSTLES
(led by RABBI NHAMOYEBONDE)
and
RABBI NHAMOYEBONDE

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 14 February, 4 March, 1 June and 2 June 2022 & 5 November 2024
Extempore ruling was delivered on 2 June 2022

ABSOLUTION FROM THE INSTANCE

F Siyakurima, for the plaintiff
T M Kanengoni, for the defendants.

MANZUNZU J:

INTRODUCTION

On 2 June 2022 I granted an absolution from the instance at the close of the plaintiff's case. The full reasons for the ruling were given extempore. The plaintiff has appealed against the decision and has asked for written reasons, These are they:

BACKGROUND

There is a dispute between the plaintiff and the two defendants with the plaintiff seeking relief to interdict the defendants and their followers from using and/or interfering with plaintiff's church services at stand 7087 Unit L Seke.

The late Sandros Nhamoyebonde (Sandros) was the founder of the plaintiff. The second defendant was his wife. It is the plaintiff's case, which position is disputed by the defendants, that before his death, Sandros appointed three men to lead the church. Further, that the second defendant attempted to usurp the leadership of the plaintiff resulting in her forming the first defendant. There is a fight now over the use of the alleged leased property by the plaintiff. The true colour of the dispute is a fight for the leadership of the church which was left behind by Sandros.

At the close of the plaintiff's case the defendants applied for absolution from the instance.

THE LAW

The law is settled on the test for determining an application for absolution from the instance. In *Supreme Service Station (1969) (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A) at 5 D –E,* the court pronounced with approval the principle enunciated in the case of *Gascoyne* v *Paul & Hunter* 1917 TPD 170 at 173 as follows:

> "At the close of the case for the plaintiff, therefore, the question which arises for consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? … The question therefore is, at the close of the case for the plaintiff was there a *prima facie* case against the defendant …, in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against (the defendant)."

In *United Air Charters (Pvt) Ltd* v *Jarman 1994 (2) ZLR 341 (SC) @ 341* the court had this to say;

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him."

One discerns from these two precedents that, the test for absolution from the instance is whether the plaintiff placed evidence upon which a court applying its mind reasonably to such evidence, could find or might find in favour of the plaintiff. In other words, absolution from the instance may be granted at the conclusion of the plaintiff's case if the plaintiff has failed to adduce sufficient evidence upon which a reasonable court might grant judgment in favour of such plaintiff. In short, a plaintiff has to make out a *prima facie* case to survive absolution.

In casu, the court has to examine the plaintiff's evidence to see if a *prima facie* case was made.

ANALYSIS

The issues that were agreed to at the pretrial conference are whether the plaintiff is the lessee of stand number 7087 Unit L Seke, also known as Nyatsime Shrine and whether the defendants should be interdicted from using or occupying the same premises.

These are the issues that guide the court in its effort to determine and resolve the dispute between the parties. The plaintiff relied on the evidence of four witnesses.

At this stage the examination of the evidence is only limited to see if it covers all the elements of the claim and not whether the plaintiff establishes what would finally be required to be established at the end of the trial. This is the position of the law in both South African and Zimbabwean courts. *In Claude Neon Lights (SA) Ltd* v *Daniel 1976 (4) SA 403 (A)* where the court stated the following*:*

> "…when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff." (emphasis is mine).

Back home in *Chiswanda* v *OK Zimbabwe Limited, SC 84/20* the court stated;

> "Crucially the test to be applied is not whether or not the evidence for the plaintiff establishes what would finally be required to be established to obtain judgment. The evidence required at this stage is whether or not the plaintiff has made out a *prima facie* case to prove the claim…. This implies that a plaintiff has to make out a *prima facie* case-in the sense that there is evidence relating to all elements of the claim – to survive absolution…" (emphasis is mine).

An application for absolution from the instance should be determined in the interests of justice. See *Carmichele* v *Minister of Safety and Security 2001(4) SA 938 (CC*). The order should be granted when the plaintiff's claim is hopeless at the close of the plaintiff's case. See also *De Klerke* v *Absa Bank Ltd and Ors* 2003 (4) SA 315 (SCA), *Madombwe* v *Rumbi* HH 354/15.

The court must look at the evidence of the plaintiff to see if it covers all the elements of the claim.

In an application for a final interdict as the one sought by the plaintiff, the plaintiff has to establish firstly, a clear right, secondly, an actual or a reasonably apprehended injury and, thirdly, absence of any other remedy; see *Setlogelo* v *Setlogelo* 1914 AD 221.

Mr *Kanengoni* in the oral application for absolution from the instance argued that the evidence by the plaintiff fell short of proving these elements. Mr *Siyakurima* argued otherwise.

Turning to the evidence lead from the plaintiff's witnesses, on the requirement of a clear right, reliance was heavily put on the lease agreement with Chitungwiza Municipality which lease does not carry the plaintiff's name as pleaded in this case. The witnesses who gave

evidence had to explain why this is so. They said despite this variance in names, the name on the lease agreement and the plaintiff are one and the same thing. Why they said so is because they claimed to be the legitimate successors of the church once led by Sandros.

Despite them having said so, the defendants on papers contest and also take a similar position. One can derive from the evidence of the plaintiff's witnesses that this matter is beyond the mere question of an interdict. It has to do with who is the legitimate successor to the church which was led by Sandos. In fact, in my view, this is the centre of the controversy. Who is the legitimate leader?

The defendants have acted in the manner they did on the strength of the claim that they are the legitimate successors to Sandrosi Nhamoyebonde's church. The plaintiff equally claims to have the same rights.

Unfortunately, the issue of who is the rightful successor to the church and who is not is not one before this court. The court is merely asked by the plaintiff to interdict the defendants. The evidence by the plaintiff goes towards the power struggle over leadership of the church and does not prove the requirement of a clear right on the part of the plaintiff.

In respect of the second requirement of an interdict, that of interference, indeed the witnesses for the plaintiff have narrated events which they said were interference from the defendants at their crossover, eg the allegations of cutting down of trees. The whole purpose of interdicting a party is on the assumption that there is continuity of the alleged unlawful act. It must be shown from the evidence that despite the acts not having continued, there is that propensity on the part of the defendant to further continue with the unlawful acts. The evidence from the witnesses confirmed there has been a stoppage. In fact, the plaintiff has not had incidents of interference as far back as 2020 when those other events occurred. All the plaintiff's witnesses have confirmed that the defendants are now conducting their business away from the Nyatsine Shrine. If one were then to ask, what then is there to interdict if there is no continuity of the alleged unlawful act. Certainly, there is none.

The third requirement is the absence of alternative remedy. It has neither been shown from the witness's evidence nor submissions in respect of this application that there are no alternative remedies. In fact, in response Mr *Kanengoni* was quick to address that aspect and

show that in fact there are alternative remedies available to the plaintiff in the event the plaintiff acted in a similar way as earlier on complained.

Having analysed the evidence of the plaintiff`s witnesses to this extend I see no point why the defendant must be placed on the witness stand to give evidence, because the evidence by the plaintiff itself falls short of covering the elements of an interdict. I found merit in the application for an absolution from the instance, which in my view, is properly taken as it does not in any way diminish or extinguish the rights of the parties to come back to this court if they are so advised.

In respect to the issue of costs, whilst the defendants asked for costs in this matter, I did not think this was an appropriate case where either party should pay costs at all. Given the circumstances and nature of the kind of dispute between these two factions, there is no need for either party to pay costs.

Chigwanda Legal Practitioners, the defendants' legal practitioners
Sawyer and Mkushi, the plaintiff's legal practitioners