

(1) UPENYU MASHANGWA
and
BLESSING MASHANGWA
versus
EMMANUEL MAKANDIWA
and
RUTH MAKANDIWA
and
UNITED FAMILY INTERNATIONAL CHURCH

HC 4197/18
Ref: HC 1774/18

(2) EMMANUEL MAKANDIWA
and
RUTH MAKANDIWA
versus
UPENYU MASHANGWA
and
BLESSING MASHANGWA

HC 1774/18
Ref : HC 7214/17

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 18 December 2018 and 23 January 2019

Opposed Applications

L Uriri, for applicants in HC 4197/18 and for respondents in HC 1774/18
S Hashiti, for respondents in HC 4197/18 and for applicants in HC 1774/18

TAGU J: The two matters were consolidated to avoid conflicting judgments as the two matters involving the same parties and same issues were ready for arguments at almost the same time before different judges. At the hearing of the two matters counsels for the parties did not make oral submissions but agreed that the two matters be decided on papers filed of record. The following is the background to the two matters.

Upenyu and Blessing Mashangwa (the Mashangwas) are husband and wife respectively. They are members of the United Family International Church (UFIC). Emmanuel and Ruth

Makandiwa (the Makandiwas) are also husband and wife respectively. The Makandiwas are leaders (prophet and prophetess respectively) of United Family International Church (UFIC). In case HC 7214/18 the Mashangwas filed Summons in this Honourable Court containing six claims against the Makandiwas and the United Family International Church for a total of sum of US\$6 535 000.00 to be paid jointly and severally, the one paying the other to be absolved. In their declaration the Mashangwas claimed that (1.) In the year 2012 at Harare, and in church the Makandiwas fraudulently and misrepresented to the Mashangwas that anyone with a bank debt or loan was to be cancelled as it was the season of miraculous cancellation of debts after the Makandiwas were informed privately that the Mashangwas had an existing ZB Bank loan to the tune of US\$500 000.00. As a result of the misrepresentation the Mashangwas were induced not to pay ZB Bank the loan and in the result the Bank executed on the Mashangwas' property being 14 Edinburgh Road Harare for \$500 000.00 thereby losing their house valued at \$700 000.00. (2.) In the same year the Makandiwas misrepresented in Church that one Tichaona Mawere was a great lawyer who would not lose a case when in fact Mr Tichaona Mawere was an unregistered legal practitioner. Acting on the misrepresentation the Mashangwas handed over their McDowell file to the said Tichaona Mawere for a claim of US\$1 698 000.00 and expended in fees an amount of US\$37 000.00. Tichaona Mawere then produced fake court orders and the Mashangwas lost a total sum of US\$1 735 000.00. (3.) In the years ranging from 2014 to 2016 the Mashangwas were called on stage in church by the Makandiwas and were announced as a successful example in their Ministry (UFIC). Acting on this misrepresentation the Mashangwas made various direct contributions to the Makandiwas and the church money amounting to US\$1 100 000.00. (4.) The Mashangwas were also paraded in Church on the stage by the Makandiwas as the chosen people by God to have succeeded in business. As a result of the misrepresentation the Mashangwas marketed the Makandiwas' prophecies to the tune of US\$ 2 000 000.00. In claims (5) and (6), they alleged that the Makandiwas' defamed them thereby destroying their reputation and causing monetary loss to the tune of USD500 000.00.

Having been served with the Summons the Makandiwas entered appearance to defend the claims. They proceeded to address a letter in terms of r 140 of the High Court Rules, 1971 to the Mashangwas pointing out that the claims were vague and embarrassing and that they did not disclose a cause of action, and asked whether they were suing in contract or delict, and as regards claim (5) and (6) asked whether the claims were in defamation or injuria. The Mashangwas did

not respond to the letter causing the Makandiwas to file an exception on the 30th of August 2017 to the Mashangwas' pleadings in terms of Order 21 r 137 (1) (b) in case HC 7214/18.

The exception was heard on the 6th November 2017 by MANGOTA J in respect of all the six claims but was dismissed on the 12th January 2018 and the Mashangwas were ordered to amend their declaration in respect of claims (5) and (6), and the Makandiwas to plead, and thereafter, the matter was to proceed in terms of the High Court Rules, 1971.

However, after the dismissal of their exception the Makandiwas filed another court application on the 23rd February 2018 for the dismissal of the Mashangwas' claims in terms of Order 11 r 75 (1) of the High Court Rules, 1971 in HC 1774/18. The Mashangwas' having felt that the Makandiwas had neglected or failed to timeously prosecute the court application which they instituted under case HC 1774/18 filed a chamber application for dismissal on 8th May 2018 under HC 4197/18. Both applications were ready for hearing at almost the same time before different judges hence the consolidation of the two applications.

ISSUES FOR DETERMINATION

This court is therefore being asked to decide two issues simultaneously. The first issue is whether the Makandiwas' application should be dismissed for want of prosecution as prayed for by the Mashangwas in HC 4197/18. In the event of this court granting the relief asked by the Mashangwas, this would be the end of the matters and this court will not deal with the Makandiwas' application. However, in the event that this court dismisses the Mashangwas' application for dismissal, the court will proceed to deal with the second issue pertaining to the Makandiwas' application for dismissal of the Mashangwas' claims in the main case under HC 7214/17.

SHOULD THE APPLICATION FOR DISMISSAL FOR WANT OF PROSECUTION BE GRANTED?

This application is being made by the Mashangwas in terms of Order 32 r 236 (3) (b) of the High Court Rules, 1971. The rule provides that:

“Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either-

- (a) set the matter down for hearing in terms of rule 223; or

(b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit.”

In this case the respondents filed a court application on the 23rd of February 2018 in terms of Rule 75 (1) of the High Court Rules, 1971 under case number HC 1774/18 and it was served on the applicants on the same day. On the 9th of March 2018 the applicants filed opposing papers and they were served upon respondents on the 13th of March 2018. The respondents were supposed to file an answering affidavit within a month, that is, by 14th of April 2018 or set down the matter for hearing. The respondents only filed their answering affidavit on the 22nd May 2018 more than a month later.

The respondents opposed the application for dismissal for want of prosecution. However, the respondents conceded that they did not file their answering affidavit and heads of argument within 30 days prescribed in r 238. Their argument being that their counsel was served with the Notice of Opposition on the 14th of March 2018 towards the end of term and was heavily committed during that period. They further submitted that the period for filing answering affidavit and heads of argument coincided with the Easter break, and this court was on vacation. However, they argued that r 236 (3) (b) does not create a bar and that they have since filed their answering affidavit, heads of argument and a Notice of set down a clear sign that they intended to prosecute their case. Be that as it may they argued that dismissal for want of prosecution is discretionary matter hence they were not barred. They said this is founded on the public policy of requirement for finality to litigation. The court is therefore not obligated to dismiss the principal case simply because r 236 (3) (b) has been invoked. The applicant must plead facts that show where the interests of justice lie. The applicant must demonstrable proof that that the respondents intended to abandon the principal application. In the face of evidence that the respondents intend to prosecute the matter and have indeed prosecuted the matter by filling their answering affidavit, filed heads of argument, applied for set down and the record has been paginated, the application must be dismissed. Then the court is enjoined to make any other order it deems fit in the interest of justice which is to allow the principal application to be heard on the merits.

The test applicable in a matter of this nature is well established. In *African Star Diamonds (Pvt) Ltd v Muchanja & Ors* HH 313-17 it was held:

“Rule 236 is one of the remedies available to a litigant who wishes to overcome an abuse of court process by an uninterested applicant. The position of the law is settled. In *Scotfin v Mtetwa* 2001 (1) ZLR 249 at 250 D-E CHINHENGO J stated as follows-

‘Rule 236, as amended by s 7 of the High Court (Amendment) Rules 2000 (No.35), was intended to ensure the expeditious prosecution of matters in the High Court. The rule was deliberately designed to ensure that the court may dismiss an application if the principal litigant does not prosecute the case with due expedition. The rule gives the judge a discretion either to dismiss the matter or to make such other order as he may consider to be appropriate in the circumstances. I think however the overriding consideration for the judge is to exercise his or her discretion in such a manner as would give effect to the intention of the law maker. The primary intention of the law maker, as I have stated to be, is to ensure that matters brought to the court are dealt with, with due expedition. The order in which the judge may issue, if it is one of dismissal, is in effect a default judgment. But in considering the application the judge can only make an order other than a dismissal if the respondent has opposed the application and shown good cause why the application should not be dismissed.’ See also *Munyikwa v Jiri* HH- 338/15, *Moon v Moon* HB-94-05 and *Ndlovu v Chigaazira* HB -104-05.”

Further in *Melgund Trading (Private) Limited v Chinyama & Partners* HH-703-16 it was held as follows;

“An application for dismissal of prosecution brought in terms of r 236 (3) (b) assists in putting to an end to proceedings that are instituted and not attentively followed up. There is a huge backlog of applications in the court. The situation is compounded by litigants who file applications and neglect to pursue them. Rule 236 is a suitable mechanism to assist in case management. A litigant who has failed to pursue his application is required to explain his failure to prosecute his application timeously. The approach of the court in applications for dismissal for want of prosecution was stated in *Karengwa v Mpofo* HB -628 -15 as follows-

‘The court usually looks at the reasons for failing to act timeously. Where failure to act is the result of an utter disregard of the rules of the court and prescribed time limits, the courts are extremely reluctant to give any further indulgence to the defaulting party.’ See also *Sibongile Ndlovu v Guardforce Investments (Pvt) Ltd* HB -3-14.

An applicant bringing an application for dismissal for want of prosecution is required to show that there has been a failure to take necessary steps to bring a claim to finality in terms of the rules and secondly that the delay is inexcusable or that there is no honest, satisfactory and reasonable explanation for the delay. The burden on the respondent is simply to explain the delay. The conduct of the respondent is also paramount. The court is required to consider all relevant and surrounding circumstances of the case. The court must explore the period of the delay complained against the reasons and explanation for it, and consider the prejudice if any caused to the other party.”

In *casu*, and in my view, after considering the circumstances of this matter, particularly that the respondents have since filed their answering affidavit, heads of argument and applied for set down which caused both applications to be set down at almost the same time before different

judges, it is clear that the respondents intended to prosecute their case. The respondents merely delayed to file their answering affidavit and heads of argument. There was no utter disregard of the rules of court. The reasons for the delay is reasonable. This is not a case where the respondents did nothing at all until the application for dismissal was made. While the court accepts that indeed the time limits were not met, rule 236 is not mandatory. It gives the court a discretion which must be exercised in the interest of justice and finality to litigation. Rule 236 (3) (b) says, and I repeat:

“Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either-

- (a) set the matter down for hearing in terms of rule 223; or
- (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make other order on such terms as he thinks fit.”
(the underlining is mine)

The applicants in this application had two options, either to set the matter down themselves for hearing in terms of r 223 or to apply for discharge. They decided to apply for discharge. On the other hand the judge is given a discretion to either order a discharge or make other order on such terms as he thinks fit.

This court therefore, after considering the circumstances of the case, the reasons for the delay, and the fact that both applications are ready for argument at almost the same time, decided to order that the application for dismissal for want of prosecution be dismissed and that the main matter be heard on the merits.

SHOULD MAIN MATTER BE DISMISSED IN TERMS OF ORDER 11 RULE 75 (1) OF THE RULES?

After the dismissal of their exception in HC 7214/17 the Makandiwas pleaded to the main case and filed this application for summary dismissal of the principal case as being frivolous and vexatious in terms of Order 11 Rule 75 (1) of the High Court Rules,1971 (the rules). The principal case contained the six claims brought against them by the Mashangwas as outline above. I shall endeavor to deal with each of the claims where possible. Suffice to state at this stage that s 75 of the rules provide that:

“75. Application for dismissal of action

- (1) Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious.
- (2) A court application in terms of subrule (1) shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his belief the action is frivolous or vexatious and setting out the grounds for his belief.
- (3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify his belief that the action is frivolous or vexatious.”

In their supporting affidavits the Makandiwas prayed that the principal case must accordingly be summarily dismissed pursuant to r 75 (1), and contended among other things that the action in the principal case is not only both frivolous and vexatious, but also a self –evident gross and contemptuous abuse of the process of this court on the bases that-

- “1. The plaintiffs have deliberately pleaded and founded their purported causes of action on deliberate and easily demonstrable falsehoods;
2. Each of the six (6) claims suffers from predictable failure and so groundless that no reasonable person could ever hope to obtain relief therefrom,
3. The principle case has not been brought with the bona fide intention of obtaining relief,
4. The proceedings have been brought with the sole and mala fide intention of annoying and harassing us. It as such amounts to the unmitigated abuse and contempt of this court and the process thereof, and
5. The principal case is inconsistent with reason and common sense and as such unworthy of serious consideration.”

The respondents (the Mashangwas) opposed the application. They took seven points *in limine*. The points were that (1) Matter passed in *rem judicatam*, (2) Estoppel, (3) Disputes of fact, (4) Unlawful reversal of order of proceedings, (5) Attempt to avoid the consequences of a valid acknowledgement, (6) Mala fides and abuse of court process and (7) Provisions of rules not available to applicants. On the merits they contended among other things that Mr Makandiwa is a common fraudster, a false prophet who has no relationship with God, is a liar who lied about a lawyer called Tichaoma Mawere and many other ills.

The court will briefly look at the points *in limine* raised by the respondents.

(a) MATTER PASSED IN REM JUDICATAM

The contention by the respondents is that another court (MANGOTA J) has already made a determination on the issue and the applicants have not appealed against that determination. The applicants are effectively asking a judge of this court to review a judgment issued by a judge of

parallel jurisdiction. They said this matter has passed in *rem judicatam* and the exercise of function by this court has already ceased.

What the respondents are failing to understand is that MANGOTA J dealt with an exception in terms of Order 21 r 137(1) (b) of the rules of this Honourable Court wherein the complaint was that there was no cause of action or that the particulars of claim were vague and embarrassing and needed correction. MANGOTA's judgment did not relate to the facts. The judgment called the respondents to plead to the merits. In *City of Harare v D & P Investments (Pvt) Ltd & Anor* 1992 ZLR 254 (SC) the court said:

“An exception is plainly an “answer to the plaintiff’s claim” or, for that matter, to the defence raised. Its main purpose is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked and so settle the dispute in the most economical manner by having the faulty pleading set aside.”

An exception does not investigate the facts. The veracity of the facts was not before MANGOTA J. The current application is an application for summary dismissal of the claim in terms of Order 11 r 75 (1) of the rules of this Honourable Court on the basis that the claims were frivolous and vexatious. The application does not raise the same issues as were before MANGOTA J. Issues before MANGOTA J were technical and preliminary legal objections without going into the merits. In my view the requirements of both applications are totally different though they involve the same parties. It does not mean a decision made under either of the rules automatically affects the other. The law makers in enacting the two rules and in their wisdom were cognizant of the different reliefs to be granted under each rule. For example the respondents were being asked to put values of the prejudice in claims (5) and (6). If the respondents had complied and responded to the letter of complaint written by the applicants in terms of r 140 of the rules this matter probably could not have gone this far. In the current application the relief being sought is a summary dismissal of the claims. For that reason it cannot be said this matter has passed in *rem judicatam* and the exercise of function by this court has already ceased. While the applicants may have appealed against the decision of MANGOTA J, they were not barred from invoking r 75 (1). I therefore dismiss this point *in limine*.

(b) ESTOPPEL

Likewise I do not agree with the respondents' submission that there is something in the nature of an estoppel which precludes applicants from seeking this kind of relief in light of the

observations made by MANGOTA J in his judgment. The basis of issue estoppel is an admission of facts or a failure to deny the facts alleged in pleadings that deals with facts such as a plea on the merits. This was not before MANGOTA J. Any remarks he may have made on the facts would be obiter dicta and of no binding effect. It cannot therefore, be said that it is incompetent for this application to be brought. I have already explained in full the differences in the plea of res judicata raised above and I need not say more because these objections are just but one thing- See *Willowvale Mazda Motor Industries (Pvt) Ltd v Sunshine Rent –A-Car (Pvt) Ltd* 1996 (1) ZLR 415 (SC) and *Galante v Galante* (1) 2002 (1) 144 at 151A-G.

(c) DISPUTES OF FACTS

The general position is that the court must not decide cases on motion if doing so would raise material disputes of fact incapable of resolution on affidavits. Even where there is conflict the rule is not absolute. See *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC) where GUBBAY JA (as he then was) said:

“It is, I think, well established that in motion proceedings a court should endeavor to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned....”

In *casu* I think it is far -fetched that the court has no power to determine with certainty whether or not, even on a balance of probabilities, the kind of influence, psychological or demonic the applicants wield on their followers with the result that those followers follow the applicants’ teachings hook, line and sinker even if those teachings do not derive from the holy book, the Bible which the applicants profess to be led by or whether the applicants rely on the occult and n’angas. In Jeremiah 14 verse 14, “The Gideons International” version it was said-

“And the Lord said to me: “The prophets are prophesying lies in my name. I did not send them, nor did I command them or speak to them. They are prophesying to you a lying vision, worthless divination, and the deceit of their own minds.”

It is therefore possible that some false prophesies may be made by fake prophets. This the court may detect even from affidavits. But in an application of this nature what the applicants are expected to do is to simply allege in affidavit forms and attach documents if any to show why they believe that the claims are frivolous and vexations. In short the applicants said that the facts as pleaded by the respondents are false. The applicants attached evidence that the facts are false.

The respondents cannot allege a dispute of fact without pleading a contrary position that is without saying that their facts are true and that they indeed suffered loss and giving full particulars of their position. For example its factual that prophesies were made, it is factual that the respondent owed ZB Bank and were owed monies, and it is factual that the respondents acted on prophesies and representations, and spent their monies and that they believed on these prophesies to be genuine. No material disputes appear. I find no merit in this point *in limine* and I dismiss it.

(d) UNLAWFUL REVERSAL OF ORDER OF PROCEEDINGS

The rules of this court are clear. They provide that a defendant who has pleaded to the plaintiff's claim may thereafter pray for the dismissal of that claim as frivolous and vexatious. In my view there is no unlawful reversal of the order of proceedings. The defendant must simply swear in an affidavit positively to the grounds of alleging that the claim is frivolous and vexatious and verifying the facts. This is precisely what the respondents have done. As I said this does not amount to a reversal of order of proceedings. The point *in limine* is accordingly dismissed.

**(e) ATTEMPT TO AVOID CONSEQUENCES OF VALID
ACKNOWLEDGMENT**

(f) MALA FIDES AND ABUSE OF COURT PROCESS

(g) PROVISIONS OF RULES NOT AVAILABLE TO APPLICANTS

I will deal with these preliminary points at once. The respondents alleged that in a bid to arrest the matter after they demanded the money they had given to Mr Makandiwa, Mr Makandiwa undertook in writing that he was going to pay all sums as would have been proved to have been offered in a letter marked "B". The court was unable to see the veracity of such allegations because the said letter was never attached to the opposing affidavit. On the *mala fide* and abuse of court process the respondents submitted that there are sinister agendas which the applicants hope to pursue. None have been elaborated as a basis for bringing this application under r 75 (1) serve to say same would be exposed during cross examination. Lastly, on the unavailability of provisions of the rules to the applicants the respondents relied again on the judgment of MANGOTA J which I dealt with extensively above. I found no merit in such submissions and the points *in limine* are dismissed.

AD MERITS

The Makandiwas filed this application in terms of r 75 (1) of the High Court Rules, 1971 for the summary dismissal of frivolous and vexatious action proceedings instituted by the Mashangwas in an action pending before this court under case number HC 7214/17.

The respondents made six claims. Their cause of action in claims 1-4 is said to fall into the delict of fraud. The fifth claim is said to relate to the delict of injurious falsehoods. The sixth claim has been held to fall under the delict of injuria. A common thread runs through these claims. They plead that they were members of the third applicant, a Christian Church founded by the first and second applicants. They further allege that they either received prophecies or representations in church or that certain injurious publications were made of and concerning them or their business. Hence they claimed various sums all aggregating to a staggering six and a half million United States Dollars.

The applicants pleaded to each of the six claims. They denied the allegations. Their pleas were filed in contemplation of the present application for dismissal. The applicants placed before the court a detailed verifying affidavit that traversed and attached incontrovertible evidence which they said exposed the falsity of the facts pleaded by the plaintiffs in their declaration. The applicants, thereafter, filed the present application for the dismissal of the suit as frivolous and vexatious.

The application is strongly opposed by the respondents.

THE LAW

Rule 75 of the rules of this Honourable court allows a defendant who has pleaded to apply for the summary dismissal of the actions on the grounds that it is vexatious. The defendants must, on notice of motion, positively swear to the facts and verify their belief that the action is vexatious and deserving of summary dismissal. The purpose of this procedure is the same as that of the procedure for summary judgment or provisional sentence. The court if satisfied, has the inherent jurisdiction to disallow and dismiss proceedings that are frivolous or vexatious. See *Ushewokunze Housing Corporative Society Limited v Crest Breeders International (Private) Limited* HH-529-16, *Rogers v Rogers & Another* 2008 (1) ZLR 330 at 337 and *S v Coopers & Others* 1977 (3) SA 475 at 476C-E.

The test to be applied can be and explained in no better words than those of MAKARAU JP (as she then was) in *Stationery Box (Pvt) Ltd v Natcon (Pvt) Ltd & Anor* HH-64-10 as follows:

“The test to be applied in summary judgment applications is clear and settled. The onus resting on a defendant resisting summary judgment has been described as amongst the lightest that the rules of procedure cast on the litigants. He does not have to prove his defence. He must merely allege facts which, if he can succeed in establishing them at the trial, would entitle him to succeed in his defence. The defence so set up must, however, be plausible and bona fide. Obviously implied in this test, but oft overlooked by legal practitioners, is that the defendant must raise a defence. The facts alleged must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the matter, do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted. To defend a claim arising out of a contract of sale, the purchaser must attack either the existence of the agreement itself or the fact that the goods sold were not delivered to him. If other defences are raised, they must be raised explicitly. It is not the function of the court to put words into the defendant’s mouth and thereby establish a possible defence on his behalf when the defendant fails to do so in his opposing affidavit.”

In the present case the respondents ultimately denied any liability to the plaintiffs. This application therefore, turns on the law of summary dismissal of cases on the basis that they are frivolous and vexatious. Order 11 Rule 75 (1) which provides for this procedure states that the defendant may make an application for the summary dismissal of the case after filing of his plea on the grounds that it is frivolous and vexatious. My sole duty is to determine whether or not the claims are frivolous and vexatious.

CLAIM ONE

In claim one the Mashangwas alleged that in the year 2012 and in church the Makandiwas fraudulently and misrepresented that anyone with a bank debt or loan was to be cancelled as it was a season of miraculous cancellation of debts. The essence of this claim is that the applicants having been informed privately that the respondents were indebted to ZB Bank Limited in the sum of \$USD500 000.00 made representations well knowing same to be false. The respondents were induced to believe the applicants’ more than anyone else in the church and defaulted on the payment of their loan resulting in their house being executed. This misrepresentation has been denied on the basis that the said property had been sold by the respondents as early as February 2012 for USD800 000.00 to Nemanji Family Trust represented by one Steward Nyamushaya. Hence the claim was based on falsehoods meant to annoy, vex and harass the applicants and without any bona fide intention of obtaining relief. Even if it is true that such a representation was made in church it is inconsistent with common sense and reason that God would unconditionally cancel all the debts of every nature and description and that congregates should immediately stop paying any loans that they had even before the same had

been cancelled, that congregates should accordingly not engage their creditors, and that congregates should ignore demands, court processes, judgments, notices of and attachment and advertisements of sales in execution and must not take any steps to safeguard their positions. The respondents from the papers are business people of undoubted and unparalleled acumen. They knew very well that the debts if any, they had incurred, they had done so in terms of positive law and not ecclesiastical law. Even in the Holy Bible, King James Version- in Genesis 3 v 19 God advised ADAM in the following words –

“In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it was thou taken....” (“By the sweat of your face you shall eat bread, till you return to the ground, for out of it you were taken; for you are dust, and to dust you shall return.” The Gedeons International version *supra*.) (In vernacular language (*Uchadya cheziya kusvikira murufu*))

This is loosely translated to mean there is nothing for free and every man shall work hard to achieve what he wanted until death and that God would give them power and wisdom to achieve their goals and not just expect miracles to happen on their own. If Makandiwas talked of season of miraculous cancellations of debts he did not literally mean those with debts should go home and just sit waiting for debts to be miraculously wiped without them doing something about them. The law on misrepresentations in delict is settled. See *Murray v McLean*, NO 1970 (1) SA 133 (R).

I therefore find the first claim to be frivolous and vexatious and must be summarily dismissed with the contempt it deserves in terms of Order 11 r 75 (1) of the Rules of this court.

CLAIM TWO

The allegations in claim two are that the applicants made representations in church that a certain Tichaona Mawere was a great lawyer and that he would not lose any case. This representation was denied by the applicants. The applicants alleged that the prophecy given concerned the Mawere’s exclusively to their family problems. It particularly related to their legal skills at home in resolving their family disputes. The applicant said so while counselling the Maweres not to do so. Never was anyone told to engage Tichaona Mawere who was a great lawyer. The applicants alleged they could not have said so given the fact that the respondents had engaged one Tichaona Govere of Govere Law Chambers to act for them on 20th March 2013 on a contingent basis to prosecute the case against McDowells in judgment number HH 288-13 which was argued before TAKUVA J on 23 July 2013 whose judgment was delivered on 2 September

2013. If at all something to that effect was said the respondents are not saying they were directly told to engage Tichaona Mawere. The claim was contrived and perjured. In my view if indeed the applicants said Tichaona Mawere was a great lawyer, or words to that effect they did not specifically told the Mashangwas to hire him. They just misconstrued the prophecy or sermon to their own prejudice. It is equally frivolous and vexatious that no relief could be obtained from it. The claim deserves to be summarily dismissed.

CLAIM THREE

Claim three is based on the fact that from year 2014 to 2016 the Mashangwas were called on stage in church and were announced as successful example in their Ministry (UFIC) and as a result they made direct contributions to the church amounting to \$1 100 000.00. The gravamen of this claim is that the respondents lost the sum of USD\$1 100 000.00 as a result of the representation made by the applicant. In short they are saying if the applicant had not paraded them in church as successful example in the Ministry they would not have made contributions to the church.

Contributions are generally known as tithes and offerings. Tithes and offerings are biblical concepts recorded as early as the Book of Genesis. Tithes and offerings are acts of worship that edifies the relationship between the person who gives the offering and God. They are predicted on the believers' faith and are not enforced. They are free will offerings given in all the Christian Churches. Tithes and offerings constitute 10% of the giver or offeror's income though in practice not all believers give the exact 10%. Only in certain churches is the 10% enforced by forcing the followers to declare their incomes from which the 10% is calculated. If the respondents' allegation is true, which may be so given that they are business people, then their income during the period in question exceeded USD\$11 000 000.00 and if they believed the representation made by the applicants that they are a successful example in the Ministry they willingly parted with an amount of USD1 100 000.00. However, what makes the claim frivolous and vexatious in my view, is the fact that if ever the respondents parted with such kind of money inside the third applicant, those were free will offerings not recoverable from anyone unless the respondents wish to try the impossible and get that from God the Receiver of the offerings. How they hope to get a court to interpret scripture and say one reading is preferable to another in the Holy Bible remains a mystery.

In *casu*, the respondents admitted in their pleadings that the tithes they gave cannot be returned. Having made that admission in pleadings the admission thereof had fatal consequences to their case. The admissions are conclusive proof of the admitted fact and the respondents are at law precluded from controverting it. This is our law. *DD Transport (Pvt) Ltd v Abbott* 1988 (2) ZLR 92 (SC); *Moresby –White v Moresby White* 1972 (3) SA 222 (RA).

This claim like the others above is frivolous and vexatious and is summarily dismissed.

CLAIM FOUR

Claim four with the greatest of respect does not make sense, its vague and embarrassing. The gravamen of the claim is that the respondents were paraded on stage in church and shown to the other congregates as the chosen people by God to have succeeded in their business. As a result they then marketed the first applicants' prophecies for the advancement of the applicants' interests and prophesies when in truth and fact this was sheer misrepresentation and they lost USD2 000 000.00. What the respondents are saying is that when they were paraded in church as the chosen people by God in church in actual fact they were not chosen people by God. That when they were said to be successful in their own business, (remember they were in fact business people) they were really not successful people. That because of the praise made by the applicants they went on their own way to market the applicants' prophecies using their own funds without being ordered to do so by the applicants. They did so because they genuinely believed that they were the chosen people by God. They in my view decided to show off and lost USD2 000 000.00. At law they did not plead any cognizable or known cause of action. This is bad in law, and is frivolous and vexatious to then claim the sum of USD2 000 000. 00 from the applicants. If at all, this may fall under *volenti non fit injuria* (he who voluntarily exercises his will suffers no injury). The claim is therefore frivolous and vexatious and must be summarily dismissed.

CLAIM FIVE AS AMENDED

The crux of this claim is that the applicants allegedly published defamatory material against the respondents' company that sells perfumes to the extent that the company was forced to close. The defamation if at all was made it was made against the company and not the respondents. However, the claim was denied by the applicants.

The law is trite and settled that a company is at law a separate persona that can sue for the wrongs committed against it or be sued for the wrongs it commits. This is principle and cannot

be deviated from. The principle is that the award made thereto is the company's assets and benefits and not the shareholders' or directors'. The respondents are directors and or shareholders of the company in question. In *Zimbabwe Electricity Supply Authority v Modus Publications (Pvt) Ltd* 1996 (2) ZLR 256 (HC) the court said:

“Dealing with the first ground, it is settled law that a trading corporation, being in law a person distinct from its members and having therefore a reputation of its own to maintain, can sue for a defamatory statement which affects it in its trade, business or property whether or not actual damage is proved. See McKerron *The Law of Delict* 7 ed at p 181. See also *Boka Enterprises (Pvt) Ltd v Manatse & Anor* 1989 (2) ZLR 117 (H).”

In this claim the fact that the respondents are the **alter ego** cannot take their matter any further. It is therefore frivolous and vexatious as well as abusive for the people that run the company to sue for wrongs allegedly committed against the company in their names without even joining the company to the proceedings other than to harass and annoy the applicants. The claim is equally and summarily dismissed in terms of r 75 (1) of the Rules of this Honourable Court.

CLAIM SIX AS AMENDED

Lastly, the crux of this claim is an allegation by the respondents to the effect that the applicants violated their privacy when they published information communicated to them in private on their Facebook page “The Truth About Makandiwa”. The respondents claim a staggering USD500 000.00.

What has not been controverted by the respondents is the fact that the Facebook page in question does not belong to the applicants nor does it represent the applicants' views. In fact the Facebook page contains some information that denigrates the first applicant. This fact from the papers is deemed admitted by the respondents. See Rule 104 of the High Court Rules 1971.

Further, the date, nature and extent of the material given to the first applicant in private and confidence has not been pleaded but is said to be certain information of a private nature, which the respondents said they would say at the trial, rendered such pleadings defective and under any circumstances did not find any cause of action. This is in variance with the law as stated in the case of *International Tobacco Co. of SA Ltd v Wollheim* 1953 (2) SA 603 (A) at 613 H where the court said:

“It appears to be clear that the plaintiff in his declaration must set out the words alleged to have been used and may not content himself with giving their effect. It is for the court to decide what their effect is.”

The sixth claim is on the pleadings so patently groundless that the respondents cannot ever hope to succeed in obtaining relief on hence should be summarily dismissed as being frivolous and vexatious.

In the result I make the following orders.

IT IS ORDERED THAT

1. The Court Application filed by the Applicants under Case No. HC 4197/18 be and is hereby dismissed and the parties to argue the main application under HC 1774/18.
2. The Court application filed by the Applicants in HC 1774/18 be and is hereby granted.
3. Each of the Respondents’ six (6) claims as the plaintiffs against the Respondents as defendants in case number HC 7214/17 is declared frivolous and vexatious.
4. Each of the six (6) claims aforesaid be and is hereby summarily dismissed with costs at the legal practitioner -client scale.

Manase and Manase, applicants’ legal practitioners
Venturas and Samukange, respondents’ legal practitioners