

GOSPEL OF GOD CHURCH INTERNATIONAL 1932

versus

VENDESENI MUNGWARU

and

MUSARURWA HOMBARUME

and

KEMBO MOYO

and

CASPER CHINAKA

and

FORD MATAMBANESHIRI

HIGH COURT OF ZIMBABWE

MUNANGATI-MANONGWA J

HARARE, 20, 21 and 23 September 2017 & 14 February 2018

Urgent Application

Mr *S.M Hashiti*, for the applicant

Mr *N Mashiza*, for the respondent

MUNANGATI-MANONGWA J: The High Court has seen an increase in cases involving legal battles over control of church shrines, assets and even congregants. Leadership battles have often turned violent in certain instances.

The Gospel of God Church International 1932, the applicant herein, is no stranger to this court. It has in its own right, or through its members been involved in legal battles involving leadership wrangles and control of a shrine in Gandanzara, Rusape as far back as 1978.

On 18 September 2017 the applicant duly represented by one Rodgers Masawi filed an urgent application against the respondents seeking the following order:

TERMS OF THE FINAL ORDER

That the respondents be called upon to show cause why a final order should not be made in the following terms;

1. That the respondents and their followers/agents/assigns are interdicted from entering Gandanzara Shrine in Rusape pending the final determination of the Court Application for Rescission of Judgment under HC 8227/16.
2. That the respondents be ordered to pay costs on an attorney and client scale, one paying the other to be absolved.

INTERIM RELIEF GRANTED

Pending determination of the matter applicant is granted following relief

3. That the respondents and their followers/agents/assigns be and are hereby interdicted from entering or approaching the Shrine at Gandanzara, Rusape pending the finalisation of the Court Application for Rescission of Judgment under HC 8227/17.
4. That the respondents/agents/assigns and their members are interdicted from assaulting, insulting and threatening members of the applicant at Gandanzara, Rusape pending the finalisation of the Court Application for Rescission of Judgment under HC 8227/17.

SERVICE OF PROVISIONAL ORDER

Service of this order may be effected by the applicant's legal practitioners or the Sheriff on the respondents or their Legal Practitioners.

After hearing submissions from counsels for the applicant and the respondents, engaging the parties and hearing from Chief Makoni (duly accepted as a friend of the court) I granted the order below on the 23rd September 2017 and indicated that reasons were to follow. I hereby furnish the reasons:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The respondents and their followers/agents/assigns are interdicted from entering Gandanzara Shrine in Rusape pending the final determination of the court application for rescission of judgment under HC 8227/17.
2. The respondents be ordered to pay costs on an attorney and client scale, one paying the other to be absolved.

INTERIM RELIEF ORDER GRANTED

That pending the determination of this matter the following relief be and is hereby granted:-

1. The respondents and their followers be and are hereby authorised to access the Johane Masowe Shrine at Gandanzara for worshipping from 23 September 2017 to 4 October 2017.
2. The respondents shall occupy the hill to the eastern part of the 4.45 hectares close to the Police Base belonging to the Applicant or the hill on the western part, whichever is convenient.
3. The Respondents shall access the main shrine through the 2nd entrance to the west.
- 4.1 The Applicant's followers shall access the grave site of Baba Johane on 28 September 2017 from 3.00 am to 11.00 am.
- 4.2 The respondents and their followers shall access the grave site of Baba Johane on 28 September 2017 from 11.30 am to 7.30 pm.
5. The applicant's leadership shall facilitate entry by unlocking the locks to the grave site and ensuring free passage through the 2nd entrance to the western side of the perimeter of the shrine.
6. The Officer Commanding Rusape District is ordered to deploy more personnel to maintain law and order from the main gate to the 3 entrances that provide access to the fenced main shrine.
7. The applicant's followers shall not threaten, assault, insult or disturb the respondents during the period of the convention.

The following historical factual background is pertinent for one to understand the reason behind the urgent application and the order that the court ultimately came up with. In 2009 the applicant

approached this court seeking an order that the respondents herein be declared not to be its members and the applicant be declared the true custodians of the shrine at Gandanzara and that the respondents be barred from attending at the shrine. The respondents herein got a default judgment which the applicant successfully had rescinded and the applicants were ordered to file an answering affidavit within a certain period of time. The respondents appealed against the rescission order and their appeal was dismissed with the Supreme court upholding Justice Mavangira's judgment. Subsequently, the applicants failed to file the answering affidavit in that case. Upon application by the respondents herein the applicant's application was dismissed by Dube J for want of prosecution in Case No HC 10481/16 on the 27th July 2017. In so doing Dube J granted the following order:

IT IS HEREBY ORDERED THAT:

1. The application filed by respondent in HC 4101/09 be and is hereby dismissed for want of prosecution.
2. The applicant and their church members be and are hereby declared to have a right to free worship at Gandanzara shrines in Rusape without disturbance from the respondent and or its representatives.
3. The respondent be and is hereby ordered to pay costs on an attorney and client scale.

Suffice that on the 5 September 2017 the applicant filed an application for rescission of that order in Case No. HC 8227/17 and the application is still to be heard.

This urgent application was triggered by the fact that on 13 September 2017 the respondents had indicated to applicant's acting Secretary-General that their church members wished to go and worship at Gandanzara shrine without disturbances as per the High Court order of 27 July 2017 by Justice Dube quoted above. Thus applicant sought, through this urgent application to prevent the respondents from executing upon their judgment in entering the shrine at Gandanzara pending the rescission of judgment by Dube J.

In support of the application the applicant indicated that

- a) it believes that the court is to grant rescission of judgment in Case No HC 10481/16 as it was obtained when respondents misled the court.
- b) that respondents have formed their own church.
- c) the respondents have no right to go and disturb the applicant's annual synod which is to begin on 23 September 2017 after not having been to the shrine for the past seventeen years.
- d) that the applicant was to have members coming in big numbers from all corners of the world and the area would not accommodate all the congregants.
- e) 5 years ago the respondents tried to force themselves at the shrine and assaulted applicant's members hence were prosecuted and convicted. Further the Officer Commanding Rusape had expressed fear that the fracas of 5 years ago would recur and result in loss of lives.
- f) The applicant had no other remedy except the order sought for.

The application was vehemently opposed, initially over the urgency, however parties agreed that the matter was urgent given that the annual Synod was to start on 23 September 2017 and given that both factions needed to attend, the matter could not wait. I so proceeded to hear the matter as an urgent application.

Mr *Hashiti* for the applicant duly briefed by Mr *Samukange* submitted that there was no way the shrine could accommodate members of the two factions as the area was small the size of Africa Unity Square in Harare. Further possibility of violence occurring was high. Also given that already an application for rescission of judgment was before the court, coupled by the fact that the respondents had not been to the shrine were factors in favour of the applicants.

The respondents maintained that they had a competent order in their favour and an application for rescission on its own was no bar to them executing upon the order. Mr *Mashizha* submitted that the applicants had no competent court order in their favour indicating that they should control the shrine. Further that, before the application for dismissal for want of prosecution was granted, Justice Dube requested for a copy of the judgment or order which applicants were relying on to allege that there was an order in their favour to control the shrine, to no avail. Reference was made to a letter from applicant's legal practitioners addressed to respondent's legal practitioners and copied to court which partly read;

“We refer to your Chamber Application for dismissal for want of prosecution, the matter was dealt with and the matter was granted in favour of the respondent Gospel of God Church International 1932. You are mistaken that this matter was not finalised as we were awarded costs under HC 4101/09.”

As a corollary DUBE J the judge attending to respondent’s application instructed the registrar to request on 15 June 2017 for a copy of the order so referred to by applicants but was not furnished with same. Mr *Mashizha* argued that prospects of success in the application for rescission for applicants were non-existent as they had not filed an answering affidavit as directed by the Supreme Court when respondent’s appeal against a previous rescission of judgment was thrown out. Further they had been served with the application for dismissal for want of prosecution and had not opposed same, the court had bent backwards to accommodate them before granting the application by communicating with applicant to no avail.

As respondents had a competent order and the applicants had no clear right their application had to be dismissed. He further argued that the allegations of impending violence were none existent as respondents rather than simply pitching up at the shrine armed with a Court Order had taken the step to engage applicant’s members through a letter dated 13 September 2017 filed of record.

Respondents disputed the allegation by the applicant that they were rebels with their own church. They also challenged reliance placed by applicant on the judgment of Justice Smith in a matter involving *Beteningo Chivese v Mai Megi Matanhire* HH 91/03 as baseless as the judgment never found that respondents were not members of applicant, in any case they were not party to the proceedings.

It was argued on behalf of the respondents that it would not be just and proper in the circumstances to grant the applicant the interdict where applicants have failed to prosecute their case for 5 years considering when their application for rescission was granted by MAVANGIRA J, and confirmed by the Supreme Court in February 2014. The best scenario was for co-existence pending rescission.

Ultimately the parties’ argument centered on whether the shrine could accommodate both parties. The parties were agreed that the synod was an important annual event for every follower of Baba Johane as each of them had to enter the shrine, see the “Mutumwa’s grave” and gets informed of his life.

For the court to have a proper appreciation of the place where the shrine is, an inspection in *loco* was carried out. I had to travel to Gandanzara a place deep inside rural Rusape. The initial entrance to the place is manned by male members of applicant and is about 400 metres from the main compound where the shrine is. Entrance into the protected compound where the shrine is located was also manned by a number of males who were visibly agitated. Entrance of the respondents was initially denied at the initial entry point by applicant's members who were resisting passage. It took persuasion from the applicant's legal practitioner Mr *Samkange* and Mr *Hashiti* for the respondent's representatives to be allowed passage after the court's intervention. Such characterises the acrimony between the parties.

The Officer Commanding Rusape, members of the Intelligence and Chief Makoni comprised the delegation in terms of protocol of the area and their presence was also necessary for the protection of Court Officials. Both parties agreed that Chief Makoni be treated as a friend of the court.

An inspection of the area or shrine revealed the following

- a) There is a durawall or perimeter fence surrounding a hill where the shrine is. There are three entrances to the shrine. Inside the perimeter wall there is a two storey modern building housing sisters, a bakery, grinding mill, several buildings for several purposes, a garden and other developments.
- b) There is an area where worshippers attending the synod stay in different groups depending on the area they came from e.g. Gokwe, Bulawayo etc. men on one side and women on the other.
- c) There is an open space reserved for worshipping.
- d) There is a paved way up the hill to the protected grave of Baba Johane. The grave is inside a building and gates have to be unlocked to access the grave itself. The current leader is a woman referred to as the president. She only opens the gate on 28 September to allow congregants to enter the place of burial.
- e) Evidence presented by the assent of both parties by Chief Makoni by way of a lease agreement for Gospel of God Church issued by the then Secretary of Home Affairs the then responsible authority showed that area under the church's control is 4.45 hectares.
This includes the fenced area.

- f) Part of the land consists of a hill to the west, flat ground and fields and a hill to the east.
- g) The fenced area is certainly greater than Africa Unity Square.
- h) Two entrances to the West are manned by Police Officers whilst the main entrance of the perimeter fence is manned by applicant's members.

It is trite that where a temporary or interim interdict is sought the following requirements have to be satisfied.

- a) a clear or *prima facie* right
- b) a well grounded apprehension of irreparable harm
- c) that the balance of convenience favours the granting of the interim relief and
- d) that the applicant has no other satisfactory remedy see *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S)

The question to be decided upon is whether the applicant established a *prima facie* right. I found the answer to be in the negative. The applicant has nothing to show that it has exclusive rights to the shrine. The respondents remain members of Gospel of God Church 1932. It is undeniable that the church has two factions which is not only borne by evidence at hand but was confirmed by SMITH J when dealing with the leadership wrangle in the case of *Beteningo Chivese v Mai Megi Matanhire* cited supra. No court has ever pronounced that respondents are not members of the applicant or that they have no right to worship at the shrine. It is the applicant's members who have held on to the shrine barring others to attend whilst awaiting the court's pronouncement.

It must be noted that respondents have an extant order and the applicant's prospects of success in the application for rescission are in my view remote given that the applicant was served with the application, did not oppose same, was alerted by DUBE J that the application was before her and applicant had to prove that they had a judgment in its favour and did nothing.

MALABA JA stated in the *Airfield* case cited *supra* at p 517-518 that an interim interdict is not a remedy for prohibiting lawful conduct. Neither is it meant to be a remedy for past invasions of rights but is for protection of existing rights. The question is what rights does the applicant have regarding the shrine? As shown or demonstrated above, it has none.

Equally I did not see or foresaw the irreparable harm to be suffered by the applicants. The synod is a once a year event running from 23rd September to about 4th October. The respondents

had not claimed that they wanted applicants barred from attending the synod. Rather the order they hold simply entitle them to freely worship at the shrine without disturbance from the applicant and or its representatives. It does not speak to the exclusion of applicants.

Neither is the balance of convenience in applicant's favour. If anything the balance of convenience is in respondent's favour. They have an extant order which applicant did not defend its granting despite being served with the application, their members from all over the world had turned up to attend the synod and have had to camp at Odzi River awaiting the green light to move to the shrine. Rather than simply pitch up with the police and sheriff to execute upon the order they have sought a peaceful engagement synonymous with the spirit of Christ.

It is a fallacy to think that applicant has no other remedy given the facts outlined above. The applicant had refused to engage the respondents who sought a peaceful facilitation of participating in the worship programme of the week. Not acting and failure to prosecute their 2009 case and failure to file an answering affidavit in case no 4101/09 despite the Supreme Court judgment rubber stamping MAVANGIRA J's decision which called upon them to file the answering affidavit speaks volumes about applicant's members attitude towards the resolution of the main matter. Applicant is a litigant reluctant to see finality of the dispute because it is enjoying control of the shrine.

Given the foregoing the applicant was not entitled to the order sought. Simply dismissing the application had its difficulties given that this is a church dispute which involves so much emotion as the court observed upon the visit to the shrine. Further the following statement in the applicant's application at p 3 shows that applicant was afraid of violence from its own members rather than respondent's members it reads:

“(v) there is a real likelihood of breach of peace if the respondents force their way in, in light of the fact that the majority of the members belong to the applicant and resent the presence of respondents.” (my emphasis)

It is clear that it is the applicant's members who resent the members of the respondents and in such circumstances, it is the applicant's members who are likely to turn violent. It is such kind of sentiments which exercised my mind in deciding what order to make. Dismissing the application means the respondents are free to attend the synod. However given the background of the fights that previously occurred how safe would the respondents be in effecting the order. I called upon

the parties to consider the sharing of times to enter the shrine. The applicants' members/representatives in attendances through Mr *Hashiti* provided the times when visit to the grave starts and ends on 28 September 2017. I engaged parties on possible attendance times. Having been made aware of the times coupled with the knowledge of the setup of the shrine I granted an order in the interests of justice also cognizant of the facts at hand and concessions made during the court's engagement with parties. It is my belief that in religious matters a judge would be abrogating his or her duties if in light of evidence available he or she blindly grants or dismisses an application totally disregarding the consequences thereof. It is in view of the foregoing that I granted the order as it is.

Venturas & Samkange, applicant's legal practitioners
Hallmark Law Group, respondents' legal practitioners