APOSTOLIC FAITH MISSION IN ZIMBABWE
(registration CF220/01)

Versus

AMON DUBIE MADAWO

And

CLEVER MUPAKAIDZA

And

BRIAN TEMBO

And

CHRISTOPHER CHEMURU

And

APOSTOLIC FAITH MISSION IN ZIMBABWE

And

THE REGISTRAR OF DEEDS, N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 14 JUNE 2021 & 24 JUNE 2021

W. Ncube, for the applicant
Ms. Mahere for the 1st, 2nd, 3rd, 4th and 5th respondents

DUBE-BANDA J: This is an urgent application. This application was lodged in this court on 4th June 2021. It was placed before me and I directed that it be served on the respondents together with a notice of set down for 9th of June 2021. On the set down date, counsel for the applicant requested for a postponement to enable the fling of an answering affidavit. The postponement was granted and the matter was subsequently argued on 14th June 2021.

The relief sought by the applicant has been formulated as follows:

Terms of the final order sought

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. Pending finalisation of HC 453/20, the 1st -5th Respondents be and are hereby interdicted from using the name of the Applicant, specifically, Apostolic Faith Mission in Zimbabwe.
2. 1ST-5TH Respondents ,their agents and assignees be and are hereby directed and restrained from using Applicant's name without prior permission of the applicant and or leave of this Court.
3. 1st-5th Respondents jointly and severally pays the costs of this application on an attorney and client scale.

Interim relief granted

Pending confirmation or discharge of this Provisional Order, Applicant is and is hereby granted the following relief:

> The 1st -5th Respondents be and are hereby temporarily interdicted from using the registered name of the Applicant, specifically being Apostolic Faith Mission in Zimbabwe , as appears on the Register of the Registrar of Deeds, registration number CF 221/01.

Service of this application and provisional order

That the service of the urgent chamber application and the provisional order shall be effected by a Messenger/Clerk in the employ of Messrs Mathonsi Ncube Law Chambers Legal Practitioners.

The application is opposed by the 1st, 2nd, 3rd; 4th and 5th respondents. 6th respondent neither filed opposing papers nor appeared in court. It has taken a position that it shall abide by the order of this court.

Factual background

This application will be better understood against the background that follows. A dispute arose between two formations for the control and leadership of the Apostolic Faith Mission in Zimbabwe (AFM or the Church). Two separate applications were filed with this court, i.e. HC 9149/18 and HC 179/19 by the two warring formations of the Church. The two factions were fronted by Aspher Madziyire (Madziyire) and Cossam Chiangwa (Chiangwa).The two applications were consolidated. The Madziyire group (HC 9149/18) sought an order in the following terms:

It is declared that:

1. The meeting called by the Respondents on 22 September ,2018 and all the resolutions passed thereat, in particular, the purported vote of no confidence passed on Reverend Dr A Madziyire, Reverend A. Madawo, Elder Shumba and Mr Tawanda Nyambira are null, void and of no force or effect.
2. The appointment of Reverend C. Chiangwa as interim chairman of the First Applicant [i.e the church], Reverend A.C. Chinyemba as Deputy chairman, Reverend N.Nhira as General-Secretary and Elder S. Sebata as National Adminstrator of the First Applicant at the illegal meeting of 22 September, 2018 is null and void.
3. The appointment of overseers by the Respondents in place of the elected overseers of the First Applicant is null and void.
4. For the avoidance of any doubt, all things done and all actions taken by the Respondents, or those acting on their behalf, including any elections conducted by them while purporting to the office bearers of first applicant are null and void and the Respondents are hereby directed to make good whatever they did, including returning any funds misappropriated by them pursuant to the actions hereby nullified.

It is ordered that:

5. An order in granted interdicting and restraining the respondents from:
   5.1. Implementing the resolutions passed at their purported "National Workers Council" meeting of 22 September 2018.
   5.2.Holding themselves out to be office bearers of the first applicant.

5.3. Calling any meetings of the first applicant.

5.4. Appointing any person or people to any positions in the first applicant.

5.5. Calling any elections or conducting any elections in the first applicant's church.

5.6. Receiving any funds due to the applicant church.

5.7. Using any property or assets belonging to the first applicant.

5.8. In any way disrupting the functions, duties or activities of the applicants whether by themselves or through any third parties acting in concert with them.

6. The respondents jointly and severally, shall pay the costs of this application on scale taxable as between attorney and own client.

In their application (HC 179/19), Cossam Chiangwa and his group sought the following order:

1. The application for a declaratory order be and is hereby granted.
2. The 1st to 4th applicants be and are hereby declared to be the duly and properly elected officials of the fifth applicant.
3. The respondents are hereby barred from using the name of the fifth applicant in the conduct of their activities without the authorisation of the applicants.
4. The respondents are hereby barred from accessing or using any assets or property of any kind belonging to the fifth applicant.
5. The respondents and their followers or agents or assignees be and are hereby directed to relinquish to the fifth applicant all and any property belonging to fifth applicant that is in possession or under control of the respondents.
6. Failure of 5 above, the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorised to take all and any property and assets belonging to fifth applicant from the control and possession of the respondents and handover same to the applicants
7. The respondents shall pay applicant's costs of suit.

In its composite judgment (HH 586/19), this court concluded thus: "I have considered all the circumstances of the two cases. I am satisfied that Madziyire proved his case on a balance of probabilities. I am also satisfied that Chiangwa failed to measure up to the accepted mark. He did not prove his case on a balance of probabilities. In the result, HC

9149/18 is granted as prayed and HC 179/19 is dismissed with costs."The Chiangwa group was aggrieved by the judgment in HH 586/19, and appealed it to the Supreme Court. The Supreme Court in judgement SC 67/21 dismissed the appeal in its entirety with costs.

Against this background, this urgent application was brought to temporarily interdict, pending the return day, Amon Dubie Madawo; Clever Mupakaidza; Brian Tembo; Christopher Chemuru and Apostolic Faith Mission in Zimbabwe from using the name Apostolic Faith Mission in Zimbabwe, as it on the register of the Registrar of Deeds, registration number CF 221/01. It is clear that the four respondents in this application were applicants in the Madziyire group in HC 9149/18, and respondents in HC 179/19.

Other than resisting the relief sought on the merits, respondents took a number of preliminary points which were also the subject of argument in this matter. Respondents took the following preliminary points,these were: -that this application is not urgent; that Enos Manyika (Mr Manyika) lacks authority to depose to an affidavit on behalf of the Church; and that the interim relief sought is incompetent. In its answering affidavit, applicant took a preliminary point. The gist of this point is that respondents have since filed an urgent chamber application in the High Court – Harare, for the purposes of defeating this application. I turn to consider these preliminary points.

Preliminary points

At the commencement of the hearing I informed counsel that in this case I shall adopt a holistic approach. What this approach entails is that for the sake of making savings on the time of the court by avoiding piece-meal treatment of the matter, the issue preliminary points had to be argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on preliminary points despite that they were argued together with the merits. But if the court considers dismisses the preliminary points, it then proceeds to deal with the merits. The main consideration here is to make savings on the court's most precious resource - time - by avoiding unnecessary proliferation when the matter should have been argued all at once. See: *Mokhosi & 15 others V Justice Charles Hungwe & 5 Others*

(Cons Case No/02/2019) [2019] LSHC 9 (02 May 2019). I now deal with these preliminary points.

I start with the preliminary point taken by the applicant in the answering affidavit. It is this:

> This matter was set down in this court on the 9th of June 2021 and was postponed to the 15th of June 2021before the Honourable Mr Justice Dube-Banda. However, whilst parties have been waiting for the matter to be heard, the 1st and 5th Respondent have launched an application at the Harare High Court seeking to enforce what it terms a trademark. This, l submit, is forum shopping on the part of the 1st -5th Respondents and they lack candour and honesty. They know that there is a matter pending before this court but they have rushed to file another application in another court trying to smuggle and get an order via the back door. This is more telling especially considering that the Applicant herein, who is an interested party, has not been cited in those proceedings. Applicant has brought this, as a preliminary issue, to demonstrate the cunning nature of the 1st-5th Respondents and their attempts to gain an unfair advantage. I attach a copy of the 1st page of that Application as Annexure AA1.

During the hearing of this matter, I enquired from counsel about the status of the application pending before the High Court, Harare. Prof *Ncube,* counsel for the applicant contended that the relief sought by the respondents in the Harare case, will defeat whatever relief this court might grant in this application. I enquired from Prof *Ncube* whether these two applications should be consolidated, he agreed. Adv. *Mahere,* counsel for the 1st, 2nd, 3rd, 4th, and 5th respondents on the other hand argued that there would be no basis for a consolidation. It was contended that in respect of the two applications the causes of action are different; the parties are different; and the jurisdictional facts on which the matters turn are different. This submission was not controverted. I then directed that the hearing of this matter proceeds.

I now turn to consider the points *in limine* raised by the 1st, 2nd, 3rd, 4th, and 5th respondents.

Ad Urgency

The respondents contend that this application is not urgent. It was argued that this court must struck it off the roll without delving into the merits. In relation to urgency this court looks at the certificate of urgency to establish whether the application is indeed urgent. In *Chidawu & Others v Sha & Others* SC 12/13 the Supreme Court held that the Certificate of Urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In making a decision as to the urgency of the application a judge is guided by the averments in the certificate of urgency. In this application the certificate states thus:

1. I have established from the papers that the Applicant is registered with the 6th Respondent as the Apostolic Faith Mission in Zimbabwe, registration number CF 221/01 as confirmed by the endorsement in Annexure A attached to the founding affidavit. The registration certificate and endorsement of Applicant's constitution by the Registrar of Deeds, 6th Respondent grants applicant the right to the protection of its registered name. That right is clear and enforceable at law against anyone that abuses and violates the registration status of the Applicant. It is a right that must be protected. Registration of a name is a legal process done in compliance with the law and legal benefits and obligations flow from such acts. Applicant is entitled to protection of its rights and registration status otherwise the legal process of registration would be rendered a *brutum fulmen.*

2. 1st – 5th Respondents, on the basis of a Supreme Court ruling dated 28 May 2021, have claimed that they are the legitimate office bearers of the Applicant yet that ruling has nothing to do with the Applicant. Applicant and deponent were not a party to those proceedings and neither is the applicant mentioned in any of those proceedings. Suffice to say, 5th respondent is an unregistered entity and has no *juristic persona.*

3. In February 2020 when applicant became aware that certain persons where using its name, it filed an application for an interdict in this court under HC 453/20 and that matter awaits a set down date for trial. While that was happening the Supreme Court made a decision referred to the above.
4. The Applicants' agents state that they became aware of the existence of the Supreme Court judgement on Tuesday the 1st of June 2021 after an article was published in the

Chronicle the previous day on Monday the 31st of May instant. They have acted urgently and swiftly in the circumstance.

5. It is of paramount importance therefore that the correct position is reflected and the true registered name holder of Applicant must be allowed to enjoy the rights and benefits that flow with registration of an entity.
6. Legally, the registered owner is the only one that can confer rights of use to any party. The Supreme Court did not confer any of those rights upon 1st-5th Respondents. Those rights remain held by the Applicant.
7. There is no other remedy that can afford the Applicant relief *instanter* in the premises. Applicant has already filed a court application and awaits a court date. Whilst applicant has been complying and following due process of the law, Respondents have continued to damage the name and image of the Applicant. Urgent relief is more important now considering that by using the Applicant's name, some people may be misled to believe they are dealing with the Applicant yet they are not. Debts and obligations may be created as against the applicant further exposing the applicant to litigation and law suits.
8. In the premises, l submit that this is a proper case to be dealt with as an urgent Chamber application in terms of Order 32 Rule 226 (2) (a) of the Rules of the High Court in order to protect Applicant's rights and registration status.
9. In the premises, l certify that the matter is urgent.

This court enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by its rules. It is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice. See: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. In the ordinary run of things, court cases must be heard strictly on a first come first serve basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See: *Kuvarega* v

*Registrar General and Another*1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27.

The leading case within this jurisdiction in relation to urgency is *Kuvarega v Registrar General & Anor* (*supra*), a judgment by CHATIKOBO J. The learned judge had the following to state at p 193F-G.

> What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.

In assessing whether an application is urgent, the courts have in the past considered various factors, including, among others: the consequence of the relief not being granted;whether the relief would become irrelevant if it is not immediately granted; and whether the urgency was self-created.See: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. Further to pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm. See:*General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank*1998 (2) ZLR 301;*Document support Centre (Pvt) Ltd* v *Mapuvire* 2006(1) ZLR 240 (H); *Dextiprint Investments (Pvt) Ltd* v *Ace Property Investment company* HH 120/2002; *Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

In the certificate of urgency, it is contended that in February 2020 applicant became aware that certain persons where using its name, it filed an application for an interdict in this court under HC 453/20, and that matter awaits a set down date for trial. While that was happening the Supreme Court made a decision referred to above.[1]The application referred to in the certificate of urgency was filed on the 25th February 2020. The application is pending before this court. The relief soughtin the court application is that: "respondents be and hereby interdicted from using the registered name of the applicant, with immediate effect."It is pertinent that the interim relief sought in this application is in substance identical to the relief sought in the court application.

[1] Paragraph 3 of the Certificate of urgency.

It is further pertinent to note that Mr Manyika, the deponent to the founding and answering affidavits in this application, is the deponent to the founding affidavit in the court application. This shows that the use of the name AFM by the respondents is not a new fact, it has been known by the 25 February 2020. Therefore, the use of the name AFM by the respondents, without more cannot the 4th June 2021,almost a year and three months later be the trigger of urgency.

Further in the certificate of urgencyit is said applicant is registered with the Registrar of Deeds as the Apostolic Faith Mission in Zimbabwe, registration number CF 221/01.[2] It is of paramount importance that the correct position is reflected and the true registered name holder of applicant must be allowed to enjoy the rights and benefits that flow with registration of an entity.[3] It is alleged that the registration was done in 2001. Accepting for a moment this fact ofthe alleged registration, such fact cannot on the 4th June 2021, be an immediate cause of urgency. On this version, the cause of action giving rise to the need to act arose as far back as the 25th February 2020. A matter is urgent if at the time the need to act arises, it cannot wait. On the facts of this case this is not the kind of urgency anticipated by the rules of court.

Further in the certificate of urgency it is contended that the there is no other remedy that can afford the applicant relief *instanter (sic)* in the premises. Applicant has already filed a court application and awaits a court date. Whilst applicant has been complying and following due process of the law, respondents have continued to damage the name and image of the applicant. Urgent relief is more important now considering that by using the applicant's name, some people may be misled to believe they are dealing with the applicant yet they are not. Debts and obligations may be created as against the applicant further exposing the applicant to litigation and law suits.[4] According to papers before court, what is being complained of here is not anything new. Such facts must have been known to Mr Manyika before the 25 February 2020. On his own version, he must have known that some people might be misled by respondent's use of the name, he must have known that debts and obligations might be created resulting in litigation. According to his own version, the cause of action arose more than a year ago. A litigant cannot be permitted to come to court running

[2] Paragraph 1 certificate of urgency.
[3] Paragraph 5 certificate of urgency.
[4] Paragraph 7 certificate of urgency.

with an urgent application after such a period of inaction. In any event, there is another remedy. The court application under HC 453/20 is still pending. If successful, it may address the issues complained of in this application. This is not a case where a litigant may well be within his rights to suggest to the court that if it does not act now, it need not bother to act subsequently as the position would have become irreversible to his prejudice. See: *Document Support Centre* v *Mapuvire* (*supra*).

The high watermark on the case on urgency is the averment that the spark or the trigger of urgency is the respondents' use or intended use of the judgment of the Supreme Court in *Chiangwa & Others v Apostolic Faith Mission in Zimbabwe & Others SC* 67/21**.** In the founding affidavit Mr Manyika contends that the hype and media frenzy that has been generated by the Supreme Court judgment has caused panic and despondency amongst members of the applicant. It has created doubt over which institution is the properly registered one. It is important to establish that clarity.[5]In his answering affidavit he avers that the Supreme Court judgment has led respondents publicly asserting that they are in control of the Church and the name of the Church. It is this widespread media coverage that has triggered the applicant into filing the urgent application.[6]In his submissions before court, Prof. *Ncube*, counsel for the applicant argued that the respondents are using the Supreme Court judgment to lockout and evict the applicants. It is contended that the names of the churches are the same but the constitutions are different. It was argued that the Supreme Court judgment does not relate applicant.

On the opposite side of the pendulum Adv. *Mahere* contends that the Supreme Court judgment and its use by the respondents cannot be the triggerof urgency. Adv. *Mahere* was careful to distinguish the Church from the deponent of the affidavits –Mr Manyika. This distinction is important as I will show later in this judgment. It is argued that Mr Manyika has always been aware of the dispute between the Chiangwa group and the Madziyire group raging first in the High Court and then later in the Supreme Court. The source of the dispute was the meeting he chaired on the 22 September 2018. It is contended that the High Court and the Supreme Court settled the question of which constitution and which Church. It is

[5]Paragraph 17 of the founding affidavit
[6] Paragraph 3 answering affidavit.

contended that this court cannot revisit those issues. The Supreme Court has sealed these issues.

The pertinent issue is whether the AFM fronted by Mr Manyika is a different formation from the AFM fronted by the respondents. The argument by Prof. *Ncube* is that these are different formations, with different constitutions but with the same name. On the other hand, respondents contend that it is the same Church and with one constitution. To answer this question it is important to ascertain whether Mr Manyika is a member or fronting the cause of the Chiangwa group. This court made a factual finding in HH 586/19 that:

> Neither the constitution nor the regulations of the church confer upon Chiangwa the power to call what he termed an extraordinary meeting of the national workers council. He called such meeting on 22 September 2018. The constitution and the regulations of the church do not provide that a former president of the church can chair a meeting of the church's workers council. Revered Manyika did chair the meeting of 22 September 2018.[7](My emphasis).

It is common cause that the Revered Manyika who chaired the 22nd September 2018 meeting, is the same Mr Manyika who is the deponent to the founding and answering affidavits in this application. The deponent to the founding affidavit in the court application HC 453/20. The former president of the Church. Respondents contend that he is merely furthering the interests and bidding of the Chiangwa group. I agree. On the facts of this case he cannot dissociate himself from the Chiangwa group. He is merely trying to pull wool over the eyes of this court.

In HC179/19, the Chiangwa group sought *inter alia* an order barring the respondentsfrom using the nameApostolic Faith Mission in Zimbabwe; barring them from accessing or using any assets or property of any kind belonging to the church; to relinquish to the church and any property belonging to church that is in their possession.Their application was dismissed. Aggrieved by the order of this court, the Chiangwa group appealed to the Supreme Court. The Supreme Court dismissed the appeal in its entirety with costs, and held *inter alia* that the Chiangwa group had no requisite *locus standi* to institute proceedings in HC 179/19 because they were not office bearers of the Church.

The High Court granted an order in favour of the Madziyire group, upheld by the Supreme Court. The meeting Enos Manyika chaired on of 22 September 2018 was declared

[7] Page 16 of the cyclostyled judgment of this court.

null and void and of no force and effect. The Chiangwa group was ordered to make good whatever they did in the name of the Church, including returning any funds misappropriated by them pursuant to the actions nullified. Sight must not be lost of the fact that whatever the Chiangwa group did in the name of the Church, was on the basis of resolution of the meeting of the 22 September 2018, chaired by Mr Manyika.

Mr Manyika cannot be heard to be saying the Church was not part of the dispute that spilled over to the Supreme Court. It cannot come from his mouth that the judgment of the Supreme Court has no bearing on the Church. He cannot be heard to be saying the Supreme Court did not confer any rights to the respondents.However he is correct that rights remain held by the Church.[8] He is incorrect to distinguish that Church from Apostolic Faith Mission in Zimbabwe fronted by the Madziyire group. The Supreme Court held thus:

> The appellants (Chiangwa group) did not have *locus standi* to launch the second application because their claim to office was anchored on their initial meeting of 22 September 2018, which was void *ab initio* and of no force or effect. The respondents (Madziyire group), however, as the elected office bearers of the Church had the *locus standi* to bring the first application. The findings of the court *a quo* in these respects were correct and are upheld in this appeal. [9]

The Chiangwa group failed to bar the respondents from using the name Apostolic Faith Mission in Zimbabwe. Failed to bar them from accessing or using any assets or property of the Church. The net effect of it all is that the question of which Church has been answered by the High Court and the Supreme Court. The question of which constitution has been answered by the High Court and the Supreme Court. No dispute about which Church and which constitution can be revisited by this court.

A close look at the complaints by Mr Manyika against the respondents, and the relief he seeks from this court betrays the actions of a person who is aggrieved by the decision of the Supreme Court. A litigant who is aggrieved by the decision of the Supreme Court does not come for relief in this court. This court cannot accede to an attempt to revisit, alter, change, interfere or manipulate a decision of the Supreme Court through the back door. This court has no such jurisdiction.

---

[8] Paragraph 24 of the founding affidavit.
[9] Page 29 of the cyclostyled judgment.

In conclusion on the issue of urgency, I respectfully disagree with the submission by Prof. Ncube that the names of the churches are the same but the constitutions are different, and that the Supreme Court judgment does not relate to the applicant. I take the view that the issue of which Church has been resolved by the Supreme Court. The issue of which name has been resolved by the Supreme Court. The issue of which constitution has been resolved has been resolved by the Supreme Court. Therefore, the use or attempted use by the respondents of the Supreme Court judgement against Mr Manyika, cannot be a cause of urgency. This matter is not urgent and it cannot be afforded a hearing in the roll of urgent matters. It falls to be struck from the roll with an appropriate order of costs.

Having answered the question of urgency in favour of the respondents, ordinarily it would have been unnecessary to deal with the issue of the alleged lack of authority by M rManyika to act on behalf of the Church. On the facts of this case, it is important to do so for the purpose of completeness. Again, such has a bearing on the issue of who should pay the costs and at what scale.

It is argued that the deponent of the founding affidavit, Mr Manyika has failed to show that it is the AFM that is litigating in this matter and that he is authorised to act on its behalf. In his founding affidavit he says he is the founder, founding president and representative of the applicant or the Church.[10] This averment has been specifically controverted in the opposing affidavit. It has been contended that he is neither a representative of the Church, nor the founding president of the Church. These contentions by the respondents have not been denied in the answering affidavit, and I take it to be correct that he is neither a representative of the Church nor the founding president of the Church. A church being *universitas* cannot be represented in a legal suit by a person who has not been authorised to do so. See: *Madzivire & 3 Ors* v *Zvarivadza & Anor*, 2006 (1) ZLR 514.No resolution has been produced by the deponent to show the authority upon which he purports to act for the Church. Hedeposed to the founding affidavit as representative of the Church, when he is not. He does not say who authorised him to depose to the affidavits. He lacked authority to do so. He did not have authority to file this application on behalf of the Church. Respondents contend that he is on a frolic of his own. I agree.

[10]Paragraph 1 of the founding affidavit.

In light of the decision I have reached on the point of urgency and lack of authority it will serve no useful purpose to determine theremaining point*in limine.*

Ad Costs

Respondents seek costs on the scale of legal practitioner and client. More than 100 years ago, INNES CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. See: *Orr v Solomon* 1907 TS 281. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court. See: *Davidson V Standard Finance Ltd* 1985 (1) ZLR 173 (HC); *Public Protector v South African Reserve Bank* [2019] *ZACC* 29;*Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC).

To mulct a litigant in punitive costs requires a proper explanation grounded in our law. These are costs that are meant to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes. The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. The question whether a party should bear the full brunt of a costs order on an attorney and client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. See: *Khumalo v Victoria Falls & Anor* 2018 (1) ZLR 232 (H); *CRIEF Investments (Pvt) Ltd & Anor v Grand Home Centre (Pvt) Ltd &Ors* 2018(1) ZLR 1 (H); *De Lacy v South African Post Office* [2011] ZACC 17; 2011 JDR 0504 (CC); 2011 (9) BCLR 905 (CC) at *paras* 116-7 and 123. A punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke.

In casu, it is clear that Mr Manyika is conducting his own litigation masquerading the Church. He had no authority from the Church to institute these proceedings. He is aware of the High Court and Supreme Court judgments in respect of this dispute. He is bringing before this court the same dispute resolved by the courts. A litigant cannot be permitted to re-cycle

the same dispute before the courts. This court cannot countenance such conduct. Once the Supreme Court has spoken, a litigant cannot be permitted to bring the same issue, in whatever name before this court. I take the view that Mr Manyika is merely attempting to hoodwink this court, and challenge the decision of the Supreme Court *via* "back-door." He cannot initiate litigation hiding under the name of the Church. An order of costs against the Church will be a *brutum fulmen*, the Church cannot pay itself. Mr Manyika cannot instruct the Church to pay, because he has no authority to do so.The costs must be for his account. This is not a case of ordering a representative of a litigant to pay the costs. It is a case of unmasking the person behind the litigation, and ordering such person to pay the costs. Mr Manyika is the person behind the litigation. This is one of the cases where this court will not hesitate to exercise its discretion in awarding costs on a legal practitioner and client scale.

Disposition

In the result, I make the following order:

1. The point *in limine*on urgency is upheld.
2. This application is not urgent and is struck off the roll of urgent matters.
3. The costs of this application to be borne by Mr Enos Manyika in his personal capacity on a legal practitioner and client scale.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 1st, 2nd, 3rd, 4th and 5th respondents' legal practitioners