

Judgment NO. 10/07
Case No. HC 2351/06
X-Ref HC 707/05; 1535/05; 1171/05

**THE APOSTOLIC FAITH MISSION OF
PORTLAND, OREGON INTERNATIONAL HEADQUARTERS**

Versus

REVEREND RICHARD JOHN SIBANDA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 26 OCTOBER 2006 & 18 & 25 JANUARY 2007

*Advocate H Zhou, instructed by Dube and Partners, for applicant
S Mazibisa, for respondent*

Urgent Chamber Application

BERE J: On 21 September 2006 I discharged with costs a provisional order that had been granted by NDOU J in favour of the now respondent. Aggrieved by my decision respondent filed a notice of appeal.

Pursuant to my order and the subsequent filing of notice of appeal by respondent, applicant filed an urgent chamber application for leave to execute pending respondent's prosecution of his appeal against my decision.

In bringing his application on an urgent basis, it was contended by applicant that ever since he obtained a provisional order, respondent had conducted himself in a manner that was not in the interest of the church. It was stated *inter alia* that respondent had unilateral removed some church members from their positions of authority and that he had abused church property and funds.

Mr *Mazibisa* for respondent raised basically two points *in limine* in countering the application filed by applicant. In a properly presented argument, counsel argued that there was no urgency in this matter so as to justify action by way of urgency. It was contended on behalf of respondent the issues complained of had allegedly taken place almost a year or so before the urgent application was filed and as such it was

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impossible to say such action by respondent would require to be put right by way of an urgent application.

A perusal of the record clearly shows that, indeed all the actions now complained of by applicant had started in May 2005 and applicant did not see the need to rectify the situation pending finalisation of the matter. It appears to me Mr *Mazibisa* was on firm ground on this issue. It is clear that applicant seems to have resigned its fate to the outcome of a protracted litigation. Applicant no doubt, by failing to act when the alleged omissions occurred had waived its rights to treat this matter as one of urgency. In short, the conduct complained of almost 12 months back cannot prompt urgency now.

Counsel for respondent took the argument further *in limine* that the now applicant had never been a party to the litigation proceedings leading to the discharge of the provisional order and consequently that applicant had no *locus standi* to prosecute this action or to seek execution pending appeal.

The court record clearly shows that prior to the filing of an application for execution pending appeal the now cited applicant never appeared as a respondent. Respondents were given as Reverend Dwight L Baltzell, Onias Gumbo, Ashworth Mahachi and Evans Mhlanga. Strictly speaking they ought to have been cited as applicants in the instant application for execution pending appeal.

To everyone's surprise a total stranger to these proceedings styled "The Apostolic Faith Mission of Portland Oregon International Headquarters" now appears as applicant. The situation in my view is not at all saved by the deponents who purport to sign papers on its behalf. If it was intended to join the now applicant in these proceedings, then a proper application for joinder should have been made.

As rightly argued by counsel for respondent, it would create an unusually strange situation where parties who hitherto had nothing to do with particular litigation would pitch up on execution day and claim to have an interest in a concluded matter.

On these two technical arguments but leaning more on the absence of urgency I would not hesitate to dismiss applicant's application.

The issue of costs

Accepted, applicant's case is weak on the two technical arguments raised. But if one were to consider the merits of respondent's case, which should be focusing on attacking the decision I made on 21 September 2006, it is doubtful whether he will be able to make any headway.

As correctly argued by *Advocate Zhou*, the order I made is in reality a default judgment because it centred on the automatic bar that applied against respondent. It does seem to me that instead of appealing against my decision, the proper procedure respondent should have adopted was to come back to this court and seek to purge his default.

For this reason I remain fully persuaded to accept the argument that the notice of appeal remains a nullity.

It is for this reason that I felt inclined not to grant costs to the respondent. It is ordered as follows:

- i) That the urgent chamber application for execution pending appeal is hereby dismissed with no order as to costs.

Dube & Partners, applicant's legal practitioners
Cheda & Partners, respondent's legal practitioners