APOSTOLIC FAITH MISSION IN ZIMBABWE
versus
APOSTOLIC FAITH MISSION OF ZIMBABWE
and
SOLOMON TOGARA
and
PAUL HWERU
and
FARAI MANYANYE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 20 October, 2022

Opposed Application

Ms *F Mahere with Mr T Ndlovu,* for the applicant
Mr *C Gumiro,* for the 2nd to 4th respondents
No appearance for the 1st respondent

DEME J: On 20 October 2022, I delivered the *ex tempore* judgment for interdict against the respondents. Essentially, the terms of the order are as prayed for in the Draft Order with the exception of two amendments effected to the relief sought. The first amendment was with respect to costs which I awarded against the respondents on an ordinary scale. The second amendment was to the effect that any attempt to access or use the property in question by the second to the fourth respondents must be with the consent of the applicant. The second to the fourth respondents subsequently requested for the reasons of the *ex tempore* judgment. Thus, this judgment is dedicated towards advancing the reasons therefor.

By way of background, the applicant approached this court seeking relief couched in the following manner:

> "Application for an interdict be and is hereby granted.
> 1. The respondents and all who claim access through them be and are hereby interdicted from entering, occupying or using stand number 19812 Lezard Road, Milton Park, Harare, for any activity whatsoever.
> 2. Respondents to pay costs on attorney client scale jointly or severally each paying the other to be absolved."

It is common cause that the applicant is a religious congregational body that has been in operation for around 100 years. According to the applicant the property in question, being stand number 19812 Lezard Road, Milton Park, Harare, (hereinafter called "the property") was leased to the applicant by the Municipality of Harare in 2011 and the lease agreement remains valid to date. According to the applicant, the property has been used by the applicant to carry out its church services, meetings and all other gatherings in line with their church doctrine.

The applicant affirmed that the first respondent was formed by members of the applicant who broke away from the applicant to form the Apostolic Faith Mission of Zimbabwe. This was formalized by the Supreme Court's judgment of 28 May 2021 wherein the first respondent was recognized as an entity separate from the applicant. It is the applicant's case that the second to fourth respondents are members of the first respondent.

The applicant averred that the property was closed on the 22nd of May 2022 by the local police authorities after the second to the fourth respondents and their congregants forcefully occupied the property and proceeded to conduct their activities that do not align with those of the applicant's constitution. The applicant further averred that upon being asked to leave the property, the members of the first respondent became violent which led to the local police being invited to deal with the situation. The applicant also claimed that the police then proceeded to lock up the property and instructed the parties to get a court order settling the dispute before reopening the property.

The applicant asserted that it has been greatly prejudiced by the conduct of the respondents as it cannot conduct its church business on the property in question. According to the Applicant, it is for this reason that the applicant has approached this court seeking an interdict against the respondents as it continues to suffer irreparable harm with no other remedy at its disposal other than approaching this court.

The first respondent did not oppose the present application. However, the rest of the respondents opposed the application. The second to the fourth respondents argued that they were not excommunicated from the applicant. They averred that they were not party to the Supreme Court judgment and can therefore not be banished from a property that they have a right to use as confirmed by spoliation order granted by the Magistrates Court under case number 2465/21. The second to the fourth respondents also contended that they are entitled to remain at the property as they also obtained a peace order which is extant which bars named individuals from disturbing their peace at the disputed property.

The second to the fourth respondents also asserted that they have been conducting their church services at the disputed property and have been paying the rentals and utility bills. They further stated that they made improvements to the property and the applicant did not contribute to the said improvements. The second to the fourth respondents further stated that they have always been attending their church services on the property and the applicant has always been aware of their attendance. They also stated that there was never an intention on their part to establish a new assembly and they are not aware of any such intention from any of their members.

Regarding the events of 22 May 2022 the second to the fourth respondents stated that they were not responsible for that and that it was in fact elements against whom the Magistrates Court order had been made against who caused the disturbance. The second to the fourth respondents averred that those who caused the disturbance were not affiliated to them in any way.

The second to the fourth respondents firmly averred that they have a right to access and use the church property in issue and that it is in fact the applicant which does not have these rights. Since the handing down of the Magistrates Court order granting the respondents a spoliation order, the applicant has been conducting its church services from a shade adjacent to the church building whilst the respondents have been utilising the main church building.

It is the belief of the second to the fourth respondents that the applicant has other remedies available to it at law. The respondents therefore believe that the relief sought in this application is incompetent.

The sole question which arises for determination is whether the applicant is entitled to the relief sought. The applicant prayed for an order of interdict. Our jurisdiction has settled the basic requirements for interdict over time. The essential requirements for the application for interdict have been established by the court in the case of *Setlogelo* v *Setlogelo.*[1] These include the following:

(a) a clear right which must be established on a balance of probabilities;
(b) irreparable injury actually committed or reasonably apprehended, and
(c) absence of a similar protection by any other remedy.

In para. 5 of the opposing affidavit, the second to the fourth respondents disassociated themselves from the first respondent. They allege that they have not been expelled from being

[1] 1914 A.D. 221.

members of the Applicant in para. 7 of the opposing affidavit. In the same paragraph, the second respondent insisted that he is still the pastor of the Applicant. In para. 16 of the opposing affidavit, the second to the fourth respondents confirmed conducting parallel church activities at the disputed property. More particularly, they averred as follows:

> "This is denied in that applicant has never been in occupation of the premises since the date of the Magistrates Court's decision granting respondents spoliation relief. The few individuals sympathetic to the deponent to the founding affidavit have been conducting their services from the shade that is adjacent to the new church building and the premises. The respondents would utilize the main church building."

From para. 16 of the opposing affidavit, it is apparent that the second to the fourth respondents have chosen to part their ways with the applicant by conducting their own corresponding church events. They have volunteered to abandon the club rules established by the Applicant. The effect of such conduct have been extensively explained by MANGOTA J in the case of *Apostolic Faith Mission in Zimbabwe* v *Apostolic Faith Mission of Zimbabwe and Others*[2], where the court beautifully propounded the following pertinent remarks:

> "The statement of the respondents which is to the effect that the applicant and them have used the civic centre 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 centre 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.
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> 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.
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> The respondents did not produce any evidence which showed that the applicant allowed them to use the civic centre 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."

[2] HH269/22.

In casu, by the admission of their counsel, the second to fourth respondents indicated to the court that they are neither part of the applicant nor part of the first respondent. Their counsel indicated to the court that they now use the new name "AFM Zimbabwe" which is not used by the applicant or the first respondent. This demonstrates that they are a new club and are no longer part of the applicant. This admission is diametrically different from the affirmation made by the second to the fourth respondents in their opposing affidavit where they averred that they did not harbor any intention to form any new assembly.

The second to the fourth respondents, through their counsel, argued that they are protected by the order for spoliation handed down by the Magistrates Court sometime in November 2021. They further submitted that this spoliation order is still extant and has not been set aside. The spoliation order is on pp 56-57 of the record and is part of the documents annexed to the opposing affidavit. The second to the fourth respondents also maintained that they are protected by the peace order delivered by the Magistrates Court on 12 January 2022 and that the order is still extant. The peace order is on p 61 of the record and has been annexed to the opposing affidavit.

The basis for the present application is that the applicant is a lessee for the property in question. The lease agreement is on pp 17-29 of the record and is annexed to the founding affidavit. The second to the fourth respondents are not lessees in terms of that agreement. The main reason why the second to the fourth respondents want to continue using and accessing the property is that they have two orders in their favour. Thus, the applicant holds better rights than those of the second to the fourth respondents by virtue of the lease agreement. The purpose of the spoliation order, which is in favour of the second to the fourth respondents, is to discourage self-help. A spoliation order restores possession where a party has successfully proved that an act of spoliation has been committed against him or her. It is a well-established principle that even a thief can be protected by a spoliation order. A lease agreement confers upon the lessee, the applicant in this case, rights which are superior to the possessory right being held by the second to the fourth respondents by virtue of the spoliation order. See the case of *Mankowitz v Lownthal*[3], quoted with approval by the Supreme Court in the case of *Blue Rangers Estates (Pvt) Ltd* v *Muduviri and Anor*[4], where the court superlatively postulated the following comments:

[3] 1982(3) SA 758(A).
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> "Now a spoliation order is a final determination of the immediate right to possession. It may not resolve the ultimate rights of the parties but it is the last word on the restoration of possession *ante omnia*."

From the case of *Blue Rangers Estates (Pvt) Ltd* (*supra*), it is evident that although a spoliation order is a final order, it is certain that future proceedings founded upon a different cause of action like eviction or interdict arising from other superior rights may ensue. Herbestein & Van Winsen, "*The Civil Practice of the Supreme Court of South Africa*" 4ed state at p 1064 that:

> "A *mandament van spolie* is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in the spoliation application is whether there has been a spoliation. The order that the property be restored finally settles that issue as between the parties."

Equally, peace order can only protect the rights of the second to the fourth respondents to a limited extent. This order does not entitle them to rights over the property in dispute which are better than the rights conferred upon the applicant by the lease agreement. The order for peace is to ensure that the second to the fourth respondents must, up to future court proceedings, if any, lodged by a person with better rights, access or use the property with their peace not being disturbed. The present application is not disturbing the peace of the second to the fourth respondents but is meant to maintain sanity at the property where two factions have emerged. If this court does not intervene, the applicant which is a lessee may not be able to enjoy its rights as a lessee. It is apparent from a constitutional perspective that juristic persons, the applicant included, are entitled to the rights enshrined in the Constitution of Zimbabwe. Reference is made to s 45(2)-(3) of the Constitution.

The applicant has satisfied the requirements of the present application. The applicant has established its clear right through lease agreement. The existence of a peace order or spoliation order does not extinguish the lease agreement. The lease agreement remains extant and enforceable against the second to the fourth respondents. Further, the fact that the second to the fourth respondents have been paying rentals and utility bills for the property does not prove better rights for the second to the fourth respondents of the property in question. The issue of improvements effected to the property by the second to the fourth respondents cannot prevent the applicant from making the present application especially in light of the fact that the second to the fourth respondents have now launched their separate organization which called itself "AFM Zimbabwe". The issues of improvements, payment of rentals and utility bills may be resolved on separate platforms. MANGOTA J, *in* the case of *Apostolic Faith Mission in*

Zimbabwe v *Apostolic Faith Mission of Zimbabwe* (*supra),* fabulously described the consequences that may ensue if a person breaks away from the club. That person is not entitled to have the claim over the property acquired at the time when he or she was part of the club.

The applicant has demonstrated that its church activities are being disturbed by the second to the fourth respondents who are, admittedly, carrying out parallel church activities. The second to the fourth respondents, according to para. 16 of the opposing affidavit, have forced the applicant's members out of the church building erected at the property. The applicant's members are now conducting their church activities in the shade while the second to the fourth respondents use the applicant's building for their parallel church activities. In my view, this act by the second to the fourth respondents causes injury to the applicant and thus satisfies one of the essential requirements of the present application.

It is my view that there is no better way of protecting the rights of the applicant other than the present application. It is admitted that the second to the fourth respondents are conducting their parallel church activities which are not sanctioned by the applicant. The only way of harnessing the eruption of this new division for the second to the fourth respondents at the site is by way of the present application. This application will ensure that the applicant may conduct its religious activities without disturbances from the second to the fourth respondents. Any other remedy that may be contemplated will not effectively protect the rights of the applicant in the same way.

After the court's interaction with the counsel for the applicant, Advocate *Mahere* consented to the amendment of the order sought to the effect that the second to the fourth respondents may retain rights of accessing or using the property with the consent of the applicant. I saw it prudent to have this amendment given that the applicant is an ecumenical body which may allow persons who reform to rejoin it, given that the second to the fourth respondents are individuals with the possibility of repenting. There is nothing wrong in having an order which allows room for reunion of the parties. Thus, the applicant, after the amendment, does have discretion to allow the second to the fourth respondents to access or use the property. Without this amendment, the second to the fourth respondents may have to seek the setting aside of this judgment if they want to rejoin the applicant.

By their own deeds, the second to the fourth respondents have excommunicated themselves from being part of the applicant. The second to the fourth respondents have no-one to point a finger at except themselves for forming a new splinter faction. By breaking away

from the applicant, they should be prepared to face the consequences associated with such behaviour. This new faction, certainly, cannot claim to have rights over the property in dispute.

The applicant had prayed for costs on a punitive scale. It is clear that such costs can only be granted in exceptional circumstances. I am of the view that costs on an ordinary scale awarded against the respondents are reasonably sufficient.

For the reasons aforementioned, I saw it necessary to grant the application subject to amendments. The second to the fourth respondents did not manage to establish any basis to continue using or accessing the property which is no longer under their jurisdiction.

Takaindisa Law Chambers, applicant's legal practitioners
Moyo, Chikono and Gumbo, second to the fourth respondents' legal practitioners