APOSTOLIC FAITH MISSION IN ZIMBABWE
versus
AMON NYIKA CHINYEMBA
and
TUNGAMIRAI MUZANGAZA
and
LOUIS ZHOYA
and
EDWIN NHARIRE
and
CLAYTON CHOGA
and
TERERAI MUZA
and
APOSTOLIC FAITH MISSION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 13 March 2024

Opposed Application

F Mahere with EE Homera, for the applicant
L Madhuku. for the respondent

CHITAPI J: The applicant Apostolic Faith Mission in Zimbabwe a church congregation pleading through a founding affidavit deposed to by one Amon Dubie Madawo who styled himself as the applicant's elected president and also stated that the applicant is a common law universitas with power to sue and to be sued. The deponent president further deposed that the applicant was constituted in terms of a written constitution and regulations which inscribed its foundational values, confession of faith mission and governance structures. The applicant did not attach a copy of its written constitution and regulations and did not do so in the answering affidavit despite a challenge in the opposing affidavit to the authority of the deponent to represent the applicant and a further challenge to the juristic standing and competence of the applicant to litigate.

The deponent to the founding affidavit described the first to the sixth respondents as male adults who hold positions of leadership in what was described as the "seventh respondents Hillside Assembly". The first respondent is described as wearing three hats given as "incumbent Hillside Assembly-pastor, Harare East Provisional Overseer and Deputy President". The second respondent is vice chairman, the third respondent secretary, the fourth respondent treasurer and the fifth respondent – Board member, sixth respondent – youth leader and *ex officio* board number and the seventh respondent shares the same name as the applicant. The deponent to the founding affidavit described the seventh respondent as "a splinter religious grouping which seceded from applicant."

To contextualize the dispute between the parties which I shall revert to in due cause, a brief background to the relationship of the parties is advised. The applicant in or about 2018 experienced an internal revolution and split arising from inter alia, disagreement on certain constitutional amendments not necessary for purposes of this application to detail. Two factious emerged being the applicant then led by Aspher Madziyire and the secessionist group led by one Cossam Chiangwa. The secessionist group is referred to by the applicant as the seventh respondent. The Hillside Assembly was not described by the applicant. From a reading of the rest of the papers in this application, the Hillside Assembly appears to be a church grouping or an extension or offshoot of the secessionist group of the seventh respondent. There was therefore in existence as a result of the split of the church, two entities sharing the same name, viz, the applicant and seventh respondent.

As usually happens where there is a church split, disagreements arise over the devolution of church property if before the split the church owned property. This application concerns a dispute over an immovable property called stand 19839 Harare Township and two motor vehicles namely: Toyota Helux Reg No AC1 8670 and Toyota Coaster Reg No ACJ 5356. The applicant in this application seeks orders as per the draft attached to the founding affidavit. The draft order reads as follows:

IT IS ORDERED THAT:

1. 1st – 7th respondents and all those acting through them be and are hereby interdicted from entering, accessing or in any other way taking possession or occupation of applicant's property located at number 19839 Central Road, Msasa, Harare otherwise known as Stand 19839 Harare Township situate in the district of Salisbury measuring approximately 13516 square metres in extent;

2. 1st -7th respondents be and are hereby ordered to return the following motor vehicles to the applicant within 24 hours of this order, namely:
   a. Toyota Hilux registration number ACI 8670 [chassis number AHTFR 29G607005483, engine Number 1900030440];
   b. Toyota Coaster registration number ACJ 5356 [chassis number BB400002229, Engine Number 3b 1379809];
3. In the event that respondent fails to comply with para 1 and 2 above, the Sheriff of Zimbabwe or any member of the Zimbabwe Republic Police be and is hereby authorised to enforce this order.
4. 1st – 7th respondent be and are hereby ordered, jointly and severally the one paying the other to be absolved, to pay the outstanding sum of $ 609 927.62 due and owing as at January 2022 to the City of Harare being rates in respect of the aforesaid property and to pay off any cumulative arrears due and owing at the time of their departure.
5. 1st -7th respondent shall pay the costs of this application, jointly and severally the one paying the other to be absolved, on the attorney- client scale.

The respondents have resisted the claim. The parties are not strangers coming before the court for the first time. They are customers or clients of the courts and in this regard previous disputes pitting the parties can be gleaned upon reference to cases which the applicant referred to and also attached some of the judgements passed by the court. Particular reference was made to case numbers HC 2405/22; HC 2409/22, HC 2533/22, HC 269/22 & SC 67 /21. These cases do not deal with the orders sought herein nor the grounds of its application. Previous and pending cases between litigants should not just be cited for the sake of it unless they conduce to the determination of the dispute to be determined by the court. As I understood the dispute and the orders sought they can be simplified by saying the court is requested to determine who the owner of the faxed property and the motor vehicles is between the applicant and the respondents and to then deal with ancillary relief which include the prayer for a declarator, interdict and the rest of the reliefs prayed for.

The applicant claims to be the owner of the immovable property described in the draft order as well as the two motor vehicles also therein described. In relation to the immovable property and the interdict, the applicant claimed that it had a clear right to the property and that such right entitled the applicant to enjoy unfettered possession and exclusive use of the property. The applicant averred that it purchased all rights, title and interest in the property.

The applicant attached a copy of a memorandum of agreement of sale of the property between the applicant and City of Harare dated 20 April 2018. It was common cause that the property has not been transferred to the purchaser and that risk and profit in terms of clause 4 of the sale agreement passes to the purchaser on transfer.

The applicant averred in relation to the use of the property that its own Hillside Assembly has "at all material times" conducted its service at the property where it constructed a brick and mortar thatched gazebo which is used for the purpose. The phrase "at all material times" is used in a confused context by the applicant because in the same founding the applicant averred that the first respondent and his breakaway group of the Hillside Assembly "continued to exclusively occupy and conduct their services at the property," "throughout the period running from 2018 until the finalization of the church dispute by the Supreme Court by judgement SC 67/21 delivered on 28 May 2021.

I have considered the Supreme Court judgement Sc 67/21. The court did not determine the parties proprietary or other rights to the property *in casu* herein. The court in judgment No HH 586/19 did not deal with the ownership of the property either. The applicant averred that courts had in case No HC 269/22 interdicted the respondent from a property called subdivision E of stand 164 of Prospect held under deed of transfer No 8984/87. The purport of the Supreme Court judgement SC 67/21 to the extent that it may be relevant to this application was its confirmation of the split of the applicant with the first respondent and others mentioned therein belonging to the secessionist group which continued to use the same name as the applicant. For clarity the Supreme Court case reference is (1) *Cossam Chiangwa (2) Amon Chinyemba* & 6 ors v *Apostolic Faith Mission in Zimbabwe* and 7 Ors sc 67/21. The fact that the respondents were interdicted from possession and use of a different property stand 164 of prospect was decided on its own facts. The property involved under dispute in judgment No HH 769/22 was held by the applicant under a title deed thereby conferring a real right to the property upon the registered title holder named in the Deed of Transfer.

In the judgment HH 269/22 whose citation for completeness is *Apostolic Faith Mission in Zimbabwe* v *(1) Apostolic Faith Mission of Zimbabwe. (2) Amon Nyika Chinyemba & 5 Ors* MANGOTA J reiterated the position of the law in relation to possession and use of a registered immovable property by the owner. The learned judge stated as follows at p4 of the cyclostyled judgment:

> "As the registered owner of the property; the applicant has a clear to the same. Our law jealously protects the rights of the owner in regard to his property, unless of course the possessor has same enforceable rights against the owner *Oakland Nomnes Ltd* v *Getra Mining & Investment Company* 1976 (1) SA 441 at 452(A). It is inherent in the nature of ownership that possession of the property should normally be with the owner and it follow that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner; for example a right of retention and use ; *Chetty* v *Naidoo* 1974 (3) SA 13 A. The *re vindication* is an action brought by an owner of the property to recover it from any person who retains possession of it without his consent *Savanhu* v *Hwange Collery Company* Sc 8/15".

The fact that the applicant had registered title over stand 164 Prospect in the matter determined by MANGOTA J distinguishes that case from the present case. The success or failure of this application must derive from different considerations than that of real rights conferred to an owner of a registered property.

In casu the applicant relied on a sale agreement between the applicant and City of Harare as already noted. The applicant averred that the respondents are presently in occupation of the property in dispute. The applicant attached a letter of confirmation of full payment of the stand in issue. The letter of confirmation of the sale of the property and of the full payment of the purchase price having been made also authorized transfer of the property to the Apostolic Faith Mission in Zimbabwe, the applicant herein. The respondents sought to counter the applicants claim based on payment by attaching financial statements and other reports to prove or show that the property in dispute was not included in the reports of the applicant hence showing that the property did not belong to it. The documents attached related to the period 2016- ending 2017 December with some predating that period. The agreement of sale was however executed on 20 April, 2018 logic and common sense would show that even if the property could have been reported as an asset of the applicant, the same had not yet been acquired at the time that the financial statements were prepared. The financial statements and reports were therefore of no evidential value and should not have been attached to the application for the court to waste time reading them. The applicant's defence was not advanced by the inclusion of the irrelevant financial documents.

The respondents also attached copes of receipts for payments made to City of Harare. The nature of the payments was not disclosed and were simply referred to as payments made by the Hillside Grace Assembly in para 22 of the opposing affidavit. The receipts however read "Apostolic Faith Mission" as payee.

In relation to two motor vehicles referred to the applicant attached registration books which show the registered owner recorded as AFM Hillside Assembly in respect of the Toyota Coaster registered on 8 July, 2008 and Apostolic Faith Mission in Zimbabwe in relation to the Toyota Hulux registered on 16 December 2011. Nothing further was stated in relation to the vehicles save to state that the Toyota Hulux was purchased for the use of the first respondent as pastor and overseer of the applicant church, whilst the coaster bus was said to be for the use of the church congregation of the applicant. The respondents on the other hand claimed that the vehicles belonged to the Hillside Unlimited Grace Assembly wherein they are members. The 1st -6th respondents denied that they are members of the 7th respondents but of the Hillside Unlimited Grace Assembly which they referred to as a separate legal persona.

The respondents raised various other points *in limine* which the applicant poorly dealt with by adopting an obstinate attitude, for example, the respondent's authority to represent the applicant. The respondents also challenged the applicant to produce its constitution to enable the court to appreciate the legal status of the applicant. Instead of simply producing the resolution and the constitution, the applicant then sought to raise issues of estoppel arguing that the respondents always realized or noted the authority of the deponent to the founding to represent the applicant in previous cases which were cited as HC 2555/22; HC 2405/22; HC 2409/22 HC 5701/22; HC 400/22; HC 4406/22. The applicant did not attach a copy of its constitution as demanded by the respondents. No explanation was given for not doing so. The applicant however attached a copy the resolution of the applicant. The resolution even if one accepts the challenged legal standing of the applicant as good is in itself too generalized and not specific to the property involved in this application. I refrain from making a pronouncement on its validity deliberately because of the risk of compromising the positions of the parties in view of the nature of the determination which I intend to issue.

I should however record that the principle of representation of juristic entities requires that there are two issues involved being the resolution of the juristic entity to litigate on a specific subject matter and against a specific legal persona and the authority of the agent to represent the entity the former requirements being paramount. See *Madzivire & Ors* v *Zvarivadza &Ors* 2006 (r) ZLR 514 (s) *Tian Ze Tebacco Company Ltd* v *Muntuyedwa* HH 626/15 and more significantly; *Beach Consultancy (Pvt) Ltd* v *Obert Makanya* & Sheriff of

High Court HH 696/21 which cites the case of *Cuthbert Elkana Dube* v *Premier Service Medical Aid & Anor* Sc 73/19 which *inter alia* states that resolution must confirm that the board is indeed aware of the proceedings and has given the agent authority to act in the stead of the company.

In relation to the legal statues of the applicant and the challenge by the respondents that it should produce its constitution, the applicant did not explain whether a constitution was available nor why the constitution could not be produced. The applicant instead produced a copy of a confirmation of a Trade Mark renewal for protection of the name Apostolic Faith Mission in Zimbabwe. How a Trade Mark registration confirmation letter can take the place of a the constitution of a voluntary association best makes sense to the applicant and all who had to do with the preparation of the answering affidavit. The issue of the legal status of an entity is answered by the instruments of association which define the entity and its powers to litigate or defend legal proceedings as the case maybe. The issue of the legal status of the applicant therefore remains unresolved. The same applies somewhat to the respondents who apart from dissociating themselves averred that they belonged to a separate entity called Hillside Unlimited Grace Assembly who purportedly owned the stand in dispute and the vehicles claimed by the applicant. The legal status of this entity needs to be established as well.

The 1st – 6th respondents also raised the issue of the *non-joinder* of Hillside Unlimited Grace Assembly of City of Harare. The issue of joinder and non-*joinder* does not defeat a course in the sense that the case is thrown out of court or dismissed per Rule 32 (11) of the High Court Rules 2021 provide as follows:

> "(11) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The purport of the quoted rules is that a party who raises *non joinder* or *misjoinde*r may not pray for dismissal of the case in which the objection is raised. It seems to me to be sensible that the party pleading *non joinder* should consider applying for the joinder itself so that the matter is fully ventilated and disposed of to finality in one sitting.

The last objection concerned the allegation that there are material disputes of fact which cannot be resolved on the papers. This objection has exercised my mind because there are indeed facts which cannot be resolved on the papers. The applicants legal standing is an issue which is answered by a production of the applicants instruments of association. The issue of

ownership of the stand and possessory rights is again not clear because the applicant appears to accept that the respondents or at least the Hillside Assembly has been in occupation of the property since its purchase in or about 2018. Without a constitution of either the Hillside Assembly or Hillside Unlimited Grace Assembly as the respondents have named their congregation, the court cannot determine the relationship of the parties with and to the land. I say so because the issue of who constitutes the applicant becomes an issue in that the applicant by name appears as the purchasers. The occupation and use of the property was and is being exercised by the entity called Hillside Assembly or Hillside Unlimited Grace Assembly. The rights of possession and use as much as the ownership itself of the property cannot be resolved on the papers. Note is made in this regard that the property has no title deeds yet.

An issue also arises of the resolution of the applicant to litigate which is too generalized and does not refer specifically to the current litigation. It is an open-ended resolution. The applicant has argued that there are no facts placed before the court by the respondents to show disputes of fact. As I have noted, there are in facts disputes of fact which can easily be resoled by evidence. The applicant itself averred in the answering affidavit that it was the owner of the properties yet the applicant uses a registration book for a vehicle registered in a different name without explanation. The paper trail remains inconclusive. The factual disputes are not fanciful in my view of the facts as I have outlined them.

Litigants should take time before settling papers in an application or get proper advice on the evidence which prove or establish their rights which they wish to vindicate The practice of simply composing a story of the dispute should be avoided. Advice on evidence is an absolute necessity and a party asking the court for certain relief must go to the law and research on what requirements the law provides for that relief before then looking for the evidence and supporting facts and documents. The application may then be settled through drawing the drafting of appropriate pleadings.

I am aware of the authorities which define what amounts to a material dispute of fact. The judgement of MAKARAU JP (as was she was) in Sup a *Plant Investments Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) is one of the popular authorities on the subject. The Constitutional Court per PATEL JCC adoted the case in *Muzanenhamo* v *Officer in Charge Law & Order & Ors* CCZ 3/13. The learned MAKARAU JP STATED as follows at p 136 -F-G.

> " A material dispute of facts arises when material facts alleged by the applicant are and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of evidence"

Whether a material dispute of fact(s) is present in an application is a value decision reached after taking account of all facts of the matter. Since there is no mathematical resolution of facts by just juxtaposing positions of parties, it will be likely that another court may not be persuaded that there are irreconcilable disputes of fact. Another court may consider the disputed facts as reconcilable upon adopting a "robust and common-sense approach". The issue then becomes, "what amounts to a robust and common-sense approach?". It does not help anyone to delve into the issue of the definition. I suggest that each case is resolved on its own facts. In saying this I am aware of the Plascon Evans Rule but prefer not to go into it. Having found that there are material disputes of fact which I cannot resolve without *viva voce* evidence the application stands to be dismissed or referred for trial. In terms of r 59 (26) (b) the court hearing an application may allow oral evidence. It is in terms of this sub rule that the court derives power to refer the application for trial. The referral to trial means the parties are placed in a position where a defined process of having the parties adduce evidence can be followed. I considered dismissing the application but was of the view that to do so would result in an injustice to more importantly the congregations who are the true owners of the properties involved in this application. It was important in my view to consider that a holistic finalization of the matter would best realize the justice of the case and between the parties.

In relation to the costs of this application, since the application will be resolved by other procedure, it appears that an appropriate cost order is one in which the costs of this application be made costs in the cause to be determined at the end of the proceedings. There has not really been a winner or loser at this stage in this application. It is ongoing. The rule that costs generally follow the event does not apply because the event at these stages is that the matter still ongoing. Costs are awarded in the discretion of the court. The principal rule that costs generally follow the event does not overside the discretion of the court in awarding a costs order.

Resultantly I make the following orders:

1. The application is referred for determination under the trial procedure.

2. The founding affidavit shall stand as the summons and the opposing papers as the appearance to defend.
3. The applicant shall file and serve its declaration within 10 days of the date of this order.
4. Further proceedings and processes shall be regulated by and follow the court rules.

5. The costs of this application and the aborted hearing shall be costs in the cause.

Dube Tachiona & Tsvangirai, applicant's legal practitioner
Lovemore Madhuku Lawyers, respondent's legal practitioner