

REVEREND CLEMENT NYATHI
and
APOSTOLIC FAITH MISSION OF AFRICA
versus
CHARLES NHANGA
and
MTHANDAZI SIBANDA
and
TEDDY NDLOVU
and
OSCAR NDLOVU
and
TRACY NCUBE
and
MEMORY NCUBE
and
MTHOKOZISI SIBINDI

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 4 MARCH AND 31 MARCH 2016

Urgent Chamber Application

N. Mugiya for the applicants
T. Masiye-Moyo for the respondents

MOYO J: The applicants in this matter are the purported bishop of a church together with the church as the second applicant. The order sought is temporary relief as follows:

- 1) The respondents and their agents are ordered to vacate the applicant's temple at Number 5563 Mkosana Township, Victoria Falls.
- 2) The respondents are ordered to surrender the control and use of the temple at No. 5563 Mkosana Township Victoria Falls to the applicants forthwith.
- 3) The respondents are barred from harassing and barring the applicants and their members from accessing and using the temple at 5563 Mkosana Township Victoria Falls as they deem fit. First applicant avers in the founding affidavit that he is the President and overseer as well as chairman of the board of Trustees of the second applicant which is the church.

The background of this matter is that second applicant has been rocked by several problems, where the authority to run the church has been fought over by two different camps, one led by first applicant and the other led by Reverend Tonny Tshuma. There have been numerous applications before this court, even as far as the Supreme Court. I am advised that some of the matters are still pending before the Supreme Court.

It would appear by virtue of the order granted in HC 2700/14, the Sheriff then handed the temple in Victoria Falls which is the subject matter of this dispute, to first applicant. It would appear though that the other group led by Tonny Tshuma appealed that decision. The first applicant then obtained leave to execute the judgment in HC 2700/14 pending appeal. Such leave was granted in HC 1669/15.

The relevant clause in the order granted in HC 2700/14 is paragraph (3) which reads as follows:

“The first and second respondents and their agents are ordered to release and return the control of the sixth applicant’s properties wherever situate to the applicant’s and to surrender the sixth applicant’s affairs and activities to the applicants forthwith. The sixth applicant’s properties shall include but not limited to those listed on the order granted by this court on HC 2166/14”.

In essence the applicants seek an order for spoliation in that the respondents took the law into their own hands and forcibly took occupation of stand 5563 Mkosana Township in Victoria Falls.

Paragraph 12 of the founding affidavit states thus:-

“The chief Registrar and ourselves then entered into a compromise that the temple should be locked and no one should access it until the notice of appeal against the default judgment had been disposed of in terms of the law.

Paragraph 13

I and the other applicants in the court order in HC 2700/14 again approached this court with an application for leave to execute pending appeal in HC 1669/15 which was granted by this court. I attach hereto a copy of the order as annexure “D”

Paragraph 14

Armed with that judgment, I then approached the Additional Sheriff Victoria Falls so that I and my followers could have access to the second applicant’s temple but the additional sheriff told me that he is still waiting for an order from the Chief Registrar who is his boss.”

These paragraphs show that the execution of the order in HC 2700/14 is still pending with the sheriff awaiting instructions from his boss the Chief Registrar.

In other words, HC 2700/14 has not been brought into effect by the sheriff, who has not executed the order in HC 1669/15.

HC 2700/14, paragraph 3 thereof orders the return of the church's properties to first applicant and four others.

Such order was interrupted by the filing of a notice of appeal. An order was granted in HC 1669/15 for leave to execute the order in HC 2700/14 pending the appeal. Paragraph 2 and 3 of that order read as follows:

- 2) The applicants be and are hereby allowed to execute the order in HC 2700/14 pending the purported appeal under SC 351/15.
- 3) Fourth respondent is ordered to proceed and enforce the terms of the order under case number HC 2700/14 and if necessary to secure the assistance of the Zimbabwe Republic Police to give effect to the order.

HC 2700/14 ordered that applicant and four others should take control of the church assets. HC 1669/15 allowed the execution of that order pending appeal. It in fact went further and ordered the sheriff to give effect to that order and enlist the services of the police where needed.

In my view, applicants are seeking a solution that has already been provided by this court in HC 2700/14. This application in my view is a duplication of proceedings for the following reasons:

- 1) HC 2700/14 has already given the control of the church assets to the applicants together with four others.
- 2) HC 1669/15 has given the applicants in HC 2700/14 leave to execute the judgment pending appeal.

It has gone further than that, it has ordered the sheriff to give full effect of the order in HC 2700/14 and to enlist the services of the police where necessary. The sheriff has however not honoured the order in HC 1669/15 as it would appear that he has not given the control of the church assets to the applicants as per HC 2700/14. The applicants in my view are barking the wrong tree. Instead of the applicants approaching the sheriff so that he gives full effect of HC

2700/14, so that they are given control of stand 5563 Victoria Falls, they instead want to exert control over an asset they have not yet taken control of in terms of HC 2700/14. Applicants are bungling in my view and as a result are unnecessarily burdening the court seeking remedies which they already have.

Applicants do not state in the founding affidavit that they have approached the sheriff after the unlawful invasion, to assert their rights of control in terms of HC 2700/14, so that the sheriff hands over the control of that asset to them. As it is, clearly applicants have not yet assumed control of the property being the subject matter of this application. Instead of seeking to enforce HC 2700/14 as read with HC 1669/15, that is getting the sheriff to give them full control of stand 5563 Victoria Falls, before taking control, they want to assert same through this application. It is for these reasons that I am of the view that this application is unnecessary as applicants should first of all execute HC 2700/14 as read with HC 1669/15 before they can talk of being despoiled by anyone. First applicant should lawfully be handed over the property by the sheriff before asserting his rights to the control of same. Again, HC 2700/14 as read with HC 1669/15 are alternative remedies available to applicants for, if applicants are handed stand 5563 Mkhosana Township Victoria Falls, they can then take the necessary steps to protect it from an invasion by not only the respondents but by any other person. It is my considered view that this multiplicity of actions, without following the orders given to fruition is inappropriate and should not be allowed. Applicant should give full effect of HC 2700/14 as read with HC 1669/15, by getting the sheriff to comply with clause 2 and 3 of HC 1669/15 as read with clause 3 of the order in HC 2700/14. Applicants have a remedy to address the problem they face in this matter in my view. If the sheriff does not obey court orders then the applicants are within their rights to act against him.

It is for these reasons that I find that the application is without merit and I accordingly dismiss it with costs.

Mugiya and Macharaga Law Chambers, applicants' legal practitioners
Muzvuzvu & Mguni Law Chambers, respondents' legal practitioners