ERNEST MHAMBARE
versus
ALFRED KUSHAMISA MWAZHA
and
NGONI EDWARD MWAZHA
and
MASIMBA MWAZHA
and
JAMES MWAZHA
and
RICHARD JURU
and
ELSON TAFA
and
CHARLES TEKESHE
and
LOVEMORE MHARADZE
and
NORMAN SIYAMUZHOMBWE
and
AFRICAN APOSTOLIC CHURCH
(VaApostora VeAfrica)

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 23 December 2020 & 5 January 2021

Urgent Chamber Application

Mrs *R Mabwe,* for the applicant
D. Ochieng, for the respondents

MUREMBA J: Following a leadership dispute in the African Apostolic Church (VaApostora VeAfrica) which is the tenth respondent in this matter, the applicant approached this court by way of a court application in case number HC 2402/20 for a relief. He petitioned the court in his capacity as an interested party, reverend and church member for a *declaratur* to set aside the purported appointment of the first respondent, Alfred Kushamisa Mwazha as the successor to the founder and Archbishop of the church, Paul Ernest Mamvuru Mwazha (Paul Mwazha) now a centurion at 102 years. The first respondent together with the second,

third and fourth respondents are sons of Paul Mwazha. Whilst the first and fourth respondents are bishops in the church, the second respondent is a former member and bishop of the church. The third respondent is a Seventh Day Adventist. The rest of the respondents from the fifth to the ninth respondent hold high ranking positions in the church, the tenth respondent. I must particularly mention that the fifth respondent is the General Secretary of the church. There is a point *in limine* that was raised by the applicant in the present urgent chamber application that relates to him that I will deal with later on in the judgment.

In HC 2402/20 it was the applicant's contention that the first respondent usurped power by seeking to ascend to the position of Archbishop and leader of the tenth respondent unconstitutionally, contrary to the provisions of the tenth respondent's constitution. He contended that the first respondent acted in connivance with the second to ninth respondent in usurping power. The applicant contended that the first respondent was purporting to have been appointed by the Archbishop as his successor. Although the respondents opposed the application, CHITAPI J made a finding that the note the respondents were relying upon did not support their claim that the Archbishop nominated or appointed the first respondent as successor. He granted the following order on 3 December 2020.

> "1 The purported nomination and/or appointment of the first respondent as the Archbishop or successor to the Archbishop of the tenth respondent presently Ernest Paul Mamvura Mwazha is unconstitutional *vis – a vis* the 10th respondent's constitution and resultantly is null and void.
>
> 2. Any appointments and reassignments of personnel made by the 1st respondent and other actions which changed the administration of the church made by the 1st respondent in the purported position of Archbishop are null and void.
>
> 3. The respondents are each and all of them ordered to comply with the provisions of clause 9.2.2 of the 10th respondent's constitution in regard to the succession dispute bedeviling the 10th respondent. The respondents must comply with this order within seven (7) days of the date of this order.
>
> 4. The 1st to 9th respondents jointly and severally, the one paying the other to be absolved shall pay costs of this application on a party and party scale".

Dissatisfied or aggrieved by the judgment of this court, the respondents noted an appeal under SC 552/2020 on 11 December 2020. In turn the applicant on 17 December 2020 filed the present urgent chamber application for leave to execute pending appeal. It is the applicant's

contention that since noting the appeal, the first to ninth respondent have been harassing him and other members of the church. They have been violently disrupting church services together with their followers. They have taken over the church structures and have been influencing their followers to disrupt church gatherings and places of worship. He then referred to some specific incidents which I will refer to later on in the judgment. The applicant averred that he wants peace and tranquillity.

In response to the application the respondents raised 2 points *in limine*. But before I deal with them, I will first deal with the *point limine* raised by the applicant in response to the respondents' notice of opposition. It was to the effect that the tenth respondent is not before the court because firstly, the deponent to its opposing affidavit, Benjamin Takura is not in the hierarchy of the people who can represent it. Secondly, the fifth respondent, Richard Juru who signed the resolution authorising the deponent to represent the church has no such powers. Richard Juru is the General Secretary of tenth respondent. Mrs *Mabwe* submitted that the tenth respondent can only be represented by members of the Board of Trustees in terms of Clause 9.6.2 of its Constitution and Benjamin Takura is not a member.

I will dismiss this point *in limine* because as was correctly submitted by Mr *Ochieng*, clause 9.6.2 only says who the trustees of the board are. It reads:

> "Regular members of the Board of Trustees shall be Archbishop Ernest Paul Mwazha, Priesthood Council, Chairman of BoT & vice Chairman, General Secretary of BoT & vice, Finance Chairman & vice, Publicity Chairman & vice, Transport Chairman & vice and other appointed BoT Bishops co-opted by the Archbishop. The Board mat at any time appoint any individuals to sit in meetings to advise or perform projects related to any existing needs."

The clause does not speak to what Mrs *Mabwe* submitted. Even the preceding clause, clause 9.6.1 (although she did not refer to it) does not speak to that. It reads:

> "The Board of Trustees (BoT) shall serve the church by leading in planning, coordinating, conducting, and evaluating the ministries and programs of the church. The primary functions of the Board of Trustees shall be to recommend to the church suggested objectives and church goals, to review and coordinate ministry and programs recommended by church officers, organisations, and committees, to recommend to the church the use of leadership, calendar time, and other resources according to program priorities, and to evaluate achievements in terms of church objectives and goals."

Clause 9.6. is the clause which deals with the issue of the Board of Trustees. It is made up of clauses 9.6.1 and 9.6.2 only. And I have already quoted both of them above. Nowhere in those clauses is it mentioned that legal action shall be taken or defended in the name of the church by the Board of Trustees as the applicant averred. So, the submission by Mrs *Mabwe*

that the resolution authorising Benjamin Takura to depose to the affidavit on behalf of the tenth respondent cannot save him has no foundation. Mrs *Mabwe* did not demonstrate that the General Secretary, Richard Juru who also happens to be the fifth respondent in the present application has no powers to authorise a member of the church to institute and defend proceedings on behalf of the church. She needed to cite the relevant provision of the constitution which deals with who represents the church in bringing and defending legal action. At law, he who alleges must prove. The applicant did not prove his allegation. This point *in limine* is thus dismissed.

I now revert to the points *in limine* raised by the respondents.

As I have already stated elsewhere above, the respondents raised 2 points *in limine*. Firstly, that the matter is not urgent. Secondly, that the relief sought is not the remedy for the injury alleged. In addition to that, the interim relief and the final relief that are being sought are identical.

Urgency

The respondents averred that the matter should not be treated as urgent because the applicant is seeking leave to execute an order that was granted in an ordinary application on an urgent basis. They averred that although the face of the judgment speaks of an urgent application, the matter was brought as an ordinary court application which shows that the applicant himself accepted that the matter was not urgent at the time that he filed it. The applicant did not dispute that the matter was brought as an ordinary application and not as an urgent application. The respondents averred that the certificate of urgency does not demonstrate the urgency of the matter save to make bald allegations of urgency. They averred that the applicant did not in the founding affidavit, demonstrate how and when the urgency arose. The respondents averred that more importantly, no evidence was placed before the court to show that there was violence and what the form of violence was. They contended that it seems that the applicant is bent on having an application for leave to execute on an urgent basis when there is no such urgency.

In the certificate of urgency, it is stated that the respondents filed the appeal with the aim of abusing, victimising, and harassing members of the church. The applicant and over a hundred thousand members of the church have been suffering the brunt of the respondent's continuous violence and illegal actions and there is nowhere to run. It was further averred that

the applicant acted with urgency. The notice of appeal was filed on 11 December 2020 and the said infractions had happened during the course of the previous week. There is imminent danger to the applicant's rights, most importantly the right to gather, freedom of assembly and freedom of conscience. If the respondents are allowed to persist with their unlawful conduct it will lead to further violence, injury and destruction of property.

In the founding affidavit the applicant averred that the first to ninth respondent have been waging a war against church members. They have been using groups of supporters to ferment violent habits, disrupt church services and alienate church property. The places of worship have been turned into places of conflict. Vulnerable members such as orphans, widows, the aged, and children are now unable to attend church services because of the violence. Their rights to freedom of assembly, association and conscience as enshrined in s 58 and 60 of the Constitution of Zimbabwe, Act 2013 need to be protected and preserved pending appeal. The applicant contended that there is danger of irreparable prejudice to him and hundreds of thousands of other church members in several countries and the ill Archbishop. The applicant averred that he acted at the earliest opportunity in bringing this application.

Mrs *Mabwe* submitted that the applicant did not waste time in protecting his rights because the disruption of churches happened from 4 December 2020 up to 10 December 2020. The notice of appeal was filed on 11 December 2020 and the violence continued up to 14 December 2020. The application was then filed on 17 December 2020. She further submitted that by noting the appeal the respondents wanted to disobey the court order as it is frivolous and vexatious.

I find merit in the objection by the respondents. The certificate of urgency and the founding affidavit do not inform why the application for leave to execute has to be heard on an urgent basis given that the main matter giving rise to this application was brought and heard as an ordinary application. The judgment thereof by CHITAPI J shows that the hearing started on 31 July 2020 and the judgment was handed down on 3 December 2020. In between the two dates the matter was heard on 5 August and 14 August 2020. The question that comes to mind is how then can execution thereof become urgent all of a sudden? A matter is urgent if at the time the need to act arises, the matter cannot wait[1]. In other words, time being of the essence in urgent matters, the applicant should act when the need to act arises. The certificate of urgency

[1] *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H).

and the founding affidavit must therefore exhibit urgency in the manner that the applicant reacted to the events or situation complained of. If the situation complained of has been existing for a significant time before the application is made, the matter is not urgent.[2]

In *casu*, the anarchy in the church is what necessitated the filing of the present application. The applicant is basically complaining about physical violence in the church, disruption of church services and alienation of church property. Despite his founding affidavit being 16 pages long, he only referred to 3 specific incidents. The rest are generalised averments about people fighting in the church over public address systems and other property of the church. There are also averments about people having resorted to leaving children, wives and the sick at home fearing violence at church. It is not stated where and when this happened. The specific perpetrators thereof are not mentioned.

The following are the specific incidents that the applicant referred to. On 5 December 2020 there was violence at Hopely Circuit, Zone 6 Harare. One Chikono came with a group of people to disrupt church service. They claimed to be acting for and on behalf of the first respondent. A case of assault was opened under RRB 4620501 by the victim. In Mutare the weekend after the judgment was delivered, all church services were disrupted. People appointed into leadership positions by the first respondent tried to forcefully take control of church proceedings, resulting in resistance from the congregation. This led to violence erupting. Police had to be called to maintain peace and order during services. The applicant also referred to an assault incident that allegedly happened on 27 October 2020 at Caledonia Farm African Apostolic Church, Eastview Circuit. One Onias Sibanda assaulted one Hatidani Maphosa and a police report was made at Mabvuku Police station under RRB 4539885.

These incidents show that the anarchy in the church has been ongoing since October 2020, well before the judgment was delivered on 3 December 2020. It continued even after the judgment had been passed and before the appeal was noted on 11 December 2020. The incident of 5 December 2020 is pertinent. Even after the appeal was noted the anarchy is said to have continued. This has been a continuing state of affairs with the bulk of the incidents complained of having happened before the appeal was noted on 11 December 2020. The matter cannot therefore be urgent. The applicant did not act when the need to act arose as far back as October 2020 right up to the time the appeal was noted on 11 December 2020. His application does not

[2] *Gwarada v Johnson & Ors* 2009 (2) ZLR 159 (H).

exhibit urgency in the manner that he reacted to the events or situation complained of. The events or situations complained of were in existence for a significant time before the application was made. The matter cannot therefore suddenly become urgent because the respondents have filed an appeal. To make matters worse, other than generalised averments, the applicant refers to no specific incident that happened after the 11th of December 2020, after the appeal was filed. Therefore, the applicant has not laid any foundation for his contention that since noting the appeal, the first to ninth respondent together with their followers have been harassing him and other members of the church by violently disrupting church services and taking over the church structures. The matter cannot therefore be urgent. Repetitive and unsubstantiated generalised averments that the applicant's and other church members' constitutional rights have been violated do not help the applicant's case.

The relief sought is not the remedy for the injury alleged

What is alleged is wrongful conduct of violence, disruption of church services and alienation of church properties. On this basis, the applicant is seeking leave to execute pending appeal. It is the respondents' contention that the relief being sought by the applicant is not the remedy for the injury or wrongful conduct alleged. Their argument is that the injury complained of does not arise from the inability to execute the judgment that was granted by CHITAPI J ON 3 DECEMBER 2020. Mr *Ochieng*'s submission was that if these allegations are proven, they would entitle the applicant to some other remedy like an interdict, but certainly not leave to execute pending appeal. His argument was that the judgment that the applicant is seeking to execute pending appeal is centred on a succession dispute between the parties which emanated from the interpretation of a note the respondents are relying upon as the basis of the first respondent's appointment. He further submitted that the judgment had nothing to do with the anarchy that the applicant is now complaining of in the present application. He argued that the two disputes are different. As such the applicant cannot seek to execute a judgment that was granted on a different cause of action on the basis of a different cause of action. I am in agreement. A judgment granted on a different cause cannot be executed on the basis of a different dispute. In my discussion of the first point *in limine* on urgency, I have already demonstrated that the wrongful conducts that necessitated the filing of the present application started as way back as October 2020 and continued after the judgment was delivered, before the appeal was noted.

The delivery of the judgment did not stop the anarchy. The applicant did not in his founding affidavit explain how its execution pending appeal will stop the anarchy.

The judgment simply declared unconstitutional the purported appointment of the first respondent as the successor to the Archbishop. It nullified his appointment. It also nullified all appointments of personnel that he made in his purported position as Archbishop. The judgment further ordered the respondents to comply with the provisions of clause 9.2.2 of the tenth respondent's constitution, for the Priesthood Council (a council of bishops) to preside as the head of the church on behalf of the Archbishop. If the judgment is executed, it will change the leadership of the church into a further dimension which is totally different from what is prevailing now and what was prevailing before the purported appointment of the first respondent. It is going to remove the first respondent from the position of Archbishop. At the same time, it is not going to restore Paul Mwazha as the Archbishop. The question is how is all of this going to resolve or stop the anarchy that has been ongoing since October 2020 well before the judgment was delivered? The applicant did not explain the link between the execution of the judgment pending appeal and the wrongful conduct complained of. I am in agreement with the respondents that the two are divorced from each other. I will thus uphold the point *in limine.*

Disposition

The two points *in limine* are interwoven as the second point *in limine* also determines whether or not the matter is urgent. The applicant is seeking leave to execute judgment pending appeal on an urgent basis on the basis of a dispute that is different from the dispute that gave rise to the judgment. Clearly the relief that he is seeking is not the remedy for the injury alleged. In the circumstances, the matter cannot be urgent, even if it was timeously filed a few days after the appeal was noted. The relief sought is also an important consideration in determining whether or not the matter is urgent. If there is no link whatsoever between the injury complained of and the relief sought, as is the situation in *casu*, the matter cannot be urgent.

In the result, I make the determination that the matter is not urgent. It be and is hereby struck off the roll with costs.

Mushangwe and Company, applicant's legal practitioners
Mupindu Legal Practitioners, respondents' legal practitioners.