THE TRUSTEES OF THE TIME BEING OF APOSTOLIC FAITH MISSION IN ZIMBABWE
versus
APOSTOLIC FAITH MISSION OF ZIMBABWE
and
AMON NYIKA CHINYEMBA
and
TAPIWA MUTUNHIRA
and
ELISHA CHIKWINDI
and
JAIROS MUZENDA
and
DENIS MUTUNGI
and
MARTIN FATI

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 18 October 2023 & 30 May 2024

Opposed Application for Summary Judgment

ADV F. Mahere for the applicant.
C. W. Gumiro for the respondents.

TAKUVA J: This is a court application for summary judgment being made in terms of the Rule 30(1) of the High Court Rules S.1. 202 of 2021.

Background Matrix And Basis Of The Application

The respondents in this matter are all former employees and members of the Apostolic Faith Mission in Zimbabwe who have since formed their own church or organization called the Apostolic Faith Mission of Zimbabwe. There is no link between the two organizations. The respondents are former members of the Apostolic Faith Mission in Zimbabwe (herein after, the applicant's church) with the second respondent having been a Provincial Overseer for Harare East Province. The respondents long ceased to be members of the applicant's church and formed a

separate church. The applicant's church is governed in terms of a written constitution which creates governance structures and lays out the process of electing the office bearers of those governance structures and the trustees of church properties. Applicant is a creation of that constitution and is further charged with the responsibility to take stewardship over its assets.

Following a review of its constitution and regulations, the Apostolic Council of the applicant's church met on the 21st September 2018 to consider the dates and rules, for the in pending triennial elections. It is at that meeting that Respondents' president one Cossani Chiangwa informed the meeting that "he would go his own way" because he did not accept the resolution that was passed on 15 September 2018. On 22 September, the respondents who are part of the followers of their breakaway leader called an unlawful meeting which produced several resolutions one of which was the election of Cossani Chiangwa as the first respondent's leader on 20 October 2018.

Aggrieved by these developments, applicant's church challenged the unlawful meetings and the subsequent actions taken to implement the resolutions through HC 9149/2018. The High Court declared the meeting of 22 September and the subsequent actions null and void. The second respondent and his allies unsuccessfully applied to the Supreme Court under case number SC 570/2019.

Following a series of disagreements over the occupation and use of church premises in Mbare, the applicant issued summons against the respondents under case number 5021/22 wherein it sought to permanently interdict the respondents and their followers from using or occupying the church premises. The Respondents filed their plea alleging that there was a relationship between the applicant's church and the first respondent as they both belonged to the same international body and that they had obtained authority to use the property in question from the applicant.

Applicant believes the plea does not raise an triable issue or valid defense. It also believes that the appearance to defend was filed for merely delaying the inevitable. Acting on this belief, applicant filed this application for summary judgment. Respondents filed a notice of opposition and opposing affidavits the applicant then filed an answering affidavit.

At hearing of this matter respondents raised a point *in limine* objecting to the filing of an answering affidavit. It is respondent' argument that this is a procedural irregularity. The applicant insisted that it is proper to file an answering affidavit in an application like *in casu*.

The issue for determination is whether or not applicant is permitted to file an answering affidavit in an application for summary judgment.

The Law

Rule 30(1) of the High Court Rules S.I., 202/2021 provides that:

"30(1) where defendant has entered appearance to defend, the plaintiff may, at any time before a pretrial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.

2 A court application in terms of sub rule (1)
shall be supported by an affidavit made by the plaintiff or any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed if any and stating that in his or her belief there is no genuine and sincere defence to the action and that appearance to defend has been entered sorely for purposes of delay.

3 ……

4 ……..

5 ……..

6 …….

7 No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross examine any person who gives evidence viva voce or by affidavit.
Provided the court may do one or more of the following_____

a) …….

b) …….

(i)…….

(ii)…….

c) Permit the plaintiff to supplement his or her affidavit with further affidavit dealing with either or both of the following___

(i) any matter arising by the defendant which the plaintiff could not reasonably be expected to have dealt with in his or her first affidavit; or

(ii) the question whether at the time the application was instituted, the plaintiff was or should have been aware of the defence." (My emphasis).

My interpretation of this rule is that an answering affidavit being "evidence" can only be introduced with leave of the court. *In casu*, no leave was sought before the answering affidavit was filed. This violates r 30(7) of the rules.

In *Van Hoorgistraten* v *James* and others 2010(2) ZLR 608 (H), the court said:

"Summary judgment is meant to be simple and straight forward. If parties were allowed to amend or sever claims at summary judgment, it defeats the whole purpose of having the procedure in place. It is no wonder that an applicant is not allowed to file an answering affidavit in summary judgment proceedings." (My emphasis).

In *Central Africa Building Society* v *Ndahwi* 2010(1) ZLR 91(H) it was heed that:

> "A supplementary affidavit further verifying the claim cannot be filed. It can only be filed for the purposes of dealing with issues raised in the opposing affidavit that have the effect of catching the plaintiff by surprise."

It was argued on behalf of the applicant that rule 30 supra does not take away the right to file an answering affidavit and that those authorities that bar the filing of an answering affidavit are inapplicable as they predate the promulgation of the 2021 rules.

Further counsel for the applicant submitted that by raising the point at the 11th hour, the respondents have ambushed the applicant in the night.

I do not find merit in these submissions for the following reasons:

a) Rule 30(7) (c) states in unambiguous language that a plaintiff must be permitted by the court to file any further affidavits or lead evidence. *In casu*, no such leave was sought and the answering affidavit was filed without the court's permission.
b) While it is a fact that the authorities predate the 2021 rules, this argument is diluted by the fact that the 1971 rules had a similar rule to rule 30(7)(c)
c) The fact that an answering affidavit is permissible in terms of r 59(10) of the 2021 rules does not in my view advance applicant's argument any further because this is a rule of general application, whereas r30 applies specifically to summary judgment applications.
d) Where one is dealing with a point of law, there certainly cannot be a question of ambush. In any event the applicant is represented by a legal practitioner.

Disposition

The answering affidavit having been filed in contravention of r 30(7) (c) of High Court Rules S.I. 202/2021 is not properly before the court.

Order

1. The answering affidavit be and is hereby expunged from the record.
2. There is no order as to costs.

Moyo, Chikono and *Gumiro* Legal Practitioners for the respondents
Zvimba Law Chambers for the applicant