

THE TRUE APOSTOLIC MISSION
OF THE WHOLE WORLD

Versus

ELIAS KANOTI

And

ANDREW CHORUWA

And

TITUS CHINHEMA

And

DOESMATTER MAKUMBIROFA

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
CHINHOYI, 27 February – 7 March 2024

Opposed Application

K. Masarire, for Applicant

W. F. Chipato, for the 1st & 2nd Respondents

No appearance, for the 3rd and 4th Respondents

BACHI-MZAWAZI J: This is an application for an interdict brought by the applicant against the respondents and all those who act through them. Applicant alleges that it is a church, which has been in existence since 1960, owning several properties. On the other hand, the respondents are portrayed as ex-members of a breakaway faction of the same.

It is applicant's contention that this splinter group is still clinging onto the name, logo letter heads and property that belongs to the applicant as a church. Applicant further submits that, the respondents have no legal right to use the said church artifacts and property as they made a conscious choice to secede from applicant. As it were, they must be interdicted from such actions. In that regard, applicants claim that they have a clear right over all the properties and religious centres owned by it as a church. They also argue that they have satisfied all the requirements of an interdict, as set out in the case of *Setlogelo v Seltegelo* 1914 AD 221.

The cases of *Baptist Convention of Zimbabwe & Anor v Malunga and 34 Ors* HH 530/21, *The Church of the Province of Central Africa v The Diocesan Trustee for The Diocese of Harare* SC 48/12, *Zambezi Conference Day & Anor* 2001 (1) ZLR 160 McNally's

and *Chiyangwa & 7 Ors v Apostolic Faith Mission in Zimbabwe SC67/21*, were cited by the applicants in support of their contention.

In addition, applicant submits that they will continue to suffer irreparable harm as their members are encountering challenges in accessing properties being occupied and used by the rival faction. The continued use of the same uniform and logo is also said to be causing chaos on the members of the opposing church groups. Applicants postulate that a final interdict is the only course of action open to them hence this application. In that respect, they advocate that the balance of convenience favours the granting of the interdict.

Mr Chipato, for the respondents, countered by stating that, the respondents are not ex-members of applicant. They belong to the church ,therefore, are as much entitled to all the rights, properties, logo, name, uniforms and paraphernalia of the church as the group that represents the applicant. As far as they are concerned, the people who deposed to the founding affidavit are not the church but a rival faction. As such, they attest that they do not have any rights greater than theirs. In fact, they argue that both are two formations of the same church, applicant.

The respondents contends that there is no proof of the termination of their membership or excommunication from applicant. The onus lies on the applicant, so they argue, to prove that indeed the respondent branched from the main church and formed yet a different church. They view themselves as the genuine church members not masquerades as alluded to by the applicants.

It is the respondent's argument that applicant ought to have produced its own constitution, as a church, alongside evidence of their expulsion or resignation. From the respondents' point of view there are triable issues pertaining to who is entitled to be the applicant from those who instituted this application and the respondents. It is a factual question that cannot be determined on papers but through oral evidence in open court.

Respondents cites two cases *HH 853/16 and HC 193/2022*, one is a summon case instituted by the applicants for the eviction of the respondents. The other one is said to be an endeavour to establish which one of the two groups should rightly represent applicant. The wrangle for the reigns of applicant is said not to be a new phenomenon but one which started in 2014. Apart from the preliminary objection on material dispute of facts, the respondent advert to a point of law that the above-mentioned matters are still to be determined, thus *lis pendens*. Nevertheless, they acknowledge the notice of withdrawal of the Chinhoyi High

Court matter after the institution of those proceedings. They, however, challenge the withdrawal as a legal nullity.

In support of their stance, respondents relied on the cases of *Chigami 2 Syndicate & 2 Ors v Cleo Brand Investments (Pvt) Ltd HMA 14/20* on “*lis pendens*” and *The Church of the Province of Central Africa v Diocesan Trustees for the Diocese of Harare SC48/2012* “on church disputes *per se*”.

On the merits, the respondent maintains that given the dispute as to who is the church, the applicant has no clear right to the property and all that has been mentioned as belonging to the church until a pronouncement has been made as to which faction the church belongs to. In that regard there is an alternative remedy to pursue the matter set down with the High Court Harare to finality and there is no irreparable harm. Thus, the balance of convenience favours the dismissal of the application as the applicants are forum shopping.

Briefly, the facts are largely common cause. Applicant as a church was formed in 1960. There have been a lot of power-hungry frictions and fissures in the church culminating in the group represented by the respondents and led by the 2nd respondent. It is a well-known fact that the church has several properties to its name. However, the ones in contention are Kaiva church stand Magunje, Fulechi Karoi, Mupata church stand Chinhoyi and some open space religious sites. The respondents are said to have left the church in 2022 amongst other schisms in the church. Applicant wants full and sole control of the above-mentioned properties, uniforms, logo and name which the respondents are still using.

At the hearing not much submissions were made by both parties. They adhered to their submissions filed off record. They also agreed to a hold over approach. The respondents did not motivate their point of law but emphasised on the first, on disputes of facts.

On analysis, the issues are whether or not the matter is *lis pendens*? Secondly whether or not there are disputes of facts incapable of resolution on the papers, lastly whether or not the applicant has satisfied the requirements of interdict and are entitled to the relief sought?

On *lis pendens*, it must be pointed out that this point was raised for the first time in the heads of argument as a point of law which as correctly pointed out by the respondents can be raised at any time. In *Zimasco (Pvt) Ltd v Marikano SC130/11*, it was emphasized that, it is well settled that a question of law can be raised at any time, even for the first time on

appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed.

Apart from merely mentioning that there is a matter pending before this court at Harare in case HH 853/16, the applicant did not attach the record of proceedings so as to assist this court in determining whether, the same cause of action, parties and subject matter in that sister court is the one before this court. It is not clear whether, it is a case to determine the respective rights of the opposing factions or its squarely on the interdict issue. It was imperative that they upload the record for ease of reference. As it stands no comparison can effectively be made to determine the *lis pendens* issue in that case as the court is not privy to the record. The onus was on the respondents to provide evidence that buttresses their averments. See, *Zimbabwe United Passenger Company v Packihorse Services (Pvt) Ltd SC 13/2017*.

Systematically, the court will now proceed to address the preliminary objection and point of law interwovenly with the merits. It is my considered view that there is nothing on record that shows that the matter is *lis pendens*. In rendition, the High Court Harare record has not been attached to show the cause of action, subject matter and relief sought in that case. In the absence of such vital information on the status of *HH853/16* which is a very long outstanding case by any standards, the court cannot safely conclude that the matter is *lis pendens* in comparison to the present matter. The applicant did not motivate this point. They neither denied or admitted to the existence of the said case.

Further, the respondents have already admitted that case HC193/22 was withdrawn though citing procedural irregularities. These irregularities are not fodder for this court. They were not challenged at the appropriate time. Though the same cause of action and subject matter features are identical, the composition of the respondents is different. There are nine on that case as opposed to four in this present case. The concept of “*lis pendens*” has been well explained in several cases. In *Diocesan Trustees for Diocese of Harare v Church of The Province of Central Africa 2009 (2) ZLR 57 (H)* it was held, that for a plea of *lis pendens* to succeed it must be demonstrated that the matters are between the same parties or their successors in title, over the same subject matter and cause of action.

Mc Nally JA (as he then was) in *Mhungu v Mtindi 1986 (2) ZLR 171 (SC)*, noted that,

“The defence raised by this allegation is the defence of *lis pendens*, sometimes known as *lis alibi pendens*, *Herbstein* and *Van Winsen* in the *Civil Practice of Superior Courts in South Africa 3rd ed at pp 269 et seq says at page 269, 279.*”

“If an action is already pending between parties and the plaintiff there brings another action against the same defendant on the same cause of action and in respect of the same subject, matter whether in the same or different court, it is open to such defendant to take the objection of *lis pendens*, that is another action respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first”. See *Jume v Yule & Anor HH 726 of 2022*.

The essence of this doctrine is to eliminate or bar forum shopping and to encourage completion and finality to those cases already filed before the courts.

This in turn means the point of law is not sustainable. *Nestle (SA) (Pty) Ltd v Mars Incorporated (2001) 4 ALL SA 315 (SCA)*.

In proceeding to the issue of material disputes of facts against the submissions on merits, it is well established that churches are voluntary organisation with a universitas status. See *Baptist Convention of Zimbabwe & Anor v Malunga and Zambezi Conference of Seventh Day Adventist v General Conference of Seventh Day Adventist* above. The Honourable Justice Malaba DCJ (as he then was) in the case of *Church of the Province of Central Africa v Diocesan Trustees Harare Diocese 2012 (2) ZLR 392 (S)* at p 410 A-B highlighted that;

“By definition, a church is a voluntary and unincorporated association of individuals united on the basis of an agreement to be bound in their relationship to each other by certain religious tenets and principle of worship, governance and discipline. The existence of a constitution is testimony to the fact that those who are members of the church agree to be bound and guided in their behaviour as individuals or office bearers on ecclesiastical matters by the provisions of the constitution and the canons made under its authority.”

The above excerpt crystalizes the point that a recognisable registered voluntary organisation such as a church is founded on its own constitution which is the body of rules and regulations that governs their dos and don'ts and the requisite reprimands and penalties. It is binding to all its members and affiliates. It has organisational structures and limitations of their powers.

In *Kahn Louw N.O & Anor 1951 (2) SA 194 at 211-212* it was enunciated that;

“The Constitution of a voluntary organisation is the charter of the organisation, expressing and regulating the rights and obligations of each member thereof. In relation to that organisation, to the Constitution of which he has subscribed, he is no longer a free and unfettered individual. He is a member bound by his agreement, and to that extent has surrendered his private individuality were it not so, the constitution would not be worth the paper it was written on, and the proceedings and activities of the organisation would be attended by embarrassment and chaos.” See *Makachi and 7 Ors v Evangelical Church of Zimbabwe SC 103/22*.

Contextually, the applicant boasts of its existence since year 1960 but has not attached its constitution or even made reference to the same. During the course of the hearing, this court queried on the issue of the constitution but was not given a ready answer. In the absence of such a crucial document the applicant failed to illustrate that the respondents breached any terms of the constitution warranting their treatment as a separate group and entity from the applicant. A code of conduct, or patterns and traditions developed over time in the absence of a written constitution assists in demonstrating in what manner the respondents seceded from applicant and the actions taken against them to qualify as a break away section.

The court is cognisant, that there are some instances, where some organisations and even countries like Britain may operate without a written constitution. Nonetheless, those entities do not operate in a vacuum, they are governed by established set up patterns and traditions.

Having observed that, this court is of a considered view that there are material facts that need the production of evidence such as the basis upon which the deponent of, founding affidavit and his group applicants claim to be the rightful representation of the applicant and the respondents are not. There is need for a determination to be made as to who is the applicant between those who deposed to the founding affidavit and the respondents. A robust approach only works when there is sufficient evidence before the court to resolve the dispute. Moreso, when respondents claim that they are still members of the Applicant who have not resigned nor expelled. This is distinct from those who would have been expelled, seceded and resigned. These are issues and factual questions that need to be interrogated in a trial. See *Masukusa v National Foods Ltd & Anor 1998 (1) ZLR (S)* and *Cossam Chiangwa & Ors v Apostolic Faith Mission in Zimbabwe & Ors SC67/21*. In this appellate case in Chiangwa, Justice Kudya JA at page 17 stated that;

“The failure to plead secession hamstrung the appellants’ case in that they failed to particularize the changes rendered to the constitution, which overhauled rather than amended the constitution, was the basis for the finding *a quo* that the appellant had failed to discharge the onus on them to establish secession.”

As a matter of fact, only after establishing the manner in which the respondents left the other group of applicants can the matters of the entitlement to the property, logo uniforms and other ancillary issues be effectively and decisively resolved. Only then can the successful party seek an interdict. In contradistinction, in the *Baptist Convention of Zimbabwe and Zambezi Conference of Seventh Day Adventist* case, excerpts cited by the applicant make reference to those members that follow in the categories listed above.

Resultantly, the court is of the opinion that there are indeed material disputes of facts warranting oral evidence. Secondly, that since there seem to be no matter pending before any competent court, on the issues related to who should assume the mantle of the applicant to enable the resolution of that material conflict of fact, the matter at hand cannot stand. As it is, it does not seem as applicants have a clear right. There is an alternative remedy to approach courts and resolve the issues observed herein. As such there is no irreparable harm to talk about and the balance of convenience favours the dismissal of the application with costs. See, *Masimba Charity Huni Fuels (Pvt) Ltd v Nathan Amos Kadurira & Anor SC 39/22*. Punitive costs have not been justified.

Accordingly, the application is dismissed with costs.

Masasire Law Chambers for the Applicant.

D. R. Charairo Legal Practitioners for the 1st & 2nd Respondents.